

Chapter 31
**Contingency Contractor
Personnel**



2014 Contract Attorneys Deskbook

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CHAPTER 31

CONTINGENCY CONTRACTOR PERSONNEL

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CHAPTER 31

CONTINGENCY CONTRACTOR PERSONNEL

I. INTRODUCTION

Throughout the history of U.S. military operations, the U.S. Military has relied upon goods and services provided by contractors. Contractors multiply the effectiveness of our fighting force by freeing up uniformed personnel to focus on primary duties. 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. A report by the Commission on Wartime Contracting cited that the Defense Department alone had 207,533 contractors in Iraq and Afghanistan as of 31 March 2010. This represented a ratio of soldiers to contractors of approximately 1:1. 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. REFERENCES

- A. U.S. Dep't of Defense, Defense Federal Acquisition Reg. Supp. 225.74 [hereinafter DFARS], with its accompanying clause at DFARS 252.225-7040 (updated May 2014); U.S. Dep't of Defense, Defense Procedures, Guidance, and Information 225.74 [hereinafter DFARS PGI]; DFARS Class Deviation 2013-00005, Contractor Personnel Supporting U.S. Armed Forces Deployed Outside the United State, 27 June 2013 available at http://www.acq.osd.mil/dpap/dars/class_deviations.html [hereinafter DFARS Class Deviation 2013-00015).
- B. U.S. Dep't of Defense, Instr. 3020.41, Operational Contract Support (20 Dec. 2011) [hereinafter DoDI 3020.41].
- C. 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].
- D. U.S. Dep't of Defense, Instr. 5525.11, Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members (3 Mar. 2005) [hereinafter DoDI 5525.11].
- E. Army Contractors Accompanying the Force (CAF) (AKA Contractors on the Battlefield) Guidebook, Procurement and Industrial Base Policy Office under the

Deputy Assistant Secretary of the Army (Policy and Procurement), September 2003, available at <http://www.afsc.army.mil/gc/files/CAF%20Guidebook.doc> [hereinafter CAF Guidebook].

- F. 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).
- G. 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.).
- H. CENTCOM Contracting Command (C3) Training Website, located at <http://centcomcc.net/> (containing training materials, checklists, policy documents, acquisition instructions, and contract clauses).
- I. U.S. Dep't Of Army, Reg. 715-9, Operational Contract Support Planning and Management (20 Jul. 2011) [hereinafter AR 715-9].
- J. U.S. Dep't Of Army, Reg. 700-137, Logistics Civil Augmentation Program (LOGCAP) (28 Dec. 2012) [hereinafter AR 700-137].
- K. See Section IX below for additional references.

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. 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, Part II (definitions). However, they are not all afforded the same legal status, access to government-provided benefits, and access to government property (installations, billeting, 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.).

3. Letter of Authorization (LOA). The LOA is a document that memorializes all the support due to a contractor under their contract. Each individual contractor must carry a copy of his or her LOA on their person at all times, as this document provides their authorization to obtain the support/services that are called for under the contract. Without this document, it will be very difficult to determine what support a particular individual should receive. (DFARS 252.225-7040(c)(3))

B. Contractors Authorized to Accompany the Force (CAAF).

1. 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 often perform duties 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 those conducted in Haiti.
2. Legal Status. The Geneva Conventions and other international agreements define a contractor's status as a civilian accompanying the force in the field. 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. Authorization to accompany the force is demonstrated by possession of a DD Form 489 (Geneva Conventions Identity Card for Persons who Accompany the Armed Forces). These individuals are usually U.S. citizens, but may be other-country nationals (OCNs) or local nationals (LNs).
3. Government Support.
 - a. 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.
 - b. Obtaining CAAF status begins with the language in the underlying contract. If the contract (or portions of the contract) requires employees to have CAAF status, that contract will contain DFARS Clause 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States." This clause applies to CAAF who accompany U.S. forces

in contingency operations, humanitarian or peacekeeping operations, or other operations or exercises as approved by the Combatant Commander. It provides a number of important authorizations and requirements, including:

