

CHAPTER 15

CONTINGENCY AND DEPLOYMENT CONTRACTING

REFERENCES

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2. U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. (Apr. 2015) [hereinafter DFARS].
3. U.S. DEP'T OF DEFENSE INSTRUCTION 3020.41, OPERATIONAL CONTRACT SUPPORT (20 Dec. 2011)[Hereinafter DODI 3020.41].
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6. JOINT CHIEFS OF STAFF, JOINT PUB. 4-10, OPERATIONAL CONTRACT SUPPORT (16 Jul 2014) [hereinafter JP 4-10].
7. U.S. DEP'T OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP) (28 Dec. 2012) [hereinafter AR 700-137].
8. U.S. DEP'T OF ARMY, REG. 715-9, OPERATIONAL CONTRACT SUPPORT PLANNING AND MANAGEMENT (20 Jun. 2011) [hereinafter AR 715-9].
9. U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY (18 Mar. 2013) [hereinafter FM 1-04].
10. U.S. DEP'T OF ARMY, FIELD MANUAL 1-06, FINANCIAL MANAGEMENT OPERATIONS (15 Apr. 2014) [hereinafter FM 1-06].
11. U.S. DEP'T OF ARMY, ARMY TECHNIQUES PUBLICATION 4-92, CONTRACTING SUPPORT TO UNIFIED LAND OPERATIONS (15 Oct. 2014) [hereinafter ATP 4-92].
12. U.S. DEP'T OF ARMY, Field Manual 6-01, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS (5 May. 2014) [hereinafter FM 6-0].
13. Army Sustainment Command (ASC), Contractor on the Battlefield Resource Library, available at <http://www.aschq.army.mil/home/BattlefieldResourceLibrary.aspx> (containing links to contingency contractor personnel related materials and websites).
14. CENTCOM Contracting Command (C3) Training and Policy Webpage, <https://www2.centcom.mil/sites/contracts/SiteAssets/Contracting.aspx> (containing training materials, checklists, policy documents, acquisition instructions, and contract clauses).

I. INTRODUCTION

A. General. The past thirteen years of combat operations, as well as humanitarian operations in poorly developed areas, have demonstrated the importance of contingency contracting as a force multiplier. Many of the goods and services required to successfully engage in extended deployment operations cannot be provided by current uniformed forces. To meet those needs, the Department of Defense continues to rely on contracted support. The apparatus for competing, awarding, and supervising contractors in deployed or contingency environments is called "contingency contracting." The Joint Chiefs of Staff, in Joint Publication (JP) 4-10, define Contingency Contracting as:

"[T]he process of obtaining goods, services and construction via contracting means in support of contingency operations. GL-6.

B. Legal Support to Operations. Doctrine addressing legal support to operations provides that the Staff Judge Advocate's "contract law responsibilities include furnishing legal advice and assistance to procurement officials during all phases of the contracting process and overseeing an effective procurement fraud abatement program." FM 1-04, para. 5-39. Specifically, Judge Advocates (JA) are to provide "legal advice to the command concerning battlefield acquisition, contingency contracting, use of logistics civil augmentation program, acquisition and cross-servicing agreements . . . and overseas real estate and construction." *Id.*

1. **Scope of Duties.** Depending on their assigned duties, JAs should participate fully in the acquisition process by participating as a member of the contracting officer's team, providing legal advice to commanders and their staff, and by communicating closely with procurement officials and contract attorneys in the technical supervision chain. *Id.* para. 5-40; *see also* AFARS 5101.602-2(c) (describing contracting officers' use of legal counsel).

2. **Pre-Deployment.** Judge Advocates should take the lead in advocating expeditionary contracting preparation. FM 1-04, para. 13-8. This could involve teaching contract/fiscal law classes to supply and logistics personnel, reviewing acquisition and logistics plans as part of the OPLAN, and advising on best practices to obtain goods and services while deployed.

3. **Operational Support.** To provide contract law support in operations, JAs with contract law experience or training should be assigned to the main and tactical command posts at the division and corps, TSC headquarters, theater army headquarters, and each joint and multinational headquarters. Depending on mission requirements, command structure, and the dollar value and/or complexity of contracting actions, contract law support may be required at various command levels including brigade or battalion. *Id.* paras. 5-40 to 5-41.

4. **Contract-Specific Roles.** Judge Advocates may be assigned as Command Judge Advocate or Deputy Command Judge Advocate for a Contract Support Brigade (CSB). These JAs serve as the primary legal advisors to CSB commanders, staff, and contracting officials on the full spectrum of legal and policy issues affecting the CSBs peacetime and operational missions. ATP 4-92, para. 1-14. Judge Advocates at sustainment brigades, theater sustainment brigades, and expeditionary sustainment brigades perform similar functions. FM 1-04, para. 5-41. Judge Advocates assigned to these and other contracting organizations should have contract law training. *Id.*

5. **Demonstrated Importance.** After action reports (AAR) from Iraq and Afghanistan consistently indicate that JAs throughout both theaters, regardless of the position to which they are assigned (including brigade judge advocates), practiced fiscal law daily. These same AARs indicated that while most JAs encountered contract law issues less frequently, they needed an understanding of basic contract law principles to intelligibly conduct fiscal law analyses. For JAs assigned to contracting or logistics heavy units, knowledge of contract law was a prerequisite to their daily duties.

C. **Applicable Law During a Deployment.** Contracting during a deployment involves two main bodies of law: international law and U.S. contract and fiscal law. FM 1-04, para. 5-38. Attorneys must understand the authorities and limitations imposed by these two bodies of law.

1. **International Law.**

a. **The Law of Armed Conflict—Combat.** The Law of Armed Conflict (LOAC) applies during combat operations, which for instance imposes limitations on the use of prisoners of war (PW) for labor. LOAC also grants PW status to contractors who are authorized to accompany the force (CAAF), should they be captured. *See* GCIII, ART 4(A)(4).

b. **The Law of Armed Conflict—Occupation.** The Law of Armed Conflict also applies during occupation and should be followed as a guide when no other body of law clearly applies (e.g. Operation RESTORE HOPE in Somalia). However, the rules for occupation may cease to apply if the US Forces in an area become subject to newly formed local or national governments.

c. **International Agreements.** A variety of international agreements, such as treaties and status of forces agreements (SOFA) may apply. These agreements can have substantial affect on contingency contracting. For example, SOFAs may limit the ability of foreign corporations to operate inside the local nation, place limits and tariffs on imports, and govern the criminal and taxation jurisdiction over contractors and their personnel.

(1) **Example:** The Diplomatic Note executed between the United States and the Transitional Government of the Islamic State of Afghanistan (12 December 2002) covers many of the duties and rights of the United States and its contractors operating in Afghanistan. The agreement states that “[t]he Government of the United States, its military and civilian personnel, contractors and contractor personnel shall not be liable for any kind of tax or other similar fees assessed within Afghanistan.” This type of provision has a profound effect on contract pricing and contractor performance. Legal Counsel must be aware of and understand these agreements in order to properly advise their clients when facing contingency contracting.

(2) International Agreements may also include choice of law provisions relating to contingency contracting. For example, the Diplomatic Note cited above also provides that all contracts awarded by the United States to “acquire materials and services, including construction . . . should be awarded in accordance with the law and regulations of the Government of the United States.”

2. U.S. Contract and Fiscal Law. **There is no “deployment exception” to Contract or Fiscal Law.** Judge Advocates in contingency operations must apply the same standards applicable during garrison operations. However, local regulations, policies, and authorities that are not normally available may exist in contingency operations and provide greater flexibility for commanders in those areas.

a. FAR and agency supplements. The FAR fully applies to contingency contracting. However, the following Parts are most relevant during contingency operations:

(1) FAR Part 6 details the competition requirements for all acquisitions. Subpart 6.3 explains when acquisition personnel may award contracts using less than full-and-open competition if certain conditions exist. In any case where less than full-and-open competition is sought, specific findings must be made.

(2) FAR Part 13 allows the use of simplified acquisitions procedures when the value of the good or service falls below the simplified acquisition threshold (FAR Section 2.101). Approximately 95% of all contracting actions in contingency operations will utilize simplified acquisitions procedures.

(3) FAR Part 18 provides a listing of the various FAR provisions allowing expedient and relaxed procedures that may be useful in a contingency situation.

(4) FAR Part 25 and DFARS Part 225 govern foreign acquisitions, including the “Buy American” Act (41 U.S.C. § 10a-10d) and other requirements.

