

CHAPTER 16

CONTINGENCY CONTRACTOR PERSONNEL

REFERENCES

1. U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 225.74 [hereinafter DFARS], *with its accompanying clause at DFARS 252.225-7040*; U.S. DEP'T OF DEFENSE, DEFENSE PROCEDURES, GUIDANCE, AND INFORMATION 225.74 [hereinafter DFARS PGI]; DFARS Class Deviation 2015-O0009, *Contractor Personnel Performing in the United States Central Command Area of Responsibility*, 12 Jan. 2015, *available at* <http://www.acq.osd.mil/dpap/policy/policyvault/USA000007-15-DPAP.pdf> [hereinafter DFARS Class Deviation 2015-O0009].
2. U.S. DEP'T OF DEFENSE, INSTR. 3020.41, OPERATIONAL CONTRACT SUPPORT (20 Dec. 2011) [hereinafter DoDI 3020.41].
3. JOINT PUBLICATION 4-10, OPERATIONAL CONTRACT SUPPORT (16 Jul. 2014) [hereinafter JP 4-10].
4. U.S. DEP'T OF DEFENSE, INSTR. 3020.50, PRIVATE SECURITY CONTRACTORS (PSCs) OPERATING IN CONTINGENCY OPERATIONS, HUMANITARIAN OR PEACE OPERATIONS, OR OTHER MILITARY OPERATIONS OR EXERCISES (1 Aug. 2011) [hereinafter DoDI 3020.50].
5. 32 CFR Part 153, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS (2006).
6. Army Sustainment Command Contractors on the Battlefield Webpage, *located at* <http://www.aschq.army.mil/home/BattlefieldResourceLibrary.aspx> (containing links to contingency contractor personnel related materials and websites).
7. Assistant Sec'y of the Army (Acquisition, Logistics and Tech.), Contingency Contracting and Contractor on the Battlefield Library, *available at* <https://www.alt.army.mil/portal/page/portal/oasaalt/SAAL-ZP-Contingency-Contracting> (containing links to materials relevant to contingency contracting; deployments; contingency contractor personnel; suggested contracting clauses; contingency contracting articles; etc.).
8. CENTCOM Contracting Command website, *located at* <https://www2.centcom.mil/sites/contracts/Pages/Default.aspx> (containing training materials, checklists, policy documents, acquisition instructions, and contract clauses).
9. U.S. DEP'T OF ARMY, REG. 715-9, OPERATIONAL CONTRACT SUPPORT PLANNING AND MANAGEMENT (20 Jun. 2011) [hereinafter AR 715-9].
10. U.S. DEP'T OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP) (28 Dec. 2012) [hereinafter AR 700-137].
11. See Section IX below for additional references.

I. INTRODUCTION

Throughout the history of U.S. military operations, contractors have provided goods and services that multiply the effectiveness of our fighting force. By taking on responsibilities that would otherwise distract soldiers from the main effort, they free up uniformed personnel to focus on fighting and supporting the troops in combat. However, this reliance has grown over the years to the extent that there are often as many contractors on the battlefield as there are uniformed personnel. Contractor roles have also expanded, now including such tasks as personnel and static security. No matter what type of unit a deploying Judge Advocate is advising, it is almost certain that the unit will rely on contracted support for at least some functions. Accordingly, it is paramount that Judge Advocates understand the relationship between DoD and contractor personnel while conducting contingency operations.

II. TYPES OF CONTRACTS THAT SUPPORT CONTINGENCY OPERATIONS.

A. General. Contingency operations require many contracts to support full operations. These may be let with local contracting personnel (for smaller requirements). However, many of the contracts required are too large and complicated to be executed within theater. Accordingly, some contracts are awarded by CONUS activities to

support operations overseas. Still others are awarded based on the requirement to support specific systems (weapons or otherwise) wherever they may be used. All of these contracts may support a contingency operation, but they are grouped into three main categories for purposes of understanding the contracting authorities used to procure the various services.

B. External Support Contracts.¹

1. External Support Contracts are prearranged contracts let by authorities outside the contingency operating area, but which support the effort. They are called “external” because the authority used to enter into these contracts is derived from authorities other than those present in theater. Examples include the Army Logistics Civil Augmentation Program (LOGCAP), the Air Force Contract Augmentation Program, the Navy Construction Capabilities Contract, Civil Reserve Air Fleet contracts, and war reserve materiel contracts. Support under external support contracts is often designated as “essential contractor services” under the contract.²

2. Contract personnel under external support contracts are primarily either US Citizens or TCNs. However, external support contractors often hire local national personnel under subcontracts.

C. Systems Support Contracts.³

1. Systems Support Contracts are contracts awarded by a Military Departments and USSOCOM contracting offices’ supporting systems program executive offices (PEOs) and PM offices for the provision of technical support, maintenance, and, in some cases repair parts for selected military weapon and support systems. For example, a system support contract for Mine Resistant Ambush Protected (MRAP) vehicles would be awarded when the vehicles are purchased and would support maintenance, modification, troubleshooting, and operation requirements. They provide essential support to specific systems throughout the system’s life cycle (including spare parts and maintenance for key weapons systems, command and control infrastructure, and communications systems) across the range of military operations.

2. Contract personnel under systems support contracts normally have high levels of technical expertise, and are hired to support specific military systems. These are often U.S. Citizens and are Contractors Authorized to Accompany the Force (CAAF) in most cases. Support under systems support contracts is often designated as “essential contractor services” under the contract.⁴

D. Theater Support Contracts.⁵ Contracts that are awarded by contracting officers in the operational area serving under the direct contracting authority of the Service component or designated SCO for the contingency operation. During contingency operations, these contracts are normally executed under expedited contracting authority and provide supplies, services, and minor construction from commercial sources generally within the operational area. Theater support contracts provide goods, services, and minor construction, usually from the local vendor base, to meet the immediate needs of operational commanders. Most of these contracts do not provide essential contractor services; however, there are exceptions such as fuel and transportation support.⁶

E. Restrictions.

1. Functions and duties that are inherently governmental are barred from private sector performance.⁷ Inherently governmental functions are those that involve the exercise of governmental discretion, including decisions to use offensive force, commit or expend government funds or equipment, or issue grants. Such discretion must be exercised by government personnel only.

