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Emerging Policy and Practice Issues (2008)

Steven L. Schooner &
David J. Berteau

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SESSION 9

EMERGING POLICY & PRACTICE ISSUES

Steven L. Schooner
Co-Director of the Government Procurement Law Program
The George Washington University Law School

David J. Berteau
Director of the Defense-Industrial Initiatives Group
Center for Strategic and International Studies
Washington D.C.

I. PREFACE: NO HIDING THE ELEPHANT(S) IN THE ROOM

> We face an unparalleled crisis in the federal government's ability to do the nation's business. ...
>
> At this point in U.S. history, it is particularly important that the government address the use of contractors. ... ***The new administration should not try to fool the American people, perpetuating the myth of smaller government by not counting the hordes of service contractors it engages.*** ... Clearly, there are things that should be contracted and that the government need not and should not undertake, but the unfettered use of contractors has skyrocketed and must be brought under control.

Bernard Rostker, *A Call to Revitalize the Engines of Government* at 1, 15 (RAND Corp. Occasional Paper 2008) (emphasis added), available at *www.rand.org/pubs/occasional_papers/2008/RAND_OP240.pdf*.

> GSA's procurement organization awards and administers government-wide contracts worth $40 to $50 billion. ***With growing programs and shrinking numbers of qualified acquisition personnel, attention to important fundamentals, such as ensuring competition, meaningful price analysis, and implementation of statutory and regulatory compliance-type requirements has diminished.***

Inspector General, General Services Administration, *Semiannual Report to the Congress, April 1, 2008 – September 30, 2008* (emphasis added), available at *www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/OIG_SAR0408-0908Nonweb_R20-mF_0Z5RDZ-i34K-pR.pdf*.

> ***DOD increasingly relies on contractors during expeditionary operations*** to perform a wide range of services. For example, more contractors are working for DOD in Iraq and Afghanistan than are U.S. military personnel. As a result, military personnel in the field are increasingly interacting with and responsible for managing contractors. Yet many observers argue that ***the military is not sufficiently prepared to manage contractors during expeditionary missions***.

Moshe Schwartz, *Training the Military to Manage Contractors During Expeditionary Operations: Overview and Options for Congress* (Congressional Research Service, Dec. 17, 2008) (emphasis added); see also, Jennifer K. Elsea et al., *Private Security Contractors in Iraq: Background, Legal Status, and Other Issues* (CRS, Updated Sept. 29, 2008).

II. CHALLENGES FOR THE OBAMA ADMINISTRATION: WHERE TO BEGIN?

Last year, while we anticipated that the Presidential candidates might jockey to score points by excoriating high-profile procurement failures, we did not expect them to commence a serious national

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conversation demanding: (1) an unprecedented effort to hire, train, and integrate the huge cadre of highly skilled business professionals necessary to manage the Govenrment's burgeoning contractor workforce (upon which the nation's functioning depends); (2) a massive Govenrment hiring binge – civilian and military – required to staff the Govenrment's current mandates (if, as a nation, we truly desire to depend less upon contractors); or (3) a significant reduction in the services that the Govenrment provides to the public (ranging from defense – at home and abroad – to air traffic control and food safety). But, now, the President-elect must govern, and difficult decisions await.

In a nutshell, the Obama administration faces a number of interrelated, critical, systemic challenges that pervade the procurement and/or acquisition landscape. Federal procurement spending has exploded in this decade. As a result—and, in addition to decisions made during the 1990's—the Govenrment is heavily outsourced. Specifically, the Federal Govenrment is dependent upon contractors to an extent – in degree and in type – that makes many uncomfortable. To exacerbate matters, the Govenrment lacks a sufficient acquisition workforce to responsibly manage its cadre of contractors (including an increasingly blended—military-contractor, civil servant-contractor, and/or military-civil servant-contractor—workforce).

While this is true throughout the Govenrment, the failure to plan and staff the acquisition function in Iraq (and Afghanistan) has generated (and will continue to generate) bad procurement news and erode confidence in the public procurement process. The poster child for all of these macro-level issues has been the Govenrment's ill-conceived and poorly-orchestrated (direct and indirect) reliance on arms-bearing (or private security) contractors in the battle area. Thus, the foreseeable future will be dominated by a deeply ingrained, broad-based (public, media, Congressional) anti-contractor sentiment. This sentiment will manifest in the form of initiatives intended to achieve greater (pick your label) accountability, compliance, corruption control, ethics, integrity, transparency, etc. Sadly, few of these initiatives will originate bearing in mind the old adage that "an ounce of prevention is worth a pound of cure." The primary beneficiaries of the new compliance regime will be attorneys, accountants, auditors, and investigators. But without a dramatic, sustained investment in the acquisition workforce, none of this will lead to Govenrment enjoying greater value for the taxpayers' dollars. All of which signals turbulent times ahead, whether or not the new administration embarks upon an epochal public works program that would continue (or continue to fuel) the breathtaking increases in procurement spending that have spanned this new century.

III. UPWARD TREND: THE PROCUREMENT SPENDING JUGGERNAUT

Throughout this decade, we've marveled at the increased volume and rate of federal procurement spending. We assumed that the growth would taper, and, to some extent, the growth *rate* had slowed somewhat—*until Fiscal Year 2007, and then Fiscal Year 2008*. The consistent, dire, annual warnings that the post-millennial spending increase was a blip, and that a

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spending contraction was imminent, never transitioned into fact. Further, signs remain that the growth cycle has not yet run its course. And, lest one forget, it is striking how dramatically the rapid growth in contracting continues to outpace the rate of inflation.

Federal Procurement Spending 2000-2008*			
Fiscal Year	Procurement Spending (in Billions)	% Increase From Previous Year	*% Increase in Consumer Price Index (CPI)*
2008	***$531.2***	***>11.5***	
2007	**$465.6**	**12.0**	*2.8*
2006	$415.4	6.6	*3.2*
2005	$389.6	8.9	*3.4*
2004	$357.7	9.6	*2.7*
2003	$326.4	**18.6**	*2.3*
2002	$275.2	**17.0**	*1.6*
2001	$235.2	7.2	*2.8*
2000	$219.3		
**FY 2008 reflects preliminary reporting.*			

See Federal Procurement Data System, *Trending Analysis Report*, *available at www.fpdsng.com/downloads/top_requests/FPDSNG5Year ViewOnTotals.xls,* and *Agencies Submitting Data to FPDS-NG, available at www.fpdsng.com/downloads/agency_data_submit_list.htm*. Annual increases in the Consumer Price Index for All Urban Consumers (CPI-U) were extracted from the annual Detailed Report Tables, U.S. Department of Labor, Bureau of Labor Statistics, *www.bls.gov/cpi/cpi_dr.htm#2008*.

