

*Chapter 30*  
**Contingency &  
Deployment Contracting**



*2014 Contract Attorneys Deskbook*

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## CHAPTER 30

### CONTINGENCY AND DEPLOYMENT CONTRACTING

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## **CHAPTER 30**

### **CONTINGENCY AND DEPLOYMENT CONTRACTING**

#### **I. REFERENCES.**

- A. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. (Jun. 2013) [hereinafter FAR]; U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. (Jun. 2013) [hereinafter DFARS]; service supplements.
- B. JOINT CHIEFS OF STAFF, JOINT PUB. 4-0, JOINT LOGISTICS (18 Jul. 2008) [hereinafter JP 4-0].
- C. JOINT CHIEFS OF STAFF, JOINT PUB. 4-10, OPERATIONAL CONTRACT SUPPORT (17 Oct. 2008) [hereinafter JP 4-10].
- D. UNDER SECRETARY OF DEFENSE, ACQUISITION, TECHNOLOGY, AND LOGISTICS, DEFENSE PROCUREMENT AND ACQUISITION POLICY, CONTINGENCY CONTRACTING, DEFENSE CONTINGENCY CONTRACTING HANDBOOK: ESSENTIAL TOOLS, INFORMATION, AND TRAINING TO MEET CONTINGENCY CONTRACTING NEEDS FOR THE 21ST CENTURY A JOINT HANDBOOK FOR THE 21ST CENTURY (Oct. 2012).
- E. U.S. DEP'T OF ARMY, REG. 715-9, OPERATIONAL CONTRACT SUPPORT PLANNING AND MANAGEMENT (20 Jun. 2011) [hereinafter AR 715-9]
- F. U.S. DEP'T OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP) (28 Dec. 2012) [hereinafter AR 700-137].
- G. U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY (Mar. 2013) [hereinafter FM 1-04].
- H. U.S. DEP'T OF ARMY, FIELD MANUAL 4-92 (FORMERLY 100-10-2), CONTRACTING SUPPORT BRIGADE (Feb. 2010) [hereinafter FM 4-92].
- I. U.S. DEP'T OF ARMY, FIELD MANUAL 1-06 (FORMERLY 14-100), FINANCIAL MANAGEMENT OPERATIONS (Apr. 2011) [hereinafter FM 1-06].
- J. Army Sustainment Command (ASC), Contractor on the Battlefield Resource Library, *available at* <http://www.aschq.army.mil/gc/ExpedContToolKit.htm> (containing links to contingency contractor personnel related materials and websites).

- K. US Central Command Contracts webpage, *located at* <https://www2.centcom.mil/sites/contracts/Pages/Home.aspx> (containing training materials, checklists, policy documents, acquisition instructions, and contract clauses).

## II. INTRODUCTION

- A. General. The past ten years of constant 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 relies more and more on contracted support. The apparatus for competing, awarding, and supervising contractors in deployed or contingency environments is called “contingency contracting.”
1. The Joint Chiefs of Staff, in Joint Publication (JP) 4-10, define Contingency Contracting as:  
  
“[T]he process of obtaining goods, services and construction from commercial sources via contracting means in support of contingency operations. It is a subset of contract support integration and does not include the requirements development, prioritization and budgeting processes. Contracts used in a contingency include theater support, systems support, and external support contracts.”
- B. Legal Support to Operations. Doctrine covering legal support to operations provides that the Staff Judge Advocates “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. 5-40. Specifically, JAs 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, Legal Counsel should participate fully in the acquisition process at their level, make themselves continuously available to their clients, involve themselves early in the contracting process, communicate closely with procurement officials and contract lawyers in the technical supervision chain, and provide legal and business advice as part of the contract management team. *Id.* para. 5-41; 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 holding contract/fiscal law classes for supply and logistics personnel, reviewing acquisition and logistics plans as part of the units' OPLAN, and begin available to give advice on the 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 division and corps level main and tactical command posts, 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. 5-39 to 5-43.
  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. FM 4-92, para. 1-13. Judge Advocates at sustainment brigades, theater sustainment brigades, and expeditionary sustainment brigades perform similar functions. FM 1-04, para. 5-42. 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), daily practiced fiscal law. 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 and 5-39. Attorneys must understand the authorities and limitations imposed by these two bodies of law.
1. International Law.

