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issues and strategy for the new millennia

# competitive sourcing and contract

# privatization contractors on the battlefield

## what have we signed up for?

Colonel Steven J. Zamparelli, USAF

"When war broke out on the morning of Jan 17<sup>th</sup> as United States and allied aircraft bombed Iraq and Kuwait, the US contractors did not leave Saudi Arabia; some industry personnel even remained on the front lines with US troops."<sup>1</sup> From now into the foreseeable future, when the US military deploys for combat, peacekeeping or peacemaking efforts, Department of Defense (DoD) contractor personnel—significant numbers of them—will deploy with the military forces. This is not such a startling revelation since civilian contractors have accompanied troops to war throughout history. No, what makes this issue worthy of research is not the fact that contractors are supporting these operations but the scope, location, and criticality of that support. Nonmilitary members are maintaining fielded weapon systems, supporting field operations, and managing and operating information and intelligence systems. "Contractors and civilians have been participating in military operations since Vietnam [or earlier], but never at current levels."<sup>2</sup> Senior Army logisticians interviewed by the Logistics Management Institute (LMI) for a post Desert Storm report were almost unanimous in their belief contractors played a vital role on the battlefield, especially in supporting high tech weapon systems.<sup>3</sup> According to the DoD Inspector General (IG) in a June 1991 audit:

If contractors leave their jobs during a crisis or hostile situation, the readiness of vital defense systems and the ability of the Armed Forces to perform their assigned missions would be jeopardized.<sup>4</sup>

That finding was more than 7 years ago when there were some 1 million more personnel on the DoD roles.<sup>5</sup> Never has there been such a reliance on nonmilitary members to accomplish tasks directly affecting the tactical success of an engagement. This has blurred the distinction between soldier and civilian. This blurring is evident in the following passage from Air Force Core Values, regarding why we have core values:

The first reason is that Core Values tell us the price of admission to the Air Force itself. Air Force personnel—whether officer, enlisted, civil servant or contractor—must display honesty, courage, responsibility, openness, self-respect and humility in the face of the mission.<sup>6</sup>

Air Force personnel? Price of admission to the Air Force? Contractor personnel may have all of these virtues, but they are not Air Force personnel! Their contract is their admission ticket, not an oath. Contractors are not DoD employees, no matter how much the Services wish it to be so. This fact and our cultural differences cannot be simply ignored through inclusion. On the other hand, this new reliance on in-theater contractor support is reality and cannot be disregarded.

In a postwar article entitled “Desert Storm and Future Logistics Challenges,” former Army Chief of Staff General Carl Vuono did not even mention the role of contractors in the war or, more importantly, a logistics challenge of the future.<sup>7</sup> The military is facing a fundamental change in the way it conducts warfare, and there is little evidence that the players have been adequately prepared for that change. Both commanders and contractors need to understand the legal and operational implications stemming from or escalated by the increasing operational role of DoD contractors. The point is not to cast doubt about the patriotism or the loyalty of DoD contractor personnel—they have done the job when called. Rather, we must recognize and plan to accommodate the important differences in roles and responsibilities. If we do not, we will create significant operational and legal challenges for the field commanders, as well as for the civilian operators. After providing some background on civilians in the combat environment, this article will focus on the following critical issues: the contractors’ responsibilities; command and control or the commanders’ authority to discipline and direct; and the contractor personnel’s combatant versus noncombatant status and implications and their effect on force protection requirements.

## Background

Throughout the history of warfare, civilians have traveled with armies and accomplished those functions now call logistical support.<sup>8</sup> The State’s employment of these civilians in this capacity has been recognized in the laws of armed conflict as defined by the Laws of the Hague in 1907 and the Articles and Protocols of the Geneva Conventions, last held in 1949. Civilian support to armies was accepted based upon a universal perspective that noncombatants could accomplish support tasks as long as those tasks kept them out of direct confrontation with the enemy. This would allow the soldiers to handle the business of warfighting and allow the private sector to do what it does best. Today, we unquestionably accept that the use of civilian support remains legal yet the requirements of warfare have dramatically changed the scope and relevance of the support tasks they provide, thus making their distinction as noncombatants less obvious.

## US History

In US history, as far back as General Washington’s Continental Army, civilians were employed to drive wagons, provide architect/engineering and carpentry services, obtain food stuffs (when not foraged), and provide medical services.<sup>9</sup> The Continental Congress believed civilians should accomplish these tasks so that the soldiers could be freed up to be with their units and focus on their warfighting responsibilities.<sup>10</sup> It made sense to use civilians to accomplish these logistical tasks because they were considered either too menial for soldiers or were well established or specialized functions in commercial industry.<sup>11</sup> This philosophy and thus the use of civilians in

noncombat roles remained relatively unchanged from the War of 1812 up through the Vietnam conflict. In each of those conflicts,

War/Conflict	Civilians	Military	Ratio
Revolution	1,500 (est)	9,000	1:6 (est)
Mexican/American	6,000 (est)	33,000	1:6 (est)
Civil War	200,000	1,000,000	1:5 (est)
World War I	85,000	2,000,000	1:2.0
World War II	734,000	5,400,000	1:7.0
Korean Conflict	156,000	393,000	1:2.5
Vietnam Conflict	70,000	359,000	1:6.0

Table 1. Civilian Participation in Conflict

significant numbers of civilians continued to accomplish basic logistics requirements in support of the soldiers, as shown in Table 1.

