

- 2. Amend section 225.7002–1 by revising paragraph (b) to read as follows:

225.7002–1 Restrictions.

* * * * *

(b) Hand or measuring tools, unless the tools were produced in the United States. For additional guidance, see PGI 225.7002–1(b).

- 3. Amend section 225–7002–2 by revising paragraph (c) to read as follows:

225.7002–2 Exceptions.

* * * * *

(c) Acquisitions of items listed in FAR 25.104(a).

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 216, 225, and 252

RIN 0750–AH28

Defense Federal Acquisition Regulation Supplement; Contractors Performing Private Security Functions (DFARS Case 2011–D023)

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

ACTION: Interim rule.

SUMMARY: DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008, which establish minimum processes and requirements for the selection, accountability, training, equipping, and conduct of personnel performing private security functions.

DATES: *Effective Date:* August 19, 2011.

Comment Date: Comments on the interim rule should be submitted in writing to the address shown below on or before October 18, 2011, to be considered in the formation of the final rule.

○ *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “DFARS Case 2011–D023” under the heading “Enter keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “DFARS Case 2011–D023.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company

name (if any), and “DFARS Case 2011–D023” on your attached document.

- *E-mail:* dfars@osd.mil. Include DFARS Case 2011–D023 in the subject line of the message.
- *Fax:* 703–602–0350.
- *Mail:* Defense Acquisition

Regulations System, Attn: Meredith Murphy, OUSD (AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Meredith Murphy, Defense Acquisition Regulations System, OUSD (AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060, Telephone 703–602–1302; facsimile 703–602–0350.

SUPPLEMENTARY INFORMATION:

I. Background

The NDAA for FY 2008 (Pub. L. 110–181, enacted October 28, 2008), section 862, entitled “Contractors Performing Private Security Functions in Areas of Combat Operations or Other Significant Military Operations,” was amended by section 853 of the NDAA for FY 2009 (Pub. L. 110–417, enacted October 14, 2008) and sections 831 and 832 of the NDAA for FY 2011 (Pub. L. 111–383, enacted January 7, 2011). An interim final rule was published in the **Federal Register** on July 17, 2009, to meet the mandate of section 862 of the FY 2008 NDAA to provide policy and guidance regulating the actions of DoD and other Governmental private security contractors. A clause to cover the interagency requirements will be covered by a separate and subsequent FAR rule currently under development.

This interim rule is focused solely on providing implementing contractual language and a contract clause mandated by statute and applicable to DoD contracts only. While section 862 of the 2008 NDAA required standardization of rules for private security contractors among Government agencies, DOD’s underlying instruction, the Department of Defense Instruction (DoDI) 3020.50, entitled “Private Security Contractors Operating in Areas of Contingency Operations, Combat Operations, or Other Significant Operations” at <http://www.dtic.mil/whs/directives/corres/pdf> was written to

cover both DoD private security contractors (in all contingency operations) and interagency private security contractors (in combat operations). This interim rule implements the legislation by establishing (1) regulations addressing the selection, training, equipping, and conduct of personnel performing private security functions in areas of contingency operations, complex contingency operations, or other military operations or exercises that are designated by the combatant commander, (2) a contract clause, and (3) remedies.

Section 833 of the NDAA for FY 2011 is entitled “Standards and Certification for Private Security Contractors.” This provision mandates the establishment of third-party certification processes for determining whether private security contractors adhere to standards for operational and business practices. The required industry standard is currently under development and will be incorporated in the DFARS once the standard is published.

The regulations implementing the referenced statutory provisions are in DFARS subpart 225.3, entitled “Contracts Performed Outside the United States.” DFARS 225.302–3, Definitions, provides the definition of “private security functions” from section 862, as amended, and the definition of “complex contingency operations” from JP–102 (DoD Dictionary). This coverage does not apply to the performance of private security functions within the United States or outside the United States in areas that are not (a) contingency operations, (b) complex contingency operations, or (c) other military operations designated by the combatant commander. Importantly, DFARS 225.302 applies to the performance of private security functions in the applicable areas, without regard to whether the DoD contractor is a private security contractor. For example, a contractor delivering construction materials in an area of contingency operations might subcontract with a private security contractor to protect its supplies and employees during delivery. Although the supplier of the construction materials is not a private security contractor, the requirements of DFARS 252.225–7039, Contractors Performing Private Security Functions, are applicable. As a further example, the same contractor, if delivering construction materials to a base in Germany is not governed, at this time, by the requirements and limitations of DFARS 252.225.7039 because Germany is not an area of contingency operations,

