October 12, 2005

VIA FIRST CLASS MAIL

Mr. Dean G. Popps
Principal Deputy to the Assistant Secretary of the Army
(Acquisition, Logistics and Technology)103 Army Pentagon
ATTN: SAAL-ZA
Room 2E672
Washington, D.C., 20310-0103

Re: Questions Posed to the Section of Public Contract Law Battle Space Procurement Task Force

Dear Mr. Popps:

This letter and attached White Paper are submitted on behalf of the Section of Public Contract Law of the American Bar Association ("the Section"). The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section's governing Council and substantive committees have members from these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.¹

¹ This letter is available in pdf format at http://www.abanet.org/contract/federal/regscomm/home.html under the topic “Emerging Issues.”
In January 2005, you met with the Battle Space Procurement Task Force ("Task Force") established by the Section, to discuss issues relating to contracting in the battlefield. During the discussion, you noted that battlefield contracting is subject to extraordinary risk and uncertainty and that these problems extended beyond the battlefield and thus the Section suggests the use of the term "Battle Space." You also asked the Section to respond to the following questions:

1. Which areas of the FAR/DFARS are barriers to rapid acquisition in a wartime environment?

2. What are the preferred solution sets?

3. How can we expedite the process yet retain fidelity across the contracting continuum?

The Task Force believes it can most helpfully respond to your questions by identifying the barriers it believes that the U.S. Department of Defense ("DOD") and industry must address in order to ensure that contractors with employees located in the Battle Space can provide timely, effective support to accomplish U.S. missions. Where appropriate, we also offer suggested solutions.

We suggest that the issues concerning contractor employees in the Battle Space need to be addressed in a uniform fashion by all DOD military departments and agencies, and that policy must be coordinated with other federal agencies likely to have contractor employees performing in the Battle Space. Although we recognize that your office only recommends policy for the Army, we believe that it is important to advocate comprehensive DOD and government-wide policy on these issues. The importance of such policies during wartime is readily apparent, but the difficulty of reaching consensus on the issues, many of which have been recognized for a long time, has resulted in the responsible parties deferring the task of finding solutions during peacetime. We offer the Section's assistance in facilitating the analytical process to find practical solutions.
The Section appreciates the opportunity to provide this response and is available to provide additional information or assistance as you may require.

Sincerely,

Robert L. Schaefer
Chair, Section of Public Contract Law

cc:  Michael A. Hordell
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     David Kasanow
CONTRACTORS IN THE BATTLE SPACE

(Response to the Principal Deputy to the Assistant Secretary of the Army)

October 12 2005

This White Paper is submitted on behalf of the Section of Public Contract Law of the American Bar Association (the “Section”). The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees have members from these three segments to ensure that a diversity of points of view are considered. By presenting its consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

The Section established the Battle Space Procurement Task Force (“Task Force”) to address issues related to contracting in the battlefield, which, as explained below, is more aptly referred to as the “Battle Space.”

I. Introduction

The Task Force has identified the following barriers to effective integration of contractor employees into the total force supporting U.S. military and diplomatic missions in the Battle Space:

- Command and control issues, including the exercise of contract authority;
- Statutory and regulatory requirements and audit requirements;
- Security (in the context of force protection) issues, including the need for consistent policy on the arming of contractor personnel; and
- Insurance and third party liability issues.

These barriers are discussed in turn below.

Although contractors are increasingly performing functions vital to the success of U.S. missions in the Battle Space, the implications of increased reliance on contractors do not seem to have been meaningfully analyzed by many segments of either the federal government or contractor communities. The Task Force chose to focus on the barriers to contractor integration into the Battle Space.

This paper uses the term “Battle Space”\(^1\) because U.S. forces and their support contractors have increasingly become subject to hostile action in areas not limited to the conventional battlefield or combat zone. For purposes of this paper, “Battle Space” is “a defined physical area outside of the United States in which U.S. forces are subject to serious hostile acts that threaten the success of U.S. missions in that area.” The Task Force’s use of the term Battle Space contemplates that designation of a Battle Space might occur before, during, or after armed
conflict. Designation of a Battle Space should occur when Defense and/or non-Defense contractors are operating in an area affected by war, civil war, or insurgency in which the U.S. military is present and supported by contractor personnel. Designation of a geographical area as a Battle Space should invoke special rules recommended by the Task Force to eliminate barriers to effective management of contract resources in the Battle Space.

