

# Contractors on the Battlefield: Part III



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*This is the third and final installment in a series that discusses policy and planning to ensure effective contractor force protection on the battlefield. The first installment explored what the military services are doing to provide force protection for contractors. The second installment detailed the present military service force protection guidance. This final chapter analyzes the issues surrounding protection of battlefield contractors. The author's views are his own and do not represent those of DCMA or the Department of Defense.*

**(Right)** Taking a break from his contingency contracting, U.S. Army Maj. Scott Meehan, DCMA Orlando, stands beside freshly cut armored sheets. (DCMA staff photo.)

**(Opposite)** Ms. Mildred Miller, DCMA Anniston, with her ACO, Maj. Todd Spencer, at the airfield in Al Kut, Iraq. (Photo by Scott Hendrickson.)





**M**ust the combatant commander provide force protection for contractor personnel? This is a very important question to which the answer is not always clear. As detailed in Army Field Manual (FM) 100-10-2, various source documents are inconsistent in determining who provides force protection, and the situation often dictates the answer. Understandably, this causes confusion.

One source, the Logistics Civil Augmentation Program (LOGCAP) contract DAAA09-02-D-0007, dictates "...the Service Theater Commander will provide force protection to contractor employees commensurate with that given service/agency's...civilians in the operations area..."<sup>1</sup> In contrast, according to Joint Publication (JP) 4-0, "Force protection responsibility for Department of Defense (DoD) contractor employees is a contractor responsibility..."<sup>2</sup> Causing further confusion, both of these quotes contain modifying language: The subtitle of the "Special Contract Requirements" section of the LOGCAP contract indicates that it is for "peacetime contracts" and the contracting officer may modify the provisions based on the situation. Meanwhile, paragraph 13 of JP 4-0 declares that the contractor is responsible for force protection of his/her employees unless the contract states otherwise.<sup>3</sup>

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Such contradictions should not occur due to the clearly stated requirement by JP 4-0 that "...contractor security provisions... (be) incorporated into Operation Plans (OPLANs) and/or Operations Orders (OPORDs), in the governing contract, and in the determination of structure and size of theater forces."<sup>4</sup> However, the confusion is often understandable given the fact that military planners and contracting officers usually belong to different organizations, operate in different time demands/horizons (the contract award date and period may not coincide with OPLAN update cycles) and have different perspectives. In some cases, the requirement to provide the force protection may cause the combatant commander (COCOM) to feel overly burdened if the available forces are already limited. He/she may be unwilling to provide force protection unless clearly directed. This has the potential to severely complicate force protection challenges in the current "no fronts" nature of asymmetric warfare.

**Unclear Requirements for Control of Contractor Employees on and off Duty**

If the COCOM is required to provide force protection to contractor personnel, how does he/she direct the actions of contractor employees both on and off duty? Guidance in this area is contradictory. According to JP 4-0

<sup>1</sup> "U.S. Army Joint Munitions Command Logistics Civil Augmentation Program (LOGCAP), Contract Number DAAA09-02-D-0007," linked document, *Suggested Clauses* at "Army Materiel Command Contingency Contracting" <http://www.amc.army.mil/amc/rda/rda-ac/ck/ck-source.htm>, Section H, Special Contract Requirements, paragraph H-16, Force Protection, 3.  
<sup>2</sup> JP 4-0, V-7.  
<sup>3</sup> *Ibid.*  
<sup>4</sup> *Ibid.*  
<sup>5</sup> LOGCAP Contract DAAA09-02-D-0007, paragraph H-14, Logistics Support Element, 2.  
<sup>6</sup> *Ibid.*, 1.  
<sup>7</sup> Susan C. Foster, "Contractors On The Battlefield: Force Multipliers Or Detractors?" Carlisle Barracks, Pa. U.S. Army War College, April 1998, 19.



Iraqi contractors install armored plates onto Humvees in an effort to better protect escorts and soldiers. (Photo by Maj. Scott Meehan, U.S. Army.)

*The current trend in warfare means there is no longer a traditional “rear area.”*



and Army Regulation (AR) 715-9, contractor employees are under the supervisory control of contractor management officials. The DoD contracting officer or contracting officer’s technical representative (COTR) only provides them with contractual direction. Yet, the LOGCAP contract requires that the contractor “...place all employees deploying to support this contract under the administrative control of the...Army Materiel Command forward commander.”<sup>5</sup> In addition, the contract requires that contractor employees “...comply with all guidance, instructions, and general orders applicable to U.S. Armed Forces and DoD civilians as issued by the theater commander or his/her representative.”<sup>6</sup> This apparent conflict in policy could lead some to wonder if contractor employees are under the command and control of the COCOM after all.