(5) FAR Part 50 outlines extraordinary contractual actions available in emergency situations. These are rarely used due to their low dollar threshold and high approval authority.

b. Fiscal Law. In addition to familiarity with expeditionary acquisitions authority, deploying Judge Advocates must develop a sound understanding of fiscal law. To that end, key resources include: the Fiscal Law Chapter of this Handbook; Title 31, U.S. Code; Department of Defense (DOD) Financial Management Regulation FMR (DOD FMR); DFAS-IN 37-1; DFAS Manual 37-100-XX (XX=current fiscal year (FY)); and TJAGLCS, Contract & Fiscal Law Dep’t, Fiscal Law Deskbook (available online at http://www.loc.gov/rr/frd/Military_Law/Contract-Fiscal-Law-Department.html).

c. Contingency Funding and Contract Authorizations. Generally, ordinary fiscal and acquisition rules apply during contingency operations. There is no blanket “wartime” or “contingency” exception to these rules. However, the fact that an operation is ongoing may:

(1) Make the use of existing authorities easier to justify. For example, a contingency operation may include the required facts and circumstances to develop a written “Justification and Approval” (J&A) in support of the unusual and compelling urgency exception to full and open competition located at FAR Section 6.302-2.

(2) Appropriation and authorization acts may contain temporary, extraordinary fiscal and contract authorities specific to a particular operation. Operations in Afghanistan contained numerous examples of these extraordinary authorities, including the expenditure of Commander Emergency Response Funds (CERP), and the Afghanistan First program.

d. Permanent Extraordinary Contract Authority. During a national emergency declared by Congress or the President and for six months after the termination thereof, the President and his designees may initiate or amend contracts notwithstanding any other provision of law whenever it is deemed necessary to facilitate the national defense. Pub. L. No. 85-804, codified at 50 U.S.C. §§1431-1435; Executive Order 10789 (14 Nov. 1958); FAR Part 50; DFARS Part 250. These powers are broad, but the statute and implementing regulations contain a number of limitations. For example, these powers do not allow waiving the requirement for full and open competition, and the authority to obligate funds greater than \$65,000 may not be delegated lower than the Secretariat level. This authority is rarely used. Additionally, despite this grant of authority, Congress still must provide the money to pay for obligations.

II. DEPLOYMENT CONTRACTING AUTHORITY, PLANNING, PERSONNEL, AND ORGANIZATION

A. Contract vs. Command Authority. Commanders have broad authority to direct operations as required. However, they do not have the authority to obligate the U.S. Government to expend funds.

1. Command Authority. Prescribed by 10 U.S.C. § 164. Command authority includes the authority to perform functions involving organizing and employing commands and forces, assigning tasks and designating objectives, and giving authoritative direction over all aspects of an operation. In a contingency operation, command authority runs from the President thru the Secretary of Defense to the Geographic Combatant Commanders (GCC) and ultimately to the commander on the ground. Command authority does NOT include the ability to make binding contracts for the U.S. Government. ATP 4-92, para. 1-40; *see also* JP 4-10, Chapter 1, para. 5.

2. Contract Authority. Premised on the U.S. Constitution, statute, and regulatory authority (FAR, DFAR, Service supplements). Contracting authority in the operational area flows from the President, then to the Secretary of Defense, through the Service/Agency Head, to the Head of Contracting Activity (HCA), then to the Senior Contracting Official (SCO) or Principal Assistant Responsible for Contracting (PARC), and finally to the contracting officer. Only the contracting officer, by virtue of their contracting warrant, has the authority to obligate the U.S. Government on contractual matters. Any binding contract attempt made by anyone other than a contracting officer will result in an unauthorized commitment. FAR 1.6; JP 4-10, Chapter 1, para. 5.c; ATP 4-92, para. 1-40.

B. Planning. The type of organization to which a JA is assigned will dictate the degree to which they must become involved in planning for contract support. However, at a minimum, JAs should be familiar with how Joint and Army doctrine incorporate planning for contract and contractor personnel support.

1. Contract Support Integration Plan (CSIP).

a. The OCS Team. In all operations where there will be a significant use of contracted support, the supported Geographic Combatant Commander (GCC) and their subordinate commanders and staffs must ensure that this support is properly addressed in the appropriate OPLAN/OPORD. To achieve this integration, a multidisciplinary team effort is required. See JP 4-10, para. III-1.b and figure III-1.

b. Planning and Integration. As the GCC leads the OCS planning process, all primary and special staff contribute to OCS. Judge Advocate responsibilities include providing advice on operational, contract, and fiscal law matters; and advising on criminal jurisdiction issues as they relate to contractors accompanying the force. OCS planning requires various commands (e.g. supported unit, contract support brigade, and expeditionary contracting command), strategic enablers, and staff sections to coordinate actions through boards, centers, cells, and working groups. ATP 4-92, para. 2-23; JP 4-10, para. III-2 and figures III-3 and III-4; and CJCSM 3130.03.

c. Annex W – Operational Contract Support. Annex W to the OPLAN/OPORD, provides the command's guidance for acquiring support for a particular operation. At a minimum, this annex will include a general acquisition strategy, audit procedures, measures of performance, and records preservation. ATP 4-92, para. 2-31 and CJCSM 3130.03.

2. Contractor Management Plan (CMP).

a. The CMP is related to, but not the same as, the OCS. While the OCS is focused on *how* we will acquire and manage contracted support, the CMP is focused on *government obligations* under contracts to provide support to contractor personnel. Contractor management is accomplished through the active involvement of all primary and special staff officers. JP 4-10, para. V-2.b.

b. An effective CMP relies on the successful coordination of various contracting officers, supported units, contracting organizations, and contractor company management personnel. Therefore, the GCC and subordinate joint forces commander must establish clear, enforceable, and well understood theater entrance, accountability, force protection, and general contractor management procedures early in the planning stages of any military contingency. JP 4-10, para. V-2.c.

c. The CMP should specify operational specific contractor personnel and equipment requirements to ensure contractors supporting an operation are qualified to deploy, processed for deployment, received in theater, managed in theater, and processed for redeployment. These requirements may include, but are not limited to: restrictions imposed by applicable international and host-nation support agreements; contractor related deployment, theater reception, accountability, and strength reporting; operations security plans and restrictions; force protection;

personnel recovery; contractor personnel services support; medical support; and redeployment requirements. JP 4-10, para. V-2.c.

d. For more detailed information on contingency contractor personnel, see Contract & Fiscal Law Dep't, The Judge Advocate General's School, U.S. Army, Contract Law Deskbook chapter 31, Contingency Contractor Personnel (updated annually and available online at http://www.loc.gov/rr/frd/Military_Law/Contract-Fiscal-Law-Department.html).

3. In a developed theater, JAs should familiarize themselves with theater business clearance procedures, theater specific contract clauses and policies, contract and acquisition review boards, as well as resource management policies and standard operating procedures (e.g. Money as a Weapons System—Afghanistan (MAAWS-A)). AARs from Afghanistan indicate that familiarity with MAAWS-A is foundational to anyone who will be providing fiscal or contract law advice in a deployed environment.

C. Deployment Contracting Personnel. Contracting authority runs from the Secretary of Defense to the Heads of Contracting Activities (HCA). The HCA appoints a Senior Contracting Official (SCO) or Principal Assistant Responsible for Contracting (PARC). The HCA and SCO/PARC warrant contracting officers (KO) at various levels and with varying levels of authority. AFARS 5101.603-1. The chief of a contracting office, a KO, may appoint field ordering officers (FOOs) to conduct relatively low dollar value purchases. FOOs are authorized to obligate the government to pay for goods or services in accordance with their appointment letters, but FOOs do not normally handle money. Finance Soldiers and Soldiers or Department of Defense (DOD) civilians, known as Class A agents or paying agents, handle money and pay merchants for purchases made by the FOOs.

1. Head of Contracting Activity (HCA). The HCA is a Flag Officer or equivalent senior executive service (SES) civilian who has overall responsibility for managing a contracting activity. FAR 2.101, JP 4-10, Ch. 1, para. 3b(2).

a. The HCA serves as the approving authority for contracting as stipulated in regulatory contracting guidance.

b. DOD Contracting Activities are listed in the DFARS, and include, among others, Headquarters, U.S. Army Contracting Command, U.S. Army Sustainment Command, U.S. Army Expeditionary Contracting Command, U.S. Army Mission and Installation Contracting Command, U.S. Army Corps of Engineers, U.S. Transportation Command, U.S. Special Operations Command, and the CENTCOM Contracting Command (C3) (formerly the Joint Contracting Command – Iraq / Afghanistan (JCC-I/A)). The head of each contracting activity is a HCA. DFARS 202.101; AFARS 5101.601(1).

c. See generally AFARS 5101.601 for a discussion on the responsibilities of HCAs.

2. Senior Contract Official (SCO) (i.e. Principal Assistant Responsible for Contracting (PARC)). The SCO is a lead service or joint command designated contracting official who has direct managerial responsibility over theater support contracting. JP 4-10, Ch. 1, para. 3b(3).

a. There may be multiple SCOs in the same operational area based on mission or regional focus. For example, at one time during Operation Iraqi Freedom (OIF), there were two SCOs, one for support to forces and one for reconstruction support. JP 4-10, para. I-2c(2).

b. In the Army, SCOs are known as PARCs. AFARS 5101.602.

