

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 237 and 252**

RIN 0750-AG88

Defense Federal Acquisition Regulation Supplement; Prohibition on Interrogation of Detainees by Contractor Personnel (DFARS Case 2010-D027)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: The Department of Defense (DoD) is adopting as final, without change, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 1038 of the National Defense Authorization Act (NDAA) for Fiscal Year 2010. Section 1038 prohibits contractor personnel from interrogating detainees under the control of DoD.

DATES: *Effective Date:* July 25, 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, 703-602-1302.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD published an interim rule at 75 FR 67632 on November 3, 2010, to implement section 1038 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84). Section 1038 prohibits contractor personnel from interrogating detainees under the control of the Department of Defense. It also allows the Secretary of Defense to waive the prohibition for a limited period of time, with limited redelegation authority, if determined necessary to the national security interests of the United States. The interim rule added coverage at DFARS 237.173 and a new clause at DFARS 252.237-7010 that prescribes policies prohibiting interrogation of detainees by contractor personnel, as required by section 1038 of the NDAA for Fiscal Year 2010. The DFARS also covers permissible support roles for contractors by providing that contractor personnel with proper training and security clearances may be used as linguists, interpreters, report writers, information technology technicians, and other employees filling ancillary positions, including as trainers of, and advisors to, interrogations, if the contractor personnel meet the criteria provided by DoD Instruction 1100.22, Policy and Procedures for Determining Workforce

Mix (<http://www.dtic.mil/whs/directives/corres/pdf/110022p.pdf>); DoD Directive 2310.01E, The Department of Defense Detainee Program (<http://www.dtic.mil/whs/directives/corres/pdf/231001p.pdf>); and DoD Directive 3115.09, DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning (<http://www.dtic.mil/whs/directives/corres/pdf/311509p.pdf>).

The public comment period closed on January 3, 2011. Three respondents provided comments on the interim rule.

II. Discussion and Analysis

A summary of the comments received and their analysis grouped by category follows.

A. Eliminate Waiver Authority

Comment: Three respondents provided comments supporting the idea that establishing an effective system of managing and overseeing contractors supporting interrogations must be accorded the highest priority. However, the respondents did not support the provision at DFARS 237.173-4 that allows the Secretary of Defense to waive the prohibition on contractor interrogations for up to 60 days on the grounds of national security interests. The respondents considered the function to be inherently governmental, and one that should never be performed by contractor personnel.

Response: Section 1038 of the statute specifically provides the Secretary of Defense authority to waive, for a limited time, the prohibition on interrogation of detainees by contractor personnel. Contractor personnel with proper training and security clearances may be used as linguists, interpreters, report writers, information technology technicians, and other employees filling ancillary positions, including as trainers of and advisors to interrogators, in interrogations of detainees, provided that appropriately qualified and trained DoD personnel (military or civilian) are available to oversee the contractor's performance and to ensure that contractor personnel do not perform activities that are prohibited under DoD policy. Such personnel are subject to the same laws, rules, procedures, and policies pertaining to detainee operations and interrogations as those that apply to Government personnel in such positions in such interrogations (DFARS 237.173-3). Accordingly, no change has been made to the DFARS in response to these comments.

B. Penalties and Compliance

Comment: One respondent stated that DoD must prescribe a clear set of

penalties for any violation of the new policy and recommended civil and criminal fines, imprisonment, the withholding of contract award fees, contract termination, and/or suspension and debarment.

Response: DoD has no authority to write civil or criminal penalties into the DFARS. Contracting officers have considerable discretion to exercise the usual broad range of contractual remedies, e.g., withholding contract award fees, contract termination, or suspension and/or debarment. Accordingly, no change has been made to the DFARS in response to this comment.

Comment: One respondent expressed concern that there would be attempts to evade the new policy by transferring detainees to the custody of non-DoD agencies or foreign governments that are not governed by the DFARS limitations. The respondent also suggested that similar coverage at FAR 7.503(c)(8) should be considered.

Response: The acquisition regulations are written based on the presumption that Government employees act in good faith and in accordance with acquisition regulations and the law. Further, since the coverage at FAR 7.503(c)(8) lists "the direction and control of intelligence and counter-intelligence operations" as an example of an inherently governmental function, there would be no value added by reiterating this language in the DFARS.

C. Clarity of Definitions

Comment: One respondent recommended clarification of the definition of "detainee" in 237.173-2, which the respondent considered to be silent on the matter of whether the term "hostilities" (which is included in the definition of "detainee") includes situations in which there has not been a formally declared war (e.g., the detainee is classified as an unlawful combatant rather than a prisoner of war). The respondent noted that the definition's qualifier, "this includes but is not limited to," suggests a broad definition for "hostilities."