The rate of growth in federal procurement spending not only exceeded the rate of increases in the consumer price index (CPI) in this decade; the procurement spending pace annually *more than doubled* the rate of inflation. Indeed, procurement spending growth *more than tripled* the rate of inflation in 2002, 2003, 2004, 2007, and (apparently) 2008. Putting this together, in this decade, federal procurement spending rose at a rate well in excess of *five times the rate of inflation*. And, with a number of aggressive public works initiatives being considered, that might accelerate, rather than decline.

IV. OUTSOURCING, CONTRACTING OUT, PRIVATIZATION – END OF A TREND OR A NEW BEGINNING?

The Govenrment's bipartisan outsourcing (or, at times, "competitive sourcing") initiative now spans more than fifteen years (and two two-term administrations). See, e.g., Steven L. Schooner & Daniel S. Greenspahn, *Too Dependent on Contractors? Minimum Standards for Responsible Governance*, 6 J. Cont. Mgmt 9 (Summer 2008), available at *ssrn.com/abstract=1263358*.

Looking ahead, an apparent disconnect is brewing between aspiration and reality. "Obama … wants to make federal buying systems more efficient

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and … reduce federal spending by $40 billion ***by using fewer contractors***." Robert O'Harrow Jr., *Like Clinton, Obama Calls for Fewer Federal Contractors to Cut Spending*, WASH. POST (Nov. 11, 2008) (emphasis added); see also, *change.gov / agenda / defense_agenda*: "**Reform Contracting** ... [R]equire the Pentagon and State … to develop a strategy for determining when contracting makes sense, rather than continually handing off governmental jobs to well-connected companies."

> [Obama] is ***concerned by the rising number of government contractors*** that are often unaccountable and frequently less efficient than government workers. … [He] will ***reduce our nation's increasing dependence on private contractors in sensitive or inherently governmental functions***. [He] will ***eliminate the … ideological bias towards outsourcing*** … and abandon initiatives, like … private bill collectors to collect federal taxes, that are a demonstrated waste of taxpayer money.

Joe Davidson, *If I Were the Boss*, WASH. POST D01 (Aug. 20, 2008) (emphasis added). Conversely, long before his inauguration, President-elect Obama described an American Recovery and Reinvestment Plan. In addition to tax breaks for an inclusive class of workers, the President-elect identified a number of initiatives – intended to generate ***millions*** of new jobs – that suggest the potential for significant growth in public procurement, particularly in what might be referred to as ***public works***. Initiatives include the repair, improvement, and/or replacement of roads and bridges as well as "rebuilding our crumbling ... schools [and] … build[ing] 21st century classrooms, labs, and libraries." The construction industry must be intrigued by the aspiration to "renovate public buildings to make them more energy efficient." The IT community must be heartened by a call to "update and computerize our health care system to cut red tape, prevent medical mistakes, and help reduce health care costs." Of course, this runs contrary to a fair amount of pre- and post-campaign rhetoric suggesting that the administration would endeavor to reduce the number of contractors that serve the (federal) Govenrment. But, it may prove consistent if the lion's share of the federal infrastructure spending, specifically the public works contracts, actually takes place at the *state, rather than the federal, level*.

For an historical perspective, see generally, Tom Huntington, *America's Top 10 Public Works Projects: Since our nation's founding, politicians have debated how far the federal government should go in supporting large infrastructure projects*, AMERICAN HERITAGE'S INVENTION & TECHNOLOGY (Winter 2009, Vol. 23, No. 4). Huntington suggests the President-elect has articulated: "Worthy ideals—but only time will tell whether the results are more Hoover Dam or Big Dig." Huntington's (highly subjective) top 10 projects include:

- The National Road (started in 1811);
- First Transcontinental Railroad (200,000 net tons of iron);
- Hoover Dam (5,000,000 barrels of concrete);
- Air Traffic Control (14,305 controllers, 87,000 flights per day);

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- Oregon Coastal Highway Bridge System (3,223-foot-long Yaquina Bay Bridge);
- Lincoln Tunnel (nearly 120,000 vehicles per day);
- The Tennessee Valley Authority (29 hydroelectric dams, 3,526 megawatts);
- Interstate Highway System (46,837 miles);
- The Big Dig (estimated: $2.6 billion; real cost: $14.6 billion); and
- The Internet (1.46 billion users).

See also, generally, *Administration Opposes Contractor Limits*, 50 GC ¶ 336; *Quarter of Intelligence Workers Are Contractors, ODNI Finds*, 50 GC ¶ 324; *Public-Private Partnerships Need DOD-Wide, Measurable Goals, GAO Says*, 50 GC ¶ 256; *Competitive Sourcing Continues Savings, OMB Says: Unions Disagree*, 50 GC ¶ 179; *House Panelists: Contractors May be Performing Inherently Governmental Tasks*, 50 GC ¶ 94; *OFPP Issues Public-Private Competition Guidance*, 50 GC ¶ 68; *Forest Service Should Improve Management of Competitive Sourcing Program, GAO Says*, 50 GC ¶ 67; DoD IG, *Report to Congress on Section 325 of the "National Defense Authorization Act for Fiscal Year 2008", OMB Influence Over DoD Public-Private Competitions* (No. D-2009-034, Dec. 15, 2008) ("We found no indication that OMB was either directing or requiring the Secretary of Defense or Secretary of a Military Department to undertake a public-private competition under OMB Circular No. A-76.").

V. ACQUISITION WORKFORCE: ACTION (BUT INSUFFICIENT URGENCY)

Last year, we conceded that we were disappointed, but are no longer surprised, that the debate over the need to restore—and dramatically invest in—the acquisition workforce continues. All of the empirical–macro and micro–and anecdotal evidence leads to the inescapable conclusion that there are too few qualified acquisition professionals to meet the Govenrment's needs today and for the foreseeable future. The good news is that, in 2008, the issue was seriously addressed—both as a matter of policy and legislation. See, e.g., *change.gov/agenda/defense_agenda/:* "Obama … will restore the government's ability to manage contracts by rebuilding our contract[ing] officer corps." The bad news is that insufficient progress is being made to solve the core problems.