2. Contractor personnel shall not be supervised or directed by military or government civilian personnel.⁸ Contractor employees should be supervised by the contractor’s supervisors and should perform pursuant to the statement of work (SOW) or performance work statement (PWS) in the contract. If military or government

¹ JOINT PUBLICATION 4-10, OPERATIONAL CONTRACT SUPPORT (16 Jul. 2014), at I-7. [hereinafter JP 4-10]

² See DEPARTMENT OF DEFENSE INSTRUCTION 3020.41, OPERATIONAL CONTRACT SUPPORT (2011) [hereinafter DoDI 3020.41], encl. 2, para 2(c).

³ JP 4-10, *supra* note 1.

⁴ See DoDI 3020.41, *supra* note 2 at encl. 2, para 2(c).

⁵ JP 4-10, *supra* note 1.

⁶ See *supra* note 2.

⁷ *Id.* at encl. 2, para. 1(e).

⁸ *Id.*; See also FAR Subpart 37.104, Personal Services Contracts.

personnel are directing the contractor’s work, it may be a prohibited personal services contract, or in violation of the terms and conditions described in the underlying contract.

III. CATEGORIES OF CONTRACTORS

A. General.

1. The contract is the only legal basis for the relationship between a contractor and the U.S. Government.⁹ As such, the contract is the primary resource one should consult on issues relating to contractor support and operations in theater. Known generally as “contingency contractor personnel,” these are individual contractors, individual subcontractors at all tiers, contractor employees, and sub-contractor employees at all tiers under all contracts supporting the Military Services during contingency Operations. See DODI 3020.41, Glossary, Part II (definitions). However, they are not all afforded the same legal status, access to government-provided benefits, and access to government property (installations, housing, etc.).

2. Types of contingency contractors. A contract may generally characterize a contractor’s relationship to the U.S. government into one of four broad categories, based on the terms included in their respective contracts: (1) Contractors Authorized to Accompany the Force (CAAF); (2) DoD contractors not accompanying the U.S. Armed Forces in the CENTCOM AOR; (3) DoD contractors not accompanying the U.S. Armed Forces outside the CENTCOM AOR; and (4) Non-DoD contractors (e.g., Department of State, U.S. Agency for International Development, etc.).

B. Contractors Authorized to Accompany the Force (CAAF). CAAF are afforded the highest amount of access to government furnished benefits and resources, and carry the most protected legal status possible for civilians. These contractors are imbedded in units, live in government housing on the compound or camp, and perform duties often alongside uniformed personnel. They are often highly skilled, and many are former members of the military. Though most CAAF contractors accompany the force into the CENTCOM AOR, they may also accompany the U.S. Military on other contingency operations, such as Haiti.

C. DoD Contractors Not Accompanying the Armed Forces in the CENTCOM AOR. Not all contractor personnel in a designated operational area are or will be CAAF, even though they are operating in the CENTCOM AOR and often alongside DOD employees.

D. DoD Contractors Not Accompanying the Armed Forces Outside CENTCOM AOR. Some contractors may be hired to perform work outside the United States in support of a contingency operation, but will not actually go into the CENTCOM AOR (for example, to support operations in Haiti). DFARS 225.301-4 requires use of the clause at FAR 52.225-19 when defense contractors will (a) not accompany the Armed Forces and (b) perform in a designated operational area or support a diplomatic or consular mission outside the United States and outside the CENTCOM AOR.

E. Non-DoD Contractors in a Contingency Environment. Contractors of other government agencies, such as the Department of State, are governed by the FAR Part 25.3 and its accompanying clause at FAR 52.225-19 as well as other agency specific regulations and directives.

F. Summary.

IF A CONTRACTOR IS A:	THEN INSERT THE CLAUSE AT:
Contractor Authorized to Accompany the Force (CAAF)	DFARS 252.225-7040
DoD Contractor Not Accompanying the Armed Forces in the CENTCOM AOR	DFARS Class Deviation 2015-O0009
DoD Contractor Not Accompanying the Armed Forces Outside the U.S. and Outside the CENTCOM AOR	FAR 52.225-19
Non-DoD Contractor	FAR 52.225-19

⁹*Id.*, encl. 2, para. 1(d).

IV. LEGAL STATUS.

A. CAAF vs. Non-CAAF. Civilians accompanying the force are generally defined as persons who accompany the Armed Forces without actually being members thereof, and are responsible for the welfare of the armed forces.¹⁰ CAAF status is conferred by including DFARS Clause 252.225-7040 in their contracts. The contractors authorized to accompany the force (CAAF) must be provided a DD Form 489 (Geneva Conventions Identity Card for Persons who Accompany the Armed Forces) to identify themselves as CAAF.¹¹ These individuals are usually U.S. citizens, but may be third-country nationals (TCNs) or local nationals (LNs). If captured during armed conflict, CAAF are entitled to POW status. Non-CAAF will not qualify for POW status under GPW.

B. Contractors may support operations through indirect participation, such as by providing communications support, transporting munitions and other supplies, performing maintenance on military equipment, and other logistic services.¹² Contractors who “engage in hostilities” risk being treated as combatants (and thus being targeted, etc.). Further, they risk being treated as “unprivileged belligerents” (and thus as war criminals).¹³

C. Use of Deadly Force. All contingency contractors are entitled to utilize deadly force in self-defense. All security contractors are authorized to use whatever force is necessary to fulfill their contracts. However, any improper use of force could expose contractor employees to host-nation criminal or civil liability.

