

REFUGEE TO GUEST: A DISCUSSION ON THE CONTRACT ADMINISTRATION ISSUES AT DOÑA ANA VILLAGE

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TABLE OF CONTENTS

- I. THE WAR IN AFGHANISTAN
 - A. *Introduction to Operation Allies Welcome*
 - B. *Operation Allies Welcome's Major Role-Players*
 - C. *Funding Operation Allies Welcome*
- II. CONTRACT ADMINISTRATION ISSUES
 - A. *Contract Administration Oversight*
 - B. *Educating Stakeholders on Requirements*
 - C. *Training and Transitioning Contract Administration Personnel*
- III. THE SIGNIFICANCE OF LEGAL COUNSEL
 - A. *Scope Determination*
 - B. *Proper Use of Appropriated Funds*
- IV. THE CONCLUSION OF OPERATION ALLIES WELCOME AT DOÑA ANA VILLAGE
 - A. *Descoping the Operation*
 - B. *Contract Closeout*
- V. CREATING THE BLUEPRINT
- VI. CONCLUSION

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ABSTRACT

Humanitarian and civic aid refers to practical support provided to people in need. This assistance is typically short-term, aimed at deserving populations, and ranging in size. The support is usually mobilized in response to catastrophic events, natural disasters, and other unprecedented circumstances. During such calamities, countries or regions often seek strategic assistance and, most importantly, humanitarian aid from the United States. When disasters strike, prompt support becomes crucial, and the demand for aid is urgent. Consequently, the need for quick planning and preparation to provide assistance can sometimes lead supporting agencies to unintentionally overlook certain contract administration considerations.

In 2021, following the withdrawal of forces from Afghanistan and the rising threat of insurgents in the area, the United States stepped up to provide stateside humanitarian and civic aid to a deserving population at a moment's notice. This Article will discuss how Operation Allies Welcome, which began on July 14, 2021, as Operation Allies Refuge, proved immeasurably successful. More importantly, this Article will address why the United States, and other countries, should review Operation Allies Welcome to develop and identify various contract administration considerations that will continue to appear when rendering humanitarian and civic aid in the future. To accomplish this, this Article will highlight the significance of Operation Allies Welcome and explore how the lessons learned from this endeavor provide a blueprint for countries to use when administering humanitarian and civic aid.

I. THE WAR IN AFGHANISTAN

The War in Afghanistan (“the War”) was an armed conflict that lasted from 2001 to 2021.¹ The War itself began almost immediately after the United States was attacked by al-Qaeda, an Islamic fundamentalist group lead by Osama bin Laden in Afghanistan, on September 11, 2001.² The War culminated in an international military coalition led by the United States.³ In fact, the War itself lasted two decades and became the longest war in the history of the United States, narrowly surpassing the duration

¹ See David Zucchino, *The U.S. War in Afghanistan: How It Started, and How It Ended*, N.Y. TIMES (Oct. 7, 2021), <https://www.nytimes.com/article/afghanistan-war-us.html> (noting that the United States engaged in armed conflict against the Taliban in Afghanistan from October 2001 to August 2021).

² Remarks on the End of United States Military Operations in Afghanistan, 2021 DAILY COMP. PRES. DOC. 1 (Aug. 31, 2021).

³ See *id.*

of the Vietnam War.⁴ The Doha Agreement, which was entered into on February 29, 2020, set the stage for the end of the War in Afghanistan, which would come in late 2021.⁵ In addition to several covenants specifically addressed at preventing terrorist operations by al-Qaeda, the agreement required the withdrawal of military forces from Afghanistan no later than August 31, 2021.⁶ The withdrawal itself was rushed and tumultuous, as Taliban insurgents spent most of the summer of 2021 seizing large areas of Afghanistan and forcing the Islamic Republic's former president, Ashraf Ghani, to flee.⁷

With fear of the Taliban's rule sweeping the country and thousands of Afghans facing persecution due to their support of the Islamic Republic and the United States during the twenty-year-long war, many were compelled to seek asylum, particularly in the United States.⁸ In response, between July 14 and August 30, 2021, more than 124,000 Afghans were evacuated from Afghanistan.⁹ This evacuation operation was initially titled Operation Allies Refuge.¹⁰ A majority of the Afghan refugees, hereafter referred to as "guests," were processed and housed in the United States, primarily on military installations such as Fort Bliss.¹¹ Given the humanitarian crisis, the influx of personnel, and the need for primary resources, the Department of Defense ("DOD") requested and was

⁴ *Id.*

⁵ Mujib Mashal, *Taliban and U.S. Strike Deal to Withdraw American Troops from Afghanistan*, N.Y. TIMES, <https://www.nytimes.com/2020/02/29/world/asia/us-taliban-deal.html> (Aug. 23, 2021).

⁶ *See id.*; Zucchini, *supra* note 1 (noting that the Taliban agreed to reduce violence and cut ties with al-Qaeda as part of its 2020 agreement with the U.S. in exchange for a May 1, 2021, withdrawal of U.S. troops, which President Biden would later extend to August 31, 2021).

⁷ Anthony Capaccio, *US-Taliban Deal Pushed Afghanistan to Collapse: Watchdog*, BLOOMBERG (May 18, 2022, 2:50 AM), <https://www.bloomberg.com/news/articles/2022-05-18/us-taliban-deal-pushed-afghanistan-to-collapse-watchdog-finds>.

⁸ *See* Anna Nagler, *Operation Allies Welcome: The United States' Plan to Relocate over 65,000 Afghan Asylum Seekers*, 36 GEO. IMMIGR. L.J. 507, 508 (2021).

⁹ Press Release, U.S. Dep't of Def., Statement by Secretary of Defense Lloyd J. Austin III (Aug. 31, 2022) (available at <https://www.defense.gov/News/Releases/Release/Article/3145780/statement-by-secretary-of-defense-lloyd-j-austin-iii/>); Glenn Thrush et al., *Evacuations for Afghans Who Helped U.S. Troops Will Begin This Month*, N.Y. TIMES (July 14, 2021), <https://www.nytimes.com/2021/07/14/us/politics/us-afghanistan-evacuations.html> (indicating that the Biden Administration expected to begin evacuating Afghan allies, as part of the U.S. military's "Operation Allies Refuge," by mid-to-late July 2021).

¹⁰ Thrush et al., *supra* note 9.

¹¹ *Operation Allies Welcome*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/allies-welcome?utm_source=hp_slideshow&utm_medium=web&utm_campaign=dhsgov (last updated Mar. 13, 2023). The following U.S.-based military installations supported Operation Allies Welcome by providing temporary housing to evacuees: Marine Corps Base Quantico (Virginia), Fort Pickett (Virginia), Fort Lee (Virginia), Holloman Air Force Base (New Mexico), Fort McCoy (Wisconsin), Fort Bliss (Texas), Joint Base McGuire-Dix-Lakehurst (New Jersey), and Camp Atterbury (Indiana). *Id.*

subsequently directed by the Secretary of Defense to use specific authorities to aid in the transition of various Afghan guests.¹² With tens of thousands of Afghan guests now arriving in the United States with no more than the clothes on their backs,¹³ detailed guidance was needed to aid the guests' transition to their new home—the United States. As a result, and in a short time, the Secretary of Defense directed the Commander of United States Northern Command and its component commands to provide support to the new foreign guests in the form of housing, sustenance, and support, with particular concern for those pending the processing of Afghan Special Immigrant Visa (“SIV”), principal applicants, their families, and other at-risk refugees.¹⁴ A primary reference point for the support was 10 U.S.C. § 401.¹⁵

A. *Introduction to Operation Allies Welcome*

United States support for Afghanistan stems from the United States' rich history of supporting impoverished nations.¹⁶ In fact, the general structure of humanitarian and civic assistance dates back as early as the 1980s when the Reagan Administration provided support to Afghanistan, Central America, and South America.¹⁷ Government-sponsored aid typically comes in the form of money, technical and physical assistance, and commodities.¹⁸ Historically, foreign aid is financed by taxpayers and other government revenue sources that Congress appropriates annually through the United States budget process.¹⁹ Over the last century, the

¹² See generally *DOD Support to Operation Allies Welcome*, U.S. N. COMMAND, <https://www.northcom.mil/OAW/> (last visited Apr. 10, 2023) (emphasizing that the Secretary of Defense approved the U.S. Northern Command to provide temporary housing and other forms of support for Afghan Special Immigrant Visa applicants and others who are at risk).

¹³ Abigail Hauslohner, *Thousands of Afghans Were Evacuated to the U.S. Will America Let Them Stay?*, WASH. POST (Mar. 29, 2022, 5:00 AM), <https://www.washingtonpost.com/national-security/2022/03/29/afghan-resettlement-biden/>.

¹⁴ U.S. DEP'T OF DEF. INSPECTOR GEN., DODIG-2022-066, MANAGEMENT ADVISORY ON THE LACK OF MEMORANDUMS OF AGREEMENT FOR DOD SUPPORT FOR THE RELOCATION OF AFGHAN NATIONALS 1 (2022).

¹⁵ 10 U.S.C. § 401 (2013).

¹⁶ See, e.g., Jangrumetta D. Shine, *The Military Logistics Support of Humanitarian Relief Efforts During Low-Intensity Conflict* (Sept. 1991) (M.S. thesis, Air Force Institute of Technology) (available at <https://apps.dtic.mil/sti/pdfs/ADA246907.pdf>) (discussing the Reagan Administration's efforts to provide humanitarian assistance to Afghanistan during the Soviet invasion of the country).

