Statement about the Contingency Contracting Reform Act.

I am Charles Tiefer, professor of governmental contracting at the University of Baltimore Law School. I was a Commissioner in 2008-2011 on the Commission on Wartime Contracting in Iraq and Afghanistan. This is my statement on the Contingency Contracting Reform Act ("the Act"). The Act does a good job of going the next step from the recommendations of my Commission. I support the Act as a whole. I have singled out the ten provisions of the Act for which I personally am most familiar as a result of my work on the Commission.

Section 112. Requirements and limitations for suspension and debarment officials.
While some agencies have properly structured their arrangements for suspension and debarment officials (SDOs), some components of the Department of Defense have not. Restructuring might facilitate the Department of Defense's moving ahead better with its suspension and debarments. The enormous Prime Vendor contract by the Department of Defense with Agility in Iraq should have produced an earlier suspension long before Agility's felony indictment. Another example is Parsons Delaware, Inc. Parsons botched vital work for the Department of Defense on the Baghdad Police College, which did not produce a suspension even when the Special Inspector General for Iraq (SIGIR) produced a blistering report.

Section 112 would usefully make agencies like the Army pull their suspension and debarment officials out of organizations like the Judge Advocate General. Without making the SDOs independent, they will certainly have the appearance, and quite possibly, of having diminished clout and independence.

A strongly supporting instance looked into by the Commission, and particularly by myself, was AID's lack of reaction to Louis Berger pleading – as a company – to criminal fraud in its billing of U.S. contracts. AID decided not to require Louis Berger to go through even one single day of suspension, just an administrative agreement. The AID decision was made without even one single page of public explanation.

Besides section 112's comprehensive overhaul of suspension and debarment officials, its subsection 112(b)(8)requires "a description of the basis for any final decision declining to pursue suspension or debarment and information on any administrative agreements in lieu of suspension or debarment." That is precisely what was missing as to Louis Berger. A description would assist oversight by Congress and the press to see whether the deal represents agency coziness with a criminal contractor. The Commission saw such a need. (Commission final report, p.156-57)(discussion of Louis Berger).

Section 113. Additional bases for suspension of contractors.
A strongly supportive instance looked into by the Commission were kickbacks in KBR's LOGCAP III contract by managers to a Kuwaiti company, Tamimi. (Commission final report, p.79.) KBR also had civil false claims charges filed against it for making payments, in violation of government rules, to armed subcontractors. Neither of these

instances became the basis of even one single day of suspension. Section 112 would properly make these the basis of automatic suspension.

Industry has complained that automatic suspension does not give enough due process. However, automatic suspension has long been the rule when contractors are indicted. When the government had probable cause to file criminal or civil fraud charges, that in itself provides the basis for suspension in order to protect the government. The contractor will have its day in court to deal with those government charges. After all, suspension does not deprive the contractor of existing contracts, just new ones. Let the contractor clear its name before being given further and increased access to the Treasury.

Section 201. Limitations of contingency contracts.
Section 201 would limit the duration of some contingency contracts to one year, others to three years. This would address the problem that contracts used to handle the beginning of a contingency, the KBR's LOGCAP III for Iraq in 2003, stay in place for many years instead of getting competed. (Commission final report, p.75).

Some might ask whether this will inhibit contracting needed in the early phase of a contingency. This should not be a serious concern. Section 201 cuts more than enough slack for the agencies' contracting -- both by having the contract period limitation not kick in until 180 days after the operation starts, and, by expressly authorizing agency heads to grant a waiver. Without some kind of duration-limiting mechanism like this section 201, contracts where there was little or no real competition with last as long as a long contingency – many years for Iraq and more than a decade for Afghanistan.

The Commission devised the standard this section uses, namely, that it applies to (among others) to "competitively bid contracts for which only one offer was received by the covered agency." Some would urge that competitively bid contracts are always competitive enough, but, all too often, a contract may be bid in a way that discourages all but one contractor (for example, when a contract comes to an end, slanting the "competition" so only the incumbent has a good shot at getting the successor. In plain English, these are the all-too-numerous "no-bid contracts."

Section 201(b) would limit subcontractor tiering. Too many levels of tiering leads to abuses. The infamous private security contract for convoys that came to light after the 2004 Fallujah incident had four tiers from KBR at the top to Blackwater at the bottom. The Commission held a hearing on a poorly structured contract involving translators (Commission report, p.79).. Another example of a tiering-type arrangement looked into by the Commission was Paravant – a security contractor – having a hidden and all-too-convenient close relationship with Blackwater.

Section 202. Performance of certain security functions.
Section 202 requires risk analyses of private security contracts. In the entire bill, this is the most significant provision about which I had the view that a tougher provision, that closed down some wrong uses of security contractors, would be better. The Commission came to see the shadow the aftermath of the terrible incident of Blackwater in Nisur

Square in 2007. The internal State Department report had said that State would have to consider, after Nisur Square, whether the continuation of the Blackwater contract was "in the interest of the United States," but the State Department responded with a degree of evasion about this that matched the continuing harm Blackwater did in generating anti-American feeling among Iraqis.

Quite distinctly, Afghanistan had its own bad scandals about the problems in performance of private security contractors. A House subcommittee issued, in a report *Warlords, Inc.*, a powerful indictment of PSCs in Afghanistan. The Commission started from there and went further, discovering the cutting-edge findings that in Afghanistan, funding from U.S. contracts was being diverted by security subcontractors to the Taliban. (Commission final report, p. 73). Indeed, diverted security subcontractor funding was the second largest source of funding for the Taliban. The many incidents in the past year of violence against American soldiers from Afghans in "allied" positions lends a new concern to this subject. In 2012 an Afghan contractor (a translator) drove a truck that may have been intended as a suicide attack, onto an airfield when Defense Secretary of Defense Panetta was landing.