- (1) Access to health care (on a reimbursable basis), including 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. Medical or dental care beyond this standard can no longer be authorized via contract. (DFARS 252.225-7040(c)(2)(iii))
- (2) Government-provided security, if:
 - (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.
4. To use force, though only for individual self-defense, CAAF may be armed upon approval of the Combatant Commander. Deadly force is no longer specifically authorized. (DFARS 252.225-7040(c)(3))
5. To be considered a Prisoner of War if captured by the enemy, and to carry a Geneva Conventions ID card identifying the individual as covered by GPW as authorized to accompany the force.
6. To be processed through a military pre-deployment site, such as the CONUS Replacement Center (CRC) at Ft. Benning, GA, the Non-LOGCAP Deployment and Redeployment Center at Camp Atterbury, Indiana, or approved contractor site.

C. Non-CAAF, Performing in CENTCOM AOR.

1. 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 at the same location, or even alongside, DOD employees.
2. DFARS Class Deviation 2013-O0015, Contractor Personnel in the United States Central Command (CENTCOM) Area of Responsibility (AOR), governs contractor personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States the CENTCOM AOR, but who are considered CAAF.

3. The main difference between these contractors and those designated as CAAF is found in the support provided to, and accountability of, those contractors:
 - a. Non-CAAF contractors receive a lower level of support from the U.S. Government (e.g., security protection and medical treatment), and
 - b. Non-CAAF may not be subject to the UCMJ for offenses committed in theater.

D. Non-CAAF, Performing Outside the 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.

E. Non-DoD Contractors in Contingency Environments.

Contractors of other government agencies, such as the Department of State, are governed by the FAR Part 25.301 and its accompanying clause at FAR 52.225-19 as well as other agency specific regulations and directives.

IV. TYPES OF CONTRACTS

A. General.

Contingency operations require many contracts to support full operations. These may be let by 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 let CONUS to support operations overseas. Still others are let 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.

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.

Contract personnel under external support contracts who are hired predominantly from outside the operational area to support deployed operational forces. External support contractors include OCN personnel and local national personnel who are hired under a subcontract relationship of a prime external support contract.

C. System Support Contracts.

1. System Support Contracts are awarded by acquisition program management (PM) offices to support specific weapons or other 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. Support under systems support contracts is often designated as “essential contractor services” under the contract.
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 considered CAAF in most cases.

D. Theater Support Contracts.

1. Contracts awarded within the contingency operations area to support deployed operational forces are called Theater Support Contracts. Military contracting personnel with the deployed force, working under the contracting authority of the theater, component, or joint forces command contracting chief, normally award and administer these contracts. 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.

2. Contract personnel under theater support contracts that are hired in, and operating in, a specific operational area. They are often LNs or OCNs and are usually not considered CAAF.

V. LEGAL STATUS

A. International Law.

1. Contractors may support military operations as “civilians accompanying the force.” Contractors must be designated as such by the military force they are accompanying and must be provided an appropriate identification (ID) card under the Geneva Conventions.
2. If captured during armed conflict, CAAF are entitled to POW status.
3. CAAF 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. CAAF 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).
4. Arming of CAAF, and CAAF performance of security services, are addressed below in Section VI.
5. Each service to be performed by CAAF in contingency operations shall be reviewed, on a case-by-case basis, in consultation with the servicing legal office to ensure compliance with applicable law and regulation.

B. Host Nation (HN) and Other-Country National (OCN) Laws.

1. Subject to international agreements, CAAF are subject to HN law and the law of their home country (OCN law).
2. **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 and Soldiers will be treated differently by a local government.
 - a. The United States may have a lesser international agreement than a SOFA, such as Diplomatic Notes.
 - b. CAAF may or may not be subject to criminal and/or civil jurisdiction of the host country to which they are deploying. CAAF status will depend upon the specific provisions of the

international agreement, if any, that are applicable between the U.S. and the country of deployment at the time of deployment.

