MEMORANDUM
April 16, 2012

To: Chairman McCaskill
Fr: Subcommittee on Contracting Oversight Staff
Re: Hearing on The Comprehensive Contingency Contracting Reform Act of 2012 (S.2139)

On Tuesday, April 17, 2012, at 10:30 a.m., the Subcommittee on Contracting Oversight will hold a hearing entitled, "The Comprehensive Contingency Contracting Reform Act of 2012 (S.2139)." Senator McCaskill and Senator Webb introduced S.2139 on February 29, 2012. Senators Blumenthal, Franken, and Tester have joined as co-sponsors. The legislation is based on the findings and recommendations of the Commission on Wartime Contracting in Iraq and Afghanistan (the Commission), which were presented in its final report to Congress in August 2011.

The purpose of this hearing is to review S.2139. The hearing will examine how S.2139 remedies systemic problems in contingency contracting. The hearing will also provide an opportunity to discuss what additional steps, if any, may be required to fully address findings in prior hearings and investigations by the Commission, Congress, and others regarding contracting in overseas military contingencies.

In preparation for the hearing, this memorandum provides background information on S.2139. A table with additional background on problem contracts in Iraq and Afghanistan will be provided separately.

I. Background

In 2007, Senator McCaskill and Senator Webb introduced legislation to create an independent Commission on Wartime Contracting to assess and examine potential waste, fraud, and abuse in contracting in Iraq and Afghanistan. The Commission was modeled on the Truman Committee, which investigated waste and fraud during World War II.[1] The legislation was incorporated in the National Defense Authorization Act for Fiscal Year 2008, which was signed by the President on January 28, 2008.[2] The Commission submitted its final report to Congress on August 31, 2011.

The Commission found that at least $31 billion, and possibly as much as $60 billion, was wasted through government contracts in Iraq and Afghanistan. According to the Commission, "waste and fraud during contingency operations in Iraq and Afghanistan averages about $12 million *every day for the past 10 years*." This assessment did not include the costs of projects

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[1] Government Executive, *Senate Dems Seek Probe of Wartime Contracting* (Sept. 25, 2007).

[2] Pub. L. 110-181, § 841, *National Defense Authorization Act for Fiscal Year 2008* (Jan. 28, 2008).

that cannot be sustained, which will increase the estimate by billions. In addition to the financial costs, the Commission found that poor planning, management, and oversight of contracts damaged the United States' strategic and diplomatic objectives. The Commission also made 15 sweeping recommendations to improve the management and oversight of contingency contracting, from changes to the management structure at the Defense Department, State Department, and the United States Agency for International Development (USAID) to improving the government's use of data and information technology. The Commission concluded that "[m]eaningful progress will be limited as long as agencies resist major reforms that would elevate the importance of contracting … ."[3]

Following the completion of the Commission's work, Congress held several hearings on the Commission's final report and recommendations. At a hearing of the Senate Armed Service Subcommittee on Readiness and Management Support that Senator McCaskill chaired in October 2011, Commissioner Dov Zakheim testified:

> [W]asteful contract outcomes in Iraq and Afghanistan demonstrate that federal agencies still do not see the heavy reliance on contractors as important enough to warrant thorough planning for and effective execution of the goods and services acquisitions that contingency requires.[4]

In his testimony, Commissioner Zakheim emphasized that legislative action by Congress would be necessary to ensure that federal agencies implemented the Commission's recommendations. He concluded, "[p]olicies are easy to make. Implementation … is really what counts."[5]

II. The Comprehensive Contingency Contracting Reform Act of 2012 (S.2139)

S.2139 builds upon the Commission's recommendations in its final report to Congress and on investigations conducted by the Subcommittee on Contracting Oversight, the Government Accountability Office (GAO), inspectors general, and other federal auditors and investigators. If enacted, the legislation would implement comprehensive reforms by (1) increasing accountability for contingency contracting and (2) transforming the way the federal government awards, manages, and oversees contracts in contingencies.

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[3] Commission on Wartime Contracting in Iraq and Afghanistan, *Final Report to Congress: Transforming Wartime Contracting: Controlling Costs, Reducing Risks* (Aug. 31, 2011). (emphasis in original).

[4] Senate Armed Services Subcommittee on Readiness and Management Support, *Hearing to receive testimony on the Final Report of the Commission on Wartime Contracting in Iraq and Afghanistan*, Testimony of Dov Zakheim, Commission on Wartime Contracting in Iraq and Afghanistan (Oct. 19, 2011).

[5] Senate Armed Services Subcommittee on Readiness and Management Support, *Hearing to receive testimony on the Final Report of the Commission on Wartime Contracting in Iraq and Afghanistan*, Testimony of Dov Zakheim, Commission on Wartime Contracting in Iraq and Afghanistan (Oct. 19, 2011).

A. Accountability for Contingency Contracting

If implemented, S. 2139 will increase accountability across government and within federal agencies for contingency contracting. S.2139 requires the federal government to address how it will pay for contingency operations. The legislation also establishes clear lines of authority for contingency contracting support within departments and requires inclusion of contract support in planning documents and professional training for departments and agencies. The legislation also strengthens oversight of contracting in contingencies.

