Accountable to Beneficiaries? The Modern Development Enterprise & its Contractors at War: Lessons on Accountability from Afghanistan to Inform the Contracting Reform Agenda

by

Huma Gupta

Bachelor of Arts in History and Asian Studies
University of Cincinnati
Cincinnati, Ohio (2008)

Submitted to the Department of Urban Studies and Planning in partial fulfillment of the requirements for the degree of

Master in City Planning

at the

MASSACHUSETTS INSTITUTE OF TECHNOLOGY

June 2011

© Huma Gupta. All Rights Reserved.

The author here by grants to MIT the permission to reproduce and to distribute publicly paper and electronic copies of the thesis document in whole or in part.

Author

Department of Urban Studies and Planning

19 May 2011

Certified by

Professor Balakrishnan Rajagopal
Department of Urban Studies and Planning
Thesis Supervisor

Accepted by

Professor Joseph Ferreira
Chair, MCP Committee
Department of Urban Studies and Planning
ABSTRACT

This thesis will review the most relevant existing and proposed accountability mechanisms for private development and security contractors coming out of the human rights, public administration and anti-corruption fields. These three fields were selected because first, they directly shape the policy discourse around contractor accountability. Second, they each have a different emphasis or bias in their policy recommendations. Human rights advocates, for instance, are largely concerned about applying legal frameworks to and extending jurisdiction over private military and security contractors. Since private development companies by and large rely on PMSCs in lieu of adequate military security, this perspective is important to ensure development contractor accountability. Human rights discourse thus, primarily emphasizes legal accountability mechanisms.

The anti-corruption field focuses on political accountability mechanisms for private contractors through initiatives to increase transparency and facilitate better governance. Lastly, public administration discourse encompasses a series of bureaucratic procedures and regulations that institutionalize accountability mechanisms through reporting, database creation, and standard operating protocols. In the human rights, anti-corruption and public administration fields, there is a cross cutting emphasis on professional accountability, whereby individual experts or firms are both internally accountable to a code of conduct and externally accountable to their peers and industry partners. But none of the existing American accountability mechanisms includes accountability to beneficiaries. Accountability is embedded within a series of relationships, whereby one party has the right to demand information, voice their opinions in a public forum and have enough leverage to impose sanctions or give rewards to another party. All present reform efforts however, continue to reinforce upwards, monetary accountability to donors, while marginalizing the ability of beneficiaries to hold private contractors accountable.

The question this thesis will try to answer is: As American development projects are increasingly contracted out to private actors in conflict contexts, how should we reframe the concept and practice of "accountability" towards beneficiaries?
SPECIAL THANKS

To my advisor Dr. Balakrishnan Rajagopal, my thesis reader Dr. Alice Amsden, Lorenzo Deslegues, Dr. Pierre Fallavier, Charles Semaris, Narinder Gupta, Sandy Wellford and Kirsten Greco for all their support and wisdom.
# TABLE OF CONTENTS

8 INTRODUCTION ‘ACCOUNTABILITY’ IN THE MODERN DEVELOPMENT ENTERPRISE

17 CHAPTER 1 THE ACCOUNTABILITY MACHINE & PRIVATE CONTRACTORS

36 CHAPTER 2 THE MODERN DEVELOPMENT ENTERPRISE

43 CHAPTER 3 SECURITY-DEVELOPMENT NEXUS

51 CHAPTER 4 EVALUATION EXISTING ACCOUNTABILITY FRAMEWORKS

- 51 Public Administration
- 60 Anti-Corruption
- 66 Human Rights

81 CHAPTER 5 RECOMMENDATIONS

84 CONCLUSION

85 WORKS CITED AND BIBLIOGRAPHY

---

**FIGURES & TABLES**

5-6 USAID Contracting Scenarios in Afghanistan

7 A Complex Web of Accountability

18 Accountability Relationships with Local Contractors

25-26 Accountability Timeline 2002-2011

37 Private Development Contractors: Year Founded and USAID Contracts in 2010
## List of Acronyms

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>AREU</td>
<td>Afghanistan Research and Evaluation Unit</td>
</tr>
<tr>
<td>BAPSC</td>
<td>British Association of Private Security Companies</td>
</tr>
<tr>
<td>CAI</td>
<td>Creative Associates International, Inc.</td>
</tr>
<tr>
<td>CPA</td>
<td>Coalition Provisional Authority</td>
</tr>
<tr>
<td>CWC</td>
<td>Congressional Commission on Wartime Contracting in Iraq and Afghanistan</td>
</tr>
<tr>
<td>DAI</td>
<td>Development Alternatives, Inc.</td>
</tr>
<tr>
<td>DCAA</td>
<td>Defense Contract Audit Agency</td>
</tr>
<tr>
<td>DCMA</td>
<td>Defense Contract Management Agency</td>
</tr>
<tr>
<td>DFID</td>
<td>UK-Department for International Development</td>
</tr>
<tr>
<td>DHS</td>
<td>Department of Homeland Security</td>
</tr>
<tr>
<td>DoD</td>
<td>Department of Defense</td>
</tr>
<tr>
<td>DoD-OIG</td>
<td>Department of Defense-Office of the Inspector General</td>
</tr>
<tr>
<td>DoS</td>
<td>Department of State</td>
</tr>
<tr>
<td>FAA</td>
<td>Foreign Assistance Act of 1961</td>
</tr>
<tr>
<td>GAO</td>
<td>Government Accountability Office</td>
</tr>
<tr>
<td>HOOAC</td>
<td>Afghan High Office of Oversight and Anti-Corruption</td>
</tr>
<tr>
<td>ICG</td>
<td>International Crisis Group</td>
</tr>
<tr>
<td>IOM</td>
<td>International Organization of Migration</td>
</tr>
<tr>
<td>IPOA</td>
<td>International Peace Operations Association</td>
</tr>
<tr>
<td>IRD</td>
<td>International Relief and Development</td>
</tr>
<tr>
<td>IWA</td>
<td>Integrity Watch Afghanistan</td>
</tr>
<tr>
<td>LBG</td>
<td>The Louis Berger Group, Inc.</td>
</tr>
<tr>
<td>MEJA</td>
<td>Military Extraterritorial Jurisdiction Act</td>
</tr>
<tr>
<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
</tr>
<tr>
<td>OSCE</td>
<td>Organization for the Security and Co-operation in Europe</td>
</tr>
<tr>
<td>PMSC</td>
<td>Private Military and Security Companies</td>
</tr>
<tr>
<td>PRT</td>
<td>Provincial Reconstruction Team</td>
</tr>
<tr>
<td>PSC</td>
<td>Private Security Company</td>
</tr>
<tr>
<td>R2P</td>
<td>UN Responsibility to Protect Doctrine</td>
</tr>
<tr>
<td>RTI</td>
<td>Research Triangle Institute</td>
</tr>
<tr>
<td>SIGAR</td>
<td>Special Inspector General for Afghanistan Reconstruction</td>
</tr>
<tr>
<td>SIGIR</td>
<td>Special Inspector General for Iraq Reconstruction</td>
</tr>
<tr>
<td>TI</td>
<td>Transparency International</td>
</tr>
<tr>
<td>UNDP</td>
<td>United Nations Development Program</td>
</tr>
<tr>
<td>USAID</td>
<td>United States Agency for International Development</td>
</tr>
<tr>
<td>USAID-OFDA</td>
<td>USAID-Office of Foreign Disaster Assistance</td>
</tr>
<tr>
<td>USAID-OIG</td>
<td>USAID-Office of the Inspector General</td>
</tr>
</tbody>
</table>
Examples of types of actors involved and how different tiers of subcontracting work.

**Tier 1 Subcontractor**
- UNOPS
- Afghan NGO

**Tier 2**
- Regional Subcontractor, e.g. Turkey/Pakistan
- Afghan Subcontractor

**Tier 3**
- Implementer
  - Regional Subcontractor, e.g. Turkey/Pakistan
  - Afghan Subcontractor
USAID CONTRACTING SCENARIOS IN AFGHANISTAN

Explanation of Diagram
USAID primarily disburses funding through three mechanisms: Contracts, Cooperative Agreements and Grants. The diagram illustrates some of the potential arrangements of for-profit and non-profit firms with USAID. This does not mean that a company who generally receives cooperative agreements can not be contracted or receive a grant. This diagram simply shows possible funding agreements as they have manifested in Afghanistan.

Each firm receiving project funding for USAID, tends to rely on a host of subcontractors for various services, including project construction, monitoring & evaluation and conducting risk assessments.

Though this diagram shows three tiers of subcontracting, in conflict zones, there can be up to five tiers of subcontracting before project implementation. At each tier, the subcontractor extracts an overhead administrative costs (% of the contract). The greater the number of contracting tiers, the harder it is for USAID to maintain visibility over who is actually implementing the project. Each tier of subcontracting also means a delegation of responsibility, relying on professional accountability to ensure the project is completed in a timely and effective manner.
A COMPLEX WEB OF ACCOUNTABILITY

EXAMPLES OF CONTRACTING RULES AND CONTRACTOR DATABASES

EXCLUDED PARTIES LIST SYSTEM
FEDERAL ACQUISITION REGULATIONS

FOREIGN SECURITY CONTRACTORS
AFGHAN SECURITY CONTRACTORS
WATAN RISK MANAGEMENT

TYPES OF FOREIGN AND DOMESTIC PRIVATE SECURITY COMPANIES

US OVERSIGHT AGENCIES
COMMISSION ON VOLUNTEER CONTRACTING & CODE OF ETHICS
INSPECTOR GENERAL

PRIVATE MONITORING & EVALUATION CONTRACTOR

US AID
FROM THE AMERICAN PEOPLE

PRIME CONTRACTOR
DAI

CONTRACTING AGENCY

US AID

SUBCONTRACTOR

ACTORS DIRECTING & IMPLEMENTING PROJECT

AFGHAN MIN. OF URBAN DEVELOPMENT
AFGHAN ANTI-CORRUPTION AGENCY

THE HIGH OFFICE OF OVERSIGHT & ANTI-CORRUPTION

3AAXDIWOD Y
INTRODUCTION

'Accountability' in the Modern Development Enterprise

Crises and wars provide tremendous opportunities to ask questions that are generally overlooked in times of peace and prosperity: What went wrong? Who was responsible? How can we prevent such instances in the future? Crises tend to shock the bureaucratic, legal, professional and political machineries into action—to hold those responsible to account. Accountability is thus, the default mode of discourse in liberal democracies where "sovereignty lies with the citizen, and authority must be held to account." Each successive crisis—such as the 1986 Challenger space explosion, the 1998 Clinton-Lewinsky scandal and 2007 financial crisis—prompts the creation of congressional commissions, hearings, inquiries, laws, new bureaucratic safeguards and varying degrees of sanctions. For the purposes of this thesis, I refer to this crisis-response system as The Accountability Machine.

After a decade of engaging in two theatres of war in Afghanistan and Iraq, we find ourselves in the midst of a severe budget crisis that has placed every American agency relying on private security and development contractors under close scrutiny. Due to successive cuts in government personnel over decades, agencies have made contractors the default option. The wars in Afghanistan and Iraq have revealed to what extent the gap between government capacity and ever-increasing government responsibilities have widened. The Congressional Commission on Wartime Contracting (CWC) has found that "reduced government staffing and increased government responsibility opened a breach into which contractors have stepped. And a missing element in decisions to contract has been the recognition that increased reliance on contractors increases the burden on government to manage and oversee them." What the wars in Afghanistan and Iraq revealed is a longstanding trend in the U.S. government to rely on consultants and contractors to compensate for external pressures to downsize—resulting in what Christopher McKenna has termed the rise of the "contractor state." Allison Stanger refers to America as "one nation under contract," which promotes the practice of laissez-faire outsourcing. She observes that "contracting in conflict environments...amounts to a stealthy whole-scale paradigm shift in the core business of American foreign policy," which is indicated by how contractors "have become prominent across the so-called three Ds of defense, diplomacy, and development, as well as in homeland security."

As public functions—whether performed domestically or internationally—are outsourced to private actors, it calls into question that exactly the "authority" is in the phrase "sovereignty lies with the citizen, and authority must be held to account." To what extent can the government agency effectively monitor private contractors and ensure contractor actions are accountable not only to the hiring agency, but also to the public they serve?

These are the questions facing the United States Agency for International Development (USAID), an agency notorious for using contracts, cooperative agreements and grants to implement all of its projects. USAID has been specifically targeted for fiscal reform, draconian cutbacks and even dissolution by some marginal congressional voices. Two days before her confirmation as Secretary of State, on January 13 2009, Hillary Clinton explained the challenges facing the agency:
BOX 1

"THE ACCOUNTABILITY MACHINE" refers to a set of often iconic political, bureaucratic, legal and professional processes western governments such as the U.S. employ in the wake of a crisis or scandal (largely to restore voter confidence.) Accountability in this definition is based on the premise that 'sovereignty lies with the citizen and authority must be held to account.'

BOX 2

"THE MODERN DEVELOPMENT ENTERPRISE" refers to the American international development strategy that models itself on a cost-effective private sector model: Investments in international development projects abroad will yield returns in the form of (1) the creation of vibrant markets abroad to ensure our economic security, (2) prevention of weak states succumbing to political violence, or even terrorism and (3) stabilizing current conflict-ridden areas by targeting the root drivers of instability. The private sector model also supports the continued use of private development contractors for both project implementation and project monitoring, insofar as there is adequate oversight capacity in the agency.
I think it’s fair to say that USAID, our premier aid agency, has been decimated. You know, it has half the staff it used to have. It’s turned into more of a contracting agency than an operational agency with the ability to deliver. The systematic gutting of the agency’s operational budget has been strangely juxtaposed with the Bush Administration’s 2002 National Security Strategy that firmly placed development on equal footing with the other pillars of national security: defense and diplomacy. The 3Ds operationalize development as part and parcel to our national security.

This characterization of development as a security strategy was enshrined in John F. Kennedy’s words as he signed the Foreign Assistance Act of 1961 that consolidated several international aid programs under the newly created USAID:

The amount of money that is involved in the nonmilitary areas are a fraction of what we spend on our national defense every year, and yet this is very much related to our national security and is as important dollar for dollar as any expenditure for national defense itself.

In addition to justifying foreign assistance on the basis of national security, JFK used an economic calculation to equate investment in development as providing returns for security. At the time, this was part of a broader cold war strategy. Fifty years later, this cold war calculation has not changed.

As Rajiv Shah, the current reform-minded USAID Administrator stated a year into his tenure, “I want the American taxpayer to know that every dollar they invest in USAID is being invested in the smartest, most efficient and most transparent way possible.” His speech that day was entitled The Modern Development Enterprise. Shah has introduced USAID Forward, a bundle of procurement, budgeting, evaluation and policy reforms, in part to assuage Washington critics who point to reports of rampant fraud, waste and abuse in the modern development enterprise that he is seeking to build. His administration has also initiated the Accountable Assistance for Afghanistan (A3) initiative that seeks to mitigate fraud, increase transparency and monitoring and evaluation of projects to ensure aid effectiveness. These types of accountability reforms are grounded in public administration debates about increasing government efficiency and procurement management. These will be evaluated in Chapter 4.

The evidentiary basis for introducing new USAID reforms comes from various oversight agencies in the accountability machine, such as the USAID-Office of the Inspector General (OIG) and Special Inspector General for the Afghanistan Reconstruction (SIGAR), the Special Inspector General for the Iraq Reconstruction (SIGIR). These oversight agencies are institutionalized or bureaucratized forms of political accountability, because they act on behalf of American taxpayers. They demand accounts on agency expenditures through conducting regular investigations and audits, and have the power to enforce sanctions by referring instances of fraud, waste and corruption to the Department of Justice for appropriate action. Their role in enforcing accountability of development contractors will be evaluated in Chapter 4.

Each of these oversight agencies has testified to the excessive waste in the reconstruction efforts before the congressional Commission on Wartime Contracting (CWC). This commission was set up to identify the reasons, scale and possible solutions for the fraud, waste and abuse identified in wartime contracting practices. The CWC is also a political accountability mechanism because it represents the interests of American taxpayers. Unlike other oversight agencies, it is not an institutionalized form
of political accountability because it was set up in January 28, 2008 under a two-year mandate to study wartime contracting. Its series of congressional hearings, investigations and reports are meant to reveal deeper structural problems with wartime contracting that can inform future policy decisions on contracting and contractor accountability.

As indicated by the name of the commission, the practice of contracting has been at the heart of the US perspective on reconstruction failures in Afghanistan and Iraq. And yet, according to Shah, “every enterprise relies on contractors and depends on them to succeed.” The logic of using contractors may be questioned during the CWC’s hearings, but the practice of using contractors remains unquestioned. The solution lies in “managing” them better, even showing them who is boss as indicated by Shah’s statement: “We do not work for our contract partners. Our contract partners work for us...’too big to fail’ simply does not exist in development.” This strong language is reassuring because it indicates a real opportunity for reexamining the role of private development contractors—to hold them accountable.

The questions that remain unanswered, however are to whom should they be accountable to and what does accountability even mean in this context? Shah partially answers in that the modern development enterprise is trying to improve how it serves its “customers,” the people of the developing world. But ‘service’ cannot stand in for ‘accountability’ in development projects. Since developing world “customers” do not actually pay for development services, they have no monetary leverage to demand better service. The monetary focus US oversight agencies often reduce the much broader goals of accountability to merely accounting.

Ashraf Ghani, the former Minister of Finance in Afghanistan (2002-2004), critiques USAID’s aid-delivery system from the perspective of its customer. In a paper by Ghani, Claire Lockhart and Michael Carnahan, they describe how “during Dr. Ghani’s two-and-a-half-year tenure...he was never asked to provide feedback on the performance of USAID’s country director – or indeed that of the director of any bi-lateral or multi-lateral institution, or UN agency.” The lack of aid coordination between USAID and the Afghan government is further illustrated by the fact that the Afghan government had developed a National Development Strategy (ANDS) by April 2002, whereas USAID did not prepare an operational strategy to integrate its efforts with ANDS until mid-2005. Though Ghani et. al’s assessment of USAID/Afghanistan’s overall strategy is rather critical, their portrayal of how USAID dealt with unaccountable contractors is downright dismal:

USAID’s contractors failed to deliver on promises in sectors ranging from education to infrastructure. The wider the gap between promises and delivery, the more expensive service delivery became. Sometimes a contract was reported as passing through five nested layers of American contracting firms – each of whom charged a substantial fee – before reaching an Afghan sub-contractor who actually built a structure. A school costing USAID $250,000, for instance, would be built by an Afghan sub-contractor at a cost of $35,000-50,000. As complaints about lack of progress and poor quality increased, USAID reportedly hired even more organizations to oversee those organizations already hired to monitor and report to it.

In fact, Ghani comments that “every $1 in cash from a program loan (either from the World Bank or Asian Development Bank)” is equivalent to $8 in USAID financing. In light of Ghani’s criticism, which presents itself as the ‘Afghan customer perspective,’ how do we reconfigure what Shah means by USAID’s service to its customers – the people of the developing world?
Accountability in American development efforts is framed within the boundaries of the state. When a state however, intervenes in a foreign nation through war, occupation or state building, that state-centric framing of accountability does not change. This is evident in how the US government has responded to the ongoing crisis of corruption and human rights violations in wartime contracting, which will be further discussed in Chapter 1.

The 2005 Paris Declaration on Aid Effectiveness introduced the idea of Mutual Accountability between partner countries and donors. This desire to harmonize how donors and partners assess the impacts of aid was a response to the largely uncoordinated, and often competing agendas of donor institutions and aid recipients. The Paris declaration attempted to forge an equal relationship between the donor and recipient country, so that each could be held accountable to the other.

The United States and Afghanistan, both adhere to the declaration, along with prominent international organizations like the World Bank and the UN Development Group. But it remains unclear how the Paris declaration can be applied to state-building and reconstruction efforts in active conflict zones. When a transitional state requires bought-in capacity in the form of development contractors and consultants to provide even the most basic services to its population, then how can that state be on equal footing with donor agencies and states to demand accountability?

In Ghani et. al, it became clear that the postwar, emerging Afghan state had very little say in influencing USAID’s programs between 2002 and 2005. Moreover, even though USAID regularly claims that there is not enough local human capital and state capacity to properly administer the large amounts of USAID funds, Ghani et. al point out “since USAID had neither an operational strategy, nor a performance-based management system, it could hardly be a model of accountability, effectiveness, and transparency to emulate.”

Though this may appear as mere bickering or even a struggle to claim sovereign rights over directing the development effort, especially during a post-conflict decade both foreign aid agencies and national governments are trying to build up capacity to effectively administer projects. The more salient accountability question, beyond mutual accountability as defined between donor and partner country, is whether it is possible for individual civilians, groups or states—as the targeted beneficiaries of development projects—to hold donors and implementers accountable?

Accountability does not exist in itself. It is a construct—a product of the human imagination. It is embedded within a series of relationships that impose rights and obligations on different groups. As certain groups gain power and exercise undue influence over the welfare of other groups, accountability mechanisms are introduced to not only safeguard against any abuse of power, but also to legitimize the holders of power. As Melvin Dubnick explains, “within the context of social transactions, it [accountability] emerges as a way for individuals to relate to one another—an ongoing process of account-giving and account-taking that is fundamental to the development and maintenance of trust.”

Within an accountability-relationship, each party has the right to demand information, a right to a forum where opinions can be openly voiced, and adequate leverage to demand remedy by imposing sanctions. To what extent—if any—do developing world ‘customers’ have a right to information, pub-
BOX 3

**Human Rights** *Universal Declaration of Human Rights, Article 8,* “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

**Anti-Corruption** *Transparency International,* “Corruption is operationally defined as the abuse of entrusted power for private gain.”