- c. If an international agreement (e.g., SOFA) does not address CAAF status, the contractor may be unable to perform because their employees may not be able to enter the country or the contractor could be treated as a foreign corporation subject to local laws and taxation policies.
 - d. 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.
 - e. The NATO SOFA covers three general classes of sending state personnel: 1) Members of the “force,” i.e., members of the armed forces of the sending state; 2) Members of the “civilian component,” i.e., civilian employees of the sending state; 3) “Dependents,” i.e., the spouse or child of a member of the force or civilian component that is dependent upon them for support.
 - f. Under the generally accepted view of the NATO SOFA, contractor employees are not considered members of the civilian component. Accordingly, special technical arrangements or international agreements generally must be concluded to afford contractor employees the rights and privileges associated with SOFA status.
 - g. If there is no functioning government with which the Department of State can negotiate a SOFA, contract planners must comply with the policy and instructions of the Combatant Commander when organizing the use of contractors in that country.
 - h. If there is any contradiction between a SOFA and an employer’s contract, the terms of the SOFA will take precedence.
 - i. 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).
3. Contingency contractor personnel remain subject to the laws of their home country. Application of U.S. law is discussed below in Section VII.

C. Afghanistan.

1. **US Contractors - Operation Enduring Freedom.**

- a. Authority. United States relations with the Islamic Republic of Afghanistan and immunities are discussed in the Agreement Regarding the Status of United States Military and Civilian Personnel of the U.S. Department of Defense Present in Afghanistan in Connection with Cooperative Efforts in Response to Terrorism, Humanitarian and Civic Assistance, Military Training and Exercises, and Other Activities. This Agreement, drafted as a Diplomatic Note, entered into force on 28 May 2003, as effected by exchanges of notes on 26 September 2002 (Note 202), 12 December 2002 (Note 791), and 28 May 2003 (Note 93).
- b. U.S. Military and Civilian Personnel. Provided a “status equivalent to that accorded to the administrative and technical staff of the Embassy of the United States of America under the Vienna Convention on Diplomatic Relations of April 18, 1981.”
- c. Contractor Personnel.
 - (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.

2. 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.
- 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.”
- c.

VI. ADMINISTRATIVE ACCOUNTABILITY AND PROCESSING

- A. **General.** Combatant Commanders are responsible, with assistance from their Component Commanders, for visibility of all personnel within their AOR, including contractors.
- B. The Synchronized Pre-deployment and Operational Tracker (SPOT).
 - 1. All defense contractors awarded contracts that support contingency operations are required, to register their employees in the SPOT system. Registration in SPOT is required in order to receive a Letter of Authorization (LOA). *See infra* Subpart V.B. for a discussion of LOAs. DFARS 252.225-7040g.
 - 2. Pursuant to requirements in the 2008 and 2009 National Defense Authorization Acts, the Departments of Defense and State, together with USAID, entered into a “Memorandum of Understanding Relating to Contracting in Iraq and Afghanistan.” In this document, the three parties agreed to use the SPOT system as the system of record for tracking all contractors in those locations. The agencies must include in the database information on contacts with more than 14 days of performance or valued at more than \$100,000.
 - 3. SPOT relationship to CENTCOM CENSUS. United States Central Command performs a quarterly census of all contractors in the CENTCOM AOR. The census is an alternate means of providing more complete information on contractor personnel in Iraq and Afghanistan pending full implementation of the SPOT database.
 - 4. SPOT may be accessed at <https://spot.altess.army.mil/default.aspx>.
- C. Contractor Responsibilities.
 - 1. **Accountability.** All contingency contractor personnel must be registered in SPOT. These contractors are responsible for knowing the general location of their employees and shall keep the database updated. The clauses at DFARS 252.225-7040(g), DFARS Class Deviation 2013-O0015, and DFARS 225.301-4(2) (which references 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 CAAF deemed unsuitable to deploy during the deployment process, due to medical or dental reasons, will not be authorized to deploy. The clauses at DFARS 252.225-7040(e)(ii), DFARS Class Deviation 2013-O0015, 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. Contracts must stipulate that CAAF must provide medical, dental and DNA reference specimens, and make available medical and dental records.

