

ETHICS ISSUES INVOLVING CONTRACTORS DEPLOYED OR ACCOMPANYING THE FORCE

I. REFERENCES.

- A. Standards of Conduct for Employees of the Executive Branch, 5 CFR 2635
- B. Post Government Employment and Conflict of Interest Restrictions, 5 CFR 2641
- C. 18 USC §201 – Bribery
- D. 18 USC §371 – Conspiracy
- E. 18 USC §1956 – Money Laundering
- F. Federal Acquisition Regulation (FAR), Defense FAR Supplement (DFARS), and service supplements.
- G. Army Federal Acquisition Regulation Manual No. 2 (Contingency Contracting), November 1997.
- H. AR 715-9, Contractors Accompanying the Force, 29 October 1999.
- I. DA PAM 715-16, Contractor Deployment Guide, 27 February 1998.
- J. Army Material Command (AMC) PAM 700-30, Logistics Civil Augmentation Program (LOGCAP), 31 January 2000.

I. INTRODUCTION.

- A. This section supplements additional material in the Ethics Counselor Course Desk Book. It is intended to be a checklist for deployment related ethics issues. Substantive discussions identified in this Chapter may be found in the Ethics Counselor Course Desk Book.
- B. Contingency operations will involve multiple levels of contractor support, from life support and sustainment to participation in combat operations. Most of the legal issues presented during deployment relate to procurement, fiscal, operational, and international law.
- C. There are no exceptions to the ethics and standards of conduct statutes and regulations applicable to the contractor relationship during contingency operations.
- D. An Ethics Counselor should understand the laws and regulations applicable during contingency operations.
 - 1. International Law. The most important international law is the Law of War, which applies during combat operations and imposes limitations, for example, treatment of prisoners and use of force.
 - 2. International Agreements. A variety of international agreements, such as treaties and status of forces agreements (SOFA) may apply and may substantially affect contingency contracting; for example, international agreements may limit the ability of foreign corporations to operate inside the local nation, may impose limits and tariffs on imports, and may govern the criminal and personal jurisdiction over contractors and their personnel.

3. Contract and Fiscal Law, including Federal Acquisition Regulations and agency supplements.
 - a. FAR Part 25 and DFARS Part 225 govern foreign acquisitions.
 - b. FAR Part 18 addresses unique procedures that may be useful in contingency operations.
 - c. Fiscal Law. Title 31, U.S. Code; Department of Defense (DOD) Financial Management Regulation FMR (DOD FMR); DFAS-IN 37-1; DFAS Manual 37-100-XX (XX=current fiscal year (FY)).
 - d. Executive Orders and Declarations.

II. PREPARATION FOR DEPLOYMENT ETHICS.

- A. General Considerations. Plan, plan, plan. Review the relevant procurement and fiscal laws and regulations if you have not already. Understand the mission and the participants, especially in a joint command or joint operating base. Know whether there are other Staff Judge Advocates or other Ethics Counselors in the AOR.
- B. Get on the SIPRNET and communicate with the downrange personnel. Understand the unique contracting and fiscal realities, understand their unique mission circumstances. Understand the contracting authorities and approval authorities. Get your hands on theater policies and procedures. Ask how they overcome obstacles. How have practices complied with ethics and procurement regulations?
- C. Identify and train of necessary personnel prior to deployment.
- D. Review existing CONPLANS or OPLANS, including acquisition appendices.
- E. Understand when the contracting team will embark to theatre. Be part of the contracting team or move with the contracting team.
- F. Obtain and understand relevant General Orders. Specifically look for information regarding relationships with local, third country national or US civilian personnel. Violations of General Orders may be punished under the UCMJ.
- G. What to take with you. IT connections in theatre generally are not fast and may be subject to content restrictions, even if the link is to a .mil address.
 1. Laptop computer.
 2. CD or electronic copies of Joint Ethics Regulation, 5 CFR 2635, 18 USC 201 et. Seq.
 3. UCMJ.
 4. TJAGLCS Desk Book Materials:
 - a. ECC
 - b. Operational Law
 - c. Contract Attorney Course
 - d. Procurement Fraud
 - e. Criminal Law
 - f. MEJA

III. ROLE OF THE SJA/ETHICS COUNSELOR

A. Advisor to the Commander.

1. Standards of Conduct issues.
 - a. Contractors frequently attempt to offer soldiers gifts under the misperception that the Standards of Conduct and JER do not apply in theatre.
 - b. Foreign officials also frequently provide gifts to soldiers and senior officials.
2. Fiscal law issues and proper use of government resources.
3. Proper relationships with civilian and contractor support personnel.

B. Ethics Counselor. Be prepared to provide advice and opinions on:

1. Gifts from prohibited sources and foreign governments.
2. Post Government Employment:
 - a. Soldiers may be on final tour before retirement
 - b. Seek employment or entertain offers from CONUS activities or DOD Contractors.
 - c. Make relationships with contractors in theatre and soldier desires to return as in theatre support contractor.
3. Outside Activities:
 - a. Soldiers desire to create in theatre businesses, usually video game, music, video or electronic supply related. Soldiers are trying to spend all that deployment money!
 - b. Soldiers create or already have outside business interest in CONUS and continue to run the business.
 - c. Writing and selling their stories.
 - 1) Coordinate with PAO and Intelligence.
 - 2) Learn and understand the soldier's duties.
 - 3) Get copies of the manuscripts and read it.
4. Political Activities.
 - a. DOD 1344.10.
 - b. 10 U.S.C. § 973: A regular member or Reserve Component member on active duty under a call or order to active duty for more than 270 days, may not hold or exercise the functions of a covered Federal office.
 - c. Reserve officers currently holding elected office.
 - d. Campaigning from theatre.