1. Consideration of Costs

Lack of controls on spending for contingencies has contributed to skyrocketing costs in Iraq and Afghanistan, including the costs of contracting. Over 90% of the Defense Department's spending in Iraq and Afghanistan, which accounts for over 94% of the $1.3 trillion spent to date in those contingencies, has been provided through emergency or supplemental appropriations. This type of funding is exempt from the ceilings and limitations applicable in normal appropriations by Congress. Between 2003 and 2008, requests to Congress for wartime spending increased by 13% to 41% each year.[6]

The growing costs of the wars in Iraq and Afghanistan have been overwhelmingly financed through borrowing by the federal government. Earlier wars were paid for with a combination of tax increases, cuts in non-essential domestic spending, and borrowing. During World War II, for example, tax increases accounted for approximately 45% of the cost of the war and cuts to federal programs in combination with borrowing paid for the remaining 55%. During the length of the wars in Iraq and Afghanistan, however, the government has neither increased taxes nor cut domestic spending to pay for war funding, making borrowing the single mechanism to finance the nation's military efforts.[7]

S.2139 requires the Executive Branch to address how it will fund overseas contingency operations in the future. The President is required to ensure that any future request to Congress for funds in support of overseas contingency operations includes the proposed means to finance the requested amount, either by increases in revenue, decreases in federal programs, borrowing by the federal government, or by other means. The Director of the Office of Management and Budget must advise the President on the means to finance such requests in consultation with the

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[6] Congressional Research Service, *The Cost of Iraq, Afghanistan, and Other Global War on Terror Operations Since 9/11* (March 29, 2011). Defense Department war costs are in addition to regular costs such as salaries, training, regular weapons procurement, and research and development. *Id.*

[7] Steven M. Kosiak, Center for Strategic and Budgetary Assessments, *Cost of the Wars in Iraq and Afghanistan, and Other Military Operations Through 2008 and Beyond (Dec.* 15, 2008); U.S. Congress Joint Economic Committee, *Hearing on The Costs of the Iraq War* (Feb. 28, 2008).

Secretaries of Defense, State, and Treasury, and must report to Congress on all such obligated funds.[8]

2. Management Structures for Contingency Contracting Support

The Commission found that inadequate contract management at the Defense Department, State Department, and USAID contributed to waste, fraud, and abuse in Iraq and Afghanistan, and that most of the waste, fraud, and abuse was "foreseeable and avoidable." With respect to USAID, the Commission found:

> [T]he decentralized structure has not served the agency well. The gravest example is the fallout from the collapse of the Kabul Bank, showing that processes and rules that work elsewhere may be unsuitable in the midst of wartime operations.[9]

The Defense Department's management of contracts has been identified by GAO as a "high-risk" area for waste, fraud, and abuse since 1992. Among the significant and ongoing problems identified by GAO has been the Department's "approach to managing services acquisitions." GAO has found that these problems extended to contingency contracting.[10]

The Defense Department was required to develop a structure for management of its service contracts in non-contingencies over six years ago.[11] The department has struggled to comply. The State Department and USAID have never had such requirements.

S.2139 requires the Defense Department to include services contracts in support of contingency operations within its existing management structure for the procurement of service contracts. S.2139 also requires the State Department and USAID to develop their own management structure for procurement of services contracts, including contracts in support of contingency operations. The State Department and USAID must evaluate whether to include elements such as guidelines and procedures for acquisition planning, solicitations, contract oversight, contract performance evaluations, and risk management, as part of their management structures. The Departments must then report to Congress on those areas included in their respective management structures and those elements not included.[12]

3. Accountability within the Defense Department

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[8] S.2139 §§ 101, 102.

[9] Commission on Wartime Contracting in Iraq and Afghanistan, *Final Report to Congress: Transforming Wartime Contracting: Controlling Costs, Reducing Risks* (Aug. 31, 2011).

[10] Government Accountability Office, *High-Risk Series* (Feb. 2011) (GAO-11-278).

[11] Pub. L. 109-163, § 812, *National Defense Authorization Act for Fiscal Year 2006* (Jan. 6, 2006).

[12] S.2139 § 111.

In its final report to Congress, the Commission cited a lack of clear lines of responsibility as a major problem in Iraq and Afghanistan. The Commission concluded that "poor planning, management, and oversight of contracts … damaged [U.S. defense, diplomatic, and development] objectives."[13]

At the Defense Department, there is no single individual or office below the Secretary who is currently responsible for all aspects of contingency contracting in Afghanistan. According to the Department's Director of Expeditionary Business Operations:

> Today's Afghanistan contingency contracting offices do not yet operate synergistically. Dozens of different offices operate independently … A single acquisition leader must be given the responsibility – and authority – to coordinate and manage end-to-end acquisition processes, systems, and controls … Not only is streamlined leadership essential to creating and implementing unified strategy, but it is also necessary to ensure progress is institutionalized and lessons are noted.[14]

The Defense Department's actions to date to streamline and centralize acquisition planning and oversight have not been adequate to address these problems. In 2006, Congress required the Secretary of Defense to develop joint policies for planning, staffing, training, and assignment of responsibility for contingency contracting. However, a subsequent review by GAO in 2008 found that the Defense Department had either failed to fully develop the required policies or had not implemented those policies it had developed.[15]

In March 2010, the Department established an internal Functional Capability Integration Board (FCIB) to coordinate operational contract support planning, program management, requirements definition, and related issues, including the requirements established by Congress in 2006.[16] The FCIB's work is ongoing.

