September 18, 2006

VIA ELECTRONIC MAIL AND FIRST CLASS MAIL

General Services Administration
Regulatory Secretariat (VIR)
1800 F Street, N.W.
Room 4035
Attn: Ms. Lauricane Duarte
Washington, DC 20405


Dear Ms. Duarte:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. 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 representing 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 Section is authorized to submit comments on acquisition regulations under special authority granted by the Association’s Board of Governors. 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

On July 18, 2006, the Civilian Agency Acquisition Council and the Defense Acquisition Council (the “Councils”) published in the Federal Register a proposed rule, 71 Fed. Reg. 40681, creating a new FAR Subpart 25.3, entitled “Contractors Outside the United States” and an implementing contractual clause at FAR 52.225-XX, entitled “Contractor Personnel in the Theater of Operations or at a Diplomatic or Consular Mission” (Proposed FAR Rule). This new proposal parallels in large part the recently promulgated DFARS Interim Rule (71 Fed. Reg. 34826, June 16, 2006) entitled “Contractor Personnel Authorized to Accompany U.S. Armed Forces.” Because these rules have many similar provisions, we are copying Amy Williams at DoD with these comments. Also, for ease of reference, we have attached the Section’s comments on the DFARS Interim Rule to this submission, and incorporate those comments herein.

Proposed FAR Subpart 25.3 and its implementing clause address how the civilian agencies integrate and manage contractors outside the United States in a theater of operations or at a diplomatic or consular mission. Such deployments involve performance at diplomatic or consular missions or in a military theater of operations, including among others, humanitarian or peacekeeping operations, contingency operations, or other military operations, as defined in FAR 2.101 or in the proposed Subpart.

In implementing the parallel DFARS Interim Rule of June 16, 2006, the Proposed FAR Rule would establish several significant policies that materially affect contractor performance. The Section emphasizes three specific points below. In addition to these comments, the Section attaches a matrix that provides additional comments and compares the Proposed FAR Rule and the DFARS Interim Rule. The parallel treatment in the Proposed FAR Rule and the DFARS Interim Rule means that many of the Section’s comments made on the DFARS Interim Rule apply with equal force to the Proposed FAR Rule.

**One FAR Rule Supplemented by DFARS Rule**

We recommend that the two regulatory councils integrate the Proposed FAR Rule and the Interim DFARS Rule to eliminate redundancy and overlap and to ensure that these rules conform to the normal FAR structure of having a uniform rule for all agencies supplemented as necessary to meet unique agency needs. The

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¹ This letter is available in pdf format at http://www.abanet.org/contract/regscomm/home.html under the topic “Emerging Areas.”
conflicts and ambiguities that combining the clauses might highlight and avoid include:

1. The inadvertent inclusion of provisions in the FAR rule that require the FAR clause to be included in all DoD contracts in which the DFARS clause from the Interim Rule would be included despite the Summary language in the Federal Register that states otherwise. See proposed FAR 25.302-5 and DFARS 212.301(f)(vii) & 225.7402-4 and Item #1 in Attachment A.

2. Questions about when the chief of mission or the combatant commander will have controlling authority. See FAR 25.302-4, 52.225-XX(b)(1)(ii), (d)(4), (i)(1), (l), & (q).

3. The distinction between contractor personnel “authorized to accompany the U.S. Armed Forces” and other contractor personnel supporting U.S. missions in the same area.

Security Support, FAR 25.302-3 and 52.225-XX(c)

Until the last few decades, contractors supporting civilian agencies overseas would generally not need military-type security. Either contractors would not be used in hostile environments or they would provide needed security against criminal acts, but contractor-provided security seldom rose to the level of military-type security. In many conflicts in the 21\textsuperscript{st} century, however, U.S. success in hostile areas\textsuperscript{2} will depend not only on military forces but success of civilian agency missions such as reconstruction, infrastructure support, and democracy-building. The Proposed FAR Rule recognizes this new reality.

Prior to the Interim DFARS rule, the presumption was that DoD provided security for contractors accompanying the force in hostile environments. The Section’s comments on the DFARS Interim Rule suggest that this should remain the presumption. We suggest in regard to the Proposed FAR Rule that when U.S.

\textsuperscript{2} On October 12, 2005, the ABA Section of Public Contract Law sent a letter to Dean G. Popps, Principal Deputy to the Assistant Secretary of the Army, (“Popps Letter”) addressing issues closely related to those addressed in these comments. We attach the Popps Letter for your consideration in amending the Proposed FAR Rule. In the Popps Letter, the Section suggested that DoD define a smaller area, the Battle Space, that might benefit from the application of special rules. In the context of security plans, such a step could help distinguish providing guard services in a quiet area where the principal threats are criminal versus a combat area in which the primary concern is providing protection from attacks by hostile forces implicating the Law of Armed Conflict (“LOAC”). For convenience, this comment will use the phrase “hostile environment” to refer to areas in which the primary security threat is from hostile armed forces and thus military-strength security may be required.
objectives require civilian agencies to deploy contractor personnel into hostile environments, the regulation should require the agency involved, in consultation with the combatant commander, to determine whether security should be provided by DoD or the contractor. This is preferable to having a default position that the contractor will provide its own security. The Councils should reconsider the following factors in formulating the final rule:

1. If contractor personnel are not vital to achieving U.S. missions in the hostile environment, they should be removed from it.

2. If contractor personnel are vital, the Government has a strong interest in ensuring that they have the security necessary to perform and that security is appropriate to the mission. In some cases, U.S. Armed Forces personnel will be more advantageous and in others private security contractors will be.

3. When contractors provide their own security, the Government should coordinate those security forces, other contractor security forces, and DoD Armed Forces to ensure intelligence is shared, resources are applied rationally, rules of engagement are consistent, and to avoid confusion.

Although the Iraq conflict and its aftermath may have strained demands on U.S. Armed Forces manpower, this single conflict should not create a standard requirement for contractors to provide their own security. Each contingency operation presents unique circumstances that, in the Section’s view, preclude an assumption that security will be either Government or contractor provided. We recognize that civilian agencies covered by the Proposed FAR Rule do not maintain security forces. Nonetheless, by engaging contractors to have their employees perform in hostile environments, civilian agencies have determined, at least implicitly, that success of the U.S. mission requires deployment of contractors’ employees for support and justifies the consequent risks. If the Proposed FAR Rule is adopted in this regard, the final rule or accompanying background material should explain why contracting for security services in such environments is generally preferable to making, in consultation with DoD, an individual decision on how to provide security to ensure success of U.S. missions.

The policy on contractor security set out in proposed FAR 25.302-3 and Clause Para. (c) has significant implications and consequences that the Proposed FAR Rule does not address. See also Section comments on the DFARS Interim Rule, attached. These include, but are not limited to, whether the Government should assign its contractors all risks associated with providing security when those
contractors generally will lack knowledge and control of the security environment approaching that of the Government. For example, even with contractor security, no obligation is placed on the Government to coordinate, communicate, or otherwise assist the contractor in meeting its contractual security obligation. There is neither security planning required by the Proposed FAR Rule, nor a requirement to share those plans appropriately with affected contractors. Therefore, not only should the policy be reconsidered, but the Proposed FAR Rule should explain the Government’s responsibilities to contractors when contractors provide their own security. It should also explain how the chief of mission and combatant commander will coordinate to achieve the best use of all security resources to address risks to all U.S. missions.