(1) HCAs appoint PARCs. AFARS 5101.692(b).

(2) The PARC serves as the senior Army contracting advisor responsible for planning and managing all Army contracting functions when the FAR, DFARS, PGI, AFARS, and other directives does not require the HCA to perform personally (except when the HCA elects to exercise selected authorities). AFARS 5101.601(5).

(3) For example, the Commander of the Army Expeditionary Contracting Command is an HCA. The HCA generally appoints each commander of a Contracting Support Brigade as a PARC. FM 4-92, para. 1-4.

3. Contracting Officer (KO). The KO is the government official (military officer, enlisted, or civilian) with the authority to legally bind the government by entering into, administering, or terminating contracts. JP 4-10, Ch. 1, para. 3b(4).

a. The HCA or SCO appoint KOs in writing through a warrant (Standard Form 1402). JP 4-10, Ch. 1, para. 3b(4).

b. Only duly warranted KOs are authorized to obligate (i.e. legally bind) the U.S. Government. JP 4-10, Ch. 1, para. 3b(4).

c. There are three main types of contracting officers: procuring KOs (i.e. enter into contracts), administrative KOs (i.e. administer contracts), and terminating KOs (i.e. settle terminated contracts). Significantly, a single KO may be responsible for duties in all of these areas. JP 4-10, Ch. 1, para. 3b(4).

4. Contracting Officer's Representative (COR). CORs operate as the KO's eyes and ears regarding contract performance, and provide the critical link between the command and the KO regarding the command's needs. CORs are organic members of the requiring unit and are assigned to be a COR as an additional duty. CORs are necessary because KOs are normally not located at the site of contract performance. In many cases, contracts will already be in place before the unit deploys, and the KO for the contract is in CONUS or at geographically remote Regional Contracting Center. Commanders must consider whether to request that the KO appoint at least one COR for each contract affecting the unit. The COR can only be appointed by the KO. CORs do NOT exercise any contract authority - they lack the authority to modify contracts. Significantly, any issues with the contractor must still be resolved by the KO, rather than the COR. JP 4-10, Ch. 1, para. 3b(6).

a. A properly trained COR shall be designated in writing prior to contract award. CORs must be a U.S. Government employee, unless authorized by agency-specific regulations. FAR 1.602-2(d). A sample appointment letter is available at AFARS 5153.303-1. Significantly, DFARS 201-602-2 authorizes officers of foreign governments to act as CORs.

b. By way of historic example, HQDA EXORD 048-10: Pre-Deployment Training for Contracting Officer's Representative and Commander's Emergency Response Program (CERP) Personnel, dated 5 Dec. 2009, required brigades and smaller units deploying in support of OEF or OIF to do the following:

(1) Determine the number of CORs needed to meet theater contracting requirements no later than (NLT) 180 days before the latest arrival date (LAD). Specifically, units should verify COR requirements with the CENTCOM Contracting Command, servicing Regional Contracting Center within the deployed area of responsibility, and with the Defense Contract Management Agency representatives administering the Logistics Civil Augmentation Program (LOGCAP) contract and other support contracts in the unit's deployed location.

(2) If unable to determine specific COR requirements during the Pre-Deployment Site Survey or from other pre-deployment communications, each deploying brigade must train 80 COR candidates. Separate battalions must train 25 COR candidates, and separate companies must train 15 COR candidates.

(3) NLT 90 days before the LAD, units must ensure COR candidates complete all required online training.

(4) CORs must receive supplemental training from the KO that appointed them.

c. For more detailed information on COR responsibilities, see Center for Army Lessons Learned, Handbook 08-47, Deployed COR (Sep. 2008) or the Department of Defense COR Handbook, OUSD(AT&L) (22 Mar. 2012).

5. Field Ordering Officer (FOO).

a. A FOO is a service member or DOD civilian appointed in writing and trained by a KO. FOOs are not warranted KOs. FOO duties are considered an extra or collateral duty. AFARS 5101.602-2-9.

b. FOOs are usually not part of the contracting element, but are a part of the forward units.

c. FOOs may be authorized to make purchases with SF44s up to the micro-purchase threshold, place orders against certain indefinite delivery contracts established by KOs, make calls under Blanket Purchase Agreements (BPAs) established by KOs, and make purchases using imprest funds. AFARS 5101.602-2-92. FOOs may also hold a government purchase card. AFARS 5113.270-90. FOOs are subject to limitations in their appointment letters, procurement statutes and regulations, and fiscal law. Contracting authority may be limited by dollar amount, subject matter, purpose, time, etc. Typical limitations are restrictions on the types of items that may be purchased and on per purchase dollar amounts. A sample appointment letter is available at AFARS 5153.303-2

d. AFARS 5101.602-2-92 contains guidance on the appointment, training, surveillance, and termination of FOOs. Additionally, contracting activities publish additional FOO guidance applicable to FOOs appointed under the authority of the contracting activity.

6. Paying Agents. A Pay Agent is a U.S. military member or DoD civilian employee appointed by the commander to act as an agent of a disbursing officer. When FOOs or KOs make purchases using SF44s, the merchant will forward a form to the paying agent for payment. However, in an immature theater, the paying agent will often accompany the FOO or KO. Once the FOO/KO completes the transactions, the paying agent will pay the merchant. The deployed contracting process is improved when, prior to deployment, coordination is made with finance to identify paying agents and their deployed locations. Significantly, paying agents may not also serve as FOOs. *See also* DOD FMR, vol. 5, para. 020604 (discussing the appointment and responsibilities of paying agents).

D. Sources of Contracted Support in a Contingency Operation. Three different sources of contract support are generally used in support of contingency operations: Theater Support Contracts, Systems Support Contracts, and External Support Contracts.

1. Theater Support Contracts. Commonly referred to as “contingency contracts,” these contracts are awarded by KOs in support of a designated contingency operation serving under the direct contracting authority of the Service component, special operations forces command, or designated joint HCA. JP 4-10, Ch. 1, para. 2(c)(1). For example, theater support contracts in Afghanistan included contracts awarded by the CENTCOM Contracting Command or their Regional Contracting Centers.

2. Systems Support Contracts. These contracts are awarded by a Service acquisition program management office to support, maintain, and, repair certain military weapon systems. Generally, systems support contracts are leveraged to support new weapons systems including air, land, and C2 platforms. These contracts are most frequently prearranged – they are awarded well before, and are not related to, any specific contingency operation. Significantly, the authority to modify or terminate the contract is limited to the contracting activity that issued the contract. JP 4-10, Ch. 1, para. 2(c)(2).

3. External Support Contracts. These contracts are generally awarded by contracting organizations prior to any specific contingency operation. External support contracts provide logistic and other noncombat related services and supply support (e.g. LOGCAP). Significantly, the Service components retain authority over these contracts – as opposed to the geographical contracting command’s operational contract support. JP 4-10, Ch. 1, para. 2(c)(3).

a. Types of Support.

(1) Logistic support includes base operating support, transportation, port and terminal services, warehousing and other supply support functions, facilities construction and management, prime power, and material maintenance. JP 4-10, Figure I-2.

(2) Non-logistic support may include communication services, interpreters, commercial computers, and information management. Subject to congressional as well as DOD policy limitations, this type of support may also include interrogation and physical security service support. JP 4-10, Figure I-2.

b. External support contracting authority does not come as a direct result of the contingency operation. Generally, these contracts are issued during peacetime for use during contingencies by the Service Components. Contracting authority, and therefore the ability to modify contracts, remains with the Service Component. For example, requirements for the Army’s Logistics Civil Augmentation Program (LOGCAP) contract are managed by the Army Sustainment Command and the contracts are awarded and managed by the Army Contracting Command, both of which fall under the Army Materiel Command (AMC). Only AMC has the authority to change the LOGCAP contract. JP 4-10, App. B, para. 2.

c. Major External Support Contracts include each Service’s civil augmentation program (CAP) contracts (the Army LOGCAP, the Air Force Contract Augmentation Program (AFCAP), and the U.S. Navy Global Contingency Construction Contract (GCCC) and Global Contingency Service Contract (GCSC)); fuel contracts awarded by the Defense Energy Support Center; construction contracts awarded by the U.S. Army Corps of Engineers and Air Force Center for Engineering and Environmental Excellence; and translator contracts awarded by the Army Intelligence and Security Command. JP 4-10, App. B, paras. 3-7.

d. Civil Augmentation Program (CAP) Contracts provide the supported GCC and subordinate Joint Forces Commander an alternative source for meeting logistic services and general engineering shortfalls when military, host-nation support, multinational, and theater support contract sources are not available or adequate to meet the force's needs. Because these contracts are generally more expensive than theater support contracts, every effort should be made to transition to theater support contracts as soon as possible. JP 4-10, Ch. 4, para. 2(2) and app. B.