¹⁷ See *id.*; see also Statement on Humanitarian Assistance for Central America, 1 PUB. PAPERS 1740 (Dec. 23, 1983) (indicating the Reagan Administration's desire to administer humanitarian assistance to meet the “desperate needs of the victims of aggression and oppression”).

¹⁸ See 10 U.S.C. § 401(e) (2013).

¹⁹ See EMILY M. MORGENSTERN & NICK M. BROWN, CONG. RSCH. SERV., R40213, FOREIGN ASSISTANCE: AN INTRODUCTION TO U.S. PROGRAMS AND POLICY 11 (2022) (highlighting that Congress annually designates support to foreign assistance programs in

United States has had a growing interest in nation-building and supporting allies across the globe during their times of need.²⁰ Because the United States stands as one of the wealthiest nations in the world, it has routinely offered the most aid to countries worldwide.²¹ Foreign aid, for the most part, has shared bipartisan support, and there is a general consensus among most Americans regarding involvement in international affairs, particularly in improving people's health, educating children, and providing assistance during natural disasters.²² Operation Allies Welcome, unique in its own right, now stands as the most recent federal aid initiative offered to a country in desperate need of assistance.²³

Operation Allies Refuge, which was later renamed Operations Allies Welcome by the Biden administration, was a federal endeavor that began in 2021 and ended on approximately February 19, 2022, when the last Afghan evacuees left their stateside temporary housing and were resettled into new communities across the United States.²⁴ Operation Allies Welcome's sole purpose was to rescue vulnerable Afghan citizens who actively assisted the United States military during various operations in

accordance with the authority it derives from the Appropriations Clause of the U.S. Constitution).

²⁰ See, e.g., Press Release, U.S. Agency of Int'l Dev., United States Provides Nearly \$105 Million for Urgent Food, Humanitarian Assistance Amid Worst Drought on Record in the Horn of Africa (June 13, 2022) (available at <https://www.usaid.gov/news-information/press-releases/jun-13-2022-united-states-provides-nearly-105-million-horn-of-africa-assistance>) ("The United States is the largest single-country donor of humanitarian assistance to the Horn of Africa, providing more than \$507 million across the region since the beginning of the Fiscal Year 2022.").

²¹ *Refugee and Humanitarian Assistance*, U.S. DEP'T OF STATE, <https://www.state.gov/policy-issues/refugee-and-humanitarian-assistance/> (last visited Apr. 5, 2023) ("The United States is the largest single provider of humanitarian assistance worldwide.").

²² Charli Carpenter, *Americans Are More Generous on Foreign Aid Than They Realize*, WORLD POL. REV. (June 18, 2021), <https://www.worldpoliticsreview.com/public-opinion-supports-an-increased-us-foreign-aid-budget/>.

²³ Press Release, U.S. Dep't of Homeland Sec., Operation Allies Welcome Announces Departure of All Afghan Nationals from the National Conference Center Safe Haven in Leesburg, VA (Sept. 27, 2022) (available online at <https://www.dhs.gov/news/2022/09/27/operation-allies-welcome-announces-departure-all-afghan-nationals-national>) (describing how the Department of Homeland Security coordinated Operation Allies Welcome beginning in August 2021).

²⁴ See JOEL DAVIDOW, AFGHANISTAN EVACUATION BRIEF (2022); see also *DOD Ceases Afghan Evacuee Safe Haven Operations at Joint Base McGuire-Dix-Lakehurst*, U.S. N. COMMAND (Mar. 17, 2022), <https://www.northcom.mil/Newsroom/News/Article/Article/2968988/dod-ceases-afghan-evacuee-safe-haven-operations-at-joint-base-mcguire-dix-lakeh/> (noting that by February 19, 2022, all remaining refugees had departed Joint Base McGuire-Dix-Lakehurst, and that on March 15, 2022, U.S. Northern Command closed Operation Allies Welcome). Operation Allies Refuge was a military operation conducted to airlift at-risk Afghan allies, who supported the DD, out of Afghanistan. Operation Allies Welcome was the follow-on effort across the U.S. Government to support Afghan evacuees as they resettled into the United States. U.S. DEP'T OF DEF. INSPECTOR GEN., *supra* note 14, at 1–2.

the Middle East.²⁵ This monumental effort came because of the sense of fear that developed in response to the withdrawal of United States Armed Forces from Afghanistan.²⁶ Because of the vast scope of Operation Allies Welcome, the number of people at risk, and the urgency of the support, the United States Army engaged in a humanitarian effort that stretched its duties in new and creative ways.²⁷

Before launching the multi-million dollar support initiative, contracting personnel were assembled to begin planning.²⁸ Historically, acquisition planning should begin as soon as a need is identified, preferably well before “the fiscal year in which contract award or order placement is necessary.”²⁹ Unfortunately, given the urgency of Operation Allies Welcome, acquisition planning was not conducted as one would envision in routine day-to-day solicitations.³⁰ Nevertheless, despite the inability to properly plan, as prescribed by the Federal Acquisition Regulation (“FAR”) Part 7,³¹ Operation Allies Welcome proved to be immeasurably successful and should be analyzed by the United States and other countries to improve disbursements of humanitarian aid that can, and will, be rendered in the future.³²

B. *Operation Allies Welcome’s Major Role-Players*

This Section highlights an agency that played a significant role in the contracting support element of Operation Allies Welcome. Additionally, this Section will call attention to the military personnel who played a primary operational contracting role in the formation, administration, and closeout of contracts supporting this multi-million-dollar contingency operation. Their support, if not received, could have tremendously endangered this mission.

²⁵ U.S. DEP’T OF DEF. INSPECTOR GEN., *supra* note 14.

²⁶ See CLAYTON THOMAS, CONG. RSCH. SERV., R46879, U.S. MILITARY WITHDRAWAL AND TALIBAN TAKEOVER IN AFGHANISTAN: FREQUENTLY ASKED QUESTIONS 21 (2021).

²⁷ See Matthew Rivera et al., *Operation Allies Welcome: Immediate Support to America’s Largest Non-Combatant Evacuation Operation*, U.S. ARMY (June 1, 2022), https://www.army.mil/article/254992/operation_allies_welcome_immediate_support_to_americas_largest_non_com.

²⁸ See *id.*; see also Brian Stevens, *Fort Lee Chaplains a Key Participant in Operation Allies Welcome*, U.S. ARMY (Sept. 9, 2021), https://www.army.mil/article/250096/fort_lee_chaplains_a_key_participant_in_operation_allies_welcome.

²⁹ FAR 7.104(a) (2023).

³⁰ See Rivera et al., *supra* note 27.

³¹ See FAR 7.104(a) (2023) (explaining the necessity of planning an acquisition); see also OFF. MGMT., ACQUISITION GUIDE CHAPTER 7.1: ACQUISITION PLANNING 6 (2011) (“Acquisition planning is the most critical part of the acquisition process—if it is not done right, nothing will [be] accomplished smoothly.”).

³² See Rivera et al., *supra* note 27.

In order to effectuate this mission, the Commander of United States Northern Command relied upon many players.³³ Each player will be highlighted as having a specific and invaluable role throughout Operation Allies Welcome.³⁴ The first key contributor to Operation Allies Welcome was the United States Army Mission and Installation Contracting Command (“MICC”).³⁵ During Operation Allies Welcome, the MICC was the primary entity providing ongoing Operational Contracting Support (i.e., Contract Support Integration, Contracting Support, and Contractor Management) services that enabled the DOD, Army Materiel Command (“AMC”), and Army Contracting Command (“ACC”) forces to establish and sustain this domestic, continental United States (“CONUS”)-based support.³⁶ The MICC, its personnel, and their contracting experience provided to support Operation Allies Welcome were invaluable.³⁷ Here, the MICC’s ability to provide the United States Government with global strategic support in acquiring goods and services helped streamline efforts and minimize contractual errors.³⁸ Moving forward, countries or agencies looking to provide humanitarian and civic aid should consider analyzing and emulating the structure and capabilities of the MICC. Their collaborative effort, contractual support, and capable workforce could serve as a model for providing contractual support during humanitarian missions.³⁹

A firm understanding of an area of operation is essential to any military operation or strategic endeavor. In the coming paragraphs, this Article will discuss one of the site locations used for Operation Allies

³³ See *id.* (describing the numerous roles involved in effectuating Operation Allies Welcome); see also U.S. Dep’t of Homeland Sec. Pub. Affs., *Operation Allies Welcome Announces Departure of Last Afghan Nationals from Fort McCoy, Wisconsin*, U.S. N. COMMAND (Feb. 16, 2022), <https://www.northcom.mil/Newsroom/News/Article/Article/2937796/operation-allies-welcome-announces-departure-of-last-afghan-nationals-from-fort/> (discussing the eight task forces assigned to support the Operation).

³⁴ See generally Rivera et al., *supra* note 27 (highlighting the specific role that many played in the execution of Operation Allies Welcome).

³⁵ See Ben Gonzales, *MICC Provides Contracting Support to Operation Allies Refuge*, U.S. ARMY (Aug. 31, 2021), https://www.army.mil/article/249865/micc_provides_contracting_support_to_operation_allies_refuge (discussing the involvement of the Mission and Installation Contracting Command, (“MICC”), at Fort Lee, Virginia, before Afghan immigrants first began arriving in July 2021).