Contractor and Contractor Employee Liability, Proposed Clause FAR 52.225-XX(i)(5)

Proposed Clause FAR 52.225-XX(i)(5) places unwarranted liability on contractors and their employees when employees use weapons in performing the security obligation the Government places on the contractor in accordance with the Proposed FAR Rule. The provision unnecessarily imperils a contractor’s ability to defend itself from third-party litigation even when the contractor performs in accordance with the statement of work prepared by the Government agency.

Whether or not weapons are Government-furnished, all liability for the use of any weapon by Contractor personnel rests solely with the Contractor and the Contractor employee using such weapon.

Proposed Clause FAR 52.225-XX(i)(5) (emphasis added). The Proposed Clause also states that “The contractor accepts risks associated with required contract performance in [dangerous or austere conditions].” Id. at 52.225-XX(b)(2). This language could have a similar effect.

Taken together these provisions could be interpreted as a blanket, unqualified declaration that all liability and risk, no matter the circumstances, lie with the contractor and its employee. This appears unnecessary to protect Government interests. The Proposed FAR Rule could endanger protections or defenses potentially available under international agreements or international law that would immunize the contractor and its employees or otherwise mitigate their liability. Unless limited, this declaration will allow host nations, U.S. prosecutors, and private plaintiffs, domestically and abroad, to argue that by agreeing to these provisions the contractor has waived otherwise available immunities and other defenses to liability – examples of potentially imperiled immunities and defenses
follow. If an accident were to occur in handling a weapon, the Defense Base Act (42 U.S.C. §§ 1651-1654) (“DBA”) would likely immunize contractors from suit by an injured employee. The DBA also entitles the employee, however, to benefits from the contractor/employer for his or her injury. Likewise, acts of self-defense causing injuries to armed enemy forces or even third-party non-combatants would not automatically place liability on the contractor or contractor employee absent these provisions. In addition, these provisions could imperil immunity under the government contractor defense, immunity under the “combatant activities” exception in the Federal Tort Claims Act, and even adversely affect otherwise applicable indemnification rights.

These risk-shifting provisions could also affect a contractor’s ability to successfully assert the Political Question Doctrine. See, e.g., Whitaker v. Kellogg Brown & Root, No. 4:05-CV-78 (CDL), 2006 WL 1876922 (M.D. Ga. July 6, 2006) (an injury “at the hands of a contractor which is performing military functions subject to military orders and regulations also raises . . . political questions.”); Smith v. Halliburton Co., Civil Action No. H-06-0462, 2006 WL 2521326 (S.D.Tex. Aug. 30, 2006) (“Allowing this action to proceed would require the court to substitute its judgment on military decision-making for that of the branches of government entrusted for this task”). A court could conclude that it need not inquire into the military’s decision-making if the contractor has agreed to accept all liability. These examples demonstrate that the Councils should delete the declaration in Proposed Clause FAR 52.225-XX(i)(5) or substantially rewrite it and the risk acceptance language at Proposed Clause FAR 52.225-XX(b)(2) to meet articulated Government needs without unduly exposing contractors and their employees to liability.

Our comments on similar risk allocation language in the DFARS Interim Rule address these issues more extensively.

Summary

The Proposed FAR Rule significantly changes civilian agency policy. These changes, particularly those involving contractor security and contractor liability, have a direct impact on each contractor’s ability to determine, accept, or mitigate significant risks and imposes on the contractor broad and potentially unreasonable exposure to risk relating to third-party lawsuits. The Proposed FAR Rule places few, if any, obligations on the Government or its contracting officers to assist in managing these significant risks – many of which the Government can control much more effectively than the contractor can.
The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Michael A. Hordell
Chair, Section of Public Contract Law

Attachments:

A. Comparative Matrix of proposed FAR and DFARS
B. Section of Public Contract Law Letter of Comment to the Defense Acquisition Regulations System, dated September 18, 2006
C. Section of Public Contract Law Letter to Dean G. Popps, Principal Deputy to the Assistant Secretary of the Army, dated October 12, 2005

cc: Defense Acquisition Regulations System
Attn: Ms. Amy Williams
OUUSD (AT&L) DPAP (DARS)
IMD 3C132, 3062 Defense Pentagon
Washington, DC 20301-3062

Patricia A. Meagher
Michael W. Mutek
Karen L. Manos
Carol N. Park-Conroy
Robert L. Schaefer
Mary Ellen Coster Williams
John S. Pachter
Council Members
Chair(s) and Vice Chair(s) of the Battle Space and Contingency Procurements Committee
Scott M. McCaleb
ATTACHMENT A
### ABA Section of Public Contract Law
Comparison of Proposed FAR and DFARS Wording
Additional Comments

<table>
<thead>
<tr>
<th>Item No.</th>
<th>FAR Item</th>
<th>FAR Ref.</th>
<th>DFARS Item</th>
<th>DFARS Ref.</th>
<th>Comment</th>
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</table>
| 1.       | **Summary:**
  Addresses contractor personnel in the theater of operations or at a diplomatic or consular mission outside the US, who "are not covered by the DoD clause."
|          | Fed. Reg. text |          |            |            | The DFARS clause must be used in DoD contracts when "contractor personnel accompany U.S. Armed Forces deployed outside the U.S.," DFARS 225.7402-4, in exactly the same instances described in FAR 25.302-5(a). Several provisions of the Proposed FAR Rule refer to the application of the FAR clause to DoD contracts; e.g., FAR 12.301(b)(5), 25.302-1(a), 25.302-5(a). There is no explanation on why or when the DFARS clause would not be used in a DoD contract or, alternatively, how the FAR clause would appear in a DoD contract except in the Summary in the Federal Register, 71 Fed. Reg. 40681. This appears to be an oversight.
  The FAR regulation should contain a clear explanation of when DoD contractor personnel "accompany the force" as opposed to performing work in a theater of operations.
  Presumably, the DFARS clause would be placed in DoD contracts covering the former and the FAR clause covers the latter. The regulation should also address task and delivery orders when the umbrella contract might be issued by a civilian agency, e.g. GSA, but the task order is issued by a DoD agency authorizing personnel to "accompany the force." |
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|          |          |          |            |            |         |</p>
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<thead>
<tr>
<th>2.</th>
<th>DFARS Interim Rule: The FAR Councils state that they considered the DFARS May 5, 2005 final rule.</th>
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<tr>
<td>3. <strong>Role and Authority of the Chief of Mission:</strong> The respective roles of the combatant commander and chief of mission are not adequately distinguished.</td>
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<td>25.302-1 Clause Para (a)</td>
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<td>a. The term “Chief of Mission” is a new term to most government contractors. The definition should be expanded to explain the distinction between an ambassador at an embassy and a chief of mission at a diplomatic or consular mission. The contract clause should also provide a blank to be completed to identify the chief of mission for these purposes in the relevant countries. We also suggest that the Councils consider providing guidance on how the chief of mission may delegate the powers provided under the clause. The Proposed FAR Rule should also avoid requiring a cross-reference to the U.S. Code in the definition of consular or diplomatic mission. Instead, it should state: At a diplomatic or consular mission means any location outside the United States where a Contractor performs a contract administered by Federal agency personnel except employees under the command of a United States area military commander.</td>
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<td>b. As discussed above, the roles of the combatant commander and chief of mission are intermingled in the FAR clause, with both having authority in certain instances, such as compliance with directions (Para (d)), the rules of force in using weapons (Para (i)(3)(i)(B)) or ordering evacuation (Para (l)). A “theater of operations,” where the combatant commander exercises authority will normally overlap with a diplomatic or consular mission where the chief of mission has authority. The expected coordination between the two authorities should be described, and we urge establishing an order of precedence between the two authorities.</td>
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4. **Terms:**
   
