

## I. Background

DFARS 209.405–1 limits placement of orders against contracts with contractors that have been debarred, suspended, or proposed for debarment. On December 11, 2003, the final rule published under FAR Case 2002–010 (68 FR 69250) incorporated these restrictions into the FAR. The DFARS text, therefore, became redundant and is deleted by this final rule.

## II. Executive Order 12866

This is not a significant regulatory action and, therefore, was not subject to Office of Management and Budget review under section 6(b) of Executive Order 12866, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

## III. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant DFARS revision within the meaning of 41 U.S.C. 418b and FAR 1.501, and publication for public comment is not required. However, DoD will consider comments from small entities concerning the affected DFARS parts in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.*, in correspondence.

## IV. Paperwork Reduction Act

This rule does not impose any new information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

### List of Subjects in 48 CFR Part 209

Government procurement.

**Ynette R. Shelkin,**

*Editor, Defense Acquisition Regulations System.*

■ Therefore, 48 CFR part 209 is amended as follows:

### PART 209—CONTRACTOR QUALIFICATIONS

■ 1. The authority citation for 48 CFR part 209 continues to read as follows:

**Authority:** 41 U.S.C. 421 and 48 CFR chapter 1.

#### 209.405–1 [Removed]

■ 2. Remove section 209.405–1.

[FR Doc. 2010–27306 Filed 10–28–10; 8:45 am]

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## DEPARTMENT OF DEFENSE

### Defense Acquisitions Regulations System

#### 48 CFR Part 225

RIN 0750–AG59

### Defense Federal Acquisition Regulation Supplement; Trade Agreements—New Thresholds (DFARS 2009–D040)

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

**ACTION:** Final rule.

**SUMMARY:** DoD is adopting as final, without change, the interim rule that amended the Defense Federal Acquisition Regulation Supplement (DFARS) to incorporate increased thresholds for application of the World Trade Organization Government Procurement Agreement and the Free Trade Agreements, as determined by the United States Trade Representative.

**DATES:** *Effective Date:* October 29, 2010.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy Williams, 703–602–0328.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

DoD published an interim rule in the *Federal Register* on June 8, 2010 (75 FR 32637) to amend the clause prescriptions at DFARS 225.1101 and 225.7503 to reflect increased thresholds for application of the trade agreements. The comment period closed on August 9, 2010. DoD received no comments on the interim rule. DoD has therefore adopted the interim rule as a final rule without change.

##### II. Executive Order 12866

This rule was not subject to Office of Management and Budget review under Executive Order 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 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.*, because this rule does not impose economic burdens on contractors. The purpose and effect of this rule is to adjust the dollar threshold changes to keep pace with inflation and thus maintain the status quo.

## IV. Paperwork Reduction Act

This final rule affects the certification and information collection requirements in the provisions at DFARS 252.225–7020 and 252.225–7035, currently approved under Office of Management and Budget Control Number 0704–0229. However, there is no impact on the estimated burden hours. The dollar threshold changes are in line with inflation and maintain the status quo.

### List of Subjects in 48 CFR Part 225

Government procurement.

**Ynette R. Shelkin,**

*Editor, Defense Acquisition Regulations System.*

### Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR part 225 published at 75 FR 32637 on June 8, 2010, is adopted as final without change.

[FR Doc. 2010–27303 Filed 10–28–10; 8:45 am]

BILLING CODE 5001–08–P

## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 237 and 252

RIN 0750–AG52

### Defense Federal Acquisition Regulation Supplement (DFARS); Continuation of Essential Contractor Services (DFARS Case 2009–D017)

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

**ACTION:** Final rule.

**SUMMARY:** DoD is adopting as final, with changes, the interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to add policy and a contract clause requiring that contractors providing essential contractor services, as determined by the requiring activity, shall be prepared to continue such services during periods of crisis.

**DATES:** *Effective date:* October 29, 2010.

*Applicability date:* Contracting officers may, at their discretion, include these changes in any existing contract with appropriate consideration, in accordance with FAR 1.108(d)(3).

