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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 25, and 52

[FAR Case 2011-029; Docket No. 2011-0029; Sequence 1]

RIN: 9000-AM20

Federal Acquisition Regulation; Contractors Performing
Private Security Functions Outside the United States

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement Governmentwide requirements in National Defense Authorization Acts that establish minimum processes and requirements for the selection, accountability, training, equipping, and conduct of personnel performing private security functions outside the United States.

DATES: Interested parties should submit written comments to the Regulatory Secretariat on or before **[Insert 60 days after publication in the FEDERAL REGISTER]** to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR case 2011-029 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2011-029" under the heading "Comment or Submission". Select the link "Send a Comment or Submission" that corresponds with FAR Case 2011-029. Follow the instructions provided to complete the "Public Comment and Submission Form". Please include your name, company name (if any), and "FAR Case 2011-029" on your attached document.

- Fax: 202-501-4067.
- Mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, N.E., 7th Floor, Washington, DC 20417.

Instructions: Please submit comments only and cite FAR case 2011-029 in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202-208-4949 for clarification of content. For information pertaining to status or

publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAR case 2011-029.

SUPPLEMENTARY INFORMATION:

I. Background

The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008 (Pub. L. 110-181, enacted January 28, 2008), section 862, entitled "Contractors Performing Private Security Functions in Areas of Combat 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). See 10 U.S.C. 2302 Note. The statute requires (1) the establishment of Governmentwide policies and (2) FAR coverage implementing the Governmentwide policies specified in the statutes and the resulting Governmentwide policy document.

This proposed rule is focused solely on providing implementing contractual language and a contract clause, as mandated by statute. Agencies are reminded that they may further supplement the applicability of these requirements beyond those included in this rule in accordance with FAR subpart 1.3, Agency Acquisition Regulations. While section 862 of the 2008 NDAA required standardization of rules for private security contractors that are performing in

designated areas of combat operations or other significant military operations, the underlying Governmentwide instruction was the responsibility of the Secretary of Defense, in coordination with the Secretary of State. The resultant regulation was published as a final rule at 32 CFR part 159, entitled "Private Security Contractors Operating in Contingency Operations, Combat Operations or Other Significant Military Operations," on August 11, 2011 (see 76 FR 49650) (or, see the corresponding Department of Defense Instruction (DoDI) 3020.50 at <http://www.dtic.mil/whs/directives/corres/pdf/302050p.pdf>).

The regulations implementing the referenced statutory provisions for contracts are proposed to be located in FAR subpart 25.3, entitled "Contracts Performed Outside the United States." The coverage implementing section 862, as amended, is proposed to be located at a new FAR section 25.302.

32 CFR part 159 provides two broad exemptions from this coverage, one for contracts entered into by elements of the intelligence community in support of intelligence activities (the source is paragraph (h)(1) of section 862, as amended), and a second for temporary arrangements entered into by non-DoD contractors for the performance of private security functions by individual indigenous

personnel not affiliated with a local or expatriate security company (the source is 32 CFR 159.3, section (3) of the definition of "covered contract").

Further, 32 CFR part 159 applies differently to DoD and non-DoD agencies. It applies to DoD contracts performed in areas of contingency operations outside the United States. It applies to DoD and non-DoD contracts performed in areas of combat operations as designated by the Secretary of Defense. It applies to DoD contracts performed in areas of other significant military operations as designated by the Secretary of Defense and to non-DoD contracts performed in areas of other significant military operations as designated by the Secretary of Defense and agreed to by the Secretary of State.

FAR 2.101, Definitions, currently provides the definition of "contingency operation" from 10 U.S.C. 101(a)(13). Definitions in this proposed rule include "private security functions," "other significant military operations," and "area of combat operations" from 32 CFR 159.3 and the statute. This coverage would not apply to the performance of private security functions within the U.S. It would not apply outside the U.S. in areas that are not (a) combat operations, (b) contingency operations, or (c) other significant military operations, as designated by

the Secretary of Defense and agreed to by the Secretary of State. In addition, the proposed FAR coverage would apply to the performance of private security functions, regardless of whether the performance of the security functions are the primary function of the contract or ancillary functions. 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 the clause proposed at FAR 52.225-XX, Contractors Performing Private Security Functions Outside the United States, are applicable. As a further example, the same contractor, if delivering construction materials to a base in Germany would not be governed, at this time, by the requirements and limitations of FAR 52.225-XX because Germany is not a designated area. This is further clarified by the proposed FAR 25.302-4, Policy.

The proposed FAR 25.302-4 subsection would implement the relevant policy document, 32 CFR part 159, and assign contractor responsibilities for the selection, accountability, training, equipping, and conduct of personnel performing private security functions under

contracts in the covered areas. It also would assign responsibilities and establish procedures for incident reporting, use of and accountability for equipment, and rules for the use of force.