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[13] Commission on Wartime Contracting in Iraq and Afghanistan, *Final Report to Congress: Transforming Wartime Contracting: Controlling Costs, Reducing Risks* (Aug. 31, 2011).

[14] Andrew S. Haeuptle, Renanah Miles, Defense Acquisition University (DAU) Defense AT&L Magazine, *Effects Through Acquisition, Leveraging the Power of Contingency Contracting* (Feb. 2012).

[15] Pub. L. 109-364, § 854, *National Defense Authorization Act for Fiscal Year 2007* (Oct. 17, 2006); Pub. L. 110-181, § 849(a), *National Defense Authorization Act for Fiscal Year 2008* (Jan. 28, 2008); U.S. Government Accountability Office, *Contract Management: DOD Developed Draft Guidance for Operational Contract Support but Has Not Met All Legislative Requirements* (Nov. 20, 2008) (GAO-09-114R).

[16] Department of Defense, Under Secretary of Defense for Acquisition, Technology, and Logistics, *Memorandum: Establishment of the Operational Contract Support (OCS) Functional Capability Integration Board (FCIB)* (March 29, 2010).

S.2139 requires the Secretary of Defense to determine the chain of authority and responsibility within the Department for policy, planning, and execution of contract support for overseas contingency operations, including the responsibilities, roles, authorities, and objectives of officials within that chain, as they relate to contract support for overseas contingency operations. The Secretary must establish the chain and report to Congress within one year of the bill's enactment. Within 18 months, the Comptroller General must report on whether the chain of authority established by the Secretary enables the Department to achieve effective policy, planning, and execution of contract support for overseas contingency operations.[17]

4. Responsibilities of Chief Acquisition Officers within the State Department and USAID

The Commission concluded that meaningful progress in contingency contracting reform would not happen at the State Department and USAID without changing the role of the Chief Acquisition Officer. According to the Commission, "without a focus on contingency contracting in both State and USAID, skill sets, tradecraft, and knowledge gleaned from lessons learned will be soon forgotten and the benefits of any staffing gains will be lost."[18]

The Commission found that the State Department had failed to comply with the 2003 Service Acquisition Reform Act, which requires most federal agencies to designate a Chief Acquisition Officer (CAO) who reports directly to the agency head. Under current law, the CAO must be a non-career employee with acquisition management as his or her primary duty. The Commission found that the State Department's CAO is several levels below the agency head and deals with procurement issues as "just one item in a grab-bag of unconnected duties."[19]

The Commission also found that USAID had failed to comply with of the intent of the law. The agency believes that it is not statutorily required to have a CAO.[20] It does, however,

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[17] S.2139 § 121.

[18] Commission on Wartime Contracting in Iraq and Afghanistan, Final Report to Congress, *Transforming Wartime Contracting: Controlling Costs, Reducing Risks* (Aug. 31, 2011).

[19] These requirements in the Service Acquisition Reform Act were adopted in the fiscal 2004 NDAA. *See* Pub. L. 108-136, § 1421, *National Defense Authorization Act for Fiscal Year 2004* (Nov. 24, 2003). *See also* 41 U.S.C. § 1702; Commission on Wartime Contracting in Iraq and Afghanistan, Final Report to Congress, *Transforming Wartime Contracting: Controlling Costs, Reducing Risks* (Aug. 31, 2011).

[20] Department of Defense, Department of State, and USAID, *Joint Briefing for Subcommittee Staff* (April 10, 2012).

have an individual who fulfills many CAO functions. This individual is a career employee, with multiple additional responsibilities, who does not report directly to the agency's administrator.[21]

S.2139 requires that CAOs advise agency and department leadership regarding applicable contracting policy for overseas contingency operations and ensure compliance with policy requirements. S.2139 also requires the head of acquisition functions for the State Department and USAID to be the Chief Acquisition Officer for the department and agency. It sets direct reporting requirements to the Secretary and Administrator and requires that the CAO comply with all aspects of the Service Acquisition Reform Act of 2003.[22]

5. Collecting and Maintaining Information on Contingency Contract Support at the Departments of Defense and State

Congress and the public still do not have access to even basic information regarding contracts performed in Iraq and Afghanistan. Although the Defense Department, State Department, and United States Agency for International Development (USAID) have been required to report annually to Congress regarding contracts performed in Iraq and Afghanistan since 2008, the agencies have failed to provide complete and accurate information.

In 2011, GAO found that agencies provided inaccurate information on contract spending and personnel figures in their annual report to Congress because none of the sources they used to report on contractor personnel and spending numbers were reliable. According to GAO, the agencies' 2010 joint report understated the three agencies' obligations on contracts and grants in Iraq and Afghanistan by at least $4 billion.[23]

S.2139 requires the Defense Department and State Department to report annually to Congress during overseas contingency operations on the total number, value, and the extent of competition for contracts performed in the area of the contingency, total number of contractor personnel working under reported contracts, total number of contractor personnel performing security functions, and the total number of contractor personnel killed or wounded under reported contracts. S.2139 also requires that reports include assessment of policy, planning, management, and oversight of contract support by the departments.[24]

6. Contingency Contract Support Planning and Training at the Departments of Defense and State

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[21] Commission on Wartime Contracting in Iraq and Afghanistan, Final Report to Congress, *Transforming Wartime Contracting: Controlling Costs, Reducing Risks* (Aug. 31, 2011).

