Provincial Reconstruction Team with contractors at bridge-repair job site, Zabul province, Afghanistan. (U.S. Air Force photo)

Chapter 7

Contract competition, management, and enforcement are ineffective

Contract competition, management, and enforcement are ineffective

Agencies have faced unique challenges in trying to make peacetime practices regarding contract competition, management, and enforcement apply in Iraq and Afghanistan. They will likely face the same challenges in future contingencies. The need to accomplish missions in Iraq and Afghanistan with constrained resources has led to the award of contracts using procedures that have not resulted in effective competition.

The federal-procurement system is founded on three fundamental tenets that are as relevant in contingency contracting as in peacetime operations:

- full and open competition under which all responsible firms are allowed to participate;
- transparency through public notice of the U.S. government's requirements and awards; and
- process-integrity that is consistently enforced through policies and laws on ethical behavior, timely audits, and contract oversight.

Acquisition managers, overloaded with work, have not focused on recording and using contractor-performance evaluations as they might in peacetime, with the consequence that local, third-country, and U.S. contractors performing in Iraq and Afghanistan may escape agency oversight and law enforcement. The current contingencies have created a number of distinct problems:

- Unprecedented reliance upon a single-award task-and-delivery-order contract—such as the Logistics Civil Augmentation Program (LOGCAP) III contract—often undermines effective competition. Unless multiple contractors compete for task orders, it is difficult to obtain the best pricing or performance.
- The Defense Contract Audit Agency (DCAA) has accumulated a backlog of billions of dollars in unaudited contingency-contract costs.
- Portions of contract payments made to Afghan subcontractors were diverted to the insurgency—a problem that U.S. enforcement efforts are not yet equipped to handle.

Acquisition managers, overloaded with work, have not focused on recording and using contractor-performance evaluations as they might in peacetime.

- Agencies' failure to record contractor-performance assessments has serious consequences. Without the necessary insight into contractor performance, the risk of agencies' awarding contracts to habitual poor performers increases.
- For contractors performing in Iraq and Afghanistan, the United States may have no tool better than effective use of the suspension or debarment process; however, full-scale suspension and debarment procedures cannot be applied effectively in contingency environments.

In its second interim report and again here, the Commission recommends a number of improvements to contingency contracting to promote adherence to the fundamental tenets of the procurement process.

Contingency-contracting competition is ineffective

Dynamic contingency operations generate rapidly changing support requirements that must be met within short timeframes. Effective competition motivates contractors to provide fair pricing, best value, and quality performance. On the other hand, the tension between a contractor's motivation to make a profit and the demand for good performance still exists.

The lessons from contingency contracting in Iraq and Afghanistan are that agencies have not effectively employed acquisition-management strategies that balance the United States' interests with contractors' competing objectives.

Afghan contractors registering so they can compete for contracts, Lashkar Gah, Afghanistan. (U.S. Marine Corps photo)

Policies and practices hamper competition

Several policies and practices hamper competition in a contingency environment. Despite a more mature contracting environment in Iraq and Afghanistan today, Defense, State, and USAID still do not consistently emphasize competitive-contracting practices. Some of the agencies' procurement and acquisition strategies have restricted competition and favored incumbent contractors, even those with demonstrated performance deficiencies.

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Agencies have repeatedly:

- awarded long-term task orders that were not recompeted when competitive conditions improved;
- extended contracts and task orders past their specified expiration dates, increased ceilings on cost-type contracts, and modified task orders and contracts to add extensive new work;
- favored using existing task- and delivery-order contracts like LOGCAP over creating more competitive and targeted contract vehicles;
- used cost-reimbursable contract types even though simpler, fixed-price contracts could expand the competitive pool; and
- failed to record incumbent contractors' performance assessments in the federal past-performance database.

Federal agencies often rely on pre-existing task-order contracts and non-competitive awards to meet urgent, mission-critical needs. Agencies award "base" contracts for an indefinite quantity or schedule of work, then issue task orders against the contracts that include specific requirements and detailed terms and conditions. Inadequate competition is the result of awarding both the base contracts and the task orders issued against these contracts.

Contracting officers and contractors alike find it convenient to award task orders even though they often are awarded with inadequate competition, involve non-competitive sole-source contract modifications that extend the period of performance, and are awarded after only a single acceptable offer.

