Addressing Human Rights Violations and Other Abuses in Contingency Contracting: A Case for Performance Standards Reform

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A Thesis submitted to

The Faculty of
The George Washington University Law School
in partial satisfaction of the requirements
for the degree of Master of Laws.
May 18, 2014

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Acknowledgements

The author wishes to thank Brantley, Brennan and Gerald.

Disclaimer

Nygina Tenay Mills is an attorney with the Department of Defense. The views expressed herein are solely those of the author and do not reflect the official policy or position of the Defense Contract Management Agency, the Defense Contract Audit Agency, Department of Defense, or the U.S. Government.

Abstract

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A number of recent legislative actions have looked at making foreign subcontractors more accountable and responsible for adhering to U.S. laws and regulations while serving the U.S. government in contingency missions. Such progress forward must start with a comprehensive performance database that rates and provides feedback to federal officials on prime contractors, as well as provides expanded oversight of both prime contractors and the foreign subcontractors they utilize. In contingency situations as in normal procurement actions, while privity of contract is only between the prime contractor and the subcontractor, federal agencies involved in contingency contracting should take the additional step of screening and/or at least providing preliminary approval of the foreign subcontractors to be utilized by primes. At the very least, this could merely involve running the subcontractors names through a centralized performance database to see if the subcontracting company comes up under any known instances of fraud, corruption or human rights violations. Extra care or scrutiny can then be placed on the prime contractor(s) to keep an eye on any foreign subcontractor(s) they do business with who are suspected of human rights abuses and egregious unfair labor practices. Organizations such as the ACLU believe that prime contractors can then be compelled by stricter enforcement of expanded civil or criminal penalties to report known instances of human rights violations.

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I. Introduction

Performance reviews have been used for several decades to help the federal government evaluate the performance of government contractors.[1] Federal contractors defined at the most basic level are the private businesses hired by the federal government to provide goods and services. Performance reviews and performance standards should be uniform and consistent across federal agencies so that private businesses can be fairly and uniformly evaluated against their competitors for future awards.[2] In contingency missions, in addition to past performance there are special considerations as the government must select contractors quickly and in often exigent circumstances.[3] In these conditions, it is critical for the government to quickly and efficiently procure resources from businesses that can deliver on time and to specifications. [4]

The wars in Iraq and Afghanistan and the efforts to stabilize and rebuild both countries have involved multiple federal agencies, including the Department of Defense

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[1] Nathanael Causey, *Past Performance Information, De Facto Debarments, and Due Process: Debunking the Myth of Pandora's Box*, 29 PUB. CONT. L.J. 637, 638-39 (Summer 2000).

[2] *See generally* KATE M. MANUEL, CONG. RESEARCH SERV., R41562, EVALUATING PAST PERFORMANCE OF FEDERAL CONTRACTORS: LEGAL REQUIREMENTS AND KEY ISSUES ("Poor performance under a federal contract can have immediate consequences for contractors, who could be denied award or incentive fees, required to pay liquidated damages, or terminated for default.") (2011), *available at* http://www.fas.org/sgp/crs/misc/R41562.pdf.

[3] David C. Hammond, Robert S. Nichols & Christopher E. Gagne, *Continuing Opportunities and Challenges in Iraq, Afghanistan and Pakistan Contracting*, CROWELL& MORING LLP 4 (2010), http://www.crowell.com/PDF/Continuing-Opportunities-and-Challenges-in-Iraq-Afghanistan-and-Pakistan-Contracting.pdf

[4] *Id.*

(DOD), Department of State and the U.S. Agency for International Development (USAID).[5] One significant issue is that there is not one uniform method or database by which contractors and subcontractors are evaluated.[6] Performance reviews are important not only to ensure the government receives the best services for the best price but also to avoid contractors (and subcontractors) with histories of fraud, crime and abuse.[7] Without documentation across agencies, it is difficult for agency officials to keep track of problematic companies.[8] They also provide valuable feedback to contractors, allowing them to continually improve their goods and services.[9] However, past performance data is only useful when it is accurate, consistent and complete.[10] Historically, federal agencies have used different databases, different standards and different evaluation criteria.[11] One uniform system with shared criteria, as suggested by legislative and

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[5]COMM'N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISK 2 (2011), *available at* http://www.wartimecontracting.gov/index.php/reports [hereinafter TRANSFORMING WARTIME CONTRACTING].

[6]*See generally* MANUEL, *supra* note 2, at 2 (discussing generally the evaluation and any contractor responses which comprise the past performance information that is stored in government databases (e.g., Past Performance Information Retrieval System (PPIRS), Federal Awardee Performance and Integrity Information System (FAPIIS)) and may be used in future source selection decisions).

[7]*Id.*

[8]*Id.*

[9]*Id.*

[10]*Id.*

[11]*Id.*

regulatory reform efforts, would allow the government to have more effective oversight of contingency contracts.[12]

While the agencies have similar goals for Iraq and Afghanistan's reconstruction, they have historically taken very different approaches to management and business systems.[13] This has proven problematic as the agencies attempt to jointly oversee billions of dollars in contingency contracts and subcontracts.[14] Moreover the lack of proper oversight over prime contractors in contingency missions has created an atmosphere of tolerance of human rights violations.[15] As the Obama administration has a zero tolerance policy with respect to human right violations, federal officials should take all precautions to ensure that federal prime contractors and subcontractors do not engage in human rights violations.[16] A lack of consistency and shared information has led to fraud, waste, abuse and ethical considerations such as the illegal trafficking of workers.[17] Congressional and

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[12] *Id.*

[13] *Id.*

[14] *See generally* AM. C.L. UNION & ALLARD K. LOWENSTEIN INT'L HUM. RTS. CLINIC, VICTIMS OF COMPLACENCY: THE ONGOING TRAFFICKING AND ABUSE OF THIRD COUNTRY NATIONALS BY U.S. GOVERNMENT CONTRACTORS (2012), *available at* http://www.aclu.org/files/assets/hrp_traffickingreport_web_0.pdf [hereinafter VICTIMS OF COMPLACENCY].

[15] *Id.*

[16] *Id.*

[17] Hammond, Nichols, & Gagne, *supra* note 3, at 3.

academic discussions on contingency contracting reform have emphasized the need for uniform procedures and standards.[18]

The lack of a uniform standard or performance system by which to rate federal contractors is especially problematic for evaluating or simply red-flagging those federal contractors that utilize the services of foreign subcontractors that do not adhere to federal fair labor standards on prime contracts.[19] Such lack of oversight by the federal government has led to a culture of abuse in which foreign subcontractors escape oversight or accountability for failing to adhere to federal regulations, especially in regards to labor standards.

With little data on, or direct access to, documentation on foreign subcontractors, the government has been unable to provide adequate oversight of contingency contracts.[20] As a result, tens of billions of dollars have been lost to waste and fraud.[21] While some of the loss can be attributed to prime contractors, the DCAA has found more than $6 billion in subcontractor-related waste and unsupported costs.[22] A 2010 audit of

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[18]TRANSFORMING WARTIME CONTRACTING, *supra* note 5, at 7.

[19]*Id.*

[20]*Id.*

[21]*Id.*

[22]*Subcontracting: Who's Minding the Store?: Hearing Before the Comm'n. on Wartime Contracting*, 111th Cong. 34 (2010) [hereinafter *Subcontracting: Who's Minding the Store?*] (response by Patrick Fitzgerald to a question from Commissioner Christopher Shays).

DynCorp found that subcontractors were responsible for $500 million of an $800 million loss.[23] A similar audit of KBR found that foreign subcontractors were primarily responsible for an unsupported $48 million.[24]

This thesis touches on two aspects of the larger discussion centering on federal contractor performance metrics: one, the federal government's current evaluation systems for contingency contractors, and two, wholly inadequate screening and tracking of foreign subcontractors who support contingency operations. This thesis will argue that the tracking systems used for contingency contracting missions are ineffective because there is no uniformity of standards and metrics government-wide, no sharing of information between all government agencies, and a lack of effective oversight of foreign subcontractors by the federal procurement apparatus.

[23] *Id.* at 34 (question from Commissioner Tiefer).

[24] *Id.* at 35.

II. Past Performance Reviews

A. Background

Informally, past performance reviews have been used in government contracting since the 1960s.[25] Congress mandated a similar practice in 1986, when it required defense agencies to consider "quality" in every source selection that used factors other than price.[26] Quality was defined as including the "prior experience of the offeror."[27] However, this requirement was eliminated in 1994 through the enactment of the Federal Acquisition Streamlining Act (FASA).[28]

While the Federal Acquisition Streamlining Act (FASA) eliminated the "quality" consideration, FASA did explicitly mandate the use of past performance reviews. The legislation codified a 1993 direction from the Office of Federal Procurement Policy (OFPP) requiring federal agencies to "[p]repare evaluations of contractors' performance on all new contracts over $100,000."[29] FASA required OFPP to issue formal guidance establishing policies for the "collection and maintenance of information on past contract

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[25] *See generally* Educ. Servs., B-156860 (July 26, 1965) and Aerojet-Gen Corp., B-165488 (Jan. 17, 1969).

[26] Joint Resolution Making Continuing Appropriations for the Fiscal Year 1987, H.J. Res. 738, 99th Cong. (1986) (enacted).

[27] *Id.*

[28] MANUEL, *supra* note 2, at 5.

[29] Exec. Off. of the Pres., Off. of Mgmt. & Budget, Off. of Fed. Procurement Pol'y, Final Issuance of Policy Letter 92-5, 58 Fed. Reg. 3573 (Jan. 11, 1993).

performance," and specified that the guidance should "to the maximum extent practicable . . . provide for ease of collection, maintenance and dissemination."[30]

In March 1995, OFPP issued Subpart 42.15 of the Federal Acquisition Regulation (FAR), establishing "responsibilities for recording and maintaining contractor performance information."[31] The regulations found that "[p]ast performance information is relevant information for future source selection purposes."[32] The FAR recommended that collected information include the contractor's record of conforming to requirements, standards of good workmanship, record of forecasting and controlling costs, adherence to contract schedules, history of reasonable and cooperative behavior, commitment to customer satisfaction, record of ethics and integrity, and its "business-like concern for the interests of the customer."[33] Under Subpart 42.15, agencies must evaluate contractors' performance for every major competitively negotiated contract.[34] However, how this information is used in the procurement process is left largely to the agencies' discretion.[35]

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[30] Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3272 (1994).

[31] FAR 42.1500 (2000).

[32] FAR 42.1501 (2010).

[33] *Id.*

[34] FAR 42.1502 (2010).

[35] *Id.*

B. Rationale

The practice of recording and using past performance data was formally adopted "after thirty years of false starts and abandoned initiatives," because the government and industry professionals finally agreed that past performance was among the best indicators of quality future service.[36] Contractors with a good performance record were generally thought to provide less risk and higher quality work, ultimately saving the government time and money.[37] The practice was also thought to act as an incentive, motivating businesses to perform well to secure future contracts and rewarding good performance.[38] Requiring past performance reviews also addressed complaints from private industry that the bidding process had essentially become a writing contest.[39] Prior to the adoption of the past performance criteria, the government was forced to rely primarily on written technical and cost proposals.[40] As a result, awards were often given to bidders who could write strong proposals, even though an ability to present well on paper had no direct

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[36] Causey, *supra* note 1, at 638-39.

[37] *Id.* at 639 (citing Ralph C. Nash & John Cibinic, *Postscript: Past Performance*, 8 NASH & CIBINIC REP. 33, 83 (1994)). However, the author notes that at least one study has shown that, in practice, there is no correlation between good past performance and good future performance.

[38] Causey, *supra* note 1, at 639-40 (citing *OFPP Asks Government, Industry Input on Past Performance Pilot Program*, 60 FED. CONT. REP. (BNA) at 662 (Dec. 27, 1993)).

[39] Causey, *supra* note 1, at 640 (citing Ralph C. Nash & John Cibinic, *Evaluation of Risk in Competitive Negotiated Procurements: A Key Element in the Process*, 5 NASH & CIBINIC REP. 22, 63 (1991)).

[40] Causey, *supra* note 1, at 640.

correlation to the contractor's ability to do to the work with the highest quality standards.[41]

The government began to focus heavily on past performance data in 1993 after Dr. Steven Kelman was named administrator of the OFPP.[42] Dr. Kelman summarized his views on the issue in an interview by saying "past performance is key."[43] He said that only contractors who had done good work for the government in the past should continue to get the government's business.[44] And he emphasized the need to allow contractors to comment on their past performance evaluations without bureaucratic formalization by creating "a formal judicial or quasi-judicial structure that would make the system collapse under its own weight."[45]

C. Concerns

The fight for past performance reviews was not without strong opposition by industry insiders. Although industry professionals generally supported adoption of the past performance criteria, many had concerns about how it would work in actual

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[41] *Id.*

[42] *Id.*at 647.

[43] *Id.* (quoting *Kelman Outlines Priorities, Pledges Not to Duck Tough Decisions*, 60 FED. CONT. REP. (BNA) 565 (Dec. 6, 1993)).

[44] Causey, *supra* note 1, at 647.

