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By electronic mail: dfars@osd.mil

Defense Acquisition Regulations Council
Attn: Ms. Amy Williams
OUSD (AT&L) DPAP (DAR)
IMD 3C132
3062 Defense Pentagon
Washington, D.C. 20301

Re: Comments on DoD Proposed Rule "Contractors Accompanying a Force Deployed" -- DFARS Case 2003-D087

Dear Ms. Williams:

We are submitting comments on behalf of Blackwater Security Consulting, Inc., and Triple Canopy, Inc., each of whom is a Private Security Contractor ("PSC"), in regard to the proposed rule announced at 69 Federal Register 13500 on March 23, 2004, entitled "Contractors Accompanying a Force Deployed" ("Proposed Rule"). The Background section of the Proposed Rule states that the objectives of the regulations are (1) to provide uniform treatment of covered contractors and (2) to enable Combatant Commanders to rapidly adjust contract requirements in response to changing conditions in the battlefield. While some of the provisions contained in the Proposed Rule generally support these goals for contractors accompanying deployed forces overseas, there are several shortcomings in the Proposed Rule that fail to recognize the role and the purpose – and the attendant risks – unique to PSCs.

The type of government contract work performed by PSCs is unlike that performed by other federal contractors supporting our deployed forces. By the nature of the work, PSC personnel are exposed to hostilities to a greater degree than many other government prime contractors and subcontractors. The Proposed Rule contains several provisions that would be impractical if not impossible for PSCs to comply with and, indeed, if imposed on PSCs, could have an unintended negative impact on the mission of our armed forces and the government and contractor personnel serving overseas, including possibly compromising their physical safety. Still other provisions impose substantial financial risk on PSCs

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because the government generally obtains such security services on a firm-fixed price basis under the “commercial item” provisions of Part 12 of the Federal Acquisition Regulation (the “FAR”). While some assumption of risk is understandable, the regulations must permit the PSCs to manage those risks.

Section I below contains comments on the Proposed Rule and suggested revisions that we believe are consistent with the overall objectives of the Department of Defense (“DOD”) and with the unique role and mission of the PSC community that supports deployed forces. Section II below contains comments that generally apply to all U.S. contractors accompanying a deployed force, whether or not engaged in PSC services.

The companies on whose behalf these comments are being submitted stand ready to meet with you and others within DOD to ensure that any procurement regulations and related contract provisions under which the DOD and its PSCs operate are workable and fair for all concerned parties.

I. ISSUES THAT ARE UNIQUE TO PRIVATE SECURITY CONTRACTORS

A. Scope of the Proposed Rule May Be Too Narrow So As Not to Encompass All Overseas Activities Associated with a Deployed Force

There is a concern that the scope of the Proposed Rule may be too narrow so as not to cover the full panoply of circumstances under which U.S. contractors generally – and PSC contractors in particular – operate overseas. The Proposed Rule is triggered when contractors accompany a deployed force that is engaged in “contingency,” “humanitarian,” “peacekeeping,” or “combat operations.” 252.225-70xx(a). The U.S. Government, however, engages in overseas activities that may not meet these definitions, including “nation” and “infrastructure” building. It is customary practice for PSCs to perform security services for the government and prime contractors in these latter circumstances.

We do not believe it was the intent of the DAR Council to so limit the scope of the Proposed Rule. In keeping with DOD’s stated objective to treat all contractors uniformly, we ask that the DAR Council review the scope of the Proposed Rule to ensure that all United States’ military activities and missions overseas are covered by the regulation.

B. With Respect to PSC Contractors, Both Combatant Commanders and Ranking Military Commanders Should be Provided More Authority Than The Proposed Rule Contemplates, and the Scope of Contractor Equitable Adjustments Similarly Should be Expanded

Authority

The Proposed Rule recognizes the unique nature of contractor services performed overseas in support of U.S. interests and the need for adjustments “on the battlefield.” *See* Background section of the Proposed Rule. To this end, the Proposed Rule would authorize Combatant Commanders to direct contract changes relating to transportation, logistical, and support requirements (252.225-70xx(p)(1)). In addition, in the case of emergencies, ranking military commanders would be authorized to direct contractors – and contractor personnel – “to undertake any action as long as those actions do not require the contractor employee to engage in armed conflict with an enemy force.” *Id.* at (q). A covered emergency under the Proposed Regulation would occur when the Contracting Officer or his representative is unavailable, and emergency action is necessary because of enemy or terrorist activity or natural disaster that causes an immediate possibility of death or serious injury to contractor personnel or military personnel. *Id.*