Much of the contingency-support requirements in Iraq and Afghanistan and in future contingencies will be met through the use of task- and delivery-order

contracts. Failure to maximize the use of multiple-award task- and delivery-orders rather than single-award contracts and to establish requirements that increase the ability of more than one contractor to compete meaningfully is simply inefficient.

Competition advocates have not effectively enhanced contingency-contract competition

As contingency operations have stabilized, agencies have not adequately revised their traditional contingency-contracting approaches to introduce competition into many long-term support contracts.

- In Afghanistan, the Army twice modified its 2007 contract for interpreters instead of recompeting new requirements worth billions of dollars.[1] Contracting officers' ad hoc decisions to extend contracts demonstrated a failure to consider overall competition goals.
- Under State's critical Iraq police training contract, the agency circumvented the requirement for "fair opportunity" by awarding task order 1436, worth $1.4 billion, without competition.
- Under the terms of the multiple-award LOGCAP IV contract, task orders are awarded for five-year periods (a base year plus four one-year options). Although DynCorp, KBR, and Fluor compete for task orders under the contract, the competition is limited and inadequate. The LOGCAP IV acquisition strategy provides little incentive for contracting officers to break out subcontracts or separately compete new requirements.
- For many years, the U.S. Army used the LOGCAP III contract for its logistics support in Iraq. LOGCAP III was a competitively awarded contract that was awarded to a single firm. Under this long-term contract, agencies' requirements were met through non-competitive task orders. Single-award task order contracts and frequent exceptions to competition illustrate the need to set and meet competition goals for contingency contracts.

As contingency operations have stabilized, agencies have not adequately revised their traditional contingency-contracting approaches to introduce competition into many long-term support contracts.

Agency competition advocates are responsible for monitoring and reporting aggregate rates of competition. Yet current reporting requirements do not carve out separate categories for contingency construction, services, or supplies. Combining these categories for measurement purposes misstates the true extent

1. The Federal Business Opportunities website has posted justification and approval documents for both extensions.

of competition and prevents officials from focusing on those areas that need improvement.

Competition can be enhanced by looking for opportunities to transition cost-type to fixed-price contracts that may broaden the pool of qualified contractors to include those whose business systems do not meet the standards for a cost-type contract. The prospect of enhanced competition can motivate contractors to continuously improve their performance.

The House of Representatives, in its version of the National Defense Authorization Act for FY 2012, H.R. 1540, included key Commission competition recommendations regarding the establishment of competition goals and measures, as well as reviews and reports on competition levels. The Senate Armed Services Committee's version of the Act for FY 2012, S. 1253, section 821, also included a provision addressing the Commission's recommendations concerning past performance. The Office of Federal Procurement Policy also supports the Commission's competition recommendations.

Competition that is merely illusory undermines the U.S. government's ability to obtain the best value for taxpayers' money and to foster excellent contractor productivity and performance innovation.

State and USAID have recognized the merits of the Commission's competition recommendations, but both agencies questioned the practicality of applying the procedures during contingency operations. Therefore, the Commission re-emphasizes the need for competition reform. Prompt development of acquisition strategies along the lines of the Commission's reform proposals will lead to greater competition during contingencies.

Competition that is merely illusory undermines the U.S. government's ability to obtain the best value for taxpayers' money and to foster excellent contractor productivity and performance innovation. Defense recognized that it had not been taking advantage of the potential savings and performance improvements provided by effective competition. In September 2010, Defense implemented reforms to reduce the incidence of one-offer competitions. Other agencies have yet to place a similar emphasis on competition policy.

Accordingly, the Commission reiterates its previous recommendations for congressional direction to agency heads:

► RECOMMENDATION 10

Set and meet annual increases in competition goals for contingency contracts

Agency heads should:

- require competition reporting and goals for contingency contracts;
- break out and compete major subcontract requirements from omnibus support contracts;
- limit contingency task-order performance periods;
- reduce one-offer competitions; and
- expand competition when only one task-order offer is received.

Because of agencies' failure to conduct contractor-performance assessments or record them in government-wide databases, agencies lack the necessary insight into contractor performance and have an increased risk of awarding contracts to habitual poor performers.

Current contract enforcement tools are inadequate to protect government interests

Agencies can improve their ability to conduct meaningful contract competitions if they consistently conduct and record contractors' performance assessments in the federal past-performance database, and use the performance information when making source-selection or suspension-and-debarment decisions.