[22] S.2139 §§ 104, 131.

[23] Government Accountability Office, *Iraq and Afghanistan: DOD, State, and USAID Cannot Fully Account for Contracts, Assistance Instruments, and Associated Personnel* (Sept. 15, 2011) (GAO-11-886).

[24] S.2139 §§ 121, 131.

A shortage of trained personnel has severely hampered the management and oversight of contracts in Iraq and Afghanistan. According to Special Inspector General for Iraq Reconstruction Stewart Bowen:

> [s]upplying adequate numbers of personnel with the requisite expertise emerged as a critical bottleneck early in the reconstruction effort … Although personnel recruitment improved somewhat as the reconstruction enterprise matured, at no time were there sufficient numbers of experienced advisors to meet Iraq's critical capacity-building needs.[25]

Neither the Defense Department nor the State Department has adequately addressed the lack of trained personnel. Since 2006, the Secretary of Defense has been required by Congress to develop joint policies for training to address contingency contracting. In 2008, Congress required the Department to expand its policies to include development of requirements for training of military personnel outside the acquisition workforce. Despite these requirements, GAO has reported that the Defense Department has not fully developed or implemented adequate training policies.[26]

In March 2012, GAO reported that Defense Department has continued to fail to provide sufficient, trained personnel to oversee contracts in Afghanistan. GAO concluded that, while the Department has taken steps to improve its training, "the required training does not fully prepare [officials] to perform their contract oversight duties in contingency areas such as Afghanistan."[27]

The Defense Department has also failed to comply with its own guidance related to planning for contingency contracting. The Defense Department has required the combatant commands to include planning for operational contract support in their planning since 2006. However, GAO found that only four operational plans had been approved containing the required sections addressing operational contract support.[28]

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[25] Stuart W. Bowen, Jr., *Hard Lessons: The Iraq Reconstruction Experience* (2009).

[26] Pub. L. 109-364, §854, *National Defense Authorization Act for Fiscal Year 2007* (Oct. 17, 2006); Pub. L. 110-181, § 849(a), *National Defense Authorization Act for Fiscal Year 2008* (Jan. 28, 2008); U.S. Government Accountability Office, *Contract Management: DOD Developed Draft Guidance for Operational Contract Support but Has Not Met All Legislative Requirements* (Nov. 20, 2008) (GAO-09-114R).

[27] Government Accountability Office, *Operational Contract Support: Management and Oversight Improvements Needed in Afghanistan* (March 29, 2012) (GAO-12-290).

[28] Department of Defense, Joint Chiefs of Staff, *Joint Publication 5-0, Joint Operational Planning* (Dec. 26, 2006); Government Accountability Office, *Warfighter Support: DOD Needs to Improve its Planning for Using Contractors to Support Future Military Operations* (March 30, 2010) (GAO-10-472).

Neither the State Department nor USAID require personnel outside of their acquisition departments to be trained on contingency contracts. In addition, neither agency is currently required to include plans for the use of contractors in contingency planning.[29]

S.2139 requires professional education for Defense Department and State Department officials to include curriculum on contracting in contingencies. Military education must include requirements for contingency program management and the strategic impact of contract costs in contingencies. State Department professional education must develop curriculum to cover these areas as well as acquisition matters specific to the Department of State in support of overseas contingency operations.[30]

S.2139 also requires the Defense Department and State Department to add operational contract support as a requirement in planning documents. Contractor support must be reviewed quarterly in reports to Congress as a capability under the Department's existing readiness reporting system. The Secretary of State must establish a readiness reporting system for the State Department that includes review of contract support. The Secretary of State must also set requirements for performance of a Quadrennial Diplomacy and Development Review (QDDR), within the Department with elements to include contractor support for diplomatic and overseas development strategy and roles and responsibilities of contractors within the Department.[31]

7. Suspension and Debarment Officials

Federal agencies have failed to adequately use suspension and debarment to protect the government. In 2011, the Defense Department found that, over a 10-year period, the Department awarded $255 million to contractors who were convicted of criminal fraud and $574 billion to contractors involved in civil fraud cases that resulted in a settlement or judgment against the contractor, many of whom were never suspended or debarred.[32] In 2011, GAO reported that over a five year period from 2006 through 2010, the State Department, with over $33 billion in contracts, had only six suspension or debarment cases.[33]

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[29] Department of State, U.S. Agency for International Development, *Briefing for Subcommittee Staff* (April 10, 2012).

[30] S.2139 §§ 123, 133.

[31] S.2139 §§ 122, 132. A similar requirement to assess roles and responsibilities of contractors was adopted in the fiscal 2012 NDAA for the Department of Defense to be included in its Quadrennial Defense Review. Pub. L. 112-81, § 820, *National Defense Authorization Act for Fiscal Year 2012* (Dec. 31, 2011).

[32] Department of Defense, Under Secretary of Defense for Acquisition, Technology, and Logistics, *Report to Congress on Contracting Fraud* (Oct. 2011).