To review, once again, the federal acquisition workforce declined dramatically due to congressionally mandated personnel reductions in the mid-1990's; arguably, the Govenrment has not hired an appropriate number of new acquisition professionals in any year since the 1980's; the existing workforce is aging and, in large part, retirement eligible (here, apparently, the recession/economic instability may prove a boon, by keeping these professionals on the Govenrment payroll); the lion's share of that workforce was neither hired nor trained to primarily purchase services using flexible contractual vehicles; and, as discussed above, the volume of purchasing has increased (or, as some might, say, exploded) in this decade.

Acquisition Workload and Ineffective Oversight Remain Top Concerns, PSC Finds, 50 GC ¶ 433; Professional Services Council, *Acquisition in*

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Transition: Workforce, Oversight and Mission (Oct. 2008) ("As has been the case in all previous surveys, workforce issues were the number one challenge and area of focus.... The dollar amount and complexity of procurement has increased dramatically while the number and, in many cases, capability of acquisition professionals has stayed constant or decreased."), available at *www.pscouncil.org/pdfs/2008PSCProcurementPolicySurvey.pdf*; *DHS Needs Better Strategic Approach for Acquisition Workforce, GAO Finds*, 50 GC ¶ 427; *USAID Needs Overseas Acquisition Workforce Strategy, GAO Says*, 50 GC ¶ 362; *IG Report Questions Homeland Security Acquisition Personnel Training Oversight*, 50 GC ¶ 223; *Senate Subcommittee Assesses the Acquisition Workforce*, 50 GC ¶ 57. For a more optimistic perspective, see, *Special Edition: AT&L Human Capital Initiatives*, Defense AT&L (DAU, Nov.-Dec. 2008), available at *www.dau.mil/pubs/dam/2008_11_12/nov-dec08.pdf*; *AT&L Human Capital Strategic Plan v 3.0* ("In addition to the original five goals for AT&L human capital management, the plan incorporates a sixth goal entitled 'Recruit, develop and retain a mission-ready workforce through comprehensive talent management.'"), *www.dau.mil/workforce/hcsp.pdf.* DAU points out that "[t]he DoD AT&L workforce is highly educated, experienced, and well trained..." when compared to "the current federal *civilian* workforce" and "federal employees" generally. *Id.* (emphasis added).

It's wonderful to see some leadership on these issues. But any perceived gains achieved in 2008, were swamped by the continued growth in purchasing. Thus, the only progress made so far in addressing the workforce crisis is recognition of the problem.

VI. IRAQ, AFGHANISTAN, AND PRIVATE SECURITY: CASE STUDIES, LESSONS LEARNED, UNANSWERED QUESTIONS, BUT FEW MODELS

A. A Wealth of Issues to Study. By any measure, as the security situation has stabilized in Iraq, the staffing and quality of the acquisition process have improved. A second (revised) edition is circulating of *Contingency Contracting: A Joint Handbook* (although it is unclear whether comments on the draft were due, or the new edition would be available, by Dec. 19, 2008). The old version is available for download at *acc.dau.mil/CommunityBrowser.aspx?id=168819&lang=en-US*, but (at the time these documents were submitted) the website still noted that: "AFLMA is currently out of the JCC Handbooks. Another 2000 copies have been ordered and should be available the end of Sep 08."

Although the acquisition process has stabilized, the steady stream of bad news – detailing poorly planned projects, ill-conceived and drafted contracts, poorly managed work, as well as criminal behavior – will not only continue, but likely will accelerate. Such an outcome is unavoidable, as the Govenrment's audit, oversight, and investigation resources have increased far more dramatically than the acquisition workforce needed to remedy the problems that will continue to be uncovered. See, generally, Chris Gagne, *U.S. Contingency Contracting: Reassessing the Battlefield,* 5 IGC ¶ 81 ("opportunities … come with a steep price: heightened scrutiny and … an increased risk of allegations, investigations, prosecutions and

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bad press"); *Better Financial Data Needed On PSCs, SIGIR Finds*, 50 GC ¶ 408; *SIGIR Reports on Iraq Reconstruction Contract Cancellations*, 50 GC ¶ 400 (noting that, as of June 30, the Govenrment had terminated 1,262 Iraq reconstruction projects, including 530 default terminations); *GAO Examines Contractor Use in Iraq, Afghanistan*, 50 GC ¶ 372; *DOD Contract Management Positions in Iraq and Afghanistan Remain Understaffed, GAO Says*, 50 GC ¶ 375; *USAID Needs Overseas Acquisition Workforce Strategy, GAO Says*, 50 GC ¶ 362; *CBO Examines Contractor Use in Iraq*, 50 GC ¶ 303, Congressional Budget Office, *Contractors' Support of U.S. Operations in Iraq* (Aug. 2008); *GAO Reports on PSC Oversight Progress*, 50 GC ¶ 293; *SBA IG Reports on Waxman's Blackwater Allegation*, 50 GC ¶ 283; *Senate Committee Questions Army Contracting Irregularities*, 50 GC ¶ 274; *President Orders New Streamlined Standards for Security Contractors*, 50 GC ¶ 242; *Senate Committee Probes Iraq Funding Waste and Corruption*, 50 GC ¶ 95; *State Updates Senate Committee on PSCs*, 50 GC ¶ 86.

B. The Wartime Contracting Commission. As expected, Congress mandated the creation of a wartime contracting commission modeled after the WWII Truman Commission. See, *The Commission on Wartime Contracting: Background Information and Chronology*, *webb.senate.gov/pdf/wtcontractbg.pdf*. The Commission is assembling a credible professional staff and, by the time of this conference, should have held its first public meeting/hearing (scheduled for February 2, 2009). The commission's extremely ambitious mandate could include, among other things: (1) a study of reconstruction, logistical support, and security contracting in Iraq and Afghanistan; (2) a review of the extent of governmental reliance upon contractors and the impact of that reliance; (3) an assessment of the quality of contractor performance and the mechanisms by which performance is measured; (4) an effort to gauge the extent of contractor fraud, waste, and abuse and the extent to which responsible parties are held accountable; (5) a review of both the DOD's and the State Department's "organizational structure, policies, practices, and resources" relating to program management and contracting; and (6) an assessment of contractor use and mis-use of force, the law of war, and related issues.

