

ENCLOSURE 8

Guidance for Risk Assessments

1. Risks to Command and Control of Military Operations and Crisis Situations. During peacetime, use of contract support in physical security activities at installations and support elements in operating forces might provide a cost-effective, risk-free alternative to in-house performance. However, circumstances in peacetime are significantly different than in a crisis, mobilization, or war. When there is concern about a contractor's continued performance of critical support services during a crisis, the military commander shall review the risks and, if necessary, switch to an alternative source of support. Unless a review of the risks indicates the support function should be exempt from private sector performance, it shall be coded for review for conversion to private sector performance. Decisions concerning operating forces and attendant risk assessments are assessed during the planning process of the Joint Strategic Planning System as required by DoD Instruction 3020.37. DoD Components shall consider the following factors when conducting risk assessments. (This list is not all-inclusive and should be expanded to address the specific activity under review.)

1.1. Consequence. Risks must be assessed in enough detail to permit decision-makers to judge the consequences to both the support mission and the missions dependent on that support. The more catastrophic the consequence of contract default, the greater the risk. For instance, combat mission failure and loss of life are severe consequences, while loss of quality of life (QOL) support services (e.g., loss of dry cleaning or mail services) is not. Also, loss of support elements that augment or enhance operations in theater during a conflict often have minor impact on combat operations. For example, loss of host nation support used to control local populations and augment military security at compounds and airfields during a military operation would have limited consequence to combat operations. Also, loss of forward deployed depot operations performed in theater independent of military operations would have limited impact on combat operations. Sufficient military force structure should be retained when the risks are high and the consequences catastrophic.

1.2. Readiness. Military commanders are responsible for the readiness of all essential support services in the operating forces, including contract support. This responsibility is inherently governmental and cannot be transferred to the private sector.

1.2.1. The less information the commander has to assess the readiness of contract support elements, the greater the risk. When conducting risk assessments, the following should be determined:

- whether readiness reporting (1) is required for in-house performance of the same function or task; (2) can be addressed to the

commander's satisfaction by the contractor under the terms of the contract; and, (3) is critical to the commander's ability to assess the probability of contract default; and,

- whether there are records indicating performance, non-performance, or default by the contractor performing the support service under environmental conditions and threat levels anticipated by the commander.

1.2.2. The fewer alternatives the commander has for replacing lost support, the greater the risk. When conducting a risk assessment, the following should be determined:

- whether an alternative source of support can be obtained from the private sector in sufficient time. The higher the number of like-vendors that can provide the support service, the lower the risk of using contract support.
- whether an alternative source of support can be obtained from within the Department in sufficient time. The higher the number of in-house sources (military or civilian) that can perform the support service, the lower the risk of using contract support.
- whether military personnel can be retrained or trained in sufficient time to perform the function. The shorter the required training time, the lower the risk.

1.3. Continuity of Operations.

1.3.1. Sustainability. Contractors that cannot replace employees who are killed, injured, or otherwise lost; rotate personnel to sustain essential services during a protracted conflict; or, replace equipment, supplies, and tools during a conflict as rapidly as the DoD Component considers necessary, represent an inappropriate risk to combat operations. The higher the ratio of required personnel or equipment to total inventory, the greater the risk of using contract support.

1.3.2. Surge Capability. Contractors might be able to perform a function during peacetime but lack the skilled personnel, equipment, facilities, or technology to increase or surge operations during a crisis or war. Contractors that do not have the capacity (i.e., adequate facilities) or capability (i.e., adequate equipment, tools, or trained personnel) to increase or surge operations to the required operating tempo (OPTEMPO) are a risk to combat operations. The lower the increase in OPTEMPO required for wartime operations, the lower the risk of using contract support.

1.3.3. Responsiveness. During war, there is always a risk that the level of threat could change unexpectedly and require immediate reformation of support

operations. Manpower managers should consult with military commanders to assess whether separate command and contractual lines of authority would complicate contract negotiations and whether the commander's lack of direct control over support operations would constitute an inappropriate risk to combat operations.

