

DOD Issues Final Rule Addressing "Contractors on the Battlefield"

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Introduction

On May 5, 2005, the U.S. Department of Defense (DOD) issued its final rule addressing the treatment of contractor personnel supporting U.S. military forces outside the United States. 70 Fed. Reg. 23790 (May 5, 2005). This rule, which amends the DOD Federal Acquisition Regulation Supplement (DFARS), sets out DOD's contractor on the battlefield policy in a lengthy new contract clause. See DFARS §252.225-7040, 70 Fed. Reg. at 23802. The rule became effective June 6, 2005.

The DFARS amendment is accompanied by approximately 11 pages in the Federal Register containing a synopsis of public comments on the proposed rule, DOD's response to the comments and the changes made to the proposed rule.

This article summarizes the key provisions of the new clause, adding DOD commentary from the synopsis as appropriate.

General Applicability

The rule specifies that the new clause, entitled "Contractor Personnel Supporting a Force Deployed Outside the United States," applies when "contractor personnel deploy with or otherwise provide support in the theater of operations to U.S. military forces deployed outside the United States" in "contingency operations," "humanitarian or peacekeeping operations," or "other military operations or exercises designated by the combatant commander." DFARS §252.225-7040(b) (1), 70 Fed. Reg. at 23802; accord DFARS §225.7402-4(a); DFARS §225.7402-1; 70 Fed. Reg. 23790, 23791, 23802.¹

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The new rule added the "military operations or exercises" phrase to replace the term "combat operations" so as to "increase flexibility" to the "scope" of the clause and to allow for use of the clause "in a wide range of military operations." *Id.* at 23791. DOD makes clear in its commentary that the rule applies to contractor personnel "situated in an area where military forces are deployed, and to some extent, contractor personnel in-transit." *Id.* at 23792. It is also noteworthy that "theater of operations" is not necessarily restricted to a single country. *Id.*

DOD commentary accompanying the rule emphasizes that it applies only to contractor personnel that "accompany" or "deploy" with U.S. forces or "provide support in the theater of operations." *Id.* Accordingly, the rule does *not* cover contractor personnel providing support from *outside* the theater of operations. *Id.* at 23791. Nor, interestingly, does the rule apply to nation-building activities generally or to Iraq reconstruction specifically, as stated in the DOD commentary. *Id.* (noting that the rule "does not apply to ... nation-building efforts such as the reconstruction of Iraq").

For its part, the clause cautions contractors that performance and support of U.S. military forces may require work in "dangerous or austere conditions" and stipulates that the contractor "accepts the risks associated with required contract performance in such operations." DFARS §252.225-7040(b)(2), 70 Fed. Reg. at 23802.

With respect to the status of contractor personnel, the clause makes clear that, notwithstanding the hostile environment in which they may operate, contractor personnel are *not* "combatants" and "shall not undertake any role that would jeopardize their status." DFARS §252.225-7040(b)(3), 70 Fed. Reg. at 23802. Thus, the rule directs that contractor personnel "shall not use force or otherwise directly participate in acts likely to cause actual harm to enemy armed forces." *Id.*; *accord id.* at 23792 ("Contractors must not directly participate in hostilities against an armed enemy.").

Military Support to Contractor Personnel

Even though, as stated above, contractor personnel are not "combatants," they are nonetheless entitled to receive certain protections and services from the military as prescribed in the rule. Thus, the combatant commander is obligated by the clause to develop a "security plan" to provide protection through military means to contractor personnel engaged in the theater of operations, unless the contract places the responsibility for such security with another party. DFARS §252.225-7040(c), 70 Fed. Reg. at 23802.

Contractor personnel engaged in the theater of operations are thus authorized by the clause to receive "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." DFARS §252.225-7040(c)(2)(i), 70 Fed. Reg. at 23802; *accord id.* at 23793 (same). However, any hospitalization of contractor personnel will be limited to efforts at "stabilization and short-term medical treatment with an emphasis on return to duty or placement in the patient movement system." DFARS §252.225-7040(c)(2)(i), 70 Fed. Reg. at 23802. Additional medical care beyond the foregoing standard could be specified in the contract. DFARS §252.225-7040(c)(2)(iii), 70 Fed. Reg. at 23802. If contractor personnel receive medical treatment or transportation to a selected civilian facility, the contractor must ensure that the Government is reimbursed for "any costs associated with such treatment or transportation." DFARS §252.225-7040(c)(2)(ii), 70 Fed. Reg. at

23802.