The Task Force has not attempted to address what the roles of contractors (and their employees) in the Battle Space should be. Nor does this paper try to resolve questions relating to the Law of Armed Conflict. We recognize that these are important issues and are the subject of serious deliberation in other fora.

II. Discussion

A. Command and Control/Contractual Authority

Contractor personnel in the Battle Space are vital to U.S. military commanders’ military operations. GAO, Contractors Provide Vital Services to Deployed Forces but Are Not Adequately Addressed in DoD Plans, GAO-03-695 (June 2003); Frank Camm & Victoria A. Greenfield, How Should the Army Use Contractors on the Battlefield? Assessing Comparative Risk in Sourcing Decisions, xxiii, 2-3, (Rand 2005) (“Rand Sourcing Report”). The declared policy of DOD is that “logisticians fully integrate, in logistics plans and orders, the functions performed by contractors together with those performed by military personnel and government civilians.” See Jt. Chiefs of Staff, Doctrine for Logistics Support of Joint Operations, JP-4-0, Ch. 5.3.a. (Apr. 6, 2000) (emphasis in original); Army Regulation 715-9, Contractors Accompanying the Force ¶1-5(m) (Oct. 29, 1999).

The military commander directs and controls military personnel and resources. In contrast, contractor personnel are directed and controlled by a contractor that in turn is directed by a contracting officer pursuant to the terms of a contract. JP-4-0, Ch.V.1.c. (“The war fighter’s link to the contractor is through the contracting officer...”). There may be a multitude of contracts between different agencies and contractors, administered by different contracting officers. Unified control of mission resources is essential to success within the Battle Space. Thus, when contractors perform vital roles in the Battle Space, close alignment is needed between operational command and control of other mission resources and contractual control of the functional operations of contractors. Although there are multiple levels of military command and control, there are no truly corresponding levels of contractor control. That is, the warfighter’s sole link to the contractor is through the contracting officer. Contracting officer authority is also stave-piped by contract (and contracting agency). There is no authority that reaches horizontally over the entirety of all contract operations in the Battle Space.

In the discussion that follows we examine three subtopics: (1) how best to give military commanders the ability to direct contractor employees in the Battle Space (including both DOD contractors and those of other agencies); (2) how to ensure discipline and accountability among contractor employees in the Battle Space; and (3) how best to ensure continuity of contractor services.

1. The ability to direct contractor employees: Contracting officers play a vital role in the procurement process. They provide technical expertise and practical experience with
contractual and fiscal rules. They use discretion and sound business judgment to protect the public fisc. Nevertheless, contracting officers are not always deployed, or not deployed in sufficient numbers, to hostile environments such as the Battle Space. An off-site contracting officer can adequately handle the routine contracting functions in the theater of operations, and with the rapid advance of electronic communication, contracting officers may have the ability to quickly process some contract changes and other requests, even if not physically present. But under the dynamic and demanding circumstances that arise in the Battle Space, when time and conditions do not always allow for communication with an offsite contracting officer, the nearest military commander will likely direct contractor personnel, if warranted in his or her judgment. Likewise, contractor employees will generally follow that direction in an effort to meet mission needs. Rand Sourcing Report, 1, n.1. Following are three suggestions to address this issue in no order of priority, although the third suggestion is likely less satisfactory.

First, DOD could provide that the military commander may exercise limited contractual authority. This proposal would extend the commander’s authority to all DOD contracts in the command area, mitigating but not eliminating stove-piping. A proposed change to the DFARS last year would have provided some authority, but it was not ultimately adopted. See 69 Fed. Reg. 13500 (March 23, 2004). This proposal would have required that DOD contractor personnel comply with all instructions of the ranking Military Commander in the immediate area of operations as to transportation, logistical, and support requirements regardless of contract requirements, and would have authorized the submission of requests for equitable adjustment for additional effort required or loss of equipment occasioned by the ranking Military Commander’s direction. In the view of the Task Force, this DFARS proposal would not have solved the problem because: a) the commander’s authority had no bounds; b) without a corresponding change to FAR 43.102, limits on contracting authority, the change would have been ineffective, and c) it is unrealistic to place contracting officer responsibilities on a commander in combat, in addition to his or her command functions.

It should be a high priority to design and implement training for military commanders on managing contractors in the Battle Space. Contractors are a vital part of the team and commanders need the training that will allow them to use contract resources effectively.