   a. **“mission statement”**
   
   Private security Contractor personnel are authorized to use deadly force only when necessary to execute their security mission to protect assets/persons, consistent with the mission statement contained in their contract.

   b. **“area of performance”**

   **Clause Para (d), (f),(j),(o)**

   “mission statement” is used in many locations in the DFARS Interim Rule. [It is also undefined in the DFARS Interim Rule and could cause significant confusion as noted in our comments on the DFARS Interim Rule.]

   The term “theater of operations” is used in the DFARS Interim Rule instead of FAR term “area of performance”

   The term “mission statement” should not be used to substitute for the more commonly used and understood term “statement of work.” For example, elsewhere in the Proposed FAR Rule, the term “statement of work” is used:

   (e) **Preliminary personnel requirements.** (1) Specific requirements for paragraphs (e)(2)(i) through (e)(2)(vi) of this clause will be set forth in the statement of work, or elsewhere in the contract.

   In the DFARS Interim Rule and Proposed FAR Rule, a mission statement authorizes use of deadly force by a private security contractor (“PSC”). Thus, it is possible that something other than a mere statement of work is intended when the rules use “mission statement.” If so, we urge clarification of the rules through definition of “mission statement” and guidance on who may issue a mission statement authorizing use of deadly force by PSCs. Our comments on the DFARS Interim Rule address this issue at length.

   The term “area of performance” is not defined; without a definition, an area of performance could mean anywhere a contractor performs - both overseas and in the U.S. – creating ambiguity. When used in the Proposed FAR Rule, it would appear that “area of performance” can be deleted or the term “theater of operations or diplomatic or consular mission” can be substituted if done so with care.

   The phrase “diplomatic or consular mission” connotes the physical location of the embassy or consulate, which seems more limited than the FAR definition contemplates.

   Accordingly, a more descriptive phrase for the geographical location where the FAR clause should apply would be helpful.
<table>
<thead>
<tr>
<th></th>
<th>Ambiguous sentence:</th>
<th>Clause 25.302-1 Para (b)(1)(ii)</th>
<th>The phrase “when designated by the chief of mission” is unclear as to its meaning and application. Also, it is unclear how the fact that “the contract is administered by federal agency personnel subject to the direction of a Chief of Mission...” signifies that the conditions in that location may require the use of the Proposed FAR clause.</th>
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<td>5.</td>
<td>“This section applies to contracts requiring contractor personnel to perform outside the United States... at a diplomatic or consular mission when designated by the chief of mission.”</td>
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<td>6.</td>
<td>Security Support: “Unless specified elsewhere... the Contractor is responsible for all... security support...”</td>
<td>Clause Para (c)</td>
<td>Similar default to contractor-provided security with explanation of when DoD will provide a security plan and may assume security responsibility.</td>
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<td>The FAR clause states that security is a contractor responsibility. Shifting responsibility to the contractor when a hostile force is operating in the area is a major policy change that the Proposed FAR Rule does not explain. Security for contractor personnel supporting U.S. missions in an area wrought with conflict with armed enemy forces should normally be a DoD responsibility. A detailed discussion addressing shifting risks to contractors in the face of hostile forces is contained in the attached comment letter on the DFARS clause.</td>
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<td>7.</td>
<td>Background checks: Before departing the U.S., the “Contractor shall ensure... all applicable specified security and background checks are completed.”</td>
<td>Clause Para (e)(2)(i)</td>
<td>“All required security and background checks are complete and acceptable.” (emphasis added)</td>
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<td>Clause Para (e)(1)(i)</td>
<td>The DFARS clause could be clearer on who determines what is “acceptable.” Nevertheless, the DFARS clause is clearer than the FAR clause, which omits “acceptability” completely. As written, the use of the employee whose background check revealed material adverse information would still meet the contract requirement.</td>
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<td>8.</td>
<td>Medical Screening: Before departing the U.S., the “Contractor shall ensure . . . all personnel are medically and physically fit and have received all required vaccinations.”</td>
<td>Clause Para (e)(2)(ii)</td>
<td>“All deploying personnel meet the minimum medical screening requirements and have received all required immunizations as specified in the contract. The Government will provide, at no cost to the Contractor, any theater-specific immunizations and/or medications not available to the general public.”</td>
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<tr>
<td>9. Geneva Convention Cards:</td>
<td>Clause Para (e)(2)(iii)</td>
<td>“Deploying personnel have all necessary passports, visas, and other documents required to enter and exit a theater of operations and have a Geneva Conventions identification card...”</td>
<td>Clause Para (e)(1)(iii)</td>
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<td>List of Contractor Personnel: Provide list of contractor personnel in the area of performance.</td>
<td>10. Clause Para (g) Provide list of contractor personnel. “The list shall include each individual’s general location in the theater of operations.”</td>
<td>10. Clause Para (g) The FAR clause requiring the listing of personnel omits the DFARS requirement for providing a general location of each contractor employee. It is not clear why this information is required by the DFARS clause but not the FAR clause.</td>
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<td>Contractor Briefing:</td>
<td>11. Clause Para (f) “The [o]nter [eception] [enter] will . . . brief Contractor personnel on theater-specific policies and procedures.”</td>
<td>11. Clause Para (f)(3) The FAR clause should adopt the DFARS provision for briefing to ensure contractor personnel have the same understanding of applicable policies and procedures as the Government.</td>
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<td>12.</td>
<td><strong>Weapons – Use of force:</strong> Contractor personnel must be adequately trained to use their weapons “[w]ith full understanding of, and adherence to, the rules of the use of force issued by the Combatant Commander or the Chief of Mission . . . .”</td>
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<td><strong>Clause Para (i)(3)(i) (B)</strong></td>
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<td><strong>Contractor personnel must be adequately trained to use their weapons “[w]ith full understanding of, and adherence to, the rules of the use of force issued by the Combatant Commander . . . .”</strong></td>
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<td></td>
<td><strong>Clause Para (j)(3)(i) (B)</strong></td>
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|  | It is unclear the circumstances under which the FAR or another regulation authorizes the chief of mission to issue “rules of engagement.” Additional guidance is needed on when the chief of mission will issue such direction and where the chief of mission can find guidance on setting rules of engagement. Before publication of this proposed rule, the combatant commander was generally considered the ultimate authority within a theater of operations to issue rules on the use of force. Clarifying language should be added so that there is no doubt on what rules for the use of force apply, and the regulation should seek to ensure consistency between those issued by the chief of mission and the combatant commander. It is also important that the regulation establish a means to ensure mission statements for private security contractors are created consistently with these rules of force and remain so.
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<th>13.</th>
<th><strong>Weapons - Liability</strong></th>
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<tr>
<td><strong>Clause Para (i)(5)</strong></td>
<td><strong>Clause Para (j)(4)</strong></td>
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<td>“(5) Whether or not weapons are Government-furnished, all liability for the use of any weapon by Contractor personnel rests solely with the Contractor and the Contractor employee using such weapons.”</td>
<td>The Proposed FAR Rule could vitiate protections or defenses potentially available under an international agreement or international law that could make the contractor and its employees immune or otherwise mitigate their liability. Without further clarification of available mitigation or potential immunity, the language, as written, will allow host nations, U.S. prosecutors, and private plaintiffs, domestically and abroad, to argue that the clause waives otherwise available immunities and other defenses. For example, if an accident were to occur in handling a weapon, the Defense Base Act (42 U.S.C. §§ 1651-1654) would likely protect contractors from suit by the injured employee and the employee would be entitled to benefits for his or her injury under this same federal statute. Likewise, in a self-defense setting, injuries to armed enemy forces or third-party non-combatants would not automatically place liability on the contractor or contractor employee. Moreover, there is no recognition that force could be used appropriately. These sample circumstances demonstrate that deletion or significant revision of this provision is required.</td>
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<tr>
<td>14. Military Clothing: The Combatant Commander may authorize contractor personnel to wear military clothing and they must “wear distinctive patches, arm bands . . . in order to be distinguishable from military personnel . . . .”</td>
<td>Clause Para (k)(1)</td>
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</tbody>
</table>
ATTACHMENT B
September 18, 2006