complex contingency operations, or other significant military operations or exercises that are designated by the combatant commander. This is further clarified at DFARS 225.302–4, Policy. This subsection implements the relevant policy document, DoDI 3020.50, and assigns contractor responsibilities for the selection, accountability, training, equipping, and conduct of personnel performing private security functions under contracts in the covered areas. It also assigns responsibilities and establishes procedures for incident reporting, use of and accountability for equipment, and rules for the use of force.

The statutes also include specific remedies for violations of the responsibilities and procedures in the law, DoDI 3020.50, and DFARS 225.302–4. Without impinging on the Government's usual contractual remedies (e.g., termination for default), the Government may, at its discretion, direct the contractor to remove or replace any personnel who fail to comply with, or violate, applicable requirements of the clause at 252.225–7039, Contractors Performing Private Security Functions. Such corrective actions must be taken at the contractor's own expense and without prejudice to any other contractual rights. The statute prescribes additional remedies as follows:

1. Contracting officers must include a contractor's failure to comply in appropriate past-performance databases.

2. If the contract is an award-fee contract, the contracting officer must include performance failure in the assessment of award fees for the relevant period (as well as authorizing the treatment of such failures as a basis for reducing or denying award fees for the relevant period or recovering all or part of award fees previously paid for such period).

3. If the contractor fails to comply with the Government's direction to remove or replace personnel, and such failure to comply is severe, prolonged, or repeated, the statute specifies the authority of the contracting officer to terminate the contract for default.

II. 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.

III. Regulatory Flexibility Act

DoD does not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the statute impacts only private security contractors performing outside the United States. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 862 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008, as amended by section 853 of the NDAA for FY 2009 and sections 831 and 832 of the NDAA for FY 2011. The statutory provisions add requirements and limitations for contractors performing private security functions outside the United States in areas of contingency operations, complex contingency operations, or other military operations or exercises that are designated by the combatant commanders. The specific requirements are included in Department of Defense Instruction 3020.50, entitled ‘Private Security Contractors Operating in Contingency Operations, Combat Operations, or Other Significant Military Operations.’ These requirements are that contractors performing in areas such as Iraq and Afghanistan ensure that contractor personnel performing private security functions comply with the DoDI, including (1) accounting for Government-acquired and contractor-furnished property and (2) reporting incidents in which a weapon is discharged, personnel are attacked or killed or property is destroyed, or active, lethal countermeasures are employed.

In FY 2010, DoD awarded 1,839 contracts for performance in Iraq and Afghanistan. Of this total, 361, or 20 percent, were awarded to small businesses. Firms performing private security functions in these areas were already required to report the occurrence of incidents such as those listed in the clause at DFARS 252.225–7039, Contractors Performing Private Security Functions, but there was no

consistency in the manner of reporting or the individual to whom the report was to be made. This DFARS interim rule and DoDI 3020.50 provide this consistency and clarity and, in that sense, serve to relieve any burden on small businesses.

The interim rule contains information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Burden Act (44 U.S.C. chapter 35). There is an approved information collection, OMB control number 0704–0460, Synchronized Predeployment and Operational Tracker (SPOT) System, in the amount of approximately 150,000 hours. DoD has determined that the currently approved burden hours are sufficient to cover these requirements.

The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no alternatives that accomplish the stated objectives of the applicable statutes.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2011–D023) in correspondence.

IV. Paperwork Reduction Act

The rule contains 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). The clause at DFARS 252.225–7039, Contractors Performing Private Security Functions, requires contractors to use the Synchronized Predeployment and Operational Tracker (SPOT) system to (1) register personnel performing private security functions; (2) register weapons to be carried by or available to be used by personnel performing private security functions; (3) register armored vehicles, helicopters, and other military vehicles operated by contractors performing private security functions; and (4) report certain incidents in which personnel performing private security functions are involved. These requirements are covered by an approved information collection, OMB control number 0704–0460, Synchronized Predeployment and Operational Tracker (SPOT) System, in the amount of approximately 150,000 hours.