A second alternative for addressing this problem is to deploy more contracting officers in the field to the same levels that contractors are deployed. If the military commander has immediate access to the contracting officer for each contract in the Battle Space, change orders could be issued quickly in emergency situations. The Army is considering such a proposal, briefed at the 2005 Contingency Contracting Conference, http://aca.saalt.army.mil/ACA/Programs/Contingency/CC_briefings.htm. In addition, the House of Representatives-passed DOD Authorization Act, H.R. 815 §813, directs formation of a Contingency Contracting Corps. This second alternative likely requires an increase in acquisition personnel or assignment/delegation of contractual authority to personnel who are already deployed. In making such delegations, FAR and DFARS delegation criteria must be met or deviations approved.

If it is not considered feasible either to grant restricted contractual authority to military commanders in the Battle Space or to deploy sufficient contracting officers to the Battle Space, a third alternative might be sanctioned use of contract ratification. Ratification is the process of
approving an unauthorized contractual commitment. See FAR 1.602-3. U.S. Government personnel in the Battle Space could be given responsibility for identifying and forwarding contract actions requiring ratification to authorized deployed or stateside contracting officers. One advantage of this approach is that statutory change is not needed. There are three distinct disadvantages: a) contractors would have no obligation to comply with an unauthorized direction; b) contractors would have no guarantee that unauthorized contract direction would later be ratified; and c) FAR 1.602-3(b)(1) prohibits use of ratification procedures in a manner that encourages government personnel to make unauthorized commitments, so that an amendment to the FAR would probably be necessary.

As noted above, command and control issues involve not only DOD contractors but contractors performing work for other agencies (e.g., Department of State, USAID). Among the contractors performing under other agency contracts are private security companies whose employees may be providing security to civilian contractor employees and, directly or indirectly, to other entities in the Battle Space. None of the command and control solutions identified above (with the possible limited exception of the ratification process) reaches the need of military commanders to exercise control over these other contractors in the Battle Space. There is a FAR Case pending (2005-011) to address the issues posed by contractor personnel who are not supporting deployed troops, but who are supporting U.S. missions in a theater of operations outside the United States. Implementing legislation has been proposed. This solution requires interagency collaboration and agreement.

2. Ensuring discipline and accountability: The need for discipline and accountability is one aspect of the larger command and control issue. Other than during a declared war (when the Uniform Code of Military Justice may apply to civilians), military commanders do not have the authority to discipline contractor employees who commit crimes or engage in disruptive behavior. The Military Extraterritorial Jurisdiction Act of 2000 (“MEJA”), 18 U.S.C. §§ 3261-67, establishes United States federal court and magistrate jurisdiction over DOD civilians, DOD contractors, and DOD contractor employees and dependents. Recent amendments to MEJA (FY 2005 DOD Authorization Act) extend that jurisdiction to civilian contractors and employees of other agencies, to the extent their employment relates to supporting DOD missions overseas. A proposed change would extend jurisdiction to all U.S. contractors overseas, whether or not supporting a DOD mission. Under MEJA, DOD may detain and charge such civilians and then turn them over to the Department of Justice for prosecution.

Uniformed service members are subject to military discipline for the failure to follow a lawful order. Contractor employees in the Battle Space, however, are not. Their employers, the companies under contract, are subject to contractual remedies for failure to follow proper contractual direction. This distinction is likely to persist between uniformed service members who are subject to military discipline and contractor employees who are not. If a civilian is suspected of committing a crime, a military commander may be able to turn the civilian over to the criminal justice authorities of the host nation or the United States, but the commander will have no direct ability to hold a civilian accountable, particularly for behaviors (e.g., failure to show up on time) that fall short of a crime in the civilian sector. Given this fact, it is important that military commanders recognize the distinction in operational planning just as they recognize the capabilities and limitations of other resources available to them to accomplish their mission.
To reiterate, increased emphasis on training military leaders to manage contractor resources upon which they will rely to accomplish military missions is essential.

3. **Ensuring continuity of essential support services:** The Government has discretion to determine whether use of civilians or contractor support in any particular environment constitutes an inappropriate or unacceptable risk or, with respect to contractors, to classify the support function as inherently governmental. See DOD Manpower Matrix, Sustainment and Reconstitution of Combat Support and Service Operations Under Fire, E1.1.1.3.

