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The increase in Department of Defense service contractors associated with contingency operations in Iraq and Afghanistan has increased the capabilities available to operational commanders. However, it has also highlighted major disadvantages associated with current processes associated with service contracts. The efforts of an adaptive enemy and a rapidly changing operational environment limit the factor of time for the operational commander. This can be offset by an agile force. Today, this force includes contractors. Although developed with good business sense in mind, current procedures and regulations may inhibit operational commanders' ability to adapt the portion of their force that is comprised of contractors. This paper highlights some of the problems operational commanders encounter regarding service contractors and identifies the primary causes of these problems. Further, recommendations are made to aid operational commanders in efficiently and effectively integrating service contractors into future operations through initial requirement identification, contract language development and potential adjustments to contract modification authority.

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Service Contracts: Is Red Tape Tying the Hands of Operational Commanders?

by

Kate E. Fleeger

Major USMC

A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

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Contents

Introduction	1
Background	2
Discussion	4
Counter Argument	10
Recommendations	12
Conclusion	16
Notes	18
Bibliography	20

Abstract

The increase in Department of Defense service contractors associated with contingency operations in Iraq and Afghanistan has increased the capabilities available to operational commanders. However, it has also highlighted major disadvantages associated with current processes associated with service contracts. The efforts of an adaptive enemy and a rapidly changing operational environment limit the factor of time for the operational commander. This can be offset by an agile force. Today, this force includes contractors. Although developed with good business sense in mind, current contracting procedures and regulations may inhibit operational commanders' ability to effectively adapt the portion of their force that is comprised of contractors. This paper highlights some of the problems operational commanders encounter regarding service contract support and identifies the primary causes of these problems. Further, recommendations are made to aid operational commanders in efficiently and effectively integrating service contractors into future operations.

INTRODUCTION

Service contractors have played a role in United States military operations since the Revolutionary War. One argument for employing contractors in military operations is that using a contractor for non-combat duties can free up a uniformed personnel to perform combat duties. Further, contractors can initially improve the responsiveness of Department of Defense (DOD) operations since they can often provide capabilities much more quickly than the DOD can develop these capabilities. Lastly, hiring contractors for DOD operations can save money because contractors can be hired for only the period for which the requirement exists, negating the need for permanent capabilities organic to the military.[1]

Gordon L. Campbell of the US Army Combined Arms Support Command identified the need for service contractors in support of the United States military operations as an "essential, vital part of our force projection capability." [2] Today, with extensive commitments in multiple theaters and a smaller force, it is likely that operational commanders cannot accomplish their missions without the critical capabilities commonly provided by contractors. These capabilities include food preparation, vehicle and aircraft maintenance, intelligence analysis, and administrative support.

Despite the proven benefits of using contractor support in military operations, this common practice may be hampering the ability of operational commanders to accomplish their missions for two primary reasons. First, poorly defined requirements have prevented operational commanders from realizing the efficiencies that contract support could provide. Second, operational commanders do not have the necessary authority to change poorly written contracts as required by a rapidly changing operational environment. This is especially true in today's combat environment where we face what General Petraeus calls "a

thinking, adaptive enemy."[3] Because of this adaptive enemy, operational requirements change frequently, and contracts must often be modified shortly after they are awarded. This can be a cumbersome process. As a result, operational commanders find themselves without certain critical capabilities until the contract modification process is complete, preventing them from realizing the agility necessary to react to fluid enemy tactics and a rapidly changing operational environment. Even if the contract modification process were more agile, operational commanders lack the *authority* to adjust their contractor forces to changing requirements. They must instead influence and rely on the actions of contracting professionals who are often outside their chain of command and geographic area.

If operational commanders lack the ability to respond, "an adaptive enemy can foil the best laid plans of a superior force."[4] Therefore, the DOD must find ways to improve the agility of their operational commanders through changes that either improve the speed with which operational commanders can modify contracts or improve the flexibility of the contract from the beginning. Through an analysis of selected lessons learned and assessments, this paper will discuss existing contractual methods for contract support personnel not directly involved in combat and the barriers to the agility of the operational commander that these regulations present. In addition, this paper will review current contract modification procedures. The last section proposes recommendations for solutions to the identified problems.

