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Federal Communications Commission.

**William F. Caton,**

*Deputy Secretary.*

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 212, 225, and 252

RIN 0750-AF25

#### Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized To Accompany U.S. Armed Forces (DFARS Case 2005-D013)

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

**ACTION:** Final rule.

**SUMMARY:** DoD has adopted as final, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement DoD policy regarding contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States.

**DATES:** *Effective Date:* March 31, 2008.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy Williams, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone 703-602-0328; facsimile 703-602-7887. Please cite DFARS Case 2005-D013.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

DoD published an interim rule at 71 FR 34826 on June 16, 2006, to implement policy found in DoD Instruction 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces. In addition, changes to the Federal Acquisition

Regulation (FAR) were proposed at 71 FR 40681 on July 18, 2006, and finalized at 73 FR 10943 on February 28, 2008, to address the issues of contractor personnel that are providing support to the U.S. Government outside the United States but are not covered by the DFARS rule. Since the FAR and the DFARS rules are similar in many respects, the following discussion of comments received on the DFARS rule also includes relevant issues raised with regard to the FAR rule.

##### 1. Right to Self-Defense (252.225-7040(b)(3)(i))

###### a. Distinction Between Self-Defense and Combat Operations

*Comment:* One respondent stated that there is an inherently vague line between what constitutes “defense” and “attack,” which is plainly crossed when the terms are applied in asymmetric warfare; and that contractors employing “self-defense” measures would have to undertake a wide array of combat activities to ensure their safety.

*DoD Response:* The DFARS rule recognizes that individuals have an inherent right to self-defense. It does not require self-defense, but authorizes it when necessary. In addition, the rule does not authorize preemptive measures. To the contrary, it recognizes that the actual conduct of an individual cannot be controlled, only governed, by contract terms and, therefore, emphasizes the consequences for the inappropriate use of force (252.225-7040(c)(3)(iii)).

###### b. Whether the Right of Self-Defense Should be Modified to “Personal” Self-Defense

*Comment:* One respondent recommended insertion of the word “personal” before “self-defense,” stating that this will clarify that civilians accompanying the force are authorized to use deadly force only in defense of themselves, rather than the broader concept of unit self-defense or preemptive self-defense.

*DoD Response:* DoD does not concur with this recommendation. The meaning of the term “self-defense” may vary depending on a person’s duties and the country or designated operational area in which the duties are being performed.

###### c. Whether the Right of Self-Defense Should be Extended to Defense Against Common Criminals

*Comment:* One respondent stated that, since the rule will apply in innumerable asymmetrical environments, the phrase “against enemy armed forces” should be

deleted, asserting that the right of self-defense should extend beyond enemy armed forces, since such defensive actions may be needed as protection against common criminals.

*DoD Response:* The final rule removes the phrase “against enemy armed forces” from paragraph (b)(3)(i) of the DFARS clause. DoD believes that it is more useful to the contractor to make an overall statement as to what is allowed with regard to use of deadly force in self-defense, than to focus on the law of war authorities with regard to enemy armed forces. There are legitimate situations that may also require a reasonable exercise of self-defense against other than enemy armed forces, e.g., defense against common criminals or terrorists. When facing an attacker, it will often not be possible for the contractor to ascertain whether the attacker is technically an “enemy armed force.” A cross-reference has been added in paragraph (b)(3)(iii) of the clause, with regard to the limitations on the use of force specified in paragraphs (d) and (j)(3) of the clause.

##### 2. Role of Private Security Contractors (252.225-7040(b)(3)(ii))

###### a. Whether a Separate Category for Private Security Contractors Is Necessary

*Comment:* One respondent stated there is no need for private security contractors as a separate category if private security contractors (like other contractors) can only use deadly force in self-defense.

*DoD Response:* While the right to self-defense applies to all contractors, the rule recognizes that private security contractors have been given a mission to protect other assets/persons. Therefore, it is important that the rule reflect the broader authority of private security contractors with regard to use of deadly force, consistent with the terms and conditions of the contract.