The use of civilians in wartime was not, however, without problems. During the Revolutionary, for example, a regiment of artificers was raised to work with civilian artificers supporting construction and ordinance requirements. A special report to Congress on the state of this regiment emphasized the disgruntled comments of the military members contrasting their wages with those paid to the civilians.<sup>12</sup> “It was difficult to persuade men to reenlist after the expiration of their three-year terms.”<sup>13</sup> Sound familiar? Additionally, there was often a question of these contractors’ commitment and responsibility. During the Civil War:

... draft exemptions were sought for teamsters to encourage them to drive wagons to western posts; however, teamsters were not only difficult to find, they proved to be recalcitrant employees, so toward the end of the war, the tendency was to replace civilian drivers with soldiers who could not resign or swear back with impunity.<sup>14</sup>

The key point is that when problems with contractor support did arise commanders could turn the task over to military personnel who had at least some basic skill. Additionally, the general policy of the military related to employing contractors was: “. . . the closer the function came to the sound of battle, the greater the need to have soldiers perform the function because of the greater need for discipline and control.”<sup>15</sup>

With the Vietnam, conflict the employment of civilians began to change. *Business Week* called Vietnam a war by contract.<sup>16</sup> “More than ever before in any U.S. conflict, American companies are working side by side with the troops. One big reason is that military equipment has become so complex.”<sup>17</sup> “Specialists in field maintenance checking on performance of battlefield equipment, have dodged Vietcong attacks on military bases at Da Nang and Pleiku.”<sup>18</sup> No longer were contractors away from the sound of battle. No longer were they relegated to basic logistics tasks. They were becoming specialists in the tools of war. “There might have been a time in the past when the site of military operations was an exclusive club for those in uniform, but those days are waning.”<sup>19</sup>

When U.S. troops set foot on Saudi Arabian sand, many defense industry contractors were close behind. The contractors followed the military to the make sure that their multi-million dollar weapon systems functioned properly in the harsh desert environment.<sup>20</sup>

The trend is for an increasing number of civilian operators in theater to support logistics and, more importantly, combat operations. “One in 10 Americans deployed for NATO peacekeeping operations in Bosnia is a civilian. By contrast,

one in 50 Americans deployed for the Persian Gulf war was a civilian."<sup>21</sup> (Note that these figures are for contractors deploying with the troops and should not be compared with the figures in Table 1.) That ratio will continue to shrink as more functions are being turned over to the private sector through competitive sourcing, privatization, and changing logistics practices such as lifetime contractor logistics support.

### Why Has This Happened

Three factors have contributed to this trend: deep cuts in uniformed personnel, a push to privatize functions that can be done outside the military, and a growing reliance on contractors to maintain increasingly sophisticated weapon systems.<sup>22</sup>

Actually, there is a fourth reason for the deployment of contractors into the battlefield: to provide flexibility in the face of congressional, executive branch, or host-country-mandated troop ceilings.<sup>23</sup> For example, at the height of the Vietnam War, there were more than 80,000 contractor personnel supporting the war effort who did not count against troop ceilings set by President Johnson. Similarly, in Bosnia, the US military has been able to get more tooth (soldiers) in-theater by having more than 2,000 contractor personnel in forward locations above the congressional limit of 20,000 US troops. However, while there is certainly a benefit to the Department of Defense stemming from an increased reliance on contractors, whether this is a cause of the increased contractor participation or simply the result is open to argument.

### Manpower Reduction

Since the end of the Cold War, the Department of Defense has cut more than 700,000 active duty troops from the ranks."<sup>24</sup> Additionally, more than 300,000 DoD civilian positions have been eliminated. These cuts have occurred without a commensurate reduction in operational requirements. In fact, all of the Services have experienced a significant increase in operating tempos over the last 10 years while operating with about one-third fewer forces. The Air Force, for example, has an average of 12,000 airmen deployed on any given day, while 10 years ago, that average was around 2,000.<sup>25</sup>

The Army has had a 300 percent increase in mission commitments during the past several years and they do not appear to be tapering off. During the same period, the Army has reduced the U.S. Army Materiel Command's (AMC) military strength by 60 percent and reduced the number of AMC depots by 50 percent.<sup>26</sup>

Out of necessity, there has been a growing recognition that more of the jobs previously accomplished by military members must be accomplished by civilians. This move to a greater reliance on nonmilitary support is recognized by all the Services. In the Air Force, it is articulated in *Global Engagement: A Vision of the 21<sup>st</sup> Century Air Force*. "The force will be smaller. Non-operational support functions will increasingly be performed by Air Force civilians or contractors."<sup>27</sup> Two parts of this excerpt need to be scrutinized.