C. Investigator and Litigator.

1. Preserve evidence and protect the record.
2. Document inappropriate behavior
3. Litigate or participate in protests, disputes or criminal cases.
4. Investigate crimes or review investigation reports for crimes punishable under Military Extraterritorial Judicial Act (MEJA) and forward to theatre Commander, for delivery to the Domestic Security Section, Criminal Division, US Department of Justice and designated US Attorney representative.

D. Defender against Fraud, Waste and Abuse.

1. How to prevent, detect, and correct fraud, waste, and abuse.
2. Provide litigation support for fraud cases.
3. Ensure the commander and contracting officer exercise sound business Judgment.
4. Do not be afraid to tell a Commander “no” or to point out inappropriate behavior.
5. Do not fall into the “we need it now” or “it’s good for the operation” mentality when statutes and/or regulations direct another course of action.
6. Know and assess contract/fiscal/ethics risks.
7. If not already, document and preserve the records.

E. “Know It All”. Walk the base/camp and know what is going on, beyond ethics, procurement and fiscal.

1. Get SIPRNET access.
2. Read intelligence and operational reports.
3. Attend contract officer’s meetings/DFAS meetings.
4. Attend commander’s meetings.
5. Understand emergent needs or trends before they land on your desk.
6. Understand politically sensitive issues, especially if your commander does not!

IV. CONTRACTOR CONDUCT AND OPERATIONS IN THEATRE

- A. Theatre Commanders may direct military and DOD civilian personnel. Except during threat to life and safety, Commanders may not supervise contractor personnel.
- B. General Orders and instructions issued by theatre Commanders apply to contractors.
- C. Command and control determined by the contract and task orders.
- D. Contractor management personnel will be required to have supervisors on site to direct contract performance and coordinate safety measures.
- E. May be required to possess and display theatre badges at all times. Similarly, contractors may be required to obtain CAC credentials and return CAC at the expiration of the contract or their service.
- F. Personnel will have support determined by the contract, or as determined by relevant theatre instructions. For example, contractor personnel with CAC credentials may have access to dining facilities (DFACs), gyms, exercise and MWR facilities, exchange privileges, legal assistance privileges, medical care. Contract language may be modified by theatre policies and may even conflict with the contract provisions.

- G. Weapons are regulated by theatre General Orders and host nation agreements. The contract may contain clauses regarding self defense weapons. Generally, no personal weapons of any type are authorized in theatre. If contractors are allowed to carry defensive weapons, they will be issued at the Individual Deployment Site or Contractor Deployment Processing Center. All personnel will be required to adhere to weapons training requirements and safety procedures. 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)).
- H. Motor vehicle operation. Contractor personnel may be authorized to operate government vehicles in theatre, subject to theatre Commander orders, terms of the contract and host nation agreements. Contractor personnel may also be provided vehicles under the terms of the contract. Contractor personnel may be subject to host nation civil and criminal actions resulting from operations of motor vehicles, unless they enjoy special status.
- I. Life Support Areas. Typically, contractor personnel will have their own Life Support Areas (LSA) separate from military and DOD civilian personnel, and separate from host nation or third country national personnel. Contractor may also be required to live in field conditions, often austere and communal, characterized by temporary structures and primitive facilities.
- J. Military Extraterritorial Judicial Act (MEJA), 18 USC §3261, et. Seq. implemented by DoD Instruction 5525.11, dated 3 March 2005. This statute provides for Federal jurisdiction over crimes committed outside the United States to offenses that, if committed within the special maritime and territorial jurisdiction of the United States, are punishable by imprisonment for more than 1 year. This jurisdiction covers members of and persons employed by or accompanying the Armed Forces. Contractors in theatre will be subject to MEJA.
- K. Keep an eye out for the Lieutenant Colonel Dominic 'Rocky' Baragona Justice for American Heroes Harmed by Contractors Act. This Act will provide in personam jurisdiction in civil actions against contractors of the United States Government performing contracts abroad with respect to serious bodily injuries of members of the Armed Forces, civilian employees of the United States Government, and United States citizen employees of companies performing work for the United States Government in connection with contractor activities.
- L. Contractor salary. Contractor personnel are not entitled to special pay or tax exempt status directly from DOD as a result of their service in theatre. All salaries are determined by the contract and by the employment relationship. All tax privileges are determined by the Internal Revenue Service.
- M. Generally, contractors are responsible for providing all life, mission, and administrative support to its employees. If the government determines it is in its interests to provide protective equipment, the level of support must be stated in the contract. The contract also provides whether the protective equipment is a reimbursable expense, the standards for equipment and whether equipment can be purchased by the contractor.
- N. Uniforms and organizational wear. Contractors are generally not authorized to wear a uniform or attire that resembles US DOD uniforms. Theatre Commanders may authorize contractors to wear uniforms in writing for operational reasons. The authorizations will be carried by contractor personnel at all times. The uniform will indicate civilian status.