BACKGROUND

The use of contractors by the DOD has increased since the Cold War due to budget cuts and military personnel reductions that left large gaps in logistical and other support personnel. In World War I, World War II, Korea and Vietnam, contractors comprised an

average of only 15.5% of the DOD workforce with Korea being the high-water mark at approximately 28%.[5] In contrast, in the three major United States military operations of the last 15 years (Iraq, Afghanistan, and the Balkans), the DOD workforce was nearly equal parts uniformed personnel and contractors.[6] Such a significant emphasis on contract support requires an increased awareness of contract management procedures.

Following the award of a contract, new or adjusted requirements may be identified, and the contract may need to be modified. According to the Federal Acquisition Regulations (FAR), the only person authorized to modify an existing contract is the Contracting Officer. Changes to a contract resulting from additional requirements are usually bilateral changes that require the signature of both the Contracting Officer and the contractor. These changes usually result in adjustments to the price of the contract. Unilateral changes – signed only by the Contracting Officer – may be used to make changes deemed within the scope of the contract and authorized by contract clauses such as options. These changes do not affect the price of the contract.

Contracting Officers may designate a Contracting Officer's Representative (COR) who is responsible for technical or administrative functions in relation to a contract and is, ideally, located at the site of contract execution. Although this person is responsible for managing contractor performance, to include assurance of quality and interpretation of the statement of work, this person does not have the authority to make any changes to the contract and is ultimately responsible to the Contracting Officer.[7]

While these regulations seem straightforward, the modification process can take weeks or months due to administrative requirements. When coupled with the fact that Contracting Officers, CORs, and operational commanders are not always collocated, the

system becomes even less responsive. Although organizations such as the Army Contracting Command's Expeditionary Contracting Command have received increases in manning to provide more contracting officers in locations that better serve operational commanders, the organization will still only deploy 100 contracting officers for the CENTCOM AOR in fiscal year 2011.[8] With nearly 210,000 contract personnel in Iraq and Afghanistan alone, a significant coordination effort will still be required between contracting officers in the United States and deployed operational commanders.[9]

DISCUSSION

Multi-National Corps-Iraq

Often, operational commanders have highlighted the problems stemming from the lack of agility of the service contracts that support their operations. These problems are further exacerbated by the lack of authority that operational commanders have to modify the contractual requirements. The first example occurred in Iraq between 2004 and 2007. During this time, Multi-National Corps-Iraq (MNC-I) received technical support services from contractors on the Iraqi Advisor Task Force (IQATF) who were governed by a task order that was part of a larger contract.

The first issue surrounding this contract was one of geography. The Contracting Officer for this contract was located at the Space and Missile Defense Command contracting office at Peterson Air Force Base in Colorado. Further complicating matters was the fact that the Contracting Officer's Representative (COR) who was responsible for contract administration was located at the Department of the Army's G-3 office at the Pentagon. For the first year of the contract, there was no contract management by anyone who had direct contact with the IQATF or by anyone at the MNC-I level.[10] Some contract management

challenges were alleviated with the designation of an MNC-I representative as the COR, but this arrangement uncovered additional problems. First, the task order that governed the IQATF was vague regarding contractor responsibilities and reporting requirements.[11] Adding to this problem was the fact that MNC-I uniformed personnel could not identify the required services or skills.[12] Instead, jobs given to IQATF contractors were based on skills of the individual contractor rather than "a valid requirement by the customer [sic] themselves."[13]

Additional concerns arose in 2006 when the contract for the IQATF personnel was due for renewal. Due to the above contractual shortcomings, authorities decided to manage the contract through a local contracting activity. While the new contract and contract management structure were improvements, the authors of the contract omitted key clauses due to a lack of experience in the local contracting office. For instance, while the contract required the contractor to fill 90% of the positions within 30 days of contract award, the contract did not specify what action was to be taken in the event that the contractor failed to comply with this requirement.[14] This failure to include necessary clauses in the contract was due to a lack of experience on behalf of the COR who acted as the principal advisor in the development of contractual verbiage.[15] In addition to this lack of experience, the absence of standardized contractual language and clause templates contributed to the shortcomings of the new contract.[16] These omissions required the command to submit a contract modification request only 30 days after contract award.[17]

The previous case illustrates the challenges presented to operational commanders without the requisite authority over their supporting contractors. With limited oversight and contracting officials who are not collocated with the contractors and supported unit,

operational commanders find it difficult to influence the management of contractors within their purview. Poorly written contracts exacerbate these challenges, and even when operational commanders are successful in transferring limited contractual authority to their personnel, a lack of training can lead to lost time and increased administrative expenses.