VIA ELECTRONIC MAIL AND FIRST CLASS MAIL

Defense Acquisition Regulations System
Attn: Ms. Amy Williams
OUSD (AT&L) DPAP (DARS)
IMD 3C132, 3062 Defense Pentagon
Washington, DC 20301-3062


Dear Ms. Williams:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. 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 representing 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 Section is authorized to submit comments on acquisition regulations under special authority granted by the Association’s Board of Governors. 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


Subpart 225.74 of the DFARS regulation, as implemented through a standard clause at 252.225-7040, addresses a key emerging issue: how DoD integrates and manages contractors accompanying U.S. Armed Forces deployed overseas. Such deployments include, among others, peacekeeping operations, declared wars, and other contingency operations as defined in FAR 2.101. Contractor support for deployed forces is now vital to the accomplishment of DoD missions abroad.² In fact, DoD recognizes contractors constitute part of DoD’s Total Force:

The Department’s Total Force – its active and reserve military components, its civil servants, and its contractors – constitutes its warfighting capability and capacity. Members of the Total Force serve in thousands of locations around the world, performing a vast array of duties to accomplish critical missions . . . . [T]he Department’s policy now directs that performance of commercial activities by contractors, including contingency contractors and any proposed contractor logistics support arrangements, shall be included in operational plans and orders. By factoring contractors into their planning, Combatant Commanders can better determine their mission needs.

Department of Defense, *Quadrennial Def. Review Report* at 75, 81 (Feb. 6, 2006).

DoD uses contractors to augment existing capabilities, improve response times, free scarce military logistical assets, and reduce the U.S. military presence

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¹ This letter is available in pdf format at http://www.abanet.org/contract/regscomm/home.html under the topic "Emerging Areas."
² GAO, *Contractors Provide Vital Services to Deployed Forces But Are Not Adequately Addressed in DoD Plans*, GAO-03-695 (June 2003).
when limitations are imposed on the number of military personnel deployable. See Joint Pub. 4-0, Doctrine for Logistics Support of Joint Operations at V-1 (Apr. 6, 2000). Logisticians must “fully integrate, in logistics plans and orders, the functions performed by contractors together with those performed by military personnel and government civilians.” Id., Ch. 5.3.a. (original emphasis omitted). When DoD promulgated Part 225.74 in 2005, it was the first substantial treatment of these issues by the DFARS.

The Interim Rule makes several significant changes in policy that materially affect contractor performance in hostile environments. These changes “implement the policy in DoD Instruction 3020.41 (“DoDI 3020.41”), Contractor Personnel Authorized to Accompany the U.S. Armed Forces, dated October 3, 2005.” 71 Fed. Reg. at 34826. The following discussion addresses these changes as they arise in the Interim Rule.3 We have not limited this discussion solely to changes made by the Interim Rule; in a few instances, we address issues that predate the Interim Rule.4

The Section respectfully submits that the Interim Rule:

1. Fundamentally changes previous key DFARS policy contained in the DFARS final rule and elsewhere on when DoD provides security to contractors and when the contractor must provide its own security without adequately explaining the need for the change or adequately implementing the change in the Interim Rule;
2. Creates a new, undefined category of contractors, Private Security Contractors (“PSCs”), which may provide security to others in limited, but undefined circumstances;
3. Fails to define other key terms and to reconcile various provisions of the Interim Rule, which will create confusion and disputes;
4. Omits important caveats and guidance contained in DoDI 3020.41;
5. Fails to define responsibilities when DoD contracts for services or supplies and services that require contractor personnel to perform in a hostile environment; and

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3 On October 12, 2005, the ABA Section of Public Contract Law sent a letter to Dean G. Popps, Principal Deputy to the Assistant Secretary of the Army, (“Popps Letter”) addressing issues closely related to those addressed in these comments. We attach the Popps Letter for your consideration in amending the Interim Rule.
4 These comments do not address several larger policy issues, such as whether and when the Government should use contractors for security against hostile forces, and if it does, whether the same rules of immunity should apply to those providing security whether or not they are members of the Armed Forces.
6. Unnecessarily imperils a contractor's ability to defend itself from third party litigation even when the contractor performs in accordance with the statement of work ("SOW") that DoD prepared.

The Section appreciates DoD's effort to address these questions and understands the difficulties they present; nevertheless, we urge DoD to suspend implementation of the Interim Rule and to avail itself of the full public comment process. Following the full public comment process is appropriate in view of the fundamental changes to the previous DFARS Final Rule and will surface issues that DoD's internal deliberations on DoDI 3020.41 apparently did not consider. Resolving these matters is important not only to avoid disputes and litigation but also, in this case, to ensure effective contractor support for warfighters.