**FOR FURTHER INFORMATION CONTACT:** Mr. Julian E. Thrash, 703–602–0310.

#### SUPPLEMENTARY INFORMATION:

## I. Background

DoD published an interim rule in the **Federal Register** at 75 FR 10191, on March 5, 2010, implementing the requirements of DoDI 3020.37, Continuation of Essential DoD Contractor Services During Crises. DoD Instruction (DoDI) 1100.22, Policy and Procedures for Determining Workforce Mix, has since superseded DoDI 3020.37.

This rule is necessary to ensure that essential contractor services are not interrupted. The current changing threat environment, particularly under the additional challenges caused by such potential crises as destructive weather, earthquakes, or pandemic disease, has increased the need for continuity of operations capabilities and plans that enable agencies to continue their essential functions during a broad range of emergencies and crises.

DoD established this requirement for contractors to submit their plans to ensure continuation of essential contractor services that support mission-essential functions during a crisis situation. As a general rule, the designation of services as essential contractor services will not apply to an entire contract but will apply only to those service function(s) that have been specifically identified as essential contractor services by the functional commander or civilian equivalent.

The public comment period for the DFARS interim rule closed May 4, 2010. Two respondents submitted comments to the interim rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided below.

## II. Analysis of Public Comments

### A. Definitions

#### 1. Definition of “Functional Commander or Equivalent”

*Comment.* A respondent requested the term “functional commander or equivalent” be defined. The respondent was concerned with how this term would be interpreted in non-military offices that did not have a “functional commander or equivalent.”

*Response.* The term “functional commander or equivalent” has been revised. The term appropriate “functional commander or civilian equivalent” clarifies the meaning of the phrase “or equivalent.” This revised identifier, “civilian equivalent,” was added to the definitions of “essential contractor services,” and “mission-essential functions.” Additionally, conforming changes to DFARS 237.7602(a), and 237.7602(b) were made for this revised term.

#### 2. Definition of a “Crisis”

*Comment.* A respondent requested a definition for a “crisis” be added to the text.

*Response.* A crisis situation is dynamic, with the body of knowledge growing hour-by-hour from the latest situational reports. As such, it does not lend itself to a precise definition. The contractor will be notified to activate plans for a crisis by the contracting officer, who does so at the directions of the appropriate functional commander or civilian equivalent.

#### B. The Contracting Officer’s Role

*Comment.* A respondent was concerned that DFARS 237.7602, Policy, did not clearly lay out the role of a contracting officer in the process of requiring a contractor to submit a plan. The concern was that direction to the contractor should come from the contracting officer, not the requiring activity.

*Response.* DFARS 237.7602, Policy, has been revised at paragraphs (a) and (b) to clarify that it is the role of the contracting officer, not the requiring activity, to provide direction to the contractor.

#### C. Written Plan

##### 1. Status of the Plan

*Comment.* A respondent expressed concern regarding DFARS 237.7602(b), whether the contractor should “have a plan” or “submit a plan.”

*Response.* DFARS 237.7602(b) has been revised to require contractors to “provide a written plan” for Government-determined essential contractor services.

##### 2. Materially Altered Plans

*Comment.* A respondent expressed concern that a contracting officer needs to have the most current version of the contractor’s plan. The concern centered on the determination of whether a change would “materially alter” the plan.

*Response.* DFARS 252.237–7023(c)(2) has been revised to require the contractor to provide all plan updates to the contracting officer for approval.

##### 3. Use of a Plan

*Comment.* A respondent expressed a number of concerns about the evaluation of a contractor’s written plan, and whether or not the plan should be evaluated prior to contract award.

*Response.* In response to this concern, a provision has been created at DFARS 252.237–7024, Notice of Continuation of Essential Contractor Services, to require the submission of the plan as part of the

offeror’s proposal. The associate provision prescription is added at 237.7603. The contractor’s continuity of essential services plan shall be considered and evaluated as part of the technical evaluation of offers. The functional managers of the services should be consulted to determine the sufficiency of these plans. The contractor’s Mission-Essential Contractor Services Plan, in the resultant contract, will remain active in accordance with the clause at DFARS 252.237–7023, Continuation of Essential Contractor Services.