³⁶ See *id.*

³⁷ See Daniel P. Elkins, *MICC Contracts Exceed \$5.2 Billion in Support of Army Needs*, JBSA NEWS (Oct. 4, 2021), <https://www.jbsa.mil/News/News/Article/2799224/micc-contracts-exceed-52-billion-in-support-of-army-needs/>.

³⁸ See Gonzales, *supra* note 35.

³⁹ *Operation Allies Welcome: Examining DHS’s Efforts to Resettle Vulnerable Afghans: Hearing Before the Subcomm. on Oversight, Mgmt., & Accountability & the Subcomm. on Border Sec., Facilitation, & Operations of the Comm. of Homeland Sec. H. of Reps.*, 117th Cong. 34 (2021) (statement of Naheed Samadi Bahram, U.S. Country Director, Women for Afghan Women).

Welcome and highlight how the MICC and its role players played a major role in contract administration during the mission at Fort Bliss's Doña Ana Village.

Doña Ana Village, located in New Mexico, was one of several DOD locations supporting the resettlement of Afghan guests.⁴⁰ At its peak, Doña Ana Village housed well over 10,000 Afghan guests.⁴¹ Notably, the MICC was one of the first contracting activities on the ground at Doña Ana Village as a result of the mobilization of elements from various contracting battalions.⁴² Here, on a rotating basis, the MICC deployed support elements from its contracting battalions located across the continental United States to support this endeavor.⁴³ These support elements were called "Contracting Detachments" and included the following personnel: an Administrative Contracting Officer ("ACO"), multiple Contracting Officers ("KO"), several Contracting Officer's Representatives ("COR") (which are Non-Commissioned Officers with military occupational specialties of 51C (Acquisition, Logistics, and Technology), and a Contract and Fiscal Law Judge Advocate ("KJA") to provide contractual support.⁴⁴

⁴⁰ Lauren Villagran, *A Rare Peek Inside the Fort Bliss Afghan Refugee Camp, 'Doña Ana Village'*, EL PASO TIMES, <https://www.elpasotimes.com/story/news/2021/09/10/fort-bliss-afghan-refugees-dona-ana-village-camp/8274111002/> (Sept. 10, 2021, 3:45 PM). Doña Ana Village, also commonly known as the Doña Ana Range Complex, is a barren Army camp that was built in 1960. *Id.*

⁴¹ *Last Group of Afghan Refugees at Fort Bliss Left This Week*, KFOX-TV (Dec. 31, 2021, 6:06 PM), <https://kfoxtv.com/news/local/last-group-of-afghan-refugees-at-fort-bliss-left-this-week>.

⁴² See Gonzales, *supra* note 35; *Fact Sheet: Mission and Installation Contracting Command*, U.S. ARMY (Jan. 23, 2020), <https://api.army.mil/e2/c/downloads/2021/01/20/89287f78/final-micc-fact-sheet-jan-2020.pdf>.

⁴³ See, e.g., *902nd CBN Soldiers Complete Fort Bliss OAW Support*, U.S. ARMY (Jan. 31, 2022), https://www.army.mil/article/253595/902nd_cbn_soldiers_complete_fort_bliss_oaw_support (indicating that the 902nd Contracting Battalion, which is based out of Joint Base Lewis-McChord in Fort Lewis, Washington, and serves as one of the MICC's forward contracting elements, provided support and contract administration services at Doña Ana Village, which was located outside of Fort Bliss in El Paso, Texas).

⁴⁴ See *id.* (detailing the roles of certain contracting officers, administrative contracting officers, and contracting officer representatives sourced out from the 902nd Contracting Battalion); see also USAAC, *Military Occupational Specialty 51C, Acquisition, Logistics, and Technology Contracting Noncommissioned Officer*, U.S. ARMY (Apr. 6, 2011), https://www.army.mil/article/54457/military_occupational_specialty_51c_acquisition_logistics_and_technology_contracting_noncommission ("Military Occupational Specialty (MOS) 51C, Acquisition, Logistics, and Technology (AL&T) Contracting Noncommissioned Officer (NCO), is a highly critical career field established in December 2006 to meet the Army's continuously increasing need for contingency contracting officers in the modular force."); *Contracting Detachment Supports National Training Center Rotation*, U.S. ARMY (Oct. 14, 2021), https://www.army.mil/article/251179/contracting_detachment_supports_national_training_center_rotation (referring soldiers from the 902nd Contracting Battalion to Contracting Detachment B); RYAN FISHER ET AL., OPERATIONAL LAW HANDBOOK 294 (Ryan Fisher ed., 2022) (describing the role of a Judge Advocate).

The key roles here, the KO, ACO, COR, and KJA, have distinct but overlapping responsibilities.⁴⁵ According to the FAR, the KO is responsible for “ensuring [the] performance of all necessary actions for effective contracting, ensuring compliance with the [contract terms], and safeguarding the interests of the United States in its contractual relationships.”⁴⁶ The ACO is responsible for administering contracts, “evaluating subcontracting plans, and . . . monitoring, evaluating, and documenting contractor performance under the clause prescribed in [FAR] 19.708(b) and any subcontracting plan included in the contract.”⁴⁷ The COR is required to “assist[] in the technical monitoring or administration of a contract” and is also required to “maintain a file for each assigned contract.”⁴⁸ Last, in a contingency environment, the KJA provides legal counsel and business recommendations; assesses risks; and provides contract and fiscal law advice to the ACO, senior leaders, and stakeholders (e.g., Senior Military Officers) on site.⁴⁹ From planning through execution, the KJA plays a vital role by ensuring that humanitarian and civic assistance activities comply with statutory and DOD policy requirements.⁵⁰

During the deployment to Doña Ana Village, the “mission included contract administration services to the United States Army North’s Logistics Civil Augmentation Program [“(LOGCAP”)”] task order, a contract implemented to provide basic life support such as essential housing, feeding, medical care, transportation, and translation services to Afghan guests.”⁵¹ The ACO, who led the forward contracting detachment, played a chief role in monitoring and overseeing various mission-essential contracts.⁵² However, stepping into uncharted territory created various obstacles, which will be addressed further below.⁵³

⁴⁵ See FAR 2.101 (2023) (pinpointing the differences between a contracting officer, an administrative contracting officer, and a contracting officer’s representative); FISHER ET AL., *supra* note 44.

⁴⁶ FAR 1.602-2 (2022).

⁴⁷ FAR 19.706 (2022).

⁴⁸ FAR 1.604 (2022).

⁴⁹ THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, 2019 CONTRACT ATTORNEYS DESKBOOK 1-6 (2019); see, e.g., U.S. DEP’T OF DEF., INSTR. 2205.3, IMPLEMENTING PROCEDURES FOR THE HUMANITARIAN AND CIVIC ASSISTANCE (HCA) PROGRAM ¶ 4.5 (27 Jan. 1995) [*hereinafter* DODI 2205.3] (requiring the combatant commander’s legal staff to review proposed HCA projects to ensure conformance with applicable statutory and DOD policy requirements).

⁵⁰ See DODI 2205.3, *supra* note 49.

⁵¹ 902nd CBN Soldiers Complete Fort Bliss OAW Support, *supra* note 43.

⁵² See Gonzales, *supra* note 35 (emphasizing the role of the contracting planner in facilitating mission plans).

⁵³ See Rivera et al., *supra* note 27; see also Zucchini, *supra* note 1.

C. *Funding Operation Allies Welcome*

Operation Allies Welcome was and remains the United States' largest non-combatant evacuation operation.⁵⁴ Given the magnitude of the support given to the Afghan guests, various obstacles occurred before, during, and after Operation Allies Welcome.⁵⁵ The first obstacle to present itself was identifying, understanding, and correctly interpreting the guidance from senior military leaders on what aid, if any, the United States could provide to the inbound foreign guests.⁵⁶ The coming paragraphs will discuss the various challenges and confusion surrounding the type of appropriated funds that could have been used to provide a suitable haven for the guests. There were and remain various limitations and restrictions on using appropriated funds.⁵⁷ During Operation Allies Welcome, a primary funding source was an appropriation titled "Overseas Humanitarian, Disaster Assistance, and Civic Aid" ("OHDACA").⁵⁸ This fund was explicitly earmarked to aid countries in desperate need of humanitarian and civic assistance and has been historically used in response to catastrophic events and uncontrollable natural disasters.⁵⁹ In terms of oversight, the Defense Security Cooperation Agency ("DSCA") managed the OHDACA appropriation.⁶⁰ Generally, the DOD utilizes humanitarian assistance, such as OHDACA, "to relieve or reduce endemic conditions such as human suffering, disease, hunger, privation, and the adverse effects of unexploded explosive ordinance ("UXO"), particularly in regions where humanitarian needs may pose [significant] challenges to stability, prosperity, and respect for universal human values."⁶¹

⁵⁴ Rivera et al., *supra* note 27.

⁵⁵ *See id.*

⁵⁶ Memorandum from Jake Sullivan, Nat'l Sec. Advisor of the U.S., to the Heads of Exec. Dep'ts and Agencies, on the Designation of the Department of Homeland Security as Lead Federal Department for Facilitating the Entry of Vulnerable Afghans into the United States (Aug. 29, 2021) (identifying the need to provide Afghan guests with proper immigration processing, COVID-19 testing, and resettlement support).

