PROCUREMENT BY OTHER MEANS: REFORMING WARZONE CONTRACTING

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An army is a collection of armed men obliged to obey one man. Every change in the rules which impairs the principle weakens the army.[1]

What is clear is that [the contracting officer] . . . is the only person legally authorized to sign the contract. In addition, the contracting officer administers the contract and prepares a report on contractor performance. Everything else is unclear.[2]

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[1] Letter from W.T. Sherman to General W. S. Hancock, President, Mil. Serv. Inst. (Dec. 9, 1879), *reprinted in* WILLIAM T. SHERMAN, MILITARY LAW 130 (1880); *see also* David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 21 (2013).

[2] JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 321(1989).

I. Introduction

The United States military's geographic combatant commanders[3] (COCOMs) possess the wartime authority to command vast armies, control billions of dollars of equipment, order lethal strikes, and lawfully detain combatants and noncombatants. Yet they do not have the authority to purchase a pallet of bottled water or rent a truck.[4] Meanwhile, contracting officers are bound by a vast array of laws, regulations, policies, and litigation constraints,[5] yet are expected to efficiently contract in warzone environments This uneasy balance of divided authority calls out for reform in an era of renewed great power competition.

The Federal Acquisition Regulation (FAR) and Competition in Contracting Act (CICA) were not developed with warzone environments or a COCOM's combat mission accomplishment in mind.[6] Within a bureaucratic process like government acquisition, officials "must serve a variety of contextual goals as well as their main or active goal."[7] Specifically, the FAR prioritizes best value acquisitions and multiple stakeholder interests.[8] The CICA prioritizes competition and provides disappointed contractors modes of redress through litigation[9] in hopes of providing interested businesses the opportunity to compete for

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[3] *See* 10 U.S.C. § 161 (establishing combatant commands).

[4] JOINT CHIEFS OF STAFF, JOINT PUB. 4-10, OPERATIONAL CONTRACT SUPPORT, at I-13 (4 Mar. 2019) [hereinafter JP 4-10]; FAR 1.602-1 (2023) (stating contracting officer authority); DFARS PGI 202.101 (Aug. 2023) (listing Department of Defense contracting activities).

[5] *See generally* JAMES F. NAGLE, HISTORY OF GOVERNMENT CONTRACTING 7 (2d ed. 1999) ("Contracting officers today are told what to do and how to do it, down to the most minute details."); *see also id.* at 494 (describing the litigious nature of Government contracting).

Competition in Contracting Act of 1984, Pub. L. No. 98-369, div. B, tit. VII, §§ 2701–2753, 98 Stat. 1175, *with* U.S. DEP'T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY (2018) ("[T]he Department of Defense's enduring mission is to provide combat-credible military forces needed to deter war and protect the security of our [N]ation. Should deterrence fail, the Joint Force is prepared to win.").

[7] WILSON, *supra* note 2, at 349; *see also* FAR 1.102(a)-(b) (2023) (identifying multiple acquisition process stakeholders); NAGLE, *supra* note 5, at 485 (discussing proliferation of socioeconomic goals in the post-World War II period).

[8] FAR 1.102(a)-(b) (2023).

[9] 31 U.S.C. § 3552 (statutory authority for bid protests).

Government contracts.[10] In contrast to civilian bureaucracies, the military tries to mitigate this aspect of Government process, particularly in wartime, through the principles of command unity and mission command.[11] Yet, acquisition, even in response to critical needs in a warzone setting, stands as a unique carve-out from that principle of military command.[12] As a result, the FAR's multiple contextual goals[13] can displace or hamper the military mission.[14]

Today's defense acquisition laws and policies were developed during the Cold War era,[15] when the military possessed greater in-house military logistical[16] capabilities to supply its global military operations.[17]

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[10] Daniel H. Ramish, *Midlife Crisis: An Assessment of New and Proposed Changes to the Government Accountability Office Bid Protest Function*, 48 PUB. CONT. L.J. 35, 41-42 n.55 (2018) (quoting H.R. REP. NO. 98-1157, at 11 (1984)). One commentator has noted the FAR's "goal of maintaining the public's trust and fulfilling public policy objectives is notably absent" from the Defense Federal Acquisition Regulation Supplement (DFARS). Moshe Schwartz, *Social and Economic Public Policy Goals and Their Impact on Defense Acquisition*, DEF. ACQUISITION RSCH. J., July 2019, at 210–11. The DFARS instead identifies "mission capability and operational support" as its primary objective. *Id.*; DFARS 201.101(3) (Feb. 2022).

[11] *See generally* JOINT CHIEFS OF STAFF, JOINT PUB. 1, JOINT PERSONNEL SUPPORT at I-3 (1 Dec. 2020) (identifying "unity of command" as a "Principle of War"); U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-0, MISSION COMMAND: COMMAND AND CONTROL OF ARMY FORCES para. 1-14 (31 July 2019).

[12] JP 4-10, *supra* note 4, at I-13; FAR 1.602-1 (2023) (stating contracting officer authority); DFARS PGI 202.101 (2023) (listing DoD contracting activities).

[13] WILSON, *supra* note 2, at 349.

[14] *See* Jacques S. Gansler & William Lucyshyn, *Contractors Supporting Military Operations*, *in* CONTRACTORS & WAR: THE TRANSFORMATION OF US MILITARY OPERATIONS 286 (Christopher Kinsey & Malcolm H. Patterson eds., 2012) ("Peacetime [Government contracting] business processes are ill-suited to support contingency operations.").

[15] *See generally* NAGLE, *supra* note 5, at 446–56, 495–504 (recounting the development of modern acquisition regulations).

[16] This article relies on the general definition of "logistics" in the military context as given by Jomini: "the practical art of moving armies and keeping them supplied." MARTIN VAN CREVELD, SUPPLYING WAR 1 (2d ed. 2004); *see also* JOINT CHIEFS OF STAFF, JOINT PUB. 4-0, JOINT LOGISTICS, at GL-8 (4 Feb. 2019) (C1, 8 May 2019) (defining logistics as "[p]lanning and executing the movement and support of forces.") [hereinafter JP 4-0].

[17] *See generally* Major Michael A. Cryer, Enabler or Vulnerability: Operational Contract Support in Large-Scale Combat Operations (May 23, 2019) (Advanced Military Studies, U.S. Army Command and General Staff College), https://apps.dtic.mil/sti/trecms/pdf/AD1083234.pdf (recounting the military's drift away from organic support units towards contracted support since the Vietnam War) (citations omitted).

However, today's context is quite different. In the three decades following the end of the Cold War, the United States military lost much of its organic logistical capability and increasingly relied on contractors for its warzone logistical needs.[18] Further, multiple sophisticated adversaries today have the potential to disrupt the United States' logistics and communications.[19] In a conflict against a peer or other capable adversary, the United States military could quickly find its current acquisition system insufficiently flexible or resilient to effectively accomplish basic combat zone acquisitions.

In light of these looming challenges, law and policy should view warzone acquisition as a command-driven military logistics function,[20] rather than a subfield within the highly intricate, bureaucratic, and litigious Government contracting system.[21]

Outside of the acquisition context, the law already recognizes the reality of logistical expediency: military commanders possess seizure and requisition authority under the law of war.[22] Yet, acquisition law lacks any

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[18] *See generally id.*; HEIDI M. PETERS, CONG. RSCH. SERV., R40057, TRAINING THE MILITARY TO MANAGE CONTRACTORS DURING EXPEDITIONARY OPERATIONS 1 (2008).

[19] DEF. SCI. BD., FINAL REPORT OF THE DSB TASK FORCE ON SURVIVABLE LOGISTICS, EXECUTIVE SUMMARY 1 (2018).

[20] *Cf.* Major Justin M. Marchesi, *Pass the SIGAR: Cutting Through the Smoke of Lessons Learned in Simplified Contingency Contracting*, 219 MIL. L. REV. 53, 70, 76 (2014) (arguing that "the overwhelmingly logistical nature of the contingency contracting mission" shows the need to better align for small-scale contingency contracting with brigade commanders).

[21] Framed organizationally, the current warzone contracting system resembles the regulatory landscape of the "administrative military," while it instead should belong to the "operational military." Mark P. Nevitt, *The Operational and Administrative Militaries*, 53 GA. L. REV. 905, 908–911 (2019) (positing that the U.S. military should be understood as "two militaries," an operational military led by combatant commanders, and an administrative military led by the Service chiefs and civilian Secretaries).

[22] *See generally* OFF. OF GEN. COUNS., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL §§ 5.17 and 11.18.7.1 (12 June 2015) (C3, 13 Dec. 2016) [hereinafter LAW OF WAR MANUAL] (method of requisition is to be determined by the local commander). "Requisition is the taking of private or state property or services needed to support the occupying military force." NAT'L SEC. L. DEP'T, THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK app. B, para. I(C)(4), at 91 (2022) [hereinafter 2022 OPERATIONAL L. HANDBOOK]. Multiple forms of legal warzone takings exist (for example, requisition, seizure, and confiscation), *see generally id.* para. I(C), but need not be differentiated for the purposes of this paper. The relevant difference

meaningful combat zone exceptions from either contracting authority strictures or competition requirements' litigation risk.[23] To ignore this disconnect is to invite self-inflicted logistical or (more likely) legal breakdowns in high-intensity or complex hybrid conflicts in which the United States may not enjoy uninterrupted supply routes, connectivity, or air dominance. In such a setting—where access to contracting officers is limited and may be disrupted—flexible, fast, and resilient command-driven acquisition authority would quickly become paramount, and current competition requirements would become unworkable due to the disruptive nature of bid protests. These features could contribute to a breakdown of logistics or a disregard of the current acquisition system (in extremis and of necessity) and move towards seizure or requisition.[24]

Acquisition law and policy should therefore be reformed prior to a future conflict in which the current system that separates command and purchasing authority will be severely tested and interrupted. In warzones, some level of purchasing authority should be fully subordinate to COCOM logistics authority, and the disruptive litigation impacts of bid protests should be reduced or eliminated.

This paper will focus on a narrowly-defined subtype of overseas contingency contracting: [25] short-term mission critical contracting,

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is between a mutually-bargained-for commercial transaction (such as a contract or purchase), versus a military taking (requisition) that is not mutually voluntary and for which payment is neither made nor definitized at the time of taking.

[23] The FAR contains well-known justifications for limiting competition on a case-by-case basis that are applicable to warzones. *See, e.g.*, FAR 6.3, 13.106 (2023) (for example, urgency). However, the general competition mandate exists as much in the warzone contracting setting as it does in peacetime domestic contracting. Further, the enumerated exceptions to competition do not negate vendors' ability to protest contract actions. *See infra* sections II.B and III.C regarding bid protests.

[24] *See generally* Elyce K.D. Santerre, *From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield*, 124 MIL. L. REV. 111, 149 (1989) (arguing that an insufficiently flexible battlefield acquisition system can lead to problems of confiscation of private property).

[25] "Contingency contracting" is defined as the "process of obtaining goods, services, and construction via contracting means in support of contingency operations." JP 4-10, *supra* note 4, at GL-6. Contingency operations are defined in statute as a military operation "designated by the Secretary of Defense as an operation in which members of the [A]rmed [F]orces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or results in the call

awarded and performed overseas in a conflict in which a sophisticated adversary has the potential to severely degrade in-theater contracting efforts (hereinafter warzone contracting).[26] In referring to "warzone" procurement, this paper primarily envisions contracts for emergent, rudimentary, critical supplies and services that directly enable ground and close air support combat operations.[27] Geographically, such requirements may be localized and relatively small, or theater-wide and large-scale. To qualify as warzone purchases, contracts would be awarded and performed within meaningful reach of physical enemy attack or other significant disruptive activity.[28]

Section II provides a brief background in warzone procurement and review of relevant contracting authorities. Section III will then identify the legal and regulatory risks present in the current contingency contracting systems, particularly in the context of potential conflicts with peer adversaries, or other technologically and legally sophisticated adversaries.

The first overarching risk discussed in Section III is the disconnect between contracting authority and command authority, and how that risk is heightened by the United States military's reliance on a handful of deployable contracting officers.[29] Further, Congress's recent recognition

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or order to, or retention on, active duty of members of the uniformed [S]ervices under [various specified provisions]." 10 U.S.C. § 101(a)(13).

[26] The term "contingency contracting" can also refer to humanitarian assistance and disaster relief. *See, e.g.*, An Act to Enact Certain Laws Relating to Public Contracts as Title 41, United States Code, "Public Contracts," Pub. L. No. 111-350, § 2312, 124 Stat. 3677, 3739 (2011) (codified at 41 U.S.C. § 2312) (creating a "Contingency Contracting Corps" to respond to disasters and military contingency operations). This paper uses of the term "warzone" to sharpen its focus on the military conflict context and to emphasize the environment in which the proposed reforms of Section IV would apply.

[27] For example, water, food, fuel, construction materials and equipment, and ad hoc transportation and facilities usage.

[28] See *infra* Appendix A (this paper's proposed statutory reform), which would provide flexibility to the Secretary of Defense to tailor the geographical parameters of a warzone (within limits) for purposes of the proposed command contracting authority.

[29] Cryer, *supra* note 17, at 27–28 (arguing that the current contingency contracting system would be insufficient in a large-scale conflict); *see also* MARK BALBONI ET AL., MISSION COMMAND OF MULTI-DOMAIN OPERATIONS 31 (2020) (describing likelihood of degraded communications in future conflicts), https://press.armywarcollege.edu/cgi/viewcontent.cgi?article=1917&context=monographs.

of the need for command-driven vendor vetting[30] highlights the related need for increased command contracting authority if such vetting is to be sufficiently flexible. The second category of risk is the disruptive effects of bid protests. This invited disruption encompasses both self-inflicted and adversarial "lawfare" vulnerabilities created by the current bid protest regime.

Section IV proposes and analyzes several statutory and regulatory reforms intended to mitigate these risks, including the assignment of limited non-FAR-based purchasing authorities through combatant commanders for warzone contracting purposes (Appendix A provides model statutory language). Second, Section IV proposes reforms to limit the disruptive impacts of the current bid protest system on battlefield acquisition. Section V provides a brief conclusion.

Given its focus on contracting authorities and regulations, this paper will not address other fiscal and regulatory authorities that would constrain the flexibilities argued for in this paper, absent parallel reforms or authorizations.[31] Further, this paper's scope aspires to a realistic focus on the limited class of rudimentary goods and services that will almost certainly be needed in any warzone. This limited scope is intended both to focus the paper and to argue for realistically achievable reforms. This paper does *not* address the supply and maintenance of complex weapons systems, munitions, information technology, and other requirements that could not be procured in local markets.