D. Status of Forces Agreements (SOFAs). SOFAs are international agreements between two or more governments that provide various privileges, immunities, and responsibilities and enumerate the rights and responsibilities of individual members of the deployed force. The United States does not have SOFA arrangements with every country, and some SOFAs do not adequately cover all contingencies. As such, it is possible that CAAF, other contractors, and Soldiers will be treated differently by a local government.¹⁴

1. The North Atlantic Treaty Organization (NATO) SOFA is generally accepted as the model for bilateral and multilateral SOFAs between the U.S. Government and host nations around the world. Under the generally accepted view of the NATO SOFA, contractor employees are not considered members of the “civilian component” recognized therein. Accordingly, special technical arrangements or international agreements generally must be concluded to afford contractor employees the rights and privileges associated with SOFA status.

2. If there is any contradiction between a SOFA and an employer’s contract, the terms of the SOFA will take precedence.

3. The following websites may help determine if the U.S. has a SOFA agreement with a particular country: <http://www.jagcnet.army.mil> (CLAMO section); <https://aflsa.jag.af.mil/INTERNATIONAL> (site requires FLITE registration and password); <http://www.state.gov> (this webpage also contains country studies, a quick way to learn about a country to which personnel are deploying).

E. Criminal Jurisdiction.

1. Generally. All contractors are subject to their home nation’s laws. Additionally, CAAF are subject to the laws of the United States via the Military Extraterritorial Jurisdiction Act (MEJA) for felonies,

2. Afghanistan - **Bilateral Agreement between the United States and Islamic Republic of Afghanistan.**

a. Authority. United States relations with the Islamic Republic of Afghanistan and immunities are discussed in the Security and Defense Cooperation Agreement Between The Islamic Republic of Afghanistan and the United States. This Agreement, signed on 30 September 2014 affirms, *inter alia*, the following:

(1) The Agreement affirms U.S. criminal jurisdiction over contractor personnel. However, the agreement also provides that contractors remain subject to the criminal jurisdiction of the Islamic Republic of Afghanistan. The Agreement does not state which country has primary jurisdiction.

(2) The Agreement precludes the transfer or surrender of contractor and other U.S. personnel to an international tribunal or any other entity or state without the express consent of the United States.

¹⁰ Geneva Convention Relative to the Treatment of Prisoners of War, art. 4A(4), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

¹¹ DoDI 3020.41, *supra* note 2, encl. 2, para. 3(f).

¹² ARMY REGULATION 715-9: OPERATIONAL CONTRACT SUPPORT PLANNING AND MANAGEMENT (20 JUNE 2011), para. 4-2(a).

¹³ Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 404-21 (2004).

¹⁴ AR 715-9, *supra* note 12, para. 4-2.

3. Afghanistan - **International Security Assistance Force (ISAF) Contractors.**

a. Contracts with ISAF forces are governed by a 2002 Military Technical Agreement negotiated with the Afghan Interim Authority.¹⁵

b. This agreement provides that “all ISAF and supporting personnel are subject to the exclusive jurisdiction of their own governments. ISAF personnel are immune from arrest or detention by Afghan authorities, and may not be turned over to any international tribunal or any other entity or State without the express consent of the contributing nation.”¹⁶

V. GOVERNMENT-PROVIDED SUPPORT

A. General.

1. Most contractors will be required to provide whatever logistical and security support they require in order to perform the contract.¹⁷ The major exceptions fall into two categories: support authorized pursuant to DFARS Clause 252.225-7040 (for CAAF), and specific contract terms placed in the contract in consideration of specific contract objectives and requirements. The latter category requires a review of each individual contract to determine what support is available to a given contractor. However, initial levels of support provided to CAAF are spelled out in the specific contract clause authorizing them to accompany the force.

2. Letter of Authorization (LOA). Any support provided under the contract will be listed on an LOA generated by the Synchronized Predeployment and Operational Tracker (SPOT) system, which will include a detailed list of benefits/support to which that contractor employee is entitled. All DOD contractors that receive any government support at all are required to carry the LOA on their person at all times.

B. Support to CAAF. DoDI 3020.41 establishes and implements policy and guidance, assigns responsibilities, and serves as a comprehensive source of DoD policy and procedures concerning requirements for management and interaction with CAAF.¹⁸ This regulation should be read along with DFARS Clause 252.225-7040 to ascertain what support is due to a contractor carrying CAAF status. However, the specific contract is the definitive expression of what is owed to the contractor.

1. Security. CAAF may benefit from government-provided security (including security by military means, in some cases) if the Combatant Commander decides it is in the interests of the Government based on a lack of legitimate civil authority in the location, and:

- (a) the contractor cannot obtain effective security services;
- (b) effective security services are unavailable at a reasonable cost; or
- (c) threat conditions necessitate security through military means.

2. Medical Care. CAAF are authorized to receive (on a reimbursable basis) resuscitative care, stabilization, hospitalization at level III military treatment facilities, and assistance with patient movement in emergencies where loss of life, limb, or eyesight could occur.

C. **Individual Protective Equipment (IPE).** All contractors may wear individual protective equipment as required to provide for safety and security. The Combatant Commander may direct the contracting officer to include contract language authorizing CAAF, and certain non-CAAF contractors, to be issued IPE including body armor and other equipment. The decision of contractor personnel to wear any issued protective equipment is voluntary; however, the Combatant Commander, subordinate JFC and/or ARFOR Commander may require contractor employees to be prepared to wear Chemical, Biological, and Radiological Element (CBRE) and High-Yield Explosive defensive equipment.¹⁹

¹⁵ Jennifer K. Elsea, CONGRESSIONAL RESEARCH SERVICE, RL40991, PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN: LEGAL ISSUES, at 13-14 (7 Jan. 2010).

