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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: Final rule.

SUMMARY: DoD is adopting as final, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement those sections of several National Defense Authorization Acts which establish minimum processes and requirements for the selection, accountability, training, equipping, and conduct of personnel performing private security functions under DoD contracts.

DATES: Effective Date: [Insert date of publication in the FEDERAL REGISTER.]

ADDRESSES: FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, telephone 571-372-6098.

SUPPLEMENTARY INFORMATION:

I. Background

The interim rule implemented 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. DoD published the interim rule in the Federal Register at 76 FR 52133 on August 19, 2011, to implement section 862, as amended, of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008. Section 862 was amended by section 853 of the NDAA for FY 2009 and sections 831 and 832 of the NDAA for FY 2011. In addition, the DoD Instruction addressing private Security Contractors (DoDI 3020.50) was revised on August 1, 2011, and the final rule to implement section 862 of the NDAA for FY 2008, as amended, 32 CFR 159, Private Security Contractors Operating in Contingency Operations, was published in the Federal Register on August 11, 2011 (76 FR 49651). Public comments on the final rule at 32 CFR 159 had been solicited by publication of an interim rule on July 17, 2009.

II. Discussion and Analysis of the Public Comments

Three respondents submitted comments on the interim rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of significant changes

The following significant changes to the DFARS are being made by this rule:

- The definition of "private security functions" in the clause at DFARS 225.370-3 was revised to conform to the DoDI, and limit the definition to the specified criteria.
- The types of active, non-lethal countermeasures that must be reported when used has been added at DFARS 225.370-4(c)(1)(iv)(E) and 252.225-7039(b)(1)(iv)(E).
- The types of Government-authorized investigations with which the contractor is required to cooperate are more narrowly described in order to conform to the limitations in the statute. Changes have been made to DFARS 225.370-4(c)(3) and the clause at DFARS 252.225-7039(b)(3). In addition, a definition of "full cooperation" has been added to the clause at DFARS 252.225-7039 to allay concerns about waiver of attorney-client privilege.
- The remedies at DFARS 225.370-5(a) have been revised to remove paragraph (a)(4), a discussion of the right to terminate for default, because this right is already covered by the contract termination clauses.
- The applicability of the rule (DFARS 225.370-2, 225.370-4(b), and 225.370-6) and references to the title of DoDI

3020.50 at DFARS 225.370-4 and 252.225-7039(b)(2)(i))

have been updated to conform to the revised DoDI 3020.50.

B. Analysis of public comments

1. Definition of private security functions

Comment: Two respondents commented that the definition of "private security functions" was (a) too broad and (b) inconsistent among the DoDI, the DFARS text, and the clause at DFARS 252.225-7039, Contractors Performing Private Security Functions.

Response: The definition of "private security functions" has been revised to limit the definition to the specified criteria all inclusive (rather than just "including" the criteria), consistent with the DoDI. The essence of the definition cannot be changed substantially in the DFARS from that in the controlling DoDI.

2. The contractor's requirement to ensure compliance of contractor personnel performing private security functions

Comment: One respondent stated that the requirement for prime contractors to ensure that personnel performing private security functions comply with numerous administrative and reporting requirements and are briefed on and understand various enumerated laws, regulations, orders, directives, instructions, and rules related to the private security function imposes "untenable oversight, policing, and enforcement obligations,"

particularly for non-private security function prime contractors that subcontract with a private security function provider. The respondent recommended that the prime contractor's obligation be limited to the administrative functions of passing the requirements on to the private security function provider and conducting audits or other administrative review functions to verify compliance.

Response: No change has been made in the final rule because the law, at section 862(b)(2), as amended, requires the contractor, without regard to whether it is a direct provider of private security functions, to "ensure" that its employees and any subcontractors' employees who are responsible for performing private security functions comply with the regulations prescribed under subsection (a) of section 862 implemented as DoDI 3020.50. In addition, the clause at DFARS 252.225-7039(b)(1), requires DoD to identify the applicable private security functions in the contract and make available to the contractor the relevant orders, directives, and instructions.

3. Contractors' obligation to cooperate with Government investigations

Comment: One respondent noted that DFARS 225.370-4(c)(3) imposes on contractors the obligation to cooperate with any Government-authorized investigation "by providing access to employees performing private security functions and relevant

information in the possession of the contractor," but fails to provide any explanation of the scope and limitations on this requirement. The respondent recommended that the final rule define the contractor's obligation to cooperate, as in the mandatory disclosure provisions of FAR 52.203-13, Contractor Code of Business Ethics and Conduct, by specifying that such cooperation does not require the contractor to waive attorney-client privilege or the protections afforded by the attorney work-product doctrine.