DoD has determined that the currently approved burden hours are sufficient to

cover these requirements. However, DoD will accept comments on how the interim rule would impact either the burden or other aspects of the approved information collection.

V. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule without prior opportunity for public comment pursuant to 41 U.S.C. 1707 (formerly 41 U.S.C. 418b) and FAR 1.501–3(b). This action is necessary because the requirements mandated for inclusion in DoD contracts by the FY 2011 NDAA became effective immediately upon enactment on January 7, 2011. Congress has expressed continuing concern that regulations for the oversight of private security contractors are not yet in place. The rule imposes new accountability requirements and limitations on DoD contractors' use of private security personnel. It is imperative that these requirements and limitations be included in DoD contracts as soon as possible in order to ensure that all employees of the Contractor who are responsible for personnel performing private security functions under DoD contracts are briefed on and understand their obligation to comply with all qualification, training, screening (including, if applicable, thorough background checks), and security requirements established by DoDI 3020.50, Private Security Contractors Operating in Areas of Contingency Operations, Combat Operations, or Other Significant Operations, as well as applicable laws and regulations of the United States and the host country and applicable treaties and international agreements regarding performance of private security functions. However, DoD will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 216, 225, and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 216, 225, and 252 are amended as follows:

- 1. The authority citation for 48 CFR parts 216, 225, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 216—TYPES OF CONTRACTS

216.405–270 [Redesignated as 216.405–2–70]

- 2. Redesignate section 216.405–270 as 216.405–2–70.
- 3. Add section 216.405–2–71 to read as follows:

216.405–2–71 Award fee reduction or denial for failure to comply with requirements relating to performance of private security functions.

(a) In accordance with section 862 of the National Defense Authorization Act for Fiscal Year 2008, as amended, the contracting officer shall include in any award-fee plan a requirement to review contractor compliance with, or violation of, applicable requirements of the contract with regard to the performance of private security functions in an area of contingency operations, complex contingency operations, or other military operations or exercises that are designated by the combatant commander (see 225.370).

(b) In evaluating the contractor's performance under a contract that includes the clause at 252.225–7039, Contractors Performing Private Security Functions, the contracting officer shall consider reducing or denying award fees for a period if the contractor fails to comply with the requirements of the clause during such period. The contracting officer's evaluation also shall consider recovering all or part of award fees previously paid for such period.

PART 225—FOREIGN ACQUISITION

- 4. Add sections 225.370 through 225.370–6 to subpart 225.3 to read as follows:

Subpart 225.3—Contracts Performed Outside the United States

Sec.

* * * * *

225.370 Contractors performing private security functions.

225.370–1 Scope.

225.370–2 Applicability.

225.370–3 Definitions.

225.370–4 Policy.

225.370–5 Remedies.

225.370–6 Contract clause.

225.370 Contractors performing private security functions.

225.370–1 Scope.

This section prescribes policy for implementing section 862 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181), as amended by section 853 of the National Defense Authorization Act for Fiscal

Year 2009 (Pub. L. 110–417) and sections 831 and 832 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111–383).

225.370–2 Applicability.

This section applies to acquisitions for supplies and services that require the performance of private security functions in areas of—

- (a) Contingency operations (see FAR 2.101);
- (b) Complex contingency operations; or
- (c) Other military operations or exercises that are designated by the combatant commander.

225.370–3 Definitions.

As used in this section—

Complex contingency operations means large-scale peace operations (or elements thereof) conducted by a combination of military forces and nonmilitary organizations that involve one or more of the elements of peace operations that include one or more elements of other types of operations, such as foreign humanitarian assistance, nation assistance, support to insurgency, or support to counterinsurgency.

Private security functions means activities engaged in by a contractor, including—

(1) Guarding of personnel, facilities, designated sites, or property of a Federal agency, the contractor or subcontractor, or a third party; and

(2) Any other activity for which personnel are required to carry weapons in the performance of their duties.

225.370–4 Policy.

