

GETTING BEYOND “GOOD ENOUGH” IN CONTINGENCY CONTRACTING: USING PUBLIC PROCUREMENT LAW AS AN ANTI-CORRUPTION TOOL BY PRINCIPLIZING STATE-BUILDING IN MILITARY OPERATIONS IN AFGHANISTAN

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The “*Money as a Weapon System*” (MAAWS) concept that undergirds the U.S. *counterinsurgency* (COIN) ethos may be causing more harm than good to the long-term prospects of building a just Afghan state. Although corruption is not an inseparable part of Afghan culture, its effects are heightened when billions of dollars flow into a country that lacks the human capital and institutional resources to deter the types of bad actors drawn to weak institutional systems. The U.S. military, rather than being a senior partner in Afghanistan’s anti-corruption campaign, has exacerbated the problem with weak fiscal stewardship and a misguided procurement policy. A major part of that failure lies in the U.S. military’s unwillingness to place Afghan institutional development on par with speed, efficiency and familiarity within its procurement culture.

With the above background in mind, the central thesis of this paper is built on two key assumptions: (1) systemic public corruption in Afghanistan is a *symptom* of larger institutional failings at the national and sub-national levels and (2) a key enabler for those failings is rooted in the DoD’s inability or unwillingness to align its public procurement practices with a broader state-building strategy. Put more succinctly, properly constituted and empowered Afghan institutions can resist and retard the growth of corruptive influences, but the DoD’s contingency contracting methodology (or lack thereof) undermines the development of those institutions.

The key for progress begins with understanding that *money is not* a weapons system; it is the ammunition that fuels the system. The effectiveness of any weapon system is not judged in terms of how much ammunition it expends or how many targets it hits; instead, it is judged in terms of its ability to neutralize its intended target. The weapon system, in this sense, is still the judgment of the requiring activity and the systems in place to deploy its funds successfully. Successful deployment of those funds means aiming at the proper target. Thus far, the U.S. military procurement focus in Afghanistan has been aimed at short-term COIN objectives rather than targeting Afghanistan’s institutional shortcomings. Overcoming this failing means developing a sound public procurement system aimed at reinforcing Afghan Procurement Law and building enduring Afghan institutions.

This can only happen, however, if the DoD is able and willing to make “state-building” the centerpiece of U.S. military efforts in Afghanistan. This starts with first supporting the Afghan government in expanding the reach of its host nation public procurement institutions while making procurement law an essential component of the DoD’s rule of law mission. Second, the DoD must actively reform the operational mindset of its contingency contracting regime so that it enables rather than distorts Afghanistan’s institutional legitimacy. The discussion, analysis, and recommendations brought forth within this thesis offer a path for moving beyond the errors of the past, while providing a tool for approaching similar operations in the future.

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I. Introduction

In 2003, Iraq, under Sadaam Hussein, had a corruption perception index (CPI) rating of 2.2, ranking it as the 19th most corrupt country surveyed that year according to data compiled by Transparency International (TI).¹ In December 2011, that score had decreased to 1.8 tying it with Haiti as the 7th most corrupt country surveyed; just a few weeks before the U.S. military mission formally concluded in Iraq.² Afghanistan, under President Karzai, has a CPI rating of 1.5, tying it with Myanmar as the second most corrupt country surveyed, just ahead of North Korea and Somalia, which share the first place position.³ No CPI data exists for Afghanistan prior to the U.S. invasion, but some Afghan locals have complained that the situation “was less corrupt under the Taliban.”⁴

According to a United Nations (UN) report published in 2010, “Afghans paid out \$2.5 billion in bribes over the past 12 months – that’s equivalent to almost one quarter (23%) of Afghanistan’s GDP.”⁵ That same report went on to note that “drugs and bribes are the two largest income generators in Afghanistan: together they [are equivalent] to about half the

¹ Transparency International – Policy Research (2003), http://www.transparency.org/policy_research/surveys_indices/cpi/2003. The Corruption Perception Index (CPI) is developed from “a poll of polls, reflecting the perceptions of business people, academics and risk analysts, both resident and non-resident.” *Id.*

² Transparency International – Policy Research (2011), <http://cpi.transparency.org/cpi2011/results/>.

³ *Id.*

⁴ Kim Sengupta, *It Was Less Corrupt Under the Taliban, says Afghans*, INDEPENDENT, Jan. 20, 2010, <http://www.independent.co.uk/news/world/asia/it-was-less-corrupt-under-the-taliban-say-afghans-1873169.html>; *see also* UNITED STATES AGENCY FOR INT’L. DEV. (USAID), ASSESSMENT OF CORRUPTION IN AFGHANISTAN 4 (2009) [hereinafter USAID Corruption Assessment]. According to this assessment Afghanistan has become progressively more corrupt since 2005. For instance, “Afghanistan fell from a ranking of 117th out of 159 countries covered in 2005, to 172nd of 180 countries in 2007, and finally to 176th out of 180 countries in 2008 - the fifth most corrupt country in the world.”

⁵ UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC), CORRUPTION IN AFGHANISTAN: BRIBERY AS REPORTED BY THE VICTIMS 4 (2010).

country's GDP."⁶ Insurgent groups, criminal patronage networks, and local power brokers are at the heart of this illicit economy, but unseating them requires a host nation response that is currently beyond Afghanistan's institutional capabilities. The conventional storyline holds that U.S. forces are in Afghanistan to support the Afghan government in shoring up that institutional weakness, but an article by Aram Roston of the Nation titled: *How the US Funds the Taliban* suggests a alternate narrative.

In the summer of 2009, the US military expanded its Host Nation Trucking (HNT) contract in Afghanistan by 600 percent "citing the coming 'surge' and [the application of] a new doctrine [known as] 'Money as a Weapons System.'"⁷ The HNT contract is essential for U.S. military operations in Afghanistan, because it accounts for over "70 percent of the total goods and materiel distributed to U.S. troops in the field."⁸ The routes these truckers must travel are long, dangerous and often controlled by Taliban warlords.⁹ And since the contractors are usually outmanned and outgunned, they often resort to paying bribes and extortion money to potential Taliban insurgents and criminals to guarantee safe passage from the pickup point to the final destination.¹⁰ However, the most troubling fact is not this blatant criminality but the moral quagmire it created for U.S. officials. Of particular note, the congressional committee investigating the matter found:

⁶ *Id.*

⁷ Aram Roston, *How the US Funds the Taliban*, NATION, Nov. 30 2009, available at <http://www.thenation.com/article/how-us-funds-taliban>.

⁸ See MAJORITY STAFF OF H. COMM. ON NATIONAL SECURITY AND FOREIGN AFFAIRS, 112TH CONG., WARLORD, INC. – EXTORTION AND CORRUPTION ALONG THE U.S. SUPPLY CHAIN IN AFGHANISTAN 1 (Comm. Print 2010) [Hereinafter WARLORD, INC.]

⁹ *Id.*

¹⁰ *Id.*

In meetings, interviews, e-mails, white papers, and PowerPoint presentations, many HNT prime contractors self-reported to military officials and criminal investigators that they were being forced to make “protection payments” for “safe passage” on the road. While military officials acknowledged receiving the warnings, these concerns were never appropriately addressed.¹¹

The Roston article went on to state that Afghan military sources believed insurgents were pocketing about 10 to 20 percent in funds from every contract in Afghanistan.¹² In 2010, the congressional committee investigation reinforced that belief by concluding that the HNT contract “fueled warlordism, extortion, and corruption, and it may be a significant source of funding for insurgents.”¹³ The HNT contracting effort, and others like it, highlights a critical flaw in the DoD counterinsurgency (COIN) strategy for Afghanistan. A strategy that will likely result in an American military leaving Iraq more corrupt than it found it and repeating a similar storyline in Afghanistan.

With this background in mind, I argue that the *Money as a Weapon System* (MAAWS) mindset that undergirds the U.S. COIN procurement ethos in Afghanistan is fundamentally flawed, because it is built on an operational framework that is ill suited for cultivating a just Afghan state. A major aspect of this flaw rests with a DoD procurement culture that values speed and military necessity over developing sound processes and strengthening host nation institutions. Money is *not* a weapons system; it is the ammunition that serves that system. The effectiveness of any weapon system is not judged in terms of

¹¹ *Id.* at 55.

¹² Roston, *supra* note 7.

¹³ WARLORD INC., *supra* note 8, at 2. The investigation began in December 2009 and a final report was issued on June 2010. It found that the HNT contract had, in fact, “fueled warlordism, extortion, and corruption, and it may [have been] a significant source of funding for insurgents,” largely due to the manner in which HNT contractors were implicitly encouraged to assemble their “security details.”

how much ammunition it expends or how many targets it hits; instead, it is judged in terms of its ability to neutralize its intended target. The weapon system, in this sense, is still the judgment of the requiring activity and the systems in place to deploy those funds successfully. Successful deployment of those funds means aiming at the proper target. Thus far, the U.S. military procurement focus in Afghanistan has been aimed at short-term COIN objectives rather than targeting Afghanistan's institutional shortcomings.

The central thesis of this paper is built on two key assumptions: (1) systemic public corruption in Afghanistan is a *symptom* of larger institutional failings at the national and sub-national levels and (2) a key enabler for those failings is rooted in the DoD's inability or unwillingness to align its public procurement practices with a broader state-building strategy. Put more succinctly, effective Afghan institutions can resist and retard the growth of corruptive influences, but the DoD's contingency contracting methodology undermines the development of those institutions.

In Part II of this paper, we begin by examining the concept of "state-building" and the DoD's role in facilitating a viable state-building agenda during the course of COIN operations in Afghanistan. Although COIN should continue to be the focal point of U.S. combat operations in Afghanistan, it should be limited to a "supporting" role that does not subsume the aims of the larger stability operation or state-building strategy.

In Part III we explore the nuanced interplay between U.S. COIN – focused policy decisions and the impact those decisions have on the bureaucratic framework for Afghanistan's governing institutions. Although corruption is not an inseparable part of Afghan culture, its effects are heightened when billions of dollars flow into a country that lacks the human capital and institutional resources to deter the types of bad actors drawn to

weak systems. In this section, we explore the idea of empowering the public procurement system as a means for reversing the tide of corruption and developing host nation institutional capabilities.

In Part IV we will examine the “MAAWS contracting mindset” that took root during “the Surge” in Iraq and how that contracting mindset has become the blueprint for “COIN contracting” actions in Afghanistan. Of particular note, here we will look at the Iraqi procurement system available at the time of the Surge and how that system *could have* been used as an interface point between U.S. military operations in Iraq and a larger state-building strategy. Unfortunately, the DoD elected to bypass Iraq’s public procurement framework and embrace a MAAWS money-spending ethos that was consistent with COIN, but corrosive to host nation institutional development.

In Part V we will consider several recommendations aimed at addressing the flaws in the design of the DoD procurement culture and provide solutions for synchronizing current military operations in Afghanistan with an overarching state-building strategy. The first step is to adopt an integrated procurement model that develops and utilizes the Afghan procurement process as a matter of law and DoD policy for all DoD related reconstruction requirements. Second, any system that values the rule of law must be equipped with a robust disputes resolution process to encourage greater market participation and enhance government transparency, predictability and a sense of fairness. As such, we will look at how the DoD could create an Afghan based bid protest regime similar to the agency based protest model described under FAR 33.103. Lastly, in addition to developing host nation institutional capacity, we consider how the DoD can ameliorate the adverse impact of its current spending practices by simply limiting the amount of money a tactical level

commander can spend on reconstruction projects; and requiring all commanders to fully assess the collateral consequences of specific contracting actions prior to award.

II. State-Building by any Other Name is Still State-Building: Challenging the Assumption of COIN

A. From Hunting Terrorist to Building a State

Charles de Gaulle popularized the edict that no nation has friends, only interest, and the U.S presence in Afghanistan generally embodies that principle.¹⁴ American interest in Afghanistan, however, has evolved as the circumstances have changed. What started out as a straight-forward mission to hunt down and neutralize a terrorist threat has largely evolved into the daunting task of state-building.¹⁵ So despite the initial impetus, state-building has subsumed all other priorities for both the international community and U.S. policy makers.¹⁶ More specifically, in 2011, the United Nations (UN) declared that “all the UN agencies and [programs] in Afghanistan agreed to work together on five main priorities, which include 1)

¹⁴ The exact quote by De Gaulle was “France has no friends, only interest,” in response to a query posed by Clementine Churchill.

¹⁵ The underlying goal of OEF was to destroy Afghanistan’s terrorist harboring capacity and bring Osama bin Laden to justice by any means necessary. In 2001, this called for a rather light U.S. military footprint, minimal reconstruction contributions, and propping up a governing regime defined by parochial Afghan and U.S. stability interest. Up until 2006, military operations in Afghanistan were mostly left under U.N. stewardship and the efforts of indigenous Afghan military forces. Unfortunately, this limited U.S. focus ultimately compromised the prospects for a lasting peace, because Taliban leaders and fighters withdrew from direct combat and hid and regrouped within the safe harbors of Pakistan and Iran, where it launched an aggressive insurgency campaign against the new Afghan government. Additionally, the Karzai administration proved to be too inept and corrupt to establish an inclusive and competent Afghan state capable of serving the Afghan people or defeating the emerging insurgency. *See* U.S. DEP’T OF DEF., REPORT ON PROGRESS TOWARD SECURITY AND STABILITY IN AFGHANISTAN 41, 42 & 57 (Nov. 2010)[hereinafter STABILITY REPORT].

¹⁶ United Nations (UN) Security Council Resolution 1974 (2011) provides the current authority for UN operations in Afghanistan. Resolution 1974 extends the mandate of resolution 1917 (2010), which is to provide “continued support for the Government and people of Afghanistan as they rebuild their country, strengthen the foundations of sustainable peace and constitutional democracy and assume their rightful place in the community of nations.”

peace, reconciliation and reintegration; 2) human rights protection and promotion; 3) sub-national governance and the rule of law; 4) maternal and newborn health; and 5) sustainable livelihoods.”¹⁷ On June 22, 2011, President Obama described the way forward in

Afghanistan as follows:

The goal that we seek is achievable, and can be expressed simply: no safe-haven from which al Qaeda or its affiliates can launch attacks against our homeland, or our allies. We will not try to make Afghanistan a perfect place....What we can do, and will do, is build a partnership with the Afghan people that endures – one that ensures that we will be able to continue targeting terrorists and supporting a sovereign Afghan government.¹⁸

The difference between the two mission statements is that the UN goals appear to be somewhat idealistic, whereas the President’s goals lie somewhere between perfection and “good enough.” The difficulty in ascertaining the right and left limits for U.S. military success in Afghanistan lies with understanding where “good enough” starts and ends and perfection ultimately begins. Here, the President’s words are somewhat instructive, when he says our desired end state is one that will allow us “to continue [to] target terrorist and support a sovereign Afghan government.”¹⁹ But will any government do? Perhaps, at least in the short term, but ideally the government we *should* choose to support and help to create *should* be a *just* one.

In the *Politics*, Aristotle argues that an Aristocratic regime (*e.g.* rule by the best and most enlightened) would be the *ideal* guarantor of justice, but such perfection is “beyond the

¹⁷ United Nations Assistance Mission in Afghanistan – Mandate, <http://unama.unmissions.org/Default.aspx?tabid=1742>.

¹⁸ Excerpt from remarks of President Barack Obama on the Way Forward in Afghanistan – Official Release, <http://kabul.usembassy.gov/obama-speech.html>.

¹⁹ *Id.*

reach of ordinary states.”²⁰ In the absence of perfection, wise men should strive to create a governing regime that is *Aristocratic-like* or the proper *synthesis* of wealth and individual freedom – *restrained* by the rule of law and oriented toward the pursuit of justice.²¹ This means that the *idea* of perfect justice is mostly an aspiration, but a just state is one that perpetually seeks that perfection. Put another way, a *just* government is not a perfect one. Instead, it is a governing regime that is “good enough” to effectively govern, but has the *capability* to be something more.

By way of comparison, a tyrant can effectively govern but the state’s growth will be limited by the wisdom and imaginative capabilities of the particular tyrant. Iraq under Sadaam Hussein and Libya under Omar Kaddafi provide post-modern examples of this limiting condition. It also means little to create a “democratic government” via elections if the institutions of state are factious and ineffective such as Iraq under Prime Minister Maliki and Afghanistan under President Karzai.²² In this sense, the DoD’s continued role in supporting the Afghan state must be governed by a desire to expand the rule of law within the context a reasonably achievable state-building effort.

²⁰ Aristotle, *Politics*, in THE POLITICS OF ARISTOTLE 281, Bk. VI, Ch. 11 (J.E.C. Welldon, MA trans., 1883).

²¹ *See id.* at 153-154, Bk. III, Ch. 16.

²² *See* Christopher Layne, *Kant or Cant: The Myth of Democratic Peace*, 19 INTERNATIONAL SECURITY, NO. 2 5,6 (1994)(arguing that having a democratic government, alone, is not a sufficient safeguard for peace); *see also* Thomas Schwartz & Kiron K. Skinner, *The Myth of Democratic Pacifism*, HOOVER DIGEST, No. 2, (1999), <http://www.hoover.org/publications/hoover-digest/article/7214> (arguing that “Democracy is still a good thing, but like most good things it does not ensure peace between states that have it. Like most good things, therefore, it is a dangerous thing to rely on for that purpose. Praise democracy—but preserve the ammunition.”); *contra* R.J. Rummel, *Democracies Don’t Fight Democracies*, PEACE MAG. (1999), <http://archive.peacemagazine.org/v15n3p10.htm> (arguing that “Democracy is a general cure for political or collective violence of any kind - it is a method of nonviolence.”); *but see* EMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL ESSAY 122-23 (London: George Allen & Unwin LTD. Ruskin House 1917) (1795) (holding that a republican government is the best bulwark against war, because the average citizen has a stake in peace, and the cost of war infringes on that interest).

B. What is State-Building?

The idea of the nation-state was born and cultivated out of the reformative energy of the French Revolution.²³ This emergence, however, “presupposed centuries of state-building, and the slow growth of national consciousness within the frame of the developing territorial state...,” and moving beyond a society that limited state-membership to members of the privileged class.²⁴ In the modern era, the nation-state is generally accepted as the central organizing principle for modern democratic states.²⁵ In terms of structure, the idea of the nation-state begins with the concept of the *nation*, which is essentially a group of people with a set of shared cultural beliefs and/or ethnicity; coupled with the concept of the *state*, which is the sovereign territorial and political entity with the authority to act on the international stage.²⁶ A “nation-state” emerges when the “political boundaries of the state and the presumed cultural boundaries of the nation match.”²⁷

In the *Beginners Guide to Nation-Building*, James Dobbins, Seth G. Jones, Keith Crane, and Beth Cole DeGrasse describe nation-building as “the use of armed force as part of a broader effort to promote political and economic reforms with the objective of transforming

²³ William Rogers Brubaker, *The French Revolution and the Invention of Citizenship*, 7 FRENCH POLITICS & SOCIETY, NO. 3 30, 30 (1989).

²⁴ *Id.* at 30-31. Brubaker writes “the ancien regime society – in France as elsewhere on the Continent – was essentially inegalitarian. It was a society honeycombed with privilege, “with distinctions, whether useful or honorific...enjoyed by certain numbers of society and denied to others.” *Id.*

²⁵ Alfred Stepan, Juan J. Linz & Yogendra Yadav, *The Rise of “State-Nations,”* 7 J. OF DEMOCRACY, NO. 3 50, 52 (2010).

²⁶ Hedva Ben-Isreal, *The Nation-State: Durability Through Change*, INT’L. J. POLITICAL CULTURAL SOCIETY, 24 65-74, 65 (2011).

²⁷ Stepan, Linz, &Yadav, *supra* note 25, at 52.

a society emerging from conflict into one at peace with itself and its neighbors.”²⁸ However, Francis Fukuyama notes that “outsiders can never build nations, if that means creating or repairing all the cultural, social, and historical ties that bind people as a nation.”²⁹ Instead, “what we are really talking about is state-building—that is, creating or strengthening such government institutions as armies, police forces, judiciaries, central banks, tax-collection agencies, health and education systems, and the like.”³⁰ The idea of nation-building, as distinguished from state-building, is the process of consolidating the cultural identity of the nation around a common purpose or a set of shared core beliefs, while state-building is aimed at establishing and/or empowering governing institutions.

With these distinctions in mind, Fukuyama is probably correct; outsider imposed nation-building is an exercise in futility if it means “outsider imposed consolidation” of cultural practices and core beliefs on an indigenous population. This is especially true in countries like Iraq and Afghanistan, where several nations occupy the same geographical space, but have distinct and competing belief sets. In such instances, outsiders must accept “the people” as they find them, but be prepared to support state-building practices that are just and consistent with the aims of an “internally driven” nation-building agenda.

Alfred Stepan, Juan J. Linz, and Yogendra Yadav have proposed the idea of a “‘state-nation’ . . . political institutional approach that respects and protects multiple but

²⁸ JAMES DOBBINS, SETH G. JONES, KEITH CRANE, & BETH COLE DEGRASSE, *RAND THE BEGINNER’S GUIDE TO NATION-BUILDING* xvii (2007).

²⁹ Francis Fukuyama, *Nation-Building 101*, *ATLANTIC MONTHLY* (Jan/Feb 2004), <http://www.theatlantic.com/magazine/archive/2004/01/nation-building-101/2862/>.

³⁰ *Id.*

complementary sociocultural identities.”³¹ The state-nation approach is built around a form of “constitutional patriotism” that unites multiple nations around the “common symbols of the state” such as a written constitution and a “self-sustaining” government.³² “Self-sustaining” is key here, because if outsiders cannot “leave behind stable, legitimate, relatively uncorrupt indigenous state institutions, they have no hope of a graceful exit.”³³ This means that if the DoD wishes to be successful in Afghanistan, it must develop a strategy anchored in an active policy of state-building. This starts by developing an operational language that adequately describes the DoD’s role in the state-building process and authoring a strategy that is consistent with that role. The *U.S. Department of Defense Instruction 3000.05 for Stability Operations* provides a critical first step in that direction.