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

D. CONUS Replacement Centers (CRC) and Individual Deployment Cites (IDS).

- 1. All CAAF shall report to a deployment center designated in the contract, or be processed through a government-authorized deployment processing facility before deploying to a contingency operation. Actions at the deployment center include:
 - a. Validating accountability information in the joint database; verify: security background checks completed, possession of required vehicle licenses, passports, visas, and next of kin/emergency data cards;
 - b. Issuing/validating proper ID cards;
 - c. Issuing applicable government-furnished equipment;
 - d. Providing medical/dental screenings and required immunizations. Screening will include HIV testing, pre- and post-deployment evaluations, dental screenings, and TB skin tests. A military physician will determine if the contractor employee is qualified for deployment and will consider factors such as age, medical condition, job description, medications, and requirements for follow-up care;
 - e. Validating/completing required theater-specific training (e.g., law of war, detainee treatment, Geneva Conventions, General Orders, standards of conduct, force protection, nuclear/biological/chemical, etc);
 - f. 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;

2. **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, and medical requirements (unless prior approval of qualified medical personnel). CAAF with waivers shall carry the waiver with them at all times.
 3. **Contractor Personnel Other than CAAF.** Contractors not accompanying the Armed Forces and who are arriving from outside the area of performance must also process through the departure center specified in the contract or complete another process as directed by the contracting officer to ensure minimum theater admission requirements are satisfied.
- E. **Joint Replacement Center (JRC).** CAAF shall process through an in-theater reception center upon arrival at the deployed location. The JRC will validate personnel accountability, ensure theater-specific requirements are met, and brief CAAF on theater-specific policies and procedures. DFARS 252.225-7040(f) subjects CAAF 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.

VII. LOGISTICS SUPPORT

A. **Policy.**

Generally, contractors are responsible for providing for their own logistical support and logistical support for their employees. However, in austere, uncertain, and/or hostile environments, the DoD may provide logistical support to ensure continuation of essential contractor services. The contracting office is required to verify the logistical and operational support that will be available for CAAF.

B. **Letter of Authorization (LOA).**

1. An LOA shall be issued via the SPOT system for all CAAF, as well as for other designated non-CAAF contractors. The LOA will be required for processing through a deployment center, travel to/from/within the AOR, and will detail the privileges and government support to which each contractor employee is entitled.
2. All contractors issued an LOA shall carry the LOA with them at all times.

3. The LOA shall state the intended length of assignment in the AOR, and identify the government facilities, equipment, and privileges the CAAF/CAAF is entitled to use.

C. Individual Protective Equipment (IPE).

Upon determination of the Combatant Commander, CAAF and designated non-CAAF contractors will be provided body armor, a ballistic helmet, and a chemical/biological ensemble. The equipment is typically issued at the deployment center and must be returned upon redeployment. 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.

D. Clothing.

Generally, contractors are required to furnish their own appropriate clothing and may not wear military or military look-alike clothing. However, the Combatant Commander may authorize contractor wear of certain items for operational reasons. Any such wear must be distinguishable from combatants (through the use of armbands, headgear, etc.).

E. Government Furnished Equipment (GFE).

1. GFE may include protective equipment, clothing, or other equipment necessary for contract performance.
2. The contract must specify that the contractor is responsible for storage, maintenance, accountability, and performance of routine inspection of Government furnished property. The contract must also specify contractor responsibilities for training and must specify the procedures for accountability of Government furnished property.
3. Contractor employees will be responsible for maintaining all issued items and must return them to the issuer upon redeployment. In the event that issued clothing and/or equipment is lost or damaged due to negligence, a financial liability investigation of property loss will be initiated IAW AR 735-5. According to the findings of the Survey Officer, the government may require reimbursement from the contractor.

F. Legal Assistance. Legal assistance services are not available to contractors either in theater or at the deployment processing center.

