

**PASS THE SIGAR: CUTTING THROUGH THE SMOKE OF
LESSONS LEARNED IN SIMPLIFIED CONTINGENCY
CONTRACTING OPERATIONS**

MAJOR JUSTIN M. MARCHESI*

Applying a force's full combat power requires unity of command. Unity of command means that a single commander directs and coordinates the actions of all forces toward a common objective. Cooperation may produce coordination, but giving a single commander the required authority is the most effective way to achieve unity of effort.¹

I. Introduction

For over ten years, the Armed Forces of the United States have been decisively engaged in combat contingency operations across the globe.² While the bulk of these operations have focused on Iraq and Afghanistan, the scope of this world-wide mission is without precedent. Never before, in the history of the U.S. military, have so few uniformed Servicemembers been tasked to successfully topple two regimes, stabilize an unprecedented amount of territory, and reconstruct a vast network of infrastructure that had either never existed or had been ravaged by years of neglect, conflict, and economic sanctions.³ In fact,

* Judge Advocate, U.S. Army. Presently assigned as Brigade Judge Advocate, 2d Brigade Combat Team, 10th Mountain Division (Light Infantry), Fort Drum, New York. LL.M., 2013, The Judge Advocate General's School; J.D., 2011, William & Mary Law School; B.A., 2003, University of Southern California. Previous assignments include Brigade Judge Advocate, 2d Security Forces Assistance Brigade, Regional Command - East, International Security Assistance Force, Paktika Province, Afghanistan, 2013; Trial Counsel and Administrative Law Attorney, XVIII Airborne Corps, Fort Bragg, North Carolina, 2011–2012; Commander, Bravo Company, Allied Forces Southern Europe, USAE-NATO, Madrid, Spain, 2007–2008; Adjutant, V Corps Special Troops Battalion, Heidelberg, Germany, 2004–2007; Adjutant, Task Force Victory, Multi-National Corps - Iraq, Baghdad, Iraq, 2006; Adjutant, 2d Battalion, 11th Infantry Regiment, Fort Benning, Georgia, 2003–2004. Member of the bars of California and the District of Columbia. This article was submitted in partial completion of the Master of Laws requirements of the 61st Judge Advocate Officer Graduate Course.

¹ U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS, at A3 (27 Feb. 2008) (describing the Unity of Command principle of war and operations).

² See Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498; Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

³ See COMM'N ON WARTIME CONTRACTING IN IRAQ AND AFG., TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS 17 (2011) [hereinafter CWC FINAL REPORT] (citing CONG. RESEARCH SVC., REPORT NO. R41677, INSTANCES OF USE OF

the size of the force performing these missions, and its supporting uniformed logistical force structure, is dramatically smaller than that of *any* modern wartime force of the United States.⁴

The stage was set for this situation when active duty forces were reduced by thirty-one percent following the end of the Cold War and the successful liberation of Kuwait in the Persian Gulf War.⁵ This spurred a reevaluation of core military competency priorities where a focus on the maintenance of offensive combat capabilities was of paramount concern. This preservation of combat power, however, came at the expense of a litany of organic sustainment capabilities necessary for the extended combat, stability, and support operations the U.S. military has encountered since 9/11.⁶

As a result, the herculean missions of the past decade relied heavily upon privately contracted security, logistics, and construction services.⁷

UNITED STATES ARMED FORCES ABROAD, 1798–2010 (2011), *available at* http://www.wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf.

⁴ See Lance M. Bacon, *Cutting Half an Army: End Strength in the Cross Hairs*, ARMY TIMES, Mar. 11, 2013, at 20 (noting the Army's end strength in the following years: 1945 (8,266,373); 1955 (1,109,296); 1970 (1,322,548); 1990 (732,403); and 2012 (551,000)).

⁵ ANTHONY H. CORDESMAN, CTR. FOR STRATEGIC AND INT'L STUD., TRENDS IN US MILITARY FORCES AND DEFENSE SPENDING 11 (1999) (noting that the active duty U.S. military manpower levels of all services combined dropped from approximately 2 million in 1991 to approximately 1.39 million in 1999).

⁶ See U.S. DEP'T OF DEF. INSPECTOR GENERAL, REPORT NO. 2012-134, CONTINGENCY CONTRACTING: A FRAMEWORK FOR REFORM 2012 UPDATE 1 (2012) [hereinafter DOD IG 2012 UPDATE] ("These contractors perform vital tasks in support of U.S. defense and development objectives, including logistics support, equipment maintenance, fuel delivery, base operations support, and security."), *available at* <http://www.dodig.mil/audit/reports/fy12/dodig-2012-134.pdf>; CWC FINAL REPORT, *supra* note 3, at 28 ("There are several reasons agencies rely on contractors for contingency-support services: . . . military services' having concentrated limited resources on combat functions, which led to a degradation of organic capability.").

⁷ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-212, WARFIGHTER SUPPORT: DOD NEEDS ADDITIONAL STEPS TO FULLY INTEGRATE OPERATIONAL CONTRACT SUPPORT INTO CONTINGENCY PLANNING 6 (2013) [hereinafter GAO WARFIGHTER SUPPORT REPORT 2013] ("The U.S. military routinely uses contracted support in contingency operations. Military forces will often be significantly augmented with contracted support because of the continual introduction of high-technology equipment, coupled with force structure and manning limitations, and the high pace of operations."); CWC FINAL REPORT, *supra* note 3, at 28 (noting that contracts are used extensively because of: (1) statutory limits on the end strength of military and civilian personnel; (2) a concentration on combat functions that has degraded organizational logistical capabilities; (3) long recruitment and training lead times; (4) voluntary nature of deployments for civilian employees; and (5) a presumption of cost effectiveness for contracts).

The contingency contracting mission was left to an established peacetime acquisition structure ill-prepared for the onslaught of fast-paced contract planning, formation, and administration duties necessary in a contingency environment.⁸ According to the Commission on Wartime Contracting, *at least* thirty-one billion dollars have been consumed by fraud, waste, and abuse by contractors, commands, and contracting personnel involved in operations in Iraq and Afghanistan.⁹

The hard-won lessons learned from these contingency contracting experiences over the past decade cannot, in good conscience, go to waste as they have in the past.¹⁰ The requirement for contractor service support in future contingency operations will only increase and the operational Army must embrace this fact.¹¹ While the creation of the new Expeditionary Contracting Command was a productive first step toward

⁸ See CWC FINAL REPORT, *supra* note 3, at 27 (“While Defense has a dedicated acquisition workforce and a mature process for acquiring and managing commodities and major weapons systems, there has been no comparable government-wide focus on the acquisition of contingency-support services.”).

⁹ *Id.* at 1 (“At least \$31 billion, and possibly as much as \$60 billion, has been lost to contract waste and fraud in America’s contingency operations in Iraq and Afghanistan.”). This conservative number does not include the massive potential waste due to the completion of unsustainable projects. *Id.* at 70; *see, e.g.*, SPECIAL INSPECTOR GEN. FOR AFG. RECONSTRUCTION, AUDIT NO. 10-6, CONTRACT DELAYS LED TO COST OVERRUNS FOR THE KABUL POWER PLANT AND SUSTAINABILITY REMAINS A KEY CHALLENGE (2010) (detailing the construction of the \$300 million Tarakil Power Plant in Kabul that the government of Afghanistan cannot afford to independently operate); SPECIAL INSPECTOR GENERAL FOR IRAQI RECONSTRUCTION, REPORT NO. PA-08-138, KAHN BANI SA’AD CORRECTIONAL FACILITY (2008) (“[T]he [Ministry of Justice] had no plans to ‘complete, occupy, or provide security for this facility.’”); *see also infra* notes 61–62 and accompanying text.

¹⁰ COMM’N ON ARMY ACQUISITION AND PROGRAM MGMT. IN EXPEDITIONARY OPERATIONS, URGENT REFORM REQUIRED: ARMY EXPEDITIONARY CONTRACTING 16 (2007) [hereinafter GANSLER COMM’N REPORT] (“[T]he expeditionary experiences in Haiti, Bosnia, and Kosovo had not been leveraged into building an operational or institutional capability to support the next military operation.”), *available at* http://www.acq.osd.mil/dpap/contingency/reports/docs/gansler_commission_report_final_report_20071031.pdf.

¹¹ CWC FINAL REPORT, *supra* note 3, at 32–33 (“The ongoing debate about the federal budget and the deficit is likely to translate into reductions in the size of the military and federal-civilian workforce, but not a corresponding reduction in national-security missions. This ‘do the same with less’ outcome—or an even riskier ‘do more with less’ outcome—may drive an even heavier over-reliance on contractors than has been seen in the past decade.”); GANSLER COMM’N REPORT, *supra* note 10, at 7 (“[T]he Army needs to recognize that, in order to operate in a streamlined, agile, expeditionary environment, it must, by necessity, rely on contractors to provide combat service support.”); *see* GAO WARFIGHTER SUPPORT REPORT 2013, *supra* note 7, at 6.

providing resources dedicated to tackling the most complex and expensive contingency contracts,¹² it remains an incomplete solution for the vast majority of small-scale contracts. Over eighty-six percent of the contingency contracts issued in Iraq and Afghanistan were below the simplified acquisition threshold (SAT) and accounted for only thirty percent of the funds spent.¹³ This dramatic contrast in the high volume of contracting actions and the low overall value of each contract coupled with the competing priorities of higher value, more complex contracts exacerbates many of the long-standing problems associated with both large- and small-scale contingency contracting.¹⁴

Rather, as this article argues, the Army should continue its transformation into a modular brigade combat team (BCT)-centric force that is structured to provide BCT commanders with the organic capabilities necessary to independently accomplish assigned missions in austere environments. By adopting contingency contracting below the SAT level as a core Logistics branch function and integrating a contingency contracting function into the logistics staff structure at the brigade level, BCT commanders will be better resourced to fulfill the independent mission capability of their modular brigades.¹⁵

In support of this proposal, Part II of this article explores the rise of the modern Expeditionary Contracting Command. Part III examines the continuing lessons learned from operations in Iraq and Afghanistan.