Agencies do not effectively use past-performance data in contingencies

A Commission hearing in early 2011 confirmed its earlier conclusion that the required performance assessments are not completed and that contractors' performance in a contingency is not adequately shared across agencies.[2] Because of agencies' failure to conduct contractor-performance assessments or record them in government-wide databases, agencies lack the necessary insight into contractor performance and have an increased risk of awarding contracts to habitual poor performers.

2. Commission hearing, February 28, 2011.

Contractor appeals of performance assessments distract contracting officers in contingencies and effectively discourage candid evaluations. Senior leaders have failed to enforce the requirement to conduct or record contractor assessments.

After considering comments received from contractors and agency officials, the Commission reiterates its previous recommendations that Congress direct agency heads to:

► RECOMMENDATION 11

Improve contractor performance-data recording and use

- Allow contractors to respond to, but not appeal, agency performance assessments.
- Align past-performance assessments with contractor proposals.
- Require agencies to certify use of the past-performance database.

Agencies do not use suspension-and-debarment processes to full effect

Suspension and debarment can be powerful tools to protect the government's interest in doing business only with contractors capable of performing their contractual obligations and maintaining acceptable standards of behavior. The opportunity costs of a suspension or debarment are very high for government contractors.

Nevertheless, agencies sometimes do not pursue suspensions or debarments in a contingency environment, preferring instead to enter into administrative agreements. In November 2010, the Louis Berger Group entered into a deferred-prosecution agreement with the Department of Justice after allegations of massive fraud. USAID did not suspend the firm. Instead, the agency entered into an administrative agreement which allowed the firm to continue competing for federal contracts.

When agencies fail to suspend contractors from participating in the federal marketplace despite chronic misconduct, criminal behavior, or repeated poor performance, the deterrent threat is lost.

Agency officials cite the complexity of suspension-and-debarment procedures as a reason for not using the tools as often as they could. In some circumstances, regulations provide contractors who have been proposed for suspension or debarment the opportunity to request a hearing on disputed facts before the agency takes final action. The Commission found that it is extremely difficult, if not impossible, to locate and

present witnesses and essential evidence in support of a suspension or debarment based on disputed facts in a contingency environment.

In addition, when officials determine that a recommendation to suspend or debar a contractor will not be pursued, they often do not record their justification. Documenting determinations and findings is not a burden, and is standard practice for most agencies. Further, the requirement for a written justification for not taking action applies only to official recommendations such as those by inspectors general or contracting officials.

U.S. government has limited jurisdiction over criminal behavior of foreign contractors

Contingency operations and programs that expend huge sums of money over a short period of time have not employed effective tools and oversight techniques to minimize contract waste, fraud, and abuse. Contingency operations in Afghanistan are under special pressure to control the diversion of funds from contractors or subcontractors to insurgents.

In contingencies, the government depends on foreign contractors to a degree never seen in normal contracting, yet lacks the strong legal tools to deal with them. At a Commission hearing in June 2011, the Under Secretary of State agreed to pursue recovery of $132 million from the firm First Kuwaiti for deficiencies in contracts for the design and construction of the new embassy compound in Baghdad. This was first reported in 2009. State's failure to recover the money points to a need for stronger tools for dealing with foreign contractors.

Afghan contractors, Musa Qa'leh, Afghanistan. (U.S. Marine Corps photo)

The government has not made full use of its recently developed system for vetting contractors to determine if they have known connections with the insurgency. The current Joint Contingency Contracting System tracks prime contracts, but not subcontractors. Subcontractors in Afghanistan are often small Afghan firms that pose a risk of being connected with "bad actors."

Termination of contracts and subcontracts with insurgent-connected firms without further payments being made to them is difficult. However, the House

of Representatives has included a provision in its version of the National Defense Authorization Act for FY 2012, H.R. 1540, section 821, that would void contracts with such entities. The Senate Armed Services Committee's version of the Authorization Act, S. 1253, contains a similar provision at section 861.

Claims against foreign prime contractors and subcontractors have gone unaddressed because the U.S. courts lack personal jurisdiction over the foreign defendants.

Investigating and prosecuting procurement-related crimes and other misconduct serve as powerful deterrents to contingency-contract waste, fraud, and abuse. This deterrent effect is especially important in the early stages of a contingency, when contractors perform in a rapidly changing environment and under limited government oversight. Deterrence is especially critical in large-scale contingencies, such as Afghanistan, where agencies need reliable investigation and prosecution tools to deal with a number of big contractors whose inadequate business systems put large-scale contracts at risk.