**Public Administration** *Center for Public Accountability,* “Public accountability means the obligation of authorities to explain publicly, fully and fairly, before and after the fact, how they are carrying out responsibilities that affect the public in important ways.”

BOX 4

**Accountability Challenges for Contractors in War**

(1) Multiple tiers of contracts and subcontracts diffuse responsibility for project outcome among numerous actors and relying on a complex web of accountabilities to get the project done, (2) Insecurity and perceptions of insecurity, which decrease monitoring and evaluation visits, duration of the visits and increased security costs of the visit, (3) The combining of security and development objectives can be a hindrance to trust building between beneficiary groups and project implementers.
lic forums and remedy from their donors? Even when accountability to end beneficiaries is lauded as a development objective, it is quickly sidestepped in the emergency conflict and postwar context where the state is considerably weakened or nonexistent.

Human rights, anti-corruption and public administration discourses all declare the state or public organ as the protector of individual and group welfare. This also means that the state is accountable for human rights violations, corruption and irresponsible public administration.

It is first, important to understand that the sovereign state and its public organs are at the center of each of these disciplines, because this poses several challenges for holding private contractors accountable. The pursuit of human rights is expressed in the language of the state: the law. It is not even possible to have a case of corruption without an “entrusted power,” or what is more commonly understood as a public official. And public administration is itself an articulation of the state and thus, accountability becomes a form of governance when “there is a sense of agreement about the legitimacy of expectations among community members.”

This state-centric notion of accountability means that the state must hold private contractors accountable for their actions, on behalf of the public they serve. In the American context, this refers to the American citizen and taxpayer. In lieu of a strong Afghan state with adequate jurisdiction and capacity to hold private contractors accountable on behalf of the Afghan people, accountability to end beneficiaries cannot be a priority. This suggests that a state-centric notion of accountability in postwar reconstruction and development projects is unable to address accountability to beneficiaries.

Though the American public can legitimately hold private development contractors accountable, those contractors operating in Afghanistan are not directly serving the American public. The future projected benefits of economic and global security may be what garners support for annual budgetary requests, but the direct beneficiaries of these development projects are the citizens of Afghanistan. In light of this obvious, though politically marginal revelation, accountability must be reconfigured as a series of relationships between the American state, American citizens, Afghan state, Afghan citizens and the private development contractors, or more likely their subcontractors. Mutual accountability, as articulated in the Paris Declaration, cannot just be superficially limited to ‘donors’ and ‘partner countries,’ but it must encompass the broad array of actors that actually do the work of development.

As the American state continues on a path of overreliance on contractors—what the CWC deems the “default” mode of operation—we can no longer have faith in accountability rhetoric, existing legal sanctions in the form of fines and suspensions to ignore the real consequences that actions of private contractors have on the populations they are hired to serve. The purpose of this thesis is not to assign blame to private contractors, because the growth of the private development industry has been in response to government agencies growing demand for contractors. Contracting has however, diffused responsibility for project outcomes among a complex web of for-profit and non-profit actors. Development agendas and budget priorities are set in Washington, D.C., while funds are disseminated through hundreds of implementing partners working in challenging, conflict contexts. This means that the present modern development enter-
prise does not want to or cannot enter into a direct relationship with its beneficiaries.

This thesis will attempt to evaluate the existing web of accountability mechanisms that target private development contractors (and the private security contractors they hire). One of the recurring and pestering questions that emerged in the course of researching and writing this thesis is whether it is even possible to conduct effective development work in conflict. Based on interviews with Afghan NGO workers, international contractors and US military personnel, it seems that “effective” is simply an unachievable goal. Security risks, lack of local capacity, contractor fraud, opportunistic insurgent and patronage networks are all cited as conditions that make reconstruction and development work untenable and often unsustainable.

Despite this knowledge, development practitioners continue to pursue projects in conflict contexts either due to international aid flows, or perhaps their own desire to help vulnerable populations in spite of challenging conditions. This thesis neither endorses the use of private development contractors in conflict zones, nor champions the undertaking of complex and ambitious reconstruction and development enterprises without adequate security. The project of holding development contractors accountable to the beneficiary populations they are hired to serve is a mitigating response to a largely dysfunctional modern American development enterprise at war.

Chapter 1 “The Accountability Machine and Private Contractors” will posit a local accountability scenario in Afghanistan in contrast with a congressional accountability scenario in America to illustrate the divergent conversations occurring regarding private development contractors. This chapter pits the competing aims of accountability to Afghan beneficiaries with accountability to US taxpayers. The two scenarios show the competing and compatible aims of upward and downward accountability: What is good for one may not be for the other.

Chapter 2 “The Modern Development Enterprise” briefly charts the rise of development contracting. This chapter poses the following questions: Why the continued reliance on private contractors? And if so, why is it so hard to hold them accountable through adequate monitoring and evaluation despite many instances of reported waste, fraud and abuse? Is it appropriate to use standard procurement practices in a post-conflict reconstruction scenario?

Chapter 3 will discuss the complex integration of security and development in the global agenda, especially the US approach to Afghanistan. If development is considered subservient to a national security agenda, is it even possible to be truly accountable to Afghan beneficiaries? How do the time-sensitive desires for rapid impact projects as counterinsurgency and stabilization strategies impede accountability to beneficiaries? Is there actually a will to be downwardly accountable in the security-development nexus?

Chapter 4 will first explain the existing accountability frameworks, emerging from public administration, anti-corruption and human rights discourses. Within each framework, current reforms are evaluated to see if they address the accountability challenges in war, and the potential impact they can have for beneficiaries.

Chapter 5 will offer core recommendations that point out gaps in accountability, the role of local governance in development success, beneficiary empowerment and striking a balance between national interests and positive outcomes in post-conflict reconstruction.
INTRODUCTION FOOTNOTES

8 Rajiv Shah took over at USAID in January 2010.
10 For more information, see Commission on Wartime Contracting in Iraq and Afghanistan-A Bipartisan Legislative Commission Established to Study Wartime Contracting. http://www.wartimecontracting.gov/
11 Shah, 19 January 2011
12 ibid.
14 ibid, 6
15 ibid.
16 “Paris Declaration and Accra Agenda for Action.” OECD.org. 2 March 2005. http://www.oecd.org/document/18/0,3746,en_2649_3236398_35401554_1_1_1_1,00.html
17 Ghani, Carnahan, Lockhart, 7
19 Dubnick, 2002, 6
I. THE ACCOUNTABILITY MACHINE & PRIVATE CONTRACTORS

"For accountability to work, there has to be the power to hold to account; there has to be the power of information and participation; and there has to be the power to judge and enforce judgment."


This chapter will analyze two contrasting scenes of private contractor accountability from Jabal Saraj, Afghanistan and Washington, D.C.

Scene 1 JABAL SARAJ, AFGHANISTAN
"From Subjects of Aid to Citizens of a State"

In January 2010, Abdul Mateen went to visit a work site for a new school being built in his district. As a teacher, but also as one of the community-chosen monitors, it is his job to monitor the construction of a local school through bi-weekly site visits. An American Provincial Reconstruction Team (PRT) from Parwan province funded the school.

On this particular site visit, Mateen and his colleagues decided to inspect the newly-arrived construction materials and he explained: "We at first checked the bricks out: If you hit them together they would break." Without complex tests, the monitors quickly determined that the bricks, cement, doorknobs and metal sheeting would not hold up past a few months.

When they brought this issue to the workers asking them to stop, they were ignored. After all, the monitors had no authority since the workers reported to an Afghan construction contractor, who was hired by the American PRT. The monitors however, had been trained by a local NGO--Integrity Watch Afghanistan (IWA)--to mobilize community and political actors for cases such as these. The monitors quickly notified the local police, political representatives and gathered 50 local residents on the scene.

By staging a sit-in, they captured the foreman Nabi Kohistani's attention, which quickly got his boss at the site. The monitors took photographs and collected video footage during their biweekly visits. In addition to showing the materials on site, they also had concrete documentation for the Afghan contractor. He had no choice but to agree that the materials were of poor quality and sent them back, including over 15,000 bricks. On this day, the community won. But, this is an aberration.

Holding contractors accountable, whether they are Afghan, Turkish, Jordanian or American, is one of the defining challenges of reconstruction and development work during conflict. Only with political pressure, or rather through political accountability mechanisms do we see those with power demanding information and then judging the information to hold the parties responsible accountable. **Answerability** (account-giving) and **Enforceability** (account-holding), are two basic components of effective accountability mechanisms. Even in complex conflicts and state-building operations, the term 'accountable' has been largely interpreted ineffectively as fiscal accountability to the donor or aid agency.

Corruption in contracting, aid or the transitional government is considered either a way to 'buy the peace' or is considered an expected cost of post-conflict reconstruction. Though scholars like Philippe Le Billon...
Accountability Relationships with Local Contractors

DoD/DoS/USAID

Parwan PRT

Afghan Construction Contractor

Afghan Provincial Governor

Local Monitors
have tried to challenge this notion by citing the negative long-term consequences of corruption. Other anti-corruption scholars like Fredrik Galtung and Martin Tisné have argued that the “upsurge of corruption and a lack of accountability... erode trust in democracy,” which delegitimizes the state and increases the chances of a return to violence. Military and civilian actors however, continue to accept the role of corruption in the immediate postwar context and as USAID-OIG, SIGAR and CWC audits and reports have shown, they even fund corruption.

Galtung and Tisné largely attribute the high corruption risk due to a mismatch between the immediate postwar development needs, extravagant international aid levels and the limited absorptive capacity of the transitioning government institutions. This mismatch is especially felt during the “potlatch effect,” where civilians have high expectations from their interim government and donor aid projects. The expectations correspond with the large international footprint on the ground, where NGO, for-profits and bilateral aid agencies are heavily investing in programs dealing with infrastructure building, governance reform, rule-of-law and gender.

Paul Collier’s study of the “conflict trap” also during the post-conflict decade, there is generally a high influx of aid in the beginning of the decade, which tends to taper out in the middle. Though peace settlements, in Afghanistan’s case the 2001 Bonn Agreement, are major opportunities for asking for aid, Collier suggests that if “long lags between commitment and disbursement” were normalized, aid would be far more effective. He however, cautions against the notion that economic growth can bring down the risk of renewed conflict during the post-conflict decade. In the case of Afghanistan, the state actually moved from a post-conflict to a conflict state in the middle of the post-conflict decade due to deteriorating security conditions, the rise of the insurgency and the lack of foreign aid alignment with state building in the early part of the decade.

Since the absorptive capacity of the interim government and civil society is just forming and rather low, it generates two dysfunctional trends. First, it leads to surplus funds that cannot be quickly spent and thus are absorbed by any number of actors through corruption or merely overvalued services and salaries. Second, since local civil society and government may not be able to implement projects in accordance with donor expectations, there is an overreliance on expensive foreign technical assistance or ‘bought-in capacity’. These “parallel bureaucracies” that include private development contractors working for USAID, are perceived as expensive, corrupt and competing institutions that undermine the growth of Afghan state capacity.

Though aid agencies and donors would argue that technical assistance is a key intermediary that balances the population’s immediate need for services with capacity building programs in the national government, the fact remains that that perceptions of corruption and lack of accountability are counterproductive to development goals. This perception is further muddled when the actions of contractors and subcontractors who implement projects on the ground negatively reflect upon donors and the Afghan government who are perceived as the responsible parties to monitor aid. An Integrity Watch Afghanistan corruption survey from May 2008 confirms this (see right).

Accountability as mentioned earlier does not exist in itself. It only exists within a series of relationships between people and organizations. The way one defines the rela-
Galtung & Tisne-Phases and Dissonances of Postwar Reconstruction

International Financial Assistance
- Range of Development Needs
- Absorptive capacity of government and civil society institutions

I. The "Potlatch Effect" - High expectations and low accountability, 1-3 years after agreement.
II. The "Late Awakening" - Entrenched corruption, demand for change, risk of return to violence, 3-5 years after agreement.

Integrity Watch Survey, 2008

<table>
<thead>
<tr>
<th>Who has the responsibility to monitor aid?</th>
</tr>
</thead>
<tbody>
<tr>
<td>The GOA</td>
</tr>
<tr>
<td>Both donors and GOA</td>
</tr>
<tr>
<td>The Donors</td>
</tr>
<tr>
<td>CDC</td>
</tr>
<tr>
<td>Parliamentarians</td>
</tr>
<tr>
<td>NGOs</td>
</tr>
<tr>
<td>Beneficiaries</td>
</tr>
<tr>
<td>Other</td>
</tr>
<tr>
<td>Don't know</td>
</tr>
</tbody>
</table>

Source: IWA Survey of May 2008

PRT Locations (Parwan Province circled in red)
tionship and how each party is empowered to hold the other accountable, determines what type of accountability you can expect.

Let us ask: Is there a relationship between an Afghan civilian and a private American or Afghan contractor? The simple answer is no. Private contractors and subcontractors are hired by: (1) Foreign governments, (2) aid agencies, (3) INGOs or (4) other contractors. As a business, they cater to the needs and objectives of their clients. But, most of all, they prioritize their capacity to generate profit by minimizing costs while still delivering adequate project results for their client. The contractor’s right to profit creates a whole host of incentives to use cheap materials, import cheap labor, falsify invoices, undervalue bids and resort to bribery or kickbacks to gain undue advantage. Though not all contractors are corrupt, the massive inflow of aid money and a ‘spending imperative’ creates many opportunities for corruption, especially in high corruption-risk industries like construction. The sense of urgency coupled with the high real and perceived costs of operating in an insecure environment can also triple or quadruple project prices. The existing corruption risks are thus, increased due to a shortage of trained personnel and insecure conditions to effectively monitor and evaluate projects.

These were the real challenges facing IWA, an anti-corruption and pro-integrity Afghan NGO that sought to increase transparency and accountability through monitoring foreign aid projects. Since there is no existing relationship between beneficiaries and the contractor implementing the development project, it is very hard to demand that contractors be accountable to the local beneficiaries. In 2008, IWA tried to change this by starting a pilot community-monitoring project in Jabal Saraj to first establish a relationship between beneficiaries and contractors. Their intention was not to bypass the donor agency funding the project, but since donors do not have a constant presence at project sites (especially in rural and/or insecure areas), it is often more time-effective to deal with the contractor directly than begin a formal complaint process through the donor compound in Kabul, the US or even the PRT headquarters. Moreover, donors tend to treat beneficiaries as “subjects of aid,” and IWA wanted to use community monitoring tools and involvement of provincial councils to transform beneficiaries into “citizens of the state.” Lodging complaints with the provincial council, according to IWA, also triggers the accountability role of local institutions to strengthen local governance.

This is how a schoolteacher like Abdul Mateen could establish a relationship with the local contractor that did not previously exist. Within this newly formed relationship, the contractor knows that the community, the local council and anti-corruption NGOs are watching and expect accountability. The absence of a direct relationship between the contractor and the community leads to feelings of marginalization, powerlessness and increased perception of corruption. This was evident when a school caretaker in Baghdad Ahmad Abdu-Satar asked an Iraqi subcontractor hired by American contractor Bechtel “why they didn’t finish the job?” They responded, “We don’t work for you, we work for the Americans.”

The 2005 Paris Declaration stated that mutual accountability is necessary between donors and partner countries. Though it was uncertain what mutual accountability really meant (besides “shared agenda,” “monitoring progress” and “negotiation and dialogue”) and why it only existed between national governments, it was quickly echoed by UN agencies and development think tanks like UNDP and ODI. In April 2009, a se-
nior researcher at the Afghanistan Research and Evaluation Unit (AREU) Marieke Denissen adapted the term to the Afghan context. Like IWA, she too wanted to move beyond the assumption that reporting to donors and their constituents at home constituted mutual accountability. So far, donor agencies and donor nations have been the only ones who could demand information from contractors and enforce sanctions if necessary. The Afghan government and civilians had either no jurisdiction or little leverage.

Mutual accountability in Denissen's framing could change that by providing "mechanisms for all development actors to claim, complain and demand answers." This combined with adequate public access to information and power to monitor and evaluate could ensure real accountability between donors and beneficiaries. Moreover, she emphasizes that instead of foregoing accountability in insecure situations due to difficult conditions and push for "quick fixes," mutual accountability should become the main priority. Working with, through and for the community can decrease conflict-risk because it increases the legitimacy of development actors.

Community monitoring of development projects is not a complete solution to the challenge of accountability. Monitoring and evaluation (M&E) is a field of study, which often requires high levels of technical expertise. Community monitoring cannot replace formal M&E processes, but requires the donors and implementers to be responsive to community needs. Monitoring reports, however expertly completed, can only influence project progress at the discretion of donors and implementers. Evaluation reports are meant to inform future development projects, but their relative importance is determined at the discretion of the donor agency. Prior to undertaking new evaluation reforms, Rajiv Shah described the two-two-two USAID evaluation model: "Two [monitoring and evaluation] contractors spending two weeks abroad conducting two dozen interviews. For about $30,000, they produce a report that no one needs and no one reads. And the results they claim often have little grounding in fact."

Monitoring and evaluation can either be a routinized, bureaucratic reporting mechanism with little impact, or it could be a powerful political accountability tool in the hands of IWA-trained local monitoring groups. This is not to suggest that formal USAID monitoring systems are consistently unsuccessful, and grassroots monitoring attempts are always successful. Rather, monitoring and evaluation, like any other accountability tool, can positively or negatively affect project beneficiaries depending on whether their interests are properly represented. Evaluation methodology that interprets beneficiary perceptions of the project through interviews versus one where beneficiaries interpret the project's impacts are the products of two different accountability relationships. In the first, USAID officials and American citizens are meant as the target audience. In the latter, the audience includes not only the donor agency and population, but also the beneficiaries and local government.

The National Solidarity Program (NSP), an experiment in participatory peace building, provides a glimpse into alternative, viable accountability configurations. The Afghan Ministry of Rural Rehabilitation and Development (MRRD) designed the NSP in 2003 in order to increase state legitimacy among rural populations through the establishment of locally elected community development councils (CDCs). Ashraf Ghani, the finance minister (2002-2004) is largely credited with the NSP's design. The CDCs were each awarded small block grants (max
to implement projects that reflected the community’s priorities and needs, such as building a school, installing water pumps, digging irrigation ditches or setting up electric stations.

One of the main themes was to shift “from government to governance” by employing multiple levels of accountability going both ways. Local governance facilitates bottom-up accountability, or the applying of political pressure towards local and national governments. It also ensures a sense of ownership at the local level, where the community can demand answers from both the facilitating partner hired by the Ministry to help the community and the local construction contractors. Unlike the local monitors trained by IWA, these CDCs are endowed with financial and political leverage and are even asked to contribute a portion of the project costs to increase community buy-in.

Facilitating partners are not paid from the CDC block grant, rather from the MRRD. Their performance is however, evaluated based on their responsiveness to and engagement with local communities. Quantitative indicators for performance-based evaluation can include number of elections held, CDCs formed, subprojects designed, contractors hired, and CDC satisfaction with outcome. Though there are some concerns regarding misuse of CDC funds by local power brokers, or the lack of transparency to the community regarding the facilitating NGO’s budget, the NSP has increased trust between beneficiaries, the Afghan government and donors.

Since perceptions play a large role in how citizens experience corruption, the building of trust and more transparent institutions reduces the frequency and perception of a corrupt state and overpaid development actors. Even more significant is the notion of timely responsiveness. Chapter 4 will discuss the importance of having accountability mechanisms that ensure project implementers are accountable to the community beneficiaries in a timely fashion. Though legal prosecution or suspension of a contractor over fraud charges five or six years after project implementation represents a form of sanction and justice, it may not have any positive impacts for the beneficiary community that either did not receive the intended project, or received a subpar project instead.

A recent DFID study on the causes of radicalization of Afghan men (joining the Taliban or Hizb-i-Islami) emphasized the role unaccountable and/or corrupt contractors play in delegitimizing the Afghan state apparatus in favor of competing groups like the Taliban and Hizb-i-Islami:

There is little point in providing services (whether through government, Provincial Reconstruction Teams or NGOs) if they in-cite more rage than appreciation due to the poor quality work that private contractors leave behind, the bad behaviour of the private security companies towards local populations and the added risk of violent attacks and civilian deaths that PSC presence can mean.

Since half of Afghan civilians surveyed by IWA in 2008 believe that the government is responsible for monitoring aid, contractor corruption can be perceived as a result of an ineffective state. Increasing state legitimacy and responsiveness to citizen needs and demands should be the main objective of state-building development projects. But foreign aid agencies are ultimately accountable to their constituents back home, reporting back to government oversight agencies to justify that their post war reconstruction investment will yield returns in the form of a stable, democratic and in most cases, an economically liberal state. The accountability configuration is decidedly a monetary one.