###### b. Hiring Private Security Contractors as Mercenaries Violates the Constitution, Law, Regulations, Policy, and American Core Values

*Comment:* Several respondents commented that, by allowing contractors to assume combat roles, the Government is allowing mercenaries in violation of the Constitution, the laws of the United States, and core American values. One law specifically identified was 5 U.S.C. 3108, Employment of detective agencies; restrictions (the “Anti-Pinkerton Act”). Also identified were the DoD Manpower Mix Criteria and the Federal Activities Inventory Reform (FAIR) Act of 1998, which

preclude contracting out core inherently governmental functions, especially combat functions.

*DoD Response:* While not disputing the many prohibitions against the use of mercenaries, private security contractors are not mercenaries and they are not part of the armed forces. The Government is not contracting out combat functions. The Government has the authority to hire security guards worldwide. In accordance with OMB Circular A-76, protection of property and persons is not an inherently governmental function. Private security contractors may be persons accompanying the armed forces within the meaning of Article 4A(4) of the Geneva Convention III.

In *Brian X. Scott*, Comp. Gen. Dec. B-298370 (Aug. 18, 2006), the Comptroller General of the United States concluded that solicitations for security services in and around Iraq violated neither the Anti-Pinkerton Act, nor DoD policies regarding contractor personnel, because the services required are not “quasi-military armed forces” activities. The Comptroller General also relied on the language of the interim DFARS rule, which prohibits contractor personnel from participating in direct combat activities, as well as the provisions of DoD Instruction 3020.41, which makes it the responsibility of the combatant commander to ensure that private security contract mission statements do not authorize the performance of any inherently governmental military functions. The Comptroller General concluded that “\* \* \* the services sought under the solicitations appear to comport with the DoD policies and regulations which state that security contractors are not allowed to conduct direct combat activities or offensive operations.”

c. Whether the Standard for Use of Deadly Force Should be Modified to One of “Reasonableness”

*Comment:* Paragraph (b)(3)(ii) of the DFARS clause uses “only when necessary” as the standard for describing the use of deadly force by security contractors. DoD Directive 5210.56, Use of Deadly Force and the Carrying of Firearms by DoD Personnel Engaged in Law Enforcement and Security Duties (E2.1.2.3.1), uses the standard of “reasonably appears necessary.” The respondent stated that, while deadly force is to be avoided, the “only when necessary” standard in the interim rule fails to recognize the “reasonably appears necessary” standard that is critical to split-second decisions, particularly in a war zone.

*DoD Response:* DoD agrees that the DFARS rule should be consistent with the cited DoD Directive and has incorporated the “reasonably appears necessary” standard into the final rule.

d. Whether Protected Assets/Persons for Private Security Contractors Should be Limited to Non-Military Objectives

*Comment:* One respondent stated the rule should be clarified to limit private security contractor personnel to protecting assets/persons that are non-military objectives. This omission from the interim rule seems to conflict with Army Field Manual No. 3-100.21, which prohibits the use of contractors in a force protection role. The respondent also expressed concern about how to craft statements of work for private security contractors that do not assign inherently governmental functions to contractors.

*DoD Response:* It is not possible to know in advance of an actual conflict what may become a military objective. Almost anything worth protecting could become a military target in wartime. As stated in paragraph 2 above, the Government is not contracting out combat functions. The United States Government has the authority to hire security guards worldwide. According to OMB Circular A-76, Performance of Commercial Activities, protection of property and persons is not an inherently governmental function (see FAR 7.503(d)(19)). DoD Instruction 3020.41 provides limitations and safeguards for private security contracts, including legal review on a case-by-case basis. Paragraph 6.3.5 of that Instruction states that, “Whether a particular use of contract security personnel to protect military assets is permissible is dependent on the facts and requires legal analysis.” The DoD Instruction also states in paragraph 6.3.5.2, “Contracts shall be used cautiously in contingency operations where major combat operations are ongoing or imminent. In these situations, contract security services will not be authorized to guard U.S. or coalition military supply routes, military facilities, military personnel, or military property except as specifically authorized by the geographic Combatant Commander (non-delegable).” Since these requirements must be fulfilled before the private security contract is entered into, it is not necessary or appropriate to include these requirements in the DFARS rule.