⁵⁷ *See* 10 U.S.C.A. § 401 (2013) (indicating that humanitarian and civic assistance administered under this Section cannot be provided to any individual or group engaged in military activity or to any foreign country); *see also* U.S. DEP'T OF DEF., INSTR. 2205.02, HUMANITARIAN AND CIVIC ASSISTANCE (HCA) ACTIVITIES PROGRAM ¶ 3(b)(2) (June 23, 2014) (prohibiting the provision of humanitarian and civic assistance to individuals or groups engaged in military or paramilitary activity).

⁵⁸ *See* 10 U.S.C. § 2561 (2022); *see generally* 10 U.S.C § 401 (noting OHDACA funding allows Combatant Commanders to provide immediate life-saving assistance to countries in their region).

⁵⁹ *See* 10 U.S.C. § 401(a)–(b) (suggesting that OHDACA allows for the averting of political and humanitarian crises; *see also* *Office of U.S. Foreign Disaster Assistance*, U.S. AGENCY FOR INT'L DEV., <https://www.usaid.gov/office-us-foreign-disaster-assistance> (last visited Apr. 11, 2023)).

⁶⁰ U.S. DEF. SEC. COOP. AGENCY, SECURITY ASSISTANCE MANAGEMENT MANUAL, 5105.38-M, C12.2.1.

⁶¹ *Id.* at C12.1.1.

Historically, OHDACA appropriations have been used to fund activities that “build the capacity of a [P]artner [N]ation government to provide essential humanitarian services to the civilian population and support[] [Partner Nation] efforts to reduce the risk of, prepare for, and respond to humanitarian disasters[,] thereby reducing reliance on international disaster relief assistance.”⁶² This particular appropriation “is an annual appropriation with a two-year period of availability that supports DOD [Humanitarian Assistance] activities” (e.g., essential services) “conducted under specific legislative authorities.”⁶³ Given the nature of the withdrawal of forces from Afghanistan and the rising threat of Taliban insurgents, the Secretary of Defense quickly delegated authority to the Commander of United States Northern Command (“NORTHCOM”) to validate and prioritize OHDACA funds—presumably to avoid ambiguity concerning various other funding sources.⁶⁴ The main point to be emphasized is that the significant influx of Afghan citizens en route to the United States, compelled the Commander of NORTHCOM, as directed by the Secretary of Defense, to undertake all possible measures to provide adequate care for the Afghan guests.⁶⁵

With funding and command guidance in place, various military installations, such as Fort Bliss, were tapped to identify suitable locations to support SIV processing, temporary housing, life sustainment materials, and various other levels of support to Afghan guests in the United States.⁶⁶ For many installations and senior leaders, this was a challenging effort to accomplish.⁶⁷ Despite the obstacles faced throughout Operation Allies Welcome, which will be addressed later in this Article, this humanitarian feat successfully resulted in more than 75,000 Afghan nationals being relocated to various parts of the United States.⁶⁸ This was

⁶² *Id.*

⁶³ *Id.* at C12.1.2.

⁶⁴ See Memorandum from the Sec’y of Def. to Commander, U.S. N. Command, on the Authorization to Provide Support to Department of State Through Provision of Humanitarian Assistance in the United States to Afghan Special Immigrant Visa Applicants, Their Families, and Other Individuals at Risk (Aug. 24, 2021) (granting the Commander of U.S. Northern Command the authority to provide humanitarian assistance to Afghan Special Immigrant Visa applicants and their accompanying family dependents at designated military installations).

⁶⁵ See generally *id.* (indicating that NORTHCOM was required to assist in the housing and processing of SIV applicants pursuant to humanitarian requirements identified by the U.S. Department of State); Zucchini, *supra* note 1.

⁶⁶ See *Operation Allies Welcome*, *supra* note 11.

⁶⁷ See *id.* (highlighting the rigorous demands on members of the U.S. Government to effectuate Operation Allies Welcome).

⁶⁸ Press Release, U.S. Dep’t of Homeland Sec., Operations Allies Welcome Announces Departure of All Afghan Nationals from U.S. Military Bases (Feb. 19, 2022) (available online at <https://www.dhs.gov/news/2022/02/19/operation-allies-welcome-announces-departure-all-afghan-nationals-us-military-bases>).

accomplished by stateside support from various agencies, services, and military personnel alike.⁶⁹ As a result of the considerable strides and accomplishments achieved by those involved in the execution of Operation Allies Welcome, the endeavor should now serve as a blueprint for humanitarian and civic aid efforts to come.⁷⁰ Next, this Article will explore three areas of contract administration that had the potential of jeopardizing this large-scale contingency operation had they not been done correctly.

II. CONTRACT ADMINISTRATION ISSUES

Contracts and their resulting task orders, like many other projects, require oversight.⁷¹ Oversight and guidance are necessary to ensure key players (e.g., stakeholders, requiring activity, and senior leaders) remain ethical, avoid legal obstacles, and are on the same page regarding project execution.⁷² In the coming paragraphs, this Section will discuss various contractual oversight issues and highlight methods implemented to overcome them.

A. *Contract Administration Oversight*

The first logistical hurdle the KJA and ACO experienced during Operation Allies Welcome was providing direct and indirect oversight to the LOGCAP prime contractor, Kellogg Brown & Root, Inc. (“KBR”), in its execution of the \$600 million task order.⁷³ This oversight required the ACO and KJA to ensure various task orders were met and aligned to the standards established in the Performance Work Statement (“PWS”).⁷⁴ The KJA's primary role was to ensure that various requirements were met regarding measurable outcomes rather than utilizing prescriptive methods. For example, several task orders required contractors to install

⁶⁹ *See id.*

⁷⁰ *See* Cindy Huang, *Operation Allies Welcome: A Health Care Success Story*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Jan. 25, 2022), <https://www.acf.hhs.gov/orr/blog/2022/01/operation-allies-welcome-health-care-success-story> (noting that during Operation Allies Welcome, the Department of Health and Human Services's Office of Refugee Resettlement provided temporary healthcare, mental health resources, and protection services to Afghan refugees in support of more than 60,000 people).

⁷¹ *See* FAR 42.201(a) (2022); *see also* FAR 43.302(a)–(b) (providing various managerial responsibilities of the contracting officer).

⁷² *See generally* U.S. DEP'T OF DEF., CONTRACTING OFFICER'S REPRESENTATIVES GUIDEBOOK 128 (2021) (suggesting that proper contract oversight and monitoring results in successful operations).

⁷³ *902nd CBN Soldiers Complete Fort Bliss OAW Support*, *supra* note 43.

⁷⁴ PWS is a statement of work for performance-based acquisitions that clearly describes the expected performance objectives and standards of the Contractor. *See* FAR 37.602 (a)–(b) (2022).

fencing around various parts of Doña Ana Village.⁷⁵ Throughout this dilemma, various stakeholders debated the necessity of fencing in areas subjectively determined to be adequately secure; however it was ultimately a condition previously negotiated and not one that could be adjusted unilaterally.⁷⁶ In order to remedy any confusion, the KJA and ACO needed to explain the complexity involved with modifying or altering contract conditions.⁷⁷

To resolve this particular issue, a significant amount of time was dedicated to educating key stakeholders on the legal consequences resulting from unilateral contract modifications. Once there was an understanding amongst stakeholders, related scenarios were analyzed repetitively to mitigate the reoccurrence of similar issues. Repetition, tangible examples, and contextual overviews of regulatory guidance proved to be the best methods to overcome the contractual oversight hurdle. Once a baseline standard was understood amongst all involved parties, task orders were executed seamlessly and requests for modifications were screened and vetted before submission for approval. These adjustments allowed more time for the ACO to focus on the mission—monitoring and ensuring contract compliance.⁷⁸ But, like all things, once one issue was resolved, another developed. The next area this Article will focus on is the efforts the KJA took to advise the customer—the Requiring Activity—and efforts taken to minimize the threat of litigation and liability.

B. Educating Stakeholders on Requirements

A shared understanding and open communication lines are vital in ensuring that contract performance remains viable and is properly recorded.⁷⁹ This Article has explained the various parties involved in this humanitarian and civic aid initiative and also discussed contract oversight. Next, it will explore how the KJA interacted with another stakeholder—the Requiring Activity. In the coming paragraphs, this

⁷⁵ A task order “means an order for services placed against an established contract or with Government sources.” FAR 2.101 (2022).

⁷⁶ See 48 CFR § 16.505(a)(8)(i)–(iii) (2023); see also FAR 43.103(b) (indicating that a unilateral contract modification can only be made by a contracting officer).

⁷⁷ See generally FAR 43.103 (2022) (describing the various bilateral and unilateral contract modifications); see also FAR 43.104(a) (2022) (requiring the contractor to notify the government of required changes to the contract); FAR 43.105(a) (2022) (“The contracting officer shall not execute a contract modification that causes or will cause an increase in funds without having first obtained a certification of fund availability . . .”).

⁷⁸ See FAR 42.302(a)(68) (2022) (“The administrative contracting officer is responsible for assisting in evaluating subcontracting plans, and for monitoring, evaluating, and documenting contractor performance under the clause prescribed in 19.708(b) and any subcontracting plan included in the contract.”).

⁷⁹ See *Guidebook for the Acquisition of Services*, OFF. OF THE ASSISTANT SEC. OF DEF. 7.1, https://www.acq.osd.mil/asda/dpc/cp/cc/docs/corhb/ref/Guidebook_for_Acquisition_of_Services_24March2012.pdf (last visited Mar. 20, 2023).