¹⁶ DODI 3020.41, *supra* note 2, encl. 2, para. 3(c)(2)(d).

¹⁷ See DFARS Class Deviation 2015-O0009, para. (c); FAR 52.225-19, para. (c).

¹⁸ *Id.* para. 1(b).

¹⁹ DODI 3020.41, *supra* note 1, encl. 2, para. 3(i).

D. **Clothing.** Generally, commanders SHALL NOT issue military clothing to contractor personnel, nor allow contractor personnel to wear military or military look-alike uniforms.²⁰ Individual contractor personnel are ordinarily responsible to provide their own clothing. Combatant Commanders may authorize certain contractor personnel to wear military uniforms for operational reasons. This authorization shall be in writing and be carried at all times by subject contractor personnel. Care must be taken to ensure contractor personnel are distinguishable from military personnel.²¹

E. **Government Furnished Equipment (GFE).** Based on the contract, the government may provide certain equipment, to include protective equipment, clothing, or other equipment necessary for contract performance. In such cases, the contract will specify how the contractor is to service and maintain GFE.²² Contractor employees will be responsible for maintaining all issued items and must return them to the issuer upon redeployment.²³

F. **Legal Assistance.** Generally, contractor personnel are NOT entitled to military legal assistance with personal legal affairs, either in theater or at the deployment center. Any authorization should be contained within the LOA, which should be carried by the contractor employee and be presented to the legal office to show entitlement.²⁴

IV. ADMINISTRATIVE ACCOUNTABILITY AND PROCESSING

A. **General.** Combatant Commanders are responsible, with assistance from their Component Commanders, for overall contractor visibility within their AOR.

B. The Synchronized Predeployment and Operational Tracker (SPOT).

1. DoD, DoS, and USAID executed a memorandum of Understanding in April 2010 that designated SPOT as the system of record for required contract and contractor personnel information. Under the MOA, the agencies must include in the database information on contacts with more than 30 days of performance or valued at more than \$100,000.²⁵

2. All defense contractors awarded contracts that support contingency operations are required, per contract, to register their employees in the SPOT system. Registration in SPOT is now a prerequisite to receive a Letter of Authorization (LOA).²⁶ See below for a discussion of LOAs.

3. SPOT relationship to CENTCOM CENSUS. Prior to the full implementation of SPOT, the United States Central Command performed a quarterly census of all contractors in the CENTCOM AOR. The census served as an alternate means of providing more complete information on contractor personnel in Iraq and Afghanistan pending full implementation of the SPOT database. The census, like SPOT, relies on contractor firms to self-report their personnel data to DoD components, which then aggregate the data and report them to CENTCOM at the end of each quarter.²⁷

4. SPOT may be accessed at <https://spot.dmdc.mil/privacy.aspx>

C. **Contractor Responsibilities.**

1. **Accountability.** External support and systems support contractors shall input employee data and maintain by-name accountability of CAAF in the joint database specified in the contract. These contractors are responsible for knowing the general location of their employees and shall keep the database updated.²⁸ The clauses at DFARS 252.225-7040(g), DFARS Class Deviation 2015-O0009(g), and DFARS 225.301-4(2) (which references

²⁰ *Id.* at encl. 2, para. 3(j).

²¹ *Id.* See also DFARS 252.225-7040(i); DFARS Class Deviation 2011-O0004(k).

²² AR 715-9, *supra* note 12, para. 4-5(d).

²³ DODI 3020.41, *supra* note 2, encl. 2, para. 5(c)(2); DFARS Clause 252.225-7040(i)(4).

²⁴ DoDI 3020.41, *supra* note 2, encl. 2, para. 3(m); *But see* U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 2-5a(7) (21 Feb. 96) [hereinafter AR 27-3] (authorizing legal assistance if specified in a given contract).

²⁵ Memorandum of Understanding (MOU) Between the U.S. Department of State (DOS) and the U.S. Department of Defense (DOD) and the U.S. Agency for International Development (USAID) Relating to Contracting in Iraq and Afghanistan (7 April 2010), available at http://www.acq.osd.mil/log/PS/p_vault/DOD_DOS_USAID_signature_20Apr2010.pdf.

²⁶ DODI 3020.41, *supra* note 2, encl. 2, para. 3(d).

²⁷ Available at http://www.acq.osd.mil/log/PS/CENTCOM_reports.html.

²⁸ DODI 3020.41, *supra* note 2, encl. 2, para. 3(c).

the Clause at FAR 52.225-19) impose this same requirement on all defense contractors in any contingency environment covered by the clauses.

2. Personnel Requirements.

a. **Medical.** Contractors are responsible for providing medically and physically qualified personnel. Any contractor employee deemed unsuitable to deploy during the deployment process, due to medical or dental reasons, will not be authorized to deploy with the military force.²⁹ The clauses at DFARS 252.225-7040(e)(ii), DFARS Class Deviation 2015-O0009(e)(2)(ii), and FAR 52.225-19(e)(2)(ii) impose this same requirement on all defense contractors in any contingency environment covered by the clauses. Further, the SECDEF may direct mandatory immunizations for CAAF performing DoD-essential services.³⁰ Contracts must stipulate that employees must provide medical, dental and DNA reference specimens, and make available medical and dental records.³¹

b. Contracting officers may authorize contractor-performed deployment processing. Contracting officers shall coordinate with and obtain approval from the military departments for contractor-performed processing.³²

D. **CONUS Replacement Centers (CRCs) and Individual Deployment Sites (IDS).** All CAAF and some designated non-CAAF contractors, as specified in their contracts, shall report to the deployment center designated in the contract before deploying to a contingency operation.³³ Actions at the deployment center include:

1. Validate accountability information in the joint database; verify: security background checks completed, possession of required vehicle licenses, passports, visas, next of kin/emergency data card;