C. A Glimmer: Transparency Into Contractor Fatalities and Injuries. As of June 30, 2008, more than 1,350 civilian contractor personnel had died in Iraq and Afghanistan in support of US military and political operations. Another 29,000 contractors have been injured; more than 8,300 seriously. Yet these fatalities (and injuries) remain generally outside the public's consciousness. That's a shame, because, in a representative democracy, public awareness of the human cost of our nation's security and foreign policies is critical. Most Americans' perception of military success or failure derives from two statistics: the number of forces deployed and how many are killed or wounded. The Govenrment's reliance on contractors in Iraq and Afghanistan has artificially reduced both numbers. See, generally, Steven L. Schooner, *Why Contractor Fatalities Matter*, 38 Parameters 78 (No. 3, Autumn 2009), available at *ssrn.com/abstract=1303022*; Michael Walzer, *Mercenary Impulse*, The New Republic (Mar. 12, 2008) ("Using private soldiers makes policy invisible and so reduces (or eliminates entirely) its political costs. But it is a crucial

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feature of democratic decision-making that politicians should pay the costs of the decisions they make.”).

Now, however, the Govenrment has begun to at least keep track. See generally, GAO, *Contingency Contracting: DOD, State, and USAID Contracts and Contractor Personnel in Iraq and Afghanistan* (Oct. 2008) (“As directed by the [NDAA] for [FY] 2008, GAO analyzed DOD, State, and USAID data on contracting activities in Iraq and Afghanistan for [FY] 2007 and the first half of [FY] 2008 including (1) the number and value of contracts and the extent they were awarded competitively; (2) the number of contractor personnel, including those performing security functions; and (3) the number of contractor personnel who were killed or wounded.”), available at *www.gao.gov/new.items/d0919.pdf*. Unfortunately, the first time around: “DOD, State, and USAID were unable to provide complete or specific information on the number of contractor personnel who had been killed or wounded in Iraq or Afghanistan . . . . [T]hat information . . . was not systematically maintained or tracked in a manner that would allow agencies to provide us reliable or complete data.” *Id.* Thus, this mandate is new to DOD, State, and AID. The Labor Department generates the data quarterly (but only makes it available through Freedom of Information Act requests) based upon claims filed because standard Govenrment contract clauses (under the Defense Base Act, and the War Hazards Compensation Act) make contractor employees eligible for worker’s compensation benefits pursuant to the Longshore and Harbor Workers’ Compensation Act. The data reflect insurance claims filed with Labor, but if a contractor’s family or employer fails to seek compensation, that death or injury is not included.

D. More Transparency: Managing Private Security *in Afghanistan*. “U.S. troop levels are rising, with the likelihood of more increases in the year ahead. Given its terrain, poverty, neighborhood, and tragic history, Afghanistan in many ways poses an even more complex and difficult long-term challenge than Iraq....” Robert M. Gates, *A Balanced Strategy: Reprogramming the Pentagon for a New Age,* Foreign Affairs (Jan./Feb. 2009).

On the issue of transparency and accountability, DoD apparently learned from (some of) its mistakes in Iraq and plans to raise the bar for both transparency and accountability in Afghanistan. To do so, it plans to rely upon contractors. In mid-December, on *FedBizOpps.gov*, the Army posted the following opportunity (for a *commercial firm-fixed-price service contract, utilizing simplified acquisition procedures*): Armed Contractor Oversight Directorate (ACOD), Solicitation Number: W91B4N-09-T-5006. Among other things,

> Contractor shall provide administrative services to manage an Armed Contractor Oversight Directorate in support of the Combined Joint Task Forces’ contractor management initiatives ... at Bagram, Afghanistan....
>
> Contractor must be available 24 hours a day, 7 days a week … [and] work side by side with Government personnel working approximately 12 hours per day.... Contractor tasks include:

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- Process, log, disseminate and monitor [Private Security Companies] PSC activity. ...
- Assist ... in conducting inspections of PSCs documentation of training and incident reporting....
- Track the status of … investigations involving PSC weapons discharges....
- Maintain regular contact with Government of the Islamic Republic of Afghanistan (GIRoA), Ministry of Interior (MOI) or their representative to identify issues concerning … (DOD) contracted PSC's actions, incidents and procedures. ... *[What about State, AID, etc.?]*
- Work with MOI counterpart in investigations concerning PSC Escalation of Force (EOF) incidents. ...
- Act as an interpreter for the ACOD staff for visiting Arabic speaking representatives. ...
- Provide cultural advice to the ACOD staff. ...
- Possess a good understanding of Afghan law and the legal system....
- Accumulate data … and performs analysis to identify trends concerning PSC activities and incidents. ... [and]
- Develop and maintain database systems capable of querying required information requests, manage and update the government's database with the most current information....

Yes, the solicitation included the standard FAR clause, 52.237-1 SITE VISIT (APR 1984): "Offerors ... are urged and expected to inspect the site where services are to be performed and to satisfy themselves regarding all general and local conditions that may affect the cost of contract performance, to the extent that the information is reasonably obtainable...." See also, Walter Pincus, *Despite Concerns, Pentagon Seeks Civilian Firm to Oversee Contractors*, WASH. POST A33 (Dec. 19, 2008) ("Shortly after an [IG] questioned the practice of the Pentagon issuing contracts to administer contracts, the U.S. Army began advertising … for an American firm to manage oversight of private security companies in Afghanistan.").

E. Rethinking (or Finally Thinking About) Private Security. The Govenrment's direct and indirect employment of as many as 30,000 arms-bearing contractor personnel in Iraq appears (finally) to have served as a catalyst for critical thinking about the proper use and management of arms-bearing contractors. See, e.g., *Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict* (Sept. 2008) (chock full of useful guidance, such as: "States contemplating to contract [private military and security companies] PMSCs should evaluate whether their legislation, as well as procurement and contracting practices, are adequate for contracting PMSCs. This is particularly relevant where Contracting States use the services of a PMSC in a State where law enforcement or regulatory capacities are compromised."), available at *www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908*; James Cocayne, et al., *Beyond Market Forces: A Feasibility Study for a Standards Implementation and Enforcement Framework for*

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the Global Security Industry (Fall 2008, public draft) ("[M]ore effective standards implementation and enforcement within the Global Security Industry is needed…. The three major stakeholder groups – states, industry and civil society – are already undertaking a number of efforts to improve regulation at the national, industry and international levels, and through civil society activism."), available at *www.ipinst.org/gsi*; Roger D. Carstens, et al. *Changing the Culture of Pentagon Contracting* (New America Foundation, Oct. 2008) ("Despite the mostly positive performance of [PSC's] in Iraq and Afghanistan, their presence in an active war zone presents problems, not the least of which is their undermining of counterinsurgency efforts, or what might be euphemistically described as the attempt to cultivate the "hearts and minds" of the populace. The fundamental responsibility of [PSC's], which is to protect the lives of their clients, may run counter to and even undermine the larger U.S. mission."); Special Inspector General for Iraq Reconstruction, *Agencies Need Improved Financial Data Reporting for Private Security Contractors*, SIGIR-09-005 (Oct. 30, 2008) ("[t]here was no financial information on obligations for 191 companies identified ... as having contracts for some type of security services[, and f]inancial data on subcontracts to prime contractors implementing reconstruction programs is limited. DoD, DoS, and USAID are not required to routinely track these costs...."), available at *www.sigir.mil/reports/pdf/audits/09-005-f.pdf*.

