

CONFERENCE REPORT STATEMENT

Requirements for risk assessments related to contractor performance (sec. 846)

The Senate amendment contained a provision (sec. 864) that would require the Department of Defense, the Department of State, and the United States Agency for International Development to perform risk assessments and develop risk mitigation plans for risks associated with contractor performance of critical functions in support of any contingency operation that is expected to continue for more than 1 year and require the expenditure of more than \$250.0 million for contract support.

The House bill contained no similar provision.

The House recedes with an amendment that would clarify the provision and add a requirement that operational plans developed by combatant commanders address potential risks associated with reliance on contractors to perform critical functions.

SEC. 846. REQUIREMENTS FOR RISK ASSESSMENTS RELATED TO CONTRACTOR PERFORMANCE.

- (a) **RISK ASSESSMENTS FOR CONTRACTOR PERFORMANCE IN OPERATIONAL OR CONTINGENCY PLANS.**— The Secretary of Defense shall require that a risk assessment on reliance on contractors be included in operational or contingency plans developed by a commander of a combatant command in executing the responsibilities prescribed in section 164 of title 10, United States Code. Such risk assessments shall address, at a minimum, the potential risks listed in subsection (c).
- (b) **COMPREHENSIVE RISK ASSESSMENTS AND MITIGATION PLANS FOR CONTRACTOR PERFORMANCE IN SUPPORT OF OVERSEAS CONTINGENCY OPERATIONS.**—
- (1) **IN GENERAL.**—Subject to paragraphs (2) and (3), not later than six months after the commencement or designation of a contingency operation outside the United States that includes or is expected to include combat operations, the head of each covered agency shall perform a comprehensive risk assessment and develop a risk mitigation plan for operational and political risks associated with contractor performance of critical functions in support of the operation for such covered agency.
- (2) **EXCEPTIONS.**—Except as provided in paragraph (3), a risk assessment and risk mitigation plan shall not be required under paragraph (1) for an overseas contingency operation if—
- (A) the operation is not expected to continue for more than one year; and
- (B) the total amount of obligations for contracts for support of the operation for the covered agency is not expected to exceed \$250,000,000.
- (3) **TERMINATION OF EXCEPTIONS.**—Notwithstanding paragraph (2), the head of a covered agency shall perform a risk assessment and develop a risk mitigation plan under paragraph (1) for an overseas contingency operation with regard to which a risk assessment and risk mitigation plan has not previously been performed under paragraph (1) not later than 60 days after the date on which—

- (A) the operation has continued for more than one year; or
 - (B) the total amount of obligations for contracts for support of the operation for the covered agency exceeds \$250,000,000.
- (c) **COMPREHENSIVE RISK ASSESSMENTS.**—A comprehensive risk assessment under subsection (b) shall consider, at a minimum, risks relating to the following:
- (1) The goals and objectives of the operation (such as risks from contractor behavior or performance that may injure innocent members of the local population or offend their sensibilities).
 - (2) The continuity of the operation (such as risks from contractors refusing to perform or being unable to perform when there may be no timely replacements available).
 - (3) The safety of military and civilian personnel of the United States if the presence or performance of contractor personnel creates unsafe conditions or invites attack.
 - (4) The safety of contractor personnel employed by the covered agency.
 - (5) The managerial control of the Government over the operation (such as risks from over-reliance on contractors to monitor other contractors or inadequate means for Government personnel to monitor contractor performance).
 - (6) The critical organic or core capabilities of the Government, including critical knowledge or institutional memory of key operations areas and subject-matter expertise.
 - (7) The ability of the Government to control costs, avoid organizational or personal conflicts of interest, and minimize waste, fraud, and abuse.
- (d) **RISK MITIGATION PLANS.**—A risk mitigation plan under subsection (b) shall include, at a minimum, the following:
- (1) For each high-risk area identified in the comprehensive risk assessment for the operation performed under subsection (b)—
 - (A) specific actions to mitigate or reduce such risk, including the development of alternative capabilities to reduce reliance on contractor performance of critical functions;
 - (B) measurable milestones for the implementation of planned risk mitigation or risk reduction measures; and
 - (C) a process for monitoring, measuring, and documenting progress in mitigating or reducing risk.
 - (2) A continuing process for identifying and addressing new and changed risks arising in the course of the operation, including the periodic reassessment of risks and the development of appropriate risk mitigation or reduction plans for any new or changed high-risk area identified.
- (e) **CRITICAL FUNCTIONS.**—For purposes of this section, critical functions include, at a minimum, the following:
- (1) Private security functions, as that term is defined in section 864(a)(6) of the National Defense Authorization Act for Fiscal Year 2008 (10 U.S.C. 2302 note).
 - (2) Training and advising Government personnel, including military and security personnel, of a host nation.
 - (3) Conducting intelligence or information operations.
 - (4) Any other functions that are closely associated with inherently governmental functions, including the functions set forth in section 7.503(d) of the Federal Acquisition Regulation.

- (5) Any other functions that are deemed critical to the success of the operation.
- (f) COVERED AGENCY.—In this section, the term “covered agency” means the Department of Defense, the Department of State, and the United States Agency for International Development.
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SENATE/SASC REPORT LANGUAGE

Risk assessment and mitigation for contractor performance of critical functions in support of overseas contingency operations (sec. 864)

The committee recommends a provision that would require the Department of Defense (DOD) to perform a comprehensive risk assessment and develop a risk mitigation plan for operational and political risks associated with contractor performance of critical functions in support of a contingency operation that is expected to continue for more than 1 year and require the expenditure of more than \$250.0 million for contract support.

The provision defines critical functions to include private security functions, training of foreign government personnel, intelligence and information operations, and other functions closely associated with inherently governmental functions. The assessment and mitigation plan would be required to address risks relating to the goals and objectives of the operation, the continuity of the operation, the safety of military and civilian personnel, DOD’s managerial control over the operation, DOD’s critical organic or core capabilities, and DOD’s ability to control costs and minimize waste, fraud, and abuse.

The Commission on Wartime Contracting in Iraq and Afghanistan (CWC) established pursuant to section 841 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181) reported that DOD and other federal agencies have too often made acquisition decisions that are expedient in the short-term without adequate consideration of the long-term risks. The final report of the CWC states:

“Ten years of war in Iraq and Afghanistan have seen the United States using too many contractors for too many functions with too little forethought and control. . . Events in Iraq and Afghanistan have shown that systematic consideration of operational, political, and financial risks must be a factor in judging appropriateness. All too often, officials assume that any task deemed not inherently governmental is therefore automatically suitable for performance by contractors. . . . For functions performed in a war zone, prudent decisions on contracting include assessing the level of risk associated with contracting, and judging whether that level is or can be mitigated to an acceptable level. . . . If mitigation or control measures leave the residual risks of using contractors at a level that outweighs the expected benefits, then the government needs timely and deployable options to support the contingency mission.”

The provision recommended by the committee would not preclude contractors from performing any specific functions. Rather, it would require DOD to systematically consider the potential risks associated with contractor performance of particular functions in an area of combat operations and take appropriate actions to mitigate or avoid such risks.