Response: The final rule has been amended to more clearly define the scope and limitations of the contractor's obligation to cooperate with Government investigations. The revised text reflects the limitations on the investigations specifically addressed by the statute, as amended (see DFARS 225.370-4(c)(3) and 252.225-7039(b)(3)). The limitation on information to that in the contractor's possession regarding the incident concerned was in the interim rule. Additionally, the final rule requires the contractor to provide "full cooperation" with any Government-authorized investigation. In addition, the definition of "full cooperation" included in the clause reflects the mandatory disclosure provisions of FAR 52.203-13, Contractor Code of Business Ethics and Conduct, with minor edits, as recommended by the respondent.

**4. Removal of personnel for failure to comply with
"applicable requirements"**

Comment: One respondent stated that the interim rule, at DFARS 225.370-5(a)(1), grants the Government the very broad power to direct a contractor to remove any personnel at its own expense if the personnel fail to comply with or violate applicable requirements. The respondent believed that it is unclear whether the "applicable requirements" are solely limited to those spelled out in the interim rule or if they include additional requirements not identified in the interim rule.

Response: No change has been made in the final rule because the applicable requirements for contracts performed outside the United States have been clearly defined in DFARS subpart 225.3 and paragraph (b) of the clause at DFARS 252.225-7039, Contractors Performing Private Security Functions. As noted in the response to comment category B.2 above, relevant orders, directives, and instructions must be made available to the contractor in a single location, including an internet website (see section 862(a)(3) of the statute, as amended), and they must be updated as they change, e.g., a change in guidance from a geographic combatant commander.

**5. Award fee reduction or denial for failure to comply
with private security functions requirements**

Comment: One respondent was concerned with the implementation of section 862(d), as amended. The respondent concluded that the DFARS interim rule went beyond the requirements of the statute "by requiring the contracting officer to include this evaluation requirement in an award-fee plan. This subpart then provides the contracting officer the flexibility to determine whether to reduce, deny, or recover all or part of award fees."

Response: No change has been made in the final rule in response to this comment. FAR 16.401(e)(2) states that the determination of the amount of award fee and the methodology for determining the award fee are unilateral decisions made solely at the discretion of the Government. In addition, FAR 16.401(e)(3) requires that all contracts providing for award fees must be supported by an award-fee plan that establishes the procedures for evaluating award fee and an award-fee board for conducting the award-fee evaluation. The use of an award-fee type contract provides the Government the maximum, subjective flexibility in the determination of the factors that will be considered, i.e., the award-fee plan, and the amount of award fee granted in a performance period. The statute requires that an additional factor, i.e., the failure of a contractor to comply with contractual requirements pertaining to the performance of private security functions, must always be a

consideration for award fees on any award-fee contract calling for performance in the applicable areas.

6. Applicability

Comments: One respondent submitted two comments on the applicability of the interim rule. First, the respondent stated that the statute limits the regulations to "combat operations or other significant military operations" and the interim rule goes beyond that. Second, the respondent noted that the interim rule requires DoD subcontractors for commercial items and commercial components to comply with requirements imposed on private security providers and recommended that the applicability of the DFARS coverage be modified to require coverage only for contracts and subcontracts that provide security as a primary function.

Response: The applicability of the DFARS final rule has been revised, at DFARS 225.370-2, to encompass the categories as specified in the DoDI, except that "combat operations" are identified separately from "contingency operations," as specified in the statute. "Complex contingency operations" are now identified as "humanitarian or peacekeeping operations," which is a term defined in statute and FAR 2.101. The Secretary of Defense has not formally designated Iraq or Afghanistan as "combat operations," yet these areas are clearly intended to be covered by the regulations for private security functions.

Therefore, "contingency operations" are covered. Whereas Governmentwide implementation will be restricted to combat operations and other significant military operations, the DoDI requires somewhat broader application for DoD contracts.

Congress did not contemplate limiting applicability of the regulations to only those contractors providing primarily private security functions. To do so would have resulted in anomalies such as sanctions for a private security contractor whose employee wounded or killed a civilian while not sanctioning a contractor providing construction goods or foodstuffs whose personnel providing security wounded or killed a civilian. These requirements are applicable only when the contract or subcontract performance is outside the United States.

7. Reporting requirements

Comment: One respondent noted a number of perceived shortcomings in the reporting requirements at DFARS 225.370-4(c)(1)(iv). Specifically, the respondent was concerned that the requirement to report any property destruction could overwhelm industry and Government employees alike with reports of incidental and *de minimis* damage to property. The respondent was concerned that the requirement to report incidents in which a firearm is discharged would include planned firearm discharges occurring during training and maintenance. In addition, the

respondent requested that the DFARS include examples of active, non-lethal countermeasures.