¹² GAO WARFIGHTER SUPPORT REPORT 2013, *supra* note 7, at 17 n.28.

¹³ GANSLER COMM'N REPORT, *supra* note 10, at 28. For a discussion of the SAT, see *infra* Part III.A.

¹⁴ See *infra* Part II and Appendix C (surveying the negative findings of Special Inspector General for Iraq Reconstruction (SIGIR) and Special Inspector General for Afghanistan Reconstruction (SIGAR) contracting audits and inspections from 2004–2012); see also GANSLER COMM'N REPORT, *supra* note 10, at 9 (“Perhaps most notable was a question that the Commission repeatedly asked the experts, ‘Who in the Army is responsible for the situation we are in today?’ In reply, the Commission repeatedly heard that there are no General Officers responsible for Army contracting—responsibility was diffused among many organizations, both within CONUS and in the field.”).

¹⁵ This proposal is roughly analogous to the Personnel Services Delivery Redesign that transferred the functions of the Personnel Services Battalion to Brigade S-1 sections throughout the Army in an effort to decentralize mission essential service support functions. ADJUTANT GEN. CORPS, U.S. DEP'T OF ARMY, HR SUPPORT TO THE MODULAR ARMY: PERSONNEL SERVICES DELIVERY REDESIGN (2006). “The result [was] improved HR support to the warfighter that is more effective, more efficient, and more responsive.” Lieutenant Colonel Christopher B. Nichols, *Personnel Services Delivery Redesign*, ARMY LOGISTICIAN, July–Aug. 2009, at 1, available at http://www.almc.army.mil/alog/issues/JulAug09/pdf/alog_julaug09.pdf.

Lastly, Part IV then describes how and why a decentralized, commander-centric methodology is the most effective strategy for implementing these continuing lessons learned at the small-scale, simplified acquisition level, ensuring that contingency contracting serves as a force multiplier in future operations.

II. The Gansler Commission and the Rise of Expeditionary Contracting Command

A. The Commission

On September 6, 2007, after almost six years of continuous combat operations and extensive contingency contracting use, Secretary of the Army Pete Geren appointed the Honorable Jacques Gansler to chair the Commission on Army Acquisition and Program Management in Expeditionary Operations.¹⁶ Under its charter, the Gansler Commission was asked to “review the Army’s policies, procedures, and operations in [contingency contracting]”¹⁷ The Commission made over two dozen findings and recommendations detailing the systemic failures of the Army acquisition system in the ongoing world-wide contingency operations.¹⁸

The crux of the challenge facing the Army’s contingency contracting capability in 2007 was that “[t]he overall acquisition workforce (especially the military) [was] weapons-system focused.”¹⁹ This reflected the institutional Army’s failure to adapt to the contemporary expeditionary environment.²⁰ For instance, at the time, uniformed Soldiers comprised only three percent of the Army acquisition workforce and the Army’s Acquisition Corps lacked general officer billets.²¹

¹⁶ GANSLER COMM’N REPORT, *supra* note 10, at 20, app. B, at 79. Among Dr. Jacques S. Gansler’s litany of qualifications, he was a Member of the National Academy of Engineering and a Fellow of the National Academy of Public Administration in addition to previously serving as the Under Secretary of Defense for Production and Logistics, the Under Secretary of Defense for Acquisition, Technology and Logistics, the Deputy Assistant Secretary of Defense for Material Acquisition, and the Assistant Director of Defense Research and Engineering for Electronics. *Id.* app. A, at 75.

¹⁷ *Id.* app. B, at 79.

¹⁸ *Id.* app. C, at 90.

¹⁹ *Id.* at 26 (referring to large U.S.-based acquisitions, as opposed to small-scale contingency support contracts procured in the theater of operations).

²⁰ *Id.* at 20.

²¹ *Id.* at 32. Comparatively, the U.S. Air Force acquisition workforce was comprised of

Not surprisingly, “Army culture [was] focused on warfighting and thus neither recognize[d] the critical and complex nature of contracting nor reward[ed] people in the contracting community.”²² A perfect example of this cultural defect was the number of open contract fraud investigations at the time: Army contracting personnel were found to be the target of fraud investigations far more than any other service despite representing a distinct minority of contracting personnel in theater.²³ Beyond the prevalence of suspected willful misconduct, the cultural disconnect was also found to be the root cause of routinely inadequate pre-award contract planning and numerous post-award contract management and oversight failures that led to billions in losses to the U.S. taxpayer.²⁴

B. Modern Contingency Contracting Force Structure

On January 30, 2008, shortly after the publication of the Gansler Commission Report, the Secretary of the Army ordered the establishment of Army Contracting Command as a major subordinate command of Army Materiel Command.²⁵ In an effort to correct the institutional deficiencies identified by the Commission, Army Contracting Command was established as a two-star level command and organized into two subordinate one-star elements.²⁶ Mission and Installation Contracting Command was tasked with providing “contracting support for the war fighter across Army commands, installations and activities located throughout the continental United States, Alaska and Puerto Rico.”²⁷

at least thirty percent uniformed military members with two permanent general officer positions and a third temporary joint General Officer billet. *Id.*

²² *Id.* at 29.

²³ *Id.* at 22 (noting that, in Southwest Asia at the time the report was published, the Air Force had 70% of the personnel with only one open fraud case while the Army had 28% of the personnel with seventy-seven open fraud cases).

²⁴ *Id.* at 21–22, 25–26, 27–28, 39–43 (detailing the difficulties encountered as a result of incomplete or unreasonable operational planning, incremental funding, inadequate contractor monitoring, and poor records keeping); *see infra* Appendix C (surveying the negative findings of SIGIR and SIGAR audits and inspections).

²⁵ Headquarters, U.S. Dep’t of Army, Gen. Order No. 2009-20 para. 1 (8 July 2009) [hereinafter Gen. Order No. 2009-20]. *But see* History of the U.S. Army Contracting Command, ARMY CONTRACTING COMMAND, <http://www.acc.army.mil/command-and-staff/staff/historian/> (last visited Mar. 15, 2013) (noting, perhaps erroneously, that the Army Contracting Command was established on 1 October 2008).

²⁶ *Army Contracting Command Fact Sheet*, ARMY CONTRACTING COMMAND, <http://www.acc.army.mil/files/ACC.pdf> (last visited Mar. 15, 2013).

²⁷ *Mission and Installation Contracting Command Fact Sheet*, ARMY CONTRACTING

The fundamental concerns of the Commission, however, were to be addressed by the other new element, Expeditionary Contracting Command (ECC).

Established on October 1, 2008, ECC assumed responsibility for contracting support to commanders stationed outside the continental United States.²⁸ As such, the Commanding General of ECC was appointed as a Head of Contracting Activity.²⁹ In theory, the ECC commander would become the officer ultimately accountable for contingency contracting operations.³⁰ To this end, ECC was organized into subordinate contracting support brigades.³¹ Each contracting support brigade was regionally aligned with the Army component commands associated with each geographic unified combatant command.³² These contracting support brigades were to serve as the largest deployable contracting element and as the Principal Assistants Responsible for Contracting, focusing primarily on planning and management.³³

COMMAND, <http://www.acc.army.mil/files/MICC.pdf> (last visited Mar. 15, 2013).

²⁸ Gen. Order No. 2009-20, *supra* note 25, para. 3a.

²⁹ U.S. DEP'T OF ARMY, FIELD MANUAL 4-92, CONTRACTING SUPPORT BRIGADE para. 1-4 (12 Feb. 2010) [hereinafter FM 4-92] (“[Head of Contracting Activity] is the official who has overall responsibility for managing the contracting activity.”); *see also* FAR 2.101 (2013) (defining “head of contract activity”); *id.* 1.601 (describing how contract authority and responsibility flows from the agency head to the designated heads of contracting activities to the contracting officers).

³⁰ FM 4-92, *supra* note 29, para. 1-4. *But see infra* Part I.C.

³¹ Command Organization, EXPEDITIONARY CONTRACTING COMMAND, <http://www.acc.army.mil/ecc/command-and-staff/> (last visited Mar. 15, 2013). The existing contracting support brigades that reported directly to Army Materiel Command prior to the activation of Army Contracting Command were reassigned to ECC when it was established. Gen. Order 2009-20, *supra* note 25, para. 3a; *see also* FM 4-92, *supra* note 29, para. 1-1 (“Headquarters Department of the Army (HQDA) directed modular force actions led to the consolidation of all theater support contracting capabilities into US Army Materiel Command (USAMC) Table of Organization and Equipment (TOE) units assigned to the new U.S. Army Contracting Command (USACC) and its subordinate Expeditionary Contracting Command (ECC). . . . Additionally, corps, divisions and brigade combat teams (BCTs) no longer have contingency contracting officers (CCOs) assigned to their support command TOEs. In the modular force, these tactical-level theater support contracting staff members have been transformed into separate contingency contraction battalions (CCBNs), senior contingency contracting teams (SCCTs) and contingency contracting teams (CCTs).”).