The school project in Jabal Saraj thus, exemplifies the challenges of monitoring PRT- and USAID-funded projects in
Afghanistan. Most of the time, community involvement is limited to a consultation with local leaders to determine community priorities, but implementation of any project is left up to the contractor with hopefully, periodic monitoring by the donor agency. Large American contractors have come under attack from their own government agencies and citizens for bloated overheads, expensive foreign salaries and unaccountable project outcomes. The USAID-Office of the Inspector General reported that between 2003 and 2010, based on 36 performance audits, 81% of inadequacies in project implementation were due to poor contractor oversight and performance. \(^3\)\(^7\)

Some contractors have launched serious campaigns to defend their reputation, citing low overhead costs and existing accountability practices to the local community. Development Alternatives Inc. (DAI), one of the largest USAID contractors in Afghanistan, explained that community involvement led to the success of its Alternatives Livelihoods Program in Nangarhar province. \(^3\)\(^8\) A participatory approach and communication with the local shura, malek, mullah and mirab increased project legitimacy. It also ensured “support from villagers” and the local government, which facilitated work in an insecure environment without undertaking extreme security measures. \(^3\)\(^9\) DAI also tried to counter the blanket criticism that all contractors have bloated overheads by citing that from the AINP-Alternative Livelihoods project budget, 80% of the funds benefited Afghans directly, which was greater than the mandated 70%. \(^4\)\(^0\) If however, the 80%-20% distribution of aid funds through contractors represents the norm, we would not be in the midst of the present accountability storm in Washington, D.C. that we will discuss in the next scene.
Scene 2  Congressional Hearing, Commission for Wartime Contracting in Iraq and Afghanistan
April 1, 2011

Commissioner Robert Henke
So my question to you, my first question—we have to be pretty brief, with our time limits—can development be done in a war zone?

USAID Administrator Rajiv Shah
Absolutely... it requires an operational construct that differs from the traditional mission structure, which is why we’ve devolved authority to our people and PRTs in Afghanistan and built project mechanisms that can move much more quickly, and improved oversight at that distal point of service and programmatic implementation.

Commissioner Shays
Isn’t it true that your agency has been involved in some poor planning and oversight of government projects and that some of your contractors have performed badly?

USAID Administrator Rajiv Shah
And we’ve been aggressive about rein ing that in and improving oversight... in just 14 months, we’ve restructured how we do award mechanisms. We’ve rebuilt a partner-vetting system in Afghanistan. We’ve implemented financial controls around subcontracts and in new contracts are shrinking the number of tiering layers so we have more visibility. We’ve improved project oversight by tripling the number of contract officers and building a program-support unit in our Office of Acquisition Assistance here in Washington, D.C.

“Poor planning and oversight” is popular phrase these days with any number of US government oversight agencies looking into reconstruction and development efforts in Afghanistan. The exchange between USAID administrator and members of the Commission for Wartime Contracting (CWC) is a decidedly different type of accountability scenario than the one found in Jabal Saraj. Unlike the local monitor Abdul Mateen, the CWC has the legal authority to demand answers. USAID, along with the Department of State, Department of Defense, local contractors and various Inspector Generals, is answerable to this commission. The commission is asking questions about contractor accountability that are similar to the ones being asked on the ground in Afghanistan, albeit the operational scale is broader. More importantly, they want to ensure that contractors are financially and otherwise held accountable to the interests of the American people. This is evident in how the CWC came to be.

On January 2, 2008, Staff Sgt. Ryan Maseth was electrocuted in the shower on an Iraqi base due to faulty wiring through a water pump that was not properly grounded. This facility like most US army bases was built by the largest Department of Defense contractor Kellogg, Brown and Root—a former subsidiary of Halliburton. Though this was one of countless examples of poor contractor performance, it gained widespread attention because KBR had prior knowledge of faulty wiring that resulted in the soldier’s death. Twenty-six days after Maseth’s death, the US accountability machine was invigorated and the 110th Congress swiftly passed a law establishing the Commission on Wartime Contracting in Iraq and Afghanistan. In 2008, both private security and private development contractors were finally under scrutiny by US lawmakers, uniformly
calling for greater contractor accountability. The CWC has since carefully investigated contractor fraud, waste and abuse and revealed how existing accountability mechanisms built into DoS, DoD and USAID have failed to prevent egregious forms of contractor corruption and inefficiency. Their mandate however, is to hold these agencies and their contractors accountable to the American public, the taxpayers who have been funding the security and development enterprise.

The CWC is only one of many oversight agencies dealing with contractors in Afghanistan and Iraq. There is a whole cadre of Inspector Generals (IGs) conducting audits and inspections of projects, e.g. USAID-OIG, SIGAR (est. 2008), SIGIR (est. 2004), DoD-OIG, DoS-OIG and DCAA. It is partly due to these institutionalized oversight bodies that the high levels of fraud, waste and abuse have been revealed to the American public. In their 2009 interim report, the CWC found that these agencies had published 537 reports and issued thousands of recommendations on improving project implementation and increasing contractor accountability.41

These reports have however, inadvertently built a case for budget cuts for more fiscally vulnerable agencies like USAID instead of facilitating a mature dialogue on how to shift the accountability paradigm in the modern development enterprise. Instead of concluding that post war reconstruction and development project outcomes can be improved by increasing accountability to individual civilian and government beneficiaries who have both greater stake and ability to monitor these projects, the regressive notion that ‘investment’ in development should have measurable ‘returns’ for the American taxpayer persists.

Moreover, the problems with USAID’s general operations were identified as early as 2002 in a GAO report entitled “USAID Relies Heavily on Nongovernmental Organizations, but Better Data Needed to Evaluation Approaches.”42 This GAO report cited how USAID’s procurement database was “plagued by data-entry flaws” that made it hard to keep track of USAID’s various funding mechanisms and financial data on firms that receive funds.43

In addition to this general critique of structural problems in USAID’s ability to keep track of funds and organizations it funded, the first USAID-OIG memorandum in April 2003 identified the major risks for fraud among USAID contractors and subcontractors in reconstructing Afghanistan.44 The memo included an important risk assessment conducted between October 30 to November 9, 2002 of the 3-year $300 million Rehabilitation of Economic Facilities and Services (REFS) Program to be implemented by a large US engineering contractor Louis Berger Group. Since this risk assessment sums most of the major challenges and corruption risks faced by conducting large-scale reconstruction and development projects in conflict, it is worthwhile to examine the document (see right):45

George R. Jiron did his due diligence as the USAID acting inspector general by outlining the 5 major risks of conducting development work in Afghanistan using contractors (see right). Jiron’s memo definitively proves that USAID/Afghanistan was made aware of all the major risks of employing subcontractors at least as early as November 2002. But instead of taking heed to this early risk assessment, the USAID/Afghanistan mission director Craig G. Buck responded by undermining the risk assessment and downplaying the actual risks:

We do caution that the risk assessment which was based upon only nine person-days of presence within Afghanistan itself,
1. Rehabilitation of Economic Facilities and Services (REFS) Program

<table>
<thead>
<tr>
<th>Implementing Entity</th>
<th>Purpose</th>
<th>Risk Exposure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Louis Berger Group (LBG)</td>
<td>Design, implement, and complete rehabilitation of infrastructure such as roads, electric energy networks, schools and health facilities.</td>
<td>High</td>
</tr>
</tbody>
</table>

Planned Audit Coverage

Agency-contracted concurrent financial audits of LBG local costs. Subcontractor compliance and/or performance may be subjected to financial or performance audits. However, subcontractor costs will likely not be audited because subs are to be firm fixed-priced (see discussion below under "Implementing Arrangements").

Risk Assessment Factors

Implementing Entities—The LBG, a U.S. engineering firm, will be the prime contractor. Although it is a well-known firm, the LBG has limited experience in Afghanistan. Subcontractors will probably have limited experience and the Mission is concerned about their capacity to carry out their work. Therefore, the risk is considered high.

Amount of Funding—This is a 3-year $143 million contract plus an option year for an additional $71 million. The risk is high both because the funding is significant and because the contractor is under intense pressure to perform in a short period of time in the face of ongoing political instability, limited availability of construction equipment, and the challenge of finding subcontractors able to do the work.

Implementing Arrangements—The LBG was awarded a cost-plus-fixed-fee contract. This type of contract is susceptible to significant cost overruns if not carefully managed and monitored. Subcontractors will be awarded firm fixed-priced contracts. Such contracts do not have the risks inherent in cost-plus-fixed-fee contracts.

However, there are risks associated with the LBG selecting and employing subcontractors. For example, how transparent and competitive will the process be? What will be the experience and capacity of the subcontractors? What types of arrangements will be made between the LBG and the subcontractors to ensure that work is done on schedule and in accordance with contract requirements. Because of 22 years of fighting, the number of private sector construction companies has greatly declined—and most construction equipment has been destroyed or is inoperable; the risk therefore is high that subcontractors may not be reliable, may be entirely new to Afghanistan, and/or that required heavy equipment may not be readily available.

Another major risk is that subcontractor procurement irregularities could occur. The LBG is required to submit a procurement plan to USAID for its approval. USAID will need to ensure that this plan is followed and procedures for full and open competition are being met. The contract also contains numerous other requirements to help ensure that subcontractor costs are reasonable (e.g., the LBG is required to develop information on unit costs on both a national and regional basis). Audit would ensure that such requirements are carried out.

While costs incurred by the subcontractors will likely not be audited (because the sub will have firm fixed-price contracts), one audit concern is that advances could be in excess of subcontractor needs. However, LBG is anticipating that advances will not be necessary because of an expedited payment system for subcontractor invoices.

The system works like this. LBG/Kabul issues invoices for both United States and local costs to USAID/Philippines, the paying station under the contract. USAID/Manila would then be required to pay LBG in the United States. Within 14 days. LBG/Kabul would then pay subcontractors 7 days thereafter, for a total 21-day turnaround. The Prompt Payment Act permits a 14-day turnaround in payment for construction progress payments (as opposed to the usual 30 day payment cycle). However, if this system does not work as anticipated, LBG might find itself forced to pay advances after all. If advances are paid, controls must be in place to ensure that funds are not advanced in excess of subcontractor needs.

And a final major risk: Afghanistan has a total cash economy. The banking sector is undeveloped, and LBG anticipates that most transactions in-country will have to be made in cash.

In summary, risk exposure is considered high for the reasons detailed above.

Nature of Activities Financed—Planned construction includes rehabilitation of the 600-mile east-west highway (in conjunction with Japan and Saudi Arabia), schools, health facilities, and government buildings. Construction activities are inherently vulnerable to such things as fraud, theft of assets and construction materials, and/or nonperformance or poor performance.

The construction activities planned for Afghanistan face additional risks. For example, security for the road project is a major consideration because the highway traverses mine fields, areas of ongoing military operations, and banditry. (However, it should be noted that the U.S. government plans to secure an agreement with the Afghan government to provide adequate security for engineering and construction crews.) Also, weather is always an intangible when it comes to construction. Rehabilitation of the first 39 kilometers of highway was beginning just before the onset of winter. During winter, construction will switch to the lowlands in the south. The result may be a patchwork of disjointed improved segments of highway—especially as two other sovereign countries are participating in the project.

The participation of other organizations and these two other countries in the highway project poses additional risks—such as construction delays. For example, each segment of highway must be certified as mine-free before reconstruction work can be begun. Mission officials noted that they must negotiate with the United Nations (UN) de-mining organization to clean up the areas in which reconstruction is to be done, and that they do not have control over how quickly the UN organization will respond. In addition, Japan and Saudi Arabia are participating in the reconstruction of the east-west highway. Japan may not begin work until 2004, and the nature of Saudi Arabia’s contribution is still uncertain. Specifically, it is unclear whether Saudi Arabia will contribute money to the LBG contract or fund its own construction work using a Saudi contractor. In other words, there is a question as to when all the "financial pipelines will be active."

In summary, the risk is high for "nature of activities financed" based on the concerns discussed above.

30
which covered in detail only two of the Mission's projects/activities, and which did not look at the adequacy of specific internal controls or whether transactions were properly documented, could be unfairly perceived or even cited as a criticism of current USAID Mission efforts. We would not like to see it used out of context to create reservations about development efforts in Kabul even before these fledgling efforts have had the opportunity to leave the nest [my emphasis].

Though Buck's defensive attitude towards a risk assessment that could be "perceived or even cited as a criticism" could be understood given the early state of USAID operations in Afghanistan, they do not excuse the fact that these initial "risks" materialized into actual instances of corruption, fraud and abuse from 2003 onwards.

Each successive USAID-OIG audit, SIGAR audit or CWC report has hammered on the same themes mentioned in Jiron's risk assessment. Conducting audits, investigations and issuing more reports between 2003 and 2011 has not frankly, revealed any new information about development contractors and how USAID manages them. In 2010 however, Jiron's risks materialized into a $69.3 million settlement and a criminal conviction of the Louis Berger Group for overbilling USAID for reconstruction work in Afghanistan and Iraq. Harold Salomon - a former senior financial analyst at the company - was the whistleblower who disclosed these fraudulent activities to the government in late 2005, three years after Jiron's memo. It seemed that just as project costs incurred in Afghanistan could not be monitored, the manipulative behavior of upper level management in the New Jersey office also went unmonitored. It took five years for Salomon's information to turn into a conviction. Neither his information nor the conviction has prevented Louis Berger from continuing old contracts or even winning new ones. Reconstruction and development contractors like Louis Berger have become modern day carpetbaggers - post war reconstruction profiteers working under the benevolent USAID motto "From the American People."

Referring back to Galtung and Tisné's diagram of the Potlatch effect, it is clearly apparent in the Accountability Timeline that for the first few years of the Afghan reconstruction effort, there were no actual audits conducted by USAID-OIG until 2004. Despite a consistent release of audit reports by USAID-OIG after 2004, it was not until the establishment of CWC and SIGAR in 2008 that political scrutiny into development contractors began. And, it was only seven years after the Bonn Agreement in 2009 that the CWC and SIGAR began to conduct serious investigations, hearings and publish reports on the matter. Galtung and Tisné would argue that it is in the immediate post war context that scrutiny is needed to prevent large-scale corruption and the ineffective distribution of aid. But it is because of the perception of development practitioners like Craig Buck who believe that the panicked imperative of rapidly implementing projects takes precedence over potentially hindering oversight and audit mechanisms, that the accountability debate is postponed indefinitely.

The business or enterprise formulation of development is detrimental to conducting real development. In fact, embracing a private-sector model and continuously shrinking USAID capacity through personnel and operating budget cuts, have led to the overreliance on contractors in the first place. The CWC's second interim report to Congress entitled At What Risk? Correcting Over-reliance on Contractors in Contingency Operations came to the following conclusions: (1) Contractors have become the default option, (2) Agencies do not treat
contingency contracting as a core function and (3) Enforcement policies and controls fail to ensure contractor accountability. The findings based on CWC's study of wartime contracting can have no impact on the past decade of poor contracting practices in Afghanistan, but do have the potential to reinsert an accountability framework that bypasses business accounting to refocus on the plight of end beneficiaries. So far, that has not been the case.

This depletion of USAID capacity over decades has virtually eliminated most in-house capacity to perform basic functions, like monitoring and evaluation, which is also contracted out in conflict scenarios. And then we get to the conflict. The impact of civil-military integration, or the politicization of aid and development to achieve security objectives, has not been adequately challenged by the American accountability machine. To reiterate Commissioner Henke's query—can development be done in a warzone? Maybe, but so far it has come at the high price of poorly monitored, rapid-impact projects to win hearts and minds, reliance on private security contractors hired by private development contractors and ultimately, the marginalization of beneficiaries because sustained community engagement is easily hindered by security threats.

The American accountability machine on the one hand, is concerned about fiscal accountability of civilian contractors and on the other hand, the uncomfortable yet rampant outsourcing of 'inherently governmental functions' like security to private military and security contractors. On September 16, 2007 Blackwater military contractors shot and killed 17 Iraqi civilians in Al-Nisour Square while protecting a US State Department convoy on its way to meet USAID representatives. This prompted outrage from authorities in Iraq, Washington D.C. and the Pentagon. For the first time since the start of the Iraq war, lawmakers became fully aware about the relative legal impunity of private military and security contractors.

Three weeks after the incident, a bill to expand American legal jurisdiction over all US contractors was quickly passed by the House of Representatives with supporters stating:

The truth is, every time we see an incident with an Iraqi civilian being killed, and American contractors escaping accountability, our men and women in uniform suffer, they see insurgent support rise, and lose the trust of the Iraqi people.

Despite being introduced in the Senate by then Illinois Senator Obama, the bill was never voted upon and remains in limbo. This was a failed attempt to establish legal accountability of private security contractors. In this framing, contractors should be held accountable to American law so their actions do not undermine the war effort. Iraqi or Afghan law and authorities could not exercise jurisdiction over contractors at this time and thus, the fate awaiting those employees was simply termination, not prosecution. Blackwater however, did suffer a temporary setback when its license was revoked in Iraq only to later rebrand itself as Xe Services LLC and acquire new contracts.

This notorious incident sparked a massive debate among US scholars and in the popular media questioning (1) whether PMSCs should perform 'inherently governmental functions' like providing security to Americans and Iraqis during a war, (2) whether we should be so heavily dependent on contractors who are in the field in greater numbers than US military personnel and (3) since we are so dependent on them, how can we better hold them accountable through legal and bureaucratic mechanisms?

Human rights advocates also embarked on several legal accountability proj-
ects such as the Swiss-initiated Montreux Document (2008) and the UN Draft International Convention on PMSCs (2010). PMSCs and their industry associations like International Peace Operations Association (IPOA) and the British Association of Private Security Companies (BAPSC) responded by issuing new voluntary Codes of Conduct to demonstrate acceptance of their human rights and criminal obligations under international and national law. Every country, especially those with heavy presence of PMSCs like Iraq and Afghanistan, were urged to strengthen domestic legislation to license, regulate and prosecute private contractors when necessary. The global accountability machinery prior to and especially after the Al-Nisoor square massacre has heavily invested in creating new laws to control the behavior of PMSCs—to end the culture of impunity.

However, if we refer back to the statement that “sovereignty lies with the citizen, and authority must be held to account,” is it truly feasible to ensure total accountability when the “authority” contracts out its inherently governmental functions due to a lack of governmental capacity to perform those functions in the first place. Through decades of downsizing, the US government has come to rely on the internal professional accountability mechanisms of private contractors in lieu of adequate levels of government personnel and resources to monitor and evaluate contractor performance. The efficacy of legal mechanisms is thus, relative to the capacity to enforce those mechanisms.

More importantly, these accountability mechanisms have not established a direct relationship between the rights of the Afghan or Iraqi citizen and the PMSCs that operate in their countries. In a conflict context, the weakened or nonexistent state must play intermediary for a citizen seeking remedy for human rights violations, damage done to their property or even death. Despite high levels of global and national outrage, a handful of lawsuits filed under the Alien Torts Claims Act and MEJA, impassioned calls for accountability and the creation of a few laws and codes of conduct, there is little evidence that a PMSC is much more accountable today to the states in which it operates, or that an al-Nisoor type incident is any more preventable than it was in 2007.

It is apparent that when accountability of contractors is discussed in congressional hearings, audit reports or in the domestic media, the emphasis is primarily on (1) Fiscal/Monetary accountability to the US taxpayer for wartime contractors and (2) Creating an appropriate legal accountability framework to control the behavior of PMSCs. In the countless USAID-OIG, SIGAR, GAO and CWC reports from 2003 onwards, there is rarely if any mention of accountability to Afghan civilians. The sacrifices of the wronged American taxpayer and brave American soldier are dually invoked to call for greater contractor accountability. Though at first it is easy to mistake this patriotic, political shorthand as merely a tactic to get the issue on the table, it is disappointing to find that the US modern development enterprise has no desire to be accountable to the end beneficiaries of their projects, such as the school teacher and local monitor Abdul Mateen.

Though Rajiv Shah claims that his “agency is no longer satisfied by writing big checks to big contractors and calling it development,” that is in fact what the American development enterprise encourages because accountability to beneficiaries is simply not on the accountability agenda; it is not even a topic for debate.
CHAPTER 1 CITATIONS


22 Philippe Le Bilion, "Buying Peace or Fuelling War: The Role of Corruption in Armed Conflicts." Journal of International Development. No. 15, 2003: 413-426


24 Ghani, Carnahan, Lockhart, 15

25 IWA, 2008, 14-15

26 IWA, 2008, 17


31 ibid, iv

32 Rajiv Shah, 19 January 2011


34 Facilitating Partner (FP) - usually an international or local NGO


37 "To Provide Alternative Livelihoods to Poppy Cultivation." AINP. Development Alternatives Inc. 31 February 2006

38 ibid, 1-2

39 ibid, 35. An interview with an international researcher based in Afghanistan, who had contracted with DAI, revealed that at one point DAI was offering farmers chickens to replace revenue from poppy cultivation. Though DAI knew that chicken farming is not a lucrative alternative and many farmers would continue with poppy cultivation, the quantity of chickens distributed was presented as a viable indicator of project success to meet their contract obligations with USAID.

40 ibid, 35. An interview with an international researcher based in Afghanistan, who had worked with DAI, revealed that at one point DAI was offering farmers chickens to replace revenue from poppy cultivation. Though DAI knew that chicken farming is not a lucrative alternative and many farmers would continue with poppy cultivation, the quantity of chickens distributed was presented as a viable indicator of project success to meet their contract obligations with USAID.


43 ibid, 7


45 ibid, 17-19


49 Prior to this under the Military Extraterritorial Jurisdiction Act (MEJA) only Department of Defense contractors could be prosecuted.


2. THE MODERN DEVELOPMENT ENTERPRISE

"I think it is fair to say that USAID, our premier aid agency, has been decimated. You know it has half the staff it used to have. It's turned into more of a contracting agency than an operational agency with the ability to deliver."

-Hillary Clinton, Secretary of State
Before the Senate Foreign Relations Committee
13 January 2009

In 2010, USAID paid Development Alternatives, Inc. (DAI) over $486 million dollars for implementing development projects, many of them in Afghanistan. Another chunk of $418 million was paid out to The Louis Berger Group, Inc. (LBG). This was accompanied by $458 million to Chemonics International, Inc. and $192 million to the Research Triangle Institute (RTI). This is a very long list of for-profit development firms. In conflict and natural disaster contexts, most of the development projects that are funded by US aid agencies and some by UN agencies are actually implemented through contracts, cooperative agreements or grants with private development contractors or non-profits.

