

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 216, 225, and 252

[Docket DARS–2015–0045]

RIN 0750–AI69

Defense Federal Acquisition Regulation Supplement: Defense Contractors Performing Private Security Functions (DFARS Case 2015–D021)

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

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to consolidate requirements that are applicable to DoD contracts for private security functions performed in designated areas outside the United States, make changes regarding applicability, and revise applicable quality assurance standards.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before January 29, 2016 to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2015–D021, using any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering “DFARS Case 2015–D021” under the heading “Enter keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “DFARS Case 2015–D021.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “DFARS Case 2015–D021” on your attached document.

- *Email:* osd.dfars@mail.mil. Include DFARS Case 2015–D021 in the subject line of the message.

- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Julie Hammond, OUSD (AT&L) DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

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

allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Julie Hammond, telephone 571–372–6174.

SUPPLEMENTARY INFORMATION:

I. Background

Requirements for Defense contractors performing private security functions outside of the United States are covered in the Federal Acquisition Regulation (FAR) at 25.302 and the clause at FAR 52.225–26, Contractors Performing Private Security Functions Outside the United States, and supplemented at DFARS 225.302 and the clause at DFARS 252.225–7039, Defense Contractors Performing Private Security Functions Outside the United States. DoD is proposing to consolidate all requirements for Defense contractors performing private security functions in certain designated operational areas in the DFARS at 225.302 and the clause 252.225–7039.

II. Discussion and Analysis

A proposed FAR rule, Contractors Performing Private Security Functions (FAR case 2014–018), was published in the **Federal Register** at 80 FR 30202 on May 27, 2015, to make conforming changes to the FAR by removing the requirements specific to DoD contracts for private security functions. Under this proposed rule (DFARS case 2015–D021), DoD is proposing the following changes: (1) Amend DFARS 225.302 to require contracting officers to use the DFARS clause 252.225–7039 in lieu of the FAR clause 52.225–26, and (2) amend DFARS clause 252.225–7039 to include all of the requirements for DoD contractors performing private security functions outside the United States from FAR clause 52.225–26.

The rule also proposes to amend DFARS clause 252.225–7039 to add “International Standard ISO 18788, Management System for Private Security Operations—Requirements with Guidance” as an approved alternative to the ANSI/ASIS PSC.1–2012, American National Standard, Management System for Quality of Private Security Company Operations—Requirements with Guidance. Many foreign countries do not accept use of foreign national standards. As such, restricting compliance to the American National Standard may deter private security contractors from other countries from competing on DoD contracts overseas, thus restricting our ability to access security services from host countries or coalition partner states. This is contrary to the DoD policy of promoting effective

competition through outreach in global markets (see Better Buying Power 3.0, September 19, 2014). In order to expand the contractor base and promote competition, this rule proposes to allow Defense contractors performing private security functions outside the United States to comply with either the American National Standard, ANSI/ASIS PSC.1–2012, or the International Standard, ISO 18788.

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 does not expect that this proposed rule will 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.* Nevertheless, an initial regulatory flexibility analysis has been prepared and is summarized as follows:

This rule proposes to amend the DFARS to consolidate all requirements for DoD contractors performing private security functions outside the U.S. from the FAR 25.302 and the clause at FAR 52.225–26, Contractors Performing Private Security Functions Outside the United States, in DFARS 225.302 and the clause at DFARS 252.225–7039, Defense Contractors Performing Private Security Functions Outside the United States.

The objectives of this rule are as follows:

- Provide DoD contracting officers and contractors a single clause covering all requirements related to the performance of private security functions outside the United States that may be updated by DoD as policies are issued that affect only defense contractors.
- Identify the international high-quality assurance standard “ISO 18788: Management System for Private Security

Operations” as an approved alternative to the American standard “ANSI/ASIS PSC.1–2012” currently required by DFARS clause 252.225–7039.

This proposed rule will apply to defense contractors performing private security functions outside of the United States in designated operational areas under DoD contracts. According to data available in the Federal Procurement Data System for fiscal year (FY) 2013, DoD awarded 159 contracts that required performance outside the United States, although not necessarily in a designated operation area, and cited the National American Industry Classification System code 561612, Security Guards and Patrol Services, of which 33 contracts (21%) were awarded to small businesses. In FY 2014, DoD awarded 123 such contracts, of which 31 contracts (25%) were to small businesses.