Intelligence Operations Community

In addition to lessons learned from an individual unit, entire operational fields have identified shortcomings of contract methods and oversight specific to their subject area. For instance, the intelligence community has experienced what a Government Accountability Office (GAO) report calls "a lack of effective management controls" on the contracts that provide intelligence support services in Iraq.[18] Maj Glenn Voelz compiled lessons learned in the intelligence operations community based on his experience as an Army intelligence officer serving as the joint intelligence advisor to the Saudi Arabian Ministry of Defense and Aviation, and the executive assistant to the director for intelligence for the Joint Chiefs of Staff.[19] In his study, Major Voelz identified the contract award period as the critical first step to ensure that the contractors provide the necessary support to operational commanders and retain the flexibility that may be required of them due to changing conditions in the operational theater.[20]

One of the first steps in creating a contract that meets the operational commander's requirements is accurately identifying those requirements for incorporation into the contract's statement of work (SOW). The SOW specifies the services to be performed by the contractor and should do so in precise, performance-based, quantitative terms. This enables the contractor to understand the government's needs and provides an efficient tool for management once the contract has been awarded.[21] Because the requirements of the contract

are ultimately dependent upon the needs of the operational commander, communication between the contracting authority and the operational commander is critical during the development of the SOW. In fact, a "mismatch between SOW language and required contractor skill sets was cited as a compounding factor in difficulties with management of interrogators supporting OIF."[22]

Other than incorrectly identifying the skills required of contractors, another problem identified in SOWs for intelligence support contracts was that of overly specific duty descriptions. Although this can limit risk to the government by ensuring that there is little room for debate regarding the contractor's responsibilities, the risk to the operational commander increases with narrow language. Limited descriptions of contractor duties can limit the range of duties that a contractor may be required to perform even as operational requirements change over the course of the contract.[23] As in the case of MNC-I, poorly written SOWs can require contract modifications within weeks of contract award.

The last critical requirement of a SOW is that it should outline the necessary initial skills and pre-deployment training to ensure efficient integration of the contractors into the military unit. Investigators cited a lack of contractor training and experience as a key factor in the investigation of the scandal Abu Ghraib prison where the contractors had received "little, if any" training on treatment of detainees or the Geneva Convention.[24] A review of operations at the detention facility in Guantanamo Bay, Cuba cited similar issues.[25] Although recent policy changes have attempted to preempt any future problems stemming from inadequate training requirements specified in the SOW, the requirement still remains for operational commanders to clearly communicate any training or skills the contractors should be required to have prior to their deployment to the theater of operations.

After Action Reports from Additional Units

In recent years, units have identified numerous examples of the same types of problems stemming from service contract support. These units range from combat units such as 7th Marine Regiment to non-combat sections of the Army's V Corps. Despite the differences in mission, each unit identified similar problems regarding service contracts both in a theater of combat operations and in preparation for deployment.

As with the intelligence community and MNC-I, 7th Marine Regiment identified a shortfall of trained and qualified individuals to manage contracts on the battlefield stating that a greater number of these individuals would increase the "quality, quantity and efficacy" of contractual efforts.[26] They further identified shortfalls in uniformed personnel contracting training which led to slow responses when problems with the current contract support arose.[27] Lastly, 7th Marine Regiment questioned the flexibility of the field service representative (FSR) teams tasked to provide advisory services, maintenance and supply support. The Marines determined these teams could not meet the requirements of the operational situation due to inadequate resourcing within the contract team itself.[28] A lack of trained contracting professionals necessary to adjust the contract to meet the emerging requirements meant that the FSR teams did not provide the commander with the necessary capabilities.

