SUBJECT: Guidance for Determining Workforce Mix

References:  
(b) Joint Pub 1-02, "Department of Defense Dictionary of Military and Associated Terms," April 12, 2001 (as amended)  
(c) Sections 113, 115(g), 117, 118(b), 129a, 131-142, 153(a), 164, 168, 193, 711-720, 801, 802, 809, 815, 899, 951, 1585a, 1586, 1588, 1722, 2383, 2462-2566, 3013-3022, 3073, 4334, 5013-5026, 5347, 5142, 8013-8022, 8067 and Chapter 47 of title 10, United States Code  
(d) Section 306 and Chapter 11 of title 5, United States Code, “Government Organization and Employees”  
(e) through (ae), see Enclosure 1

1. PURPOSE

1.1. This Instruction implements policy in Reference (a) for determining the appropriate mix of manpower (military and civilian) and private sector support necessary to accomplish Defense missions consistent with applicable laws, policies, and regulations.

1.2. It provides Manpower Mix Criteria and guidance for risk assessments to be used when identifying and justifying activities that are inherently governmental (IG), commercial but exempt from private sector performance, and commercial and subject to private sector performance.

1.3. The Manpower Mix Criteria are also used to designate activities for DoD civilian or military performance.

1.4. Guidance in this Instruction supports strategic planning and daily management of the Defense workforce. By understanding the underlying rationale for the workforce mix of an activity, Defense officials can assess the risk that manpower shortfalls have on IG responsibilities, readiness, workforce management, and mission accomplishment.
2. APPLICABILITY AND SCOPE

2.1. This Instruction applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as the “DoD Components”).

2.2. Guidance in this Instruction applies:

2.2.1. When determining the workforce mix for new or expanded missions or capabilities, to include Manpower Estimates for Defense acquisition programs.

2.2.2. When revalidating the workforce mix of activities during reorganizations; mission area analyses; efficiency reviews; streamlining, reengineering, or restructuring efforts; or other manpower studies.

2.2.3. When contracting for service support.

2.2.4. When developing Inter- and Intragovernmental Service Support Agreements.

2.2.5. When documenting manpower for the centralized DoD database, and for the Inherently Governmental/Commercial Activities (IGCA) Inventory used to develop the commercial activity and IG inventories required by the Office of Management and Budget (OMB).

3. DEFINITIONS

The following terms used in this Instruction are defined in Joint Publication 1-02 (Reference (b)).

3.1. Combat Forces.

3.2. Combat Power.

3.3. Combat Service Support.

3.4. Combat Support.

3.5. Concept of Operations.


3.7. Mission.
3.8. Operating Forces.


3.10. Operational Control.

4. POLICY

Section 118(b) of 10 United States Code (U.S.C.) Chapter 47 (Reference (c)) requires the Department of Defense to identify resources that would be required to execute successfully the full range of missions called for in the national defense strategy at a low to moderate level of risk. In keeping with this guidance, workforce mix shall be established to accomplish Defense missions commensurate with acceptable risk. Likewise, section 129a of Reference (c) requires the Secretary of Defense to use the least costly form of personnel (DoD civilian, military, or private contract) consistent with military requirements and other needs of the Department. Accordingly, workforce mix decisions shall be fiscally informed and support the readiness and workforce management needs of the Department of Defense. Also, risk mitigation shall take precedence over cost savings when necessary to meet IG responsibilities or provide critical mission capabilities.

4.1. Consistent with Reference (a), functions and tasks that are IG shall be performed by government personnel. IG functions include, among other things, activities that require either the exercise of discretion when applying Federal Government authority or value judgments when making decisions for the Federal Government. IG functions shall be identified consistent with section 306 of 5 U.S.C. (Reference (d)); sections 501 (note), 1115, and 1116 of 31 U.S.C. (Reference (e)); Attachment A of OMB Circular No. A-76 (Reference (f)); subpart 7.5 of the Federal Acquisition Regulation (FAR) (Reference (g)); and other applicable laws. These functions cannot be legally contracted and shall be designated for DoD civilian or military performance.

4.2. Certain commercial functions are exempted from private sector performance by law, Executive Order, treaty or International Agreement (IA). Consistent with Reference (a), these commercial functions shall be identified and designated for DoD civilian or military performance.

4.3. Consistent with Reference (a), commercial functions are exempted from private sector performance to provide for the readiness and workforce management needs of the Department of Defense and are designated for DoD civilian or military performance in order to:

4.3.1. Mitigate operational risk or provide sufficient personnel for wartime assignments in the operating forces.

4.3.2. Provide for overseas or sea-to-shore rotation, career progression, continuity of peacetime and wartime operations, or "esprit de corps."
4.4. Consistent with sections 129a and 2462 of Reference (c) and Reference (a), respectively, commercial functions shall be exempted from private sector performance and designated for DoD civilian or military performance when a satisfactory commercial source is not available or when it has determined, through economic analyses, that DoD civilian or military personnel perform the work in a more cost-effective manner. See Reference (f) for guidance on making these determinations.

4.5. Consistent with Reference (a), manpower shall be designated as civilian except when military incumbency is required by law, Executive Order, treaty or IA; for command and control of crisis situations, combat readiness, risk mitigation, or esprit de corps; when unusual working conditions or costs are not conducive to civilian employment; or when military-unique knowledge and skills are required for successful performance of the duties. In addition, sufficient military manpower shall be provided for overseas and sea-to-shore rotation, career progression, and wartime assignments.

4.5.1. When designating management positions as military (Active or Reserve) or civilian, career opportunities for both categories of personnel shall be considered.

4.5.2. Manpower in support activities shall not be designated as military solely for the purpose of exercising military authority under sections 801-946 of Reference (c). Support activities may be assigned or attached to secondary activities to preserve military order and discipline.

4.5.3. The peacetime workforce shall be structured to accomplish day-to-day activities and satisfy projected mobilization, contingency, and wartime demands that cannot be met with personnel acquired after mobilization.

5. RESPONSIBILITIES

5.1. The Under Secretary of Defense for Personnel and Readiness, USD(P&R), as the primary DoD manpower advisor, shall:

5.1.1. Work with the Heads of DoD Components to ensure that the DoD Components establish policies and procedures consistent with this Instruction.

5.1.2. Maintain oversight of programs that implement this Instruction.

5.1.3. Coordinate with the Under Secretary of Defense for Acquisition, Technology, and Logistics, USD(AT&L), to issue annual guidance for the IGCA Inventory consistent with the guidance in this Instruction.
5.2. The USD(AT&L) shall:

5.2.1. Ensure policies and procedures governing Defense contracting in the Defense FAR Supplement (DFARS) (Reference (h)) are consistent with this Instruction. Acquisition planners shall be required to consult with DoD Component manpower officials and the DoD Competitive Sourcing Official when planning to contract for support services to ensure that activities that are IG or exempt from private sector performance are not contracted.

5.2.2. Ensure policies and procedures governing the Defense acquisition process in DoD Instruction 5000.2 (Reference (i)) are consistent with this Instruction. Acquisition planners shall be required to consult with DoD Component manpower officials in the initial stages of developing requirements for Defense acquisition programs and planning for support services to ensure that activities that are IG or exempt from private sector performance are not contracted.

5.2.3. Ensure policies and procedures governing contractor personnel authorized to accompany the U.S. Armed Forces addressed in DoD Instruction 3020.41 (Reference (j)) are consistent with this Instruction.

5.2.4. Ensure policies and procedures governing the commercial activities program in DoD Instruction 4100.33 (Reference (k)) are consistent with this Instruction.

5.2.5. In coordination with the USD(P&R), issue annual guidance for the IGCA Inventory consistent with the guidance in this Instruction and include a cross-Reference of the Manpower Mix Criteria codes to the OMB reason codes that may be used when developing the commercial activities and IG inventories required by Attachment A of Reference (f).

5.3. The Heads of DoD Components through their designated manpower authority1 shall:

5.3.1. Follow the guidance in this Instruction when:

5.3.1.1. Determining the workforce mix for new or expanded missions or capabilities, to include developing Manpower Estimates for Defense acquisition programs covered by USD(P&R) Memorandum (Reference (l)).

5.3.1.2. Revalidating manpower during reorganizations, mission area analyses, efficiency reviews, and streamlining, reengineering, or restructuring efforts, to include Most Efficient Organizations for OMB Circular No. A-76 competitions covered by Reference (k).

5.3.1.3. Developing Inter- and Intra-governmental Service Support Agreements.

5.3.2. Use the Manpower Mix Criteria codes when:

5.3.2.1. Documenting manpower for the centralized DoD database as required by DoD Instruction 7730.64 (Reference (m)).

1 Within the Military Departments, the manpower authority is normally the Assistant Secretary for Manpower and Reserve Affairs.
5.3.2.2. Developing IGCA Inventories.

5.3.3. Ensure that guidance in this Instruction is considered before contracting for support services so that activities that are IG or exempt from private sector performance are not contracted.

5.4. The Chairman of the Joint Chiefs of Staff shall:

5.4.1. When reviewing the strategic plans, major programs and policies of the Armed Forces as required by section 153(a) of Reference (c), assess whether workforce mix is consistent with the guidance in this Instruction.

5.4.2. When reviewing the adequacy of critical contract services that support the Combatant Commander's contingency plans during the deliberative planning process of the Joint Strategic Planning System, assess risk consistent with the guidance in this Instruction.

5.4.3. When conducting periodic reviews of combat support agencies as required by section 193 of Reference (c), assess the adequacy of the agency's manpower and contract support consistent with the guidance in this Instruction.

5.5. The Commanders of the Combatant Commands are responsible for determining if the authority, direction and control they have are sufficient to command effectively as required by section 164 of Reference (c). As a part of their review, Commanders of the Combatant Commands shall determine if the authority, direction and control they have of DoD civilian and private sector contract support elements are sufficient.

6. PROCEDURES

6.1. Workforce Mix Decision Process. When establishing the workforce mix of an activity, manpower planners shall review both peacetime and wartime missions so that activities are designed to transition easily from peacetime to wartime operations. As explained below, these decisions require input from both the activity under review and the DoD Component headquarters.

6.1.1. Initial Steps

6.1.1.1. When determining or revalidating the workforce mix of an activity, manpower authorities shall first verify functions and tasks to be performed, performance objectives (required outputs, outcomes and capabilities), military doctrine, operational environments, dispersion of activities, threat levels, risks, and other factors relevant to mission success. This shall include a review of U.S., international, and host nation (HN) laws; Executive Orders; treaties; Status of Forces Agreements (SOFAs) and other IAs; HN agreements; Memorandums of Understanding; Inter- and Intragovernmental Service Support Agreements; and other similar arrangements. When revalidating the workforce mix, manpower authorities
shall also verify management arrangements and use of borrowed labor, volunteers, private sector contracts and other sources of support. Table T1 provides a decision matrix for determining workforce mix.

Table T1. Decision Matrix for Determining Workforce Mix

6.1.1.2. Manpower authorities shall identify the type of work from the list of DoD Functions (Reference (n)) and use the guidance for risk assessments at Enclosure 3 to help identify risks. Manpower authorities shall use the Manpower Mix Criteria at Enclosure 2 to distinguish between functions that are IG and commercial. The Manpower Mix Criteria also shall be used to identify which IG and commercial functions shall be performed by military personnel and which shall be performed by DoD civilian personnel. Table T2 lists the Manpower Mix Criteria.
Table T2. Manpower Mix Criteria

- **A**: Direction and Control of Combat and Crisis Situations
- **B**: Exemption of Combat Support and Combat Service Support due to Operational Risk
- **D**: Exemption of Manpower Dual-Tasked For Wartime Assignments
- **E**: DoD Civilian Authority Direction & Control
- **F**: Military-Unique Knowledge & Skills
- **G**: Exemption for Esprit de Corps
- **H**: Exemption for Continuity of Infrastructure Operations
- **I**: Military Augmentation of the Infrastructure During War
- **J**: Exemption for Civilian & Military Rotation
- **K**: Exemption for Civilian & Military Career Progression
- **L**: Exemption by Law, Executive Order, Treaty or International Agreement
- **M**: Exempted by DoD Management Decision
- **P**: Pending Restructuring of Commercial Activities
- **R**: Subject to Review for Competition Under OMB Circular No. A-76
- **W**: Non-Packageable Commercial Activity
- **X**: Alternatives to OMB Circular No. A-76

6.1.2. **Inherently Governmental (IG) Activities**. Manpower Mix Criteria A, E, F and I identify activities that are IG consistent with section 306 of Reference (d); Reference (e); Attachment A of Reference (f); and subpart 7.5 of Reference (g). These functions cannot be legally contracted and shall be designated for performance by government personnel. All other work is commercial in nature. Criterion I identifies IG activities performed during a mobilization, crisis, or war. Manpower authorities shall consult mobilization planners to identify these IG activities.

6.1.3. **Commercial Activities (CAs) Exempt from Private Sector Performance**. Criterion L identifies CAs that are exempt from private sector performance due to law, Executive Orders, treaties and IAs. All other commercial work is subject to private sector performance but may be
performed by government personnel if justified due to the readiness or workforce management needs of the Department of Defense as explained below.

6.1.3.1. Readiness Needs of the Department. Manpower officials shall exempt commercial combat support (CS) and combat service support (CSS) functions in the operating forces from private sector performance for risk mitigation purposes as addressed by criterion B. Because operational risk is often dependent on the threat level in a geographical region, these exemptions shall be reevaluated as threat levels change. As addressed by criterion D, manpower officials at DoD headquarters shall confer with mobilization planners to exempt manpower in CAs in the infrastructure from private sector performance for personnel who are dual-tasked for wartime assignments in the operating forces. Manpower officials shall also exempt commercial work to provide for continuity of wartime operations as addressed by criterion H. Manpower officials shall consult mobilization planners concerning these exemptions.

6.1.3.2. Workforce Management Needs of the Department. Criterion G identifies CAs that are exempt from private sector performance for "esprit de corps" reasons. Manpower authorities at DoD Component headquarters shall confer with personnel officials to exempt commercial work from private sector performance to provide for overseas or sea-to-shore rotation (criterion J) or career progression (criterion K). In addition, manpower officials shall exempt CAs to provide for continuity of peacetime operations as addressed by criterion H. CAs are also exempted based on DoD management decisions (criterion M). However, these exemptions are usually temporary, pending final resolution by the DoD Component and OSD.

6.1.4. CAs Subject to Private Sector Performance or Divestiture. All other CAs are subject to private sector performance or divestiture. These activities are designated "subject to review for competition under OMB Circular A-76" (criterion R) except when they are identified for conversion to private sector performance through an alternative to Circular A-76 (criterion X). Also, sometimes CAs have to be temporarily retained in-house pending restructuring of the activities (criterion P) or because they cannot be packaged for a contract (criterion W).