Finally, this paper does not contend that warzone procurement is a wise solution—let alone the preferred solution—to satisfy large-scale logistical requirements.[32] Rather, this paper assumes that warzone

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[30] *See* National Defense Authorization Act for 2014, Pub. L. No. 113-66, § 831, 127 Stat. 672, 810–814 (2013) (requiring specified combatant commands to establish vendor vetting procedures).

[31] *See, e.g.*, 10 U.S.C. § 2803 (capping the amount of the Department of Defense's emergency construction authority); U.S. DEP'T OF ARMY, REG. 405-10, REAL ESTATE, ACQUISITION OF REAL PROPERTY AND INTERESTS THEREIN para. 2-11 (14 May 1970) (prohibiting Army organizations other than the Corps of Engineers from leasing property where the total lease value is greater than $500).

[32] *See* JP 4-10, *supra* note 4, at III-11 ("[C]ontracted support should not be the source of last resort."); *see also* Cryer, *supra* note 17, at 26–27 (arguing that U.S. Army force structure doctrine leads to "ad hoc logistics" that are vulnerable in large-scale combat

procurement will be necessary on at least some meaningful scale, as it nearly always has been,[33] particularly during a chaotic opening phase of a large conflict.[34]

By their nature, combat logistics contain significant elements of improvisation.[35] In order to improvise successfully and legally, commanders must actually possess sufficient control over their logistics operations and options.[36] Acquisition regulations should therefore be made less restrictive and more resilient in anticipation of disrupted warzone environments.

II. Background

This section provides a brief historical background regarding warzone contracting before reviewing the current acquisition system and related vendor vetting programs.

A. Historical Background of Warzone Contracting and Logistics

Warzone acquisition has a long and sordid history. While armies have often satisfied supply needs through on-site contracting, more often armies relied on procurement by other means: pillage on a massive scale,

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operations because of over-dependence on locally-contracted support). Overreliance on local supply could be particularly dangerous today where civilian economies in developed countries typically rely on just-in-time delivery of food, fuel, and such, and in a warzone such civilian logistical systems would come under similar strains as military systems.

[33] *See, e.g.*, WILLIAM G. PAGONIS & JEFFREY L. CRUIKSHANK, MOVING MOUNTAINS 107 (1992) ("[O]ur limited-and-precious transport space [was] reserved for combat troops, and for those supplies, such as weapons and ammunition, that could not be procured in the theater. Everything else was our problem, to be found and contracted for.") (discussing the Gulf War).

[34] *See* Lieutenant Colonel Scott B. Kindberg, Accumulation of Degradation Sustainment Force Structure Imbalance 4-5 (Jan. 4, 2018) (Strategic Research Project, U.S. Army War College) (arguing that initial phases of campaigns will suffer from slow deployment of sustainment and logistics forces due to current force structure), https://publications.armywarcollege.edu/publication/accumulation-of-degradation-sustainment-force-structure-imbalance.

[35] *See* VAN CREVELD, *supra* note 16, at 236; MOSHE KRESS, OPERATIONAL LOGISTICS 53 (2d ed. 2016); THOMAS M. KANE, MILITARY LOGISTICS AND STRATEGIC PERFORMANCE 4 (2001).

[36] *See* KRESS, *supra* note 35, at 53.

extortion, and the like.[37] Modern military procurements has its roots in the late 17th century French army's semi-regularized supply contracts, which coincided with the advent of standing professional armies.[38] Modern armies have tried to add greater internal supply train capabilities to reduce the need for acquiring necessaries on site but have often still filled gaps through on-site purchase or pillage.[39] More recent history shows that locally-sourced warzone procurement remains an important component of present-day military logistic. Common examples of critical supplies acquired in-theater during the United States' conflicts in the Middle East include potable water, fuel, food and food-related services, and large-scale ground transportation and shipping.[40] The United States military is not the only present-day military demonstrating the necessity of locally-acquired warzone goods and services to fill gaps in long logistical chains. Russia's modern mechanized military struggled to supply itself with adequate food,

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[37] *See generally* VAN CREVELD, *supra* note 16, at 30, 33. Historically, pillage was an accepted aspect of warfare in the pre- or early-modern age, when soldiers were often expected to provide for their own food and supply needs. *Id.* at 6-7. Today, pillage is defined as "the taking of private or public movable property (including enemy military equipment) for private or personal use" and is unlawful. LAW OF WAR MANUAL, *supra* note 22, § 5.17.4.1.

[38] VAN CREVELD, *supra* note 16, at 20. Even goods for which early modern armies contracted were often financed with cash "contributions" extorted from the local populace or local rulers under threat of violence. *Id.* at 27, 30; CHRISTOPHER DUFFY, THE MILITARY EXPERIENCE IN THE AGE OF REASON 166 (1987).

[39] *See generally* VAN CREVELD, *supra* note 16, at 30-34, 72, 233.

[40] Water, often in bottled form, has been a perennial contracting requirement during the United States' operations in the Middle East. *See, e.g.*, Captain Jason A. Miseli, *The View From My Windshield*: *Just-in-Time Logistics Just Isn't Working*, ARMOR, Sept.–Oct. 2003, at 16; *see also* Colonel Max Brosig et al., *Implications of Climate Change for the U.S. Army*, at 26–28 (2019), https://climateandsecurity.files.wordpress.com/2019/07/implications-of-climate-change-for-us-army_army-war-college_2019.pdf (discussing reliance on bottled water and the precarious nature of U.S. Army water supply during overseas operations). The Defense Logistics Agency (DLA) often relied on fuel purchased from (and delivered and stored by) vendors in theater. *See generally* INSPECTOR GEN., U.S. DEP'T OF DEF., REP. NO. 2021-129, AUDIT OF DEFENSE LOGISTICS AGENCY AWARD AND MANAGEMENT OF BULK FUEL CONTRACT IN AREAS OF CONTINGENCY OPERATIONS (2021). For DLA's current overseas food contracts, see generally, *Food Services Contract Search*, DEF. LOGISTICS AGENCY, https://www.dla.mil/TroopSupport/Subsistence/FoodServices/Contract-Search (last visited Aug. 1, 2022). Regarding DoD's use of large-scale shipping contracts, see, for example, INSPECTOR GEN., U.S. DEP'T OF DEF., REP. NO. 2019-069, AUDIT OF ARMY'S OVERSIGHT OF NATIONAL AFGHAN TRUCKING SERVICES (2019); 3 RICHARD L. OLSON ET AL., U.S. DEP'T OF AIR FORCE, GULF WAR AIR POWER SURVEY: LOGISTICS AND SUPPORT, pt. I at 144, 164 (1993) (recounting the United States' reliance on thousands of contracted trucks and drivers during the Gulf War).

among other items, from the rear during the opening weeks of its invasion of Ukraine, although their immediate solution appeared to be pillage or requisition rather than contracting.[41]

B. The Contracting Carve Out from Command Authority over Warzone Logistics

The United States has a history of bureaucratic, congressionally scrutinized, military contracting dating back to the Revolution.[42] After World War II, the military agencies served as the foundation of modern Government procurement system.[43] During the post-World War II period, Congress oversaw the expansive growth of procurement regulations in an effort to achieve manifold socioeconomic policy goals, rather than through an effort to improve contract performance.[44]

Under the current acquisition regime, contracting authority and command authority are disconnected. Contracting authority resides within Department of Defense (DoD) contracting organizations—for example the

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[41] *See, e.g.*, Tom Levitt & Chris McCullough, *'Russian Soldiers Took over My Farm': The Battle for Food Supplies in Ukraine*, THE GUARDIAN (Mar. 16, 2022, 11:28 AM), https://www.theguardian.com/environment/2022/mar/16/russian-soldiers-took-over-farm-battle-food-supplies-ukraine; Russia, or any invading army, may of course have limited opportunities to purchase supplies from an overwhelmingly hostile local populace. *See, e.g.*, Yaroslav Trofimov, *A Ukrainian Town Deals Russia One of the War's Most Decisive Routs*, WALL ST. J. (Mar. 16, 2022), https://www.wsj.com/articles/ukraine-russia-voznesensk-town-battle-11647444734 (describing Ukrainian woman who provided meals to invading Russian soldiers in exchange for payment under investigation and who was described as a "traitor" by Ukrainian commander).

[42] *See* DUFFY, *supra* note 38, at 174. The Continental Congress established a procurement structure for the Continental Army in 1775 relying on a commissary general and quartermaster general. By 1809, however, Congress removed contracting authority from the military staff and gave it to civilian contracting officers. NAGLE, *supra* note 5, at 31–39, 70–71. *See also* SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE 400 (1957) (explaining how Congress focuses on military procurement even during periods when it otherwise displays little interest in military affairs). However, there were interludes of decentralized authority as well. During the Civil War a significant degree of acquisition authority was decentralized to commanders. *See* Lt. Col. Douglas P. DeMoss, *Procurement During the Civil War and Its Legacy for the Modern Commander*, ARMY LAW., Mar. 1997, at 10–11.

[43] *See generally* NAGLE, *supra* note 5, at 446–56 (recounting the post-World War II development of Government contracting regulations).

[44] *See generally id.* at 481–518.

Army Contracting Command, or other specialized organizations like the Army Corps of Engineers—while command authority for combat operations resides with the statutorily-designated geographical combatant commanders and their subordinates.[45] Both acquisition law and military policy doctrine require commanders to avoid improper influence over contracting officer decisions.[46] Yet, it is the COCOMs and their subordinate commanders—not contracting officers—who retain the responsibility both to determine the extent of contracting support appropriate to an operation, and the primary responsibility of operational contract planning.[47]

This divided authority is at least partially dissonant with defense doctrine regarding command authority over logistics. Defense doctrine defines operational contract support as a core logistics function,[48] and both statute and doctrine include logistics squarely within a COCOM's command authority.[49] COCOMs possess the power, in times of war, to "make diversion of the normal logistics process" and "use all facilities and supplies of all forces assigned to their commands."[50] Yet they do not possess the power to enter into contracts of any size.[51] The current system does not differentiate for purposes of contracting authority between contracts awarded and performed entirely in the United States or peacetime foreign territory and those awarded and performed on foreign battlefields.

Congress and the DoD have recognized the need for greater flexibilities in some defense contracting authorities in recent years, however, none of these changes have altered the status quo of contracting authority.[52] The Army has also made several modest organizational

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[45] *See* JP 4-10, *supra* note 4, at I-13; FAR 1.602-1 (2023); DFARS PGI 202.101 (Aug. 2023).
[46] FAR 1.602-2; JP 4-10, *supra* note 4, at I-13.
[47] JP 4-0 at II-10; JP 4-10, *supra* note 4, at xii, II-8.
[48] U.S. DEP'T OF DEF., INSTR. 3020.41, OPERATIONAL CONTRACT SUPPORT encl. 2, para. 2 (20 Dec. 2011) (C2, 31 Aug. 2018) [hereinafter DODI 3020.41].
[49] JP 4-0, *supra* note 4, at II-10; 10 U.S.C. § 164.
[50] JP 4-0, *supra* note 4,at III-3.
[51] *See* authorities cited *supra* note 12.
[52] Examples include the creation of alternative procedures when acquiring goods or services from local or host nation vendors within certain DoD contingency or assistance operations, but these were limited to contracts intended for socioeconomic development of

reforms following various contracting scandals in the first decade of the War on Terror.[53] In 2007, the so-called Gansler Commission identified the need for the Army to improve its expeditionary contracting capability by increasing the number of uniformed contracting officers who could deploy to contingency theaters.[54]

C. Contract Litigation Background

Bid protests are challenges either to the terms and conditions of a contract solicitation or award decision.[55] Protests can be filed with the contracting agency, the Government Accountability Office (GAO), or at the Court of Federal Claims (COFC).[56] If a protest is timely filed with the agency, the FAR requires the contracting officer to stay (i.e., stop or indefinitely postpone) the award or performance of the contract until the

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the host nations and did not increase a commander's own logistical flexibility. *See*, *e.g.*, National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 886, 122 Stat. 3, 266 (limiting competition to Iraqi or Afghan vendors). In implementing this authority, Defense agency procedures permitted award "to a particular source or sources from Afghanistan" using "other than competitive procedures." DFARS 225.7703-1 (Aug. 2023). *See also*, *e.g.*, National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, § 899A, 130 Stat. 1999, 2336 (2016) (granting authority to limit competition for certain defense contracts in African countries). See also the Commander's Emergency Response Program (CERP), which enabled commanders to spend money on small projects for the benefit local Iraqi and Afghan communities. *See*, *e.g.*, An Act Making Emergency Supplemental Appropriations for Defense and for the Reconstruction of Iraq and Afghanistan for the Fiscal Year Ending September 30, 2004, and for Other Purposes, Pub. L. No. 108-106, § 1110, 117 Stat. 1209, 1215 (2003) (providing appropriated funds to the CERP program); *see also* Heidi Lynn Osterhout, *No More "Mad Money": Salvaging the Commander's Emergency Response Program*, 40 PUB. CONT. L.J. 935, 940 (2010).

[53] For a well-known example, see DEP. OF JUST., https://www.justice.gov/opa/pr/army-officer-wife-and-relatives-sentenced-bribery-and-money-laundering-scheme-related-dod (last visited Mar. 3, 2022).

[54] *See* COMM'N ON ARMY ACQUISITION AND PROGRAM MGMT. IN EXPEDITIONARY OPERATIONS, URGENT REFORM REQUIRED: ARMY EXPEDITIONARY CONTRACTING 62 (2007) [hereinafter GANSLER COMM'N], https://ogc.altess.army.mil/Documentation/EandF/Guidance/Gansler%20Commission%20Report_Final%20Report_10-31-07.pdf. This led, for instance, to the creation of the Army's expeditionary contracting command. MOSHE SCHWARTZ, CONG. RSCH. SERV., R40764, DEPARTMENT OF DEFENSE CONTRACTORS IN IRAQ AND AFGHANISTAN: BACKGROUND AND ANALYSIS 13-14 (2010).

[55] FAR 33.101 (2023).

