

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System**

48 CFR Parts 201, 203, 204, 212, 213, 217, 219, 222, 225, 233, 243, 252, and Appendix I to Chapter 2

RIN 0750-AH55

Defense Federal Acquisition Regulation Supplement: Title 41 Positive Law Codification—Further Implementation (DFARS Case 2012–D003)

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to conform statutory titles throughout the DFARS to the new Positive Law Codification of Title 41, United States Code, “Public Contracts.”

DATES: June 15, 2012.

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571–371–6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 76 FR 78874 on December 20, 2011. The comment period closed on February 21, 2012. One respondent submitted a public comment in response to the proposed rule.

DoD is updating the historical names of the Acts in the DFARS (e.g., the “Service Contract Act of 1965” is now the “Service Contract Labor Standards statute”). A table providing the historical titles of the Acts, the present statutory citation, and the new titles of the statutes is being proposed under FAR case 2011–018 for inclusion at FAR 1.110. That table will cover acts under both titles 40 and 41. Additionally, editorial changes are being made to conform to DFARS drafting conventions.

Although there were no substantive changes to the meaning of the statutes, there were some changes in terminology.

II. Discussion and Analysis

One respondent submitted two edits, which have been incorporated in the final rule at 225.1101(2)(i)(C) and 225.7000(b).

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 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 the rule does not change any policies or requirements. It just changes and updates references and terminology. Additionally, the proposed rule published at 76 FR 78874 on December 20, 2011, invited comments from small businesses and other interested parties. No comments were received from small entities on the affected DFARS subparts with regard to small businesses. Therefore, a Final Regulatory Flexibility Analysis has not been performed.

V. Paperwork Reduction Act

The rule does not impose 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 Parts 201, 203, 204, 212, 213, 217, 219, 222, 225, 233, 243, 252, and Appendix I to Chapter 2

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 201, 203, 204, 212, 213, 217, 219, 222, 225, 233, 243, 252, and 48 CFR chapter 2 appendix I are amended as follows:

■ 1. The authority citation for 48 CFR parts 201, 204, 212, 213, 217, 219, 225, 243, 252, and 48 CFR chapter 2 appendix I continues to read as follows:

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

PART 201—FEDERAL ACQUISITION REGULATIONS SYSTEM

201.107 [Amended]

■ 2. Section 201.107 introductory text is amended by removing “In accordance with section 29 of the Office of Federal Procurement Policy Act (41 U.S.C. 1304)” and adding “In accordance with 41 U.S.C. 1304” in its place.

201.304 [Amended]

■ 3. Section 201.304 is amended in paragraph (2) introductory text in by removing “In accordance with section 29 of the Office of Federal Procurement Policy Act (41 U.S.C. 1304)” and adding “In accordance with 41 U.S.C. 1304” in its place.

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 4. The authority citation for 48 CFR part 203 is revised to read as follows:

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

203.070 [Amended]

■ 5. Section 203.070 is amended in paragraph (f) by removing “Anti-kickback Act” and adding “Kickbacks” in its place.

203.502–2 [Amended]

■ 6. Section 203.502–2 is amended in paragraph (h) introductory text by removing “under the Anti-Kickback Act of 1986” and adding “under 41 U.S.C. chapter 87, Kickbacks” in its place.

PART 204—ADMINISTRATIVE MATTERS

204.1202 [Amended]

■ 7. Section 204.1202 is amended—
■ a. In paragraph (2)(v), by removing “Buy American Act—Balance of Payments Program Certificate” and adding “Buy American—Balance of Payments Program Certificate” in its place; and

■ b. In paragraph (2)(ix), by removing “Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate” and adding “Buy American—Free Trade Agreements—Balance of Payments Program Certificate” in its place.

■ 8. In 204.7003, revise paragraph (a)(3)(vi) to read as follows:

204.7003 Basic PII number.

(a) * * *
(3) * * *

(vi) Contracting actions placed with or through other Government departments or agencies or against contracts placed

by such departments or agencies outside the DoD (including actions from nonprofit agencies employing people who are blind or severely disabled (AbilityOne), and the Federal Prison Industries (UNICOR))—F

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PART 212—ACQUISITION OF COMMERCIAL ITEMS

212.301 [Amended]

■ 9. Section 212.301 is amended—

■ a. In paragraph (f)(i)(A) by removing “Buy American Act—Balance of Payments Program Certificate” and adding “Buy American—Balance of Payments Program Certificate” in its place; and

■ b. In paragraph (f)(i)(C), removing “Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate” and adding “Buy American—Free Trade Agreements—Balance of Payments Program Certificate” in its place.