[45] *Id.*

practice.[46] Contractors lobbied the Senate for more "due process features," including the right to respond to negative past performance information and the right to appeal evaluations to a "disinterested official within the agency."[47] They feared that the new system was open to abuse, since government personnel could arbitrarily affect hiring, not only in their own agency but government-wide.[48] Contractors also expressed concern that unfavorable reports could be used in retaliation against vendors who pursued the government on legitimate requests for equitable adjustments of claims.[49]

Legal professionals, including the American Bar Association's Public Contract Law Section, joined the call for more due process for contractors. The ABA issued a policy letter, arguing that the proposed rule, which did not allow contractor comments, failed to provide "procedural safeguards."[50] The ABA predicted "significant litigation" against the government as a result.[51] The Bar Association also expressed concern that

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[46] *Id.* at 642.

[47] *Id.* at 650 (citing *Acquisition Reform, Defense Industry Groups Urge Changes to S 1587, Recommend Additional Legislation*, 60 FED. CONT. REP. (BNA) 571 (Dec. 6, 1993)).

[48] William W. Goodrich Jr., *Past Performance as an Evaluation Factor in Public Contract Source Selection*, 47 AM. U. L. REV. 1539, 1543 (1998).

[49] *Id.*

[50] Causey, *supra* note 1, at 650 (*quoting Proposed FAR Rule Raises Issues of De facto Debarment, Bias, ABA Section Contends*, 61 FED. CONT. REP. (BNA) 497 (Apr. 18, 1994)).

[51] Causey, *supra* note 1, at 650.

unfavorable past performance reports could be "tantamount to a de facto debarment."[52] Critics argued that the reviews inserted a subjective element into source evaluations and that "unfavorable information in decentralized databases," could undermine full and open competition.[53]

In response, the FAR was amended. FAR 42.1503 required agencies to provide contractors a copy of the performance evaluation, "as soon as practicable after completion."[54] Contractors were given a minimum of thirty days to submit "comments, rebutting statements, or additional information," and copies of the contractors' responses were retained along with the performance reports.[55] FAR 42.1503(b) allowed contractors to appeal performance reviews internally to "a level above the contracting officer."

OFPP's policy of making past performance "heavily weighted" in award evaluations created a strong incentive for contractors to ensure that reports were fair and accurate.[56] However, historically, they could rarely challenge the reports outside the agency.[57] Initially, the courts and the Government Accountability Office (GAO) would only review

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[52] Timothy Sullivan & Edward J. Gill, Contracting for Services, Federal Publications LLC (2007).

[53] Goodrich, *supra* note 48, at 1542.

[54] FAR 42.1503(b) (2010).

[55] *Id.*

[56] Goodrich, *supra* note 48 at 1542.

[57] MANUEL, *supra* note 2 at 5.

past performance narratives as part of bid protests challenging source selection.[58] In these cases, focus was generally on the reasonableness of source selection and not on the fairness of the performance evaluations.[59] According to one study, between 1992 and 1997, GAO sustained only thirteen out of three hundred contractor protests challenging performance data.[60]

However, several cases by contractors directly changed the performance review rating system, and the reviews they received by agencies. In 2004, the U.S. Court of Federal Claims recognized in Record Steel & Construction, Inc. v. United States that disputes over past performance could be "claims" under the 1978 Contract Disputes Act.[61] However, even in these cases, courts have applied a highly deferential standard in favor of the agency.[62] The GAO has held that it only "examines an agency's evaluation of past performance to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations," and that "[a]s a general matter, the evaluation of an offeror's past performance is within the discretion of the

[58] *Id.*

[59] *Id.*

[60] *Id.* at 13.

[61] 62 Fed. Cl. 508 (2004).

[62] JSW Maintenance, Inc., B-4400581.5 (Comp. Gen. Sep. 8, 2009).

contracting agency."[63] The GAO "will not substitute [its] judgment for reasonably based performance ratings."[64]

The courts and the GAO have also been very hesitant to find due process violations or de facto debarments based on past performance data. Courts have consistently found that performance reviews do not trigger due process concerns unless the reviews are stigmatizing, meaning that they impugn the contractor's reputation, honesty or integrity.[65] The courts have been careful to distinguish stigma from negative assessments of a contractor's performance.[66] For example, in *Southeast Kansas Community Action Program, Inc. v. Lyng*, the court found no due process violation where the government wrote that the contractor was "incompetent."[67] The court noted that this was different than alleging dishonesty or a similar "badge of infamy."[68] In *BMY, Harsco Corp. v. United States*, the U.S. District Court for the District of Columbia found that rejecting a contractor based on a negative performance history was not a due process

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[63] Dorado Services, Inc., B-401930.3, 2010 CPD ¶ 5 (Comp. Gen. Jun. 7, 2010), *available at* http://www.gao.gov/assets/390/389155.pdf.

[64] *Id.*

[65] Causey, *supra* note 1, at 681 (citing *ATL, Inc. v. United States*, 736 F.2d 677 (Fed. Cir. 1984); *Conset Corp. v. Community Servs. Admin.*, 655 F.2d. 1291 (D.C. Cir. 1981); *Transco Security Inc. v. Freeman*, 639 F.2d 318 (6th Cir.1981); *Old Dominion Dairy Products v. Secretary of Defense*, 631 F.2d 953 (D.C. Cir. 1980); *Electro-Methods, Inc. v. United States*, 3 Cl. Ct. 500 (Cl. Ct. 1983)).

[66] Causey, *supra* note 1 at 682.

[67] *Id.* (citing 758 F. Supp. 1430 (D. Kan. 1991), *aff'd*, 967 F.2d 1452 (10th Cir. 1992)).

[68] *Southeast Kansas*, 758 F.Supp. at 1434.

violation as long as the government has not "formally or constructively blacklisted," the company.[69]

While the GAO has found that a nonresponsibility determination can be de facto debarment, it treats adverse performance reports very differently. In *JCI Environmental Services*, a contractor argued *de facto* debarment where the agency rated its work "marginally acceptable."[70] The GAO disagreed with the claim, pointing out that JCI had been considered, although rejected, for every subsequent award.[71] The GAO found that "JCI's failure to receive the subsequent awards [did] not constitute de facto debarment," and that JCI had the opportunity, through comments on the rating, to "highlight its relevant experience and explain its prior unacceptable performance."[72]

In sum, the performance review process arose out of the need for objective ratings of contractors to ensure the best products and services for the federal government. Due process protections thereafter arose to provide contractors the opportunity to dispute ratings and provide comments to be reviewed alongside the ratings. With little recourse in the courts, contractors who felt that their performance reviews were inaccurate or one-sided could only ensure that their comments and rebuttals were on file in the database and seek review through the agency internal appeals process. These due process rights have

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[69] Causey, *supra* note 1 at 682 (citing 693 F. Supp. 1232 (D.D.C. 1988)).

[70] B-250752.3, 9301 CPD ¶ 299 (Comp. Gen. Apr. 7, 1993), *available at* http://www.gao.gov/products/401829#mt=e-report.

[71] *Id.*

[72] *Id.*

been consistently targeted by reform efforts seeking to discontinue these rights to challenge performance ratings.

D. Legislative Reform in Contingency Contracting

1. Brief History of Contingency Contracting

Over the last decade, Congress's efforts to reform government contracting have been based largely on studies of contingency contracts, defined as those contracts directly supporting war zone efforts in a time of war. While problems exist in all federal acquisitions, they may be clearest in contingency contracting. Past performance information is seemingly most important for contingency contracts, where both lives and billions of dollars are at stake.[73] However, in these exigent circumstances, the government has a poor record of enforcing procedure. Often, the focus has been on acquiring the goods or services quickly, rather than on obtaining the best services or the best deal.

This long-standing tension between good business practices and effective wartime strategy was illustrated by Brigadier General Charles G. Dawes at a Congressional hearing following the First World War. In explaining why the Army overpaid French contractors for the use of their horses, General Dawes explained that his focus had not been on financial concerns:

[73] COMM'N ON WARTIME CONTRACTING, ENSURING CONTRACTOR ACCOUNTABILITY: PAST PERFORMANCE AND SUSPENSION AND DEBARMENT 22 (2011), *available at* http://www.wartimecontracting.gov/docs/hearing2011-02-28_transcript.pdf [hereinafter ENSURING CONTRACTOR ACCOUNTABILITY]

> Sure we paid . . .We would have paid horse prices for sheep if the sheep could have pulled artillery . . . It's all right now to say that we bought too much vinegar or too many cold chisels, but we saved the civilization of the world. . . Hell and Maria, we weren't trying to keep a set of books. We were trying to win a war.[74]

Like past generals in times of war, recent military leaders have focused on war strategy rather than fiscal conservatism. Audits of contingency contracts in Iraq and Afghanistan have suggested that both military and federal agency leadership have not focused on "keep(ing) a set of books." [75]

Contractors have played a major role in both theaters. Between September 2001 and March 2011, Congress allocated $1.283 trillion to the two conflicts.[76] More than half of the wartime and reconstruction workforce, including services for military operations, base security, reconstruction, foreign aid, embassies, and veterans' health care, has been comprised of contractors.[77] The Department of Defense alone has employed more than

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[74]*Expenditures in the War Department, Hearings Before Subcommittee No. 3 (Foreign Expenditures) of The Select Committee on Expenditures of the War Department*, 66th Cong., at 4427, 2292, 4515; subcommittee chairman notes: "profanity (Hell Maria) was omitted from the transcript.." (1921)(statement by Brigadier General Charles G. Dawes).

[75]*Id.*

[76]AMY BELASCO, CONG. RESEARCH SERV., RL33110, THE COST OF IRAQ, AFGHANISTAN, AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11 1 (2011), *available at*http://www.fas.org/sgp/crs/natsec/RL33110.pdf.

[77]COMM'N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN,AT WHAT COST: CONTINGENCY CONTRACTING IN IRAQ AND AFGHANISTAN: INTERIM REPORT at 5 (June 2009), *available at* http://www.wartimecontracting.gov/docs/CWC_Interim_Report_At_What_Cost_06-10-09.pdf [hereinafter AT WHAT COST].

240,000 contracted employees, and additional contracts have supported the Department of State and the U.S. Agency for International Development (USAID).[78] While contractors have provided valuable services, the sheer scale of operations has created "plentiful opportunities for waste, fraud and abuse."[79]

The Project on Government Oversight's "Report to Congress on Contracting Fraud" found that over a two-year period, the Department of Defense awarded $270 billion to ninety-one contractors that had been found liable in civil fraud cases, and $682 million to thirty contractors convicted of criminal fraud.[80] The report also found that some debarred companies were given waivers and continued to win bids.[81] Charles Tiefer, former solicitor and deputy general counsel for the U.S. House of Representatives, has labeled the top offenders the "flagrant five."[82] These include the Al Tamimi Group, whose manager had a felony conviction for accepting kickbacks; First Kuwaiti Company, which had over $132 million in questioned costs; and Kellogg, Brown and Root (KBR), which had twenty-four instances of misconduct.[83]

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[78]*Id.* at 1.

[79]*Id.*

[80]ENSURING CONTRACTOR ACCOUNTABILITY, *supra* note 73, at 2.

[81]*Id.*

[82]*Id.* at 17 (witness questioning from Commissioner Charles Tiefer).

[83]*Id.* at 17-20. Also included in the "flagrant five" were Agility Defense and Government Services, Inc., Public Warehouse Company, K.S.C. and The Louis Berger Group, Inc.

2. The Commission on Wartime Contracting

In 2007, Senators Jim Webb (D-VA) and Claire McCaskill (D-MO) proposed an independent, bipartisan commission to investigate contracting in Iraq and Afghanistan and to identify the specific instances of waste and fraud.[84] The panel was based on and inspired by the "Truman Committee," which saved taxpayers an estimated $178 billion during and after World War II.[85] The proposal was supported by numerous taxpayer advocacy groups, including the Project on Government Oversight, Taxpayers for Common Sense, the Government Accountability Project, and Iraq and Afghanistan Veterans of America.[86] Although the 2007 founding bill was vetoed by President George W. Bush, the Commission on Wartime Contracting was established by the National Defense Authorization Act (NDAA) on January 28, 2008.[87]

Section 841 of the NDAA tasked the Commission with investigating the government's use of contractors in Iraq and Afghanistan, specifically for reconstruction, logistical support and security.[88] Its statutory purpose was, among other things, to determine the extent of the government's reliance on contractors; the impact of this reliance; the extent of waste, fraud and abuse; and the extent to which those responsible

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[84] *Background* of the Commission on Wartime Contracting in Iraq and Afghanistan, COMM'N. ON WARTIME CONTRACTING, http://www.wartimecontracting.gov/index.php/about (last visited Sept. 28, 2013).

[85] *Id.* $178 billion figure is based on today's dollars.

[86] *Id.*

[87] *Id.*

[88] National Defense Authorization Act, Pub. L. No. 110-181, 122 Stat. 3 (2008).

for waste, fraud and abuse had been held legally accountable.[89] The Commission was required to submit at least one interim report and a final report setting out its findings and recommendations.[90]

3. First Interim Report

The Commission submitted its first interim report to Congress in June 2009.[91] The report identified management and accountability, and specifically contract oversight, as areas of "immediate concern."[92]

In drafting its report, the Commission conducted interviews with Contracting Officers' Representatives (CORs) in Iraq.[93] CORs are appointed to oversee and administer contracts and are generally responsible for compiling contractor performance data.[94] The COR role is usually assigned in addition to and secondary to other, primary responsibilities.[95] According to the Commission, "several" CORS said that they lacked sufficient time to oversee contractors' performance.[96]

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[89] *Id*. at § 841(c)(3).