G. I.D. Cards.

1. Contingency Contractor Personnel will receive one or more of the following three distinct forms of identification:
 - a. **Common Access Card (CAC).** Required for access to facilities and use of privileges afforded to military, government civilians, and/or military dependents. CAAF are issued CACs.
 - b. **DD Form 489** (Geneva Conventions Identity Card for Persons who Accompany the Armed Forces). Identifies one's status as a contractor employee accompanying the U.S. Armed Forces. Must be carried at all times when in the theater of operations. Pursuant to the Geneva Convention Relative to the Treatment of Prisoners of War, Article 4(4), if captured, contractors accompanying the force are entitled to prisoner of war status.
 - c. **Personal identification tags.** The Army requires all CAAF to have personal ID tags. The identification tags will include the following information: full name, social security number, blood type, and religious preference. These tags should be worn at all times when in the theater of operations.
 2. In addition, other identification cards, badges, etc., may be issued depending upon the operation. For example, when U.S. forces participate in United Nations (U.N.) or multinational peace-keeping operations, contractor employees may be required to carry items of identification that verify their relationship to the U.N. or multinational force.
 3. If the contractor processes CAAF for deployment, it is the responsibility of the contractor to ensure CAAF receive required identification prior to deployment.
- H. Medical and Dental Care. CAAF are entitled to resuscitative care, stabilization, hospitalization at level III Military Treatment Facilities (MTF), and assistance with patient movement in emergencies where loss of life, limb, or eyesight could occur. The following applies:
1. All costs associated with treatment and transportation are reimbursable to the government.
 2. **Resuscitative care.** The aggressive management of life and limb-threatening injuries. Examples of emergencies include refills of prescription/life-dependent drugs, broken bones, and broken teeth.
 3. **Primary Care.** Support beyond resuscitative or emergency care, such as primary medical or dental care cannot be authorized under the terms of the contract. DFARS 252.225-7040(c)(2)(iii).
 4. **Long term care.** Long term care will not be provided.

- I. Evacuation, Next of Kin Notification, Personnel Recovery, Mortuary Affairs.
 - 1. **Evacuation.** The government will provide assistance, to the extent available, to U.S. and OCN contractors if the Combatant Commander orders a mandatory evacuation.
 - 2. **NOK Notification.** The contractor is responsible for notification of the employee-designated NOK in the event an employee dies, requires evacuation due to an injury, or is isolated, missing, detained, captured, or abducted.
 - 3. The government will assist, in accordance with DoDD 2310.2, Personnel Recovery, in the case of isolated, missing, detained, captured, or abducted CAAF.
 - 4. **Mortuary Affairs.** Mortuary affairs will be handled in accordance with DoDD 1300.22, Mortuary Affairs Policy.
- J. **Religious Support.** Access to military religious support may be authorized under the terms of a contract.
- K. Military Postal Service (MPS). U.S. citizen CAAF contractors will be authorized to use MPS. However, non-U.S. citizen CAAF and other contractors may only use MPS to send their paychecks to their homes of record.
- L. Morale, Welfare, and Recreation (MWR) Support. CAAF who are also U.S. Citizens will be authorized to use MWR and exchange services, including post exchanges and vendors. However, non-U.S. and non-CAAF contractors will not be authorized.
- M. American Red Cross (ACS) Services. ARC services such as emergency family communications and guidance for bereavement airfare are available to contractors in the area of operations.
- N. Hostage Aid. When the Secretary of State declares that U.S. citizens or resident aliens are in a “captive status” as a result of “hostile action” against the U.S. government, CAAF personnel and his/her dependents become entitled to a wide range of benefits. Potential benefits include: continuation of full pay and benefits, select remedies under the Servicemembers’ Civil Relief Act, physical and mental health care treatment, education benefits to spouses or dependents of unmarried captives, and death benefits. Eligible persons must petition the Secretary of State to receive benefits. Responsibility for pursuing these benefits rests with the contractor employee, the employee’s family members, or the contractor.

VIII. SECURITY, WEAPONS, AND USE OF FORCE

- A. Security.

1. CAAF and designated non-CAAF personnel may be eligible for US-provided security. It is DoD policy to develop a plan for protection of CAAF in locations where there is not sufficient or legitimate civil authority and the commander decides it is in the interests of the government to provide security because the contractor cannot obtain effective security services, such services are unavailable at a reasonable cost, or threat conditions necessitate security through military means. In contrast, DFARS Class Deviation 2013-O00015, which pertains to contractors who are not authorized to accompany the Armed Forces, provides that the contractor is responsible for all security support required for contractor personnel engaged in the contract.
2. The contracting officer shall include the level of protection to be provided to contractor personnel in the contract.
3. In appropriate cases, the Combatant Commander may provide security through military means, commensurate with the level of security provided to DoD civilians.
4. All contingency contractors shall comply with applicable Combatant Commander force protection orders, directives, and instructions. However, only the Contracting Officer is authorized to modify the terms and conditions of the contract. (DFARS 252-225-7040(d)(1)(iv), Class Deviation 2013-O00015 (c)(iv))