[56] *Id.*; 28 U.S.C. § 1491(b); *see also* the Administrative Dispute Resolution Act of 1996, Pub. L, No. 104-320, § 12(d), 110 Stat. 3870, 3874-75 (ending district court jurisdiction over bid protests on 1 January 2001).

protest is complete.[57] Statute requires an automatic stay following a timely filed protest at the GAO.[58]

Contract stays that attach to protested actions are subject to an override process in which a senior agency contracting official may determine that the award or performance of the procurement at issue should proceed despite the pending protest.[59] Protestors may challenge an override at the COFC, and the court may determine that the override decision by the agency is unlawful and invalid.[60] Bid protests before the COFC do not include an automatic stay, however the court may enjoin contract award or performance pending the outcome of the protest.[61] Warzone contracts are not exempt from standard bid protest jurisdiction or procedures.[62]

D. Vendor Vetting Background

Over the last two decades of conflict in the Middle East, the DoD and Congress have recognized the need to identify current or potential contractors that have ties with enemy forces. The processes that emerged are generally referred to as "vendor vetting."[63] In 2010, the DoD created "Task Force 2010" to enable commanders and contracting personnel to understand whether local Afghan contractors had ties to insurgent or

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[57] FAR 33.103(f) (2023).
[58] 31 U.S.C. § 3553(c)(1); *see also* FAR 33.104(b), (c) (2023).
[59] 31 U.S.C. § 3553(c)(1); FAR 33.104(h)(3) (2023).
[60] *See* Spherix, Inc. v. United States, 62 Fed. Cl. 497, 503 (2004) ("The United States Court of Federal Claims also has jurisdiction to hear an objection to the override of a statutory stay pursuant to the CICA.") (citing RAMCOR Servs. Group v. United States, 185 F.3d 1286, 1289 (Fed. Cir. 1999)). The COFC may provide a protestor relief from an agency override (such as reinstate the stay) through its powers declaratory judgement or an injunction. *See, e.g.*, Cigna Gov't Servs., LLC v. United States, 70 Fed. Cl. 100, 109 (2006).
[61] 28 U.S.C. § 1491(b)(2) (granting the COFC power to grant declaratory and injunctive relief in bid protests).
[62] Various GAO and COFC opinions (cited below) describe elements of Central Command's otherwise non-public vendor vetting processes. Because only a broad understanding of the process is necessary here, this paper will not attempt to synthesize different terminology used across the cases cited.
[63] *See generally* Brett Sander & Joe Romero, *Vendor Vetting of Non-US Contractors in Afghanistan*, 50 PROCUREMENT LAW. 1 (2015); Todd J. Canni & Jason A. Carey, *Contractors Beware--COFC Endorses Clandestine Debarment*, GOV'T CONTRACTOR, no. 30, 2013, at 251.

criminal networks.[64] Also in 2010, Central Command[65] (CENTCOM) established its "Vendor Vetting Cell" for essentially the same purpose.[66] A negative vetting rating may make a vendor ineligible for award,[67] although the case law also suggests that such a finding may also be waived.[68]

Shortly thereafter, Congress directed CENTCOM to identify contractors that support insurgents, or oppose the United States and coalition forces, and refer them to the appropriate head of the contracting activity for designation as an ineligible contractor.[69] Congress has since expanded this program to other COCOMs.[70] Vetting procedures may prevent contracting officers from notifying vendors with negative ratings about their ineligibility.[71] However, a vendor may nevertheless discover it has an unfavorable rating during bid protest litigation.[72]

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[64] MOSHE SCHWARTZ, CONG. RSCH. SERV., R42084, WARTIME CONTRACTING IN AFGHANISTAN: ANALYSIS AND ISSUES FOR CONGRESS 10 (2011).

[65] Central Command's area of responsibility is the Middle East, including Iraq and Afghanistan. *Area of Responsibility*, U.S. CENTRAL COMMAND, https://www.centcom.mil/AREA-OF-RESPONSIBILITY/ (last visited Aug. 7, 2023).

[66] SCHWARTZ, *supra* note 64, at 10.

[67] *See, e.g.*, MG Altus Apache Co. v. United States, 111 Fed. Cl. 425, 434 (2013).

[68] *Id.* at 436.

[69] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 841(c)(2), 125 Stat. 1298, 1510–12 (2011).

[70] The mandate has since broadened to include United States Africa Command, United States Central Command, United States European Command, United States Indo-Pacific Command, United States Southern Command, and United States Transportation Command. *See* U.S. DEP'T OF DEF., DTM 18-003, PROHIBITION ON PROVIDING FUNDS TO THE ENEMY AND AUTHORIZATION OF ADDITIONAL ACCESS TO RECORDS, at 15 (9 Apr. 2018) (C5, 11 Jan. 2022) (defining "covered CCMD [Combatant Command]").

[71] *See MG Altus Apache Co.*, 111 Fed. Cl. at 445–46 (stating that procedures in effect limited contracting officers to telling negatively rated ("rejected") "apparent[ly] successful offeror[s]" that they were "ineligible" while prohibiting any mention of ineligibility for offerors not apparently in line for award).

[72] *See, e.g.*, *id.* at 435–36 ("A military intelligence unit, CJ2X, assesses vendors by 'risk to mission,' and classifies that risk as either 'MODERATE, SIGNIFICANT, HIGH, or EXTREMELY HIGH.' A rating of 'MODERATE' means that [redacted]. A rating of 'SIGNIFICANT' means that [redacted]. A rating of 'HIGH' means that [redacted]. A rating of 'EXTREMELY HIGH' means that [redacted].") (internal citations omitted; bracketed redactions in original); *see also, e.g.*, Aria Target Logistics Serv., B-408308.23, 2014 WL 4363483, at *1 (Comp. Gen. Aug. 22, 2014) ("Pursuant to the vetting program, vendors are assigned one of four force protection risk ratings: [redacted] (moderate risk);

The case law shows that a negative vendor vetting rating may result in two types of exclusionary actions: a contracting officer's non-responsibility determination[73] based on the rating,[74] and a commander's base access denial.[75] The case law also shows that contracting officers have made non-responsibility determinations on the basis of a commander's installation access determination. [76] The contracting officer's responsibility determination is a contracting action and may be challenged in the GAO or COFC.[77]

Further, a tailored CENTCOM provision or clause can explicitly link base access eligibility (a command decision) to contract award eligibility (a contracting officer decision). [78] Under the provision, offerors are ineligible for award under the terms of a solicitation if ineligible for base access, and an awardee that is later denied base access by the command is in breach of a solicitation term or contract clause.[79] In the bid protest context, the COFC may "consider [vendor vetting processes] to the extent the resultant vendor vetting rating was a basis for the contracting officer's non-responsibility determination."[80]

Contract award ineligibility due to a negative vendor vetting rating will likely amount to a de facto debarment because it "effectively [deprives

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[redacted] (significant risk); [redacted] (high risk); or [redacted] (extremely high risk).") (alterations in original).

[73] Responsibility findings inquire into an offeror's apparent ability and capacity to adequately perform. *See* FAR 9.104 (2023). Contracting officers must find an offeror responsible prior to contract award. FAR 9.103 (2023).

[74] *Cf.* Leidos Innovations Corp., B-414289.2, 2017 CPD ¶ 200, at 4 (Comp. Gen. June 6, 2017); Omran Holding Group v. United States, 128 Fed. Cl. 273, 277 (2016). The court in *Omran* appears to use the term "responsive" synonymously with "responsible" for this opinion. *See Omran*, 128 Fed. Cl. at 275–76.

[75] *Omran*, 128 Fed. Cl. at 277. Regarding a commander's inherent authority to exclude, *see* Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 893 (1961) (commanding officers possess power to summarily exclude from area of command).

[76] *Cf. Omran*, 128 Fed. Cl. at 277 ("The [contracting] agency found Omran to be installation access ineligible, and thus it deemed Omran's proposal nonresponsive.").

[77] *See, e.g.*, *Leidos*, 2017 CPD ¶ 200, at 4; *See generally* NCL Logistics Co. v. United States, 109 Fed. Cl. 596 (2013).

[78] *See Omran*, 128 Fed. Cl. at 275–76 (quoting the CENTCOM theater base access eligibility clause).

[79] *Id.*

[80] MG Altus Apache Co. v. United States, 111 Fed. Cl. 425, 444 (2013).

the vendor] of future DoD contract awards." [81] Under normal circumstances, contractors can only be suspended or debarred from contracting with an agency following an administrative process.[82] Such a process should provide notice and an opportunity to respond to the specific derogatory information relied on by the agency. [83] Where an agency sidesteps its prescribed debarment process and blacklists a firm in some other manner, the firm will have a strong case that it is subject to an unlawful de facto debarment.[84] However, in the context of warzone vendor vetting, the COFC has held that national security concerns trump the general requirement for the Government to notify a contractor of the reasons for its de facto debarment.[85]

The COFC has generally shown deference to contracting officers' decisions not to award to offerors with negative vendor vetting ratings.[86] The GAO has shown deference to contracting officer's vetting-driven non-responsibility determinations. [87]

III. The Current Warzone Contracting System's Risks and Challenges

The current warzone contracting system is ripe for disruption. The relatively favorable conditions in which it operated during the last twenty years will not likely obtain in a conflict against a peer adversary or in a large-scale conflict. [88] This section identifies two overarching risks

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[81] *Id.* at 445.
[82] *See* Old Dominion Dairy v. Secretary of Defense, 631 F.2d 953, 968 (D.C. Cir. 1980) (stating that due process requires that the contractor must be "notified of the specific charges concerning the contractor's lack of integrity" and be provided an "opportunity to respond").
[83] *Id.*
[84] *Cf. Old Dominion Dairy* at 962 n.17, (declining to take up the issue of whether or not the actions of the Government in this case constituted a de facto debarment, only remarking that there was a case to be made that it had).
[85] MG Altus Apache Co., 111 Fed. Cl. at 445 (citing 28 U.S.C. § 1491(b)(3) (2006)) (holding that the Tucker Act requires that the COFC "give due consideration to national security interests in exercising its bid protest jurisdiction").
[86] *See, e.g., id.*
[87] *See, e.g.*, Leidos Innovations Corp., B-414289.2, 2017 CPD ¶ 200, at 6 (Comp. Gen. June 6, 2017).
[88] *See, e.g.*, John E. Wissler, *Logistics: The Lifeblood of Military Power*, *in* 2019 INDEX OF U.S. MILITARY STRENGTH 93, 97 (Dakota L. Wood ed., 2019), https://www.heritage.org/

inherent to the current system in adversary-disrupted environments: the contracting authority divide, and the risks to warzone logistics and purchasing stemming from bid protest litigation. The section will then address policy considerations to include the current system's implicit tilt toward requisition, and the inapplicability of competition considerations to warzone contracting.

A. Risks Stemming from Bifurcated Contracting and Command Authority

Contracting authority in its current form was not designed to function in warzones and is easily disrupted. A contracting officer's authority is a specific grant to one person from an individual warrant,[89] and that contracting officer has only a limited ability to delegate purchasing authority to individual ordering officers.[90] With these limitations, a contracting officers' ability to execute contracts is therefore hostage to their mobility and communications. In a disrupted warzone where contracting officers are few and far between, unable to communicate, or casualties of war, frontline units could quickly find themselves without a legal method of purchasing critical supplies and services. Command authority, by contrast, permeates a theater of operations: the chain of command exists anywhere there is a functioning military unit.

1. Separate Contracting Authority Is Ill-Suited for Disrupted Warzones

In both the Gulf War and in post-September 11, 2001, Middle East conflicts, the United States enjoyed overwhelming air superiority, including secure aerial supply routes to major bases, and largely uninterrupted communications.[91] Notably, in this context, the Gansler

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sites/default/files/2018-09/2019_IndexOfUSMilitaryStrength_WEB.pdf (highlighting that the U.S. did not face a peer or near-peer adversary while executing logistics in Iraq).

[89] *See* FAR 1.602-1(a) (2023).

[90] *See generally* FAR 1.603-3 (2023); DFARS 213.306 (Aug. 2023); AFARS 5101.602-2-92 (Feb. 8, 2022).

[91] *See, e.g.*, INSPECTOR GEN., U.S. DEP'T OF DEF., REP. NO. 2020-094, AUDIT OF ARMY CONTRACTING COMMAND—AFGHANISTAN'S AWARD AND ADMINISTRATION OF CONTRACTS 27 (18 June 2020) [hereinafter DOD IG AUDIT: ACC-A]. Even in this relatively favorable environment and after almost two decades on site, sporadic IT and connectivity issues degraded contracting efforts.

Commission did not propose lessening the regulatory burden placed on contracting personnel, or expanding contracting authority to military commanders for battlefield contracting; rather, it accepted that "expeditionary contracting" was merely "the same business operating at a mission-critical tempo" and that the FAR's "special provisions" were sufficient if contracting personnel were properly trained, and if their numbers were increased.[92]

While such an understanding may have been valid the early-2000s, focus on counter-insurgency and train-advise-assist missions of Iraq and Afghanistan, it should be reexamined against foreseeable risks present in large-scale conflicts.[93] During the Battle of Mosul,[94] contracting officers struggled to award contracts using simplified acquisition procedures, where the requesting units were engaged in combat often and their request were needed within forty-eight hours or less—faster than current procedures could accommodate.[95]

In future conflicts with sophisticated adversaries, U.S. forces must anticipate a greater level of airspace competition, and relatedly, communication and supply route disruption.[96] This different type of

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[92] GANSLER COMM'N, *supra* note 54, at 6. Gansler's own writing several years later, however, may suggest less confidence in such conclusions. *See* Gansler & Lucyshyn, *supra* note 14, at 286.

[93] National security strategy and defense doctrine increased focus on large-scale combat operations in the last several years. *See generally* RONALD O'ROURKE, CONG. RSCH. SERV., R43838, RENEWED GREAT POWER COMPETITION: IMPLICATIONS FOR DEFENSE—ISSUES FOR CONGRESS (2021); U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (1 Oct. 2022) [hereinafter FM 3-0].

[94] The Iraqi army (with assistance from the United States and coalition forces) battled ISIS to recapture the city of Mosul from October 2016 through July 2016. The U.S. military has closely studied this large battle to inform future operations. *See, e.g.*, MOSUL STUDY GROUP, WHAT THE BATTLE FOR MOSUL TEACHES THE FORCE, U.S. ARMY TRAINING AND DOCTRINE COMMAND, REP. NO. 17-24 U (2017), [hereinafter MOSUL STUDY GROUP] https://www.armyupress.army.mil/Portals/7/Primer-on-Urban-Operation/Documents/Mosul-Public-Release1.pdf.

[95] Major Nolan Koon, *Contracting in a Deployed Environment*, ARMY LAW., Nov./Dec. 2018, at 31. *See also* MOSUL STUDY GROUP, *supra* note 94, at 26 ("[T]he U.S. Army may be reaching the limits of its approach to contractor support and utilization. The U.S. Army must re-examine the employment of contractors in a high-intensity conflict.").

[96] *See generally* U.S. ARMY TRAINING AND DOCTRINE COMMAND, MULTI-DOMAIN BATTLE: EVOLUTION OF COMBINED ARMS FOR THE 21ST CENTURY 3 (2017) ("The intensity of

operating environment would have degrading impacts on the current contingency contracting system.[97] Such disruptions could be localized and sporadic, or systemic and ongoing.