[90] *Id*. at § 841 (d).

[91] AT WHAT COST, *supra* note 77.

[92] *Id.* at 5.

[93] *Id.* at 9.

[94] *Id.*

[95] *Id.*

[96] AT WHAT COST, *supra* note 77, at 9.

The Commission also found that there were not enough CORs assigned to oversee contracts in Iraq and Afghanistan and that many of those who were assigned to those theaters were not adequately trained.[97] Many military service members told the Commission that they were not informed of or trained for their new roles until after they arrived in theater.[98] One soldier described the COR selection process as a "'Hey, you pickup game," and one COR said that they were "given a two-hour course and told to run with it."[99]

While the Department of Defense does require CORs to complete online training before appointment, interviewees told the Commission that internet connectivity and data-transmission issues sometimes made the course difficult to complete.[100] This led to gaps in contractor oversight while the training was pending.[101] The Commission found that the gaps and lack of training were contributing to fraud and abuse, since "[w]ithout

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[97] *Id.* at 10.

[98] *Id.* at 12.

[99] *Id.*

[100] *Id.* The Commission noted that the Defense Acquisition University (DAU) had received more than one hundred requests to make the training course available on compact disc, but as of April 2009, DAU had not done so.

[101] AT WHAT COST, *supr*a note 77, at 12.

proper oversight, the government cannot confirm that contractors are performing in accordance with contract requirements."[102]

The Commission also found that CORs lacked sufficient time to complete the performance reviews. They spoke to one COR at Task Force Warhorse in Afghanistan who said that he was concurrently responsible for overseeing fifteen contracts and writing four performance reviews, all as "extra duty," while he completed his three primary jobs.[103] Another officer said that he was aware of contracts in Afghanistan that were being "monitored" by CORs in the United States.[104]

The interim report noted that the lack of adequate training and personnel had already been documented repeatedly: by the Comptroller General in January 2008 in his testimony before the House Committee on Armed Services, again in the Comptroller General's March 2007 testimony to Congress, and in interviews and briefings in April 2009.[105] These and other issues had also been addressed in more than five hundred and thirty reports on wartime contracting published by political research and oversight organizations.[106] Together, the reports contained more than one thousand, two hundred recommendations.[107]

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[102]*Id.*

[103]*Id.* at 11.

[104]*Id.*

[105]*Id.*

[106]AT WHAT COST, *supra* note 77, at 24-25.

4. Second Interim Report

On February 24, 2011, the Commission issued its second interim report to Congress, setting out its criticism of the existing system, along with twenty-two proposed recommendations for legislation and policy changes.[108] Among other things, the Commission found that the government was failing to record contractors' performance assessments in the federal database.[109] According to the interim report, agencies admitted that recording assessments was not given priority and that the information was not adequately shared across agencies.[110]

The Commission commented on a recent report by OFPP which acknowledged that past performance assessments were rarely completed.[111] OFPP recommended that agencies focus primarily on writing assessments for high-risk contracts.[112] The Commission disagreed with this advice, arguing that "all contingency contracts deserve

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[107]*Id.*

[108]COMM'N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, AT WHAT RISK: CORRECTING OVER-RELIANCE ON CONTRACTORS IN CONTINGENCY OPERATIONS (2011) *available at* http://www.wartimecontracting.gov/docs/CWC_InterimReport2-lowres.pdf [hereinafter AT WHAT RISK].

[109]*Id.* at 41.

[110]*Id.* at 46.

[111]*Id.*

[112]AT WHAT RISK, *supra* note 108, at 46.

priority treatment due to their high risk to critical services and substantial resources.[113] The Commission wrote that a selective approach by senior leaders encouraged contracting officers "to view recording contractor performance assessments as a waste of time."[114]

In addition to finding fault with the general approach to performance reviews, the Commission pointed to three primary barriers or limitations as cited in the interviews with contracting officers.[115] First, the officers said that poor bandwidth in remote locations made logging into the internet database difficult and time consuming.[116] Second, the responsibility to rate the contractors was generally delegated to CORs who had high turnover rates and were therefore not familiar with contractors' past performance.[117] Third, contracting officers cited federal policy which allowed contractors to engage in a "lengthy comment, rebuttal and review process."[118] The officers said that to avoid these delays, they sometimes made an "unduly generous assessment - or no assessment at all."[119]

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[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] AT WHAT RISK, *supra* note 108, at 46.

[118] *Id.*

[119] *Id.*

The Commission offered three recommendations to address these issues: 1) allow contractors to "respond to, but not appeal" agency performance assessments, eliminating the policy that allows contractors to elevate disagreements within the agency; 2) limit contractors' past performance references to only those contracts that have been recorded in the database; and, 3) require agencies to certify semiannually that they have used the information to make source-selection decisions.[120]

5. Hearing on Proposed Committee Recommendations

In February 2011, the Commission held ahearing to discuss the proposed recommendations and to further explore the reasons for the government's failure to use the past performance database.[121] According to the Commission's co-chairman, then-Representative Christopher Shays, a sampling of contingency contracts suggested that more than ninety percent of all DOD contracts had no performance data entered.[122] Approximately seventy-five percent of the past performance reports that were entered for the DOD lacked information on the contractors' cost-control efforts.[123] As a result, Shays said, accountability was "absent, diluted, delayed, or even avoided."[124] Commissioner Robert Henke later cited the same survey's figures for the State Department and

[120]*Id.* at 47.

[121]*See* ENSURING CONTRACTOR ACCOUNTABILITY, *supra* note 73 (transcript of the panel discussion before the Commission on Wartime Contracting).

[122]*Id.* at 2 (statement of Commissioner Christopher Shays).

[123]*Id.*

[124]*Id.* at 1.

USAID.[125] According to the survey, in 2009, the State Department awarded ninety-three contingency contracts, while USAID awarded eighty-one; neither recorded any performance reviews for contingency contracts that year.[126]

The Commission also found that that performance reviews that were entered were not often used in source selection. Commissioner Grant Green cited a 2009 report by the Government Accountability Office (GAO) which found that sixty percent of contracting officers said they did not factor past performance into their selection process.[127] The Commission speculated, and Green agreed, that at least some contracting officers refused to consider performance because they did not want to risk bid protests. "Sometimes they're reluctant to upset the apple cart with a contractor," Green said, "particularly when there are few contractors that might be able to perform that mission."[128] Scott Amey, General Counsel for the Project on Government Oversight, responded that, in his experience, many contracting officers wrote inflated performance reviews for similar reasons. According to Amey, "[they] give the lowest possible grade that avoids a protest or a complaint from a contractor."[129]

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[125] *Id.* at 24 (question from Commissioner Robert Henke).

[126] ENSURING CONTRACTOR ACCOUNTABILITY, *supra* note 73, at 24.

[127] *Id.* at 14 (question from Commissioner Grant Green).

[128] *Id.*

[129] *Id.* at 16 (response from General Counsel Scott Amey).

Amey also said that contracting officers or CORs "do not have time to sufficiently assess a contractor's history of performance and responsibility."[130] "Unfortunately, the workforce has been stretched thin," he said. "You have . . . two wars going on, so ...who wants to be the person that slows down the process and is blamed for that. The government needed things yesterday."[131]

Witness Daniel Gordon, Administrator for the Office of Federal Procurement Policy (OFPP) argued that the Commission's data was inaccurate and that past performance is collected and considered "in every single case."[132] He said that he would be "astonished if [the Commission] found a case where there was a mandatory evaluation criterion that was ignored."[133] While Gordon admitted that most contracting officers "don't use the database," he said they did contact other agencies' contracting officers directly asking them to make "an [oral] assessment of the contractor's performance."[134] Gordon rejected Commissioner Shay's summation that "we do it differently, informally in

[130]*Id.* at 21.

[131]ENSURING CONTRACTOR ACCOUNTABILITY, *supra* note 73, at 23-24.

[132]*Id.* at 80 (response from Daniel Gordon, OFPP Administrator).

[133]*Id.*

[134]*Id.*

the field."[135] "It's not informal, sir," Gordon responded. "The requirement . . . has been in place for more than a decade."[136]

Commissioner Shays countered that oral performance reviews are inadequate, because they are not transparent.[137] Shays said that the process "is supposed to protect, in a sense, the contractor. They have a right to know what's being said." Commissioner Thibault also disputed Gordon's assertion that even informal or oral reviews were taking place, saying that, based on his visits to outlying bases, "it's not really being done in theater."[138]

6. Final Report and Recommendations

The Commission's final report, entitled "Transforming Wartime Contracting: Controlling Costs, Reducing Risks," was submitted to Congress on August 31, 2011.[139] The report found that the agencies' failure to record and use past performance data created an "increased risk of awarding contracts to habitual poor performers."[140] The

[135]*Id.* at 79 (question from Commissioner Shays).

[136]ENSURING CONTRACTOR ACCOUNTABILITY, *supra* note 73, at79 (response from Daniel Gordon).

[137]*Id.* at 79 (question from Commissioner Shays).

[138]*Id.* at 81 (question from Commissioner Thibault).

[139]*See* TRANSFORMING WARTIME CONTRACTING, *supra* note 5.

[140]*Id.* at 155.

Commission estimated that up to $60 billion has been lost to waste and fraud.[141] The report attributed the failure, in part, to contractor appeals, which it said "distract contracting officers in contingencies and effectively discourage candid evaluations."[142] It also blamed senior leadership, who had "failed to enforce the requirements."[143] The Commission reiterated its three previous recommendations on this issue: allow contractors to respond to assessments but not appeal them, align past performance assessments with contractor references, and require agencies to certify their use of the database.[144]

On September 30, 2011, the Wartime Commission was dissolved, pursuant to a "sunset" provision in the NDAA.[145] Controversially, the panel required its records, which included transcripts of twenty-five hearings, extensive interviews and fact-finding reports, to be sealed in the National Archives for twenty years.[146] Media articles contrasted this with the 9/11 Commission, which sealed its records for only five years.[147] Senators McCaskill and Webb wrote to David Ferriero, Archivist of the United States,

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[141] *Id.* at 1.

[142] *Id.* at 156.

[143] *Id.*

[144] *Id.*

[145] NDAA, *supra* note 88, at § 841(f).

[146] Nathan Hodge, *Panel's War-Waste Records Sealed as Work Ends*, WALL ST. J. (Sept. 30, 2011), http://online.wsj.com/article/SB10001424052970204226204576603060868379444.html.

[147] *Id.*

asking him to reconsider the Commission's request. The Senators wrote that the secrecy behind the Commission's final act was "inconsistent with the goals [Congress] established for [it]," and that "simply stated, we need to live in the light."[148]

7. Senate Bill 2139

On February 29, 2012, Senators McCaskill and Webb introduced The Comprehensive Contingency Contracting Reform Act of 2012 (S. 2139).[149] The bill's purpose was to "enhance security, increase accountability, and improve the contracting of the Federal Government for overseas contingency operations."[150]

Although the bill's past performance provisions were based, at least ostensibly, on the Commission's recommendations, they went beyond them in one key respect and fell short of them in others. Rather than accepting the Commission's recommendation to allow contractors to comment on reviews but not to appeal, the bill eliminated contractor comments entirely. Section 224 specified that "[t]he requirements under Section 42.1503(b) of the Federal Acquisition Regulations to submit agency evaluations of contractor performance to a contractor, to permit contractor response to evaluations, and

[148] Letter from Senators Claire McCaskill and Jim Webb to David S. Ferriero, Archivist of the United States. National Archives and Records Administration (Nov. 7, 2011), *available at* http://www.mccaskill.senate.gov/?p=press_release&id=1390.

[149] Comprehensive Contingency Contracting Reform Act of 2012, S. 2139, 112th Cong. (2012), *available at* http://www.govtrack.us/congress/bills/112/s2139/text.

[150] *Id.*

to retain such response in performance evaluations shall be terminated."[151] However, the bill did not expressly terminate the provision in Section 42.1503(b) that allowed appeals, so the effect of the law was exactly opposite the Commission's intent. Rather than allowing comments and eliminating appeals, as the Commission recommended, it allowed appeals and eliminated comments.

The legislation did not incorporate the Commission's recommendations to tie performance data to contractors' references, and to require agencies to certify their use of the federal database.[152]

The bill was sent to the Ad Hoc Subcommittee on Contracting Oversight, which held a hearing on April 17, 2012.[153] Several panel witnesses expressed concern about the provision that would have eliminated contractor comments. Writing on behalf of USAID, Angelique Crumbly, Acting Assistant for the Administrator at the Bureau for Management, said that "[a]llowing contractors to present their side of the story . . . is a step [USAID] strongly believe[s] maintains the integrity of the record and improves...accountability."[154]

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[151] *Id.* at § 224.

[152] See TRANSFORMING WARTIME CONTRACTING, *supra* note 5, at 156.