(a) The policy, responsibilities, procedures, accountability, training, equipping, and conduct of personnel performing private security functions in designated areas are addressed in Department of Defense Instruction (DoDI) 3020.50, Private Security Contractors Operating in Contingency Operations, Combat Operations, or Other Significant Military Operations, at <http://www.dtic.mil/whs/directives/corres/pdf/302050p.pdf>.

(b) The requirements of this section apply to contractors that employ private security contractors in areas of contingency operations, complex contingency operations, or other military operations or exercises that are designated by the combatant commander, whether the contract is for the performance of private security functions or other supplies or services.

(c) DoD requires contractors described in paragraph (b) above to—

- (1) Ensure that all employees of the contractor who are responsible for

performing private security functions comply with orders, directives, and instructions to contractors performing private security functions for—

(i) Registering, processing, accounting for, managing, overseeing, and keeping appropriate records of personnel performing private security functions. This includes ensuring the issuance, maintenance, and return of Personal Identity Verification credentials in accordance with FAR clause 52.204–9, Personal Identity Verification of Contractor Personnel, and DoD procedures, including revocation of any physical and/or logistical access (as defined by Homeland Security Presidential Directive (HSPD–12)) granted to such personnel;

(ii) Authorizing and accounting for weapons to be carried by or available to be used by personnel performing private security functions;

(A) All weapons must be registered in the Synchronized Predeployment Operational Tracker (SPOT) materiel tracking system.

(B) In addition, all weapons that are Government-furnished property must be assigned a unique identifier in accordance with the clauses at 252.211–7003 and 252.245.7001 and physically marked in accordance with MIL–STD–130 (current version) and DoD directives and instructions. The items must be registered in the DoD Item Unique Identification (IUID) Registry (<https://www.bpn.gov/iuid/>);

(iii) Registering and identifying armored vehicles, helicopters, and other military vehicles operated by contractors performing private security functions;

(A) All armored vehicles, helicopters, and other military vehicles must be registered in SPOT.

(B) In addition, all armored vehicles, helicopters, and other military vehicles that are Government-furnished property must be assigned a unique identifier in accordance with the clauses at 252.211–7003 and 252.245.7001 and physically marked in accordance with MIL–STD–130 (current version) and DoD directives and instructions. The items must be registered in the DoD IUID Registry; and

(iv) Reporting incidents in which—

(A) A weapon is discharged by personnel performing private security functions;

(B) Personnel performing private security functions are attacked, killed, or injured;

(C) Persons are killed or injured or property is destroyed as a result of conduct by contractor personnel;

(D) A weapon is discharged against personnel performing private security functions or personnel performing such

functions believe a weapon was so discharged; or

(E) Active, non-lethal countermeasures (other than the discharge of a weapon) are employed by personnel performing private security functions in response to a perceived immediate threat;

(2) Ensure that all employees of the contractor who are responsible for personnel performing private security functions are briefed on and understand their obligation to comply with—

(i) Qualification, training, screening (including, if applicable, thorough background checks), and security requirements established by DoDI 3020.50;

(ii) Applicable laws and regulations of the United States and the host country and applicable treaties and international agreements regarding performance of the functions of the private security contractors;

(iii) Orders, directives, and instructions issued by the applicable commander of a combatant command relating to weapons, equipment, force protection, security, health, safety, or relations and interaction with locals; and

(iv) Rules on the use of force issued by the applicable commander of a combatant command for personnel performing private security functions; and

(3) Cooperate with any Government-authorized investigation by providing access to employees performing private security functions and relevant information in the possession of the contractor.

225.370–5 Remedies.

(a) In addition to other remedies available to the Government—

(1) The contracting officer may direct the contractor, at its own expense, to remove and replace any contractor personnel who fail to comply with or violate applicable requirements. Such action may be taken at the Government's discretion without prejudice to its rights under any other contract provision, including termination for default. Required contractor actions include—

(i) Ensuring the return of personal identity verification credentials;

(ii) Ensuring the return of any other equipment issued to the employee under the contract; and

(iii) Revocation of any physical and/or logistical access granted to such personnel;

(2) The contracting officer shall include the contractor's failure to comply with the requirements of this subpart in appropriate databases of past performance and consider any such

failure in any responsibility determination or evaluation of past performance;

(3) In the case of award-fee contracts, the contracting officer shall consider a contractor's failure to comply with the requirements of this subpart in the evaluation of the contractor's performance during the relevant evaluation period, and may treat such failure as a basis for reducing or denying award fees for such period or for recovering all or part of award fees previously paid for such period; and

(4) If the contractor fails to comply with the Government's direction to remove or replace personnel (see paragraph (a)(1) of this subsection), and such failure to comply is severe, prolonged, or repeated, the contracting officer may terminate the contract for default.