6.2. Delegation of IG Responsibilities and Non-Severable IG and Commercial Tasks. How management responsibilities are delegated within an organization often has a direct impact on workforce mix. For example, approval authority is an IG task. How approval authority is assigned (centralized or decentralized) has a direct bearing on the number of personnel performing IG work. Also, if a function entails both IG and commercial tasks, how the work is organized dictates the workforce mix. For example, if IG and commercial tasks are non-severable (both have to be performed by all the manpower in the activity to accomplish the mission), the entire activity is coded IG to ensure that work involving IG tasks is always performed by government personnel. However, if IG and commercial tasks can be separated into sub-functions without adverse consequence to mission success or national security, the sub-functions are designated IG or commercial according to the nature of the work.

6.3. Order of Precedence for Coding Manpower. Manpower Mix Criteria are listed in descending order of precedence at Table T2. When two or more criteria apply, the criterion highest on the list shall take precedence. This order of precedence is structured to give
manpower officials visibility of why activities are performed by DoD civilian or military personnel. As required by Reference (j), when documenting manpower for the centralized DoD database, Manpower Mix Criteria codes shall be used to indicate the underlying reason for the workforce mix of an activity. Manpower Mix Criteria codes are addressed at Enclosure 2. By understanding the underlying reason for the workforce mix, Defense officials can assess the risks that manpower shortfalls have on IG responsibilities, readiness, workforce management, and mission accomplishment.

6.4. Use of Additional Criteria Codes by the DoD Components. If DoD Component manpower authorities elect, they may use additional codes to separately account for manpower covered by a single criterion provided the manpower is reported to OSD consistent with the guidance in this Instruction. For example, code "L" identifies exemptions for laws, Executive Orders, treaties and IAs. Manpower authorities may code manpower exempted by laws "L1," Executive Orders "L2," treaties "L3" and so forth, to separately account for these exemptions so long as all the manpower is coded "L" when reported to OSD.

6.5. Coding Military/Civilian Manpower Conversions. If manpower authorities decide that military personnel are performing IG functions or CAs that should be performed by DoD civilian personnel, or that DoD civilian personnel are performing work that should be performed by military personnel, they shall use the appropriate code to show that the activity should be converted from military to civilian or from civilian to military performance. For example, manpower authorities shall designate military manpower with code E, “Civilian Authority Direction & Control,” if criterion E best describes the type of work performed. Also, civilian manpower that perform work that requires “Military-Unique Knowledge & Skills” shall be coded F.

6.6. Coding Military Manpower Outside the Military Departments. When manpower authorities from OSD, Joint Staff, Field Activities, Defense Agencies, or other organizations outside the Military Departments determine or revalidate the workforce mix, they shall consult officials from the Military Services to ensure that manpower needed for military rotation, career progression, and wartime assignments are properly coded.

6.7. Requirements. When assessing manpower costs, manpower authorities shall not assume that military performance is less costly than either DoD civilian or contract performance, but shall conduct economic analyses similar to those required by Reference (f) to justify use of military personnel. Manpower authorities shall not designate manpower for military performance assuming that DoD civilian employees cannot be recruited or will not deploy to perform critical activities during peacetime or war. Manpower authorities shall consult personnel officials to verify if DoD civilian employees are available or can be recruited and trained to perform the work. Additionally, manpower designations should reflect required work and not temporary assignments.
7. **EFFECTIVE DATE**

This Instruction is effective immediately.

David S. C. Chu  
Under Secretary of Defense for  
Personnel and Readiness

Enclosures – 3  
   E1. References, continued  
   E2. Manpower Mix Criteria  
   E3. Guidance for Risk Assessments
E1. ENCLOSURE 1

REFERENCES, continued

(e) Sections 501 (note), 1115, 1116, 3711, and 3718 of title 31, United States Code

(g) Federal Acquisition Regulation, Subpart 7.5 of the FAR, “Inherently Governmental Functions,” current edition
(h) Defense FAR (DFAR) Supplement, current edition

(j) DoD Instruction 3020.41, "Contractor Personnel Authorized to Accompany the U.S. Armed Forces," October 3, 2005


(m) DoD Instruction 7730.64, "Automated Extracts of Manpower and Unit Organizational Element File," December 11, 2004
(n) DoD Functions, current edition


(q) Articles 2, 3, 4 and 32 of the Geneva Convention Relative to the Treatment of Prisoners of War, of August 1949 (Third Geneva Convention)

(r) Articles 24, 28 and 30 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, (GWS)

(s) Directive 2310.01, "DoD Program for Enemy Prisoners of War (EPOW) and Other Detainees," August 18, 1994

(t) DoD Directive 3115.09, "DoD Intelligence, Interrogations, Detainee Debriefings and Tactical Questioning," November 3, 2005


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2 OMB Circular No. A-76 can be found at: www.whitehouse.gov/omb/circulars/
3 The FAR can be found at: www.armedgov/far/
4 The DFAR may be found at www.acq.osd.mil/dpap/dars/dfars/index.htm
5 Copies may be obtained via Internet at http://www.dod.mil/prhome/docs/pifunctions.doc
7 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, (GWS) can be found at: www.unhchr.ch/html/menu3/b/q_genev2.htm
8 Document is classified – those with adequate securities may contact authority listed at: http://www.dtic.mil/whs/directives/corres/pub1.html
(y) DoD Directive 1100.20, "Support and Services for Eligible Organizations and Activities Outside the Department of Defense," April 12, 2004
(z) DoD Instruction 4000.19, “Inter-service and Intra-governmental Support,”
     August 9, 1995
(aa) DoD Instruction 6025.5, "Personal Services Contracts (PSCS) for Health Care Providers (HCPS), January 6, 1995
(ac) Section 1905 of Title 18, United States Code
(ad) DoD Instruction 3020.37, "Continuation of Essential DoD Contractor Services During Crisis," November 6, 1990
E2. ENCLOSURE 2

MANPOWER MIX CRITERIA

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E2.1. CRITERION A - DIRECTION AND CONTROL OF COMBAT AND CRISIS

SITUATIONS

Manpower in operating forces (DoD Functions M415-M810 of Reference (n)) are coded A if
they perform one or more of the IG activities addressed below. Civilian manpower in overseas
locations that are coded A are also designated Emergency-Essential (E-E) as provided by DoD
Directive 1404.10 (Reference (o)). These E-E positions are also designated as “key” following
the procedures in DoD Directive 1200.7 (Reference (p)) to indicate that they are not to be filled
by Ready Reservists that can be called to active duty.

E2.1.1. Operational Command of Military Forces. Operational command of military forces
is an IG function according to Reference (g) and may not be legally contracted. Consistent with
Reference (c), command within the Armed Forces is implemented through a unique construct of
command authority, known as the “military chain of command,” and enforced, among other
means, by the Uniform Code of Military Justice. Within the operating forces, this authority
begins with field commanders and extends to the lowest level of command responsible for
discretionary decision-making, personnel safety, and mission accomplishment. Accordingly,
manpower in operational command of military forces is designated military and coded A.
E2.1.2. **Operational Control.** Operational control is derived, in part, from IG responsibilities assigned to commanders and their military subordinates as explained in the sub-paragraphs below and is essential to the success of certain IG operations as addressed in paragraphs E2.1.3 and E2.1.4.

E2.1.2.1. **Uniform Code of Military Justice (UCMJ) Authority.** Consistent with section 809 of Reference (c), only commanding officers and, in certain cases, commissioned officers have authority to order the arrest or confinement of members of the U.S. Armed Forces or civilians accompanying Armed Forces in the field during a declared war who have violated the UCMJ. This authority entails substantial discretion and is IG consistent with Reference (e) and Attachment A of Reference (f) and may not be legally contracted.

E2.1.2.2. **Military Discipline and Discretionary Decision Authority.** Unlike private sector contractor employees, military personnel must obey all lawful orders at all times and are trained and prepared to immediately perform all duties as directed by military commanders. This strict discipline provides military commanders with the control and flexibility needed to quickly reassign duties, reconstitute operations, and provide relief and assistance to military forces during hostilities. (See paragraph E3.2.5. and its sub-paragraphs for restrictions on the use of DoD civilians and private sector contractor employees.) However, military personnel may have to assume responsibility for discretionary decisions, to include assuming command and control of military operations, if the commander is killed or incapacitated during hostilities. DoD civilians and private sector contractor employees cannot legally assume command or control of military operations. Military personnel alone have this responsibility and military forces alone perform this role in defense of the nation.9 This discretionary decision authority together with military discipline ensures continuity of control during crisis and war and is IG consistent with Reference (e) and Attachment A of Reference (f).

E2.1.3. **Combat Operations.** When armed fighting or force is deemed necessary for national defense, the Department of Defense may authorize deliberate action against another sovereign government or non-state actors on behalf of the United States (i.e., authority to plan, prepare and execute operations to actively seek out, close with and destroy enemy forces, including employment of firepower and other destructive and disruptive capabilities on the battlefield). The U.S. government has exclusive responsibility for discretionary decisions concerning the appropriate, measured use of combat power. Combat authorized by the U.S. government is IG and coded A and also is designated for military performance for the following reasons.

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9 The recognition of the role of the military in advancing U.S. national security interests and the command of military forces in the definition of what constitutes an IG function acknowledges that protection of our national security is one of the fundamental bases for which our national government exists. The unique nature of the military and its role in defense of the nation was recognized by the Supreme Court, in *Parker v. Levy*, 417 U.S. 733, 743 (1974): "[T]he military is, by necessity, a specialized society separate from civilian society. The differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17, 76 S.Ct. 1, 5, 100 L.Ed. 8 (1955)." It is the UCMJ that sets the military establishment apart from the civilian and what qualifies functions requiring military authority and discipline as IG.
E2.1.3.1. Because combat operations authorized by the U.S. government entail the exercise of sovereign government authority, involve substantial discretion,\(^{10}\) and can significantly affect the life, liberty, or property of private persons or international relations, they are IG consistent with Reference (e) and Attachment A of Reference (f), and cannot be legally contracted.

E2.1.3.2. The appropriate, measured use of combat power during hostilities is of critical national interest. Under certain circumstances, the United States can be liable for its misuse or compelled to make restitution due to its unintended collateral effects. The Department of Defense safeguards its sovereign authority and reduces the risk of inappropriately using combat power by:

E2.1.3.2.1. Delegating, through the military chain of command, military commanders alone responsibility for combat operations.

E2.1.3.2.2. Holding military commanders\(^{11}\) and their forces accountable for the appropriate and controlled use of combat power and adherence to rules of engagement and the Law of War.

E2.1.3.2.3. Ensuring that the discretionary judgment, leadership, knowledge, and discipline necessary to perform effectively and responsibly under fire is developed and reinforced through extensive training of military commanders in tandem with their forces.

E2.1.3.2.4. Holding commanders responsible for assessments of the training, discipline, and readiness\(^{12}\) of their units to conduct assigned wartime missions.

E2.1.3.3. Consistent with paragraphs E2.1.3.1. and E2.1.3.2., manpower that take a direct part in hostilities (DoD Functions M415-M810 of Reference (n)) shall be designated military and coded A if the planned use of disruptive and/or destructive combat capabilities (including offensive cyber operations, electronic attack, missile defense, and air defense) is an inherent part of the mission. Only military forces provide the appropriate authorities and controls (command authority, UCMJ authority, and discretionary decision authority), discipline, weapons, equipment, training and organization needed to execute combat missions on behalf of the United States. If combat operations were performed by private sector contractors, it would constitute an inappropriate relinquishment of the U.S. government's sovereign authority.

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\(^{10}\) Although combat missions are governed by military rules of engagement and laws and conventions of war, because combat regularly takes place in uncontrolled, unpredictable, chaotic environments, substantial discretion is still required when making on-the-spot decisions about "friend or foe," risk of collateral damage, the appropriate degree of fire power and what constitutes an "unlawful order" during combat.

\(^{11}\) Consistent with section 164 of Reference (c), if commanders of combatant commands at any time consider their authority, direction or control with respect to any of the commands or forces assigned to their command to be insufficient to command effectively, they shall promptly inform the Secretary of Defense. Because this responsibility entails substantial discretion, it is IG consistent with Reference (e) and Attachment A of Reference (f), and cannot be legally contracted.

\(^{12}\) Consistent with sections 117 and 164 of Reference (c), commanders are directly responsible for the readiness of Armed Forces. Because this responsibility entails substantial discretion, it is IG consistent with Reference (e) and Attachment A of Reference (f), and may not be legally contracted.
E2.1.3.3.1. This includes units located inside or outside a theater of war if the personnel operate weapon systems against the enemy (e.g., B-52 and Inter-Continental Ballistic Missile crews).

E2.1.3.3.2. This does not include technical advice on the operation of weapon systems or other support of a non-discretionary nature performed in direct support of combat operations. (See Enclosure 3.)

E2.1.4. Security Provided to Protect Resources in Hostile Areas

E2.1.4.1. Security provided for the protection of resources (people, information, equipment, supplies, etc.) in uncontrolled or unpredictable high threat environments inside the continental United States or outside the continental United States entails a wide range of capabilities, some of which are IG and others of which are commercial. See paragraph E2.2 for a discussion of security functions that are not IG. Security is IG if it involves unpredictable international or uncontrolled, high threat situations where success depends on how operations are handled and there is a potential of binding the United States to a course of action when alternative courses of action exist. This includes security performed as part of CS and CSS operations. The following are examples.

E2.1.4.1.1. A show of military force (i.e., combat capability) that demonstrates U.S. resolve can avert or delay hostilities while preserving the option to employ the full range of destructive and disruptive capabilities of the Armed Forces. Because this option has significant consequence, this kind of operation entails substantial discretion and is IG consistent with Reference (e) and Attachment A of Reference (f). For this reason, this kind of operation cannot be performed by Defense contractors but must be provided through a military means.

E2.1.4.1.2. When the Department of Defense authorizes the use of force to achieve a specific objective or end state, decisions on how to accomplish the mission are the responsibility of the Department. Security forces that operate as part of a larger, totally integrated and cohesive Armed Force typically perform operations that require deadly force and substantial discretion. For instance, security operations that directly support combat (e.g., battlefield circulation control and area security) are governed by rules of engagement, mission statements and orders expressing the "commander's intent."13 Nevertheless, the military troops are still required to exercise initiative and substantial discretion when deciding how to accomplish the mission, particularly when unanticipated opportunities arise or when the original concept of operations no longer applies. The kind of discretion required for such operations is IG and cannot be legally exercised by Defense contractors. These operations require military training and discipline for reasons stated in paragraph E2.1.3.2 and are designated for military performance.