- a. The Law of War – Combat. The Law of War applies during combat operations and imposes limitations, for example, on the use of prisoners of war (PW) for labor. Many contractors are authorized to accompany the force, a technical distinction that allows them to receive POW status should they be captured. See GCIV, ART 4(A)(4).
  - b. The Law of War – Occupation. The Law of War also applies during occupation, and may also be followed as a guide when no other body of law clearly applies, such as in Somalia in Operation Restore Hope.
  - c. International Agreements. A variety of international agreements, such as treaties and status of forces agreements (SOFA) may apply. These agreements can have substantial impact on contingency contracting by, for example, limiting the ability of foreign corporations from operating inside the local nation, placing limits and tariffs on imports, and governing 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 impact on contract pricing and contractor performance. Legal Counsel must know 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 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 otherwise 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 specifies the use of simplified acquisitions. Approximately 95% of all contracting actions in contingency operations will utilize simplified acquisitions, which are based primarily on low acquisition cost. More expensive acquisitions may not qualify.
  - (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. §§ 8301-8305) and other requirements.
  - (5) FAR Part 50 outlines the extraordinary contractual actions available during emergency situations. These are rarely used due to their low dollar threshold (\$50,000) and high approval levels, involving Congressional notification.
- b. Fiscal Law. 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)). For a more in-depth discussion of fiscal law principles, *see generally* CONTRACT & FISCAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, FISCAL LAW DESKBOOK (updated frequently and available online at [www.jagcnet.army.mil](http://www.jagcnet.army.mil)).
- c. Executive Orders and Declarations.
- d. 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. The fact that an operation is ongoing, however, may:

- (1) Make the use of existing authorities easier to justify. For example, the operational situation in a contingency operation will likely give rise to circumstances making it easier to develop a justification and approval to support the use 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 contain numerous examples of these extraordinary authorities, from the expenditure of Commander Emergency Response Funds (CERP) through the Afghanistan First program.
- e. 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 delegates 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 in excess of \$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.

### III. 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. 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 joint force commanders. Command authority does NOT include the ability to make binding contracts for the U.S. Government. FM 4-92, para. 1-20; *see also* JP 4-10, p. III-4.
  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, p. I-7; FM 4-92, para. 1-20.
- 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. At a minimum, however, JAs should be familiar with how Joint and Army doctrine incorporate planning for contract and contractor personnel support through the Contract Support Integration Plan and Contractor Management Plan.
1. Contract Support Integration Plan (CSIP).
    - a. In all operations where there will be a significant use of contracted support, the supported GCC and their subordinate commanders and staffs must ensure that this support is properly addressed in the appropriate OPLAN/OPORD. JP 4-10, p. III-16. To achieve this integration, a CSIP must be developed by logistics staff contracting personnel, assisted by the lead Service contracting element (if a lead Service is designated). *Id.* Annex W to the GCC OPLAN/OPORD contains the CSIP. *Id.*

- b. The CSIP is a planning mechanism to ensure effective and efficient contract support to a particular operation. The CSIP development process is intended to ensure the operational commander and supporting contracting personnel conduct advanced planning, preparation, and coordination to support deployed forces, and that the contract support integration and contractor management related guidance and procedures are identified and included in the overall plan. FM 4-92, para. 2-4.
- c. At a minimum, the CSIP must include: theater support contracting organization responsibilities; boards and/or center information; operational specific contracting policies and procedures to include Service civil augmentation program/external contract, multi-national, and host-nation support coordination guidance; and, contract administration services delegations. Other elements may include but are not limited to the identification of major requiring activities and information on commercial support capabilities to satisfy requirements. JP 4-10, figure III-3.
- d. Each Service component should also publish its own CSIP seeking integration and unity of effort with the supported GCC's CSIP. JP 4-10, III-8.b. For the Army, the CSIP is located in Tab G, Appendix 1, of Annex F, Sustainment. U.S. DEP'T OF ARMY, FIELD MANUAL 5-0, THE OPERATIONS PROCESS table E-2 (Mar. 2010).

2. Contractor Management Plan (CMP).

- a. The CMP is related to, but not the same as, the CSIP. While the CSIP 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. JP 4-10, para. IV-3.b.
- b. Contractor management is accomplished through a myriad of different requiring activities, contracting officer representatives, supported units, contracting organizations, and contractor company management personnel. JP 4-10, para. IV-1.b. Therefore, the GCC and subordinate joint forces commander must establish clear, enforceable, and well understood theater entrance, accountability, force protection, and general contractor management and procedures early in the planning stages of any military contingency. JP 4-10, para. IV-1.b(1). To accomplish this task, the GCC should publish a CMP. JP 4-10, para. IV-3.b(1).