(1) Service CAP similarities. JP 4-10, app. B.

(a) Augment organic military capabilities.

(b) Long term (four to nine years depending on the program) competitively awarded contracts.

(c) Use, or can opt to use, cost-plus award fee ID/IQ task orders.

(d) Potentially compete for the same general commercial support base.

(2) Service CAP differences. JP 4-10, app. B.

(a) Authorized expenditure limit and planning and management capabilities.

(b) Support focus:

i. LOGCAP focuses on general logistic support and minor construction support. The program utilizes separate support (planning and program support) and performance (task order execution) contracts.

ii. AFCAP focuses on both construction & general logistic support; can also do supply support.

iii. Navy GCCC focuses exclusively on construction; Navy GSCS focuses on facilities support.

E. Theater Contracting Support Organizational Options.

1. The Geographic Combatant Commander (GCC), in coordination with the subordinate Joint Force Command and Service Components, determines the contracting support organization based on mission requirements and operational factors (e.g. size, scope, complexity, etc). Although there is no single preferred contracting organization, there are three main options: service component support, lead Service, and joint theater support contracting command. Within the Army, outside of the theater contracting organization options discussed herein, corps, divisions, and brigades do not have any organic contracting officers or authority (beyond FOOs, Government Purchase Cardholders, etc). JP 4-10, p. xii and ATP 4-92, para. 2-26.

a. Service Component Support to Own Forces.

(1) The GCC generally allows Service component commanders to maintain control over their own theater support contracting authority and organizations for small scale operations of limited duration. This option also applies to operations where the majority of units are operating in different locations throughout the joint area of operations.

(2) Army. The Army established the Expeditionary Contracting Command (ECC) to provide theater support contracting in support of deployed Army forces worldwide and garrison contracting support for Army installations outside the Continental United States. The ECC Commander is an HCA. The commanders of each of six regionally focused contracting support brigades (CSB) are PARCs or SCOs. ATP 4-92, paras. 1-4 to 1-7. In turn, each brigade has a number of contingency contracting battalions, contingency contracting teams, and senior contingency contracting teams. ATP 4-92, para. 1-33. CSB units are deployed as necessary to meet mission contracting requirements. ATP 4-92, para. 1-34.

b. Lead Service Responsible for Theater Support Contracting. JP 4-10, Ch. 4, para. 1c(2).

(1) The GCC may designate a Lead Service for Contracting (LSC) specific Service component responsible to provide consolidated theater contracting support (generally Army or Air Force).

(2) This option is most appropriate for major, long-term operations where the supported GCC and supported joint force commander desire to ensure that there is a consolidated contracting effort within the operational area, but without the need to stand-up an entirely new joint contracting command.

(3) The lead service often has command and control over designated component theater contracting organizations from other Services and may have its staff augmented by contingency contracting personnel from other Services.

(4) Within the Army, the CSB may be designated as the lead Service contracting organization (with or without command and control of other Service contracting elements). ATP 4-92, para. 3-5.

c. Joint Theater Support Contracting Command. (JTSCC)

(1) Established by GCC. The joint theater support contracting command is a joint functional command that has a specified level of command and control authority over designated Service component theater support contracting organizations and personnel within a designated support area. JP 4-10, Ch. 4, para. 1d. For Afghanistan, the CENTCOM Contracting Command (C3) has been established and organized as a Joint Theater Support Contracting Command.

(2) The joint theater support contracting command's HCA authority flows from one of the Service component's to the operational area because GCCs do not have their own contracting authority. In this option, the joint theater support contracting command headquarters should be established by a Joint Manning Document (JMD). For example, C3 falls beneath the Army. JP 4-10, para. III-7d and DFARS 202.101.

(3) Within the Army, the CSB may serve as the building block for the formation of a joint theater support contracting command. ATP 4-92, para. 3-11.

2. While there is no established model for lead Service theater support or the joint theater support contracting command organization, JP 4-10, app. E provides a general model for each type of organization. Generally, each of these organizational options will include the following subordinate activities:

a. Regional Contracting Centers (RCC). Typically consists of 10-25 warranted contracting officers, enlisted members, and/or DOD civilians often aligned with major land force (division, corps, Marine expeditionary force) headquarters or Air Force wings. JP 4-10, app. E, para. 4e(4)(b).

b. Regional Contracting Offices (RCO). Organization under the command and control of an RCO head composed of 2 thru 8 warranted contracting officers, enlisted members, and/or DOD civilians. Typically provide area support to specific forward operating bases and or designated areas within the joint operating area. JP 4-10, app. E, para. 4e(4)(b).

III. Requirements Generation, Approval, and the Contracting Process

A. General. Financial management (finance operations and resource management), contracting personnel, and the judge advocate (the "Fiscal Triad") must work in concert to actually acquire and pay for the good or service once its requirement is identified and approved by a requiring activity. FM 1-04, para. 13-1; FM 1-06, para. 1-6; and ATP 4-92, para. 2-44.

1. Requiring Activity. Units are requiring activities, regardless of their organizational level. For example, whether a company or a corps requires fuel or base support services, each is a requiring activity. The unit is responsible for developing the requirement, to include clearly defining the requirement. JP 4-10, Ch. 1, para. 3a(3)(a).

a. Timely and accurate requirements determinations are essential to quality contract support – all remaining steps in the acquisitions process are dependent on a sound description of the required good or service. Significantly, requiring activities, not CSBs, are responsible for developing requirements that accurately describe what is required in order to satisfy the minimum acceptable government standard. This information allows the contracting activity to create a solicitation so that commercial vendors can submit a bid or proposal, and ultimately perform, in satisfaction of the government's requirement. ATP 4-92, para. 2-49.

b. Specifically, the requiring activity, in coordination with the supporting contracting office, must conduct basic market research, develop an independent government estimate, develop a performance work statement or statement of work, and obtain certified funding from the requiring activity's resource manager. JP 4-10, app. F, para. 3c(2). Judge Advocates conducting fiscal and contract reviews must carefully review each of these documents. For example, requirements which superficially appear to be services and therefore properly funded with operations

and maintenance appropriations may actually include requirements for construction or the procurement of investment items that may require the use of a different appropriation.

2. Resource Management (RM).

a. RMs serve as the commander's representative to lead requirement validation, prioritization, and approval effort.

b. RMs certify the availability of funds and commit those funds by executing a purchase, request, and commitment (PR&C); provide accounting support; and provide cost management.

c. RMs neither create requirements nor possess acquisition authority.

3. Contracting Officers (KOs).

a. KOs are the only government officials (military officer, enlisted, or civilian) with the legal authority (i.e. a valid appointment) to enter into, administer, and terminate contracts.

b. Upon receipt of certified funding (i.e. PR&C) and a properly developed requirement, the KO is able to contract on behalf of the U.S. Government to obtain required the good or service.

c. KOs are also responsible for appointing and training field ordering officers. Ch. 1, para. 3a(3)(a) and FAR 1.602.

4. Finance Operations.

a. As the government's banker, finance is the only member of the triad with the authority to disburse funds. Once a contract has been awarded, finance operations provide vendor payments through cash, check, government purchase card, or electronic funds transfer.

b. Finance personnel also train, fund, and clear paying agents. FM 1-06, Ch. 3; ATP 4-92, para. 2-46.

B. Requirements Approval Process.

1. This process ensures the appropriate functional staffs coordinate, prioritize, approve, and certify funding for "the acquisition ready requirements package before it is forwarded to the appropriate contracting authority." These staff reviews can include, but are not limited to: Legal, Supply, Engineer, Medical, Signal, and Resource Management. ATP 4-92, para. 2-51.

2. In major operations, common user logistics (CUL) are coordinated by the GCC and subordinate Joint Forces Commander among the functional staffs through the use of three important contracting related review boards. ATP 4-92, paras. 2-51 and 3-3.

a. Combatant Commander Logistic Procurement Support Board (CLPSB). Ensures that contracting and other related logistics efforts are properly coordinated across the entire AOR. JP 4-10, Ch. 3, para. 2c(1). The CLPSB focuses on general policies and AOR-wide issues related to contracting support at the GCC level, to include:

(1) Identifying contracting and related issues that may require Joint Staff Office of Primary Responsibility, J-4, and/or Office of the Secretary of Defense action;

(2) Establishing AOR-wide contracting and contractor management policies and procedures; and

(3) Determining theater support contracting organization structure.

b. Joint Acquisition Review Board (JARB).

(1) The JARB manages the creation and prioritization of the CUL supplies and services that are required to support the operational mission.

(2) Generally, the JARB is chaired by the Joint Forces Commander or Deputy Commander with participation by the functional staff (to include JAs) as well as theater, external, and system support contracting members.