13 Consistent with FM101-5-1/MCRP 5-2A, "commander's intent" is a clear, concise statement of what the force must do to succeed with respect to the enemy and the terrain and the desired end state. It provides the link between the mission and concept of operations by stating the key tasks that, along with the mission, are the basis for subordinates to exercise initiative when unanticipated opportunities arise or when the original concept of operations no longer applies.
E2.1.4.1.3. Security operations could entail defense against a military or paramilitary organization whose capabilities are so sophisticated that only military forces could provide an adequate defense. This includes situations where there is such a high likelihood of hostile fire, bombings or biological or chemical attacks by groups using sophisticated weapons and devices that, in the judgment of the military commander, the operation could evolve into combat. Responsibility for discretionary decisions inherent to such high risk security operations rests with the U.S. government and is IG. Responsibility for these kinds of security operations may only be vested in government officials. The Department of Defense does not have the legal authority to delegate or contract such operations to a private sector firm even if it employs fully trained and competent armed security personnel. In these situations, security must be provided through a military means.

E2.1.4.1.4. Security operations that involve more than a response to hostile attacks typically entail substantial discretion and are IG. For example, security operations that are performed in highly hazardous public areas where the risks are uncertain, could require deadly force that is more likely to be initiated by U.S. forces than occur in self defense. Security operations that require immediate decisions on the appropriate course of action or the acceptable level of risk typically require substantial discretion and are IG particularly when the outcome could significantly affect the life, liberty, or property of private persons or international relations. Such operations typically require on-the-spot judgments on the appropriate level of force, acceptable level of collateral damage, and whether the target is "friend or foe." They also require protocols on the use of force that permit discretion for "preemptive" attacks. Such high risk operations require military training and discipline for the reasons stated in paragraph E2.1.3.2 and are designated for military performance.

E2.1.4.1.5. If consistent with applicable U.S., international, and HN laws; SOFAs and other IAs; HN support agreements; and federal regulations, a defense contractor may be authorized to provide security services provided the services do not involve substantial discretion. Consistent with subsection 1.b of Reference (f), a decision is not IG if it can be limited or guided by existing polices, procedures, directions, orders, or other guidance that identify specific ranges of acceptable decisions or conduct and subject the discretionary authority to final approval or regular oversight by government officials.

E2.1.4.1.5.1. Physical security at buildings in secure compounds in hostile environments normally does not require substantial discretion and may be contracted except as provided at E2.2. (Also see paragraph E3.2.5.4.6.)

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14 The use of force by contingency contractor personnel is often strictly limited by U.S., international and HN laws (including the Law of War) and not protected by IAs and SOFA provisions. Subject to the application of IAs, contingency contractor personnel must comply with applicable HN laws. Also, international and HN support agreements may affect contracting by restricting services to be contracted, limiting contracted services to HN contractor sources, or prohibiting contractor use altogether. U.S. statutes restrict the types of weapons that can be exported or procured for use by the private sector. See paragraph E3.2.5.5 concerning these restrictions. Plans for security services should be reviewed on a case-by-case basis with the assistance of the servicing legal office and in coordination with the geographic Combatant Commander Staff Judge Advocate's office to ensure compliance with applicable laws, SOFAs, IAs, HN support agreements, and other similar arrangements. See paragraph E3.2.12.
E2.1.4.1.5.2. Contingency contractors may provide security services for other than uniquely military functions provided the geographic Combatant Commander: 15

E2.1.4.1.5.2.1. Clearly articulates "rules for the use of deadly force" 16 that preclude ceding governmental control and authority of IG functions to private sector contractors as addressed in E2.1.4.1.5.17

E2.1.4.1.5.2.2. Sets clear limits on the use of force based on U.S., HN, and international law and clarifies what is not protected by IAs or SOFA provisions,18 including the Law of War and provisions in articles 2, 3 and 4 of Reference (q).19

E2.1.4.1.5.2.3. Ensures contracts for security services includes a description of the anticipated threat and any known or potentially hazardous situations and a plan for how appropriate assistance will be provided to contract security personnel who become engaged in hostile situations consistent with the procedures in Reference (m).20

E2.1.4.2. Consistent with paragraph E2.1.4.1 and its sub-paragraphs, security in hostile environments (DoD Functions M415-M810 of Reference (n)) shall be designated for military performance and the manpower coded A if, in the judgment of the commander, the security operations would entail defense against military forces of another sovereign government or non-state actors (e.g., terrorists or insurgents) whose capabilities are so unpredictable or sophisticated or such a high risk that a military capability is needed to provide the discretionary authority, flexibility, and options necessary to achieve the sovereign interests of the United States. In such cases, only military forces have the appropriate authorities and controls (command authority, UCMJ authority, and discretionary decision authority), discipline, weapons, equipment, training and organization needed to achieve the sovereign interests of the United States. Capabilities legally provided by DoD civilian or contractor employees would inappropriately limit or risk the government's responsibilities, options or objectives. In addition, if these security operations were performed by a private sector contractor, it most likely would constitute an inappropriate relinquishment of the U.S. government's sovereign authority.

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15 See section 6.3.5 of Reference (m) for procedures for arming contractor personnel for security services.

16 Section 6.3.5.3.4 of Reference (m) requires geographic Combatant Commanders, when determining whether to grant permission to arm contingency contractor personnel to provide security services, to develop "rules for the use of deadly force" and to distinguish between "rules of engagement" applicable to military forces and the "rules for the use of deadly force" that control the use of weapons by civilians.

17 This is consistent with sections 6.1.5 and 6.3.3 of Reference (m).

18 Contingency contractor personnel providing security services who exceed the limits imposed by applicable laws and agreements may be subject to prosecution and civil liability. Section 6.3.5.3.7 of Reference (m) states that requests for permission to arm contingency contractor personnel to provide security services must include written acknowledgement by the defense contractor and individual contractor security personnel that (among other things) "potential civil and criminal liability exists under U.S. and HN law for the use of weapons."

19 It is not a violation of the Law of War for civilians who are authorized to accompany the U.S. Armed Forces in the field during hostilities to be issued a weapon on the authority of the Combatant Commander for individual self defense. However, under the Law of War, civilians accompanying the Armed Forces may be directly targeted for such time as they take a direct part in hostilities but do not lose their entitlement to Prisoner of War (POW) status.

20 Consistent with paragraph E2.1.4.1.3, the geographic Combatant Commander shall not assign private sector contractors responsibility for security services that are at high risk of evolving into combat.
E2.1.4.2.1. This includes CS and CSS units that perform commercial functions if all the manpower in the unit must also perform IG security operations to accomplish the mission. For example, manpower in Marine Corps CS and CSS units that perform commercial functions and are required to defend the unit as a regular part of their mission are coded A. In this example, two functions are performed by all of the manpower in the unit and the IG function (security) takes precedence over the commercial function for coding purposes so that IG work is always performed by government personnel.

E2.1.4.2.2. If IG security operations can be performed separately without adverse impact to mission success, only manpower performing IG security operations are coded A. For example, if a Military Service has a new weapon system available for use during hostilities but sufficient numbers of military maintainers are not yet trained, the commander might be able to use contract maintenance in a secure compound without degrading the operational capability of the system. The Army's Stryker Brigade is an example. In such cases, only the IG security forces at the compound are coded A.

E2.1.5. Medical and Chaplain Services Performed in Hostile Areas. Services provided by military medical personnel and Chaplains embedded in military units that engage in hostile action are IG. This manpower shall be designated military and coded A for the following reasons:

E2.1.5.1. During hostilities, military medical personnel function as an inherent part of the unit and (as with other members of the unit) use substantial discretion when defending their patients.

E2.1.5.2. Military Chaplains are appointed to military duty consistent with sections 3073, 5347, 5142, and 8067 of Reference (c). They have support from over 230 endorsing bodies that represent over 300 faith groups to work cooperatively with other faith groups to provide for the pluralistic religious needs of military members. They provide for military members' religious "free exercise" rights and satisfy both the "establishment" and "free exercise" clauses of the Constitution. Legal efforts to invalidate this contention have been unsuccessful. Also, even though many aspects of their duties are governed by policy and practice, military Chaplains must use substantial discretion and make value judgments when interpreting DoD policy and ministering to the pluralistic religious needs of the military.

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21 The First Amendment prohibits any law "respecting the establishment of religion or prohibiting the free exercise thereof." Although the Department of Defense can and does contract for religious ministry from individual faiths, the Department of Defense cannot (1) contract for the type of religious pluralism required in operational environments because it is not available in the private sector, or (2) impose upon civilian religious ministry professionals (RMPs) the type of religious pluralism exercised by military Chaplains in operational settings without risk of challenge under the non-establishment clause of the First Amendment.

22 In Katoff vs. Marsh, 755 F.2d 223 (2d Cir. 1985), the U.S. Court of Appeals for the Second Circuit concluded that there was no viable or feasible means for individual religious denominations in America to provide the pluralistic and comprehensive religious support currently offered by the Service Chaplaincies.

23 For example, to avoid proselytizing, Chaplains often have to balance their personal religious beliefs with the requirements of ministering to members of different faiths or to persons of no particular faith who are brought to personal crises during war. Also, Chaplains must use substantial discretion when requested for actions that certain faith groups consider essential but are inconsistent with the Chaplain's personal religious beliefs. This is not the
Military Chaplains also play an active, discretionary role in planning and preparation of activities when religion and other cultural issues and ideologies could have a pronounced influence on civil-military operations, psychological operations, or public affairs activities.

E2.1.5.3. If captured during an international armed conflict, unlike civilian or private sector contractor employees performing religious or medical services, military Chaplains and military medical personnel are not held as prisoners of war (POWs). They are retained persons who are permitted to attend to the religious and medical needs of U.S. POWs under the Geneva Convention. Their unique role is performed on behalf of the U.S. government and cannot be delegated to DoD civilians or private sector contractors.24

E2.1.6. Criminal Justice, Law Enforcement and Interrogations Performed in Operational Environments. How enemy prisoners of war (EPW), civilian internees (CI), retained persons (RP), other detainees, terrorists and other criminals are to be treated when captured, transferred, detained, and interrogated during or in the aftermath of hostilities as addressed in DoD Directive 2310.01 (Reference (s)), falls under the discretionary exercise of government authority. Responsibility for their handling as well as decisions concerning how they are treated cannot be transferred to private sector contractors who are beyond the reach of government controls. However, in areas where adequate security is available and expected to continue, properly trained and cleared contractors may be used as linguists, interpreters, report writers, etc., if their work is properly reviewed by sufficient numbers of properly trained government officials as required by Reference (g).

E2.1.6.1. Consistent with Reference (g), control of prosecutions and performance of adjudicatory functions in support of UCMJ criminal justice proceedings (DoD Function M510 of Reference (n)) are IG activities. Consistent with Chapter 47 of Reference (c) and Reference (s), these activities must be performed by military personnel. Accordingly, this manpower shall be designated military and coded A.

E2.1.6.2. Consistent with Reference (g), direction and control of intelligence interrogations (DoD Function M311 of Reference (n)) are IG activities. This includes the approval, supervision and oversight of interrogations. Also, consistent with Reference (e) and Attachment A of Reference (f), those aspects of an interrogation that entail substantial discretion are IG. If performed in hostile areas where security necessary for DoD civilian performance cannot be provided, the manpower shall be designated military and coded A. Otherwise, the manpower shall be designated DoD civilian and coded A. However, in areas where adequate security is available and is expected to continue, properly trained and cleared contractors may be used to draft interrogation plans for government approval and conduct government approved interrogations consistent with DoD Directive 3115.09 (Reference (t)) if they are properly supervised and closely monitored throughout the interrogation process by sufficient numbers of

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24 See Articles 24, 28 and 30 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, (GWS) (Reference (r)). Also see Article 32 of the Geneva Convention Relative to the Treatment of Prisoners of War, of August 1949 (Third Geneva Convention) (Reference (q)).
properly trained government officials. (See paragraphs E3.3.2.1, E3.3.2.4, and E3.3.2.6 of Enclosure 3.)

E2.1.6.3. Certain law enforcement operations, to include issuing warrants, making arrests, and preservation of crime scenes, are IG activities. According to Reference (g), direct conduct of criminal investigations (DoD Function M510 of Reference (n)) is an IG activity. If these activities are carried out under the UCMJ as prescribed in Chapter 47 of Reference (c), or are performed in hostile areas where security necessary for DoD civilian performance cannot be provided, they shall be designated for military performance and coded A. Otherwise, they shall be designated for DoD civilian performance and coded A. However, in areas where adequate security is available and expected to continue, properly trained and cleared contractors may perform special non-law enforcement security activities that do not directly involve criminal investigations so long as they are closely monitored by sufficient numbers of properly trained government officials as required by Reference (g).

E2.1.6.4. Direction and control of detention facilities for EPW, CI, RP, other detainees, terrorists, and other criminals in areas of operation (DoD Function M510 of Reference (n)) are IG activities. Consistent with Chapter 47 of Reference (c) and Reference (s), these activities must be performed by military personnel. Manpower performing these activities shall be designated military and coded A. This includes detention of individuals under the Law of War as part of ongoing operations for their own protection or to remove potential threats from the battle space.

E2.1.6.5. Direction and control of confinement/correctional facilities for U.S. military prisoners in areas of operation (DoD Function M510 of Reference (n)) are IG functions. Manpower performing these activities shall be designated military and coded A if the facility is for the confinement of offenders of the UCMJ as prescribed in section 951 of Reference (c) and the prisoners are under military command.

E2.1.7. Other Support Functions Performed in Operational Environments. The following support functions are IG. When performed in hostile areas where security necessary for DoD civilian performance cannot be provided, the manpower shall be designated military and coded A. Otherwise, they shall be designated DoD civilian and coded A.

E2.1.7.1. According to Reference (g), direction and control of intelligence and counterintelligence operations are IG activities. Consistent with the section 501 (note) of References (e) and Attachment A of Reference (f), intelligence and counterintelligence operations (DoD Function M480 of Reference (n)) that entail substantial discretion also are IG.

E2.1.7.2. According to Reference (g), federal procurement activities with respect to prime contracts (to include determining what supplies or services are to be acquired; approving, awarding, administering, and terminating contracts; and determining whether contract costs are reasonable, allocable, and allowable) are IG.
E2.2. **CRITERION B - EXEMPTION OF CS AND CSS DUE TO OPERATIONAL RISK**

Consistent with Reference (a), certain commercial CS and CSS functions are exempted from private sector performance and designated for DoD civilian or military performance for risk mitigation purposes.²⁵

**E2.2.1. Exemption for Military CS and CSS**

E2.2.1.1. Manpower authorities shall designate commercial CS or CSS functions in operating forces (DoD Functions M415-M810 of Reference (n)) for military performance and code the manpower B if, in the commander’s judgment, a military capability is not normally required for proper performance of the duties, but performance of the function by DoD civilians or contractors or total reliance on DoD civilians or contractors would constitute an unacceptable risk.

E2.2.1.2. This includes situations where there is a significant risk that:

E2.2.1.2.1. The threat level could increase and military personnel would be needed on short notice to provide or augment a military capability.²⁶

E2.2.1.2.2. There would be an unsafe number of personnel in hostile areas who are not combatants.