1.3.4. Information Assurance. When conducting risk assessments, military commanders should verify whether contractors in theater can safeguard integral information and information systems. Commanders should determine whether there is a risk that attack or disruption could delay or prevent the timely delivery of critical services, systems, or supplies and have an adverse impact on military operations.

1.4. Maintaining Ready Military Forces. Manpower managers should identify the number of activities providing a support function and assess the impact that contracting a large number of the activities to firms that are non-deployable would have on peacetime and wartime rotation, PERSTEMPO, and wartime operations. The lower the ratio of deployable support elements to deployed elements, the greater the risk. Manpower managers should also verify whether positions in support activities are needed for career progression mobilization, or casualty replacement, and whether contracting the work would impair the personnel community's ability to maintain a trained and ready workforce.

1.5. Operational Success. Generally, the decision to use DoD civilians and contract labor where there is a high likelihood of exposure to hostile fire is made on an exception basis. In all cases, risk reduction shall take precedence over cost savings. No matter how promising in terms of efficiency or improved effectiveness, risk associated with contract support must be objectively assessed in terms of its impact on warfighting capabilities. Therefore, when proposals are made to contract functions previously performed by operating forces, an assessment of the risk shall be completed prior to undertaking the contract.

1.5.1. Risks in Theater. Manpower authorities shall be guided by Joint Staff and Military Service policies governing the use of civilians or contractors in the battlefield.

1.5.1.1. Cross-Utilization of Personnel. The ability of a unit to sustain combat operations is maximized if personnel can be cross-utilized to perform more than one function. This is particularly true during high intensity conflicts when combat casualties can degrade the combat capability of the unit.

1.5.1.1.1. DoD civilian and contract personnel are non-combatants. When considering whether a support function should be performed by DoD civilians or private sector contractors, manpower authorities shall weigh the likelihood of exposure to combat and the effects the presence of non-combatants would have on a commander's flexibility.

1.5.1.1.2. Contract personnel shall not be required to perform work that is not covered by the contract (e.g., fire fighting, security, search and rescue, or transportation). This might prove problematic during crises when unconstrained use of all available personnel is critical to the commander's ability to reconstitute essential support functions. Manpower authorities shall consult with military commanders to determine whether the terms of the contract would limit the commander's flexibility during crises and be an inappropriate risk.

1.5.1.2. Liability for Active Duty Service. Military commanders shall not integrate, in any manner, civilians or contract personnel into the military organization and "Active military service." DoD Civilian/Military Review Boards consider several factors when determining whether DoD civilians or contract employees have provided services to the U.S. Armed Forces that would qualify as active military service for Department of Veterans Affairs (VA) benefits.¹ In general, active duty service is equivalent to active military service based on the extent the participant was under the control of the U.S. Armed Forces in support of a military operation or mission during an armed conflict. This includes situations where direct control by the military Commander is required for the proper or timely execution of a support function, or military discipline is needed to maintain order.² A key factor for determining if a support function should be performed by military personnel is whether the continued, proper, and timely execution of the function under combat conditions has to be assured or safeguarded through military authority, discipline, and training. These functions are military essential and inherently governmental because, during crises, command and execution of the function are non-severable (i.e., the military commander must be present to oversee and guide the operation and the personnel must be trained to ensure a well coordinated, disciplined, and effective response).

1.5.1.3. Operational/Logistic Footprint. Manpower authorities shall verify whether use of civilians or support contractors would increase the size of the operational "footprint" (e.g., increase personnel³ or physical security requirements) or the size of the logistic "footprint" (e.g., for medical, mess, transportation, or supplies) beyond what would be required by military personnel. Manpower authorities shall consult with military commanders to determine whether additional personnel or increased logistic or physical security requirements, when taken in their entirety, would limit battlefield mobility or undermine the commander's flexibility in forward areas and adversely effect military operations.

¹ See DoD Directive 1000.20.

² Generally, contract employees (unlike U.S. and foreign national civilian employees and military personnel) are not under the direct supervision of military commanders. Although a contract could require the employee to comply with the commanding officer's guidance, the commanding officer has no disciplinary authority over that person. Aside from barring the employee from certain locations, the commanding officer's only redress would be to recommend that the contractor fire the employee.