Response: The term "detainee" is defined at 237.173-2 as "any person captured, detained, held, or otherwise under the effective control of DoD personnel (military or civilian) in connection with hostilities. This includes, but is not limited to, enemy prisoners of war, civilian internees, and retained personnel. This does not include DoD personnel or DoD contractor personnel being held for law enforcement purposes." This definition was derived from the "detainee" definition in the governing directive,

DoDI 2310.01E, The Department of Defense Detainee Program, dated September 5, 2006. Paragraph 2.2 of the directive notes "This Directive applies during all armed conflicts, however such conflicts are characterized, and in all other military operations." In addition, paragraph E.2.1. of DoDI 2310.01E notes that the definition of "detainee" includes "unlawful enemy combatants." Accordingly, DoD has determined that clarification is not necessary, and no change has been made to the DFARS definition in response to this comment.

Comment: One respondent recommended clarifying the definition of "interrogation of detainees" in 237.173-2 by adding the same qualifier, *i.e.*, "this includes, but is not limited to," as is found in the definition of "detainee." The respondent stated that a difference between the two definitions could lead to confusion over whether this includes any other sort of non-"systematic," "formal," or "official" process of "questioning," or questioning not done "for the purpose of obtaining reliable information to satisfy foreign intelligence collection requirements" (see 237.173-2).

Response: The definition of "interrogation of detainees" was derived from the definition for "intelligence interrogations" in DoDD 3115.09, DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning. This directive consolidates existing DoD policies, including the requirement for humane treatment during all intelligence interrogations, and speaks of interrogations exclusively in terms of the purpose of "obtaining reliable information to satisfy foreign intelligence collection requirements." Accordingly, any questioning done for a purpose other than "obtaining reliable information to satisfy foreign intelligence collection requirements" is outside the scope of allowable activities under DoD policy. Accordingly, no change has been made to the DFARS definition in response to this comment.

D. Prohibition on Specific Type of Torture

Comment: One respondent proposed that water torture be banned. The respondent also proposed to make the Federal Government responsible when violations of human rights occur and recommended banning all torture and procedures that allow torture to occur.

Response: As noted previously, DoDD 3115.09 consolidates existing DoD policies, including the requirement for humane treatment during all intelligence interrogations for the purpose of gaining intelligence from

captured or detained personnel. It is DoD policy that no person in the custody or physical control of DoD or detained in a DoD facility shall be subject to cruel, inhumane, or degrading treatment or punishment as defined in Title XIV of Public Law 109-163, also known as "The Detainee Treatment Act of 2005." Accordingly, no change has been made to the DFARS in response to this comment.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, applies to this rule. DoD prepared a final regulatory flexibility analysis (FRFA) that is summarized as follows:

The objective of this rule is to implement section 1038 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84). This statute provides that no enemy prisoner of war, civilian internee, retained personnel, other detainee, or any other individual who is in the custody or under the effective control of DoD, or otherwise under detention in a DoD facility in connection with hostilities, may be interrogated by contractor personnel. It also allows the Secretary of Defense to waive the prohibition for a limited period of time, with limited re-delegation authority, if determined necessary to the national security interests of the United States.

In Fiscal Year 2009, the latest year for which complete information is available, DoD awarded contracts for intelligence-related requirements to only 255 unique Data Universal Numbering System (DUNS) numbers. Of this total, there were 143 unique DUNS numbers for small business concerns.

This rule only prescribes policies that prohibit interrogation of detainees by contractor personnel. DoD anticipates

that there will be no additional costs imposed on small businesses.

There is no reporting or recordkeeping requirement established by this rule. This rule does not duplicate, overlap, or conflict with any other Federal rules.

Interested parties may obtain a copy of the FRFA from the point of contact named herein. A copy of the FRFA has been submitted to the Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

The rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 237 and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR parts 237 and 252, which was published at 75 FR 67632 on November 3, 2010, is adopted as a final rule without change.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 101126522-0640-02]

RIN 0648-XA594

Fisheries of the Exclusive Economic Zone Off Alaska; Northern Rockfish for Catcher/Processors Participating in the Rockfish Limited Access Fishery in the Central Regulatory Area of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for northern rockfish by catcher/processors participating in the rockfish limited access fishery in the Central Regulatory Area of the Gulf of Alaska