The term “stability operation” is a key component of the DoD’s operational vernacular. The DoD defines a stability operation as “an overarching term encompassing various military missions, tasks, and activities conducted outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief.”³⁴ Qualitatively, there is no significant difference between Fukuyama’s conception of “state-building” and the DoD’s concept of stability operations. Although not all stability operations require a state-building response, all DoD

³¹ Stephan, Linz, & Yadav, *supra* note 25, at 53.

³² *Id.*

³³ Fukuyama, *supra* note 29.

³⁴ U.S. DEP’T OF DEF. INST. 3000.05, STABILITY OPERATIONS ¶ 4 a & b (16 Sept. 2009) [hereinafter DODI 3000.05] (describing stability operations as “a core U.S. military mission,” in which military commanders must be prepared to (1) establish civil security and civil control; (2) restore or provide essential services; (3) repair critical infrastructure; and (4) provide humanitarian assistance).

state-building endeavors can be classified as stability operations.³⁵ And since the DoD has designated stability operations as a “core military mission” and placed it on par with combat operations, stability operations **should not** be seen as subordinate to the war fighting mission.³⁶ At the policy level, this suggests that the DoD has the necessary operational language to describe the state-building process. But at the strategic level and echelons below, the current DoD approach in Afghanistan is mired within the operational limitations of a COIN strategy that has not fully embraced a state-building agenda.

C. Examining the Limitations of a “COIN Strategy” in a Failing State

Field Manual (FM) 3-24 describes an insurgency and counterinsurgency as “complex subsets of warfare.”³⁷ Warfare is, by definition, another name for combat, and an insurgency is essentially a way of waging war that relies on irregular methods to overthrow the established government.³⁸ In *Counterinsurgency*, David Kilcullen notes that the combat methods of the insurgency are not irregular “in the sense that [they are] uncommon...but in the literal sense that [they are] against the rules” set forth by “nation-states and their military establishments.”³⁹ A COIN, on the other hand, is an “umbrella term that describes the

³⁵ *Id.* The difference between a state-building endeavor and something else depends on the capability and capacity of the host nation. For instance, providing disaster assistance to Japanese citizens following a massive typhoon can be classified as humanitarian assistance, because the Japanese state generally has the capacity and capability to fix the problem on its own, but the assistance of other nations simply expedites the process in order to provide critical aid in a timely fashion. A state-building operation occurs when the host nation government lacks the institutional capability or capacity no matter how much time it is given to address the problem.

³⁶ *See id.*

³⁷ U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY ¶ 1-1 (15 Dec. 2006) [hereinafter FM 3-24].

³⁸ *Id.* ¶ 1-2.

³⁹ DAVID KILCULLEN, COUNTERINSURGENCY Preface X (2010).

complete range of measures that governments take to defeat the insurgency.”⁴⁰ More specifically, FM 3-24 describes COIN as a combination of

Offensive, defensive, and stability operations to achieve the stable and secure environment needed for effective governance, essential services, and economic development. The focus of COIN operations generally progresses through three indistinct stages that can be envisioned with a medical analogy: 1) Stop the bleeding, 2) Inpatient care—recovery and 3) Outpatient care—movement to self-sufficiency.⁴¹

Like Kilcullen suggests, COIN is not just another combat operation. Instead, it is as an overarching blueprint for conducting combat and *all other* operations needed to defeat the insurgency and to move the host nation government to a self-sustaining state.⁴² Therefore, inasmuch as the military operation in Afghanistan is a COIN operation, COIN is the organizing strategic principle for conducting military operations in that country, and a stability operation is simply a potential *tactic* for *supporting* the COIN strategy.⁴³

This conception of COIN is not without its critics. Noted historian Colonel Gian Gentile writes that “population-centric COIN may be a reasonable operational method to use in certain circumstances, but it is not a strategy.”⁴⁴ Gentile goes on to write that “strategy is about choice, options, and the wisest use of resources in war to achieve policy objectives. Yet in the American Army’s new way of war, tactics—that is, the carrying out of the “way”—

⁴⁰ *Id.* at 1.

⁴¹ *Id.* ¶ 5-3.

⁴² *Id.* ¶ 1-2 (defining “counterinsurgency” as those political, economic, military, paramilitary, psychological, and civic actions taken by a government to defeat an insurgency).

⁴³ See *Hearing Before the Senate Armed Services Committee to Consider the Nomination of Hon. Leon E. Panetta to be Sec. of Def.*, 112th Cong. 14 (2011) [hereinafter Panetta Hearing] (Senator Clare McCaskill states that “part of our mission *in counterinsurgency* is to secure and stabilize and enhance the infrastructure.”).

⁴⁴ Colonel Gian P. Gentile, *A Strategy of Tactics: Population-centric COIN and the Army*, PARAMETERS 3, 6 (2009).

have utterly eclipsed strategy.”⁴⁵ For Gentile and his ilk, COIN is simply a means and method of carrying out a specific type of warfare, “nothing more and nothing less.”⁴⁶

In response to Gentile’s criticisms of COIN as a strategy, retired Colonel Jack J. McCuen states:

Gentile fails to recognize the key point in any counterinsurgency strategy. The purpose of such a strategy is not “to win hearts and minds.” The purpose is not “nation building.” The purpose is to win the war against the strategy imposed upon us by our enemies who wage this type of war against us because experience has shown them that it is the only one by which they can defeat us -- what Mao described as a “protracted revolutionary war.” They wage this war within the population by using the population as a shield and weapon.⁴⁷

McCuen’s advocacy for a COIN *strategy* has a robust and influential following, which allowed it to become the leading viewpoint within U.S. military policy circles in Iraq and Afghanistan.⁴⁸ This is significant, especially if a COIN strategy is, as Col. McCuen states, not about “winning hearts and minds” or “nation-building,” but about doing whatever it takes to defeat the insurgency. Under this operational paradigm, stability operations simply function as a subset of COIN, aimed at “stabilizing” conflict areas and sapping insurgent

⁴⁵ *Id.* at 7.

⁴⁶ *Id.* at 6.

⁴⁷ Thomas E. Ricks, *A Challenge for COINhata Gentile*, FOREIGN POL’Y (2009), http://ricks.foreignpolicy.com/posts/2009/12/04/a_challenge_for_coiuhata_gentile (this is an excerpt from a discussion between journalist Thomas E. Ricks and Col. McCuen).

⁴⁸ See Panetta Hearing, *supra* note 43 (Mr. Panetta expresses support for continuing COIN operations in Afghanistan); see *Hearing to Consider the Nominations of General Stanley A. McChrystal et. al. Before the U.S. Senate Committee on Armed Services*, 111th Cong. 19 (2009) (statement of Gen Stanley McChrystal) (noting that the COIN strategy employed in Iraq would also be implemented in Afghanistan); see William B. Caldwell, IV, & Steven M. Leonard, *Field Manual 3-07, Stability Operations: Upshifting the Engine of Change*, MILITARY REVIEW, 88, 6 (July/August 2008) (“[T]he future is not one of major battles and engagements fought by armies on battlefields devoid of population; instead, the course of conflict will be decided by forces operating among the people of the world.”).

strength rather than developing long-term institutional capacity.⁴⁹ In this sense, development aid used in support of COIN is fundamentally primed to serve as a short-term stabilization tool.

In March 2010, a group of leading experts on the role of development aid in COIN assembled together at a conference at Wilton Park in the United Kingdom. The conference report found that “there is still a surprisingly weak evidence base for the effectiveness of aid in promoting stabilization and security objectives” from operations in Afghanistan.⁵⁰ More specifically, the report asserts that “aid seems to be losing rather than winning hearts and minds in Afghanistan.”⁵¹ Adding that:

At a time when more aid money is being spent in Afghanistan than ever before, popular perceptions of aid are overwhelmingly negative. Despite the considerable work that has been done, including the expansion of basic social services, major investments in roads and other infrastructure, and a communications revolution, negative perceptions persist that little has been done, the wrong things have been done, what was done is poor quality, the benefits of aid are spread inequitably, and that much money is lost through corruption and waste. Research findings suggest policymakers should be cautious in assuming that aid projects help create positive perceptions of the deliverers of aid, or that they help legitimize the government.⁵²

The report concluded that the military had confused “the achievement of ‘popularity’ among local populations with the more important objective of competing for ‘legitimacy’ vis-à-vis

⁴⁹ See S. REP. NO. 112-21, at 8 (2011). The logic here is that the U.S. military will “clear” and “hold,” while the USG civilian agencies follow up to “build” capacity and “transfer” power to Afghan civil authority.

⁵⁰ *Winning Hearts and Minds in Afghanistan: Assessing the Effectiveness of Development Aid in COIN Operations*, REPORT ON WILTON PARK CONFERENCE 1022 at 1 (2010), <http://www.eisf.eu/resources/library/1004WPCReport.pdf>. This report reflected the findings from leading experts on the role of development in counterinsurgency.

⁵¹ *Id.* at 3.

⁵² *Id.*

the insurgency.”⁵³ Simply put, in the current COIN conflict the primary competition is not for the “hearts and minds” of the population but “between the *system* of the insurgent and that of the host regime” or a battle of institutional authority and competence.⁵⁴ Progress under this “institution-centric” approach can only be measured in terms of the Afghan government’s ability to plan, deliver, and control the flow of essential services, not the ability of the U.S. military to do it for them. Unfortunately, the short-term emphasis of COIN largely favors the latter, while effectively undermining the realization of the former.

The final defeat of the Taliban or an eventual political compromise will inevitably be settled on Afghan terms rather than conditions set by U.S. warfighters.⁵⁵ The best the U.S. military can hope for, under these circumstances, is to ensure that the Afghan state we leave behind can continue the fight on its own terms or negotiate a final peace from a position of strength. If we continue with the current strategic course, the U.S. military will be waging a COIN fight up until the projected 2014 departure date, and advocating for a continued stake in the fight long after that date has passed.

⁵³ *Id.* at 6. The report noted that British General Sir Gerald Templar referred to winning hearts and mind as “that nauseating phrase I think I invented.” Critical to Templar’s view is that institutional competence, rather than popularity will carry the day. This suggest that “the current predatory behavior of many people within the state apparatus suggests that the international community should be looking to all forms of political governance in the country, including structures which do not conform to Western expectations.” *Id.*

⁵⁴ *Id.*

⁵⁵ See SETH G. JONES, RAND COUNTERINSURGENCY STUDY VOL. 4: COUNTERINSURGENCY IN AFGHANISTAN, 10 (2008) The study states that “the United States is...unlikely to remain for the duration of most insurgencies,” further noting that:

An analysis of all insurgencies since 1945 shows that successful counterinsurgency campaigns last for an average of 14 years, and unsuccessful ones last for an average of 11 years... Governments with competent security forces won in two-thirds of all completed insurgencies, but governments defeated less than a third of the insurgencies when their competence was medium or low.

Although total military defeat of the Taliban is a laudable goal, it is highly unlikely in today's operational environment, especially if that means complete annihilation of the enemy or securing the unconditional surrender of all hostile forces.⁵⁶ Instead, the most likely course of action is a protracted counterinsurgency that will continue long after U.S. military operations cease.⁵⁷

U.S. military operations in Afghanistan can best serve Afghan and U.S. interest by facilitating an Afghan-borne conclusion to the insurgency. In this regard, state-building (i.e. stability operations) should serve as the strategic-centerpiece for U.S. military operations in Afghanistan; because it can best prepare the Afghan state with the capacity needed to create a final peace. COIN, on the other hand, should be seen as a *tactic* for facilitating the state-building mission, because it is concerned with fighting insurgents and establishing the “safe and secure environment” needed to execute a state-building strategy. Plainly stated, military operation in Afghanistan should more properly be understood as state-building in a COIN environment or “institution-centric COIN.” Put it another way, it's the act of conducting state-building operations while someone is still shooting at you. In the next section, we shall

⁵⁶ See STABILITY REPORT, *supra* note 15, 41, 42 & 57 (2010) (stating that “efforts to reduce insurgent capacity, such as safe havens and logistic support originating in Pakistan and Iran, have not produced measurable results....The insurgency continues to adapt and retain a robust means of sustaining its operations, through internal and external funding sources and the exploitation of the Afghan Government's inability to provide tangible benefits to the populace.” This suggests that despite concerted efforts to purge the insurgent threat, sanctuaries in Iran and Pakistan have made getting at the enemy virtually impossible. Secondly, the disparate nature of Al-Qaeda and Taliban leadership structures make “surrender” extremely unlikely. For instance, the U.S. counterinsurgency operation in the Philippines from 1899-1902, often hailed as a model for a successful COIN operation, was ultimately concluded when its principle leader, Gen. Aguinaldo, was captured in 1901 and the last vestiges of resistance, led by Gen. Lukban, surrendered in 1902. It is unlikely that U.S. military forces will be able to facilitate a similar end in Afghanistan before 2014. See Timothy K. Deady, *Lessons from a Successful Counterinsurgency: The Philippines, 1899-1902*, PARAMETERS 53, 55-56 (2005).

⁵⁷ See JONES, *supra* note 55.

consider the role that contingency contracting could play in advancing an institution-centric approach.

III. The Role of Contingency Contracting in Enabling an Anti-Corruption and State-Building Agenda

A. What is Corruption

At times corruption can be seen as a rather elusive culturally specific phenomenon that varies throughout time and from place to place.⁵⁸ Regardless of the characterization, the common thread that defines the focal point of the corruptive act is the relationship between the state and the non-state actor.⁵⁹ More specifically, corruption is essentially “seen as transactions between private and public sector actors through which collective goods are illegitimately converted into private payoffs.”⁶⁰ This conception of corruption typically manifests itself in one of two ways: political corruption (high level or grand corruption) or bureaucratic corruption (low level or petty corruption).⁶¹

⁵⁸ See A. J HEIDENHEIMER ET AL. *POLITICAL CORRUPTION: A HANDBOOK* 8–11 (New Brunswick, NJ: Transaction Books, 2002) (social scientists have generally characterized corruption in three ways: public-office centered, public-interest centered, or market-centered). See J.S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 *AMERICAN POLITICAL SCIENCE REVIEW*, No. 2, 417 (1967), stating that public-office centered corruption is seen as “behavior which deviates from the formal duties of a public role because of private-regarding (personal, close-family, private clique) pecuniary status gains; or violates rules against the exercise of certain types of private regarding influence.” See MONIQUE NUIJTEN & GERHARD ANDERS, *CORRUPTION AND THE SECRET OF LAW: A LEGAL ANTHROPOLOGICAL PERSPECTIVE* 7 (Ashgate Publishing Company 2008) stating that Market-centered corruption does “not focus on norms or public interest but on the office as business, the income of which the corrupt bureaucrat strives to maximize;” see Carl Friedrich, *Corruption Concepts in Historical Perspective*, in *PATHOLOGY OF POLITICS: VIOLENCE, BETRAYAL CORRUPTION, SECRECY AND PROPAGANDA* 127, 127 (New York: Harper & Row, 1972) stating that public-interest corruption is “deviant behavior associated with a particular motivation, namely that of private gain at public expense.

⁵⁹ Shaukat Hassan, *Corruption and the Development*, *J. OF DEV. POL’Y. & PRACTICE* 25, 25 (2004).

⁶⁰ HEIDENHEIMER, *supra* note 58, at 6.

⁶¹ Anti-Corruption Resource Center – Glossary, <http://www.u4.no/glossary/>.

Political corruption occurs “when the laws and regulations are abused by the rulers, side-stepped, ignored, or even tailored to fit their interests. It is when the legal bases, against which corrupt practices are usually evaluated and judged, are weak and furthermore subject to downright encroachment by the rulers.”⁶² Bureaucratic corruption is bribery or extortion in connection with the implementation of existing laws, rules and regulations.⁶³ This mostly occurs at the administrative level of government and includes law enforcement personnel, soldiers, and other civil servants.

Both types of corruption are particularly insidious and difficult to combat, especially when the problem is “systemic” rather than “sporadic” in nature. For definitional purposes, “systemic corruption is not a special category of corrupt practice, but rather a situation in which the major institutions and processes of the state are routinely dominated and used by corrupt individuals and groups, and in which many people have few practical alternatives to dealing with corrupt officials.”⁶⁴ Examples of systemic corruption “might include contemporary Nigeria and Mobutu’s Zaire; Haiti’s tonton macoute; the deeply rooted corruption analyzed in 1960’s Thailand [and] the political machines found, often during phases of rapid urbanization, in American cities and elsewhere.”⁶⁵ With systemic corruption in Afghanistan steadily on the rise, Afghanistan can also be added to that list.

The Integrity Watch Afghanistan (IWA) 2009 survey of 32 Afghan provinces reported that Afghans regarded corruption as the third most significant problem facing the

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Michael Johnston, *Fighting Systemic Corruption: Social Foundations for Institutional Reform*, in CORRUPTION & DEVELOPMENT 85, 89 (Mark Robinson ed., 1998).

⁶⁵ *Id.*

country behind unemployment and security.⁶⁶ Despite the bad news, the one silver lining is that the Afghan people primarily see corruption as resulting from “poor state governance rather than a general and vague social ill.”⁶⁷ As a consequence, more citizens are now stepping forward to denounce corrupt practices “on legal [grounds] rather than on a religious or moral basis.”⁶⁸ This presents a valuable opportunity for U.S. Government (USG) policy makers, as the USG retools its own efforts in Afghanistan and examines ways to combat the spread of corruption. The most vital step in supporting this movement begins by coming to grips with the U.S. role in enabling its spread, mostly manifesting itself in an atypical manner described here as “process” or “noble cause” corruption.

B. Defining Noble Cause Corruption

Much of the DoD’s anti-corruption agenda has traditionally been aimed at rooting out petty corruption involving U.S. and third country nationals, such as military officials receiving kickbacks for steering work to preferred contractors and rogue contractors who have fraudulently billed the USG for work it did not or was not authorized to perform.⁶⁹ The

⁶⁶ INTEGRITY WATCH AFGHANISTAN, AFGHAN PERCEPTIONS AND EXPERIENCES OF CORRUPTION 27 (2010) [hereinafter IWA 2010 SURVEY].

⁶⁷ *Id.* at 23. In addition to issues concerning governance, Afghan perceptions of corruption may vary between perceptions held by most Americans. “For example, there is some survey evidence that many Afghans consider small payments to expedite transactions with the government – which are clearly illegal – as justifiable (as long as payments are not unreasonable in amount), on the grounds that low-paid government officials are ‘poor’ due to their low salaries. At the opposite end, even though all required procedures may have been followed and there is no illegality, many Afghans may resent and consider corrupt high salaries and benefits for international consultants, expatriate Afghans, NGO employees, etc.” *See* ASIAN DEVELOPMENT BANK ET AL., FIGHTING CORRUPTION IN AFGHANISTAN: A ROADMAP FOR STRATEGY AND ACTION 9 (2007).

⁶⁸ *Id.*

⁶⁹ *See* SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN RECONSTRUCTION, QUARTERLY REPORT TO CONGRESS (Jan. 2011) (according to the report SIGAR had 105 ongoing investigations and 62 allegations of procurement/contract fraud. There had been 4 convictions and more than 6 million in repayments to the U.S. Government);

moral imperative for addressing this type of malfeasance is fairly straightforward and the USG has established several specialized investigative and litigation units to directly confront these crimes.⁷⁰ Since these offenses are generally sporadic, relatively petty and directed at offenders within the U.S. legal framework, a direct law enforcement approach is largely appropriate.

To help deal with systemic offenses within the jurisdictional purview of the Afghan government, the USG has helped to create the Major Crimes Task Force (MCTF), which is an Afghan unit focused on prosecuting Afghan nationals, such as corrupt public officials, kidnapers and other high profile criminals.⁷¹ The moral imperative for detecting and

see, e.g., Australian Jailed in US over Afghan Bribes, AUSTRALIAN BROADCASTING COMPANY (ABC) NEWS, Dec. 21 2011, <http://www.abc.net.au/news/2011-12-21/australian-jailed-in-us-over-afghan-bribes/3742652> (sentenced two years in prison for accepting “a one-time cash payment of nearly \$200,000 to allow a sub-contractor to continue building a hospital and provincial teaching college;”*see, e.g., Former U.S. Army Contracting Official Pleads Guilty to Accepting Bribes*, DEP’T OF JUSTICE NEWS RELEASE, Aug. 7, 2009, <http://www.justice.gov/opa/pr/2009/August/09-crm-783.html> (a former U.S. Army contracting official pleaded guilty today to accepting more than \$80,000 in bribes in exchange for providing contract work to two Afghan trucking companies.)).

⁷⁰ For example, the International Contract Corruption Task Force (ICCTF) is one such organization. According to the FBI website the ICCTF’s “mission is to go after Americans and others overseas who steal U.S. dollars flowing into the war zone.” Since 2004, the task force has initiated nearly 700 investigations. There are currently more than 100 cases pending in Afghanistan, and since 2007, 37 people have been charged with crimes committed there, and all but one have been convicted, have pled guilty, or are awaiting trial. Another organization is the National Procurement Fraud Task Force (NPFTF), created in October 2006 by the Department of Justice, was designed to promote the early detection, identification, prevention and prosecution of procurement fraud associated with the increase in government contracting activity for national security and other government program according the agency’s website.

⁷¹ *See* Federal Bureau of Investigation – Mission in Afghanistan, http://www.fbi.gov/news/stories/2011/april/afghanistan_042211. According to the website, “about 40 international mentors support nearly 170 Afghans on the task force. All the Afghans—who go through a vetting process before joining the MCTF, which includes a polygraph test—receive basic law enforcement training, and many have taken additional courses at the FBI’s training facility in Quantico, Virginia. Since the MCTF was formally established in January 2010—with funding from the U.S. Department of Defense—nearly 150 cases have been initiated IAW Afghan law.” Task Force 2010, a U.S. DoD organization, was stood up in the wake of the HNT contract debacle. “to ensure that the military’s contracting dollars in Afghanistan don’t inadvertently fund corrupt businesses, warlords or insurgents.” The focus is on systemic corruption of Afghan contractors.

prosecuting these types of crimes is also quite clear, but Afghan internal politics (or lack thereof) often creates prosecutorial impossibility for many potential cases.⁷² Nevertheless, it does provide a reasonable step in the right direction and another tool to supplement the direct law enforcement approach already underway. Noble cause corruption, conversely, has a less intuitive moral imperative than combating petty or grand corruption and generally falls outside the jurisdictional purview of a direct law enforcement approach. However, like any form of systemic corruption, it can have an equally devastating impact on Afghan legal and cultural life if allowed to grow unabated.