(3) The JARBs primary role is to make approval, prioritization, and funding recommendations for all GCC directed, subordinated Joint Forces Commander controlled, high-value and/or high visibility CUL requirements.

(4) Theater support and external support contracting members advise the other JARB members which contracting mechanisms are readily available for a particular acquisition.

(5) Once a requirement is validated and approved by the JARB, the resource manager certifies funding and forwards the action to a contracting activity.

(6) Judge Advocates should review local authority and processes prior to deploying. For example, the MAAWS-A contained detailed guidance on the JARB (and related, subordinate, and superior ARBs) and the requirements approval process.

c. Joint Contracting Support Board (JCSB). JP 4-10, p. xiv and figure III-1.

(1) The JCSB focuses on how contracting will procure support in the Joint Operations Area.

(2) The JCSB also reviews contract support requirements forwarded by the JARB and makes recommendations on which specific contracting organizations/venues (e.g., theater v. external) are best suited to fulfill the requirement.

(3) This board establishes theater support contracting procedures.

(4) The JCSB is chaired by SCO/PARC or subordinate J-4 acquisition officer.

C. Theater Business Clearance / Contract Administration Delegation.

1. During operations, the need may arise to ensure that all contracts performed in the joint operating area are visible, contain certain minimum clauses and requirements, and are being effectively administered.

2. To enable this uniformity of effort, the Deputy Under Secretary of Defense, Acquisition, Technology, and Logistics and the Director of Defense Procurement and Acquisition Policy may issue guidance. For example, a series of memoranda were published in Iraq and Afghanistan directing CENTCOM Contracting Command (C3) to develop TBC procedures, to include procedures on contract administration delegation.

3. CENTCOM Contracting Command uses the TBC review process to ensure that contracting officers outside C3 (e.g., external and system support contracting officers) insert mandatory language and clauses in contracts. As an example, such clauses include:

a. C3 952.225-0001, Arming Requirements and Procedures for Personal Security Services Contractors and Requests for Personal Protection.

b. C3 952.225-0005, Monthly Contractor Census Reporting.

c. C3 952.225-0009, Medical Screening and Vaccination Requirements for Third Country Nationals and Locally Hired Employees Operating in the CENTCOM Area of Responsibility.

d. DFARS 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Forces Deployed Outside the U.S., and DFARS Class Deviation 2007-O0010, Contractor Personnel in the U.S. Central Command Area of Responsibility.

4. The TBC review process also addresses whether in-theater contract administration will be delegated to Defense Contract Management Agency-I/A or whether administration will be re-delegated to the procuring contracting officer.

IV. CONTRACTING DURING A DEPLOYMENT

A. General. This section discusses various methods used to acquire supplies and services. It begins with a general discussion of seeking competition and then discusses specific alternatives to acquiring supplies and services pursuant to a new or existing contract to meet the needs of a deploying force.

B. Competition Requirements. The Competition in Contracting Act (CICA), 10 U.S.C. § 2304, requires the government to seek competition for its requirements. In general, the government must seek full and open competition by providing all responsible sources an opportunity to compete. Significantly, there is no automatic exception for contracting operations during deployments. FAR Part 6 and Far 2.101.

1. For contracts awarded and performed within CONUS, the statutory requirement of full and open competition for purchases over the simplified acquisition threshold creates a 45-day minimum procurement administrative lead time (PALT). This lead time is due to a requirement to publish notice of the proposed acquisition 15 days before issuance of the solicitation by synopsis of the contract action in the Government-wide Point of Entry (GPE) at FedBizOpps.gov; and a requirement to provide a minimum of 30 days for offerors to submit bids or proposals. FAR Section 5.203. Three additional time periods further extend this 45-day lead-time: 1) time needed for the unit to define the requirement and push it through the requirement generation and approval process; 2) time needed for the contracting office to prepare the solicitation, evaluate offers and award the contract; and 3) time needed after contract award for delivery of supplies or performance of services.

2. There are seven statutory exceptions that permit contracting without full and open competition, which are set forth in 10 U.S.C. § 2304(c) and FAR Subpart 6.3:

a. Only one responsible source and no other supplies or services will satisfy agency requirements. FAR 6.302-1. The contracting officer may award a contract without full and open competition if the required supplies or services can only be provided by one or a limited number of sources. For example, it may be necessary to award a contract to a particular source where that source has exclusive control of necessary raw materials or patent rights. FAR 6.302-1 provides additional examples of circumstances where use of this exception may be appropriate. This exception allows the KO to limit the competition to those sources that can meet the Government's need. For also Smith and Wesson, Inc., B-400479, Nov., 20, 2008, 2008 CPD ¶ 215.

b. Unusual and compelling urgency. FAR 6.302-2. This exception applies where the need for the supplies or services is of such an unusual or compelling urgency that delay in awarding the contract would result in serious injury to the government. Use of this exception enables the contracting officer to limit the procurement to the only firm(s) he reasonably believes can properly satisfy the requirement in the limited time available. Because of the urgency, the contracting officer is permitted to award the contract even before the written "Justification and Approval" (see paragraph 3 below) is completed. Similarly, the urgency requiring use of this exception can allow the contracting officer to dispense with the 15-day publication requirement. FAR 5.202(a)(2).

(1) This exception is particularly applicable to meet urgent critical needs relating to human safety and which affects military operations. For example, this exception was used to procure sandbags in support of Operation Iraqi Freedom (Total Industrial & Packaging Corporation, B-295434, 2005 U.S. Comp. Gen. Proc. Dec. ¶ 38 (Feb. 22, 2005)) and to procure automatic fire suppression systems for U.S. Marine Corps's light armored vehicles (Meggitt Safety Systems, Inc., B-297378, B-297378.2, 2006 U.S. Comp. Gen. LEXIS 27 (Jan. 12, 2006)).

c. Industrial mobilization, engineering, developmental, or research capability; or expert services for litigation. FAR 6.302-3. This exception is used when it is necessary to keep vital facilities or suppliers in business, to prevent insufficient availability of critical supplies or employee skills in the event of a national emergency.

d. International agreement. FAR 6.302-4. This exception is used where supplies or services will be used in another country, and the terms of a SOFA or other international agreement or treaty with that country specify or limit the sources. This exception also applies when the acquisition is for a foreign country who will reimburse the acquisition costs (e.g., pursuant to a foreign military sales agreement) directs that the product be obtained from a particular source.

e. Authorized or required by statute. FAR 6.302-5. Full and open competition is not required if a statute expressly authorizes or requires the agency to procure the supplies or services from a specified source, or if the need is for a brand name commercial item for authorized resale.

f. National security. FAR 6.302-6. This exception applies if disclosure of the government's needs would compromise national security. Mere classification of specifications generally is not sufficient to restrict the competition, but it may require potential contractors to possess or qualify for appropriate security clearances. FAR 6.302-6.

g. Public interest. FAR 6.302-7. Full and open competition is not required if the agency head determines that it is not in the public interest for the particular acquisition. Though broadly written, this exception is rarely used because only the head of the agency can invoke it—it requires a written determination by the Secretary of Defense. DFARS 206.302-7.

h. Lack of advance planning is NOT an exception to full and open competition and may not be used to justify the use of noncompetitive procedures. FAR 6.301(c)(1). See, for example, World Wide Language

Resources, Inc.; SOS International Ltd., B-296984, 2005 U.S. Comp. Gen. Proc. Dec. ¶ 206 (Nov. 14, 2005) (protest of sole-source contract award for bilingual-bicultural advisor/subject matter experts in support of Multinational Forces-Iraq sustained where the urgency—the immediate need for the services prior to the January 2005 elections in Iraq—was the direct result of unreasonable actions and acquisition planning by the government 2-3 months earlier).

3. Use of any of these exceptions to full and open competition requires a written “Justification and Approval” (J&A). FAR 6.303. For the contents and format of a J&A, refer to AFARS 5106.303, 5153.9004, and 5153.9005. The approving authority is responsible for the J&A, but attorney involvement and assistance is critical to successful defense of the decision to avoid full and open competition. Limiting competition in any way invites protests which may interrupt the procurement process. Approval levels for justifications, as listed in FAR 6.304, are:

- a. Actions under \$650,000: the contracting officer.
- b. Actions from \$650,000 to \$12.5 million: the competition advocate designated pursuant to FAR 6.501.
- c. Actions from \$12.5 million to \$62.5 million (or \$85.5 million for DOD, NASA, and the Coast Guard): the HCA or designee.

4. Actions above \$62.5 million (or above \$85.5 million for DOD, NASA, and the Coast Guard): the agency acquisition executive. For the Army, this is the Assistant Secretary of the Army for Acquisition, Logistics, and Technology (ASA(ALT)).