E2.2.1.2.3. DoD civilians or private sector contractors will not²⁷ or cannot continue to perform their work.²⁸

E2.2.1.2.4. Security provided by private sector contractors could prove inadequate due to inferior weapons, operational security (OPSEC), communications, or training. This always includes security for nuclear weapons, as required by DoD 5210.41-M (Reference (u)), and could include security for captured chemical, biological, radiological, and high explosive weapons and Conventional Arms, Ammunitions, and Explosives.

E2.2.1.3. This manpower is exempt from private sector performance. It provides a ready and controlled source of technical competence (core capability) necessary to ensure an effective and timely response to an emergency or national defense contingency in the event military

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²⁵ Section 118(b) of Reference (g) requires the Department to identify the resources needed "to execute successfully the full range of missions called for in the national defense strategy at a low to moderate level of risk."
²⁶ Section 113(i) of Reference (g) requires the Department to address "the means by which the DoD will maintain the capability to reconstitute or expand the defense capabilities and programs of the Armed Forces of the United States on short notice to meet a resurgent or increased threat to the national security of the United States."
²⁷ Except during a declared war, DoD civilian and private sector contract employees have the discretionary option of quitting their jobs and not performing their duties without being subject to criminal prosecution under the UCMJ.
²⁸ This includes situations where the commander has concerns that the contractor can no longer fulfill the terms of the contract because the threat level, duration of hostilities, or factors specified in the contract have changed significantly, or because U.S. law, international law, HN law, or international or HN support agreements (e.g., SOFAs) have changed in a manner that affects contract arrangements, or because of political or social situations.
capabilities are required. Decisions about the number of CS and CSS units necessary to provide a core capability are based on risk assessments. (See Enclosure 3.)

E2.2.2. Exemption for Civilian CS and CSS

E2.2.2.1. Manpower authorities shall designate commercial CS and CSS functions (DoD Functions M415-M810 of Reference (n)) in operating forces for DoD civilian performance and code the manpower if, in the commander’s judgment, a military capability is not normally required for proper performance of the duties, but performance of the function by private sector contractors or total reliance on private sector contractors would constitute an unacceptable risk.

E2.2.2.2. This includes Emergency-Essential (E-E) manpower that provides continuity for essential functions, maintain the availability of combat-essential systems, or perform duties critical to combat operations in overseas locations during a crisis when other civilians are evacuated as provided by Reference (o).

E2.2.2.3. This manpower is exempt from private sector performance and requires DoD civilian performance. These positions cannot be vacated or eliminated during a national emergency or mobilization without seriously impairing the ability of the activity to function effectively. These positions are also designated as “key” following the procedures in Reference (p) to indicate that they are not to be filled by Ready Reservists who can be called to active duty.

E2.2.2.4. Examples include supply and maintenance of strategic weapon systems and strategic defense forces at locations where there is little or no likelihood of hostile fire. Army units at echelon above division, Army Logistical Support Elements that deploy to hostile areas, Technology Escort Units that retrieve chemical and biological weapons in forward areas, and Navy ships with CS missions that are part of the Combat Logistics Force, are other examples.

E2.2.3. Threat Levels. Because operational risk often depends on the threat level in a geographic region, coding for this manpower has to be reevaluated as threat levels change.

E2.3. CRITERION D - EXEMPTION OF MANPOWER DUAL-TASKED FOR WARTIME ASSIGNMENTS

Consistent with Reference (a), manpower authorities shall establish sufficient manpower in the infrastructure so that an adequate pool of personnel is available for critical assignments in the operating forces during a mobilization, crisis, or war. This refers to positions in the operating forces that cannot be met through other sources (i.e., cannot be filled in sufficient time by personnel mobilized or recruited during a mobilization or war). Manpower authorities at DoD Component headquarters shall consult mobilization and crisis planners to identify military and civilian personnel in CAs in the infrastructure that are needed for wartime assignments in the

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29 DOD Instruction 3020.37 (Reference (v)) requires commanders to develop contingency plans to continue performance of critical support services during a crisis if there is concern that the incumbent contractor cannot or will not continue to provide the support service and DoD civilians and replacement contractors cannot be used to perform the work.
operating forces. This manpower is coded D to indicate the incumbents are dual-tasked for wartime assignments (i.e., assigned to positions in the infrastructure and counted for wartime assignments in the operating forces). During peacetime, these personnel are not assigned to the operating forces, but are designated for assignments to the operational forces in the event of a mobilization, war, or other emergency.

E2.3.1. Military Manpower Designated for Wartime Assignments. Manpower in the infrastructure shall be designated military and coded D if the incumbents are Active military or Active Guard and Reserve (AGR) who are designated for assignments in the operating forces or serve as replacements for personnel in the operating forces during mobilization or war but perform CAs in the infrastructure during peacetime. For example, the Navy uses active-duty military from the shore establishment to stand-up Fleet hospitals and to staff hospital ships with medical personnel during a mobilization or war. Also, Air Force unit type code (UTC) military needed for mobilization or war are coded D. This manpower is designated military and exempted from private sector performance because the incumbents are needed for assignments in the operating forces during a mobilization or war before Reserve Component personnel are recalled and before post-mobilization recruits (i.e., personnel acquired after mobilization) can be trained and assigned to the operating forces to support or sustain a military operation.

E2.3.2. Civilian Manpower Designated for Wartime Assignments. Manpower in the infrastructure shall be designated DoD civilian and coded D if the incumbents are designated for assignments in operating forces overseas or serve as alternates or replacements for personnel in overseas assignments in the operating forces during hostilities. For example, E-E personnel who are assigned overseas during a crisis or that replace E-E personnel assigned to positions in overseas locations according to Reference (o) are coded D. These positions are also designated as "key" following the procedures in Reference (p) to indicate that they are not to be filled by Ready Reservists that can be called to active duty. Also, DoD civilians who are dual-status military technicians covered by section 115(c) of Reference (c) who train the Selected Reserve (SELRES) or maintain or repair equipment issued to the SELRES or Active Component forces during peacetime are coded D if they are designated for military wartime assignments in units of the SELRES.

E2.3.3. Designations for Wartime Assignments. Manpower authorities at the DoD Component headquarters shall determine the number and skills required for a mobilization, war, or other emergency using a formal validated process. Manpower authorities shall centrally manage the coding for this manpower. A mobilization may expand the operating forces beyond the programmed force structure or require additional personnel for wartime rotation to sustain operations. Accordingly, manpower authorities must consider the entire mobilization and wartime manpower demand before making final decisions about the numbers and skills required. Decisions to code manpower D are made in conjunction with decisions to code manpower H. (See section E2.7.)
E2.4. CRITERION E - DOD CIVILIAN AUTHORITY, DIRECTION AND CONTROL

The following IG duties and responsibilities are inherent to DoD civilian authority, direction, control, and accountability of the Department of Defense consistent with Reference (c). This manpower is designated civilian and coded E. If the incumbents also have emergency essential responsibilities, the manpower is also designated E-E as provided by Reference (o). Also, if the positions cannot be vacated or eliminated during a national emergency or mobilization without seriously impairing the ability of the activity to function effectively, they are designated as “key” following the procedures in Reference (p) to indicate that they are not to be filled by Ready Reservists that can be called to active duty.

E2.4.1. Civilian Leadership and Control. Manpower performing DoD Functions A610-M399 and P110-Z999 of Reference (n) shall be designated civilian and coded E if the incumbents are directly and ultimately accountable for the accomplishment of defense missions and functions, the discretionary exercise of DoD authority, or judgments relating to monetary transactions and entitlements. This includes ultimate control of the acquisition, use, or disposition of the property (real or personal, tangible or intangible) of the United States. It includes the authority to obligate federal funds or to commit the Department of Defense to take or not take action by contract, policy, regulation, authorization, order or otherwise. Examples include the duties and responsibilities vested in the Secretary of Defense; Secretaries of the Military Departments; Directors of Defense Agencies and DoD Field Activities; and other civilian officials specified in sections 131-142, 3013-3022, 5013-5026, and 8013-8022 of Reference (c). This also includes program/project managers, contracting officers, and other officials delegated management authority (direction and final decision-making) and accountability for:

E2.4.1.1. Conduct of foreign relations and determination of foreign policy according to Reference (g), to include implementation of IAs and treaties covered by DoD Directive 5530.3 (Reference (v)), Law of War under DoD Directive 5100.77 (Reference (w)), and foreign military sales and security assistance programs.

E2.4.1.2. Recommendations and responses to Congress for changes to governing legislation and comments to draft legislation on matters concerning the Department of Defense.

E2.4.1.3. Determination of policies, directives, and regulatory guidance to include determining the content and application of regulations, among other things. However, contractors may perform services that involve or relate to the development of regulations so long as the work is properly reviewed by government personnel according to Reference (g).

E2.4.1.4. Approval of strategic plans according to section 306 of Reference (d), as well as program goals and objectives (to include national security objectives).

E2.4.1.5. Determination of DoD program priorities for budget requests and determination of budget policy, guidance and strategy according to Reference (g).
E2.4.1.6. Discretionary decisions concerning the effective, efficient, and economical organization, administration, and operation of the Department of Defense, such as decisions to transfer a function, power, or duty; delegate authority; or approve support agreements, cooperative agreements, and non-procurement transactions.

E2.4.1.7. Direction and control of certain functions and operations to include intelligence and counterintelligence operations, criminal investigations, and adjudications (other than those relating to arbitration or other methods of alternative dispute resolution) according to Reference (g), and direction, control, and responsibility for intelligence interrogations.

E2.4.1.8. Control of treasury accounts and the administration of public trusts and grants according to Reference (g).

E2.4.1.9. Direction and ultimate control over the acquisition, use, or disposal of property (real or personal, tangible or intangible) of the United States (to include the collection, control, and disbursement of appropriated and non-appropriated funds) according to References (e) and (f).

E2.4.2. Civilian Expertise and Experience. Manpower performing DoD Functions A610-M399 and P110-Z999 of Reference (n) shall be designated civilian and coded E if Defense officials require their judgment and insight to make informed decisions and preclude sole reliance on contract advisory assistance. This manpower enables Defense officials to maintain ultimate control and accountability of government operations, federally funded projects, contracts, or government property or funds. They perform an active and informed role in policy development, program execution, contract administration, and judiciary or fiduciary matters. They also perform a discretionary role in establishing objectives, setting priorities, judging risks, or deciding on a course of action by narrowing the number of alternatives and recommending the Department’s preferred position based on their corporate knowledge; technical expertise; and advice, opinions, and recommendations provided by sources inside and outside the Department of Defense. This manpower has the delegated authority to:

E2.4.2.1. Establish terms for IAs, treaties, foreign military sales, and security assistance programs. However, contractors may assist in these activities by gathering information or providing advice, opinions, or recommendations.

E2.4.2.2. Draft or develop proposed changes to governing legislation and comments to draft legislation and draft Congressional testimony, responses to Congressional correspondence, or agency responses to audit reports from the Inspector General, the General Accounting Office or other Federal audit entity according to Reference (g). However, contractors may provide background information to assist governmental personnel with these activities.

E2.4.2.3. Interpret, develop or evaluate legal opinions and implementing policy for laws, Executive Orders, treaties, and IAs. However, contractors may assist government personnel by providing non-legal advice according to Reference (g).
E2.4.2.4. Draft, develop or evaluate strategic plans according to section 306 of Reference (d), to include planning options, priorities, strategies, and justifications for strategic plans; and draft and develop performance goals, performance indicators, performance plans, program evaluations, and program performance reports required under sections 1115 and 1116 of Reference (e).

E2.4.2.5. Develop or evaluate program and budget requests. However, contractors may assist government personnel with these activities through workload modeling, fact finding, efficiency studies, feasibility studies, should-cost analyses, and other analyses as provided by Reference (g).

E2.4.2.6. Maintain control and accountability of government operations, federally funded programs and projects, contracts, and federal property and funds. However, contractors may assist government personnel with these activities through workload modeling, fact finding, feasibility studies, efficiency studies, and other analyses of a non-discretionary nature to support program management, acquisition planning, and evaluations as provided by Reference (g). These IG functions include, among others:

E2.4.2.6.1. Administering and managing government operations to include discretionary decisions on the reorganization and improvement of activities. However, contractors may assist government personnel by providing advice, opinions, ideas or recommendations; gathering information; and performing other non-discretionary services that involve or relate to reorganizing or improving activities consistent with Reference (g).

E2.4.2.6.2. Systems acquisition management. However, according to section 2383 of Reference (c), contractors may support government personnel in acquisition planning by gathering information; providing advice, opinions, recommendations, or ideas; and assisting in program monitoring, milestone and schedule tracking, and other non-discretionary tasks.

E2.4.2.6.3. Allocating resources (dollars and manpower) and obligating federal funds. However, employee utilization of government credit cards for the purchase of office supplies or temporary duty travel does not meet the funds obligation criteria specified here.

E2.4.2.6.4. With respect to prime contracts, determining what supplies or services are to be acquired by the government. However, according to Reference (g), an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the Department of Defense, subject to government oversight and acceptance.

E2.4.2.6.5. Awarding, terminating, and administering contracts for goods and services to include ordering changes to contract performance or contract quantities, taking action based on evaluation of contract performance, and accepting or rejecting contract products or services as prescribed in Reference (g). However, subject to applicable conflict of interest laws and regulations, contractors may assist in the development of statements of work and provide technical evaluations of contract proposals so long as the contractor’s involvement is properly administered. In such cases, the government must not allow the contractor to perform in
conflicting roles that might bias its judgment, or to gain an unfair competition advantage by virtue of access to confidential business information or other sensitive information.

E2.4.2.6.6. Approving any contractual document (to include documents defining requirements, incentive plans, and evaluation criteria) or participating as a voting member on any source selection boards or performance evaluation boards according to Reference (g). However, contractors may participate as technical advisors to a Source Selection Evaluation Board according to section 2383 of Reference (c).

E2.4.2.6.7. Determining whether contract costs are reasonable, allocable, and allowable according to Reference (g).

E2.4.2.6.8. Determining what government property (real or personal, tangible and intangible) is to be disposed of and on what terms. However, contractors may be given authority under government oversight to dispose of property identified by the government at prices within clearly specified ranges as determined by the government and subject to other reasonable conditions deemed appropriate by the Department of Defense consistent with Reference (g).

E2.4.2.6.9. Consistent with Reference (g), collecting, controlling, and disbursing fees, royalties, duties, fines, taxes and other public funds unless the function falls into one of the following categories:

E2.4.2.6.9.1. Activities authorized by statute, such as section 3711 of Reference (e) relating to private collection contractors, and section 3718 of Reference (e) relating to private collection services;

E2.4.2.6.9.2. Collection of fees, fines, penalties, costs or other charges from visitors to or patrons of mess halls, post or base exchange concessions, and similar entities or activities, or from other persons, where the amount to be collected is easily calculated or predetermined and the funds collected can be easily controlled using standard cash management techniques; and

E2.4.2.6.9.3. Routine voucher and invoice examination.