2. Issue/validate proper ID card;

3. Issue applicable government-furnished equipment;

4. Provide medical/dental screenings and required immunizations. Screening will include HIV testing, pre- and post-deployment evaluations, dental screenings, and TB skin test. A military physician will determine if the contract employee is qualified for deployment to the AO and will consider factors such as age, medical condition, job description, medications, and requirement for follow-up care.³⁴

5. Validate/complete required training (e.g., law of war, detainee treatment, Geneva Conventions, General Orders, standards of conduct, force protection, nuclear/biological/chemical, etc);

6. All CAAF shall receive deployment processing certification (annotated in the letter of authorization (LOA) or separate certification letter) and shall bring this certification to the JRC and carry it with them at all times;

7. Waivers. For less than 30-day deployments, the Combatant Commander may waive some of the formal deployment processing requirements, including processing through a deployment center. Non-waivable requirements include possession of proper ID card, proper accountability, medical requirements (unless prior approval of qualified medical personnel). Personnel with waivers shall carry the waiver with them at all times.³⁵

8. **Contractor Personnel Other than CAAF.** Non-CAAF have similar deployment requirements to all contractors unless otherwise directed by the contracting officer. Contractors not accompanying the Armed Forces and who are arriving from outside the area of performance must also process through the theater entrance/departure center specified in the contract or complete another process as directed by the contracting officer to ensure minimum theater admission requirements are satisfied.³⁶

E. **Theater Entry Locations.** CAAF shall process through a theater entry location (reception center) upon arrival at the deployed location. The reception center will validate personnel accountability, ensure theater-specific requirements are met, and brief personnel on theater-specific policies and procedures.³⁷ DFARS 252.225-7040(f)

²⁹ *Id.*, encl. 2, para. 3(h)(1).

³⁰ *Id.*

³¹ *Id.*, encl. 2, para. 3(h)(3).

³² *Id.* at encl. 2, para. 2(b).

³³ *Id.* at encl. 2, para. 3(h); DFARS 252.225-7040(e).

³⁴ DFARS 252.225-7040(e), (f).

³⁵ DODI 3020.41, *supra* note 2, encl. 2, para. 3(o).

³⁶ DFARS Class Deviation 2015-O0009(f); FAR Clause 52.225-19.

³⁷ DoDI 3020.41, *supra* note 2, encl. 2, para. 3(a); DFARS 252.225-7040(f).

subjects other contractors to similar procedures. Contractors not accompanying the Armed Forces arriving from outside the area of performance must process through a reception center as designated by the contracting officer upon arrival at the place of performance.³⁸

VI. SECURITY, WEAPONS, AND USE OF FORCE

A. Arming for Self-Defense.

1. All contractors are authorized to use deadly force in self-defense.³⁹ Security contractors may also use deadly force if it appears reasonably necessary to carry out their security mission.⁴⁰ However, any improper use of force could expose contractors to host nation criminal and civil liability, as well as potential violations of the laws of war (if applicable based on status – i.e. to CAAF).

2. Although all contractors may use deadly force in self-defense, they must be authorized to be armed. Arming requests are approved by the Combatant Commander (CCDR). Contractors must voluntarily accept arms, and cannot be prohibited by U.S. law to carry firearms (i.e. Lautenberg Amendment).

B. **Security Services.** DOD often uses contractors to provide security for static sites, convoys, and other assets. The key issues with such services include ensuring such activities are not inherently governmental.

1. Inherently governmental services are prohibited from performance by the private sector. Army Regulation 715-9, Appx. B(2)(b), states, “[s]ecurity is inherently governmental 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.” Thus, security must be restricted to operations that do not involve plan-altering implications.⁴¹

2. **Private Security Company (PSC).** Private Security Companies are employed by the DoD to perform “private security functions” under a “covered contract” in a contingency operation. In an area of “combat operations” as designated by the Secretary of Defense, the term PSC expands to include all companies employed by U.S. Government agencies that are performing “private security functions” under a “covered contract.”⁴² The definition of PSC similarly expands in areas designated as “other significant military operations” by both the Secretary of Defense and Secretary of State.⁴³

3. Requests for permission to arm contingency contractors to provide security services shall include:⁴⁴

a. A description of where such contract security personnel will operate, the anticipated threat, and what property, or personnel such personnel are intended to protect;

b. A description of how the movement of contractor security personnel will be coordinated through areas of increased risk or planned or ongoing military operations including how the contractor security personnel will be rapidly identified by members of the Armed Forces;

c. A communication plan to include a description of how relevant threat information will be shared between contractor security personnel and U.S. military forces, including how appropriate assistance will be provided to contractor security personnel who become engaged in hostile situations;

d. Documentation of individual training covering weapons familiarization, rules for the use of deadly force, limits on the use of force including whether defense of others is consistent with HN law, the distinction between the rules of engagement applicable to military forces and the prescribed rules for the use of deadly force that control the use of weapons by civilians, and the Law of Armed Conflict;

e. DD Form 2760, “Qualification to Possess Firearms and Ammunitions,” certifying the individual is not prohibited under U.S. law from possessing a weapon or ammunition due to conviction in any court of a crime of domestic violence, whether a felony or misdemeanor;

³⁸ DFARS Class Deviation 2015-00009(f)(3).

³⁹ See DFARS Clause 252.225-7040(b); Class Deviation 2015-00009(b); FAR Clause 52.225-19(b).

⁴⁰ *Id.*

⁴¹ AR 715-9, *supra* note 12, appx. B(2)(b).

⁴² DoDI 3020.50, Glossary.

