**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Part 52**

**[FAC 2005-74; FAR Case 2012-016; Item V; Docket No. 2012-0016, Sequence No. 1]**

**RIN 9000-AM50**

# Federal Acquisition Regulation; Defense Base Act

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

**ACTION**: Final rule.

**SUMMARY**: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to clarify contractor and subcontractor responsibilities to obtain workers' compensation insurance or to qualify as a self-insurer, and other requirements, under the terms of the Longshore and Harbor Workers' Compensation Act (LHWCA) as extended by the Defense Base Act (DBA).

**DATES**: Effective: July 1, 2014.

**FOR FURTHER INFORMATION CONTACT**: Mr. Edward N. Chambers, Procurement Analyst, at 202-501-3221 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat

at 202-501-4755. Please cite FAC 2005-74, FAR Case 2012-016.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD, GSA, and NASA published a proposed rule in the Federal Register at 78 FR 17176 on March 20, 2013, to make the necessary regulatory revisions to revise the FAR to clarify contractor and subcontractor responsibilities to obtain workers' compensation insurance or to qualify as a self-insurer, and other requirements, under the terms of the LHWCA, 33 U.S.C. 901, et seq., as extended by the DBA, 42 U.S.C. 1651, et seq. Three respondents submitted comments on the proposed rule.

**II. Discussion and Analysis**

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final 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.**

This final rule includes one change to align the FAR with Department of Labor's (DOL) regulations and implementation of section 30(a) of the LHWCA. This change involves deleting proposed paragraph (b) of FAR clause

52.228-3, which stated that the actions set forth under paragraphs (a)(2) through (a)(8) may be performed by the contractor's agent or insurance carrier. The DOL's regulations place the responsibility for reporting injuries on the employer, see 20 CFR 703.115. The removal of proposed FAR 52.228-3 paragraph (b) also promotes consistency with the statutory requirements.

**B. Analysis of Public Comments.**

**1. Support of the proposed rule.**

Comment: Two respondents expressed support for the rule.

Response: The public's support for this rule is acknowledged.

**2. Clarify term "days".**

Comment: One respondent recommends that the ten-day reporting period within the report of injury requirements set forth in proposed FAR 52.228-3 paragraph (a)(2) should be revised to read "ten business days." The respondent asserts this modification will clarify the reporting period.

Response: The intent of this rule is to alert contractors to their obligations under the LHWCA, rather than to alter those obligations. The respondent's suggested revisions could result in altering a contractor's

obligations and therefore are beyond the scope of the FAR rule. The DOL's regulation interprets the ten-day injury reporting period set forth in LHWCA section 30(a), 33 U.S.C 930(a), as ten calendar days. See 20 CFR 702.201(a) (using unqualified term "days" to describe reporting period). Thus, adding "business" days would alter the intent of the law.

**3. Inclusion of "work-related" terminology.**

Comment: The respondent states that the terms injury and death should be modified by adding the phrase "work-related" before both. The respondent asserts that this modification will serve to clarify a contractor's obligation.

Response: The Councils do not recommend adding the phrase "work-related" to the terms "injury" and "death." The added phrase is not necessary as the LHWCA defines an injury in 33 U.S.C 902(2) and the concept of work-relatedness is subsumed in the term "injury." Moreover, the question whether a particular injury is work-related is often a difficult issue to resolve, and a contractor may not be able to decide whether a particular injury arose out of and in the course of employment within the meaning of the statute. By leaving the terms "injury" and "death"

unqualified, contractors will be encouraged to err on the side of reporting any incident that may be work-related.

**4. Inclusion of "actual" terminology.**

Comment: One respondent suggests that the provision should specify that the contractor's "actual/constructive" knowledge of the injury triggers the reporting period. The respondent recommends this revision to further clarify a contractor's obligation.

Response: DOL's governing rules use the unqualified term "knowledge of an employee's injury or death" when describing the event that triggers the reporting period. This FAR rule simply tracks that language.

**5. Conflicts with current practice.**

Comment: One respondent states that FAR 52.228-3 paragraph (b), which allows the contractor's agent or insurance carrier to submit the first report of injury referenced in paragraph (a)(2), is inconsistent with section 30(a) of the LHWCA, 33 U.S.C. 930(a), as extended by the DBA, and the DOL's current practice. The respondent argues that it is inappropriate to redefine this statutory provision through a FAR clause. The respondent recommends the proposed paragraph (b) should be amended to conform to current practice both under the DBA and LHWCA.