E2.4.2.7. Maintain direction and control of the Defense workforce and contract services to include responsibility for the following:

E2.4.2.7.1. Actions to commission, appoint, direct or control officers or employees of the United States, consistent with Reference (e), to include the selection or non-selection of individuals for federal government employment (including the interviewing of individuals for employment) and the approval of position descriptions and performance standards for federal employees according to Reference (g). (However, when activities are identified for competition or private sector performance, concomitant supervisory duties may also be designated for competition or private sector performance if they are not otherwise IG.)
E2.4.2.7.2. Volunteers including those covered by section 1588 of Reference (c) and direct and indirect hire foreign national employees.

E2.4.2.7.3. Personal service contracts and general service contracts. However, contractors may be used for contract quality control and performance evaluation or inspection services under government oversight provided specific guidelines for products or services can be specified and contractor involvement properly administered. In such cases, contractors must be precluded from influencing official evaluations of other contractors, and from gaining access to confidential business information or other sensitive information according to Reference (g).

E2.4.2.8. Represent the Department’s interests at official functions, negotiations, and hearings, or conduct activities involving criminal justice, labor relation, law enforcement or entitlement matters. Examples include:

E2.4.2.8.1. Control and performance of adjudicatory functions other than those relating to arbitration or other methods of alternative dispute resolution according to Reference (g). However, contractors may assist government personnel with these activities by gathering information or providing advice, opinions, recommendations, or ideas.

E2.4.2.8.2. Negotiation (e.g., endangered species negotiations and re-negotiations for Federal personnel rules for bargaining units). However, contractors may assist government personnel with these activities by gathering information or providing advice, opinions, recommendations, or ideas.

E2.4.2.8.3. Certain law enforcement operations (DoD Function S510 of Reference (n)). This includes the authority to execute and serve warrants and make arrests without a warrant and other duties assigned to special agents of the Defense Criminal Investigative Service according to section 1585a of Reference (c), and preservation of crime scenes. However, properly trained and cleared contractors may perform special non-law enforcement security activities that do not directly involve criminal investigations according to Reference (g).

E2.4.2.8.4. Direct conduct of criminal investigations according to Reference (g).

E2.4.2.8.5. Conduct employee labor relations. However, contractors may serve as arbitrators or provide alternative methods of dispute resolution according to Reference (g).

E2.4.2.8.6. Conduct administrative hearings to determine eligibility for security clearances or eligibility to participate in government programs; address actions that affect matters of personal reputation according to Reference (g); or resolve matters related to government employment except as provided in Chapter 11 of Reference (d).

E2.4.2.8.7. Approve Federal license applications (except for vehicles or support equipment) and inspections according to Reference (g).

E2.4.2.9. Develop and clarify policy to include DoD decisions regarding responses to Freedom of Information Act (FOIA) requests and administrative appeals of denials of FOIA
requests. However, according to Reference (g), contractors may assist government officials with routine responses that, because of statute, regulation, or agency policy, do not require the exercise of any judgment in determining whether documents are to be released or withheld.

E2.4.2.10. Conduct test and evaluations (T&E) (DoD Function A620 of Reference (n)) to determine the potential utility and operational suitability and effectiveness of systems and technologies; or the suitability of critical human design and human factors engineering features for systems that will be operated or maintained by DoD civilians. However, contractors may be used to provide direct support to organic T&E activities under government oversight and according to applicable laws.

E2.4.2.11. Perform intelligence and counterintelligence operations and clandestine intelligence operations that entail substantial discretion (DoD Functions M301-M399 of Reference (n)) consistent with Reference (e). This includes direction and control of intelligence interrogations; approval, supervision, and oversight of interrogations; and, consistent with References (e) and (f), performance of those aspects of an interrogation that entail substantial discretion. However, in areas where adequate security is available, properly trained and cleared contractors may be used to draft interrogation plans for government approval and conduct government approved interrogations consistent with Reference (t), if they are properly supervised and closely monitored throughout the interrogation process by sufficient numbers of properly trained government officials. (See paragraphs E3.3.2.1, E3.3.2.2.4, and E3.3.2.2.6 of Enclosure 3.)

E2.4.3. Support to Agencies Outside the Department of Defense. Manpower shall be designated civilian and coded E if they provide advisory assistance on defense-related matters on behalf of the Department of Defense (DoD Function Y320 of Reference (n)) while on permanent duty outside the Department of Defense (e.g., to Congress, the White House, and other Federal or state agencies). This manpower is established by formal request and approved following procedures in DoD Directive 1000.17 (Reference (x)) or some other formal approval process.

E2.4.4. Support Provided to International Organizations and Foreign Nations. Manpower that provide advisory assistance and support to international organizations and foreign nations on behalf of the Department of Defense on defense-related matters shall be designated civilian and coded E if the work requires proficiencies that are not authorized to be obtained from the private sector or other government agencies (DoD Function Y320 of Reference (n)). For example, exchanges of civilian personnel between the Department of Defense and defense ministries of foreign governments intended to encourage a democratic orientation of defense establishments of other countries as prescribed in section 168 of Reference (c) are coded E.

E2.5. CRITERION F - MILITARY-UNIQUE KNOWLEDGE AND SKILLS

E2.5.1. Military Advice and Counsel. Manpower performing DoD Functions A610-M399 and P110-Z999 of Reference (n) shall be designated military and coded F if the incumbents are specifically required by Reference (c) to provide "military advice" and counsel to the President, Congress, National Security Council, Secretary of Defense, senior DoD officials, or Secretaries,
Under Secretaries, and Assistant Secretaries of the Army, Navy, and Air Force. Examples include the Chairman and Vice Chairman of the Joint Chiefs of Staff; Chiefs, Vice Chiefs, Deputy Chiefs, and Assistant Chiefs of Staff of the Army, Air Force, and Marine Corps; Chief, Vice Chief, Deputy Chiefs, and Assistant Chiefs of Naval Operations; and Commandant and Assistant Commandant of the Marine Corps. These are IG responsibilities established by post or appointment under Reference (c) that require extensive military judgment based on military experience and cannot be transferred to DoD civilians or to the private sector.

E2.5.2. Accomplishment of Military Missions. Commanders of the Combatant Commands are responsible to the President and Secretary of Defense for the execution of military missions (DoD Functions M120-M199 of Reference (n)). These are IG responsibilities established under Reference (c) that require military judgment based on extensive military experience and cannot be transferred to DoD civilians or to the private sector. This manpower shall be designated military and coded F. (Functions performed by the operating forces (DoD Functions M415-M810 of Reference (n)) are coded A rather than F.)

E2.5.3. Policy and Procedure. Manpower in infrastructure activities performing DoD Functions A610-M399 and P110-Z999 of Reference (n) shall be designated military and coded F if the incumbents have the authority to commit the Department of Defense to take action by direction, order, policy, regulation, contract, authorization or otherwise or have responsibility for activities listed in paragraph E2.4.1 and its subparagraphs and the work requires military-unique knowledge and skills. This includes program directors, managers, directors of line operations, or principal staff elements, and other military personnel that are delegated these authorities and whose recent military training and current military experience are required for the successful performance of the prescribed duties.

E2.5.4. Military Justice. Manpower in infrastructure activities responsible for military justice (DoD Functions Y405 and Y415 of Reference (n)) on behalf of the United States shall be designated military and coded F. These are IG responsibilities established by post or appointment under Reference (c) that require military representation and cannot be transferred to DoD civilians or to the private sector. For instance, responsibility for the administration of justice under the UCMJ in general and special courts-martial, summary courts-martial, courts of inquiry, the Military Departments’ Courts of Criminal Appeals, the U.S. Court of Appeals for the Armed Forces, and other legal proceedings is assigned to The Judge Advocates General, military judges, judge advocates (staff judge advocates, prosecutors, defense counsel, and appellate counsel), and law specialists as defined in section 801 of Reference (c). The exercise of judicial and non-judicial punishment under the UCMJ is a responsibility assigned to military officers under sections 951 and 815 of Reference (c).

E2.5.5. Law Enforcement under the UCMJ. Manpower that issue warrants, make arrests, preserve crime scenes, or (consistent with Reference (g)) conduct criminal investigations shall be designated military and coded F if the duties are carried out under the UCMJ as prescribed in Chapter 47 of Reference (c).

E2.5.6. Administration of Military Confinement/Correctional Facilities. Manpower responsible for the direction and control of U.S. military confinement/correctional facilities shall
be designated military and coded F if the facility is established for the confinement of offenders of the UCMJ as prescribed in section 951 of Reference (c), and the prisoners are under military command.

E2.5.7. Military-Unique Knowledge and Experience. Manpower performing DoD Functions A610-M399 and P110-Z999 of Reference (n) shall be designated military and coded F if Defense officials require their military-unique judgment and insight to make informed decisions and preclude sole reliance on contract advisory assistance. This manpower enables Defense officials to maintain ultimate control and accountability of government operations, federally funded projects, Federal contracts, government property, and funds. They perform an active and informed role in policy development, program execution, contract administration and judiciary or fiduciary matters. The incumbents of these positions ensure that DoD officials are properly connected to the war-fighting establishment and are aware of the war-fighter’s perspective on programs and actions intended to support military operations. They perform a discretionary role in establishing objectives, setting priorities, assessing alternatives, judging risks, and deciding the course of action on military-related matters by narrowing the number of alternatives and recommending the preferred position of the Department of Defense. They decide the DoD preferred position based on their military-unique knowledge and experience;\textsuperscript{30} technical expertise; and advice, opinions, recommendations, and ideas provided by sources inside and outside the Department of Defense. This includes activities identified in paragraph E2.4.2 and its subparagraphs and the following examples.

E2.5.7.1. Manpower that determine operational requirements and gaps in military capabilities shall be designated military and coded F if the work entails judgment based on military-unique knowledge and experience acquired through recent assignments in the operating forces.

E2.5.7.2. Manpower that provide basic training and military training of doctrine and tactics shall be designated military and coded F as indicated below.

E2.5.7.2.1. Manpower that provide training that is specifically designed to acculturate military personnel on military standards or conventions shall be designated military and coded F if:

E2.5.7.2.1.1. The instructors command military trainees (as with drill instructors).

E2.5.7.2.1.2. Military presence is needed to demonstrate military leadership, ingrain responsibility for the use of deadly force and proper conduct during armed conflicts or, through example, reinforce the integrity of the military command structure.

\textsuperscript{30} The required knowledge and experience must be more substantial than what DoD civilians could provide, such as those with prior military experience. It must be derived from recent first-hand involvement in military activities such as commanding military forces or conducting or participating in military operations or exercises. Also, recent assignments to the operating forces must be a prerequisite for filling these positions.
E2.5.7.2.2. Manpower that teach military doctrine or tactics as shall be designated military and coded F if the following two conditions are met:

E2.5.7.2.2.1. The course material is evolving and not yet covered by government practice, policy, or procedures.

E2.5.7.2.2.2. The training requires military expertise that can only be acquired through recent operational experience.

E2.5.7.2.3. This training may be imparted formally in a classroom (DoD Functions U100-U400 of Reference (n)) or in a unit. Examples include drill instructors; Commandants of Cadets at military academies; instructors in fleet training centers and schools that provide tactical aviation or field training based on current operational experience; and Active Component advisors to the USNG and USAR. (This does not include training of the mechanics, supply, maintenance, functionality, or operation of military equipment or weapons.)

E2.5.7.3. Manpower that perform research, development, test, and evaluation (RDT&E) shall be designated military and coded F if the work requires judgment concerning the potential utility of emerging technologies; strategies for integrating new systems with fielded systems on the battlefield or in the fleet; critical human design and human factors engineering features; and appropriate tests for operational suitability and effectiveness.

E2.5.7.3.1. This includes activities at program development agencies, testing facilities, aircraft plants, shipyards, or other armament production centers where recent “hands-on” experience and military judgment are needed to provide an independent and objective evaluation of operational effectiveness and suitability of acquisition systems that, upon fielding or deployment, will be operated and supported by military personnel.\(^3\)

E2.5.7.3.2. This does not include positions covered by section 1722 of Reference (c) that are competed for fill by both DoD civilian and military personnel unless the work requires military-unique judgment.

E2.5.7.4. Manpower that perform intelligence and counterintelligence operations (DoD Functions M301-M399 of Reference (n)), to include clandestine intelligence operations, shall be designated military and coded F if the activities entail substantial discretion consistent with References (e) and (f) and the required knowledge and skills are military-unique. (See Enclosure 3.)

E2.5.7.5. How enemy EPWs, CI, RP, other detainees, terrorists, and other criminals are treated when captured, transferred, detained, and interrogated during or in the aftermath of hostilities (as addressed in References (s) and (t)) falls under the discretionary exercise of government authority. Responsibility for their handling as well as decisions concerning how they are to be treated cannot be transferred to the private sector to contractors who are beyond

\(^3\) Defense policy requires that during OT&E, “typical” military users operate and maintain the test systems under conditions that realistically simulate combat stress and peacetime environments if military personnel will be operating and maintaining the systems once they are fielded/deployed.
the reach of government controls. This does not include support functions performed by linguists, interpreters, report writers, C4/IT technicians, etc., provided sufficient safeguards are implemented to ensure the work is non-discretionary and properly performed. (See Enclosure 3.)

E2.5.7.5.1. Manpower that perform certain law enforcement functions, to include issuing warrants, making arrests, preserving crime scenes or (consistent with Reference (g)) directing conduct of criminal investigations for EPW, CI, RP, other detainees, terrorists, and other criminals shall be designated military and coded F if the individuals are detained under the Law of War as part of ongoing operations for their own protection or to remove potential threats from the battle space. However, properly trained and cleared contractors may perform special non-law enforcement security activities that do not directly involve criminal investigations according to Reference (g).

E2.5.7.5.2. Manpower that direct and control detention facilities for EPW, CI, RP, other detainees, terrorists, and other criminals outside areas of operation shall be designated military and coded F (consistent with Chapter 47 of Reference (c) and Reference (s)) if the individuals are detained under the Law of War as part of ongoing operations for their own protection or to remove potential threats from the battle space.

E2.5.7.5.3. Manpower that direct or control intelligence interrogations (DoD Function M311 of Reference (n)), to include the approval, supervision, or oversight of interrogations, or (consistent with References (e) and (f)) perform those aspects of an intelligence interrogation that entail substantial discretion shall be designated military and coded F if the required knowledge and skills are military-unique. However, properly trained and cleared contractors may draft interrogation plans for government approval and conduct government approved interrogations consistent with Reference (t) if they are properly supervised and closely monitored throughout the interrogation process by sufficient numbers of properly trained government officials. (See section E3.3.2.1 of Enclosure 3.)