**Inadequate Explanation for the Changes**

The explanations prefacing the Interim Rule do not adequately justify the significant changes made by the Interim Rule and do not explain why immediate implementation without public input was required. The preface states that the immediate need to conform the 2005 Final Rule to DoDI 3020.41 led DoD to issue the amendments effective immediately. 71 Fed. Reg. 34827 (June 16, 2006). DoDI 3020.41, as an internal DoD instruction, was not published in the Federal Register and was not subject to public comment. The fact that the DoDI was issued over eight months before the Interim Rule suggests suspending the Interim Rule for a reasonable time to analyze public comments and respond with any necessary changes could be accommodated. As explained more fully below, the Interim Rule also departs in crucial respects from DoDI 3020.41. Therefore, the Interim Rule should be suspended until the public comments on it have been addressed and an amended proposed rule is published and finalized.

**Inadequate Definitions**

The Interim Rule, and to some extent the 2005 Final Rule, introduce a number of key terms but fail to define them. In some cases, the Interim Rule seems to create similar terms to those used in DoDI 3020.41. Nevertheless, it neither defines the terms nor explains why they differ from the DoDI. Terms that require definition include:

<table>
<thead>
<tr>
<th>Interim Rule Term</th>
<th>DoDI Term</th>
<th>Comment</th>
</tr>
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<tbody>
<tr>
<td>1 Private security contractor</td>
<td>security services</td>
<td>Undefined in both</td>
</tr>
<tr>
<td>2 personnel authorized to accompany U.S. Armed Forces</td>
<td>contractor contingency personnel</td>
<td>DoDI E2.1.3 defines</td>
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<td></td>
<td>mission statement</td>
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<td>4</td>
<td>essential contractor services</td>
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<td>5</td>
<td>mission essential</td>
<td>not used</td>
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<td>6</td>
<td>security support</td>
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<td>Enemy armed forces</td>
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<td>8</td>
<td>security mission</td>
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<td>9</td>
<td>security plan</td>
<td>security plan</td>
</tr>
<tr>
<td>10</td>
<td>mandatory evacuation</td>
<td>not used</td>
</tr>
<tr>
<td>11</td>
<td>non-mandatory evacuation</td>
<td>not used</td>
</tr>
</tbody>
</table>

The failure to provide definitions for these key terms creates uncertainty and nearly ensures differing interpretations among DoD components and contracting offices, leading to likely disputes and litigation. In some cases, contract performance may be jeopardized.

One example of ambiguity is private security contractor ("PSC"). A PSC could be interpreted to be limited to businesses that have a contract directly with the Government. This interpretation is supported by the capitalized "Contractor" in DFARS 252.225-7040(b)(3), which would seem to identify the business named as the contractor in the prime contract's cover sheet. On the other hand, because DFARS 252.225-7040(q) requires incorporation of the substance of the clause into any subcontract "when subcontractor personnel are authorized to accompany U.S. Armed Forces," such subcontracts will address the use of PSCs. Supporting an interpretation that PSCs could also be subcontractors is the practical implication of having contractors provide their own security in a hostile environment. A contractor may want to subcontract that function to experts in providing such security. Those security firms will be hired to protect "assets/persons," not to defend themselves - except incidentally. But Section (q) of the clause and the regulation do not explain how the clause will be flowed down and when the prime contractor should replace the "Contracting Officer" and other government representatives with its own name as is routinely done with other clauses when they are flowed down into subcontracts. If PSCs may be subcontractors, then a prime contractor could authorize its PSC subcontractor to use deadly force.

A PSC, or a contractor providing its own security, operating in a hostile environment will need to be armed. In some instances, these arms need to go well beyond side arms. The Interim Rule creates a presumption, discussed below, that the prime contractor will provide its own security support, but a contractor will be unable to do so if it may not have employees or subcontractor employees "use deadly force . . . when necessary to execute their security mission to protect
assets/persons" because they will not simply be acting in self-defense. Much of the ambiguity in the Interim Rule could be resolved in definitions of PSC and "mission statement." In this instance, however, in addition to definitions, DFARS language or reference to guidance would likely be needed on:

- the potential implications of arming contractor personnel to perform security in such sensitive environments;
- Law of Armed Conflict\(^5\) ("LOAC") implications;
- the steps the Contracting Officer and the contractor, including PSCs and contractors providing their own security, should take to manage the risks presented; and
- how to tailor the clause for use in subcontracts, particularly if PSCs may be subcontractors.

There are also several terms of art that are undefined in the Interim Rule that likely cannot be defined satisfactorily in the DFARS. Nevertheless, understanding the concepts underlying these terms is crucial to preparing SOWs for and administering contracts that will send contractor employees into hostile environments. These concepts are likely unfamiliar to contracting personnel as well as to many contractors. Thus, the DFARS text should include some discussion of them and the need for contracting personnel to seek advice when dealing with them. Such terms include law of war, law of war protections, and "take a direct part in hostilities;" the latter is perhaps the most important phrase for PSCs and those drafting SOWs or "mission statements" for them. The difficulty of understanding the concept "take a direct part in hostilities," much less defining it for use in a contract clause, is illustrated by the fact that the International Committee of the Red Cross has held three conferences recently for the purpose of defining this term without reaching consensus. <http://www.icrc.org/web/eng/siteeng0.nsf/html/all/participation-hostilities-ihl-311205?opendocument>. Sections 6.1, 6.3.4, & 6.3.5 of DoD 3020.41 provide explicit instructions about the need for legal counsel’s advice to adequately address the many facets of direct participation in the hostilities issue, which the Interim Rule notably lacks. Although this might be considered solely internal guidance, it is important that such guidance be placed or referenced where contracting officers will see it.

\(^5\) DoD often uses the phrase Law of War rather than LOAC. We use LOAC because it conveys the notion in its name that it applies to more than just declared wars or conflicts between states, which is consistent with DoD’s policy of applying the Law of War to all armed conflicts. DoDD 2311.01E, 3.1 & 4.1(May 9, 2006).
Order of Precedence

The Interim Rule does not explain how DoD 3020.41 and other DOD policy apply to contract performance and what controls in the event of a conflict between the contract, SOW, DFARS clauses, DoD Instructions, DoD Directives, or Combatant Commander orders (whether written or oral). An order of precedence is particularly important because the Interim Rule requires in several places that the contractor comply with all such documents and orders. DFARS 252.225-7040(d)(3)(i)(4), (e), (g)(2), & (j)(n)(2). The standard FAR order of precedence clauses, FAR 52.214-29 & 52.215-4, do not cover the full gamut of DoD documents and orders referenced in the clause. We also question whether all the referenced, otherwise internal, DoD policy has been drafted to apply to contractors.

Security Support, DFARS 25.225-7040(c)

Prior to the Interim Rule, DFARS 252.225-7040(c)(1)(i) required the combatant commander to “develop a security plan to provide protection, through military means, of contractor personnel engaged in the theater of operations unless the terms of the contract place the responsibility with another party.” The Interim Rule reverses the previous policy to only require the combatant commander to develop such a security plan for those locations where: (a) “There is not sufficient or legitimate civil authority,” (b) The contractor cannot obtain effective security services; (c) Effective security services are unavailable at a reasonable cost; or (d) “Threat conditions necessitate security through military means.” Even then, a security plan does not require the U.S. military personnel to provide security. See DFARS 252.225-7040(c)(1)(iii) (“in appropriate cases, the Combatant Commander may provide security through military means . . . .”). Requiring contractors to provide their own security in hostile environments has traditionally been the exception, not the rule.