[33] Government Accountability Office, *Suspension and Debarment: Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could Be Improved* (Aug. 31, 2011) (GAO-11-739).

Agencies, including the State Department, which failed to adequately use suspension and debarment procedures to safeguard the government's interests, share similar characteristics: no full time dedicated suspension and debarment staff, lack of detailed policies and guidance, and absence of established practices to encourage referrals.[34] By contrast, the Air Force suspensions and debarment program, which had 367 suspension or debarment actions in 2010 and is widely regarded as successful, owes its effectiveness to a dedicated staff with a full-time, career official in charge who is separate from the acquisition chain, and "empowered" to protect the government.[35]

S.2139 requires Suspension and Debarment Officials (SDOs) for the Defense Department, the military departments, the State Department, and USAID to maintain a dedicated staff, adopt and comply with guidance on policies and procedures, and implement training and uniform practices for suspension and debarment activities. Each agency must maintain at least one full time official, whose duties are limited to the direction, management, and oversight of suspension and debarment activities. The legislation prohibits locating the SDO within the acquisition offices of the department or agency and requires that SDOs maintain membership and provide information to the Interagency Committee on Debarment and Suspension (ICDS) to assist the ICDS in fulfilling its annual reporting obligations to Congress.

S.2139 also provides for automatic suspensions where a contractor has been indicted, a civil or criminal action alleging fraud has been filed by the government, or there has been a final determination of a contractor's failure to pay outstanding obligations. This section applies only to suspension, not debarment, and its requirements may be waived at the discretion of the SDO.[36]

8. Responsibilities of Inspectors General

Congress has previously attempted to address the lack of oversight in contingencies by creating new Inspectors General. In 2003, Congress created the Special Inspector General for Iraq Reconstruction (SIGIR) and in 2008, it created the Special Inspector General for Afghanistan Reconstruction (SIGAR) to provide a comprehensive and independent means for oversight of programs and operations in Iraq and Afghanistan, respectively.[37] In the past nine years, SIGIR has issued over 200 audit reports and estimates that over $644 million has been recovered or saved based on actions taken by government agencies in response to SIGIR findings

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[34] Government Accountability Office, *Suspension and Debarment: Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could Be Improved* (Aug. 31, 2011) (GAO-11-739).

[35] Senate Committee on Homeland Security and Governmental Affairs, *Hearing on Weeding out Bad Contractors: Does the Government Have the Right Tools?* (Nov. 16, 2011).

[36] S.2139 §§ 112, 113.

[37] Pub. L. 108-106, § 3001, *Emergency Supplemental Appropriations Act for Defense and for Reconstruction of Iraq and Afghanistan* (Nov. 6, 2003). The Inspector General of the Coalition Provisional Authority was re-designated as the SIGIR under Pub. L. 108-375; Pub. L. 110-181, §1229, *National Defense Authorization Act for Fiscal Year 2008* (Jan. 28, 2008).

and recommendations. As of January 2012, SIGAR has completed 53 audits over a four year period, identifying over $259 million in funds that should be returned to the U.S. Investigations by SIGIR and SIGAR have resulted in over $224 million in recovered funds in Iraq and Afghanistan.[38]

Statutory Inspectors General have also made major contributions to the detection and prevention of waste, fraud and abuse in Iraq and Afghanistan. In 2011, GAO found that across government, the Inspectors General reported potential savings of about $43.3 billion resulting from their work in 2009 alone, which represents a return of approximately $18 for every dollar spent on the Inspectors General."[39] In just the six month period between April and September 2011, the Defense Department Inspector General conducted over 80 audits identifying $547 million in funds which could be better spent.[40]

S.2139 works within existing structures to increase the authority and responsibility of Inspectors General upon declaration of contingency operations. S. 2139 does not implement the Commission's recommendation that Congress create a permanent Office of Inspector General for Contingency Operations with authority to increase or decrease staff in the event of an overseas contingency. The Inspectors General for the Defense Department, State Department, and USAID have expressed concerns regarding this recommendation, including whether such an office could be effective. In addition, fiscal concerns remain about the efficacy of creating a new inspector general office, staff, and fund, all of which would be required by the creation of a permanent Inspector General for contingencies.[41]

S.2139 amends the Inspector General Act of 1978 to require the Chair of the Council of Inspectors General on Integrity and Efficiency (CIGIE) to designate a Lead Inspector General for Contingency Operations from among the existing Inspectors General for the Department of Defense, Department of State, and USAID. The Lead Inspector General is responsible for conducting oversight of all aspects of a contingency and must report annually to Congress on all overseas contingency operations. The Lead Inspector General is also responsible for resolving jurisdictional disputes and, along with the other covered inspectors general, may employ rehired

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[38] Special Inspector General for Iraq Reconstruction, *Quarterly and Semiannual Report to the United States Congress* (Jan. 30, 2012); Special Inspector General for Afghanistan Reconstruction, *Quarterly Report to the United States Congress* (Jan. 30, 2012).

[39] Government Accountability Office, *Inspectors General: Reporting on Independence, Effectiveness, and Expertise* (Sept. 21, 2011) (GAO-11-770).

[40] Department of Defense Office of Inspector General, *Semiannual Report to the Congress* (Sept. 30, 2011).