The idea of “noble cause corruption” or “process corruption” is a concept borne out of the context of policing ethics to describe:

[A] mindset or sub-culture which fosters a belief that the ends justify the means. In other words, law enforcement is engaged in a mission to make our streets and communities safe, and if that requires suspending the constitution or violating laws ourselves in order to accomplish our mission for the greater good of society, so be it.⁷³

Whereas traditional notions of corruption involve the abuse of official authority for personal gain, noble cause corruption is the abuse of authority on behalf of the public good.⁷⁴ The

⁷² See, e.g. Greg Miller & Ernesto Londoño, *U.S. Officials Say Karzai Aides are Derailing Corruption Cases Involving Elite*, WASH. POST, June 28, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/27/AR2010062703645.html> (alleges “top officials in President Hamid Karzai’s government have repeatedly derailed corruption investigations of politically connected Afghans, according to U.S. officials who have provided Afghanistan’s authorities with wiretapping technology and other assistance in efforts to crack down on endemic graft.”); see, e.g., Alissa J. Rubin, *Karzai Says Foreigners Are Responsible for Corruption*, N.Y. TIMES, Dec. 11, 2011, <http://www.nytimes.com/2011/12/12/world/asia/karzai-demands-us-hand-over-afghan-banker.html> (alleges “[T]he former governor of the Central Bank, Qadir Fitrat, is living in Virginia. He fled Afghanistan, saying he feared for his life after he was involved in making public the massive fraud at Kabul Bank and removing its senior management.”).

⁷³ Steven Rothlein, *Noble Cause Corruption*, PUBLIC AGENCY TRAINING COUNCIL NEWSLETTER (2008), <http://www.patc.com/weeklyarticles/noble-cause-corruption.shtml>.

⁷⁴ See Peter Johnstone & Joe Frank Jones, *Noble Cause Police Corruption: Suggestions for Training*, in POLICE EDUCATION AND TRAINING IN A GLOBAL SOCIETY 317 n. 5 (Philip C. Kratcoski & Dilip K. Das eds. 2011). The

prototype for this mindset was personified by the fictional character Detective Harry Callahan in the 1971 Warner Brothers film *Dirty Harry*.

In the film, Detective Callahan acts as an agent of the “public good,” but his unorthodox style often brings him into conflict with departmental rules and the law. This conflict is vividly expressed in a scene where a 14-year old girl is in imminent danger; but only Scorpio, her kidnapper and deranged sociopathic murderer, knows her whereabouts. Harry tracks down Scorpio but he refuses to cooperate; prompting Harry to inflict significant pain on Scorpio to force him to divulge the girl’s whereabouts in order to save her life. Harry’s life and death dilemma provides a classic piece of romantic fiction that vividly demonstrates the appeal of noble cause corruption and the misplaced desire to bypass procedural safeguards to achieve a moral good.

Carl Klockars describes this as “the Dirty Harry problem” or a moral dilemma that emerges “when the ends to be achieved are urgent and unquestionably good and only dirty means will work to achieve them.”⁷⁵ Klockars argues that the danger in embracing such a position is that it causes “[p]olicemen [to] lose their sense of moral proportion, fail to care, turn cynical, or allow their passionate caring to lead them to employ dirty means too crudely

authors note that the phrase “noble cause corruption” was apparently first coined by Sir John Woodcock, Chief Inspector of the HM Constabulary for England and Wales, when he stated “one aspect is what is known as noble cause corruption. Someone connected with the Police Federation once said to me that there is nothing wrong with perjury committed by an honest officer in pursuit of a good cause.” *Id. citing* House of Commons Select Committee on Home Affairs, Minutes of Evidence, Examination of Witnesses. Question 128. 1998-12-08.

⁷⁵ 452 C B Klockars, *The Dirty Harry Problem*, ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 3, 33 (1980).

or too readily.”⁷⁶ For every Scorpio scenario, there are many more insidious manifestations, such as the “informal control of crime through allowing preferred powerful criminals a license of ‘green light’ - in return for the elimination of their competitors, the avoidance of worse criminality, and the provision of information.”⁷⁷ Hence, “[t]he only means of assuring that dirty means will not be used too readily or too crudely is to punish those who use them and the agency which endorses their use.”⁷⁸ Regardless of the underlying intent, noble cause corruption is antithetical to the preservation of the rule of law and a moral quagmire for those who engage in it.

In this paper, the concept of noble cause corruption will be decoupled from the context of policing ethics and applied to the operational reality of military procurement operations in Iraq and Afghanistan. For definitional purposes, the cause is “noble” in the sense that the military commander is making an earnest effort to protect the local populace and secure the peace. It is corruption in that the commander’s actions often undermine the very host nation institutions he seeks to preserve. Put more directly, the “corruptive influence” is the deteriorating impact that “well-intended” command decisions have on the state-building enterprise as a result of “COIN – focused” actions.

Generally speaking, discussions regarding public procurement policy do not engender the same sense of moral urgency as those confronted by Harry, but the stakes are no less important. Commanders, like Harry, are often placed in situations where they must

⁷⁶ *Id.*

⁷⁷ ROYAL COMMISSION INTO THE NEW SOUTH WALES POLICE SERVICE, FINAL REPORT VOLUME I: CORRUPTION 53 (1997).

⁷⁸ Klockars, *supra* note 75.

choose between life or death objectives and supporting Afghan institutional viability, such as issuing a contract to a well connected but anti-statist provincial warlord in order to achieve an immediate but short-term “COIN effect.”⁷⁹ Such dilemmas tend to manifest within the tactical setting, but the source of the problem begins with the choices made at the strategic and policy level.

With this baseline in mind, the focus of this paper will not be on the petty and high level corruption occurring within the Afghan government, but on the type of corruption borne out of U.S. policy making decisions in support of U.S. COIN operations. Noble cause corruption, in this context, is defined as the failure to reinforce the host nation institutions that are needed to facilitate just governance or the inability or unwillingness to prevent the growth of parallel power structures as a result of contingency contracting actions. In terms of public procurement, noble cause corruption moves in lock step with a “MAAWS mindset” that fosters an unquestioned allegiance to COIN with little to no regard of the unintended consequences for Afghan civil institutions. This, however, does not have to be the case, because the public procurement process, if properly resourced, could serve as a key state-building tool and an anti-corruption force.

⁷⁹ The “COIN effect” used here is a descriptive term meant to describe the active cultivation of positive pro-Coalition sentiment of the local population toward U.S. military operations and host nation governance. See Colonel Ralph O Baker, *The Decisive Weapon: A Brigade Combat Team Commander’s Perspective on Information Operations*, MIL. REV., May–June 2006, at 13, available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA489185&Location=U2&doc=GetTRDoc.pdf>. The author states

Soon after taking command of my brigade, I quickly discovered that IO [Information Operations] was going to be one of the two most vital tools (along with human intelligence) I would need to be successful in a counterinsurgency (COIN) campaign. COIN operations meant competing daily to favorably influence the perceptions of the Iraqi population in our area of operations (AO). I quickly concluded that, without IO, I could not hope to shape and set conditions for my battalions or my Soldiers to be successful.

C. Public Procurement as a Tool for State-Building

The fundamental purpose for public procurement is to acquire goods and services from the private sector that the government cannot ostensibly produce on its own.⁸⁰ The government has many methods to accomplish this, but the process of public procurement typically involves five phases: (1) planning and needs assessment, (2) product design and document preparation, (3) tender process and award, (4) contract implementation and (5) final accounting and audit.⁸¹ This process is fundamentally utilitarian in that it is primarily concerned with getting the best value for the public with the least amount of corruption. This, however, is not something that comes easily to any governing regime, especially those in their relative infancy. As such, it is generally not helpful to approach the corruption fight in Afghanistan as if it were a 21st century post-modern nation-state. Instead, the corruption fight and related state-building efforts should be more properly viewed from the perspective of a post-revolutionary pre-modern multinational-state akin to the U.S. during the colonial period of the Revolutionary War era.

In earlier periods of USG procurement history the public purse was routinely viewed as an extension of private interest as “favoritism and nepotism were everyday aspects of government contracting.”⁸² The fate of any particular procurement action mostly depended on the diligence of the contracting official, because the USG procurement regime lacked the

⁸⁰ See e.g. South-South Knowledge Exchange Hub, *Building Skills to Improve Public Procurement in Central Asia* (2011), <http://wbi.worldbank.org/sske/result-story/1718>. The report notes that “public procurement can make up as much as 30 % of a country’s total budget, and can account for as much as 15% to 20 % of GDP.”

⁸¹ SUSANNE SZYMANSKI, *HOW TO FIGHT CORRUPTION EFFECTIVELY IN PUBLIC PROCUREMENT IN SEE COUNTRIES 5* (2007).

⁸² JAMES NAGLE, *HISTORY OF GOVERNMENT CONTRACTING 14* (The Geo. Wash. U. Press, 2d ed., 1999).

necessary institutional framework to protect the public coffers on a systemic basis.⁸³ In fact, during the Revolutionary War, contractor malfeasance was so widespread that it threatened to destroy the nation's ability to secure its independence from the British.⁸⁴

Logistics support was particularly troublesome. Blankets, clothes and shoes often arrived to the war front in questionable condition, and beef was delivered spoiled along with casks of meat “containing stones and tree roots.”⁸⁵ “Even gunpowder was debased and unusable” leading one Continental officer to describe contractors as ““destroying the Army by their conduct much faster than Howe [a British commander] and all of his army can possibly do by fighting us.””⁸⁶ By skimping on quality, suppliers were able to significantly enhance their profit margins by as much as 600 to 700 percent.⁸⁷ Widespread abuse and excessive profits also distorted the local economy, leading one observer to note that “the war has thrown property to channels where before it never was and that increased little streams to overflowing rivers, and what is worse, in some respect by a method that has drained resources of some as much as it has replenished others.”⁸⁸ In other words, the price distortions from wartime abuses had improved the lot of a privilege few but increased transaction cost for everyone else.

During this era, institutional shortcomings were apparent and widespread but the pace of reform was slow and sporadic – evolving and devolving through relative states of progress

⁸³ *Id.* at 15.

⁸⁴ *Id.* at 19.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 43.

⁸⁸ *Id.*

and setbacks. The primary impediment to reform was that the Continental Congress had an “evident lack of experience, authority, and the ability to get things done,” coupled with an organizational structure that resembled the tribal system of modern day Afghanistan rather than a body of states united toward a common purpose.⁸⁹ “Each of the thirteen states not only regarded itself as absolutely independent, but was jealous both of its sister states and the Continental Congress.”⁹⁰ This persistent weakness dominated the process of reform from the outset but it did not prevent it from moving forward. Eventually the Continental Congress would enact the necessary policies to start to move the USG’s public procurement system from the dark ages to an age of relative rebirth.

One of the early authors for this gradual reform was Robert Morris, an experienced Philadelphia merchant and financier, who was appointed to the position of superintendent of finance in 1781.⁹¹ Despite being plagued by charges of fraud and “speculating with public funds,” Morris’ single most important achievement was the implementation of a contract system for provisioning the Army and procuring public goods.⁹² Although bickering and internal rivalries between the states and the central government “made his job exceedingly

⁸⁹ See HARRY CARMAN ET AL. A HISTORY OF THE AMERICAN PEOPLE VOL. 1, 162 (New York: Knopf and Company 1952).

⁹⁰ *Id.* at 158.

⁹¹ ELLIS PAXSON OBERHOLTZER, ROBERT MORRIS: PATRIOT AND FINANCIER 90 (Norwood Press 1903) (Morris was also an instrumental figure in the Battle of Yorktown in 1781. He loaned money from his personal holdings to help support the war effort. Without his connections, attention to detail and financial backing it is unlikely that George Washington would have been able to field an army, yet alone prevail, at Yorktown).

⁹² CHARLES RAPPLEYE, ROBERT MORRIS: FINANCIER OF THE AMERICAN REVOLUTION 288(2010) (Morris noted that the contracting system had achieved “the cheapest, most certain, and consequently the best mode of obtaining those articles which are necessary for subsistence, covering clothing, and moving the army”); NAGLE, *supra* note 82, at 47.

difficult, Morris did vastly more than had previously been done to bring order out of chaos” than any other public official of his time.⁹³

Prior to the implementation of a contracting system, USG procurement practices were largely driven by personalities as opposed to transparent and predictable standards.⁹⁴ With the advent of a “systematic approach,” USG procurement practices were now afforded a consistent path for getting things done and enabling future success. The U.S.’s governing structure in the 1780s, like modern day Afghanistan, was hampered by many institutional shortcomings that impeded progress but those impediments were more akin to rocks along the path than insurmountable barricades. A path for success, however, is nothing without the people who must maintain and use it. In this sense, ultimate progress for the U.S. Revolutionary War era procurement regime was not only facilitated by the establishment of a sound procedural framework, but also the fact that procurement decisions, for better or worse, were carried out by American institutions within a U.S. controlled framework. Although money and practices were borrowed from Europe, institutional development was always a distinctly American burden.⁹⁵

One of earliest efforts to manage that burden was to introduce free market principles into the USG’s procurement culture.⁹⁶ Now a hallmark of public procurement practice, use of

⁹³ CARMAN, *supra* note 89, at 162.

⁹⁴ *See id.* at 287 (the author notes that even though Morris told his friends William Duer and Philip Schuyler of the contracts to be let in support of the Yorktown campaign, “but in a testament to the integrity of the process, both found themselves underbid.”).

⁹⁵ To support the war effort, the U.S. borrowed money from France and Holland. Under the stewardship of Robert Morris, the U.S. adopted the European contracting system, something that Morris claimed the U.S. should have implemented at the start of the war. *See* NAGLE, *supra* note 82, at 47-48.

⁹⁶ *See id.* at 68; *see* RAPPLEYE, *supra* note 92, at 288.

these principles was aimed at driving down prices, reducing government overhead and shifting many acquisition risks from the government to the business sector. Early in American history, principle reliance on free market self-interest proved to be both a blessing and a curse, because the early market was dominated by well connected merchants and power brokers.⁹⁷ This early imbalance helped to demonstrate that the USG's engagement with the private sector must be done from a position of strength that reflects institutional competence and an unyielding desire to promote the public's interest.⁹⁸ In this sense, the public's interest should be understood as the perpetual balance between the competing needs of the government and the private sector.

Over time, both practice and policy has gradually shifted to dampen private sector overreach and shifted again whenever government imperiousness began to distort the public's interest.⁹⁹ Without this "public-centered" focus, however, the USG would function as just another buyer in an otherwise consumer driven economy. This is because the USG procurement process is fundamentally amoral, only receiving its moral direction when governing officials act on behalf of the general welfare through the passage of laws and

⁹⁷ See NAGLE, *supra* note 82, at 52. The author noted that "Morris had been overly optimistic in trusting economic self-interest to solve the army's supply problems. In the hands of grasping merchants, a contract, even with arbitration clauses written into it, was a frail reed to lean upon; the agreement's stipulations could be shoddily complied with or simply ignored."

⁹⁸ *Id.*, at 51-52. Although Morris' aim was to contract with men of experience and character, the contractor's desire for profit often undercut the benefits of both. By March 1782, complaints of "spoiled flour, rotten meat, bad rum and adulterated whisky," began to flood the battlefield. Washington said of one contractor "Sir, if I have not formed a very Erroneous opinion of him is determined to make all the money he can by the contracts. Herein I do not blame him, provided he does it honestly and with reciprocal fulfillment of the agreement. Of a want of the first I do not accuse him but his thirst of Gain leads him in my opinion into a mistaken principle of Action."

⁹⁹ For example, the Competition in Contracting Act (CICA), passed in 1984, was designed to enhance taxpayer value but also increase the level of participation from the business sector for government contracts, by making the government more predictable and less arbitrary in its selection decisions.

policies. In the 1930s, Congress enacted such laws as the Davis-Bacon Act of 1931, the Buy American Act of 1933, and the Copeland Anti-Kickback Act of 1934, just to name a few.¹⁰⁰ In the 1960s, Congress used the public procurement process as a means to address “societal ills [such] as poverty, discrimination, and environmental blight,” by mandating the use of anti-discrimination and environmentally friendly contracting clauses and encouraging the use of socioeconomic set asides.¹⁰¹

In essence, through the use of legislation and policy, elected officials have made the *USG* procurement process more of a *public* procurement process by imbuing the institutional framework with what author Laura Dickinson describes as “core public law values.”¹⁰² This development suggests that the *USG*’s value seeking calculus means more than just getting the best price, but also leveraging the buying power of the state to create a better polity. In this sense, the *USG* is not just another buyer in a consumer driven market, but an expression of the public’s interest, which must always act in a just manner. Justice, in the public procurement sense, is the attainment of value for both the buyer and the seller in the overall performance of a transaction that is contributive to the public good.¹⁰³

¹⁰⁰ Davis Bacon Act, 40 U.S.C. § 3141 (1931) (providing for the payment of a prevailing wage on public construction projects); Buy American Act, 41 U.S.C. § 10a-10d (1933) (created a preference for domestic over foreign supply items); Copeland Anti-Kickback Act 40 U.S.C. § 276c (1934) (provided a criminal sanction to anyone who required a business to provide compensation for receiving a government construction contract).

¹⁰¹ Nagle, *supra* note 82, at 1.

¹⁰² LAURA DICKINSON, *OUTSOURCING WAR & PEACE* 8 (Yale U. Press, 2011).

¹⁰³ *See Northern Pacific Railway v. United States*, 356 US 1, 4 (1958). The public expenditure of money means getting “the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions.”

In Afghanistan, many U.S. “value related” public procurement laws do not apply or have been exempted.¹⁰⁴ This generally makes sense because most U.S. procurement laws were enacted to address peacetime domestic concerns and would not logically apply to the overseas warzone environment of Afghanistan. In the absence of legislative decree, the moral directions for warzone procurements in Afghanistan are primarily driven by the applicable federal laws, DoD policy, regulations, and a host of other patchwork considerations. Consequently, the framework for moral action is defined by the wartime strategy. In Afghanistan that strategy is COIN, which provides a commander a virtual smorgasbord of options for defeating the insurgency. However, it has also left commanders vulnerable to falling into the trap of faulty moral thinking. The pervasive nature of noble cause corruption endures because the DoD’s moral framework for prosecuting the war and advancing its procurement strategy is concerned with supporting COIN operations *at the expense of* cultivating value and empowering Afghan institutions. More specifically, the military objective, under the COIN operational paradigm is usually defined in starkly military terms that have helped to foster a way of thinking that permits a commander to quickly choose COIN, but not thoughtfully consider the relevant state-building obligations.

As stated previously, the U.S. has one principle goal that manifests itself as two objectives. The principle goal is to protect U.S. security interest, by satisfying objective 1 – eliminating the current armed threat in Afghanistan; while simultaneously achieving

¹⁰⁴ See generally GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. (Jan. 2010) [hereinafter FAR]. The FAR provides approximately 1900 pages of regulatory guidance for the government procurement process, but many clauses are exempted for overseas application. For instance, small business set asides and the focus on minority owned businesses are not applicable for overseas procurements. Also, most environmental laws, policies, and regulations do not apply to governmental activities overseas.

objective 2 – developing a viable Afghan state that is strong enough to keep that threat from reemerging after U.S. forces depart. This means that our procurement approach in Afghanistan must not sacrifice one objective at the expense of the other. Unfortunately, the trend of institutional short-sightedness that began during military operations in Iraq has fully taken root in Afghanistan. In the next section we shall fully explore that trend and what it means for DoD public procurement practices in Afghanistan and beyond.

IV. Reducing Violence at the Expense of Peace: Contracting and the Surge – from Iraq to Afghanistan

In 2008, Presidential hopeful, Barack Obama, campaigned on the promise of ending the war in Iraq and refocusing U.S. military efforts to operations in Afghanistan.¹⁰⁵ In 2009, President Obama made good on his promise by increasing the number of U.S. ground forces in Afghanistan by 17,000 within a month of taking office, and naming GEN Stanley McChrystal as the ISAF and USFOR-A Commander six months later.¹⁰⁶ GEN McChrystal's ascension to the top military post in Afghanistan was both audacious and symbolic. It was audacious in the sense that it began with the firing of his predecessor, GEN David McKiernan. It was symbolic in the sense that GEN McKiernan and GEN McChrystal

¹⁰⁵ *Obama Calls Situation in Afghanistan 'Urgent'*, CABLE NEWS NETWORK (CNN), July 20, 2008, available at http://articles.cnn.com/2008-07-20/politics/obama.afghanistan_1_presumptive-democratic-presidential-nominee-afghanistan-afghan-president-hamid-karzai?_s=PM:POLITICS (stating that "I think one of the biggest mistakes we've made strategically after 9/11 was to fail to finish the job here, focus our attention here. We got distracted by Iraq.").

¹⁰⁶ Helene Cooper, *Putting Stamp on Afghan War, Obama Will Send 17,000 Troops*, N.Y. TIMES, February 17, 2009, <http://www.nytimes.com/2009/02/18/washington/18web-troops.html>.

fundamentally agreed on what needed to be done in Afghanistan,¹⁰⁷ but the belief in Washington was that GEN McKiernan was “too conventional” and “too deferential to NATO” to quickly effectuate a winning strategy.¹⁰⁸ Put more succinctly, the President and the DoD leadership wanted to bring the “Petraeus Doctrine” to Afghanistan as quickly as possible and GEN McChrystal was regarded as the leader who could make that happen.¹⁰⁹ In this sense, GEN McChrystal’s appointment to the top military post in Afghanistan symbolized the Obama administration’s commitment to COIN.