⁴³ *Id.*

⁴⁴ *Id.* at encl. 3, para. 1(a).

f. Written acknowledgement by the defense contractor and individual contractor security personnel, after investigation of background and qualifications of contractor security personnel and organizations, certifying such personnel are not prohibited under U.S. law to possess firearms; and

g. Written acknowledgement by the defense contractor and individual contractor security personnel that: potential civil and criminal liability exists under U.S. and HN law for the use of weapons; proof of authorization to be armed must be carried; PSC personnel may possess ONLY U.S. Government-issued and/or approved weapons and ammunition for which they have been qualified; contract security personnel were briefed and understand limitations on the use of force; authorization to possess weapons and ammunition may be revoked for non-compliance with established rules for the use of force; and PSC personnel are prohibited from consuming alcoholic beverages or being under the influence of alcohol while armed.

4. Upon approval of the request, the Combatant Commander will issue written authorization to the defense contractor identifying who is authorized to be armed and the limits on the use of force.

5. DoDI 3020.50, Enclosure 3, tasks Combatant Commanders to develop and implement guidance and procedures to maintain accountability of PSC personnel. In addition to the requirements described above for approving arming requests, Combatant Commanders must develop procedures to implement and identify the organization responsible for:

a. Registering, processing, accounting for and keeping appropriate records of PSCs and PSC personnel IAW DoDI 3020.50.

b. Verifying PSC personnel meet all legal, training, and qualification requirements for authorization to carry a weapon IAW their contract and host country law, to include the establishment of weapons accountability procedures.

c. Approving arming requests as described above.

d. Registering and identifying in SPOT armored vehicles, helicopters, and other vehicles operated by PSC personnel.

e. Reporting alleged criminal activity or other incidents involving PSCs or PSC personnel by another company or any other person, to include a weapon discharge; death or injury of any person occurring in the performance of duties or as a result of conduct by PSC personnel; property destruction by PSC personnel; any incident in which PSC personnel come under attack; and any incident in which non-lethal countermeasures are employed by PSC personnel in response to a perceived immediate threat during an incident that could significantly affect U.S. objectives.

f. The independent review and, if practicable, investigation of incidents reported IAW subsection e. immediately above.

g. Identification of ultimate criminal and investigative jurisdiction where the conduct of PSCs and PSC personnel are in question;

h. A mechanism for subordinate commanders to request the removal of non-compliant PSC personnel from the operational area;

i. The interagency coordination of administrative penalties or removal, as appropriate, of non-DoD PSC personnel who fail to comply with the terms of their contract;

j. Implementation of the training requirements that must be accomplished before PSC personnel may be armed.

6. DFARS Class Deviation 2015-O0009(j) requires contractors not authorized to accompany the Armed Forces to comply with all United States, DoD, and other rules and regulations as applicable, to include guidance and orders issued by the CENTCOM Commander regarding possession, use, safety, and accountability of weapons and ammunition.

7. CENTCOM Contracting Command Clauses 952.225-0001, Arming Requirements and Procedures for Personal Security Services Contractors and for Requests for Personal Protection (Aug. 2010) and 952.225-0002, Armed Personnel Incident Reports, implement many of these requirements.

VII. COMMAND, CONTROL AND DISCIPLINE

A. General. Command and control, including direction, supervision, and discipline, of contractor personnel is significantly different than that of military personnel or even government civilian employees.

1. The contract is the only legal basis for the relationship between DoD and the contractor. The contract shall specify the terms and conditions under which the contractor is to perform.⁴⁵

3. Contractor personnel are not under the direct supervision of military personnel in the chain of command.⁴⁶ Contractor personnel shall not be supervised or directed by military or government civilian personnel.⁴⁷

4. The Contracting Officer is the designated liaison for implementing contractor performance requirements. The Contracting Officer is the only government official with the authority to increase, decrease, or materially alter a contract scope of work or statement of objectives.⁴⁸ The contract officer's representative (COR) is the operational commander's primary oversight point of contact to ensure that the contracted support is being executed as required in the contract.⁴⁹

5. Contractor personnel cannot command, supervise, or control military or government civilian personnel.⁵⁰

B. Orders and Policies.

1. All contingency contracts include provisions requiring contractor personnel to comply with: U.S. and HN laws; applicable international agreements; applicable U.S. regulations, directives, instructions, policies, and procedures; orders, directives, and instructions issued by the Combatant Commander relating to force protection, security, health, safety, or relations and interaction with local nationals.⁵¹

2. Commanders and legal advisers must be aware that interaction with contractor personnel may lead to unauthorized commitments and possible Anti-Deficiency Act (ADA) violations. While Contracting Officers are the only government officials authorized to change contracts, actions by other government officials, including commanders, CORs, etc., may bind the government under alternative theories of recovery.

3. Contract changes.

a. The DFARS maintains the general rule that only Contracting Officers may change a contract, even in emergency situations. The clauses for contingency contracts do expand the scope of the standard Changes Clause by authorizing the Contracting Officer to make changes at any time to Government-furnished facilities, equipment, material, services, or site.⁵²

b. DOD Instruction 3020.41 states that the ranking military commander may, in emergency situations (e.g., enemy or terrorist actions or natural disaster), "urgently recommend or issue warnings or messages urging" CAAF and some non-CAAF, as determined by that commander, to take emergency actions as long as those actions do not require them to assume inherently governmental responsibilities.⁵³

C. Discipline. The contractor is responsible for disciplining contractor personnel; commanders have LIMITED authority to take disciplinary action against contractor personnel.⁵⁴

1. Commander's Options.

⁴⁵ DoDI 3020.41, *supra* note 2, encl. 2, para. 1(d).

⁴⁶ AR 715-9, *supra* note 23, para. 4-1(d).

⁴⁷ *Id.*; See also FAR Subpart 37.104, Personal Services Contracts.

⁴⁸ AR 715-9, *supra* note 12, para. 4-1(a); see also FAR Part 43; AR 700-137.

⁴⁹ AR 715-9, *supra* note 12, paras. 4-1(c);, 3-3(b).