5. Contract actions awarded and performed outside the United States, its possessions and Puerto Rico, for which only local sources will be solicited, are generally exempt from compliance with the requirement to synopsize the acquisition in the GPE. Accordingly, these actions may be accomplished with less than the normal minimum 45-day PALT. However, but they are not exempt from the requirement for competition. See FAR 5.202(a)(12); see also FAR 14.202-1(a) (thirty-day bid preparation period only required if procurement is synopsized). Thus, during a deployment, contracts may be awarded with full and open competition within an overseas theater faster than within CONUS, thus avoiding the need for a J&A in support of other than full and open competition. Full and open competition under these circumstances is attained by posting notices on procurement bulletin boards, soliciting potential offerors on an appropriate bidders list, advertising in local newspapers, and telephoning potential sources identified in local telephone directories. See, FAR 5.101(a)(2) & (b) and AFARS Manual No. 2, para.4-3.e.

6. Temporary Exceptions. During contingency operations, Congress may authorize temporary exceptions to normal contracting and competition rules through authorization acts or annual or supplemental appropriations acts. Historic examples from Iraq and Afghanistan include the CERP (Afghanistan only), Iraq/Afghan First Program, and the SC-CASA Program (allowing preferences and set-asides for certain acquisitions from vendors in certain countries along major supply routes to Afghanistan).

C. Methods of Acquisition

1. Sealed Bidding. This is the appropriate acquisition method when award is based solely on price and price-related factors, and is made to the lowest, responsive, responsible bidder. See FAR Part 14.

a. Sealed bidding procedures must be used if the four conditions enumerated in the Competition in Contracting Act exist. These four conditions, commonly known as the “Racal factors,” are:

- (1) Time permits the solicitation, submission, and evaluation of sealed bids;
- (2) Award will be made only on the basis of price and price-related factors;
- (3) It is not necessary to conduct discussions with responding sources about their bids; and
- (4) There is a reasonable expectation of receiving more than one sealed bid.

10 U.S.C. § 2304(a)(2)(A); FAR 6.401; see also, Racal Filter Technologies, Inc., B-240579, Dec. 4, 1990, 70 Comp. Gen. 127, 90-2 CPD ¶ 453.

b. Practitioners should note the use of sealed bidding allows little discretion in the selection of a source. Bids are solicited using Invitations for Bids (IFB) under procedures that do not allow for pre-bid discussions with potential sources. Consequently, a clear understanding and description of the requirement is essential. Sealed bidding requires more sophisticated contractors because errors in bid preparation may result in a non-responsive bid preventing the government from accepting the offer. Only fixed-price type contracts are awarded using this method of acquisition. Sealed bidding procedures are rarely used during active military operations in foreign countries

because, generally, discussions with responding offerors are required to ensure their understanding of, and capability to meet, our requirement.

2. Negotiations (also called “competitive proposals”).

a. With this acquisition method, the award is based on stated evaluation criteria—one criterion must be cost—and is made to the responsible offeror whose proposal offers the “best value” to the government. The contracting officer informs potential offerors up front whether best value will be based upon an offeror submitting the “lowest cost, technically acceptable” solution to the government’s requirement, or whether best value will be determined on a “cost-technical tradeoff” basis, which allows the government to accept a higher-priced offer if the perceived benefits of the higher-priced proposal outweigh the additional cost. The basis for award (low-cost, technically-acceptable or cost-technical tradeoff) and a description of all factors and major sub-factors that the contracting officer will consider in making this determination must be stated in the solicitation. See FAR Part 15.

b. This method of acquisition is used when the use of sealed bids is not appropriate. 10 U.S.C. § 2304(a)(2)(B). Negotiations permit greater discretion in the selection of a source and allow consideration of non-price factors in the evaluation of offers, such as technical capabilities of the offerors, past performance history, etc. Offers are solicited by use of a Request for Proposals (RFP). Proposals are submitted by offerors and are evaluated in the manner stated in the solicitation. Consistent with the solicitation, the contracting officer may establish a competitive range comprised of the most highly-rated proposals and conduct discussions with only those offerors. Following discussions, the offerors may submit revised proposals for evaluation. Finally, award is made to the offeror whose proposal represents the best value to the government. Of note, negotiations permit the use of any contract type.

D. Simplified Acquisition Procedures.

1. Thresholds. Simplified procedures may be used for procurements below certain dollar amounts. These amounts are specified in FAR Part 2. However, on October 28, 2004, the thresholds for procurements in support of contingency operations (defined in 10 U.S.C. § 101(a)(13)) or to facilitate defense against or recovery from NBC or radiological attack were increased. Section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375. Presently, the base thresholds and the increased contingency thresholds are as follows:

a. Simplified Acquisition Threshold (SAT). Simplified acquisition procedures can be used to procure goods and services up to the “simplified acquisition threshold” (SAT), which is normally \$150,000. For purchases supporting a contingency operation but made (or awarded and performed) *inside* the United States, the SAT is \$300,000. For purchases supporting a contingency operation made (awarded and performed) *outside* the United States, the SAT is \$1,000,000. 41 U.S.C. § 428a(b)(2); FAR 2.101 (restating SAT and defining contingency operation). DFARS Class Deviation 2011-O0009, Simplified Acquisition Threshold for Humanitarian or Peacekeeping Operations (28 Mar. 2011), sets the SAT at \$300,000 when soliciting or awarding contracts to be awarded and performed outside the United States to support a humanitarian or peacekeeping operation. See FAR 2.101 (defining humanitarian or peacekeeping operation). DFARS Class Deviation 2013-O0003, Definition of Contingency Operation (26 Nov. 2012), directs use of a new definition for “contingency operation” when making acquisitions in support of a major disaster, when the Secretary of Defense mobilizes Reserve forces in response to a Governor’s request for assistance. In that case, the definition from 10 U.S.C. § 101(a)(13) should be used in lieu of the definition outlined in FAR 2.101.

b. Micro-Purchase Threshold. The “micro-purchase threshold” is \$3,000. Below this threshold purchases may be made without competition. However, for purchases of construction subject to the Davis-Bacon Act the micro-purchase threshold is \$2,000 and for acquisitions of services subject to the Service Contract Act the micro-purchase threshold is \$2,500. For purchases supporting a contingency operation made (or awarded and performed) *inside* the United States, the micro-purchase threshold is \$15,000. For purchases supporting a contingency operation made (or awarded and performed) *outside* the United States, the micro-purchase threshold is \$30,000. 41 U.S.C. § 428a(b)(1); FAR 2.101.

c. Commercial Items. Commercial Item Test Program (CITP) allows agencies to use simplified acquisition procedures to purchase commercial item supplies and services for amounts greater than the simplified acquisition threshold but not greater than \$6,500,000. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4202(a) (1) (A) (codified at 10 U.S.C. § 2304(g)(1)(B)) and FAR 13.5. For contingency operations or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack

against the United States, the \$6,500,000 commercial item test program threshold increases to \$12,000,000. *See* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1443. Congress created this authority to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors. 10 U.S.C. § 2304(g)(1). For the period of the CITP test, contracting activities are to use simplified acquisition procedures to the maximum extent practicable. FAR 13.500(b). (While still labeled “test program” this authority was made permanent by section 815 of the 2015 NDAA).

2. Methods under Simplified Acquisition Procedures. About 95% of the contracting activity conducted in a deployment setting will be simplified acquisitions. The following are various methods of making or paying for these simplified purchases. Most of these purchases can be solicited orally, except for construction projects exceeding \$2,000 and complex requirements. *See* FAR 13.106-1(d). The types of simplified acquisition procedures likely to be used during a deployment are: Purchase Orders; Blanket Purchase Agreements (BPA); Imprest Fund Purchases; Government Purchase Card Purchases; and Accommodation checks/government purchase card convenience checks.

a. Purchase Orders. A purchase order is an offer to buy supplies or services, including construction. Purchase orders are usually issued only after requesting quotations from potential sources. Issuance of an order does not create a binding contract. A contract is formed when the contractor accepts the offer either in writing or by performance. In operational settings, purchase orders may be written using three different forms. FAR Subpart 13.302; DFARS Subpart 213.302; AFARS Subpart 5113.302 and 5113.306-90 (for use of the SF 44).

(1) DD Form 1155 or SF 1449. These are multi-purpose forms which can be used as a purchase order, blanket purchase agreement, receiving/inspection report, property voucher, or public voucher. They contain some contract clauses, but users must incorporate all other applicable clauses. FAR 13.307; DFARS 213.307; DFARS PGI 213.307. *See* clause matrix in FAR Part 52.301. When used as a purchase order, the KO may make purchases up to the simplified acquisition threshold. Only KOs have the authority to use these forms.