³² FM 4-92, *supra* note 29, fig.1-1, at 1-2.

³³ *Id.* para. 1-1.

Each contracting support brigade was organized into contingency contracting Battalions, which were aligned with (but not assigned to) Army corps headquarters,³⁴ and senior contingency contracting teams, which were aligned with (but not assigned to) numbered division headquarters.³⁵ The contingency contracting battalions, like their superior contracting support brigades, were tasked primarily with planning and management duties “vice actually writing and executing contracts.”³⁶ Rather, “the Army’s primary deployable theater support contracting maneuver unit and building block” was the Contingency Contracting Team that “normally deploy[s] and serve[s] under the command of a [Contingency Contracting Battalion]”³⁷ The intent was to provide contracting assets to field commanders that were “available as units (vice individuals), organized and deployed in accordance with [mission, enemy, terrain, troops, time, civilian] and other factors”³⁸

These assets remain under the direct command and control of ECC through each contracting support brigade. Contingency contracting battalions, senior contingency contracting teams, and contingency contracting teams are only to be aligned with and available to support the contracting requirements identified, planned, and prepared by field commands during contingency operations.³⁹ For any purchase that exceeds the micro-purchase threshold,⁴⁰ the requiring activity is presently required to follow a lengthy process to obtain the needed supplies or services.

³⁴ *Id.* para. 1-15.

³⁵ *Id.* para. 1-17.

³⁶ *Id.* para. 1-16.

³⁷ *Id.* para. 1-18. “Like [Senior Contingency Contracting Teams], [Contingency Contracting Teams] are small TOE teams consisting of five [Contingency Contracting Officers], but led by a Major ([O]4).” *Id.*

³⁸ *Id.* para. 1-23.

³⁹ *See id.* para. 2-18. Interestingly, current regulations and doctrine do not mandate, or even address, the participation of Contract Support Brigade elements in the field training exercises, mission rehearsal exercises, or command post exercises of operational warfighting units. *See* U.S. DEP’T OF ARMY, REG. 715-19, OPERATIONAL CONTRACT SUPPORT PLANNING AND MANAGEMENT (20 June 2011) [hereinafter AR 715-19]; FM 4-92, *supra* note 29. For a brief discussion of how contingency contract training integration might positively impact Army culture and operational readiness, see *infra* Part III.D.

⁴⁰ The micro-purchase threshold, in a contingency environment, is \$15,000 if procured and performed domestically and \$30,000 if procured or performed outside the United States. FAR 2.101 (2013).

C. Current Contingency Contracting Process

If a deployed unit identifies an urgent need for a certain supply or service, the unit point of contact would first have to develop an “acquisition ready requirements package” that described the requirement in sufficient detail for inclusion in a solicitation.⁴¹ This involves developing “an independent government estimate and performance work statement (services) [or] statement of work (supplies and construction)” that is sufficiently detailed while avoiding a level of specificity that would cause problems during the competition phase of the solicitation or cause the government to assume risk for a failed project during performance or closeout.⁴² This becomes an extremely difficult and inefficient task for a staff that is not trained in the intricacies of contract formation and has to reach out to non-organic, remotely located contracting assets for assistance.⁴³

Once the solicitation package is appropriately reviewed and funded, it leaves the control of the operational unit and is sent to an element of the servicing contract support brigade.⁴⁴ The applicable contingency contracting team is then responsible for developing the appropriate contract instruments, conducting the solicitation, and finally awarding the contract.⁴⁵ The action, though, will be prioritized by the limited number of contracting personnel based upon the workload and complexity of the required contracting instrument and any packages containing “[i]nadequate descriptions are normally returned to the originator” without action, creating significant interoffice delays.⁴⁶

⁴¹ FM 4-92, *supra* note 29, para. 2-18 (emphasis omitted); *see also* AR 715-9, *supra* note 39, para. 1-4(t)(1) (describing the requiring activity’s responsibilities with respect to “acquisition ready requirements packages”); *id.* para. 2-4 (defining the required elements of the “acquisition ready requirements package”).

⁴² *See* FM 4-92, *supra* note 29, para. 2-18.

⁴³ *See supra* Part II.B (noting the remote and inorganic nature of the new contingency contracting force structure with respect to the requiring activities).

⁴⁴ FM 4-92, *supra* note 29, para. 2-21.

⁴⁵ *Id.*

⁴⁶ *See* U.S. DEP’T OF DEF., DEF. PROCUREMENT AND ACQUISITION POL’Y, DEFENSE CONTINGENCY CONTRACTING HANDBOOK 53 (2012) [hereinafter DCC HANDBOOK]; *see also* SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, AUDIT NO. 10-005, IRAQ SECURITY FORCES FUND: WEAK CONTRACT OVERSIGHT ALLOWED POTENTIAL OVERCHARGES BY AECOM TO GO UNDETECTED (2009) (finding that the Army Contracting Command had inadequate personnel available to properly review invoices prior to disbursing over \$567 million in funds).

Upon completion of the solicitation period, the contingency contracting officer will conduct the evaluation and source selection processes required under the Federal Acquisition Regulation (FAR),⁴⁷ again, in accordance with the workload priorities of the contingency contracting team itself. Once the contract is awarded, the unit assumes “responsibility” for the direct supervision of the contractor’s performance through the appointment of a contracting officer’s representative.⁴⁸ The contracting officer, working at the contingency contracting Team headquarters, will seldom become directly involved in routine contract performance supervision.⁴⁹ “The unit [Contracting Officer Representative] or receiving official is responsible to ensure delivery, receipt or acceptance of the service or commodity in accordance with the terms and conditions of the contract.”⁵⁰ Once performance is completed or accepted, responsibility falls back to the contingency contracting team and the contracting officer must close out the contract and forward instructions to the financial management unit to disburse payment on the completed contract.⁵¹ Under this model, even the simplest contract vehicles must travel through at least five layers of bureaucracy and be subject to the differing priorities of at least three separate chains of command, only one of which is a warfighting element.⁵²

III. Continuing Lessons Learned

While a drastic improvement over the pre-Gansler state of contingency contracting,⁵³ the ECC model is an incomplete solution.

⁴⁷ These vary significantly depending on the method of procurement: sealed bidding; negotiated procurement; or simplified acquisition. See FAR 13 (2013); *id.* 14; *id.* 15.

⁴⁸ FM 4-92, *supra* note 29, para. 2-22. Despite this doctrinal attempt to shift the burden of responsibility for contract supervision to the unit, the contracting officer remains legally responsible for the acceptance of contract performance. FAR 46.502. As the title of the Contracting Officer’s Representative (COR) suggests, this individual must be appointed by the *contracting officer* and may only *assist* in the technical monitoring and administration of a contract. *Id.* 1.602-2(d); *id.* 1.604.

⁴⁹ DCC HANDBOOK, *supra* note 46, at 224–25 (“Contractor surveillance by contracting personnel under contingency conditions can be difficult because of ongoing military operations, local threat conditions, remote locations, broad customer bases, and time involved for performance and delivery.”).

⁵⁰ FM 4-92, *supra* note 29, para. 2-23. *But see* discussion *supra* note 48.

⁵¹ *Id.* para. 2-24.

⁵² See *infra* Appendix A.

⁵³ See GAO WARFIGHTER SUPPORT REPORT 2013, *supra* note 7, at 23.

The Special Inspector General for Iraq Reconstruction (SIGIR), Special Inspector General for Afghanistan Reconstruction (SIGAR), and Department of Defense Inspector General have continued to update their contingency contracting reviews and, in 2011, the Commission on Wartime Contracting issued its final report.⁵⁴ Unfortunately, many of the Gansler Commission findings continue to be echoed.

As discussed below, pre-award planning continues to be a significant problem and a distinct lack of oversight continues to plague projects.⁵⁵ These performance failures suggest an enduring culture that, as the Gansler Commission noted years earlier, “does not sufficiently value or recognize the importance of contracting, contract management, and contractors in expeditionary operations”⁵⁶ and the overwhelming workload experienced by the workforce.⁵⁷

A. Pre-Award Planning

The first step in the development of any contract, and often the beginning of the problems in contingency contracting, is initial planning and the identification of the requirements by the requiring activity.⁵⁸ Commanders and their staff must first consider whether a particular requirement is appropriate to delegate to a contractor. While the longstanding prohibition on contracting out inherently governmental functions is a starting point,⁵⁹ an analysis of operational and political risk is essential to the contingency contracting planning process.⁶⁰ One

⁵⁴ CWC FINAL REPORT, *supra* note 3; *see, e.g.*, DOD IG 2012 UPDATE, *supra* note 6; *infra* Appendix C.

⁵⁵ Compare DOD IG 2012 UPDATE, *supra* note 6, at 4, CWC FINAL REPORT, *supra* note 3, at 1, and *infra* Appendix C, with GANSLER COMM’N REPORT, *supra* note 10, at 38.

⁵⁶ GANSLER COMM’N REPORT, *supra* note 10, at 9.

⁵⁷ See CWC FINAL REPORT, *supra* note 3, at 17; *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-829T, WARFIGHTER SUPPORT: CULTURAL CHANGE NEEDED TO IMPROVE HOW DOD PLANS FOR AND MANAGES OPERATIONAL CONTRACT SUPPORT (2010).