The start of any reforms of PSC issues is risk analysis, as the Commission devoted an entire chapter, in significant measure, to discussing (Commission final report, at 52-61). So as to that, section 202 is a good start. But, the provision should go further, as the Commission did, and describe some uses of PSCs that ought to be ended.

Section 203. Justification and approval for sole source contracts.
The Commission discussed several of the most famous problems of competition failure, such as Dyncorp's training contract in Iraq and KBR's RIO contract in Iraq (Commission final report, at 78, 83). The Commission proposed a number of recommendations. (Commission final report, p.153). Requiring a J&A of this kind is a useful first step.

Section 221 Contractor consent to jurisdiction.
This Subcommittee has compiled an impressive record to support this under the rubric of the "Rocky Baragona" bill. The Commission similarly recognized the problem that foreign contractors or subcontractors should consent to U.S. jurisdiction. (Commission final report, p.158).

Industry may say that this would discourage foreign contractors. That is implausible. The Commission saw how avidly foreign contractors pursue contingency contracts – how lucrative such contractors are for foreign contractors. As an example of what needs to be done, construction work by foreign subcontractors proved all-too-often to be faulty, and food services, like dining facilities, could have risks like foreign workers with communicable diseases. Our troops deserve at least the rights about such contracting, as to foreign contractors and subcontors, that they rightly have today about U.S. contractors.

Section 222. Combating trafficking in persons.
This section has both an excellent list of concrete examples of trafficking, and, the right approach of making prime contractors responsible for their subcontractors and labor

brokers. The Commission similarly found the problem acute and in need of vigorous action.. (Commission final report, p.160) The problem here is passive inaction both by the agencies and by the prime contractors, who shrug their shoulders and contend they are doing all they can. Congressional action is necessary to deal with the problem.

Section 223. Information on contractors through FAPIIS

The Commission observed that the new government database of contractor performance, FAPIIS, often did not include many dramatic contractor abuses on the public record, such as criminal or civil charges and administrative scandals whether reported in the press. An example would be the KBR "negligent electrocutions" scandal in Iraq. (Commission final report, p.89).

Even when a contracting officer might learn off very bad contractor performance, all too often they simply do not enter it in the database. The Commission found that for years of the KBR logistics contracting, either some data had been entered in an obscure and hard-to-find way, or, most often, had not been entered at all. For example, contracting officers failed to record DCAA questioning of costs or adverse findings about business systems. The lame came back from agencies that future contracting officers could just contact the present or past ones for information about KBR. Just think about how lame that answer is. There is no substitute for putting important information in the database.

The Project on Government Oversight keeps an entire public database of instances of contractor abuse which is largely unreflected in FAPIIS. This section would take the government database in the right direction.

Section 224. Contractor performance evaluations and PPIRS

The Commission found a severe problem with getting timely and frank evaluations into the PPIRS database: contracting officers face delay and difficulty from contractor replies drawing on unlimited legal resources. (Commission final report, p.155-56) This section would go right to the heart of that problem. There is such a problem with contracting officers learning the facts about past performance, that every effort should be made to further this. Industry may say that it needs to respond for future source selections. Let us first make sure that the source selection officials hear of the past performance problems, and then contractors, having made sure the source selection officials have heard, can say what they want at that later stage. The current system is deterring what it is most vital to encourage.

Section 231. Sustainability requirements for DoD projects.

The Commission did extensive work on the problems of sustainability, particularly in DoD projects in Afghanistan. (Commission final report, Chapter 2). These include the training facilities for CSTC-A in Afghanistan (Commission final report, p.72). This section is vitally nee3ded today because the drawdown in Afghanistan is accompanied by the pouring of billions of dollars into projects in Afghanistan, which may not be sustainable. This section is a vital step to making sober judgments about what to fund.

Never before has there been so large a role for the Defense Department in reconstruction as in Iraq and, at least as importantly, today and in years to come in Afghanistan. The Commission noted that many billions of dollars has been spent on Commander's Emergency Response Program (CERP) projects in Iraq and Afghanistan, including how, in 2011 alone, Defense programmed more than 4000 projects in Afghanistan (Commission final report, at 133). CERP funding of projects that the Afghans will not sustain, is grossly wasted. Similarly, the Commission found "the $6.4 billion per year in training, equipping, and otherwise supporting the Afghan National Security Forces goes far beyond what the government of Afghanistan can sustain" (Commission final report, at 72).

Take an important example of initiating, contracting for, or funding electricity generating or transmitting in Kandahar and Helmand provinces. I personally studied this during my trip to Kandahar, and then brought up at Commission hearings. DoD funded projects that AID would not. Some of these projects appeared to have been initiated just to make an immediately favorable impression among Afghans – like diesel generating plants – when there was little reason to think that, in years to come, Afghans would be able to sustain the projects.

Section 103. Responsibilities of inspectors general.

There is a real need to report to inspector general system for contingencies. It took too long in Iraq to have a response to the contingency – scandals had their roots in the buildup in Kuwait in 2002-2003, and then bloomed in 2003-2004, yet it was not until 2004 that a special inspector general was given charge. (Commission final report, p.146). This section is a sensible step to putting in place rapidly a lead inspector general as early in the contingency as possible. The work by the special inspectors general in Iraq and Afghanistan has been highly commendable. But, there is a need to have a mechanism in place to respond swiftly in future wars, that will kick in if and until Congress does not set up a special inspector general.