V Corps' command, control, communications, computers, intelligence, surveillance and reconnaissance (C4ISR) section proposed similar lessons learned. As may be expected, V Corps acknowledged the indispensability of contractor support on the modern battlefield. However, they identified inadequate planning and preparation of the individual contractors as an issue. Lessons learned included the need for clear guidance regarding pre-deployment

training and equipment requirements. In addition, V Corps identified authority issues as "most of the contractors hired [were] hired under separate contracts with different sources of money and managed [by] multiple government managers."[29] As a result, when questions arose regarding procedures for deployment activities, no central command authority existed, and simple concerns such as the procurement of protective eye wear for contractors became significant problems costing the government both time and money.

Potential Repercussions of Identified Problems

As outlined above, numerous issues surround contractors in support of military operations. These problems include inadequate or inaccurate SOW language, lengthy contract modification procedures, lack of trained contract professionals on location with contract support, and a lack of authority of operational commanders to adjust the mission of their contract support as required. These problems can lead to increased cost, increased pressures on military and contract personnel and even mission failure.

When a SOW does not adequately address the requirements of the operational commander, critical shortfalls in mission essential resources could occur. This, coupled with lengthy contract modification procedures, a lack of on-site contractual support, and a lack of training, may drive operational commanders to make adjustments to contracts under the guise of mission accomplishment. If a government official makes a change to a contract, and the appropriate contract modification procedures are not followed, a contractor may take legal actions against the government, resulting in significant cost increases.

Unauthorized changes to the contract (written or oral) are called constructive changes and can be unwittingly made by any government official if the contractor reasonably believes that the government official has the authority to make such a change. Even if the official is

not authorized to modify a contract, the government may nevertheless be held liable for increased costs to the contractor. For instance, an operational commander in Bosnia directed a contractor to speed up the construction of a camp building, requiring the contractor to purchase plywood at nearly three times the original cost.[30] Furthermore, if a contractor feels pressured to perform work outside the original scope of the contract, the contractor may file for an equitable adjustment after the completion of the contract based on the actual work they performed.[31]

Not only can lengthy contract modification procedures put pressure on operational commanders to find another way to fill in the gap, it also puts pressure on contractors to accomplish the mission despite the fact that it is out of the scope of their contract. A desire to please the customer in hopes of a favorable review can drive the contractor's site manager to push his employees to work outside the scope of the contract. This may cause inefficiencies for the operational commander and additional costs to the governments since the contract would need to be "modified after the fact to reflect the actual conditions of work performance."[32]

COUNTER ARGUMENT

Red Tape Does Serve a Function

While it is true that the above problems and consequences may increase the risk to the accomplishment of the operational commander's mission, contracting regulations are constructed in such a way that they limit the amount of risk assumed by the government. Limitations on contract change authority, requirements for narrowly focused SOWs and the need for contract management to be in the purview of trained contracting professionals rather than uniformed personnel are control measures that lessen the risk to the government.

In an effort to limit monetary risk to the government through contractual disputes or fraud, waste and abuse, the FAR specifies those individuals with the authority to create or modify contracts.[33] If any person in a uniform, or even any operational commander were empowered to adjust contracts as he saw fit, not only could the contract be modified from its initial intent, but as a result, the government could incur significant cost increases as contractors submitted requests for equitable adjustments as compensation for their increased or changed performance requirements.[34] It is further reasoned that the current regulations avoid the chaos that would necessarily ensue if a contractor could be directed by "any one of dozens or potentially hundreds of Government 'agents'."[35]

One alternative to providing contract change authority and management responsibilities to an operational commander is to provide that commander with a dedicated contracting officer. The Army's current efforts to increase the number of contracting professionals forward deployed in support of operational commanders is a good start, but other services must apply their resources as well if operational commanders are to be adequately supported. Unfortunately, with the number of contracts and contractors rising due to shortages of government manpower, it is unlikely that the government will be able to provide an increase in manpower in response to the increase in contractors.