As a student of COIN, GEN McChrystal believed that a “well resourced” COIN campaign was critical to success in Afghanistan.¹¹⁰ Although he recognized that Iraq was in some ways different, he believed that much of what he learned in Iraq could be imported to Afghanistan.¹¹¹ GEN McChrystal believed that the most critical requirement of COIN was to “protect the people,” adding that:

Efforts to convince Afghans to confer legitimacy on their government are only relevant if Afghans are free to choose. They must be shielded from coercion while

¹⁰⁷ *U.S. General Urges Troop Surge in Afghanistan*, N.Y. TIMES, Oct. 1, 2008, available at <http://www.nytimes.com/2008/10/01/world/asia/01iht-military.4.16620651.html> (General McKiernan was quoted as saying that he needed more troops “as quickly as possible” to fight the counterinsurgency. Further adding that stability in Afghanistan meant more than “adding troops”; it also meant a concerted effort to “strengthen the government, improve the economy and build its military and police forces”).

¹⁰⁸ See Rajiv Chandrasekaran, *Firing a general: McKiernan's Ouster Reflects New Realities in Afghanistan - and Washington*, WASH. POST, Aug. 17, 2009, available at http://www.slatrib.com/nationworld/ci_13144418.

¹⁰⁹ *Id.* Admiral Mullen bluntly asserted that “it was much more about getting [Gen. McChrystal] in than getting McKiernan out.” He added that “I couldn’t afford not to have my A team over there.”

¹¹⁰ *Hearing to Consider the Nominations of General Stanley A. McChrystal et. al. Before the U.S. Senate Committee on Armed Services*, 111th Cong. 19 (2009) (statement of Gen Stanley McChrystal); see also Robert Downey, Lee Grubs, Brian Malloy & Craig Wonson, *How Should the U.S. Execute a Surge in Afghanistan*, SMALL WARS J. (2008), available at <http://smallwarsjournal.com/jrnl/art/how-should-the-us-execute-a-surge-in-afghanistan> (argues that although Iraq is not Afghanistan “there are similarities that should be considered...and the differences do not negate the transferability of certain operational concepts learned from the Iraq surge).

¹¹¹ *Id.* General McChrystal noted that Afghanistan had “many of the same requirements” he addressed as a commander in Iraq.

their elected government secures their trust through effective governance and economic development at all levels. This must be Afghanistan's effort, with our committed support.¹¹²

In this sense, GEN McChrystal understood that the road to victory in Afghanistan meant empowering an Afghan institutional system that was capable of providing good governance. However, how this understanding would manifest at the tactical level was not immediately clear.

In August 2009, GEN McChrystal sent a request to the president through the Secretary of Defense (SECDEF) for additional troops and resources.¹¹³ In December 2009, President Obama obliged the General and authorized the commitment of 30,000 additional U.S. troops to Afghanistan on top of the 68,000 already there; continuing the troop surge in Afghanistan that marked the beginning of the Obama presidency.¹¹⁴ In practice, the surge strategy in Afghanistan would assume the same strategic and operational posture brought to bear in Iraq. This also meant that the MAAWS ethos that began in Iraq would emerge as the tactical arm of COIN operations in Afghanistan. GEN McChrystal's "new strategy" called for an aggressive focus on protecting and supporting the local Afghan population; coupled with a "properly-resourced force and capability level" to fight and defeat the insurgency.¹¹⁵

¹¹² *Id.*

¹¹³ See Report from GEN Stanley A. McChrystal, Commander NATO ISAF-A and USFOR-A, to the Honorable Robert M. Gates, Secretary of Defense 1-4 (Aug. 30, 2009) (redacted), available at http://media.washingtonpost.com/wp-srv/politics/documents/Assessment_Redacted_092109.pdf?hpid=topnews [hereinafter Commander's Initial Assessment]. This report outlined the necessity of employing population centric COIN operations in Afghanistan. This included a call for more troops and better resourcing for COIN operations.

¹¹⁴ Peter Baker, *How Obama Came to Plan for 'Surge' in Afghanistan*, N.Y. TIMES, Dec. 5, 2009, available at <http://www.nytimes.com/2009/12/06/world/asia/06reconstruct.html?pagewanted=all>.

¹¹⁵ *Id.* at 2-1 to 2-2. General McChrystal boldly asserts that "Accomplishing the mission requires defeating the insurgency, which this paper defines as a condition where the insurgency no longer threatens the viability of the

A surge in troops also meant increasing the intensity of contingency contracting operations in the theater. However, to fully understand the implications of the so called “Petraeus Doctrine” on contracting efforts in Afghanistan, we must first look back and examine what those same principles brought to bear in Iraq.

A. From Mission Accomplished to Financing a Rebellion

1. The Path to War & the Surge

In the summer of 2003, U.S. forces invaded Iraq “to disarm Iraq of weapons of mass destruction, to end Saddam Hussein’s support for terrorism, and to free the Iraqi people.”¹¹⁶ The initial phase of the war was quickly and decisively decided in favor of U.S. and Coalition forces with the routing of the Iraqi military and the ouster of Iraq’s governing regime. The search for WMDs, however, did not produce the desired results, but, by this time, U.S. strategic interest in the region had already shifted from WMD hunting to “helping the Iraqis achieve a united, stable, and free country.”¹¹⁷ The creation of a free Iraqi State, however, was mostly regarded as something that would emerge *sua sponte* through the

state.” He goes on to add that “the situation in Afghanistan is serious. The mission is achievable, but success demands a fundamentally new approach- one that is properly resourced and supported by a better unity of effort.” *Id.*

¹¹⁶ George W. Bush - Radio Address (March 22, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030322.html>

¹¹⁷ *Id.* As a matter of U.S. policy, President Bush and his team not only believed that U.S. security interest was tied to disarming Saddam Hussein, but building a free Iraqi state. See THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES (2002). The report does not affirmatively state that it would use military force to achieve this goal, but it does note that military force would be used to prevent the spread of WMDs, which was also provided as basis for the Iraq invasion.

collective efforts of the Iraqi people and some *limited* assistance from U.S. military forces.¹¹⁸ By September 2006, that belief would become unjustified as the country was launched onto a path of escalating violence that threatened to propel Iraq into civil war.

Al-Qaeda in Iraq (AQI) was the principle architect of the turmoil, accounting for a large share of the roughly 1,500 attacks per week against Iraqi citizens and Coalition Forces in late 2006 to early 2007.¹¹⁹ In response to the violence, members of the U.S. Congress, particularly those of the Democratic Party, were calling for an explicit timeline and a strategy to withdraw U.S. forces from Iraq.¹²⁰ These critics argued that the centerpiece of the initial invasion push was predicated on the immediacy of Iraq's WMD threat; and the failure to find these weapons delegitimized further U.S. involvement in Iraq.¹²¹

In response, President Bush and his supporters reluctantly admitted that the current strategy was not working, but candidly insisted that withdrawal was not an option.¹²² Instead, the Bush administration argued that continued violence threatened to destabilize Iraq even further, and an unstable Iraq “would be a disaster for the United States.”¹²³ From the midst of

¹¹⁸ Dana Milbak, *Upbeat Tone Ended With War*, WASH. POST, Mar. 29, 2003, at A01 (quoting an interview from Vice President Cheney when he states that military operations would be settled in “weeks rather than months,” and he went on to state that “I think things have gotten so bad inside Iraq, from the standpoint of the Iraqi people, my belief is we will, in fact, be greeted as liberators.”).

¹¹⁹ Gerry J. Gilmore, *Violence Down, Stability Up Across Iraq*, U.S. General Says, AMERICAN FORCES PRESS SERVICE, Aug. 18, 2008, <http://www.defense.gov/news/newsarticle.aspx?id=50850>.

¹²⁰ Noam N. Levey & Richard Simon, *Democrats Shift Iraq War Debate To Exit Strategy*, L.A. TIMES, March 09, 2007, <http://articles.latimes.com/2007/mar/09/nation/na-warfunds9>.

¹²¹ See Nancy Pelosi - Bringing the War to an End is my Highest Priority as Speaker, http://www.huffingtonpost.com/rep-nancy-pelosi/bringing-the-war-to-an-en_b_34393.html (stating that the current conflict was an “unnecessary preemptive war” that has “come at great cost.”).

¹²² Peter Baker, *U.S. Not Winning War in Iraq, Bush Says for 1st Time*, WASH. POST, Dec. 20, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/20/AR2006122000268.html>.

¹²³ George W. Bush - Full Transcript of Bush's Iraq Speech, <http://www.cbsnews.com/stories/2007/01/10/iraq/main2349882.shtml>.

these competing viewpoints, the Bush team set forth a new national security strategy.¹²⁴ The essence of the new strategy provided for aggressive violence reduction “by committing more than 20,000 additional American troops to Iraq,” coupled with tangible reconstruction efforts.¹²⁵ In his address to the nation, President Bush was clear to note that,

A successful strategy for Iraq goes beyond military operations. Ordinary Iraqi citizens must see that military operations are accompanied by visible improvements in their neighborhoods and communities. So America will hold the Iraqi government to the benchmarks it has announced.¹²⁶

This reflected the belief that if U.S. forces could provide the Iraqis “breathing space,” the Iraqi government could use that opportunity to unify the *nation* and shore up the *state*.¹²⁷

With this dual-mandate in hand, GEN David Petraeus, the architect of FM 3-24 for conducting counterinsurgency operations, was charged with creating the strategic and operational blueprint for military operations in Iraq. GEN Petraeus’ strategy called for “increased base dispersion, increased local national partnering at the tactical and operational level, hostile party reconciliation, co-option of the Sunni population, local defense initiatives such as Sons of Iraq, and an increase of civil-military operations.”¹²⁸ The media and most

¹²⁴ See White House- Iraq Fact Sheet, <http://georgewbush-whitehouse.archives.gov/news/releases/2007/01/20070110-3.html> (the new national security strategy stressed six fundamental elements: 1) let the Iraqis lead; 2) help Iraqis protect the population; 3) isolate extremists; 4) create space for political progress; 5) diversify political and economic efforts; and 6) situate the strategy in a regional approach.

¹²⁵ Bush Transcript, *supra* note 123.

¹²⁶ *Id.* The benchmarks referenced in the Bush speech refer to the benchmarks “articulated by the Iraqi government beginning in June 2006 and affirmed in subsequent statements by Prime Minister Maliki in September 2006 and January 2007.” GOV’T. ACC. OFFICE, SECURING, STABILIZING, AND REBUILDING IRAQ: IRAQI GOVERNMENT HAS NOT MET MOST LEGISLATIVE, SECURITY, AND ECONOMIC BENCHMARKS, GAO-07-1195 70 (Sept. 2007).

¹²⁷ *Id.*

¹²⁸ Joshua Thiel, *The Statistical Irrelevance of American SIGACT Data: Iraq Surge Analysis Reveals Reality*, SMALL WARS J. (2011), available at smallwarsjournal.com.

outside observers described this new strategy as “the Surge,” deriving its name from the politically charged national debate regarding the wisdom of increased troop strength versus de-escalation and a timeline for eventual withdrawal. Within military circles, however, this effort was described as the counterinsurgency strategy or COIN.

Armed with a new strategy, the DoD executed Surge operations from January 2007 to July 2008; and, in terms of reducing violence, the Surge proved to be a tactical success by almost any objective standard. But in terms of bringing Iraq closer to becoming a stable state, the answer depends on what one means by stability. If stability is simply understood as leaving behind a state with reduced or manageable levels of violence, then the answer is closer to an affirmative response. If stability, however, is understood as leaving behind a state with “stable, legitimate, relatively uncorrupt indigenous state institutions,” then the answer is much less certain.¹²⁹

A key enabler for reducing the violence in Iraq has been attributed to the billions of dollars poured into the battlefield to “stabilize” the security situation. However, rather than taking advantage of the developing Iraqi procurement framework, this money was spent in accordance with the limited contracting methodology provided in the MAAWS Standard Operating Procedure (SOP). This approach enabled commanders to quickly turn thousands of would be insurgents into U.S. contractors, but it did very little to build Iraqi institutional capabilities or deter the growth of parallel power structures outside the Iraqi government. To

¹²⁹ See e.g., Tim Arango, *U.S. Marks End to 9-Year War, Leaving an Uncertain Iraq*, N.Y. TIMES (Dec. 16, 2011), available at <http://www.nytimes.com/2011/12/16/world/middleeast/panetta-in-baghdad-for-iraq-military-handover-ceremony.html?pagewanted=all> (noting that “Iraqis will be left with a country that is not exactly at war, and not exactly at peace. It has improved in many ways since the 2007 troop “surge,” but it is still a shattered country marred by violence and political dysfunction, a land defined on sectarian lines whose future, for better or worse, is now in the hands of its people.”).

fully understand this point, it is important to look at the existing host nation procurement framework prior to and during Surge operations as well as the path the DoD ultimately chose to follow in developing its “COIN contracting” philosophy. This examination will serve as a baseline for understanding what impact “surge-like” efforts in Afghanistan are likely to have on the procurement model for operations there and possibly beyond.

2. A Path to Empowering a Just State – the Existing Public Procurement Framework under Iraqi Law

On January 20, 2003, President Bush signed National Security Presidential Directive (NSPD) 24, which established the Office of Reconstruction and Humanitarian Assistance (ORHA) and gave the DoD civil and military responsibility for the Iraqi state.¹³⁰ The ORHA was responsible for providing humanitarian and reconstruction assistance to post-war Iraq, but its entire rule-making authority fell under the “supervision of the Under Secretary of Defense for Policy.”¹³¹ On May 13, 2003, the Coalition Provisional Authority (CPA) was created;¹³² and by June 2003, it had subsumed and replaced the ORHA as the operational lead for Coalition reconstruction efforts.¹³³ The CPA, like its predecessor, still remained in

¹³⁰ U.S. Department of Defense, Office of the Inspector General, *Contracts Awarded for the Coalition Provisional Authority by the Defense Contracting Command-Washington*, p. 1 [hereinafter D-2004-057].

¹³¹ *Id.*

¹³² See L. ELAINE HALCHIN, *THE COALITION PROVISIONAL AUTHORITY (CPA): ORIGIN, CHARACTERISTICS, AND INSTITUTIONAL AUTHORITIES* 32 (2005) [hereinafter HALCHIN]. The report states, *inter alia*, that

[t]he status of this organization [the CPA] remains open to question. While a letter exists that states that the United States, and the United Kingdom, created the authority, in 2005 Justice Department attorneys identified General Franks as the individual who established CPA. No explicit, unambiguous, and authoritative statement has been provided that declares how CPA was established, under what authority, and by whom, and that clarifies the seeming inconsistencies among alternative explanations for how CPA was created.

¹³³ D-2004-057, *supra* note 130, 2.

the DoD chain of command;¹³⁴ but, in practice, the DoD exercised little, if any, actual authority over the day to day operations of the CPA.¹³⁵ Instead, the CPA functioned as the semi-autonomous *defacto* sovereign of Iraq and the primary conduit for implementing the U.S. government’s state-building strategy, until it was formally dissolved on June 30, 2004.¹³⁶

From the very beginning, the CPA took several affirmative steps to shape the Iraqi governing framework and state institutions. For instance, it passed orders establishing banks, ministries, a new Iraqi Army, administrative bodies and other state institutions. Of particular note, on July 13, 2003, the CPA issued Regulation 6, which established the Governing Council of Iraq (GCI).¹³⁷ The GCI would serve “as the principal body of the Iraqi interim administration, pending the establishment of an internationally recognized, representative government by the people of Iraq, consistent with [United Nations (UN)] Resolution 1483.”¹³⁸ The GCI was also responsible for appointing temporary ministers, but it did not have any significant direct governing authority over the Iraqi state. More specifically, the

¹³⁴ U.S. Office of Management and Budget, “Report to Congress Pursuant to Section 1506 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11),” June 2, 2003 (letter), *available at* [\[http://pdf.usaid.gov/pdf_docs/PCAAB790.pdf\]](http://pdf.usaid.gov/pdf_docs/PCAAB790.pdf)

¹³⁵ See HALCHIN, *supra* note 132 at 16 (explaining that there is no explicit writ of authority that explains whether or not the CPA was a component of the DoD or whether the CPA was a non-DoD agency that simply received support from DoD).

¹³⁶ See Brief of the United States in response to the court’s invitation at p. 4, *United States ex rel. DRC, Inc. and Robert Isakson v. Custer Battles, LLC*, et al. (E.D. Va. 2004) (No. CV-04-199a). Stating in part that:

[T]he Secretary of Defense designated the presidential envoy to be the head of the CPA with the title of Administrator. You [Ambassador Bremer] shall be responsible for the temporary governance of Iraq, and shall oversee, direct and coordinate all executive, legislative and judicial functions necessary to carry out this responsibility, including humanitarian relief and reconstruction and assisting in the formation of an Iraqi interim government.

¹³⁷ Coalition Provisional Authority (CPA) Regulation 6 (2003), *available at* http://www.iraqcoalition.org/regulations/20030713_CPAREG_6_Governing_Council_of_Iraq_.pdf

¹³⁸ *Id.*

CPA would work on behalf of U.S. interest; while the GCI, in theory, worked with the CPA on behalf of the Iraqi people. In practice, this meant that the initial state-building activities would be conceived through CPA-GCI coordination, but implemented solely through CPA authority. As a practical matter, this also meant that the burden of state-building fell squarely on the shoulders of the CPA and, by extension, the DoD.

The CPA managed its operations and promoted reconstruction efforts with funds provided from four primary sources: 1) appropriated funds, 2) vested funds, 3) seized funds and 4) development funds for Iraq (DFI).¹³⁹ In terms of contracting authority, the CPA satisfied its own requirements in accordance with U.S. procurement laws and regulations.¹⁴⁰ However, Iraq reconstruction and state-building projects were procured in accordance with the laws and regulations promulgated by the CPA up until June 2004; after June 2004, the Iraqi government assumed that responsibility after the CPA dissolved. Of particular note, were CPA Order 87 (Public Contracts – 2004), the Regulations for Implementing Governmental Contracts (2007) and the Instructions for Government Contract Execution (2008).

¹³⁹ *Id.* at 5; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-902R, REBUILDING IRAQ: RESOURCE, SECURITY, GOVERNANCE, ESSENTIAL SERVICES, AND OVERSIGHT ISSUES 10 n.3 (June 2004) [hereinafter GAO-04-902R].

A vested asset refers to former Iraqi regime assets held in U.S. financial institutions that the President confiscated in March 2003 and vested in the U.S. Treasury. The United States froze these assets shortly before the first Gulf War. The U.S.A. PATRIOT Act of 2001 amended the International Emergency Economic Powers Act to empower the President to confiscate, or take ownership of, certain property of designated entities, including these assets, and vest ownership in an agency or individual. The President has the authority to use the assets in the interests of the United States. In this case, the President vested the assets in March 2003 and made these funds available for the reconstruction of Iraq in May 2003. Seized assets refer to former regime assets seized within Iraq.

¹⁴⁰ *See* HALCHIN, *supra* note 132, 15.

CPA Order 87 was issued on May of 2004 as the principal regulation for public procurement activities.¹⁴¹ This order formally recognized that:

[P]ublic contracts laws should conform to international standards of transparency, predictability, fairness of treatment; provide for dispute resolution mechanisms; be free from corruption and undue influence; and create a system to procure goods and services at the best possible value for the government, *Noting* that the concept of full, fair and open competition is of critical importance to the economy of Iraq and the goal of free trade among nations, *Building on* the existing Iraqi laws in the field, including administrative instructions, and modernizing them in accordance with best international practice...¹⁴²

CPA Order 87 addressed the basic elements of public procurement; such as, authority to contract, basic rules for free and open competition, and provided the basis for a dispute resolution system. It also established the Office of Government Public Contract Policy (OGPCP) to implement the 2004 law and vested it with the following responsibilities in accordance with Section 2, paragraph 1(a) and (b):

1. Serve as coordinating public procurement agency for all ministries and public institutions.
2. Establish a dispute resolution tribunal.
3. Provide contracting expertise for improving public procurement regulations and instructions.
4. Establish and implement standard government contract provisions.
5. Train a cadre of public contracting personnel.¹⁴³

¹⁴¹ CPA Order 87 (2004), *available at* http://www.iraqcoalition.org/regulations/20040516_CPAORD_87_Public_Contracts.pdf.

¹⁴² *Id.* at 1.

¹⁴³ *Id.* at 2.

In furtherance of the OGPCP's mandate, the order empowered the Minister of Planning and Development Cooperation (MoPDC), through the OGPCP to "issue and publish implementing regulations and include standard public contracting provisions."¹⁴⁴ However, the MoPDC did not get around to formalizing a process until 2007, with the publication of the Regulations for Implementing Governmental Contracts – 2007 (also known as the 2007 Procurement law).

Once established, the 2007 Procurement law, in conjunction with CPA Order 87, provided the legal framework for Iraqi public procurement procedures until early 2008.¹⁴⁵ In addition to the law, the OGPCP in coordination with the Iraqi Ministry of Planning - Procurement Assistance Center (PAC) produced and distributed the *Quick Start Contracting Guide – 2007* to serve as a user-level contracting SOP and to "simplify executing contracts within the intent of the Implementing Regulations."¹⁴⁶ In 2008, the MoPDC issued the Instructions for Government Contract Execution – 2008 (also known as the 2008 Procurement law), which replaced and superseded CPA Order 87 and the 2007 Procurement law.¹⁴⁷ Despite this relatively rapid change, the 2008 law reiterated much of the 2007 law, but provided more detailed explanations in some sections. In general, it attempted to

¹⁴⁴ *Id.* at 14.

¹⁴⁵ The 2007 Procurement law was put into legal force by the Council of Ministers (CoM), because the CPA had been formally dissolved in June 2004. However, many CPA orders, to include CPA Order 87, remained in force long after the June 2004 dissolution date.

¹⁴⁶ OFFICE OF GOVERNMENT PUBLIC CONTRACT POLICY, QUICK START CONTRACTING GUIDE (2007), available at http://trade.gov/static/iraq_pdf_contractingguide.pdf.

¹⁴⁷ Ministry of Planning and Development Cooperation, Instructions for Government Contract Execution (2008) [hereinafter Iraqi 2008 Procurement Law].

establish overarching principles for the execution of public contracts that are signed and administered by Iraqi state officials.