Given the exigencies of services performed by PSCs in support of troops overseas, the Proposed Regulation provides too narrow a grant of authority to Combatant Commanders and ranking military commanders. With respect to PSCs, the proposed authority of these senior officers should be expanded beyond the areas of transportation, logistical, and support requirements to address any and all situations that may reasonably arise, relying on their judgment as senior military officers. While the ranking military commander is authorized to undertake “any action” in an “emergency” short of requiring contractor personnel to engage in armed conflict, the Combatant Commander should have similar authority. The Combatant Commander should not be unnecessarily burdened when taking actions that, in the Commander’s reasonable judgment, require such authority such as when issuing instructions designed to prevent such emergencies in the first instance. Moreover, granting different levels of authority depending on emergency and non-emergency situations unnecessarily injects confusion and uncertainty at a critical point when clarity and expedited decision making are required. On that

note, to the extent DOD decides to retain different levels of authority depending on the “emergency” nature of the circumstances, the Proposed Rule should create a presumption that any decision by the ranking military officer that an emergency existed can only be rebutted based on clear and convincing evidence.

In addition, the Proposed Rule provides that instructions issued by the Combatant Commander take precedence over any existing terms in the contract. *Id.* at (p)(2). In what we suspect was an oversight, the Proposed Rule is silent with respect to the governing nature of directions issued by ranking military commanders; we recommend that the final rule be amended so that direction issued by ranking military commanders also takes precedence over the contract terms.

Equitable Adjustments

The Proposed Rule would limit the ability of a contractor to seek an equitable adjustment in circumstances where the Combatant Commander or a ranking military commander issued an order authorized under the regulations, *i.e.*, only in connection with contract changes relating to transportation, logistical, and support requirements and action undertaken in the case of emergencies. Further, the equitable adjustment could only be “for any additional effort required or any loss of contractor-owned equipment.” *Id.* at (p)(3) and (q)(2). Therefore, other types of claims such as for delay and disruption or for third-party liability not covered by insurance appear to be proscribed.

The Problem

The Proposed Rule does not recognize the realities of performing PSC work in hostile environments. Protecting personnel against such hostilities requires maximum flexibility. In these circumstances, limiting the authority of Combatant Commanders to issue instructions to PSCs, while at the same time limiting the circumstances under which those contractors can seek equitable adjustments to their contracts, is inconsistent with the notion of providing maximum flexibility to battlefield commanders and fair treatment of government contractors. Senior military officers and PSCs should not be expected to parse the terms of a government contract clause, especially on the battlefield. Combatant Commanders and ranking military officers reasonably will expect contractors and contractor personnel supporting deployed forces to comply with all reasonable direction, and it is unworkable to expect contractors to challenge such direction. The Proposed Rule

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does just that by limiting the authority of Combatant Commanders in certain situations and the types of "authorized" contract changes under which equitable adjustments will be allowed.

At bottom, we believe that equipping Combatant Commanders and ranking military commanders with the same authority as Contracting Officers is required in connection with work performed by PSCs, and that PSCs should not be limited in the type of equitable adjustments to which they would be entitled. If there is a reluctance to grant contracting officer-like authority to Combatant Commanders and ranking military commanders, we recommend that the DAR Council include in the final rule a ratification process. An approach to ensuring that the government has the flexibility to achieve the goal of "adjust[ing] contract requirements in response to changing conditions on the battlefield" as set forth in the Background to the Proposed Rule, would be to institute a process to ratify the actions of Combatant Commanders and ranking military commanders similar to the process contained in the FAR on ratification of unauthorized commitments. FAR 1.602-3. Under these provisions, the government generally may pay a contractor when someone other than a designated contracting officer has directed a contract change so long as the government has or will receive a benefit from the contractor's performance; the ratifying official has the authority to enter into the contractual commitment; the contract or contract change would have otherwise been proper had it been entered into by a contracting officer; and a contracting officer has reviewed the action and has determined the price to be fair and reasonable. FAR 1.602-3(c).

Further, the method for pricing such equitable adjustments should take into consideration the fact that the prime contracts and subcontracts under which PSC services are acquired are generally commercial services contracts under Part 12 of the FAR. In keeping with the public policy behind Part 12, *i.e.*, to streamline acquisition of commercial items and services, to give the government the benefit of commercial pricing, and not to impose unnecessary layers of government regulation on commercial companies, we recommend that the pricing of equitable adjustments follow the model for pricing termination claims contained in the mandatory commercial items/services clause. FAR 12.212-4(l). Under that clause, in pricing claims relating to the government's termination of the contract for its convenience, the contractor is not be required to comply with the cost accounting standards or the contract cost principles.