In the meantime, the US military is left with few alternatives. While a scenario that increases the number of personnel with contract modification authority conjures visions of myriad uniformed personnel each pointing contractors in a different direction, this seems more like hyperbole than realism. While it is true that once Pandora's Box is opened, it is hard to replace the lid, providing limited contract change authority to operational commanders or their designees could be extremely useful. This would require significant

training to ensure that individuals granted contract change authority could use this authority within the boundaries of both regulations and professional ethics.

Narrowing SOW language was another control measure instituted in service contracting with honorable intentions. An oft cited argument against broad SOW language for contract support is that specific SOW language ensures that the government receives the required services at the appropriate level of quality. The Office of Federal Procurement Policy concurred and released a policy letter in 1991 that sought to avoid broad SOW language for service contracts because it hinders effective contract performance management.[36]

However, it could be argued that a broadened SOW does not necessarily mean a SOW that lacks specificity. When a SOW includes a broad range of specific contractual requirements, it can cover various contingencies without denying the government the ability to assess contract performance. For instance, a contract that specifies ten specific, detailed, measurable tasks would be more useful to an operational commander than a contract that merely listed five. By keeping the same high level of detail, contractors and operational commanders would know exactly what could be expected and how the contractor's performance would be evaluated. It is true that a broader SOW with more requirements may cost more money since contractors will be required to do more individual tasks. However, this increase in cost could be offset by the increase in efficiency and decrease in the need for multiple contract modifications.

RECOMMENDATIONS

While increased authority for contract modifications is a quick way that an operational commander can adjust his supporting contracts, it does increase the risk to the

government. In addition, contract modification merely addresses a symptom of a broader problem. If contracting professionals write contracts that are more flexible from the beginning, operational commanders will have the leeway within the contract to meet their operational requirements. A number of alternative contracting methods that provide this flexibility should be considered when contracting professionals construct a contract in support of an operational commander.

Indefinite Delivery-Indefinite Quantity Contracts

Indefinite delivery-indefinite quantity (IDIQ) contracts can be an extremely flexible and responsive, yet cost-effective method of procuring services. Also known as a task order contract, IDIQ contracts are used when the exact times and quantities of future services are unknown (but within a particular timeframe and between a minimum and maximum amount).[37] IDIQ contracts are broadly scoped with general statements regarding the nature and complexity of the requirements. Once an IDIQ contract is awarded (to one or multiple awardees) individual task orders are built underneath the umbrella of the IDIQ. This method substantially decreases the amount of time necessary to develop and compete a contract since the contractors have already been chosen. The government merely has to develop a specific task order within the scope of the overall IDIQ contract.

The development and awarding of an IDIQ does not preclude thorough contract planning. In fact, the GAO identified contract planning as a crucial element of the process.[38] Because IDIQ contracts require robust planning for the initial contract as well as for each subsequent task order, acquisition planning is particularly important and pervasive.[39] Contract planning is also the best way to ensure maximum flexibility of response in the rapid execution of a task order.

Another aspect of IDIQ contracts that makes them ideal for a changing operational environment is the ability to add services or even additional contractors to the umbrella contract. Multiple contract awards can provide the flexibility of a wider range of options when requirements become better known, and they can also relieve "administrative burdens associated with management of individual contracts."[40]

Taking advantage of the flexibility inherent in IDIQ contracts could have assisted 7th Marine Regiment in their endeavors. When the unit discovered that the FSR could not meet emerging requirements of the battlefield situation, an IDIQ contract would have allowed them to more rapidly adjust the contract, enabling the commander's ability to respond rapidly to the situation. IDIQ contracts could have also aided the intelligence community when they found that their SOWs were inadequate for the tasks required. An IDIQ contract with a broader SOW and specific task orders underneath the umbrella contract would have enabled intelligence community commanders to tailor contracts to the operational requirements.