Response: The statute requires contractors, at section 862(b)(2)(A)(iv), to report incidents in which (1) a weapon is discharged by personnel performing private security functions; (2) personnel performing private security functions are killed or injured; or (3) persons are killed or injured, or property is destroyed, as a result of conduct by contractor personnel. The second comment resulted in the addition of a listing of active, non-lethal countermeasures in both the DFARS text see DFARS 225.370-4(c)(1)(iv)(E) and the clause at 252.225-7039.

8. Statutory remedies do not include contract termination

Comment: One respondent stated that the legislation does not allow the Government to terminate a contract for default in the case of noncompliance.

Response: The Government has the right to terminate a contract for default pursuant to one of the termination clauses at FAR 52.249-6 (cost-reimbursement), -8 (fixed-price supply and service), -10 (construction), or -11 (personal services) that is included in every contract, as applicable. DoD does not acquire new or additional termination-for-default rights by including such coverage in the clause at DFARS 252.225-7039. Therefore, the final rule has removed the termination language from DFARS 225.370-5 and the clause at DFARS 252.225-7039.

While the statute does not specifically list termination of a contract for default when a contractor's failure to comply is severe, prolonged, or repeated, it does provide that the contractor must be referred to the agency suspension or debarment official and that the failure may be a cause for suspension or debarment of the contractor. Once a contractor appears on the Excluded Parties List System (FAR 9.404), all Government agencies are prohibited from awarding contracts or consenting to subcontracts with the contractor, unless there is an agency head determination to do so (FAR 9.405(a)).

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

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., and is summarized as follows:

DoD is adopting as final, with changes, 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 final rule has been updated to conform with the Governmentwide regulation at 32 CFR part 159, entitled "Private Security Contractors Operating in Contingency Operations." In addition, this final rule implements DoDI 3020.50, "Private Security Contractors (PSCs) Operating in Contingency Operations, Humanitarian or Peace Operations, or Other Military Operations or Exercises," which provides procedures for personnel performing private security functions for DoD. This final rule impacts only private security contractors performing outside the United States in areas of combat operations and other significant military operations designated by the Secretary of Defense, contingency operations, or other military operations designated by the combatant commanders. DoD does not expect this final 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 it impacts only private security contractors performing outside the United States.

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 incidences 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 final rule provides this consistency and clarity and, in that sense, serves to relieve the burdens on small businesses.

No comments were received from the Chief Counsel for Advocacy of the Small Business Administration in response to the rule.

The rule does not duplicate, overlap, or conflict with any other Federal rules. No alternatives have been identified that accomplish the stated objectives of the applicable statutes.

V. Paperwork Reduction Act

This 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 rule affects the certification and information collection requirements in the provisions at DFARS 225.7402-3, currently

approved under OMB Control Number 0704-0460, titled "Synchronized Predeployment and Operational Tracker (SPOT) System," effective through March 31, 2013. No impact is anticipated, however, because DoD contractors operating in areas of combat operations, contingency operations, or other military operations or exercises are currently required to use SPOT for registering personnel and weapons, as well as armored vehicles, helicopters, and other military vehicles operated by personnel performing private security functions, and to report the incidents addressed in the clause at DFARS 252.225-7039.

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

Foreign currencies, Government procurement, Reporting and recordkeeping requirements

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Accordingly, the interim rule amending 48 CFR parts 216, 225, and 252, which was published at 76 FR 52133 on August 19, 2011, is adopted as a final rule with the following changes:

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

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

PART 225—FOREIGN ACQUISITION

2. Sections 225.370-2 and 225.370-3 are revised to read as follows:

225.370-2 Applicability.

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

- (a) Combat and other significant military operations designated by the Secretary of Defense;
- (b) Contingency operations (see FAR 2.101);
- (c) Humanitarian or peacekeeping operations; or
- (d) Other military operations or exercises designated by the combatant commander.

225.370-3 Definitions. As used in this section—

Full cooperation and private security functions are defined in the clause at 252.225-7039, Contractors Performing Private Security Functions.

- 3. Section 225.370-4 is amended—
 - a. By revising paragraphs (a) and (b);
 - b. In paragraph (c)(1) introductory text by removing “Ensure that all employees” and adding “Ensure that the contractor and all employees” in its place;
 - c. By revising paragraph (c)(1)(iv)(E);
 - d. In paragraph (c)(2) introductory text by removing “Ensure that all employees” and adding “Ensure that the contractor and all employees” in its place; and
 - e. By revising paragraph (c)(3).