(b) If the performance failures are significant or repeated, the contracting officer shall refer the contractor to the appropriate suspension and debarment official.

225.370–6 Contract clause.

Use the clause at 252.225–7039, Contractors Performing Private Security Functions, in all solicitations and contracts to be performed in areas of—

- (a) Contingency operations;
- (b) Complex contingency operations; or
- (c) Other military operations or exercises, when designated by the combatant commander.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Amend section 252.212–7001 as follows:

- a. Revise the clause date to read "(AUG 2011)";
- b. Redesignate paragraphs (b)(16) through (b)(27) as (b)(17) through (b)(28);
- c. Add new paragraph (b)(16); and
- d. Revise paragraph (c).

252.212–7001 Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items.

* * * * *
 (b) * * * *
 (16) 252.225–7039, Contractors Performing Private Security Functions (AUG 2011) (Section 862 of Pub. L. 110–181, as amended by section 853 of Pub. L. 110–417 and sections 831 and 832 of Pub. L. 111–383).

* * * * *
 (c) In addition to the clauses listed in paragraph (e) of the Contract Terms and Conditions Required to Implement

Statutes or Executive Orders—
Commercial Items clause of this contract (FAR 52.212-5), the Contractor shall include the terms of the following clauses, if applicable, in subcontracts for commercial items or commercial components, awarded at any tier under this contract:

(1) 252.225-7039, Contractors Performing Private Security Functions (AUG 2011) (Section 862 of Pub. L. 110-181, as amended by section 853 of Pub. L. 110-417 and sections 831 and 832 of Pub. L. 111-383).

(2) 252.237-7010, Prohibition on Interrogation of Detainees by Contractor Personnel (NOV 2010) (Section 1038 of Pub. L. 111-84).

(3) 252.237-7019, Training for Contractor Personnel Interacting with Detainees (SEP 2006) (Section 1092 of Pub. L. 108-375).

(4) 252.247-7003, Pass-Through of Motor Carrier Fuel Surcharge Adjustment to the Cost Bearer (SEP 2010) (Section 884 of Pub. L. 110-417).

(5) 252.247-7023, Transportation of Supplies by Sea (MAY 2002) (10 U.S.C. 2631).

(6) 252.247-7024, Notification of Transportation of Supplies by Sea (MAR 2000) (10 U.S.C. 2631).

* * * * *

■ 6. Add section 252.225-7039 to read as follows:

252.225-7039 Contractors Performing Private Security Functions.

As prescribed in 225.370-6, insert the following clause:

CONTRACTORS PERFORMING PRIVATE SECURITY FUNCTIONS (AUG 2011)

(a) Definition.

Private security functions means activities engaged in by a contractor, including—

(i) Guarding of personnel, facilities, designated sites, or property of a Federal agency, the contractor or subcontractor, or a third party; or

(ii) Any other activity for which personnel are required to carry weapons in the performance of their duties.

(b) Requirements. The Contractor is required to—

(1) Ensure that all employees of the Contractor who are responsible for performing private security functions under this contract comply with any orders, directives, and instructions to Contractors performing private security functions that are identified in the contract for—

(i) Registering, processing, accounting for, managing, overseeing, and keeping appropriate records of personnel performing private security functions. This includes ensuring the issuance, maintenance, and return of Personal Identity Verification credentials in accordance with FAR 52.204-19, Personnel Identity Verification of Contractor Personnel, and DoD procedures, including revocation of any physical and/or

logistical access (as defined by Homeland Security Presidential Directive (HSPD-12)) granted to such personnel;

(ii) Authorizing and accounting for weapons to be carried by or available to be used by personnel performing private security functions;

(A) All weapons must be registered in the Synchronized Predeployment Operational Tracker (SPOT) materiel tracking system.