The law includes specific remedies for violations of the responsibilities and procedures in the law. These are addressed at FAR 25.302-5, Remedies. Without impinging on the Government's usual contractual remedies (e.g., termination for default), the proposed rule would allow the Government, at its discretion, to direct the contractor to remove or replace any personnel who fail to comply with, or violate, applicable requirements of the clause at FAR 52.225-XX. Such corrective actions would be required to be taken at the contractor's own expense and without prejudice to any other contractual rights. The proposed rule also includes 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's performance failures are severe, prolonged, or repeated, the statute requires the contracting officer to refer the matter to the appropriate suspension and debarment official.

The clause prescription, at FAR 25.302-6, proposes to closely follow the applicability coverage at FAR 25.302-2.

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

The changes may 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. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and is summarized as follows:

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement section 862 of the NDAA for 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, together with the implementing Governmentwide regulations required by the statute (32 CFR part 159, published at 76 FR 49650 on August 11, 2011) add requirements and limitations for contractors performing private security functions in areas of contingency operations, combat operations, or other military operations as designated by the Secretary of Defense, upon agreement of the Secretaries of Defense and State. These requirements are that contractors performing in areas such as Iraq and Afghanistan ensure that their personnel performing private security functions comply with 32 CFR part 159, 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.

At this time, the only statistics available are from DoD. Other agencies are beginning to award contracts for performance in areas subject to the statute as U.S. troops are recalled. 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 under DoD contracts in these areas were already required to register their private security personnel, weapons, and certain vehicles under a web-based system (SPOT), and contractors for the Department of State and the U.S. Agency for International Development (AID) have been using SPOT in Iraq and Afghanistan. The requirement to report the occurrence of certain incidences is on an as-needed basis and is minimal.

As DoD personnel exit the areas of current contingency operations, e.g., Iraq and Afghanistan, support requirements are being transitioned to other Government agencies. The expected total number of contracts requiring the use of private security contractors is approximately one half of the DoD level, but the assumption was made that 20 percent of these contracts would continue to be awarded to small businesses.

The impact on small business subcontractors will be minor, for several reasons. Not all subcontracts involve the performance of private security functions, in which case the clause does not flow down to the subcontract. Therefore, in these situations, there is no impact on small business subcontractors. Further, most subcontracts that require the performance of private security functions in the areas of Iraq and Afghanistan are being awarded to firms based in those countries. Such firms are, by definition, not small businesses because they are not U.S. firms. In the small proportion of situations where a subcontractor is both a U.S. small business and is performing private security functions, the costs of compliance will be included in the proposed and negotiated subcontract cost. At this time the clause would only apply to the Department of Defense, as the Secretary of Defense has made no designations of area (see FAR 25.302-2(b)).

The publication of 32 CFR part 159 will provide consistency in reporting requirements and accountability for private security personnel and their weapons, thus simplifying compliance for small and large businesses.

While DoD contractors and subcontractors currently are required by another clause to register equipment and personnel using the DoD's Synchronized Predeployment and Operational Tracker (SPOT) System, there are, at present, no reporting systems that have been developed by non-DoD agencies. An information collection request has been prepared and submitted to the Office of Management and Budget with this proposed rule.

The proposed rule does not unnecessarily overlap or conflict with existing coverage at Defense Federal Acquisition Regulation Supplement (DFARS) 225.370. However, the DFARS coverage will be amended to delete duplicative text when a final rule is published for this FAR case. There are no alternatives that would further decrease the already minimal economic impact of the statute's implementation.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. The Councils will consider comments from small entities concerning the affected FAR parts 1, 25, and 52 in accordance with 5 U.S.C. 610. Comments must be

submitted separately and should cite 5 U.S.C 601, et seq.
(FAR case 2011-029), in correspondence.

IV. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C chapter 35) applies. The proposed rule contains information collection requirements. Accordingly, the Regulatory Secretariat submitted a request for approval of a new information collection requirement for non-DoD agencies to the Office of Management and Budget (OMB). OMB has assigned the number 9000-0184, entitled "Contractors Performing Private Security Functions Outside the United States," for this new information collection request. DoD's information collection has been approved previously under OMB Control Number 0704-0460, Synchronized Predeployment and Operation Tracker (SPOT) System.

A. Public reporting burden for this collection of information is estimated to average 0.109 hours per response, including the time for identifying and inputting information.