³ There may be differences in the number of personnel due to differences in manpower availability factors.

1.5.1.4. High-Value Targets. Manpower authorities shall consult with military commanders to determine whether contracting support functions would reduce the number of CONUS or OCONUS support activities to a point that they would become lucrative, high value targets for sabotage or military attack. For instance, reliance on a sole source contractor in the U.S. or overseas, or consolidation of civilian and contract support elements in secure compounds in theater during a war could, at some point, become a risk.

1.5.1.5. Use of Indigenous Personnel. Military commanders should verify whether commercial contractors plan to employ indigenous personnel to fulfill contract requirements and the concomitant threat to the security of U.S. personnel (e.g., the use of local workers to construct base defenses during a fluid counter insurgency mission or the use of members of one ethnic group to the exclusion of others during peacekeeping operations).

1.5.2. Risks at Military Installations. DoD manpower authorities shall check with military commanders and security officials to determine whether physical security activities at military installations will: (1) involve discretionary decisions for actions that will significantly and directly affect the life, liberty, or property of private persons, including the likelihood of the contractor's need to resort to force in support of a police or judicial function; whether force, especially deadly force, is more likely to be initiated by the contractor or by some other person; and the degree to which force may have to be exercised in public or relatively uncontrolled areas;⁴ or, (2) require special authorities (such as the power to deputize private persons or use excessive force). If the circumstances require special authorities, the risks and consequences should be assessed to determine whether a DoD civilian or military detail would be more appropriate.

2. DoD Oversight and Control of Government Operations. The degree of government involvement and expertise necessary to retain sufficient oversight and control of government operations will vary by function and situation depending on such factors as delegation of approval authority, complexity of operation; geographic dispersion of the activity; regulatory guidance; and consequence of default. The following factors should be considered when conducting risk assessments. (This list is not all-inclusive and should be expanded to address the specific activity under review.)

2.1. Contract Advisory Assistance.

⁴ See section 7(b)(4) of OFPP Policy Letter 92-1.

2.1.1. Discretionary decisions made by government officials must be based on informed, independent judgments and, as required by Section 6(a)(3) of OFPP Policy Letter 92-1, must not be unduly influenced or controlled by private sector contractors who are beyond management controls otherwise applicable to public employees and who might not have objectives in concert with the public's best interests. So, although a Department official may consider a contractor's advice when making a decision, the official may not rely solely or so extensively on a contractor's recommendations that, by so doing, the decision no longer reflects an independent judgment.⁵ Therefore, DoD Components shall:

- ensure contract advisory assistance is not used to support a government decision without thorough knowledge and understanding of the work submitted by the contractor and recognition of the need to apply independent judgment in the use of the work products;
- ensure that advisory assistance is not used in a manner that allows private sector contractors an equal or final say in discretionary matters. Contractors shall not have undue influence in the final decision to include (1) determination of what or how options or alternatives are to be provided to Defense officials for a final decision; or, (2) determination of what is recommended to Defense officials as the preferred alternative; and,
- take steps to ensure that a contractor's involvement in a project is not so extensive or so far advanced that the DoD staff does not have the ability (sufficient time, information, or resources) to develop and consider options other than those provided by the contractor.

2.1.2. To safeguard the government's authority, when plans and recommendations are developed by a private sector contractor or by joint public-private teams, government personnel alone shall be responsible for a final review, revision, or comment on the product. To ensure this, manpower officials shall conduct risk assessments to determine whether there are sufficient knowledgeable government employees available to:

⁵ Determining when and how advisory assistance provided by contractors may be used to *support* governmental decision-making is often difficult since advisory assistance can often relate to or even involve the inherently governmental tasks they support. For instance, although a contractor may be asked to develop options for a government decision-maker, or to develop or expand decisions already made by government officials, they may not be given the authority to decide on a course of action for the government. For example, contractors may develop agency regulations, but may not approve or determine agency policy, such as determining the content and application of regulations.

- maintain sufficient oversight and understanding of the project to determine whether the contractor has met the terms of the contract and provided a complete and objective product; and,
- review and revise the contractor's recommendations to the extent necessary to ensure the decision expresses the Department's views, conforms to its policy, complies with the law, and supports public interests; or, provide alternative points of view to the deciding official.