E2.5.8. Support to Agencies Outside the Department of Defense. Manpower that provide advisory assistance to agencies outside the Department of Defense (DoD Function Y320 of Reference (n)) on defense-related matters on behalf of the Department shall be designated military and coded F if the work requires military-unique knowledge and skills.

E2.5.8.1. This includes personnel in permanent duty stations outside the Department of Defense established by formal request and approved following procedures in DoD Directive 1000.17 (Reference (x)) or some other formally approval process. Examples include attachés to U.S. embassies and couriers for the State Department, as prescribed in sections 711-720 of Reference (c).

E2.5.8.2. This does not include military support provided to eligible organizations and activities outside the Department of Defense that is incidental to military training accomplished through innovative readiness training (IRT) covered by DoD Directive 1100.20 (Reference (y)) or interagency support to a DoD activity by a DoD activity according to DoD Instruction 4000.19 (Reference (z)).
E2.5.9. **Support Provided to International Organizations and Foreign Nations.** Manpower that provide advisory assistance and support to international organizations and foreign nations on defense-related matters (DoD Function Y320 of Reference (n)) on behalf of the Department of Defense shall be designated military and coded F if the work requires military-unique knowledge and skills acquired through recent assignments in the operating forces. Examples include:

E2.5.9.1. Military details to republics in the Western Hemisphere to assist in military matters according to section 712 of Reference (c).

E2.5.9.2. Support to NATO military commands and agencies if the manpower is not part of the Department’s internal management or command structure.

E2.5.9.3. Exchanges of military personnel between the Department of Defense and defense ministries of foreign governments and between units of the Armed Forces and units of foreign Armed Forces to encourage a democratic orientation of defense establishments and military forces of other countries as prescribed in Reference (c).

E2.6. **CRITERION G - EXEMPTION FOR ESPRIT DE CORPS**

Consistent with Reference (a), manpower authorities shall exempt a limited number of CAs in the infrastructure from private sector performance for "esprit de corps" to foster public support for the Department of Defense and assist in meeting recruitment and retention objectives. This manpower shall be designated DoD civilian or military and coded G if it is needed for "esprit de corps" as explained below. These exemptions are intended to demonstrate DoD commitment to the men and women who serve in defense of our Nation and engender group spirit, camaraderie, and a sense of pride.

E2.6.1. **Military “Esprit de Corps”**

E2.6.1.1. Examples of military “esprit de corps” include:

E2.6.1.1.1. Military bands that wear military uniforms (DoD Function G220 of Reference (n)) and perform during peacetime and war to promote group spirit and pride.

E2.6.1.1.2. Honor guards such as the 3d Infantry Old Guard and Honor Guards, that perform at funerals and other ceremonies during peacetime and war to promote group spirit, a sense of pride, and honor.

E2.6.1.1.3. Navy Blue Angels who demonstrate military expertise to the public.

E2.6.1.1.4. Superintendents at the U.S. Military Academy, the U.S. Naval Academy, and the U. S. Air Force Academy covered by Reference (c), and Reserve Officers’ Training Corps instructors, who all serve as military role models (DoD Function U200 of Reference (n)).
E2.6.1.5. The Army Director of Religious Education who provides religious education and counseling to soldiers and their family members (DoD Function G900 of Reference (n)) (Chaplain Assistants in garrison assignments are not included).

E2.6.1.6. A set number of military recruiters who wear military uniforms to instill a sense of pride in military service and serve as military role models for potential recruits.

E2.6.1.2. These exemptions are for functions that can be performed by DoD civilians or, in some cases, the private sector, but without the same effect. Military performance of these activities carries special meaning for military personnel, their families, and the public.

E2.6.1.3. In the manpower mix order of precedence, “Exemptions for Military and Civilian Wartime Designations (dual status)” takes precedence over “esprit de corps.” Therefore, manpower that promote “esprit de corps” during peacetime but are dual-tasked for wartime assignments (such as Thunderbirds, Golden Knights, Army Marksmanship Units, and Parachute Units that demonstrate military expertise to the public) are coded D. Only manpower that promote military “esprit de corps” during peacetime and war are coded G.

E2.6.2. Civilian “Esprit de Corps”

E2.6.2.1. Examples of civilian “esprit de corps” include:

E2.6.2.1.1. Faculty at the U.S. Military Academy, U.S. Naval Academy, and U.S. Air Force Academy (DoD Function U520 of Reference (n)) as authorized by Reference (c).

E2.6.2.1.2. Principals and faculty at DoD Dependent Schools (DoD Functions U710 through U799 of Reference (n)) to demonstrate family support, promote “Quality of Life,” and foster camaraderie for recruitment and retention purposes.

E2.6.2.2. These exemptions are for functions that can be performed by the contractors but without the same effect. Direct involvement by DoD civilians demonstrates the Department of Defense’s dedication to family matters and carries special meaning for military members and their families.

E2.7. CRITERION H - EXEMPTION FOR CONTINUITY OF INFRASTRUCTURE OPERATIONS

Consistent with Reference (a), manpower authorities shall provide sufficient manpower for the efficient and effective operation of the Department of Defense. This includes manpower needed for continuity of peacetime and wartime operations.

E2.7.1. Continuity of Operations During National Emergency or War. During a national emergency or war, when military and DoD civilian personnel dual-tasked for wartime assignments (code D) are reassigned to operating units, their vacant positions might not be backfilled immediately, or at all depending on the wartime mission and workload. However,
because high numbers of vacant positions can impair the ability of an activity to function effectively, activities with critical wartime missions that employ code D manpower must retain sufficient manpower to continue operations until critical vacated positions are filled.

E2.7.1.1. Manpower in the infrastructure shall be designated civilian and coded H if the positions cannot be vacated or eliminated during a national emergency or war without seriously impairing the ability of the activity to function effectively. Manpower authorities also shall designate these as “key” positions following the procedures in Reference (p) to indicate that they are not to be filled by Ready Reservists that can be called to active duty.

E2.7.1.2. Decisions about coding manpower H shall be made in conjunction with decisions about coding manpower D as addressed in section E2.3.

E2.7.2. Continuity of Peacetime Operations

E2.7.2.1. CAs with manpower that are designated for rotation (code J) or career progression (code K) must have sufficient manpower to continue operations as personnel transfer in and out of the activity. (See sections E2.9 and E2.10.) Manpower shall be designated civilian and coded H if it is needed for continuity of operations in CAs where there is high personnel turn-over due to rotation or career progression. Decisions to code manpower H shall be made in conjunction with decisions to code manpower J and K. Also, decisions on the numbers of civilians needed for the continuity of direct patient care shall be determined in conjunction with decisions for shared health care as provided by DoD Instruction 6025.5 (Reference (aa)).

E2.7.2.2. Some IG activities require personal services for their efficient and effective operation. In many cases, these personal services are non-severable from the IG work. (See paragraph E3.3.2.) Manpower shall be designated civilian and coded H if the incumbents provide personal services that are non-severable from, and required for, the efficient and effective operation of an IG activity.

E2.7.3. Emergency Operations Critical to the Department of Defense. Manpower in CAs in the infrastructure shall be designated civilian and coded H if they are needed to provide a ready and controlled source of technical competence for emergency operations involving skills and equipment critical to the Department of Defense. Examples include firefighting and rescue operations at areas with chemical, biological, nuclear, or other agents that require special firefighting equipment or training.

E2.7.4. Core Logistic Capabilities with Unique Skills. Manpower in logistics functions shall be designated civilian and coded H if they are needed to provide a ready and controlled source of technical competence necessary for an effective and timely response to a mobilization, war, or other emergency involving skills unique to the Department of Defense. Manpower for the maintenance and repair of Navy nuclear propulsion systems at Navy shipyards is an example.
E2.8. CRITERION I - MILITARY AUGMENTATION OF THE INFRASTRUCTURE DURING WAR

During a crisis, military personnel in IG activities in the infrastructure (code F) that are dual-tasked for wartime assignments may be reassigned to operating units and their vacated positions might not be backfilled immediately or at all depending on the wartime mission and workload of the activity. Manpower needed to backfill critical positions vacated by active-duty military shall be designated military and coded I if the duties require military-unique knowledge and skills. Also, manpower that is needed to augment infrastructure activities during a crisis, mobilization, or war due to increased workload shall be designated military and coded I if the work requires military-unique knowledge and skills.

E2.8.1. Determining Manpower Requirements. Manpower authorities shall use a formally approved process for determining mobilization manpower requirements and wartime manpower demands as required by Reference (a) and centrally manage the coding for this manpower at the DoD Component headquarters.

E2.8.2. Operations Continuity during Crises. This work is IG and designated military because it is needed for continuity of operations during a mobilization, war, or other crises and the work requires military-unique knowledge and skills.

E2.9. CRITERION J - EXEMPTION FOR CIVILIAN AND MILITARY ROTATION

Consistent with Reference (a), manpower authorities shall provide a rotation base for overseas and sea-to-shore rotation. Coding for this manpower shall be centrally managed at the DoD Component headquarters by manpower officials. Decisions to code manpower J shall be made in conjunction with decisions to code manpower H and K. (See sections E2.7 and E2.10.)

E2.9.1. Civilian Rotation. Manpower authorities shall designate manpower in CAs in the infrastructure that perform work that could be considered for private sector performance as civilian code J if it is needed to provide a rotation base for civilian positions outside the United States. This shall be done when the number of civilian manpower coded A through I is not sufficient to satisfy peacetime rotation needs. This manpower is designated civilian and exempted from private sector performance because it is needed to maintain civilian overseas tour lengths and civilian personnel turnover at appropriate levels as required by section 1586 of Reference (c). This manpower shall be determined by civilian series and based on assignment, rotation and other relevant policies. Manpower authorities shall coordinate with DoD Component civilian personnel authorities to verify the validity of these requirements and ensure the numbers are determined using a formally approved process.

E2.9.2. Military Rotation. Manpower authorities shall designate manpower in CAs in the infrastructure that would not otherwise require military incumbents as military code J if it is needed to provide a rotation base for overseas or sea-to-shore assignments. This shall be done when the number of manpower coded A through I is not sufficient to satisfy peacetime rotation needs. This manpower is designated military and exempted from private sector performance.
because it is needed to maintain military tour lengths and personnel turnover at appropriate levels and, by so doing, keep recruitment, retention, and training costs to a minimum. This manpower shall be determined by occupational specialty and based on assignment, rotation, and career development policies and personnel tempo goals governed by DoD Directive 1315.7 (Reference (ab)). Manpower authorities shall consult military personnel officials to verify the validity of these requirements and ensure the numbers are determined using a formally approved process.

E2.10. CRITERION K - EXEMPTION FOR CIVILIAN AND MILITARY CAREER PROGRESSION

Consistent with Reference (a), manpower authorities shall provide reasonable opportunities for the development of both military and civilian personnel. Coding for this manpower shall be centrally managed at the DoD Component headquarters. Decisions to code manpower K shall be made in conjunction with decisions to code manpower H and J. (See sections E2.7 and E2.9.)

E2.10.1. Civilian Career Progression. Manpower authorities shall designate manpower in CAs in the infrastructure that perform work that could be considered for private sector performance as civilian code K if it is needed to provide career paths (developmental positions) for civilian personnel. This shall be done when the number of manpower coded A through J does not provide adequate career progression opportunities. This manpower is designated civilian and exempted from private sector performance because it is needed to provide developmental assignments and day-to-day work experiences necessary to produce competent leaders, administrators, and personnel with skills unique to the Department of Defense. To be coded K, the manpower must provide career progression into civilian positions that require technical or leadership skills that cannot be taught or directly acquired from the private sector. Manpower authorities shall coordinate with civilian personnel authorities to verify the validity of these requirements and ensure the numbers are determined using a formally approved process.

E2.10.2. Military Career Progression. Manpower authorities shall designate manpower in CAs in the infrastructure that do not otherwise require military incumbents as military code K if it is needed to provide career paths for development of military-unique competencies. This shall be done when the number of manpower coded A through J does not provide adequate career progression opportunities for the military coded A, B, D, F and I. This manpower is designated military and exempted from private sector performance because it is needed to provide developmental assignments and day-to-day work experiences necessary to produce military leaders and develop military-unique knowledge and skills. Manpower authorities shall check with military personnel authorities to verify the validity of these requirements and to ensure they are determined by military occupational specialty using a formally approved process that considers options for combining occupational specialties and restructuring grade requirements.

E2.11. CRITERION L - EXEMPTED BY LAW, EXECUTIVE ORDER, TREATY OR IA

E2.11.1. Laws and Executive Order. Military and civilian manpower shall be coded L if the activity is not IG or exempted from private sector performance for reasons covered by criteria A
through K but the activity is restricted from private sector performance due to a law or Executive Order. Examples include:

E2.11.1.1. Manpower that perform fire fighting and security guard functions (DoD Functions S440 and S510 of Reference (n), respectively) at DoD military installations and facilities covered by section 2465 of Reference (c), that are not coded A through K.

E2.11.1.2. Manpower that perform depot-level maintenance and repair functions necessary to provide a “Core Logistics Capability” or comply with the “50 percent rule” as specified in sections 2464 and 2466 of Reference (c), that are not coded A through K.

E2.11.1.3. Manpower in activities that are not coded A through K with access to trade secrets that cannot be properly protected as required by section 18 U.S.C. 1905 (Reference (ac)), if performed by private sector contractors.

E2.11.1.4. Manpower in activities that are not coded A through K and that perform commercial work because HN laws prevent the use of contract support or prevent the use of U.S. or foreign national (FN) civilians for performance of certain functions.

E2.11.1.5. Dual-status military technicians that are not coded A through K, but are required to meet Congressional end-strength floors in section 115 of Reference (c).

E2.11.1.6. If the Department of Defense is unable to obtain relief from constraints set on military personnel strengths in section 115 of Reference (c), or the annual National Defense Authorization Act, the manpower shall be coded M.

E2.11.2. Treaties and IAs

E2.11.2.1. Manpower shall be designated FN civilian and coded L if the terms of a treaty or IA specifically require the United States to use direct or indirect hire FNs or make it impractical to convert from FN support. For example, under the Army’s cost-sharing agreements with the governments of Korea and Japan, 70 percent and 100 percent of the costs of the FN workforces are borne by the Korean and Japanese governments, respectively. The replacement costs make it impractical to switch from FN support.

E2.11.2.2. Manpower shall be designated U.S. civilian and coded L if, due to a SOFA, using other than U.S. civilians would require increasing FN authorizations beyond what is required. (The U.S. and FN civilian workforce mix is agreed upon in each SOFA and varies by country. For example, SOFAs in Europe require seven FN authorizations for every three U.S. civilian authorizations.)