- c. The CMP should specify operational specific contractor personnel and equipment requirements in order for the Joint Forces Commander, Service components, theater support contracting command, special operations forces, external support contracts, and Defense Logistics Agency to incorporate these into applicable contracts. JP 4-10, para. IV-3.b(1). 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. *Id.*
  - d. The Joint Forces Command and Service components should prepare supporting CMPs that support the GCC's CMP but provide more specific details. JP 4-10, para. IV-3.b(1); FM 4-92, paras. 2-13 to 2-14.
  - e. 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 chpt 31, Contingency Contractor Personnel (updated frequently and available online at [www.jagcnet.army.mil](http://www.jagcnet.army.mil)).
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, such as the Money as a Weapons System—Afghanistan (MAAWS-A). AARs from Afghanistan indicate that familiarity with this resource is foundational to anyone who will be providing fiscal or contract law advice in theater.
- 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). A Flag Officer or equivalent senior executive service (SES) civilian who has overall responsibility for managing a contracting activity. JP 4-10, para. I-2.c(1); FM 4-92, para. 1-4; FAR 2.101.
  - 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 Materiel Command, U.S. Army Corps of Engineers, U.S. Transportation Command, U.S. Special Operations Command, and the Joint Theater Support Contracting Command. 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) (a.k.a. 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.
  - a. There may be multiple SCOs in the same operational area based on mission or regional focus. For example, at one time in Operation Iraqi Freedom (OIF), there were two SCOs (known as PARCs), one for support to forces and one for reconstruction support. JP 4-10, para. I-2c(2). Presently, C3 has one SCO or PARC for Afghanistan.
  - b. In the Army, SCOs are known as PARCs. AFARS 5101.601; *cf.* JP 4-10, para. I-2c(2).
    - (1) HCAs appoint PARCs.
    - (2) The PARC serves as the senior Army contracting advisor responsible for planning and managing all Army contracting functions which 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) Example—The Commander of the Army Materiel Command is an HCA. The HCA normally appoints each Contracting Support Brigade Commander as a PARC. FM 4-92, para. 1-4.

3. Contracting Officer (KO). The government official (military officer, enlisted, or civilian) with the legal authority to enter into, administer, and/or terminate contracts. JP 4-10, para. I-2c(3); *see also* FAR 1.602.
  - a. Appointed in writing through a warrant (Standard Form 1402) by the HCA or SCO/PARC. JP 4-10, para. I-2c(3).
  - b. Only duly warranted contracting officers are authorized to obligate the U.S. Government, legally binding it to make payments against a contract. *Id.*
  - c. Three main types of contracting officers: procuring contracting officers (PCOs), administrative contracting officers (ACOs), and terminating contracting officers. *Id.* PCOs enter into contracts. ACOs administer contracts. TCOs settle terminated contracts. A single contracting officer may be responsible for duties in any or all of these areas. FAR 2.101 (definition of “contracting officer”).
  
4. Contracting Officer’s Representative (COR). CORs operate as the KO’s eyes and ears regarding contract performance, and provide the key link between the command and the KO regarding the command’s needs. CORs are organic members of the 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 and are used for communication regarding contract performance. Any issues with the contractor must still be resolved by the KO. *See* DFARS 201.602-2; JP 4-10, para. I-2c(3).
  - a. A properly trained COR shall be designated in writing prior to contract award. FAR 1.602-2(d). CORs must be a U.S. Government employee, unless authorized by agency-specific regulations. In this case, DFARS 201-602-2 authorizes officers of foreign governments to act as CORs as well.
  - b. HQDA EXORD 048-10: Pre-Deployment Training for Contracting Officer’s Representative and Commander’s Emergency Response Program (CERP) Personnel, dated 5 Dec. 2009. Requires brigades, brigade equivalents, and smaller units deploying in support of OEF or OIF:

- (1) Determine the number of CORs needed to meet theater contracting requirements no later than (NLT) 180 days before the latest arrival date (LAD). 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, ensure COR candidates complete online training courses developed by the U.S. Army Training and Doctrine Command.
  - (4) CORs must receive supplemental training from the contracting officer that appoints them as a COR.
- c. For more detailed information on COR responsibilities, *see* CENTER FOR ARMY LESSONS LEARNED, HANDBOOK 08-47, DEPLOYED COR (Sep. 2008); *see also* DFARS 201.602-2(2); DFARS Class Deviation 2011-O0008, Designation of Contracting Officer's Representative (21 Mar. 2011) (setting forth appointment requirements for CORs).

5. Field Ordering Officer (FOO).

- a. Service member or DOD civilian appointed in writing and trained by a contracting officer. AFARS 5101.602-2-90; 5101.603-1; 5101.603-1-90; 5101.603-1-90(b). FOOs are not warranted contracting officers and their FOO duties are considered an extra or collateral duty. JP 4-10, para. I-2c(5).
- 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 over the counter 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 5101.602-2-90. FOOs may also be government purchase card holders. AFARS 5113.2. 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 found at AFARS 5153.9002.

d. AFARS 5101.602-2-90 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. For an example, *see* <http://centcomcc.net> as well as MAAWS-A.