Article will provide an overview of the issues experienced while advising the Requiring Activity, specific issues the KJA had to adjudicate, and will also explore the processes the KJA implemented to reduce the ever-looming threat of litigation.

Ensuring all key leaders and stakeholders were on the same page with contract administration was another concern throughout Operation Allies Welcome.⁸⁰ The LOGCAP task order outlined in the existing contract, performance standards, metrics, and reporting requirements.⁸¹ However, given the fluctuating population, evolving seasons, and changeover in stakeholders at the various site locations, the Requiring Activity often felt compelled to make improper unilateral adjustments to stay ahead of the evolving operation.⁸² As an example, unilateral requests were made to CORs that deviated from previously established reporting requirements. There were also instances in which Contractors were asked to perform more than they initially contracted to do.⁸³ Unchecked, either scenario could have resulted in increased fees and possibly litigation due to the impact such changes could have had on competition.⁸⁴

In this instance, the KJA played a significant role in decision-making conversations and supporting the ACO and contracting team on the ground. The KJA accomplished this by insisting that proper reporting procedures be followed and helping hold the supporting units adhere to standards when procedures were falling out of compliance. For example, the KJA was instrumental in explaining the process of submitting task orders to senior leaders and also distinguished between the utilization of

⁸⁰ See generally U.S. DEP'T OF DEF. INSPECTOR GEN., DODIG-2022-064, MANAGEMENT ADVISORY: DOD SUPPORT FOR THE RELOCATION OF AFGHAN NATIONALS AT FORT BLISS, TEXAS 21 (2022) (emphasizing the need for interagency partners and the various commands responsible for the relocation of Afghan guests to each be equally aware of the challenges involved in the facilitation of aid to Afghan guests, specifically those evacuated to Fort Bliss).

⁸¹ See generally *902nd CBN Soldiers Complete Fort Bliss OAW Support*, supra note 43 (providing that the U.S. Northern Command's LOGCAP task order specifically provided basic life support to Afghan guests including housing, food services, medical care, transportation, and translation services); see also FAR 16.501-1 (defining a task order as "a contract for services that . . . provides for the issuance of orders for the performance of tasks during the period of the contract.").

⁸² See FAR 43.103(b)(1)–(4)(2023) (outlining the conditions in which a unilateral contract modification are permitted to occur).

⁸³ But see CAR 1352.201-72(b)(2) (2021) ("The COR is not authorized to make any commitments or otherwise obligate the Government or authorize any changes which affect the contract price, terms[,] or conditions.").

⁸⁴ Cf. Competition in Contracting Act, 41 U.S.C. § 253 (1984). The Competition in Contracting Act "is a public law enacted to encourage competition for the award of all types of government contracts. The purpose was to increase the number of competitors and to increase savings through lower, more competitive pricing." *Competition in Contracting Act (CICA)*, ACQNOTES, <https://acqnotes.com/acqnote/careerfields/competition-contracting-act-cica> (last visited Apr. 13, 2023).

unilateral and bilateral modifications.⁸⁵ The chief concern that the KJA raised to the Requiring Activity was that deviation from outlined task orders could require the Contractor to complete work above what was previously contracted for them to do.⁸⁶ These actions could also require Contractors to underperform what was established in the terms and conditions of the respective contract and therefore expose the Government to liability.⁸⁷

Given the varied requests given to the CORS by the Requiring Activity and various other stakeholders, the KJA and ACO found it prudent to step in and provide counsel on the role of CORs and the significance of staying within established reporting requirements.⁸⁸ In doing so, the KJA directly explained to an audience that was likely unfamiliar with performance-based contracts that each performance assessment activity has to be documented as it is conducted.⁸⁹ The KJA further discussed issues involved with unilaterally adjusting COR surveillance plans.⁹⁰ The KJA accomplished this by articulating that though there are standard checklists for contractor observation,⁹¹ the ones

⁸⁵ See FAR 16.501-1 (defining a task order as “a contract for services that . . . provides for the issuance of orders for the performance of tasks during the period of the contract.”); see also FAR 43.103 (2019) (distinguishing between bilateral and unilateral contract modifications).

⁸⁶ See FAR 31.201-3(a)–(b) (2019) (suggesting that a cost or action requested to be taken by a contractor and which exceeds his responsibility to the Government or is a “significant deviation from . . . [his] established practices is unreasonable in nature or amount if it exceeds that which he would be expected to incur in the ordinary course of competitive business”).

⁸⁷ See generally FAR 31.2013(a) (noting that the reasonableness of a given contract’s anticipated expenses and responsibilities depends upon “a variety of considerations and circumstances.”).

⁸⁸ See FAR 1.602-2(d)(1)–(7) (2019) (specifying the duties and responsibilities of the Contracting Office Representative); see also CONTRACTING OFFICER’S REPRESENTATIVES GUIDEBOOK, *supra* note 73 (highlighting that COR’s “function as the ‘eyes and ears’” of their Commanding Officer and “liaison between the government and contractor when executing . . . technical and administrative functions”).

⁸⁹ See CONTRACTING OFFICER’S REPRESENTATIVES GUIDEBOOK, *supra* note 72 (highlighting the need for CORs to “routinely monitor the contractor’s performance” throughout the duration of the contract to ensure that the supplies or services delivered conform to the agreed upon terms).

⁹⁰ See *id.* at 104 (disclosing that the federal government may unilaterally alter Quality Assurance Surveillance Plans (“QASP”) for service contracts). QASPs are used by CORs to “determine [] if the contractor is meeting the performance standards contained in the contract.” *Id.* QASPs may be adjusted throughout the contract depending upon a contractor’s ability to carry out its quality control plan. *Id.*

⁹¹ See *id.* at 105 (indicating that checklists for contractor observations should at least (1) provide a schedule for on-site inspections and audits of contractor’s billings; (2) identify what will be checked during an inspection; and (3) describe the method used for verifying contract invoices); see also FAR 37.601 (2019) (explaining that a standard contract includes a performance work statement, measurable performance standards, and performance incentives).

in place for Doña Ana Village were unique and tailored specifically to the service of performance. The KJA and ACO also successfully explained that if a particular project is not done correctly, there are methods to address said deficiencies.⁹² In certain instances, compliance did become an issue and proper reporting requirements were undertaken. In these situations, each issue was handled individually, and the KJA reviewed non-conformity reports, which, if adjudicated, could impact the contractor's rating in the Contractor Performance Assessment Reporting System.⁹³ Dialogues, such as the ones discussed here, helped to clarify ambiguity in terms of contractor performance and allowed for consistency in the evaluation of the services on Doña Ana Village. Lastly, and most importantly, these dialogues served as risk mitigation.

Open and direct conversations with leaders and stakeholders, such as the Requiring Activity, were the key to avoiding issues at Doña Ana Village and often served to prevent costly and prolonged litigation.⁹⁴ Here, the KJA was able to be proactive rather than reactive, which is extremely important and an often-overlooked aspect of the acquisition process. With the aforementioned in mind, governments interested in developing a humanitarian and civic assistance acquisition team should select and adequately train a Contract and Fiscal Law Judge Advocate to round out their team. As one can see, the involvement of a properly trained attorney on a humanitarian and civic assistance acquisition team can help the team to correctly interpret law and policy and minimize the risk of litigation.

C. Training and Transitioning Contract Administration Personnel

Providing humanitarian and civic assistance in a contingency environment with personnel who need to be trained or equipped with the necessary tools is a quick way to end up in mission failure.⁹⁵ Fortunately, despite the steep learning curve, key personnel from the MICC, including the KJA, were able to not only adjust to the austere environment at Doña Ana Village but created tools and systems to ensure that replacement

⁹² See FAR 46.407 (2019) (indicating that Contracting Officers may reject, or request replacements of, nonconforming supplies or services).

⁹³ See generally CONTRACTOR PERFORMANCE ASSESSMENT REPORTING SYS., GUIDANCE FOR THE CONTRACTOR PERFORMANCE ASSESSMENT REPORTING SYSTEM (CPARS) 6 (2022) (explaining that CPARS utilizes performance assessment evaluations to ensure that the U.S. Government only conducts business with those contractors who “consistently provide quality, and on-time products and services that conform to contractual requirements”).

⁹⁴ See generally CONTRACTING OFFICER’S REPRESENTATIVES GUIDEBOOK, *supra* note 72, at 52 (emphasizing the need for “open communication between the Contracting Officer in COR” and instructing the COR to “always contact the Contracting Officer for guidance and direction”).

⁹⁵ Cf. DODI 2205.3, *supra* note 49, at ¶ 5(1) (emphasizing that prior to engaging in a major exercise or operation, military forces should receive essential training and support).

contracting detachments were fully prepared when onboarding. In the next paragraph, this Article will discuss experience and how the lack of the same can impact contract administration in a contingency environment.

Contract administration training and turnover were other obstacles that contracting personnel looked to navigate while operating at Doña Ana Village.⁹⁶ A lack of Contract Administration Services (CAS)/LOGCAP experience from the CORS can and will make day-to-day operations more challenging. During any humanitarian initiative, a lack of personnel with the requisite training will force acquisition teams to fill gaps and increase the workloads of those who are appropriately trained.⁹⁷ This was not the case in Doña Ana Village, as each acquisition team was adequately trained and equipped to provide real-time and accurate contractual oversight.⁹⁸ To accomplish this and prepare personnel for deployment to Doña Ana Village, the Quality Assurance and LOGCAP representatives from the 418th Contracting Support Brigade (901st Contracting Battalion) provided in-person training to both the acquisition team and key stakeholders.⁹⁹ This was accomplished through providing desk-side briefs and physical tours of the various site locations in Doña Ana Village. Additionally, time was allocated for personnel to provide feedback on current battle plans while allowing each departing soldier time to work on the development of improved mission standard operating procedures.