First, the reference to increased participation by Air Force civilians must be looked at with skepticism. While historically a significant portion of the competencies cut from the active duty forces were passed on to DoD, that is no longer possible. As discussed above, they, like the active forces, have faced significant cuts since the Gulf War. Those cuts continue. According to Deputy Secretary of Defense John Hamre, 237,000 DoD employees will participate in public-private competitions from 1997 to 2003.<sup>28</sup> Only a year earlier, the *Air Force Times* had reported that Service planners were considering giving private contractors more than 160,000 jobs

performed by service members and DoD civilians.<sup>29</sup> Additionally, Global Engagement's statement regarding nonoperational support functions is suspect. As cuts to the military forces and budgets continue, the skills being reduced or eliminated are becoming more related to operations, as opposed to their historical base support focus. During Desert Shield and Desert Storm, for example, contractors had maintenance teams supporting Army tracked and wheeled vehicles (anything from 2-1/2-ton trucks to 65-ton M1A1 tanks); the Fox nuclear, biological, and chemical vehicles; and TOW and Patriot missiles.<sup>30</sup> The Air Force had contractors flying in support of the Joint Surveillance, Target Attack Radar System (JSTARS), as well as performing in-theater organizational maintenance. During Operation Just Cause, a total of 82 contractors were in Panama to support aviation assets.<sup>31</sup> These certainly appear to be operational activities. They may even be considered combat operations. Nonoperational is defined in terms of what is privatized rather than by whether the function is core to warfighting.

### Privatization and Contracting Out

While declining manpower is placing more operational jobs directly in the hands of the private sector, the budget and manpower reduction is also forcing the Department of Defense to look at demilitarizing large areas of core functions through privatization or contracting out. In the past, core functions were defined as those requiring a military or organic capability because it was combatant in nature, required potential deployment into harms way, or required the capability to be expanded (surged) in times of crisis. They were specific skills, maintenance and munitions handling, for example. Today, there has been a move away from functions toward a focus on more broadly defined core competencies. For example, the Air Force identifies its core competencies as Air and Space Superiority, Precision Engagement, Information Superiority, Global Attack, Rapid Global Mobility, and Agile Combat Support.<sup>32</sup> Thus, functions previously felt to be sacrosanct are now candidates for transition to contractors. The largest of these function being rapidly transitioned is maintenance, most significantly, depot maintenance. Less than 10 years ago, maintenance was considered to be a core logistics function. For years, the Pentagon has been after Congress to repeal the law requiring that government employees accomplish 60 percent of depot weapon system maintenance. They have recently succeeded in reducing that to 50 percent and are not through yet.<sup>33</sup> By 2003, almost 40 percent of DoD maintenance depots, and 55 percent of the depot work force will have been eliminated.<sup>34</sup>

Another core function facing either privatization or contracting out is information and communications—the functions supporting Information Superiority. Information Superiority, which includes information warfare, is identified as a core function in *Global Engagement* and emphasized in *Joint Vision 2010*. Yet, the Air Force has plans to reduce the communication-computer occupational field by 24 percent within the next 5 years.<sup>35</sup> There are many other examples. Where noncommissioned officers used to test and calibrate weapons, civilian technicians are now doing the work.<sup>36</sup> The Aerospace Guidance and Metrology Center—once the military facility responsible for the maintenance, repair, and calibration of missile guidance systems and Air Force measurement standards—is now completely a contractor operation. New initiatives under consideration include contracting out all software maintenance on the B-2 bomber and the total maintenance effort for the F-117 fighter. The Air Force is also studying the possibility of outsourcing all of its precision measurement equipment laboratories. If implemented, the Services will eventually be devoid of the organic capability to support these systems and missions. In

time of war, they will be completely dependent on contractors to provide whatever support is needed, whenever it is needed. Commanders need to ensure the contract supporting them accurately reflects and supports peacetime and wartime requirements.

Outsourcing and privatization among the Services or even within each Service is not being accomplished in a standardized manner. In the Air Force wing or center, commanders are strongly encouraged to contract out base support functions. However, a standard has not been set for outsourcing functions identified by higher headquarters. Some wings, for example, have turned the majority of their civil engineering functions over to contractors, while others have not. As the Air Force moves into the Air Expeditionary Force (AEF) structure, concern is growing over the lack of organic engineering skills at some locations.<sup>37</sup>

Two related outcomes of privatization are further reducing the availability of skilled DoD technicians. First, for those military members in a career field that is being privatized, there are fewer places they can be stationed. Often, the only place they can go is overseas or to a continental United States (CONUS) base which has significant deployment responsibilities, therefore, reducing quality of life and retention. Second, privatization provides civilian job opportunities for skilled military members. "When a military repairman achieves journeyman status, he can easily be wooed to leave the Service and accept private employment at higher pay. Often these journeymen then work for contractors who support the military."<sup>38</sup> On the other hand, in the long term, industry is losing a primary source of trained and uniquely skilled labor for the military systems it is now supporting. This most certainly will increase future contractor costs.