6. **Paying Agents.** Finance specialists, and Soldiers and DOD civilians appointed and trained by Finance, hold money. When FOOs or KOs make purchases using SF44s, the merchant can present the form to the paying agent for payment. Alternatively, and most likely a necessity in an immature theater, the paying agent will accompany the FOO or KO. Once the FOO/KO completes the transactions, the paying agent will pay the merchant. Pre-deployment coordination with finance to determine who the paying agents are and where they will be located will aid the deployed contracting process. Paying agents may not be FOOs. For detailed guidance on paying agents, *see* FM 1-06, app. D; *see also* DOD FMR, vol. 5, para. 020604 (discussing the appointment and responsibilities of paying agents). For Afghanistan specific guidance on paying agents, *see* the MAAWS-A.

D. Sources of Contracted Support in a Contingency Operation.

1. General. Three different sources of contract support generally are used in support of contingency operations: Theater Support Contracts, Systems Support Contracts, and External Support Contracts.
2. Theater Support Contracts. Contracts awarded by contracting officers in the operational area serving under the direct contracting authority of the Service component, special operations forces command, or designated joint HCA for the designated contingency operation. JP 4-10, p. vii, para. III-6. These contracts are commonly referred to as contingency contracts. *Id.* For example, theater support contracts in Afghanistan include contracts awarded by the CENTCOM Joint Theater Support Contracting Command or any of its Regional Contracting Centers or Offices.

3. Systems Support Contracts. Contracts awarded by Service acquisition program management offices that provide technical support, maintenance and, in some cases, repair parts for selected military weapon and support systems. Systems support contracts are routinely put in place to provide support to newly fielded weapons systems, including aircraft, land combat vehicles, and automated command and control systems. These contracts are often awarded long before and unrelated to specific operation. JP 4-10, p. vii, para. III-4 and app. A. Only the contracting activity that issued the contract has the authority to modify or terminate the contract.
4. External Support Contracts. Contracts awarded from contracting organizations whose contracting authority does not derive directly from the theater support contracting HCA or from system support contracting authorities. External support contracts provide a variety of logistic and other noncombat related services and supply support. JP 4-10, p. vii, para. III-5.
  - 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. JP4-10, para. III-5a and figure III-2.
    - (2) Non-logistic support may include communication services, interpreters, commercial computers and information management, and subject to congressional as well as DOD policy limitations, interrogation and physical security service support. *Id.*
  - 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. Only AMC has the authority to change the LOGCAP contract. JP 4-10, para. III-5(b).
  - c. Major External Support Contracts include each Service's civil augmentation program (CAP) contracts (LOGCAP for the Army,

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, para. III-5(a).

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, para. III-5 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 and general logistic support and can be used for supply support.
- (iii) The Navy GCCC focuses exclusively on construction.
- (iv) The Navy GSCS focuses on facilities support.

E. Theater Contracting Support Organizational Options.

1. General. There is no single preferred contracting organizational option for theater support contracting organizations; the specific organization option is determined by the Geographic Combatant Commander (GCC) in coordination with the subordinate Joint Force Command and Service Components. JP 4-10, para. III-7a. In general, however, there are three main organizational options: service component support to own forces, choosing a lead Service, and forming a joint theater support contracting command. *Id.* 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, and so forth). FM 4-92, para. 1-1.
2. Service Component Support to Own Forces.
  - a. During smaller scale operations with an expected short duration, the GCC may allow the Service component commanders to retain control of their own theater support contracting authority and organizations. This organizational option is also applicable to operations where the bulk of individual Service component units will be operating in distinctly different areas of the joint operations area thus limiting potential competition for the same vendor. JP 4-10, para. III-7b.
  - b. Army. The Army established the Expeditionary Contracting Command to provide theater support contracting in support of deployed Army forces worldwide and garrison contracting support for Outside the Continental United States Army installations. The commanders of each of six regionally focused contracting support brigades (CSB) are PARCs or SCOs. FM 4-92, paras. 1-1 to 1-4. In turn, each brigade has a number of contingency contracting battalions, contingency contracting teams, and senior contingency contracting teams. *Id.* para. 1-5. CSB units are deployed as necessary to meet mission contracting requirements. *Id.* paras. 1-

22 to 1-23. Specifically, the CSB may be organized to provide Service component support to Army forces. *Id.* para. 1-24.