Absent a major shift, DOD will continue awarding contracts for support of U.S. forces in the Battle Space despite the increased risks. Military commanders must use the mix of resources given them to accomplish each mission. Although contractors committed to the support of U.S. forces are likely to (and do) remain in hostile environments to carry out their support functions, contractors are most likely to direct their employees to exit the Battle Space if security is or appears to be inadequate. If the U.S. Government fails to provide, either directly or indirectly, security for contractor personnel in the Battle Space, there may also be an adverse effect on the competition and the ability of the government to obtain supplies and services at reasonable prices. Simply placing the risk of operating in a hostile environment on the contractor, as DFARS 252.225-7043 allows, does not solve the force protection and security issues. It does not modify the excuses for nonperformance due to acts of a public enemy in the standard FAR Termination for Default clauses; it does not change the fact that any remedy for violation of a contract clause is contractual; and it leaves each contractor to individually assess, provide for, and price security needs. The issue of security for contractor personnel in the Battle Space is addressed more fully below.

One means to provide increased control over contractor employees in a Theater of Operations is to create a “sponsored reserve.” DOD policy already requires that mission-essential tasks be identified in contracts and DOD clauses already reserve to the government the right to remove those tasks from contractor responsibility during specified types of hostilities. The “sponsored reserve” concept would convert willing contractor employees performing specified tasks to Title 10 status to perform during the hostilities. This change in status, in turn, would solve a number of issues associated with use of contractors in combat situations, e.g. performing inherently governmental functions, status under the Law of Armed Conflict, use of arms, and direct command and control. Predictably, the sponsored reserve concept has raised political and business issues including the impact on corporate recruitment and retention of employees subject to conversion to Title 10 status and potential conflicts of authority between civilian employers and the military commanders.

**B. Statutory and Regulatory Requirements**

Other than potential changes to provide military commanders with contracting authority and expansion of ratification procedures (discussed above) and, as discussed below, special Battle Space contract audit standards and expanded use of an existing liability clause, the Task Force has not identified any other aspect of the FAR or DFARS that imposes barriers to expedited Battle Space procurement. That is not to say that there might not be other FAR or DFARS barriers to rapid acquisition, simply that we are not aware that other FAR or DFAR provisions have proven, based on anecdotal evidence, to be problematic in the Battle Space.
Thus, in the absence of a process analysis that identifies bottlenecks in the acquisition process, attributable to regulatory requirements, we have no further recommended regulatory changes. It is our qualified view that the procurement laws and regulations, if implemented by personnel with adequate acquisition training and authority, provide considerable flexibility to facilitate urgent procurements. For instance, contracts may be let without competition if justified by an unusual and compelling urgency. FAR 6.302-2. In addition, commodities and services available from the GSA’s Federal Supply Schedule or task or delivery order vehicles provide the means to quickly acquire a wide variety of supplies and services. Contracts that are in place usually may be modified to suit Battle Space conditions through both bilateral and unilateral changes, so long as those changes do not reasonably exceed the scope of the contract and are fairly contemplated for the contract as awarded. Indefinite delivery, indefinite quantity (“IDIQ”) contracts such as LOGCAP also provide considerable flexibility during times of uncertain and changing requirements. DOD contracts increasingly utilize broad statements of work that provide additional flexibility.

Adequate training is critical. A compendium of best practices in contingency contracting could be of great use to deployed contracting personnel. A starting point might be Chapter 30 of the Contract Attorneys Course (Army JAG School) addressing Contingency and Deployment Contracting. The Army’s annual Contingency Contracting Conference is another useful training model.

Finally, the Task Force believes that action is needed to promulgate audit standards for in-theater support contracts. Given the exigent circumstances under which contractors must often perform to provide the desired level of support to troops, particularly in the Battle Space, the application of peacetime audit standards to in-theater support contracts must be evaluated for change. We recommend that an interagency task force, to include the Defense Contract Audit Agency and experienced military officers, with input from the contractor community, be charged with such a review and creation of audit guidelines for contracts performed in the Battle Space.