The measures described here were important developments for several reasons. First, these laws are the first steps at developing a uniform process for obligating public funds through the Iraqi state and spending those funds on behalf of the Iraqi people. Second, these laws created state policy making institutions that could be responsive to the needs of the Iraqi nation(s). Third, the regulations and institutions created under these laws emphasized and promoted the ideas of transparency, accountability and predictability within the public procurement process. Fourth, and perhaps most importantly, the evolution of these laws demonstrated a maturing procurement process that began under the occupation authority of the DoD and the CPA, but ended within the eager hands of Iraqi state authority. So what *could* this have meant to the DoD state-building strategy?

The procurement laws and related institutions could have served as interface points between DoD borne procurement activities and the procurement activities of Iraqi state-builders. For example, between the years of 2003-2008, the DoD was one of the largest and wealthiest “public institutions” in the Iraqi state. With that wealth, the DoD spent billions of dollars to support its own war fighting capabilities and conduct reconstruction and humanitarian activities on behalf of the Iraqi people. However, the DoD procurement process **was not** subject to laws and regulations the DoD encouraged the Iraqis to adopt. In essence, the DoD, through the CPA, set the legal framework for the Iraqi procurement process in motion, but exempted all DoD reconstruction contracting activities from that system. This asymmetrical relationship between reconstruction and humanitarian contracts constituted under Iraqi law and those constituted under DoD procedures was most stark in the area of CERP funded contracts.

3. Deviating from the Path – The CERP and the MAAWS

After the fall of Sadaam’s regime, U.S. and Coalition forces uncovered cash stockpiles from hidden Ba’athist coffers.¹⁴⁸ In March 2003, the President confiscated these funds on behalf of the Iraqi people and made them “available for the reconstruction of Iraq in May 2003.”¹⁴⁹ That same month, the CPA created the CERP in Iraq with Iraqi seized assets and proceeds from the Development Fund for Iraq (DFI).¹⁵⁰ The CERP was designed as a tactical level fund source that could be used by U.S. field commanders to provide urgent humanitarian relief and execute reconstruction projects for the benefit of the Iraqi people.¹⁵¹ The uniqueness of the CERP was its command-centric structure, which allowed commanders to “work directly with local citizens, through civil affairs experts, to identify and respond to immediate needs with low – cost, high-impact projects.”¹⁵² It also lacked any meaningful restraints, since it was not subject to U.S. or Iraqi procurement laws.¹⁵³ In the absence of formal contracting procedures, U.S. field commander’s relied on the limited instructions issued by the CPA, which primarily focused on cash accountability and managing the cash dispersal process. Additional guidance was provided at the operational level via military

¹⁴⁸ GAO-04-902R, *supra* note 139.

¹⁴⁹ *Id.*

¹⁵⁰ OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, COMMANDER’S EMERGENCY RESPONSE PROGRAM IN IRAQ FUNDS MANY LARGE SCALE PROJECTS, SIGIR-08-006, at i (Jan. 25, 2008) [hereinafter SIGIR-08-006]

¹⁵¹ See Lieutenant Colonel Mark S. Martins, *No Small Change of Soldiering: The Commander’s Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW., Feb. 2004, 1, 3 n.14 (providing an invaluable historical primer on the origins and early successes of CERP in Iraq); see Captain Charles Bronowski & Captain Chad Fisher, *Money as a Force Multiplier: Funding Military Reconstruction Efforts in Post-Surge Iraq*, ARMY LAW., Apr. 2010, 50 (discussing in some detail the use of CERP in Iraq from January 2008 through April 2009).

¹⁵² Blackledge transcript - <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=1417>.

¹⁵³ *Id.*

fragmentary orders (FRAGO). For instance, Combined Joint Task Force-7 issued operational guidance for the CERP with the publication of FRAGO 89, dated June 19, 2003.¹⁵⁴ FRAGO 89 provided minimal procurement guidance, but instructed commanders to concentrate efforts on the following focus areas:

The building, repair, reconstitution, and reestablishment of the social and material infrastructure in Iraq. This includes but is not limited to: water and sanitation infrastructure, food production and distribution, healthcare, education, telecommunications, projects in furtherance of economic, financial, management improvements, transportation, and initiatives which further restoration of the rule of law and effective governance, irrigation systems installation or restoration, day laborers to perform civic cleaning, purchase or repair of civic support vehicles, and repairs to civic or cultural facilities.¹⁵⁵

In its early stages of the CERP, the CPA and FRAGO 89 provided life and direction for the program; and by most accounts the CERP served as an effective commander's tool.¹⁵⁶ The reason was simple, in the absence of an effective and functioning civil government, U.S. field commanders were uniquely situated to quickly identify problems and leverage cash to provide quick and decisive solutions.

These early successes prompted Congress and the President to extend the program's life in the latter part of 2003 with the Emergency Supplemental Appropriations Act for

¹⁵⁴ OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR COALITION PROVISIONAL AUTHORITY, COALITION PROVISIONAL AUTHORITY COMPTROLLER CASH MANAGEMENT CONTROLS OVER THE DEVELOPMENT OF IRAQ FUNDS, Rep. No. 04-009, at 2 (June 2004), *citing* HEADQUARTERS, COMBINED-JOINT TASK FORCE 7, FRAGMENTARY ORDER (FRAGO) 89 to CJTF-7 OPERATIONS ORDER (OPORD) 03-036 (19 June 2003).

¹⁵⁵ *Id.*

¹⁵⁶ *See* Martins, *supra* note 151, at 3. According to now Brigadier General Martins that “[f]rom early June to mid-October [2003], Iraqis benefited noticeably from the seized funds entrusted to commanders. More than 11,000 projects were completed in this time, resulting in the purchase of \$78.6 million of goods and services, mostly from local economies that were being brought to life after decades of centralized rule from Baghdad.” *Id.* at 8.

Defense and for the Reconstruction of Iraq and Afghanistan (2004).¹⁵⁷ The Act was significant in at least two regards. First, it continued the CERP’s “bureaucracy free mandate,” by providing the Secretary of Defense (SECDEF) with the authority to waive any provision of law that might undermine the CERP’s intended purpose.¹⁵⁸ Second, it continued the CERP’s broad mandate to essentially address any humanitarian or reconstruction need a U.S. field commander deemed fit. Simply put, there were no practical limitations on what a commander could do with CERP assuming he chose projects that provided a benefit to the Iraqi people.

Despite its successes, the CERP was not without its critics, especially from those agencies responsible for fiscal oversight, such as the Government Accountability Office (GAO) and the Special Inspector General for Iraq Reconstruction (SIGIR). The SIGIR was especially concerned that the program appeared to be moving beyond a “small project focus” to the area of major reconstruction activities.¹⁵⁹ The SIGIR noted that projects costing over \$500,000 climbed from 8 percent to over 40 percent of the CERP budget between 2004 and 2007.¹⁶⁰ In 2008, the GAO reiterated the SIGIR’s concern.¹⁶¹ All in all, the command uses

¹⁵⁷ Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, § 1110, 117 Stat. 1209, 1215 (2004). The act stated that “during the current fiscal year, from funds made available in this Act to the Department of Defense for operation and maintenance, not to exceed \$180,000,000 may be used, notwithstanding any other provision of law, to fund the Commander’s Emergency Response Program.”

¹⁵⁸ *Id.*

¹⁵⁹ See SIGIR-08-006, *supra* note 150, at 11. The SIGIR noted that although “CERP program guidance emphasizes small-scale, urgent humanitarian relief and reconstruction projects, the program devotes a major portion of its funding to larger-scale, more expensive projects, many estimated to cost over \$500,000 in value.”

¹⁶⁰ *Id.* at 6.

¹⁶¹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-736R, MILITARY OPERATIONS: ACTIONS NEEDED TO BETTER GUIDE PROJECT SELECTION FOR COMMANDER’S EMERGENCY RESPONSE PROGRAM AND IMPROVE OVERSIGHT IN IRAQ 3 (23 June 2008) [hereinafter GAO-08-736R]. The report noted that “during our [GAO] visit to Iraq, we

for the CERP were steadily growing from program inception up until the time President Bush was announcing a shift in America's strategy for Iraq. As the program's uses grew, however, the procurement regime used to implement CERP funds remained relatively static and permissive. For instance, the Under Secretary of Defense (Comptroller) (USD(C)) issued general guidance for administering CERP funds on November 25, 2003.¹⁶² The memorandum did not provide any specific contracting procedures; but instead, it directed commanders to rely on CPA Memorandum Number 4, dated August 19, 2003 to "the maximum extent practicable."¹⁶³

CPA Memo 4 provided a relatively uncomplicated contracting process for spending seized assets and DFI.¹⁶⁴ More specifically, it *necessitated* competition for most requirements and a formal determination of responsibility for any contractor who receives a contract award.¹⁶⁵ It also provided a standardized contracting form, which included a bid protest procedure and a disputes resolution mechanism. Interestingly, the disputes clause stated that the contract was "not subject to the Contract Disputes Act of 1978," but permitted

observed three projects: a multimillion-dollar sewage lift station, a several hundred thousand dollar sports center and community complex, and a fruit and vegetable stand that had been renovated with a \$2,500 grant. Commanders typically defined urgent as restoring a basic human need, such as water and electricity, or projects identified by the local Iraqi government as its most pressing requirement for the area. As a result, the scale, complexity, and duration of projects selected vary across commands."

¹⁶² See Memorandum from Undersec'y of Defense (Comptroller), to Commander, U.S. Central Command and Sec'y of the Army, subject: Guidance on the Use of Appropriated Funds for the Commander's Emergency Response Program (CERP) (25 Nov. 2003).

¹⁶³ *Id.*

¹⁶⁴ CPA Memorandum Number 4, Contract and Grant Procedures Applicable to Vested and Seized Iraqi Property and the Development Fund for Iraq (2003), *available at* http://www.iraqcoalition.org/regulations/20030820_CPAMEMO_4_Contract_and_Grant_Procedures_and_Appendix_A_-_D.pdf.

¹⁶⁵ *Id.*

an aggrieved contractor to file a claim with a Contracting Officer “in accordance with the United States Federal Acquisition Regulation Clause 52.233-1, Disputes.” It further permitted a contractor to appeal the Contractors Officers “final decision” to the Armed Services Board of Contracting Appeals (ASBA).¹⁶⁶ However, a commander could elect to follow CPA Memo 4 in its entirety, partially, or not at all. In any event, the “practicability standard” provided in the USD(C) memo remained relatively unchanged up until the publication of the MAAWS SOP.¹⁶⁷

In June 2007, the Multinational Corps – Iraq (MNC-I) J8 published the MAAWS SOP.¹⁶⁸ The MAAWS SOP not only provided guidance for the CERP, but also provided a comprehensive overview for other funding policies, from buying commander’s coins to ordering items under the Logistics Civil Augmentation Program (LOGCAP). In terms of the CERP, the MAAWS SOP provided a cradle to grave process from project selection to final closeout. But unlike CPA Memo 4, CERP contracting procedures were much more permissive and far less exacting under the MAAWS SOP. For instance, competition was encouraged but not required and there was no mention of bid protest or dispute resolution procedures.¹⁶⁹ It codified the use of Project Purchasing Officers (PPO), rather than warranted contracting officers, for most CERP funded contracts.¹⁷⁰ The MAAWS SOP contained some

¹⁶⁶ *Id.*

¹⁶⁷ Prior to the publication of MAAWS, the USD(C) republished the 2003 guidance Memo and codified the basic tenets of that memo in Volume 12, Chapter 27 of the Department of Defense Financial Management Regulation (DoDFMR) in April 2005.

¹⁶⁸ Multinational Corps – Iraq (MNC-I), *Money as a Weapon System MNCI CJ8 SOP* (2007) [hereinafter MAAWS].

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at B-1-7 (contracting officers were only required for projects that exceeded 500k).

standardized forms, but it did not contain a standardize contract template with standard clauses or details concerning contracting methods. Instead, the “contracting process” was left to the discretion of the battlefield commander.

This approach certainly promoted creativity and rapid implementation, but it also failed to generate and capture the processes needed to sustain and promote the modest intent of the 2007 or 2008 Iraqi Procurement Laws. A major reason for this shortcoming is that the MAAWS SOP, as a J8-Comptroller product, was **not** created to function as an acquisitions SOP; it was designed to function as a money management SOP to help commanders spend money as quickly and efficiently as possible. In fact, the MAAWS SOP describes the CERP in the following manner:

The CERP family of funds is an effects enabler that provides Commanders with a non-lethal weapon system for high payoff projects and services. CERP provides a quick and effective method to institute an immediate positive impact on the Iraqi people. The keys to project selection are (1) execute quickly; (2) employ many Iraqis; (3) benefit the Iraqi people; and (4) be highly visible.

As an “effects enabler,” the MAAWS SOP was written to support COIN operations; it was not designed to develop and support host nation institutions. This generally meant that the proper stewardship and accounting of government funds was the only type of transparency and accountability that mattered. The only significant hard and fast rules related to the approval authorities for specific spending thresholds, rather than defining the right and left limits of contracting authority. Additionally, the MAAWS SOP did not mention nor did it even contemplate the use of host nation or CPA procurement procedures. This meant that the loose contracting guidance provided under the “practicability standard” discussed earlier, was even more permissive under the MAAWS SOP.

All of these factors helped to cultivate a “MAAWS contracting mindset” that measured success in terms of producing quick, high visibility, labor intense projects that provided a benefit to the local populace. Whether or not the benefit fit within a larger state-building framework was immaterial to project selection and implementation. What mattered was supporting COIN operations, by providing quick-win quantifiable projects that could gain the support of the local population thereby sapping the strength of the insurgency. As a result, the MAAWS contracting methodology became the centerpiece of Surge related security and reconstruction project development and execution. This led to the creation of thousands of tactically useful projects – in that these projects supported the combat aims of COIN operations; but strategically subversive – in that many of these same projects failed to provide much long-term benefit to and/or frustrated Iraqi state-building activities.¹⁷¹ The essential point here is that the DoD, through CPA Memo 4, had a viable path for synchronizing its COIN procurement activities with Iraqi public procurement law, but it chose to deviate from that path and follow the one set forth under the MAAWS SOP.

The procurement framework set forth by the CPA but adopted by the Iraqi government was much more comprehensive than the one established under the MAAWS

¹⁷¹See e.g., Dana Hedgpeth & Sarah Cohen, *Money as a Weapon System: A Modest Program to Put Cash in Iraqis' Hands Stretches Its Mandate with Big Projects*, WASH. POST, 11 Aug. 2008, http://o.seattletimes.nwsourc.com/html/nationworld/2008107036_iraqcash12.html. Relying on statements from Gen. Peter W. Chiarelli, the authors noted “the military may not be equipped to maintain the schools, clinics and water projects it builds with CERP money. In one case in 2005, he [Gen. Chiarelli] said, he brought water to 220,000 houses in the Sadr City section of Baghdad using CERP funds. But when he went back a year later to check on whether the program had been expanded to more houses, it hadn’t. ‘The problem is follow-through’”; see also c.f. Seth G. Jones, *Stabilization from the Bottom Up: Testimony before the Commission on Wartime Contracting in Iraq and Afghanistan* (Feb. 5, 2010) [hereinafter Jones Testimony], available at http://www.rand.org/pubs/testimonies/2010/RAND_CT340.pdf (stating that “counterinsurgency and sustainability should go hand-in-hand. Sustainable programs in eastern, southern, or western Afghanistan without a significant counterinsurgency impact can be tactically useful but strategically irrelevant. Yet programs with a positive counterinsurgency impact that are not sustainable can be counterproductive over the long run.”).

contracting regime. However, the comprehensive nature, alone, does not establish its preferability. What makes the former more preferable is that it is the one system that would be in place long after the DoD mission concluded. It would be the one responsible for building roads, improving schools and feeding and moving the army. All in all, in the battle for “institutional authority and competence” it would ultimately need to be the only system that mattered vis-à-vis the Iraqi people.

During the course of COIN operations in Iraq, the U.S. military became better at planning and executing combat missions. It also improved its competence at training and mentoring the Iraqi security forces (ISF) that would someday take over that mission. The training mission was initially very difficult, but it grew easier overtime as ISF gained in competence and became more adept at asserting their authority. In addition to the combat mission, U.S. commanders have always had significant fiscal and contracting authority to shape the COIN environment with civil military operations. Like the security mission, the Iraqi government would be expected to assume that responsibility as well, but there was rarely any effort made to effectuate a “trainer to trainee” transfer from U.S. hands to the appropriate Iraqi public procurement regime.

As discussed in part II, COIN fights should not be focused on “the the achievement of popularity” but in winning the battle of institutional authority and competence. Progress under this “institution-centric” approach can only be measured in terms of the host government’s ability to plan, deliver, and control the flow of essential services, not the ability of the U.S. military to do it for them. In the next section, we will take a look at two types of requirements, security and reconstruction, that were key to the “tactical success” of COIN, but strategically problematic for the overall state-building mission in Iraq. The emphasis of

this examination is not whether or not the contracting practices under COIN could have been done more cheaply or efficiently, because that fact is mostly irrelevant if the mission is accomplished. Instead, our examination will be directed at how these operations largely missed the mark in supporting the fight for institutional authority and competence.

B. COIN Contracting and the Surge

1. The SoI Program

a. Background

Shortly after the U.S. invasion of Iraq, Sunnis tribal groups, who had enjoyed a position of status and privilege under Sadaam, were pushed to the fringes of Iraqi cultural and political life after the Ba’athist defeat.¹⁷² In response to this loss, Sunnis tribal groups aligned themselves with the local and foreign jihadist such as AQI to defeat the Coalition and the Shiite dominated Iraqi government.¹⁷³ In as early as 2005, however, U.S. commanders began to notice a rift between the Al Anbar Sunnis tribal groups and AQI, which amounted to what one sheik described as a “blood feud.”¹⁷⁴ This feud primarily stemmed from differences regarding the ideological aims of the insurgency, overall leadership structure and AQI’s infringement on tribal “business enterprises.”¹⁷⁵

¹⁷² CATHERINE DALE, CONG. RES. SERV. RL34387, OPERATION IRAQI FREEDOM: STRATEGIES, APPROACHES, RESULTS, AND ISSUES FOR CONGRESS 115 (Apr. 2, 2009).

¹⁷³ *Id.*; see Steven Simon, *The Price of the Surge*, FOREIGN AFFAIRS (2008) http://www.realclearpolitics.com/articles/2008/04/the_price_of_the_surge.html

¹⁷⁴ DALE, *supra* note 172, at 115. The report notes that “the first rising in Al Anbar took place in 2005—a movement that became known as the “Desert Protectors.” Members of local tribes in al Qaim and Haditha volunteered to begin working with some U.S. Special Operations Forces and later with the Marines.”

¹⁷⁵ See Simon, *supra* note 173, (the article notes that the “Albu Risha tribe...had lost control over portions of the road from Baghdad to Amman, undermining its ability to raise revenue by taxing or extorting traders and travelers.”

In late 2006, the situation came to a head with a string of sensational killings and kidnappings of Sunni tribal members by AQI.¹⁷⁶ In the aftermath of this “campaign of murder and intimidation,” one leader asserted that these actions had “left resistance groups with two options: either to fight al Qaeda and negotiate with the Americans or fight the Americans and join the Islamic State of Iraq...Both options are bitter.”¹⁷⁷ In late 2006, “Sheikh Abdul Sattar Buzaigh al-Rishawi, leader of the largest Al Anbar tribe, chose the first option, by “signing a manifesto denouncing Al Qaeda and pledging support to coalition forces;” a pledge that included the allegiance of eleven other Al Anbar Sheiks.¹⁷⁸ The movement, known as the Anbar Awakening (Sahwa), took root and began to grow. For the Al Anbar sheiks, this marriage between the Sunnis Al Anbar tribes and U.S. forces was one of convenience, aimed at “killing Al Qaeda” and building enough political capital to serve as a political counterweight to the Shiite dominated Iraqi state.¹⁷⁹

In January 2007, the National Intelligence Estimate (NIE) on Iraq recommended “deputizing, resourcing, and working more directly with neighborhood watch groups and establishing grievance committees to help mend frayed relationships between tribal and religious groups, which have been mobilized into communal warfare over the past three years.”¹⁸⁰ The rift between Sunnis tribal groups and AQI created an opening to act on that recommendation. In early 2007, the Awakening movement began to spread beyond Al

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ DALE, *supra* note 172, at 115 (Abdul Sattar's father and two brothers were killed by al-Qaeda).

¹⁷⁹ *Id.*

¹⁸⁰ NATIONAL INTELLIGENCE ESTIMATE (2007), available at http://www.dni.gov/nic/special_keyjudg_iraq_2007.html.

Anbar, creating volunteer movements in all other regions of Iraq.¹⁸¹ Initially known as “concerned local citizens,” these volunteers operated as “neighborhood watch-like initiatives by Iraqis who self-organized and ‘deployed’ to key locations in their own communities, to dissuade potential trouble-makers.”¹⁸²

U.S. commanders, realizing the opportunities this movement could create, “provided volunteers in their areas with equipment, or payments in kind for information, or other forms of support,” mostly on an *ad hoc* basis.¹⁸³ However, these initial *ad hoc* origins would quickly blossom into one of the largest DoD funded security contracts of the Iraq war: the SoI program.¹⁸⁴ The experience with the Anbar Awakening would now serve as the centerpiece of Surge operations throughout Iraq.¹⁸⁵ As the centerpiece, the SoI program had become the single most significant factor in reducing violence throughout Iraq and diminishing the power and influence of AQI.¹⁸⁶ However, in terms of advancing a state-building agenda and countering the growth of corruption, the results are, at best, debatable.

b. The SoI Program as an Engine for Noble Cause Corruption

The SoI program was one of the largest requirements filled by DoD contract during the Iraq War. At its height, the U.S. military placed approximately 100,000 Iraqi nationals under DoD control through 779 individual contractual agreements valued at approximately

¹⁸¹ DALE, *supra* note 172, at 116

¹⁸² *Id.* at 118.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, SONS OF IRAQ PROGRAM: RESULTS ARE UNCERTAIN AND FINANCIAL CONTROLS WERE WEAK 3 (Jan. 28, 2011) [hereinafter SIGIR 11-010].