First, future warzone conditions and enemy action could disrupt the contracting support received remotely from largely civilian defense contracting organizations located in the United States.[98] Additionally, in a dynamic environment, reach-back contracting personnel would likely have limited knowledge of the local vendors, business practices, or access to interpreters. Such knowledge and resources, to the extent it exists, would more likely exist within the COCOM's units in theater.

Second, a sophisticated adversary could disrupt networked support from contracting personnel who are deployed in the theater, but not immediately adjacent to a given unit, with an urgent requirement. While a low-tech paper contracting method (the Standard Form 44) can be used in situations without connectivity, such methods are still limited above the micro-purchase threshold by the necessity of having a contracting officer on location to execute the contract.[99] That is a luxury that cannot be assumed in future operations that could extend hundreds of miles with

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operations and the enemy's ability to deny or degrade communications require resilient formations to conduct the mission command philosophy and employ new capabilities that express and communicate the integration of capabilities across domains, environments, and functions over longer time periods and expanded physical spaces."), https://www.tradoc.army.mil/wp-content/uploads/2020/10/MDB_Evolutionfor21st.pdf.

[97] *See generally* Lieutenant General Scott McKean, *Sustainment at Speed and Range*, U.S. ARMY (Aug. 11, 2021) https://www.army.mil/article/249270/sustainment_at_speed_and_range ("[S]ustainment formations will be required to support operations at greater ranges, in decreased response times, and in environments with denied, degraded, intermittent, or limited network communications.").

[98] *See generally id.* (describing the likelihood of denied or degraded communications).

[99] Micro-purchase threshold is $35,000 for overseas contingency operations. *See* FAR 13.201(g)(1)(ii) (2023). Contracting officer-appointed ordering officers may make purchases up to the micro-purchase threshold. DFARS 213.306(a)(1) (Aug. 2023); AFARS 5101.602-2-92 (7 Sept. 2023). Contracting officers and ordering officers will have even less purchasing power relative to local prices in many potential areas of operations (for example, Eastern Europe or East Asia) compared to Afghanistan or Iraq. Contracting officers may use the Standard Form 44 for on-the-spot purchases of supplies up to the simplified acquisition threshold in support of overseas contingency operations (and subject to other criteria). *See* DFARS 213.306 (Aug. 2023).

widely dispersed forces,[100] yet rely on only a handful of contracting officers possessing contracting authority.[101]

The current expeditionary contracting units within Army Contracting Command rely primarily on web-based software and commercial telecommunication to create and administer contracts in combat zones,[102] and routinely service operational units that are hundreds of miles away, even if in the same country or theater. Further, these expeditionary contracting units are not large,[103] and even in relative peacetime the uniformed contracting officers deploy overseas at a high rate, [104] meaning there is a limited surge capacity to respond to a large-scale conflict. Even in the recent experiences in the Middle East, contracting officers could quickly become overwhelmed trying to contract for urgent logistical needs while not running afoul of the FAR.[105]

Commanders should therefore possess some level of battlefield contracting authority to increase its potential for dispersal and survivability.

2. Vendor vetting or vendor selection?

The inaptness of today's divergent contracting and command authority model is clearly illustrated through the vendor vetting process. In recent years, Congress appears to have noticed some of the disparity

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[100] FM 3-0, *supra* note 93, at 1-20 (identifying the likely need for maximum dispersal of forces and resulting challenges to sustainment).

[101] Physical distance also created significant challenges for contracting offices in recent conflicts. *See, e.g.*, MAJORITY STAFF OF SUBCOMM. ON NAT'L SEC. AND FOREIGN AFFS., H. COMM. ON OVERSIGHT AND GOV'T REFORM, WARLORD, INC., EXTORTION AND CORRUPTION ALONG THE U.S. SUPPLY CHAIN IN AFGHANISTAN 49-50 (2010), https://www.cbsnews.com/htdocs/pdf/HNT_Report.pdf (last visited Aug. 8, 2023) [hereinafter WARLORD, INC.].

[102] *See* AFARS 5104.8 (Sept. 7, 2023).

[103] *See generally* U.S. DEP'T OF ARMY, TECHS. PUB. 4-71, CONTRACTING SUPPORT BRIGADE ch. 1 (4 June 2021) (describing the structure of contract support brigades and subordinate units).

[104] U.S. ARMY CONTRACTING COMMAND, https://acc.army.mil/about (last visited Aug. 8, 2023) ("ACC supports approximately 180 expeditionary missions in 50 countries each year.").

[105] *See* Koon, *supra* note 95, at 31 (discussing contracting officers becoming "overwhelmed" by the contract requirements in the 2017 operations in Iraq and Syria to counter ISIS).

between the standard FAR-based business judgment[106] model of vendor responsibility and debarments,[107] and the need for greater combat theater vendor vetting.[108] In one sense, Congress has tacitly acknowledged that commanders should have a larger role in vendor selection, however, this relatively new mandate to conduct vendor vetting creates more questions about the role of commanders than it answers.

The primary question posed is whether a contracting officer-driven source selection process can or should continue to be the default in future warzone acquisitions, where presumably every single vendor also must be screened by the command. In the more controlled context of the United States' conventional force dominance in the Middle East, vendor vetting may have fit into the acquisition process as something of a command security veto appended to an otherwise normal contracting process.[109]

The publicly disclosed information regarding the recent vendor vetting process suggests the ability to conduct a discrete, collateral vendor screening (undertaken by the COCOM) appended to an otherwise standard acquisition process (undertaken by the contracting officer). Such is the picture painted in the facts of *Omran Holding Group v. United States*.[110] There, the contracting officer reviewed an online database containing the base-access approval status of various vendors and determined that Omran was not responsible because they were not approved for base access, relying on the information in a database.[111] The contracting officer explained that he did not play any part in the base access determination, but rather relied on the information in the system as to whether Omran had been denied base access as a matter of "inherent commander authority."

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[106] FAR 1.602-2 (2023).
[107] *See generally* FAR 9.104 (2023) (standards of contractor responsibility). Part 9 of the FAR also implements procurement law-based (as opposed to command authority-based) debarment procedures. *See* FAR 9.4 (2023). Agency debarment officials (rather than the contracting officer) determine whether contractors should be suspended or debarred from contracting with the agency. *See, e.g.*, DFARS 209.403 (Aug. 2023).
[108] *See supra* Section II.D.
[109] *See, e.g.*, Leidos Innovations Corp., B-414289.2, 2017 CPD ¶ 200 (Comp. Gen. June 6, 2017).
[110] Omran Holding Group v. United States, 128 Fed. Cl. 273, 277 (2016).
[111] *See, e.g.*, *id.* at 277.

Because Omran was listed as ineligible for base access, the contracting officer determined it was not a responsible offeror.[112]

However, one wonders how such a process will work at scale, at greater speed, and against potential adversaries that are well versed at the use of proxies and commercial espionage.[113] Russia's use of hybrid tactics, for example, could present a challenging setting for the current military acquisition system in a setting short of full-scale peer-on-peer combat. If the United States were ever to find itself conducting ground operations in Eastern Europe, the selection of vendors would at least at times need to be driven by a commander's vendor vetting process or pressing operational concerns, with business judgment or acquisition system priorities representing distant secondary or tertiary concerns.

Further, warzone contracting must take into account not only business judgment and security concerns, but also related political or social concerns, which may—reasonably and appropriately—impact which firms it makes sense to do business with. For instance, tribal, ethnic, religious, or political affiliations of a given contractor's personnel may make them unable to travel through or work in environments controlled by other groups hostile to them.[114] Commanders, unlike contracting officers, will have more resources and information to analyze such situations.

Therefore, vendor vetting could quickly become—by necessity—indistinguishable from vendor selection. Assuming security, or some other aspect of operational necessity, in a warzone is often the overriding concern, what is left of a contracting officer's independent business judgment? What should be left? The current state of the law recognizes a

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[112] *Omran*, 128 Fed. Cl. at 278-279.

[113] *See generally* Christopher Wray, Director, Federal Bureau of Investigation, Remarks at Department of Justice China Initiative Conference: Responding Effectively to the Chinese Economic Espionage Threat (Feb. 6 2020), https://www.fbi.gov/news/speeches/respond ing-effectively-to-the-chinese-economic-espionage-threat; William Akoto, *Hackers for Hire: Proxy Warfare in the Cyber Realm*, MOD. WAR INST. (Jan. 31, 2022), https://mwi.usma.edu/hackers-for-hire-proxy-warfare-in-the-cyber-realm.

[114] *See, e.g.*, Koon, *supra* note 95, at 3 ("[Contracting officers] operating in Erbil, Iraq, could not award trucking contracts to Iraqi Arab companies because they could not get through Kurdish checkpoints. In some instances, KOs had to facilitate the release of Iraqi Arab truck drivers, who were detained at the border by the Kurdistan Regional Government and the Peshmerga Armed Forces.").

de facto command veto,[115] but does not allow the commander to make a positive award decision. As the GAO stated when discussing vendor vetting, "We recognize that […] the contracting officer's judgment is limited by a military command decision to deny [the barred entity] access to military installations."[116] When trying to operate at speed in a complex warzone, however, it is a reasonable next step, or a simple reframing, to allow for command selection of vendors.

To illustrate a one-step command vetting-plus-selection in a future conflict—one in which the current contracting authority divide still exists—imagine the following scenario: A U.S. military unit in a contested warzone urgently needs to purchase large quantities of gravel and lease the equipment required to move and emplace it on a damaged road. This work needs to be completed in the next several days before the launch of a fast-developing new operation. There are several vendors in the region capable of supplying these goods and services. The unit's intelligence section has one day in which to conduct a hurried screening of the vendors' political leanings and identify any business entanglements with the foreign adversary whose proxies and partisans are at work in a neighboring district. There is not time to forward information for a formal vetting process under the congressionally mandated vetting program. The marginal difference in price between vendors is not nearly as important to the commander as knowledge of the vendor. Operating on the information available to them after a few hours of intelligence gathering, the commander and his intelligence staff identify several viable vendors. They also identify several who present security concerns. The commander's staff calls the contracting officer on the phone and puts her in touch with their chosen vendor. The commander joins the call and tells the contracting officer to execute the contract.

Continuing with our hypothetical, the contracting officer is a hundred miles away and does not want to slow down the operation. She awards the

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[115] *See, e.g.*, Leidos Innovations Corp., B-414289.2, 2017 CPD ¶ 200, at 5-6 (Comp. Gen. June 6, 2017). For a proposed reform on this point, see Captain Thomas Cayia & Captain Joshua McCaslin, Contracting with the Enemy: The Contracting Officer's Dilemma, at 80 (June 2015) (M.B.A. report, Naval Postgraduate School), https://apps.dtic.mil/sti/pdfs/AD1014644.pdf (arguing for a "modif[ication of] the relationship between military command authority and contracting authority" by granting COCOMs contracting-based "authority to declare an enemy-affiliated contractor ineligible" for award).

[116] *Leidos*, 2017 CPD ¶ 200, at 6.

contract that night but does not have the time to do anything other than copy and paste a similar contract she executed recently, change a few key terms like quantity and price, and send it to the awardee via email (happily, telephones and Wi-Fi are working this week), because she has a dozen other area commanders calling her with similar requests. If one's frame is battlefield logistics, they both achieved their missions under challenging circumstances. However, if one's frame of reference is the current FAR-based contracting, the commander and the contracting officer in this scenario likely acted unlawfully. In this case, the standard analysis is; the contracting officer failed to exercise independent judgment, failed to document the justification for the sole-source acquisition, failed to solicit competition, and failed to complete a fair and reasonable price determination. Such an eminently foreseeable scenario should highlight some of the unrealism of the current FAR-based acquisition system.

In conclusion, the contracting officer's independent business judgment and the Federal procurement system's manifold contextual goals[117] should not be talismanic—especially when the business at hand is warzone logistics rather than business as usual. In warzones that are contested by peer or sophisticated adversaries, where the military mission is paramount and the contracting process is not, the vetting and selection roles will quickly collapse into each other. Vendor vetting therefore provides a useful point of reference to highlight the unsustainable nature of the contracting authority divide in warzone acquisition.

B. Risks Stemming from the Bid Protest Regime

Bid protests present another form of disruptive risk built into the current warzone acquisition system. While in peacetime settings, planners can account for the possibility of a protest in their acquisition timeline,[118] such a luxury will rarely exist in the warzone contracting context. Warzone contracts are by their nature subject to the greatest level of disruption. Requirements emerge at a fast pace and allow little time for the lengthy

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[117] WILSON, *supra* note 2, at 349.

[118] *See, e.g.*, Memorandum from Command Gen. of Army Contracting Command to Headquarters, Army Contracting Command et al., subject: FY18 Procurement Action Lead Time (PALT) Metric, para. 4(b) (12 Mar. 2018) (considering protests a PALT factor).

acquisition planning and tidy evaluations that adjudicative bodies are used to seeing.

The concept of lawfare provides a useful lens through which to view the risks to warzone acquisition created by the bid protest regime. Bid protests' inherently disruptive nature in a warzone are both a form of self-inflicted lawfare and an opportunity for adversarial lawfare.

The prominent exponent of the concept lawfare, retired Major General Charles Dunlap, proposes a neutral definition of the term: the "strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective."[119] Major General Dunlap has also identified the potential for "self-inflicted" lawfare, whereby a nation or military hamstrings itself through its unwise creation of new legal requirements or interpretation of existing legal obligations.[120] Such "unintended consequences of well-meant positions" can needlessly hinder operations and provide adversaries with opportunities for exploitation.[121]

The following subsections analyze the impacts of bid protests through a lawfare lens and argue that the new Congressional emphasis placed on vendor vetting runs counter to the interests pursued through the bid protest regime.