(B) In addition, all weapons that are Government-furnished property must be assigned a unique identifier in accordance with the clauses at DFARS 252.211-7003, Item Identification and Valuation, and DFARS 252.245.7001, Tagging, Labeling, and Marking of Government-Furnished Property, and physically marked in accordance with MIL-STD 130 (current version) and DoD directives and instructions. The items must be registered in the DoD Item Unique Identification (IUID) Registry (<https://www.bpn.gov/iuid/>);

(iii) Registering and identifying armored vehicles, helicopters, and other military vehicles operated by Contractors performing private security functions;

(A) All armored vehicles, helicopters, and other military vehicles must be registered in SPOT.

(B) In addition, all armored vehicles, helicopters, and other military vehicles that are Government-furnished property must be assigned a unique identifier in accordance with the clauses at DFARS 252.211-7003 and DFARS 252.245.7001 and physically marked in accordance with MIL-STD 130 (current version) and DoD directives and instructions. The items must be registered in the DoD IUID Registry (<https://www.bpn.gov/iuid/>); and

(iv) Reporting incidents in which—

(A) A weapon is discharged by personnel performing private security functions;

(B) Personnel performing private security functions are attacked, killed, or injured;

(C) Persons are killed or injured or property is destroyed as a result of conduct by contractor personnel;

(D) A weapon is discharged against personnel performing private security functions or personnel performing such functions believe a weapon was so discharged; or

(E) Active, non-lethal countermeasures (other than the discharge of a weapon) are employed by personnel performing private security functions in response to a perceived immediate threat;

(2) Ensure that all employees of the Contractor who are responsible for personnel performing private security functions under this contract are briefed on and understand their obligation to comply with—

(i) Qualification, training, screening (including, if applicable, thorough background checks), and security requirements established by DoDI 3020.50, Private Security Contractors Operating in Areas of Contingency Operations, Combat Operations, or Other Significant Operations, at <http://www.dtic.mil/whs/directives/corres/pdf/>;

(ii) Applicable laws and regulations of the United States and the host country and applicable treaties and international agreements regarding performance of private security functions;

(iii) Orders, directives, and instructions issued by the applicable commander of a combatant command relating to weapons, equipment, force protection, security, health, safety, or relations and interaction with locals; and

(iv) Rules on the use of force issued by the applicable commander of a combatant command for personnel performing private security functions; and

(3) Cooperate with any Government-authorized investigation by providing access to employees performing private security functions and relevant information in the possession of the Contractor regarding the incident concerned.

(c) *Remedies.* In addition to other remedies available to the Government—

(1) The Contracting Officer may direct the Contractor, at its own expense, to remove and replace any Contractor personnel who fail to comply with or violate applicable requirements of this contract. Such action may be taken at the Government's discretion without prejudice to its rights under any other provision of this contract, including termination for default. Required Contractor actions include—

(i) Ensuring the return of personal identity verification credentials;

(ii) Ensuring the return of other equipment issued to the employee under the contract; and

(iii) Revocation of any physical and/or logistical access granted to such personnel;

(2) The Contractor's failure to comply with the requirements of this clause will be included in appropriate databases of past performance and may be considered in any responsibility determination or evaluation of past performance;

(3) If this is an award-fee contract, the Contractor's failure to comply with the requirements of this clause shall be considered in the evaluation of the Contractor's performance during the relevant evaluation period, and the Contracting Officer may treat such failure to comply as a basis for reducing or denying award fees for such period or for recovering all or part of award fees previously paid for such period; and

(4) This contract may be terminated for default if the Contractor fails to comply with the requirements of paragraph (b) of this clause or, if directed by the Contracting Officer, fails to remove or replace, at its own expense, any of its personnel who violate the requirements of paragraph (b) of this clause.

(d) *Rule of construction.* The duty of the Contractor to comply with the requirements of this clause shall not be reduced or diminished by the failure of a higher- or lower-tier Contractor to comply with the clause requirements or by a failure of the contracting activity to provide required oversight.

(e) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (e), in all subcontracts that will be performed in areas of contingency operations, complex contingency operations, or other military operations or exercises designated by the Combatant Commander.