#### D. Equitable Adjustment

*Comment.* A respondent stated that, if costs increase due to the continuation of services during an event that would create an excusable delay, contractors should be entitled to an equitable adjustment to the terms of the contract. Furthermore, they were concerned that inclusion of the clause in a contract could be construed as waiving the contractor’s right to an equitable adjustment to contract terms other than schedule terms when providing its best efforts to maintain continuity of operations during a crisis.

*Response.* DFARS 252.237–7023(f), Changes, provides the basis for determining an equitable adjustment. In the interim rule, this paragraph allowed for an equitable adjustment to contract price. In the final rule, this paragraph has been revised to include that, in addition to an adjustment in price, an equitable adjustment may be to “delivery schedule, or both.”

#### E. Causes Beyond the Control of the Contractor

*Comment.* Two respondents requested the clause at DFARS 252.237–7023(c) be clarified with regard to causes beyond the control of the contractor.

*Response.* As a result of the necessity to ensure performance of a mission-essential function, a new paragraph has been added at DFARS 252.237–7023(d)(1). This paragraph clarifies that, in those specific instances where a contractor function is considered mission essential, it is important for contract performance to continue notwithstanding any other clause of the contract; and that the contractor shall be responsible to perform those services identified as essential contractor services during crisis situations (as directed by the contracting officer), in accordance with its Mission-Essential Contractor Services Plan. If in the course of contract performance, a contractor feels it must apply for an equitable adjustment, it may follow the

process required in DFARS 252.237–7023(f), Changes.

#### F. Other Changes

- The definitions have been moved from 237.7601 to the clause 252.237–7023(a).
- DFARS 252.237–7023 has been renamed “Continuation of Essential Contractor Services” instead of “Continuation of Mission-Essential Functions” in order to use more precise terminology.
- Redesignated DFARS 252.237–7023(e) adds “military” personnel to the list of options the Government reserves the right to utilize in crisis situations. Additionally, reference to the Office of Federal Procurement Policy letter dated May 2007, and FAR and DFARS parts 18 and 218 were determined unnecessary and have been deleted from that paragraph.

### III. Executive Order 12866

This regulatory action was subject to review under Section 6(b) of Executive Order 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 certifies that this rule will not have a significant economic impact upon a substantial number of small entities because it allows for an equitable adjustment for additional costs that are incurred during a crisis situation.

The interim rule published at 75 FR 10191, on March 5, 2010, invited comments from small businesses and other interested parties. No comments were received from small entities on the affected DFARS subpart with regard to small businesses.

### V. Paperwork Reduction Act

This final rule contains an information collection requirement. The Office of Management and Budget (OMB) has approved the information collection requirement for use through December 31, 2010, under OMB Control Number 0704–0465, in accordance with the emergency processing procedures of 5 CFR 1320.13.

The following is a summary of the information collection requirement.

*Title:* Defense Federal Acquisition Regulation Supplement (DFARS) 2009–D017; Continuation of Essential Contractor Services.

*Type of Request:* New collection.

*Number of Respondents:* 7,600.

*Responses per Respondents:* 1.25.

*Annual Responses:* 9,500.

*Average Burden per Response:* 2.

*Total Annual Burden Hours:* 19,000.  
*Needs and Uses:* DoD needs this information to ensure essential contractor services are performed for continuity of operations.

*Affected Public:* Businesses or other for-profit institutions.

*Frequency:* On occasion.

*Respondent's Obligation:* Required to obtain contract.

The interim rule, published at 75 FR 10191, on March 5, 2010, invited comments on the following aspects of the interim rule: (a) Whether the collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. No comments were received regarding this information collection requirement.

To request more information on this information collection or to obtain a copy of the information collection requirement and associated collection instruments, please write to the Defense Acquisition Regulations System (DARS), Attn: Mr. Julian Thrash, OUSD(AT&L)DPAP(DARS), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060.

### List of Subjects in 48 CFR Parts 237 and 252

Government procurement.