This trend in privatizing development project implementation is not a new phenomenon. In fact, private development firms like DAI have succeeded mostly due to a symbiotic relationship with USAID since the 1970s. Former students of the Harvard Kennedy School for Government started DAI after their tenures with USAID and the Peace Corps, because they collectively believed that a profit-driven firm competing on the basis of technical excellence could provide the best economic development advice to developing countries. Giving DAI its first break in the 1970s, USAID has continued to rely on the company to be one of its largest project-implementing partners in the past 40 years. As Dr. Allison Stanger reminds us in a Center for a New American Security report entitled Contracting in Conflicts: The Path to Reform that "the federal government had the same number of full-time employees in 2008 as it had in 1963." In those 45 years however, the federal budget has tripled in real terms and the gap has been made up in part by contractors. Christopher McKenna has carefully documented the rise of consultants in the federal government and private sector since the 1860s, which according to him has resulted in "creating the contractor state."

The contractor state at war means over 250,000 DoD contractors in Iraq and Afghanistan. In simpler terms, it means a 1:1 ratio of contractors to troops in Iraq and a significantly higher 1.42:1 ratio in Afghanistan. The use of contractors has allowed the Bush and now Obama administration to more than double the combat and support personnel in the two theatres of war. The contractor state doing reconstruction means pouring $53.31 billion into Iraq since 2003. Of that figure, USAID spent $7.6 billion in Iraq just between fiscal years 2007 and 2010. If that figure seems large, then contemplate the $55 billion that has been poured into the Afghanistan reconstruction effort since 2001. Just between 2007 and 2009 USAID, DoD and DoS reported allocating $17.7 billion in contracts, cooperative agreements and grants to over 7,000 contractors in Afghanistan.
Private Development Contractors
Year Founded & USAID Contracts in 2010

<table>
<thead>
<tr>
<th>Year Founded</th>
<th>Company</th>
<th>USAID Contracts in 2010 ($US Millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1953</td>
<td>Louis Berger Group Inc. (Morristown, N.J.)</td>
<td>143.8</td>
</tr>
<tr>
<td>2006 (BV est.1915)</td>
<td>Louis Berger Group Inc. and Black &amp; Veatch Special Projects Corp. Joint Venture</td>
<td>594.4</td>
</tr>
<tr>
<td>1959</td>
<td>Research Triangle Institute (Research Triangle Part, N.C.)</td>
<td>228.0 + 87</td>
</tr>
<tr>
<td>1965</td>
<td>Abt Associates (Cambridge, MA)</td>
<td>123.6</td>
</tr>
<tr>
<td>1970</td>
<td>Development Alternatives Inc. (Bethesda, MD)</td>
<td>382.5 + 105.8 + 65.1</td>
</tr>
<tr>
<td>1975</td>
<td>Chemonics (Washington, D.C.)</td>
<td>526.8</td>
</tr>
<tr>
<td>1977</td>
<td>Creative Associates International Inc.</td>
<td>1,630.0</td>
</tr>
<tr>
<td>1977</td>
<td>Tetra Tech ARD</td>
<td>126.8</td>
</tr>
<tr>
<td>1998</td>
<td>International Relief and Development Inc.</td>
<td>89.4</td>
</tr>
<tr>
<td>1997</td>
<td>BearingPoint</td>
<td>72.5</td>
</tr>
</tbody>
</table>
The contractor state also gives rise to salient questions such as whether the use of contractors for "inherently government functions" is a violation of federal law, or whether the CIA's employment of 10,000 contractors (a third of their workforce) is an internal national security threat. CIA Director Leon Panetta stated that "for too long, we've depended on contractors to do the operational work that ought to be done [by CIA employees]." Defense secretary Robert M. Gates wants to scale the number defense contractors back to pre 9/11 levels, but he recently confessed, "I can't get a number on how many contractors work for the Office of the Secretary of Defense." The Department of Defense and the CIA's struggle with first counting, then holding their contractors accountable is something USAID can certainly empathize with. The reliance of western governments on private contractors has historically skyrocketed during times of either internal insecurity or foreign military and humanitarian intervention. For example, around 600 small companies were formed after 9/11 to provide intelligence services to US agencies due to "the huge flow of taxpayer money into the private sector." Before the war in Iraq, the British PMSC industry was estimated to be $320 million. By March 2004, this number quintupled to $1.6 billion. Similarly, the private development industry thrives on government funded post-conflict reconstruction and development projects.

The reconstruction efforts in Bosnia and Herzegovina during the mid-1990s is one such example that created many opportunities for private development firms such as DAI. Here is an excerpt from DAI's history book that demonstrates how closely firms rely on post-conflict reconstruction contracts:

Six months after the December 1995 Dayton Accords ended three years of war in this former Yugoslav republic, [Jean] Gilson was on a military C-130 on her way to launch the Bosnia Reconstruction Finance Facility. This two-year contract was big in every way--DAI's largest project up to that time in terms of revenue. In June 1996, eight bankers working for DAI arrived in Sarajevo with more than $300 million worth of credit at their disposal. Their objective was to instill a 'credit culture' in a society that had no history of commercial bank lending and, above all, to create jobs and, thereby, foster stability.

Balkan veterans from the 1990s can probably draw parallels to Afghanistan and Iraq where development objectives like job creation and finance reform are tied to security and stability. They could also note how as in Bosnia, today in Afghanistan and Iraq many established prime contractors and fledgling subcontractors have won their "largest project up to that time in terms of revenue" leading to the rapid expansion of the private development industry. Chemonics International is one such firm who won $250 million in USAID contracts in 2008, up from only $6.7 million before the wars in 2000.

One big difference between the Bosnian reconstruction efforts and today's development enterprise is that USAID had close to 3,500 people in 1990 in charge of $5 billion in aid. Today, the agency has 2,200 people administering $8 billion every year. The shift in these numbers over the past two decades has dire developmental consequences on the ground. For instance, Chemonics International cited above received a $153 million contract in 2003 to train farmers, build irrigation canals, grain silos, greenhouses and vaccinate livestock to promote agriculture in Afghanistan. Through various investigations by USAID-OIG, the GAO and non-profit group CorpWatch, it was revealed that several grain silos collapsed during the first winter, there were construction defects in their buildings and
farmers were not trained as promised. The OIG declared that none of the eight project objectives the company was hired for were fulfilled.  

In addition to contracting project implementation, USAID also contracts out the monitoring and evaluation of these projects. That means USAID uses contractors to monitor other contractors. International Business and Technical Consultants, Inc. (IBTCI) is one of the contractors frequently hired to conduct monitoring in Iraq. In March of 2008, the USAID-Office of Foreign Disaster Assistance (OFDA) hired IBTCI to monitor their activities in Iraq. Upon completing their assessment and providing a list of recommendations to improve the program in May of 2008, they had to wait until June of 2009 to receive any response or follow up from OFDA.

This example reveals an obvious concern about how and whether the monitoring and evaluation of USAID projects actually influences their implementation in a timely fashion. A more glaring question however, is how can the agency truly be invested in and know about the positive or negative development outcomes their projects have on the target beneficiaries in conflict settings if they contract out both the implementation and the monitoring?

The youngest and most reform-minded administrator USAID has seen in a while—Rajiv Shah—has ushered in a series of reforms called USAID Forward to shift away from the contracting, procurement and evaluation policies under the previous administrations of Henrietta Fore (2007-2009), Randall L. Tobias (2006-2007) and Andrew S. Natsios (2001-2005). Natsios, the USAID administrator during the beginning of the wars in Afghanistan and Iraq, publicly came out in 2006 to criticize Paul Bremer for “allowing ill-qualified or corrupt contractors to dominate” the reconstruction effort in Iraq without setting up adequate monitoring systems.

In the fall of 2009, Natsios who had criticized Bremer’s performance published “The Nine Principles of Reconstruction and Development” inspired by the Nine Principles of War found in modern Army field manuals. He cites Accountability as the 9th principle, as he celebrates USAID’s business model in Afghanistan. Using the Kabul-to-Kandahar road project, he claims that USAID was able to ensure contractor accountability through (1) strong internal procurement and implementation procedures that are monitored by the agency’s Inspector General, (2) demanding prime international contractors subcontract to local Afghani companies, (3) contracting the US Army Corps of Engineers to provide technical oversight and (4) urging the Ministry of Finance to implement anti-corruption programs. He also cites how USAID “compiles a list of corrupt organizations and bars them from receiving future funding.”

Natsios’ 2009 rosy depiction of accountable contracting practices within USAID is in contradistinction to current USAID administrator Shah’s assessment of the agency’s contracting practices in 2011 and the findings of the CWC through various testimonies of contractors, inspector generals and oversight officials. In fact, every single accountability mechanism cited by Natsios has been revealed to be thoroughly lacking. The numbers of suspensions and disbarments of fraudulent contractors prior to Shah’s administration were negligible. But, Natsios’ article demonstrates how easy it is to claim accountability by citing existing bureaucratic and legal accountability mechanisms built into an agency.

The former OXFAM head of policy in Afghanistan Matt Waldman bemoaned how
the "vast amount of aid is absorbed in the profits of private contractors and consultants," namely the five biggest US contractors who take half of the US development assistance in the country.70 Despite Waldman's pointed criticism, he still concludes, "international contractors are indispensable" though require more scrutiny.71 Even contracting's fiercest critics resolve that somehow greater accountability would fix the problems caused by the overreliance of development agencies on contractors. The question we return to again and again is how to actually realize accountability for contractors when the traditional reporting mechanisms, electronic databases, transparency legislation, criminal investigations, contractual clauses and sporadic media scandals have so far proven insufficient checks on reconstruction efforts during a conflict.

A USDA agriculture advisor to Afghanistan between 2004 and 2005 described the USAID contracting process as follows:

They [USAID] spent-and they brag on it-$1.2 billion in '04 in assistance money in Afghanistan. USAID does not have the people and didn’t hire up to meet the needs. They hired two main contractors: IOM and Chemonics. There's your second layer. These two organizations then hire contractors to do projects and these contractors hire people to do projects. Those people hire people to do projects. You can have five layers of people for organizations, businesses, before you ever get to the person who puts it on the ground.72

If private military and security contractors have been primarily targeted for human rights violations and arms trafficking, then private development contractors have been primarily targeted for reckless spending and lack of financial accountability to US taxpayers and Afghan civilians who frequently receive incomplete or inadequate work from subcontractors.

In the first several years of contracting practice in Afghanistan and Iraq, a popular form of contracting was costs-plus contracts. These contracts pay a base, negotiated amount to contractors for services rendered plus any additional costs incurred during implementation. In a conflict context, it makes sense to allow for flexibility due to unexpected costs. In practice however, this allowed for rampant abuse and overspending. Moreover, even when contractors failed to provide services or constructed buildings that collapsed, repairs and improvements would still be billed to the contracting agency and would not be paid out of the contractor's pocket.73 Despite the existence of several disciplinary measures to hold contractors accountable, such as withholding payments, imposing fines or firing a contractor, a senior engineer in the US Army Corps of Engineers (USACE) explained that using disciplinary measures does not necessarily produce desired outcomes.74 For example, he explained that if he threatened to withhold payment or impose a fine, the contractor would withhold payment to construction workers, who are employed by the contractor and not USACE thus, contributing to labor exploitation. Also, firing contractors could only be done at a very early stage due to funding structures. If a contractor was fired in the middle of a project, all the funds paid to the contractor would be lost and the new contractor would have to be hired through remaining project funds because they could not ask for more funds.

He also explained the challenges of dealing with "broker firms" or contracting companies that form overnight from Jordan, Turkey or Pakistan. These firms have expertise in drafting attractive bids and procuring contracts, but after winning a contract they either disappear if the contract is front-loaded (a large percentage of the contract is paid
to the firm upfront) or extract the majority of the funds for their overhead expenses leaving barely enough to cover labor and project costs. Needless to say, it takes an extremely creative and astute contract supervisor to see through the potential scams and waste in each minute step of project implementation.

Accountability thus, requires the effective building of relationships at every level of a reconstruction effort: Between an Afghan civilian and the Afghan government, between the civilian and contractor, between the contractor and aid agency/client, between the aid agency and government oversight agency, and finally between the oversight agency and the American taxpayer. Some of these relationships are mandated under law (between aid agencies and government oversight agency), whereas others, such as the one between a private contractor and an Afghan civilian and by extension the Afghan government, have yet to be established.
CHAPTER 2 CITATIONS

62 ibid.
63 ibid.
65 "The First 40: A History of DAI 
67 ibid.
71 ibid.
74 Colonel Dan Anninos (Chief of Staff, USACE), "Reconstruction in Iraq: The Challenges, the Wins, and the Losses." Security Studies Program Special Seminar at MIT. 14 April 2011.
On January 25, 2011 a historic merger occurred. It was not on the footsteps of Wall Street, rather across the river from Washington, D.C. in the silent, scenic setting of Virginia. DynCorp International, a Private Military Contractor (PMC) founded in 1946 purchased Casals & Associates, an international development firm committed to democracy, rule of law, conflict management and anti-corruption work. This merger is emblematic of a well-established linkage, or circular conditionality between security and development in setting both policy agendas and corporate strategy.

Under colonialism, colonial regimes designed “welfare schemes for the protesting natives” to ensure continued access to colonized lands; During the cold war, development was used to offer “incentives for restive rural peasant populations not to rebel.” During the cold war, the specter of communism justified American development investment in selected countries to either bolster strong, anti-communist regimes or prevent at-risk countries from falling to communism. Development, on the one hand, is claimed as a precondition to security and on the other hand, it is difficult to pursue development in the absence of security. Within this self-contained rationale, there emerges great potential for financial gains by both private security and development contractors. The merging of a private development firm with a private military firm is simply a reconfiguration of the relationship between the security and development industries into a corporate form.

Scholars so far have warned that this newest manifestation of the security-development nexus pushes forth a global interventionist agenda. The Responsibility to Protect (R2P) doctrine is an exemplar of the ideological shift from state sovereignty to contingent sovereignty. The R2P as enshrined in the 2005 UN World Summit elevated the international community’s obligation to intervene to prevent severe human rights violations, including ethnic cleansing and genocide. UN Secretary General Ban Ki-Moon recently reasserted the importance of implementing the R2P when the sovereign state fails in its “responsibility to ensure protection of human beings from want, from war, and from repression.”

A month after his statement, in March 2011, R2P was invoked by the international com-
The Corporate Form of the Security-Development Nexus
Reproduced from Google Maps
munity as a rights-based rationale to intervene in Libya.

The “responsibility to protect” however, more often than not “opens the way to a responsibility to reconstruct.” The living laboratories of Iraq and Afghanistan have revealed the challenges of realizing the security goals of the military occupation through development assistance. Especially, when foreign and national development agencies, private development firms and NGOs struggle with project implementation in an insecure environment. The immediate answer to their security dilemma has been to reallocate greater percentages of project funding to paying for private security. In addition to the problem that funds allocated for development are being rerouted to private security companies, there is the larger concern that the use of private security will become institutionalized in not only development, but also in humanitarian peacekeeping missions.

The UN Secretary General concluded his speech cited above by asking a difficult question: “Have our strategies and our operational practice on the ground kept pace with the ever-increasing demand for human protection?” The phrase “ever-increasing demand for human protection” is particularly troubling. Just as US defense, intelligence and development agency officials claim there is an ever-increasing demand for their services thus, expanding their mandate, Ban Ki-Moon is suggesting that the UN has insufficient resources and operational capacity in conjunction with ever-increasing responsibilities to protect people. Since the current debate is centered around who is responsible for protecting civilians in lieu of a responsible state, the question that remains unaddressed is who is then accountable to those very civilians in lieu of a responsible state? Does a UN-style contingent sovereignty backed by various international NGOs and development agencies ensure any sort of direct accountability to citizens? When the responsibility to protect bleeds into the responsibility to reconstruct, the mismatch between capacity levels and the scope of mandate leaves a large vacuum that can be filled by the private sector.

The use of the private sector further complicates the question of accountability posed above. How can we ensure accountability of private actors working under an international mandate to provide development and security services in a state that has failed to do so?

Malcolm Hugh Patterson, an Australian international law scholar, has argued in his 2009 book Privatising Peace: A Corporate Adjunct to United Nations Peacekeeping and Humanitarian Operations that the failures of UN peacekeeping operations can be remedied by the use of private military contractors. As a lawyer, he believes that within an appropriate legal regime, private contractors can be effectively utilized to hold egregious human rights violators accountable. Rule of law is once again the default accountability framework with little or no consideration towards the complex and murky context of war.

Patterson’s suggestion that the UN should responsibly utilize PMSCs, turning mercenaries into UN peacekeepers, may not be a distant reality considering the present R2P mindset. Afterall, Blackwater can certainly provide the helicopters UN peacekeeping missions require, but member states won’t provide. If the UN uses private contractors to enforce its obligations under R2P, then it would represent two types of state failure. First, the state that fails to protect its population requires international intervention. And, second, the international community fails to effectively intervene in
the humanitarian crisis without relying on private contractors. In both cases, state sovereignty as a concept is slowly rendered into oblivion.

Mainstream human rights lawyers do not embrace Patterson's view that PMSCs should be the default security option of UN peacekeeping missions, but do endorse a stronger legal accountability framework for PMSCs. In order to further contextualize the challenges of accountability in the security-development nexus, let us revisit the DynCorp-Cassals merger mentioned at the beginning of this chapter. DynCorp was hired to train peacekeepers in Bosnia in the 1990s. It was however, revealed through various journalist and whistleblower reports that several employees “were implicated in sex crimes, prostitution rackets, and illegal arms trafficking.” “One site supervisor even taped himself raping two women. The worst offenders were fired, the whistleblowers were also fired, but employees could not be prosecuted due to the terms of the Dayton Accords peace agreement. They were outside US legal jurisdiction.”

Even if the Bosnian cases are dismissed as rare occurrences of egregious human rights violations by private contractors in a vacuum of legal jurisdiction, DynCorp has not necessarily evolved in its handling of human rights violations in the past two decades. Wikileaks released a June 2009 American diplomatic cable from Afghanistan, which confirmed a journalist's suspicion that DynCorp workers employed to train Afghan police forces paid for “dancing boys” or child prostitutes and drugs to entertain Afghan policeman in Kunduz. Paying for dancing boys is explicitly prohibited under Afghan sharia law. Hanif Atmar, the Afghan Minister of Interior, had asked the assistant US ambassador at the time to “quash” the story and accompanying video of the event.

As public opinion in Afghanistan was turning against private security companies, the Kunduz scandal would only inflame popular passion. Though Atmar did not want a public airing of DynCorp's laundry because he prioritized training for Afghan policeman, he did express that overall “contractors were not producing what was desired.”

When the Washington Post broke the story in July 2009, the DynCorp spokesperson Douglas Ebner stated:

“We're absolutely dedicated to a framework for governance and compliance that ensures a transparent and accountable business environment. Whether it's misconduct, or public perception or allegations of misconduct, these can tarnish a company's ability to work in challenging environments. Don't mistake an individual act of misconduct for a corporate failure to respond.”

Despite Ebner's attempt to distance the DynCorp Corporation from the actions of DynCorp employees, this event was one in a row of allegations of murder, abuse and fraud against private security contractors that led Hamid Karzai to finally enforce the ban on PMSCs in Afghanistan in November 2010.

Political analysts have argued that in addition to human rights and criminal violations, the presence of private security contractors poses a political threat to Karzai's government. Nevertheless, since the enforcement of the ban in November 2010, six-billion dollars of USAID funding for health, infrastructure, agriculture and energy projects was frozen in Afghanistan. A USAID official explained, “No new development projects can get underway because they [private development firms] can't contract security.”

Due to the vast number of for-profit, non-profit and government development agencies on the ground, military forces are overextended and can't meet their security demands. In Kandahar's Panjawai District, Major Mike Blanchette who oversees Ca-
adian operations explains, “we can’t secure every road improvement project, there is simply not enough coalition forces to do that. A lot of these [private security] companies fulfill an important need that does contribute to the good guys cause in terms of improving things and what not.” However, given the general, albeit somewhat begrudging consensus from military, development and government actors that private security companies are integral to both providing security and training national security forces, Karzai’s administration had no choice but to issue an exemption for development agencies to contract security as long as the firms were properly licensed and regulated.

Accountability of PMSCs has garnered much of the media attention. Their large weapons, mercenary attitudes and notorious human rights violations have largely overshadowed the role of private civilian contractors in the massive US-funded reconstruction and development enterprise in Afghanistan and Iraq. Development is now considered part and parcel to the security and stabilization efforts in both theatres. Our present war has extended far beyond the traditional objective of military operations, and determined to capture the “hearts and minds” of the populations. This approach leads to the unholy marriage of long-term development goals with short-term military objectives, and further complicates the project of accountability.

Though the military was traditionally seen as the harbinger of security, Mark Duffield argues that development is now seen as the real “technology of security.” Seeing development as central to liberal forms of power and governance, Duffield employs the Foucauldian notion of biopolitics to suggest that development functions to govern marginalized populations by managing “underdevelopment’s destabilizing effects.” In other words, he claims that development has always been a form of counter-insurgency. Development masquerading as security has facilitated the dramatic rise of the private development industry over the past half century, but increasingly so in the last decade. Since 2001, USAID has seen its budget ballooning every year to support the expanded mandate of coordinating reconstruction and development projects in Afghanistan and Iraq. The expansion of the agency mandate and funding however, as mentioned before was not accompanied by a comparable increase in personnel and capacity.