The annual reporting burden is estimated as follows:

Respondents:	<u>920.</u>
Responses per respondent:	<u>5.</u>
Total annual responses:	<u>4,600.</u>
Preparation hours per response:	<u>0.109</u> hours.
Total response Burden Hours:	<u>501.</u>

B. Request for Comments Regarding Paperwork Burden.

Submit comments, including suggestions for reducing this burden, not later than **[insert date 60 days after publication in the FEDERAL REGISTER]** to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Hada Flowers, 1275 First Street, NE, 7th Floor, Washington, DC 20417.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the FAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requesters may obtain a copy of the supporting statement from the General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE, 7th floor, Washington, DC 20417. Please cite OMB Control Number 9000-0184, Contractors Performing

Private Security Functions Outside the United States, in
all correspondence.

List of Subjects in 48 CFR Parts 1, 25, and 52

Government procurement.

Dated: July 12, 2012

Laura Auletta,
Director,
Office of Governmentwide
Acquisition Policy,
Office of Acquisition Policy,
Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 1, 25, and 52 as set forth below:

1. The authority citation for 48 CFR parts 1, 25, and 52 is revised to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

2. Amend section 1.106, in the table following the introductory text, by adding in numerical sequence, FAR segment "52.225-XX" and its corresponding OMB Control No. "9000-0184".

PART 25—FOREIGN ACQUISITION

3. Add subpart 25.302 to read as follows:

Subpart 25.302 Contractors Performing Private Security

Functions Outside the United States

Sec.

- 25.302-1 Scope.
- 25.302-2 Applicability.
- 25.302-3 Definitions.
- 25.302-4 Policy.
- 25.302-5 Remedies.
- 25.302-6 Contract clause.

Subpart 25.302 Contractors Performing Private Security

Functions Outside the United States

- 25.302-1 Scope.

This section prescribes policy for implementing section 862 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008 (Pub. L. 110-181), as amended by section 853 of the NDAA for FY 2009 (Pub. L. 110-417), and sections 831 and 832 of the NDAA for FY 2011 (Pub. L. 111-383) (see 10 U.S.C. 2302 Note).

25.302-2 Applicability.

(a) DoD: This section applies to acquisitions by Department of Defense components for supplies and services under a contract that requires performance—

(1) During contingency operations outside the United States;

(2) In an area of combat operations as designated by the Secretary of Defense; or

(3) In an area of other significant military operations as designated by the Secretary of Defense.

(b) Non-DoD agencies: This section applies to acquisitions by non-DoD agencies for supplies and services under a contract that requires performance—

(1) In an area of combat operations as designated by the Secretary of Defense; or

(2) In an area of other significant military operations as designated by the Secretary of Defense, and

only upon agreement of the Secretary of Defense and the Secretary of State.

(c) These designations can be found at http://www.acq.osd.mil/dpap/pacc/cc/designated_areas_of_other_significant_military_operations.html and http://www.acq.osd.mil/dpap/pacc/cc/designated_areas_of_combat_operations.html.

(d) When the applicability requirements of this subsection are met, contractors and subcontractors must comply with 32 CFR part 159, whether the contract is for the performance of private security functions as a primary deliverable or the deliverable is other supplies or services and the provision of private security functions is ancillary.

(e) The requirements of this section 25.302 shall not apply to contracts entered into by elements of the intelligence community in support of intelligence activities, and temporary arrangements entered into by non-DoD contractors for the performance of private security functions by individual indigenous personnel not affiliated with a local or expatriate security company; these temporary arrangements must still comply with local law.

25.302-3 Definitions.

As used in this section—

Area of combat operations means an area of operations designated as such by the Secretary of Defense when enhanced coordination of private security contractors working for Government agencies is required.

Other significant military operations means activities, other than combat operations, as part of a contingency operation outside the United States that is carried out by United States Armed Forces in an uncontrolled or unpredictable high-threat environment where personnel performing security functions may be called upon to use deadly force (see 25.302-2(b)(2)).

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

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

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

25.302-4 Policy.

(a) General. (1) The policy, responsibilities, procedures, accountability, training, equipping, and conduct of personnel performing private security functions in designated areas are addressed at 32 CFR part 159,

entitled "Private Security Contractors (PSCs) Operating in Contingency Operations, Combat Operations, or Other Significant Military Operations." Contractor responsibilities include ensuring that employees are aware of, and comply with, relevant orders, directives, and instructions; keeping appropriate personnel records; accounting for weapons; registering and identifying armored vehicles, helicopters, and other military vehicles; and reporting specified incidents in which personnel performing private security functions under a contract are involved.

(2) In addition, contractors are required to cooperate with any Government-authorized investigation into incidents reported pursuant to paragraph (b)(3) of the clause at 52.225-XX, Contractors Performing Private Security Functions Outside the United States, by providing access to employees performing private security functions and relevant information in the possession of the contractor regarding the incident concerned.