e. Use of the Term “Mission Statement”

*Comments:* Paragraph (b)(3)(ii) of the DFARS clause authorizes private security contractor personnel to use

deadly force only when “necessary to execute their security mission to protect assets/persons, consistent with the mission statement contained in their contract.” Several respondents stated that the use of the term “mission statement” in that sentence caused confusion and should be clarified. One respondent noted that not all contracts for security services will contain a “mission statement” as such. Statements of work may contain sections entitled “objectives,” “purpose,” or “scope of work,” which may or may not contain the equivalent of a mission statement. The respondent further noted that the need to deploy security personnel quickly could result in a mission statement (or its equivalent) that may not be as precise as desired and, therefore, ill-suited to serve as part of a standard for when deadly force is authorized.

Other respondents requested clarification as to whether subcontractors would be considered private security contractors, or whether the term “private security contractor” was limited to contractors that have a contract directly with the Government. One respondent stated there is no guidance as to who would qualify as private security contractor personnel, creating uncertainty as to whether private security companies retained by a prime contractor would be covered if the prime contractor drafted a mission statement for its private security subcontractor.

*DoD Response:* DoD agrees that the term “mission statement” could cause confusion and has replaced “mission statement” with “terms and conditions” in paragraph (b)(3)(ii) of the clause. DoD does not believe that any clarification with regard to subcontractors is necessary. When a clause flows down to subcontractors, the terms are changed appropriately to reflect the relationship of the parties. Nothing in the rule indicates that private security contractors cannot be subcontractors.

f. Authority of Combatant Commander To “Create Missions”

*Comment:* One respondent stated that the rule delegates extensive authority to combatant commanders to direct contractor actions under both support and security contracts. The respondent further stated that granting such nearly unlimited authority to combatant commanders to create missions is inconsistent with laws and regulations that convey such authority to contracting officers and serves to undermine their authority.

*DoD Response:* The combatant commander is not authorized to create

missions for private security contractors. A contractor must perform in accordance with the terms and conditions of the contract. The combatant commander is responsible for reviewing/approving any contractor request to carry weapons and evaluating whether the planned use of such weapons is appropriate.

#### g. Approval of Private Security Contractors

*Comment:* One respondent questioned whether there will be a vetting process and a list of approved Private Security Contractors from which DoD contractors or their subcontractors may acquire services.

*DoD Response:* Contractors are responsible for providing their own security support and for the selection and performance of subcontractors. However, the Government may reserve the right to approve subcontracts.

#### h. Definition of "Private Security Contractor"

*Comment:* Several respondents requested a definition of "private security contractor." One respondent noted that DoD Instruction 3020.41 uses the term "security services."

*DoD Response:* DoD considered defining "private security contractor" to mean "a contractor that has been hired to provide security, either by the Government or as a subcontractor." However, in considering this definition, DoD realized that, in some circumstances, a contractor whose primary function is not security may directly hire a few personnel to provide security, rather than subcontracting to a private security contractor. The authority for use of deadly force ultimately rests with the individuals who are providing the security, whether as direct hires or as employees of a subcontractor. Therefore, the final rule amends paragraph (b)(3)(ii) of the contract clause to replace the term "private security contractor personnel" with "contractor personnel performing security functions." In addition, since some contractor personnel performing security functions are employees, rather than hired by contract, paragraph (b)(3)(ii) of the clause has been further amended to address execution of the security mission by such personnel consistent with their job description and terms of employment.

#### i. Coordination and Communication With Private Security Contractors

*Comment:* One respondent stated that DoD is coordinating responsibilities and functions among the military and contractor security forces in Iraq and

requested that the DFARS state that DoD will similarly coordinate security efforts in future theaters of operation. In addition, the respondent stated that the DFARS should name an organization to coordinate the overall activities of the private security contractors to meet U.S. tactical and strategic goals and that DoD should have a process by which it communicates and receives threat information to and from contractors operating in the field, as required by DoD Instruction 3020.41. Further, DoD Instruction 3020.41, paragraph 6.3.5.3.3, also requires a plan as to how appropriate assistance will be provided to contractor security personnel who become engaged in hostile situations.