C. Security

As noted above, security for contractor employees (of which force protection is part) has obvious implications for continuity of contractor-provided services. DOD policy in this regard must be clarified and consistently applied. Whether or not military personnel are providing security to DOD contractors, non-DOD contractors, civilian agency representatives, or U.S. forces or installations, the measures to provide protection to these groups must become a routine part of the mission and operational planning process. Our assumption is that the host nation will be unable or unwilling to provide adequate security. Complicating the picture is that current legal authorities do not clearly address the use of contractor personnel to perform security and related force protection functions. Nonetheless, careful consideration of the legal implications should be a routine part of assigning security and force protection roles to contractors in the Theater of Operations. The U.S. government’s opinion regarding these issues should also routinely be shared with contractors.

Inside the Theater of Operations, DOD is responsible for protecting its troops; however, the military has traditionally viewed protection of civilians and contractors (even those supporting DOD operations) as incidental to its other missions. That this attitude must change is
perhaps acknowledged by the recent DFARS clause 252.225-7040(e)(1), which states that “The Combatant Commander will develop a security plan to provide protection, through military means, of Contractor personnel engaged in the theater of operations unless the terms of this contract place the responsibility with another party.” The requirement to provide a security plan accords with the crucial role that contractors now play in supporting the military and U.S. missions in the Battle Space. If DOD lacks resources to provide security, contingency plans must define alternatives to ensure that other means for providing the requisite protection are made available, so that the DOD missions are not imperiled.

Current policies regarding arming contractor personnel are inconsistent. Some existing military contracts prohibit firearms (even sidearms), presumably because the Government will provide security. At least one contract, in seemingly similar circumstances, mandates employee training in the use of firearms. The new DFARS provisions only address contractor requests to arm employees, DFARS 252.225-7040(j), not the circumstances in which the Government will contractually require contractor employees to be armed, and they do not define how the Combatant Commander will make this decision. This decision may affect the status, under the Law of Armed Conflict, of contractor employees providing vital services to U.S. missions. Although the Army alone may be unable to set DOD policy, as the dominant military presence in many theaters of operations, it and its support contractors would benefit from (and should pursue) clarity on this key point.

In short, DOD policy must recognize that contractors need security to provide essential support services in the Battle Space, and the means to provide that protection must be addressed in military commanders’ operational plans and implemented through consistent contract provisions.

D. Insurance and Third Party Liability

From its inception in 1941, the Defense Base Act (DBA) and its companion laws have provided contractor employees performing contracts overseas workers’ compensation insurance protection for injury or death and their employers with limits on liability. DBA regulatory implementation has evolved over time to largely meet these needs of contractors and the employees performing federal contracts overseas. Nevertheless, there are two facets of this insurance regime that need prompt attention to facilitate use of contractors in the Battle Space.

First, if DOD wishes to increase competition and small business participation in Battle Space procurement, it should encourage insurance pooling arrangements. Larger companies with small proportions of their total workforce performing overseas can self-insure or obtain an endorsement as part of their workers’ compensation coverage. For smaller companies, DBA coverage costs represent significant increases to their existing coverage. Rates for an individual DBA policy for Iraq have been as high as $30 per $100 of payroll. By contrast, USAID has entered into separate requirements contracts with insurance carriers in order to make DBA insurance available to its contractors at affordable rates—under $4 per $100 of payroll. No other agency has followed USAID’s example, although the Corps of Engineers currently has a solicitation pending that goes in this direction.

Second, reconstruction contracting policies, particularly those in Iraq, emphasize employment of local nationals and host-nation or third-country contractors and subcontractors.
Obtaining DBA coverage for these local nationals or non-US contractors and subcontractors has proven difficult. Early consideration of the broader use of the existing omissions in the Theater of Operations may drive costs up and competition down. The United States may enjoy sovereign immunity for acts of negligence by a member of the U.S. armed forces in the Battle Space. When a covered function is contracted out and the same action is taken by a contractor employee, immunity may be lost. See Air Force General Counsel Guidance Document, Deploying with Contractors: Contracting Considerations (November 2003) at 9 (“Even if a contractor performs in accordance with the contract, the contractor may be vulnerable to claims that services in support of a war effort are inherently risky. Poor performance of systems support services (e.g., calibrating a weapon) could result in casualties or fatalities involving the military members using those weapons as well as unintended civilians.”) Contractors holding cost reimbursement contracts will seek to pass on resulting costs to the Government. Those with fixed price contracts will also seek to recover the increased costs, perhaps unsuccessfully, in which event costs of insurance or self insurance will be added to the costs of fixed price contracts.

Addressing the concern about third-party DBA waiver process and appropriate prior planning would make the use of local nationals and non-US contractors easier and more likely.