The President-elect's agenda acknowledges the need to: "**Expand to Meet Military Needs on the Ground** … and support[s] plans to increase the size of the Army by 65,000 soldiers and the Marine Corps by 27,000 Marines. Increasing our end strength will help units retrain and re-equip properly between deployments and decrease the strain on military families." Yet, surprisingly, the agenda does not appear to suggest further increases sufficient to alleviate the need to rely upon private security firms.

For better or worse, Blackwater continues to serve as the poster child for the industry:

> The [September 16, 2007] Nisoour Square incident [involving Blackwater] was broadly proclaimed to be the final straw that would force the White House, Congress and the courts to come to terms with the complex and often fraught relationship between the U.S. military and the increasingly ubiquitous, increasingly interoperable private military contractors that it hires. ... Accompanying the use of PMCs are costly externalities associated with their private-sector status—not only tort and contract liability to employees and shareholders, but also compliance with corporate statutes and regulations, insurance costs, and the incentive structure created by the government contracting regime. ... In short, the government's use of PMCs has caused corporate and commercial law to profoundly affect the conduct of war, and the consequences remain unstudied.

Rebecca Ulam Weiner, *The Hidden Costs of Contracting: Private Law, Commercial Imperatives and the Privatized Military Industry* (Dec.

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2008), available at *belfercenter.ksg.harvard.edu/publication/18725/hidden_costs_of_contracting.html*.

The Blackwater employee indictment relies upon the Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. § 3267. *See, news.findlaw.com/nytimes/docs/iraq/blackwater-indictment1208ind.html*. Granted, the Justice Department did not have a lot of choices, but this feels like a stretch (and even the media seems to grasp this). Justice charged Blackwater's employees—working under a State Department contract—as "supporting the mission of the [U.S.] Department of Defense." That's got to make someone at State uncomfortable, right? For this jurisdictional discussion, put aside any moral imperative (e.g., that high-profile bad actors should be prosecuted). Do companies that do business with State know (*at the time they enter into their contractual agreements*—at least one legal point in time that matters) that they are "supporting the [DOD] mission"? Do those companies' employees know? On a related note, for a different perspective, consider that:

> The government saw a need for highly experienced, highly trained Americans to protect our civilians abroad, and …selected Blackwater.
>
> Every individual who has worked for Blackwater in Iraq has previously served in the U.S. military or as a police officer. Many were highly decorated.… [They] have been bound by detailed contracts that ensure intensive government direction and control. ...
>
> While some of our critics seize upon inaccurate labels, I doubt they have ever known … our contractors personally or been protected by them. Our teams are not cooking meals or moving supplies. They are taking bullets. They are military veterans who have chosen to serve their country once again. Very few people know someone who would voluntarily go into a war zone to protect a person he has never met. I know 1,000 of them, and I am proud that they are part of our team.

Erik D. Prince, *How Blackwater Serves America*, Wall St. J. (Dec. 16, 2008). Rep. Jan Schakowsky (D., Ill.) responded (also in the Wall St. J.): "Let's be clear. Private security contractors are not soldiers who re-enlist. They are not part of the U.S. military. They do not wear the uniform of the United States, though the distinction is rarely made by those facing a gun shouldered by a Blackwater employee. ... It's time to pass my Stop Outsourcing Security Act and phase out the use of private companies like Blackwater in combat zones before they get us in even more trouble."

F. In Harm's Way: The New Status of Forces Agreement (SOFA). Contractors—and their employees—are justifiably concerned about the new U.S.—Iraq Status of Forces Agreement (SOFA), which subjects contractors and their employees to the Iraqi judicial system. See, *Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq* (Nov. 17, 2008), *www.abanet.org/contract/pdf/SE_SOFA_cln_opt.pdf*. See also, Robert Brod-

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sky, *Loss of legal immunity will change landscape for contractors in Iraq*, Gov. Exec. (Dec. 5, 2008), *www.govexec.com/story_page.cfm?filepath=/dailyfed/1208/120508rb1.htm* ("'While we're confident [that] State did not intend to put at risk the human rights of … civilians … providing essential skills in support of Iraq reconstruction, we are disappointed and concerned that the document offers so few legal protections,' said Doug Brooks, president of [IPOA.]"). The United Nations' recent findings should be required reading for firms doing work in Iraq, their employees, and the firms that insure them:

> Ongoing widespread ill treatment and torture of detainees by Iraqi law enforcement authorities, amidst pervasive impunity of current and past human rights abuses, constitute severe breaches of international human rights obligations and represent examples of challenges faced by the Iraqi government. …
>
> UNAMI visits detention facilities and prisons to monitor the situation of detainees held by the ministries of Interior, Justice, Defence, and Labour and Social Affairs. Many have been deprived of their liberty for months or even years, often under harsh physical conditions, without access to defence counsel, or without being formally charged with a crime or produced before a judge. Continuing allegations of widespread torture and ill-treatment of inmates are of particular concern. Yet again, slow bureaucratic procedures, insufficient resources, degraded infrastructure and lack of effective accountability measures result in inordinate delays in processing detainees' cases.

UN Assistance Mission for Iraq (UNAMI), *Human Rights Report, 1 January – 30 June 2008*, *www.uniraq.org/documents/UNAMI_Human_Rights_Report_January_June_2008_EN.pdf*. It's remarkable that a Govenrment so entirely dependent upon contractors to perform its most critical missions could be so cavalier about their contractors' (and their employees') well being.