During on-duty periods, the contractor employees are only subject to the Uniform Code of Military Justice during a declared war and without the declaration they are not.<sup>7</sup> Therefore, if the COCOM cannot direct the actions of contractor employees during an emergency in an “undeclared war,” such as an attack on a contractor employee location, then he/she may be faced with a significantly complicated ability to provide effective force protection if the contractor personnel flee from their assigned posts or move

to locations inconsistent with effective military strategy. This situation could worsen if, by fleeing an assignment to maintain a key weapon system, the contractor employee’s absence negatively impacts the use of the very equipment that could protect him/her and fellow military and civilian personnel from harm.

The difference between military and contractor personnel is also present during off-duty hours, as contractor personnel are not subject to the same restrictions. For example, contractor employees are allowed to travel “off post” within the battlefield area. This apparent “privileged” status could significantly affect the morale and discipline of military personnel within the area of operations, increasing the difficulty of the COCOM’s force protection burden while at the same time endangering mission accomplishment.

**Unclear Understanding of Non-Combatant Status**

Contractor personnel are considered non-combatants per Army FM 100-10-2, Contracting Support on the Battlefield, and Navy Warfare Publication (NWP) 1-14M, Commander’s Handbook on the Law of Naval Operations. For this reason, contractor employees assigned overseas should be issued identification (ID) cards stating the employee’s non-combatant status under the Geneva Convention. However, there is still much misunderstanding of this issue. For example, paragraph H-18 of the LOGCAP contract requires the contractor to ensure that its employees have ID cards. But it does not

**...policy should make contractor employees subject to the Uniform Code of Military Justice during any “contingency operation”...**

**(Above)** Mr. Al Bashir, an Iraqi vendor, supplied U.S. Army Maj. Scott Meehan, DCMA Orlando, and his men with armored plates that stopped nearly all fire rounds with few to no indentation marks. Here, soldiers install these life-saving devices.  
**(Right)** U.S. Army Maj. Scott Meehan, DCMA Orlando, shakes on a contract and closes a deal.



*...significant gaps in CoB policy, doctrine and military planning exist in the area of contractor employee force protection.*



specify that the ID cards indicate Geneva Convention status. The urgency of this issue is exemplified in an Air Force e-mail dated April 8, 2003: "Recently, a disturbing number of DoD civilians and contractor employees were found to be in the Southwest Asia area of operations without Geneva Convention identification."<sup>8</sup> By indicating Geneva Convention status on the ID cards, contracting employees will gain the protection offered to those with this status. Unfortunately, it is obvious that much work needs to be done to clarify this issue in Iraq and Afghanistan, as well as across DoD.

Another form of identification is military uniforms. Because contractor employees are not authorized to wear military uniforms, they should be issued "...distinctively colored patches, armbands or headgear."<sup>9</sup> However, distinct articles of clothing have not always been given to contractor personnel in every operation. As distinctively identified non-combatants, contractor employees would not be made the object of attack nor considered military targets and, if captured, would be given the same protection granted Prisoners of War under the Geneva Convention.

Without such identification, contractors performing new types of battlefield support, such as battlefield repair of weapons systems engaged on the front lines, could be considered illegal combatants because of their direct support in the taking up of arms against an enemy. Illegal combatants do not receive the protections of the Geneva Convention and could be subject to war crimes trials. For this reason, clarification on which activities are lawfully non-combatant must be provided to the international community and DoD to prevent uncertainty in this area and preclude loss of non-combatant status if the employee is detained.

**(Above)** A member of Maj. Scott Meehan's group in Iraq.

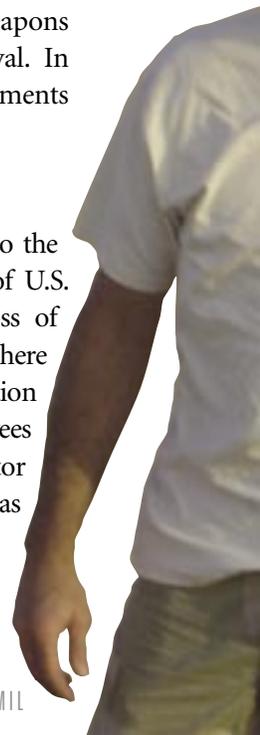
### **Unclear Requirements for Weapons**