3. Lead Service Responsible for Theater Support Contracting.
  - a. GCCs may designate a specific Service component responsible to provide consolidated theater contracting support. JP 4-10, para. III-7c.
  - b. 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. JP 4-10, para. III-7c(1).
  - c. The lead service often has command and control of designated other Service component theater contracting organizations and also has its staff augmented by other Services' contingency contracting personnel. JP 4-10, para. III-7c(1).
  - d. 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). FM 4-92, para. 1-24.
4. Joint Theater Support Contracting Command.
  - a. 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, para. III-7d. For Afghanistan, the CENTCOM Contracting Command (C3) has been established and organized as a Joint Theater Support Contracting Command.
  - b. Since GCCs do not have their own contracting authority, the joint theater support contracting command's HCA authority flows from one of the Service component's to the operational area. In this option, the joint theater support contracting command headquarters should be established by a Joint Manning Document (JMD). *Id.* For example, C3 falls beneath the Army. DFARS 202.101.
  - c. Within the Army, the CSB may serve as the building block for the formation of a joint theater support contracting command. FM 4-92, para. 1-24.

5. There is no formally approved, established model for lead Service theater support or the joint theater support contracting command organization options. JP 4-10, app. G, however, provides a general model or organization framework for each type of organization, to include a discussion of legal support to these organizations. Significantly, each of these organizational options will likely 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. G, paras. 2.g, 3.k(1).
  - 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. G, paras. 2.h and 3.k(2).
  - c. Specialty Contracts Division. May be used to provide contracting support for common, joint operations area-wide services or supplies OR to perform complex contracting actions that exceed the RCC and RCO capabilities. JP 4-10, app. G, paras. 2.h and 3.k(3).
6. Reachback Contracting. The National Defense Authorization Act for Fiscal Year 2012 granted the Under Secretary of Defense for Acquisition, Technology, and Logistics the power to designate a lead contracting activity for Operation Enduring Freedom and Operation New Dawn.
  - a. Army Contracting Command – Rock Island (ACC-RI) was designated in June 2012 as the Lead reach-back contracting authority by DoD.
  - b. ACC-RI directly contracts for theater requirements over \$1M. ACC-RI provides support in Afghanistan to all services.

#### **IV. REQUIREMENTS GENERATION, APPROVAL, AND CONTRACTING PROCESS**

- A. General. Once a requirement for goods or services is identified and approved by a requiring activity, resource management, finance operations, and contracting personnel must work in concert to actually acquire and pay for the good or

service. Together, these three are known as the “Fiscal Triad.” FM 1-06, at vii; FM 4-92, para. 2-17, FM 1-04, app. G.

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 and conducting basic market research. JP 4-10, app. G. Unit commanders and staff identify, develop, validate, prioritize, and approve requirements. FM 1-06, at vii.
  - a. Requiring activities are responsible for developing “acquisition ready” requirements. In coordination with the supporting contracting activity (e.g., RCC or RCO), the requiring activity must be able to describe what is needed to fulfill the minimum acceptable standard for the government. This information allows the contracting activity to create a solicitation against which commercial vendors can bid a proposal and successfully deliver in accordance with the terms of the contract to satisfy a government requirement. FM 4-92, para. 2-18; *see also* JP 4-10, app. G.
  - 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. FM 4-92, para. 2-18; *see also* JP 4-10, app. G. 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 in fact include requirements for construction or the procurement of investment items that may require the use of a different appropriation.
2. Resource Management (RM).
  - a. Serve as the commander’s representative to lead the requirement validation, prioritization, and approval effort.
  - b. Certifies the availability of funds by executing a purchase, request, and commitment (PR&C) and ensures the use of the funds is legal and proper. As the keeper of the commander’s checkbook, the RM does not create requirements and has no acquisition authority. FM 1-04, app. G; FM 1-06, at vii, ch. 1, sec. II; FM 4-92, para. 2-17.

3. Contracting Officers.
  - a. The only government officials (military officer, enlisted, or civilian) with the legal authority to enter into, administer, and/or terminate contracts. JP 4-10, para. I-2c(3); *see also* FAR 1.602.
  - b. Upon receipt of certified funding and properly developed requirement, contracts on behalf of the U.S. Government to obtain the good or service. FM 1-04, app. G; FM 1-06, at vii; FM 4-92, para. 2-17
  - c. Responsible for appointing and training field ordering officers.
4. Finance Operations.
  - a. As the government's banker, finance is the only triad element with funds disbursement authority. Once a contract has been awarded, finance operations provide vendor payment through cash, check, government purchase card, and electronic funds transfer. FM 1-04, app. G; FM 1-06, at vii, ch. 1, sec. I; FM 4-92, para. 2-17.
  - b. Funds and clears paying agents.