1. Self-inflicted Lawfare

A bid protest to a warzone contract solicitation or award is a legal action that can have immediate and automatic impacts on kinetic operations.[122] A bid protest to the GAO or the agency requires the immediate halt to the award process or work stoppage without regard to the merit of the filing or the importance of the stopped work.[123] Such

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[119] Charles J. Dunlap, Jr., Commentary, *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFFS. 146, 146 (2008).
[120] Charles J. Dunlap Jr., *Does Lawfare Need an Apologia?*, 43 CASE W. RESERVE J. INT'L L. 121, 133 (2010) (using the 2007 example of NATO's self-imposed restrictions on airstrikes as "beyond what the law of armed conflict would require").
[121] *Id.* at 133.
[122] *See* authorities regarding automatic stays cited *supra* notes 57-58.
[123] 31 U.S.C. § 3553(c)(1); FAR 33.104(b), (c), (h)(1), (3) (2023).

invited disruption may be accomplished merely through a brief email, handwritten note, or simple electronic filing.[124]

This invited disruption to ongoing warzone operations is unique to the law. While the United States may be sued for its military activities in any number of fora, a bid protest is singular in its ability to automatically and immediately halt a military logistical operation, rather than provide a forum for after-the-fact redress or punishment.[125] Such disruption is inherent to any bid protest, whether it is filed by a vendor in good faith, or by a malicious actor.[126]

Unlike the familiar, hotly debated subfields in the lawfare literature (e.g., use of force or detainee operations), restraints on the U.S. military's ability to purchase goods and services on the battlefield are entirely a matter of self-binding[127] and not the result of competing interpretations of the law of war. The law of war and international law do not require that

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[124] Protests to the agency have essentially no barriers to filing. *See, e.g.*, AFARS 5133.1 (Sept. 7, 2023); *HQ AMC-Level Protest Procedures Program*, ARMY MATERIEL COMMAND, https://www.amc.army.mil/Connect/Legal-Resources (last visited Oct. 5, 2023) (protest may be filed by mail, email, or fax to the contracting officer or the agency address provided). Protests to the GAO require electronic filing and require a $350 fee. *See* 4 C.F.R. 21.1(b) (2023); GOV'T ACCOUNTABILITY OFF. ELECTRONIC PROTEST DOCKETING SYSTEM INSTRUCTIONS, (Oct. 2021), https://www.gao.gov/assets/2021-10/EPDS_ Instructions.pdf. An agency protest to a contracting officer could be submitted by handwritten note. Regarding protests to the contracting officer, see generally FAR 33.103(b) (2023). Written guidance is limited (based on the author's reading of AFARS) regarding contracting officer-level protests in the U.S. Army, although they are generally treated in a similar manner as agency-level protests. This assertion is based on the author's recent professional experiences as the Command Judge Advocate for U.S. Army Contracting Command-Afghanistan from December 2018 to August 2019. *Cf.* AFARS 5133.103 (Sept. 7, 2023).

[125] For example, multiple claims processes (contract and non-contract) address monetary remedies, military or international criminal law addresses criminal misconduct, and detainee litigation seeks restitution of liberty or the right to be tried in civilian court, yet such filings do not stop ongoing operations as a matter of default.

[126] Government contracting became increasingly litigious. This is due to increasing regulatory complexity and evolving judicial interpretations that read procurement regulations as granting quasi-rights to contractors rather than merely creating principal-agent rules through which agencies controlled their contracting officers. *See* NAGLE, *supra* note 5, at 492–94.

[127] *See generally* Nathan A. Sales, *Self-Restraint and National Security*, 6 J. NAT'L SEC. L. & POL'Y 227, 230, 239 (2012) (using the phrase and discussing different theories of "why officials adopt these restraints even when they believe them to be legally unnecessary").

the United States follow its Federal procurement procedures in warzone settings.[128] Further, a protestor's commercial interests are far less weighty than plaintiffs seeking redress on matters of life or liberty.[129] Yet protests, in contrast, automatically impact operation in a manner that weightier claims filed in Federal district court do not.

In the case of agency and GAO bid protests, an agency's stay override authority offers the apparent prospect of relief. However, the override process merely inserts an additional, burdensome, and litigation-constrained bureaucratic process into the warzone contracting effort.[130] This is because the bureaucratic nature of the stay override process will typically require the involvement, review, and approval of remote senior officials,[131] and the stay override is itself subject to challenge by the protestor before the COFC.[132]

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[128] Considered under the law of war, such self-binding in the warzone purchase process may place the United States on worse footing vis-à-vis the law of armed conflict if its aggregate practical effect is to encourage taking rather than purchasing. *See* Santerre, *supra* note 24, at 149–52. Relevant requirements of international commercial law are discussed in section III.C below.

[129] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008) (considering whether a foreign detainee held at Guantanamo Bay could petition for writ of habeas corpus); Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56 (D.D.C. 2014) (relatives of U.S. citizens killed in drone strikes allege Fourth and Fifth Amendment violations).

[130] Defense agencies issue stay overrides in fewer than 2 percent of GAO protests. MARK ARENA ET AL., RAND CORP., RR2356, ASSESSING BID PROTESTS OF U.S. DEPARTMENT OF DEFENSE PROCUREMENTS 32 (2018) [hereinafter RAND REPORT]. One reason for this relative infrequency is that agencies often account for the 100-day GAO protest timeline in their acquisition planning. *See, e.g.*, Memorandum from Command General of Army Contracting Command to Headquarters, Army Contracting Command et al., subject: FY18 Procurement Action Lead Time (PALT) Metric, para. 4(b) (12 Mar. 2018) (considering protests a PALT factor). *See also* Kevin J. Wilkinson & Dennis C. Ehlers, *Ensuring CICA Stay Overrides are Reasonable, Supportable, and Less Vulnerable to Attack: Practical Recommendations in Light of Recent COFC Cases*, 60 A.F. L. REV. 91, 110 (2007) ("Acquisition personnel should build into the procurement process time for potential bid protests . . . [because] an agency's finding that an alternative [to a stay override] is not reasonable will be analyzed [by the COFC] in light of its lack of advance planning and the source of the problems encountered, including the failure to factor in time for a potential protest.") (citing Reilly's Wholesale Produce vs. United States, 73 Fed. Cl. 705, 715–16 (2006)).

[131] *See* authorities cited *supra* note 59.

[132] *See* cases cited *supra* note 60.

Further, the general trend at the COFC has been to give less deference to agency stay overrides.[133] While override decisions based on national security or defense will at times receive greater deference from the COFC judges, such deference is far from guaranteed.[134] The outcomes of CICA stay override challenges at the COFC are unpredictable because the FAR and CICA provide little meaningful guidance on what standards agencies should consider when they enact a stay override, and the COFC's relatively young jurisprudence in this area has resulted in a conflicting body of case law regarding the standard of review and which party bears the burden.[135] This can mean that the outcome may greatly depend on which judge presides over the challenge.[136]

Even if the military agency ultimately prevails before the judge, the mission will likely have been harmed by the process. Under a realistic timeline, drafting a litigation-resistant override documents will take several days at least, and must be accomplished at the same time the contracting officer must assemble the administrative record for the protest.[137] Override determinations for sensitive contracts will take longer if they require classified information that entails additional time for classification reviews and redaction decisions. During this time, award or

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[133] KATE M. MANUEL & MOSHE SCHWARTZ, CONG. RSCH. SERV., R40228, GAO BID PROTESTS: AN OVERVIEW OF TIME FRAMES AND PROCEDURES 14 (2016) (citations omitted). *See also* Steven L. Schooner, *Postscript III: Challenging an Override of a Protest Stay*, 26 NO. 5 NASH & CIBINIC REP. ¶ 25 (May 2012) ("[T]he Court of Federal Claims may be slowly, inexorably, and, alas, inconsistently, raising the bar for agencies to justify their override decisions."); Kara M. Sacilotto, *Is the Game Worth the Candle? The Fate of the CICA Override*, 45 PROCUREMENT LAW. 3, 3 (2009) ("[W]ithin the last few years, agency overrides have not experienced an 'easy course' at the COFC and, instead, arguably have met with the 'uphill battle' that plaintiffs were said to face. Judicial review generally has been searching, and some judges on the court have effectively placed the burden on the agency to defend its override decision instead of on the plaintiff to demonstrate that the override is arbitrary and capricious.").

[134] MANUEL & SCHWARTZ, *supra* note 133, at 14 (citations omitted).

[135] Nathaniel E. Castellano, *Year in Review: The Federal Circuit's 2019 Government Contract Law Decisions*, 69 AM. U. L. REV. 1265, 1294 (2020).

[136] Kevin J. Wilkinson & John M. Page, *CICA Stays Revisited: Keys to Successful Overrides*, 66 A.F. L. REV. 135, 141 (2010). Further, not every COFC "judge will have published a definitive position on each issue relevant to a CICA override challenge. This often requires that parties to override litigation must brief their (likely expedited) case against multiple alternative standards." Castellano, *supra* note 138, at 1296.

[137] *See, e.g.*, Beechcraft Defense Company, LLC v. United States, 111 Fed. Cl. 24, 29 (2013) (override determination documentation took four days to complete).

performance will have stopped. Instead of purchasing critical commodities and services, the contracting officer will be on the phone with lawyers and multiple levels of supervisors, working on litigation strategies and drafting Determination and Findings documents. If this defensive process is required across dozens of warzone contracts in a compressed time period, the effects will quickly become deleterious.[138]

To counter the challenges just discussed, creative contracting officers with strong stomachs could likely develop various contracting strategies to ensure continued performance. Such approaches might include stretching the definition of immediately stay to a flexible few days in the case of a contract that only took a few days to perform. Another approach could be to award a short-term sole-source contract to the protested-awardee as many times as is necessary during the pendency of the protest—staying one step ahead of the pace of additional bid protest filings if these stopgap contracts themselves are subsequently protested.[139]

Such stopgap measures only demonstrate that warzone acquisitions do not fit neatly into the current bid protest regime: short-term critical commodity or service contracts under protest could likely be "bridged away" in a matter of weeks, long before any decision on the merits of the protest could be reached. In practice, in a warzone contracting environment there would likely be strong pressure on a contracting officer to disregard stays in certain high-pressure situations. While contracting officers and other agency officials certainly feel the weight of statutory stays and COFC injunctions, in a battlefield contracting scenario there could be potentially overwhelming countervailing pressures of immediate security or sustainment needs.[140] Contracting officers should not be placed

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[138] One predictable outcome would be for units to give up on the acquisition process and rely more on requisition, or perhaps split purchases by Government card holders or ordering officers. A split purchase is an impermissible method of breaking up larger purchases in order to avoid thresholds or use certain procedures not otherwise available. *See* FAR 13.003(c) (2023) (prohibiting the practice regarding the micro-purchase threshold).

[139] *See, e.g.*, Access Sys. v. United States, 84 Fed. Cl. 241, 243 (2008) (holding that bridge contract did not constitute a de facto override of automatic stay of original contract's performance).

[140] *Cf.* Jeffery Alan Green, *Alternatives for the Future of Contingency Contracting: Avoiding a Repeat of the Mistakes of Iraq*, 35 PUB. CONT. L.J. 447, 453 (2006) (It is possible that contracting officials placed in a life-threatening situation are motivated by

in such an untenable and predictable position by a bid protest regime designed with inapposite peacetime procurement system interests in mind.

Thus, the current state of the law produces an unreasonable and self-imposed burden on the United States military in the field, with little or no practical benefit to, or relationship with, the greater acquisition system. The bid protest regime that currently applies to warzone contracting—in the same way it applies to General Services Agency furniture purchases—should be reformed prior to the next large conflict, or risk injuring combat logistical effectiveness and making a mockery of the bid protest system. Congress should "un-bind" the military's warzone purchasing system and end an era of self-inflicted lawfare before the system breaks down in a near-future warzone.

Instead, Congress should empower COCOMs to develop and train on more realistic and resilient purchasing processes so that units are trained and prepared to execute that mission in disrupted settings. Proposed reforms are discussed in Section IV.

2. Adversarial Lawfare

Moving beyond the self-inflicted lawfare just discussed, this subsection will now argue that the bid protest regime is a ripe target for adversary-driven lawfare. The status quo presents an opportunity-laden system for hostile actors to conduct lawfare-via-protest against United States contracting and logistical activities in a theater of operations. Adversaries would have little difficulty in convincing through bribery, political sympathies, threats, or other means, some number of foreign vendors to file protests for malign purposes.

Broad categories of adversarial lawfare could include disruption-via-stay, information gathering, or propaganda. To achieve disruption, a lawfare-driven protest might target particular contract actions at select

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factors of far more immediate importance than the FAR, such as their personal safety. If contracting officials' actions directly affect the safety of a large group of military and civilian personnel, perhaps it is appropriate to shift 'fair and reasonable' price to a secondary consideration while life-threatening circumstances exist.").

moments, or file coordinated protests against multiple actions to delay contracting work across the broadest spectrum as possible.

Even in normal domestic settings, some firms may use bid protests as a method of learning information about the Government's source selection processes,[141] or pursue frivolous cases for the purpose of harassing rival firms or procuring agencies.[142] Similarly, foreign adversaries, through proxy firms, could use the bid protest system for their own malign purposes. Bid protests could be used by adversaries as a quasi-open-source intelligence gathering technique. Intelligence gleaned could include information on logistical requirements and planning, or information about local vendors willing to do business with the United States.

Protests require the Government to provide protestors with troves of documents regarding the contract planning and award process.[143] Adversaries' intelligence services could find agency protest reports useful to fill in in a "mosaic"[144] of information about the military's logistical needs and operations. It is true that bid protest processes protect various categories of sensitive information and documents.[145] However, such safeguards are not bulletproof and tend to focus on pricing and proprietary information, which may be of less interest than the basic contracting documents that state times, locations, and quantities. Further, a pro se litigant, while not able to receive material subject to a protective order,[146] nevertheless receives the remainder of the administrative record, much of which is not otherwise publicly available.[147]

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[141] *See* RAND REPORT, *supra* note 130, at xiii.

[142] *See generally* Bruce Tsai, Targeting Frivolous Bid Protests by Revisiting the Competition in Contracting Act's Automatic Stay Provision (Dec. 2014) (M.P.A. capstone paper, Johns Hopkins University), http://jhir.library.jhu.edu/handle/1774.2/37240.

[143] *See* 4 C.F.R §§ 21.3(c), 21.3(d) (2023); R. CT. FED. CL. 52.1(b).

[144] "Mosaic theory" is "a method by which all intelligence agencies collect seemingly disparate pieces of information and assembl[e] them into a coherent picture." Berman v. CIA, 378 F. Supp. 2d 1209, 1215 (E.D. Cal. 2005) (internal quotation marks omitted).

[145] *But see* Christopher R. Yukins, *Stepping Stones to Reform, Making Agency-Level Bid Protests Effective for Agencies and Bidders by Building on Best Practices from Across the Federal Government*, 50 PUB. CONT. L.J. 197, 209 (2021) ("[T]here is no clear authority for protective orders in agency-level bid protests.").

[146] *See* 4 C.F.R. § 21.4(a) (2023).

[147] A comparison with what information, and on what timeline, would be releasable under the Freedom of Information Act would be instructive but is beyond the scope of this paper.

In addition to information released to protestors, the publicly-released GAO and COFC opinions resulting from warzone protests similarly carry the risk of revealing sensitive, though not classified, information about otherwise non-public warzone vendor vetting processes. While agencies may request that GAO and COFC redact information from publicly released opinions, the result is not a foregone conclusion.[148] Iterate this process over many dozens or hundreds of cases and opinions, and adversaries will inevitably gain a clearer, if still incomplete, picture of both vendor vetting processes and the pool of vendors that work with the United States in the warzone.