The revisions read as follows:

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 (PSCs) Operating in Contingency Operations, Humanitarian or Peace Operations, or Other Military Operations or Exercises, 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 outside the United States in areas of combat and other significant military operations designated by the Secretary of Defense, contingency operations, humanitarian or peacekeeping operations, or other military operations or exercises designated by the combatant commander, whether the contract is for the performance of private security functions or other supplies or services.

(c) * * *

(1) * * *

(iv) * * *

(E) Active, non-lethal countermeasures (other than the discharge of a weapon, including laser optical distracters, acoustic hailing devices, electromuscular TASER guns, blunt-

trauma devices like rubber balls and sponge grenades, and a variety of other riot control agents and delivery systems) are employed by personnel performing private security functions in response to a perceived immediate threat;

* * * * *

(3) Provide full cooperation with any Government-authorized investigation into incidents reported pursuant to paragraph (b)(1)(iv) of the clause at 252.225-7039, Contractors Performing Private Security Functions, and incidents of alleged misconduct by personnel performing private security functions by providing access to employees performing private security functions and relevant information in the possession of the contractor.

225.370-5 [Amended]

4. Section 225.370-5 is amended—

a. In paragraph (a)(2), by adding “and” at the end of the sentence;

b. In paragraph (a)(3), by removing “paid for such period; and” and adding “paid for such period (see 216.405-2-71).” in its place;

c. By removing paragraph (a)(4); and

d. In paragraph (b), by removing “significant, or repeated” and adding “significant, severe, prolonged, or repeated” in its place.

5. Section 225.370-6 is revised to read as follows:

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 outside the United States in areas of—

- (a) Combat and other significant military operations designated by the Secretary of Defense;
- (b) Contingency operations (see FAR 2.101);
- (c) Humanitarian or peacekeeping operations; or
- (d) Other military operations or exercises designated by the combatant commander.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Section 252.225-7039 is amended—

- a. By removing the clause date and adding "(JUN 2012)" in its place;
- b. By revising paragraph (a);
- c. In introductory sentence (b)(1), by removing "Ensure that all employees" and adding "Ensure that the Contractor and all employees" in its place;
- d. In paragraph (b)(1)(i), by removing "Personnel Identity Verification of Contractor Personnel" and adding "Personal Identity Verification of Contractor Personnel" in its place;
- e. By revising paragraph (b)(1)(iv)(E);

f. In introductory sentence (b) (2), by removing "Ensure that all employees" and adding "Ensure that the Contractor and all employees" in its place;

g. In paragraph (b) (2) (i), by removing "Combat Operations, or Other Significant Military Operations" and adding "Humanitarian or Peace Operations, or Other Military Operations or Exercises" in its place;

h. By revising paragraph (b) (3);

i. In paragraph (c) (2), by adding "and" at the end of the sentence;

j. In paragraph (c) (3), by removing "paid for such period; and" and adding "paid for such period." in its place;

k. By revising paragraph (c) (4); and

l. By revising paragraph (e).

The revisions read as follows:

252.225-7039 Contractors Performing Private Security Functions.

* * * * *

(a) Definitions.

Full cooperation-

(i) Means disclosure to the Government of the information sufficient to identify the nature and extent of the incident and the individuals responsible for the conduct. It includes providing timely and complete response to Government auditors'

and investigators' requests for documents and access to employees with information;

(ii) Does not foreclose any Contractor rights arising in law, the FAR, the DFARS, or the terms of the contract. It does not require—

(A) The Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or

(B) Any officer, director, owner, or employee of the Contractor, including a sole proprietor, to waive his or her attorney-client privilege or Fifth Amendment rights; and

(C) Does not restrict the Contractor from—

(1) Conducting an internal investigation; or

(2) Defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.

Private security functions means the following activities engaged in by a contractor:

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

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

(b) * * *

(1) * * *

(iv) * * *

(E) Active, non-lethal countermeasures (other than the discharge of a weapon, including laser optical distracters, acoustic hailing devices, electromuscular TASER guns, blunt-trauma devices like rubber balls and sponge grenades, and a variety of other riot control agents and delivery systems) are employed by personnel performing private security functions in response to a perceived immediate threat;

* * * * *

(3) Provide full cooperation with any Government-authorized investigation into incidents reported pursuant to paragraph (b)(1)(iv) of this clause and incidents of alleged misconduct by personnel performing private security functions by providing access to employees performing private security functions and relevant information in the possession of the Contractor regarding the incident concerned.

(c) * * *

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

* * * * *

(e) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (e), in all subcontracts that will be performed outside the United States in

areas of combat and other significant military operations designated by the Secretary of Defense, contingency operations, humanitarian or peacekeeping operations, or other military operations or exercises designated by the Combatant Commander.

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