B. CAAF Arming for Self-Defense.

1. In accordance with applicable U.S., HN, and international law, and relevant international agreements, on a case-by-case basis, the Combatant Commander, may authorize CAAF arming for **individual** self-defense.
2. The contractor's request shall be made through the Contracting Officer.
3. The contracting officer will notify the contractor what weapons and ammunition are authorized and the contractor will ensure its personnel are adequately trained, will adhere to all applicable combatant commander and local commander force protection policies, and understand that the use of force could subject them to U.S or host-nation prosecution and civil liability. DFAS 252.225-7040(j)
4. The contractor must ensure that employees are not prohibited under U.S. law to possess firearms (e.g., Lautenberg Amendment, 18 U.S.C. § 922(d)(9)).

C. Security Services.

1. If consistent with applicable U.S., HN, and international law, international agreements, DoDI 3020.41, and DoDI 3020.50, a defense contractor may

be authorized to provide security services for other than uniquely military functions. Contracts for security services shall be used cautiously in contingency operations where major combat operations are ongoing or imminent. Whether a particular use of contract security personnel to protect military assets is permissible is dependent on the facts and requires legal analysis considering the nature of the operation, the type of conflict, and a case-by-case determination.

- a. Private Security Company (PSC). A PSC is a company employed by the DoD performing “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.” The definition of PSC similarly expands in areas designated as “other significant military operations” by both the Secretary of Defense and Secretary of State.
- b. Private Security Functions include:
 - (1) Guarding of personnel, facilities, designated sites, or property of a Federal agency, the contractor or subcontractor, or a third party.
 - (2) Any other activity for which personnel are required to carry weapons in the performance of their duties. Contractor personnel armed for self-defense are not subject to requirements of DoDI 3020.50; DoDI 3020.41 continues to prescribe policies related to the arming of individual contractors for self-defense.
 - (3) Contractors are not authorized to perform inherently governmental functions. Therefore, any private security function is limited to a defensive response to hostile acts or demonstrated hostile intent.
- c. Covered Contracts include:
 - (1) A DoD contract for the performance of security services or delivery of supplies in an area of contingency operations, humanitarian or peace keeping operations, or other military operations or exercises, outside the United states. A “contingency operation” is a military operation that is either designated as such by the Secretary of Defense or becomes a contingency operation as a matter of law under 10 U.S.C. § 101(a)(13).

- (2) A contract of a non-DoD Federal agency for performance of services or delivery of supplies in an area of combat operations or other significant military operations, as designated by the Secretary of Defense.
2. Requests for permission to arm PSCs to provide security services shall be approved or denied by the Combatant Commander..
3. Requirements for requesting permission to arm PSCs to provide security services are listed in DODI 3020.50.
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. This regulation discusses in-depth the minimum requirements for this guidance, which deals with security, arming, accountability, and rules for the use of force.
6. DFARS Class Deviation 2013-O0015 requires non-CAAF PSC personnel 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.

IX. COMMAND, CONTROL AND DISCIPLINE

- A. Contractors in the Workplace. 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.
 2. Functions and duties that are inherently governmental are barred from private sector performance. Additionally, the contracting officer is statutorily required to make certain determinations before entering into a contract for the performance of each function closely associated with inherently governmental functions.

3. Contractor personnel are not under the direct supervision of military personnel in the chain of command. However, CAAF and certain non-CAAF personnel working on military facilities are under the direct authority of local commanders for administrative and force protection issues. Contractor personnel shall not be supervised or directed by military or government civilian personnel.
4. The Contracting Officer is the designated liaison for implementing contractor performance requirements. The Contracting Officer is the only government officials with the authority to increase, decrease, or materially alter a contract scope of work or statement of objectives..
5. Contractor personnel cannot command, supervise, or control military or government civilian personnel.

B. Orders and Policies.

1. All contracts involving contractor personnel should include provisions requiring contractor personnel to comply with: applicable U.S. and HN laws; applicable international agreements; applicable U.S. regulations, directives, instructions, policies, and procedures; orders, applicable directives, and instructions issued by the Combatant Commander relating to force protection, security, health, safety, or relations and interaction with local nationals.
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 (direction to contractor personnel) in emergency situations.
 - a. **DFARS.** The DFARS maintains the general rule that only Contracting Officers may change a contract, even in emergency situations. The DFARS clause does expand the scope of the standard Changes Clause, by allowing, in addition to changes otherwise authorized, that the Contracting Officer may, at any time, make changes to Government-furnished facilities, equipment, material, services, or site.
 - b. **DoDI.** The Instruction 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 that CAAF and non-CAAF personnel take emergency actions to remove themselves from harm's way or take

other appropriate self-protective measures. DoDI 3020,41, Enclosure 2, paragraph 4d(1)

C. Discipline.

1. The contractor is responsible for disciplining contractor personnel; commanders have LIMITED authority to take disciplinary action against contractor personnel.
2. Commander's Options.
 - a. Revoke or suspend security access or impose restriction from installations or facilities.
 - b. Request the contracting officer to inquire whether the employer intends to take any disciplinary action against the employee.
 - c. Request that the contracting officer direct removal of the individual. However, Government may be liable if the employee successfully claims they were wrongfully terminated and that termination was based upon Government direction.
3. **Contracting Officer Options.** If permitted under the contract, 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 contractors who are so removed.
4. Specific jurisdiction for criminal misconduct is subject to the application of international agreements. Application of HN and OCN law is discussed above in Section III.
5. Military Extraterritorial Jurisdiction Act of 2000, *as amended by* § 1088 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (MEJA).
 - 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.

- b. **Solution.** The MEJA closes the jurisdictional gaps by extending Federal criminal jurisdiction to certain civilians overseas and former military members.
- c. Covered Conduct:
 - (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:
 - (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;
 - (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:
 - (a) 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) OCNs 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 OCN.
- 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.
- 6. 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.

- b. Under the law for at least the past 30 years, CAAF were only subject to the UCMJ in a Congressionally declared war. During that time, there was never UCMJ jurisdiction over CAAF because there were no Congressionally declared wars.
- c. Congress amended the UCMJ in the John Warner National Defense Authorization Act for Fiscal Year 2007 (2007 NDAA). 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.
- d. 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.
- e. 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.

X. OTHER CONTINGENCY CONTRACTOR ISSUES

A. Working Conditions.

- 1. **Tours of Duty.** Contingency Contractor Personnel 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.
- 2. **Hours of Work.** Contractors must comply with local laws, regulations, and labor union agreements governing work hours. 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. Worker's 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. Pursuing any of the following benefits is up to the contractor employee or the contractor.
2. Defense Base Act (DBA) 42 U.S.C. §§ 1651 *et seq.*; FAR 28.305 and 52.228-3; DFARS 228.305, 228.370(a), and 252.228-7000.
 - 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 "public work" contracts or subcontracts 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.
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.
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.

- D. Pay. CAAF pay and benefits are governed by the CAAF employment contract with the contractor. The U.S. Government is not a party to this employee-employer relationship. CAAF are not entitled to collect any special pay, cash benefits or other financial incentives directly from the U.S. Government.
- E. Veteran's Benefits. Service performed by CAAF is NOT active duty or service under 38 U.S.C. 106. DoD policy is that contractors operating under this clause shall not be attached to the armed forces in a way similar to the Women's Air Forces Service Pilots of World War II. Contractors today are not being called upon to obligate themselves in the service of the country in the same way as the Women's Air Forces Service Pilots or any of the other groups listed in 38 U.S.C. 106.
- F. Continued Performance During a Crisis.
 - 1. During non-mandatory evacuation times, Contractors shall maintain personnel on location sufficient to meet contractual obligations.
 - 2. DoDI 3020.41 requires planning to minimize the impact of losing essential contractor services by, among other things, including contract terms that obligate contractors to ensure the continuity of essential contractor services. Contracts involving essential contractor services that support mission essential functions may contain the clause at DFARS Class Deviation 2009-00010, Continuation of Essential Contractor Services.
 - 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.