The preparation, personal resources, and shared connections were well received, greatly appreciated by the incoming contracting detachments, and made for seamless transitions. Transitions are often challenging and stressful; however, at Doña Ana Village, the process articulated above allowed for inbound contracting detachments to receive and experience immediate and transferrable intel and allowed incoming

⁹⁶ See generally U.S. DEP'T OF DEF. INSPECTOR GEN., DODIG-2022-114, SPECIAL REPORT: LESSONS LEARNED FROM THE AUDIT OF DOD SUPPORT FOR THE RELOCATION OF AFGHAN NATIONALS 14 (2022) (explaining that the lack of clear communication procedures and particularized responsibilities negatively impacted the administration of Operation Allies Welcome).

⁹⁷ Cf. FAR 7.103(r) (highlighting that it is the responsibility of agency heads or designees to “[m]ake a determination, prior to the issuance of . . . services involving the analysis and evaluation of proposals . . . that a sufficient number of covered personnel with the training and capability to perform an evaluation . . . are readily available within the agency . . .”).

⁹⁸ See *902nd CBN Soldiers Complete Fort Bliss OAW Support*, supra note 43 (describing the efficiency of Contracting Officers and the contract administration services team in implementing training, oversight, and management at Doña Ana Village).

⁹⁹ See generally *id.* (crediting the 418th Contracting Support Brigade with supporting the U.S. Department of State’s mission to relocate SIV applicants and indicating that the Brigade provided for the “early integration” of essential contracting support across each of the military installations involved in Operation Allies Welcome).

leaders adequate time to assess the capabilities of the teams on the ground.

III. THE SIGNIFICANCE OF LEGAL COUNSEL

Creating a team of well-prepared and trained personnel is key to establishing a well-functioning humanitarian aid plan.¹⁰⁰ A key team member should be a KJA, primarily when operating in a “contingency environment.”¹⁰¹ In the following paragraphs, this Article will examine in detail the KJA’s responsibilities and highlight the issues of scope determinations and how this was resolved during their rotation. Last, this Article will discuss what processes the KJA implemented to foster trust and build team cohesion. Ultimately, it will be established how incorporating a KJA into a team of acquisition professionals will benefit any future humanitarian effort and also serve to mitigate risks.

During the deployment to Doña Ana Village, the KJA played a significant role in task order oversight and worked closely with the ACO to enlighten the Requiring Activity on government contracting issues. Another area in which the KJA was instrumental was advising senior leaders on statutory requirements and DOD policies. Here, the KJA briefed stakeholders daily on contract principles, fundamentals of 10 U.S.C. § 401, current and evolving policy, and provided risk assessments to decision-makers. The success of this contingency operation was paramount, and with internal and external scrutiny in play, the focus of many senior leaders remained firmly on accomplishing the mission. In light of the demanding expectations and critical observations of political and public authorities, the primary responsibility of delivering difficult updates regarding contract compliance often fell on the KJA.¹⁰²In the

¹⁰⁰ See, e.g., *Humanitarian Assistance*, SOUTHCOM, <https://www.southcom.mil/Commanders-Priorities/Strengthen-Partnerships/Humanitarian-Assistance/> (last visited Mar. 27, 2023) (emphasizing the need to train and effectively prepare the U.S. Armed Forces and its partners to render humanitarian aid in disaster relief situations).

¹⁰¹ See 10 U.S.C. § 101(a)(13)(A)–(B) (defining a “contingency operation” as a military operation that is designated by the Secretary of Defense . . . in which members of the armed forces are . . . involved in military actions, operations, or hostilities against an enemy of the United States . . . or [which] results in the call . . . on active-duty members of the uniformed services.” There are generally considered to be nine major types of contingency operations: (1) show of force and demonstration; (2) noncombatant evacuation operations; (3) rescue and recovery operations; (4) strikes and raids; (5) peacemaking; (6) unconventional warfare; (7) disaster relief; (8) security to assistance surges; and (9) support to U.S. civil authorities. *Chapter 7 Contingency Operations*, GLOB. SEC., <https://www.globalsecurity.org/military/library/policy/army/fm/5-71-100/Ch7.htm>, (last visited Apr. 14, 2023).

¹⁰² See generally CONTRACTING OFFICER’S REPRESENTATIVES GUIDEBOOK, *supra* note 72, at 160 (suggesting that contractors who fail to comply with agreed upon contract terms may violate “Occupational Safety and Health Administration, Environmental Protection Agency, Department of Labor, and other pertinent regulations[.]”).

coming paragraphs, this Article will highlight several of these issues adjudicated by the KJA.

A. *Scope Determination*

The issue of scope determination presented itself frequently during Operation Allies Welcome.¹⁰³ A scope determination is an examination of a proposed modification, unilateral or bilateral, by the KO to determine if the modification is permissible under the contract.¹⁰⁴ In every such situation, the KJA provided input. For instance, during the operation, requests outside the standard task ordering process were often haphazardly made to contractors, requesting them to perform duties outside the scope of work they were contracted to complete.¹⁰⁵ Some of these requests extended beyond the scope of the initially considered competition. Here, the KJA was able to explain that the Government cannot unilaterally expand the scope of the contract because it violates the Competition in Contracting Act as well as improperly obligates funding in ways not allowed by Congress.¹⁰⁶ Further, the KJA advised of the consequences, which could include protracted and costly litigation, payment of attorney's fees and interest, as well as compounded use of government resources. Adjudication of these issues, like others, took time. However, the KJA found it judicious to advise the acquisition team, senior leaders, and stakeholders on the importance of acting within their authority.¹⁰⁷

Competent counsel offered by the KJA was appreciated, and ultimately, trust was built and established between the KJA, key stakeholders, and senior leaders. To further develop this rapport, the ACO and KJA implemented and participated in various working groups; took time to explain their various roles and limitations; and provided insight on the damages that may occur if approaches were not permitted within the bounds of the acquisition team's existing contracts. These collaborative working groups also helped to establish a firm understanding of the task

¹⁰³ *Zodiac of North America, Inc.*, B-414260 at 5 (2017) (holding that a material difference exists when "the modification substantially changes a contract that the original and modified contracts are essentially and materially different").

¹⁰⁴ *See id.* at 4–5.

¹⁰⁵ *See generally Matter of Makro Janitorial Servs., Inc.*, B-282690 (1999) ¶ 7, 12 (indicating that a task order for housekeeping is outside the scope of an IDIQ contract for preventive maintenance).

¹⁰⁶ The Competition in Contracting Act is a public law which was enacted to encourage competition for awarding government contracts. *See* Competition in Contracting Act of 1984, 41 U.S.C. § 253. The purpose was to increase the number of competitors and to increase savings through lower, more competitive pricing. *Id.* *See also* FAR Subpart 6.1.

¹⁰⁷ *See generally* 31 U.S.C. § 1517 (indicating that it is not permissible for an employee or officer of the U.S. Government from making an "expenditure or obligation" beyond their appointment).

ordering process.¹⁰⁸ Ultimately, such working groups proved to be successful and resulted in minimal deviation and improved cohesion amongst senior leaders and stakeholders. This knowledge-sharing process was also offered to the Requiring Activity, which benefitted from a shared understanding of the various aspects of government contracting. In the end, this open forum allowed for team cohesion and an opportunity for all to appreciate government contracting.

B. Proper Use of Appropriated Funds

Misunderstanding of the use of appropriate funding sources was a routine issue throughout the administration of Operation Allies Welcome. Appropriations are designated for specific line items, and misuse could result in an Anti-Deficiency Act Violation.¹⁰⁹ In the coming paragraphs, this Article will analyze numerous funding sources and discuss the issues and corresponding answers to problems faced when determining the appropriate methods through which to fund various initiatives in Doña Ana Village.

A reoccurring debate during Operation Allies Welcome arose when distinguishing humanitarian assistance from non-humanitarian requirements.¹¹⁰ While deployed, the goal was to ensure that the source of funding used was either Operation and Maintenance funds, Presidential Drawdown Authority, Department of State Reimbursement, or OHDACA.¹¹¹ In context, support for purchasing winterized jackets,

¹⁰⁸ See generally FAR 16.505 (2023) (describing, in detail, the task ordering process for individual and multiple-award contracts).

¹⁰⁹ Antideficiency Act, 31 U.S.C. § 1341(a)(1); *Antideficiency Act Violation*, BUDGET COUNS., <https://budgetcounsel.com/cyclopedia-budgetica/cb-antideficiency-act-violation/#:~:text=The%20Antideficiency%20Act%20prohibits%20Federal,both%20administrative%20and%20criminal%20penalties> (last visited Feb. 24, 2023).

¹¹⁰ See 10 U.S.C. § 401(e) (2013) (“In this section, the term ‘humanitarian and civic assistance’ means any of the following: (1) Medical, surgical, [and] dental . . . care provided in areas of a country that are rural or are underserved by medical, surgical, [and] dental . . . professionals, respectively, including education, training, and technical assistance related to the care provided, (2) Construction of rudimentary surface transportation systems, (3) Well drilling and construction of basic sanitation facilities, and (4) Rudimentary construction and repair of public facilities.”); see also *The Most Needed Types of Humanitarian Aid*, LIFE USA (Dec. 9, 2022), <https://www.lifeusa.org/post/the-most-needed-types-of-humanitarian-aid>.