212.7102–1 [Amended]

■ 10. Section 212.7102–1 is amended in paragraph (e)(2) by removing “section 26 of the Office of Federal Procurement Policy Act (41 U.S.C. 1502)” and adding “41 U.S.C. 1502” in its place.

PART 213—SIMPLIFIED ACQUISITION PROCEDURES

213.301 [Amended]

■ 11. Section 213.301 is amended in paragraph (1) by removing “Continental Shelf lands” and adding “Continental Shelf” in its place.

213.302–5 [Amended]

■ 12. Section 213.302–5 is amended—

■ a. In the first sentence of paragraph (d) introductory text by removing “Buy American Act—Supplies” and adding “Buy American—Supplies” in its place and in the second sentence, removing “Buy American Act” and adding “Buy American statute” in its place; and

■ b. Removing “Act” from paragraphs (d)(i) and (d)(ii).

PART 217—SPECIAL CONTRACTING METHODS

217.7000 [Amended]

■ 13. Section 217.7000 is amended by removing “Section 201(c) of the Federal Property and Administrative Services Act of 1949, 63 Stat. 384, as amended (40 U.S.C. 481(c))” and adding “40 U.S.C. 503” in its place.

PART 219—SMALL BUSINESS PROGRAMS

219.703 [Amended]

■ 14. Section 219.703 is amended in paragraph (a) by removing “the Javits-Wagner-O’Day Act (41 U.S.C. 8502–8504)” and adding “41 U.S.C. chapter 85” in its place.

PART 222—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 15. The authority citation for 48 CFR part 222 is revised to read as follows:

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

Subpart 222.3—[Amended]

■ 16. Subpart 222.3 is amended in the subpart heading by removing “Act”.

222.302 [Amended]

■ 17. Section 222.302 is amended in the introductory text by removing “Act”.

■ 18. Section 222.402–70 is amended by revising paragraph (a) introductory text and paragraphs (b), (c), (d), and (f) to read as follows:

222.402–70 Installation support contracts.

(a) Apply both the Service Contract Labor Standards statute and the Construction Wage Rate Requirements statute to installation support contracts if—

* * * * *

(b) *Service Contract Labor Standards statute coverage under the contract.* Contract installation support requirements, such as plant operation and installation services (i.e., custodial, snow removal, etc.) are subject to the Service Contract Labor Standards. Apply Service Contract Labor Standards clauses and minimum wage and fringe benefit requirements to all contract service calls or orders for such maintenance and support work.

(c) *Construction Wage Rate Requirements statute coverage under the contract.* Contract construction, alteration, renovation, painting, and repair requirements (i.e., roof shingling, building structural repair, paving repairs, etc.) are subject to the Construction Wage Rate Requirements statute. Apply Construction Wage Rate Requirements clauses and minimum wage requirements to all contract service calls or orders for construction, alteration, renovation, painting, or repairs to buildings or other works.

(d) *Repairs versus maintenance.* Some contract work may be characterized as either Construction Wage Rate Requirements painting/repairs or

Service Contract Labor Standards maintenance. For example, replacing broken windows, spot painting, or minor patching of a wall could be covered by either the Construction Wage Rate Requirements or the Service Contract Labor Standards. In those instances where a contract service call or order requires construction trade skills (i.e., carpenter, plumber, painter, etc.), but it is unclear whether the work required is Service Contract Labor Standards maintenance or Construction Wage Rate Requirements painting/repairs, apply the following rules:

(1) Individual service calls or orders which will require a total of 32 or more work hours to perform shall be considered to be repair work subject to the Construction Wage Rate Requirements.

(2) Individual service calls or orders which will require less than 32 work hours to perform shall be considered to be maintenance subject to the Service Contract Labor Standards.

(3) Painting work of 200 square feet or more to be performed under an individual service call or order shall be considered to be subject to the Construction Wage Rate Requirements statute regardless of the total work hours required.

* * * * *

(f) Contracting officers may not avoid application of the Construction Wage Rate Requirements statute by splitting individual tasks between orders or contracts.

■ 19. The 222.404 section heading is revised to read as follows:

222.404 Construction Wage Rate Requirements statute wage determinations.

* * * * *

■ 20. Section 222.406–1 is amended by revising paragraph (b)(1)(A)(1), and in paragraph (b)(1)(A)(2) by removing the word “Act” and adding “statute” in its place.