⁵⁸ See FAR 2.101 (2013) (“‘Acquisition planning’ means the process by which the efforts of all personnel responsible for an acquisition are coordinated and integrated through a comprehensive plan for fulfilling the agency need in a timely manner and at a reasonable cost. It includes developing the overall strategy for managing the acquisition.”).

⁵⁹ *Id.* 7.503(a).

⁶⁰ Operational risk comes in many forms and can most readily be seen in either degraded organic capabilities of the unit or through contractors gaining inappropriate influence as the sole conduit for continuity because of frequent and irregular government personnel rotations. See CWC FINAL REPORT, *supra* note 3, at 29. Political risk similarly comes in

particular facet of political risk that *must* be considered is the sustainability of the project once the contract has been performed. For instance, in Afghanistan:

Massive expenditures are occurring in areas like security, counter-narcotics, and highway rehabilitation and road construction, mostly through the External Budget. In addition, social services like education and health are being sharply expanded. These investments and programs are creating substantial expenditure liabilities for the future—roads will need to be maintained, teachers paid, and the sustaining costs of the Afghan National Army (ANA) and other security services covered. The same will be true of investment programs in sectors like electric power and irrigation.⁶¹

Well intentioned projects, like those described above by the World Bank, can “be carefully planned, well executed, and economical, but still *become* wasteful if the host nation cannot provide trained staff, afford parts and fuel, perform necessary maintenance, or produce the intended outcome.”⁶² Both commanders and contracting officers have an interdependent duty to guard against this waste, but the current system, in an illogical fashion, divorces their consideration of the relevant factors. Commanders do not have the benefit of readily available contracting officer expertise on their staff and contracting officers do not have the benefit of firsthand knowledge of the operational environment and the commander’s intent.

many forms and can arise in the context of host nation inflation as a result of a rapid influx of capital, distorted economic activity that encouraged fraud, corruption, improper, and illegal behavior, and damage to U.S. and host nation government credibility. *Id.* at 29–30. The use of contract personnel can also significantly obscure the cost of war because military fatalities are widely reported in the U.S. media, but contractor fatalities tend to remain obscured under the surface. As of July 2011, while 4,464 military fatalities were recorded in Iraq, and additional 1,542 contractors were killed—a 34.5% increase. *Id.* at 31 (“Many foreign contractor employee deaths are believed not to have been officially reported by the firms that employed them. No definitive accounting for federal civilian-employee deaths in Iraq and Afghanistan has been located.”). Similarly, 887 contractors were killed in Afghanistan in addition to the 1,667 military fatalities—a 53.2% increase. *Id.*

⁶¹ WORLD BANK, REPORT NO. 34582-AF, AFGHANISTAN: MANAGING PUBLIC FINANCES FOR DEVELOPMENT 7–8 (2005).

⁶² CWC FINAL REPORT, *supra* note 3, at 101. For example, see the SIGIR and SIGAR reports *supra* note 9.

The overarching purpose of this entire planning process is “to ensure that the government meets its needs in the most effective, economical, and timely manner.”⁶³ It is essential that the unit’s requirements are articulated in “clear, specific, and objective terms with measurable outcomes”⁶⁴ because they will become the basis for the entire contract. The Gansler Commission captured it best when it noted, “All too often, however, the inability to generate an effective contract statement of work is due to a lack of trained personnel who can translate their commander’s intent into a requirement that can readily be given to and adopted by the contracting officer.”⁶⁵ This failure to adequately definitize contracts leads to management and oversight difficulties, creating a situation ripe for fraud, waste, and abuse.⁶⁶

B. Contract Performance Oversight

Contract administration problems have also persisted despite the systemic safeguards implemented by the stovepipe command and control environment of ECC.⁶⁷ The overwhelming workload and rotational nature of personnel assigned to contingency environments is one of the largest contributing factors to this dilemma.⁶⁸ Doctrine specifically acknowledges the likelihood that ECC elements will either not be available or will rotate on a different deployment cycle from their supported headquarters.⁶⁹

⁶³ FAR 7.102(b).

⁶⁴ DoD IG 2012 UPDATE, *supra* note 6, at iii.

⁶⁵ GANSLER COMM’N REPORT, *supra* note 10, at 40.

⁶⁶ CWC FINAL REPORT, *supra* note 3, at 81–83 (noting the abject failure of contracting officials to definitize the LOGCAP III ID/IQ contract and numerous related task orders awarded over a three year period from 2003 to 2005). The ECC structure continues to place this burden on the requiring activities which lack properly trained personnel that could foresee these difficulties and take appropriate action before the “acquisition ready requirements package” was finalized. *See supra* notes 41–43 and accompanying text.

⁶⁷ *See, e.g., infra* Appendix C.

⁶⁸ CWC FINAL REPORT, *supra* note 3, at 84; *see, e.g.,* SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, AUDIT NO. 08-019, OUTCOME, COST, AND OVERSIGHT OF THE SECURITY AND JUSTICE CONTRACT WITH PARSONS DELAWARE, INC. (2008) (finding contract management failures as a result of overwhelming workload and a turnover rate of eighteen contracting officers over a two-year period); SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, AUDIT NO. 08-011, OUTCOME, COST, AND OVERSIGHT OF ELECTRICITY SECTOR RECONSTRUCTION CONTRACT WITH PERINI CORP. (2008) (finding contract management failures as a result of a turnover rate of 14 contracting officers over a 2.5-year period).

⁶⁹ FM 4-92, *supra* note 29, para. 1-15 (“When available ([Contingency Contracting

The high probability of desynchronized rotation and stationing among contracting personnel and their warfighting counterparts is extremely problematic for a variety of reasons. “Lessons learned were not applied [in Operation Iraqi Freedom and Operation Enduring Freedom] because United States personnel rotated frequently in and out of theater, staff at remote locations knew little about conditions on the ground, [and] hundreds of contracts were involved”⁷⁰ At the very least, this contributes to severe difficulty in record maintenance.⁷¹

Record maintenance is extremely important at *every* phase of contracting. “The head of the contracting office and contract administration office should maintain a contract file that contains records of all contractual actions taken during that contract.”⁷² Disjointed rotation of contracting personnel creates inherent risk that these files will not be properly maintained as contracting offices and warfighting units are relieved separately while contracts remain in effect, affecting continued contract administration, enforcement, and audit operations.⁷³

C. Continuing Institutional Cultural Impediments

Beyond the continuing structural and procedural challenges, contingency contracting continues to be a misunderstood and poorly integrated Army function, despite the findings of the Gansler Report and the establishment of the Army Contracting Command and ECC.⁷⁴ This has occurred even with the overwhelming number and value of

Battalions] may, or may not, be on the same deployment cycle as the corps [headquarters]) they will deploy in support of their aligned corps [headquarters].”); *id.* para. 1-17 (“When available ([Senior Contingency Contracting Teams] may, or may not, be on the same deployment cycle as the local division [headquarters]) the [Senior Contingency Contracting Team] team chief provides the division commander and staff operational contract support advice and serves as the ECC liaison officer to the division [headquarters].”).

⁷⁰ CWC FINAL REPORT, *supra* note 3, at 84.

⁷¹ See *infra* Appendix C.

⁷² DoD IG 2012 UPDATE, *supra* note 6, at 7.

⁷³ See, e.g., DCC HANDBOOK, *supra* note 46.

⁷⁴ See CWC FINAL REPORT, *supra* note 3, at 114 (citing DEF. SCI. BD. TASK FORCE, IMPROVEMENTS TO SERVICES CONTRACTING 9 (2011); CTR. FOR A NEW AM. SECURITY, CONTRACTING IN CONFLICTS: THE PATH TO REFORM 20–21 (2010); GANSLER REPORT, *supra* note 10, at 21–22, 29, 47). *But see* GAO WARFIGHTER SUPPORT REPORT 2013, *supra* note 7, at 23 (noting that the Army is well ahead of the other uniformed services with respect to the integration of contingency contracting into the operational force).

contingency contracts and the potential impacts of contract failure.⁷⁵ Despite the advent of ECC, “[s]hort deployment cycles in theater also put military and civil-service contract managers at a disadvantage vis-à-vis contractors, who are likely to have more continuity of knowledge of contracts and programs.”⁷⁶ This problem is exacerbated by continued deployments that are off-cycle with supported commands and the lack of a habitual pre-deployment relationship between warfighting units and their supporting contracting teams. These cultural impediments directly relate to the unnecessarily divorced relationship between contingency contracting officers and their supported warfighting commanders.

IV. Contingency Contracting Delivery Redesign

The findings of the many commissions and inspectors general make it abundantly clear that a fundamental shift in Army culture must still occur with respect to contingency contracting.⁷⁷ While the establishment of ECC was a positive first step, it is an incomplete solution that treats contingency contracts of all stripes the same and continues to foist responsibility upon an Acquisition Corps inadequately resourced for execution and on warfighting commanders insufficiently integrated into the contingency contracting process.⁷⁸ The true power of ECC’s concentration of contracting expertise and resources lies in its ability to properly conduct *complex* contracting operations.⁷⁹ As the Gansler Commission noted, “the simple items are not where the need for contracting skills lie.”⁸⁰

The Acquisition Corps and ECC should focus their skills and resources on the complex acquisitions that made up only fourteen percent of contracting actions, but accounted for seventy percent of

⁷⁵ CWC FINAL REPORT, *supra* note 3, at 114 (“Agencies must fully accept contracting as a core function if only because of the sheer numbers of contingency contracts, their value, and the adverse financial, political, and operational impacts of failure.”).