Neither the Interim Rule nor the DoD explains this reversal of policy or how the decision that DoD presumably will not provide the security plan is consistent with protecting contractor resources vital to accomplishing U.S. missions. Although recognizing that temporary exigencies, like those that may exist in Iraq, could require DoD to temporarily have others provide security, those

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6 In the Popps Letter, supra n. 2, the Section suggested that DoD define a smaller area, the Battle Space, that might benefit from the application of special rules. In the context of security plans, such a step could help distinguish providing guard services in a quiet area where the principal threats are criminal versus a combat area in which the primary concern is providing protection from attacks by hostile forces implicating LOAC.

7 This rule should also appear in Subpart 225.74 since it instructs the combatant commander who is not normally thought of as a party to a DoD contract.
exigencies do not explain such a significant, permanent policy change, nor does the Interim Rule rely on those exigencies to justify the change. This change, in association with other aspects of the Interim Rule, has significant implications and consequences that the Interim Rule, the background provided in the Federal Register, and DoDI 3020.41 all fail to address. These implications and consequences include, but are not limited to, whether DoD should assign its contractors all risks associated with providing security when those contractors generally will lack knowledge and control of the security environment approaching that of DoD, and of the status under LOAC of contractor personnel supplying security. This significant permanent policy shift should be subject to further public deliberation before implementation. Until this public process has occurred, the previous version of DFARS 252.225-7040(c)(1)(i) should be reinstated to restore the presumption that the Government will provide security for its contractors.

Other DoD Responsibilities

The DFARS should also direct the contracting officer to ensure that the contractor’s SOW does not require the contractor to violate host nation or international law. This tracks many provisions in DoDI 3020.41 that the Interim Rule omits. The Interim Rule provides that the contractor must itself ascertain all applicable rules governing use of force. DFARS 252.225-7040(j)(3). In contrast, DoDI 3020.41 subparagraph 6.3.5.34 describes the documentation the agency must submit with the request to arm contractor personnel as including:

Documentation of individual training covering weapons familiarization, rules for the use of deadly force, limits on the use of force including whether defense of others is consistent with host nation (“HN”) law, the distinction between the rules of engagement applicable to military forces and the prescribed rules for the use of deadly force that control the use of weapons by civilians, and the Law of Armed Conflict, including the provisions of reference (j) [reference (j) is the Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949].

The Interim Rule should require the contracting officer to provide contractors access to this documentation as finally approved by the combatant commander.

DoD is coordinating responsibilities and functions among the military and contractor security forces in Iraq. DoD should state in the Interim Rule that DoD will similarly coordinate security efforts in future theaters of operations. Although each PSC will have its own relationship with the entity with which it has contracted -- such as DoD, a prime contractor, a subcontractor, or another U.S.
agency -- the Interim Rule names no organization to coordinate the overall activities of these entities and their PSCs to meet U.S. tactical and strategic goals. Requiring a coordinated security plan to address PSCs and contractor security forces throughout the theater of operations and incorporating it into each PSC and contractor’s contract seems only reasonable. Yet neither the DFARS rule nor the Interim Rule addresses this need. The Interim Rule clearly anticipates the use of PSCs but fails to require coordinated contractual treatment, which may create confusion among PSCs and uniformed military forces. A coordination plan also would provide: (i) additional integration into the DoD command structure without fundamentally altering the requirements of individual contracts; (ii) better use of armed resources; (iii) a single source for rules for the use of force; and (iv) feedback to contracting officers from experience across all DoD contracts regarding pre-deployment training to achieve improved, effective contract performance.

Whenever DoD uses PSCs, or it requires contractors to provide their own security, it is important for DoD to have a process by which it communicates and receives threat information to and from contractors operating in the field. Under certain circumstances, DoDI 3020.41 subparagraph 6.3.5.3.3 already requires a communication plan [including] a description of how relevant threat information will be shared between contractor security personnel and U.S. Military Forces, including how appropriate assistance will be provided to contractor security personnel who become engaged in hostile situations.

The Interim Rule should implement this section by requiring development of such a plan and communicating how such a plan will be enforced and by whom.

The Interim Rule also should require that the solicitation state whether DoD will provide a security plan and, if so, the solicitation should include the security plan. The Interim Rule is silent on this key DoD responsibility. If DoD provides the security plan before the award of a contract, a contractor would be able to decide whether to compete for a contract that includes providing the contractor’s own security. If, on the other hand, the contractor must devise its own security plan, then the solicitation should provide sufficient information to allow the contractor to devise an effective plan and to price its proposal to cover security services, insurance, and increased labor expenses. Conversely, issuing a security plan post-award or providing additional or materially different information about security conditions after award would likely require an equitable adjustment. Even with a potential for an equitable adjustment, the contractor may not be willing or able to: (a) undertake the financing of the security operation while the adjustment is prepared and negotiated, (b) bear the additional risk of performance, or (c) make suitable arrangements with a private security firm or its own personnel. Thus,
without careful preaward planning and disclosures, a contractor’s ability to perform could be impaired and may result in serious negative consequences to: (i) the Government (mission failure); (ii) the contractor (loss of revenue, termination, debarment, and third-party liability), and (iii) employees and third parties.

Furthermore, small contractors will be even more significantly impacted than will larger ones if DoD fails to accept these responsibilities because small entities have fewer resources than larger, better financed businesses to take on additional risks and manage additional responsibilities.

**Status of Contractor Personnel under the Law of Armed Conflict**

The Interim Rule has the potential to significantly change the status of contractors in the theater of operations, particularly PSCs. Previous DoD interpretations of international law strictly limited contractors to clearly non-combatant roles and U.S. military practice enforced this role. The changes made by the Interim Rule may enhance the ability of DoD to employ PSCs to provide security for military facilities in hostile areas. Nevertheless, the changes also significantly blur the LOAC protections for all contractor personnel and fail to adequately address how contracting officers, contractors, and military officers are to ensure LOAC violations do not occur. DoDI 3020.41 similarly changes this policy but with many restrictions and caveats that do not appear in the Interim Rule. For example, DoDI 6.3.4.1 provides that “inappropriate use of force could subject” contractor personnel armed for self defense to U.S. or host nation prosecution or civil liability. (Italics added.) The Interim Rule states in 252.225-7040(j)(4): “all liability for the use of any weapon by Contractor personnel rests solely with the Contractor and the Contractor employee using such weapon.” In addition to omitting “inappropriate” as a modifier to use of weapons, the Interim Rule fails to mention that international agreement or international law could make the contractor and its employees immune. The omission of potential immunity will allow host nations, U.S. prosecutors, and private plaintiffs, here and abroad, to argue that the clause required by the Interim Rule waives otherwise available immunities, possibly including combatant immunities.

The Interim Rule should better reconcile fundamental LOAC principles with DoD authorizing contractors to use deadly force. Specifically, the Interim

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8 This part of the discussion focuses on PSCs but similar issues arise for any business providing security where it may engage hostile forces. Nevertheless, since contractors other than PSCs may also face materially differing issues, the Interim Rule should address them separately.