[153] *The Comprehensive Contingency Contracting Reform Act of 2012 (S.2139):Hearing on S. 2139 Before the Subcommittee on Contracting Oversight*, 112th Cong. (2012), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112shrg75272/pdf/CHRG-112shrg75272.pdf [hereinafter *Hearing on S. 2139*].

[154] *Id.* at 96 (written statement of Crumbly for the record).

Michael Carroll, Deputy Inspector General for USAID, similarly suggested that contractors should be given an opportunity to respond on the record and that "what the agency does with that information is up to them."[155]

Witness Richard Ginman, Director of Defense Procurement and Acquisition Policy, also objected to the provision, but more on the grounds of efficiency than of fairness.[156] Ginman explained that since contracting officers are required to seek out the contractors' explanations for any negative information that appears in the bids, agencies would find themselves asking repeatedly if contractor comments were removed.[157] "So I can do it one time up front," Ginman explained, "or I can have ten people afterwards do it."[158] He also expressed concern that some contracting officers would fail to seek out an explanation for negative information in the bids from contractors, thereby risking bid protests.[159]

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[155]*Id.* at 35 (Carroll hearing testimony).

[156]*Id.* at 23 (Ginman hearing testimony).

[157]*Id.*

[158]*Hearing on S. 2139*, *supra* note 153, at 23.

[159]*Id.*

The Professional Services Council (PSC) provided a written statement on behalf of three hundred and fifty government contractors, objecting strongly to the proposal.[160] PSC wrote that it was "alarming that such protections would be throw by the wayside in an effort to fix unrelated problems . . . with the government's use of the past performance process."[161] While acknowledging that there were serious issues with the existing system, PSC argued that the solution was not to "eviscerate contractors' rights under the current process."[162] Instead, the Council recommended that Congress "reinforce the contracting officers' responsibilities to post current, complete, and accurate past performance evaluations in a timely manner."[163]

8. Senate Bill 3286

Following the hearing, the Comprehensive Contingency Reform Act was revised and reintroduced on June 12, 2012 as a clean bill.[164] Senate Bill 3286 did not include the controversial section eliminating contractor comments. Instead, this proposed legislation shifted significantly more responsibility to the federal agencies. Section 223 required that the Federal Acquisition Regulatory Council propose a new performance review

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[160] *Id.* (statement of PSC for the record, *available at* http://www.hsgac.senate.gov/download/professional-services-council-statement-for-the-record).

[161] *Id.* at 10.

[162] *Id.*

[163] *Id.*

[164] Comprehensive Contingency Contracting Reform Act of 2012, S. 3286, 112th Cong. (2012), *available at* http://www.govtrack.us/congress/bills/112/s3286/text.

strategy within 180 days of the bill's enactment.[165] The bill specified that the new strategy should, at minimum, establish standards for performance, review timeliness and completeness, assign responsibility and management accountability for the completeness of the reports, and ensure that past performance submissions were consistent with the award fee evaluations where such evaluations were conducted.[166]

The bill also required agencies to provide contractors with copies of their performance reviews "in a timely manner," afforded contractors up to fourteen calendar days to comment or rebut the information, and required that past performance information, including comments or rebuttals, be included in the federal database within fourteen days of delivery.[167] The bill also allowed contractors to submit comments, rebuttals or information outside that fourteen day period and allowed them to challenge evaluations "in accordance with applicable laws, regulations or procedures."[168]

The bill was referred to the Senate Committee on Homeland Security and Governmental Affairs on June 12, 2012.[169]

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[165] *Id.* § 223.

[166] *Id.* § 223(b).

[167] *Id.* § 223(c).

[168] *Id.* § 223(d).

[169] *Id.*

9. Senate Bill 3254 and House Bill 4310

After its reintroduction on June 12, 2012 as Senate Bill 3286, the Comprehensive Contingency Contracting Reform Act was never referred to or even discussed by the Committee on Homeland Security and Governmental Affairs.[170] However, on November 30, 2012, the Senate agreed to incorporate key provisions of the bill into the National Defense Authorization Act for Fiscal Year 2013 (S. 3254).[171] The Senate passed the Authorization Act unanimously on December 4, 2012, but the bill was never voted on by the House.[172] Instead, the provisions were added to the House's version of the Defense Authorization Act, House Bill 4310.[173] The Senate passed the revised bill on December 21, 2012, and it was signed by the President on January 2, 2013.[174]

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[170]*See* S. 3286 (112th): Comprehensive Contingency Contracting Reform Act of 2012, GOVTRACK, http://www.govtrack.us/congress/bills/112/s3286 (last updated June 12, 2012) (showing no action had been taken on S.3286 after its introduction).

[171] S. 3254, 112th Cong. (2012), *available at* http://www.govtrack.us/congress/bills/112/s3254/text; Press Release, Senator Claire McCaskill, Senate Passes McCaskill's Wartime Contracting Bill (Nov. 29, 2012, *available at* http://www.mccaskill.senate.gov/?p=press_release&id=1745.

[172]*See* S. 3254 (112th): National Defense Authorization Act for Fiscal Year 2013,GOVTRACK, http://www.govtrack.us/congress/bills/112/s3254 (last visited Sept. 30, 2013) (detailing the progress of S. 3254).

[173]National Defense Authorization Act for Fiscal Year 2013,H.R. 4310, 112th Cong. (2012), *available at* http://www.govtrack.us/congress/bills/112/hr4310/text.

[174]*See* H.R. 4310 (112th): National Defense Authorization Act for Fiscal Year 2013, GOVTRACK, http://www.govtrack.us/congress/bills/112/hr4310 (last visited Sept. 30, 2013) (listing the progress of H.R. 4310 from introduction to signing by President Obama).

The past performance provisions of both Senate Bill 3254 and House Bill 4310 are virtually identical to those in Senate Bill 3286. Like the second iteration of the Comprehensive Contingency Reform Act, the Defense Authorization Act requires the Federal Acquisition Regulatory Council to develop a new past performance strategy within 180 days of enactment.[175] The NDAA also gave contractors fourteen days to submit comments, rebuttals and information in response to part performance reports[176] and preserved their right to appeal.[177]

The bill assigns oversight to the Comptroller General of the United States and requires the Comptroller General to submit a report to Congress on the effectiveness of the provisions no later than 18 months after enactment.[178]

E. Regulatory Reform

1. Background Detailing

While Senators Webb and McCaskill have led recent legislative efforts, there has been a parallel push for regulatory reform. In April 2009, the GAO issued a report entitled "Federal Contractors: Better Performance Information Needed to Support

[175] H.R. 4310 § 853(a)(1).

[176] *Id.* § 853(c)(2).

[177] *Id.* §853(d).

[178] *Id.* § 853(e).

Agency Contract Award Decisions."[179] The study was in response to three House members who noted that the government was renewing or awarding new contracts to companies with questionable records.[180] The GAO report attributed these failures primarily to flaws in the performance database and in the government's multiple systems for reporting and collecting information.[181]

The effort to provide one standardized reporting system has spanned more than a decade. In July 2002, the OFPP created the Past Performance Information Retrieval System (PPIRS), intending it to be a central repository for federal contractor performance information.[182] The web-based database replaced the agencies' "fragmented methods," of collecting and storing performance reviews, including paper files and private electronic databases.[183] Use of PPIRS was mandated by a 2009 amendment to the FAR; however,

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[179]U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-374, FEDERAL CONTRACTORS: BETTER PERFORMANCE INFORMATION NEEDED TO SUPPORT AGENCY CONTRACT AWARD DECISIONS (2009), *available at* http:///www.gao.gov/new.items/d09374.pdf [hereinafter FEDERAL CONTRACTORS: BETTER PERFORMANCE].

[180]*Id.* at 1.

[181]*Id.*

[182]*Id.*

[183] Memorandum from Lesley A Field, Deputy Administrator, Off. of Fed. Procurement Pol'y on Improving the Use of Contractor Performance Information, (July 29, 2009) *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/procurement/improving_use_of_contractor_perf_info.pdf.

the rule specified that "the process for submitting such reports to PPIRS shall be in accordance with agency procedures."[184]

In practice, this resulted in multiple databases that fed into the PPIRS, all with different rating systems, scales and evaluation criteria. For example, the DOD maintained three databases: the Architect-Engineer Contract Administration Support System (ACASS), the Construction Contractor Appraisal Support System (CCASS), and the Contractor Performance Assessment Reporting System (CPARS).[185] The Department of Energy also used CPARS, which rated contractors as "Unsatisfactory," "Marginal," "Satisfactory," "Very Good," or "Exceptional."[186] The DOD and the DOE also rated contractors on a color scale, including "Red," "Yellow," "Green," "Purple," and "Dark Blue."[187] DOD and DOE evaluation criteria included issues such as subcontract management, logistics support, product performance, and program management, but did not include business relations or management of key personnel.[188]

Other agencies used the Contractor Performance System (CPS) maintained by the National Institutes of Health.[189] CPS ratings included "Unsatisfactory," "Poor," "Fair,"

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[184] FAR 42.1503(c) (2009); 74 Fed. Reg. 31,561 (July 1, 2009).

[185] FEDERAL CONTRACTORS: BETTER PERFORMANCE, *supra* note 179, at 7.

[186] *Id.* at 17.

[187] *Id.* at 18.

[188] *Id.* at 17.

[189] *Id.* at 7.

"Good," "Excellent," and "Outstanding," and contractors were rated on a scale from 0 to 5.[190] CPS used only five evaluation criteria, while CPARS used fourteen, but unlike the DOD's system, it did consider business relations.[191]

The National Aeronautics and Space Administration (NASA), used its own system, the Past Performance Database (PPDB).[192] PPDB ratings were "Poor/Unsatisfactory," "Satisfactory," "Good," "Very Good," and "Excellent," and the rating scale ranged from 1 to 5.[193] NASA used four evaluation criteria, including "Other," and did not consider business relations or management of key personnel.[194]

The GAO found that the data collected from various agencies was too disparate to allow PPIRS to assign contractors an aggregate rating.[195] This meant that contracting officers were forced to open and read many reports across many different agencies to gain an overall picture of a contractor's performance.[196] A "Satisfactory" assessment from the DOE or the DOD had a very different meaning than a "Satisfactory" assessment

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[190]*Id.* at 17-18.

[191]*Id.* at 17.

[192]*Id.* at 7.

[193]*Id.* at 17-18.

[194]*Id.* at 17.

[195]*Id.* at 18.

[196]*Id.*

from NASA. The GAO concluded that "the lack of this information hinders the federal government's ability to readily assess a contractor's performance . . . or how overall performance is trending over time."[197]

The lack of standard evaluation criteria also meant that some performance reports omitted critical information, such as terminations for default.[198] The GAO noted that a $280 million Army munitions contract was awarded to a contractor with a long history of defaults, because the defaults were not documented in collected performance reports.[199] The company subsequently defaulted on the $280 million contract.[200]

These problems were first highlighted in 2005, when an OFPP working group and the Chief Acquisition Officers Council made recommendations to improve the performance review system.[201] The group recommended standardized ratings; collection of "more meaningful past performance information" such as terminations for default; a centralized questionnaire system; and possible elimination of the multiple systems that fed information into the PPIRS.[202] The 2009 GAO report reiterated these

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[197] *Id.*

[198] *Id.* at 13.

[199] *Id.*

[200] *Id.* at 13.

[201] *Id.* at 19.

[202] *Id.* at 19-20.

recommendations, noting that since 2005, little progress had been made, and no funding had been allocated to improve the system.[203]

In 2010, most agencies voluntarily transitioned to CPARS.[204] However, they still maintained separate scales, rating systems and evaluation criteria.

2. First Proposed Rule

In June 2011, the DOD, NASA and the General Services Administration (GSA) proposed amendments to the FAR to standardize ratings and evaluation criteria.[205] According to the proposed rule's "background" section, its purpose was to implement the GAO's 2009 recommendations.[206] The proposed amendments made CPARS the official feeder system into PPIRS.[207] It also specified that evaluation factors should include, "at a minimum . . . (i) Technical or Quality (ii) Cost Control (as applicable) (iii) Schedule/Timeliness (iv) Management or Business Relations [and] (v) Small Business Subcontracting (as applicable)."[208] Each factor would be rated as "Unsatisfactory,"

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[203] *Id.*

[204] 76 Fed. Reg. 37,704 (June 28, 2011) (to be codified at 48 C.F.R. pts. 8, 12, 15, 42, and 49).

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *Id.*

"Marginal," "Satisfactory," "Very Good," or "Exceptional."[209] The proposed rule did not include definitions of these ratings but incorporated by reference the definitions in the CPARS Policy Guide.[210]

3. Second Proposed Rule

The second iteration of the proposed rule, published on September 6, 2012, included rating definitions in the rule's text.[211] It also added "Other" as an evaluation category.[212] The addition was in response to a public comment on the first proposed rule, which suggested that contracting officers should have a place to note tax delinquencies, terminations, suspensions, debarments, late or non-payment to subcontractors, trafficking violations and other relevant information.[213] The second proposed rule also solicited public comments on a proposal to remove the appeal language at FAR 42.1503(d), in order " to improve economy and efficiency."[214] Specifically, the FAR Council asked for comments on whether removing the right to appeal would "improve or weaken the

[209] 76 Fed. Reg. at 37,704.