⁷⁶ *Id.* at 118.

⁷⁷ *See, e.g., id.*; DoD IG 2012 UPDATE, *supra* note 6; GANSLER REPORT, *supra* note 10; *infra* Appendix C.

⁷⁸ *See supra* Parts I.C, II.

⁷⁹ *See supra* Part I.B.

⁸⁰ GANSLER COMM’N REPORT, *supra* note 10, at 26.

the obligated funds.⁸¹ A fundamental contingency contracting delivery redesign should occur for simplified contingency contracts below the SAT. This proposal includes accepting simplified contingency contracting as a core function of the Logistics branch, fixing ultimate accountability for requirements definition and contractor oversight with the BCT commander, integrating a contracting officer into the BCT staff for sustainment planning and operations, and ensuring that these brigade contracting officers are properly trained to perform their duties and are integrated into unit training activities. The desired end state of this proposal is an organically sustainable and fully mission capable BCT that facilitates a fundamental shift in the Army's cultural attitude towards contingency contracting at the tactical level.⁸²

A. Appropriate Limits: Simplified Acquisition Threshold

Most acquisitions made under the SAT use the simplified acquisition procedures available under FAR Part 13.⁸³ The simplified acquisition procedures exist in order to “allow the government to efficiently issue contracts for smaller acquisitions with simpler terms and conditions.”⁸⁴ Among the most significant procedural simplifications are: (1) the requirement that the agency

⁸¹ *Id.*

⁸² This proposal differs fundamentally from previous proposals advocating for the establishment of a new J-10 directorate at the Joint Staff level. *See, e.g.*, CWC FINAL REPORT, *supra* note 3, at 119. As the Joint Staff previously stated, a top-down J-10 solution is not feasible given current fiscal and operational constraints. *Id.* at 120. Rather, by approaching this problem from the bottom-up, there will likely be a far greater effect on the Army's cultural perception of contingency contracting. This will occur at the tactical level, where results can be seen almost immediately without the establishment of a burdensome new bureaucracy that would likely compete with the existing contracting force structure.

⁸³ FAR 13.003(a) (2013) (“Agencies shall use simplified acquisition procedures to the maximum extent practicable for all purchased of supplies or services not exceeding the simplified acquisition threshold . . .”).

⁸⁴ JOHN CIBINIC, JR., ET AL., FORMATION OF GOVERNMENT CONTRACTS 1027 (4th ed. 2011); *see also* FAR 13.002 (“The purpose of this part is to prescribe simplified acquisition procedures in order to—(a) Reduce administrative costs; (b) Improve opportunities for [socio-economically disadvantaged businesses]; (c) Promote efficiency and in contracting; and (d) Avoid unnecessary burdens for agencies and contractors.”).

must only make *reasonable efforts* to obtain competition;⁸⁵ (2) reduced publication timelines;⁸⁶ and (3) simplified evaluation procedures.⁸⁷ The FAR sets the SAT for contingency acquisitions at three-hundred thousand dollars, if awarded, performed, or purchased domestically, and at one million dollars, if awarded, performed, or purchased outside the United States.⁸⁸

Since contracting officers are already required to be appointed by the Head of Contracting Activity in writing with specific limits defined in their warrants,⁸⁹ the SAT is a reasonable level at which to set those limits. There is very little need for a brigade contracting officer's warrant to exceed the SAT because a BCT is a relatively small unit with inherent fiscal limitations.⁹⁰ This will give BCT commanders the flexibility necessary to meet the majority of the BCT's contingency contracting needs while placing responsible limits on that ability, thereby minimizing the risk associated with assigning a non-Acquisition Corps officer in this role.

⁸⁵ B&S Transport, Inc., B-407589, Dec. 27, 2012, 2012 CPD ¶ 354, at 2 (citing 10 U.S.C. § 2304(g)(3) (2012); SDM Supply, Inc., B-271492, June 26, 1996, 96-1 CPD ¶ 288, at 4) (“When using simplified acquisition procedures, agencies must promote competition to the maximum extent possible. In meeting this requirement, agencies must make reasonable efforts, consistent with efficiency and economy, to afford all eligible and interested vendors and opportunity to compete.”).

⁸⁶ See FAR 5.201(b)(1)(i); *id.* 5.203(b).

⁸⁷ See *id.* 13.106-2(b) (noting that FAR Part 14 and 15 procedures are not mandatory under simplified acquisition procedures).

⁸⁸ *Id.* 2.101. The Commercial Items Test Program raises this limit to \$6.5 million (if procured or performed in the United States) and \$12 million (if procured or performed outside the United States) for commercial item contracts. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 822, 126 Stat. 1632, 1830 (2013); see FAR 2.101 (defining “commercial items”). Due to the realistic fiscal limitations of the BCT's budget, however, it is unlikely that a brigade contracting officer would need a warrant up to these amounts.

⁸⁹ See FAR 1.602.

⁹⁰ See, e.g., U.S. FORCES AFGHANISTAN, PUB. 1-06, MONEY AS A WEAPON SYSTEM AFGHANISTAN 19 (Mar. 2012) (defining \$500,000 as the maximum approval threshold for brigade-level commanders).

B. Logistics Branch Integration

Military reliance on contract logistical support will only increase as organic logistical assets continue to be cannibalized in order to maintain the warfighting capability of an Army in the midst of another round of downsizing and reorganization.⁹¹ This is especially true of our modular deployable BCTs. As the basic self-sustaining Army maneuver unit, a BCT committed independently will struggle in any contingency environment without an organic capability to execute small local support contracts.⁹²

While the Acquisitions Corps is the subject matter expert for contract procurements,⁹³ they need not be the only participants in the contracting mission during contingency operations. The first and foremost way to effect change in Army culture regarding contingency contracting is to accept it as a core function of a basic branch. Given the overwhelmingly logistical nature of the contingency contracting mission, the Logistics branch is the natural choice. As subject matter experts in the logistics field, these officers are uniquely suited to effectively serve as small-scale contingency contracting officers. Marrying the subject matter expertise in logistics with training in simplified contract formation is a common sense approach, ensuring that this blend of capabilities is brought to bear on the entire process from the initial planning phases through contract closeout.⁹⁴

⁹¹ See Bacon, *supra* note 4.

⁹² See U.S. DEP'T OF ARMY, FIELD MANUAL 3-90.6, BRIGADE COMBAT TEAM para. 1-1 (14 Sept. 2010) [hereinafter FM 3-90.6].

⁹³ U.S. DEP'T OF DEF., INSTR. 5000.66, OPERATION OF THE DEFENSE ACQUISITION, TECHNOLOGY, AND LOGISTICS WORKFORCE EDUCATION, TRAINING, AND CAREER DEVELOPMENT PROGRAM para. E.2.3.1 (21 Dec. 2005) [hereinafter DODI 5000.66] ("The purpose of the Acquisition Corps is to create a pool of highly qualified . . . personnel to fill [critical acquisition positions (CAP)]."); U.S. DEP'T OF ARMY, PAM. 600-3, COMMISSIONED OFFICER PROFESSIONAL DEVELOPMENT AND CAREER MANAGEMENT 391 (1 Feb. 2010) [hereinafter DA PAM. 600-3]; see also 10 U.S.C. § 1733 (2012) (noting CAP are positions dealing with acquisitions over the SAT).

⁹⁴ At a minimum, these officers must be required to have:

- (1) complet[ed] at least 24 semester hours or the equivalent of study from an accredited institution of higher education or similar educational intuition in any of the disciplines of accounting, business,

Moreover, Acquisition Corps officers are simply not the experts in logistical functions.⁹⁵ The Acquisition Corps is a functional area drawn from the Army-at-large and intended for large-scale acquisition missions requiring complex contract instruments.⁹⁶ Once transferred to the Acquisition Corps, officers do not return to or receive any additional training from their basic branches.⁹⁷ Since eighty-six percent of all contingency contracting occurs below the SAT,⁹⁸ and given the vastly less complicated contracting procedures involved, personnel well versed in

finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, or organization and management; or

(2) pass[ed] an examination that demonstrates skills, knowledge, or abilities comparable to that of an individual who has completed at least 24 semester credit hours or the equivalent of study in any of the disciplines described in paragraph (1).

10 U.S.C. § 1724(f) (describing the minimum qualifications for personnel serving as a member of the Contingency Contracting Force (CCF)). There is no required formal contracting coursework or contracting experience necessary for contracting officers working below the SAT. DoDI 5000.6, *supra* note 93, para. E.6. Prior to deployment CCF personnel should have minimal training in: “Government contract principles, simplified acquisition procedures, contingency contracting and Government purchase card” *Id.* para. E.6.2.4.1. Anecdotal arguments that the military lacks sufficiently talented logistics personnel for this task are without merit. The Logistics Corps boasts a plethora of the finest and most experienced logisticians in the world. *See* Jim Garamone, *Military Logistics Is Strained, But Healthy, Official Says*, U.S. DEP’T OF DEF., Jan. 10, 2012, <http://www.defense.gov/News/NewsArticle.aspx?ID=66743>. Ensuring that the best and brightest are assigned to these mission essential contingency contracting billets is certainly a personnel management challenge, but not an insurmountable one.

⁹⁵ *See* DA PAM. 600-3, *supra* note 93, para. 35-2c (“Logistics branch officers . . . require extensive knowledge and experience in planning, preparing, executing, and assessing the sustainment warfighting function logistics Logistics tasks include supply, field services, transportation, maintenance, distribution management, contracting, and related general engineering.”).