Relational Contracting Approach to Performance-Based Services Acquisition

Performance-Based Services Acquisition (PBSA) is the standard contracting method by which the DOD acquires services. The FAR states that PBSA must include a Performance Work Statement, appropriate performance incentives, measurable performance standards, and methods of measurement. Unfortunately, PBSA alone has not necessarily been successful due to the impracticality of requiring knowledge of future needs. This ability to know the future can be particularly troublesome for long-term service contracts.[41]

Relational PBSA, a recently proposed adjustment to PBSA, "emphasizes the need to establish a solid working relationship between the government and its contractor."[42] This approach is risky and is not commonly used because it's greater emphasis on partnerships,

cooperation and long-term mutual agreements can be easily compromised by fraud. As a result, the same basic oversight principles would still apply, but it would also be mandatory for both parties (the government and the contractor) to document all decisions and tradeoffs. Further, because multiple changes to contract requirements leave the door open to legal disputes, the mandatory use of alternative dispute resolution procedures, such as arbitration, would lower the financial risk to the government due to decreased legal costs.

For operational commanders, the fact that one of the key features of Relational PBSA is the ability to specify requirements during the execution of the contract means greater flexibility and responsiveness. Both parties would work together to make trade-offs to ensure that the entire project remains within budget. Because these adjustments and trade-offs would remain within the budget, they would not require contract modifications. Therefore, they would not require the approval of the Contracting Officer.[43] For these reasons, Relational PBSA can provide a more flexible, cost-effective and ultimately more efficient contracting approach.

Had the Intelligence Operations community employed Relational PBSA, they could have ensured a match between SOW language and the actual requirements of the community enabling better management of contract performance. Further, the room for negotiation inherent in Relational PBSA contracting would have meant that the Intelligence Operations community could have continued to adjust the contract as necessary in order to ensure that it met changing operational requirements. Through a reliance on a long-term relationship with the contractor, commanders within the Intelligence Community could have made a more effective use of their service contractors by being able to adapt requirements throughout the execution of the contract.

Standardized Contracting Language

Despite its benefits, Relational PBSA can be labor intensive because it requires consistent and frequent communication between the government and the contractor. However, one of the simplest ways to streamline the contracting process and facilitate the timely and effective delivery of contract services to operational commanders is by standardizing contractual language. As identified by MNC-I, the lack of standardized language and templates for clauses can lead to the omission of crucial contract elements, requiring subsequent modifications and additional administrative expenditures. While the legal and technical clauses are important, perhaps even more important to the operational commander is the standardization of requirements language. Standardized definitions and verbiage help operational commanders effectively communicate their requirements to contracting officers. The best way to develop this language is by compiling lessons learned and using appropriate sections of contracts that were successfully executed.

Planning for any contract requires frequent and clear communication between the requirements generating body (in this case, the operational commander) and the contracting professionals. Reinventing the wheel each time a new requirement arises wastes valuable time and increases the potential for confusion and miscommunication. Combining standardized contractual language, continuous planning, and an IDIQ or Relational PBSA approach can greatly enhance the satisfaction of the operational commander by ensuring the early identification of requirements and the timely execution of contracts.

CONCLUSION

There is considerable room for improvement in the contracting processes and regulations. Unfortunately, as with any bureaucracy, changing regulations takes a significant

amount of time. In the meantime, communication between the operational commander and the contracting officer is crucial to identifying and documenting the contract's requirements. Contracts must be carefully crafted from the beginning in order to satisfy the validated requirements of the operational commander and remain flexible in the likely event that requirements change.

In the event that a contract is not created with the necessary flexibility, the government must provide operational commanders with the tools and authority to assess and modify contracts that no longer satisfy requirements. Whether these tools are on-site contracting officers, contract modification authority, or Relational PBSA negotiation authority, the result should be that the operational commander can influence his supporting contracts in a timely manner. The key is to balance these changes with the existing FAR and Defense Federal Acquisition Supplements to ensure an acceptable level of risk for both the government and the contractor.

Concerns regarding contractors performing military duties have surfaced at all levels of war, from tactical to strategic. While this paper addresses concerns relating only to techniques to improve the agility of contracts in response to operational commanders' needs, future research efforts should focus on standardizing and streamlining the process for identification of contractual requirements at all levels of war.

NOTES

(All notes appear in shortened form. For full details, see the appropriate entry in the bibliography.)

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38. Wilkinson, "More Effective Federal Procurement Response," 272.
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