**Clare M. Zebrowski,**

*Editor, Defense Acquisition Regulations System.*

■ Therefore, the Defense Acquisition Regulations System confirms as final the interim rule published at 75 FR 10191, March 5, 2010, with the following changes:

■ 1. The authority citation for 48 CFR parts 237 and 252 continues to read as follows:

**Authority:** 41 U.S.C. 421 and 48 CFR chapter 1.

### PART 237—SERVICE CONTRACTING

■ 2. Subpart 237.76 is revised to read as follows:

#### Subpart 237.76—Continuation of Essential Contractor Services

Sec.

237.7600 Scope.

237.7601 Definitions.

237.7602 Policy.

237.7603 Solicitation provision and contract clause.

### Subpart 237.76—Continuation of Essential Contractor Services

#### 237.7600 Scope.

This subpart prescribes procedures for the acquisition of essential contractor services which support mission-essential functions.

#### 237.7601 Definitions.

As used in this subpart, *essential contractor service* and *mission-essential functions* are defined in the clause at 252.237–7023, Continuation of Essential Contractor Services.

#### 237.7602 Policy.

(a) Contractors providing services designated as essential contractor services shall be prepared to continue providing such services, in accordance with the terms and conditions of their contracts, during periods of crisis. As a general rule, the designation of services as essential contractor services will not apply to an entire contract but will apply only to those service functions that have been specifically identified as essential contractor services by the functional commander or civilian equivalent.

(b) Contractors who provide Government-determined essential contractor services shall provide a written plan to be incorporated in the contract, to ensure the continuation of these services in crisis situations. Contracting officers shall consult with a functional manager to assess the sufficiency of the contractor-provided written plan. Contractors will activate such plans only during periods of crisis, as authorized by the contracting officer, who does so at the direction of the appropriate functional commander or civilian equivalent.

(c) The contracting officer shall follow the procedures at PGI 207.105U(b)(20)(C) in preparing an acquisition plan.

#### 237.7603 Solicitation provision and contract clause.

(a) Use the clause at 252.237–7023, Continuation of Essential Contractor Services in all solicitations and contracts for services that are in support of mission-essential functions.

(b) Use the provision at 252.237–7024, Notice of Continuation of Essential Contractor Services in all solicitations for services that include the clause 252.237–7023.

### PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Section 252.237–7023 is revised to read as follows:

**252.237–7023 Continuation of Essential Contractor Services.**

As prescribed in 237.7603(a), use the following clause:

**CONTINUATION OF ESSENTIAL CONTRACTOR SERVICES (OCT 2010)**

(a) *Definitions.* As used in this clause—

(1) *Essential contractor service* means a service provided by a firm or individual under contract to DoD to support mission-essential functions, such as support of vital systems, including ships owned, leased, or operated in support of military missions or roles at sea; associated support activities, including installation, garrison, and base support services; and similar services provided to foreign military sales customers under the Security Assistance Program. Services are essential if the effectiveness of defense systems or operations has the potential to be seriously impaired by the interruption of these services, as determined by the appropriate functional commander or civilian equivalent.

(2) *Mission-essential functions* means those organizational activities that must be performed under all circumstances to achieve DoD component missions or responsibilities, as determined by the appropriate functional commander or civilian equivalent. Failure to perform or sustain these functions would significantly affect DoD's ability to provide vital services or exercise authority, direction, and control.

(b) The Government has identified all or a portion of the contractor services performed under this contract as essential contractor services in support of mission-essential functions. These services are listed in attachment \_\_, Mission-Essential Contractor Services, dated \_\_\_\_\_.

(c)(1) The Mission-Essential Contractor Services Plan submitted by the Contractor, is incorporated in this contract.

(2) The Contractor shall maintain and update its plan as necessary. The Contractor shall provide all plan updates to the Contracting Officer for approval.

(3) As directed by the Contracting Officer, the Contractor shall participate in training events, exercises, and drills associated with Government efforts to test the effectiveness of continuity of operations procedures and practices.

(d)(1) Notwithstanding any other clause of this contract, the Contractor shall be responsible to perform those services identified as essential contractor services during crisis situations (as directed by the Contracting Officer), in accordance with its Mission-Essential Contractor Services Plan.