⁹⁶ *See id.* para. 42-1.

⁹⁷ *See, e.g., id.* para. 35-4a(3) (“For example, many logistics officers apply to the Acquisition Corps (FA 51). . . . However, once officers are accepted into another FA designation, such as FA 51, they will not return to the Logistics branch nor will they be eligible to command logistics units.”).

⁹⁸ GANSLER COMM’N REPORT, *supra* note 10, at 26 (noting that eighty-six percent of contingency contracting actions occur below the Simplified Acquisition Threshold, accounting for only thirty percent of the money spent in contingency contracting through Joint Contracting Command–Iraq/Afghanistan).

logistical matters are better suited for the majority of these small-scale contingency contracting missions.

Experience and maturity are essential to thorough and professional contract formation, administration, and termination.⁹⁹ This is especially true because the contracting officer serves as the ultimate supervisor for contract performance.¹⁰⁰ An ideal formal entry point into warranted service as a brigade contracting officer is a successful post-command Logistics Corps captain on track to assume duties as a brigade S4, brigade support operations officer, or battalion executive officer, following Intermediate Level Education.

The Logistics branch should make a concerted effort to favor those with contracting experience for service in key and developmental positions at the rank of major and beyond. Given the universal importance of contingency contracting, emphasis must be placed on it as a key logistics function. Service as a brigade contracting officer must be marketed as a highly competitive, career-enhancing opportunity affording unique leadership challenges that are an invaluable experience for any future logistics commander or key billet staff officer.

C. Accountability and Staff Integration

According to AR 600-20, “Commanders are responsible for everything their command does or fails to do.”¹⁰¹ That should not change with respect to contingency contracting given the pervasive role it plays in contingency operations of all types. By integrating the contracting officers responsible for eighty-six percent of contingency contracting directly onto the staff of warfighting commanders, the Army will remove any confusion as to who is ultimately responsible for these small-scale contracting operations

⁹⁹ See GANSLER COMM’N REPORT, *supra* note 10, at 4.

¹⁰⁰ FAR 46.103(d) (2013); DCC HANDBOOK, *supra* note 46, at 227.

¹⁰¹ U.S. DEPT. OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 2-16 (18 Mar. 2008).

and push responsibility directly into the operational chain of command.

Moreover, the maintenance of contract records by personnel regularly assigned to the unit occupying battlespace in a contingency operation will alleviate a significant amount of confusion about who bears the responsibility for maintaining the required documentation. The bottom line is that the brigade contracting officer will be responsible for maintaining a complete contract file for all contracts the unit procures or administers and commanders will be ultimately responsible for ensuring that all of these files are appropriately maintained and available for contract closeout actions and future audit activities.

To this end, the brigade contracting officer best serves as an enabling asset under the brigade S4. As the primary staff officer responsible for logistics coordination, the S4 will need to exercise direct oversight of the brigade contracting officer during the planning and execution phase of any contingency operation involving contracted assets in order to ensure that the efforts provided under contract are properly synchronized with the other logistical lines of effort.¹⁰² The brigade contracting officer will be an invaluable voice in the sustainment cell and in the plans and operations working groups, in addition to being responsible for drafting the Contract Support Annex to unit operations orders.¹⁰³ This will bring a new level of visibility, attention, and understanding to contracting operations executed within the BCT's area of responsibility.

This tactical and technical oversight of the logistical assets that the Brigade contracting officer can provide should not be confused, however, with the brigade contracting officer's independent

¹⁰² This avoids many of the coordination challenges that would arise at the tactical level if a separate S-10 staff section was established under the J-10 directorate proposal. *See* discussion, *supra* note 82.

¹⁰³ *See* FM 3-90.6, *supra* note 92, paras. 1-111 to 1-134. Moreover, while operational contract support planning has been regulatorily integrated into corps and division-level planning processes, the same cannot be said for the Army's basic independently deployable unit: the BCT. *See* AR 715-9, *supra* note 39, para. 2-2.

warranted contracting authority.¹⁰⁴ The brigade contracting officer must be able to conduct the technical contracting process in accordance with all applicable regulations and policy and be free from external influence.¹⁰⁵ To ensure that this independence is maintained and that high quality contracting services are provided to the command, a technical chain should be utilized to provide that technical contract support to the brigade contracting officer. Similar to that of the brigade judge advocate, the brigade contracting officer should be dually supervised and evaluated by both the unit and by a representative of the servicing contracting support brigade.¹⁰⁶ This direct input from the technical chain would serve two very important purposes: (1) to provide advice, training, and support to the brigade contracting officer; and (2) to serve as a check on the system, ensuring that fraud, waste, and abuse are minimized in the contingency contracting process.

By routing the majority of the simplified contingency contracting mission through this brigade-level staff officer, the process will also become truly simplified and require much less interoffice bureaucracy. The unit, and more specifically the brigade contracting officer, will assume all of the major contract formation and administrative duties, except for funds management.¹⁰⁷ This will create a far more responsive system that can be tailored to the BCT commander's intent and will more readily respond to the dynamic evolution of future contingency operations.

¹⁰⁴ See FM 4-92, *supra* note 29, para. 1-20.

¹⁰⁵ See FAR 15.308 (2013) (mandating that the source selection decision be based on the *independent* judgment of the Source Selection Authority). In acquisitions under the SAT, the contracting officer serves as the Source Selection Authority unless other procedures are mandated by service or unit policy. See *id.* 13.106-2.

¹⁰⁶ See U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM paras. 2-22, D-2d (5 June 2012).

¹⁰⁷ See *infra* Appendix B.

D. Training

As an early exposure point, all Logistics Corps officers should receive training on contract formation and administration in their Officer Basic Course and Captains Career Course curriculum. Early academic exposure is essential and will enable young staff officers to more fully participate in the staff planning process and mission execution. Those selected to serve as brigade contracting officers should receive additional training at the Defense Acquisition University in order to become certified to hold a contracting warrant limited to the SAT.¹⁰⁸ Utilization following this training should be mandatory and tantamount to a utilization tour after a program like the School of Advanced Military Studies.

By ensuring that the brigade contracting officers are academically trained to conduct contingency contracting in simplified acquisition situations, the contingency contracting process can be fully integrated into brigade-level field training exercises, mission rehearsal exercises, and command post exercises.¹⁰⁹ Commanders and fellow staff officers will be able to rehearse with the brigade contracting officer as a member of the combined arms team and better understand the force multiplier that contingency contracting brings to the fight. Organic relationships amongst all players will have the opportunity to develop *prior* to deployment and contingency contracting operations will be better tailored to the commander's intent, thereby dramatically shifting cultural perceptions.

V. Conclusion

According to the Gansler Commission, as the U.S. military entered the 21st century, its previous "expeditionary experiences in

¹⁰⁸ See generally DODI 5000.66, *supra* note 93, para. E.2.2.7.1 (describing the three contracting certification levels); DEF. ACQUISITION UNIV., <http://www.dau.mil/> (last visited Mar. 15, 2013).

¹⁰⁹ As mentioned earlier, current regulations and doctrine do not mandate, or even address, the participation of contracting support brigade elements in warfighting unit training exercises. See discussion *supra* note 39.

Haiti, Bosnia, and Kosovo had not been leveraged into building an operational or institutional capability to support the next military operation.”¹¹⁰ We cannot afford to repeat this same mistake with our experiences in Iraq and Afghanistan. The present contracting force structure, with the advent of ECC, is only a partial solution to the contingency contracting problems that have occurred over the past decade. This centralized, stove-pipe contracting support structure is ideal for the complex, high-value projects that account for over seventy percent of the dollars spent in Iraq and Afghanistan.¹¹¹ It ensures that a highly qualified team of contracting experts properly execute the complex contracting mission that these projects demand.

Those missions, however, only account for fourteen percent of the overall contingency contracting mission.¹¹² A stunning eighty-six percent of the contracting mission in the modern contingency environment occurs below the SAT.¹¹³ Mixing the very large number of simplified acquisitions needed by warfighting commanders with the limited number of highly complex and expensive projects does an incredible disservice to the entire contingency contracting mission by overwhelming the acquisition professionals who should dedicate their expertise to the more complex projects.

Rather, the Army should embrace the decentralized modular brigade concept and staff every BCT with an organic brigade contracting officer, thereby enabling the BCT commander to truly assume full-spectrum responsibility for the accomplishment of the brigade’s assigned contingency mission. Ultimately, this proposal has the potential to integrate contingency contracting into the Army’s culture at the *tactical* level, fostering the fundamental cultural shift called for by numerous reports, audits, and commissions.

¹¹⁰ GANSLER COMM’N REPORT, *supra* note 10, at 16.