E2.11.2.3. Manpower shall be designated military or DoD civilian and coded L if, due to a treaty, SOFA, or other IA, private sector contract support may not be used and military or DoD civilian performance is required.
E2.12. CRITERION M - EXEMPTED BY DOD MANAGEMENT DECISION

Manpower authorities shall designate military and civilian manpower with code M if a DoD official who exercises management authority over a functional area has exempted the manpower from private sector performance for reasons not covered by criteria A through L. This authority is vested in Secretaries of Military Departments, Directors of Defense Agencies and DoD Field Activities, Under and Assistant Secretaries of Defense and Military Departments, Chairman of the Joint Chiefs of Staff, and the Combatant Commanders. This authority shall not be delegated below the Assistant Secretary or equivalent level.

E2.12.1. Pending a Final DoD Decision. Manpower that has been exempted from private sector performance based on a formally approved DoD Component exemption that is not covered by criteria A through L and has not yet been formally reviewed by OSD shall be coded M. This restriction is temporary, pending a formal DoD review. Supporting documentation for the decision must be maintained by the DoD Component.

   E2.12.1.1. CAs that could be performed by civilian personnel may be designated for military performance and coded M on an exception basis if the DoD Component manpower authority has determined that the required work must be performed by military personnel for reasons not covered by criteria A through L and there is sufficient justification and appropriate documentation to support the decision. These designations shall be reviewed at least every 2 years to ensure the validity of the exemption.

   E2.12.1.2. IG work that is normally performed by civilian personnel may be designated for military performance and coded M on an exception basis if the DoD Component manpower authority has determined that the required work must be performed by military personnel for reasons not covered by criteria A through L and there is sufficient documentation to support the decision. For example, IG work that is performed in a remote location where sufficient numbers of civilians with the appropriate knowledge, skills and abilities are not available and cannot be recruited and trained in a cost-effective manner may be designated for military performance. In this example, the supporting documentation must include an economic analysis. These designations shall be reviewed at least every 2 years to ensure the validity of the exemption. (Note: If there is concern that sufficient numbers of DoD civilians or contract support may not be available in remote locations to perform commercial work in a cost-effective manner, the manpower is coded R.)

E2.12.2. Pending Resolution of the Workforce Mix During a Crisis. Manpower in activities that are established on an emergency basis shall be coded M pending final resolution of the appropriate workforce mix. For instance, manpower may be designated M on an emergency basis to respond to increased threat levels; address a time-sensitive, high priority national defense need; or as a safeguard against premature loss or interruption of an essential support function during a mobilization or war. (See Enclosure 3 for additional guidance.)

E2.12.3. Pending Change of Authorized Military End Strength. If the Department of Defense is unable to obtain immediate relief from constraints set on military personnel strengths
in section 115 of Reference (c), or the annual National Defense Authorization Act, manpower authorities shall code the manpower with code M.

E2.13. SUBJECT TO REVIEW FOR PRIVATE SECTOR PERFORMANCE OR DIVESTITURE

The DoD Components shall designate all other manpower in CAs by using manpower mix criteria codes P, R, W, or X as defined below. DoD Components shall periodically review the work to determine if it can be more efficiently or cost-effectively performed by another source (e.g., through a contract with the private sector, an intra-governmental support agreement with a non-DoD agency) or if the function can be eliminated, thus not requiring performance by either the government or the private sector.

E2.13.1. CRITERION P - PENDING RESTRUCTURING OF CAs

The DoD Components shall use code P for all DoD military or civilian manpower performing work in a commercial function if a competition or direct conversion to contract performance has been deferred pending the results of an approved force restructuring decision. This code is limited to major restructuring initiatives, such as approved base closures, functional realignments, functional assessments, or consolidation actions which have been approved in writing. Manpower in CAs exempt from private sector performance that are part of an approved restructuring initiative involving a reevaluation of risk assessments may be coded M if the outcome is uncertain. Coding for this manpower is temporary, normally not to exceed 3 years, pending the results of the formally approved restructuring initiative.

E2.13.2. CRITERION R-SUBJECT TO REVIEW FOR COMPETITION UNDER OMB CIRCULAR A-76

The DoD Components shall use code R for military or civilian manpower performing work that is commercial in nature and subject to review for competition with the private sector according to References (f) and (k). Additional reasons for using code R are:

E2.13.2.1. Retained In-house Based on Competition. The DoD Component has determined that DoD civilians (or, in certain situations, DoD military) perform the work in a more cost-effective fashion based on the results of a competition.

E2.13.2.2. Pending Contract Award. The DoD Components shall use code R for civilian or military manpower that is in the process of being converted to contract support based on the results of a competition or direct conversion.

E2.13.2.3. Pending Competition Results. The DoD Components shall use code R for all military or civilian manpower performing work that is pending the results of an in-progress competition.
E2.13.2.4. **Based on Terminated Competition.** The DoD Components shall use code R for DoD military or civilian manpower performing work in a function where a competition was initiated but terminated because it exceeded applicable time limits.

E2.13.2.5. **Converted from Contract based on Competition.** The DoD Components shall designate manpower with code R when a contracted function has been converted from contract performance to in-house performance because of a competition.

E2.13.2.6. **No Satisfactory Commercial Source.** The DoD Components shall designate military and civilian manpower with code R when the DoD Component’s competitive sourcing official (CSO) has determined, based on a review of documentation provided by the contracting officer, that there is not satisfactory commercial source following the procedures in Reference (f).

E2.13.3. **CRITERION W-NON-PACKAGEABLE COMMERCIAL ACTIVITY**

The DoD Components shall designate manpower performing CAs with code W when a competition is not possible because the work is not packageable for competition with the private sector. This code must be limited to very few positions performing only CAs. Before using this code, the positions must be certified as non-packageable by the DoD Component’s CSO. This code is not to be confused with non-severability as described in the code H definition.

E2.13.4. **CRITERION X-ALTERNATIVES TO OMB CIRCULAR A-76**

DoD Components shall designate manpower with code X when the Component has determined that the CA can be obtained using processes other than those prescribed by Reference (f).

E2.13.4.1. More specifically, manpower shall be coded X when the CA:

   E2.13.4.1.1. Can be acquired by direct contract without performing an OMB No. A-76 competition (such as research and development, or depot maintenance that are specifically exempted from OMB Circular No. A-76 competition).

   E2.13.4.1.2. Can be converted employing alternative techniques (such as public-private partnership, divestiture, or privatization initiatives).

   E2.13.4.1.3. Can be obtained under an intra-governmental support agreement with a non-DoD agency.

E2.13.4.2. Because the functions under code X may be subject to performance by the private sector, this code differs from code L, which applies if law, E.O., treaty or IA prohibits any means of contracting.
E3. ENCLOSURE 3

GUIDANCE FOR RISK ASSESSMENTS

E3.1. GENERAL

Section 118(b) of Reference (c) requires the Department of Defense to identify resources needed to execute the full range of missions called for in the national defense strategy at a low to moderate level of risk. Consistent with this direction, workforce mix shall be commensurate with the appropriate level of risk. The following guidance helps identify risks associated with using military, DoD civilian, and private sector contractor personnel to accomplish Defense missions.

E3.1.1. Urgency. Risks must be assessed in terms of the urgency of the situation. When characterizing the risk, the higher the likelihood of mission failure due to a slow response or disruption, the higher the risk.

E3.1.2. Consequence. Risks must also be assessed in enough detail to permit decision-makers to judge the consequences to both the activity under review as well as other organizations dependent on that activity. When characterizing the level of risk, the more catastrophic the consequence of non-performance or contract default, the greater the risk. Also, when the loss of services in one activity would have a detrimental impact on other activities, which, in turn, would negatively affect still other activities, the consequences must be viewed in their entirety when establishing the risk.

E3.2. RISKS TO COMMAND AND OPERATIONAL CONTROL OF CONTINGENCIES AND CRISIS SITUATIONS

During peacetime, contract support might provide a cost-effective, risk-free alternative to in-house performance. However, circumstances in peacetime are significantly different than in a crisis, mobilization, or war. Decisions concerning the readiness of operating forces and supporting elements and attendant risk assessments are reviewed during the planning process of the Joint Strategic Planning System as required by DoD Instruction 3020.37 (Reference (ad)). The DoD Components shall, as a minimum, consider the following factors when conducting risk assessments.

E3.2.1. Readiness. The less information the commander has to assess the readiness of DoD civilian and private sector contract service support, the greater the risk. When conducting risk assessments, the following should be determined:

E3.2.1.1. Whether readiness reporting:

E3.2.1.1.1. Is required for in-house performance of the function or task.
E3.2.1.1.2. Can be addressed to the commander’s satisfaction by the contractor under the terms of the contract.

E3.2.1.1.3. Is critical to the commander’s ability to assess the probability of contract default.

E3.2.1.2. Whether there are historical records or studies indicating satisfactory performance, unsatisfactory performance, or default by a contractor performing the support service under environmental conditions and threat levels or for the length of time anticipated by the commander, and

E3.2.1.3. Whether there are historical records or studies indicating civilian E-E employees were not able to perform their duties under environmental conditions and threat levels, or for the length of time anticipated by the commander.

E3.2.2. Replacing Lost Support. The fewer options there are for replacing lost support, the greater the risk. When conducting a risk assessment, the following should be determined:

E3.2.2.1. Whether an alternative source of support can be obtained from an alternative private sector provider in sufficient time consistent with applicable laws. The higher the number of vendors that can provide the support service, the lower the risk of using contract support.

E3.2.2.2. Whether an alternative source of in-house support can be obtained in sufficient time. The higher the number of in-house sources (military or civilian) that can perform the support service, the lower the risk of using contract support.

E3.2.2.3. Whether military or civilian personnel can be trained in sufficient time to perform the function. The shorter the required training time, the lower the risk.

E3.2.2.4. With regards to supply or maintenance, whether products can be stockpiled in sufficient quantities to provide sufficient time to find an alternative source of support or to train military or civilian personnel to provide the support.

E3.2.3. Continuity of Operations During Hostilities. A number of factors can lead to a break in critical support services during hostilities.

E3.2.3.1. Sustainability. Contractors responsible for critical support functions that cannot replace contractor employees who are killed, injured, or otherwise lost; rotate personnel during a protracted conflict; or replace equipment, supplies, and tools, represent an inappropriate risk to combat operations. The higher the number of contract personnel or resources needed to sustain a conflict, the higher the risk.

E3.2.3.2. Surge Capability. Contractors might be able to perform a function during peacetime but lack the resources or technology to increase or surge operations during a crisis. Contractors that have a limited capacity (e.g., adequate facilities) or capability (e.g., adequate equipment, tools, or trained personnel) to increase or surge operations to the required operating
tempo (OPTEMPO), represent a risk to combat operations. The higher the increase in OPTEMPO required for mobilization or war, the higher the risk.

E3.2.3.3. Information Assurance. When conducting risk assessments, military commanders and planners should verify whether contractors can safeguard integral information and information systems. If they cannot, there is a risk that disrupted communications could delay or prevent timely delivery of critical services or supplies and adversely impact military operations. (See section 6.3.5.3.3 of Reference (m) concerning communication plans for private sector contractors providing security services.)

E3.2.4. Maintaining a Trained and Ready Workforce

E3.2.4.1. Manpower authorities must provide sufficient manpower for overseas or sea-to-shore rotation, wartime assignments, career progression, and continuity of operations. Contract authorities shall confer with manpower authorities to determine whether contracting CAs would impair the personnel community’s ability to maintain a trained and ready workforce.

E3.2.4.2. Contracting for critical skills during a mobilization or war that are also in short supply in the Department of Defense can complicate efforts to hire civilians with the same skills and place the Department in direct competition with itself. This could jeopardize key operations, undermine the DoD’s ability to accomplish high priority missions, and represent an inappropriate risk.

E3.2.5. Operational Control in Hostile Environments. Consistent with section 164 of Reference (c), if commanders of combatant commands at any time consider their authority, direction, or control with respect to any of the commands or forces assigned to their command to be insufficient to command effectively, they shall promptly inform the Secretary of Defense. This shall include direction and control of DoD civilian and private sector contract support activities. The following factors shall be considered.

E3.2.5.1. Risk of Non-Performance. Except during a declared war, DoD civilian and contractor employees have the option of quitting their jobs and not performing their duties without being subject to criminal prosecution under the UCMJ.32 If the risk of non-performance is high enough to adversely impact the readiness status of the unit, commanders should switch to an alternate source of support consistent with Reference (v).

E3.2.5.2. Reconstitution of Support Functions and Cross-Utilization of Personnel. If support units are attacked or sustain damage, the military commander may require direct control and unconstrained use of all available personnel to reconstitute essential support functions.33 The ability of field commanders to reconstitute support functions and/or sustain combat

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32 Sections 802(a)(10) and (11) of the UCMJ in Reference (g), state that in time of war, persons serving with or accompanying an Armed Force in the field are subject to the UCMJ. A Court of Military Appeals interpreted “in time of war” to mean a Congressionally declared war. Although, in certain cases (such as on board U.S. vessels, as they are within the special maritime and territorial jurisdiction), federal criminal law would apply.

33 Section 113 of Reference (g) requires the Department to address “the means by which the DoD will maintain the capability to reconstitute or expand the defense capabilities and programs of the Armed Forces of the United States on short notice to meet a resurgent or increased threat to the national security of the United States.”
operations is maximized if personnel can be cross-utilized to perform more than one function. This is particularly important during high intensity conflicts when combat casualties degrade the capability of operational units.

E3.2.5.2.1. Flexibility. Commanders often cannot compel DoD civilians or contractor employees to perform work or assume risks that were not agreed upon under the terms of their employment or covered in a contract. In emergency situations (e.g., enemy or terrorist actions or natural disaster), a military commander may direct DoD civilians to take lawful actions. However, a military commander may direct contingency contractor employees to take lawful actions as long as those actions do not require them to assume IG responsibilities. Because contract personnel may not perform IG duties, use of contract support may limit the commander’s flexibility in crisis situations and represent an inappropriate risk.

E3.2.5.2.2. Responsiveness. During hostilities, there is always a risk that the level of threat could change unexpectedly and require immediate reformation of support operations and re-designation of responsibilities. Generally, contractor employees (unlike U.S. and foreign national civilian and military personnel) are not under the direct supervision of military commanders. The contracting officer, or designee, serves as the liaison between the commander and the defense contractor for directing or controlling the contractor’s performance. Separate command and contractual lines of authority could hamper or overly complicate the Commander’s control of support operations and constitute an inappropriate risk to combat operations.

E3.2.5.3. Disciplinary Action. Defense contractors are responsible for ensuring that contractor employees perform under the terms of the contract; comply with applicable laws, orders, directives, and regulations; and maintain discipline. Except during a declared war, the commander has limited authority to take disciplinary action against contingency contractor personnel. However, a commander has authority to take certain actions affecting contingency contractor personnel, such as revoking or suspending security access or barring the employee from certain locations. Such limitations could overly complicate operations in high risk situations.34

E3.2.5.4. Relief and Assistance to Armed Forces During Hostilities. Military personnel are required and can be punished under Article 99 of the UCMJ if they do not afford all practicable relief and assistance to troops, combatants, vessels, or aircraft of the Armed Forces belonging to the United States or their Allies when engaged in battle. (See section 899 of Reference (c).) Even during a declared war, this Article does not apply to civilians.

