

May 25, 2001

General Accounting Office
Office of General Counsel
Attention: William T. Woods
Room 7476
441 G St. NW
Washington DC 20548

Dear Mr. Woods:

I am writing to request an opportunity to present written and oral testimony to the GAO Commercial Activities Panel. I request this opportunity on the basis of my experience both as the Executive Director of the Reserve Officers Association (ROA) and as the former Deputy Assistant Secretary of the Army for Force Management, Manpower and Resources. In the latter capacity, I was directly involved in all Army force management and outsourcing decisions. In addition, I was involved in preparing the Army's initial response to the FAIR Act inventory and Defense Reform Initiative Decision 20.

ROA represents officers from all seven uniformed services. Most of our members are Reservists who provide a mobilization base for combat support and combat service support functions in the medical, logistics, engineering, garrison support, adjutant general, legal and similar support functions. In addition to working in the civilian economy, these Reservists deploy when needed to the Persian Gulf, Bosnia, Kosovo and other theaters.

I request the opportunity to testify to highlight the following concerns with the work of the Commercial Activities Panel.

The bulk of our concerns focus on the role of contractors on the battlefield. ROA urges the Panel to focus on the fact that war is not a commercial function.

We acknowledge that contractors have been present in the rear echelons of the battlefield since the earliest days of the Republic. ROA does not dispute that contractors could be used in theater to supplement shortfalls in military force structure. ROA is vehemently opposed, however, to substituting contractors for existing deployable military logistics positions.

ROA is opposed to expanding the role of contractors on the battlefield because the nature of war is changing. Because the future battlefield will be different than past battlefields, the role of contractors in theater must change along with the nature of war. The proliferation of ballistic missiles means that our future foes will strike deep into our rear echelon and engage targets in what we formerly considered relatively safe areas. Similarly, the proliferation of chemical and biological weapons compounds the lethality of the future theater of war. As a result, maintenance, supply and other personnel stationed in the rear are as likely to be killed or operate in a contaminated environment as soldiers operating on the front lines are.

A superficial analysis of these logistician positions could lead one to conclude that they perform commercial functions that could be performed more cheaply by contractors on the battlefield of tomorrow. Such an analysis is inconsistent with national security.

Ballistic missiles, weapons of mass destruction and traditional munitions do not discriminate between soldiers and contractors. Replacing military logistics personnel with contractors will lead to contractor casualties. If a military unit is wiped out, the military will replace it with another military unit. Unit cohesion, discipline and the UCMJ ensures that soldiers will not balk at orders to perform their duties in a lethal environment.

No such safeguards can ever exist with respect to contractors on the battlefield. If such safeguards existed, they would not be contractors, they would be soldiers! If a group of contractors were wiped out by a ballistic missile, there is no legal or other compunction that would cause a subsequent group of contractors to willingly replace the casualties in a lethal environment. When that occurs, it will be too late for the Pentagon to enter into negotiations over increased compensation or moving front-line units around to provide additional force protection for the contractors.

Additional questions arise as to the status of contractors under the Geneva Convention, their status should they be captured by the enemy, etc.¹

We recognize the on-going contributions of contractors on the ground in the Balkans. The Balkan theater is, however, fundamentally different than a shooting war where ballistic missiles and weapons of mass destruction are used. We do not organize forces for peacekeeping duties. We organize forces for war. Not one American, military or contractor, has been killed by hostile fire in the Balkans. It is certain the performance of contractors would change if they were dying on a daily basis in the Balkans. Accordingly, the Balkans provides few relevant lessons for organizing our logistics forces for the combat of the future.