If contractor personnel are considered non-combatants and are not under the direct control of the COCOM, they should not carry weapons. However, once again, guidelines are conflicting. An interim memo from the acting secretary of the Air Force states, "Air Force commanders should not issue firearms to contractor personnel...nor should they allow contractor personnel to carry personally owned weapons."<sup>10</sup> In contrast, paragraph H-21 of the LOGCAP contract permits the carrying of government furnished firearms (M9 pistols) by contractor employees (for self-defense purposes at the discretion of the theater commander).<sup>11</sup>

This flexibility regarding weapons for the contractors should be eliminated. Contractor employees receive limited weapons training and should not act as soldiers. Possession of a firearm by contractor employees in battlefield conditions could actually increase their chances of being killed or injured in a hostile situation for two reasons. First, enemy forces would probably attack armed contractor personnel. Their outlook is reflected in NWP 1-14M, which states that non-combatant persons who take up arms lose their immunity as non-combatant persons and may be attacked.<sup>12</sup> Second, the contractor employees may be tempted when faced with enemy forces to use their weapons without proper authorization or approval. In summary, there are many unclear requirements in force protection policy.

### **If Force Protection Efforts Fail**

Why is this issue important? In addition to the public outcry that accompanies any loss of U.S. personnel in battle and the military's loss of critically needed personnel and capability, there is also a compensation cost if force protection efforts fail. Compensation is due to employees (or beneficiaries) if an eligible contractor employee is injured or killed in overseas



battlefield employment when the Workers' Compensation Insurance (Defense Base Act) clause, Federal Acquisition Regulation (FAR) 52.228-3, is included in the contract as required by FAR 28.309(a). This coverage also applies to injury or death during transit to or from an employee's place of employment when the government provides the transportation or reimburses the contractor for the cost of the transportation.<sup>13</sup>

The Worker's Compensation and War-Hazard Insurance Overseas clause, FAR 52.228-4, also requires compensation for injuries or death resulting from a war-risk hazard (a hazard that can arise in any U.S. armed conflict whether or not a war has been formally declared) even when the injury or death occurs outside of the course of the employee's battlefield employment. This compensation comes from the Federal Employee's Compensation Act Fund (funded by the government).<sup>14</sup>

However, as was noted during the Defense Acquisition Excellence Council (DAEC) briefing, these clauses are not always included in all contracts. This inconsistency could cause significant liability and/or public relations problems, not to mention emotional and financial hardship, should a contractor employee be injured or killed without the financial protection that the clauses provide.

**If the Contractor Employee Is Captured and Detained**

Compensation is due to employees (or beneficiaries) if an eligible contractor employee is captured and detained in the course of overseas battlefield employment or when in the area as required by the contract if the Capture and Detention clause is included in the contract. (This clause is Defense Federal Acquisition Regulation Supplement (DFARS) 252.228-7003.) This compensation, which could be the total pay due the employee while detained by the enemy, is paid by the government.<sup>15</sup>

**"The contributions of DCMA's employees increase our position as the 'indispensable partner' to our customers and bolster our mission to provide combat support for today's soldiers."**

**- Maj. Gen. Darryl A. Scott (10/04)**

Further, compensation is due to employees captured and detained while performing personal services contracts under the Victims of Terror Compensation Act (VTCA), which does not require a clause to be included in the contract to apply. The VTCA compensation includes

not only pay and benefits but also physical and mental health care and educational benefits for the employee's family as well as death benefits if the employee is killed while detained.<sup>16</sup>

**If the Contractor Has Been Indemnified by the Government**

Compensation may also be due contractors who are a party to third-person claims for injury or death when the Indemnification Under Public Law 85-804 clause, FAR 52.250-1, is included in the contract.<sup>17</sup>

In summary, it could be quite costly to taxpayers if battlefield force protection efforts fail and compensation must be provided.