### Support of High-Technology Weapon Systems

This situation is further exacerbated by reliance on cutting-edge weapon systems technology. The Army's logistics after action report from Operation Desert Storm said, "There is a role for contractors on the battlefield, particularly when the tasks are so complex that it is not economically beneficial for the Army to maintain needed capability within the force."<sup>39</sup> Continual and rapid technological change has made it uneconomical to keep soldiers technologically capable of maintaining, troubleshooting, and in some cases, employing sophisticated weapons. This is driving the military to rely on contractor support, at least during the initial fielding phase of a system and possibly for its life (C-17 contractor logistics support). In the not too distant past, it was DoD policy that the Services establish organic support for the logistical sustainment of new weapon systems as soon as possible after fielding. DoD Directive 1130.2, *Management and Control of Engineering and Technical Services*, required the military to achieve self-sufficiency in maintaining and operating new systems as early as possible and limited the use of contractor field service to 12 months thereafter.<sup>40</sup>

The purpose of this directive was to ensure the Services did not come to rely too heavily on the use of civilian technicians to support their systems.<sup>41</sup> Today, that directive is gone, and the general philosophy has completely reversed. Congressional language now requires that maintenance and repair for all new critical weapon systems be under contractor support for at least 4 years and for life for noncritical systems.<sup>42</sup> Once again, in the future when US forces deploy, there will be many situations where a contractor employee is the only person with the technical skill to perform functions necessary for the employment of a weapon system.

Downsizing has made it a necessity that contractor personnel go to the front lines to support their weapon systems and perform functions the same as military members. We have, in effect, stopped trying to keep an organic ability, thus creating a hybrid, not a military member, but

not quite the historical civilian who accompanies the troops. The ramifications could be significant to fighting and winning.

## Issues

The challenges or issues generated from increased reliance on contractors to perform combat support functions are not new to the Department of Defense or the Services. As far back as 1980, there have been several studies, audits, and articles highlighting the Services' increased reliance on contractors, along with warnings of the risk that accompanies that reliance during crisis or hostile situations.

### Contractor Responsibility

The greatest risk, at least from a field commanders' perspective, is that the contractor will not be there to perform or will leave when hostilities break out. How great is this risk? It is really defined by four elements: the criticality of the missions being performed, availability of alternative resources, authority to direct compliance, and finally, history. There is no doubt that the systems supported and the functions being accomplished are critical to the prosecution of the battle. The systems involved include JSTARS, Patriot, AN/GYQ-21 data-processing equipment, and the Fox chemical biological system, to name a few. Functions performed include maintenance and even systems operations. As a result of downsizing, privatization, and modernization, there are no DoD resources available to fill potential voids.

Regarding the authority or capability of the commander or the Service, virtually every audit, study, or article written on the subject says the same thing. The Services cannot ensure that the contractor will be there when hostilities begin. Legally, contractors cannot be compelled to go into harms way, even when under contract, unless there is a formal declaration of war. In 1980, the Logistics Management Institute published a study entitled *DoD Use of Civilian Technicians*. The report summary stated:

... continued reliance on civilian technicians means that maintenance skills are not being successfully transferred from the producer to the ultimate user of the system. Should civilians leave their job in wartime or other periods of heightened tension, the material readiness of key systems would be jeopardized.<sup>43</sup>

In November 1988, a related DoD IG report expanded this perspective, stating there was:

... no capability to ensure continued contractor support for emergency-essential services during mobilization or hostilities, no central oversight of contracts for emergency-essential services, no legal basis to compel contractors to perform and no means to enforce contractual terms.<sup>44</sup>

The report recommended that all commands identify war-stoppers that should be performed only by military personnel and other services that could be contracted out if there was an adequate contingency plan that ensured performance if a contractor defaulted. The DoD responded with DoD Instruction 3020.37, *Continuation of Essential DoD Contractor Services During Crises*, which simply lays the responsibilities on the commander for finding alternatives or accepting the risk on the commander. In June 1991, the DoD IG completed a follow-up audit report entitled, *Civilian Contractor Overseas Support During Hostilities*. The report's bottom line again was, "DoD components cannot ensure that emergency-essential services performed by contractors would continue during crisis or hostile situations."<sup>45</sup> The report goes on to say:

If the contractors leave their jobs during a crisis or hostile situation, the readiness of vital defense systems and the ability of the Armed Forces to perform their assigned missions would be jeopardized. Therefore, it is necessary to seek ways to assure that civilian contractor support will continue during periods of greatest need.<sup>46</sup>

Their findings and recommendations for accomplishing this, along with DoD's response to those findings, are summarized as follows:

**Finding 1:** DoD components cannot ensure the continuance of emergency-essential services during crises or hostile situation.

**Response:** DoD Instruction 3020.37, while published in November 1990, had not been completely implemented. That instruction provides that the heads of components ensure annual reviews are accomplished to identify such services. The activities commander shall "... either obtain alternative personnel to perform the services or prepare a plan to obtain the services from other sources or accept the risk."<sup>47</sup>

In reality, the component commander cannot compel contractors to perform, even under contract, if it would force them to go into harm's way. Additionally, the three options provided in the response are not realistic. There are no other available resources. Thus, the commander has no real alternative other than to accept the risk.

**Finding 2:** Require identification of war-stopper services that should be performed exclusively by military personnel.

**Response:** Not necessary, DoDD 1100.4, *Guidelines for Manpower Programs*, identifies those functions that must be military.<sup>48</sup>

**IG Final Report:** DoDD 1100.4 is 37 years old. It does not establish standard criteria for identifying these functions, without which the components will continue to identify a wide range of services.<sup>49</sup> (The report, overall, implied the current reporting was ineffective.) That now 44-year old regulation says:

Civilian personnel will be used in positions which do not require military incumbents for reasons of law, training, security, discipline, rotation or combat readiness, which do not require a military background for successful performance of the duties involved and which do not entail unusual hours not normally associated or compatible with civilian employment.<sup>50</sup>

**Finding 3:** Require an annual reporting system identifying the number of contractors performing emergency-essential services and the number of contractors involved.