[210] *Id.*

[211] 77 Fed. Reg. 54,864, 54,869 (Sept. 6, 2012) (to be codified at 48 C.F.R. pts. 8, 12, 15, 17, 42, and 49).

[212] *Id.*

[213] *Id.* at 54,866.

[214] *Id.* at 54,865.

effectiveness of past performance policies and associated principles of impartiality and accountability."[215]

Although the proposed rule did not provide a rationale for the suggested amendment, it was possibly based on two sentences in the 2009 GAO report. The GAO provided a list of "several reasons" for contractors' reluctance to rely on performance data.[216] Among these was that they felt reviewers might "water down" assessments if they were afraid contractors would contest a negative rating.[217] Seven out of sixteen public comments on the proposed rule argued against removing the appeal provision.[218] There were no comments in favor of the proposal.[219]

The American Bar Association's Section of Public Contract Law argued that removing the appeals process would "increase the likelihood of costly and disruptive litigation, and undermine confidence in the past performance evaluation process among

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[215] *Id.*

[216] FEDERAL CONTRACTORS: BETTER PERFORMANCE, *supra* note 179, at 9.

[217] *Id.*

[218] *See generally Federal Acquisition Regulation: Documenting Contractor Performance; FAR Case 2012–009*, Regulations.gov (Nov. 5, 2012), http://www.regulations.gov/#!documentDetail;D=FAR-2012-0009-0001 (listing the public comments on FAR-2012-0009).

[219] *Id.*

not only the contractor community but also within the Government."[220] The ABA also suggested that it would reduce oversight and accountability, which could "undermine the appearance of...impartiality or make the past performance evaluation process vulnerable to abuse."[221] The Bar Association's comment cited *Bannum, Inc. v. United States*, in which the Federal Circuit acknowledged the value of an internal process "intended to account for any bias or mistake in the contracting officer's review."[222] The ABA speculated that without this process, contractors would be forced to resort to litigation at the Board of Contract Appeals or Court of Federal Claims.[223] The law firm Peckar and Abramson made a similar point.[224] They added that forcing contractors to resort to litigation would effectively deny any recourse to small businesses that could not afford to challenge inaccurate ratings in court.[225]

URS Corporation's Global Management and Operations Services commented from the perspective of a government contractor that had received fifteen CPAR

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[220] AM. BAR ASS'N SEC. OF PUB. CONT. L., SECTION COMMENTS ON FAR-2012-0009 2 (2012), *available at* http://www.regulations.gov/#!documentDetail;D=FAR-2012-0009-0013.

[221] *Id.*

[222] *Id.* at 3-4 (*quoting Bannum, Inc. v. United States*,404 F.3d 1346, 1351 (Fed. Cir. 2005)).

[223] *Id.* at 6.

[224] Letter from Lori Ann Lang to General Services Administration, *in* FAR CASE 2012-009-TRANSMITTAL-COMMENTS 69, 69 (GSO Off. of Governmentwide Acquisition Pol'y, 2012), *available at* http://www.regulations.gov/#!documentDetail;D=FAR-2012-0009-0015.

[225] *Id.* at 70.

evaluations in the two previous years.[226] According to the company, almost thirty percent of its initial evaluations contained errors which were subsequently amended.[227] The comment emphasized that these were not "mere expressions of . . . differing judgment or opinion," but "were based on the identification of incorrect, incomplete, or misleading recitations of the factual record; ratings that were inconsistent with . . . definitions established by the agency; and/or ratings that were inconsistent with the government's factual narrative description of contractor performance."[228]

The Council of Defense and Space Industry Associations similarly noted that its members had reported "numerous cases where an initial CPARS evaluation contained factual errors that, when corrected, resulted in substantial changes in the final performance rating and/or narrative."[229] As with URS, most of the errors "were . . . not differences in judgment or opinion."[230]

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[226] Comments from URS Corp. – Global Management and Operation Services on FAR-2012-009 Documenting Contractor Performance, *in* FAR CASE 2012-009-TRANSMITTAL-COMMENTS 65 (GSO Off. of Governmentwide Acquisition Pol'y, 2012), *available at* http://www.regulations.gov/#!documentDetail;D=FAR-2012-0009-0015.

[227] *Id.* at 67.

[228] *Id.*

[229] COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS FAR COMMENT LETTER DOCUMENTING CONTRACTOR PERFORMANCE 6 (2012), *available at* http://www.regulations.gov/#!documentDetail;D=FAR-2012-0009-0011.

[230] *Id.*

The Associated General Contractors of America suggested that without oversight, contracting officers could base negative reviews on personality conflicts rather than on actual contract performance.[231] They cited the "rare - but reportedly more frequent" case where a contracting official used the evaluation as a negotiating tool to lower the price on a valid change order.[232] Like URS, the Associated General Contractors were also aware of, or had experienced, basic factual mistakes. They pointed to an example of an evaluation that was written for the wrong project.[233] The Association speculated that without the basic protections of an internal appeal system, many contractors would seek future business in private industry, rather than in the federal market.[234]

4. Final Rule

The FAR Council issued its final rule on "Documenting Contractor Past Performance," on August 1, 2013.[235] The Council ultimately retained the appeals process, based on public comments.[236] The rule's published background information notes that no comments were in favor of eliminating appeals and that respondents argued

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[231] JIMMY CHRISTIANSON, AGC PAST PERFORMANCE EVALUATION COMMENTS FAR CASE 2012-009 2 (2012) *available at* http://www.regulations.gov/#!documentDetail;D=FAR-2012-0009-0006.

[232] *Id.*

[233] *Id.*

[234] *Id.*

[235] Documenting Contractor Past Performance, 78 Fed. Reg. 46,783 (Aug. 1, 2013) (to be codified at 48 C.F.R. pts. 8, 12, 15, 17, 42, 49).

[236] *Id.* at 46,786.

that to do so would "reduce contractor competition, increase the likelihood of disruptive and costly litigation, weaken the effectiveness of past performance review procedures and undermine confidence in the process."[237] However, the Council clarified that performance reviews would not be withheld pending appeal, writing that "the existence of an appeal need not delay making a past performance evaluation available to source selection officials."[238]

The final rule requires agencies to prepare past performance reports "at least annually and at the time the work under a contract is completed."[239] It also requires them to assign responsibility and accountability for past performance reports to "individuals," or to Contracting Officers who will collate information from project managers, program managers and contracting officer representatives.[240]

The rule creates standard evaluation factors, including: Technical (quality), Cost Control, Schedule/Timeliness, Management or Business Relations, and Small Business Subcontracting (if applicable).[241] It provides an "other" factor for relevant information that does not fall within one of these categories.[242] It also creates a standardized, five-

[237] *Id.* at 46,785.

[238] *Id*. at 46,786.

[239] *Id.* at 46,788.

[240] Documenting Contractor Past Performance, 78 Fed. Reg. at 46,788.

[241] *Id*. at 46,789.

[242] *Id*.

scale rating system: Exceptional, Very Good, Satisfactory, Marginal and Unsatisfactory.[243] Detailed tables explain and define each rating.[244]

The final rule took effect on September 3, 2013.[245]

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[243] *Id*.

[244] Documenting Contractor Past Performance, 78 Fed. Reg. at 46,789-791.

[245] *Id.* at 46,783.

III. Foreign Subcontractors and SPOT

A. Background

With regard to contingency contracting, where the need for goods and services procured means that normal safeguards to ensure quality are often not in place, experts and academics have also criticized federal agencies' lack of consistent and comprehensive data on contingency subcontractors, particularly foreign subcontractors.[246] Although subcontractors currently perform approximately seventy percent of the work assigned to prime contractors in Iraq and Afghanistan, the U.S. government has very limited access to and control over these arrangements.[247] While the agencies are required to track and document subcontracts, the DOD, Department of State, and USAID have different screening policies, and no uniform system exists for collecting data.[248] The lack of oversight poses serious security concerns and has opened the door to fraud, waste, abuse and crime.[249]

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[246] David Isenberg, The Invisible Foreign Subcontractor, THE HUFFINGTON POST, Aug. 16, 2012, http://www.huffingtonpost.com/david-isenberg/the-invisible-foreign-sub_b_1785420.html.

[247] Carissa N. Tyler, Limitations of the Contingency Contracting Framework: Finding Effective Ways to Police Foreign Subcontractors in Iraq and Afghanistan, 41 Pub. Cont. L.J. 453, 455 (2012).

[248] Isenberg, *supra* note 246.

[249] *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-999R,MILITARY OPERATIONS: BACKGROUND SCREENINGS OF CONTRACTOR EMPLOYEES MAY LACK CRITICAL INFORMATION, BUT U.S. FORCES TAKE STEPS TO MITIGATE THE RISK CONTRACTORS POSE (2006) ("While contractor employees can provide significant benefits to U.S. forces, contractor employees can also pose a risk to U.S. troops. For example, the terrorists who attacked the U.S.S. Cole were suspected to be contractor employees associated with its refueling operations…..Military commanders and other officers are aware that DOD and contractors have difficulties conducting comprehensive

B. Use of Foreign Subcontractors

The U.S. military and NATO allies have relied heavily on foreign contractors and subcontractors in Iraq and Afghanistan due largely to diplomacy-based legislation. Congress codified the "Afghan First" and "Iraqi First" policies as part of the National Defense Authorization Act for Fiscal Year 2008.[250] The programs were based on the post-World War II Marshall Plan and were designed to help the countries rebuild their economies and skilled labor forces after decades of war.[251] The legislation's mandate is to employ Afghan and Iraqi citizens wherever possible and to give priority to local goods and services.[252]

According to some experts, the initiatives have had "mixed results" in practice. Ambassador (Ret.) Kenneth Moorefield, Assistant Inspector General for Special Plans and Operations, found that some Afghan companies have been "unable to meet contractual timing and quality requirements."[253] Patrick Fitzgerald, Director of the Defense Contract Audit Agency (DCAA), echoed this point in a hearing on wartime

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criminal background screenings and take steps to reduce the risk contractors may pose to U.S. forces and installations…)) [hereinafter MILITARY OPERATIONS].

[250] National Defense Authorization Act for Fiscal Year 2008 § 886.

[251] Hammond, Nichols & Gagne, *supra* note 3, at 3.

[252] National Defense Authorization Act for Fiscal Year 2008 § 886(a) (3).

[253] Hammond, Nichols & Gagne, *supra* note 3, at 3 (quoting Risks and Challenges Associated with ANSF Training Contracts: Hearing Before the Commission on Wartime Contracting in Iraq and Afghanistan, 111th Cong. 12 (2009) (written statement of Ambassador (Ret.) Kenneth P. Moorefield, Assistant Inspector General for Special Plans & Operations for the GWOT and Southwest Asia Inspector General, Department of Defense)).

contracting, saying that foreign subcontractors "pose some real challenges [because] many of them have not done business under the FAR...so trying to communicate what the expectations are for them has [been difficult]."[254]

The U.S. government has also found it difficult to fully track contractor personnel, in part because of the unusually large number, and layers, of subcontracts. According to one experienced Contracting Officer, work is frequently subcontracted to "loosely organized cooperatives...because there are few large construction companies in Iraq."[255]

An investigation of Bechtel, a U.S. company hired to provide construction, security and life support services, found that the contractor hired sixty-six subcontractors for a 2007 project. Those sixty-six companies further subcontracted to another one hundred and two, and according to Bechtel, there were "probably other subcontractors that were not specifically identified."[256] According to congressional testimony by Stuart

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[254]*Subcontracting: Who's Minding the Store?*, *supra* note 22, at 57 (response by Patrick Fitzgerald to a question from Commissioner Christopher Shays).

[255]SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, REVIEW OF BECHTEL'S SPENDING UNDER ITS PHASE II IRAQ RECONSTRUCTION CONTRACT 24 (2007), *available at* http://www.sigir.mil/files/audits/07-009.pdf.

[256] Subcontracting in Combat Zones: Who Are Our Subcontractors?, *Hearing Before the Subcommittee on National Security and Foreign Affairs, Committee on Oversight and Government Reform*, 111th Cong. 4 (2010), *available at* http://www.sigir.mil/files/testimony/SIGIR_Testimony_10-004T.pdf [hereinafter *Subcontracting in Combat Zones*] (testimony of Inspector General Stuart W. Bowen).

Bowen, Special Inspector General for Iraq Reconstruction, "even prime contractors may have difficulty identifying all of their subcontractors."[257]

Author David Isenberg expressed a similar opinion in his congressional testimony. Isenberg borrowed from Winston Churchill when describing the relationship between prime contractors and subcontractors as "a riddle, wrapped in a mystery, inside an enigma."[258]

C. Tracking and Screening

In theory, all subcontractors should be accounted for, since the DOD, Department of State and USAID all have policies requiring prime contractors to submit their subcontracts for review and approval. According to testimony from agency officials, in contingency contracting mission both State and USAID require contractors to obtain written consent from the contracting officer before making a subcontract award.[259] Although in the DOD, screening and express approval "hasn't happened in the past," an

[257] *Id.*

[258] Are Government Contractors Exploiting Workers Overseas? Examining Enforcement of the Trafficking Victims Protection Act: *Hearing Before the House Committee on Oversight and Government Reform*, 112th Cong. 19 (2011) [hereinafter *Are Government Contractors Exploiting Workers Overseas*] (testimony of David Isenberg), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg71964/pdf/CHRG-112hhrg71964.pdf.