(End of clause)

- 7. Revise section 252.244–7000 to read as follows:

252.244–7000 Subcontracts for Commercial Items and Commercial Components (DoD Contracts).

As prescribed in 244.403, use the following clause:

SUBCONTRACTS FOR COMMERCIAL ITEMS AND COMMERCIAL COMPONENTS (DOD CONTRACTS) (AUG 2011)

In addition to the clauses listed in paragraph (c) of the Subcontracts for Commercial Items clause of this contract (Federal Acquisition Regulation 52.244–6), the Contractor shall include the terms of the following clauses, if applicable, in subcontracts for commercial items or commercial components, awarded at any tier under this contract:

(a) 252.225–7009 Restriction on Acquisition of Certain Articles Containing Specialty Metals (JAN 2011) (10 U.S.C. 2533b).

(b) 252.225–7039, Contractors Performing Private Security Functions (AUG 2011) (Section 862 of Pub. L. 110–181, as amended by section 853 of Pub. L. 110–417 and sections 831 and 832 of Pub. L. 111–383).

(c) 252.236–7013 Requirement for Competition Opportunity for American Steel Producers, Fabricators, and Manufacturers (JAN 2009) (Pub. L. 110–329, Division E, Section 108).

(d) 252.237–7010 Prohibition on Interrogation of Detainees by Contractor Personnel (NOV 2010) (Section 1038 of Pub. L. 111–84).

(e) 252.237–7019 Training for Contractor Personnel Interacting with Detainees (SEP 2006) (Section 1092 of Pub. L. 108–375).

(f) 252.246–7003 Notification of Potential Safety Issues (JAN 2007).

(g) 252.247–7023 Transportation of Supplies by Sea (MAY 2002) (10 U.S.C. 2631).

(h) 252.247–7024 Notification of Transportation of Supplies by Sea (MAR 2000) (10 U.S.C. 2631).

(End of clause)

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 209 and 252

RIN 0750–AG92

Defense Federal Acquisition Regulation Supplement; Identification of Critical Safety Items (DFARS Case 2010–D022)

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to add a contract clause that clearly identifies any items being purchased that are critical safety items so that the proper risk-based surveillance can be performed.

DATES: *Effective Date:* August 19, 2011.

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

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule at 76 FR 14641 on March 17, 2011, to add a contract clause that clearly identifies any items being purchased that are critical safety items so that the proper risk-based surveillance can be performed. One public comment was received in response to the proposed rule.

II. Discussion and Analysis of the Public Comment

Comment: The respondent noted that the DFARS case specifically addresses aviation and ship critical safety items, but states that protective personal equipment, such as body armor and helmets, can also have catastrophic results if they fail. The respondent asked how DoD ensures that contract administration activities apply increased surveillance procedures in these types of contracts.

Response: The additional risk-based surveillance required for aviation and ship critical safety items is mandated by law (section 802 of the National Defense Authorization Act for Fiscal Year 2004 and section 130 of the National Defense Authorization Act for Fiscal Year 2007). There is no equivalent statutory requirement for protective personal equipment, and instituting such a requirement is outside the scope of this case. However, the respondent's comment has been forwarded to the Defense Contract Management Agency for future consideration.

The respondent also asked about the process that ensures that contract administration activities apply increased surveillance procedures when aviation and ship critical safety items have been identified. The process was summarized in the preamble to the proposed rule published at 76 FR 14642 on March 17, 2011. Briefly, the combination of the actions of the design control activities, joint agency instructions (e.g., Management of Aviation Critical Safety Items), limitations on contracting with sources that have not been approved by the design control activity, and focus on

contract administration will ensure the proper surveillance for these critical items.

The respondent did not recommend changes to the DFARS text or clause, and the final rule does not revise the DFARS text or clause from that published in the proposed rule.

II. 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 Department of Defense certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Its purpose is internal to the Government only by alerting Government quality-assurance activities to existing heightened surveillance requirements that are imposed by DoD requiring activities. The process for identifying an item as a critical safety item occurs entirely outside the acquisition process, as does the process of approving a source for production of a critical safety item. No comments from small entities were received in response to publication of the proposed rule.

V. Paperwork Reduction Act

The rule does not contain 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 209 and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 209 and 252 are amended as follows: