



Security Clearance Issues for Access to Military Base Construction Projects

By *Deborah I. Hollander*

In 2008, terrorists plotted to attack Fort Dix using a map obtained from a pizzeria which frequently delivered to customers within the base. Although the conspiracy was discovered before the attack took place, the government began to impose security clearances for civilians working at, or delivering to, military bases. By August 14, 2014, all branches were required to establish background checks for employees of contractors working on bases.

Since then, all branches of the military have developed and have been constantly refining their security requirements. Last year, the Navy abruptly cancelled contracts with a vendor which offered a commercial system to clear companies and individuals and then cleared them at the gate site. The Navy discovered the program, once known as Rapidgate, had allowed “ineligible” persons access. As a result, the company which had offered the Rapidgate system, sold its other business ventures and filed for bankruptcy. The Navy is now working towards a “biometric” identity system. In the meantime, the military tightened its identification requirements by refusing to accept driver licenses from states which had not met federal deadlines for tightening verification systems for licenses. Therefore, individuals from the non-compliant states (Alaska, Kentucky, Maine, Minnesota, Missouri, Montana, Oklahoma, Oregon, Pennsylvania, South Carolina, Virginia, and Washington) will have to use a passport or other identification system in order to gain access.

In 2018, the military became concerned that by following fitness applications being used by armed service members, (and contractor employees), hostile interests could track individual armed forces members and the overall number of forces at a location. For the moment, the U.S. military has advised armed force members, particularly those stationed overseas, to be cautious in using tracking software applications, while it “reviews its guidelines.”

Obviously, if a contractor, its employees, subcontractors, and even suppliers' delivery trucks cannot get access to the construction site, they cannot perform. Therefore, contractors should do a “gut check” on whether they, their employees and subcontractors are likely to meet these requirements before bidding. After a default, and a surety seeks a replacement to finish work, the clearance requirements may become a major delay issue. Sureties, claims consultants and even attorneys may find even getting access to the location for a site inspection and review of work in place is highly problematic.

50 U.S.C.A. § 797 gives the Secretary of Defense the power to adopt security regulations to regulate the entry or removal of persons from military property or otherwise safeguard such property against destruction, loss, or injury by accident or by enemy action, sabotage or other subversive actions. The statute requires the posting of such regulations and makes it a misdemeanor to violate them. In 2014, the Supreme Court ruled that this military's power applied to any place with a defined boundary under the command of a military officer, and not just gated facilities owned by a military branch. 10 U.S.C.A. § 1564 further gives the Secretary of Defense the authority to develop security clearance procedures for the Department of Defense personnel and the Department of Defense contractor personnel who are engaged in sensitive duties that are critical to the national security. Under 22 U.S.C.A. § 4863, only “cleared personnel” are entitled to work on the construction or maintenance of federal facilities that store classified information or are overseas installations.

The access clearances must occur at two levels; clearance for the company with a contract and a clearance for the individual. Contracting firms, including tiers of subcontractors must themselves receive clearance. However, a firm is not able to request its own security clearance in anticipation of classified work. In order to obtain clearance, it is necessary to have an actual contract with the military or a subcontract (at some tier level) with a prime contractor at the base in question. In the case of subcontractors, the prime contractor must provide the evidence that it has hired the subcontractor. The Government Contracting Activity (GCA) or prime contractor provides the request. After the GCA, or prime contractor, submits the sponsorship letter, the contractor can begin the process of applying for the

clearance.

Corporations and partnerships must be organized under U.S. laws, have a good "ethical track record," and its key personnel must be identified and able to pass the same background check and standards that will be applied to individual employees working at the site.

For an individual to obtain clearance, the Department of Defense standards require an FBI records check called a National Crime Information Center or NCIC test. All of the services will fail an individual if the background check turns up a felony conviction, a listing on a sex offender registry, open criminal warrants, a listing as a "terrorist" by the Office of Foreign Control lists, or Interpol listings and warrants. The Department of Defense also requires a periodic update check, so that access checks may be revoked if a person subsequently becomes disqualified.

The process of obtaining corporate security clearance, according to the Department of Defense should take 45 days. However, if the government finds information missing, problematic or incomplete, or if there is a backlog, it may take longer. Up until recently, commercial companies offered companies clearance checks for their employees on a much faster basis. However, within the last year, it was found that many people who were "cleared" by at least one such company had felony convictions and other disqualifiers, the military therefore has been tightening its procedures. Several branches, including the Navy, have announced intentions to include "biometric data" as part of identification systems.

If the construction project itself is at the site of secret operations, the companies may have to be owned by U.S. citizens and, otherwise, be free of "foreign influence". Companies with foreign investors may also be subject to Presidential veto or limitation where transactions affect National Security under the Defense Production Act of 1950. Section 721 of the DPA directs, "the President, acting through [the Committee on Foreign Investment in the United States (CFIUS)]," to review a "covered transaction to determine the effects of the transaction on the national security of the United States."

If CFIUS concludes at the end of its investigation that a covered transaction should be suspended or prohibited, it must "send a report to the President requesting the President's decision," which report includes, *inter alia*, information regarding the transaction's effect on national security and CFIUS's recommendation. Once CFIUS's report is submitted to the President, he has fifteen days to "take such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States".

Most government agencies have procedures under which an individual is notified of the denial of clearance and has the opportunity to protest and seek further review before it becomes final. These are not necessarily formal hearings, but individuals can submit letters to clarify facts or offer explanations as to why some issue should not be viewed as creating a security risk.

Courts generally do not review clearance denials. In *Department of the Navy v. Egan*, 484 U.S. 518, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988), the Supreme Court held that "[f]or 'reasons ... too obvious to call for enlarged discussion,'" each agency has the discretion to protect its classified information without judicial second guessing. *Id.* at 529, 108 S.Ct. 818. The judiciary is even less likely to grant review to individuals or companies seeking physical access to military sites.

Ultimately, access to a base or military site is controlled by its commander and differs from site to site. For instance, some bases only allow those Uber drivers with a base pass to pick up passengers at a site. At some bases, Uber drivers have reported access depends on the time of day or even which guard is on duty. Seeking relief, whether through the agency's security supervisor or the courts, is unlikely to be sufficiently timely for construction bidding or project schedules. Contractors should scrutinize security requirements in bid documents, and ask about specific policies at the particular site in pre-bid meetings. Successful bidders should then make good relationships with the contracting officer and the base security officials a priority. A surety, or general contractor, seeking to find a completion contractor in a classified area in the midst of the project is likely to face limited options. Discussing the situation with these officials and how the security clearance may impact the choice of available contractors or job schedule can be crucial to finding the best resolution to a crisis.

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