¹¹¹ See *Operations and Maintenance (O&M) Funds*, DEF. ACQUISITION UNIV., <https://www.dau.edu/acquipedia/pages/ArticleContent.aspx?itemid=339>, (last visited on Apr. 14, 2023) (listing the types of expenses funded by Operations and Maintenance appropriations as including “DD civilian salaries, supplies and materials, maintenance of equipment, certain equipment items, real property maintenance, rental of equipment and facilities, food, clothing, and fuel.”); see also Memorandum from Joseph R. Biden, U.S. President, to the Secretary of State on the Delegation of Authority Under Section 506(a)(2) of the Foreign Assistance Act of 1961 (July 23, 2021) [hereinafter Memorandum from Joseph R. Biden] (available online at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/23/memorandum-for-the-secretary-of-state-on-the-delegation-of-authority->

temporary housing, and medical supplies can be logically connected to a humanitarian function.¹¹² In contrast, the need for the internet, civilian law enforcement, and recreational resources may differ.¹¹³ In this instance, for non-humanitarian support the KJA was required to advise the Commander of NORTHCOM through Task Force Iron Horse (2nd Armored Brigade Combat Team, 1st Armored Division, Fort Bliss, Texas) to meet the support requests via the Presidential Drawdown Authority or reimbursable support.¹¹⁴ Despite the regulatory restrictions and limitations on funding, the KJA was able to confidently and consistently advise on such nuanced issues through established relationships with personnel representing DSCA and a firm understanding of the resettlement support services sought. Given the magnitude of the humanitarian effort, it was logistically impossible to provide oversight on every purchase requested during the Operation's pendency. To obtain a better sight picture and gain more oversight on these issues, the KJA and counsel from the 1st Armored Division legal office enforced continuity of legal advice. Together, they routinely discussed purchase requests and the legality of the same. This uniform approach allowed the legal counsel assisting with the initiative to speak with one voice and prevent unauthorized purchases. A key point to highlight is the significance of avoiding snares such as unauthorized purchases.¹¹⁵ Unauthorized commitments, if not ratified or corrected, could result in an Anti-Deficiency Act Violation.¹¹⁶ In such situations, agencies determined to have violated the Anti-Deficiency Act must report the violation to the President, Congress, and simultaneously transmit a copy of the report to

under-section-506a2-of-the-foreign-assistance-act-of-1961/) (authorizing the use of the Presidential Drawdown Authority in the amount of \$200,000,000 to provide assistance for refugees, victims of conflict, and other at-risk persons in Afghanistan); Global Community Liaison Office, *Evacuation Benefits Overview and Allowances*, U.S. DEPT. OF STATE, <https://www.state.gov/family-liaison-office/crisis-management/evacuation-benefits-allowances> (last visited Apr. 14, 2023) (reimbursing Afghan guests for normal family living expenses "to help offset added expenses incurred as a result of . . . their evacuation of Afghanistan); U.S. DEF. SEC. COOP. AGENCY, *supra* note 60, at C12.1.1 ("OCDACA-funded activities are designed to . . . reduce . . . human suffering, disease, hunger, and privation, particularly in regions where humanitarian needs [] pose major challenges to stability, prosperity, and respect for universal values.").

¹¹² See *The Most Needed Types of Humanitarian Aid*, *supra* note 110.

¹¹³ U.S. DEF. SEC. COOP. AGENCY, *supra* note 60, at C12.3.4.1. The DOD interprets "humanitarian assistance" as those directly providing essential human services to relieve or reduce civilian populations' suffering. *Id.* Additionally, the primary purpose of DOD-provided humanitarian assistance is to alleviate human suffering and privation. *Id.*

¹¹⁴ See Memorandum from Joseph R. Biden, *supra* note 111; 22 U.S.C. § 2318(a)(2)(A) (2012).

¹¹⁵ See 31 U.S.C. § 1517(a); 31 U.S.C. § 1341(a)(1)(A).

¹¹⁶ *Antideficiency Act Violation*, *supra* note 109; 31 U.S.C. § 1517(a); 31 U.S.C. § 1341(a)(1)(A).

the Comptroller General.¹¹⁷ Even more impactful is the personal financial ability that needs to be assumed.¹¹⁸

In sum, determining the appropriate funding source is paramount. Also, avoiding unauthorized expenditures or obligations can have significant consequences, including civil and criminal penalties for government employees, soldiers, and civilians.¹¹⁹ Moving forward, Operation Allies Welcome should serve as a goalpost, so that future acquisition professionals can understand funding sources and work to avoid the commitment of an unauthorized expenditure and the public scrutiny and personal liability associated with such a mistake.¹²⁰

IV. THE CONCLUSION OF OPERATION ALLIES WELCOME AT DOÑA ANA VILLAGE

As quickly as a Doña Ana Village was established as a haven for thousands of refugees, it was just as quickly shut down.¹²¹ Nevertheless, what seems like the flip of a light switch for most was not as easy for contracting personnel. In government contracting, there are generally two steps involved in concluding a contractual action—descope and contract closeout.¹²² Next, this Article will discuss descoping and what that meant for Doña Ana Village and its guests. Then, this Article will explore this multi-million-dollar contingency operation's final administrative closeout operation.¹²³ Ultimately, given the complexity of this operation, the lessons learned from the closeout and descope of Doña Ana Village should be analyzed further to develop a streamlined approach to use when concluding humanitarian aid efforts.

A. *Descoping the Operation*

“Descoping” is the process of removing and descaling, partially or totally, some parts from the original awarded “Scope of Work.”¹²⁴ At Doña Ana Village, and in most instances, the performance work statement, a requirement in performance-based contracts, accounts for descope operations (e.g., provisions directing descope operations were built into

¹¹⁷ 31 U.S.C. § 1517(b).

¹¹⁸ *See id.*; *see also* 31 U.S.C. § 1349; 31 U.S.C. § 1350.

¹¹⁹ *See* 31 U.S.C. § 1349; *see also* 31 U.S.C. § 1350.

¹²⁰ *See* 31 U.S.C. § 1517(a); *see also* 31 U.S.C. § 1341(a)(1)(A), (B).

¹²¹ *Last Group of Afghan Refugees at Fort Bliss Left This Weekend*, *supra* note 41.

¹²² *See generally* FAR 4.804-5(a) (specifying the contract administration office's “[p]rocedures for closing out contract files”).

¹²³ Rivera et al., *supra* note 27.

¹²⁴ *See* FAR 16.504 (2019); *see also* NSDV Firm, *Descoping of Work*, LINKEDIN (Aug. 4, 2022), <https://www.linkedin.com/pulse/descoping-work-nsdvfirm/> (“[D]escoping describes the removal of all or part of the works awarded to a Contractor or Subcontractor, by an Employer or Contractor respectively.”).

the original contract).¹²⁵ As descopeing was an anticipated action, there was no surprise that Operation Allies Welcome would ultimately end.¹²⁶ Here, once the Commander of NORTHCOM provided guidance that Doña Ana Village would be receiving no additional Afghan guests, plans commenced to descope and close out this Operation.

In order to accomplish this, roles were established, and work was assigned. Here, the ACO conducted site walks of the areas to be descoped with the stakeholders, senior leaders, and contractors to better understand the magnitude of this endeavor.¹²⁷ At the same time, the KJA focused on the appropriate disposition of OHDACA- secured property.¹²⁸ While the ACO's role had more discretion, there was more rigidity with the tasks assigned to the KJA. During Operation Allies Welcome, there was a bright line rule: DOD components may not absorb OHDACA-funded equipment or supplies into DD stock.¹²⁹ As previously stated, as a matter of law, the DOD is only permitted to use OHDACA funds to provide humanitarian assistance.¹³⁰ Improper disposition of the property accumulated in Doña Ana Village could result in a statutory violation.¹³¹ To avoid this snare, the KJA was required to advise the Commander of NORTHCOM on various line items, with the decision point of whether or not a humanitarian purpose for the supplies still existed before declaring the items as excess.¹³² Though this was time-consuming, the KJA and contracting detachment were able to properly adjudicate the property and equipment at Doña Ana Village, while keeping the primary goal—the safety of guests and the sustainment of life support systems—at the forefront of the Operation's closeout.¹³³

¹²⁵ See generally FAR 37.601(b) (“Performance-based contracts for services shall include . . . [a] performance work statement (PWS) . . . [w]hen used, the performance incentives shall correspond to the standards outlined in the contract . . .”).

¹²⁶ Cf. Press Release, U.S. Dep't. of Homeland Security, Operation Allies Welcome Announces Departure of Last Afghan Nationals from Fort Bliss, Texas (Dec. 31, 2021) (available online at <https://www.dhs.gov/news/2021/12/31/operation-allies-welcome-announces-departure-last-afghan-nationals-fort-bliss-texas>) (citing that “[t]he end of operations at Fort Bliss marks . . . an important step in [the] mission to safely and successfully resettle our Afghan allies.”).

¹²⁷ See *902nd CBN Soldiers Complete Fort Bliss OAW Support*, *supra* note 43.