9 In Brian X. Scott, Comp. Gen. Dec. B-298370 (Aug. 18, 2006), GAO concluded that solicitations for services, including guard services, comported with DoD policy. GAO relied on the Interim Rule to limit the RFPS’ requirements to guard and protective services rather than combat services. It
Rule categorizes all contractor personnel as "civilians accompanying the U.S. Armed Forces." DFARS 252.225-7040(b)(3). Current U.S. military joint doctrine uses this phrase at times, but the Interim Rule could be interpreted as implying "civilians accompanying the U.S. Armed Forces" overlaps the well-defined LOAC categories of "combatant" and "non-combatant" or constitutes a new category. Such ambiguity may undermine one of the fundamental precepts of LOAC, the principle of distinction.

Most experts would agree that this principle "lies at the root" of LOAC. The International Court of Justice describes this distinction as an "intrangressible" principle of customary international law. It requires belligerents to distinguish combatants from civilians, and military objectives from civilian objects, and to direct their operations against combatants and military objectives.10

Under Articles 47 and 51 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, entered into force Dec. 7, 1978, civilians who directly participate in hostilities lose their non-combatant status.11 The Interim Rule provides in 252.225-7040(b)(3)(iii) that PSCs may use deadly force against hostile forces:

Private Security Contractor personnel are authorized to use deadly force only when necessary to execute their security mission to protect assets/persons, consistent with the mission statement contained in their contract.

reasoned that DoDI 3020.41 contemplated contractors providing security services; stated such contractors, PSCs, were civilians; prohibited PSCs from participation in preemptive attacks, other types of attacks and mutual defense; and also prohibited PSCs from participating in direct combat activities. GAO also seems to have assumed that guard services in the U.S. equate to guard services in combat zones. The decision does not address the potential conflicts and ambiguities between DoDI 3020.41 and the Interim Rule. The decision also did not expressly address the broader issues of whether DoDI 3020.41 and Interim Rule comport with LOAC.

Thus, by the nature of the work specified by the Government, the Interim Rule authorizes PSC personnel to be armed and to use deadly force to protect assets or persons from enemy forces. The Interim Rule does not limit protected assets or persons to non-military objectives. This omission from the Interim Rule seems to conflict with the Army Field Manual that prohibits use of contractors in a force protection role, Department of the Army Field Manual (FM) No. 3-100.21, Contractors on the Battlefield ¶ 6-1, 6-1 & 6-1, Ch. 6 Intro. (Jan. 2003).\textsuperscript{12} Because a DFARS regulation or clause does not normally override LOAC, particularly when LOAC is embodied in treaties duly ratified by the United States, the Interim Rule or Government-issued SOWs may provide no protection for the PSC.

The Interim Rule should be clarified. Explanations of the importance of, and criteria for, distinguishing the use of force for self defense from protection of other persons or military assets is important to both contracting personnel and contractors. If DoD is to contract with PSCs to “execute their security mission to protect assets/persons,” DFARS 252.225-7040(3)(ii), revisions to the Interim Rule or additional background information should (i) explain how to craft SOWs for protection of other persons or property from hostile forces that do not assign contractors inherently governmental functions and (ii) direct contracting officers (or procurement activities) that they need to consider LOAC implications when drafting SOWs.\textsuperscript{13} Contractors directly participating in hostilities may be considered to be unlawful combatants or “unprivileged belligerents.” Moreover, contracting officers, military commanders, and others who allow or direct participation in hostilities by civilians, may themselves risk criminal sanction under host nation, U.S., or the law of another belligerent nation for contractor actions. The Interim Rule should implement the requirement in DoD 3020.41 subparagraph 6.3.5.1 that the geographic combatant commander obtain advice of legal counsel before authorizing contract security services to guard unique military functions evidenced by explicitly requiring legal analysis of potential issues under LOAC and host nation law.

The regulation should also eliminate all language suggesting that the contractor, including PSCs (but not limited to them), is acting at its own risk as

\textsuperscript{12} Stating this prohibition only in an Army Field Manual, if the contractor is aware of it, gives a contractor no basis to object to a SOW that violates the prohibition. Army Field manuals are also not normally reviewed by those drafting SOWs.

\textsuperscript{13} Further examples of additional issues that should be considered when DoD drafts a SOW for a PSC contract include: ensuring required coverage under the Defense Base Act is not affected because contractor personnel actually engaged in combat could be excluded from coverage; if differing treatment is required for indigenous, third party, or U.S. personnel employed by a PSC; and avoiding contracting for inherently governmental functions or creating personal services contracts without proper authority.
long as it meets the contract terms, only acts in self defense or, for PSCs, acts pursuant to their mission statement. In the words of DoDI 6.3.4.1, PSC personnel may be liable if they use force “inappropriately.” Otherwise, the current Interim Rule could be interpreted as the U.S. disavowing the legitimate actions of the persons performing the work the U.S. obliged them to do and depriving them of otherwise available LOAC protection.

Contractor Relationship with the Host Nation

Contractors accompanying U.S. Armed Forces can be subjected to the terms of the Status of Forces Agreement (“SOFA”) or analogous agreements between the host nation and the United States, which may specify if the host nation will have criminal or civil jurisdiction of contractor personnel. The Interim Rule should provide guidance for future DoD input to SOFAs regarding contractor personnel. It should require that contracts identify the relevant SOFA or state that the SOFA does not cover contractors. This information is not readily available publicly. An analogy from Iraq is Coalition Provisional Authority Orders Number 3\textsuperscript{14} and 17,\textsuperscript{15} which exempt contractors and subcontractors from Iraqi law, including incidents where force is used by contractors for self defense and PSCs as part of their contracts. Future SOFAs should address contractor status issues to set expectations for contractors and host nation police, military forces, and judges.

Explicit Shift of Risks to Contractors

The DFARS should instruct procuring activities on how to recognize, define, and allocate risks of contractor performance in a theater of operations. Instead, the Interim Rule attempts to shift known and unknown, contractor controllable, Government controllable, and uncontrollable risk and liability to the contractor and away from the Government. For example, both the original rule and the Interim Rule provide that “[t]he Contractor accepts the risks associated with the required contract performance in such operations [e.g., in dangerous or austere conditions].” The Interim Rule further adds that “[w]hether or not weapons are Government-furnished, all liability for the use of any weapon by Contractor personnel rests solely with the Contractor and the Contractor employees using such weapon.” Interim Rule, DFARS 252.225-7040(b)(2) and (j)(4). In doing so, as explained below, the Interim Rule conflicts with the Principles of Allocating Risks in Public Contracts as adopted by the American Bar Association, often places risk on the party least able to mitigate the risk, may adversely affect recognized defenses against third party claims, and may adversely affect a contractor’s ability


to enforce an otherwise applicable contractual indemnification. As a result, the impact of the Interim Rule is likely to increase proposed prices to the Government in connection with supporting overseas deployments.