VII. COMPLIANCE, INTEGRITY, ETHICS, CORRUPTION CONTROL, AND THE RISING TIDE OF ANTI-CONTRACTOR SENTIMENT

A. Bad News Makes Bad Policy

> [O]ver the past few years it has become almost impossible to open a newspaper and not read of some well-connected and obscenely compensated contractor foisting a colossal botch on the taxpayer. Contractors bungling the occupation of Iraq; contractors spinning the revolving door at the Department of Homeland Security; contractors reveling publicly in their good fortune after Hurricane Katrina.

Thomas Frank, *Government by Contractor Is a Disgrace*, Wall St. J. (Nov. 25, 2008). This public perception is widely accepted and, in large part, seems to have been embraced by the incoming administration. David M. Nadler & Joseph R. Berger, *Believe That Change Has Come for Contrac-*

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tors, 31 Legal Times (Nov. 20, 2008) (describing a reform agenda focused on "improving government contract management and oversight capacity, minimizing no-bid and cost-plus contractors, reducing spending on federal contracts, increasing transparency, and cracking down on tax-delinquent contractors."). See also, *change.gov / agenda / defense_agenda /* :

> **Restore Honesty, Openness, and Commonsense to Contracting and Procurement**: ... [R]ealize savings by reducing the corruption and cost overruns that have become all too routine in defense contracting. ... [E]nd the common practice of no-bid contracting. ... [O]rder the Justice Department to prioritize prosecutions that will punish and deter fraud, waste and abuse.

Personally, we'd rather see the new administration talk about making the investments necessary to maximize the value for money the Govenrment receives for its more than $500 billion spent in the marketplace.

B. The New Compliance Regime: A (Roiling) Sea Change. As discussed elsewhere at length (particularly in the Chapters: Joseph D. West & Diana G. Richard on *Corporate Compliance and Ethics*; Agnes P. Dover & Thomas L. McGovern on *Risk Mitigation*; and Brian C. Elmer & W. Stanfield Johnson, on *Fraud, Debarment & Suspension*), Congress is mandating the contractor community make investments in compliance on a scale not experienced since the late 1980's. The new compliance regime is as controversial as it is broad-reaching. But now it is required. That's great news for the attorneys, accountants, auditors, investigators, and, frankly, the training and compliance communities.

See also, OFPP Memorandum, *Preventing Fraud in Federal Contracting* (Nov. 14, 2008) ("The government remains committed to detecting and deterring fraud in federal contracting. … I ask that you advise your agencies of the affirmative steps being taken to combat and prevent this unacceptable activity, and reiterate the steps your agency is taking to deter fraudulent contracting actions in your agencies."), available at *www.whitehouse.gov / omb / procurement / memo / preventing_fraud_111408.pdf*; Louis D. Victorino & John W. Chierichella, *The FAR's 'Contractor Business Ethics Compliance Program and Disclosure Requirements' Require Significant Changes for All Government Contractors and Subcontractors*, 50 GC ¶ 439 ("to use the FAR council's own words, it represents a 'sea change' in how the Government regulates federal contractors'); *FAR Rules for Contractor Ethics Finalized*, 50 GC ¶ 415; Christopher R. Yukins, *U.S. Contractor Compliance Rules are Likely to Expand*, 50 GC ¶ 147. See also the "Clean Contracting Act of 2008" included in the NDAA for FY 2009 (and discussed at length in other chapters).

Of course, the new compliance regime will sap resources and change the way all parties do business (and not necessarily in a manner that increases the Govenrment's value for money).

Acquisition Workload and Ineffective Oversight Remain Top Concerns, PSC Finds, 50 GC ¶ 433; PSC, *Acquisition in Transition, supra* ("More than 90 percent of respondents reported that oversight has increased over

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the past two years…. Participants saw a need for *more effective oversight*, focusing on systemic issues rather than anecdotes, and better training in procurement for auditors and oversight professionals. … [A]cquisition professionals believe 'front-end' process and skills improvements … will generate far more benefit than 'back-end' checking."), available at *www.pscouncil.org/pdfs/2008PSCProcurementPolicySurvey.pdf*; *DHS Acquisition Oversight Still Needs Improvement, Critics Say*, 50 GC ¶ 343; *GSA CAO Must Improve Contract Oversight and Administration, IG Says*, 50 GC ¶ 316; *Waxman Picks Up Contractor Fraud Inquiry*, 50 GC ¶ 236.

On a related note, it wasn't a particularly good year for DCAA. *New DCAA Performance Metrics Emphasize Audit Quality*, 50 GC ¶ 374; *Committee Investigates DCAA Auditing Failure*, 50 GC ¶ 335; *DOD Independent Panel to Review DCAA*, 50 GC ¶ 306; *GAO Finds Extensive Problems in DCAA Auditing Practices*, 50 GC ¶ 281. See also DCAA Memo, *Audit Guidance on Significant Deficiencies/Material Weaknesses and Audit Opinions on Internal Control Systems* (Dec. 19, 2008, 08-PAS-043(R)) ("Effective immediately, audit reports on contractors' internal control systems that report ***any*** significant deficiencies/material weaknesses will include an opinion that the *[entire?]* system is inadequate." (Emphasis and query added.)).

C. Purchase Cards: In the Weeds, Management Problems Remain. See, e.g., Garrett L. Hatch, *Misuse of Government Purchase Cards* (Congressional Research Service, July 30, 2008) (describing approximately $19 billion in purchase card transactions in FY 2007, and cataloging the Govenrment's purchase card program weaknesses as: (1) ineffective transaction review and approval processes; (2) inconsistent program monitoring; (3) lack of separation of duties (e.g., the same person approves and places the order); (4) inadequate training; (5) excessive number of cards issues and high credit limits; and (6) inadequate staffing levels (suggesting that approval authorities are overwhelmed by transaction volume). See also, *OMB Responds to GAO Purchase Card Abuse Report*, 50 GC ¶ 151; *GAO Finds Purchase Card Abuse Unacceptably High*, 50 GC ¶ 139, GAO, *Governmentwide Purchase Cards: Actions Needed to Strengthen Internal Controls to Reduce Fraudulent, Improper, and Abusive Purchases*, GAO-08-333 (Mar. 14, 2008).