¹⁸⁶ *Id.*

\$370 million.¹⁸⁷ Since DoD authority permitted the use of CERP funds to fund “Temporary Contract Guards for Critical Infrastructure,” commanders used the CERP to fund all SoI related contracts. More importantly, use of the CERP also permitted commanders to issue these contracts in accordance with the MAAWS SOP.¹⁸⁸

There was little if any effort made to utilize the Iraqi institutional framework to execute SoI related contracts or align the mission’s purpose with Iraqi institutional capacity. Instead, the SoI program permitted tactical level commanders to issue contracts on an *ad hoc* basis at fairly local levels without much, if any, blessings from the Iraqi state.¹⁸⁹ The terms of the contracts were done in accordance with U.S. law and policy and issued by U.S. military personnel. Both of which undoubtedly contributed to the speed and efficiency of contract execution, but did little to inform and develop the Iraqi public procurement system.

Using a U.S. dominated public procurement approach in the early stages of the Anbar Awakening was probably a strategic necessity in some instances, but once the program grew beyond the borders of Al Anbar, there is little reasons to believe that a pro-Iraqis approach would not have been effective or preferred. An Iraqi-based approach would have undoubtedly been slower and less efficient in the early goings, but it would have codified Iraqi buy-in and situated the procurement process within the context of Iraqi institutional

¹⁸⁷ *Id.*

¹⁸⁸ DALE, *supra* note 172, at 119

¹⁸⁹ See Colonel Dale C. Kuehl, Unfinished Business: The Sons of Iraq and Political Reconciliation 15, March 25, 2010 (unpublished paper submitted in partial fulfillment of Master of Strategic Studies Degree, U.S. Army War College)(on file at U.S. Army War College).The author notes that “at the local level, the SoI were generally tied to reconciliation efforts between CF commanders and local Sunni civil leaders. While the ultimate goal was to bring Sunnis into the political process, reconciliation started with an accommodation between the Sunni populace and CF.”

capacity and the broader interest of the Iraqi state.¹⁹⁰ Because U.S. forces developed, implemented and managed the program, the initiative was largely seen as a “U.S. backed effort,” even after U.S. forces transferred the program to Iraqi control in 2009.¹⁹¹ One former SoI member noted “The Americans did not betray us. They sentenced us and our families to death. They supported us in fighting al-Qaida, but then suddenly they left us caught between two enemies — al-Qaida and Iran. That is America's legacy here.”¹⁹² This sentiment is not uncommon and steadily grows as former SoI members continue to be targeted by AQI death squads.¹⁹³

It is hard to say what could have been done to better protect SoI members after U.S. forces departed, but the manner in which the SoI program was conceived inevitably created expectations for SoI members that the Iraqi government could never deliver. Unfortunately, the COIN focus for the SoI program was on attaining high recruitment numbers and curbing violence, rather than aligning the recruitment mission with Iraq’s institutional capacity and

¹⁹⁰ At the time U.S. forces were preparing to transfer the SoI program to the Iraqi government, over 100,000 members were on the U.S. payroll. Integrating these members into the Iraqi government and providing them with jobs has proven to be an arduous and political sensitive task.

¹⁹¹ On September 8, 2008, the Prime Minister of Iraq issued executive order 118-C, which mandated that all Sons of Iraq (SOI) members under contract with U.S. Forces move from U.S. control to the Government of Iraq (GOI) payroll, beginning on October 1, 2008. Prime Ministerial Order Number 118C (Sept. 8, 2008) (on file with author).

¹⁹² Lourdes Garcia-Navarro, *Bitterness Grows Amid U.S. – Backed Sons of Iraq*, NPR, Jun. 24 2010, available at <http://www.npr.org/templates/story/story.php?storyId=128084675>.

¹⁹³ See Dan Morris, *Former ‘Sons of Iraq’ targeted by insurgents after U.S. pullout*, NY TIMES, Jan. 27, 2012, available at http://www.washingtonpost.com/world/middle_east/former-sons-of-iraq-targeted-by-sunni-insurgents-after-us-pullout/2012/01/14/gIQAjf49VQ_story_1.html. (the article notes that “as more of the Sahwa get picked off, those who remain and feel abandoned by the government may be more willing to stake their loyalties elsewhere); see GREG BRUNO, COUNCIL ON FOREIGN RELATIONS, FINDING A PLACE FOR THE “SONS OF IRAQ” (2009), <http://www.cfr.org/iraq/finding-place-sons-iraq/p16088> (noting that in 2008 528 SOI members were killed and 828 were wounded); see Martin Chulov, *Sons of Iraq Turned the Tide for the US. Now They Pay the Price*, GUARDIAN, May 13, 2010, available at <http://www.guardian.co.uk/world/2010/may/13/sons-of-iraq-withdrawal-rebels> (noting that early in 2010 “15 Awakening members were killed in one night in Abu Ghraib.”).

the needs and capabilities of SoI members. For instance, the Iraqi government has repeatedly indicated that in addition to capacity constraints, recruitment of former SoI members is slow because of the low literacy rates among former SoI members.¹⁹⁴ This suggests that a holistic Iraqi-borne approach was needed at the very start to ensure that promises made by U.S. forces on *behalf* of the Iraqis could *actually* be accomplished by the Iraqi government. In this sense, genuine “buy in” meant more than brokered agreements authored at the top levels of government, but developing and adopting a strategic framework that sought to align the capabilities of the tactical level commander with the capacity and willingness of the host nation-state.

Another unintended consequence of the SoI program was that it encouraged and facilitated the growth of “warlordism.” SoI procurements were generally issued as 90-day renewable contracts subject to minimal higher level guidance.¹⁹⁵ Commanders were not required to competitively bid these efforts, nor was there any need to justify a sole sourcing decision.¹⁹⁶ Instead, commanders largely used the SoI program as an “effects enabler” by selecting “contractors” on their ability to dry up the pool of potential insurgents and fight AQI. This naturally meant funneling contract money to those contractors that had the most regional influence, regardless of the contractor’s commitment to the Iraqi central government. Some outsiders have described this as the pentagon’s “make-a-sheik program”

¹⁹⁴ *Id.*

¹⁹⁵ SIGIR 11-010, *supra* note 185.

¹⁹⁶ John A. McCary, *The Anbar Awakening: An Alliance of Incentives*, WASH. QUARTERLY 43, 50 (2009) (noting that “U.S. military leaders began a drastically different approach by actively courting Sunni tribal sheikhs in al Anbar. The U.S. military almost completely changed its reconstruction and security policy in the province, sending money through Sunni tribal sheikhs instead of contract bids or the central government.”)

or the process of offering no-bid contracts to any community strongman willing to support the Surge and Coalition forces in Iraq.¹⁹⁷

This methodology undoubtedly contributed to advancing the DoD's violence reduction strategy, but it also allowed connected strongmen to establish local footholds within their areas of influence. In essence, commander's, through contract, enabled non-state power brokers, like sheiks, to regain the legitimacy they had lost as a result of the U.S. invasion "and demand the fealty of their tribesmen as they had done in the past."¹⁹⁸ One study notes that,

The alliance and allegiance of tribal leaders, both Sunni and Shi'a throughout Iraq, is tenuous but remarkably effective at reducing violence. Although it remains to be seen whether these tribal militias can be successfully converted to state-run security forces or a civilian sector job force, the hard earned lessons from both sides on how to form an alliance to reduce violence and root out destabilizing extremists certainly merit closer examination.¹⁹⁹

This does not mean that the contracting process was *per se* destabilizing, but it does suggest that the MAAWS contracting methodology used to implement the SoI program supported the growth of parallel power structures at odds with Iraqi central authority. This approach is not problematic if these decisions were a part of the institutional design of the COIN mission and the host nation national strategy. In Iraq, this certainly was not the case. Instead, the growth of warlordism was mostly done on an *ad hoc* basis with little regard to the long-term impact on the state-building mission.

¹⁹⁷ See generally Shane Bauer *Bought Stability in Iraq by Funneling Billions of Taxpayer Dollars to the Country's Next Generation of Strongmen*, MOTHER JONES, (Sept./Oct. 2009) available at <http://motherjones.com/politics/2009/09/sheik-down?page=2>.

¹⁹⁸ McCary, *supra* note 196, at 50.

¹⁹⁹ *Id.* at 45.

We have already seen an analogous situation in Afghanistan with the rise of warlord run “security contracting.” The congressional investigation of the HNT contract noted:

Both the old and new warlords’ interests are in fundamental conflict with a properly functioning government...Warlordism is antithetical to the Afghan state, and ultimately to U.S. counterinsurgency strategy in Afghanistan, yet these warlords have flourished providing security for the U.S. supply chain there.²⁰⁰

The desperation spawned by the escalating violence in pre-Surge Iraq created a unique opportunity for well positioned power brokers and a moral crisis for U.S. military commanders. Commanders generally solved the moral crisis by backing away from the high-mindedness of state-building and focusing on the immediacy of violence reduction, by attaching their fortunes to well resourced strongmen. For many commanders, supporting questionable figures was often seen as the “cost of doing business” in a lawless wasteland.²⁰¹ This often led to ignoring the prior conduct of unsavory characters as long as SoI recruitment was up and violence was down.²⁰² In a 2009 article commenting on the U.S. backed rise of local power brokers noted:

²⁰⁰ *Id.*

²⁰¹ Joshua Partlow, Ann Scott Tyson & Robin Wright, *Bomb Kills a Key Sunni Ally of U.S.*, WASH. POST, Sept. 14, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/13/AR2007091300490.html>. The article stated that “Abu Risha, was called a warlord and a highway bandit, an oil smuggler and an opportunist, who sold out the Sunni resistance for American military friendship”; see also Jim Michaels, *An Army Colonel’s Gamble Pays Off in Iraq*, USA TODAY, April 20, 2007, http://www.usatoday.com/news/world/iraq/2007-04-30-ramadi-colonel_n.htm (the article sites COL MacFarland as a military commander who “was also willing to overlook the ‘checkered past’ and questionable allegiance of many of the sheikhs, claiming, ‘I’ve [Col. MacFarland] read the reports. . . . You don’t get to be a sheik by being a nice guy. These guys are ruthless characters. . . . That doesn’t mean they can’t be reliable partners.’”).

²⁰² See SIGIR 11-010, *supra* note 185, at 12. The SIGIR report indicates that many commanders were well aware that contractors were skimming money off the total contract amount, but “speculated that this would happen regardless of whether or not funds were disbursed directly to the SOI leader or to each SOI member.” One commander told SIGIR “that he believed that it was likely that some portion of the U.S. payments to the SOI was provided to a local insurgent group as protection money.”

Funneling billions of dollars into an unstable country “has raised the stakes of corruption considerably,” says the US Institute of Peace’s Parker...Payoffs and profiteering are widely seen as “the cost of doing business” in Iraq, Parker says. He believes the US government doesn’t care whether Iraqis are left with a corrupt country when our troops leave. “We are fine with letting the Iraqis have their own corrupt system for themselves.”²⁰³

The essential point here is that the SoI program was a series of security contracts that *should* have fallen under a comprehensive institutional process nested within an Iraqi – centered state-building framework. The MAAWS, as a COIN fund disbursement SOP, provided tactical level commanders with a fast and efficient money spending tool that could be used to influence the security situation. However, the MAAWS did not provide a “public procurement framework” to help commanders synchronize the security mission with the political aspirations of SoI members and the broader interest of the Iraqi state. This deficiency ultimately led to the use of a contracting process that reasonably advanced the dictates of COIN, but conflicted with the long-term aims of the state-building mission.

2. Construction Contracting and COIN

DoD COIN practitioners often incorporate the language of “capacity building” within their operational vernacular, which has largely meant directing funds at promoting and funding projects such as building schools, clinics, water treatment facilities and other “brick and mortar” structures that *relate* to civil institutions and good governance. Taken to its logical conclusion, the larger the project the greater the impact; thus, a large project delivered expeditiously is a potential capacity building windfall for any aspiring COIN practitioner – or so the logic goes.

²⁰³ Bauer, *supra* note 197.

From a state-building perspective, the concept of capacity building has less to do with brick and mortar projects and more to do with developing a responsive bureaucratic regime capable of administering effective governance and providing essential services. For instance, if a commander determines that child illiteracy rates are high in his area of operation, the problem might not be a lack of schools. Instead, the community might have a shortage of teachers, administrative staff and a viable funding stream to make sure that the teachers, staff and utilities are paid once a facility is up and running. The institutional shortcomings, in such an instance, are systemic and cannot be effectively remedied with a “shovel ready” solution.

U.S. forces have already departed Iraq and are scheduled to depart Afghanistan by 2014, but the sustainment cost for U.S. funded projects will linger on in both countries long after the last warfighter leaves. The World Bank said of Afghanistan:

These investments and programs are creating substantial expenditure liabilities for the future—roads will need to be maintained, teachers paid, and the sustaining costs of the Afghan National Army and other security services covered. The same will be true of investment programs in sectors like electric power and irrigation.²⁰⁴

The task of future sustainment becomes even more daunting when Afghan government authorities are not even aware that a liability exists. A SIGAR report on U.S. development projects in Nangarhar Province in October 2010 revealed that 24 of the 26 project for fiscal years 2009 and 2010 it reviewed “did not contain a U.S. and Afghan sustainment agreement or the signature of a government official accepting responsibility for operation and maintenance,” and large doubts loomed regarding the Afghan government’s capacity and

²⁰⁴ THE WORLD BANK, AFGHANISTAN PUBLIC FINANCE MANAGEMENT PROJECT, REP. NO. 34582-AF, AFGHANISTAN: MANAGING PUBLIC FINANCES FOR DEVELOPMENT 8 (2005).

willingness to sustain them.²⁰⁵ A similar finding was noted in Laghman Province in a January 2011 SIGAR audit.²⁰⁶ The *Commission on Wartime Contracting in Iraq and Afghanistan* added that these types of projects will likely result in “billions of dollars in waste,” that directly stems “from failure to apply realistic analysis and effective acquisition discipline in the stress of a contingency setting.”²⁰⁷

From the perspective of the tactical level commander, the concept of future sustainability is generally an unknown variable that he cannot control whether the host nation formally agrees to sustain the project or not. What he does know is that he has a deteriorating security situation and millions of dollars at his disposal to solve it. He also knows that he has a MAAWS inspired mandate that encourages the funding of high impact - high visibility projects that can get young men off the streets and undermine support for the insurgency. This COIN – centered approach fits well within the capabilities of a tactical level framework and a year to year deployment cycle. A state-building centered approach, conversely, does

²⁰⁵ See SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN RECONSTRUCTION, WEAKNESSES IN REPORTING AND COORDINATION OF DEVELOPMENT ASSISTANCE AND LACK OF PROVINCIAL CAPACITY POSE RISKS TO U.S. STRATEGY IN NANGARHAR PROVINCE, SIGAR AUDIT 11-1, at 11 (Oct. 2010) [hereinafter SIGAR 11-1].

²⁰⁶ See OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN RECONSTRUCTION, COMMANDER’S EMERGENCY RESPONSE PROGRAM IN LAGHAM PROVINCE PROVIDED SOME BENEFITS, BUT OVERSIGHT WEAKNESS AND SUSTAINMENT CONCERNS LED TO QUESTIONABLE OUTCOMES AND POTENTIAL WASTE, SIGAR AUDIT-11-7, at ii (Jan. 2011) [hereinafter SIGAR 11-7] (the report noted that 92 percent of the \$53 million invested in Lagham province Afghanistan related to projects that were at risk of failure or of questionable value).

²⁰⁷ See COMM’N ON WARTIME CONTRACTING, TRANSFORMING WARTIME CONTRACTING CONTROLLING COST, REDUCING RISK at 102 (31 Aug. 2011)[hereinafter the WCT], noting that:

Failure by Congress and the Executive Branch to heed a decade’s lessons on contingency contracting from Iraq and Afghanistan will not avert new contingencies. It will only ensure that additional billions of dollars of waste will occur and that U.S. objectives and standing in the world will suffer. Worse still, lives will be lost because of waste and mismanagement.

Id. at 12.

not naturally fit within that scheme because it is generally focused on developing institutional capabilities over several years involving many different commanders and organizations.

More to the point, state-building practices are efforts that most tactical level commanders do not have the time or capability to consistently implement.

Consequently, in an effort to simply get something done, military and political considerations tend to dominate the planning process. In Iraq, this has led to a long list of questionable construction endeavors in support of COIN operations.²⁰⁸ This is not to suggest that every reconstruction project in Iraq has failed or will eventually fail,²⁰⁹ but the overall strategic tone did not *consistently* provide tactical level commanders with an effective way for bridging the tactical dictates of COIN with a far reaching state-building strategy. In Iraq, few projects have exemplified this dilemma more directly than the U.S. led effort to build the Fallujah Waste Water Treatment System.

The Fallujah Waste Water Treatment System (FWWTS), with an initial estimated cost of \$35 million, was one of the largest U.S. reconstruction projects ever undertaken in Iraq.²¹⁰ The stated purpose of the project was “to provide a sewage treatment facility for

²⁰⁸ See, e.g., Hedgpeth & Cohen, *supra* note 171; see also e.g. SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, COMMANDER’S EMERGENCY RESPONSE PROGRAM: PROJECTS AT BAGHDAD AIRPORT PROVIDE SOME BENEFITS, BUT WASTE AND MANAGEMENT PROBLEMS OCCURRED 2-3 (26 Apr. 2010) [hereinafter SIGIR-10-013]. The main Baghdad Economic Zone (BEZ) represented \$35.5 in CERP funds on 46 individual projects. 24 of the 46 projects representing 46% of funds spent resulted in outcomes with questionable value.

²⁰⁹ See, e.g., SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, COMMANDER’S EMERGENCY RESPONSE PROGRAM: MUHALLA 312 ELECTRICAL DISTRIBUTION PROJECT LARGELY SUCCESSFUL (26 July 2009) [hereinafter SIGIR 09-025]. The Muhalla 312 Electrical Distribution Grid project was an \$11.7 million CERP project administered by the Joint Contracting Command–Iraq. The SIGIR found that “although the project took longer to complete than anticipated because of GOI approval delays and security issues, this was a successful CERP project.”

²¹⁰ SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, FALLUJAH WASTE WATER TREATMENT SYSTEM: A CASE STUDY IN WARTIME CONTRACTING 1 (30 OCT. 2011) [hereinafter SIGIR 12-007].

100,000 residents” that could reduce the contaminating effects “on the receiving waters in [the Euphrates].”²¹¹ Originally conceived by the CPA in June 2004, this project arose at a time when the term COIN was not yet fashionable in U.S. military policy circles. However, the driving impetus for the project was decidedly influenced by the COIN ethos. According to SIGIR,

[T]his project addressed the CPA goal of focusing on large infrastructure projects that would provide stability by increasing essential services, such as sewage treatment. At the time the project was initiated, Falluja was widely considered the most dangerous place in Iraq. The CPA awarded this project as a “carrot” to stabilize the local population by providing an essential service and jobs to Falluja residents.²¹²

The original contract task order indicated that the project would take 3½ years to complete, but the CPA wanted to increase the “hearts and minds” impact on the local populace.²¹³ To do this, the CPA accelerated the completion schedule to 18 months.²¹⁴ As of September 2011 and an estimated cost of \$107.9 million, the project was still unfinished and it will take the Iraqi government at least 2 more years and an additional \$87 million to finally complete the project as originally planned.²¹⁵ Worst than that, there is little evidence to suggest that the project helped to alleviate violence or endear the people more closely to the Iraqi government.²¹⁶

²¹¹ *Id.* at 5.

²¹² *Id.*

²¹³ *Id.* at 6.

²¹⁴ *Id.*

²¹⁵ *Id.* at 1.

²¹⁶ SIGIR 12-007, *supra* note 210, at 28 (SIGIR “found no information on whether the project has impacted local residents’ feelings towards their government, either local or national.”); *see also* Timothy Williams, *U.S. Fails to Complete, or Cuts Back, Iraqi Projects*, N.Y. TIMES, 3 July 2010, http://www.nytimes.com/2010/07/04/world/middleeast/04reconstruct.html?_r=1&pagewanted=1&hp. The

The problems with the FWWTS were legion, beginning with a flawed funding scheme that adversely impacted the entire project. More specifically, the initial requirement was funded with money from the Iraq Relief and Reconstruction Fund (IRRF), but as the project drug on, it became increasingly necessary to incrementally fund it with other sources, to include the DFI, the CERP, and money from the Economic Support Fund (ESF). Unfortunately, each funding source originated from different government authorities with distinct fiscal rules for implementation and final disbursement. This piecemeal funding approach also heavily influenced the manner in which the contract could be executed. More specifically, IRRF, CERP and DFI could not be mixed and each funding source varied in allocated amount, which meant that the various components of the project “needed to be severable and of varying sizes.”²¹⁷

The decision to split the project into smaller components was probably the only way to move forward under this arrangement, but it ultimately created a series of complex interdependencies that “adversely impacted other contracts and then eventually the project overall.”²¹⁸ For example,

The Ministry of Finance’s refusal to pay DFI-funded contract invoices in late 2006 resulted in work stoppages of critical path construction contracts. Specifically, the earthworks contractor left the project site over the non-payment

article discusses the feelings of resentment that some Iraqi people felt toward U.S. forces when large scale projects go unfinished. One Iraqi complained of the unfinished sewer line from the waste water treatment project, stating “this project was supposed to be a mercy...but it has been nothing but a curse.”

²¹⁷ *Id.* at 21.

²¹⁸ *Id.*

of more than \$1.3 million in invoices, which delayed the start of the construction of the facility.²¹⁹

Further complicating matters was that “award of individual contracts required construction throughout the still very dangerous city.”²²⁰ A former Gulf Region District commander stated “that it made no sense to award a contract and require the contractor to begin construction throughout a city that was not secure.”²²¹ An analogous situation would have been akin to the Governor of California ordering the completion of a large infrastructure project through the most dangerous part of Los Angeles during the 1992 riots. Most outside observers would have seen the Governor’s actions as foolish, but in the universe of COIN, the COIN practitioner only sees opportunity.

The concerns raised here have less to do with the various streams of funding and the resulting adverse interdependencies or even the wisdom of attempting a large infrastructure project in a battle zone. Instead, the issue here is that the project and the resulting problems fell solely on U.S. shoulders, leading to U.S. based solutions for an Iraqi need. The FWWTS project was almost entirely developed, awarded and managed by the USG, even though the Iraqis government would ultimately take ownership of the project. This led to significant conflicts throughout all phases of project development and execution, resulting in wasted time, wasted money, and a wasted chance to empower the host nation’s institutional authority and professional competence.²²² It is unlikely that the Iraqi institution in place during this

²¹⁹ *Id.* at 22.