[259] *Subcontracting: Who's Minding the Store?*, *supra* note 22 at 10, 12 (testimony from Cathy Read, Director of Acquisition Management, Department of State and testimony from Drew Luten, Acting Assistant Administrator for Management, USAID).

agency representative assured the Commission on Wartime Contracting that the DOD is engaged in a "steady forward effort to make sure that it does happen."[260]

In 2008, the agencies agreed via a Memorandum of Understanding (MOU)[261] and policy directives[262] to use the Synchronized Predeployment and Operational Tracker (SPOT) database to monitor contracts and contractor personnel. The memorandum applies to all contracts in Iraq and Afghanistan that last for more than thirty days or are valued at more than $100,000.[263] However, the agreement does not provide guidelines on data collection methods, and agencies do not use the system uniformly.[264] The DOD, USAID and Department of State all have different standards defining what data must be tracked and entered into SPOT.[265]

The agencies also use different security screening methods for contractors and contractor personnel, and even intra-agency procedures are not always consistent. For

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[260] *Id.* at 52 (response from Edward Harrington, Deputy Assistant Secretary of the Army for Procurement).

[261] Memorandum of Understanding (MOU) Between the U.S. Dep't of State (State), the U.S. Dep't of Defense (DOD), and the U.S. Agency for International Development (USAID) Relating to Contracting in Iraq and Afghanistan 3 (2008), *available at* http://www.acq.osd.mil/log/PS/p_vault/MOU_Signed_July2008.pdf.

[262] U.S. AGENCY FOR INT'L DEV., ACQUISITION AND ASSISTANT POLICY DIRECTIVE 09-015 (2009).

[263] Isenberg, *supra* note 246.

[264] *Id.*

[265] *Id.*

example, there are no DOD-wide standards or procedures for conducting security screenings with background checks.[266] A representative of the Department of State told a congressional committee that it uses a different screening process at each location.[267] Cathy Read, the State's Director of Acquisition Management, said this is necessary because the locations have varying access to information.[268] GAO reports confirm this, outlining a long list of obstacles to effective background checks on foreign workers.[269]

Since nation-wide criminal databases do not exist in Iraq and Afghanistan, screeners are forced to check local and regional databases, where available.[270] This means that they are reliant on the applicant to truthfully provide all of their prior addresses. If the applicant fails to provide a prior address, the screeners may miss some local criminal data.[271] However, most regions of Iraq do not maintain criminal records at all.[272] The level of corruption in Iraq and Afghanistan means that the databases that do exist may be unreliable - records may have been changed, destroyed, or not acknowledged.[273] Some countries lack national identification numbers, so even where

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[266]MILITARY OPERATIONS, *supra* note 249 at 5.

[267]*Subcontracting: Who's Minding the Store?, supra* note 22 at 10-11.

[268]*Id.*

[269]MILITARY OPERATIONS, *supra* note 249 at 6.

[270]*Id.*

[271]*Id.*

[272]*Id.*

[273]*Id.*

records are found, it is difficult to be certain that those records belong to the worker being screened.[274] The countries' privacy laws can also make it difficult to gain access to records.[275] In some cases, the foreign governments will not release criminal records to third parties.[276] Screeners can check workers' names against online U.S. databases; for example, the Office of Foreign Asset Control's "Specially Designated Nationals and Blocked Persons List."[277] However, the list identifies terrorists, narcotics traffickers and weapons traffickers by name or alias, so where the worker has a common name, there is no real way to tell whether the person screened is the person listed.[278]

Contractors have found it difficult to screen subcontractors for human rights violations, since no unclassified U.S. or international database exists for tracking accusations and convictions.[279] Human rights abuse is generally classified as another crime - for example, homicide - and the individuals involved can just change their names.[280]

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[274]MILITARY OPERATIONS, supra note 249, at 6.

[275]*Id.*

[276]*Id.*

[277]*Id.* at 7.

[278]*Id.*

[279]MILITARY OPERATIONS, supra note 249, at 7.

[280]*Id.*

Screeners have even found it difficult to perform background checks on U.S. nationals, since state criminal databases may be inaccurate or incomplete.[281] Screeners may fail to review federal court records unless directed to do so by the government, and they may miss other relevant databases, like family or domestic courts.[282]

These obstacles to effective background checks mean that even where agencies act in good faith to record subcontractor data in SPOT, the information available may be extremely limited.

D. Fraud, Waste, Abuse and Crime

With little data on or access to foreign subcontractors, the government has been unable to provide adequate oversight of contingency contracts. As a result, tens of billions of dollars have been lost to waste and fraud.[283] While some of the loss can be attributed to prime contractors, the DCAA has found more than $6 billion in subcontractor-related waste and unsupported costs.[284] A 2010 audit of DynCorp found that subcontractors were responsible for $500 million of an $800 million loss.[285] A

[281] *Id.* at 5.

[282] *Id.*

[283] TRANSFORMING WARTIME CONTRACTING, supra note 5, at 32.

[284] *Subcontracting: Who's Minding the Store?*, supra note 22, at 34.

[285] *Id.* (question from Commissioner Tiefer).

similar audit of KBR found that foreign subcontractors were primarily responsible for an unsupported $48 million.[286]

Although the FAR makes prime contractors responsible for ensuring that subcontractor' costs are "fair and reasonable,"[287] the government can have difficulty accessing cost information when that process breaks down.[288] In many cases, foreign subcontractors are shielded by the host country's privacy laws.[289] In congressional testimony, DCAA Director Patrick Fitzgerald pointed to the example of Al-Shora Trading (Al-Shora International General Trading and Contracting Company).[290] When asked to provide actual cost data to support its invoices, the company refused, responding that it had "previously never had to provide data for an audit," and that it was not "required to, per Kuwaiti law."[291] The Kuwaiti company would not cooperate with the U.S. government, despite provisions in the subcontract requiring it to do so.[292] The government's only recourse was to suspend payments to the prime contractor, DynCorp's Global Linguistics Solutions.[293]

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[286] *Id.* at 35.

[287] FAR 15.402(a) (2010).

[288] *Subcontracting: Who's Minding the Store?*, supra note 22, at 35.

[289] *Id.* at 58.

[290] *Id.*

[291] *Id.*

[292] *Id.*

[293] *Subcontracting: Who's Minding the Store?*, supra note 22, at 8.

IV. Human Rights Violations

A. Reported Incidents

In the absence of oversight, some foreign subcontractors have also been involved in "incidents that reflect badly upon the United States."[294] A June 2012 report by the American Civil Liberties Union (ACLU) and Yale Law School's Lowenstein International Human Rights Clinic found that in both Iraq and Afghanistan, human trafficking and abuse of Third Country Nationals are widespread.[295] According to the report, some government contractors rely on "local recruiting agents," who target vulnerable Third Country Nationals in places such as Nepal, India, the Philippines and Uganda.[296] The workers, many of whom are earning less than $1.00 per day in their home countries, are charged exorbitant fees, which they are often forced to borrow from loan sharks.[297] The money lenders threaten the workers' families when they are unable to repay the loans and charge them interest rates of up to 50% per year.[298] The local recruiters promise the workers lucrative jobs in Dubai or Amman, so they may not be aware that they will be working in Iraq or Afghanistan until they arrive at the Baghdad or Kandahar airports.[299]

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[294] *Id.* at 3.

[295] *See generally* VICTIMS OF COMPLACENCY, *supra* note 14.

[296] *Id.* at 6.

[297] *Id.*

[298] *Id.*

[299] *Id.*

Once there, many are subjected to squalid living conditions, physical confinement, physical and verbal abuse, and fourteen-hour, seven-day workweeks.[300] They are paid as little as $150 a month and are exposed to deadly working conditions without compensation or insurance.[301] According to the ACLU, many workers will not report these practices or seek protection because they are afraid that whistle blowing will cause them to lose their jobs.[302] Most need the money to repay their debts so that the loan sharks will not harm their families.[303]

In 2011, David Isenberg and the Project on Government Oversight documented an almost identical story, based on government emails and internal documents from Houston-based contractor KBR.[304] In 2008, KBR hired Kuwaiti subcontractor Najlaa International Catering Services to fulfill a catering and cleaning contract for an Army base in Iraq.[305] Najlaa promised the work to South Asian laborers, at least one thousand of whom were subsequently warehoused for months without work, pay, sanitary living

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[300] VICTIMS OF COMPLACENCY, *supra* note 14, at 6.

[301] *Id.*

[302] *Id.*

[303] *Id.*

[304] David Isenberg & Nick Schwellenbach, Documents Reveal Details of Alleged Labor Trafficking by KBR Subcontractor, PROJECT ON GOV'T OVERSIGHT BLOG (Jun. 14, 2011, 2:38 PM), *available at* http://pogoblog.typepad.com/pogo/2011/06/documents-reveal-details-of-alleged-labor-trafficking-by-kbr-subcontractor.html.

[305] *Id.*

conditions, or even windows.[306] The story came to the media's attention when workers staged a protest on the outskirts of Baghdad.[307]

Although the government investigated the alleged human rights abuses, the company was not prosecuted, and neither the contract with KBR nor the subcontract with Najlaa were terminated.[308] KBR was subsequently awarded additional government contracts, and the government also directly contracted with Najlaa. Despite U.S. and international anti-trafficking laws and FAR 22.17's "zero tolerance policy regarding trafficking in persons," the U.S. government has never fined, prosecuted, suspended or terminated contractors or subcontractors for human rights abuses or human trafficking.[309]

However, support exists in the current administration to hold contractors accountable for human rights violations. Each year since January 2010, President Obama has marked the anniversary of the Emancipation Proclamation and the 13th Amendment by declaring January "National Slavery and Human Trafficking Prevention Month."[310] The event is designed to raise awareness of the victims of modern slavery --

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[306] *Id.*

[307] *Id.*

[308] *Id.*

[309] VICTIMS OF COMPLACENCY, supra note 14, at 7.

[310] Proclamation No. 8471, 3 C.F.R. 8471 (2011), *available at* http://www.whitehouse.gov/the-press-office/presidential-proclamation-national-slavery-and-human-trafficking-prevention-month.

workers throughout the world who are "bought, sold, beaten and abused, locked in compelled service and hidden in darkness."[311] According to the State Department's 2013 Trafficking in Persons Report, approximately twenty-six million men, women and children are victims of human trafficking at any given time.[312] This includes those subjected to involuntary servitude, slavery, debt bondage and forced labor."[313]

The United States has been active in seeking financial penalties against countries such as Cuba and North Korea that continue to permit human trafficking.[314] In June 2013, a State Department report identified sixteen countries that have failed to combat or have been complicit in forced labor.[315] The State Department focused its criticism on Russia, China and Uzbekistan, which received the report's lowest rankings, and the State

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[311] Proclamation No. 8924, 3 C.F.R. 8924 (2013), *available at* http://www.whitehouse.gov/the-press-office/2012/12/31/presidential-proclamation-national-slavery-and-human-trafficking-prevent [hereinafter December 2012 Presidential Proclamation].

[312] OFF. TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2013 7 (June 2013), *available at* http://www.state.gov/j/tip/rls/tiprpt/2013/index.htm (follow "Introductory Material (PDF)" hyperlink).

[313] *Id.* at 29 (citing Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, 114 Stat. 1464).

[314] Steven Lee Myers, *U.S. Accuses 3 Countries of Abetting Human Trafficking*, N.Y. TIMES (Jun. 19, 2013), http://www.nytimes.com/2013/06/20/world/us-accuses-3-countries-of-abetting-human-trafficking.html?_r=0.

[315] *Id.*

Department gave President Obama ninety days to decide whether to impose economic sanctions.[316]

While the State Department's report found that the United States "fully complies with the minimum standards for the elimination of trafficking,"[317] it recommended specific changes to the way the government oversees and enforces labor standards in its foreign contracts.[318] These included better screening, better data sharing across agencies, and the use of debarment for contractors and subcontractors who engage in human trafficking.[319] According to Luis CdeBaca, Ambassador for the Office to Monitor and Combat Trafficking in Persons, "the United States has a long way to go."[320]

In his 2013 Trafficking Prevention Month proclamation, the President acknowledged that, as one of the world's largest purchasers of goods and services, the Federal Government has a responsibility to "keep leading by example," and to "ensure

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[316] *Id.*

[317] Trafficking in Persons Report, *supra* note 312, at 381, *available at* http://www.state.gov/j/tip/rls/tiprpt/2013/index.htm (follow "Country Narratives: T-Z and Special Case (PDF)" hyperlink).

[318] *Id.* at 382.