Except for the support detailed above and except as may be otherwise stated in the contract, the contractor is responsible for the support required for its personnel engaged in the theater of operations. DFARS §252.225-7040(c)(3), 70 Fed. Reg. at 23802.

A number of respondents apparently commented that the provision lacked detail in defining the "variety of support functions." *Id.* at 23793. DOD responded that the language was "deliberately non-specific" because the precise support would likely vary on a case-by-case basis. 70 Fed. Reg. at 23793 (available Government support "can only be ascertained after consultation with the relevant combatant commander and service components"); *id.* ("The Government will only provide support services that are available in the theater of operations concerned.") If the contracting officer is able to identify additional support, the contract can provide for it. *Id.*; *accord, id.* ("To the extent that such support is identifiable and known at time of solicitation and award, it can be specified in the solicitation and resulting contract.").

Compliance with Laws and Regulations

The clause directs that the contractor itself must comply with and ensure that its personnel supporting a force are familiar with and comply with all applicable laws and regulations. DFARS §252.225-7040(d), 70 Fed. Reg. at 23802. This includes United States and host country laws, treaties and international agreements, United States regulations, directives and instructions, and policies and any orders, directives and instructions issued by the combatant commander relating to "force protection, security, health, safety, or relations and interaction with local nationals." *Id.* In response to commenters who questioned the ability of contractors to access such laws, regulations and other authorities, DOD pointed out that on-line resources gave contractors access to such materials. 70 Fed. Reg. at 23794. DOD acknowledges that changes in orders, directions or instructions of the combatant commander could result in contractor claims for equitable adjustment, and specifies that any such claims will be handled pursuant to the terms of the contract. *Id.* at 23795.

Among other personnel requirements, the contractor, prior to deploying personnel in support of U.S. military forces, must ensure that:

- All required security and background checks of personnel are complete and acceptable;
- All deploying personnel meet the minimum medical screening requirements and have received all required immunizations as specified in the contract;
- Deploying personnel have all necessary passports, visas and other documents required to enter and exit a theater of operations and have a Geneva Conventions identification card; and
- Country and theater clearances are obtained.

DFARS §252.225-7040(e)(1)-(4), 70 Fed. Reg. at 23802-03.²

Personnel Data List

The clause specifies that the contractor shall establish and maintain with the contractually-designated Government official a "current list of all contractor personnel that deploy with or otherwise provide support in

the theater of operations." DFARS §252.225-7040(g), 70 Fed. Reg. at 23803.

The contractor does not have unfettered rights with respect to its deployed personnel. Rather, 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 clause. DFARS §252.225-7040(h)(1), 70 Fed. Reg. at 23803. Such expulsion could be peremptory for, as DOD's commentary explained, "[c]ontracting officers must have the ability to *summarily direct* the removal of personnel perceived as jeopardizing or interfering with the mission." *Id.* at 23795 (emphasis added). In anticipation of the potential use of this authority by the contracting officer, the clause directs the contractor to have a plan on file showing how the contractor would replace employees who are unavailable for deployment or who need to be replaced during deployment. This list must be kept current and the contractor shall provide a copy to the contracting officer upon request. DFARS §252.225-7040(h)(2), 70 Fed. Reg. at 23803. Under the clause, the plan must have three components:

- Identify all personnel who are subject to military mobilization;
- Detail how the position would be filled if the individual were mobilized; and
- Identify all personnel who occupy a position that the contracting officer has designated as mission essential.

DFARS §252.225-7040(h)(2), 70 Fed. Reg. at 23803.

Military Clothing and Protective Equipment

Probably because contractor personnel are not deemed to be combatants, the clause prohibits contractor personnel from wearing military clothing unless specifically authorized in writing by the combatant commander. DFARS §252.225-7040(i)(1), 70 Fed. Reg. at 23803. In the event that contractor personnel receive authority to wear military clothing, they must wear "distinctive patches, armbands, nametags or headgear" that will make them "distinguishable from military personnel, consistent with force protection measures and the Geneva Conventions." DFARS 252.225-7040(i)(1), 70 Fed. Reg. at 23803; *accord, id.* at 23797 ("distinctive civilian insignia ... keep non-combatant civilian status clear under the Geneva Conventions").