⁵⁰ *Id.* para. 4-4; AR 700-137.

⁵¹ DoDI 3020.41, *supra* note 2, encl. 2(1)(b); DFARS 252.225-7040(d); DFARS Class Deviation 2015-O0009(d); DFARS Class Deviation 2015-O0009(d) reminds the contractor that notwithstanding the obligation to abide by CENTCOM Commander issued orders, only the contracting officer is authorized to modify the terms and conditions of the contract.

⁵² DFARS 252.225-7040(p); DFARS Class Deviation 2015-O0009(p).

⁵³ DoDI 3020.41, *supra* note 2, encl. 2, para. 4(e).

⁵⁴ *Id.* encl. 2, para. 4(d)(2).

- a. Revoke or suspend security access or impose restriction from installations or facilities.
 - b. Request that the contracting officer direct removal of the individual.
2. Contracting Officer Options. The Contracting Officer may direct the contractor, at its own expense, to remove and replace any contractor personnel who jeopardize or interfere with mission accomplishment or who fail to comply with or violate applicable requirements of the contract. The contractor shall have on file a plan showing how the contractor would replace CAAF who are so removed.⁵⁵
3. Specific jurisdiction for criminal misconduct is subject to the application of international agreements. Application of HN and TCN law is discussed above in Section III.
4. Military Extraterritorial Jurisdiction Act of 2000, *as amended* by § 1088 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (MEJA).⁵⁶
- a. Background. Since the 1950s, the military has been prohibited from prosecuting by courts-martial civilians accompanying the Armed Forces overseas in peacetime who commit criminal offenses. Many Federal criminal statutes lack extraterritorial application, including those penalizing rape, robbery, burglary, and child sexual abuse. In addition, many foreign countries decline to prosecute crimes committed within their nation, particularly those involving U.S. property or another U.S. person as a victim. Furthermore, military members who commit crimes while overseas, but whose crimes are not discovered or fully investigated prior to their discharge from the Armed Forces are no longer subject to court-martial jurisdiction. The result is jurisdictional gaps where crimes go unpunished.⁵⁷
 - b. Solution. The MEJA closes the jurisdictional gaps by extending Federal criminal jurisdiction to certain civilians overseas and former military members.⁵⁸
 - c. Covered Conduct:⁵⁹
 - (1) Conduct committed outside the United States, that
 - (2) Would be a crime under U.S. law if committed within U.S. special maritime and territorial jurisdiction, that is
 - (3) Punishable by imprisonment for more than one year.
 - d. Covered persons include:⁶⁰
 - (1) Members of the Armed Forces who, by Federal indictment or information, are charged with committing an offense with one or more defendants, at least one of whom is not subject to the UCMJ;
 - (2) Members of a Reserve component who commit an offense when they are not on active duty or inactive duty for training;
 - (3) Former members of the Armed Forces who were subject to the UCMJ at the time the alleged offense was committed, but are no longer subject to the UCMJ;
 - (4) Civilians employed by the Armed Forces outside the United States, who are not a national of or resident in the HN, who commit an offense while outside the United States in connection with such employment. Such civilian employees include:
 - (a) Persons employed by DoD, including NAFIs;
 - (b) Persons employed as a DoD contractor, including subcontractors at any tier;
 - (c) Employees of a DoD contractor, including subcontractors at any tier;

⁵⁵ DFARS 252.225-7040(h). DFARS Class Deviation 2015-O0009(h) contains a similar requirement but does not expressly require the contractor to have a similar personnel replacement plan on file.

⁵⁶ 18 U.S.C. §§ 3261-3267.

⁵⁷ DoDI 5525.11 (implementing the Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261).

⁵⁸ *Id.* para. 2.5.

⁵⁹ *Id.* para. 6.1.1

⁶⁰ *Id.* paras. 6.1.2 to 6.1.9

(d) Civilian employees, contractors (including subcontractors at any tier), and civilian employees of a contractor (including subcontractors at any tier) of any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the DoD overseas.

(5) Civilians accompanying the Armed Forces: Dependents of anyone covered above if the dependent resides with the person, allegedly committed the offense while outside the United States, and is not a national of or ordinarily resident in the HN. Command sponsorship is not required for the MEJA to apply.

(6) The MEJA does not apply to persons whose presence outside the United States at the time the offense is committed is solely that of a tourist, student, or is otherwise not accompanying the Armed Forces.

(7) Foreign Criminal Jurisdiction. If a foreign government, in accordance with jurisdiction recognized by the U.S., has prosecuted or is prosecuting the person, the U.S. will not prosecute the person for the same offense, absent approval by the Attorney General or Deputy Attorney General.

(8) TCNs who might meet the requirements above for MEJA jurisdiction may have a nexus to the United States that is so tenuous that it places into question whether the Act should be applied. The DOS should be notified of any potential investigation or arrest of a TCN.

e. DoDI 5525.11 contains detailed guidance regarding the procedures required for MEJA use, including investigation, arrest, detention, representation, initial proceedings, and removal of persons to the United States or other countries. Further, much authority is delegated to Combatant Commanders, so local policies must be researched and followed.