(b) Implementing guidance. In accordance with 32 CFR part 159–

(1) Geographic combatant commanders will provide DoD private security contractors with guidance and procedures for the operational environment in their area of responsibility; and

(2) In a designated area of combat operations, or areas of other significant military operations, as designated by the Secretary of Defense and only upon agreement of the Secretary of Defense and the Secretary of State, the relevant Chief of Mission will provide implementing instructions for non-DoD private security contractors and their personnel consistent with the standards set forth by the geographic combatant commander. In a designated area of combat operations, 32 CFR 159.4(c) gives the Chief of Mission the option of instructing non-DoD private security contractors and their personnel to follow the guidance and procedures of the geographic Combatant Commander and/or a sub-unified commander or joint force commander where specifically authorized by the combatant commander to do so and notice of that authorization is provided to non-DoD agencies.

25.302-5 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 performing private security functions 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, e.g., termination for default;

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

(3) In the case of award-fee contracts, the contracting officer shall consider a contractor's failure to comply with the requirements of this subsection 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.

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

25.302-6 Contract clause.

(a) Use the clause at 52.225-XX, Contractors Performing Private Security Functions Outside the United States, in the following solicitations and contracts:

(1) A DoD contract for performance of services and/or delivery of supplies in an area of:

(i) Contingency operations outside the United States;
(ii) Combat operations, as designated by the Secretary of Defense; or

(iii) Other significant military operations, as designated by the Secretary of Defense only upon agreement of the Secretary of Defense and the Secretary of State.

(2) A contract of a non-DoD agency for performance of services and/or delivery of supplies in:

(i) An area of combat operations, as designated by the Secretary of Defense; or

(ii) An area of other significant military operations, as designated by the Secretary of Defense and only upon agreement of the Secretary of Defense and the Secretary of State.

(b) The clause is not required to be used for:

(1) Contracts entered into by elements of the intelligence community in support of intelligence activities; or

(2) Temporary arrangements entered into by non-DoD contractors for the performance of private security functions by individual indigenous personnel not affiliated with a local or expatriate security company.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Amend section 52.212-5 by—

- a. Revising the date of clause;
- b. Redesignating paragraphs (b) (43) through (51) as paragraphs (b) (44) through (52), respectively;
- c. Adding a new paragraph (b) (43);
- d. Redesignating paragraphs (e) (1) (xiii) and (xiv) as paragraphs (e) (1) (xiv) and (xv), respectively; and
- e. Adding a new paragraph (e) (1) (xiii).

The revised and added text reads as follows:

52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR
EXECUTIVE ORDERS—COMMERCIAL ITEMS (DATE)

* * * * *

(b) * * *

_(43) 52.225-XX, Contractors Performing Private Security Functions Outside the United States (DATE) (Section 862, as amended, of the National Defense Authorization Act for Fiscal Year 2008; 10 U.S.C. 2302 Note).

* * * * *

(e) (1) * * *

(i) * * *

(xiii) 52.225-XX, Contractors Performing Private Security Functions Outside the United States (DATE) (Section 862, as amended, of the National Defense Authorization Act for Fiscal Year 2008; 10 U.S.C. 2302 Note).

* * * * *

5. Add section 52.225-XX to read as follows:

52.225-XX Contractors Performing Private Security Functions Outside the United States.

As prescribed in 25.302-6, insert the following clause:

CONTRACTORS PERFORMING PRIVATE SECURITY FUNCTIONS OUTSIDE THE UNITED STATES (DATE)

(a) Definition.

Private security functions means activities engaged in by a Contractor, as follows:

(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 in accordance with the terms of this contract.

(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 32 CFR part 159, and 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;

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

(iii) Registering and identifying armored vehicles, helicopters, and other military vehicles operated by Contractors performing private security functions; 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 the Contractor and all employees of the Contractor who are responsible for 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 32 CFR part 159, Private Security Contractors (PSCs) Operating in Contingency Operations, Combat Operations, or Other Significant Military Operations;

(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 or relevant Chief of Mission 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 or relevant Chief of Mission for personnel performing private security functions; and

(3) Cooperate with any Government-authorized investigation of incidents reported pursuant to paragraph (b) (1) (iv) of this clause and incidents of alleged misconduct by personnel performing private security functions under this contract by providing—

(i) Access to employees performing private security functions; and

(ii) 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 performing private security functions who fail to comply with or violate applicable requirements of this clause or 32 CFR part 159. Such action may be taken at the Government's discretion without prejudice to its rights under any other provision of this contract.

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

(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.

(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 or subcontractor 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—

(1) DoD contracts only: Contingency operations, combat operations, as designated by the Secretary of Defense, or other significant military operations, as designated by the Secretary of Defense; or

(2) Non-DoD contracts: Combat operations, as designated by the Secretary of Defense, or other significant military operations, upon agreement of the Secretaries of Defense and State that the clause applies in that area.

(End of clause)

[BILLING CODE 6820-EP]

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