More broadly, bid protests in warzones offer adversaries propaganda opportunities in an age when such propagandistic "information warfare"[149] is increasingly critical.[150] Protests filed by adversary-influenced vendors would "cause lawfare mischief by being a public forum for official criticism and judgment of U.S. military action,"[151] particularly while such action is still in progress. As Justice Jackson warned in *Johnson v. Eisentrager*,

> [Providing litigation fora to foreign adversaries] diminish[es] the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and

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[148] *See* Akal Sec., Inc. v. United States, 87 Fed. Cl. 311, 314 n.1 (2009) (declining to redact various portions of opinion).

[149] *See, e.g.*, CATHERINE A. THEOHARY, CONG. RSCH. SERV., R45142, INFORMATION WARFARE: ISSUES FOR CONGRESS 1 (2018) (defining "information warfare" as "the range of military and government operations to protect and exploit the information environment").

[150] *See, e.g.*, Stuart A. Thompson & Davey Alba, *Fact and Mythmaking Blend in Ukraine's Information War*, N.Y. TIMES (July 30, 2004), https://www.nytimes.com/2022/03/03/technology/ukraine-war-misinfo.html.

[151] JACK GOLDSMITH, THE TERROR PRESIDENCY 63 (2007).

> military opinion highly comforting to enemies of the United States.[152]

Congress intended CICA and the bid protest process to pressure the executive branch into compliance with the law through the force of publicity.[153] While this is no doubt a noble goal and is presumably good policy in a peacetime setting, however, inviting adversary-driven publicity into warzone logistical operations seems less wise. One of lawfare's great strengths as a tactic is that it provides a platform on which a belligerent can assert "the apparent moral high ground."[154] In the warzone contracting context, every protest, no matter how meritless or malign, can become potential propaganda fodder for U.S. adversaries, who would be able to point to an official pending legal matter before the GAO or COFC and claim it as an example of the United States military dealing unfairly with the local populace. Viewed through this lens, the current bid protest system is a clear case of invited disruption.

3. Congress Should Limit Protestors' Ability to Challenge Contracting Exclusions Based on Vendor Vetting

Vendor vetting not only is a challenge to the survival of the contracting authority divide but is also an issue in the context of bid protests, where the uneasy relationship between vetting and source selection will frequently emerge in a large conflict with high volumes of bid protests. To date, the GAO and the COFC have been relatively deferential to vendor vetting processes, but this is still a relatively underdeveloped area of the law. The intermingling of command and contracting authority will create pitfalls for contracting officers and result in numerous cognizable, even if infrequently successful, protests.

At first impression, the most litigation-resistant approach for warzone contracting officers may be to keep at arms-length from the vetting process in order to maintain their independence. For example, the contracting officer in *Omran* appears to have been walled-off from the vendor vetting

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[152] Johnson v. Eisentrager, 339 U.S. 763, 779 (1950).
[153] Ameron, Inc. v. United States, 809 F.2d 979, 984 (3d Cir. 1986).
[154] GOLDSMITH, *supra* note 151, at 63.

process.[155] Such an approach is consistent with how contracting officers review suspensions and debarments under normal procedures: they rely on vendor exclusions already determined by debarment officials.[156] This frames the question within the traditionally forgiving standard of review regarding inherent command authority over force protection,[157] rather than acquisition authority.

However, in a large, hotly contested, and chaotic future conflict, warzone vendor screening may of necessity, become rushed and untidy. Rather than the walled-off process described in *Omran*,[158] imagine a vetting process that is a series of rushed verbal discussions, first between the commander's intelligence personnel and local sources of information, and then between the command and the contracting officer. If such a process is iterated at scale over a large theater, it is eminently predictable that much of the standard process will not be captured in writing or catalogued in a system.[159] This could lead to difficulties for the Government in a bid protest setting if protestors allege an erroneous internal Government process.[160] Also, in an unfolding warzone, classification decisions regarding the underlying derogatory information

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[155] Omran Holding Group v. United States, 128 Fed. Cl. 273, 274–77 (2016). This and every other bid protest case involving recent vendor vetting issues originated out of the U.S. campaigns in the Middle East, where U.S. agencies enjoyed the benefits of uninterrupted communications and processes developed over two decades of post-September 11th operations.

[156] *See generally* FAR 9.1, 9.4 (2023).

[157] *See, e.g.*, Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 893 (1961).

[158] The Government's argument appears to have relied in part on the contracting officer's lack of interaction with the vetting process. *Omran*, 128 Fed. Cl. at 279. Because the court held that the plaintiff lacked standing (for unrelated reasons), it did not directly address the question of whether the walled-off approach was necessary for the Government to prevail on the merits. *Id.* at 285.

[159] Leidos Innovations Corp., B-414289.2, 2017 CPD ¶ 200, at 2 (Comp. Gen. June 6, 2017) (describing the contracting officer's review of the "Joint Contingency Contracting System" database). Future contracting officers and command personnel may have other more pressing tasks in their warzone than papering a contract file in anticipation of a bid protest

[160] *See, e.g.*, Sander & Romero, *supra* note 63, at 20 ("A practitioner might be able to show that the DoD failed to follow its own [process] in making the decision (i.e. errors were made, such as the incorrect decision maker placed the contractor on the "rejected list") and, therefore, the process was arbitrary and capricious.").

will become rushed or uneven, and any unclassified information relied upon by a contractor officer could be open to scrutiny.[161]

There are other ways in which rushed vendor screening could increase litigation risk for the Government under the current law. First, contracting officers may reasonably believe they should gain personal knowledge of the intelligence underlying vendor vetting and weigh its value, such as the contracting officer in *Leidos Innovations Corp.*, who chose to view the classified report underlying the vendor's ineligibility rating.[162] This intermingling of roles could open the door to greater scrutiny of the reasonableness and independence of a contracting officer's responsibility determination. Second, vendor vetting exclusions create situations where contracting officers are not able to give meaningful debriefings.[163] This could in turn may increase the likelihood of protests.[164]

Third, the inherent authority of a commander to bar firms also includes the discretion to rescind such a bar. In the context of vendor vetting, this could mean that the appropriate commander may choose to waive a negative vendor vetting status or resulting bar to allow for contracting with the otherwise ineligible firm.[165] When making that decision, one of the considerations for commanders may be "market research performed by the contracting agency."[166]

Therefore, while in Section III.A.2 we considered the command influence over the contracting officer's independent business judgment in the vendor vetting context, the waiver process presents the reverse

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[161] *See* Canni & Carey, *supra* note 63, at ¶ 251 ("The ruling suggests that the decision was driven not only by the *classified nature of the information*, but by the fact that *war-zone contracting* was involved. Remove either of these factors from the situation, and the COFC may have reached a different result.") (discussing MG Altus Apache Co. v. United States, 111 Fed. Cl. 425, 434 (2013)).

[162] *Leidos*, 2017 CPD ¶ 200, at 2.

[163] Or similarly, where contracting officers must use cryptic statements to notify unsuccessful offerors where debriefings are not required. The contracting officer can likely say nothing more than, "I find you ineligible for award." *See* NCL Logistics Company v. United States, 109 Fed. Cl. 596, 607-08 (2012) (Policy mandated that rejected status may only be revealed to an "apparent successful offeror," who may only be told that they are "ineligible for award.").

[164] RAND Report, *supra* note 130, at xiii, 20.

[165] *See NCL Logistics Company*, 109 Fed. Cl. at 608–09 (referencing waiver authority).

[166] *NCL Logistics Company*, 109 Fed. Cl. at 608.

potential litigation trap for the contracting officer: commanders may rely, sometimes heavily, on a contracting officer's business advice in determining whether to exercise their inherent powers to bar a firm from their area of operations, or to waive their negative vetting status.[167] What deference might the GAO or COFC make of such intermingled authority in the future?[168] This is an unpredictable and potentially fraught area for future warzone-based litigation.

Congress needs to decide whether it is in the United States' defense mission's interest, or the general procurement system's interest, to have these issues continually litigated in a warzone contracting context—where such issues are likely to proliferate. One approach is to do nothing, and let the law work itself out within the idiosyncratic[169] jurisprudence of the COFC and the easily accessed forum of the GAO. This would enable adversaries not only to disrupt warzone contracting with the litigation effects, but also to rummage around vendor vetting processes via the adjacent responsibility determinations. The better approach is for Congress to cabin warzone bid protest opportunities.

C. Additional Policy Considerations: Requisition and Competition

Having considered the challenges that divided authority, bid protests, and vendor vetting pose to the current warzone acquisition system, this subsection will address several policy considerations relevant to Section IV's proposed bid protest reforms. Section 1 discusses relevant requirements under international law. Section 2 argues for commanders to

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[167] This suggests the viability of the contracting officer's independent review of the derogatory information, so that even if the vendor vetting process is called into question by a reviewing body, the Government may still rely on the contracting officer's responsibility determination. *Cf. NCL Logistics Company*, 109 Fed. Cl. at 618 ("information in investigative reports may be used as the basis of a non-responsibility determination.") (citation omitted). *See also* Sander & Romero, *supra* note 63, at 20–21 ("It is the authors' view that [a responsibility determination] would, at minimum, require the contracting officer to read the reports on which the "rejected" rating is based.").

[168] A protestor could argue that a contracting officer acted unreasonably in failing to seek a waiver of a negative vendor rating. *Cf.* Rockies Express Pipeline LLC v. Salazar, 730 F.3d 1330, 1339 (Fed. Cir. 2013) ("Interior breached the [agreement] by refusing to seek a deviation from the FAR provisions").

[169] *Cf.* Castellano, *supra* note 135, at 1294; Schooner, *supra* note 133, at ¶ 25 ("[A]ll too often, the luck of the draw at the Court of Federal Claims significantly affects a case's outcome.").

possess purchasing authority in warzone environments. Section 3 addresses the Congressional priority of competition, and why it should not drive warzone acquisition policy.

1. International Law Does Not Preclude Warzone Contracting Reforms

International law does not mandate the use of domestic acquisition procedures in warzone settings as a general matter, nor does it foreclose the reforms proposed in Section IV.[170] The World Trade Organization's Government Procurement Agreement[171] established general Government contracting rules for states party to the agreement, including, in relevant part, a preference for competitive procurement[172] and a review procedure (i.e. bid protest) conducted by, or appealable to, an "impartial administrative or judicial authority that is independent of the procuring entity whose procurement is the subject of the challenge."[173] The GPA also requires that procedures "provide for…rapid interim measures" that "may result in suspension of the procurement process," [174] i.e., a stay of performance or award.

However, the GPA also contains several exceptions that would apply to warzone purchasing reforms, including those proposed in Section IV of this paper. The GPA's preamble recognizes the need for "sufficiently

[170] A detailed review of the manifold bilateral trade and defense agreements that touch on U.S. Government procurement is beyond the scope of this paper. *See, e.g.*, *Reciprocal Defense Procurement and Acquisition Policy Memoranda of Understanding*, DEF. PRICING & CONTRACTING, https://acq.osd.mil/asda/dpc/cp/ic/reciprocal-procurement-mou.html (last visited Oct. 5, 2023) (containing current reciprocal procurement agreements). As a general matter, however, in a warzone setting where U.S. forces are present at the invitation of the foreign nation, a new procurement agreement or status of forces agreement could address any bilateral Government procurement concerns.

[171] Agreement on Government Procurement, Apr. 15, 1994, 1915 U.N.T.S. 103.

[172] *See, e.g.*, Agreement on Government Procurement, as Amended on 30 March 2012, arts. IX, XIII, 3008 U.N.T.S. 49, 63–65, 69–70 (2014) [hereinafter Revised GPA]. The DoD is a covered party. *United States of America – Central Government Entities – Annex 1*, WORLD TRADE ORG., https://e-gpa.wto.org/en/Annex/Details?Agreement=GPA113&Party=UnitedStates&AnnexNo=1&ContentCulture=en%20United%20States%20of%20America%20(wto.org) (last visited Oct. 5, 2023) [hereinafter *Annex 1 – U.S. Central Government Entities*].

[173] Revised GPA, *supra* note 172, art. XVIII, ¶¶ 1, 5.

[174] *Id.* art. XVIII, ¶ 7(a).

flexible [terms] to accommodate the specific circumstances of each Party."[175] Following from that principle, the GPA includes a broadly worded national security savings clause that exempts "any action" necessary for the procurement of war materials or otherwise indispensable for national security.[176] Because the reforms proposed in Section IV would only apply in active warzones, this GPA exception would apply.[177]

Additionally, the GPA contains standing exceptions for the lease of land[178] and procurements that fall "under the particular procedure or condition of an international agreement relating to the stationing of troops." [179] Further, under normal circumstances and without other exceptions, DoD purchases of goods and services valued under $182,000 and "construction services" valued at under $7,008,000 are exempt from the GPA's requirements.[180]

In conclusion, the GPA's requirements would not apply to warzone contracting following an appropriate determination.[181] Further, even if reforms were tailored to fit within the GPA as it normally applies, bid protests could be limited or eliminated up to the standard GPA thresholds,[182] and the CICA stay could be made discretionary rather than automatic.

2. Command Purchasing Authority Is Not Scary

Policy considerations demonstrate the reasonableness of vesting COCOMs with some warzone purchasing authority. While there are ample arguments for separating command and contracting authority for major weapon systems procurements and routine domestic and peacetime

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[175] *Id.* at Preamble.
[176] *Id.* art. III, ¶ 1.
[177] The United States in the annex to the GPA exempts DoD from certain categories of purchases outright (primarily relating to weapons systems and rare metals) but also reserves the ability to expand the application of GPA's national security exception more broadly "subject to [U.S.] determinations" under that exception. *Id.*, Annex 1, n.4, U.S.-Central Government Entities.
[178] Revised GPA, at Article II, ¶ 3(a).
[179] Revised GPA, at Article II, ¶ 3(e)(ii).
[180] *Annex 1 – U.S. Central Government Entities*, *supra* note 172, n.4 (U.S.-Thresholds).
[181] *See supra* note 177 and accompanying text.
[182] *Id.*

contracting, such justifications do not have the same purchase in the warzone contracting context. Combatant commanders already possess vast powers in the theater under their command. Compared with such activities as lethal strikes, detentions, etc., the purchase of basic supplies and services is neither particularly weighty nor complex. Rudimentary, if not necessary small, purchases would be well within the competence of commanders and their logistical staff sections.