The revision reads as follows:

222.406–1 Policy.

* * * * *

(b) * * *

(1) * * *

(A) * * *

(1) Construction Wage Rate Requirements statute.

* * * * *

222.406–8 [Amended]

■ 21. Section 222.406–8 is amended in paragraph (c)(4)(A) introductory text by removing “Contract Work Hours and Safety Standards Act (CWHSSA)” and adding “Contract Work Hours and Safety Standards (CWHSS) statute” in its place.

222-406-9 [Amended]

■ 22. Section 222.406-9 is amended in paragraph (a) by removing “Davis-Bacon or CWHSSA” and adding “Construction Wage Rate Requirements or CWHSS statute” in its place.

■ 23. Section 222.406-13 is amended—

■ a. In the introductory text by removing “Davis-Bacon Act and the CWHSSA” and adding “Construction Wage Rate Requirements statute and the CWSS statute” in its place;

■ b. By revising paragraphs (7)(i) and (ii) and (8)(i) and (ii);

■ c. In paragraph (9) introductory text by removing “CWHSSA” and adding “CWSS statute” in its place;

■ d. In paragraph (9)(i), by adding “; and” to the end; and

■ e. By revising paragraphs (10)(i) and (ii).

The revisions read as follows:

222.406-13 Semiannual enforcement reports.

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*   *   *   *   *
(7) * * *
(i) Construction Wage Rate
Requirements statute; and
(ii) CWSS statute;
(8) * * *
(i) Construction Wage Rate
Requirements statute; and
(ii) CWHSS statute;
*   *   *   *   *
(10) * * *
(i) Construction Wage Rate
Requirements statute;
(ii) CWSS statute;
*   *   *   *   *

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Subpart 222.10—Service Contract Labor Standards

■ 24. The subpart 222.10 heading is revised as set forth above.

Subpart 222.14—Employment of Workers with Disabilities

■ 25. The subpart 222.14 heading is revised to read as set forth above.

PART 225—FOREIGN ACQUISITION**225.003 [Amended]**

■ 26. Section 225.003 is amended in paragraphs (4) and (11) by removing “Act” each time it appears.

Subpart 225.1—Buy American—Supplies

■ 27. The subpart 225.1 is revised to read as set forth above.

225.103 [Amended]

■ 28a. Section 225.103 is amended—
■ a. In paragraph (a)(i)(B) by removing “Buy American Act” and adding “Buy American statute” in its place; and

■ b. In paragraph (a)(ii)(A) introductory text by removing “Subpart 225.5” and adding “subpart 225.5” in its place and by removing “Buy American Act” and adding “Buy American statute” in its place.

Subpart 225.2—Buy American—Construction Materials

■ 28b. The subpart 225.2 heading is revised to read as set forth above.

225.502 [Amended]

■ 29. Section 225.502 is amended—

■ a. In paragraphs (c) introductory text and (c)(iii)(C), by removing “Buy American Act” and adding “Buy American statute” in its place;

■ b. In paragraph (c)(i)(A), by removing “Buy American Act” and “Buy American Act or Balance of Payments Program” and adding “Buy American statute” and “Buy American or Balance of Payments Program”, respectively, in its place; and

■ c. In paragraphs (c)(i)(B), (c)(ii)(C), (c)(ii)(D), and (c)(iii)(A), by removing “Act”.

225.872-1 [Amended]

■ 30. Section 225.872-1 is amended in paragraphs (a) introductory text and (b) introductory text by removing “Buy American Act” and adding “Buy American statute” in its place.

225.872-4 [Amended]

■ 31. Section 225.872-4 is amended by removing “Buy American Act” and adding “Buy American statute” in its place.

225.1101 [Amended]

■ 32. Section 225.1101 is amended—

■ a. In paragraphs (1)(i), (2)(i) introductory text, (2)(i)(D)(2), (3)(i), (3)(iii), (10)(i), (11)(i) introductory text, and (11)(iii), by removing “Act” each time it appears; and

■ b. In paragraph (2)(i)(C), removing “Act” and adding “statute” in its place.

225.7000 [Amended]

■ 33. Section 225.7000 is amended in paragraph (b) by removing “Buy American Act” and adding “Buy American statute” in its place.

225.7017-3 [Amended]

■ 34. Section 225.7017-3 is amended in paragraph (a) by removing “Buy American Act” and adding “Buy American statute” in its place.