USAID was first integrated into this security-development nexus through the establishment of the Provincial Reconstruction Teams (PRT) in 2003. The PRTs were to engender Afghan government capacity through supporting provincial governors in insecure areas and thus, they were “seen as a means for dealing with the causes of Afghanistan’s instability: terrorism, warlords, unemployment and grinding poverty.” The American PRTs between 2004-2005, in contrast with the German- or British-led PRTs, focused on village improvement projects to win the hearts and minds in the ‘Taliban’s spiritual heartland.’

Modern PRTs in Afghanistan and Iraq are an improvisation on past attempts in civil-military integration such as the Civil Operations and Revolutionary Department Support (CORDS) organization used in the Vietnam War. Today, PRTs in Afghanistan include US soldiers, civilian contractors, and representatives from USAID, US Department of Agriculture and Afghan Ministry of the Interior. The ambitious, three-pronged goals of the PRTs—Governance, Security and Reconstruction—are being implemented by individuals with entirely different institutional mandates or as Robert Perito calls...
them "corporate cultures," funding structures, modes of operation and thinking. In addition to this basic challenge of coordination, many of the deployed agency and army representatives have little to no pre-deployment training, adequate language or area expertise, and have to learn on the job. In fact, since USAID had only a thousand Foreign Service Officers worldwide, they often sent in new hires straight out of graduate school or had to hire Personal Service Contractors to fill USAID spots in PRTs.

Though 'reconstruction' or more appropriately, development is emphasized in the name of PRTs, they are primarily a military organization, which has had significant challenges in implementing development projects. The military's "spend and build" strategy led to the building of schools and clinics without teachers or doctors to staff them. Moreover, the reliance on local contractors without any oversight or inspection meant that "PRT-sponsored buildings developed structural problems, became unusable, or simply collapsed altogether." It was this phenomenon of collapsing PRT projects that led Integrity Watch Afghanistan to empower local community members to monitor the PRT-funded school in Jabal Saraj.

PRT development projects have had numerous successes and failures—not all buildings have collapsed—but their real strength has been in supporting security sector reform. Even if PRTs had excelled at kick-starting the development process in Afghanistan, they have failed to address one key issue: being accountable to the Afghan public they serve. The United States Institute of Peace conducted an oral history project with various members of PRTs in Afghanistan. Many of them mentioned that the lack of accountability, in that Afghan civilians are seen as passive recipients of development assistance as opposed to claimants with rights to hold PRTs accountable, which threatens the sustainability of PRT projects.

The USIP Oral History Project interviewed the USAID programme officer in Afghanistan in 2005 on the role of USAID in PRTs. He explained that first, only 5% of USAID's budget in Afghanistan was allocated to PRT projects. During the interview, he expressed three reservations and key issues of the PRTs, (1) Development agencies and NGOs believe PRTs destroy their neutrality and expose them to violent attacks by blurring the line between humanitarian and military objectives, (2) PRTs are not seen as an extension of the central Afghan government, rather an occupying entity that is contained within a military fortress and thus, Afghans do not feel any direct connection with PRTs and (3) Civil affairs soldiers working on development simply failed to grasp that "development takes a very long time."

Development and security operate in fundamentally different time frames. The objectives of one do not neatly overlap on the other. The challenges faced by the PRTs in implementing small, rapid development projects, such as contractor corruption, lack of accountability to communities, inadequate security provision and lack of expertise are representative of the larger challenges facing the US-funded reconstruction and development enterprise in Afghanistan. If only 5% of USAID development funds was allocated to PRTs, then the other 95% were for country-wide development projects implemented entirely through the use of private development contractors. The PRTs made a point to hire only Afghan contractors, whereas the bulk of USAID projects were originally and continue to be implemented by a few, massive private US development contractors.
Between 2007 and 2009, the major USAID contractors in Afghanistan were Chemonics, DAI, Louis Berger Group, Association for Rural Development and Bearing-Point. And each of these prime contractors hired international private security firms like G4S, Blue Hackle and Edinburgh International or Afghan PSCs like Watan Risk Management. It is worthy to note that in January 2011, the Afghan government cited sixteen PSCs as “worst offenders” for crimes like tax evasion, keeping unlicensed armored vehicles, employing more guards than allowed, using unregistered weapons. Many of these firms, like Blue Hackle and G4S, provide security for USAID-funded projects and so provoked outrage among the development community. An Afghan official’s rationale for disbanding these firms was to allow room to “strengthen first the Afghan institutions,” and many of the local militia-based PSCs could be integrated into the formal security forces as part of the DDR program instead of perpetuating a parallel, security structure that undermines Afghan state sovereignty. 103

The unquestioned security-development nexus thus, continues to expand without addressing the underlying concern about accountability. Since the war in Bosnia and Herzegovina, the utility and the dangers of using private contractors has been part of policy discourse. 104 Yet despite the promulgation of new legislation, national licensing regulations, corporate codes of conduct, and voluntary agreements (e.g. UN Anti-Trafficking Law, MEJA, IPOA code of conduct) to hold private contractors accountable, the challenges of accountability remain largely the same. Legal accountability mechanisms continue to be undermined by jurisdictional disputes, weak national licensing standards (or enforcement) and ultimately the lengthy and expensive legal battle that prevents effective access to remedy. The next chapter will evaluate some of these human rights-based, legal accountability mechanisms in greater detail.
CHAPTER 3 CITATIONS

75 Mark Duffield, Development, Security and Unending War: Governing the World of Peoples, Polity, 2007, viii-ix
82 "Secretary-General Sets out Broad Agenda for Strengthening Human Protection."
84 "Secretary-General Sets out Broad Agenda for Strengthening Human Protection."
87 "US Embassy Cables: Afghan Government asks US to Quash 'Dancing Boys' Scandal." Guardian.co.uk. 2 December 2010 http://www.guardian.co.uk/world/us-embassy-cables-documents/213720
92 Duffield, 2007, vii-ix
93 ibid.
95 ibid. 3-4
96 ibid, 11
97 ibid.
98 ibid, 12
4. EVALUATING EXISTING ACCOUNTABILITY FRAMEWORKS

Any accountability framework that calls for increased legal, bureaucratic, political and professional mechanisms to better manage development and security contractors, also risks the further institutionalization and embedding of private contractors in the modern development enterprise. If accountability is expanded to include the end beneficiary, then it is possible to question the use of private development and security contractors in post-conflict reconstruction and development.

The primary contractor accountability challenges in wartime as mentioned before are:

1. Multiple tiers of contracts and subcontracts diffuse responsibility for project outcome among numerous actors and relying on a complex web of accountabilities to get the project done.
2. Insecurity and perceptions of insecurity decrease monitoring and evaluation visits, duration of the visits, while increasing security costs.
3. The combining of security and development objectives can be a hindrance to trust building between beneficiary groups and project implementers.

The following set of American accountability reforms, emerging from the public administration discourse, has tried to address these issues. This chapter examines some of the current procurement, evaluation, monitoring and oversight reforms to see if they do in fact address the core challenges of accountability in post-conflict reconstruction. More importantly, this chapter will see how these mechanisms can be adapted to create accountability relationships between the project implementers and beneficiaries in the early postwar reconstruction period (when the state has not yet rebuilt any governing capacity, more like the Afghan state between 2001 and 2006).

Public Administration Frame

Since this thesis examines the phenomenon of public agencies, such as USAID, contracting out much of their core responsibilities, it is important to first examine how accountability is framed in public administration discourse. The question is not whether private contractors are accountable or not. Rather we must ask what types of accountability are they subjected to and are these appropriate to preventing and punishing waste, fraud, abuse and human rights violations in conflict.

Accountability as explained by public administration scholars such as Richard Mulgan requires three basic conditions:

1. The existence of an individual or body that is external to the subject being held accountable,
2. A forum for social exchange and interaction for one party to seek “answers and rectification while the other side, that being held accountable, responds and accepts sanctions,” and
3. The ones calling for the account must have the rights of authority over those being held accountable.

Early 20th century scholars such as Carl Friedrich and Herman Finer debated whether professional accountability of public servants to the public was an internal or external process. Friedrich emphasized the “inward responsibility of public servants to their professional standards,” whereas Finer believed that accountability is an external relationship between one individual to another.

In 1987, Barbara S. Romzek and Melvin J. Dubnick analyzed the issue of pub-
lic sector accountability following the 1986 explosion of the space shuttle Challenger. They further developed Friedrich and Finer's debate through their analysis of the Challenger incident.\textsuperscript{107} This led them to create a typology of accountability systems for public agencies.

Romzek & Dubnick's
Types of Accountability Systems (1987)

<table>
<thead>
<tr>
<th>Source of Agency Control</th>
<th>Internal</th>
<th>External</th>
</tr>
</thead>
<tbody>
<tr>
<td>Degree of Control over Agency Actions</td>
<td>High: 1. Bureaucratic</td>
<td>Low: 3. Professional</td>
</tr>
<tr>
<td></td>
<td>2. Legal</td>
<td>4. Political</td>
</tr>
</tbody>
</table>

Bureaucratic accountability (US) is largely hierarchical, where the top agency administrator sets the priorities and all subordinates must comply with orders from above. Accountability is enforced using “close supervision or a surrogate system of standard operating procedures or clearly stated rules and regulations.”\textsuperscript{108} This form of accountability is clearly evident in agencies such as USAID, DoD, and DoS who have laid out extensive sets of rules and standard operating procedures for contract bidding, contract assessment, budgeting and procurement. Reporting between agencies, contractors and subcontractors is the preferred method of communication to ensure accountability in a bureaucratic context.

For instance, in a 2005 quarterly report from DAI to USAID, they noted the submission of the following reports to meet their contract requirements: (1) Program Implementation Strategy, (2) Program Performance Management Plan, (3) Life of Project Work Plan, (4) Year One Annual Work Plan and (5) Inventory of On-Going Alternative Livelihoods Assistance in the Region and Proposed Coordination Strategy.\textsuperscript{109} Though reporting mechanisms are supposed to be accompanied by frequent site visits by a USAID representative to check on the contractor's progress, site visits especially to rural areas are often hindered or reduced in frequency due to variable security risks.

Legal accountability involves an external body that has the ability or power to “impose legal sanctions or assert formal contractual obligations.”\textsuperscript{110} Unlike the hierarchy of bureaucratic accountability, Romzek and Dubnick theorize that legal accountability is based on two relatively equal and independent bodies culminating in a principal-agent relationship. The Federal Acquisition Regulations (FAR) are a set of laws that the Department of Justice (DoJ) can use to ascertain whether state agencies are complying with appropriate contracting practices (bidding, procurement, evaluation).

Contractors that violate the FAR are subject to fines, suspension, debarment and prosecution. The FAR thus, enables USAID to use legal accountability mechanism to ensure contractors adhere to their commitments. Contractor firms or individuals that are under investigation, prosecuted or fined are recorded in the Excluded Parties List System (EPLS).\textsuperscript{111} The establishment of the Congressional Commission on Wartime Contracting is an example of congressional monitoring of compliance of government agencies and contractors with FAR regulations. The CWC however, is not a legal accountability mechanism in itself because it cannot impose legal sanctions. Rather, it falls into the next category of political accountability.

Political accountability requires an individual or agency to be responsive to the constituency that they represent. This can include “the general public, elected officials, agency heads, agency clientele, other special interest groups, and future genera-
The movement for transparency in government largely relies on this notion of accountability to the people. The CWC was a congressional, and by extension political, committee set up to investigate inefficient and some outright harmful wartime contingency contracting practices. In the course of their investigations and hearings, they have uncovered numerous instances of noncompliance with FAR regulations. They have also revealed broader structural problems with how contracting has become the default mode of operation and must be reexamined as a practice in itself. As a bipartisan congressional committee though, they cannot enforce their findings or impose sanctions. They serve in an advisory capacity to congress and can inform future policy decisions and contracting reforms. The CWC is also a response to media reports of rampant contractor fraud and waste, which can quickly diminish domestic support for war and state-building operations abroad.

This type of accountability is not only important for the country at war or reconstruction efforts abroad, but it is also extremely important as a way to increase the legitimacy of the Afghan state through state building and reconstruction efforts. That's why civil society groups like Integrity Watch Afghanistan rely on the responsiveness element of political accountability to empower local communities to monitor development projects, while simultaneously engaging their local government to apply pressure to contractors.

And, herein lies the paradox of the American development enterprise at war. The rationale for rapid and expensive reconstruction efforts in Afghanistan have been justified in America on the grounds that it will increase legitimacy of the Afghan state, while delegitimizing the support base for the competing Taliban and Al-Qaeda. Contractor fraud and corruption, even in the more benign form of highly paid foreign consultants that are viewed as corrupt, is counterproductive to engendering a system of political accountability in Afghanistan.

Professional accountability, the third form, is the most applicable to our framing of private development and security firms. Professional accountability occurs when “public officials must rely on skilled and expert employees to provide appropriate solutions.” The public official in this instance becomes a layperson that must rely on and trust the expert to provide quality work. If the expert falls through, the lay official would hopefully be able to hold them accountable and fire them if necessary. US-
AID, like other agencies, is perhaps becoming a “lay institution” deferring to private development “experts” in the secret hope that they will hold themselves accountable for both ethical budgeting and positive development outcomes.

When the Rogers Commission Report presented its analysis of the gap in NASA's accountability to account for Challenger, Romzek and Dubnick offered an alternative perspective that did not focus on gaps, but rather on what types of accountability were being emphasized. Due to the incredibly technical nature of NASA’s operations, the agency largely relied on professional accountability in the 1960s and 1970s. Due to congressional pressures in the 1970s however, NASA experienced major budget cuts. 40% of NASA’s staff was cut and between 1970 and 1986, the quality control staff was cut by 71%.114

Under the dual pressures to decentralize and privatize, NASA began to rely on bureaucratic accountability mechanisms to maintain linkages between various departments and subheads. The agency also began to use contractors, who “in addition to any technical and financial benefits they provided NASA, contractors had always proved very helpful politically in establishing support for the agency’s programs and annual funding requests.”115

Romzek and Dubnick’s powerful insight into the relationships between contractors and political support is really important in understanding the role contractors continue to play for the modern development enterprise constantly under threat of budget cuts and increasing political scrutiny. Functionally, the use of contractors replaced the traditional supervisor-subordinate relationship found in bureaucratic accountability with a superordinate-subordinate relationship. Contracts provide a legal framework to demand better performance at lower costs since public agency managers no longer have to incur the “costs associated with directly maintaining professional accountability mechanisms.”116

In the case of private development contractors, they are hired because of their expertise. However, public agencies rely on the firm’s internal bureaucratic and professional accountability systems in place of direct governmental supervision. It is no surprise then that Inspector Generals of all agencies using contractors in Iraq and Afghanistan have found that public agency officials lack direct knowledge and ability to measure contractor performance.

The response to the Challenger explosion was to call for greater accountability. In this case, there were calls for an external oversight body to review safety standards, the creation of checklists and guidelines to follow when preparing for a space shuttle launch or hiring famous ex-astronauts to bring up both the technical and celebrity profile of the NASA program. Despite the series of accountability reforms within NASA, seventeen years later on February 1, 2003 the Space Shuttle Columbia disintegrated upon re-entry into the Earth’s atmosphere. The Columbia Accident Investigation Board (CAIB) cited similarities to the findings of the Roger’s Commission.117 Despite prior knowledge of technical problems like in the Challenger launch, the decision-makers in NASA’s upper management decided to proceed with the Columbia mission.

The two space shuttle accidents, followed by the establishment of two commissions to investigate the accidents (identify lapses in accountability and recommend reforms) offer a distant, but related parallel to the issue of contractor accountability today. The accountability machine is reinvigorated in cycles, usually after a crisis or during a
war. It offers a tremendous opportunity for reform, but one that can easily be hindered by generic resorts to bureaucratic and legal tinkering that result in yet another crisis, albeit somewhat deferred, such as the Columbia explosion. Though private development contractor corruption is not nearly as shocking as the technical and managerial failures that led to these space shuttle accidents, it has tremendous relevance for the well being and prosperity of Afghans that have endured several decades of conflict, international peace-building attempts and politicized aid operations.\(^{118}\)

**Current Public Administration Reforms**

**Procurement: Peacetime Rules for Wartime?**

*USAID Forward* is a set of procurement and contracting reforms that seek to manage contractors better—better to what end? One of the key criticisms of the current USAID procurement policies is its reliance on a small cohort of private development contractors that continue to receive the lion's share of USAID contracts, cooperative agreements and grants. Some have titled these companies the "beltway bandits" to indicate their concentration inside the I-495 highway around Washington. Though not all of the prominent contractors are located in this area, the close proximity of many contractors illustrates the evolution of the development-industrial complex.

The CWC in particular, is concerned that American taxpayers are not getting the "best value" or "efficiency" that they are paying for in Afghanistan. But these complaints are simply not a unique phenomenon in the history of US procurement policy. Steven L. Schooner, a legal expert on US procurement laws, outlines nine competing objectives of government procurement systems.\(^{119}\) I have organized them under the categories "Free Market Ethics," "Consumer Values," and "Checks on Free Market Competition" (see right).

In this table, the desire to implant free-market ethics like fair competition, integrity and transparency are compatible with the American taxpayer's desire to know how her money is spent so she can get the best deal. The use of procurement for wealth distribution, risk avoidance and uniformity however, can contradict with free-market ethics for the best consumer value, because they encourage selective awarding of contracts on the basis of catering to underrepresented firms or relying on a well-seasoned contractors whose business practices, organizational structure and capacity cater primarily to their primary client—the government.

As discussed in Chapter 2, there has been a historic co-evolution of USAID and the private development industry. The fact that USAID has consistently relied on the same group of contractors for several decades may appear to counter fair procurement practices on the surface. Full and open competition in bidding and procurement processes is a cornerstone of anti-corruption practices as advocated by OECD and Transparency International. They are also enshrined in US law through the Competition in Contract Act of 1984 and Federal Acquisition Regulations that clearly state:

Government business shall be conducted... with complete impartiality and with preferential treatment for none. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.\(^{120}\)

But as Schooner points out that along with a desire for transparency and cost-efficiency, there is a competing desire to use procurement for wealth distribution or cultivate "specific manufacturers to maintain sufficient expertise or industrial base capac-
USAID Forward Key Points

Key Objectives of USAID Forward's Implementation & Procurement Reform

1. Strengthen partner country capacity to improve aid effectiveness and sustainability by increasing use of reliable partner country systems and institutions to provide support to partner countries.

2. Strengthen local civil society and private sector capacity to improve aid effectiveness and sustainability, by working closely with our implementing partners on capacity building and local grant and contract allocations.

3. Increase competition and broaden USAID’s partner base, by increasing the number of prime contract awards and percentage of total dollars obligated to U.S. based small and disadvantaged businesses and small NGOs (while decreasing the number and value of large pre-competed contracts).

4. Use USG resources more efficiently and effectively, by increasing the number of fixed price contracts where feasible and appropriate, decreasing the use of “high-risk” procurement methods, and harmonizing procurement approaches with other US government agencies working in the same substantive areas.

5. Strengthen collaboration and partnership with bilateral donors, multilateral and international organizations to increase synergies and avoid duplication.

6. Rebuild USAID’s internal technical capacity and rebalance the workforce, working with the Talent Management Reform initiative.

Steven L. Schooner’s 9 Objectives of Government Procurement

<table>
<thead>
<tr>
<th>Free Market Ethics (Anti-corruption)</th>
<th>Consumer Values</th>
<th>Checks on Free Market Competition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Competition</td>
<td>Efficiency</td>
<td>Wealth Distribution</td>
</tr>
<tr>
<td>Integrity</td>
<td>Customer Satisfaction</td>
<td>Risk Avoidance</td>
</tr>
<tr>
<td>Transparency</td>
<td>Best Value</td>
<td>Uniformity</td>
</tr>
</tbody>
</table>

A³ Key Points

USAID A³ (Accountable Assistance for Afghanistan) initiative

1. Restrict to the number of subcontract tiers and eliminate subcontracts with brokers who provide no value;
2. Tighten financial controls to establish auditing procedures for 100 percent of locally incurred project costs and advocate increased use of electronic funds transfers;
3. Perform additional project oversight in high-risk areas, utilizing multiple monitoring techniques and delegating more oversight authority to USAID field staff; and
4. Conduct background investigations on Afghan and third-country companies and individuals who work on USAID projects to thoroughly vet our partners.
ity in anticipation of future contingencies." The private development industry (and also the private security industry) is what Schoon-ner calls the “industrial base capacity” on which agencies like USAID consistently rely.

Wealth distribution in the US domestic case has historically meant awarding government contracts to competitive, but smaller firms or even minority-owned firms in the case of affirmative action. This is mentioned in USAID Forward’s third objective that seeks to “increase competition and broaden USAID’s partner base.” Is this really going forward or simply reiterating what the agency should have been doing since the 1960s? Reliance on a greater number of contractors does not mean decreasing reliance on the small cohort of prime contractors. It also means that despite the CWC’s cautioning against overreliance on contractors, current USAID implementation reforms merely reinstitute the practice of development through contract.