**Response:** The requirement for the components to conduct the annual assessment and to have contingency plans is sufficient. "The number of contracts is not the important factor; the need is to make sure we are able to carry out our mission."<sup>51</sup>

**IG Final Report:** The number of contracts and contractors is valuable information. That is evident by the fact that the Assistant Secretary of Defense (Production and Logistics) requested that the IG provide data on the number of contractors and contractor personnel in theater.<sup>52</sup>

This is important information. How does a commander in chief (CINC) or a field commander plan requirements without knowing who and how many personnel will be there or what requirements are actually on contract? It is also a critical factor in determining force protection requirements, an issue discussed later.

**Finding 4:** Revise DoD Instruction 3020.37 to include "Provisions to safeguard personnel performing emergency-essential services during a crisis or hostile situation."

**Response:** Not necessary, "... the commander is charged by the Geneva Convention with protecting the lives of all noncombatants."<sup>53</sup>

**IG Final Report:** The response to this finding will not afford the contractor employees with similar priority, rights, and privileges accorded to DoD personnel. Geneva conventions deal with identification of noncombatants, not protection. "Only 1 of 67 emergency essential contracts reviewed contained provisions to protect contractors against chemical and biological warfare."<sup>54</sup>

The DoD response to this finding was incredulous. In Desert Storm, the coalition forces had to provide chemical and biological gear to Civilian Reserve Air Fleet (CRAF) pilots to ensure their continued operations into theater. Today, the United States will not allow CRAF, which provides approximately 33 percent of heavy lift, to travel into a chemical or biologically tainted airfield.<sup>55</sup>

In fact, the DoD response to all of the findings reflects that they either did not understand the issues or, worse, did not care. This is reflected in their policies. In addition to the Services being governed by a 44-year-old instruction, there is a 13-year-old directive, DoDD 1100.18, *Wartime Mobility Planning*, which states that DoD manpower utilization policy is to "... encourage civilian employees who occupy emergency-essential positions and contractor personnel who are performing critical support activities overseas to remain in the theater."<sup>56</sup> How? Who? With what? DoDD 1404.10, *Emergency Essential Civilian Personnel*, dated April 1992, says: "It is DoD policy [to] limit the number of emergency-essential civilian to those positions specifically required to ensure the success of combat operations or the availability of combat-essential systems."<sup>57</sup> Yet, virtually every review and study related to the subject has stated emphatically that civilian contractors are providing vital support to critical systems, and their continued support to those systems in time of hostilities is crucial to mission success.

The final element defining risk is history. History has, for the most part, found contractor personnel doing their jobs during times of crises or hostilities. However, in the previously cited LMI study, the authors proposed:

It was questionable whether the civilians would have remained when the bullets started flying. There were a few instances of contractor/Department of the Army Civilians wanting to leave the theater because of the dangers of war. However, many people have doubts about how long they would have stayed if the operations had been costly in lives.<sup>58</sup>

There have been a few examples to substantiate these fears. In South Korea, in the wake of the 1976 tree-cutting incident in the demilitarized zone, emergency-essential civilian contracting personnel fled their posts at the prospect of imminent hostilities.<sup>59</sup>

Additionally, in the wake of the desert conflict, several CRAF contractors reduced the percentage of systems they would place under the program. We have yet to see any major incident involving contractor personnel or equipment. It must be noted also that in Vietnam and Korea and to some degree in Desert Storm contractor personnel involved "... normally had the advantage of at least some military training and were generally familiar with the tactical and operational levels of employment."<sup>60</sup> They might be compelled to stay by their understanding of the mission or out of a feeling of camaraderie. This was not necessarily the case in Southwest Asia and in Macedonia and will be even less likely in the future.<sup>61</sup>

Again, as reported by LMI in its after action report, senior logisticians felt civilians contractors were vital for Desert Storm.<sup>62</sup> That was 8 years ago when we had several hundred thousand more military and DoD civilian members. Today, even more critical functions are in the domain of civilians. Contractor support on the battlefield at today's level of dependence has not been tested in a real life-threatening hostile situation. Desert Storm cannot be held up as the way things will be. We need to prepare for the worst case, and that case is where critical contractor personnel leave their posts. The point is not that civilians would not stay. They may or may not. However, they are not combatants. The point is they do not have to stay, and the Department of Defense needs to work to minimize the risk that fact entails.

### The Noncombatant

In ancient times, as evidenced by the laws of Manu, the old Testament or the writings of Kautilya on Sun Tzu, there was no attempt to identify those who were entitled to be treated as combatants. In former times, especially in small states, as soon as war was declared, every man became a soldier; the entire people took up arms and carried on the war.<sup>63</sup>

Warfare slowly evolved into the concept of professional armies and a distinction developed between the soldier and the nonsoldier or noncombatant.

Category	Military Target	POW Status	War Criminal
Combatants	Yes	Yes	No
Noncombatants	No	Yes	No
Illegal Combatants	Yes	No	Yes

Table 2 Combatant Versus Noncombatant

In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to attack.<sup>64</sup>

The distinction between combatant and noncombatant is critically important to all parties as it defines the treatment of the individual in time of war and is shown in the matrix.