PART 233—PROTESTS, DISPUTES, AND APPEALS

■ 35. The authority citation for 48 CFR part 233 is revised to read as follows:

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

233.204-70 [Amended]

■ 36. Section 233.204-70 is amended by removing “the Contract Disputes Act of 1978” and adding “41 U.S.C. chapter 71 (Contract Disputes)” in its place.

PART 243—CONTRACT MODIFICATIONS

■ 37. Section 243.204-71 is amended in paragraph (c) in the first sentence by removing “the Contract Disputes Act of 1978 (41 U.S.C. 7103)” and adding “41 U.S.C. 7103, Disputes” in its place, and in the second sentence, removing “Contract Disputes Act” and adding “Contract Disputes statute” in its place and removing “Subpart” and adding “subpart” in its place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**252.204-7007 [Amended]**

■ 38. Section 252.204-7007 is amended by removing the clause date “(SEP 2011)” and adding “(JUN 2012)” in its place and in paragraphs (d)(2)(ii) and (d)(2)(vi) by removing “Act”.

252.212-7001 [Amended]

■ 39. Section 252.212-7001 is amended by—

■ a. Removing the clause date “(SEP 2011)” and adding “(JUN 2012)” in its place;

■ b. In paragraphs (b)(4), (b)(22), and (c)(4), removing “(SEP 2011)” and adding “(JUN 2012)” in its place;

■ c. In paragraphs (b)(6)(i) by removing “Act” and by removing “(OCT 2011)” and adding “(JUN 2012)” in its place;

■ d. In paragraph (b)(8) by removing “(JAN 2011)” and adding “(JUN 2012)” in its place; and

■ e. In paragraph (b)(13)(i) by removing “(MAY 2012)” and adding “(JUN 2012)” in its place.

■ f. In paragraph (b)(16)(i) by removing “(MAY 2012)” and adding “(JUN 2012)” in its place; and

■ g. In paragraphs (b)(16)(ii) through (iv) by removing “(OCT 2011)” and adding “(JUN 2012)” in its place;

■ h. In paragraphs (b)(16)(v) and (vi), by removing “(MAY 2012)” and adding “(JUN 2012)” in its place; and

■ i. In paragraphs (b)(18) and (c)(1), removing “(AUG 2011)” and adding “(JUN 2012)” in its place.

252.212-7002 [Amended]

■ 40. Section 252.212-7002 is amended by removing the clause date “(JUN 2011)” and adding “(JUN 2012)” in its place and in the definition

“Nontraditional defense contractor”, paragraph (1), removing “Section 26 of the Office of Federal Procurement Policy Act (41 U.S.C. section 1502)” and adding “41 U.S.C. section 1502” in its place.

252.217–7002 [Amended]

■ 41. Section 252.217–7002 is amended by removing the clause date “(DEC 1991)” and adding “(JUN 2012)” in its place and in paragraph (a), removing “Section 201(c) of the Federal Property and Administrative Services Act of 1949, 63 Stat. 384 (40 U.S.C. 481(c))” and adding “40 U.S.C. 503” in its place.

252.219–7003 [Amended]

■ 42. Section 252.219–7003 is amended—

- a. By removing the clause date “(SEP 2011)” and adding “(JUN 2012)” in its place;
- b. In paragraph (e) introductory text by removing “Section 831” and adding “section 831” in its place; and
- c. In paragraph (e)(1), by removing “handicapped” and adding “disabled” in its place.

■ 43. Section 252.225–7000 is amended:

- a. By revising the section heading;
- b. By removing “Act” from the provision title;
- c. By removing the clause date “(DEC 2009)” and adding “(JUN 2012)” in its place;
- d. In paragraph (b)(2) by removing “Act” and adding “statute” in its place; and
- e. In paragraph (c)(1) introductory text by removing “Act”.

The revision reads as follows:

252.225–7000 Buy American Statute—Balance of Payments Program Certificate.

* * * * *

252.225–7001 [Amended]

■ 44. Section 252.225–7001 is amended—

- a. By revising the section heading;
- b. By removing “Act” from the provision title;
- c. By removing the clause date “(OCT 2011)” and adding “(JUN 2012)” in its place;
- d. In paragraph (a), in the definition of “Commercially available off-the-shelf (COTS) item”, paragraph (ii), by removing “section 3 of the Shipping Act of 1984 (46 U.S.C. 40102)” and adding “46 U.S.C. 40102(4)” in its place;
- d. In paragraph (a), in the definition of “Domestic end product”, paragraph (ii)(A)(2), by removing “Act” and adding “statute” in its place;
- e. In paragraph (b) in the first sentence, by removing “the Buy American Act (41 U.S.C chapter 83)”

and adding “, Buy American” in its place and in the second sentence, removing “Act” and adding “statute” in its place; and

■ f. In paragraph (c), by removing “Act”.