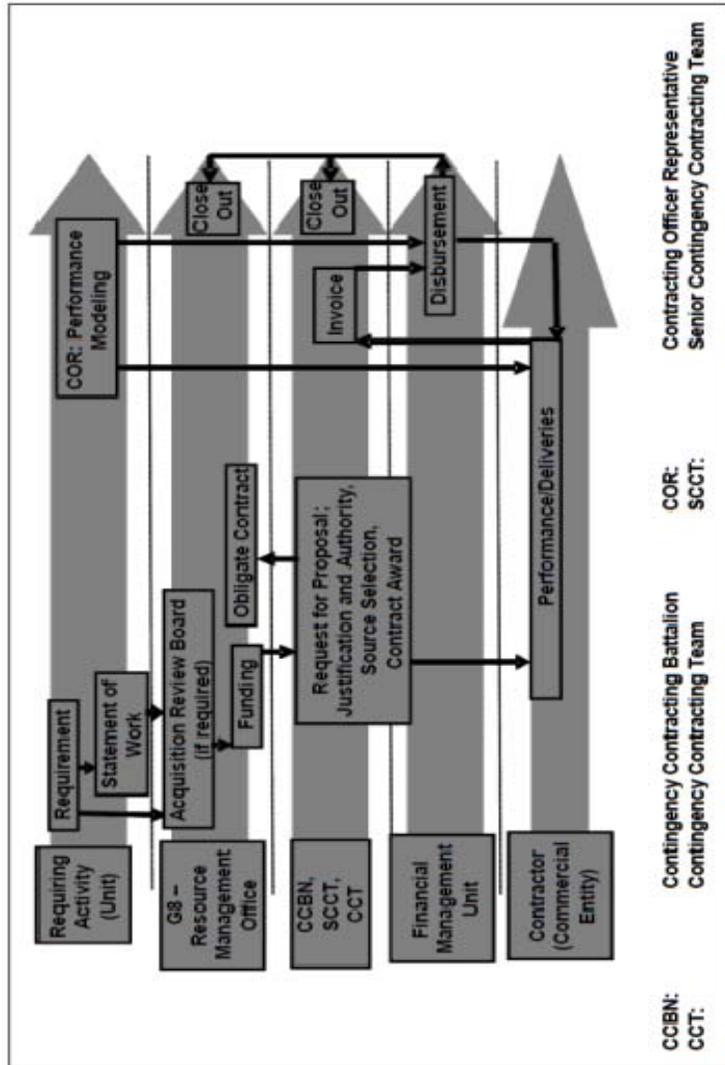
¹¹¹ *See id.* at 26.

¹¹² *Id.*

¹¹³ *Id.*

Appendix A

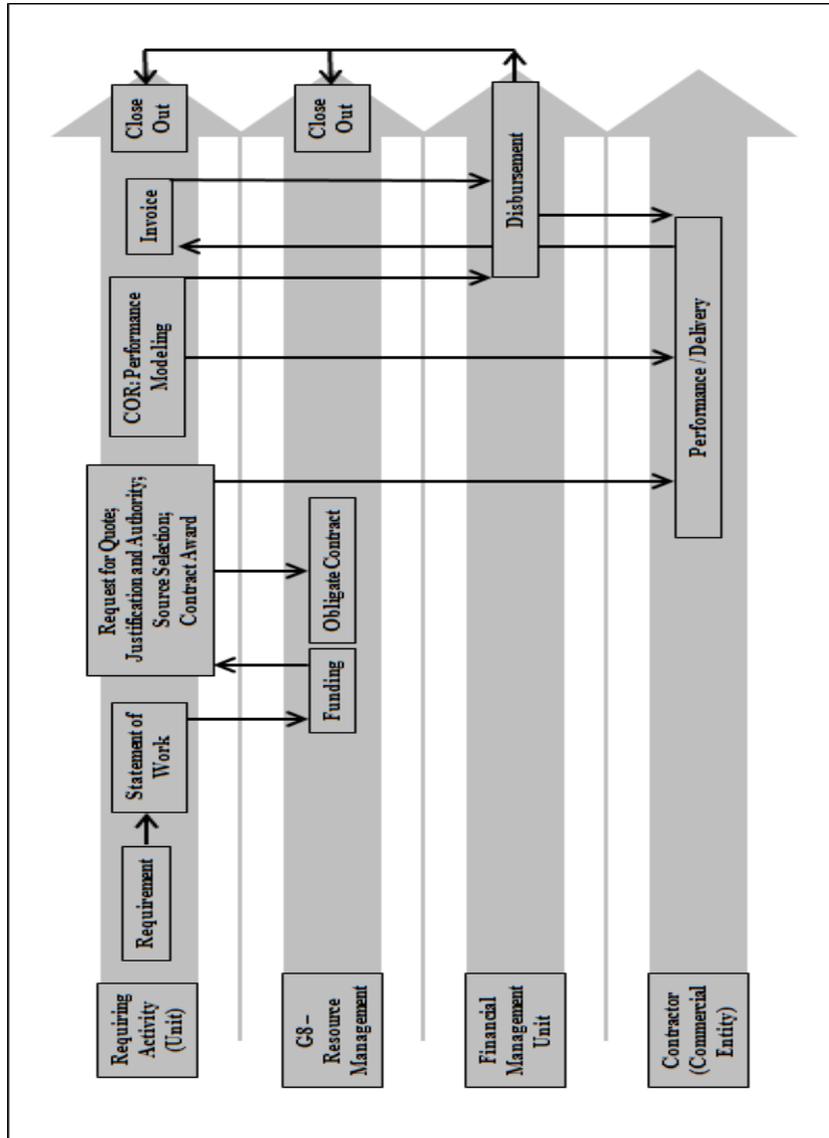
Contract Workflow: Contracting Support Brigade¹



¹ FM 4-92, *supra* note 29, fig.2-2, at 2-6.

Appendix B

Contract Workflow Contingency Contracting Redesign



Appendix C

Survey of Negative Contingency Contracting Audit Findings

Date	Agency	Report	Description of Contract Area Reviewed	Area of Identified Contracting Deficiency					
				Definition & Planning	Solicitation Process	Proposal Evaluation	Award Decision	Management Oversight	Records Maintained
Jul-04	SIGIR	04-011	LOGCAP K for CPA Property Accountability	X				X	
Jul-04	SIGIR	04-003	LOGCAP K FDC Operations Kuwait					X	
Jul-04	SIGIR	04-004	AFCEE role in reconstruction K					X	
Jul-04	SIGIR	04-005	Award of sector construction projects			X	X	X	X
Jul-04	SIGIR	04-013	CPA Contracting Procedures			X		X	
Oct-04	SIGIR	05-002	LOGCAP K for CPA Property Accountability					X	
Nov-04	SIGIR	05-003	LOGCAP Task Order 44	X	X			X	
Apr-05	SIGIR	05-005	Safety and Security K					X	X
Apr-05	SIGIR	05-007	Iraq Relief/Reconstruction Fund K Administration					X	X
Apr-05	SIGIR	05-008	Development Fund for Iraq K Administration					X	X
Jul-05	SIGIR	PA-05-001	Al Wabaha Water Treatment Plant		X			X	X
Jul-05	SIGIR	PA-05-002	Al Wabaha Water Treatment Plant					X	X
Jul-05	SIGIR	05-010	PCO/JCC-I Award Fee Process	X				X	X
Sep-05	SIGIR	05-013	Al Sumelat Water Network	X				X	
Oct-05	SIGIR	05-018	Equipment Controls for Security Contractors			X		X	
Oct-05	SIGIR	05-016	Armored Vehicle Purchase	X				X	X
Oct-05	SIGIR	05-020	Babylon Police Academy Const./Operation K	X	X			X	X
Oct-05	SIGIR	PA-2005-016	Karbala Library Rehabilitation	X	X			X	X
Oct-05	SIGIR	PA-2005-019	Primary Healthcenter/Maternity Hosp. Rehab.	X				X	
Oct-05	SIGIR	PA-2005-032	Railway Station Rehabilitation in Central Iraq	X				X	
Jan-06	SIGIR	PA-2005-001	Hilla Police Academy					X	X
Jan-06	SIGIR	PA-2005-021	Horizontal Directional Drilling Project	X		X		X	X
Jan-06	SIGIR	PA-05-021-F-24	Sulaymaniyah Border Forts					X	
Jan-06	SIGIR	PA-05-029	Qudaa Gas Turbine	X				X	
Jan-06	SIGIR	PA-2005-027	Um Qasr Ammunition Supply Point	X				X	
Jan-06	SIGIR	PA-2005-018	Port of Um Qasr Security Upgrades	X				X	
Apr-06	SIGIR	06-009	Hilla SWAT Police Station			X		X	
Apr-06	SIGIR	06-010/06-015	Task Force Shield (Oil and Electrical Security Forces)					X	X
Apr-06	SIGIR	06-011	IAF Seized Asset Fund	X				X	X
Apr-06	SIGIR	06-016	Primary Healthcare Center Const.	X				X	X
Apr-06	SIGIR	PA-2006-035	Primary Healthcare Center Equip.					X	
Apr-06	SIGIR	PA-2006-036	Nineewa Village Roads	X				X	
Apr-06	SIGIR	PA-06-040	Fire Station Construction					X	X
Jul-06	SIGIR	06-020	Aviation Base Construction					X	X
Jul-06	SIGIR	PA-06-063, PA-05-013, -014	Advanced First Responder Network	X				X	X
Jul-06	SIGIR	PA-06-049	Oil Pipeline Projects					X	X
Jul-06	SIGIR	PA-06-051	Bazrah Airport Terminal and Tower Renovation	X				X	X
Jul-06	SIGIR	PA-06-051	Sarwan Police Station Construction	X				X	X
Jul-06	SIGIR	PA-06-053	Nasiriyah Fire Station Construction	X				X	X