(2) In the event the Contractor anticipates not being able to perform any of the essential contractor services identified in accordance with paragraph (b) of this clause during a crisis situation, the Contractor shall notify the Contracting Officer or other designated representative as expeditiously as possible and use its best efforts to cooperate with the Government in the Government's efforts to maintain the continuity of operations.

(e) The Government reserves the right in such crisis situations to use Federal employees, military personnel, or contract

support from other contractors, or to enter into new contracts for essential contractor services.

(f) *Changes.* The Contractor shall segregate and separately identify all costs incurred in continuing performance of essential services in a crisis situation. The Contractor shall notify the Contracting Officer of an increase or decrease in costs within ninety days after continued performance has been directed by the Contracting Officer, or within any additional period that the Contracting Officer approves in writing, but not later than the date of final payment under the contract. The Contractor's notice shall include the Contractor's proposal for an equitable adjustment and any data supporting the increase or decrease in the form prescribed by the Contracting Officer. The parties shall negotiate an equitable price adjustment to the contract price, delivery schedule, or both as soon as is practicable after receipt of the Contractor's proposal.

(g) The Contractor shall include the substance of this clause, including this paragraph (g), in subcontracts for the essential services.

(End of clause)

■ 4. Section 252.237–7024 is added to read as follows:

**252.237–7024 Notice of Continuation of Essential Contractor Services.**

As prescribed in 237.7603(b), use the following provision:

**NOTICE OF CONTINUATION OF ESSENTIAL CONTRACTOR SERVICES [OCT 2010]**

(a) *Definitions.* *Essential contractor service* and *mission-essential functions* have the meanings given in the clause at 252.237–7023, Continuation of Essential Contractor Services, in this solicitation.

(b) The offeror shall provide with its offer a written plan describing how it will continue to perform the essential contractor services listed in attachment \_\_, Mission Essential Contractor Services, dated \_\_\_\_\_, during periods of crisis. The offeror shall—

(1) Identify provisions made for the acquisition of essential personnel and resources, if necessary, for continuity of operations for up to 30 days or until normal operations can be resumed;

(2) Address in the plan, at a minimum—

(i) Challenges associated with maintaining essential contractor services during an extended event, such as a pandemic that occurs in repeated waves;

(ii) The time lapse associated with the initiation of the acquisition of essential personnel and resources and their actual availability on site;

(iii) The components, processes, and requirements for the identification, training, and preparedness of personnel who are capable of relocating to alternate facilities or performing work from home;

(iv) Any established alert and notification procedures for mobilizing identified "essential contractor service" personnel; and

(v) The approach for communicating expectations to contractor employees

regarding their roles and responsibilities during a crisis.

(End of provision)

[FR Doc. 2010–27302 Filed 10–28–10; 8:45 am]

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**DEPARTMENT OF DEFENSE****Defense Acquisition Regulations System****48 CFR Parts 246 and 252**

RIN 0750–AG73

**Defense Federal Acquisition Regulation Supplement; Safety of Facilities, Infrastructure, and Equipment for Military Operations (DFARS Case 2009–D029)**

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

**ACTION:** Interim rule with request for comments.

**SUMMARY:** DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 807 of the National Defense Authorization Act of 2010. Section 807 requires that facilities, infrastructure, and equipment that are intended for use by military or civilian personnel of the Department of Defense (DoD), in current or future military operations, should be inspected for safety and habitability prior to use, and that such facilities should be brought into compliance with generally accepted standards for the safety and health of personnel to the maximum extent practicable consistent with the requirements of military operations and the best interests of DoD to minimize the safety and health risk posed to such personnel.

**DATES:** *Effective date:* October 29, 2010.

*Comment date:* Comments on the interim rule should be submitted in writing to the address shown below on or before December 28, 2010, to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments, identified by DFARS Case 2008–D029, using any of the following methods:

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

Submit comments via the Federal eRulemaking portal by inputting "DFARS Case 2009–D029" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2009–D029." Follow the instructions provided at the "Submit