Using contractors on the battlefield, in support of military operations, or for military training, also poses risks to maintaining adequate civilian oversight over the military. The very nature of private entities, as distinct from civil service and military organizations, makes their operations less visible and accountable to the public, the Congress and the Executive branch. The oath of office rendered by military or civil servants is not merely an archaic distinction between government officials and the private sector. Because a government official takes an oath of office, there are real distinctions in the kind of command and control, and ultimately oversight, that may effectively be rendered over the activities undertaken by a government official, as opposed to a mere contractor. The constitutional implications of such attenuated oversight have not been adequately considered during this rush to privatization.²

The Department of Defense maintains an internal inventory of military positions classified as inherently Governmental or Commercial. We are concerned that some in industry,

¹ This issue is not far-fetched. At least one transport logistician was a POW during the Gulf War.

² See, e.g., Ann Markusen, *The Case Against Privatizing National Security* (Council on Foreign Relations, January 2001): "Ongoing work by George Washington University Professor Deborah Ant (1999) raises a series of questions about the likelihood that such firms will be accountable to civilian and democratic goals. Will established systems for holding militaries accountable work just as easily for private firms? Will new systems develop that reflect prevailing norms? Or does the devolution of security tasks to private firms threaten to empower new groups and transform authority over who decides when, how and over what to fight? . . . What happens when a firm's home government's interest and its employers' interest diverge? How will the potential to sell army and air force modernization advice worldwide affect the proliferation of conventional weapons and techniques?"

Pentagon acquisition offices and the Office of Management and Budget will argue that military positions should be included in the FAIR Act Inventory, and for reducing force structure classified as “commercial” through competition or direct conversion to contract to fund force modernization.

We are aware of the Administration’s goal of converting to contract at least 50 percent of the positions performed by civilian employees on the FAIR Inventory.³ In many instances, military personnel perform the same functions side by side with civilian employees. Functions, not positions, are packaged for competition. It is more expensive to contract out such functions because DOD must still pay the military personnel whose jobs were replaced by contractors. When the Department competes those functions it must be doing so because converting those functions to private sector performance is important even if it costs the DOD billions of dollars more to have contractors perform those functions.

Furthermore, proponents of competition may claim that they have “saved” the Department money for force modernization because they will have reduced the number of in-house civilians performing the function and replaced them with contractors. This only holds true if DOD eliminates the military positions and reduces military end strength.

We submit that it is dangerous to reduce military end strength simply because a given military position is performing a commercial function. There are a host of bona fide national security reasons as to why military personnel will perform commercial functions during peacetime. These should be addressed during the June hearing.

We are also concerned that as the FAIR Inventory decreases, pressure will mount to convert more to contract, starting with functions currently listed on the FAIR Inventory, but not ending there. Directives to compete a percentage of the FAIR Inventory have a perverse incentive to force onto the FAIR Inventory functions currently excluded as inherently Governmental, or functions performed by military personnel. This would be an abuse of the FAIR Inventory. Contractors are not subject to the Uniform Code of Military Justice, civil service ethical rules, and the liabilities associated with being Government officials. The attenuated public oversight and accountability of functions performed by contractors, even avowedly commercial ones, must be subject to regulation other than that of the marketplace.

There is increasing concern about a gap between military and civilian society.⁴ Creating an army consisting only of trigger pullers and contractors is not healthy for our democracy and begins to resemble a mercenary force, rather than a force motivated by sacrifice, service and patriotism.

There are also unique challenges to considering the Reserves in the FAIR inventory. The FAIR Act requires reporting “full time equivalents” by “activity”. A determination will have to be made as to whether the “full time equivalent” associated with a reservist will apply only to his 39 days of training per year, or whether the full time equivalent of the reservist will be counted when he is mobilized and deploys. This analysis implicates what type of performance work statement one would have to construct to replace a reservist with a contractor, something that on its face seems to be an expensive and useless endeavor. But if the intention is to include everything on the FAIR Inventory, including functions that ought not be competed (e.g.,

³ We offer no opinion on whether this goal is appropriate for agencies other than DOD and the Coast Guard that is within the Department of Transportation.

⁴ See, e.g., the studies done by Peter Feaver and the Triangle Institute for Security Studies. Their research can be viewed at www.poli.duke.edu/civmil/summary_digest.pdf.

inherently governmental and those exempt by national security concerns or by law), then this question will have to be addressed.