Further, in a high-intensity or complex hybrid conflict, if commanders were empowered to make short-term critical purchases, they would be able to keep a cleaner balance sheet for the DoD compared to the current system which removes all purchasing authority from commanders. The current system will merely result in more requisition during operations where there are significant disruptions to the standard acquisition system.[183] As a result, the United States military would likely face greater financial and legal jeopardy by tipping the scales away from contracting and in favor of requisition to satisfy fast-moving logistical needs.[184]

While requisition, as opposed to pillage, is permissible under the law of armed conflict, and a routine fact of any conflict, it is neither money-saving nor low risk.[185] Under the law of armed conflict, fair value must be paid as soon as possible for any requisitioned items.[186] In terms of tax-dollar stewardship, military units might account for up-front purchases more efficiently than try to record requisitions for payment at an unspecified later date.[187] Further, commanders may not requisition labor to perform direct military tasks (e.g., constructing defensive positions)

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[183] *See* Santerre, *supra* note 24, at 149–52.

[184] *Id.* at 112 (citing 2 L. OPPENHEIM, INTERNATIONAL LAW § 143 (7th ed. 1952)) ("A violation of contracting regulations and statutes may result in a commander becoming personally liable for payment of a contract or answerable for a domestic 'white collar crime.' A violation of international law in this area could result in a commander being charged with a violation of the law of war.").

[185] *See id.* at 112.

[186] Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 55, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] ("Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned [food and medical supply] goods."). *See also* LAW OF WAR MANUAL § 11.18.7 (2016) (addressing requisition of private enemy property).

[187] *See* Santerre, *supra* note 24, at 151.

under the law of armed conflict.[188] However, there is no such restriction against paying the local populace to voluntarily perform such labor.[189] The law of war may weigh an instance of requisition or seizure against its military necessity,[190] whereas voluntary commercial transactions need not meet such a standard.[191]

Assuredly, even if commanders possessed an inherent purchasing authority, requisition will be necessary at times due to battlefield exigencies or the unwillingness of locals to voluntarily contract with the United States.[192] Whenever possible, the policy preference should be to maximize a commander's ability to purchase rather than requisition private property. A policy that lessened the legal and regulatory dichotomy of command and contract authority in the warzone context would therefore not only be administratively cleaner and present less profound legal risk, it could maximize "strategic communications"[193] with the local populace: paying local businesses and individuals (or at least definitizing the amounts of obligations) prior to taking their property would mitigate ill-will towards U.S. forces.[194] Paying local businesses and property owners up front would also mitigate the discipline and morale risks inherent to requisition—particularly the ever-present danger that it spills over into marauding.[195] A status quo of a contracting-officer dependent system that

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[188] Geneva Convention IV, *supra* note 186, art. 51.
[189] *See* LAW OF WAR MANUAL, *supra* note 22, § 11.20.4.
[190] This is clearly the case with *seized* private property, although *requisition* of private property may require a lower standard because the taking will later be compensated. *Cf.* 2022 OPERATIONAL L. HANDBOOK, *supra* note 22, ch. 2 (II)(F)(5), n.316 (citing Geneva Convention IV, *supra* note 186, art. 97); *see also* definition of requisition *infra* note 199.
[191] *See* Santerre, *supra* note 24, at 112.
[192] Another useful definition of requisition is "the right of the occupying force to buy from an unwilling populace." 2022 OPERATIONAL L. HANDBOOK, *supra* note 22, ch. 3, app. B(I)(C)(4).
[193] *See generally* Gregory P. Noone, *Historical and Semiotic Orgins of "Lawfare": Lawfare or Strategic Communications?*, 43 CASE W. RESERVE J. INT'L L. 73, 79 (2010) (discussing "strategic communications" in the lawfare context).
[194] *See* JP 4-10, *supra* note 4, at I-12.
[195] VAN CREVELD, *supra* note 16, at 30, 34, 67, 73; DUFFY, *supra* note 38, at 167. *Cf.* James Dao, *Soldier Who Seized Car in Iraq Is Convicted of Armed Robbery*, N.Y. TIMES (July 30, 2004), https://www.nytimes.com/2004/07/30/us/soldier-who-seized-car-in-iraq-is-convicted-of-armed-robbery.html. Without arguing that this episode was caused by the lack of contracting authority, it does suggest the unpleasant outcomes that could flow from an ineffectively distributed warzone purchasing system.

implicitly favors requisition is, at best, undefinitized contracting by another name; at worst, it is an invitation to run afoul of the law of war.

Therefore, the reform of the contracting dichotomy of authority is an opportunity for offensive lawfare.

3. Competition Should Not Be a High Priority in Warzones

Competition, of a manufactured variety, is a restriction that Congress places on the Federal acquisition system. In the context of military operations warzones, however, competition should not rate especially high. While the current acquisition system's self-binding in a warzone context may be seen as a moral or strategic positive, any consideration of its use in a given context should consider unintended consequences. The competition requirements are closely linked to public transparency.[196] In warzones, however, immediate public transparency regarding ongoing operations is not always a desirable state.[197]

While militaries throughout history have done great damage to civilian populations, merely declining to freely contract with one party in favor of another, for security or expediency reasons, does not register on the scale of military misdeeds. Foreign nationals overseas do not have a right to do business with the United States Government, [198] and warzone policy considerations should prioritize mission accomplishment and abiding by the law of war far above the socioeconomic goals of the Federal acquisition system.

Meanwhile, the benefits of allowing the protest regime are minimal at best. Foreign vendors will mostly be unfamiliar with the United States' Government procurement system and will not typically enter the process with an expectation that a warzone military will choose its goods or services in accordance with a domestic bureaucratic process. Further,

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[196] *See generally* Steven L. Schooner, *Desiderata*: *Objectives for a System of Government Contract Law*, 11 PUB. PROCUREMENT L. REV. 103, 104–06 (2002).

[197] Transparency and accountability are of course crucial; however, for obvious security reasons, publicizing details of ongoing operations will often need to be delayed.

[198] *Cf.* People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999) ("A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.").

many such protests will be filed in part by small-business local vendors—exactly the class of protests that have low success rates on the merits.[199] The ultimate success rate of future foreign warzone small businesses can hardly expected to be higher, though the disruption to U.S. operations stemming from the protests can still be significant.

Warzone commanders should be able to tailor the amount of competition and transparency used in acquiring products and services. This would enable them to take into primary account military interests (e.g. security, efficiency, and relations with the local populace) rather than the standard acquisition system's socioeconomic goals.

D. Conclusion

Legally re-categorizing warzone acquisition as a military logistical activity rather than a Federal procurement process would not cause any loss of public trust in the acquisition system. The acquisition system writ large would continue apace, unaffected. Such a re-categorization of warzone purchasing would, however, help minimize requisition, increase mission effectiveness and resiliency, and unburden the GAO and COFC from having to issue myriad bid protests decisions regarding sensitive warzone purchasing activities.

IV. Reforms

This section proposes and analyzes several possible reforms that would address the challenges addressed above. Section A addresses possible reforms of contracting authority, as well as the ability to distribute contracting authority more broadly in theater. Section B addresses possible reforms of the bid protest system for warzone acquisitions. The reforms proposed in these two subsections could be pursued in tandem or independent of one another.

These proposed reforms are relatively straightforward in terms of how they could be accomplished via statute and regulation. This apparent simplicity flows from the shift of warzone purchasing from a highly

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[199] RAND REPORT, *supra* note 130, at 35. More than half of GAO and COFC protests between 2008 and 2016 were filed by small businesses. *Id.* at 30–31.

regulated and litigious system to a decentralized and less litigious system. More challenging, however, may be the second-order requirements of implementation and oversight. Such issues are addressed in Section C.

A. Reforms to Contracting Authority

This subsection will discuss several reforms including the creation of a command-based purchasing authority that would reside outside the Federal procurement system. Appendix A provides an example of a statutory reform providing limited warzone purchasing authority to COCOMs. Next, this section proposes FAR-based reforms that would increase the resiliency of purchasing power within a warzone while still residing within the broader Federal procurement system.

1. Congress Should Create a Command-Based Purchasing Authority

Congress should grant COCOMs purchasing authority and end the current contracting authority divide within warzones. Such authority would need to flow from a newly enacted statute, vesting COCOMs with a delegable purchasing authority outside the general acquisition system.[200] To maximize the authority's resiliency and reach, the authority should be delegable to any level, subject to agency regulations, and able delegable to classes based on position. [201] Implementing regulations could subsequently assign management and oversight to commanders and their logistics staff sections at each level. Appendix A proposes statutory language that would limit this authority to purchases made or contracts awarded and performed in Secretarially designated warzones. Further, the period of performance of any such contract would be limited to three months.

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[200] *See, e.g.*, 10 U.S.C. § 4021 (creating a non-FAR-based authority to enter into transactions for the development of certain prototype projects).

[201] *Cf.* Karen L. Douglas, *Contractors Accompanying the Force: Empowering Commanders with Emergency Change Authority*, 55 A.F. L. REV. 127, 144 (2004) ("With delegation of [contracting] authority by position, whoever is next in rank would gain the emergency contract change authority at the same time as assuming military command.") (discussing a proposed authority for commanders to possess emergency contract modification authority).

This reform would solve the current disconnect between the warzone logistics function and the purchasing function by enabling logisticians on the ground to purchase necessary items themselves.[202] Further, such a dispersed system would be more flexible and resilient in the event an adversary disrupts the current computer- and telecommunications-based—and contracting officer dependent—acquisition system. In the event of such disruptions, logisticians or other designated military personnel in the field would still be able to quickly—and legally—make purchases.[203]

2. FAR-Based Reforms

As an alternative and less ambitious reform, Congress could create a head of a contracting activities within each COCOM. This reform would help distribute contracting authority, but would not require the creation of a separate, non-FAR-based command purchasing authority. A model for this exists in the statute establishing the special operations COCOM, which grants "head of an agency" acquisition authority to the commander of Special Operations Command (SOCOM).[204] This authority enables SOCOM to appoint its own contracting officers.[205]

While this reform would not solve the lack of resiliency and limited distribution of contracting authority inherent to the contracting officer acquisition model, several accompanying regulatory reforms could mitigate this concern. Class deviations could allow a COCOM head of

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[202] *Cf. See* Marchesi, *supra* note 20, at 70 ("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.") (proposing expanding FAR-based contracting authority up to the simplified acquisition threshold to logistics officers within maneuver units).

[203] While such an approach is comparable on its face to a contracting officer-appointed ordering officers, the command-driven approach is vastly more resilient because of the omnipresence of command authority. Ordering officers, by contrast, require specific appointment, and are greatly limited in their purchasing power. Further, this proposed authority would not be limited to the micro-purchase threshold, as are ordering officers. DFARS 213.306(a)(1) (Aug. 2023); AFARS 5101.602-2-92 (Sept. 7, 2023). Additionally, areas of potential future conflicts (for example, East Asia or Eastern Europe) are more expensive than Iraq or Afghanistan, meaning diminished purchasing power if FOO thresholds are maintained.

[204] 10 U.S.C. § 167(e)(4)(B).

[205] *See* SOFARS 5601.602 (June 30, 2021).

contracting to grant contracting officer authority based on position, rather than individuals, or to a class (e.g., logistics officers above a certain rank), so that killed, injured, or unavailable personnel do not create an absence of purchasing authority.[206] To supplement this contracting authority, Congress could permanently raise the warzone micro-purchase threshold for overseas contingencies and thereby enable contracting officers to appoint ordering officers with sufficient purchasing authority to fill in gaps in communications-disrupted warzones.

In smaller theaters, another solution could be to increase the number of uniformed contracting officers and distribute them among lower-echelon units.[207] However, such a proposal is very likely infeasible at a large enough scale to diffuse purchasing power throughout a larger contested theater. The significant education and training requirements[208] of the contracting officer career path, and the difficulty and fierce budgetary competition involved in the creation of any new personnel billets, make expansion and flexibility difficult.[209] Further, such an approach would likely degrade standard contracting organizations if their acquisition workforce is cannibalized to serve as warzone contracting officers.

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[206] *See* Douglas, *supra* note 201, at 144. Deviations allow agencies to use contracting methods or issue policies that are inconsistent with the FAR. *See generally* FAR 1.4 (2023).

[207] *See* Marchesi, *supra* note 20, at 68–70 (proposing assignment of contracting officers at the combat brigade level).

[208] The process to become a DoD contracting officer typically requires years of education, training, and work experience as a contract specialist. *See* DFARS 201.603-2 (Aug. 2023) (listing requirements); *but see also* DFARS 218.201(1) (Aug. 2023) (waiving requirement for baccalaureate degree for DoD contingency contracting officers).

[209] *See, e.g.*, RAND REPORT, *supra* note 130, at 20 ("The workforce was cut massively in the 1990s and is still in the process of rebuilding. New process requirements are constantly being added or changed to meet the rapidly evolving marketplace. Future budgets are likely to severely constrain training, recruiting, and retention."). Further, it may not be a safe assumption that in a larger or bloodier conflict the U.S. military could rely on civilian contracting officer volunteers for expeditionary contracting to the extent it did in recent U.S. conflicts in the Middle East (for any number of policy, organizational, or personal reasons). *See, e.g.*, Gansler & Lucyshyn, *supra* note 14, at 283 (discussing reliance on civilian personnel for expeditionary contracting); DOD IG AUDIT: ACC-A, *supra* note 91, at 2 (As of October 2019, 65 percent of the Army's contracting office personnel in Afghanistan were Civilian DoD employees or contractors).

B. Bid Protest Reforms

Congress should limit the effects of bid protests on warzone purchasing. Such reforms could be accomplished independent of any of the reforms to contracting authority proposed in the above section.

1. Congress Should Limit Bid Protest Effects on Warzone Contracts

Congress should eliminate bid protest jurisdiction at the GAO and COFC for warzone acquisition activities whether conducted under FAR-based authorities or under the proposed authorities in Subsection IV.A above. Defense agencies could continue to offer disappointed vendors an agency protest process, which could take better account of security considerations. Further, such a carve-out of bid protest jurisdiction could prove a valuable test case for some of the bid protest reform proposals[210] made recently by the Section 809 Panel.[211]

Alternatively, Congress should eliminate the automatic statutory and regulatory stay provisions for warzone bid protests.[212] Such reforms would remove or mitigate many of the protest-related threats to logistical activities in future warzones. Further, Congress should grant the GAO the authority to extend protest decision deadlines for warzone-based protests. This would allow hard-pressed warzone contracting officers more leeway when assembling the administrative record and other bid protest requirements. At a minimum, Congress should eliminate GAO and COFC

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[210] These include: limiting jurisdiction at the GAO and COFC to protests of procurements exceeding $75,000, eliminating the opportunity for protestors to file at both the GAO and the COFC, and establishing a "purpose statement" against which adjudicative bodies may measure "protest program performance." ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION REGULATIONS, ROADMAP REPORT 21 (2019), https://discover.dtic.mil/wp-content/uploads/809-Panel-2019/Roadmap/Sec809Panel_Roadmap_DEC2019.pdf.

