



## TEAM

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## Secretary of Defense Issues Guidance on UCMJ Jurisdiction Over Contractor Personnel and Other Civilians Supporting Contingency Operations

On March 10, 2008, Secretary of Defense Robert Gates published important guidance with respect to the application of the Uniform Code of Military Justice (UCMJ) to civilian contractor personnel accompanying U.S. armed forces in contingency operations. The Secretary's guidance arrived several weeks before the Department of Defense's (DoD) final DFARS rule implementing DoD policy regarding private contractor personnel accompanying the armed forces in contingency operations took effect. See 73 FR 16764.

**Background:** Traditionally, the only instance when civilians have been subject to the UCMJ was when they were accompanying armed forces during times of declared war, and not during contingency or other operations that were not incident to a Congressional declaration of war. This changed with the FY 2007 Military Authorization Act, which amended Article 2(a)(10) of the UCMJ so that it now applies to persons serving with or accompanying an armed force in the field during a "contingency operation." As a result, contractors supporting armed forces in Iraq and Afghanistan are subject to military disciplinary law and can be punished by military commanders through court-martials for violations of the UCMJ.

The new DFARS Clause 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States, which became effective on March 31, 2008, provides a contractual framework for government contractors with personnel accompanying the armed forces. Among other things, the clause requires all contractor personnel not only to comply with U.S. laws and host country laws, but also orders, directives, and instructions issued by combatant commanders relating to force protection, security, health, safety, and relations with local nationals. The clause specifically states that contractor personnel are subject to the UCMJ. Although only the contracting officer has the actual authority to change a contract, contractor personnel have a legal obligation to follow the directives of military commanders when they are accompanying armed forces.

**Secretary of Defense Guidance:** The application of the UCMJ to private contractor personnel marks a significant departure from prior DoD practice and creates a situation in which contractors are subject to both civil and military laws and regulations. In recognition of the "unique nature" of the application of the UCMJ to civilian contractors, the Secretary has imposed

procedural limitations on the authority of certain commanders to initiate court-martial charges against civilian contractor employees.

- Before a commander may initiate court-martial charges or nonjudicial punishment under the UCMJ against a civilian contractor, commanders with general court-martial convening authority are first required to issue notice to their respective geographic combatant commander of the suspected criminal offense and their intention to initiate court-martial charges or impose nonjudicial punishment. The geographic combatant commander must then notify the DoD General Counsel, which will in turn provide notice to the Department of Justice (DoJ). Once notified, the DoJ has 14 calendar days to decide whether to take jurisdiction over the case and prosecute the civilian contractor under federal criminal laws under the Military Extraterritorial Jurisdiction Act. See 18 U.S.C. § 3261 et seq.
- If the DoJ does not inform the DoD whether it will take over the case within the 14-day time period (or a longer period, which DoD may grant under extraordinary circumstances), the commander in the field is entitled to take disciplinary action against the civilian contractor under the UCMJ as a matter of “command discretion.” If, on the other hand, the DoJ elects to pursue the case under its authority, the military commanders will not initiate court-martial charges or impose nonjudicial punishment on civilian contractors. However, commanders will regain their court-martial convening authority if, at a later point, the DoJ declines or terminates its jurisdiction over the case.
- Military commanders do not have authority to initiate court-martial charges or nonjudicial punishment against civilian contractors until these notification procedures have been followed. Thus, the Secretary has signaled that the military will first defer to the DoJ to prosecute suspected criminal conduct of civilian contractors before initiating court-martial charges. Moreover, contractor personnel will not be subject to simultaneous prosecution by the DoD and the DoJ.

The Secretary has stated that the UCMJ jurisdiction should only be exercised when there is a “military necessity” and doing so “meets the interests of justice.” As an example, the Secretary explained that UCMJ jurisdiction over civilian contractors would be appropriate when the “alleged misconduct that may jeopardize good order and discipline or discredit the armed forces and thereby have a potential adverse effect on military operations.”

**Practitioner Tips:** The 2007 amendments to UCMJ jurisdiction and the Secretary of Defense’s guidance constitute a “sea change” in the disciplinary options available to military commanders and the potential consequences faced for contractor personnel supporting contingency operations. Only experience and time can tell whether and how often commanders will exercise their UCMJ authority over contractors. In the meantime, contractors should consider:

- The impact that UCMJ jurisdiction may have on personnel policies and practices. Existing employment agreements, for example, may need to be revised to include indemnification and other terms that will apply in the event an employee is subjected to discipline by military authorities. Contractors might also anticipate that their personnel, especially senior managers responsible for contract performance in a theatre of operations, will wish to negotiate terms that require the provision of defense counsel to advise and represent them in UCMJ proceedings.
- Establishing policies with respect to documenting direction and orders given to contractor personnel under threat of UCMJ action that may have a cost impact which would constitute a change to the contract. Although military commanders do not, under the DFARS, have actual contractual authority, it seems conceivable that such orders should serve as the basis for a constructive change, particularly where a contractor’s failure to comply with such direction may result in punishment under the UCMJ. **V**

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