B. Requirements Approval Process.

1. Ensures the appropriate functional staffs coordinate on, prioritize, approve, and certify funding for the "acquisition ready requirements" package before it is forwarded to the appropriate contracting activity. FM 4-92, para. 2-19. These staff reviews can include, but are not limited to:
  - a. Legal
  - b. Supply/logistics/property book.
  - c. Engineer
  - d. Medical
  - e. Signal (information technology and communication)
  - f. Resource Management
  - g. Other as needed/required by the circumstances.
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 as discussed below. JP 4-10, para. III-3; *see also* FM 4-92, para. 2-19.

3. 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, para. III-3.b. Focuses on general policies and AOR-wide issues related to contracting support at the GCC level, to include:
  - a. 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;
  - b. Establishing AOR-wide contracting and contractor management policies and procedures; and
  - c. Determining theater support contracting organization structure. JP 4-10, para. III-3.b and figure III-1.
4. Joint Acquisition Review Board (JARB). JP 4-10, para. III-3.c.
  - a. Utilized to coordinate and control the requirements generation and prioritization of joint common user logistics (CUL) supplies and services that are needed in support of the operational mission.
  - b. Normally 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.
  - c. Main role is to make specific approval and prioritization recommendations for all GCC directed, subordinated Joint Forces Commander controlled, high-value and/or high visibility CUL requirements and to include recommendations on the proper source of support for these requirements.
  - d. Theater support and external support contracting members' role is to inform the other JARB members which contracting mechanisms are readily available for a particular acquisition.
  - e. For an example, *see* Money as a Weapons System—Afghanistan (MAAWS-A). This contains detailed guidance on the JARB (and related, subordinate, and superior ARBs) and the requirements approval process. Judge Advocates deploying to Afghanistan, regardless of organizational level, must familiarize themselves

with the policy contained in these documents in advance of deploying to theater.

- f. Once a requirement is validated and approved by the JARB, the resource manager certifies funding and the packet is provided to a contracting activity.
5. Joint Contracting Support Board (JCSB). JP 4-10, para. III-3.d and figure III-1.
- a. Focuses on how contracting will procure support in the Joint Operations Area.
  - b. 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.
  - c. Establishes theater support contracting procedures.
  - d. Chaired by SCO/PARC or subordinate J-4 acquisition officer.
- C. Theater Business Clearance (TBC) / Contract Administration Delegation (CAD).
- 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 in Iraq and Afghanistan, the Deputy Under Secretary of Defense, Acquisition, Technology, and Logistics and the Director of Defense Procurement and Acquisition Policy issued a series of memoranda directing JCC-I/A (now CENTCOM Contracting Command (C3)) to develop TBC procedures, to include procedures on contract administration delegation. Headquarters, Joint Contracting Command – Iraq / Afghanistan, subj.: Theater Business Clearance (TBC) Authority, Procedures, and Requirements for Iraq and Afghanistan, *available at* <http://www2.centcom.mil/sites/contracts/Pages/Default.aspx>, *also available at* <http://centcomcc.net>.
  - 3. CENTCOM Contracting Command uses the TBC review process to ensure that contracting officers outside theater (e.g., external and system support contracting officers) insert mandatory language and clauses in contracts. *Id.* 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 or whether administration will be re-delegated to the procuring contracting officer. *Id.* On May 13, 2013, DPAP issued updates to the TBC policy, including requirements for an in-theater sponsor and in-theater management over contracts, *e.g.* COR, COTR, GTPR. *See* Director, Defense Procurement and Acquisition Policy, subj. Theater Business Clearance Update for the USCENTCOM Area of Responsibility *available at* <http://www.acq.osd.mil/dpap>.

## V. 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 discusses specific alternatives to acquiring supplies and services pursuant to a new 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. *See also* FAR Part 6 and Far 2.101. In general, the government must seek full and open competition by providing all responsible sources an opportunity to compete. No automatic exception is available for contracting operations during deployments.
  - 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), which results from 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, followed by a requirement to provide a minimum of 30 days for offerors to submit bids or proposals. Three additional time periods extend the minimum 45-day PALT: 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 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.
  - 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.<sup>1</sup> Because of the urgency, the contracting officer is permitted to award the contract even before the written "Justification and Approval" (see paragraph 3

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<sup>1</sup> This exception can be particularly applicable to meet urgent critical needs relating to human safety and which affects military operations. For example, it 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)). However, this exception cannot be used where the urgency was created by the agency's lack of advanced planning. 10 U.S.C. § 2304(f)(5); *see, e.g.*, WorldWide Language Resources, Inc.; SOS International Ltd., B-296984; B-296984.2; B-296984.3; B-296984.4; B-296993; B-296993.2; B-296993.3; B-296993.4., 2005 U.S. Comp. Gen. Proc. Dec. ¶ 206 (Nov. 14, 2005) (protest of December, 2004 award of sole-source contract 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).

