

Contractors on the Battlefield: Outsourcing of Military Services

By Denis Chamberland

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Contractors have a long history of supporting national armed forces on and off the battlefield. The last decade, however, has witnessed a sharp increase in the scale of outsourcing of military services to third parties, emphasizing the importance of integrating contractor support into military operations and generating efficiencies.

It is an area where the U.S. defense sector needs to improve. Undersecretary of Defense for Acquisition, Technology and Logistics Ashton Carter last year announced new rules to guide the Pentagon's \$400 billion-a-year procurement process, including a focus on better managing contractors and increasing "real competition."

The Defense Department spent more than \$212 billion on services in 2009 — amounting to more than half of the department's contracted work. The funds were applied to such things as technology support, facilities upkeep, weapons maintenance and transportation. Outsourced services are big business.

The reasons for contracting out services are many and include cost cutting, access to new technology, force multipliers and moving to a more flexible, variable costs, financial model, among others. On the battlefield, the rationale may be that contractors are sometimes allowed to fight wars that national armies would normally have assumed, but could not because of the anticipated public condemnation.

It is estimated that in 2005 the Departments of Defense, State and Homeland Security combined spent a total of \$390 billion on services provided by the private sector, and that the value of logistics contracts over the next decade will exceed \$150 billion.

The type of military services provided by private companies is broad and includes basic research and technology development, strategic research and consulting, threat analysis, war gaming and simulations, software development, information technology systems support, operation of military equipment and systems, intelligence gathering, surveillance, interrogation, counterterrorism, destruction of weapons and unexploded ordnance clearance, clearing of firing ranges, weapon collection and destruction, demining, protection of diplomats, company sites and civilian convoys in conflict zones.

The outsourcing of any service or function previously performed in-house or carried out by a national army raises a number of concerns about the quality of the services and control over the contractor. Because successful outsourcing is about finding just the right balance of control over the contractor but in a way that allows it the flexibility to perform those tasks for which it has been entrusted, some key areas need to be dealt with contractually.

The success of outsourced services contracts depends largely on contractor management. In the military context, the management of contractors has little in common with the management of soldiers during military operations. It is the contract that governs. As U.S. Field Manual 3-100.21

(100-21), entitled "Contractors on the Battlefield," notes, "It is important to understand that the terms and conditions of this contract establish the relationship between the military (U.S. government) and the contractor; this relationship does not extend through the contractor supervisor to his employees."

It is through the contract that the expectations of the military chain of command on the contractor are established. Provided the scope of the services is clearly articulated in the contract, the contractor is legally obligated to perform. Generally, it is the contracting officer — the point of contact defined in the contract — who is the military link to the contractor and who communicates the commander's specific instructions.

As a rule the contracting officer is the only government official with the authority to amend the contract to add new requirements. An amending procedure — often called a change management procedure — is normally set out in the contract for this purpose. Such a procedure typically allows either party to the contract to initiate proposed changes to the contract, but the procedure should not lead to granting precisely the same rights equally to each party. The asymmetrical position of the parties needs to be recognized contractually.

Every change management procedure also needs to be understood within its own context. For example, flexibility is one of the essential principles for effective logistics performance, in the sense that the military authority must be able to adapt logistics structures and procedures to changing situations, missions and concepts. Where a contract needs to be amended to accommodate changing mission requirements, the contract should include a structure mandating the contracting officer to work with the field commander and the contractor to review, modify and implement changes as required by the mission. Accordingly, the contract must be drafted in a way that it does not become the controlling factor, restricting command and control flexibility.

Regardless of the party outsourcing and the type of services being outsourced, all appropriate contractor management procedures should be well defined in the contract. One notable area of concern is that military authorities often do not retain an adequate number of qualified personnel to manage the contractor and exercise the terms of the contract. Here, the military authority needs to weigh its need to manage the contractor and administer the contract against its desire to transfer as much responsibility to the contractor as possible.

This was the analysis conducted last September by Carter, who determined that the Pentagon needs to build up its in-house contract management capability to generate cost efficiencies and improve the quality of the services. It cannot be overemphasized that sufficient resources must be available to manage the contract proactively if value for money is to be optimized.