Date	Agency	Report	Description of Contract Area Reviewed	Area of Identified Contracting Deficiency						
				Definition & Planning	Solicitation Process	Proposal Evaluation	Award Decision	Management Oversight	Records Maintained	
Jul-06	SIGIR	PA-06-054	Nasriyah Prison Expansion						X	
Jul-06	SIGIR	PA-06-055	Muthanna Village Roads							X
Jul-06	SIGIR	PA-06-057	Baghdad Railway Station Rehabilitation	X						
Oct-06	SIGIR	06-028	Iraq Reconstruction Admin. Task Orders							X
Oct-06	SIGIR	06-033	ISF Weapons Procurement						X	X
Oct-06	SIGIR	PA-06-067	Baghdad Municipal Solid Waste Landfill	X						
Oct-06	SIGIR	PA-06-069	Al Kut Training Academy						X	
Oct-06	SIGIR	PA-06-072	Ninewa Police Headquarters						X	X
Jan-07	SIGIR	06-029	Iraq Police Training Program Support Task Order							X
Jan-07	SIGIR	PA-06-074	Al Kasik Waste Water Treatment Plant	X						
Jan-07	SIGIR	PA-06-075	Iraq Army Brigade Barracks	X						
Jan-07	SIGIR	PA-06-077	Iraq Army Battalion Barracks	X						
		PA-06-078.2, -079.2								
Jan-07	SIGIR	PA-06-078.1, -079.1 (Oct 06)	Baghdad Police College						X	
Apr-07	SIGIR	PA-06-087, -088	Tallil Military Base						X	
Apr-07	SIGIR	PA-06-089	Al Hilla Recruiting Center						X	X
Apr-07	SIGIR	PA-06-090	Baghdad Civil Defense Headquarters						X	X
Apr-07	SIGIR	PA-06-091	Bab Shams Police Station						X	X
Jun-07	SIGIR	07-009	Iraq Reconstruction Contract, Phase II	X		X				
Jun-07	SIGIR	07-001	LOGCAP Task Order 130						X	X
Oct-07	SIGIR	07-105	Mosul Dam Relief and Reconstruction	X					X	X
Jan-08	SIGIR	08-004	Taji Military Base and Baghdad Recruiting Center						X	
Jan-08	SIGIR	08-010	Iraq Reconstruction K	X						
Jan-08	SIGIR	PA-07-111	Mansour Pump Station Rehabilitation	X					X	
Jan-08	SIGIR	PA-07-112	Mahalla Sewer Collapse Project							
Jan-08	SIGIR	PA-07-118, -118.1 (Apr 08)	Al Ghazaliya Sewage Lift Station Repair	X					X	X
Apr-08	SIGIR	08-011	Energy Sector Reconstruction Ks						X	X
Apr-08	SIGIR	PA-08-120	Sanwahan Primary School	X				X		
Apr-08	SIGIR	PA-08-121	Bnaslaw Middle School	X						X
Jul-08	SIGIR	08-018	Water Sector Reconstruction Ks	X					X	
Jul-08	SIGIR	08-019	Security and Justice Ks	X					X	X
Jul-08	SIGIR	PA-08-138	Kahn Bani Sa'ad Correctional Facility	X				X		
Jul-08	SIGIR	PA-08-124	Al Shofa Water Facility						X	X
Jul-08	SIGIR	PA-08-125	Al Kazim Water Supply						X	X
Jul-08	SIGIR	PA-08-127	33-kV Power Line						X	X
Jul-08	SIGIR	PA-08-129	Al Abeer Water Compact Unit						X	X
Oct-08	SIGIR	PA-08-144 thru -148	Falluja Waste Water Treatment System	X						
Oct-08	SIGIR	PA-08-149 thru -151	Al Quds, Al Mu'alameen, Al Faoo Schools	X					X	
Jan-09	SIGIR	09-010	Security Services Ks							X

Date	Agency	Report	Description of Contract Area Reviewed	Area of Identified Contracting Deficiency						
				Definition & Planning	Solicitation Process	Proposal Evaluation	Award Decision	Management Oversight	Records Maintained	
Jan-09	SIGIR	PA-08-134	Haditha Primary Healthcare Center							X
Jan-09	SIGIR	PA-08-141	Al Inqadar School	X						
Jan-09	SIGIR	PA-08-142	Al Shurhabil School	X						
Jan-09	SIGIR	PA-08-153	Ramadi 132KV Substation						X	
Apr-09	SIGIR	09-014	Security Forces Logistics Ks	X					X	
Apr-09	SIGIR	09-017	Internal Security Services Ks						X	
Apr-09	SIGIR	PA-08-135	Suroor Elementary School Rehabilitation	X						
Apr-09	SIGIR	PA-08-140	Rebuilding of the Saigrah School	X						X
Apr-09	SIGIR	PA-08-157	Shiqaq Hai Musalla Primary Healthcare Center							X
Apr-09	SIGIR	PA-08-158	Hai Tiseen Primary Healthcare Center							X
Apr-09	SIGIR	PA-08-159, -169	Basrah Courthouse and Witness Protection Facility							X
Jul-09	SIGIR	09-021	Personal Protective Services Task Orders						X	X
Jul-09	SIGIR	09-026	BIA Caravan Hotel	X					X	X
Jul-09	SIGIR	PA-08-162	Port of Umm Qasr Roll-On/Roll-Off Berth							X
Jul-09	SIGIR	PA-08-164	Iraqi Army Brigade Barracks	X						X
Jul-09	SIGIR	PA-08-165, -167	Missan Surgical Hospital							X
Jul-09	SIGIR	PA-09-170	Mujarrah Canal Bridge							X
Jul-09	SIGAR	Audit 09-1	CSTC-A Oversight Capabilities							X
Jul-09	SIGAR	Inspection 09-01	Khowsat City Power System	X						X
Oct-09	SIGIR	10-001	Iraqi Security Forces Facility Ks	X						X
Oct-09	SIGIR	10-005	Global Maintenance and Supply Svc K							X
Oct-09	SIGIR	08-166	Secure Document Storage Facility							X
Oct-09	SIGIR	PA-09-177	Chamchamal Correctional Facility Renovation	X						X
Oct-09	SIGAR	Audit 09-05	CERP Project Management							X
Oct-09	SIGAR	Inspection 09-02	Mahmood Raqi to Nijrab Road	X						X
Oct-09	SIGAR	Inspection 10-01	Fanukh Shah School Construction	X						X
Oct-09	SIGAR	Inspection 10-02	Manan Secondary School Construction	X			X			X
Oct-09	SIGAR	Inspection 10-03	Habib Rahman Secondary School Construction	X						X
Oct-09	SIGAR	Inspection 10-04	Kohi Girls' School Construction	X						X
Jan-10	SIGIR	10-007	Various (1x ID/IQ; 2x FFP)	X						X
Jan-10	SIGIR	PA-09-168	Iraqi Tomb of the Unknown Soldier	X						X
Jan-10	SIGIR	PA-09-172	Abu Ghraib Dairy	X						X
Jan-10	SIGIR	PA-08-173	Rabeaa Point of Entry Screening Facility							X
Jan-10	SIGIR	PA-09-174	Hammam Al Allil Division Training Center							X
Jan-10	SIGAR	Audit 10-06	Kabul Power Plant	X						X
Apr-10	SIGIR	10-013	Baghdad Airport CERP Projects	X						X
Apr-10	SIGIR	PA-09-189	Basrah Modern Slaughterhouse	X						X
Apr-10	SIGIR	PA-09-192	Haditha Dam Perimeter Security							X
Apr-10	SIGAR	Audit 10-09	Kunduz ANA Garrison Construction	X						X

Date	Agency	Report	Description of Contract Area Reviewed	Area of Identified Contracting Deficiency										
				Definition & Planning	Solicitation Process	Evaluation	Award Decision	Management Oversight	Records Maintained					
Apr-10	SIGAR	Audit 10-10	Gamberi ANA Garrison Construction	X										
Apr-10	SIGAR	Audit 10-07	Toig Bridge Construction	X						X				X
Jul-10	SIGIR	10-021	Iraq Reconstruction Program Records											X
Jul-10	SIGAR	Audit 10-12	Kandahar ANP Compound Construction	X									X	
Jul-10	SIGAR	Audit 10-14	Farah ANA Garrison Construction	X									X	
Oct-10	SIGAR	Audit 11-03	ANP District Headquarters Construction	X									X	
Jan-11	SIGIR	11-009	Iraqi International Academy	X										
Jan-11	SIGAR	Audit 11-07	Laghman Province CERP Projects	X									X	
Apr-11	SIGIR	11-011	Quick Response Fund Ks											X
Apr-11	SIGIR	11-016	USACE K Management											X
Apr-11	SIGAR	Audit 11-09	Mazare-e Sharif and Heart ANA Facility Construction	X									X	
Jul-11	SIGIR	11-018	Internal Security Services Ks										X	
Jul-11	SIGIR	11-022	ISF Supply/Equipment RSOI										X	
Oct-11	SIGAR	Audit 12-02	Kabul Military Training Center Construction	X									X	
Oct-11	SIGAR	Audit 12-03	Afghan Nat'l Security University Construction	X									X	
Oct-12	SIGIR	13-003	Development Fund for Iraq										X	
Total Identified Deficiencies:				66	3	7	3	91	65					

The foregoing survey was compiled from the Audits and Inspections performed by the Special Inspector General for Iraq Reconstruction (SIGIR) and the Special Inspector General for Afghanistan Reconstruction (SIGAR) completed through December 2012. The "Areas of Identified Contracting Deficiency" have been simplified and aligned with the major stages of the contracting process for ease of reference. For instance, "Definition & Planning" encompasses, among other things, design planning failures, sustainability planning omissions, and inadequate contract definitization. The reports included above are those that, in the author's opinion, clearly identified significant contracting deficiencies not otherwise reported.