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).

- c. Industrial mobilization, engineering, developmental, or research capability; or expert services for litigation. FAR 6.302-3. This exception is used primarily 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.
3. Use of any of these exceptions to full and open competition requires a “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 of the procurement which may interrupt the procurement process. Approval levels for justifications, as listed in FAR 6.304:

- 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.
  - d. 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)).
4. Contract actions awarded and performed outside the United States, its possessions, and Puerto Rico, for which only local sources will be solicited, generally are exempt from compliance with the requirement to synopsise the acquisition in the GPE. These actions therefore may be accomplished with less than the normal minimum 45-day PALT, 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 for other than full and open competition for many procurements executed in rapid fashion. Obtain full and open competition under these circumstances 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.
5. Temporary Exceptions. During contingency operations, Congress may authorize temporary exceptions to normal contacting and competition rules through authorization acts or annual or supplemental appropriations acts. Examples in Afghanistan include the Commander's Emergency Response Program, 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 – Sealed Bidding. This is the appropriate method if award is based only on price and price-related factors, and is made to the lowest, responsive, responsible bidder. *See* FAR Part 14.

1. Sealed bidding procedures must be used if the four conditions enumerated in the Competition in Contracting Act exist. 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. These four conditions, commonly known as the “Racal factors,” are:
  - a. Time permits the solicitation, submission, and evaluation of sealed bids;
  - b. Award will be made only on the basis of price and price-related factors;
  - c. It is not necessary to conduct discussions with responding sources about their bids; and
  - d. There is a reasonable expectation of receiving more than one sealed bid.
2. 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. A clear description/understanding of the requirement is needed to avoid having to conduct discussions. Sealed bidding requires more sophisticated contractors because minor errors in preparing a bid can make the bid non-responsive and prevent the government from accepting the offer. Only fixed-price type contracts are awarded using these procedures. Sealed bidding procedures are rarely used during active military operations in foreign countries because it is usually necessary to conduct discussions with responding offerors to ensure their understanding of, and capability to meet, U.S. requirements.

D. Methods of Acquisition – Negotiations (also called “competitive proposals”).

1. With this acquisition method, award is based on stated evaluation criteria, one of which 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 subfactors that the contracting officer will consider in making this determination, must be stated in the solicitation. *See* FAR Part 15.

2. Negotiations are 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 those offerors, after which those offerors submit revised proposals for evaluation. Award is made to the offeror whose proposal represents the best value to the government. Negotiations permit the use of any contract type.

E. 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, Section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, amended 41 U.S.C. § 1902 (Special Emergency Procurement Authority) to increase each of these thresholds for procurements in support of a contingency operation as defined in 10 U.S.C. § 101(a)(13), or to facilitate defense against or recovery from NBC or radiological attack. 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. § 1903; 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).
  - b. **Micro-purchase threshold**. The “micro-purchase threshold,” below which purchases may be made without competition, is normally \$3,000. For purchases supporting a contingency

operation but 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. § 1903; FAR 2.101.

- c. **Commercial items.** Prior to 1 January 2012, the Commercial Items Test Program (CITP) authorized DoD to utilize simplified acquisition procedures up to an amount well above the SAT for the purchase of commercial items. This authority expired on 1 Jan 2012, but was renewed by Section 822 of the National Defense Authorization Act (NDAA) for Fiscal Year 2013, Public Law 112-239, which extends this test program until January 1, 2015. The commercial items test program threshold is \$6,500,000. For purchases supporting a contingency operation, the threshold was \$12,000,000. 41 U.S.C. § 1903; FAR 13.500(e).
2. 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:
    - a. Purchase Orders. FAR Subpart 13.302; DFARS Subpart 213.302; AFARS Subpart 5113.302 and 5113.306 (for use of the SF 44).
    - b. Blanket Purchase Agreements (BPA). FAR Subpart 13.303; DFARS Subpart 213.303; AFARS Subpart 5113.303.
    - c. Imprest Fund Purchases. FAR 13.305; DFARS Subpart 213.305; DOD FMR vol. 5, para. 0209.
    - d. Government Purchase Card Purchases. FAR 13.301; DFARS 213.279, 213.301; AFARS Subpart 5113.2.
    - e. Accommodation checks/government purchase card convenience checks. DoD FMR, vol. 5, ch. 2, para. 0210; *see also* DFARS 213.270(c)(6).
  3. **Purchase Orders.** A purchase order is an offer to buy supplies or services, including construction. Purchase orders usually are 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.