The multiple tiers of contracting and subcontracting are a major challenge for contractor accountability during wartime, because every tier decreases visibility and control over actual project outcomes, while increasing opportunities for financial exploitation. If at present, it is difficult to adequately monitor and evaluate even a small group of large, private development contractors, it remains unclear through the USAID reform agenda how even an increase in numbers and technical capacity of USAID personnel can keep up with the objective of increasing the number of contracts to provide opportunities for smaller firms and NGOs. Moreover, the broader USAID reform agenda does not suggest a limit on the tiers of subcontracting allowed or how to ensure subcontractors are accountable not only to their direct clients, but also to the project beneficiaries (the community or country they are working for) and the project donor (USAID). Though the USAID A3 initiative does suggest restricting subcontract tiers and eliminating “brokers who provide no value,” that is only possible through the presence of an active USAID field staff that has the time and ability to gauge the subcontractor’s value before the contract is awarded.

In the Afghan case, procurement is strategized as a wealth distribution strategy in the form of the “Afghan First” initiative, which encourages agencies under the US Mission to Afghanistan to rely on Afghan firms for supplies and services. Most often, this means the use of Afghan subcontractors, while USAID's sole-source, costs-plus and fixed-cost contracts continue to be awarded to the small cohort of private development firms mentioned above. But, one of the largest challenges in fair and transparent procurement policies is that especially in the early years, Afghan subcontractors were not always familiar with the convoluted FAR-mandated bidding procedures and the additional procurement requirements of each individual contracting agency (USACE, USAID, DoD, DoS). This limited the pool to larger American or regional (Turkish, Pakistani, UAE, Jordan) subcontractors that could quickly put together compelling bids with strong marketing skills. Moreover, strong marketing and design skills that used “appealing but unrealistic project simulations” combined with the Prime Contractor’s promise to use costly, though innovative materials such as Chemcrete justifiable drastically higher project costs.

A USACE senior engineer explained that if you seriously wanted Afghan or Iraqi subcontractors to be competitive with Turkish and American subcontractors, then it was necessary to first simply FAR regulations to make it easier to bid and also conduct training sessions in US contract bidding pro-
cesses. He added that the mere fact that a government procurement jobs website FedBizOpps.gov or USAID.gov/Procurement_Bus_Ppp was used as a taken-for-granted reference for subcontractors to discover opportunities indicates the large gap between American business-as-usual practices in post-conflict reconstruction and local contractors' impediments to benefit from the "Afghan First" or "Iraqi First" initiatives.

When procurement training seminars are actually conducted for Afghan or Iraqi contractors, the seminars are initiated by American prime contractors like DAI, Inc. in Afghanistan or BearingPoint in Iraq. A two-day seminar conducted by DAI in Kabul, entitled "USAID Award Compliance for Development Professionals" costs $795 to attend—an unbelievable price considering it is much higher than most Afghans’ monthly salaries.

From 2002 to 2010, the ‘spending imperative’ has released a flurry of contracting funds into Afghanistan. Each time the failures of monitoring, evaluation and financial controls are brought up, contractors and USAID management cite the lack of security, high turn-over and short tenures of USAID field staff and lack of Afghan governmental and civilian capacity for these shortcomings. If A3 or USAID Forward were implemented in 2002 at the heels of the reconstruction activity, would the results have been any different? ‘Peacetime’ contracting reforms, especially those in response to congressional scrutiny during a budget crisis, do not necessarily address the accountability challenges in a conflict setting.

Though this implementation, procurement and evaluation reform is necessary for USAID in general to improve development operations in countries that are not embroiled in conflict, they simply do not address the wartime challenges that led to the intense scrutiny of their operations in the first place.

In fact, an interview with an Afghan engineer who had worked on various USAID projects, including those implemented by IOM and a private development contractor Emerging Markets Group, Ltd, revealed that much of the contractor corruption was due to specific security concerns.

A USAID-OIG report from March 2011 accordingly found that "IOM approved materials that did not meet the minimum acceptance criteria" in their own quality control manual. The issue of inflated costs has also been documented in USAID-OIG’s investigation into the Development Alternatives Inc. Jalalabad office, which is implementing part of USAID’s Local Governance and Community Development project:

In addition to citing cost inflations, the memorandum mentioned how DAI employees “were working in collusion to fabricate monitoring reports” by taking “bogus photographs or use photographs from other projects.” Projects that escaped frequent monitoring visits due to high security risks would generate the most opportunities for kickback schemes and exploitation.

This particular USAID-OIG memorandum was in response to more alarming reports of private security contractors paying off local insurgents, including the Taliban in return for safe passage of supply convoys. One newspaper article carried the headline “Taxpayer Money Funneled to Taliban” right after the release of the memo. After auditing DAI’s private security contractor Edinburgh International, the OIG determined that no suspicious transfers were found. The focus then shifted to DAI’s subcontractors who were in charge of stabilization and community development aspects of the project. The OIG recommended that “USAID/Afghanistan conduct appropriate risk
and impact assessments...to determine whether the security environment in those locations is permissive enough to allow civilian implementation and monitoring efforts to proceed without interference from insurgent groups."\(^{131}\)

OIG's recommendation above is yet another example of competing objectives for conducting development in insecure areas to win the "hearts and minds" of Afghans versus conducting development in a FAR-compliant, transparent, corruption-free and low-risk manner. During a public presentation on reconstruction efforts, Brigadier General Peter A. DeLuca speaking from his experiences with the US Army Corps of Engineers (USACE) in Iraq and Afghanistan, expressed the gaps between peacetime regulations and wartime challenges. He stated simply "the paper isn't going to be perfect," which meant that you are not going to have a "DCAA [Defense Contract Audit Agency]-operable audit" in a warzone.\(^{132}\) This may suggest that FAR regulations are important as a baseline aspirational standard, but if the project implementers on the ground neither have the time, nor the patience to follow each and every regulation, then it is important to be clear about when transparency and when haste is the main priority.

DeLuca followed up his comments with a reflection on USAID. Since USAID uses USACE as a contractor, the two agencies have a basic understanding of each other's operational strengths and weaknesses. He stated that since the State Department and USAID do not have personnel "on hand to deploy" and work in active conflicts, the "AID model is not good for doing reconstruction in a compressed timeline with conflict." It seems unfair to judge an agency's performance based on their work in a conflict zone, if the agency is not even internally structured to manage reconstruction efforts in conflict. The bought-in capacity that contractors and consultants provide

---

**Material Cost Inflation:** The engineer (from here on will be referred to as Engineer "A") who was in charge of project monitoring explained how local subcontractors design cost sheets. "A" illustrated if it costs $2 per square meter to paint the school, then the contractor could price it as high as $45. Though this example seemed outrageous to the engineer, when "A" reported material cost inflations to the project supervisor, who reports directly to USAID-Kabul, the response was summed up in a shrug. Cost inflation is tolerated, "A" explained, because the aid agency and upstream contractors know that in order to construct in an insecure area, local contractors have to pay off certain warlords, police or even the Taliban. In fact, when a development project is announced in a given area, "A" claimed that the local gunman would even approach the contractor himself and demand a cut up front, anywhere from 15-20%. In cases where cost inflation did not cover the extra costs incurred by the contractor, cheaper materials would be used.

<table>
<thead>
<tr>
<th>Description</th>
<th>Subcontractor #1 Inflated Costs ($)</th>
<th>Subcontractor #2 Standard Costs ($)</th>
<th>Quantity</th>
<th>Difference ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wheelbarrow</td>
<td>77.00</td>
<td>32.00</td>
<td>100</td>
<td>4,500.00</td>
</tr>
<tr>
<td>Shovel</td>
<td>6.00</td>
<td>3.20</td>
<td>100</td>
<td>280.00</td>
</tr>
<tr>
<td>Water bucket</td>
<td>10.00</td>
<td>2.00</td>
<td>100</td>
<td>800.00</td>
</tr>
<tr>
<td>Pickaxe</td>
<td>6.00</td>
<td>4.00</td>
<td>100</td>
<td>200.00</td>
</tr>
</tbody>
</table>
is only as efficient as the agency's ability to manage that capacity. The key component in reconstruction work during conflict is not only having adequate security, but also the element of adequate time.

USAID's accountability reforms such as A3, USAID Forward and Afghan First are simply not tailored to prevent and punish contractor fraud in a timely fashion as projects are underway. What the Afghan engineer revealed about cost inflations used for paying off insurgents was common knowledge to local and foreign aid workers as early as 2004. The USAID memorandum investigating the real cost of security in Afghanistan was only released in September 2010.

Anti-Corruption Frame

"If you take US $10 Million from the US government and sub the job out to Iraqi businesses for US $250,000, is that business, or is it corruption?" — Ed Kubba, Member American-Iraqi Chamber of Commerce 13 January 2009

For international development practitioners, corruption in reconstruction and development projects should be a major concern. Anti-corruption scholars like Cheyanne Scharbatke-Church and Kirby Reiling have argued that dealing with corruption should be a priority during peace building, rather than treated as a marginal concern for accountants and lawyers. Since reconstruction and development projects are critical processes of reallocating resources, corruption can "exclude vast swathes of the population from decision-making and access to resources." The most widely accepted definition of corruption is the one popularized by the prominent anti-corruption NGO Transparency International (TI): "the abuse of entrusted power for private gain." This definition is a refinement of Joseph S. Nye's classic 1967 definition: "Corruption is behavior that deviates from the formal duties of a public role because of private regarding, pecuniary or status gains." When devising accountability frameworks for private contractors, both Nye and TI's definitions pose a conceptual problem. Accountability resides firmly within a public body that must not deviate from its formal, entrusted role. This public framing of corruption has a direct impact on how anti-corruption strategies are designed. The UN, OSCE and TI have all published widely dispersed anti-corruption toolkits. The OSCE's 2004 "Best Practices in Combating Corruption" handbook as an example, covers many high risk sectors, the "Conflict of Interest," "Public Procurement," and "Building and Maintaining an Ethical Public Administration" are the most pertinent for this thesis.

For instance, in the "Building and Maintaining an Ethical Public Administration" section, they recommend "adequate accountability mechanisms should be in place within the public service." The OSCE seems to rely on the internal, professional accountability of civil servants, which is irrelevant in cases where civil servants have little direct knowledge of contractor actions and performance in distant conflict zones. Private contractors in Afghanistan have thus, widely benefited from corruption in the public procurement process. OSCE's handbook first addresses the issue of bid opening, evaluation and evaluation. USAID consistently awards prime contracts to the same companies over and over again, which as discussed under the previous sec-
tion reveals how the competing objectives of government procurement result in inconsistent outcomes.

In September of 2004, the International Crisis Group (ICG) published a timely analysis of the Iraq reconstruction process and recommendations to be immediately implemented. They state: “Corruption thrives on construction and public projects, especially in the confusion and chaos of transition.”\textsuperscript{140} Citing lack of public capacity to oversee contracting, expense and procurement, the ICG stated that the U.S. is “setting a bad example” of corruption for the rebuilding Iraqi state.\textsuperscript{141} In particular, they isolated three core problem areas:

1. The awarding of prime contracts to large American firms behind closed doors with corruption issues such as conflict of interest, noncompetitive bids, poor procurement procedures and over billing.
2. The “costs-plus” contract structure, where “companies are fully reimbursed for costs incurred and given an additional percentage as guaranteed profit.”\textsuperscript{142}
3. The prevalence of kickbacks to employees from subcontractors.

This 2004 assessment of corruption risks is similar to the Jiron’s 2003 USAID-OIG Memorandum. At a very relatively early stage in the respective reconstruction processes in Iraq and Afghanistan, the problems had already been identified. Though OIG issued the public administration vocabulary of “risk assessment,” the ICG employed the vocabulary of corruption to condemn the same phenomenon of private wartime contracting.

The OSCE recommends that first competitive bidding is only possible if the bidders names are concealed from bid evaluators. Since this is rarely the case, they also recommend that bid evaluation criteria should be clearly outlined and bid selection should be an open and transparent process. Though US agencies have violated many of these procurement norms in awarding reconstruction contracts, the OSCE implicitly authorizes such violations as necessary exceptions: “In cases of extreme urgency because of disasters” and “in cases where national security is at risk.”\textsuperscript{143}

There is also nothing inherently corrupt about the “costs-plus” contract structure because financial abuses under such contracts are legitimized first by contract, and second, by common business practices in tenuous conflict situations where unexpected costs frequently arise. Kickbacks in Iraq and Afghanistan have taken many forms, but are frequently facilitation fees to introduce a subcontractor to the prime foreign contractor. The problem with kickbacks is that they are budgeted into primary budget of the general contractor and only realized at much lower levels. Though the USAID-OIG has been able to uncover certain kickback schemes and appropriately referred employees for prosecution, these schemes are largely factored into what some employees consider their rightful benefits package.

Furthermore, OSCE recommends blacklisting of unethical contract partners.\textsuperscript{144} This provision has also been institutionalized in the US with the Excluded Parties List System. This Internet database allows bid evaluators or businesses to identify individuals and firms who have been debarred and under suspension. Any database however, as good as its maintenance. Often due to the use of aliases, reassignment with different firms and a general lack of oversight, the database cannot accurately capture all procurement code violators. Furthermore, many known violators are very large private development companies who generally tend to avoid legal prosecution or are pardoned due to their indispensable services.

Current USAID administrator Rajiv Shah stated, “Too big to fail simply does not
exist in development.” This statement is not consistent with the fact that only one large USAID NGO contractor—Academy for Educational Development—has been suspended so far. AED was suspended in December 2010 due to USAID-OIG’s investigation into the firm’s “corporate misconduct, mismanagement, and a lack of internal controls.”

Though the agency was not debarred (permanently prohibited from getting new contracts), a suspension for a giant government contractor might as well be a ticket to bankruptcy since the large percentage of their revenue is contingent on contracts. After only a few months of suspension, AED announced that it would sell of its assets so that “most of AED’s programs will continue uninterrupted and most staff will continue to implement activities grounded in our mission of implementing solutions to critical social problems in the U.S. and around the world.”

Suspensions and debarments are some of USAID’s most powerful sanctions against contractors, and yet it is clear from AED’s case that an inefficient contractor never really disappears. It only disassembles into a mélange of mergers and acquisitions, to rise up from the ashes like a phoenix with a new development brand to re-enter the modern development enterprise.

Needless to say, such bureaucratic best practices and accountability mechanisms can be helpful, but remain inadequate for addressing the practice of corruption. Furthermore, the private sector in this framing is placed on the supply-side of corruption, and the public sector on the demand-side, especially in the case of bribery. In the case of private wartime contractors however, an entrusted public official is entering into a legally enforceable agreement with a private company to provide services or furnish goods. The anti-corruption frame thus, is unable to directly tackle the issue of private wartime contracting. In corruption lingo, private contractors can commit fraud, but only public officials can be truly defined as “corrupt.”

This distinction is especially troubling in the case of USAID’s investigation into Edinburgh International mentioned earlier. Though USAID-OIG concluded that Edinburgh International had not directly bribed the Taliban or other insurgent groups, even if they had, their activities would be contractually categorized as fraud and they could be criminally prosecuted for funding terrorists. Despite the fact that Edinburgh International was entrusted to provide security (a public good) for supplies critical to the US mission and personnel (a public mission) in Afghanistan, the private contractor conveniently falls outside the narrow scope of “entrusted authority” that can be labeled corrupt.

If anti-corruption accountability mechanisms are to be effectively applied to contractor states engaging in post-disaster and post-conflict reconstruction, then they must directly deal with the increasingly leveled relationship between governments and their contractors. If public officials continue to shirk any accountability of contractor behavior and contractors continue to bemoan lack of government oversight, then the reconstruction and development projects will remain ripe for corruption.

Corruption has also become an explanatory variable in understanding the challenges of conflict and failures of peace building. Expanding on the broader state building and development-oriented works of Collier and Ghani, anti-corruption scholars diagnose the “conflict cycle” by positioning corruption at the intersection of development and state-building challenges. Alix Boucher, William Durch, Margaret Midyette, Sarah Rose and Jason Terry took on the daunting chal-
lence of mapping the relationship between corruption and conflict, identifying five “nodes or points of convergence on which corruption fighters” can focus:

1) Post-conflict distribution of political and military power.
2) Cross-border trafficking in people and commodities.
3) Informal post-war economy.
4) Weakened national public administration
5) Wasted, misspent, or mistargeted reconstruction aid by international agencies and employees.

First, since it is very difficult to accurately measure corruption, most corruption indices such as TI’s rely on popular or business perceptions. Perceptions play a crucial role in determining levels of trust both in the government and the reconstruction effort. Second, even when corruption is overstated in perception surveys, the legitimacy of the governmental or international actor relies on how closely they can link public expectations with service delivery. Street commentary on corruption thus reveals larger systemic issues in a given state and as Daniel Jordan Smith says, it “has become the dominant discourse of complaint in the postcolonial world, symbolizing people’s disappointments with democracy and development.”

Current Anti-Corruption Reforms
Are Private Development Contractors on the Anti-Corruption Agenda?

Corruption continues to be the preferred discourse of complaint to express frustration with the shortcomings of security and development promises. The lack of oversight, institutions and appropriate legal frameworks has been cited as the main problem areas by military and development agencies alike. After a decade of learning from US contracting errors, General Petraeus recently stated that insufficient oversight is the reason that international contracting funds “unintentionally fuel corruption, finance insurgent organizations, strengthen criminal patronage networks and undermine our [US] efforts in Afghanistan.” Some of the Department of Defense (DoD) initiatives have been to (1) better train military contracting officers that oversee contracts, (2) begin using the Synchronized Predeployment and Operational Tracker (SPOT) electronic database to record contractor activities and (3) to enact the federal “contractor transparency clause” that would require prime and first tier subcontractors to disclose information to the government.

The question is then, whether these types of mechanisms actually increase contractor accountability in conflict contexts? Moreover, all of these initiatives are to tackle waste and fraud, and not other types of contractor misconduct. Better training of military or USAID contracting officers can increase professional accountability, whereby these officers can better monitor civilian contractors. Using SPOT can also increase bureaucratic accountability by helping the State Department (DoS), DOD and USAID share and track contractor activity and performance. Using the contractor transparency clause can increase legal accountability, because without adequate access to information it is hard to legally prosecute cases of fraud and abuse.

Even though General Petraeus is concerned about the impact of contractor corruption in fueling the conflict, the accountability mechanisms do not seem tailored for implementation in a conflict context. Legal, bureaucratic and professional procedures are implemented in an ad hoc fashion on the ground. And even when fraud is revealed using these measures, the painfully slow pace of litigation in civil fraud cases does not ad-
dress contractor accountability in a timely fashion. A recent DoD report on contracting fraud revealed that between 2007-2009, the Pentagon had awarded $285 billion to contractors convicted of fraud.\textsuperscript{152} These fraud proceedings moreover only yielded $1 million in court judgments. Robert E. Klitgaard, Ronald MacLean-Abaroa and H. Lindsey Parris devised a simple equation for understanding the frequency of corruption that can perhaps help us evolve beyond blaming corruption to improving accountability.\textsuperscript{153} 

Corruption = Monopoly + Discretion − Accountability

It is no surprise that in this equation, accountability is understood as the only counter variable to an individual's monopoly on decision-making and excessive discretionary powers.

The Afghan government under pressure from its own citizens and foreign aid organizations has also stepped up to create and continually revise anti-corruption policies. This was initially done in compliance with ratification of the UN Convention against Corruption (UN-CAC). The Afghan anti-corruption strategy, which combines “Anti Corruption and Administrative Reform,” outlines an entire section on contracts with foreign companies and NGOs. Main problem areas identified in the strategy are inadequate legal expertise to evaluate contract design, lack of pre-award contractor evaluation, inaccurate project design and nonexistent monitoring. The solutions offered emphasize increased monitoring, strengthening the contractor-licensing regime and reforming existing procurement laws.

Despite the existence of an anti-corruption strategy in Afghanistan, it remains unclear how much jurisdiction the government has over private development contractors and subcontractors working for aid agencies. Even with legal jurisdiction over all private development and security contractors, it may not be feasible to quickly hold contractors accountable without circuitous judicial involvement. More to the point, the sanctions (withholding contractor payment) and incentives (extra payment for early project delivery) written into a contract can only be enforced by the donor agency or prime contractor themselves.

The Afghanistan High Office of Oversight & Anti-Corruption (HOOAC) was set up in July 2008 by the Karzai administration. An Anti-Corruption Unit (ACU) was also set up in the Attorney General’s office in late 2009. This was followed by a joint venture between ISAF and the Afghan government to establish the Combined Joint Interagency Task Force (CJIATF)-Shafafiayat (“Transparency”) in August 2010. Though these Afghan anti-corruption initiatives from 2008 onwards are important steps for the Afghan state to battle corruption ten years after the US-led invasion, their primary focus is on countering corruption within government agencies, targeting high level officials and preventing the funneling of Afghan revenues and aid funds into the hands of insurgents, warlords and powerbrokers alike.

Private development contractors are considered a nuisance, but they are not at the top of the current anti-corruption agenda. Ultimately the job of keeping private contractors in check belongs to the agencies and governments that employ them.

Civil Society to the Rescue
(Ex: Integrity Watch Afghanistan, est. 2006)

Integrity Watch Afghanistan has a predominantly political accountability framing, because it is first and foremost concerned with the project implementers, the state
and donors responding to beneficiary needs and priorities. Post-conflict environment are tenuous environments where most project beneficiaries do not have direct access to information about the projects (e.g. plans, budgets, contractor information, project targets). They do not have a forum to voice grievances and demand sanctions with the assurance they will be heard and addressed. Despite the intermittent use of complaint boxes and public consultation meetings, in an insecure and volatile context, donors, subcontractors and contractors are often too afraid or prohibited from meeting with beneficiaries without excessive security details. Large aid and development agency employees such as USAID and UNDP thus, tend to be barricaded in embassy and field offices surrounded by security guards.