The private security contractors are required to report incidents when: (1) A weapon is discharged by personnel performing private security functions; (2) personnel performing private security functions are attacked, killed, or injured; (3) persons are killed or injured or property is destroyed as a result of conduct by Contractor personnel; (4) a weapon is discharged against personnel performing private security functions or personnel performing such functions believe a weapon was so discharged; or (5) 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. As a regular record keeping requirement, private security contractors are required to keep appropriate records of personnel by registering in the Synchronized Predeployment Operational Tracker the equipment and weapons used by its personnel. The complexity of the work to prepare these records requires the expertise equivalent to that of a GS–11, step 5 with clerical and analytical skills to create the documents.

The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known significant alternatives to the rule. The impact of this rule on small business is not expected to be significant.

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

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

U.S.C. 610 (DFARS Case 2015–D021), in correspondence.

V. Paperwork Reduction Act

The rule contains information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). Accordingly, DoD has submitted a request for approval of a new information collection requirement concerning “Defense Contractors Performing Private Security Functions Outside the United States” to the Office of Management and Budget.

A. Public reporting burden for this collection of information is estimated to average .5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden estimated as follows:

Respondents: 12.

Responses per respondent: 4.

Total annual responses: 48.

Preparation hours per response: .5 hours, estimated.

Total response Burden Hours: 24.

B. Request for Comments Regarding Paperwork Burden.

Written comments and recommendations on the proposed information collection, including suggestions for reducing this burden, should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, or email Jasmeet_K_Seehra@omb.eop.gov, with a copy to the Defense Acquisition Regulations System, Attn: Ms. Julie Hammond, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060. Comments can be received from 30 to 60 days after the date of this notice, but comments to OMB will be most useful if received by OMB within 30 days after the date of this notice.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the DFARS, 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.

To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Acquisition Regulations System, Attn: Ms. Julie Hammond, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060, or email osd.dfars@mail.mil. Include DFARS Case 2015–D021 in the subject line of the message.

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

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

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

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

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

PART 216—TYPES OF CONTRACTS

216.405–2–71 [Amended]

■ 2. In section 216.405–2–71, amend paragraph (b) by removing “FAR 52.225–26, Contractors Performing Private Security Functions” and adding “252.225–7039, Defense Contractors Performing Private Security Functions Outside the United States”;

PART 225—FOREIGN ACQUISITION

225.302–6 [Amended]

■ 3. Amend section 225.302–6 introductory text by adding “instead of FAR clause 52.225–26, Contractors Performing Private Security Functions Outside the United States,” after “Functions Outside the United States,”;

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 252.225–7039 by—
 ■ a. Removing clause date “(JAN 2015)” and adding “(DEC 2015)” in its place;
 ■ b. Redesignating paragraphs (a) and (b) as paragraphs (c) and (f) respectively;
 ■ c. Adding new paragraphs (a) and (b);
 ■ d. Revising newly designated paragraph (c);
 ■ e. Adding paragraphs (d) and (e);
 ■ f. In newly designated paragraph (f), removing “paragraph (b)” and adding “paragraph (f)” in its place.

The additions and revisions read as follows:

252.225–7039 Defense Contractors Performing Private Security Functions Outside the United States.

* * * * *

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

Full cooperation—

(1) 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;

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

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

(ii) 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

(3) Does not restrict the contractor from—

(i) Conducting an internal investigation; or

(ii) 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:

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

(2) 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) *Applicability.* If this contract is performed both in a designated area and in an area that is not designated, the clause only applies to performance in the designated area. Designated areas are areas outside the United States of—

(1) Contingency operations;

(2) Combat operations, as designated by the Secretary of Defense;

(3) Other significant military operations (as defined in 32 CFR part 159), designated by the Secretary of Defense upon agreement of the Secretary of State;

(4) Peace operations, consistent with Joint Publication 3–07.3; or

(5) Other military operations or military exercises, when designated by the Combatant Commander.