252.225–7009 [Amended]

■ 45. Section 252.225–7009 is amended by removing the clause date “(JAN 2011)” and adding “(JUN 2012)” in its place; and in paragraph (a)(4)(ii), removing “section 3 of the Shipping Act of 1984 (46 U.S.C. App 1702)” and adding “46 U.S.C. 40102(4)” in its place.

252.225–7013 [Amended]

■ 46. Section 252.225–7013 is amended—

- a. By removing the clause date “(DEC 2009)” and adding “(JUN 2012)” in its place;
- b. In paragraph (a), by removing the numerical designations (1) through (4) from the definitions;
- c. In paragraph (a), in the definition “Eligible product”, paragraph (ii), by removing “*Bahrainian end product* or a *Moroccan end product*, as defined in the Buy American Act” and adding “*Bahrainian end product*, a *Moroccan end product*, or a *Peruvian end product*, as defined in the Buy American” in its place, and in paragraph (iii), by removing “Act”; and
- d. In paragraph (a), in the definition “Qualifying country” and “qualifying country end product”, removing “Act” each time it appears.

252.225–7021 [Amended]

■ 47. Section 252.225–7021 is amended by removing the clause date “(MAY 2012)” and adding “(JUN 2012)” in its place, and in paragraph (a), in the definition “Commercially available off-the-shelf (COTS) item”, paragraph (ii), by removing “section 4 of the Shipping Act of 1984 (46 U.S.C. 40102)” and adding “46 U.S.C. 40102(4)” in its place.

252.225–7035 [Amended]

■ 48. Section 252.225–7035 is amended—

- a. By revising the section heading;
- b. In the clause title by removing “Act”;
- c. By removing the clause date “(DEC 2010)” and adding “(JUN 2012)” in its place;
- d. In paragraphs (a) and (b)(2) by removing “Act”;
- e. In introductory paragraph (c)(1), removing “Buy American Act” and adding “Buy American” in its place;
- f. In Alternate II, by removing the clause date “(DEC 2010)” and adding

“(JUN 2012)” in its place; and in Alternate II, paragraph (b)(2), removing “Act”; and

■ g. In Alternate III, removing the clause date “(DEC 2010)” and adding “(JUN 2012)” in its place; and in Alternate III, paragraphs (a) and (b)(2), removing “Act”.

The revision reads as follows:

252.225–7035 Buy American—Free Trade Agreements—Balance of Payments Program Certificate.

* * * * *

■ 49. Section 252.225–7036 is amended—

- a. By revising the section heading;
- b. In the clause title by removing “Act”;
- c. By removing the clause date “(MAY 2012)” and adding “(JUN 2012)” in its place;
- c. In paragraph (a), in the definition “Commercially available off-the-shelf (COTS) item”, paragraph (ii), by removing “section 3 of the Shipping Act of 1984 (46 U.S.C. 40102)” and adding “46 U.S.C. 40102(4)” in its place;
- d. In paragraph (a), in the definition “Domestic end product”, paragraph (ii)(A)(2), by removing “Act” and adding “statute” in its place;
- e. In paragraph (c) by removing “Act”; and
- f. In Alternates I, II, and III, by removing the clause date “(OCT 2011)” and adding “(JUN 2012)” in its place and in paragraph (c), removing “Act”.

The revision reads as follow:

252.225–7036 Buy American—Free Trade Agreements—Balance of Payments Program.

* * * * *

252.225–7044 [Amended]

■ 50. Section 252.225–7044 is amended by removing the clause date “(DEC 2010)” and adding “(JUN 2012)” in its place and in paragraph (a), in the definition “Commercially available off-the-shelf (COTS) item”, paragraph (2), by removing “section 3 of the Shipping Act of 1984 (46 U.S.C. 40102)” and adding “46 U.S.C. 40102(4)” in its place.

252.227–7037 [Amended]

■ 51. Section 252.225–7037 is amended—

- a. By removing the clause date “(APR 2012)” and adding “(JUN 2012)” in its place;
- b. In paragraph (e)(3), by removing “the Contract Disputes Act of 1978 (41 U.S.C. 7101)” and adding “41 U.S.C. 7101, Contract Disputes” in its place; and
- c. In paragraph (g)(2)(iv), removing “Act” and adding “statute” in its place.