Within the anti-corruption discourse, the primary role of contractor oversight is left to the behest of civil society. The Afghan anti-corruption strategy thus, places a premium on strengthening civil society so it can hold government to account. IWA is only one such civil-society actor, and has limited resources to deal with larger systemic issues of private sector corruption. Their strategy to establish local monitoring groups does provide an important check on contractor corruption, though the approach is more geared towards strengthening local governance by mobilizing local community and political forces to hold project implementers accountable. Without adequate leverage however, it is difficult to make contractors consistently answerable and enforceable to local communities.

In February 2008, IWA began a pilot project in Jabulsaraj, Parwan province, which according to them receives the highest ratio of aid per capita in Afghanistan. First, the local *shura* is approached and IWA employees propose the local monitoring project to them. If the *shura* attendees agree to participate, they are asked to select which of the ongoing community projects they would like to monitor based on IWA's brief guidelines. Then, they present the volunteer role and responsibilities of the project monitor, who will be in charge of collecting information on the project. Monitors must determine the project objective, help administer surveys to project beneficiaries, identify the control systems of project implementers and gather financial information when possible.

Monitors are nominated, given an opportunity to explain their interest in the position and eventually at least two are elected by the *shura*. First, IWA trains the monitors in both qualitative and quantitative methodologies, including photo documentation of projects. Monitors then begin to gather project information through biweekly site visits and gaining access to project contract documents, bills, feasibility studies or evaluations associated with the project.

Data collected based on monitor assessments, beneficiary interviews and questionnaires, project documents and any contact with project implementers is relayed to an IWA facilitator who helps compile the information into a monitoring report. This report is shared with community members, donors, contractors and government officials. The report is a political accountability mechanism that exerts pressure on local government officials, donors and contractors to act and remedy project shortcomings.

IWA has expanded to working in forty-five communities, and are currently building towards one hundred and five. They have effectively set up local monitoring groups for dozens of projects, including the construction of a police station in Bagram District, a road project in Darwaz-e-Kandahar, a water
project in Sajadiah and Paen Ab High School in Herat city. The diversity of projects shows that local monitoring groups are a sustainable monitoring institution that can cover a wide range of development projects. Technical expertise can be a limitation, when monitors may or may not be able to inspect the quality of water engineering systems or road construction materials. IWA however, has recruited local engineering students to provide technical expertise to communities on an ad hoc basis.

The LMG program’s strengths derive from its emphasis on enabling communities to hold donors and project implementers accountable. By actually building capacity and empowering local communities to measure, document and present their grievances in a monitoring framework familiar to NGOs and aid agencies, IWA is able to translate street level complaints about corruption into well-informed, powerful political leverage. This was the leverage that Abdul Mateen and his colleagues used to confront the construction contractor in Chapter 1.

Human Rights Frame

The human rights discourse is largely focused on Private Military and Security Companies (PMSC). Even though as discussed in the previous chapter, there is a very strong relationship between the private development and security industries, the human rights discourse has largely ignored the role of private development firms in conflict areas. Since economic and social rights, including the Right to Development rarely make the headlines, the misappropriation and abuse of public funds for international development by private development contractors is disturbing, but not a top agenda item. Private development contractors are thus, relegated to the contentious arena of congressional committee meetings and lengthy, oversight agency reports. Just cogens human rights abuses remain the primary focus.

The Al Nisoor Square massacre can be likened to the Challenger explosion insofar as it roused the massive bureaucratic machinery of the United Nations, ICRC, US Congress and others to action. The UN Working Group on the Use of Mercenaries, a few months later, released a report citing the incident as a prime case for expanding the definition of mercenaries to include PMSCs. Overall, they recommend greater international and national legislation regulating the behavior of PMSCs and their employees. They also call for domestic licensing regimes.

The Montreux Document, a collaborative effort between 2006-2008 by the Swiss government and the International Committee of the Red Cross (ICRC) initially brought together 17 governments, PMSCs, international legal scholars and members of the global human rights community to define the international legal obligations on PMSCs and a list of best practices for states to prevent human rights abuses. This document was signed by the American, British, Afghan and Iraqi government representatives. Though it sets an important legal precedent, the Montreux Document is not legally binding and only represents an international contracting standard states should adhere to in conflicts.

These efforts are well-intentioned attempts to increase legal and bureaucratic accountability of private military and security contractors who most believe fall through gaps in international jurisdiction. The overly legalistic human rights approach however, does not adequately address the issue of accountability in practice. Though licensing
and regulatory frameworks sanctioned under international law seem like progressive steps, they tend to silently legitimize the use of private contractors without addressing the practical issues of enforcing legal accountability.

It seems that mainstream human rights advocates and organizations forget that contractors are utilized because of weak governmental capacity and the slashing of agency operational budgets. The accountability issues arise not because there is a critical absence of regulation and laws, but rather a critical lack of resources and personnel to enforce regulation. Jurisdictional gaps are important to fill, but the state-centered human rights literature is relying on the contractor state to license, regulate, monitor and prosecute private contractors.

The existing regulatory bodies that are a form of bureaucratic accountability such as USAID-OIG, DoD-OIG, SIGAR and SIGIR have done a tremendous job of uncovering contractor fraud and abuse, despite the fact that many of these offices are run by a handful of investigators looking into billions of dollars worth of contracts. Yet, despite having many bureaucratic and legal accountability mechanisms in place to regulate PMSCs, public agencies like USAID in Afghanistan tend to circumvent their responsibilities. For instance, they do not directly contract PMSCs but require their implementing partners to do so. Here is an excerpt of a February 2007 USAID/Afghanistan contract with a partner:

Security for the Contractor’s personnel and offices is the responsibility of the Contractor. The Contractor shall assess the security situation in Afghanistan and particularly in the provinces targeted by the program, and institute appropriate measures. 158

By distancing themselves from PMSCs in the above contract, USAID/Afghanistan is trying to relinquish responsibility of any direct oversight or liability due to the PMSC’s actions. Though a smart move by the agency, such distancing language is now in direct violation of the National Defense Authorization Act for fiscal year 2008, section 862. 159

This example shows that in response to an incident like the Al-Nisoor Square massacre, there is often intense pressure for some sort of national and international response. From a human rights perspective, this response takes the form of calling for new legislation and increased regulation and oversight. In practice however, when strong human rights concerns translate into bureaucratic and legal accountability measures, the original social and political potency of the concern becomes buried in reporting.

Moreover, most international and national legal accountability mechanisms assume that the state that is either hosting or contracting the PMSC is ultimately responsible for PMSC violations. Also, third-party states like El Salvador, Chile, India and South Africa where many contractors are recruited are told they should declare prosecute and jurisdiction over nationals who conduct human rights violations while abroad. Accountability in these cases moves upward to the highest possible form of authority—the state.

None of these frameworks, surprisingly enough, explicitly address who is accountable when a UN development agency or a private development company hires PMSCs. As a multilateral organization, how would for instance, UNDP be held accountable if one of their private security contractors killed a civilian? Do we treat the UN agency as the highest unit of authority who is liable for their contractors, and if so, who will hold the agency accountable? The same rationale applies to a private firm like DAI who hired Edinburgh International. The only recourse DAI would have in the even
that an Edinburgh employee committed a human rights violation would be to investigate and terminate the contract. They may even withhold payment if that was acceptable under the contract. It would be up to the Afghan or American state to prosecute the crime individually and determine what liability, if any, Edinburgh International had for the employee’s actions.

The media and popular public discourse also seems to grudgingly accept the reality of PMSCs. Following the Al Nisoor square massacre, several popular non-fiction books were published calling attention to dangers of using private security contractors. Peter Warren Singer, David Isenberg, Jeremy Scahill, Pratap Chatterjee and James Jay Carafano are just some of the prominent public voices that have analyzed the issue and offered recommendations. Their opinions on private contractors however, range broadly from Scahill’s absolute disapproval of the use of contractors, Chatterjee’s litany of complaints against the private American war machine, Singer’s cautionary tale from his experiences in the Balkans, Isenberg’s default call to increase legislation and Carafano’s wholehearted acceptance and promotion of PMSCs.

Most of these public intellectuals ultimately advocate for “increased accountability” in the form of laws, which is emblematic of the human rights approach. These are generic calls to end the culture of impunity for contractors killing civilians or torturing prisoners. Many of them even recommend pushing for international human rights conventions to directly address the modern form of private contractors. Romzek and Dubnick would term this a push to increase legal and bureaucratic accountability.

Rights-based legislation is critical for building international consensus and setting global norms, but it does not ensure accountability of private contractors. Laws also ensure the ability to hold to account. But accountability also requires the “power of information and participation.” Furthermore, the human rights accountability frameworks have so far largely disregarded economic and social rights abuses conducted by private development firms. They also have not addressed the growing hunger of private development firms and multilateral NGOs for private security, a truly uncomfortable phenomenon for human rights advocates. If we want to see an adequate rights-based approach to private contractor accountability, humanitarians must include themselves as potential perpetrators of human rights abuses at the hands of hired contractors.

**Common Rights-Based Accountability Recommendations**

- International and Domestic Laws Regulating PMSCs
- Domestic and/or Global Licensing Regime of PMSCs
- New Domestic and International Oversight Bodies
- Increased Criminal Jurisdiction over PMSC Employees
- International Register/Blacklist of Rights Violators

**Current Human Rights Reforms**

UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989 [Entered into Force 20 October 2001]

This is one of the older UN conventions that address the topic of mercenaries,
but whose definition of "mercenary" does not directly address the structure and recent phenomena of PMSCs as used in Iraq and Afghanistan. Though this convention explicitly prohibits the use of mercenaries, it is an exceptionally weak convention with only 32 state parties and 10 signatories. The United States, Great Britain, Iraq and Afghanistan are not parties to this convention. Moreover, it took twelve years for this convention to enter into force, which incidentally occurred a month after the events of September 11, 2001. In those twelve years, international consensus has also shifted considerably from this abolitionist perspective that seeks to eliminate all contracting of military and security functions. Despite its operational weakness, this convention serves an important legitimating function for more recent draft laws, conventions and documents on PMSCs that cite the 1989 convention as an international precedent for regulating PMSCs.

Additionally, there can be an overlap between PMSCs and mercenarism in certain cases. For example, some PMSCs have hired third-party nationals to work in Iraq or Afghanistan, which would fall under the convention's definition of "mercenary." In 2004, a US PMSC Triple Canopy was reported to be recruiting men and women from El Salvador to go to Iraq. Geoff Thale from the Washington Office of Latin America likened this to a "poverty draft," which was targeting and exploiting vulnerable El Salvadorans. It is also estimated that more than ten thousand South African nationals, comprising of former police and military personnel are currently employed by PMSCs in Iraq. Though neither El Salvador, nor South Africa is party to the 1989 convention, South Africa did recently adopt "The Prohibition of Mercenary Activities and Regulation of Certain Activities in Areas of Armed Conflict" law in 2006. The combined concern that South African mercenaries were participating in coups across Africa and the rise in South African nationals working for foreign PMSCs in Iraq prompted the adoption of this law. Even though the convention is currently unpopular, due to overlaps between PMSC and mercenary activities, there are still many institutions, activists and nations pushing for wider adoption and ratification the convention.

U.S. Military Extraterritorial Jurisdiction Act (MEJA) of 2000

Signed into law on 22 November 2000 at the end of the Bill Clinton's administration, MEJA sought to cover two jurisdictional gaps. First, it sought to prosecute former US military personnel who had committed a crime during their service, but due to their exit from the military could not be prosecuted under the Uniform Code of Military Justice (UCMJ). Second, it allowed prosecution of contractors employed by the military, specifically those contracted by the Department of Defense.

Since it preceded 9/11 and the wars in Iraq and Afghanistan, this new legislation quickly became outdated and inadequate to address the large-scale contracting undertaken by every US department, including Department of State (DoS), USAID and Department of Interior (DoI).

MEJA originally had been conceived to address only a couple of discrete jurisdictional gaps, not the broader issues of accountability arising as a result of the wholesale reconfiguration and downsizing of the armed forces, where security and many other kinds of contractors operate side-by-side with uniformed troops.

Though MEJA is inadequate to address the current need for accountability in wartime contingency contracting, it did set a precedent of domestic extraterritorial jurisdiction
over certain subsets of military contractors. It continues however, to be celebrated by some in the U.S. government as a good example of domestic oversight over contractors. This position thankfully, is not one of consensus. Since the start of the two wars, there have been continual efforts to reform and expand MEJA, especially following the 17th September Al-Nisoor Square massacre.

The MEJA Expansion and Enforcement Act of 2007 was an attempt to "require accountability for contractors and contract personnel under Federal contracts, and for other purposes." In addition to providing jurisdiction over all federal department contractors, it also established jurisdiction over all subcontractors no matter how far down the contracting tier they fell. Though this Act would have closed the jurisdictional gaps, considering that until 2008 only twelve persons were charged under MEJA with only a few amounting to successful prosecutions, the level of enforcement is contingent on the allocation of resources to enforcement agencies and open access to often confidential and private wartime information.

Even if enforcement needs, access to information and unlimited jurisdiction was provided, the Department of Justice would be very careful in prosecuting contractors because litigation draws negative attention to the war effort and can further destabilize the already precarious public opinion. Despite these drawbacks, there continues to be major pressure from human rights groups, US politicians and the UN Working Group on the Use of Mercenaries to expand jurisdiction under MEJA.

The Montreux Document (MD) represents the first modern International attempt to highlight the existing legal obligations of both the "contracting state" that employs the Private Military and Security Companies (PMSC), "territorial state" that hosts them during armed conflict and the "home state" where the PMSC is based. Seventeen original states, including the United States, Great Britain, Iraq and Afghanistan, came to an understanding after two years of rigorous debate about their legal obligations regarding PMSCs on September 17, 2008. Today, that number has risen to thirty-five.

Using existing human rights agreements, humanitarian law and customary international law, the MD counters the claim that the legal obligations of the contracting state and its contractor PMSCs are in any way unclear or vague. Even in the absence of a discrete UN convention regulating PMSCs, there are "certain well-established rules of international law [that] apply to states" to prevent and prosecute human rights abuses by PMSCs, including the provision of reparations to wronged parties.

Though this document is not a legally binding international agreement, several states, including the United States of America have participated in the process of creating the MD and endorsed the final product. The process of formulating the MD, which was hosted by the Government of Switzerland, also included participation from PMSCs and civil society actors. It thus, has the capacity to exercise the same type of influence as a treaty, and may even serve as a precursor to a UN Convention on PMSCs.

The MD holds that the contracting state instructs the conduct of the PMSC hence, is responsible for their actions,
which raises the question about what happens when a PMSC subcontracts to another PMSC. The MD however, cleverly defines contracting states as those who “directly contract for the services of PMSCs, including, as appropriate, where such a PMSC subcontracts with another PMSC.” In this way, they establish that the chain of accountability moves upwards from the lowest possible subcontractor towards the highest responsible party—the contracting state.

Though this may seem like a minor detail, in the case of complicated contracting and sub-contracting relationships between private actors, the establishment of the state as the responsible party in typical human rights tradition mandates more regulation of private actors. “Superior responsibility” is also attributed to governmental officials (military and civilian) and directors or managers of PMSCs. In the MD, superior responsibility is “not engaged solely by virtue of a contract.” This means that military, civilian and business leaders can be held liable for crimes under international law. The chain of accountability yet again moves upwards from the lowest PMSC employee to the highest responsible individual.

The responsibilities of the territorial state and the home state of the PMSC are largely defined in legislative terms, in the legalistic spirit of human rights, where the state must provide adequate recourse against misconduct of PMSCs and their personnel. These legal obligations include enacting legislation, investigation, prosecution, administration of fair trials, and extradition of suspects when necessary.

In addition to highlighting existing legal obligations of states mentioned above, the MD also highlights non-legal binding “good practices” related to PMSCs. These include protocols for defining services, selecting contractors, their training, raising awareness of all applicable human rights laws, regular reporting and ensuring welfare of employees. The MD also recommends provision of civil liability, criminal jurisdiction and/or establishing national corporate criminal responsibility regarding crimes committed by PMSCs under international law.

Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by the Human Rights Council (2010)

In the 2010 Working Group on the Use of Mercenaries report, they include a copy of the most recent attempt at a draft convention on PMSCs. This convention largely builds on the framework used in the MD, using identical terms like “contracting states,” “states of operation,” and “home states.” It too outlines the specific responsibilities of the different types of state parties in their relations to the PMSC. It also attempts to define “inherently state functions”—those that cannot be outsourced. The definition remains vague and includes many currently outsourced functions, like intelligence, knowledge transfer with military, security and policing application, and the interrogation of detainees.

Some notable features that distinguish this draft from the aforementioned is the provision of both an international registry and domestic state registries that keep track of all licensed PMSCs in the world and their contract records. In addition to the international PMSC database, the convention sets up an “International Fund for the Rehabilitation of Victims” in Article 28. Article 37 also sets up an optional mechanism for Individual and Group petitions.

The draft was circulated widely and was open to comments from various stake-
Some of the interesting criticisms it received was
1) The convention should cover situations beyond armed conflict, since PMSCs are utilized in non-conflict settings as well, also in disaster relief operations,
2) The need to establish international standards for domestic licensing regime to ensure some basic standards,
3) Others wanted an international licensing regime in lieu of various domestic ones,
4) The special fund for victims required further clarification as to the definition of "victim," compensation amounts and clarifying the relation between State and PMSC obligations to compensate victims,
5) High implementation costs of a domestic regulatory regime could be a disincentive to ratification,
6) "Inherently governmental functions" remains a vague term,
7) Individual right to petition should not be optional and
8) There needs to be further specification on how to balance transparency with the PMSC industry’s desire for privacy.\textsuperscript{183}

International Code of Conduct (ICoC) for Private Security Service Providers (27 August 2010, Swiss Initiative)\textsuperscript{184}

The ICoC emerged out of a Swiss-initiated yearlong collaboration between PSC industry associations, corporations, business leaders and the US and UK governments. It thus, builds on both the Montreux Document (also hosted by the Swiss government) and the United Nations “Respect, Protect, Remedy” framework developed by John Ruggie, Special Representative of the UN Secretary General on Business and Human Rights. It, moreover, requires its signatories to endorse the principle of the aforementioned texts.

The ICoC, a non-legally binding document, largely echoes the rights-based framework outlined by the Montreux Document by emphasizing the need to follow international humanitarian and human rights laws. It specifies personnel conduct for use of deadly and non-lethal force, the apprehension and detention of people, the prohibition against torture, discrimination, sexual or gender-based violence, human trafficking, slavery and the worst forms of child labor. Where the ICoC distinguishes itself is in its positive duty towards civilian rights in states of operation: The right to privacy, property, freedom of expression, freedom of peaceful assembly, freedom of association and creating a duty to ensure the “identification of personnel.” All of these special considerations are directed towards civilians in states where PSCs operate and are a response to the criticisms that PSCs may provide security to their clients, but largely create insecurity for civilian populations.

The last requirement for personnel to identify themselves is extremely important. In the case of Afghanistan, for instance, where the majority of PSC employees tend to be local Afghans, PSCs often recruit former militia members since they already have weapons.\textsuperscript{185,186} As such, they may maintain ties with their former patrons, e.g. tribal leaders, warlords, which leads to distrust of PSC employees among Afghan civilians and increases the chances that former militia members will commit human rights violations. Without adequate identification such as ID badges, uniforms or the use of marked cars however, it is exceedingly difficult to monitor the activities of PSC employees and hold them accountable. Thus, it makes it impossible for an Afghan civilian to distinguish between men employed by warlords versus a PSC employee, because often they are the same individual who has simply changed patrons.

Since the ICoC is a document targeted towards PSC industry professionals, it designs special commitments regarding company contract, management and gover-
nance policies. For instance, in the preamble, it states "whenever possible, compliance with this Code will be made an integral part of contractual agreements, including those with clients, personnel, companies and subcontractors." Though the preamble uses "whenever possible" to leave the door open for non-compliance, later in the document in a section entitled "Selection and Vetting of Subcontractors," the ICoC mandates that "signatory companies will only enter into sub-contracting agreements with companies or individuals who accept the commitments contained in this code [my emphasis]."

Personnel contracts must also incorporate the code and be available in a language accessible for personnel, which is helpful for third-party nationals from countries like India, El Salvador and South Africa. They are also required to keep service and employment records that can assist law enforcement officials in future litigation and provide a basis for disciplinary action or dismissal within the company.

Other internal mechanisms to regulate personnel conduct is the requirement to authorize all service weapons, mandate incident reporting, provide a safe and healthy working environment and prevent employee harassment. Furthermore, the code sets up internal grievance and disciplinary procedures for any violations under the code or human rights law. It also creates a whistleblower policy to protect employees who report. And finally, it specifies the establishment of a fund or adequate insurance coverage to meet any type of liability. An independent and oversight body will further monitor this code. The form of this body has not been determined as of yet.

Given the rigorous and invasive regulatory nature of this code, it is surprising that as of April 2011, ninety-four major international PSCs including AEGIS, DynCorp, Garda World, Edinburgh International, Xe Services (formerly Blackwater) and Four Horsemen International have all signed the code. Seven PSC industry associations, including the Private Security Association of Iraq (PSCAI), also endorsed the code. Though the industry’s show of good faith in its eagerness to adopt self-regulatory mechanisms is admirable, there is another motivation.

