

The Use of DoD Contractors in Germany: An Information Paper

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April 1999

Executive Summary

As of March 1998, the designation of DoD contractor employees working in Germany as "technical experts" is no longer a unilateral decision of the U.S. Forces. The decision on who is or is not a "technical expert" is now a bilateral decision involving both the U.S. Forces and the German states (the Laender). Consequently, approximately one-third of the 2000+ contractor employees that formerly held the privileged status of "technical expert" will lose that status. Loss of privileged status results in three principal changes affecting the lives and incomes of the contractor employees:

- Loss of the U.S. Forces ID card (PX/commissary privileges, low-cost gasoline, etc.)
- Loss of exemption from German taxes on salary
- Need for German work and residency permits

These changes will result in an increase in the cost of doing DoD business in Germany.

Background

Under the provisions of Article 73 of the Supplementary Agreement to the NATO Status of Forces Agreement in Germany, employees of DoD contractors who qualify as "technical experts" (TE) under Article 73 receive exemptions from the application of German law otherwise limited to American military personnel and civilians employees employed directly by the DoD or one of its instrumentalities. These include exemption from the German income tax on salaries and exemption from the German requirement for work permits. In addition, qualification as a TE grants the individual an identification card that permits use of facilities (PX, commissary, etc.) otherwise restricted to American military personnel and DoD civilians.

Under Article 73, a TE must have certain technical qualifications and not be ordinarily resident in Germany. Article 73 does not define the term "technical expert," nor does it define the term "ordinarily resident." From 1963, when the Supplementary Agreement entered into force, until the early 1990s, U.S. Forces in Germany applied Article 73 unilaterally, using their own definitions of "technical expert" and "ordinarily resident."

In the early 1990s, the German authorities began questioning whether the United States had the right under the Supplementary Agreement to make unilateral determinations under Article 73. They cited examples of situations where contractor personnel without TE qualifications, e.g., forklift drivers, mechanics performing routine repair and maintenance, and office administrative personnel, were working in Germany without work permits on a tax-free basis.

In view of the important exemptions from the application of German law implicit in Article 73, the German authorities decided they were not bound by determinations made by U.S. forces without bilateral consultation. In their view, all persons benefiting from the unilateral U.S. Forces determinations were subject to the full application of German law, including the tax laws which permit the German government to seek back taxes for a ten-year period. As a result, German authorities initiated back tax actions against a number of Defense contractors and contractor employees with a total estimated bill in excess of \$200 million.

After more than two years of discussions, the US and German governments reached an agreement in March 1998. In an Exchange of Diplomatic Notes (Agreement), the parties agreed to a definition of

“technical expert,” established criteria for determining whether a person is “ordinarily resident” in Germany, and developed a bilateral process for accrediting technical experts.

[NOTE: This paper focuses on Article 73, but the negotiations also involved determinations for “troop care” providers (doctors, dentists, drug abuse counselors, nurses, etc.) under Article 72. Since all the “troop care” positions are enumerated within the Agreement for Article 72, determination of “troop care” providers has proven less problematic.]

Definitions of Technical Expert and Ordinarily Resident

A TE is an individual who accomplishes complex tasks of a technical-military or technical-scientific nature. The TE must have a high degree of skill and/or knowledge acquired through a process of higher education or through a long period of specialized training and experience. TE work is distinguished from routine mental, manual, or physical processes, e.g., administrative and blue-collar work. [NOTE: The requirement for a security clearance is not an issue for determining TE status.]

In addition, a TE is neither a German national nor “ordinarily resident” (OR) in the Federal Republic of Germany. Under the Agreement, an individual is ordinarily resident in Germany if, in “weighing the totality of circumstances”, the authorities ascertain that the “individual has shifted the main focus of vital interests” from another nation to Germany. The Agreement establishes nine criteria that must be specifically considered. There is no “weighting scheme” and no single factor makes or breaks the determination; each individual’s situation is unique and considered on its own merits.

How it Works

In September 1998, the Director, Defense Procurement, designated the Department of Defense Contractor Personnel Office (DOCPER) as the official DoD Executive Agent to implement and administer the Agreement. DOCPER is within the office of the Deputy Chief of Staff, Personnel, for U.S. Army, Europe, and is located at Hammonds Barracks in Seckenheim, Germany.