(2) Standard Form (SF) 44. This is a pocket-sized form intended for over-the-counter or *on-the-spot* purchases. Use this form Ordering officers and KOs may use this form for “cash and carry” type purchases. Practitioners should note that clauses are not incorporated. Reserve unit commanders may use the SF 44 for purchases not exceeding the micro-purchase threshold when a Federal Mobilization Order requires unit movement to a Mobilization Station or site, or where procurement support is not readily available from a supporting installation. FAR 13.306; DFARS 213.306; AFARS 5113.306. The SF 44 may be use only if *all* of the following conditions are satisfied:

- (a) The amount of the purchase is at or below the micro-purchase threshold;
- (b) The goods or services are immediately available;
- (c) One delivery and one payment will be made; AND
- (d) It is determined to be more economical and efficient that use of other simplified acquisition procedures.

(3) Ordering officers may use SF 44s for purchases up to the micro-purchase threshold for supplies or services. However, during a contingency operation, a contracting officer may make purchases up to the simplified acquisition threshold. *See* DFARS 213.306(a)(1).

b. Blanket Purchase Agreements (BPA). A BPA is a simplified method of filling anticipated repetitive needs for supplies or services essentially by establishing “charge account” relationships with qualified sources of supply. They are not contracts but merely advance agreements for future contractual undertakings. BPAs set prices, establish delivery terms, and provide other clauses so that a new contract is not required for each purchase. The government is not bound to use a particular supplier as it would be under a requirements contract. KO negotiates firm-fixed-prices for items covered by the BPA, or attaches to the BPA a catalog with pertinent descriptions/prices. FAR Subpart 13.303; DFARS Subpart 213.303; AFARS Subpart 5113.303.

(1) BPAs are prepared and issued on DD Form 1155 or SF 1449 and must contain certain terms/conditions. FAR 13.303-3:

- (a) Description of agreement.
- (b) Extent of obligation.

(c) Pricing.

(d) Purchase limitations.

(e) Notice of individuals authorized to place purchase orders under the BPA and dollar limitation by title of position or name.

(f) Delivery ticket requirements.

(g) Invoicing requirements.

(2) KOs may authorize ordering officers and other individuals to place calls (orders) under BPAs. FAR 13.303, AFARS 5113.303-2. Existence of a BPA does not per se justify sole-source procurements. FAR 13.303-5(c). Requiring activities must consider BPAs with multiple sources. If insufficient BPAs exist, requiring activities must solicit additional quotations for some purchases and make awards through separate purchase orders.

c. Imprest Fund Purchases. An imprest fund is a cash fund of a fixed amount established by an advance of funds from a finance or disbursing officer to a duly appointed cashier. The cashier disburses funds as needed to pay for certain simplified acquisitions. Authorized individuals (ordering officers and contracting officers) make purchases and provide the receipts to the cashier. When documented expenditures deplete the amount of cash in the imprest fund, the cashier may request to have the fund replenished. FAR 13.305; DFARS 213.305; DOD FMR vol. 5, para. 0209.

(1) DOD activities are not authorized to use imprest funds unless the Under Secretary of Defense (Comptroller) approves an exception to policy for a contingency or classified operation. DOD FMR, vol. 5, para. 020902.

(2) Imprest funds may not exceed \$10,000 and a single transaction may not exceed \$500. During contingency operations, the designated area commander may increase the ceiling on cash holdings to \$100,000 and the single transaction limit to \$3,000. DOD FMR vol. 5, para. 020903.

(3) DOD FMR vol. 5, para. 0209, contains detailed guidance on the appointment, training, and procedures governing the use of imprest funds, to include permissible and prohibited expenditures. Imprest fund cashiers should receive training in their duties, liabilities, and the operation of an imprest fund prior to deployment.

d. Government Purchase Card Purchases. Authorized GPC holders may use the cards to purchase goods and services up to the micro-purchase threshold. FAR 13.301(c). In a contingency operation, KOs may use the cards for purchases up to the SAT. DFARS 213.301(3). Overseas, even if not in a designated contingency operation, authorized GPC holders may make purchases up to \$30,000 for certain commercial items/services for use outside the U.S., but not for work to be performed by workers recruited within the United States. See DFARS 213.301(2) (containing additional limitations on this authority). The GPC can also be used as a payment instrument for orders made against Federal Supply Schedule contracts, calls made against a BPA, and orders placed against Indefinite Delivery/Indefinite Quantity (IDIQ) contracts that contain a provision authorizing payment by purchase card. FAR 13.301(c); AFARS 5113.202-90. Of note, funds must be available to cover the purchases. Special training for cardholders and billing/certifying officials is required. AFARS 5113.201(c). Issuance of these cards to deploying units should be coordinated prior to deployment, because there may be insufficient time to request and receive the cards once the unit receives notice of deployment. FAR 13.301; DFARS 213.279, 213.301; AFARS Subpart 5113.2.

e. Accommodation checks/government purchase card convenience checks. Commands which are deployed may utilize accommodation checks and/or GPC convenience checks in the same manner as they are used during routine operations. Checks should only be used when Electronic Funds Transfer (EFT) or the use of the government purchase card is not possible. See DoD FMR, vol. 5, para. 0210. Government purchase card convenience checks may not be issued for purchases exceeding the micro-purchase threshold. See DoD FMR, vol. 5, para. 021001.B.1.; see also DFARS 213.270(c)(6).

3. Commercial Items Acquisitions. FAR Part 12. Much of our deployment contracting involves purchases of commercial items. The KO may use any simplified acquisition method to acquire commercial items, or may use one of the other two acquisition methods (sealed bidding or negotiations). All three acquisition methods are streamlined when procuring commercial items. FAR Part 12 sets out a series of special simplified rules, to include a special form, simplified clauses, and streamlined procedures that may be used in acquiring commercial items.

(NOTE: The increased thresholds for commercial items acquisition are no longer available.) However, any contract for commercial items must be firm-fixed-price or fixed-price with economic price adjustment. FAR 12.207.

4. Simplified Acquisition Competition Requirements. The requirement for full and open competition does not apply to simplified acquisitions. However, for simplified acquisitions above the micro-purchase threshold, there is still a requirement to obtain competition “to the maximum extent practicable,” which ordinarily means soliciting at least 3 quotes from sources within the local trade area. FAR 13.104(b). For purchases at or below the micro-purchase threshold, there is no competition requirement at all, and obtaining just one oral quotation will suffice so long as the price is fair and reasonable. FAR 13.202(a)(2). Additional simplified acquisition competition considerations:

a. Micro-purchases. While there is no competition requirement, micro-purchases shall be distributed equitably among qualified sources to the extent practicable. FAR 13.202(a)(1). If practicable, the requiring activity should solicit a quotation from a supplier different than the previous supplier before placing a repeat order. Additionally, the requiring activity should use oral solicitations as much as possible. However, a written solicitation must be used for construction requirements over \$2,000. FAR 13.106-1(d).

b. Simplified acquisitions above the micro-purchase threshold. Because there is still a requirement to promote competition “to the maximum extent practicable,” KOs may not sole-source a requirement above the micro-purchase threshold unless the need to do so is justified in writing and approved at the appropriate level. FAR 13.501. Soliciting at least three sources is a good rule of thumb to promote competition to the maximum extent practicable. Whenever practicable, request quotes from two sources not included in the previous solicitation. FAR 13.104(b). Generally, the requiring activity should also solicit the incumbent contractor. *J. Sledge Janitorial Serv.*, B-241843, Feb. 27, 1991, 91-1 CPD ¶ 225.

c. Requirements that exceed the SAT or the micro-purchase threshold may not be broken down into several purchases to avoid procedures that apply to purchases exceeding those thresholds. FAR 13.003(c).

5. Publication (Notice) Requirements. Normally, contracting officers are required to publish a synopsis of proposed contract actions over \$25,000 on the Government-wide point of entry (GPE) at FedBizOpps.gov. 15 U.S.C. § 637(e); 41 U.S.C. § 416(a)(1); FAR 5.101(a)(1) and FAR 5.203. For actions estimated to be between \$15,000 and \$25,000, public posting (displaying notice in a public place) of the proposed contract action for 10 days is normally required. 15 U.S.C. § 637(e); 41 U.S.C. § 416(a)(1)(B); FAR 5.101(a)(2). None of these notice requirements exist if the disclosure of the agency’s needs would compromise national security. 15 U.S.C. § 637(g)(1)(B); 41 U.S.C. § 416(c)(1)(B); FAR 5.101(a)(2)(ii) and FAR 5.202(a)(1). Practitioners should note, disclosure of most needs in a deployment would not compromise national security. Still, the requirement to publish notice in FedBizOpps.gov is often not required in deployment contracting because there are other exemptions listed at FAR 5.202 that will often apply. For example, publication is not required for contracts that will be made and performed outside the United States, and for which only local sources will be solicited. FAR 5.202(a)(12). Accordingly, notice of proposed contract actions overseas is accomplished primarily through public posting at the local equivalent of a Chamber of Commerce, bulletin boards outside the deployed contracting office, or other locations readily accessible by the local vendor community. See FAR 5.101(a)(2) & (b)

E. Use of Existing Contracts to Satisfy Requirements.

1. Existing ordering agreements, indefinite delivery contracts, and requirements contracts may be available to meet recurring requirements, such as fuel, subsistence items, and base support services. Investigate the existence of such contracts with external and theater support contracting activities. For a discussion of theater and external support contracts, see *supra* subpart III.C.