The law of war related to this issue stems from both the Laws of The Hague and from the Laws of Geneva. Section 1, Chapter 1, of the Laws of The Hague, 18 October 1907, entitled "The Qualifications of Belligerents," defines combatants as follows:

Article 1. The laws, rights and duties of war apply not only to armies but also to militia and volunteer corps fulfilling the following conditions: To be commanded by a person responsible for his subordinates; to have a fixed, distinctive sign recognized at a distance; to carry arms openly; and to conduct their operations in accordance with the laws and customs of war.<sup>65</sup>

This description was further defined by Article 43 of Protocol I of the Geneva Convention, dated August 1949.

The armed forces of a party to a conflict consist of all organized armed forces, groups and units that are under a commander responsible to that party for the conduct of its subordinates.... Such armed forces will be subject to an internal disciplinary system that, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.<sup>66</sup>

Those who do not fit these descriptions are noncombatants. DoD civilians and contractors fall into this category. The reasons contractors and DoD civilians cannot be considered combatants are:

- Neither category of civilian is subject to the commander's internal disciplinary system (for US forces that is the Uniform Code of Military Justice [UCMJ]).
- Neither is necessarily trained to conduct operations in compliance with the law of armed conflict.
- The contractor is not subordinate to the field commander.

The law of war, however, has historically recognized the right of noncombatants to be present in a combat area "... and [they] may even be aboard combat aircraft, vessels and vehicles on operational missions. They may provide technical support and perform other logistics functions."<sup>67</sup> This international recognition is somewhat dated (reaffirmed by the Geneva Convention Protocol I of 1949.) As defined in Air Force Pamphlet 110-31, *Civilians Accompanying the Armed Forces*, a category of noncombatants entitled to prisoner-of-war status, includes:

... civilian members of military aircraft crews, supply contractors' personnel, technical representatives of government contractors, war correspondents and members of labor units or civilian services responsible for the welfare of the armed forces.<sup>68</sup>

It goes on to warn that trends since World War I have tended to blur the distinction between combatants and noncombatants. This includes civilians, resulting in less protection for the noncombatant, because: "(a) growth of the number and kinds of combatant, including guerrillas ... [and] (b) growth of noncombatants engaged in activities directly supporting the war effort, including armament production ..."<sup>69</sup> The pamphlet is dated 19 November 1976, and a significant changes in weapon systems and operations have occurred since that time making that distinction even more difficult.

While the Protocol and subsequently the Air Force pamphlet recognized the noncombatant status of civilian aircrews, it is extremely improbable that the authors of either document envisioned civilian technicians assisting in the collection of surveillance data during operational missions. Did they envision civilian maintainers providing battlefield maintenance of a TOW missile, the M1A1, the Bradley, or the Patriot missile, as was evident during Desert Storm when they accepted the civilian-accompanying-the-troops philosophy? How about contractors supporting the gathering and interpreting of data from the Joint Air Forces Control Center and feeding intelligence and targeting information to operators. Were they the noncombatants described in these conventions? As we privatize the communications-computer field, will contractors, who at least supplement our information warrior force, be noncombatants?

In his legal opinion regarding the noncombatant status of having contractor/civilian operators for the Dark Stars remotely piloted vehicle, W. Darrell Phillips—Chief, International and Operational Law Division, Air Force Judge Advocate General School, Maxwell AFB, Alabama—determined these operators would risk losing their noncombatant designation and could be considered illegal combatants.<sup>70</sup> A person:

... cannot be a combatant and a noncombatant at the same time. However, by Article 51 (3) of Protocol 1, 1997, a non-combatant, that is to say a civilian who takes part in hostilities, loses his/her status under both the Protocol and Civilian Conventions and for as long as he operates in that capacity, becomes a legitimate object of attack.<sup>71</sup>

Additionally:

... since they are not combatants (lawful) and not within the extremely restrictive category of *levée en masse* if they commit a combat act, (defined in the terms of the German manual as "participate in the use of a weapon system"<sup>72</sup>) then they are liable to trial as "unlawful" combatants or war criminals.<sup>73</sup>

The implications are that by having a contractor accomplish a particular job, field commanders may be asking them to give up their protected status and even possibly risk execution if captured. Additionally, there is certainly some question as to whether the commander is, therefore, violating the law of war by having a civilian noncombatant participate in combat. So why not just make them combatants? US civil law precludes civilian contractor personnel from meeting the four criteria specified in Section 1, Chapter 1, Article 1 of the Laws of The Hague and the requirements of Article 43 of Protocol 1 of The Geneva Convention, which determine legal combatants. Regardless of their inclusion in the Air Force Core Values, contractor personnel have not been held to the same standard that society holds its military members. The fact is these personnel are different from soldiers, and these differences mean a great deal to a commander's pursuit of combat operations. If employed improperly, the commander could risk being liable for violation of the laws of war. Additionally, a commander could commit the US Government to care and benefits for contractors commensurate with those of veterans.