As the governments of Afghanistan and Iraq have moved towards regulating and/or banning PSCs, along with several international convention projects on PM-SCs, the industry does not want to be marginalized and uninvited to the negotiation table. By taking a proactive rights-based approach, they have ensured that they have a legitimate voice in not only shaping any international or domestic legislation on PM-SCs, but also to ensure they can shift equal responsibility on state and humanitarian partners who given the political tidings may seek to use them as scapegoats for irresponsible PMSC behavior in the field.

In addition to the ICoC, international PSCs operating in Iraq and Afghanistan have formed country-based associations, such as the Private Security Association of Iraq (PSCAI) mentioned above and the Private Security Association of Afghanistan (PSCAA), which is modeled after the PSCAI. These associations are yet another mechanism for developing shared industry norms and operational standards through the development of an association constitution and engagement with the local governments. While on the one hand these associations can be understood as another private sector self-regulating mechanism, on the other hand, they largely function as foreign PSC "interest groups," who are able to influence domestic regulatory legislation.
in Iraq and Afghanistan and build trust with local ministries, such as the Ministry of Interior that are in charge of licensing.\textsuperscript{189}

The ICoC is a critical tool to integrate human rights into corporate norms. It remains however, largely insufficient because it relies on voluntary membership and lacks sufficient oversight mechanisms. Association charters and codes of conduct such as the ones for the ICoC, PSCAI and BAPSC have largely attracted major international corporations. Small, locally based PSCs, who are often also subcontractors, are either uninvited to join associations like the PSCAI or may simply lack the capacity or will to join and implement such mechanisms. This is another structural barrier to the greatest possible impact of such industry self-regulating mechanisms. The ICoC thus, requires the support of domestic and international legislation to increase its legitimacy and impact in the field.

International Peace Operations Association (IPOA) Code of Conduct\textsuperscript{190}

The International Stability Operations Association, also known as IPOA, is a trade association based in Washington, D.C. for various private security, military and development contractors. The private sector's response to regulatory frameworks is of course to first, self-regulate. Though the IPOA's code of conduct is in many ways a commendable private sector effort to increase self-regulation of wartime contracting, it is important to note that out of the top fifty Private Contractors in Iraq and Afghanistan between 2003 and 2006, only four are currently members of the IPOA.\textsuperscript{191} The top contractor Kellogg Brown and Root (formerly Halliburton) is not an IPOA member, but the second largest DynCorp International is in fact a member. After that the 16th, 22nd, and 44th largest contractors are members. The IPOA website states:

ISOA is committed to raising the standards of the peace and stability operations industry to ensure sound and ethical professionalism and transparency in the conduct of peacekeeping and post-conflict reconstruction activities.\textsuperscript{185}

The IPOA specifically obliges all of its members to be "guided" by the following human rights conventions and documents:

- Universal Declaration of Human Rights (1948)
- Geneva Conventions (1949)
- Convention Against Torture (1975)
- Protocols Additional to the Geneva Conventions (1977)
- Chemical Weapons Convention (1993)

The ideals of human rights, transparency, accountability, legitimate client selection and employee safety are the core principles of the code of conduct. With regards to transparency, the IPOA assures a full level of compliance with all legal obligations to cooperate and share information. However, in the absence of a domestic legal regime that ensures access to information and jurisdiction, IPOA members are not obliged to go beyond their legal obligations.

The IPOA code of conduct attempts to distance itself from mercenary-type activities by assuring adequate training of personnel, background checks and attempt not to use third-party nationals, rather recruit primarily from the local population. They agree to adhere to ILO age-minimum standard of 15-years, which still provides an opening for the recruitment of child soldiers. Recently some PMSC employees have articulated their rights under the UN Trafficking Protocol, which deems a person trafficked when he/she cannot return at the termination of their contract. The IPOA states that it will
not detain employees beyond their contractual obligation. Furthermore, in response to charges of human rights violations of PMSC employees, who are frequently denied proper medical care and insurance, the IPOA ensures the provision of appropriate protective gear and care. Rules of engagement under the code of conduct must comply with international humanitarian law. This code also requires a pledge from members not to use excessive weapons or partake in arms trafficking. This echoes the International Draft Convention on Regulating Private Military and Security Companies mentioned above.

The truly remarkable portion of this code is provision ten, which outlines members’ responsibilities with regards to subcontracting parties. The code explains, “due to the complex nature of the conflict/post-conflict environments, companies often employ the services of partner companies and subcontractors to fulfill the duties of their contract.” So, the code establishes a chain of accountability from the lowest subcontractor to the highest-level member company:

Signatories agree that they select partner companies and subcontractors with the utmost care and due diligence to ensure that they comply with all appropriate ethical standards, such as this Code of Conduct.192

The complex, multi-layered, transnational contracting and subcontracting practices render it almost impossible to firmly establish the correct chain of accountability that contributes to an appearance of a culture of impunity around PMSCs. Though this is only a code of conduct, the fact that it suggests the private contractor is accountable for ensuring its subcontractors uphold the same level of ethics is a step towards internalizing human rights as corporate norms. The IPOA also has a fairly detailed enforcement mechanism that is twice as long as the code of conduct. Moreover, they have a complaint mechanism where individuals can lodge complaints in writing or on their website against companies. This is a fairly progressive step to promote accountability. The process from the lodging of a complaint to action from the Standards Committee of the International Peace Operations Association (SCIPOA) can take up to 3-4 months according to their internal protocols. Though their commitment to investigate complaints is admirable, it seems the heaviest sanctioning tool they have is the member’s expulsion from the IPOA. This may or may not be a strong enough sanction to prevent violations of the code though, expulsion may have negative spillover effects for the member firm, such as detrimental effects to its reputation, industry relationships and invites to industry conferences.

The IPOA also testified in front of the CWC on September 14, 2009.194 Representing over sixty companies, the IPOA was able to present industry concerns to the commission and made the following recommendations:
1) Create a separate unit of Contingency Contract Officers to improve relations and oversight between military and PMSCs.
2) Adapt procurement and contract management rules to contingency environment. Remove unnecessary bureaucratic delays.
3) Contracting officers, contracting officer representatives, industry executives and country managers should work together as partners, not as antagonists.
4) Use the Department of Defense’s bidding structure, where they are not legally obliged to go with the lowest bidder, as is the case for the State Department. There should be a true-best value competition.
5) Mandatory third-party certification of PSCs.
6) Industry self-regulation is a positive step, but contract law, criminal laws and government oversight must provide better accountability mechanisms.

In addition to these recommendations, the IPOA reminded congress that contractors also work in humanitarian and international peacekeeping missions, for instance Haiti,
Darfur and Eastern Congo.

By highlighting the significant and growing presence of PSCs in low-intensity conflicts, peacekeeping missions and disaster relief operations, they are seeking to expand regulatory frameworks to go beyond situations of armed conflict. This can be understood as the industry's attempt to further legitimize and institutionalize itself as an integral and permanent portion of US defense, diplomacy and development operations abroad. This institutionalization can only be achieved by the Industry's willing submission to a regulatory framework.
CHAPTER 4 CITATIONS

106 ibid, 557
108 ibid, 228
110 Romzek and Dubnick, 229
111 For more information, see epls.gov
112 ibid.
113 ibid.
114 ibid, 232
115 ibid.
116 ibid.
122 “The extremely short time for construction and limited maintenance budgets required Berger to develop long-lasting paving materials. In response, the Team designed an asphalt treated base using screened river run gravel treated with Chemcrete.” For this road reconstruction project, LBG subcontracted road sections to Arc Construction (Turkey), Mensel Construction (Turkey), Kolin Nafir Construction (Turkey), BSC & C&C Construction (India) and Gulsar/Cukorova Construction (Turkey). www.louisberger.com/berger/world/2003q4/mainpage.html (Accessed 2004)
123 Lorenzo Deslegues, “Integrity in Reconstruction-Afghan Roads Reconstruction: Deconstruction of a Lucrative Assistance.” Integrity Watch Afghanistan. 2007, 4-5
126 27 April 2011 interview with Afghan engineer who had worked on a USAID-funded project for IOM and one for Emerging Markets Group, Ltd.
129 ibid.
CHAPTER 4 CITATIONS contd

132 BG Peter A. DeLuca, “Engineers in Service to the Nation.” MIT, Center for International Studies Lecture. 28 April 2011
133 This was corroborated in conversations with an aid worker who had worked in Afghanistan for three years and by USACE and US Army personnel.
136 ibid.
140 “Reconstructing Iraq.” 21
141 ibid. 22
142 ibid.
143 OSCE Handbook, 105
144 OSCE, 112
150 The contractor transparency clause is part of the US Federal Funding Accountability and Transparency Act of 2009.
151 FAR 52.204-10 Published July 8, 2010.
154 A local town meeting between elders to discuss community issues
155 Thanks to the co-Director of IWA, Lorenzo Deslegues for providing me with critical materials for this case
CHAPTER 4 CITATIONS contd

study on the organizations local monitoring projects. "Monitoring Aid from the Ground Up." Powerpoint Presentation for TIRI: Making Integrity Work.


157 ibid., 25-7


159 H.R. 158, "National Defense Authorization Act for Fiscal Year 2008" 110th Congress 2007-2008. Subtitle F, section 862: "Requires the: (1) Secretary to prescribe regulations on the selection, training, equipping, and conduct of personnel performing private security functions under a federal contract or subcontract in an area of combat operations; and (2) Federal Acquisition Regulation to be revised to require the insertion into each covered contract or subcontract of a clause addressing such selection, training, equipping, and conduct. Requires a report from the DOD Inspector General to Congress on the feasibility and advisability of a pilot program for the imposition of fines on contractors or subcontractors for personnel who violate or fail to comply with such regulations or requirements. Makes requirements of this section inapplicable to contracts entered into by elements of the intelligence community in support of intelligence activities."


165 Davis, 3


170 ibid.

171 ibid.


175 The Montreux Document defines “contracting states” as those “that directly contract for the services of PMSCs, including, as appropriate, where such a PMSC subcontract with another PMSC,” 9

176 The Montreux Document defines PMSCs as “private business entities that provide military and/or security services irrespective of how they describe themselves. Military and security services include, in particular,
armed guarding and protection of personas and objects, such as convoys, buildings and other places; main-

tenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and

security personnel," 9

177 The Montreux Document defines "territorial states" as those "on whose territory PMSCs operate," 10

178 The Montreux Document defines "home states" as the "States of nationality of a PMSC, i.e. where a PMSC

is registered or incorporated; if the State where the PMSC is incorporated is not the one where it has its prin-
cipal place of management, then the State where the PMSC has its principal place of management is the 'Home

State'," 10

179 Montreux Document, 9

180 ibid, 15

181 "Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and

Action by the Human Rights Council" found in "Report of the Working Group on the Use of Mercenaries as a

Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination." 2

July 2010 (Accessed 4 December, 2010), 25

182 ibid, 39

183 ibid, 17-19


185 Lisa Rimli & Dr. Susanne Schmeidl, "Private Security Companies and Local Populations: An Exploratory


186 "The hiring of militia members 'by PSCs+ virtually en masse, with their estimated 44,000 weapons, is
described as 'expedient' despite government efforts to disarm the various nonstate armed organizations in

Afghanistan." Christopher Spearin, "What Manley Missed: The Human Security Implications of Private Security
March 2008], 8-11

187 ICoC, 6

188 ibid, 11

189 Rimli & Schmeidl, 27

190 The ISOA/IPOA has 52 current members. Some of the most notable members include DynCorp, AECOM

Technology and Triple Canopy.

191 Bill Buzenberg, "Baghdad Bonanza: The Top 100 Private Contractors in Iraq and Afghanistan." The Center


codeofconduct/87-codeofconductv12en.html.html (Accessed 4 December 2010)

193 ibid.

194 "IPOA Testimony before the Commission on Wartime Contracting." International Stability Operations As-


11 December 2010)
5. RECOMMENDATIONS

As Austen Davis states, “for accountability to work, there has to be the power to hold to account; there has to be the power of information and participation; and there has to be the power to judge and enforce judgment.” These recommendations specifically address private development contractors. Some recommendations are broader that address domestic US agency operations, while others emphasize ways to empower beneficiaries to hold development contractors accountable through transparency – the power of information, networks – the power of participation and remedy – the power to judge and enforce judgment.

1. Private Development contractors and subcontractors who receive government funds must make public their contract documents: operational and project budgets, all project costs incurred (e.g. materials, human resources, transport) and project documents (e.g. blueprints, indicators, monitoring and evaluation metrics).
   a. Civilians, civil society organizations and local government leaders should be legally and contractually empowered to access this information at any time.
   b. This could also be modeled after the Indian Right to Information act, whereby contractors have to provide the information within for example, 7 business days or else face criminal prosecution, fines or the termination of their contract.

2. Ensure beneficiaries, civil society organizations and local government officials have access to American databases, such as the Excluded Parties List System (EPLS).
   a. The existing database is not as dynamic as it can be. If beneficiaries and civil society organizations could write contractor reviews and report fraudulent contractors, government agencies can use this “customer satisfaction” rating to discourage or encourage the use of a particular contracting firm or individual. (Since lack of Internet access and English-language skills can be two major barriers, civil society and humanitarian groups can act as an intermediary to upload the information to the web where project funders and the contracting agency could view it).
   b. Create a Dari and Pashto equipped site to record information for contractors working in Afghanistan.

3. Fund the creation of country-specific project monitoring and evaluation website.
   a. Since there are a plethora of monitoring and evaluation actors (private contractors, independent observers, local government officials, civil society organizations and local monitoring groups), it would be helpful to upload all monitoring and evaluation reports to a centralized website so that donors and beneficiaries can share information.
   b. Though USAID administrator stated that monitoring reports would become available for the public to peruse after 30 days, it would be helpful to compare USAID-commissioned monitoring and evaluation reports with reports from other sources.
   c. This portal could also provide space for individuals to contest the monitoring and evaluation reports.

4. Include local monitoring and social audits as components of project and contract design.
   a. Just as budget, monitoring and evaluation information flows upwards to donors, it must flow down-
wards to beneficiaries. Local monitoring and social audits are processes whereby beneficiaries have some access to donor and contractor networks. These processes that are generally used in small-scale projects.

---

i. Despite often-low levels of expertise to monitor for effectiveness, local community groups have far greater stake in the success of the project. If there is no community stake, then the presence of the project should be questioned in the first place.

ii. Add contractual clauses that mandate local construction contractors, especially those building schools, clinics, wells, etc. engage in social audit workshops through civil society facilitators with the community they serve. This will set up an accountability relationship between contractors implementing development projects and the beneficiaries they serve.

iii. Develop or use simple tests for construction materials that can be quickly taught to project beneficiaries and local staff. Since “lack of local capacity” is frequently cited as a hindrance to quality monitoring, technical structural engineering monitoring that is less frequent can be supplemented by more frequent, low-tech monitoring of construction materials that can be easily switched out in the week-long gap between monitoring visits.

b. Local monitoring reports should be factored in as project “indicators” to determine quality of contractor performance and as a basis for levying fines or granting monetary incentives.

5. Increase the operational budget for USAID, while decreasing their budget allocations and projects.

a. USAID desperately needs an influx of full-time personnel to conduct adequate monitoring and evaluation of their development projects.

b. Stop contracting out monitoring and evaluation. USAID should build in-house capacity to conduct monitoring and evaluation. The reliance on contractors for M/E results in the generation of many reports that may not even be read by USAID personnel and/or impact the ongoing development project. Contracting monitoring and evaluation further distances USAID from the projects it is implementing.

c. USAID is not structured for conduction reconstruction in a time-compressed situation amidst conflict. Either the agency must be restructured or discontinued from conducting reconstruction in conflict contexts.

6. Determine a fixed cap on tiers of subcontracting.

a. Though USAID has expressed a desire to restrict the levels to the number of contractors deemed of value, it is important to set a definite limit, such as 2 or 3. Despite USAID’s desire to allow for some flexibility in tiers of subcontracting, without a fixed limit, subcontracting will continue ad infinitum. The limit should be determined by USAID’s personnel capacity to keep track of the 2nd and 3rd tier subcontractors.

b. Prohibit the extraction of administrative costs when contracts move between two agencies in the same organizations, such as when contracts are awarded to UNDP, who extracts a percentage of the contract for “administrative costs” before handing it to UNOPS, who then finds the appropriate local subcontractors to implement the project.

7. Carrots or Sticks? Carrots.

a. Using time-bound projects with daily monetary incentives to finish early will ensure contractors stick around to finish the projects.
b. In a conflict context, contractors either abandoning projects or dragging them on to benefit from costs-plus contracts is a major hindrance to reconstruction work. However, it should be easier to terminate a contractor mid-project. Since project expenditures with a non-performing contractor are considered lost, it prevents contracting officers and managers from firing contractors since they would have to hire another contractor for the same project with the remaining funds.

c. If you choose sticks, then enable a mobile DoJ outfit that can assess, investigate and prosecute cases of contractor noncompliance in real time. The current timeline of USAID investigations is too long. By the time USAID-OIG investigates a complaint or rumor of contractor corruption, assesses its validity and refers it to DoJ for potential prosecution, it is often too late to have any impact on the ongoing development projects. Contracting fraud is thus, not deterred by the threat of suspension, debarment, fines or prosecution.

8. Prevent the hiring of “Broker Firms” from nearby countries such as Turkey and Pakistan, many of which form just to win development contracts and then disappear after collecting enough payments without completing the project.

a. Always demand a proportional billing for work done or a Bill of Quantity (BoQ). This will prevent firms from allocating the majority of their budget on concrete, because once the foundation is laid and they are paid, they can easily escape without completing the work. A BoQ allows the contracting officer or manager to assess whether the contractor has allocated appropriate amount of funds for various construction materials.

9. Fines, Suspensions, Debarments, Investigations and Indictments

a. If USAID wants to establish a thorough vetting process of contractors, then it must update its EPLS database and integrate it with other state agencies like DoD, DoS and USACE who may be using the same contractors and can thus, contribute to a shared pool of knowledge of contractor performance.

b. The integrated database suggested above that can record all instances of fines, suspensions, debarments, investigations and indictments of contractors must be made public knowledge for not only the US taxpayer with ready internet access, but also for Afghan nationals.

c. Moreover, Afghan civilians or locally-appointed monitors should be able to contribute to the database
CONCLUSION

The central query in this thesis—whether the modern development enterprise and its contractors at war are accountable to beneficiaries—is meant to call into question the very nature and motivations of the international development. The American development enterprise is a product of the rise of the "contractor state" or "one nation under contract." Though the obvious risks and downfalls brought on by the overreliance on contractors have been carefully documented in the past decade, even contracting's staunchest critics like Allison Stanger believe that better management of contractors or "smart-sourcing" can resolve these issues.

It seems that this structural shift in the way that the federal government operates has been begrudgingly accepted in academic and policy circles. But better management strategies, no matter how thorough, have not been able to address the pivotal issue of who constitutes the "authority" that citizens can hold to account. The beneficiaries of postwar reconstruction projects are even further deprived of access to information, participation and leverage that could enable them to demand accountability from a foreign power and hired contractors.

Not only has contracting in US policy discourse been mostly criticized on behalf of US taxpayers, but the discourse continues to ignore the point of nullifying the voice of beneficiaries. The impacts, both positive and negative, of postwar reconstruction and development projects cannot be taken lightly. The ambitious and interventionist security agenda that utilizes sloppy, contractor-led development as a counter-insurgency and stabilization tool is slowly becoming institutionalized through the very reform efforts that sought to challenge using contractors in war. Today, it is considered acceptable to use private security and development contractors, albeit within an adequate regulatory framework. Though the security-development nexus has seen many permutations during colonialism and the cold war era, the present corporate incarnation is just as disturbing because the private security and development industries thrive in the dual categories of 'conflict' and 'underdevelopment.'

The project of increasing accountability to beneficiaries attempts to establish a direct relationship between beneficiaries and the for-profit contractors that are hired to serve them. Just as American taxpayers would like to know how their money is being spent, wouldn't Afghan civilians also like the same information? Afghan civilians are not customers of some free-market development market who get to choose the contractor and development agency that best suits their needs and fits their budget. And the modern development enterprise is not much of an enterprise after all, because it is selling an expensive, defective product that no savvy consumer would willingly purchase. This enterprise is currently being subsidized by dollars earmarked for security, without which American foreign aid funding will decline to low, peacetime levels.

The recommendations in the previous chapter are a mitigating response to this very conundrum. Is it possible for America to invest personnel and funds into its premier development agency—USAID—and actually set development goals that are not subservient to foreign policy objectives? Yes. But, in order to do that, beneficiaries have to be empowered to hold agents of development accountable, and if the time comes, to even be able to say no, thank you because American-style development is not working for them.
Works Cited & Bibliography

Books


--------- Halliburton’s Army: How a Well-connected Texas Oil Company Revolutionized the Way America Makes War. Nation Books, 2009


Articles


Torabi, Yama. “Assessing the NSP: The Role of Accountability in Reconstruction.” Integrity Watch Afghanistan. 2007

News Articles


"US Embassy Cables: Afghan Government asks US to Quash 'Dancing Boys' Scandal." Guardian.co.uk. 2 December 2010 http://www.guardian.co.uk/world/us-embassy-cables-documents/213720


**Speeches/Lectures**


BG Peter A. DeLuca, “Engineers in Service to the Nation.” MIT, Center for International Studies Lecture. 28 April 2011

**Reports/Audits**

UNDP


UN General Assembly


UN Working Group on Mercenaries


USAID-OIG


CWC


DOD-OIG

GAO

SIGAR

SIGIR

UN-WORKING GROUP ON MERCENARIES

DAI
“To Provide Alternative Livelihoods to Poppy Cultivation.” AINP. Development Alternatives Inc. 31 February 2006