¹²⁸ See generally U.S. DEF. SEC. COOP. AGENCY, *supra* note 60, at C12.1.2 (outlining OHDACA's humanitarian assistance programs and funding stipulations).

¹²⁹ See generally *id.* at C12.6.3 (noting that any excess OHDACA funds that are no longer required for project execution should be returned to the Defense Security Cooperation Agency as soon as possible for reallocation).

¹³⁰ *Id.* at C12.3.4.1 (citing 10 U.S.C. § 2561(a)).

¹³¹ See 31 U.S.C. § 1517(b).

¹³² See generally *id.* (describing the process of what happens to excess supplies that were made available for humanitarian relief purposes).

¹³³ See Operation Allies Welcome Announces Departure of Last Afghan Nationals from Fort Bliss, Texas, *supra* note 126; *902nd CBN Soldiers Complete Fort Bliss OAW Support*, *supra* note 43.

B. Contract Closeout

A contract closeout occurs when a contract has met all the terms, all administrative actions have been completed, all disputes settled, and final payment has been made.¹³⁴ This includes those administrative actions that are contractually required, (i.e., property, security, patents, and royalties).¹³⁵

During the contract closeout stage, an issue that was at the forefront of the acquisition team's mind was that of cost savings.¹³⁶ Before receiving any guidance from the KJA or ACO, senior leaders and stakeholders established a plan to summarily delete line items, terminate all the task orders, and order the shutdown of various sites within Doña Ana Village. Though at first blush, this appears to be a prudent and logical approach to pursue during the closeout of a contract, there were serious issues to address prior to making this determination. In this scenario, the KJA and other acquisition team members emphasized to senior leaders and stakeholders that while they might view the complete cessation of a project as a cost-saving measure, it would be better acknowledged as a case of cost avoidance. Here, it was important for the KJA to advise that if the United States Government elected to close the contract out in this manner, it might be forced to assume additional costs and fees.¹³⁷ Essentially, costs such as those associated with the immediate removal of personnel, equipment, materials, and fees associated with potential early termination of subcontracts could result in the government not obtaining a value, as it may not have been something initially contemplated in the existing contract.¹³⁸ In this scenario, the KJA offered a different viewpoint to contracting professionals, suggesting that they collaborate with the Requiring Activity to assess the mission and remaining requirements. Rather than hastily terminating operations, decisions should be made in line with the terms and conditions of the existing contract, with contract closeout costs considered as part of the overall analysis. The KJA and ACO's opinion was that this was the best way to close-out the mission and realize an actual value. Eventually, this approach was adopted and, in turn, resulted in the United States Government saving hundreds of thousands of dollars.

Descoping an effort and contract closeout is sometimes just as arduous as contract formation. Here, the contract administration team

¹³⁴ See FAR 4.804-5 (2019).

¹³⁵ *Id.*

¹³⁶ See *generally id.* ("At the outset of this [closeout] process, the contract administration office must review the contract funds status . . .").

¹³⁷ See FAR 31.205-42 (2019).

¹³⁸ See *generally id.*

at Doña Ana Village was able, through open lines of communication, hard work, and a commitment to succeed, to ensure that the descope and closeout process was appropriately conducted and in line with the statutory and regulatory authority. This simple and collaborative approach can be adopted when developing plans for future humanitarian and civic aid missions.

V. CREATING THE BLUEPRINT

Acquisition planning is a mandatory prerequisite in government contracting.¹³⁹ As a goal, acquisition personnel should strive to think smarter—not harder—and build upon the lessons learned from previous solicitations, contracts, and in this case, humanitarian and civic aid operations. As discussed previously, Operation Allies Welcome was the first and largest non-combatant evacuation and haven operation ever undertaken.¹⁴⁰ While there were many obstacles and pitfalls to overcome throughout the Operation, it ultimately resulted in various lessons learned. This Section will highlight key points for acquisition practitioners planning to support a future humanitarian effort in the following paragraphs. Ultimately, these high-level points should serve as a starting point for creating a government contracting blueprint for humanitarian and civic assistance.

As difficult as it may be, it is imperative to plan as far in advance as possible. However, events that trigger a humanitarian operation will likely happen at a moment's notice. As such, governments should consider establishing a specific contracting department that monitors global phenomena and keeps a watchful eye on market conditions. This will allow for quicker response times, better intelligence on issues involved, and the ability to assist a Requiring Activity or customer in developing their specific needs. The goal of any acquisition is to seek competition so that the government can receive the best value possible. When planning for a humanitarian operation, one should remember the significance of always striving for the best value while maintaining fairness and equity (as for the United States—remember government contracts operate with taxpayer money). Lastly, understand that time will be scarce and resources, from the outset, will be sparse. In order to stay ahead of this, contracting professionals should maintain relationships with various industries that can support a humanitarian operation.¹⁴¹ This can be accomplished by hosting industry days where stakeholders can discuss scenarios, assess capabilities, or submit requests for information from

¹³⁹ FAR 7.102(a) (2019).

¹⁴⁰ Rivera et al., *supra* note 27.

¹⁴¹ See generally FAR 15.201(a)–(c) (2019).

mission partners to assess proficiency.¹⁴² Ultimately, this will ensure that when the time comes, an agency is appropriately synopsisizing requirements, which will result in fruitful competition.¹⁴³

Increase knowledge management. If there is one thing Operation Allies Welcome taught acquisition professionals on the ground, it is that there is always something to learn. Throughout Operation Allies Welcome, contracting detachments rotated in and out of Doña Ana Village, and at the beginning, information was not equally shared. After this was discovered, each detachment member was required to create logs and contact sheets and also tasked to maintain a database with up-to-date resources to streamline information. Though somewhat time-consuming for the first team on the ground to complete, it became easier as time progressed, and products were further developed. A similar approach can be created and established as a requirement before sending acquisition professionals forward to support a contingency or humanitarian aid effort. If done correctly and in advance, these efforts would create a knowledge management infrastructure that could be shared across platforms, which would work to ensure continuous knowledge transfers.

When the time comes and disaster strikes, strive to define requirements in clear, concise language. Operation Allies Welcome showed the world the capabilities of United States based contractors and acquisition professionals. As such, when developing requirements, Requiring Activities should feel confident in contractors' abilities and thus focus on specific work outcomes and ensure they are measurable to the greatest extent practicable. Contractor performance assessments (the process known as "quality assurance") should focus on outcomes rather than on contractor processes, if operating under a performance-based service contract. Focus on the insight into the Contractor's performance, not necessarily the oversight. Also, governments should establish specific acquisition teams to serve as liaisons to senior leaders, stakeholders, and the Requiring Activity. This particular team would have a similar function as the COR but with different reporting requirements. Another consideration is that this team should be equipped with a practicing Contract and Fiscal Law Judge Advocate. The attorney would play a considerable role in explaining operation conditions and providing advice and counsel on the fundamentals of government contracting. If properly aligned, the attorney's counsel would not only streamline the actual administration stage of the contract but would also work to mitigate risks.

Training is an essential tool used to maximize the success of any given effort. Governments should plan for disasters and stay abreast of evolving

¹⁴² See generally *id.*

¹⁴³ Cf. *id.* at 15.201(f) (indicating that the exchange of information among various industries may "avoid creating an unfair competitive advantage").

contingency contracting laws and regulations. Furthermore, it is pivotal to identify data sharing platforms, and dedicated workstations before a disaster strikes and routinely simulate scenarios to develop multi-functional acquisition teams that are prepared to deploy at a moment's notice.

VI. CONCLUSION

Acquisition professionals operating in a contingency environment or supporting a humanitarian mission have the advantage of building upon existing knowledge and experience rather than starting from scratch when providing humanitarian and civic assistance to countries or regions in need. Instead of reinventing the wheel, endeavors such as Operations Allies Welcome should be carefully analyzed to provide a comprehensive blueprint for future humanitarian efforts, with a particular emphasis on understanding the legal, policy, and procedural requirements stipulated in 10 U.S.C § 401.¹⁴⁴

This analysis is instrumental in establishing the necessary framework for effectively administering and operating within the realm of humanitarian missions. In addition, the critical role of acquisition professionals, especially the KJA, cannot be overstated. These professionals should receive specialized training to become effective communicators and possess the ability to operate independently. Effective communication plays a vital role in establishing coordination and collaboration among diverse stakeholders involved in humanitarian operations, while the capability to work autonomously empowers acquisition professionals to respond swiftly to rapidly evolving situations and to make informed decisions in time-sensitive environments. By honing these skills, the KJA and other acquisition professionals can enhance their effectiveness and contribute to the successful execution of future humanitarian missions.

As with many areas of practice, meticulous planning and prior preparation are key in humanitarian endeavors. Short-notice missions and unprecedented disasters are inevitable occurrences that require the United States and other nations to remain prepared to render aid and support within any window of time. The ability to mobilize resources, establish logistical frameworks, and implement effective strategies is crucial in addressing humanitarian crises efficiently.

Ultimately, this Article, accompanied by other reputable sources covering Operation Allies Welcome, should serve as a valuable secondary resource, providing a foundational level of understanding for acquisition

¹⁴⁴ 10 U.S.C § 401 (dictating the authority of the U.S. military to carry out “[h]umanitarian and civic assistance activities in conjunction with authorized military operations”).

professionals and stakeholders involved in humanitarian efforts. By leveraging the lessons and insights from such endeavors, acquisition professionals can enhance their capabilities and contribute to the successful execution of future humanitarian missions.