### Discipline and Control

One of the key differences between the contractor and the soldier—and also one of the primary reasons contractors do not qualify under the definition of combatants—is they are not subject to the military's internal disciplinary system, the Uniform Code of Military Justice, unless there is a declared war.<sup>74</sup> In an overseas deployment, contractor personnel cannot be disciplined by the military for violations of the UCMJ. In fact, typically, the only recourse commanders have for punishing contractors for crimes committed on post is, working through the contracting officer, to send them home and let their respective chains of command or boss determine and administer punishment, if any. The military may, if the offense was of a criminal nature, refer charges to the Department of Justice. From the contractor-employee perspective:

... the most important thing contractor employees need to know are the terms of the contract they are working under and the Status of Forces Agreement (SOFA) between the United States and the country they are serving in. Depending on the SOFA, contractor employees may be subject to local and criminal laws of the country in which they are deployed.<sup>75</sup>

In countries where justice is based upon the Talmudic code—an eye-for-an-eye—this could be extremely important.

This issue of contract brings us to another key difference between the military member and the contractor and another significant reason they are not and cannot be considered combatants. A field commander needs to understand this concept for contractor personnel. These personnel are not compelled by an oath of office, but rather by the terms of their employment contract. "One of the hardest things for military personnel to do is to learn to interpret a contractual agreement literally, to assume nothing."<sup>76</sup> The contractor is authorized to accomplish only those tasks within the scope of the contract and is answerable for performance only to the contracting officer or his representative. The contract language directs that the contractor not take orders from anyone other than the contracting officer or his duly appointed representative. The representative cannot direct action

outside the scope of the contract. This is a fiscal and liability issue. Commanders risk personal liability for the cost of unauthorized work as well as for the cost of property that might be damaged.

Another important point for commanders' operational planning is the fact they cannot command or give orders to these individuals as they do a soldier. It is also important to understand that contractor employees enjoy the legal right to unilaterally terminate employment rather than accept the hardships and potential danger occasioned by exposure to combat operations.<sup>77</sup> The commander cannot assume that they will remain on the battlefield or even in theater simply because of military necessity or personnel shortages even though they knew the risks when they signed on. Civilians cannot be compelled to deploy, remain in a designated area, or perform certain missions, and they are not subject to criminal punishment for refusal to do so.<sup>78</sup>

One final note. While not a legal issue in the vein of UCMJ or contract law, the laws of war require that combat be accomplished in accordance with the applicable laws of war. This implies a distinct understanding of the conventions and the ability of the State to define its operations in terms appropriate to those laws. The LMI study cited a couple of findings worthy of consideration. First, some of the people interviewed "... perceived a lack of clear command and control over contractors. Army units had difficulty determining who had management control over contractors."<sup>79</sup> Couple this with their finding, "... our interviewees sensed that the contractors were not aware of the commander's intent and the political consideration of their effort."<sup>80</sup>

### Force Security

Since the Kohbar Towers incident where terrorists used a car bomb to severely damage the compound housing US military members working at the base, killing 19 and injuring hundreds, force protection has been one of the number one priorities and responsibilities of commanders. What is not often discussed is the commander's responsibility to protect the growing number of contractor personnel. That responsibility is or at least should be expanding as more contractors move into potentially hostile areas to perform necessary functions. In his article, "Contractors on the Battlefield," Lieutenant General Williams, Vice Commander of the US Army Materiel Command, frames the issue: "Noncombatants require force protection resources."<sup>81</sup> It sounds simple enough, but it is not a simple matter. These personnel may not be living or performing their duty at the base or compound. They may have family members accompanying them, and they are not required to observe the same restrictions that commanders may place on military members.

In a potentially hostile situation, there must be security forces available to escort contractor personnel. For that matter, security is also required for government contracting personnel who oversee the contractors' performance. As previously discussed, contractors and other noncombatants cannot arm themselves other than for self-protection. Use of a weapon to defend coworkers or equipment changes their status and could subject them to treatment as a combatant or possibly even a mercenary (subject to execution). Therefore, force protection is a requirement. This often requires commanders to take some degree of risk, regarding the effect on the security of their bases or posts by dividing scarce force protection assets. It is a risk they will be reluctant to take if they do not understand the issue. In a brief to Defense Contract Command Western District commanders, Lieutenant Colonel Dan Krebs, who had commanded the command's contract administration team in Haiti, stated that one of his greatest tasks was managing the security support for his team as they went to check fuel quality or water shipment.<sup>82</sup>

One of the related challenges, also identified in the *Army Magazine* article, was, "Noncombatants cannot perform rear area security missions."<sup>83</sup> Force protection people are a scarce commodity. Often at overseas locations, other support personnel augment the force protection personnel. The Kobhar Towers after action report even recommended the use of other (non-force protection) personnel to augment the force protection mission.<sup>84</sup> As military support forces are privatized, the resources for augmentation of the security forces dwindle. The result is longer shifts, more deployments, and a severe drop in retention rates, further compounding the problem. It should be noted that one of the Air Force responses to the shortage and retention problems is to look to contract out some of the functions accomplished by those forces on CONUS bases.<sup>85</sup>

Finally, in long peacekeeping or even conflict situations, contractors often bring family members. The mass exodus of civilian technicians that resulted from the tree-cutting incident mentioned earlier was attributed to their fear for the safety of their dependents. After escorting their families to safety, most returned to their posts to fulfill their missions.