C. Government Direction to Subcontractors Performing PSC Functions

Prime contractors and higher tier subcontractors covered by the regulation would be required to flow-down the terms of the clause contained in the Proposed Rule. *Id.* at (r). It is not clear how the DOD intends these flow-down obligations to work.

If the clause is inserted into subcontracts without change, then, read literally, Combatant Commanders and ranking military commanders can issue instructions directly to subcontractors. This process of flowing down clauses without change is not how the process is typically handled. Rather, because of the rule of privity of contract, prime contractors usually change the word “government” to “prime contractor” and the word “contractor” to “subcontractor” wherever those terms appear in a government clause required to be flowed down to subcontractors.

In this circumstance, however, from an operational and safety standpoint it makes sense for the Combatant Commanders and the ranking military commanders to be able to direct subcontractor personnel. Practically speaking, without clarifying how such directions will be communicated in the contracting chain, subcontractor personnel may be reluctant or refuse to follow the reasonable direction of the Combatant Commander or the ranking military commander, instead asserting that they can only take direction from their prime contractor customer. Therefore, even though the subcontractor could be faced with following the direction of the government, under the rules of privity of contract, there is a question as to whether the subcontractor would be entitled to an equitable adjustment where the prime contractor had no role in the direction or changed work of the subcontract.

The rights of PSCs performing overseas in hostile environments to seek equitable adjustments when their work is changed should not depend on whether the directed change properly flowed through the prime and subcontracting chain. The end result should be the same. If the PSC must follow the direction of the Combatant Commander or the ranking military commander, then the PSC must be able to seek financial redress through the equitable adjustment process. We request that a provision be added in the final rule that recognizes the unique circumstances under which PSCs operate. To implement this policy, when a PSC subcontractor has received direction from a Combatant Commander or a ranking military commander and such direction increased the cost of performance, the PSC

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should be permitted either (1) direct access to the government to submit an equitable adjustment (perhaps under the procedures similar to those in FAR 1.602-3 for ratifying unauthorized commitments, discussed above) or (2) the right to submit an equitable adjustment request through the prime contract.

D. Government Provided Support

The proposed rule provides that contractors generally will be required to provide all in-country support. 225.7402-1(a) and 252.225-70xx(c)(1). Exceptions would include circumstances where the contract or an operation order issued by the Combatant Commander sets forth government-provided support. 225.7402-1. We have several concerns with this proposal.

First, the provision of government provided support in connection with services provided in support of U.S. forces deployed overseas should contain language similar to that set forth in standard Government Property clauses, such as FAR 52.245-2. Under that clause and other similar FAR Government Property clauses, the government recognizes that the contractor is relying on timely receipt of government property and that any delay in receipt is grounds for an equitable adjustment.

Because there currently is no standard Government Property clause that is required to be inserted in a commercial services contract for PSC services under FAR Part 12 (the vehicle under which PSC services are typically acquired by the government and support contractors), we recommend that the DAR Council adopt language substantially similar to that contained in the FAR Government Property clauses that would provide for equitable adjustments in the case of late or non-delivery of promised government property.

In addition, the Proposed Rule would permit the government, at its "sole discretion," to authorize or require the use of certain Government-provided logistical or in-country support. 252.225-70xx(c)(2). Because such direction might constitute a change to the contract, we request that the rule be amended to clarify that any such government direction will be paired with a contractor's right to seek an equitable adjustment. Consistent with our comments above, such an equitable adjustment should not be limited in scope, and certainly not limited to the cost of "additional effort required or any loss of contractor-owned equipment" as set forth in other provisions of the Proposed Rule. *Id.* at (p)(3) and (q)(2). In addition, consistent with our comments above regarding the need for maximum operational

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flexibility, we request clarification that the term “the Government” includes the Combatant Commander and ranking military officers, and not merely the Contracting Officer.

E. Weapons

The Proposed Rule prohibits contractors from having privately-owned firearms “unless specifically authorized by the Combatant Commander.” *Id.* at (i). Under contracts previously awarded by the government and government prime contractors and higher-tier subcontractors, PSCs are required to supply contractor-furnished weapons and ammunition as part of the contract requirements. We therefore ask that the final rule make a distinction between “contractor-furnished” and “privately owned” weapons and ammunition, the former of which would be authorized by the Contracting Officer.

The only alternative would be to require the government to timely furnish weapons and ammunition to the PSCs. The PSC community finds this approach to be unworkable and impractical, and we believe the DOD community is in agreement. Issues of delay, shortages, and repair and replacement of weapons and ammunition could effectively prohibit PSCs from protecting assigned personnel and could compromise the physical safety of such personnel and those assigned to protect them.