2. Theater Support Contracts. In developed theaters, the theater contracting activity (regardless of organizational type) may have existing IDIQ contracts, BPAs, or requirements contracts available to efficiently satisfy a unit’s needs. For example, C3 may have multiple award IDIQ contracts for base support services and security services. If a unit has a requirement for either of these services, C3 may expeditiously award the task order to one of the awardees of the underlying IDIQ contract utilizing the “fair opportunity” to be considered procedures in FAR 16.5.

F. Alternative Methods for Fulfilling Requirements. New and existing contracts are not the only method of meeting the needs of deployed military forces. The military supply system is the most common source of supplies and services. Cross-servicing agreements and host-nation support agreements exist with NATO, Korea, and other

major U.S. allies. Similarly, under the Economy Act, other government agencies may fill requirements for deployed forces, either from in-house resources or by contract. Finally, service secretaries retain substantial residual powers under Public Law 85-804 that may be used to meet critical requirements that cannot be fulfilled using normal contracting procedures.

1. Host nation support and acquisition and cross-servicing agreements provide a critical means of fulfilling the needs of deployed U.S. forces and are addressed in 10 U.S.C. § 2341-2350; governed by U.S. Dep't of Defense, Dir. 2010.9, Acquisition and Cross-Servicing Agreements (28 Apr. 2003); and implemented by Joint Chiefs of Staff, Instr. 2120.01A, Acquisition and Cross-Servicing Agreements (27 Nov. 2006). Army guidance is located in U.S. Dep't of Army, Reg. 12-1, Security Assistance and International Logistics, Security Assistance, Training and Export Policy (23 Aug. 2010). These authorities permit acquisitions and transfers of specific categories of logistical support to take advantage of existing stocks in the supply systems of the U.S. and allied nations. Transactions may be accomplished notwithstanding certain other statutory rules related to acquisition and arms export controls. For further information, see Contract & Fiscal Law Dep't, The Judge Advocate General's School, U.S. Army, Fiscal Law Deskbook, ch. 10, Operational Funding (available online at http://www.loc.gov/rr/frd/Military_Law/Contract-Fiscal-Law-Department.html).

2. The Economy Act (31 U.S.C. § 1535) provides another alternative means of fulfilling requirements. An executive agency may transfer funds to another agency and order goods and services to be provided from existing stocks or by contract. For example, the Air Force could have construction performed by the Army Corps of Engineers, and the Army might have Department of Energy facilities fabricate special devices for the Army. Procedural requirements for Economy Act orders, including obtaining contracting officer approval on such actions, are set forth in FAR 17.5; DFARS 217.5; U.S. Dep't of Defense, Instr. 4000.19, Interservice and Intragovernmental Support (9 Aug. 1995); and DFAS-IN 37-1. For further information, see Contract & Fiscal Law Dep't, The Judge Advocate General's School, U.S. Army, Contract Law Deskbook, ch. 11, Interagency Acquisitions (available online at http://www.loc.gov/rr/frd/Military_Law/Contract-Fiscal-Law-Department.html).

3. Extraordinary contractual actions under Public Law 85-804. During a national emergency declared by Congress or the President and for six months after the termination thereof, the President and his designee may initiate or amend contracts notwithstanding any other provision of law whenever it is deemed necessary to facilitate the national defense. See *supra* subpart I.C.2.e. for further detail.

G. Leases of Real Property. The Army is authorized to lease foreign real estate for military purposes. 10 U.S.C. § 2675. True leases normally are accomplished by the Army Corps of Engineers using Contingency Real Estate Support Teams (CREST).

V. POLICING THE CONTRACTING BATTLEFIELD

A. Ratification of Contracts Executed by Unauthorized Government Personnel. Only warranted KOs can legally bind the government in contract. However, sometimes other government officials purport to bind the government. For example, this may occur when a commander directs a contractor to take actions beyond the scope of an existing contract or in the absence of a contract. An "unauthorized commitment" is an agreement that is not binding on the government solely because it was made by someone who did not have authority to bind the government. (FAR 1.602-3).

1. Because the person making the unauthorized commitment had no authority to bind the government, the government has no obligation to pay the unauthorized commitment. However, someone with actual authority to bind the government may choose to subsequently ratify the unauthorized commitment.

2. Based upon the dollar amount of the unauthorized commitment, the following officials have the authority to ratify the unauthorized commitment (See FAR 1.602-3; AFARS 5101.602-3):

- a. Up to \$10,000: Chief of Contracting Office
- b. \$10,000 - \$100,000: PARC or SCO
- c. Over \$100,000: HCA

3. These officials may ratify only when (FAR 1.602-3(c)):

- a. The government has received the goods or services;
- b. The ratifying official has the authority to enter into a contractual commitment;
- c. The resulting contract would have otherwise been proper if made by an appropriate contracting officer;
- d. The price is fair and reasonable;
- e. The contracting officer recommends payment and legal counsel concurs, unless agency procedures do not require such concurrence; and
- f. Proper funds are available and were available at the time the unauthorized commitment was made.

B. Extraordinary Contractual Actions. If ratification is not appropriate, for example, where no agreement was reached with the supplier, the taking may be compensated as an informal commitment. FAR 50.102-3; 50.103-2(c). Alternatively, the supplier may be compensated using service secretary residual powers. FAR Subpart 50.104.

1. Requests to formalize informal commitments must be based on a request for payment made within six months of furnishing the goods or services, and it must have been impracticable to have used normal contracting procedures at the time of the commitment. FAR 50.102-3(d).

2. These procedures have been used to reimburse owners of property taken during the Korean War (AFCAB 188, 2 ECR § 16 (1966)); in the Dominican Republic (Elias Then, Dept. of Army Memorandum, 4 Aug. 1966); in Jaragua S.A., ACAB No. 1087, 10 Apr. 1968; and in Panama (Anthony Gamboa, Dep't of Army Memorandum, Jan. 1990).

C. Quantum Meruit.

1. Prior to 1995-1996, the Comptroller General had authority under 31 U.S.C. § 3702 to authorize reimbursement on a quantum meruit or quantum valebant basis to a firm that performed work for the government without a valid written contract.

2. Under quantum meruit, the government pays the reasonable value of services it actually received on an implied, quasi-contractual basis. *Maintenance Svc. & Sales Corp.*, 70 Comp. Gen. 664 (5 Aug. 1991).

3. The GAO used the following criteria to determine justification for payment:

- a. The goods or services for which the payment is sought would have been a permissible procurement had proper procedures been followed;
- b. The government received and accepted a benefit;
- c. The firm acted in good faith; and
- d. The amount to be paid did not exceed the reasonable value of the benefit received. *Maintenance Svc. & Sales Corp.*, 70 Comp. Gen. 664 (1991).

4. Congress transferred the claims settlement functions of the GAO to the Office of Management and Budget, which further delegated the authority. *See* The Legislative Branch Appropriations Act, 1996, Pub. L. 104-53, 109 Stat. 514, 535 (1995); 31 U.S.C. 3702.

5. The Claims Division at the Defense Office of Hearings and Appeals (DOHA) settles these types of claims for the Department of Defense. DOHA decisions can be found at <http://www.dod.mil/dodge/doha/>.

D. Contract Disputes Act (CDA) claims. If the contractor believes it can meet its burden in proving an implied-in-fact contract, it can appeal a contracting officer's final decision to the United States Court of Federal Claims or the cognizant board of contract appeals. *See* 41 U.S.C. §§ 601-613; FAR Subpart 33.2.

E. Contracting With the Enemy.

1. Section 831 of the 2014 National Defense Authorization Act (NDAA) authorizes the HCA to restrict award, terminate contracts already awarded, or void contracts to contractors who directly or indirectly fund the insurgency or forces opposing the United States. Further, the Combatant Commander can use battlefield intelligence to make this determination and does not have to disclose that intelligence to the affected contractor. This authority applies to all contracts exceeding more than \$50,000.

VI. CONCLUSION

Sound contingency contracting requires Judge Advocates who are able to advise the key players (commanders, contracting officers, field ordering officers, etc) on how to legally meet the needs of the requiring activity. This is particularly true when many of the key players have limited contracting experience and staggering sums of money are available to accomplish their mission. The most important thing to remember when spending appropriated funds, whatever the vehicle or mechanism, is that each decision carries significant consequences. Judge Advocates should spend the time and effort to become familiar with the major contracts laws, policies, and regulations prior to deploying. Equally as important, Judge Advocates are encouraged to develop reach-back relationships prior to deployment; both within their command and throughout their technical chain of command, so difficult questions can be answered accurately and quickly.