252.227–7038 [Amended]

■ 52. Section 252.225–7038 is amended by removing the clause date “(DEC 2007)” and adding “(JUN 2012)” in its place and in paragraph (l)(2)(ii), by removing “Act” and adding “statute” in its place.

252.244–7001 [Amended]

■ 53. Section 252.244–7001 is amended by removing the clause date “(MAY 2011)” and adding “(JUN 2012)” in its place and in paragraph (c)(17), by removing “the Anti-Kickback Act” and adding “41 U.S.C. chapter 87, Kickbacks” in its place.

■ 54. In appendix I to chapter 2, section I–101.4 is revised to read as follows:

Appendix I to Chapter 2—Policy and Procedures for the DOD Pilot Mentor-Protege Program

* * * * *

I–101.4 Severely disabled individual.

An individual who has a physical or mental disability which constitutes a substantial handicap to employment and which, in accordance with criteria prescribed by the Committee for Purchase from People Who Are Blind or Severely Disabled established by the first section of the Act of June 25, 1938 (41 U.S.C. 8502), is of such a nature that the individual is otherwise prevented from engaging in normal competitive employment.

* * * * *

[FR Doc. 2012–14259 Filed 6–14–12; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 216, 225, and 252

RIN 0750–AH28

Defense Federal Acquisition Regulation Supplement; Contractors Performing Private Security Functions (DFARS Case 2011–D023)

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

ACTION: Final rule.

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

DATES: *Effective Date:* June 15, 2012.

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

SUPPLEMENTARY INFORMATION:

I. Background

The interim rule implemented the legislation by establishing (1) Regulations addressing the selection, training, equipping, and conduct of personnel performing private security functions in areas of contingency operations, complex contingency operations, or other military operations or exercises that are designated by the combatant commander, (2) a contract clause, and (3) remedies. DoD published the interim rule in the **Federal Register** at 76 FR 52133 on August 19, 2011, to implement section 862, as amended, of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008. Section 862 was amended by section 853 of the NDAA for FY 2009 and sections 831 and 832 of the NDAA for FY 2011. In addition, the DoD Instruction addressing private Security Contractors (DoDI 3020.50) was revised on August 1, 2011, and the final rule to implement section 862 of the NDAA for FY 2008, as amended, 32 CFR part 159, Private Security Contractors Operating in Contingency Operations, was published in the **Federal Register** on August 11, 2011 (76 FR 49651). Public comments on the final rule at 32 CFR part 159 had been solicited by publication of an interim rule on July 17, 2009.

II. Discussion and Analysis of the Public Comments

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

A. Summary of Significant Changes

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

- The definition of “private security functions” in the clause at DFARS 225.370–3 was revised to conform to the DoDI, and limit the definition to the specified criteria.
- The types of active, non-lethal countermeasures that must be reported when used has been added at DFARS 225.370–4(c)(1)(iv)(E) and 252.225–7039(b)(1)(iv)(E).
- The types of Government-authorized investigations with which the contractor is required to cooperate are more narrowly described in order to conform to the limitations in the statute. Changes have been made to DFARS

225.370–4(c)(3) and the clause at DFARS 252.225–7039(b)(3). In addition, a definition of “full cooperation” has been added to the clause at DFARS 252.225–7039 to allay concerns about waiver of attorney-client privilege.

- The remedies at DFARS 225.370–5(a) have been revised to remove paragraph (a)(4), a discussion of the right to terminate for default, because this right is already covered by the contract termination clauses.

- The applicability of the rule (DFARS 225.370–2, 225.370–4(b), and 225.370–6) and references to the title of DoDI 3020.50 at DFARS 225.370–4 and 252.225–7039(b)(2)(i) have been updated to conform to the revised DoDI 3020.50.

B. Analysis of Public Comments

1. Definition of Private Security Functions

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

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

2. The Contractor’s Requirement To Ensure Compliance of Contractor Personnel Performing Private Security Functions

Comment: One respondent stated that the requirement for prime contractors to ensure that personnel performing private security functions comply with numerous administrative and reporting requirements and are briefed on and understand various enumerated laws, regulations, orders, directives, instructions, and rules related to the private security function imposes “untenable oversight, policing, and enforcement obligations,” particularly for non-private security function prime contractors that subcontract with a private security function provider. The respondent recommended that the prime contractor’s obligation be limited to the administrative functions of passing the requirements on to the private security function provider and conducting audits or other administrative review functions to verify compliance.

Response: No change has been made in the final rule because the law, at