[41] Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Contracting Oversight, *Hearing on Oversight of Reconstruction Contracts in Afghanistan and the Role of the Special Inspector General* (Nov. 18, 2010).

annuitants and temporary personnel for up to five years to assist in conducting oversight of contingency operations.[42]

B. Contract Award, Management, and Oversight

S.2139 requires agencies to reduce reliance on noncompetitive contracting practices and restrict subcontracting practices that have resulted in a lack of visibility regarding where U.S. dollars flow in contingencies. The legislation also requires agencies to conduct risk analyses before relying on private security contractors and to terminate unsustainable reconstruction and development projects. It also strengthens tools to combat human trafficking.

1. Limitations on Noncompetitive Contracts

The Commission found that lack of competition contributed to the waste, fraud, and abuse of contracts in Iraq and Afghanistan. In just one example, the Commission estimated that failure to implement competition at the task-order level at the beginning of the $6 billion Army logistical support contract known as LOGCAP III and delays in awarding its competitive successor contract, LOGCAP IV, resulted in over $3.3 billion in waste.[43]

S.2139 limits the time period for contracts entered into by the Defense Department, State Department, and USAID in contingency operations to three years for competitively bid contracts and one year for all non-competitive contracts. These limitations can be waived depending on compelling needs of departments in contingencies if senior officials provide written justifications. The limitations do not take effect until six months after the commencement of an overseas contingency operation.[44]

S.2139 requires that when agencies solicit contract proposals from only a single source, use of the "unusual and compelling urgency" exception provided for in the Federal Acquisition Regulation (FAR) as the basis for entering into sole-source contracts, must be documented by the agency in a written justification and approval (J&A) of the reasons necessary for using this authority. The legislation requires agencies to compile these J&As and submit them annually in a report to Congress.[45]

2. Subcontractor Transparency and Oversight

The government's inability to conduct adequate oversight of subcontractors has also contributed to waste, fraud, and abuse. For example, in 2011, the Justice Department filed a False Claims Act case against KBR on the LOGCAP III contract based on allegations of

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[42] S.2139 § 103.

[43] Commission on Wartime Contracting in Iraq and Afghanistan, *Final Report to Congress: Transforming Wartime Contracting: Controlling Costs, Reducing Risks* (Aug. 31, 2011) (emphasis in original).

[44] S.2139 § 201.

[45] S.2139 § 203.

kickbacks to one of its subcontractors, Tamimi. According to the Commission, Tamimi, which held subcontracts worth over $700 million, and whose general manager was subsequently convicted of related felonies, was legally entitled to refuse to provide a complete record of its subcontracts to the Defense Contract Audit Agency or to the Commission.[46]

In June 2011, in response to a report by the Senate Foreign Relations Committee on U.S. foreign assistance to Afghanistan which found that USAID relied heavily on contractors, had limited oversight and visibility of prime contractors and subcontractors, and concluded that the U.S. should review Afghan aid policy to ensure that it engages only in projects that are "necessary, achievable, and sustainable", USAID implemented a number of improvements to address contractor accountability and enhanced oversight at USAID. These improvements include new limitations for subcontractors. USAID states that it now includes a clause in new contract awards in Afghanistan which permits USAID to restrict the number of subcontract tiers and requires the prime contractor to perform a certain percentage of the work.[47]

S.2139 limits the number of tiers that can be subcontracted for service contracts. These limitations can be waived depending on compelling needs of departments in contingencies if senior officials provide written justifications. The limitations do not take effect until six months after the commencement of an overseas contingency operation.[48]

3. **Reliance on Private Security Contractors.**

Problems with armed private security personnel in Iraq and Afghanistan have been widely reported. The most notorious incident occurred in September 2007, when guards employed by the private security company Blackwater allegedly shot and killed 17 civilians in Iraq's Nisur Square.[49] In Afghanistan, multiple private security contractors working for the Defense Department have been found to be funneling U.S. taxpayer dollars to Afghan warlords.[50] The performance of many private security contractors has also been found to be so inadequate that their failures "directly affect the safety of U.S. military personnel."[51]

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[46] Commission on Wartime Contracting in Iraq and Afghanistan, *Final Report to Congress: Transforming Wartime Contracting: Controlling Costs, Reducing Risks* (Aug. 31, 2011)

[47] Senate Committee on Foreign Relations, *Evaluating U.S. Foreign Assistance to Afghanistan* (June 8, 2011) (S. Rept. 112-21); Letter from USAID Administrator Rajiv Shah to Chairman John Kerry (June 1, 2011).

[48] S.2139 § 201.

[49] *U.S. Contractor Banned by Iraq Over Shootings*, New York Times (Sept. 18, 2007).

[50] Senate Committee on Armed Services, *Report: Inquiry Into the Role and Oversight of Private Security Contractors in Afghanistan* (Sept. 28, 2010).

[51] Senate Committee on Armed Services, *Report: Inquiry Into the Role and Oversight of Private Security Contractors in Afghanistan* (Sept. 28, 2010).

