

Status of Contractors Accompanying U.S. Armed Forces and Protection of Contractor Personnel

The Department of Defense ("DoD"), effective June 16th, has proposed amendments to the Defense Federal Acquisition Regulations ("DFAR") rules regarding contractor personnel accompanying U.S. Armed Forces deployed outside the United States. The new interim rule limits the combatant commander's responsibility to protect contractor personnel and authorizes, in specific circumstances, contractors' use of force against enemy armed forces. These amendments represent a step forward but still raise issues of concern to contractors supporting military operations abroad in the area of operations.

Security Plans Limited

Currently, the combatant commander is required to develop a security plan for protecting contractor personnel through military means, unless the contract places responsibility with another party. The proposed rule would amend the combatant commander's requirement to develop a security plan to those locations where there is not sufficient or legitimate civil authority to provide security and the combatant commander determines it is in the Government's interest to provide security. This change places critical judgments within the purview of the commander as to the need for a security plan. It appears that by the amendments, DoD is attempting to eliminate paperwork and the need for security plans for contractor personnel based upon the existence of the above conditions. Judgments on the existence of key conditions would appear to depend on where the deployments are ordered. The current DFAR broadly defines deployment areas "outside the United States" for "contingency operations"; "humanitarian or peacekeeping operations"; "other military operations"; and "military exercises". Since one size does not fit all, it appears that the DoD policy makers have made the changes to eliminate unnecessary requirements for security plans under the umbrella of the broad places of possible deployments around the world. The regulation, however, is not so clear as to who makes the determination that there is not sufficient or legitimate civil authority in the host country to provide security for the contractors. The regulation does provide that the commander is to determine whether it is in the best interests of the government to provide contractors with security, but the predicate to that decision would seem to rest with a decision higher up in the government concerning the sufficiency and/or legitimacy of civil authority protection. It is unclear where and who will make that decision, and whether contractors will have any input into that decision making process for a security plan if one is undertaken or if one is needed in the view of the affected contractors. It is also unclear how this determination will be communicated to the affected contractors.

It is and has been the view of industry that whether or not military personnel are providing security to DoD contractors, non-DoD contractors, civilian or DoD civilian agency representatives or U.S. installations abroad (e.g., the Green Zone in Baghdad), measures to provide security must become a routine part of the mission and planning process. Based on recent experiences in Iraq and Afghanistan, it appears that some host nations will be unable in the near future to provide adequate security for contractors in the area in or near the military operations. As a result, careful security planning is a must, particularly since it has been the policy of the government to outsource many functions to contractors performed in the area of operations from food services, to logistics, to security itself. Inside the area of operations, DoD is, of course, responsible for protecting its troops, but has traditionally viewed protection of civilians and contractors as incidental to its mission. DoD is now acknowledging the necessity of planned contractor protection and security by issuing Instruction No 3020.41 in October 2005 on this subject, by issuing the DFAR 252.225-7040 and by issuing the present interim rule

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amending that DFARS. If the contractor personnel in the area of operations will continue and increase, it will be essential to address many concerns and issues as a result of that presence. The continuity of services by these contractors will also be critical to the military mission as discussed below.

Continuity of Contractor Services

There is concern within the industry and within segments of DoD that if contractors are to continue to provide services in the area of military operations, their safety must not be underestimated. If safety concerns are not addressed, sources of supply may be reduced or the costs of self protection will find there way into increased cost and the price of contracts. The interim rule clarifies that the Government will only provide logistical or security support when the contractor cannot obtain such support from other sources and the Government determines that such support is needed to continue essential contractor services. As to security, this rule appears to encourage bidders and contractors to seek their own protections. To some this is but a play on the traditional military philosophy to "protect the troops" and treat the contractors on the battle space as incidental. This will surely be the subject of comments to this interim rule and the subject of continuing debate within the government and industry as to how far the government will go to protect its contractors performing work in the area of operations. The ultimate cost of contractors providing their own security if none is provided by the military will surely increase the price of contracts. Then too, in actual practice, contractors providing for their own protection (security contractors being the exception) present many issues of coordination with and approval of the combatant commander regarding security measures, issues of liability of contractors and protections accorded them under the International Law of Armed Conflict.

U.S. Contractor Personnel Are Not Combatants

Under the interim rule, contractor personnel who accompany the armed forces deployed outside of the U.S. are regarded as civilians. The rule states that contractor personnel are not combatants, but the DFAR amendments in the interim rule now seem to recognize that contractors (other than contractors providing security services in the battle space per their contracts) may use force in self defense. The interim rule specifically identifies contractor personnel who accompany U.S. Armed Forces deployed outside the United States as civilians. Currently then, such persons are defined by what they are not, that is "contractor personnel are not combatants". DFAR 252.225-7040(b)(3). This method of identification has major implications regarding contractor representatives status under the law of armed conflict if they use any firearms or other weaponry to protect their personnel. Under the interim rules contractor personnel, other than private security contractors, may use deadly force against enemy armed forces for "self defense". Private security contractors may also use deadly force against enemy armed forces when necessary to execute their security mission to protect people/assets as required in their contract. It is the combatant commander's responsibility to ensure that contractors do not perform any inherently Governmental military functions, such as when a civilian directly takes part in hostilities. In such circumstances, and as civilians, they lose their law of war protection from direct attack as civilians. Intentional use of force by these contractors could well be perceived as U.S. government combatant action. The International Law of Armed Conflict is premised on uniformed troops representing hostile parties in the area of operations. That model in our view no longer reflects the reality of battle space operations because "unconventional" wars are the common experience now and because of continued outsourcing by DoD to private contractors who are actively supporting the military personnel in the conflicts.

To allay some of these concerns, the interim rule, like the current rule, continues to provide that contractor personnel are prohibited from wearing military clothing unless specifically authorized in writing by the combatant commander. This prohibition is to make sure contractor personnel are not presenting themselves as enemy combatants. They can wear protective clothing, however, such as ballistic, nuclear, biological or chemical protective equipment. To carry weapons, the contractors must request this authorization through the Contracting Officer to the Combatant Commander. The Commander in turn will determine whether to authorize personnel to carry weapons and ammunition. Those weapons can be contractor owned or government furnished and the regulation mandates training for those authorized to carry weapons. What the interim does do is clarify that the liability for use of any weapon by contractor personnel rests solely with the contractors and contractor employees using such weapons. Be that as it may, nagging issues will continue to arise as to the status of contractor personnel on the battle space whether they are carrying weapons for "self defense" or otherwise (i.e., performing security missions directly for the military). Some in the industry have said

that drawing such distinctions as to military versus non-military operations is very difficult. Control of civilians on the battle space and what they can and cannot do to keep their status and protections as non-combatants in unconventional conflicts around the world will require more study. The interim rule only goes so far in this regard.

McKenna Long & Aldridge continues to stay ahead of the curve on these and other issues through discussions with and advice to clients and its membership in such organizations as the American Bar Association (“ABA”) Public Contracts Section’s Task Force on Contractors In The Battle Space. The Task Force was established in early 2005, and in October 2005 issued a white paper to the Army on the above and other issues. The Task Force included members from companies contracting for work in the battle space, law firms, trade groups and military representatives. The interim rule changes discussed herein were prompted in part by this study but will require more study and refinement. The ABA has now extended the task force to a Committee on Battle Space and Contingency Contracting. The latter will include assessments of contracting relating to natural disasters as well as continuing assessment of battle space contracting.

Comments to the proposed rule are due August 15, 2006.

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