5. Uniform Code of Military Justice (UCMJ).

a. Retired military members who are also CAAF are subject to the UCMJ. Art. 2(a)(4), UCMJ. DA policy provides that retired Soldiers subject to the UCMJ will not be tried for any offense by any courts-martial unless extraordinary circumstances are present. Prior to referral of courts-martial charges against retired Soldiers, approval will be obtained from Criminal Law Division, ATTN: DAJA-CL, Office of The Judge Advocate General, HQDA.⁶¹

b. In section 552 of the 2007 NDAA, Congress changed Article 2(a)(10), addressing UCMJ jurisdiction over civilians accompanying the Armed Forces, from “time of war” to “time of declared war or contingency operation.” This change now subjects CAAF and other civilians accompanying the Armed Forces to the UCMJ in contingency operations.

c. It is not clear whether this congressional attempt at expanding UCMJ jurisdiction over civilians in less-than Congressionally declared war is constitutional. Prior Congressional attempts at expanding UCMJ jurisdiction have been rejected by the courts as unconstitutional.

d. The Secretary of Defense published guidance on the exercise of this expanded UCMJ jurisdiction in March 2008. Office of the Secretary of Defense memorandum, Subject: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations, dated March 10, 2008. This guidance requires, among other things, that the Department of Justice be notified and afforded an opportunity to pursue U.S. federal criminal prosecution under the MEJA or other federal laws before disciplinary action pursuant to the UCMJ authority is initiated.

VIII. OTHER ISSUES

A. Living Conditions.

1. Generally, when provided by the government, CAAF living conditions, privileges, and limitations will be equivalent to those of the units supported unless the contract with the Government specifically mandates or prohibits certain living conditions.

2. Tours of Duty. CAAF tours of duty are established by the contractor and the terms and conditions of the contract between the contractor and the government. Emergency-based on-call requirements, if any, will be included as special terms and conditions of the contract.

⁶¹ U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, para. 5-2b(3) (3 Oct. 2011).

3. Hours of Work. Contractors must comply with local laws, regulations, and labor union agreements governing work hours.⁶² Federal labor laws that govern work hours and minimum rates of pay do not apply to overseas locations. FAR 22.103.1 allows for longer workweeks if such a workweek is established by local custom, tradition, or law. SOFAs or other status agreements may impact work hours issues.

B. Life and Health Insurance.

1. Unless the contract states otherwise, the Army is not statutorily obligated to provide health and/or life insurance to a contractor employee. Policies that cover war time deployments are usually available from commercial insurers.

2. Contractors and their employees bear the responsibility to ascertain how a deployment may affect their life and health insurance policies and to remedy whatever shortcomings a deployment may cause.

C. Workers' Compensation-Type Benefits.

1. Several programs are available to ensure "worker's comp" type insurance cover contractor employees while deployed and working on government contracts.⁶³

2. Defense Base Act (DBA) Insurance.⁶⁴

a. Requires contractors to obtain worker's compensation insurance coverage or to self-insure with respect to injury or death incurred in the scope of employment for government contracts performed outside the United States.

b. FAR Clause 52.228-3, Workers' Compensation Insurance (Defense Base Act), is required in all DoD service contracts performed, entirely or in part, outside the U.S. and in all supply contracts that require the performance of employee services overseas.⁶⁵

3. Longshoreman and Harbor Worker's Compensation Act (LHWCA) 33 U.S.C. §§ 901-950, DA Pamphlet 715-16, paragraphs 10-5c to 10-5d. Applicable by operation of the DBA. The LHWCA provides compensation for partial or total disability, personal injuries, necessary medical services/supplies, death benefits, loss of pay and burial expenses for covered persons. Statute does not focus on fault.⁶⁶

4. War Hazards Compensation Act (WHCA) 42 U.S.C. §§ 1701-17, FAR 52.228-4, DFARS 228.370(a). The WHCA provides that any contractor employee who is killed in a "war risk hazard" will be compensated in some respects as if the CAAF were a full time government civilian employee. WHCA benefits apply regardless of whether the injury or death is related to the employee's scope of employment.⁶⁷

F. Continued Performance During a Crisis.

1. During non-mandatory evacuation times, Contractors shall maintain personnel on location sufficient to meet contractual obligations.⁶⁸

2. Contractors must use all means available to continue to provide services deemed essential by DoD, as specified in their contracts.⁶⁹ Contracts involving essential contractor services that support mission essential functions may contain the clause at DFARS Class Deviation 2009-O0010, Continuation of Essential Contractor Services.⁷⁰

3. There is no "desertion" offense for contractor personnel. Commanders should plan for interruptions in services if the contractor appears to be unable to continue support.

⁶² DFARS 252.222-7002.

⁶³ See generally FAR 28.305.

⁶⁴ 42 U.S.C. §§ 1651 *et seq.*; FAR 28.305 and 52.228-3; DFARS 228.305, 228.370(a), and 252.228-7000.

⁶⁵ Office of the Under Secretary of Defense Memo, 8 Dec. 2003.

⁶⁶ 33 U.S.C. §§ 901-950, DA Pamphlet 715-16, paragraphs 10-5c to 10-5d.

⁶⁷ 42 U.S.C. §§ 1701-17, FAR 52.228-4, DFARS 228.370(a).

⁶⁸ DFARS 252.225-7040(m).

⁶⁹ DoDI 3020.41, *supra* note 1, encl. 2, para. 2(c).

IX. ADDITIONAL REFERENCES

12. Geneva Conventions of 1949 and Additional Protocol of 1977.
13. 18 U.S.C. § 922(d), Unlawful Acts (providing firearms to certain persons).
14. 22 U.S.C. § 3261 *et seq.*, Responsibility of the Secretary of State (for U.S. citizens abroad).
15. AR 700-4 (Logistics Assistance).
16. AR 570-9 (Host Nation Support).
17. FM 4-92, Contracting Support Brigade
18. DA PAM 27-1 (Treaties Governing Land Warfare)
19. DoDI 4161.02 (Accountability and Management of Government Contract Property).
20. DoDI 1300.23 (Isolated Training for DoD Civilian and Contractors).
21. DoDI 1000.1 (Identification Cards Required by the Geneva Conventions).
22. DoDI 1100.22 (Policy and Procedures for Determining Workforce Mix).
23. DoDD 5000.02 (Operation of the Defense Acquisition System).
24. Joint Pub 1-02 (DOD Dictionary of Military and Associated Terms).
25. Joint Pub 4-0 (Joint Logistics).