- a. 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. When used as a purchase order, the KO may make purchases up to the simplified acquisition threshold. Only KOs are authorized to use these forms.
  - b. Standard Form (SF) 44. This is a pocket-sized form intended for over-the-counter or on-the-spot purchases. Clauses are not incorporated. Use this form for “cash and carry” type purchases. Ordering officers, as well as KOs, may use this form. 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. Conditions for use:
    - (1) As limited by KO’s warrant or FOO’s appointment letter.
    - (2) Away from the contracting activity.
    - (3) Goods or services are immediately available.
    - (4) One delivery, one payment.
  - c. Ordering officers may use SF 44s for purchases up to the micro-purchase threshold for supplies or services, except that purchases up to the simplified acquisition threshold may be made for aviation fuel or oil. During a contingency operation, a contracting officer may make purchases up to the simplified acquisition threshold. *See* DFARS 213.306(a)(1).
4. Blanket Purchase Agreements (BPA). FAR Subpart 13.303; DFARS 213.303-5; and AFARS 5113.303. 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.

- a. BPAs are prepared and issued on DD Form 1155 or SF 1449 and must contain certain terms/conditions. FAR 13.303-3:
    - (1) Description of agreement.
    - (2) Extent of obligation.
    - (3) Pricing.
    - (4) Purchase limitations.
    - (5) Notice of individuals authorized to place purchase orders under the BPA and dollar limitation by title of position or name.
    - (6) Delivery ticket requirements.
    - (7) Invoicing requirements.
  - b. 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). Consider BPAs with multiple sources. If insufficient BPAs exist, solicit additional quotations for some purchases and make awards through separate purchase orders.
5. Imprest Funds. 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.
- a. 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.
  - b. 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 020903.

- c. 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.
6. Government-wide Purchase Card (GPC). 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 Blanket Purchase Agreement (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. 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.
7. Accommodation Checks/Purchase Card Convenience Checks. Commands involved in a deployment 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, ch. 2, para. 0210. Government purchase card convenience checks may not be issued for purchases exceeding the micro-purchase threshold. *See* DoD FMR, vol. 5, ch. 2, para. 021001.B.1.
8. 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. However, any contract for commercial items must be firm-fixed-price or fixed-price with economic price adjustment. FAR 12.207.

9. 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, solicit a quotation from other than the previous supplier before placing a repeat order. Oral solicitations should be used as much as possible, but 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). You normally should also solicit the incumbent contractor. J. Sledge Janitorial Serv., B-241843, Feb. 27, 1991, 91-1 CPD ¶ 225.
  - c. Requirements aggregating more than the SAT or the micro-purchase threshold may not be broken down into several purchases merely to avoid procedures that apply to purchases exceeding those thresholds. FAR 13.003(c).
10. 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. § 1708; 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. § 1708; 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. § 1708; FAR 5.101(a)(2)(ii) and FAR 5.202(a)(1). 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)

F. 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 indefinite quantity-indefinite delivery (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 awardee of the underlying IDIQ contract utilizing the "fair opportunity" to be considered procedures in FAR 16.5.

G. 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 are also 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, International Logistics, Training, and Technical Assistance Support Policy and Responsibilities (24 Jan. 2000). 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 (updated frequently and available online at [www.jagcnet.army.mil](http://www.jagcnet.army.mil)).

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 (25 April 2013); 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 (updated frequently and available online at [www.jagcnet.army.mil](http://www.jagcnet.army.mil)).
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 delegates 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 in excess of \$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

- H. 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).

## VI. 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. This may occur, for example, 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.
  - 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 6 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 (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 [www.defenselink.mil/dodgc/doha](http://www.defenselink.mil/dodgc/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. 41 U.S.C. §§ 7101-7109; FAR Subpart 33.2.
  - E. Contracting With The Enemy.
    1. Section 841 of the 2012 NDAA (Public Law 112-81) 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 U.S. in the CENTCOM theater of operations. Further, the CENTCOM 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 that will be executed in the CENTCOM AOR for more than \$100,000.
    2. Section 842 of the 2012 (Public Law 112-81) NDAA requires the inclusion of a contract term for contracts covered by sections 841 and 842 that allows the government to inspect “any records of the contractor” or subcontractor to ensure contract funds are not going to support the insurgency or otherwise oppose US action in the CENTCOM AOR.

## VII. CONCLUSION

Individuals who have little to no contracting experience often spend staggering sums of money in support of their unit’s mission. The most important thing to remember when dealing with the expenditure of appropriated funds, whatever the vehicle or mechanism, is that each decision to spend money carries consequences. To that extent, it is worth the time and effort to prepare, research, reach out, and be diligent to adhere to contracting rules and regulations. Judge Advocates are encouraged to develop reach-back relationships prior to deployment, both within their command and outside, so difficult questions can be answered accurately and quickly.