The Agreement requires two distinct processes in implementation of Article 73:

- Review of new contracts to determine if they can support TE positions
- Review of new applicants for Technical Expert Status Accreditation (TESA)

Timeframes: The contract notification review may take up to 8 weeks (3 weeks by DOCPER and 5 weeks by the Laender) and the new applications review may take up to 10 weeks (4 weeks by DOCPER and 6 weeks by the Laender). Therefore, the total processing time for new applications under a new contract could take up to 18 weeks.

Process:

Contract review: Generally, the requirements are reviewed at the pre-solicitation phase in order to determine whether proposed TE positions are likely to be approved. DOCPER and the Laender review the job descriptions and technical qualifications necessary to fill those proposed TE positions, and make the initial determination whether the positions are in fact TE. If so, the purchasing activity will require the offerors to include the specifics regarding the number of TEs, job titles, detailed job descriptions, resumes, etc. With those specifics from the offerors, information lacking in the pre-solicitation phase can now be sent forward to DOCPER and the Laender as part of the pre-award coordination to ensure that the TE positions are locked in prior to award.

Applicant review: Review of individual applicants is a three-step process, executed bilaterally: DOCPER first reviews the TESA application of each individual submitted to ensure that they are (1) not OR, (2) the job is a TE job, and (3) that the individual has the requisite qualifications to fill the position. If DOCPER approves the TESA application, it forwards the application to the German authorities for their approval. In the face of objections by the Laender, the US Forces may accept the determination, request reconsideration, or in an appropriate case, may submit the case to a Consultative Commission (co-chaired by the German Foreign Office and the US Embassy).

If mission requirements demand faster turn-around, the Agreement allows DOCPER to approve individual applications under a "military exigency" (ME) provision. The use of the ME provision is usually requested by a General Officer, and is intended to be used sparingly, and only for individuals with strong TE credentials, working under an existing contract. DOCPER's expedited review (within one week) unilaterally approves TESA conditionally for a limited time; however, this does not change the essential bilateral approval process, and the Laender may later object to the granting of TESA.

In executing its responsibilities, DOCPER follows processing guidelines that balance the mission requirements of the U.S. Forces with the need for credibility and cordiality with the German Laender. To achieve this goal, DOCPER closely adheres to the language of the Agreement and insists the Laender do likewise, seeks consistency and predictability, argues Laender denials that set bad precedents and/or appear to be based on outside factors, and educates the Laender on military mission needs.

The Exchange of Notes provides for a Consultative Commission (CC), co-chaired by the German Foreign Office and the Embassy of the United States of America, as a means of mutually resolving issues of concern and to review implementation of the Exchange of Notes. In cases where the U.S. Forces and the Laender disagree, either party may request the CC to resolve the dispute, and issue a written recommendation to the parties. At the request of the Laender to review implementation of the Agreement, the first meeting of the CC will take place in early May 1999.

Experience to Date

Results: Approximately 30-35% of the of TESA applications submitted to DOCPER are denied TESA. DOCPER itself denies TESA to approximately 10% of the applicants. Of the remainder passing the DOCPER screen and going forward to the Laender, approximately 25% are denied. This 30-35% rate holds true both for new TESA applications (around 1120 sent to Laender as of early Apr 99) and for existing TESA holders (about 1510 applications, sent to the Laender in February, 1999, under the so-called "Bottom-Up Review" (BUR), conducted in compliance with one of the provisions of the Agreement).

Lessons learned from denials by the Laender:

- OR "stereotype": An individual married to a German spouse, who works on the German economy, and whose family has received German social benefits is highly likely to be deemed OR. Children in German schools and ownership of a home in Germany are also negative factors.
- Jobs: Cultural differences often complicate determinations of what is TE work. The Laender tend to view a position more favorably if it requires formal education. The U.S. (and DoD contractors) value "on-the-job training", such as that received by ex-service members who may not be degraded. In general, it does not matter how sophisticated the equipment is; it's what the proposed TE does with the equipment that determines whether the job is TE.
- Qualifications: Resumes should emphasize specifics of the TE-qualifying experience: what, where and when.

Getting More Information

Additional information can be found at the DOCPER web site located at <http://www.chrma.hqusaureur.army.mil/docper>.

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