The Proposed Rule asks contractors accompanying deployed forces to acknowledge that this type of contract performance is “inherently dangerous” and that the contractor “accepts the risks associated with required contract performance.” *Id.* at (b)(2). If PSCs are to assume the risks, the DOD must permit the contractors to manage those risks. At a minimum, this includes allowing PSC’s to supply and manage their own contractor-owned weapons and ammunition.

F. Scarce Commodities

The Proposed Rule requires covered contractors to obtain approval to procure items designated as “scarce commodities.” *Id.* at (o). Scarce commodity lists could, for example, include weapons, ammunition, and personal protective gear, which, for PSCs, are necessary for contract performance. While we recognize the general intent of this provision, for PSCs, a literal reading of the Proposed Rule could prohibit or impede PSCs from meeting their contract requirements and could compromise the physical safety of personnel. Therefore, we ask that the final rule

recognize the role of PSCs and make an exception that permits them to procure supplies necessary for contract performance, *i.e.*, protection of personnel, even when those categories of supplies are contained on a scarce commodities list.

II. ISSUES OF COMMON CONCERN TO CONTRACTORS ACCOMPANYING A DEPLOYED FORCE

A. Compliance Obligations

The Proposed Rule would impose an obligation on covered contractors to comply with a host of requirements, including:

- U.S., host country, and local laws;
- Treaties and international agreements (*e.g.*, Status of Forces Agreements, Host Nation Support Agreements, and Defense Technical Agreements);
- U.S. regulations, directives, instructions, policies, and procedures “applicable to the Contractor in the area of operations”;
- Orders, directives, and instructions issued by the Combatant Commander relating to force protection, security, health, safety, or relations and interaction with local nationals; and
- The Uniform Code of Military Justice “where applicable.”

Id. at (d)(1)-(5)

Contractors generally should be expected to comply with the first two categories of requirements, which, for the most part, should be ascertainable by the contractor and the cost of compliance factored into the contractor’s fixed price. With respect to the third and fourth categories, however, we have a concern that such internal government policies, procedures, directives and instructions will not always be communicated by the government to contractors. In addition, it is not clear what provisions of the UCMJ are believed by the DAR Council to be “applicable” to contractors accompanying a deployed force. We understand that contractor personnel are not generally subject to the UCMJ, and, therefore, we recommend that DOD identify those provisions it believes are applicable.

We ask that the government agree to notify contractors in writing of all requirements with which they are expected to comply, especially where a failure to comply could give rise to a contract breach by the contractor leading to a termination of the contract for default. Notification of existing requirements prior

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to contract award would permit the contractors to include the cost of compliance in the contract price. Further, changes in contract requirements during performance would give rise to an equitable adjustment in contract price.

B. Evacuation of Remains

Contractors would be required to evacuate the remains of personnel “from the point of identification.” *Id.* at (k). This term is not defined in the Proposed Rule. Recent experience in Iraq is that the government has imposed the requirement on contractors to repatriate personnel remains, but may place limitations on the timing and manner in which they may retrieve and repatriate the remains of fallen civilian personnel.

Given the government’s operational priorities and the fact that the government controls all modes of transportation in-country (roads, airspace, etc.), contractors have no control over repatriation of fallen personnel and cannot be expected to assume this responsibility. The government should acknowledge the realities of the battlefield and agree to transport the remains of contractor personnel to a location identified in the contract or operation order, from which point contractors can reasonably be expected to assume responsibility for evacuating the remains to the point previously specified by the employee or by next of kin.

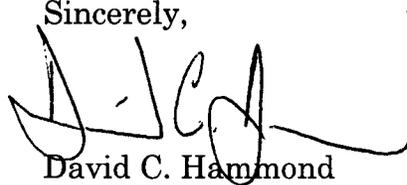
Summary

The overall objectives of the Proposed Rule, such as providing contractual authority to Combatant Commanders and ranking military commanders, are laudable and necessary given the realities of contractors providing support during a contingency operation. Nevertheless, because of the unique services provided by PSCs, which include significantly increased risk of exposure to hostilities, not all provisions in the Proposed Rule can or should be applied to PSCs. If PSCs are to assume the risks involved with unusually hazardous conditions, then PSC’s must be allowed to retain the necessary flexibility to manage those risks particularly in

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connection with the logistics of protecting assigned government and contractor personnel. We ask that DOD keep this principle in the forefront when promulgating a final rule.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. C. Hammond', written over a horizontal line.

David C. Hammond
Shauna E. Alonge