> Using a statistical sample of purchase card transactions from July 1, 2005, through June 30, 2006, GAO estimated that nearly 41 percent of the transactions failed to meet ... basic internal control standards. Using a second sample of transactions over $2,500, GAO found a similar failure rate—agencies could not demonstrate that 48 percent of these large purchases met the standard of proper authorization, independent receipt and acceptance, or both. …
>
> [More specifically,] numerous examples of fraudulent, improper, and abusive purchase card use ... included ... purchase cards [used] to subscribe to Internet dating services, buy video iPods for personal use, and pay for lavish dinners that included top-shelf liquor ... and one case where a cardholder ... embezzle[d] over $642,000 over a period of 6 years from the … Forest Service firefighting fund.

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D. Defending Contractors in the Court of Public Opinion? In light of these issues, much work needs to be done to educate the public, the media, the courts, Congress, and the President-elect.

> no one is defending the contractors. …As story after story of wrongdoing by defense contractors leads nightly newscasts, generates above-the-fold, front-page headlines, and dominates editorial page focus, it has become increasingly important for these contractors to finally adopt new approaches to shape the debate, lest their detractors be the only ones telling the story. [Defense contractors]
>
> 1. ... must ensure full transparency and cooperation.
>
> 2. ... [must not] forget they have powerful messages to deliver on their own behalf that can win key support, or at least tolerance, on most ends of the political spectrum.
>
> 3. ... must define their limits of responsibility.
>
> 4. … should employ powerful images from Iraq and Afghanistan in all of their communication materials, highlighting the vital roles contractors play to support American military operations as well as keep the troops safe and American interests intact.
>
> 5. ... must develop a second-nature familiarity with relevant media.
>
> 6. ... must pick their spokespeople wisely and prepare them to face any audience—from high-authority bloggers to Congress.
>
> 7. ... must harness the power of technology, specifically the blogosphere, to disseminate accurate information and tell their story to their audiences.

Christopher Harvin & Babak Zafarnia, *Taking the Stand: Contractors on the Defense*, WASH. LAW. (Oct. 2008), available at *www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/october_2008/stand.cfm*.

VIII. PERCOLATING: OTHER ISSUES HEATING UP

A. Procurement's Role In The Financial Crisis Recovery Process. The stakes are enormous. The target is changing and moving rapidly. It's difficult to be optimistic. See, generally, Michael J. Schaengold, Robert K. Tompkins & Michael J. Lowell, *The Emergency Economic Stabilization Act of 2008-Procurement Issues*, 50 GC ¶ 432; GAO, *Troubled Assets Relief Program: Additional Actions Needed to Ensure Integrity, Accountability, and Transparency*, GAO-09-161 (Dec. 2008), available at *www.gao.gov/new.items/d09161.pdf*; *Grassley Presses Government to Use FCA to Fight Economic Stabilization Act Fraud*, 50 GC ¶ 424.

B. Tanker Procurement: A Can Kicked Down The Street. The Obama administration will inherit one of the hottest potatoes imaginable—the future of in-flight refueling for the Air Force. Because the tanker protest involved an incredibly important, high-profile procurement, it attracted (and, frankly, merited) extraordinary attention. Alas,

> GAO found that [1] the record did not show that the Air Force, in its evaluation and source selection decision, applied the

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> identified relative weighting in assessing the merits of the firms' proposals; [2] a key discriminator relied upon by the Air Force in its selection of Northrop Grumman's proposal for award was not consistent with the terms of the solicitation; [3] the record did not show that the Air Force reasonably determined that Northrop Grumman's proposed aircraft could refuel all current Air Force fixed-wing, tanker-compatible aircraft using current Air Force procedures ... and the Air Force did not reasonably evaluate the capability of Northrop Grumman's proposed aircraft to initiate emergency breakaway procedures; [4] the Air Force conducted misleading and unequal discussions with Boeing; [5] the Air Force improperly accepted Northrop Grumman's proposal, even though that firm took exception to a material solicitation requirement; [6] the Air Force did not reasonably evaluate military construction costs in evaluating the firms' cost proposals; [7] the Air Force improperly increased Boeing's estimated non-recurring engineering costs in calculating that firm's most probable life cycle cost; [and, finally] the Air Force [unreasonably used] a simulation model to determine the amount by which Boeing's non-recurring engineering costs should be increased in calculating that firm's most probable life cycle cost. ...

Statement of Daniel I. Gordon, *Air Force Procurement, Aerial Refueling Tanker Protest*, GAO-08-991T (July 2008), available at *www.gao.gov/new.items/d08991t.pdf*. See also, *DOD Grounds KC-X Tanker Competition*, 50 GC ¶ 334; *DOD Issues Draft Tanker RFP*, 50 GC ¶ 292; *Congress Weighs in on Tanker Dispute*, 50 GC ¶ 243; *DOD Reopens Tanker Procurement*, 50 GC ¶ 252; *Congress Weighs in on Tanker Decision, Boeing Protests Award*, 50 GC ¶ 85; *Air Force Tanker Award is a Shocker*, 50 GC ¶ 76; Vernon J. Edwards, *Boeing Versus the Air Force—The KC-45 Tanker Protest and the Future of Major System Source Selections*, 50 GC ¶ 230 ("If the gentlemen's agreement between contractors and the military services has broken down, as appears to have happened, and future major system procurements will be subject to protests, then the military services should seriously consider ways to simplify their source selection processes and reduce their vulnerability to procedural error."); Jeffrey A. Green, *Splitting the Baby—Why the Air Force Needs Two Tankers*, 50 GC ¶ 353.

C. Green Procurement: Market Leadership or Salutary Symbolism? All signs point to the Govenrment assuming a leadership role in galvanizing the green procurement movement. But the same signs suggest that the road may be quite bumpy. For now, it's a developing landscape, and it seems to have limitless potential. See, e.g., David Nadler & Joseph Berger, *OFPP Evaluating Proposed Policy on Procurement of 'Green' Products and Services*, 50 GC ¶ 207; *Green Procurement Policy Needs Refinement, Commentors Say*, 50 GC ¶ 127, 72 Fed. Reg. 73904 (Dec. 28, 2007). The proposed OFPP policy letter would require agencies to:

> identify opportunities and give preference to the acquisition of green products and services, including but not limited to:
>
> (1) Alternative fuels and alternative fuel vehicles and hybrids;

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(2) biobased products;

(3) Energy Star and Federal Energy Management Program (FEMP)-designated products;

(4) environmentally-preferable products and services;

(5) electronics registered on the Electronic Product Environmental Assessment Tool;

(6) low or no toxic or hazardous chemicals or materials or products;

(7) non-ozone depleting substances;

(8) recycled-content and/or remanufactured products;

(9) renewable energy; and

(10) water-efficient products.