[319] *Id.*

[320] LUIS CDEBACA, OFF. TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, BRIEFING ON THE 2013 TRAFFICKING IN PERSONS REPORT (2013), *available at* http://www.state.gov/j/tip/rls/rm/2013/210906.htm.

that American tax dollars never support forced labor."[321] Ambassador CdeBaca also emphasized this point in a June 2013 briefing, saying that "President Obama feels strongly that [the government] has a responsibility," to look at its supply chain.[322] However, despite the President's commitment, multiple trafficking incidents implicating U.S. contractors and subcontractors have led watchdog groups such as the American Civil Liberties Union (ACLU) and the Project on Government Oversight to criticize the government harshly for failing to meet its responsibility.[323]

Ostensibly, the U.S. has a zero-tolerance policy on human trafficking, established by two memoranda issued by the Secretary of Defense and Deputy Secretary of Defense in 2004. On January 30, 2004, Deputy Secretary of Defense Paul Wolfowitz issued a memorandum announcing President Bush's policy that "all departments of the United States Government will take a 'zero tolerance' approach to trafficking in persons."[324]

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[321] December 2012 Presidential Proclamation, *supra* note 311.

[322] CDEBACA, *supra* note 320.

[323] *See* Isenberg & Schwellenbach, *supra* note 304; *see generally* VICTIMS OF COMPLACENCY, *supra* note 14.

[324] Memorandum from Paul Wolfowitz to the Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, Commanders of the Combat Commands, General Counsel of the Department of Defense, Inspector General of the Department of Defense, Directors of Defense Agencies on Combating Trafficking in Persons (Jan. 30, 2004).

Writing on behalf of the DOD, the Deputy Secretary denounced "any. . . activities that may contribute to the phenomenon of trafficking in persons," and said that trafficking "will not be facilitated in any way by the activities of [the department's] Service members, civilian employees, indirect hires or DOD contract personnel."[325] Secretary of Defense Donald Rumsfeld reiterated this approach in a follow-up memorandum on September 16, 2004, writing that military commanders should "be vigilant to the terms and conditions of employment for individuals employed by DOD contractors in their Area of Operations." The Secretary of Defense emphasized that "[t]rafficking includes involuntary servitude and debt bondage," and said that these practices "will not be tolerated in DOD contractor organizations or their subcontractors in supporting DOD operations."[326] The policy was codified in the Federal Acquisition Regulation, which calls for "suitable remedies, including termination," for contractors who engage in human trafficking.[327]

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[325] *Id.*

[326] Memorandum from Donald Rumsfeld to the Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, Commanders of the Combat Commands, General Counsel of the Department of Defense, Inspector General of the Department of Defense, Directors of Defense Agencies, Combating Trafficking in Persons (Sep. 16, 2004).

[327] 48 C.F.R § 22.1703 (2009).

However, despite the regulation and official policy against human trafficking, there has been very little, if any, enforcement; both the Commission on Wartime Contracting and the ACLU have documented multiple instances of ongoing forced labor in federal contracts. According to the ACLU and based on testimony given at Commission hearings, "the Government's response to even the most egregious abuses remains inadequate."[328] As of June 2013, no contractor had been debarred for human trafficking.[329]

B. Executive Order

The President cited the zero-tolerance policy when he announced the "Executive Order Strengthening Protections Against Trafficking in Persons in Federal Contracts," on September 25, 2012.[330] The President's order directed the Federal Acquisition Regulatory

[328] *See generally Are Government Contractors Exploiting Workers Overseas*, *supra* note 258, at 2 (Statement of Sam McCahon).

[329] Kelly Heinrich & Kavitha Sreeharsha, *Opportunity for Federal Contractors to Lead on Human Trafficking*, THE HUFFINGTON POST, Jun. 11, 2013.http://www.huffingtonpost.com/kelly-heinrich/opportunity-for-federal-c_b_3415284.html.

[330] Exec. Order No. 13627, 77 Fed. Reg. 60,029 (Sept. 25, 2012), *available at* http://www.gpo.gov/fdsys/pkg/DCPD-201200750/pdf/DCPD-201200750.pdf [hereinafter Exec. Order 13627]

Council to amend the FAR to strengthen the policy's efficacy.[331] The President said that the new measures were modeled on best practices in the private sector, and his efforts focused on amending anti-trafficking FAR provisions and expanding government training programs.[332]

The President said that the amended FAR should expressly prohibit not just trafficking but "trafficking-related activities," including misleading and fraudulent recruitment practices, employee recruitment fees, and destruction of an employee's identity documents.[333] He also gave the Council discretion to target "other specific activities that [it] identifies as directly supporting or promoting trafficking in persons."[334]

The President recommended a mandatory contract clause that would require contractors and subcontractors to cooperate fully with trafficking audits and investigations.[335] He said contracting officers should also be required to notify the

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[331] *Id.*

[332] *Id.*

[333] *Id.* § 2.

[334] *Id.* § 2(A)(v).

[335] Exec. Order 13627, *supra* note 330 § 2(B).

agency's Inspector General if they become aware of any trafficking activity.[336] President Obama outlined the elements of a compliance plan that contractors and subcontractors should maintain during the performance of the contract and should provide to the contracting officer upon request.[337] These included a process for employees to report trafficking activity without fear of retaliation.[338] The President also recommended that the compliance plans include wage policies that prohibit recruitment fees and permit the use of only experienced recruitment companies which meet host-country wage requirements.[339]

In addition to addressing FAR amendments, the Executive Order directed the Administrator for Federal Procurement Policy to provide guidance to the agencies on improving monitoring and training programs for federal employees.[340] The Order specified that the federal acquisition workforce should be trained on anti-trafficking laws, regulations and policies and should be familiar with internal agency policies and procedures for investigating and managing contractor and subcontractor violations.[341]

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[336] *Id.* § 2(C).

[337] *Id.*

[338] *Id.*

[339] *Id.*

[340] Exec. Order 13627, *supra* note 330 § 3.

[341] *Id.*

C. Legislation

Congress included similar provisions in the End Trafficking in Government Contracting Act (ETGCA), signed into law in January 2013.[342] The ETGCA was ultimately incorporated into the National Defense Authorization Act for Fiscal Year 2013 after similar bills, including H.R. 4567 (111th Congress), S. 2979 (111th Congress), and H.R. 2136 (112th Congress), died in committee.

Like the Executive Order, the Act requires contractors to develop and maintain anti-trafficking compliance plans.[343] The clause applies to all overseas government contracts exceeding $500,000, and requires contractors to present the plan prior to receiving an award.[344]

The ETGCA requires contracting officers to report any "credible information" on trafficking to the Inspector General[345] and recommends (but does not require) remedial action, including termination, suspended payments or referral for debarment, for a substantiated allegation.[346]

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[342] National Defense Authorization Act for 2013, H.R. 4310, 112th Cong. (2013) (enacted).

[343] *Id.* § 1703.

[344] *Id.* § 1703(a).

[345] *Id.* § 1704(a)(1).

[346] *Id.* § 1704(c).

The Act also expands the penalties for fraud in foreign labor trafficking to apply to "whoever knowingly and with intent to defraud recruits, solicits, or hires a person outside the United States or causes another person to recruit, solicit or hire," for U.S. government work "by means of materially false or fraudulent pretenses, representations or promises."[347]

The Act orders amendment of the FAR no later than 270 days after ETGCA enactment to implement its provisions.

D. Implementation

The Federal Acquisition Regulatory Council (the FAR Council) held an open meeting in March 2013, seeking comments on how to best implement both the Executive Order and the ETGCA.[348] The Council noted that it was seeking the "most effective and least burdensome," approach.[349] The notice received eighteen public comments.

Members of Congress, including Senators Richard Blumenthal and Al Franken and House members Chris Smith, Carolyn Maloney, Karen Bass, and James Lankford,

[347] *Id.* § 1706 (emphasis added).

[348] 78 Fed. Reg. 9918 (Feb. 12, 2013).

[349] *Id.*

wrote a detailed letter requesting that the final regulation include specific provisions.[350] Among other things, the members of Congress requested regulatory enforcement of the new Title 18 anti-fraud provision, which prohibits fraud, misrepresentation, and false promises to individuals recruited for federal contracts overseas. [351] They noted that the provision also prohibits "causing another" to engage in these practices and asked that the new regulations clearly highlight the mandatory disclosure triggered by this clause.[352]

Sam McCahon, a former government attorney, wrote on behalf of McCahon Law Offices, asking the Council to prohibit government hiring through agents, subagents and consultants.[353] He explained that these actors commonly engage in deceptive and fraudulent hiring practices and that their use creates an "onion skin" effect that makes legal accountability difficult.[354] McCahon recommended that the new regulations require

[350]RICHARD BLUMENTHAL ET AL., U.S. CONGRESS, MEMO TO FAR RE MVC-2013-01 - PROTECTION AGAINST TRAFFICKING IN PERSONS IN FEDERAL CONTRACTS (2013), *available at* http://www.regulations.gov/#!documentDetail;D=FAR-2013-0081-0015.

[351]*Id.*

[352]*Id.*

[353]SAM W. MCCAHON, WRITTEN COMMENTS TO DEPARTMENT OF DEFENSE (DOD), GENERAL SERVICES ADMINISTRATION (GSA), AND NAT'L AERONAUTICS AND SPACE ADMINISTRATION (NASA): COMMENTS ON "PROTECTIONS AGAINST TIP" 4 (2013), *available at* http://www.regulations.gov/contentStreamer?objectId=0900006481236ef4&disposition=attachment&contentType=pdf.

[354]*Id.*

the government to hire only through licensed recruiting companies and bona fide employees of those recruiters.[355]

McCahon's letter also addressed a possible discrepancy between the President's Executive Order and the ETGCA. While the Executive Order recommended that the Council prohibit recruiting fees entirely, the ETGCA seemed to allow them, provided they are "reasonable."[356] McCahon noted that recruiters often target the poorest workers, because they know the workers will need to use a loan shark to pay the commission.[357] Unable to repay the loans, the workers are essentially trapped in indentured servitude.[358] McCahon argued that since the fees are generally paid in cash, the "reasonable" requirement would be difficult to police.[359] A flat prohibition would better protect vulnerable workers and would be much easier to enforce.[360]

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[355]*Id*. at 4-5.

[356]*Id.* at 5.

[357]*Id.*

[358]MCCAHON, *supra* note 353, at 5.

[359]*Id.* at 6.

[360]*Id.*

The Project on Government Oversight (POGO) similarly recommended the use of licensed recruiters and the complete prohibition of recruitment fees.[361] The group also recommended that recruiters be required to offer all contracts, recruitment agreements and work papers in the workers' native language.[362] POGO suggested that the regulation expressly state that fraudulent hiring of labor constitutes a "violation of Federal criminal law including fraud, conflict of interest, bribery, gratuity or trafficking in persons found in Title 18 of the United States Code," triggering the mandatory reporting requirements in FAR 3.104.[363] POGO recommended that offerors be required to disclose any trafficking in persons allegations against them and that agency determinations be recorded in the Federal Awardee Performance and Integrity Information System (FAPIIS).[364] The Project argued that mandatory disclosure and reporting requirements would make it easier for the government to cancel a contract or to suspend or debar a contractor.[365]

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[361]Scott H. Amey, Project on Gov't Oversight, Public Comments on Protections Against Trafficking In Persons (Mar. 12, 2013), *available at* http://www.regulations.gov/#!documentDetail;D=FAR-2013-0081-0010 (written comment on the Federal Acquisition Regulation (FAR) Notice: Meetings: Protections Against Trafficking In Persons In Federal Contracts; Notice-MVC–2013–01).

[362]*Id.*

[363]*Id.* at 2.

[364]*Id.*

[365]*Id.*

On September 26, 2013 the FAR Council issued a proposed rule.[366]The proposed rule, entitled "Ending Trafficking in Persons," amends FAR 22 and 52 to expressly prohibit trafficking practices in all federal contracts.[367] Contractors could not destroy identity or immigration documents, use misleading practices in employee recruitment, charge recruitment fees or provide or arrange unsafe housing.[368] Contractors would be obligated to provide all work documents in the employees' native languages and to provide or pay for Third Country Nationals' return transportation at the end of employment.[369] Contractors would be required to protect and interview all suspected victims or witnesses of trafficking practices and to record any substantiated trafficking allegations in the Federal Awardee Performance and Integrity Information System (FAPIIS).[370]

The proposed rule would create additional compliance plan requirements for contracts where the value of goods produced or services provided outside of the United States exceeded $500,000.[371] Contractors would be required to create awareness programs, reporting processes, recruitment and wage plans, housing plans, and

[366] Ending Trafficking in Persons, 78 Fed. Reg. 59,317 (proposed Sept. 26, 2013) (to be codified at 48 C.F.R. pts. 1, 2, 9, 12, 22, and 52).

[367] *Id.* at § II(A).

[368] *Id.*

[369] *Id.*

[370] *Id.*

[371] *Id.*

monitoring and prevention programs.[372] However, these requirements would not apply to commercial items.[373]

On December 20, 2013, POGO submitted comments on the proposed rule.[374] POGO supported the proposed rule but recommended several additional measures.[375] POGO's comments recommended that the rule include a more thorough discussion of anti-trafficking prevention and best practices, including a recommendation that contractors limit subcontracting and create paper trails of their compliance efforts.[376] POGO strongly supported the requirement that all substantiated allegations be reported in FAPIIS, saying that the organization had "long advocated" the addition of more "contractor responsibility instances," to the federal database.[377] The group strongly opposed the exception for "off the shelf," items, saying that under the "broad definition" in FAR 2.101, most work in Afghanistan in Iraq could fall under this category.[378]

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[372] *Id.*

[373] *Id.*

[374] Scott H. Amey, J.D., POGO Implores Government to Strengthen Zero-Tolerance Policy Against Human Trafficking in Federal Contracts [hereinafter *POGO Comment*] *available at* http://www.pogo.org/our-work/letters/2013/pogo-implores-government-to-strengthen-zero-tolerance-policy.html.