**(Left)** Mr. Steve Bratz, DCMA San Antonio, in Kuwait in July 2004. (DCMA staff photo.)

<sup>8</sup> Kevin White, "Geneva Conventions Identification" [e-mail to multiple addressees] 8 Apr 2003, linked document, "Contractors in-Theater - Urgent Message" at "Air Force Contracting" <http://www.safaq.hq.af.mil/contracting/public/index.cfm>.  
<sup>9</sup> Delaney, 4.  
<sup>10</sup> *Ibid.*  
<sup>11</sup> LOGCAP Contract DAAA09-02-D-0007, 6.  
<sup>12</sup> U.S. Navy Department, *The Commander's Handbook on the Law of Naval Operations, Navy Warfare Publication (NWP) 1-14M*, (Norfolk VA: October 1995), 11-1.  
<sup>13</sup> McCullough and Pafford, 8.  
<sup>14</sup> *Ibid.*  
<sup>15</sup> *Ibid.*  
<sup>16</sup> *Ibid.*  
<sup>17</sup> *Ibid.*

## New Army Acquisition Strategy Restrictions

The assistant secretary of the Army (ASA) for Acquisition, Logistics & Technology (AL&T) has recognized the trend of increased contractors on the battlefield and published a June 2002 policy memorandum addressing the issue. The memorandum places restrictions on the use of contractor support to maintain battlefield operations, which includes a requirement that new systems under development not place contractor support in forward areas. A second requirement is that new systems necessitating contractor support in forward areas be reviewed by the ASA AL&T prior to approval.

This ASA AL&T memo is a step in the right direction for providing a framework to keep track of the number of contractor employees on the battlefield. However, given the current slow pace of the acquisition of weapon systems, the impact of the memo may not be felt for several years. Until the memo is incorporated into applicable Army regulations, its power may be less than compelling; and even after it is adopted, its power will be only within the Army. Given the asymmetric “no fronts” nature of the current operations in Iraq and Afghanistan where attacks on U.S. forces have occurred behind the “front lines,” contractor employees may not gain much protection from hostile fire just because they are shifted from “forward” areas. The current trend in warfare means there is no longer a traditional “rear area.”

## My Recommendations

Policy at all levels and by all services and the joint staff should be revised to consistently and clearly detail who is responsible for force protection of contractor employees.

In addition, that policy should make contractor employees subject to the Uniform Code of Military Justice during any deployed military operation meeting the statutory definition of “contingency operation” under 10 United States Code. The policy should also ensure that contractor employees not carry weapons.

Contractor employees assigned overseas should be issued distinctively colored patches, armbands or headgear and ID cards that identify the employee’s non-combatant status under the Geneva Convention. Further, clarification on those activities that can be considered lawfully non-combatant needs to be issued to the international community and DoD to prevent uncertainty and preclude loss of that status if the employee is detained.

The policy changes recommended above should be incorporated into the new proposed Army Federal Acquisition Regulation Supplement (AFARS) clause, 5125.225-74-9000 – Contractors Accompanying the Force, and be adopted DoD-wide as a DFARS clause. In addition, the policy changes recommended should be incorporated into FM-3-100-21, Contractors on the Battlefield, and be adopted as a DoD manual.





Additionally, contracting officers should become part of the planning process. The use of a revised proposed AFARS clause and revised FM 3-100-21 would be helpful in any continuity of business (CoB)-related plan regarding contractors on the battlefield. Contracting officers should also ensure contracts include all Defense Base Act and related clauses such as FAR 52.228-3. OPLANs, OPODs and LOGCAP contracts should be written and updated in coordination with the contracting officer and the combatant commander's staff and reviewed by both parties prior to issue.

Finally, mandatory CoB training should be conducted at all military service senior and intermediate colleges using the revised AFARS clause and revised FM 3-100-21 as mandatory topics. For example, the U.S. Army's Command and General Staff College already has a course titled, "Contractors on the Battlefield," which is currently an elective. In addition, similar CoB training should be provided to all contractor personnel. Also, the CoB office of primary responsibility (OPR) should work with the DAEC to quickly resolve and promulgate revised policy, including the recommended solutions to the issues identified above as well as any new emerging issues concerning contractors on the battlefield.

### Conclusion

The current Bush administration's Presidential Management Agenda has encouraged the

**(Above)** These five Iraqi contractors keep their families in mind while making their dangerous commute to and from work in Al Kut, Iraq.

**(Left)** CCAS Volunteer Ms. Susan Clark, quality assurance representative, in Iraq.

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increased use of contractor employees for functions formerly performed by military and DoD civilian personnel. This policy, combined with recent acquisition trends of higher use of contractor logistical support throughout the weapons system life cycle, has given rise to larger numbers and types of CoB during combat, contingencies, peacekeeping and other deployed military operations.

Unfortunately, significant gaps in CoB policy, doctrine and military planning exist in the area of contractor employee force protection. These policy gaps pose significant risks to the combatant commander and must be corrected

to ensure effective contractor employee force protection for the increased numbers of contractor personnel on the battlefield and an increased opportunity for mission success.

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