…

[Moreover,] Executive agencies ***shall*** ...[e]nsure representation of environmental and energy experts, managers, or technical personnel on integrated procurement teams for all major acquisitions and ***consider each of the following factors***: (a) Sustainable design practices; (b) Life cycle cost analysis; (c) Product or packaging take back (return to manufacturer for recycling or remanufacturing purposes); and (d) Maximization of energy and resource recovery in solid waste management.

See also *GSA Implementing Green Building Mandates, GAO Finds*, 50 GC ¶ 409; *OFPP Memo Requests OMB Green Activities Survey Response*, 50 GC ¶ 392, OFPP Memorandum, *FY 2008 Reporting on Green Purchasing Requirements* (Oct. 20, 2008), available at *www.whitehouse.gov/omb/procurement/green/fy2008_report_on_green.pdf*; *Agencies Acquiring Alternative Fuel Vehicles But May Not Be Using Alternative Fuel, GAO Finds*, 50 GC ¶ 391.

IX. DEFENSE REFORMS

When it comes to procurement, ... the trend has gone toward lower numbers as technology gains have made each system more capable. ... [T]hese platforms have grown ever more baroque, … ever more costly, … tak[e] longer to build, and are … fielded in ever-dwindling quantities. ... A given ship or aircraft, no matter how capable…, can be in only one place at one time.

… [M]eanwhile, the prevailing view has been that weapons and units designed for the so-called high end could also be used for the low end. And to some extent that has been true....

Nevertheless, given the types of situations [we are] likely to face ... the time has come to consider whether the specialized, often relatively low-tech equipment well suited for stability and counterinsurgency missions is also needed. …. [H]ow [can we] institutionalize the procurement of such capabilities and get them fielded quickly[?] Why was it necessary to go outside the normal bureaucratic process to develop technologies to counter improvised explosive devices, to build MRAPs, … to quickly

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> expand [our] ISR capability … [and] bypass existing institutions and procedures to get the capabilities needed to protect U.S. troops and fight ongoing wars? ...
>
> [DOD] has to consider whether ... it makes sense to employ lower-cost, lower-tech aircraft … in large quantities.... [H]ow [do we] build this kind of innovative thinking and flexibility into the rigid procurement processes…. The key is to make sure that the strategy and risk assessment drive the procurement, rather than the other way around.

Gates, *Balanced Strategy,* Foreign Affairs, *supra*.

Presidential transitions often bring the promise of new opportunities and the threat of reversing key advances. With this in mind, the CSIS U.S. Defense and National Security Group and the Defense-Industrial Initiatives Group conducted a study aimed at informing the next Secretary of Defense's transition decisions. The CSIS study team focused on the little-understood organizational and process changes that the Bush administration has implemented in an attempt to improve the DOD's internal operations in the categories of strategic direction, force development, force employment, force management, and corporate support. See *www.csis.org/media/csis/pubs/081209_hicks_transdeforg_web.pdf*. The study team found that the attempted Bush administration defense reforms ran the gamut from qualified success to qualified failure. The study group's top ten recommendations for the next Secretary of Defense are:

1. Acquisitions: Institutionalize recent guidance, restore a defense acquisition workforce, and provide cost realism in setting program requirements.
2. Strategic Guidance: Establish three to five discrete and manageable priorities and task the Director of Program Analysis & Evaluation (D(PA&E)) or other official to report quarterly on efforts to achieve these priorities.
3. Program and Budget: Require the D(PA&E) or other official to assume all capability portfolio assessment responsibilities from the current capability portfolio managers and reinstitute separate annual Program (Capability) and Budget Reviews.
4. Office of the Under Secretary of Defense for Policy (OUSD(P)) Reorganization: Ensure at least ASD-level emphasis on nuclear, space, and cyber matters. Create Director for Strategy, Execution, and Assessment or realign Policy Planning and FT&R organizations under a single manager.
5. Joint Requirements: Add functional combatant commanders as voting members of the Joint Requirements Oversight Council (JROC). Add the commander, U.S. Joint Forces Command (USJFCOM) to the JROC as the Department's Future Joint Force Advocate.
6. Unified Command Plan (UCP) Revisions: Direct the Office of the Secretary of Defense (OSD) and the Joint Staff to undertake a zero-based assessment of the unified command plan and revisit the roles and responsibilities of USNORTHCOM, USJFCOM, and USSTRATCOM.

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7. Joint Concepts: Direct CJCS to place a hold on all joint concept development except Joint Integrating Concepts and to create a Senior Advisory Panel to provide recommendations regarding the concept development process.
8. OUSD(I): With the Director of National Intelligence (DNI), clarify USD(I) authorities and responsibilities in the Intelligence Community. Direct the CIO to serve as an approval authority on all relevant Planning, Programming, Budgeting, and Execution (PPBS) and acquisition issues.
9. Adaptive Planning and Execution System: Require the Director, Defense Information Security Agency (DISA) to provide in-person monthly reports on progress in deploying a full suit of enabling software for adaptive planning.
10. Future Security Environment: Direct selected defense officials to meet as a Futures Group to cultivate a shared understanding of DoD's long-range fiscal, technological, geopolitical, and military operational projections.

Specifically, while the Bush administration explored a variety of alternative approaches to acquisition reform, the element missing was a strong focus on implementation, execution, and follow-up. The alternative, of course, is to provide that focus—to institutionalize current initiatives, to provide cost realism to programs and requirements, to fund to those realistic costs, and to restore the capability of the acquisition system and workforce.

Rebuilding the acquisition workforce—both military and civilian—is key to both major acquisition reform and contingency operations support. The administration should also continue efforts to redefine the role of contractors to eliminate, to the maximum extent possible, conflicts of interest.

Moreover, the Obama administration should institutionalize current initiatives on competitive prototypes, on the use of existing USD(AT&L) authorities to control requirements and cost growth, and on serious early program reviews and evaluations (pre-Milestone A). More importantly, costs need to be identified and programs adjusted to funding levels. The administration must review requirements for major programs in advance of the next quadrennial defense review (QDR), redefine baselines in accordance with those requirements, and add cost realism as a key performance parameter for all programs.

Contracts in Operations and Maintenance (O&M) accounts now equal or surpass contracts from procurement or from research and development accounts. Accordingly, cost and management controls are necessary for these O&M contracts, as well as better front-end requirements definition and back-end oversight of contract execution.

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