In 2008, Congress required increased training and reporting requirements for private security contractor personnel in contingencies as well as new contract clause provisions to reflect these changes. However, over four years later, regulations addressing selection, training, equipping, and conduct of contractor personnel performing private security functions in areas of contingency operations have still not been fully enacted.[52]

In its final report, the Commission concluded that existing standards do not provide adequate guidance to federal agencies about when private security contractors should be used in contingency operations. Those standards only address when the government is legally entitled to use such contractors, not whether it is advisable. The Commission recommended that agencies conduct a realistic risk assessment and noted that there could be circumstances, like those currently present in Afghanistan, where the risks outweighed the benefits of contracting for security functions.[53]

S.2139 requires that, for contingency operations that exceed six months, the commander of combat activities in a contingency, in consultation with the Secretaries of Defense or State, must perform a risk analysis consistent with the obligations for analysis under Defense Department Instruction 1100.22 to determine whether the continued performance of personal, mobile, or static security functions by contractors is appropriate. The Act requires the Secretaries of Defense and State must each report annually to Congress on the continued use of contractors to perform these security functions in overseas contingency operations. The review must incorporate the risk analysis performed by the combatant commanders and explain the departments' plans for maintaining performance of these functions.[54]

4. Uniform Contract Writing Systems and Information on Prices.

The award and management of contingency contracts could be improved through better implementation of information technology. For example, GAO has identified five overlapping

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[52] Pub. L. 110-181, § 862, *National Defense Authorization Act for Fiscal Year 2008* (Jan. 28, 2008). In 2011, The Defense Department prescribed regulations that fulfilled the first requirement in section 862. However, the Federal Acquisition Regulation (FAR) has not yet been revised to require a contract clause to reflect these regulations for covered contracts performed in areas of contingency operations, as required by the second requirement in that section. *See* Pub. L. 110-181, § 862. As of March 2012, the proposed FAR change has been submitted to the Office of Information and Regulatory Affairs in the Office of Management and Budget for review. *See* DFARS Case 2011-029: *Contractors Performing Private Security Functions*.

[53] Commission on Wartime Contracting in Iraq and Afghanistan, *Final Report to Congress: Transforming Wartime Contracting: Controlling Costs, Reducing Risks* (Aug. 31, 2011).

[54] S.2139 § 202.

and duplicative contract writing systems at the Air Force alone, which the Air Force has recently begun work to consolidate.[55]

There are also opportunities to achieve savings in contingency contracts through better sharing of information among agencies. The Defense Department's Director of Defense Pricing is developing a pilot system called the Contractor Business Analysis Repository (CBAR), which will give contracting officials tools to compare the price histories and the proposed rates on goods and services across the Department.[56] If expanded and shared, this type of information presents an opportunity for cost savings across the government.

S.2139 requires civilian and military agencies each to establish and maintain a single contract writing system for executive branch agencies. Agencies may use contract writing systems of another agency if the Office of Management and Budget determines that such use will result in cost savings to the federal government. S.2139 also requires that the Office of Federal Procurement Policy establish a database on prices for services and items charged to the federal government under existing contracts to assist acquisition personnel in monitoring price changes and conducting cost analyses regarding the reasonableness of prices for items and services.[57]

5. Combating Trafficking in Persons and Consent to Jurisdiction.

The Commission found that existing laws have been insufficient to stem human trafficking under contracts in Iraq and Afghanistan. The Commission stated:

> At many times during its travels and hearings, the Commission uncovered tragic evidence of the recurrent problem of trafficking in persons by labor brokers or subcontractors of contingency contractors. Existing prohibitions on such trafficking have failed to suppress it. Labor brokers or subcontractors have an incentive to lure third-country nationals into coming to work for United States contractors, only to be mistreated or exploited.[58]

The Commission also noted that there are limited opportunities for accountability for contractors because civil and criminal jurisdiction for foreign contractors operating overseas remains uncertain due to lack of personal jurisdiction in U.S. courts.

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[55] Government Accountability Office, *Information Technology: Department of Defense and Energy Need to Address Potentially Duplicative Investments* (Aug. 17, 2012) (GAO-12-241).

[56] *DCMA Leads Acquisition 'Revolution'* Federal News Radio (Nov. 16, 2011).

[57] S.2139 §§ 211, 212.

[58] Commission on Wartime Contracting in Iraq and Afghanistan, *Final Report to Congress: Transforming Wartime Contracting: Controlling Costs, Reducing Risks* (Aug. 31, 2011).

S.2139 makes it illegal to solicit, recruit or hire persons for work on contracts performed outside the United States by fraudulent means, such as material misrepresentations or promises regarding employment. The legislation also requires that these contracts include a termination clause applicable if any prime contractor, subcontractor, or labor broker employed under a contract with the Defense Department, State Department, and USAID engages in trafficking in persons, the procurement of commercial sex acts, or the use of forced labor, such as failure to repatriate an employee upon the end of employment or confiscation or concealment of an employee's immigration documents. Contractors would be required to annually certify to the government that no such activity has occurred by persons employed by them under the contract.[59]

S.2139 requires that foreign entities who choose to enter into contracts with the United States must consent to personal jurisdiction in the United States in suits brought by the government and authorized individuals for actions involving wrongful death, serious bodily injury, rape, or sexual assault.[60]