²²⁰ *Id.*

²²¹ *Id.*

²²² *See id.* at 24. At some point during the project design and the award phase, the representatives from Fallujah disagreed with the Ministry about the overall project design. In an effort to get the project moving forward,

time would have been equipped to take on a project as grand as the FWWTS. However, that fact alone would have fostered an approach that was more in line with actual Iraqi desires and its institutional capabilities and placed U.S. military commanders in a role aimed at *supporting* those institutions.

Government institutions are only as strong as the people responsible for operating the bureaucracy. A bureaucracy gains competence by executing its assigned mission and being judged on the results. Although military commanders have a natural aversion to civilian bureaucracies, it is only through properly assembled bureaucracies that a failing state can secure some degree of institutional stability and professional competence. Consequently, each time a military commander circumvents the civil bureaucracy, for whatever reason, he contributes to the type of noble cause corruption discussed earlier. Unfortunately, more often than not, the tactical level commander is placed in a very difficult position and they are rarely afforded the necessary tools to align their good intentions with sound state-building practices. To reverse this trend, the DoD should address the strategic shortcomings that breed this type of corruptive influence by adopting a public procurement approach that is, more or less, “institution-centric.”

however, the U.S. Marine authority stationed in Fallujah instructed the contracting office to essentially side with the Fallujah Reconstruction Council. The command eventually reversed the decision several months later.

V. State-Building as a Tool for Combating Corruption and Providing a Way Forward

Throughout this paper I have described how the strategic failings of the DoD policy making regime have created a vacuum for procurement practices at the operational and tactical levels to facilitate consistent state-building activities. In the absence of meaningful strategic guidance, battlefield commanders have adopted a “COIN – focused” utilitarian posture for approaching procurement efforts in Afghanistan. This way of thinking has proven to be intellectually durable and practically useful for securing short-term tactical objectives. However, many of those tactical successes have proven to be strategically problematic, because Iraqi and Afghan institutions continue to be hobbled by ineffectiveness made worst by systemic corruption.

The only way to move beyond these strategic limitations is to adopt a strategy and moral framework that values institutions and the rule of law over the expediency of COIN. More specifically, the DoD must see building a just Afghan state as a central part of its strategic vision and retarding the growth of corruption as a natural derivative of its state-building efforts. Consequently, rather than focusing on short-term “anti-corruption fixes,” this paper advocates for an approach that places the state-building enterprise at the center of the DoD’s operations in Afghanistan. First, the DoD must work to support and reinforce Afghan public procurement processes and institutions as a component of the DoD’s RoL mission. Second, the DoD must reform its approach to contingency contracting so that it enables rather than distorts Afghanistan’s institutional legitimacy.

A. Building Afghan Public Procurement Institutions as a Component of the DoD Rule of Law Mission

Military relations between the United States and Afghanistan have been generally governed by a series of ad hoc agreements and “diplomatic notes.”²²³ Public procurement policies and spending priorities, however, are not controlled by either. Instead, the systems of each country have evolved along two separate and distinct budgetary tracks; the core budget, managed by the Afghanistan Ministry of Finance (MoF); and the external budget, managed by donor nations and international organizations.²²⁴ According to Article 4 of the 2008 Afghan Procurement Law (APL), “all municipalities and other units funded under the government [core] budget are required to procure goods, works and services in accordance with the provisions of this Law” unless an enumerated exception applies.²²⁵ The external budget, conversely, is largely governed by donor nation law and policy.²²⁶

Speed, efficiency, and familiarity have been the driving forces for this bi-furcated approach, but it “is now seen as undermining public confidence in the government as the majority of funds are still passed through the external budget using donor driven systems.”²²⁷ In fact, over 90% of the monies expended in Afghanistan are funded by external sources, which means that “most economic activity takes place outside of the government's fiscal

²²³ See R. Chuck Mason, *Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?*, CONGRESSIONAL RESEARCH SERVICE (CRS) REPORT FOR CONGRESS RL34531 7 (2011).

²²⁴ ISLAMIC REPUBLIC OF AFGHANISTAN – MINISTRY OF FINANCE, DEVELOPMENT COOPERATION REPORT 2 (2010) [hereinafter DCR].

²²⁵ ISLAMIC REPUBLIC OF AFGHANISTAN, PROCUREMENT LAW, 2008, as amended Jan 2009, Art. 4 (2009) [hereinafter APL].

²²⁶ See ISLAMIC REPUBLIC OF AFGHANISTAN – MINISTRY OF FINANCE, PUBLIC FINANCIAL MANAGEMENT ROADMAP 5 (2010) [hereinafter FINANCIAL MANAGEMENT ROADMAP]. It is currently estimated that approximately 30% of all donor funds are currently channeled through the core budget.

²²⁷ DCR, *supra* note 224.

control systems” undermining the “legitimacy and relevance of the government to the Afghan people.”²²⁸ According to the MoF, this parallel procurement regime has created “unbalanced and inequitable” development throughout Afghanistan and denied Afghan ministries the opportunity to “learn by doing and thereby develop the required capacity to design, implement, monitor and report on development programs.”²²⁹

Afghanistan’s procurement system is by no means a model of perfection, but after considerable support from the international community, Afghanistan has established a viable legal framework and established key supporting institutions.²³⁰ Of particular note, Article 80 of the APL established the Procurement Policy Unit (PPU) to oversee the implementation of the APL and to update and amend the law as necessary. Similar to the OGPCP in Iraq, the PPU does not consider award recommendations or act as an award authority. It is a policy hub, whose most significant responsibilities include developing, standardizing and enforcing procurement policy. The PPU has acted on its mandate and developed key public

²²⁸ See ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, STRENGTHENING COUNTRY PROCUREMENT SYSTEMS: RESULTS AND OPPORTUNITIES 23 [hereinafter RESULTS AND OPPORTUNITIES].

²²⁹ DCR, *supra* note 224. The MoF adds that the U.S. emphasis on addressing security requirements, representing roughly 51% of total external assistance, has caused the aid process to become “politicized and militarized.”

²³⁰ Prior to 2005, Afghanistan operated under a loose series of procurement regulations, but these regulations functioned largely as a set of bid and contract preparation guidelines than regulations designed to ensure competitive bidding. In 2005, a new procurement law was passed to overhaul and modernize the legal framework. In July 2008, the 2005 law was replaced by the pre-amended version of the current law. However, several major donor nations took issue with the new law because it failed to comply with international standards. After consultation with the World Bank, sixty-six observations were made. Twenty-seven observations out of the 66 would be addressed as amendments to the law, while the rest were resolved via legal and policy documents. The 2008 law was formally amended in 2009. See Capacity for Afghan Public Service Project -

http://www.undp.org.af/Projects/CAP/CAP.SuccessStories/ImplementationProcurementLaw.SS4_CAP.pdf

procurement policies and processes to implement the APL.²³¹ According to a World Bank, “with donor assistance, Afghanistan has made considerable efforts to establish the legal and regulatory framework for public procurement over the last five years.”²³² However, that same report notes that “while the law provides a very modern legal system for procurement, effective implementation of the law may encounter difficulties in the current weak institutions and capacity of the government.”²³³ This suggests that the current gains are real but fragile and could be lost if not properly reinforced.

Much like the DoD contracting regime in Iraq, the DoD is operating along a public procurement path that is consistent with its MAAWS money spending ethos, but inconsistent with reinforcing the APL and related institutions. This inconsistency is a lead contributor to the type of noble cause corruption discussed in Part III of this paper. Not in the sense that the DoD is intentionally undermining the success of Afghan public procurement institutions, but that in its role as a state-builder the DoD has an affirmative duty to support those institutions that are within its capacity to do so. This is not an affirmative duty in the purely legal sense, but one that is borne out of specific U.S. policy aims and its moral capacity to advance a just state-building agenda. This is especially true in a country where America’s legal obligations

²³¹ RESULTS AND OPPORTUNITIES, *supra* note 228, 23. The PPU has issued thirty-seven procedural circulars/guidelines to support implementation including "Rules of Procedures for Public Procurement". The “Procurement Appeal and Review Mechanism” initially issued in 2007, has been reconstituted and re-issued. The PPU also prepared standard bidding documents and the MOF mandated their use for procurement of goods, works and services. A Procurement Management Information System (PMIS) has been developed and piloted in three line ministries. The PPU is currently working to include data from all line ministries on the website. The PPU is also actively working on the accreditation of line ministries in order to decentralize the procurement function which is currently handled primarily through a central procurement facilitation unit established in the Ministry of Economy. *Id.*

²³² *Id.* citing *Procurement Arrangements, Afghanistan Sustainable Management of Natural Resources Project* dated March 2011.

²³³ *Id.*

are somewhat nebulous; leaving only policy aims and those corresponding moral obligations. In this instance, shoring up Afghanistan’s public procurement institutional capacity is consistent with those aims, moral obligations and long-term American interest.

1. Employ an Integrated Procurement Model

There are certain requirements that are “U.S. military specific” in that they primarily relate to the combat mission, such as the HNT logistics contract or buying fuel for U.S. military helicopters. There are others, however, that primarily relate to the benefit of the Afghan state, such as a CERP funded contract to build a local clinic or an Afghanistan Security Force Funds (ASFF) financed contract to provide logistic support to the Afghan National Army (ANA).²³⁴ The former requirements should remain within normal U.S. procurement channels, while the latter requirements should be procured through the Afghan procurement process as a matter of DoD policy. However, there are several adjustments that would need to be made to integrate DoD funds into the Afghan procurement framework. It begins by first recognizing that the Afghan Public Financial Management System (PFMS) is highly centralized when compared to the U.S. system. Paragraph 2.4 of the Defense Institution Reform initiative for Afghanistan summarizes those differences as follows:

In the United States, the responsibilities and processes of resource management are found in multiple government institutions. At the national level, overall responsibility for the annual President’s Budget resides in the Office of Management and Budget (OMB). The responsibility to disburse and collect funds resides in the Department of Treasury. Within the U.S. Military Services, the

²³⁴ The difference between the two funding sources is that one can only be used to support non-military humanitarian and reconstructive priorities for the direct benefit the Afghan people (CERP), and the other is meant to solely support Afghan security forces (ASFF). However, both essentially support the Afghan state. In any event, for the purpose of this paper “reconstruction funding” will consist of CERP, ASFF and Afghanistan Infrastructure Funds (AIF).

Defense Finance and Accounting Service (DFAS) disburses funds. The OSD Comptroller is responsible for budget execution and OSD Cost Analysis and Program Evaluation (CAPE) is responsible for determining how well programs. In Afghanistan, each of the aforementioned functions is performed by the MoF. The MoF budget office provides top-line budget guidance to all government departments to prepare each year's annual budget. MoF determines the final budget for each government department -- to include the funding of specific programs within each government department's budget. MoF submits the budget to the President and eventually the Parliament. All GIRoA disbursements are made by the MoF-Treasury. MoF control of the resource management process also includes the allocation of funds for individual development projects in Afghanistan. In the U.S. DoD, this particular resource management function is called programming and is done by the individual services and then collectively by DoD.²³⁵

Although the *funding piece* (payment) of the procurement process is controlled by the MoF, requirement development and contracting are done under the stewardship of the government ministry that is responsible for the requirement.

Under the proposed model, the DoD would manage the *funding piece*, but delegate requirement development and contract preparation to the responsible Afghan ministries. However, prior to submitting funds to those ministries, the DoD would provide the MoF a detailed breakdown of how much funding has been disbursed and when the disbursement was made. This additional funding would act as a "supplemental budget" to the funds already provided by the MoF. As DoD funds are obligated, the ministries would report those obligations to the DoD for disbursement and to the MoF for recording and informational purposes. This approach would ensure that the MoF is included in the budgetary process, with minimal disruption to normal U.S. military funding practices.

²³⁵ DEFENSE INSTITUTION REFORM INITIATIVE AFGHANISTAN, RESOURCE MANAGEMENT LINE OF OPERATION MASTER PLAN VER. 3, sec. 2.4 (Oct. 14, 2011) [hereinafter DIR].

The authority to obligate U.S. funds via contract is limited to duly appointed contracting officers IAW 41 U.S.C. § 414 and FAR 1.602-1. However, this authority could conceivably be expanded to include properly certified Afghan procurement officials similar to how PPOs are authorized to contract CERP funded contracts now.²³⁶ Absent such authority, a warranted contracting officer would be required to finalize any U.S. funded contracting action generated under this model. A contracting officer would also be needed, in some instances, to ensure the inclusion of relevant U.S. contracting clauses IAW U.S. procurement law.

There are three key DoD funding sources that would likely flow through this procurement model: CERP funds, Afghanistan Infrastructure Funds (AIF), and ASFF. The first, CERP funding, is exempt from virtually all U.S. procurement laws, while the latter two, ASFF and AIF are subject to most U.S. procurement laws and regulations.²³⁷ For CERP funded contracts, full use of the APL could be implemented as a matter of DoD policy, subject to congressional notification requirements and funding limits.²³⁸ Since AIF and ASFF

²³⁶ See U.S. DEP'T OF DEF., REG. 7000.14-R, vol. 12, ch. 27, ¶ 270313 (Jan. 2009) [hereinafter DoDFMR].

²³⁷ See Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1212, § 1217 & § 1513, 124 Stat. 4137, 4389-90 (2011) [hereinafter NDAA FY11]. The CERP is a one-year appropriation, whereas funds under the Afghanistan Infrastructure Fund (AIF) are available for two-years. ASFF is a single year appropriation, subject to all applicable U.S. procurement laws. Additionally, AIF is can only be spent with concurrence of State Department officials. See Policy Memorandum for U.S. Embassy Kabul and USFOR—A Consolidated Policy for Executing Afghanistan Infrastructure Fund (AIF) Procedures (12 Feb. 2011) (on file with author). The memo is signed by Karl Eikenberry, U.S. Ambassador to Afghanistan, and General David H. Petraeus, Commander, Int'l Sec. Assistance Force/U.S. Forces—Afghanistan. The memo further discusses the DoD and the DoS working groups and the types of projects suitable for funding under the AIF.

²³⁸ See *id.* § 1212(c)(2). The notification (to Congress) of projects exceeding \$5 million must include (1) the location, nature, and purpose of the proposed project, including how the project is intended to advance the military campaign for Afghanistan; (2) the budget and implementation timeline for the proposed project; and (3) a plan for the sustainment of the proposed project. *Id.* Of the \$500 million set-aside for CERP, \$100 million could be used for operations in Iraq, while the remaining \$400 million would be set aside for programs in Afghanistan. *Id.* § 1212(a)(3).

fall under the normal U.S. procurement regime, the DoD would need to either (1) seek congressional approval to waive use of normal U.S. procurement laws for all contracts generated under this model or (2) create said contracts IAW U.S. procurement laws, but supplement those contracts with APL provisions that are consistent with U.S. law and policy. In any event, regardless of the contracting approach taken, Afghan procurement personnel could still be heavily involved in the requirement development, solicitation and evaluation stages without any changes to U.S. procurement law or significant modifications to DoD policy.²³⁹

Whether done all at once or in stages, the proposed model would undoubtedly serve as an “effects enabler” for the PPU, by providing real world contracting opportunities to Afghan officials, mentorship support, and institutional development of ministry level contracting bureaucracies. Additionally, this approach would likely create a remediating impact to the “spillover effect” discussed earlier, because the flow of money into the local economy would begin to better mirror actual Afghan capacity. According to the *Commission*

²³⁹ Afghanistan Reconstruction and Development Services (ARDS) already provide the type of support generally contemplated in this paper for select high value Afghan procurements using Afghan or donor nation funds. According to its website:

ARDS was established in December 2003 as a government institution to put in place emergency procurement capacity to facilitate rapid and transparent utilization of donor resources for reconstruction and development of Islamic Republic of Afghanistan with the primary task to assist Line Ministries in carrying out procurement in conformity with the guidelines of funding agency(ies), for all goods, works and services under operations financed directly by IDA, IDA-administered Trust Fund as well as non-IDA funded contracts including domestic funded contracts.

ARDS website - <http://www.ards.gov.af/WhoWeAre.php>. ARDS primary value is that it assists line ministries with developing procurements in accordance with provisions of the APL and host nation procedures. The key component of the ARDS approach is that ownership of the procurement process remains with Afghan line ministry as envisioned in Article 87 of the APL. ARDS merely serves as a central facilitation and supporting unit during the procurement process. *See* ISLAMIC REPUBLIC OF AFGHANISTAN – MINISTRY OF FINANCE, REPORT ON ASSESSMENT OF NATIONAL PROCUREMENT SYSTEMS 15 (2007). Since 2003, ARDS has assisted the Afghan government with approximately 600 procurements.

on *Wartime Contracting in Iraq and Afghanistan*, “if a host country has limited absorptive capacity, influxes of external aid may reach a point at which the net benefit of additional funds turns *negative* as economic distortions proliferate and grow.”²⁴⁰ The report went on to state that external aid essentially oversaturated Iraq’s absorptive capacity, causing distortions in the competitive landscape and served as a catalyst for corruption.²⁴¹ In Afghanistan, the cause for concern is even greater because it “does not have the kind of bureaucracy or operations or resources that Iraq has and, therefore, will have a much more gradual or much lower absorptive capacity.”²⁴² Consequently, the DoD should adopt a public procurement model that encourages the synchronization of spending (DoD + MoF contributions) with actual Afghan institutional capabilities. The model proposed here offers a meaningful step in that direction, by providing U.S. military commanders with a “state-building tool” that fosters “spending – capability” equilibrium, while simultaneously developing the Afghan institutional expertise needed to meet future challenges.

In terms of application and scope, this model could be easily implemented in and around U.S. power centers in Kandahar and Bagram, but it also offers a unique opportunity to provide procurement development prospects in provinces where Afghan central government authority is weakest, but U.S. security presence is more trusted. For instance, the U.S. military could establish procurement advisory cells (PAC) to support contracting

²⁴⁰ WCT, *supra* note 207, at 100.

²⁴¹ *Id.*

²⁴² *Id.*; see FINANCIAL MANAGEMENT ROADMAP, *supra* note 226 at 5. According to this assessment Afghanistan has significant capacity restraints in its provincial administrations. “Less than 2% of the Afghan population is estimated to work in the public sector, which is relatively low even for low-income countries.” This suggests that a major impediment to absorptive capacity is the availability of effective administrators to implement and manage projects.

activities in the official offices of any province benefiting from DoD reconstruction funds. More significantly, this layer of support could also serve as a facilitator for linking the activities of the provincial offices with the MoF and PPU. This is especially relevant given the current centralized nature of the Afghan government. This proposed model could be used to bolster the capabilities of the central government and provide a path for an orderly transition to a more decentralized approach in the future. More importantly, this approach would start to move the U.S. military reconstruction emphasis away from the tactical nature of COIN and toward a genuine state-building strategy.

2. Enable the Use of an Afghan Based Disputes Resolution Process

Article 71 of the APL states that “a bidder that has suffered damage due to the violation of the Law is entitled to seek review by submitting a written application for review identifying the specific decision, act, or failure to act alleged to violate the procurement legislation.” On January 6, 2010, the PPU established, IAW article 72 of the APL, the *Manual of Procedures for Procurement Appeal & Review* to provide a general process for aggrieved bidders to enforce their rights under article 71, by challenging improprieties in the issuance of public contracts by Afghan agencies.²⁴³ To initiate the process, the aggrieved party submits an application to the Secretariat within the PPU for processing. If the application conforms to the procedural guidelines, the PPU assembles a Review Board and the application is then submitted to the board for decision.²⁴⁴ Finally, any order issued by the

²⁴³ See ISLAMIC REPUBLIC OF AFGHANISTAN – MINISTRY OF FINANCE, *MANUAL OF PROCEDURES FOR PROCUREMENT APPEAL & REVIEW* (2010).

²⁴⁴ See *id.* at 8. The review board consist of three independent experts chosen from administrative review committee consisting of a maximum of twenty-one members.

Review Board is confirmed by the PPU. The procedure manual does not describe the types of actions available to the Review Board, but presumably it has broad authority to rectify any improper deviation from the APL.²⁴⁵ This process is still in its infancy and there is little evidence to describe its overall effectiveness. Nevertheless, there is some evidence to suggest that the process is not widely used. For example, all orders issued by the Review Board must be published on the PPU website.²⁴⁶ As of the writing of this paper, no such orders have been published on that website. Second, aggrieved bidders could be reluctant to request a review because of fear of incurring additional cost. For instance, the PPU can assess a fee for submitting an application for review and the Review Board can assign the cost of the review

²⁴⁵ *Id.* at 11. The Application shall be submitted within the following time limits:

(a) if the contract has not been awarded yet:

(i) the application for review must be submitted to the Head of the procuring entity itself within ten (10) working days of the date when the bidder became aware of the circumstances giving rise to the application for review.

(ii) the decision on the application for review shall be issued by the head of the procuring entity within seven (7) working days after its submission; and

(iii) the decision of, or the failure to decide within the required time by the head of the procuring entity may be appealed to the Administrative Review committee within ten (10) working days after either the decision or the expiry of the time for issuing the decision.

(b) if the contract has been awarded, the application for review must be submitted within ten (10) working days after the applicant knew the alleged violation

²⁴⁶ *Id.* at 15. The manual states:

ARTICLE 28: PUBLICITY OF ORDERS:

(1) The Secretariat shall produce a summary of each Order which shall include the basic facts, reasoning and findings of the Review Board.

(2) The Secretariat shall publish such a summary on the website of the PPU.

(3) The Secretariat shall maintain copies of the full text of each Order and make it available to interested parties on request. The PPU may prescribe a charge for reproducing the Order.

proceedings to the aggrieved party and/or the Afghan agency in any proportion it sees fit.²⁴⁷

So if the aggrieved bidder wins or loses, he or she could end up absorbing all cost just to be heard.