(c) *Requirements.* The Contractor shall—

(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 any orders, directives or 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, accounting for and registering in Synchronized Predeployment and Operational Tracker (SPOT), weapons to be carried by or available to be used by personnel performing private security functions;

(iii) Identifying and registering in SPOT armored vehicles, helicopters and other military vehicles operated by Contractors performing private security functions; and

(iv) In accordance with orders and instructions established by the applicable Combatant Commander, 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;

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

(3) Provide full cooperation with any Government-authorized investigation of incidents reported pursuant to paragraph (c)(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; and

(4) Comply with ANSI/ASIS PSC.1–2012, American National Standard, Management System for Quality of Private Security Company Operations—Requirements with Guidance or the International Standard ISO 18788, Management System for Private Security Operations—Requirements with Guidance (located at <http://www.acq.osd.mil/log/PS/psc.html>).

(d) *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 or subcontractor 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.

(e) *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.

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 217

[Docket DARS-2015-0067]

RIN 0750-AI80

Defense Federal Acquisition Regulation Supplement: Multiyear Contract Requirements (DFARS Case 2015-D009)

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

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the DFARS to implement a section of the National Defense Authorization Act for Fiscal Year (FY) 2015 and a section of the Department of Defense Appropriations Act for FY 2015, which address various requirements for multiyear contracts.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before February 29, 2016 to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2015-D009, using any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2015-D009" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2015-D009." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2015-D009" on your attached document.

- *Email:* osd.dfars@mail.mil. Include DFARS Case 2015-D009 in the subject line of the message.

- *Fax:* 571-372-6094.

- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Tresa Sullivan, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s),

please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Tresa Sullivan, telephone 571-372-6176.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement section 816 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 (Pub. L. 113-291) and section 8010 of the Department of Defense Appropriations Act for FY 2015 (Division C, Title VII of Pub. L. 113-235), which address various requirements for multiyear contracts.

Section 816 of the NDAA amends subsection (i) of 10 U.S.C. 2306b to clarify that a multiyear contract may not be entered into for a defense acquisition program that has been specifically authorized by law to be carried out using multiyear authority unless the Secretary of Defense certifies in writing that certain conditions have been met not later than 30 days before award of the contract (10 U.S.C. 2306b(i)(3)).

Section 8010 makes the following additional changes:

- A multiyear contract may not be terminated without 30-day prior notification to the congressional defense committees.

- A multiyear contract may not be entered into unless the head of the agency ensures that—

- Cancellation provisions in the contract do not include consideration of recurring manufacturing costs of the contractor associated with the production of unfunded units to be delivered under the contract;

- The contract provides that payments to the contractor under the contract shall not be made in advance of incurred costs on funded units; and

- The contract does not provide for a price adjustment based on a failure to award a follow-on contract.

II. Discussion and Analysis

DoD is proposing to make the following changes to the DFARS:

- Amend 217.170(b) to change "10 days before termination" to "30 days before termination" and remove the references to 10 U.S.C. 2306.

- Add the new section 8010 requirements for multiyear contracts to the list of requirements at 217.172(e).

- Clarify at 217.172(h) that the requirements are applicable to defense acquisition programs specifically authorized by law to be carried out using multiyear contract authority.

- Change 217.172(h)(2) to require the Secretary of Defense to certify to Congress by no later than "30 days before entry" into a contract, instead of no later than "March 1 of the year in which the Secretary requests legislative authority to enter" in such contract.

- Delete paragraph (7) at DFARS 217.172(h), which requires a notification to congressional defense committees 30 days prior to award, and redesignate paragraph (h)(8) as paragraph (7). Add to the newly redesignated paragraph (7), a reference to 10 U.S.C. 2306b(i)(4).

- Update cross references to 10 U.S.C. 2306b(i) throughout section 217.172.

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 does not expect this proposed 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 implements requirements for the head of agency, which are procedures internal to the Government. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The purpose of this proposed rule is to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to require the head of agency to—

- Provide written notice to the congressional defense committees at least 30 days before termination of any multiyear contract;

- For defense acquisition programs specifically authorized by law to be carried out using multiyear authority, ensure the Secretary of Defense certifies to Congress certain conditions for the multiyear contract have been met no