On a related note, to address contractor liability to third parties for acts in the Battle Space, DOD should encourage the use of FAR clause 52.228-7, Insurance—Liability to Third Persons. This clause provides that contractors may be reimbursed for certain liabilities to third persons arising out of the performance of the contract and not compensated by insurance or otherwise. This clause is specifically endorsed for use in cost reimbursement contracts. We recommend that the clause be expressly endorsed for use in fixed price contracts performed in the Battle Space.

III. Conclusion

The Section appreciates the opportunity to present its views on barriers to integration of contractor personnel and military forces. As this White Paper indicates, there are ways to increase contracting agility in the Battle Space while retaining fidelity to tested and effective procedures across the acquisition continuum. It is a matter of balancing competing interests: those of war fighters, commanders, contractors and their employees, and those who provide oversight.

The Section welcomes the opportunity to discuss the issues with you and your staff in greater depth.

1 We capitalize it and spell it as two words to distinguish it from “battlespace,” which DOD’s Dictionary of Military and Associated Terms, Jt. Pub. 1-02 (as amended through 23 March 2004) defines as “The environment, factors, and conditions that must be understood to successfully apply combat power, protect the force, or complete the mission. This includes the air, land, sea, space, and the included enemy and friendly forces; facilities; weather; terrain; the electromagnetic spectrum; and the information environment within the operational areas and areas of interest.”

2 Contract personnel in the Battle Space come from a variety of organizations and may have contracts and subcontracts with numerous organizations. All these contractors and procuring organizations have different approaches to contract and personnel management as well as the unique issues presented in the Battle Space. This
multiplicity of corporate cultures and procuring organizations contributes to the difficulty in uniformly administering contracts in the Battle Space.

3 We use the definition of Theater of Operations used by DFARS 252.225-7040(a), “an area defined by the combatant commander for the conduct or support of specific operations.” We do so knowing that DOD otherwise defines Theater of Operations as:

A subarea within a theater of war defined by the geographic combatant commander required to conduct or support specific combat operations. Different theaters of operations within the same theater of war will normally be geographically separate and focused on different enemy forces. Theaters of operations are usually of significant size, allowing for operations over extended periods of time. Also-called TO. See also theater of war. (JP 5-0)

theater of war — Defined by the National Command Authorities or the geographic combatant commander, the area of air, land, and water that is, or may become, directly involved in the conduct of the war. A theater of war does not normally encompass the geographic combatant commander’s entire area of responsibility and may contain more than one Theater of Operations. See also area of responsibility; Theater of Operations. (JP 5-0).

DoD Dictionary of Military and Associated Terms (JP 1-02) (12 April 2001 as amended through 23 March 2004). The most apparent substantive difference is that the DFARS deletes the reference to “combat.” When we use Theater of Operations, we assume either combat or other circumstances exist, or are expected to materialize, that will likely make conditions dangerous or austere as alluded to in DFARS 2542.225-7040(b).

4 We use the term “military commander” to refer broadly to a military officer who directly and regularly communicates with contractor employees in the Battle Space about their work in support of that officer’s missions.

5 We suggest this could be done without statutory change to 10 U.S.C. §1724, contracting officer training requirements, because, as proposed, military commanders would not be designated contracting officers and would not be awarding or administering the contracts but only acting in Battle Space areas to provide needed direction within the scope of the pertinent contract. [If the “direction” given the commander would be a breach of the contract, if not followed, without the need for ratification by a contracting officer, the commander is acting as a contracting officer or ultra vires.] Nevertheless, under 10 U.S.C. § 1723, the Secretary of Defense is required to set experience requirements that reinforce the need to give military commanders training.

6 Another alternative would be consideration by DOD of a DFARS adaptation for use in the Battle Space of existing authority under FAR and DFARS Subparts 50.3 for extraordinary contractual actions.


8 The MEJA applies only to felonies and may be unsuitable to less serious discipline matters.


11 USACE Solicitation No. W912HQ-05-R-0004.

12 The Task Force recognizes that U.S. contractors (under both DOD and non-DOD contracts) employ, directly or indirectly through subcontractors, host-country, or third-country nationals. Although military commanders in the Battle Space may not be fully cognizant of the numbers or identities of such non-U.S. workers or possess the ability to screen them for background clearances, security, or health, they do rely on the U.S. contractors to manage these issues and properly identify all of their workers.