This force protection role may be the least understood, yet most important. The first time a commander fails to provide the security necessary and that failure results in loss of life or capture will be the time we see how well we can operate on our own.

### Recommendations

Civilian leaders have a mandate from the people of this country to build a smaller, more efficient military. Therefore, you will not see a recommendation for the Department of Defense to fight force structure cuts or downsizing efforts. The Department of Defense is already well down the road in privatization and competitive outsourcing efforts, as it should be. However, it seems to have started the process without a coordinated master plan. The primary recommendation is to make sure core competency requirements are dictating what is outsourced and not the other way around. What is required now is some forethought and planning in bringing about new reductions and in-depth analysis of the effects of privatization and outsourcing efforts to date on warfighting capabilities. The risks need to be minimized by eliminating the unknowns and illuminating the risks, facts, and issues.

A recent distinguished guest lecturer at the Air War College said that with the advent of the Air Expeditionary Force, the Air Force is looking at every job and skill—his example was civil engineers—at those AEF locations before authorizing outsourcing efforts. It is an excellent start. However, analysis needs to go beyond AEF and include actions taken already. Retention rates, deployment requirements, criticality of the systems supported, private sector sources of supply, and training time need to be addressed. Is AEF determining the support concept for weapon systems; as an example, the C-17? A thorough review of all support specialties is needed.

Commanders have been placed in a precarious position. They need these contractors in order to accomplish their mission but have been given no tools with which to work. Doctrine needs to be developed—a joint publication focused specifically on contractors on the battlefield. Things that need to be considered include contractor deployment and time-phased force and deployment data applicability, force protection and self-protection responsibility, discipline, understanding contract scope and authority, liability, and the law of armed conflict applicability.<sup>86</sup> This needs to be taught to officers early on and emphasized just the way officers are taught to lead their soldiers. After all, from a strategic perspective, they are being treated as though they were soldiers.

The DoD IG recommendation for developing a methodology and system for reporting the number of and requirements of each contract

with emergency-essential responsibilities needs to be followed up. DoD contracting officers are required to have analyzed the requirements and determined whether they constitute emergency essential services. That information needs to be gathered and made available to CINC planners.

Finally and admittedly a little out of the box, we need to get with our lawyers and acquisition experts and define a methodology that provides commanders with administrative and tactical command of contractor personnel during hostilities—maybe a deputizing clause that in times of Presidential-declared crises makes contractors reservists.

We cannot stop the move to increased private sector involvement and can no longer limit the involvement to base operations or supply. Those functions are already significantly private sector provided. What leaders must do is drive further outsourcing, not by how many military it removes but based upon a risk assessment. The outcome of a wrong choice could well be measured in lives and possibly battles lost.

### Conclusion

The Department of Defense is gambling future military victory on contractors' performing operational functions on the battlefield. Contractors are becoming increasingly responsible for in-theater taskings previously accomplished by military personnel. This has occurred auspiciously due to significant and necessary cuts in force structures and the related need to transition, through outsourcing or privatization, *nonoperational* functions to the private sector. However, contractor numbers are increasing in theater and on the front lines, and their support is directly related to combat operations. The functions being accomplished by contractors today are not nonoperational support functions. They include maintenance and even operations of vital warfighting systems, JSTARS, Patriot, M1A1, and Dark Stars, to name just a few. In fact, fiscal policy has driven us to a point where there is, or will be, no organic military capability in many functions critical to weapon systems performance.

What this means is contractors need to be on the battlefield performing their job even when confronted by life-threatening hostilities. The irony is the contractors legally cannot, and possibly should not, be compelled to remain in harms way and participate in hostilities unless war has been declared. They are noncombatants and risk extreme penalty if their actions are determined to be in violation of that categorization. As the US military has attempted to compensate for force drawdowns, the distinction between military member and contractor support has been conveniently blurred. This is placing commanders and civilian operators in a predicament regarding the laws of war, the terms of this *new soldier's* employment contract, and the effect of these issues on the ability to perform the mission. While a transition of support functions, perhaps even operational functions, from the military to private sector is required by budget necessity, it seems to be happening without a master plan or risk-based assessment. There is little evidence that the strategic and doctrinal implication of contractors on the battlefield is being addressed. Each new outsourcing effort must be reviewed and past efforts analyzed based on its overall implications to the warfighting ability. Logistics support concepts may need to be adjusted to accommodate rear echelon or less risky support. Field commanders must be provided with information regarding the size and requirements related to contractor operations. Finally, if nothing else, we must provide field commanders and contractors with a doctrinal-based understanding of the challenges faced in times of hostilities.

The single deadliest incident during the Persian Gulf War occurred when an Iraqi scud missile hit barracks housing Army Reservists who were providing water purification support far from the front. Today, the military relies heavily on contractors for this support.<sup>87</sup> If death becomes a real threat, there is no doubt that some contractors will exercise their legal rights to get out of the theater. Not so many years ago that may have simply meant no hot food or reduced morale and welfare activity. Today, it could mean the only people a field commander has to accomplish a critical core competency tasking, such as weapon system maintenance or communications and surveillance system operations, have left and gone home. Warfare is changing. It appears, unfortunately, that, rather than face this change, we are hoping that nobody notices.

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