E3.2.5.5. Restrictions During Hostilities Due to Laws and IAs. If consistent with U.S., HN, and international law (to include the Law of War and the four Geneva Conventions of 1949); relevant SOFAs and other IAs; HN support agreements; and federal regulations, DoD civilians and private sector contractors may provide support to U.S. Armed Forces.35

34 See paragraph 6.3.3 of Reference (m) concerning these restrictions.
35 Services provided by DoD civilians and private sector contractors during hostilities should be reviewed with the assistance of the servicing legal office and in coordination with the geographic Combatant Commander Staff Judge Advocate’s office, to ensure compliance with applicable laws, SOFAs, IAs, HN support agreements, and other similar arrangements. See References (m) and (o) concerning identity cards and other provisions required for
E3.2.5.5.1. During international armed conflicts, if civilians who are authorized to accompany the U.S. Armed Forces are captured, they are entitled to POW status under the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW) (Reference (q)). It is not a violation of the Law of War for civilians who are authorized to accompany U.S. Armed Forces in the field during hostilities to be issued a weapon on the authority of the Combatant Commander for individual self defense as addressed in References (m) and (o). While supporting military operations, DoD civilians and private sector contractors may be at risk of injury or death incidental to enemy actions. Also, under the Law of War, civilians accompanying the Armed Forces may be directly targeted for such time as they take a direct part in hostilities but do not lose their entitlement to POW status upon capture.

E3.2.5.5.2. Absent a SOFA or other IA or international law to the contrary, contingency contractor employees might be subject to the domestic criminal laws of the HN. Use of force by contingency contractor employees is often strictly limited by law and not protected by IAs and SOFA provisions. For example, HN law might preclude civilians from carrying or using weapons. If a SOFA or other IA or international law that protects military personnel engaged in armed fighting from prosecution does not apply to contractor personnel, contractor employees might not be able to provide physical security without risk of prosecution and punishment.

E3.2.5.5.3. In certain situations, IAs and HN support agreements might restrict services that can be contracted by limiting contracted services to HN contractors or by prohibiting contractor use altogether.

E3.2.5.5.4. U.S. statutes restrict the types of weapons that can be exported or procured for use by the private sector. These restrictions may limit the contractor's capabilities.

E3.2.5.5.5. Support services that require substantial discretion or prudent judgment are IG and may not be legally contracted consistent with References (e) and (f). With respect to security services, subsection 1.c.(4) of Reference (f) states that an agency shall consider the following to avoid transferring IG authority to a contractor:

E3.2.5.5.5.1. The provider's authority to take action that will significantly and directly affect life, liberty, or property of individual members of the public, including the likelihood of the provider's need to resort to force in support of a police or judicial activity; whether the provider is more likely to use force, especially deadly force, and the degree to which the provider may have to exercise force in public or relatively uncontrolled areas.

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36 When military force protection and legitimate civil authority are deemed unavailable or insufficient, the geographic combatant commander (or a designee no lower than general or flag officer) may authorize on a case-by-case basis civilian personnel to be armed for self defense so long as it is consistent with applicable U.S., HN, and international law; IAs; SOFAs; or other arrangements with local HN authorities. Also see section 6.3.5 of Reference (m) for procedures for arming contingency contractor personnel for security services.
E3.2.5.5.2. These policies do not prohibit contracting for guard services, convoy security services, pass and identification services, plant protection services, or the operation of prison or detention facilities, without regard to whether the providers of these services are armed or unarmed.

E3.2.5.6. Active Duty Service Determinations for Civilian or Contractual Groups. Commanders shall not hire or plan to use DoD civilians or contractor employees in a manner that could qualify as active military services. Consistent with DoD Directive 1000.20 (Reference (ae)), active duty service is considered to be equal to active military service for purposes of qualifying for Department of Veterans Affairs benefits based on the extent to which the group was under the control of the U.S. Armed Forces in support of a military operation or mission during an armed conflict. The extent of control must be similar to that exerted over military personnel and is determined based on:

E3.2.5.6.1. The uniqueness of service.

E3.2.5.6.2. Organizational authority over the group.

E3.2.5.6.3. Integration into military organization.

E3.2.5.6.4. Subjection to military discipline.

E3.2.5.6.5. Subjection to military justice.

E3.2.5.6.6. Prohibition against members of the group joining the Armed Forces.

E3.2.5.6.7. Receipt of military training and/or achievement of military capability.

E3.2.5.7. Risk Reduction. Manpower authorities shall consult Joint Staff and Military Service guidance concerning the risks of using civilians on the battlefield. In all cases, risk reduction shall take precedence over cost savings when necessary to preserve critical warfighting capability.

E3.2.6. Operational/Logistic Footprint. Manpower authorities shall verify whether use of civilians or support contractors would increase the size of the operational “footprint” (e.g., personnel numbers or physical security needs) or the logistic “footprint” (e.g., medical support, mess, transportation, or supplies) beyond that required by military personnel. When taken in their entirety, such increases could limit the commander’s flexibility and adversely affect military operations.

E3.2.7. Maintain Sufficient Organic Capability. Manpower authorities shall consult with commanders and planners to determine whether contracting a key function beyond a certain level could lead to the inability to perform the function in a crisis should the contractor not be

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37 See paragraphs 6.3.4 and 6.3.5.3.3 of Reference (m) for requirements for security plans for the protection of contingency contractor personnel.
available. For example, total reliance on contracted logistics and maintenance support or reliance on a sole source contractor could, in some situations, represent an inappropriate risk.

E3.2.8. **High Value Targets.** Consolidation of civilian and contract support in secure compounds during hostilities could, at some point, become a high value target for enemy forces and represent an inappropriate risk to combat operations.

E3.2.9. **Use of Indigenous Personnel.** Military commanders should verify whether commercial contractors plan to employ indigenous personnel to fulfill contract needs and the concomitant threat to the security of U.S. personnel. For instance, the use of local workers during a fluid counterinsurgency mission or the use of members of one ethnic group to the exclusion of others could create unrest and raise the risk of sabotage. Also, as has happened in the past, use of indigenous personnel as linguists for interrogating prisoners may invite problems when personnel from one ethnic or religious group are asked to translate conversations involving prisoners from another ethnic or religious group.

E3.2.10. **OPSEC.** Commanders should assess the risk of using contractors for operations that entail OPSEC. The Department of Defense does not have visibility into the contractor's hiring practices and background checks particularly when contractors recruit and hire employees outside the United States.

E3.2.11. **Operational Control in High Stress Environments.** Military commanders and planners should consider the risks of using contractor personnel or DoD civilians in high stress environments where the chain of command is required to control volatile situations, close supervision is needed to safeguard government responsibilities, and training and experience are necessary to ensure discipline. The kind of discipline required to execute military orders typically has to be instilled through military ethos and culture.

E3.2.12. **Risk Mitigation.** In certain situations, the United States can be liable for the misuse of force or compelled to make restitution for its unintended collateral effects. Because contractor employees are not under the direct supervision of military commanders, particular attention should be paid to the political and legal consequences of letting private sector contractors use force. This applies to the use of force against enemy forces, insurgents, terrorists, criminals, etc., during hostilities or when handling detainees during or in the aftermath of hostilities. The consequence of using private sector contractors who are beyond management controls otherwise applicable to public employees and who might not have objectives in concert with the United States' best interests have to be weighed. In all cases, risk mitigation shall take precedence over cost savings when necessary to meet U.S. government responsibilities.

E3.3. **DOD OVERSIGHT AND CONTROL OF IG OPERATIONS**

The degree of government involvement and expertise necessary to keep sufficient oversight and control of government operations will vary by function and situation depending on such factors as delegation of approval authority, complexity of operation, geographic dispersion of the activity, regulatory authority, and consequence of default. The following factors should be
considered when conducting risk assessments to preclude ceding governmental control and authority over IG functions to the private sector where there is insufficient public accountability and transparency. This list is not all-inclusive and should be expanded to address the specific activity under review. These factors should be considered when determining the source of support for functions in both the operating forces and support establishment.

E3.3.1. Contract Advisory Assistance

E3.3.1.1. Need for Informed, Independent Judgement. Discretionary decisions made by government officials must be based on informed, independent judgments and must not be unduly influenced or controlled by private contractors who are beyond management controls otherwise applicable to public employees and who might not have objectives in concert with the public’s best interests. Although, a Department official may consider a contractor’s advice when making a decision, the official may not rely solely or so extensively on a contractor’s recommendations that, by so doing, the decision no longer reflects an independent judgment. Therefore, DoD Components shall:

E3.3.1.1.1. Ensure contract advisory assistance is not used to support a government decision without thorough knowledge and understanding of the work submitted by the contractor and recognition of the need to apply independent judgment in the use of the work products,

E3.3.1.1.2. Take steps to ensure that a contractor’s involvement on a project is not so extensive or so far advanced that the government does not have the ability (sufficient time, information, or resources) to develop and consider options other than those provided by the contractor (e.g. during staff coordination of products developed by contractors), and

E3.3.1.1.3. Ensure that contractors do not have undue influence in the final decision to include determining:

E3.3.1.1.3.1. Which, and how, options or recommendations are provided to Defense officials for a final decision; or

E3.3.1.1.3.2. Why an option is recommended to the deciding official as the government’s preferred alternative.

E3.3.1.2. Government Contracting Responsibility. To safeguard the government’s authority, when plans and recommendations are developed by a private sector contractor or by joint public-private teams, government personnel alone shall be responsible for a final review, revision, or comment on the product. Manpower officials shall conduct risk assessments to

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38 Determining when and how advisory assistance provided by contractors may be used to support governmental decision-making is often difficult since advisory assistance can often relate to or even involve the IG tasks they support. Although a contractor may be asked to develop options for a government decision-maker, or to develop or expand decisions already made by government officials, they may not be given the authority to decide on a course of action for the government. For example, contractors may draft regulations for government approval, but may not approve or determine agency policy. Also, consistent with Reference (g), contractors may not determine the content and application of regulations.
determine whether there are a sufficient number of knowledgeable and experienced government employees available to:

E3.3.1.2.1. Maintain sufficient oversight and understanding of the project to determine whether the contractor has met the terms of the contract and provided a complete and objective product; and

E3.3.1.2.2. Review and revise the contractor’s recommendations to the extent necessary to ensure the decision expresses the DoD's views, conforms to Defense policy, complies with the law, and supports public interests; or provide an alternative point of view or recommendation to the deciding official.

E3.3.2. Contract Support Services

E3.3.2.1. Discretionary Authority. Contractors may provide service support if both the following apply:

E3.3.2.1.1. The required level of performance or quality of service is specified in the contract in quantifiable and measurable terms and is not left to the discretion of the contractor.

E3.3.2.1.2. The Department of Defense holds discretionary authority for final approval of the product or service through a government review or test.

E3.3.2.2. Risk Assessment. Some support services require a level of control and involvement that is inappropriate for a contractual arrangement. Support services shall not be contracted if oversight, supervisory control, and performance of the function are non-severable because extensive discretionary decision-making is involved. The DoD Components shall conduct risk assessments to verify if the Defense official, in the administration of the contract, would have to:

E3.3.2.2.1. Regularly address policy issues not covered, or not adequately covered, by DoD Directive, Instruction, Regulation, or other formally approved document.

E3.3.2.2.2. Regularly or routinely provide guidance on procedural matters of a discretionary nature because the Department of Defense does not have established practices or procedures or a clear vision for how to accomplish the work (such as with research projects where arbitration and judgment are needed to decide the direction the project should take).

E3.3.2.2.3. Regularly change how the service is performed to match evolving law, policy, doctrine, or tactics because the situation is so fluid that revisions are required on a recurring basis. Examples include operations in uncontrolled and highly unpredictable hostile environments.

39 The use of discretion is IG if it commits the government to a course of action when two or more alternative courses of action exist and decision making is not already limited or guided by existing polices, procedures, directions, orders, and other guidance that (1) identify specific ranges of acceptable decisions or conduct and (2) subject the discretionary authority to final approval or regular oversight by agency officials as required by section B.1.b of Attachment A of OMB Circular No. A-76, Reference (f).
environments where conditions are so fluid that rules of engagement have to be changed regularly or generalized to allow sufficient flexibility.

E3.3.2.4. Supervise and control the daily activities of the contractor as opposed to reviewing or testing the final product because how the services are performed and with what consistency is critical to an acceptable outcome (such as with the handling/treatment of EPW, terrorists, or criminals during or in the aftermath of a crisis or war).

E3.3.2.5. Retain the right to add or remove employees from the project for other than security or misconduct reasons as opposed to specifying performance standards because the activity is too complicated to specify how or what should be accomplished or ranges of acceptable actions (such as time-sensitive projects where a short suspense drives decisions about the scope of work and what can reasonably be accomplished in the allotted timeframe).

E3.3.2.6. Intervene in operations involving individuals from foreign nations or other Federal agencies who are not governed by the same laws, treaties, Executive Orders, rules, regulations or policies as DoD personnel to mediate policy or procedural differences or prevent other parties from usurping DoD authority. For example, if DoD intelligence or counterintelligence agents or interrogators are expected to operate in conjunction with CIA agents who are not governed by the same laws, Executive Orders rules, regulations or policies, or do not follow the same procedures as DoD employees, the operations should be performed by DoD employees who are in the position to ensure that DoD responsibilities are met.

E3.3.2.3. Discretionary Decisions. Some support services involve discretionary decision making. However, not all discretionary decision making is IG. For a decision to be IG it must have the effect of committing the government to a course of action when two or more alternative courses of action exist and have significant consequence to the Department of Defense. DoD officials are responsible for reviewing projects in enough detail to determine the risks and consequences to contracting the service. As a part of the review, DoD officials shall both:

E3.3.2.3.1. Determine if the way the function is performed would result in inappropriate contract relationship (e.g., personal services) or inappropriately affect assignment of liability; and

E3.3.2.3.2. Determine if the consequences of the discretionary decision making (to include possible unintended consequences) is of sufficient significance to the Department of Defense to warrant government control and, therefore, should not be contracted.

E3.3.2.4. Confer with Authorities. The DoD Components shall confer with manpower authorities before contracting for support services to verify whether the work is required for readiness or management needs of the Department of Defense (e.g., risk mitigation, continuity of operations, wartime assignments, esprit de corps, rotation, or career progression).
E3.4. DETERMINING REQUIREMENTS

When assessing the merits of contracting functions, manpower authorities should also assess whether it would require more manpower to develop the statement of work; award and execute the contract; and assess the quality of the final product or service, than it would take to perform the service in-house.