2.2. Contract Support Services.

2.2.1. Support services may be provided by a contractor if (1) the contractor is given the authority to implement (but not decide on) the course of action; (2) the level of performance or quality of product is specified in the contract in quantifiable and measurable terms; and (3) the government retains discretionary authority for final approval of the product or service. Some support services require a level of control and involvement that is inappropriate for a contractual arrangement, however. Support services shall not be contracted if oversight, supervisory control, and performance of the function are non-severable because extensive discretionary decision-making is involved. DoD Components shall conduct risk assessments to verify if the Defense official would have to:

- constantly address policy issues on matters not covered, or not adequately covered, by directive, instruction, regulation, or other formally approved document;
- constantly provide guidance on procedural matters of a discretionary nature because the Department does not have established practices or procedures or a clear vision for how to accomplish the required work (as in research projects where arbitration and judgment are needed to decide the direction the project should take);
- constantly change how the service is performed to match evolving policy, doctrine, or tactics because the environment is so fluid that revisions are required on a recurring basis (as with tactical training where military instructors are expected to insert "lessons learned" and stratagems for skill improvements into the course material based on recent experience in the operating forces).
- supervise the daily activities of the contractor as opposed to reviewing or testing the final product or service; control how the contractor performs the service as opposed to specifying what services are required; and, retain the right to remove contractor employees from the project for other than security or misconduct reasons (e.g., poor performance) as opposed to specifying performance standards (as with time-sensitive projects where short suspense drives decisions about the scope of the work and what can reasonably be accomplished).

- use more manpower to develop the statement of work; award and execute the contract; and assess the quality of the final product or service, than it would take to perform the service in-house.

2.2.3. Additionally, not all discretionary decision-making is inherently governmental. For a decision to be inherently governmental it must (1) have the effect of committing the government to a course of action when two or more alternative courses of action exist; and, (2) have a significant consequence to the Department. When the contract properly identifies the required level of performance or quality of service (and it is not left to the discretion of the contractor) and retains discretionary authority for final approval of the product or service through a government review or test, the government has retained control of the contract and has avoided an unacceptable transfer of official responsibility to the private sector. DoD officials are responsible for reviewing projects in enough detail to determine the risks and consequences to operations. DoD officials shall, as a part of the review, confer with Component manpower authorities in advance of contracting for support services to verify whether the work is needed for rotation, career progression, or mobilization purposes.

2.3. Government Authority and the Appearance of Private Sector Influence.

2.3.1. To safeguard the government's authority, the DoD is required to identify contractors and contractor work products whenever there is a risk that the public, Congress, or other persons outside of the government might confuse them with government officials or with government work products.⁶

2.3.2. The appearance of private sector influence might be enough to bar a contractor's involvement in certain particularly sensitive activities. For example, to preclude the appearance of private sector influence, Section 6(c) of OFPP Policy Letter 92-1, restricts the government from using contractors to draft congressional testimony; responses to congressional correspondence; or agency responses to audit reports from an Inspector General, the General Accounting Office, or other federal audit entity.

3. Intelligence and Security Operations. The Director, Defense Intelligence Agency, as the designee for the Director of Central Intelligence for DoD risk assessments, determines whether highly sensitive intelligence work can be performed by contractors without an unacceptable risk to national intelligence. This includes highly sensitive intelligence work prescribed in Executive Order 12333,

⁶ Section 7(g) of OFPP Policy Letter 92-1, requires that, "Contractor personnel attending meetings, answering government telephones, and working in other situations where their contractor status is not obvious to third parties must be required to identify themselves as such to avoid creating an impression in the minds of members of the public or the Congress that they are government officials, unless, in the judgment of the agency, no harm can come from failure to identify themselves. All documents or reports produced by contractors are to be suitably marked as contractor products."

reference (cc), as required by DoD Instruction 4100.33. Determinations about highly sensitive security work (such as maintenance and operation of Signals Intelligence (SIGINT), Telecommunications, Computer Security (COMPUSEC), and Communications Security (COMSEC) equipment) are also based on advice provided by the National Security Agency (NSA).