[211] The Section 809 panel was created (and named after) the National Defense Authorization Act of Fiscal Year 2016, Pub. L. No. 114-92, § 809, 129 Stat. 726, 889-90 (2015). The panel was created to study ways to improve defense acquisition processes. *Id.* § 809(c).

[212] *Cf.* Gansler & Lucyshyn, *supra* note 14, at 287 (recommending reforms to contingency contracting that allow the military to "proceed with mission-essential contracts even in light of acknowledged administrative errors").

jurisdiction over protests arising from any warzone contracting officer's responsibility determination based on a commander's vendor vetting or bar decision.

2. A Modest Statutory Reform

Even absent more significant reforms of the bid protest process, Congress could mitigate disruption from statutory stays for warzone contracts by lowering or making delegable stay override authority from the head of the contracting activities (the current statutory approval level)[213] to one level above the contracting officer (the level currently granted stay override authority for agency protests),[214] or, better still, to the contracting officer level. In a disrupted warzone environment, this additional flexibility would minimize delays in securing overrides for critical protested contract actions. Congress could also prohibit or limit the COFC from reviewing or enjoining stay override decisions for warzone contracts.

C. Oversight and Implementation of Proposed Reforms

Military warzone operations are inherently risky and chaotic.[215] These characteristics make oversight of warzone purchasing highly necessary, yet also elusive. This section will argue that the proposed reforms may improve oversight and accountability, relative to the last two decades of Middle East contingency contracting, and in order to maximize this benefit, such reform should be made prior to the next conflict.

1. Command-driven Purchasing Simplifies Oversight and Accountability

The aforementioned reforms would not eliminate the challenges of oversight and accountability, but they do offer the prospect of simplifying

[213] 31 U.S.C. § 3553(c)(2), (d)(3)(C).
[214] FAR 33.103(f)(3), 33.104 (2023). One level above a contracting officer will typically be a supervisory contract specialist in the role of an office or section chief.
[215] *See* NAGLE, *supra* note 5, at 3 ("At the beginning of every war, a cleavage develops between supply and demand that entrepreneurs, both scrupulous and unscrupulous, rush to fill. The result is as chaotic as a barroom brawl.").

and improving them.[216] Concerns regarding oversight or accountability under a command-driven purchasing system cannot be considered in a vacuum, but rather need to be compared to the problematic and uneven performance of the existing contingency contracting system. The last twenty years of FAR-based contracting in the Middle East birthed a misfit family of reports from congressional branch, executive branch, and non-governmental organizations that found or allege mismanagement, waste, and fraud on a grand scale.[217]

The divided authority model presents serious accountability challenges, since the contracting officer controls the contract and the contractor, but the command or program office is responsible for developing the requirement and monitoring its day-to-day performance.[218] Such a system is particularly difficult to oversee in a warzone where contracting officers likely have minimal direct access either to their customer units or servicing contractors due to distance and a limited ability to travel.[219] These experiences suggest the risks of merely maintaining the status quo.

In contrast, placing rudimentary purchasing authority within the remit of commanders would create a single point of accountability.[220] Also, in

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[216] *See* Gansler & Lucyshyn, *supra* note 14, at 281 (suggesting that unifying responsibility for contingency contracts could improve accountability); QUADRENNIAL DEF. REV. INDEP. PANEL, THE QDR IN PERSPECTIVE: MEETING AMERICA'S NATIONAL SECURITY NEEDS IN THE 21ST CENTURY 85 (2010) ("[T]he fundamental reason for the continued underperformance in acquisition activities is *fragmentation of authority and accountability for performance*.") (emphasis in original), https://www.usip.org/sites/default/files/qdrreport.pdf.

[217] These include the Government Accountability Office, DoD Inspector General, Special Inspectors General for Afghanistan and Iraq recovery, the Commission on Wartime Contracting in Iraq and Afghanistan, Brown University's Cost of War Project, and the Project on Government Oversight.

[218] *See generally* WILSON, *supra* note 2, at 321.

[219] Recent contracting oversight struggles in Iraq and Afghanistan often stemmed from the fact that neither contracting officials nor command representatives had direct eyes-on oversight of contractors operating outside of the U.S. bases to which both were largely confined. *See, e.g.*, WARLORD, INC., *supra* note 101, at 49–50; DOD IG AUDIT: ACC-A, *supra* note 91, at 4. In a more conventional or dynamic conflict, however, the commanders would typically have far greater visibility over contractors outside the wire than would the few contracting personnel in the theater. Due to the likely dispersal of forces in a large future conflict, the chain of command would have greater visibility over warzone contractors than would a small number of contracting personnel in theater. *Cf.* FM 3-0, *supra* note 93, at 1-20 (noting likely dispersal of forces).

[220] *See* Gansler & Lucyshyn, *supra* note 14, at 281.

changing the frame of accountability from acquisition systems to military logistics would make accountability more straightforward and effective because military commanders have direct knowledge of their own logistics and budgets. Compliance would more effectively focus on the laws of war, ensuring minimal waste, and policing fraud,[221] because limited resources would not be spent on compliance with thousands of pages of acquisition laws, regulations, policies, directives, and litigation.

Regarding concerns about fraud, [222] bid protest fora are not designed to police or adjudicate fraud allegations, much less in distant and chaotic overseas warzones. Fraud and waste concerns would continue to be addressed by appropriate oversight and law enforcement agencies, such as the DoD Inspector General.[223] Finally, concerned parties could still seek relief for any constitutional or other[224] grievance in Federal district court.

In addition, much of the waste in DoD contracting efforts in the Middle East stemmed from a beneficiary problem: the DoD spent billions of dollars on purchases to benefit the Iraqi or Afghan governments, with very limited ability to oversee delivery of goods and execution of projects.[225] In contrast, the command-driven purchasing power proposed in Section IV.A and Appendix A would be for the immediate needs of the

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[221] Relevant procurement integrity rules would still apply. *See* Appendix A. The Uniform Code of Military Justice and manifold administrative punishments available to the military also provide many avenues for accountability.

[222] Fraud is a perennial concern with warzone contracts and expenditures. *See, e.g.*, DUFFY, *supra* note 38, at 175; NAGLE, *supra* note 5, at 19, 198–204; SPECIAL INSPECTOR GEN. FOR AFGHANISTAN RECONSTRUCTION, SIGAR-21-05-SP, UPDATE ON THE AMOUNT OF WASTE, FRAUD, AND ABUSE UNCOVERED THROUGH SIGAR'S OVERSIGHT WORK BETWEEN JANUARY 1, 2018 AND DECEMBER 31, 2019 (2020).

[223] Specifically, the DoD and the Services have law enforcement agencies specifically tasked with investigating fraud, waste, and abuse. *See, e.g.*, *Defense Criminal Investigative Service*, DEP'T OF DEF. OFF. OF INSPECTOR GEN., https://www.dodig.mil/Components/DCIS (last visited Oct. 6, 2023).

[224] *See, e.g.*, 31 U.S.C. § 3730 (*Qui Tam* provision of the False Claims Act, incentivizing whistleblowers with share of recovered damages).

[225] *See generally, e.g.*, SPECIAL INSPECTOR GEN. FOR AFGHANISTAN RECONSTRUCTION, SIGAR-18-41-IP, MANAGEMENT AND OVERSIGHT OF FUEL IN AFGHANISTAN (2018) (recounting fraud and waste findings regarding DoD's fuel purchases for the Afghan military). On a smaller scale, the command-directed purchasing program of CERP was intended to benefit local communities. *See, e.g.*, Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, Pub. L. No. 108-106, § 1110, 117 Stat. 1209, 1215 (2003) (providing appropriated funds to the CERP program).

United States military itself. Commanders and their logisticians are better able to assess whether their own immediate and tangible requirements are met, rather than assessing and overseeing the complicated and slippery goals of community relations and nation building that were pursued in Iraq and Afghanistan. Finally, a limited command purchasing for rudimentary goods and services would enable the small numbers of deployed contracting officers to spend their time more effectively on the larger, longer, and more complicated acquisitions that will be required in any theater.[226]

2. Reforms Should Be Implemented Prior to the Next Conflict

Congress should implement these warzone purchasing reforms before they are needed in the field. In the past, while Congress has previously shown some willingness to grant the Secretary of Defense extraordinary powers to waive acquisition laws, although in one instance, the law required deaths in the field to trigger the authority.[227] A more proactive approach in the warzone context would be for Congress to change the law in anticipation of predictable needs and grant limited but permanent purchasing authority to COCOMs. This would save time, as well as enable commanders and their units to train for such field purchasing scenarios rather than having to invent new processes after a conflict has begun.[228]

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[226] *See* Marchesi, *supra* note 20, at 76 ("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.").

[227] The 2005 National Defense Authorization Act granted the Secretary of Defense the authority "to waive any provision of law, policy, directive, or regulation . . . that . . . would unnecessarily impede the rapid acquisition and deployment of the needed equipment." Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 811, 118 Stat. 1811, 2012-13 (2004). This authority was primarily intended to address gaps in heavy military equipment, rather than the types of field-expedient supplies and services addressed in this paper. *See generally* U.S. DEP'T OF DEF., 5000.78, RAPID ACQUISITION AUTHORITY (20 Mar. 2019) [hereinafter DODM 5000.78]. The "fatalities" standard was subsequently broadened to include "likely . . . combat casualties" and "critical mission failure." *See id.* at 7.

[228] *See* Marchesi, *supra* note 20, at 68, 75. *Cf.* NAGLE, *supra* note 7, at 7 ("A major part of America's preparation for its wars, both in the nineteenth and especially in the twentieth

Expanding warzone purchasing authorities would require new implementing processes and training for the newly empowered commands, with presumably the responsibility falling primarily on the logistics branch.[229] However, because of the rudimentary and short-lived nature of the purchasing at issue, such training and process development—and incorporation into exercises—could be achieved in a relatively short time period.

V. Conclusion

Today's new geopolitical threats and potential operating environments highlight the need for fast, adaptable, and resilient warzone procurement systems. Military commanders and their staffs—already entrusted with matters of life and death—can also be entrusted with a limited purchasing authority for critical warzone needs. Such reforms need not affect the broader U.S. Government acquisition system. The reforms would help ensure that even in disrupted warzone settings, military logistics can adapt to challenging realities while staying within legal and regulatory bounds. And beyond the immediate efficiencies gained from a distributed and simplified purchasing regime, reformed warzone contracting and bid protest systems would also minimize adversaries' opportunities for lawfare and propaganda.

The reforms proposed here would not displace the ability to conduct standard contracting in warzones as well. As operations move from a combat phase to a sustainment or rebuilding phase,[230] civilian policymakers and senior commanders would have the flexibility to phase out command purchasing authority in specific areas. But for active warzones, some extent of chaos in logistics and contracting is unavoidable, and complex systems, such as federal acquisition, cannot be expected to fare better than simpler systems in such environments.

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centuries, has been the need to suspend or modify the competitive bidding rules as the country rushed to overcome decades of neglect in a few short months.").

[229] *Cf.* Marchesi, *supra* note 20, at 70–71.

[230] *Cf.* Green, *supra* note 140, at 455 ("What is required is a system of post-conflict and reconstruction contracting that is flexible enough to react to operational realities, while emphasizing the rapid return to full and open competition.").

Finally, warzone contracting should be compared not with tidy peacetime Government contracting, but with its actual alternative: requisition, with all its associated legal and moral risks. Given the choice between a rudimentary command purchasing authority and simply taking, policy makers should prefer the former whenever possible.[231] The current business-as-usual contingency acquisition system places a heavy thumb on requisition's side of the scale in future large-scale conflicts,[232] yet, with minimal effects on the Government acquisition system as a whole, Congress could rebalance these risks for warzone procurement and logistics—and do so before the moment of actual need.

[231] *See* Santerre, *supra* note 24, at 149–52.
[232] *See id.*

Appendix A

10 U.S. Code § _____

Authority of the geographic combatant commanders to carry out certain warzone acquisition activities--

(a) Subject to paragraph (d), unified combatant commanders assigned under section 164 of this title, may, under the authority of this subsection, enter into contracts or other transactions that directly enable their logistical operations in warzones. The authority in this subsection is in addition to other acquisition authorities.

(b) Federal acquisition law shall not apply to this authority. [233] Notwithstanding section 1491(b) of title 28,[234] the Court of Federal Claims shall not have jurisdiction over disputes arising from the use of this authority. The Secretary shall create appropriate agency procedures, or apply existing applicable procedures, to address vendor complaints arising out of solicitation or award actions taken under this authority. Disputes arising out of agreements or transactions made under this authority shall be resolved following the procedures of sections 7101 through 7109 of title 41.[235]

(c) Exercise of Authority by Combatant Commanders: Combatant Commanders may delegate this authority, subject to regulations or approval made by the Secretary of Defense or a designee. The combatant commanders, in coordination with the service chiefs, will ensure that personnel delegated this authority receive appropriate training.

(d) The authority of this section may be exercised only if all of the following criteria are met:

(1) The President or Secretary of Defense determines in writing that a combatant commander may exercise this authority within a delineated warzone. Such warzone may not exceed the boundaries of a related

[233] For narrower language, the Federal Aviation Administration's exemption from CICA and GAO protest jurisdiction could also serve as an example. *See* 49 U.S.C. § 40110(d)(2)(F).
[234] The Tucker Act, granting the COFC jurisdiction over bid protests.
[235] The Contract Disputes Act.

designated combat zone designated under section 112 of title 26[236] or exceed the scope of a contingency operation designated under section 101 of this title.[237]

(2) Purchases are for the exclusive use of United States military forces to satisfy immediate logistical needs. Purchases do not exceed $5,000,000[238] in value or 90 days in length. Any repeat or follow-on purchase of the same service or supply must be approved at a higher level, subject to such regulations as the Secretary shall designate.

(3) Purchases are not for real property, but may be used for the rental or lease of real property.

(4) Funds are available in accordance with applicable law.

(e) Notwithstanding subsection (b), purchases or transactions made under the authority of this section shall be treated as a Federal agency procurement for the purposes of procurement integrity requirements.

(f) Section 31 of title 3730 shall apply to payments made under this authority.[239]

(g) Definition: "Warzone" means an area of imminent or active military conflict.

(h) The staff of a combatant commander exercising the authority under this section shall include an inspector general who shall conduct audits and inspections of purchasing actions made under this authority, and such other inspector general functions as assigned.

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[236] The President's "combat zones" designation authority for taxation purposes.
[237] The Secretary of Defense's "contingency operation" designation authority.
[238] Further analysis beyond the scope of this paper is necessary to determine the appropriate dollar threshold.
[239] The *Qui Tam* provision of the False Claims Act.