Despite these shortcomings, this process offers a step in the right direction by providing a meaningful legal and procedural framework for adjudicating potential acquisition improprieties. In this regard, the Review Board is akin to the bid protest division of the U.S. GAO Procurement Law Branch, which serves a similar function under U.S. law.²⁴⁸ The aim of the GAO is to provide “an objective, independent, and impartial forum for the resolution of disputes concerning the awards of federal contracts.”²⁴⁹ The most direct benefit of this forum is that it can leverage private sector interests to act as a regulatory force for ensuring government compliance with its own procurement rules. For instance, aggrieved contractors, rather than government officials, identify potential defects within the procurement process and bring these potential problems to the GAO for resolution.²⁵⁰ If Afghan private sector

²⁴⁷ *Id.*, which states:

ARTICLE 29: RECOVERING THE COSTS OF THE PROCEDURE

(1) In addition to delivering its Order on the merits of the case, the Review Board may also make an award on the costs, including administrative costs, of the case and decide which of the parties shall bear the costs or the proportions of the costs to be borne by each party.

²⁴⁸ *See generally* UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE - OFFICE OF GENERAL COUNSEL, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE (2009, 9th ed.). The bid protest process at GAO begins with the filing of a written protest. Unless the protest is dismissed because it is procedurally or substantively defective (for example, the protest is untimely or the protest fails to clearly state legally sufficient grounds of protest), the agency is required to file a report with GAO responding to the protest and to provide a copy of that report to the protester. The protester then has an opportunity to file written comments on the report. Other parties may be permitted to intervene, which means that they will also receive a copy of the report and will be allowed to file written comments on it. *Id.* at 6. Government contractors may also bring their protest to the United States Court of Federal Claims (COFC), whose jurisdictional statute is 28 U.S.C. § 1491 (b).

²⁴⁹ *Id.* at 5.

²⁵⁰ Although GAO opinions are not binding on a U.S. government agency, those agencies tend to abide by GAO rulings because of the GAO’s special relationship with congress.

actors could be galvanized in a similar fashion it might have a transformative impact on the competitive environment and influence more fairness amongst Afghan government ministries. The DoD could help to Sheppard this evolution along by creating a bridge to serve as a transitional link between the DoD's procurement activities and the Afghan State, and the FAR provision at 33.103 could offer a way to create that bridge.

FAR 33.103 encourages agencies to establish an inexpensive, informal, procedurally simple, and expeditious protest forum separate and apart from the GAO.²⁵¹ This means that the DoD could authorize the creation of an agency level protest branch for bid-protest actions related to Afghan reconstruction efforts and/or involve Afghan based contractors in USFOR-A area of operation.²⁵² Currently, no contract issued under DoD contracting authority can be protested before an Afghan forum; and it is exceedingly rare for an Afghan based vendor to take an action to the GAO despite its relative availability. The agency protest option, however, brings the forum closer to the contractor – potentially making it more accessible to Afghan based vendors. Although this forum would not technically be an Afghan institution, it could mirror the procedural framework established by the PPU and synchronize its activities with the PPU and the APL, and, at some point, serve as an eventual integration point for the two systems. This is especially true if the DoD elects to adopt this forum and to build it within the alternate procurement model discussed above.

Even as a standalone model, however, this approach provides a twofold benefit. First, it establishes a local due process forum for the billions of dollars that the DoD spends in

²⁵¹ FAR, *supra* note 104, at 33.103(c).

²⁵² This approach would mean that contracts financed with non-reconstruction type funds could also participate in this process if the contracting action involves an Afghan vendor.

Afghanistan. This is important because it could help to increase the perception of fairness throughout the entire system; thus, encouraging more participation from prospective vendors. Second, it more effectively leverages the strength of the private sector to serve as an anti-corruption regulatory force. For instance, instead of limiting protest complaints to only addressing improprieties in the solicitation, it could be expanded to include providing direct evidence that a prospective bidder fails to meet one of the eligibility criterion detailed at Article 17 of the APL.²⁵³ The rationale at play here is that the DoD can leverage its spending power to serve as an anti-corruption force if it invests in an institutional framework rather than building more courthouses.

B. Reforming the DoD's Approach to Contingency Contracting

Contingency contracting is the point in the acquisition process where public funds are transformed into the goods and services the DoD needs to conduct military operations in a deployed environment. The ability to draft and execute legally enforceable contracts is

²⁵³ APL, *supra* note 225, at art. 17, which states, *inter alia*:

- (1) In order to be eligible to participate in procurement, a bidder shall:
 - (i) have the legal capacity to enter into the contract;
 - (ii) not be insolvent, in receivership, bankrupt or being wound up, its business activities have not been suspended, and it is not the subject of legal proceedings for any of the foregoing;
 - (iii) not have a conflicting interest which would cause it to benefit by failing to conclude the procurement contract;
 - (iv) not have been, within a period of three (3) years prior to the participation in the procurement proceedings, convicted relating to business or professional misconduct, or that involved false statements as to its qualifications to enter into a procurement contract;
 - (v) not be subject to debarment pursuant to Article 70 of this Law;
 - (vi) not have been associated with and neither a relative of a bidder or contractor currently subject to debarment pursuant to sub-paragraph (v) of paragraph (1) of this Article.

essential, since “money” is ultimately made purposeful through the execution of sound contracts. Over the last several years, however, DoD contingency contracting has come under a storm of criticism for fraud, waste, abuse, and general mismanagement.²⁵⁴ More specifically, on 24 September 2007, the Secretary of the Army established the “Commission on Army Acquisition and Program Management in Expeditionary Operations” to “review the Army’s policies, procedures, and operations in [Army contracting] and make findings and recommendations as to their effectiveness and compliance with applicable laws and regulations.”²⁵⁵ The Commission completed its work forty-five days later and filed its final report on 31 October 2007.²⁵⁶ The Commission concluded that “the ‘Operational Army’ is expeditionary and on a war footing, but does not fully recognize the impact of contractors in expeditionary operations and on mission success.”²⁵⁷ As a result of these findings, *inter alia*, the Commission concluded that the “acquisition failures in expeditionary operations require a systemic fix of the Army acquisition system.”²⁵⁸ In 2008, Congress established the “Commission on Wartime Contracting in Iraq and Afghanistan” to further assess the

²⁵⁴ The most significant reports were generated by the Gansler Commission, The Commission on Wartime Contracting, and the Subcommittee on National Security and Foreign Affairs Committee on Oversight and Government Reform.

²⁵⁵ COMMISSION ON ARMY ACQUISITION AND PROGRAM MANAGEMENT IN EXPEDITIONARY OPERATIONS, URGENT REFORM REQUIRED: ARMY EXPEDITIONARY CONTRACTING 22 (31 Oct. 2007) [hereinafter the GANSLER REPORT]. The report concluded that the “Army’s acquisition workforce is not adequately staffed, trained, structured, or empowered to meet the Army needs of the 21st Century deployed war fighters. Only fifty-six percent of the military officers and fifty-three percent of the civilians in the contracting career field are certified for their current positions.” Also of note, of the seventy-eight active contract related fraud investigations in 2007 in Iraq and Afghanistan, seventy-seven involved Army personnel.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 1.

²⁵⁸ *Id.*

effectiveness of DoD-wide contingency contracting and provide recommendations.²⁵⁹ After three years of extensive research, this Commission reiterated the concerns described in the Gansler report, concluding that contingency contracting is broken and is in dire need of extensive reform.²⁶⁰ The common theme here is that the DoD has an undertrained and understaffed contingency contracting regime, and it will need to improve training and oversight to become effective now and for future operations.

Although the Commissions' findings highlight a critical shortcoming within the DOD contingency contracting regime, it fails to underscore the fact that no amount of additional training or oversight can cure a misguided strategy. Throughout this paper I have argued that the DoD procurement strategy is mostly adrift and does not provide a meaningful way for tactical commanders to assess potential cost and/or provide a way to mitigate potential damage done to the state-building mission. This is because the DoD's current procurement strategy is mostly "inward looking," in that it is primarily concerned with providing goods and services to U.S. Soldiers and to advance the COIN effort. An "outward looking" strategy would be one that is primarily focused on building up and supporting host nation public procurement institutions. This paper has argued for a comprehensive approach, with a special emphasis on pursuing "outward looking" objectives in fragile States like Iraq and

²⁵⁹ National Defense Authorization Act (NDAA) for Fiscal Year 2008: Commission on Wartime Contracting in Iraq and Afghanistan, Pub. L. No. 110-181, § 841 (2008).

²⁶⁰ See WCT, *supra* note 207, noting that:

Failure by Congress and the Executive Branch to heed a decade's lessons on contingency contracting from Iraq and Afghanistan will not avert new contingencies. It will only ensure that additional billions of dollars of waste will occur and that U.S. objectives and standing in the world will suffer. Worse still, lives will be lost because of waste and mismanagement.

Afghanistan. This includes adopting an integrated framework like the one proposed in the previous section, but also rethinking how the DoD issues contracts that would fall outside of the Afghan procurement model discussed above. This begins by (1) limiting the money commanders can spend at the tactical level and (2) requiring commanders to assess the collateral impact of all contracting decisions.

1. Limit the CERP Spending Authority for Tactical Level Commanders

On January 27, 2010, the New York Times reported that a dispute between the Shinwaris and Taliban over land and control of smuggling routes from Pakistan to Kabul created the basis for a U.S. – Shinwaris “anti-Taliban pact.”²⁶¹ The leaders of the Shinwaris tribes “agreed to support the American-backed government, battle insurgents and burn down the home of any Afghan who harbored Taliban guerrillas.”²⁶² In return for support, “U.S. commanders pledged \$200,000 for small development projects and promised an additional \$1 million for future projects.”²⁶³ In order to minimize corruption, “the senior U.S. commander in eastern Afghanistan decided to [bypass the central government] and disperse the aid through the local government and fund projects approval by a tribal shura.” The decision to bypass the central government drew complaints from senior Afghan officials who

²⁶¹ Dexter Filkins, *Afghan Tribe, Vowing to Fight Taliban, to Get U.S. Aid in Return*, N.Y. TIMES, Jan. 27, 2010, <http://www.nytimes.com/2010/01/28/world/asia/28tribe.html?pagewanted=all>. , The Shinwaris tribes is a patchwork confederation of tribes that represents over 400,000 Afghans.

²⁶² *Id.*

²⁶³ Bethany Matta, *Tribal Dispute in Afghanistan Benefits Taliban*, VOICE OF AMERICA, Oct. 11, 2011, <http://www.voanews.com/english/news/asia/south/Tribal-Dispute-in-Afghanistan-Benefits-Taliban-131515658.html>.

argued it undermined the Karzai administration.”²⁶⁴ There were also allegations that the development contracts were not dispersed equitably, “even amongst Shinwaris,” and that other tribes were angered because they had been excluded from “the deal.”²⁶⁵ The U.S. military denied these allegations, but the plan created such a backlash, it was ultimately disavowed by the U.S. Embassy, which responded by issuing a policy memo effectively squashing the agreement.²⁶⁶ The actions of the U.S. commander were undoubtedly well intended, but distinctly “anti-statist,” largely made possible by the heavy influx of CERP funds within his authority to disburse.

The DoD cannot elect to pursue any variation of the “integrated procurement model” described in the previous subsection if battlefield commanders are permitted to spend CERP funds as they see fit. The National Defense Appropriation Act (NDAA) for FY2011 provided \$400 million in CERP funds for Afghanistan and the NDAA for 2012 provides another \$400 million for FY 2012.²⁶⁷ The infusion of \$400 million into the Afghan economy is significant and should be synchronized with other state-building efforts and Afghanistan’s national development strategy. To put this in perspective, the developmental budget for Afghanistan was roughly \$1.53 billion for 2011, which means that CERP spending, alone, is equivalent to over 26% of the Afghan developmental budget.²⁶⁸ Like in Iraq, the CERP in Afghanistan is a decentralize program that provides broad spending authority for tactical level execution. An

²⁶⁴ *Id.*

²⁶⁵ Joshua Partlow and Greg Jaffe, *U.S. Military Runs into Afghan Tribal Politics After Deal with Pashtuns*, N.Y. TIMES, May 10, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/09/AR2010050903257.html>.

²⁶⁶ *Id.*

²⁶⁷ National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, § 1201.

²⁶⁸ ISLAMIC REPUBLIC OF AFGHANISTAN – MINISTRY OF FINANCE, 1390 NATIONAL BUDGET 10 (2011)

O-5 battalion level commander has the authority to approve a project up to \$100k and an O-6 brigade combat team (BCT) commander has a \$500k approval authority.²⁶⁹ However, this authority to spend is not coupled with a comprehensive state-building strategy. Although coordination with local Afghan officials is often required, there is no formal requirement for a tactical level commander to synchronize his actions with the Afghan central government. As for anti-corruption measures, under the best practices section of the MAAWS-A it states that a “Commander should appoint a Threat Finance & Corruption Analyst to evaluate vendors and focus on anti-corruption operations with regards to the CERP,” but it provides no details for implementing this beyond that brief recommendation.²⁷⁰ The best way to align the CERP with the broader state-building strategy and to minimize corruptive influences is to *decrease* tactical level spending authority and shift most CERP spending into more formal Afghan procurement channels.

Under the Afghan Rules of Procedure for Public Procurement (RPPP) it offers a streamlined contracting process called a Request for Quotations (RFQ).²⁷¹ It’s not much more detailed or paperwork intense than a CERP funded contract, but spending authority for this contract type is limited to 500,000 Afghanis or about \$10K.²⁷² There would be few

²⁶⁹ MONEY AS A WEAPONS SYSTEM – AFGHANISTAN, COMMANDER’S EMERGENCY RESPONSE PROGRAM (CERP) STANDARD OPERATING PROCEDURES (SOP) 32 (Feb. 2011) [hereinafter MAAWS–A]. The MAAWS-Afghanistan (MAAWS-A) is the primary field guide for issuing CERP funded contracts but it is slightly more informative than its Iraq MAAWS counterpart. For example, the MAAWS-A contains a 2 – page contract template and some general contracting pricing principles. However, like its counterpart, it is short on contracting procedures and a uniform process.

²⁷⁰ *Id.* at 191.

²⁷¹ ISLAMIC REPUBLIC OF AFGHANISTAN – MINISTRY OF FINANCE, THE RULES OF PROCEDURE FOR PUBLIC PROCUREMENT 20 (2009).

²⁷² APL, *supra* note 225, at art. 21. These spending limits are generally consistent with the spending authority of a Government Purchase Card (GPC) holder. In garrison, that authority is limited to \$3,000 but can be increased

drawbacks and much to gain if tactical level commanders accepted similar limitations. More specifically, limited spending would finally get tactical commanders out of the “big project business,” which would likely improve the spotlight on genuine COIN efforts and return the CERP back to its small project focus. Limiting spending authority also means less likelihood that commanders will authorize the funding of large unsustainable infrastructure projects. This is especially relevant given that past practice has shown that even when commanders are required to coordinate large projects with the Afghan government, they will not do it if doing so impedes the operational pace.²⁷³

Additionally, and perhaps most importantly, after US forces depart Afghan contractors will have to learn to rely on, for better or worse, their own public procurement procedures. In this sense, limiting CERP spending authority effectively encourages commanders to support those Afghan based institutions that will be there for the long haul. Encouraging commanders to adopt such an approach might be difficult at first, but the key is to emphasize that the ultimate goal in Afghanistan is to hand the capacity building mission over to Afghan civil authorities prior to the U.S. military projected departure date and to provide mentorship support until that time. This step offers yet another move in that direction.

to \$25,000 in support of contingency operations. The procurement method for a GPC acquisition is fairly straightforward with minimal bureaucratic oversight. The CERP, under limited spending authority, could be treated in a similar fashion.

²⁷³ See SIGAR 11-1, *supra* note 205. This report notes that twenty-four of the twenty-six reconstruction projects reviewed lacked sustainment agreements from the Afghan government, despite there being a MAAWS SOP requirement to do so.

2. Implement a Collateral Impact Assessment (CIA) Tool for all DoD Funded Contracts

The natures of military operations in Iraq and Afghanistan have been wrought with foreign policy implications and the heavy influx of money onto the battlefield has provided military commanders an oversized role in shaping it. At times that shaping has been intentional, as with the SOI program, and other times it has been unintentional, as with the “security arrangements” of the HNT contract discussed in the introduction. Whatever the case, whenever the U.S. military engages in contracting actions, there exists the potential that those actions could disrupt the fragile balance between powerful private sector actors and the Afghan governing regime. As a result, U.S. commanders should not only consider the cost, speed and quality of the actual requirement but who is actually filing that need and how they plan to fill it.

More often than not, tactical level commanders are better positioned to identify potential real-time problems within the procurement process in the early stages than contracting personnel are later in the process. More to the point, at the requirement phase a military commander can leverage his intelligence gathering assets to determine who’s – who within the host nation contracting world and how they fit within the Afghan state-building scheme. If the only individuals that could possibly win an award are connected to criminal networks or insurgent groups, the proposed contracting should be treated as a “high risk” endeavor. The major advantage of this approach is that it treats contracting actions in the same way a targeteer conducts a Collateral Damage Assessment (CDA). During a CDA, a commander is responsible for fully assessing the potential casualty toll or collateral impact of an ordinance round directed at an area where civilian contact is eminent or probable. Before taking such an action, a commander is required to assess the risk prior to engagement. If he

determines that the likelihood of civilian deaths is high he can then take steps to mitigate that risk. After all reasonable mitigating measures have been enacted; the commander can then take action. Even if casualties result, the decision made will have been the best any commander could have made under the circumstances, which is all anyone can ask for.

Here, I am arguing for a similar form of deliberation during the acquisition process in Afghanistan. This assessment or CIA would serve as a tool for gauging the feasibility of a specific contracting action before money is obligated to a specific effort. If the CIA index is unreasonably high, this will provide a signal to the contracting official that filling x requirement cannot be adequately addressed via contract without causing significant damage to Afghan governing capacity. This assessment would not preclude military commanders and contracting officers from issuing risky contracts, but at least the award decision would be better informed. Although the analysis would be conducted on a contract-by-contract basis, it could potentially be used in a comprehensive manner for creating baseline profiles for “high-risk contractors” and developing methods for mitigating the risk associated with working with such actors. More importantly, it would provide future commanders and planners with viable information from deployment to deployment that could be used as the centerpiece for expending funds and charting a path for future operations.

One of the principle drawbacks of the contracts issued under the SoI program is the lack of any meaningful assessments regarding who received those awards and the types of risk undertaken during the acquisition process. The same shortcomings were at play when the U.S. military sought to fill the requirements of the HNT contract. Although the HNT contract was generally regarded as “successful” in terms of filling the military’s logistic needs, it was distinctly unsuccessful in curbing the growth of parallel power structures. The HNT contract

further demonstrates that the CIA must go deeper than just considering the impact of the prime contractor but also the collateral impact of ancillary factors, such as subprime vendors and partnership arrangements. Again, the purpose of the CIA is not to develop a bright-line test for rejecting and approving projects, but to encourage a way of thinking that promotes deliberative action. The hope is that if commanders and contracting officials understand the collateral consequences of a contracting action to Afghanistan's institutional integrity they will be in a better position to mitigate those factors that might undermine it.

VI. Conclusion

In September 2010, General David Petraeus, serving as the ISAF and USFOR-A commander, issued a memorandum outlining his guidance for "COIN Contracting" in Afghanistan.²⁷⁴ He stated:

The scale of our contracting efforts in Afghanistan represents both an opportunity and a danger. With proper oversight, contracting can spur economic development and support the Afghan's government's and ISAF's campaign objectives. If, however, we spend large quantities of international contracting funds quickly and with insufficient oversight, it is likely that some of those funds will unintentionally fuel corruption, finance insurgent organizations, strengthen criminal patronage networks, and undermine our efforts in Afghanistan.²⁷⁵

GEN Petraeus went on to state that in order to alleviate this plight "contracting has to be 'Commander's business'" and that "we must use intelligence to inform our contracting and ensure those with whom we contract work for the best interest of the Afghan people."²⁷⁶ This

²⁷⁴ Memorandum for the Commanders, Contracting Personnel, Military Personnel, and Civilians of NATO ISAF and US Forces-Afghanistan, subject: COMISAF's Counterinsurgency (COIN) Contracting Guidance (8 Sept. 2010).

²⁷⁵ *Id.*

²⁷⁶ *Id.*

is most certainly true, but also a bit ironic that after over 10 years of military operations in Afghanistan and a completed campaign in Iraq, GEN Petraeus felt compelled to express such an obvious truism. Even prior to such guidance, U.S. tactical commanders have been well aware of the dubious mix of money and COIN since the dawning of the Anbar Awakening. What they generally do not know is how to consistently integrate the long-term strategic vision for Afghanistan with the *money as a weapon system* ethos that undergirds the COIN strategy. As noted at the outset, the weapon system is still the judgment of the battlefield commander and the procurement framework in place to deploy funds at the proper target. Unfortunately, the U.S. military procurement model in Afghanistan has largely directed money at addressing the short-term dictates of COIN rather than building up long-term Afghan institutional capabilities.

In the introduction section of this paper, I implied that once U.S. military operations in Afghanistan conclude it is quite possible that we will leave Afghanistan more corrupt than we found it. In the *Nation* piece cited at the beginning of this paper, Mr. Roston concludes his article by saying:

In any case, the main issue is not that the US military is turning a blind eye to the problem [fueling corruption]. Many officials acknowledge what is going on while also expressing a deep disquiet about the situation. The trouble is that--as with so much in Afghanistan--the United States doesn't seem to know how to fix it.²⁷⁷

Mr. Roston's assessment is probably correct but it also suggests if we do not "fix it" now, the U.S. will, in fact, leave Afghanistan more corrupt than it found it.

²⁷⁷ Roston, *supra* note 7.

Winston Churchill was once quoted as saying “we can always count on the Americans to do the right thing, after they have exhausted all the other possibilities.” In Afghanistan, we have reached the exhaustion point and it is now time to do the right thing. The direct law enforcement measures currently underway provide a step in the right direction, but final success in Afghanistan will not be defined by the number of bad actors killed or imprisoned, but by the legacy of laws and institutions that endure long after the last Soldier departs. In the end, even if the U.S. misses the mark it can leave a legacy of an Army and a nation that gave Afghanistan a government that is “good enough” to effectively govern today, but has the capability to become something more in the days beyond.