[375] *Id.*

[376] *Id.*

[377] *Id.*

[378] *Id.*

While POGO supported the rule's prohibition of recruitment fees, they recommended that the provision be broadened to include any "travel, training, hiring, administrative, handling, or any other type of fees," assessed against the worker.[379] According to the group, "[l]oan sharks, recruiters and contractors at all tiers will find new ways to financially enslave and exploit workers if any and all fees are not prohibited."[380]

POGO recommended specific and additional changes to FAR 22.1703(e), which currently requires contractors to "cooperate fully" with government officials during an investigation.[381] POGO asked that the FAR Council clarify that the provision also applies to subcontractors.[382] They also recommended a requirement that contractors and subcontractors keep potential trafficking victims and witnesses in the area to make them accessible to government investigators.[383]

The group recommended further changes to FAR 52.222-50, clarifying the standards by which trafficking allegations will be evaluated and reporting requirements triggered.[384] Currently, the proposed rule uses undefined terms like "adequate evidence," credible violations" and "credible information."[385]

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[379] *Id.*

[380] *Id.*

[381] *Id.*

[382] *Id.*

[383] *Id.*

[384] *Id.*

[385] *Id.* (*citing* FAR Case 2013-001).

To ensure effective enforcement, POGO recommended that all government agencies conduct random audits of contractor anti-trafficking compliance.[386] These should include a review of recruiting and employment paperwork and training materials as well as random, unannounced interviews with workers.[387]

As of February 20, 2014, a final rule has not yet been issued on Ending Trafficking in Persons.[388]

E. Recommendations

Numerous organizations, academics, congressional committees and government officials have made recommendations on how to improve oversight of foreign subcontractors. Most agree that better tracking and better accountability are key.

Inspector General Stuart Bowen proposed the creation of a new government office to oversee stabilization and reconstruction efforts in Iraq and Afghanistan.[389]

Among other things, the office would develop uniform policies and procedures for managing contingency contracts and subcontracts.[390]

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[386] *Id.*

[387] *Id.*

[389] *Subcontracting in Combat Zones*, supra note 256, at 2.

[390] *Id.*

Bowen also recommended that the government explore the creation of a separate Contingency FAR to provide a "single, simplified, and uniform contracting process for use during contingency operations."[391] Bowen suggested that the new FAR could provide more specific flow-down provisions to be used in contingency contracts, putting subcontractors on notice of government expectations.[392] The new regulations would also provide contracting officers with firmer criteria for evaluating contractor performance and would place the government in a better position to take action against prime contractors where the contractor or subcontractor did not perform.[393] Bowen recommended that the Contingency FAR include terms that "ensure that contractors and subcontractors do not undermine national policy."[394]

DCAA Director Patrick Fitzgerald recommended that the government focus on improving contractors' "business systems," which he called the "first line of defense against fraud, waste and abuse."[395] Fitzgerald said that his office's billing audits had identified multiple situations where contractors lacked adequate systems to validate

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[391]*Id.*

[392]*Id.* at 4-5.

[393]*Id.* at 5.

[394]*Subcontracting in Combat Zones*, supra note 256, at 5.

[395]*Subcontracting: Who's Minding the Store*, supra note 22 at 7.

subcontractors' costs.[396] While he did not go as far as Bowen in recommending a new contingency-specific FAR, he did recommend changes to the existing regulations to emphasize and define adequate business systems.[397] Fitzgerald also recommended that all contracts include explicit language making prime contractors responsible for subcontractors' costs and performance. He said this would strengthen the DCAA's case when it performed audits.[398]

A recent note in the Public Contract Law Journal likewise recommended overarching changes to contingency contracts; the author, Carissa Tyler, recommended that they be made by amending mandatory flow-down provisions in the FAR.[399] Specifically, the note recommended provisions that would allow the government access to contractor reports and documentation regarding "internal audits to and other types of management reviews pertaining to government contracts."[400] Under the existing FAR's Audits and Records-Negotiation Clause[401] contractors are required to insert provisions in their subcontracts that allow audits of subcontractor proposals. However, the provision does not provide the government access to subcontractor records for firm-fixed-price

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[396] *Id.*

[397] *Id.* at 67.

[398] *Id.*

[399] Tyler, *supra* note 247 at 456.

[400] *Id.* at 464-65 (*quoting* AT WHAT RISK, *supra* note 108, at 57).

[401] FAR 52.215-2 (2004).

contracts.[402] Tyler's note recommended amending the flow-down provisions to grant broader access.[403] While she acknowledged that the agencies might still be denied access to subcontractor records, Tyler felt the flow-down provisions would provide firmer support for cost suspensions.[404]

The note also recommended an amendment to the FAR to require mandatory vetting and certification of foreign subcontractors.[405] Tyler suggested that the agencies use shared lists of approved and disallowed subcontractors, similar to DynCorp's "Visual Compliance" system.[406] Visual Compliance is a web-based search engine that consolidates lists compiled by the Departments of Commerce, State, Treasury and Justice; the Federal Register, foreign governments and Interpol.[407]

Emphasizing the need for integrated data, the note similarly recommended a redesign and overhaul of SPOT to make it a more effective way to gather and share subcontractor information.[408] Tyler recommended that the agencies make a coordinated effort to determine "their respective information needs," and that they develop a plan and

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[402] Tyler, *supra* note 247 at 463.

[403] *Id.* at 464-65.

[404] *Id.*

[405] *Id.* at 466.

[406] *Id.*

[407] Tyler, *supra* note 247, at 466.

[408] *Id.* at 463.

a timeframe for full implementation.[409] Tyler argued that "[c]ollecting information on foreign subcontractors can help to deter fraud and abuse."[410]

[409] *Id.*

[410] *Id.* at 472.

V. Moving Forward

Dr. Steven Kelman's 1993 statement that "past performance is key" is still true and relevant twenty years later. Performance reviews of contractors are important not only to ensure the government receives the best services for the best price, but also to avoid contractors with histories of fraud, crime and abuse. They also provide valuable feedback to contractors, allowing them to continually improve their goods and services. However, past performance data is useful only when it is accurate, consistent, complete and evaluates all contractors fairly and uniformly. Historically, federal agencies have used different databases, different standards and different evaluation criteria to evaluate contractor performance. One uniform performance database system with shared criteria, as suggested by legislative and regulatory reform efforts, would allow the government to have more effective oversight of contingency contracts.

While past performance is still key in several respects, it is not the only factor the government should scrutinize in contingency contracting. Per the Obama administration's recent mandate and Executive Order, companies the government chooses to do business with should not only provide the best in products and services, but should adhere to ethical standards by engaging in fair labor standards.

The government would benefit from a shared system for the screening and management of foreign subcontractors in that respect. While a shared database on prime contractors exists, the agencies use it differently and sporadically, and the information is

therefore inconsistent and incomplete. As a result, Federal agencies currently have very little control over or even knowledge of the millions of foreign subcontractors who are providing services under U.S. contracts. In his congressional testimony, Inspector General Bowen said that the desire for information must be "balanced with the reality that the information may not be available in all cases and that such information comes at a cost."[411] However, a shared subcontractor database in foreign contingency missions would at least allow the government to utilize information that is available on these untracked foreign subcontractors more effectively.

[411] *Subcontracting in Combat Zones*, *supra* note 256, at 4.

VI. Summary

As summarized by various academics and industry experts in this note, this author agrees that the features of an effective government performance database on contractors would have the following multiple facets: a uniform system, government-wide, by which contractors are evaluated; a method by which those companies (both prime and subcontractors) suspected of human rights violations or fraudulent business practices can be tracked and the information communicated to agencies and procurement professionals; an opportunity for contractors to respond and place a statement on the record when disagreements exists with any performance review or description. [412]

As this thesis has summarized, a number of recent legislative actions have looked at the performance review system in whole, and specifically at how to make both domestic, as well as foreign subcontractors more independently accountable and responsible for adhering to US laws and regulations. [413] The problem is particularly urgent for those US officials who wish to discontinue doing business with foreign subcontractors suspected of human rights abuses. Such progress forward must start with a comprehensive database that rates and provides feedback to officials on the foreign subcontractors utilized by primes. [414] This author believes that the suggestions of Clarissa Tyler are the most practical and feasible in both protecting workers on these contracts in

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[412] *See generally* MANUEL, *supra* note 2; TRANSFORMING WARTIME CONTRACTING, *supra* note 5; VICTIMS OF COMPLACENCY, *supra* note 14.

[413] TRANSFORMING WARTIME CONTRACTING, *supra* note 5, at 142; *see generally* VICTIMS OF COMPLACENCY, *supra* note 14.

[414] Tyler, *supra* note 247, at 455; *see generally* MILITARY OPERATIONS, *supra* note 249.

foreign countries from human rights violations, and also to ensure the highest quality of work: allow the federal government access to contractor reports and documentation of internal audits of subcontractors. [415] To take this one step further, as suggested by the ACLU, the prime contractors should be required under the FAR to submit reports (and internal audits should be required to be conducted by the primes) on any suspected human rights violations taking place in subcontractors' businesses.[416] Ideally, a separate Contingency FAR as the Inspector General Stuart Bowen suggests would alleviate more concerns as to subcontractors' responsibilities under prime contracts in contingency missions.[417]

While the government's long-standing legal position, which is firmly entrenched in government contracts law, is that the government is only in privity of contract with the prime contractor and not the subcontractor, it is this author's position that the responsibility for oversight of the records of subcontractors' fraud, waste and abuse lies with the federal government as both the recipient and steward of the public funds. Prime contractors should be required under the FAR to provide non-compliance reports of subcontractors with suspected fair labor and human rights violations.[418] This author believes mandatory subcontractor noncompliance reports regarding fair labor standards should be a FAR requirement placed on primes. As of now, prime contractors on DoD

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[415] *Id.*

[416] *See generally* VICTIMS OF COMPLACENCY, *supra* note 14.

[417] *Subcontracting in Combat Zones*, *supra* note 256, at 2.

[418] *Id.*

contracts must report instances of criminal fraud, waste and abuse suspected in the invoices and claims submitted to them by subcontractors to the Defense Contract Audit Agency (DCAA) and also possibly the Defense Criminal Investigation Service (DCIS). Per the Executive Order prohibiting human trafficking (2012), contracting officers have to report known instances of human trafficking up the chain to the Inspector General.[419] In the same manner, prime contractors must be held accountable for failure to report subcontractor non-compliance with fair labor standards or risk debarment and suspension.

While in contingency situations as in normal operations, privity of contract is between the prime contractor and the subcontractor, it is clear from the analyses of the fraud, waste and abuse on past contracts that agencies involved in contingency contracting must take the additional step of screening or at least providing preliminary approval of foreign subcontractors. At the very least, agencies should be required to run subcontractors' names through a centralized performance database to determine whether the company has been linked to any known instances of fraud, corruption or human rights violations. Similarly, at the very least extra care or scrutiny should be required of prime

[419] Exec. Order 13627, *supra* note 330 § 2(1)(C). Under Obama's Executive order, instances of human rights violations are to be reported to "the agency's Inspector General, the agency official responsible for initiating suspension or debarment actions, and law enforcement, if appropriate, if they become aware of any activities that would justify termination under section 106(g) of the TVPA, 22 U.S.C. § 7104(g), or are inconsistent with the requirements of this order or any other applicable law or regulation establishing restrictions on trafficking in persons, the procurement of commercial sex acts, or the use of forced labor, and further requiring that the agency official responsible for initiating suspension and debarment actions consider whether suspension or debarment is necessary in order to protect the Government's interest…" *Id.*

contractor(s) regarding the day to day contact with foreign subcontractor(s) they do business with who are suspected of human rights abuses.[420] As President Obama stated in his Executive Order prohibiting human trafficking: "

> The United States has long had a zero-tolerance policy regarding Government employees and contractor personnel engaging in any form of this criminal behavior. As the largest single purchaser of goods and services in the world, the United States Government bears a responsibility to ensure that taxpayer dollars do not contribute to trafficking in persons. By providing our Government workforce with additional tools and training to apply and enforce existing policy, and by providing additional clarity to Government contractors and subcontractors on the steps necessary to fully comply with that policy, this order will help to protect vulnerable individuals as contractors and subcontractors perform vital services and manufacture the goods procured by the United States." [421]

As a result, the responsibility lies with the federal government to place all protections and procedures in place to ensure that protections against human rights violations are afforded to the most vulnerable of individuals in the federal contracting business: foreign workers on subcontracts during contingency missions. This author believes that the recommendations put forth above will be good first steps for the federal procurement apparatus to take in what needs to be an on-going effort towards re-working the flaws in the system in order to attain expanded third country national worker's rights protections.

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[420] *Id.*

[421] *Id.*