XI. COMBATING TRAFFICKING IN PERSONS

- A. Policy. U.S. Government is committed to proactively to preventing trafficking in persons and ensuring our contractors and subcontracts do as well. Executive Order 13627, (25 Sep 2012), 22 USC § 7101 et. seq.
 - 1. FAR subpart 22.17 and 52.222-50 are currently in the process of being revised (FAR Case 2013-001).
 - 2. DoD established a Task Force to Combat Trafficking in Persons involving senior personnel from all Services, AAFES, DLA and other organizations.
 - 3. DoS releases a *Trafficking in Persons Report* each June.
 - 4. DFARS Procedures, Guidance, and Information 22.1703 applies to contracts outside the United States.
- B. Living Conditions.

1. Generally, when provided by the government, CAAF living conditions, privileges, and limitations will be equivalent those of the units supported, unless the contract with the Government specifically mandates or prohibits certain living conditions.
 2. CENTCOM requires contractor personnel be provided square footage equivalent to an E1 in government-furnished facilities. Previously, CENTCOM required 50 sq ft of living space for contractor employees in government furnished facilities. (CENTCOM Clause 5152.222-5900, revised March 2014)
 3. Contractors are still required to provide 50 Sq Ft in contractor-provided facilities within the CENTCOM AOR.
- C. Passports.
1. Contractors may not knowingly destroy, conceal, remove, confiscating, or possess any passport or similar document in order to maintain the employment of any person (18 USC § 1592)
 2. Contractors shall only hold an employee's passport or other identification documents for the shortest period of time reasonable for administrative processing purposes.
- D. Native Language.
1. Employees must be provided a signed copy of their employment contract in both English and their native language.
 2. Contractors should have informational posters in their employees' native languages regarding reporting Trafficking in Person violations and hotlines with native speakers.

XII. ADDITIONAL REFERENCES

1. Geneva Conventions of 1949 and Additional Protocol of 1977.
2. 18 U.S.C. § 922(d), Unlawful Acts (providing firearms to certain persons).
3. 22 U.S.C. § 3261 *et seq.*, Responsibility of the Secretary of State (for U.S. citizens abroad).
4. AR 700-4 (Logistics Assistance).
5. AR 570-9 (Host Nation Support).
6. AR 12-1 (International Logistics).
7. FM-4-100.2 (formerly FM-100-10-2) – Contracting Support on the Battlefield.
8. FM 4-92, Contracting Support Brigade
9. DA PAM 27-1-1 (Geneva Convention Protocols).
10. DA PAM 715-16 (Contractor Deployment Guide).
11. DoDI 4161.2 (Government Property in Possession of Contractors).

12. DoDI 1300.23 (Isolated Training for DoD Civilian and Contractors).
13. DoDI 1000.1 (Geneva Convention ID Cards).
14. DoDI 1100.22 (Guidance for Determining Workforce Mix).
15. DoDI 3020.37 (Continuation of Essential DoD Contractor Services Crisis).
16. DoDD 5000.1 (The Defense Acquisition System).
17. DoDD 3025.1 (Non-combatant Evacuation Operations).
18. Joint Pub 1-2, Definitions.
19. Joint Pub 4-0, Doctrine for Logistics Support of Joint Operations, Contractors in Theater.
20. Joint Pub 4-10, Operational Contract Support.
21. AMC Pamphlet, 715-18. AMC Contracts and Contracting Supporting Military Operations. 16 June 1999.
22. Defense Contingency Contracting Officer's Representative Handbook (Sep. 2012), *available at* <http://www.acq.osd.mil/dpap/ccap/cc/corhb/index.html>.
23. Under Secretary of Defense, Acquisition, Technology, and Logistics, Defense Procurement and Acquisition Policy, Contingency Contracting, Defense Contingency Contracting Handbook: Essential Tools, Information, and Training to Meet Contingency Contracting Needs for the 21st Century (Oct. 2012).

XIII. CONCLUSION

During Contingency Operations, the U.S. Military will continue to utilize contractor support to perform many non-governmental functions. The individuals employed by defense contractors will be present in the theater of operations and will often live and work side-by-side with uniformed military personnel. It is imperative, given this close relationship and mutual dependence, that Judge Advocates understand the proper legal context for our relationship with contractors on the battlefield, and know how to ensure they are properly provided for, supervised, and employed.