Notwithstanding the foregoing, contractor personnel may wear military-unique organizational clothing and individual equipment required for "safety and security, such as ballistic, nuclear, biological, or chemical protective clothing." DFARS §252.225-7040(i)(2), 70 Fed. Reg. at 23803.

As explained by DOD's commentary, the combatant commander may authorize contractor personnel to wear military clothing – as distinct from military *uniforms* – "for operational reasons on a case-by-case basis." *Id.* at 23797. Military "clothing" differs from military "uniforms" in that the former are "without specific military insignia" such as rank and decorations which are only authorized for uniformed military personnel. *Id.*

Weapons

The clause anticipates that the contractor may request that its personnel performing the theater of operations be authorized to carry weapons. DFARS §252.225-7040(j)(1), 70 Fed. Reg. at 23803. The contractor's request for

such authority must be made through the contracting officer to the combatant commander who will ultimately determine whether to authorize contractor personnel to carry weapons and, if so, what weapons will be allowed. DFARS §252.225-7040(j)(1), 70 Fed. Reg. at 23803. It is noteworthy that the clause thus appears to preclude compelled carrying of weapons by contractor personnel. Under the clause and the DOD commentary, the contractor must request authorization for its employees to carry weapons before the combatant commander authorizes such activity. See 70 Fed. Reg. at 23798 ("It is the contractor's responsibility to determine whether to request authorization and for which employees to request such authorization."); *id.* ("Contractor personnel will only carry weapons if the contractor requests ... and the combatant commander authorizes the carrying of weapons.").

DOD received several comments asserting that arming contractors placed them at risk of forfeiting their status as noncombatant civilians, subjecting them to unlawful combatant or mercenary status if captured, with a concomitant loss of POW status and treatment. *Id.* at 23797. In response, DOD acknowledged "the potential risk" in allowing contractors to carry and use weapons in a "hostile environment," but determined that "the most practical approach is to give the combatant commander the final decision as to whether to allow contractors to carry and use weapons and the types of weapons that will be authorized." *Id.*

If contractor personnel are authorized to carry weapons, the clause mandates that the *contractor*, not the Government, shall ensure that its personnel are adequately trained, are not barred from possession of the firearm by the criminal laws and adhere to all guidance and orders issued by the combatant commander regarding "possession, use, safety, and accountability of weapons and ammunition." DFARS §252.225-7040(j)(2), 70 Fed. Reg. at 23803. In this regard, DOD expressly declined to indemnify contractors and their personnel against claims for damage or injury or ensure immunity from criminal prosecution associated with the use of weapons. *Id.* at 23798.

Evacuation

The clause anticipates two types of evacuation—"mandatory" evacuation and "non-mandatory" evacuation. In the event that the combatant commander orders a mandatory evacuation of some or all personnel, the Government obligates itself under the clause to provide assistance "to the extent available" to United States contractor personnel. In the event of a non-mandatory evacuation, the contractor is obligated to "maintain personnel on location sufficient to meet obligations under this contract" unless otherwise directed in writing by the contracting officer. DFARS §§252.225-7040(m)(1) and (2), 70 Fed. Reg. at 23803.

Subcontracts

The contractor on the battlefield clause contains a mandatory flow down. Thus, the contractor is directed by the clause to incorporate the substance of the clause, including the flow down mandate, in all contracts that "require subcontractor personnel to be available to deploy with or otherwise provide support in the theater of operations of U.S. military forces." DFARS §252.225-7040(q), 70 Fed. Reg. at 23803.

Endnotes:

1. As used in the rule, the phrase "combatant commander" means "the commander of a unified or specified combatant command" established in accordance with 10 U.S.C. §161. DFARS §252.225-7040 (a), 70 Fed. Reg. at 23802. The phrase "theatre of operations" means "an area defined by the combatant commander for the conduct or support of specific operations." *Id.*
2. The Government will provide, at no cost to the contractor, any theater-specific immunizations and/or medications not available to the general public. DFARS §252.225-7040(e)(2), 70 Fed. Reg. at 23803.