Claims against foreign prime contractors and subcontractors have gone unaddressed because the U.S. courts lack personal jurisdiction over the foreign defendants. Without establishing personal jurisdiction, attempts by the United States and other parties to recoup damages for civil-contract claims, and for private parties to recover on tort claims arising out of conduct related to government contracts, are protracted and expensive for all parties involved. Foreign courts may

Iraqi children surround donkey cart, Biaj, Iraq. (U.S. Navy photo)

be unavailable, unreliable, or otherwise unable to hear these claims. United States criminal jurisdiction over non-Defense contractors and subcontractors operating overseas also remains uncertain.

Contributing to the difficulty of prosecuting procurement-related crimes is the challenge of gathering evidence in contingency environments. The chaotic conditions of war zones often impede quick investigative responses. Investigative agencies are often unable to access information, physical evidence, and witnesses in a timely manner.

Contracting officers need a full array of tools for dealing with foreign or local contingency subcontractors. These firms come from an entirely different culture than that of the United States and they perform in a chaotic and unpredictable environment. Contracting officers need better visibility into subcontractor performance, as well as tools for intervening to avoid contract waste and fraud such as these:

> **$400 million Defense (Army) LOGCAP III contract**—The Tamimi subcontractor-kickback scandal detailed in Chapter 3 provides a strong example of the difficulties of investigating foreign subcontractors.
>
> **$17.6 million Defense (AFCEE) infrastructure project**—The Air Force subcontractor, ENCORP, failed to pay its second-tier subcontractors, and the ENCORP owner fled the country with around $2 million. As detailed in Chapter 3, poor oversight and management of foreign subcontractors resulted in a delay of this important project for more than a year.

Exploitation of persons in contingency contracting remains a serious problem in Iraq and Afghanistan

At many times during its travels and hearings, the Commission uncovered tragic evidence of the recurrent problem of trafficking in persons by labor brokers or subcontractors of contingency contractors.[3] Existing prohibitions on such trafficking have failed to suppress it. Labor brokers or subcontractors have an incentive to lure third-country nationals into coming to work for United States contractors, only to be mistreated or exploited.

Some prime contractors, although not themselves knowingly violating the prohibitions on trafficking, have not proactively used all their capacities to supervise their labor brokers or subcontractors. For such prime contractors,

3. Commission hearing, July 26, 2010.

agencies have not effectively applied positive and negative incentives in the contracts they award.

The Commission identified the need for a number of important changes to foster competition, improve contract management, and assure compliance in a contingency environment. If implemented, these changes will save billions of dollars and lead to more effective contingency contracting and accountability.

Accordingly, the Commission reiterates several recommendations from its second interim report and offers two new recommendations to strengthen contract-enforcement tools.

► RECOMMENDATION 12
Strengthen enforcement tools

- Facilitate the increased use of suspensions and debarments for contingency contractors by revising regulations to lower procedural barriers and require a written rationale for not pursuing a proposed suspension and debarment.[4]
- Make consent to U.S. civil jurisdiction a condition of contract award.
- Expand the power of inspectors general.
- Amend acquisition regulations to require contracting-officer consent for the award of subcontracts valued at or above $300,000 to foreign companies when performance will predominantly be conducted overseas in support of contingency operations.
- Direct agencies to incentivize contingency contractors to end trafficking in persons by labor brokers and subcontractors by requiring prime contracts to include performance incentives, such as award fees, and mandate that an assessment of contingency contractors' management of trafficking in persons be included in performance assessments.

4. In its February 2011 interim report, the Commission recommended mandatory suspension for contractors indicted on contract-related charges. Following additional research and deliberation, the Commission has withdrawn that provision from its recommendations to strengthen enforcement.

Contract management and administration resources are insufficient to conduct overseas-contingency operations

Contingency-contract management problems extend far beyond contract auditing within a single department. As previously established in Chapter 2, affected federal agencies do not have adequate and deployable contracting capabilities. They continue to struggle with an absence of strategic planning and the lack of a dedicated budget to support related human-resources and information-systems requirements. Significant monetary returns will be realized by investment in additional staff and resources to conduct contingency contracting.

Contractor business systems and access to contractor records are ineffectual

Following a Commission hearing and special report in 2009, Congress in the National Defense Authorization Act for FY 2011 authorized Defense to withhold payment to contractors with inadequate business systems as a means of protecting U.S. government interests and compelling contractor compliance. Still, the new rules under that Act cannot serve as a meaningful incentive unless payments are actually withheld upon the recommendation of auditors.