Response: The Councils concur with the respondent. The intent of this FAR rule is to clarify and inform contractors of their obligations under the DBA and the DOL's regulations, not to alter those requirements. Section 30(a) of the LHWCA, as implemented by the DOL's regulations, places the responsibility for reporting injuries on the employer. See 20 CFR 703.115. Accordingly, the Councils are removing the proposed FAR 52.228-3 paragraph (b) to promote consistency with the statutes referenced above.

**6. Contractors should provide insurance.**

Comment: One respondent states that the contractors should have sufficient insurance to be able to pay compensation if an employee is injured.

Response: The Councils concur that the views of this respondent are in accord with the intent of the law, this FAR rule, and the existing FAR clause 52.228-3.

## 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 not a significant regulatory action and, therefore, was not 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**

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

> DoD, GSA, and NASA do not expect this 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 this rule merely clarifies the existing prescriptions and clauses relating to contractor and subcontractor responsibilities to obtain workers' compensation insurance or to qualify as a self-insurer, and other requirements, under the terms of the LHWCA as extended by the DBA, and implemented in DOL Regulations. No comments from small entities were submitted in reference to the Regulatory Flexibility Act request under the proposed rule.
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> The rule imposes no reporting, recordkeeping, or other information collection requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules, and there are no known significant alternatives to the rule.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

## V. Paperwork Reduction Act

The rule does not contain any new 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 Part 52**

Government procurement.

Dated: May 22, 2014.

William Clark,
Acting Director,
Office of Government-wide
Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR part 52 as set forth below:

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

1. The authority citation for 48 CFR part 52 continues to read as follows:

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

2. Revise section 52.228-3 to read as follows:

**52.228-3 Workers' Compensation Insurance (Defense Base Act).**

As prescribed in 28.309(a), insert the following clause:

WORKERS' COMPENSATION INSURANCE (DEFENSE BASE ACT) **(JUL 2014)**

(a) The Contractor shall—

(1) Before commencing performance under this contract, establish provisions to provide for the payment of disability compensation and medical benefits to covered employees and death benefits to their eligible survivors, by purchasing workers' compensation insurance or qualifying as a self-insurer under the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932) as extended by the Defense Base Act (42 U.S.C. 1651, et seq.), and continue to maintain provisions to provide such Defense Base Act benefits until contract performance is completed;

(2) Within ten days of an employee's injury or death or from the date the Contractor has knowledge of the injury or death, submit Form LS-202 (Employee's First Report of Injury or Occupational Illness) to the Department of Labor in accordance with the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 930(a), 20 CFR 702.201 to 702.203);

(3) Pay all compensation due for disability or death within the time frames required by the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 914, 20 CFR 702.231 and 703.232);

(4) Provide for medical care as required by the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 907, 20 CFR 702.402 and 702.419);

(5) If controverting the right to compensation, submit Form LS-207 (Notice of Controversion of Right to Compensation) to the Department of Labor in accordance with the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 914(d), 20 CFR 702.251);

(6) Immediately upon making the first payment of compensation in any case, submit Form LS-206 (Payment Of Compensation Without Award) to the Department of Labor in accordance with the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 914(c), 20 CFR 702.234);

(7) When payments are suspended or when making the final payment, submit Form LS-208 (Notice of Final Payment or Suspension of Compensation Payments) to the Department of Labor in accordance with the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 914(c) and (g), 20 CFR 702.234 and 702.235); and

(8) Adhere to all other provisions of the Longshore and Harbor Workers' Compensation Act as extended by the Defense Base Act, and Department of Labor regulations at 20 CFR Parts 701 to 704.

(b) For additional information on the Longshore and Harbor Workers' Compensation Act requirements see http://www.dol.gov/owcp/dlhwc/lsdba.htm.

(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in all subcontracts to which the Defense Base Act applies.

(End of clause)

**[BILLING CODE 6820-EP]**

**[FR Doc. 2014-12406 Filed 05/29/2014 at 8:45 am; Publication Date: 05/30/2014]**