Closely related to this concern is that the cost of reporting full time equivalents for Reservists, or any kind of military, will be substantial. DOD does not currently account for military on a full time equivalent basis. There is no reason why it should if cost is no issue. We believe cost ought to be an issue and that, in fact, the costs of compiling the FAIR Inventory as a whole ought to be addressed by this Panel. A currently open-ended component of this cost is the amorphous notion of what constitutes an “activity” for purposes of FAIR and activity based costing. The level of detail where activity is defined is highly subjective and open-ended.

The Panel must also clarify the application of the FAIR Act to the thousands of military technicians. These are civilian employees who must also serve in the Reserve or National Guard. As civilians, they perform maintenance and other functions to maintain a unit’s readiness during the week.⁵ On the weekend, they are members of the Reserve or National Guard unit and deploy with the unit during wartime. These citizen-soldiers are currently listed as performing commercial functions on the FAIR Inventory for the Army. Given their deployable wartime role and day-to-day intimate involvement with their unit, there is serious concern that readiness will suffer if their weekly “commercial” functions are turned over to contractors.

Having said all this, there are circumstances in which the ROA would find including military on the FAIR Inventory as less objectionable, provided all of the following safeguards were adequately accounted for:

1. A contractor inventory like that currently being compiled by the Army is maintained and used for the purposes articulated by the Army. The readiness and capabilities of military units and the organizational tail supporting them in the operating forces and infrastructure is best measured by their equipment fill, manning levels and training. The manning level of military units and their support includes accounting for the augmentation by contractors in the operating forces or substitution of in-house capabilities with contractors in the organizations supporting the operating forces. (Macro-estimates based on contract dollars at the Departmental level do not provide this kind of information provided by the Army contractor inventory.) Moreover, the use of ceilings and arbitrary cuts in the acquisition workforce and management headquarters have led to contractors assuming a greater role in effectively making inherently Governmental decisions.⁶
2. It is recognized that the fact that a function is classified as non-inherently Governmental (or commercial) does not mean that the function ought to be converted to contract. A separate statutory category should be established for the FAIR Inventory, corresponding to the current Department of Defense national security based exemptions from private sector performance. Medical care is a commercial function. But no one would seriously want to replace the Medical Corps with contractors when that would mean telling the soldiers subjected to a terrorist attack that they would be treated by host nation contract doctors and nurses.

⁵ Military Technicians are employed under 5 U.S.C. § 3101 and are administered under 10 U.S.C. § 10216 et seq.

⁶ See, e.g., Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 Admin. L. rev. 859-926 (2000).

3. The practice of establishing arbitrary and capricious competition percentage targets based on what is on the FAIR Inventory would have to cease.
4. The challenge and appeal process remains limited to the issue of what is or is not inherently Governmental. Military end strength and the National Military Strategy should not be hostage to commercial interests in a challenge and appeal process. If a Military Department exempts a commercial function on grounds of national security, that should be the end of the matter. And it would undermine good order and discipline to allow a challenge and appeals process outside the chain of command for military members.
5. As recognized by the General Accounting Office, it is disingenuous to argue for including military and inherently Governmental civilian employees on the FAIR Inventory based on a professed need for a complete picture for purposes of making better decisions, and yet to dogmatically resist at the same time getting a complete picture on the contractor workforce.
6. The question of what should be converted to private sector performance can no longer be viewed as exclusively an acquisition and force modernization issue. It is also a force structure and readiness issue. There is a perception that this process is biased towards contractors and the acquisition community and against the uniformed military. The credibility of the process would improve if there this panel included a formal role for the Under Secretary of Defense for Personnel and Readiness, and the Joint Staff, and not simply the Acquisition side of the Pentagon.

These are only some of the issues that I would like to address to the Committee through fuller written, and oral, testimony.

Sincerely,

Jayson L. Spiegel
Executive Director

cc: Panel Members