Significant monetary returns will be realized by investment in additional staff and resources to conduct contingency contracting.

Authorizing civilian agencies to take similar measures regarding payment withholds would promote a government-wide approach to addressing problems related to contractor business systems. Withholds in defense and civilian agencies alike would also motivate contractors to shift priorities and make necessary business-system investments to assure agencies that contractor costs are accurate and reliable.

Access to contractor records and review of contractor business systems can also serve the government well in overseeing contractors, an always-challenging task in the chaos of contingencies.

In addition, expanding access to contractor records will help ensure that government audits are performed more efficiently and effectively and are directed at areas of greatest risk to the government in contingencies. Auditors could use such information to reduce the amount of labor-intensive audit-testing required to accept contractor costs. Benefits would include reducing resource requirements for both government and industry, as well as reducing the potential for contract waste and fraud.

DCAA and DCMA are understaffed to support operations in Iraq and Afghanistan

The benefit of conducting contingency-contractor performance oversight more effectively was reported recently by the Defense Contract Audit Agency (DCAA): a net savings of $2.9 billion that equates to a return on investment of $5.20 for every $1 invested in the agency.

Civilian contractor, Al Asad Air Base, Iraq. (U.S. Marine Corps photo)

The current unaudited backlog stands at $558 billion, having risen sharply from $406 billion in only nine months. At current staffing levels, DCAA has reported that the backlog will "continue to grow virtually unchecked" and will exceed $1 trillion in 2016.[5]

DCAA reports that long delays in performing audits increase the difficulty of locating the documentation necessary to conduct incurred-cost audits and further postpones the recovery of any unjustified payments on behalf of the taxpayers. Contractors are also concerned by long delays as the burden falls on them to maintain and produce records covering many years, and complicates their own cash management because of potential future outlays that may result from long-overdue audits. Since the historical return on incurred cost audits ranges from 0.2 percent to 0.4 percent of total dollars audited, reducing the entire $558 billion backlog would save $1.1 billion to $2.2 billion.

At current staffing levels, DCAA has reported that the backlog will "continue to grow virtually unchecked" and will exceed $1 trillion in 2016.

A recent independent study by the Army Force Management Support Agency recommended that DCAA would need a total workforce of 6,250 by 2015 to accomplish its mission. Defense is committed to fund additional staff for DCAA by that date, which would bring its total workforce to 5,700 personnel, of which 5,100 would be auditors. These increases would help reduce the backlog by providing the additional auditors who would be needed in a contingency environment. Nevertheless, Defense has not funded these increases for fiscal year 2012;

5. Defense Contract Audit Agency Manpower Study, 9.

moreover, the contemplated increases still appear to be insufficient to meet DCAA's needs, and funding could be reduced as a result of any future cuts in the Defense budget.

State and USAID have well-documented requirements for additional contingency staff to perform program management, contract oversight, and related activities. They rely upon their existing resources and in some cases on DCAA and Defense Contract Management Agency (DCMA) for operational contract support.

DCMA needs more deployable administrative contracting officers, contract administrators, quality-assurance representatives, and other technical personnel to effectively meet their customers' requirements. Given the current environment, in which the career workforce is shrinking, it will be necessary to draw military and civilian contracting officers, contract specialists, cost and price analysts, and procurement attorneys from various acquisition commands and U.S.-based procurement organizations to fill critical slots overseas.

Executive agency and military leadership, with the support of Congress, must effectively address contingency contracting as a core function and provide the requisite management changes and funding support for all agencies participating in the national-security mission. The initiatives set forth in this chapter represent a substantial investment in capabilities for future operations for all affected agencies and organizations. To reach full effect, these changes should be made from a whole-of-government standpoint, increasing each element's ability to support the other. A piecemeal approach will result in piecemeal solutions that will not bring about meaningful change.

► RECOMMENDATION 13

Provide adequate staffing and resources, and establish procedures to protect the government's interests

- Strengthen authority to withhold contract payments for inadequate business systems.
- Amend access-to-records authority to permit broader government access to contractor records.
- Increase agencies' staff and resources to enable adequate management of all aspects of contingency contracting: financial management, acquisition planning, business-system reviews, source selection, incurred-cost audits, performance management, property management, contract payment, and contract close-outs.