

CONTRACTORS ON THE BATTLEFIELD

1. With the downsizing of active duty military forces and the increased use of technically complex military equipment and weapons systems has come an increasing reliance on contractor support, to include the battlefield arena. The types of contractor battlefield support provided generally fall under two main categories. The first is system support type contracts which are designed to provide sustainment, maintenance and item management. The second is contingency contracting wherein contractors provide a variety of logistics and engineering/construction services for both peacekeeping and wartime operations. The use of contractors under battlefield conditions brings with it a multitude of considerations and problems which need to be addressed in all phases of the acquisition process (Requirements Planning, Solicitation, Source Selection and Post-Award Administration). The following focuses on these considerations with some recommended actions that may mitigate potential problems. It must be recognized from the outset, however, that many of these considerations/problems are currently under review at the highest levels within DOD. Until such time as revised regulations and/or statutory guidance are enacted, there are limitations on what may be accomplished at the local command level.

2. REQUIREMENTS PLANNING. The first issue to be addressed is whether a particular function should be performed by Government personnel. The retention of an organic capability brings with it significant advantages in assuring mission accomplishment notwithstanding the increased pressure to downsize. As will be discussed later in this memorandum, there presently are significant restrictions on the Government when it comes to the enforcement of support contractor contractual requirements. There may be instances when, in a battlefield scenario, a contractor either refuses or is unable to perform. In such instances, there may be no immediate alternative available to provide the needed services within the required timeframe. In those cases where the Government currently performs a task, such as the maintenance of front line weapons systems, careful consideration should be given to retaining the capability versus contracting out. In those instances where the function has already been contracted out, the requirements package for any follow-on contractual effort should mandate that the contractor address, in detail, contingency planning. If problems have been encountered with previous contractor support, then consideration should be given to the possibility of re-establishing a Government capability.

3. SOLICITATION. Any Statement of Work (SOW) involving a contractual effort with the potential for the use of contractor personnel in hostile situations must specify in detail the required duties and responsibilities of those contractor personnel. Information must be provided on possible areas of deployment. Specific training and/or qualification requirements must be set forth. Applicable Status of Forces Agreements should be cited as well as what Government services, facilities, security, equipment, etc., will be provided and any limitations thereon. In response to such a solicitation, the contractor must address its plan for maintaining contractor support during wartime conditions, personnel shortages, labor actions, employee turnover, etc. Presently, in trying to define what role contractor personnel may be asked to perform on the front lines, there has been, and continues to be, considerable debate over such basic concepts as whether the contractor support personnel should wear uniforms, whether they may be allowed to carry weapons, and what the contractor's responsibilities should be in situations where contractor personnel are killed or captured. Much of this debate centers on concerns about how contractors may be treated if captured by enemy troops (rules of engagement, Geneva Conventions, etc.). Government personnel drafting such solicitations must keep abreast of the constantly evolving guidance in this area as, more and more, the use of contractor personnel in this manner brings these and other performance issues to the forefront.

4. SOURCE SELECTION. Two areas that must be emphasized in developing any Basis for Award and in carrying out the ensuing evaluation and source selection for a contractual effort that involves deployment to hostile sites are: 1) an in depth evaluation of the contractor's plans for compliance with SOW requirements and its strategy for avoiding any disruption in performance and; 2) a thorough review of the contractor's Past Performance involving similar efforts. As discussed in paragraph 3, above, the contractor must explain in its proposal how it will ensure performance in potentially hostile environments. This includes what training, expertise and credentials its personnel will have and what plan of action it will have in place to ensure performance and minimize any negative impact on the warfighter. Consistent emphasis on the evaluation of Past Performance for this type of contractual effort will enable the Government to assess the contractor's demonstrated ability to overcome these deployment-unique problems in the past.

5. POST-AWARD ADMINISTRATION. Theatre Commanders are the senior military commanders responsible for the completion of the mission and safety of all deployed military personnel. As such, the Theatre Commander maintains command and control over active duty military. The Theatre Commander can also direct DA civilian employees to perform specific task assignments and initiate and effect special recognition or disciplinary actions over these personnel. For contractor employees, however, command and control is tied to the terms and conditions of the contract between the respective prime contractor and the Government. The Government is not a party to the relationship between the prime contractor and its employees. Therefore, the Theater Commander has no direct control over these personnel in his/her area of command. The Uniform Code of Military Justice (UCMJ) sets forth criminal sanctions applicable to the military. Contractor employees are subject to the UCMJ only in times of Congressionally declared war. As such, the UCMJ has not had any application to contractors in

any of the engagements involving U.S. forces since World War II. Therefore, from Korea to Viet Nam and from the Middle East to Bosnia, control over contractor employees has remained with the contractor. Standard remedies for poor contractor performance such as termination for default and convenience remain with the Government. As always, the Government may seek consideration for any delays or failures to meet contractual requirements. In addition, a contract may include liquidated damage provisions. Note, however, that the use of liquidated damages has led to substantial judicial intervention in the past because federal contracts are subject to the common law rule that liquidated damages will not be enforced if they are determined to be a penalty. Liquidated damages can be used when the time of performance is of such importance that the Government may justifiably expect to suffer damage if performance is delinquent. The amount of the liquidated damages to be assessed must also be reasonable and established on a case-by-case basis. Damages fixed without any reference to actual damages would thereby be held to be a penalty and thus unenforceable. Consideration may also be given to the development of special clauses that would assist the Government in re-establishing an organic capability in light of contractor non-performance. For example, a clause might require the contractor to place the necessary data in escrow. The Government could then access this data if certain specified conditions occurred. It is clear that the traditional Government remedies for poor performance and/or non-performance fall well short of guaranteeing performance in the face of hostilities or of providing a methodology for the quick implementation of an alternative capability. It is imperative, therefore, that acquisition personnel be creative in seeking ways to overcome these shortcomings.

6. Until such time as there is implementation of specific all-encompassing guidance from DOD, it is incumbent upon those involved in the acquisition process at the command level to recognize the problems inherent in the use of contractors on the battlefield. Using the tools currently available, as well as original concepts such as the placing of data in escrow method described above, they may be able to effectively lessen the potential for the disruption of the needed services.

7. Should you have any questions or require any additional information regarding this subject, the point of contact in the Legal Office is Mr. John Reynolds, DSN 992-9780.

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