1. **ABA Principles of Allocating Risks in Public Contracts**

The House of Delegates of the American Bar Association has adopted certain principles of risk allocation in public procurement, including that “the parties should, to the maximum extent practicable, (i) clearly identify the risks of performance for both parties, and (ii) allocate those risks and the values exchanged in a commercially reasonable manner, consistent with the broader obligations of parties to public contracts.”\(^{16}\) As the ABA Principles suggest, the Interim Rule should require contracting officers to identify the risks to both parties when contracting personnel deploy with DoD forces. The Contracting Officer should then allocate defined risks to contractors consistently with the contractor’s ability to manage those risks. Potential competitors may be wary of submitting bids and proposals for contracts that allocate to them risks that contractors cannot manage. Those companies that do compete may dramatically increase proposed prices to cover these risks, which ultimately increases the Government’s costs. Shifting ill-defined and unmanageable risks to the contractor is also of concern because in battlefield conditions, contractor failure to perform due to such risks could have much more significant consequences.\(^{17}\) The Interim Rule’s failure to provide better instructions on risk identification, definition, and allocation may lead contracting personnel to devote insufficient resources to mitigating risks, particularly those that only the military or combatant commander can materially address, thus increasing government costs and performance problems that could affect mission outcomes.

2. **The Risk-Shifting Provisions and Defenses to Third Party Claims**

Before promulgation of the Interim Rule, contractors received immunity in civil actions derived from the federal government’s immunity on the basis that state tort law should not impede the contractors’ support of the warfighter. See, e.g., *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992) (state tort action preempted by “combatant activities” exception under the Federal Tort Claims Act in connection with civil action against manufacturers of the Aegis weapon system used by the U.S.S. Vincennes to shoot down a Iranian civilian aircraft); *Bentlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486 (C.D. Cal. 1993) (government contractor

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\(^{16}\) Available at: http://www.abanet.org/contract/admin/riskprin.html

\(^{17}\) The Interim Rule should also provide means to allow equitable adjustments when increased, decreased, or unexpected hostilities require or allow material changes in anticipated security operations in a theater of operations.
that manufactured Maverick missile cannot be held for deaths of American military personnel arising from combat activities. The reasons for granting contractors immunity in these cases include: (1) the federal interest in determining the duty of care in combat; (2) the military’s interest in controlling military policy during war; (3) a concern that exposing government contractors to tort liability would place undue pressure on manufacturers to act too cautiously, contrary to the national interest; and (4) that the Government is in the best position to deter wrongful activity by contractors. *Bentzlin*, 833 F. Supp. at 1492-1494; *Koohi*, 976 F.2d at 1336-1337.

Nevertheless, when the Interim Rule states that the contractor “accepts the risks” of operating in “dangerous and austere conditions” and that “all liability for the use of any weapon . . . rests solely with the Contractor and the Contractor employees,” a reviewing court could interpret these provisions as a decision by DoD that contractor liability to third parties, including that under state tort law, will not adversely affect DoD’s military policy and wartime efforts. Except for these provisions in the Interim Rule, there is no indication that DoD intended that the Interim Rule affect a contractor’s ability to defend against third party claims. If, however, DoD fails to provide a clarification on this point, the Interim Rule could undermine the potential defenses mentioned above as well as have an unpredictable effect on the “government contractor defense” under *Boyle v. United Technologies*, 487 U.S. 500, 108 S. Ct. 2510 (1988), thus compelling contractors to perform to minimize their exposure to civil suits and potential tort liability. If DoD’s primary interest in promulgating the Interim Rule’s risk-shifting clauses is to limit further federal government liability beyond existing immunities and to avoid contractor claims, it can do so without potentially undermining existing defenses to third party claims that may be available under existing case law. One step toward preserving any existing defenses would be to add to the DFARS 252.225-7040 an express statement that

Nothing in this clause should be interpreted to affect any defense or immunity that may be available to the contractor in connection with third party claims.

At a minimum, a statement to such effect should be included in the regulatory preamble when promulgating the final rule. Changes to the troublesome language itself to more clearly achieve DoD’s goal would be clearly preferable. Without such clarifications, contractor performance could be impacted and support to the warfighter impaired.
3. *The Risk-Shifting Provisions and Indemnification*

The same risk-shifting provisions in the Interim Rule could also adversely affect indemnification otherwise available. For example, the Government provides limited indemnification under FAR 52.228-7, Insurance—Liability to Third Persons, but that clause contains the proviso that a

Contractor shall not be reimbursed for liabilities (and expenses incidental to such liabilities) . . . [f]or which the Contractor is otherwise responsible under the express terms of any clause specified in the Schedule or elsewhere in the contract . . .

FAR 52.228-7(e)(1).

The risk-shifting provisions in the Interim Rule could be interpreted to constitute areas “for which the Contractor is otherwise responsible” for purposes of FAR 52.228-7(e)(1), resulting in indemnification being unavailable (e.g., in connection with third-party tort liability arising from operating in dangerous and austere conditions or the use of a weapon).

Likewise, the provisions stating that a contractor accepts certain risks and liability could be the basis to deny a pre- or post-award request for indemnification under Public Law 85-804. If DoD did not intend this, we recommend that the clause include the following statement (or modify the similar recommended statement above to be in accord):

Notwithstanding any other term in this contract, nothing in this clause should be interpreted to enlarge or diminish any indemnification a contractor may have under other terms of this contract or as otherwise may be available under law.

At a minimum, a statement to such effect should be included in the regulatory preamble when promulgating the final rule. Such a statement in the regulatory history of the rule will provide guidance to both contracting officers and contractors in connection with negotiating specific contract language to address this issue on a case-by-case basis.

**Conclusion**

The Interim Rule’s revisions to DFARS 252.225-7040(c), as well as the similar changes made in DoDI 3040.42 issued in October 2005, significantly change DoD policy. Absent a clear, published justification, the Interim Rule should not have been made effective without opportunity for public comment.
Indeed, the change has a direct impact on each contractor’s ability to determine, accept, or mitigate significant risks; some will argue that it imposes on the contractor broad and potentially unreasonable exposure to risk relating to violations of the LOAC, other international laws, and third-party lawsuits. It puts no responsibilities on DoD or its contracting officers to assist in managing these risks – many of which DoD can control much better than the contractor and many of which are addressed in DoDI 3020.41. Thus, although we commend DoD for addressing these difficult issues, their complexity supports our recommendation that DoD suspend implementation of the Interim Rule pending publication of proposed amendments to the Interim Rule and resolution of comments received.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Michael A. Hordell
Chair

Attachment: Letter from Public Contract Law Section to Dean G. Popps, Principal Deputy to the Assistant Secretary of the Army, dated October 12, 2005.

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    Chair(s) and Vice Chair(s) of the Battle Space and Contingency Procurements Committee
    Scott M. McCaleb
ATTACHMENT C
October 12, 2005

VI A 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/vecgeom/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,

[Signature]

Robert L. Schaefer
Chair, Section of Public Contract Law

cc: Michael A. Hordell
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Procurement Task Force
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, JP4-0, 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. JP4-0, 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 stove-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 Sourcings 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.saatt.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 committing 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
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, Jr. 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).

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 252.225-7040(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.