6. Information on Past Performance

The Commission found that agencies were not effectively using information about contractors' past performance in contingencies. According to the Commission, "agencies lack the necessary insight into contractor performance and have an increased risk of awarding contract to habitual poor performers." The Commission also found that the current process of performance evaluations, including contractor appeals, discourages candid evaluations and unduly delays sharing past performance information among contract officials. The Commission recommended that contractors not be allowed to appeal agency performance evaluations.[61]

In 2011, Congress partially addressed the problem of contractor evaluations by changing the applicable time period for the process for Defense Department contracts. Defense Department officials are now required to report past performance information into the government's past performance system 14 days after sharing it with the contractor, regardless of whether contractors provide rebuttals or additional information to contracting officials for inclusion in their evaluations.[62]

S.2139 requires that information about past performance and integrity of contractors currently maintained by the government in the Federal Awardee Performance and Integrity Information System (FAPIIS) must include information about an entire corporation, including

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[59] S.2139 § 222.

[60] S.2139 § 221.

[61] Commission on Wartime Contracting in Iraq and Afghanistan, *Final Report to Congress: Transforming Wartime Contracting: Controlling Costs, Reducing Risks* (Aug. 31, 2011).

[62] Pub. L. 112-81, § 806, *National Defense Authorization Act for Fiscal Year 2012* (Dec. 31, 2011).

any parent, subsidiary, or successor entity, not just an individual vendor. The legislation also amends the Federal Acquisition Regulation to require agencies to use the Contractor Performance Assessment Reporting System (CPARS) when submitting information to the Past Performance Information Retrieval System (PPIRS). It also eliminates the obligation for agencies to wait 30 days in order for contractors to respond to performance evaluations prior to submission.[63]

7. Sustainability

The federal government has spent hundreds of millions, if not billions, on projects in Iraq and Afghanistan which cannot be sustained by the host government. In just one example, the Commission found that the United States spent $40 million to partially construct a prison in Iraq, even though the Iraqi government explicitly stated it would not complete construction or occupy the prison after it was completed.[64]

The government of Afghanistan will be unable to sustain the overwhelming majority of projects built by the United States. In June 2011, the Senate Foreign Relations Committee released a report which found that 97% of Afghanistan's GDP is comprised of spending related to the military operation and international support. The Foreign Relations Committee report recommended that the Administration and Congress review Afghan aid policy to ensure that it engages only in projects that are "necessary, achievable, and sustainable."[65]

The majority of funding for reconstruction projects in Iraq and Afghanistan has come from the Defense Department. Overall, the Defense Department has spent more than $6.9 billion in Iraq and Afghanistan on projects funded by the Commanders' Emergency Response Program (CERP) and the Afghanistan Infrastructure Fund (AIF).[66] In one year, under the AIF alone, the Defense Department received over $400 million for reconstruction and development projects, including approximately $130 million for continuation of a power transmission project in Kandahar, $101 million for a power transmission project in Chimtala-Ghazni, and $23 million for a road construction project in Helmand Province. These projects were approved with cursory

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[63] S.2139 §§ 223, 224.

[64] Commission on Wartime Contracting in Iraq and Afghanistan, *Final Report to Congress: Transforming Wartime Contracting: Controlling Costs, Reducing Risks* (Aug. 31, 2011).

[65] Senate Committee on Foreign Relations, *Evaluating U.S. Foreign Assistance to Afghanistan* (June 8, 2011) (S. Rept. 112-21).

[66] Congressional Research Service, *The Cost of Iraq, Afghanistan, and Other Global War on Terror Operations Since 9/11* (Mar. 29, 2011); Congressional Research Service, *Afghanistan: U.S. Foreign Assistance* (Aug. 19, 2011).

explanations by the Department regarding how the host country might sustain these projects in the future.[67]

Under current law, sustainability analyses are already required to be performed for projects administered by USAID. The Foreign Assistance Act of 1961 requires that a sustainability analysis be conducted and certification of a host nation's ability to sustain a project be provided for any infrastructure projects over $1 million that are funded out of development-related accounts.[68]

S.2139 prohibits the Defense Department from entering into large reconstruction related projects in contingencies unless the Secretary of Defense in consultation with the U.S. commander of military operations in the country in which the project is to be carried out jointly certify that the host country can sustain the project once completed. Certifications must be provided to Congress and current projects in Afghanistan must be terminated unless they can be certified as sustainable or a determination is made by the Secretary that the project is necessary to the military mission.[69]

III. WITNESSES

The following witnesses will testify at the hearing:

Panel I

The Honorable Jim Webb
U.S. Senator

Panel II

Richard T. Ginman
Director, Defense Procurement & Acquisition Policy
U.S. Department of Defense

The Honorable Patrick Kennedy
Under Secretary for Management
U.S. Department of State

Angelique Crumbly
Acting Assistant to the Administrator, Bureau of Management
U.S. Agency for International Development

Panel III

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[67] Department of Defense, Afghanistan Infrastructure Fund: Approved FY2011 Projects Supporting the Afghanistan Infrastructure Fund (June 27, 2011).

[68] 22 U.S.C. § 2361.

[69] S.2139 § 231.

Lynne M. Halbrooks
Acting Inspector General
U.S. Department of Defense

Harold W. Geisel
Deputy Inspector General
U.S. Department of State

Michael G. Carroll
Acting Inspector General
U.S. Agency for International Development