A standard practice in all forms of outsourcing is to define the standard level of performance — often described as "service levels" — to be achieved by the contractor. Typically, the objective is to define precisely the standard of performance while leaving it to the contractor to determine how it will perform. Unless there are compelling operational reasons to prescribe extensively how the services will be provided, the goal is to manage but not micro-manage the contractor, allowing it to apply its expert judgment, which is why it was retained in the first place.

Various mechanisms exist to ensure just the right amount of control over the contractor. These include the establishment of a governance structure, with robust monitoring and reporting requirements; the application of liquidated damages in the event of non-performance (linked to a right of termination where the events of non-performance attain a contractually-defined number of breaches within a set period); a general right to terminate the contract in various circumstances, including sometimes for public policy reasons; and extensive rights of indemnification allowing the

armed forces to recover where it has been damaged by the acts or omissions of the contractor.

As well, certain outsourcing contracts seek to align the interests of the parties in some areas by incentivizing the “right” conduct by the contractor, often through financial arrangements known as “gain-sharing,” where the parties share the financial gain resulting from improvements in the operations made by the contractor.

Separate from the provisions set out in the contract that govern the rights and obligations of both the military authority and the contractor are national and international laws. Those laws affect, and limit, the way in which contractor services are deployed. As the U.S. field manual notes, such laws matter because they may direct how a host nation makes use of contractors; restrict the provision of certain services in the country; prohibit outright the use of private contractors; and impose legal obligations on the host nation, such as work permits, vehicle registration and licensing, and the hiring of local workers.

It is critical, therefore, to consider the legal requirements that exist outside the four corners of the contract to ensure that the contractual provisions are reliable and can be met without breaching external legal requirements. Failure to ensure that applicable international agreements are complied can put the military authority at risk and make all or parts of the contract unenforceable.

While the main drivers behind traditional outsourcing are typically focused on the economic motivators, outsourcing military services can involve a mix of economic, political and military necessities. The common credo of outsourcing is that non-core functions can be outsourced, while core functions — those that define the *raison d’être* of the organization — should never be outsourced.

In some areas the difficulty is that sometimes the outsourced services are not only important, but are often crucial to the security, and sometimes even survival, of the military authority. Within that context, the contract that defines the relationship between the contractor and the military authority cannot be limited to matters of economic efficiencies, where disputes ultimately get settled between the parties or, less frequently, before the courts. Such contracts must also take into account the different interests, including the loyalties that may exist between the contractor and the military authority in the specific circumstances.

When logistics services are being outsourced, if the supply to the military authority in operational conditions arrives late or not at all, the military authority will have no problem determining that the contractor is in breach of its obligations under the contract. The result is that the appropriate consequences to the contractor, as stipulated in the contract, will be applied. But what if what’s involved is the physical protection of diplomats or a military authority’s business sites? Here it may be much more difficult for the military authority to assess compliance with the requirements of the contract. It is extremely important then to consider, before the contract is signed, the military authority’s performance expectations, so that non-performance can adequately be assessed, with the appropriate consequences clearly articulated in the contract.

There is also the concern that some mandates are not easy to monitor, sometimes because the military authority is not able to be physically present at all times. This raises at least two issues. The first is that the situation can lead to abuse by the contractor — where firearms are used in an emergency, for example — with no control being exercised by the military authority. Even in critical or emergency situations, efforts should be made to contractually define upfront what comes within the parameters of an emergency or a critical situation, and what might be considered a proportional response under the circumstances. Unexpected situations can arise, but without any guidance in the contract, the military authority will have no contractual control over the contractor.

A second concern is that, in the absence of an appropriate oversight mechanism, the military authority can become vulnerable to having its needs dictated or defined by the contractor, to a smaller or larger extent. It is easy to imagine how this can lead to additional costs to the military authority, in the sense that it may pay for services actually not provided. It could also lead to the prolongation of a conflict. The importance of including the appropriate contractual provisions to avoid losing control cannot be overemphasized.

The implications of contracting out military services — whether “military” in the traditional sense of the word or in the more modern sense that includes technology or other services and products also sold in the civilian sphere — are many. In most cases, both the military authority and the contractor share a common interest to ensure that their contract properly addresses the broad range of issues that make outsourcing arrangements successful.

Although a large number of questions and concerns can be addressed contractually, others lie outside the four corners of the contract.

Aside from managing risks, achieving value-for-money is based on good contract management practices.