*DoD Response:* Such plans for coordination and communication are the responsibility of the combatant commander and are outside the scope of this DFARS rule. These issues must be addressed before the combatant commander approves the arming of contingency contractor personnel to provide security services. Once approved, the terms and conditions of the contract will reflect these requirements as appropriate.

#### 3. Consequences of Inappropriate Use of Force (252.225-7040(b)(3)(iii))

##### a. Loss of "Law of War" Protection From Direct Attack

*Comment:* The statement in paragraph (b)(3)(iii) of the contract clause, that civilians lose their law of war protection from direct attack if and for such time as they take a direct part in hostilities, raised numerous questions regarding its meaning. One respondent considered this to be a correct statement under the international law of war, but that it may call into question the foundation for the global war on terrorism and targeting "unlawful combatants" when they are not taking a direct part in hostilities.

*DoD Response:* The statement in question has been excluded from the final rule. DoD considered the statement to be unnecessary and potentially confusing. Paragraph (b)(3)(i) of the clause establishes the right to self-defense. Paragraph (b)(3)(ii) sets forth a limited right for some contractor personnel to protect assets/persons. A new paragraph (b)(3)(iii) has been added to address the consequences of the inappropriate use of force.

##### b. Consequences Other Than "Law of War" Consequences

*Comment:* Several respondents stated that the notice to contractors relating to the personal and legal impact of directly participating in hostilities is incomplete. Without including the

cautionary language of DoD Instruction 3020.41 relating to possible criminal and civil liability, civilians accompanying the armed forces might erroneously believe the only impact of their direct participation is that they would be lawful targets during such time that they are participating in hostilities. One respondent was also concerned that, by not mentioning potential immunity, it could be argued that the clause waives otherwise available immunities. The respondents suggested addition of language stating that, "Since civilians accompanying the force do not have combatant immunity, unless immune from host nation jurisdiction by virtue of an international agreement or international law, contingency contractor personnel are advised that inappropriate use of force could subject them to U.S. or host nation prosecution and civil liability."

*DoD Response:* The new paragraph (b)(3)(iii) in the contract clause incorporates the information found in DoD Instruction 3020.41 relating to possible immunity and possible criminal and civil liability for contractor personnel who inappropriately use force.

#### 4. Contractors Are Not Active Duty (252.225-7040(b)(4))

*Comment:* One respondent was concerned about paragraph (b)(4) of the contract clause, which states, "Service performed by Contractor personnel subject to this clause is not active duty or service under 38 U.S.C. 106." The respondent stated that the Note under 38 U.S.C. 106 explains that the Secretary of Defense is to determine what constitutes active duty or service under this statute for Women's Air Forces Service Pilots who were attached to the Army Air Corps during World War II and persons in similarly situated groups who rendered services in a capacity considered civilian employment or contractual service. The respondent stated that the determination can only be made retrospectively.

*DoD Response:* Paragraph (b)(4) of the clause correctly states the terms of service for Defense and non-Defense contractors. Contractors should hold no expectations under this clause that their service will qualify as "active duty or service." The Note under 38 U.S.C. 106 requires that determinations for any applicant group be based on (1) regulations prescribed by the Secretary, and (2) a full review of the historical records and any other evidence pertaining to the service of any such group. In promulgating the DFARS, DoD has issued a regulation prescribed by

the Secretary. This DoD regulation establishes the historical record that shall be used in future review of the historical evidence surrounding a contractor's service under this clause. DoD policy is that contractors operating under this clause shall not be attached to the armed forces in a way similar to the Women's Air Forces Service Pilots of World War II. Contractors today are not being called upon to obligate themselves in the service of the country in the same way as the Women's Air Forces Service Pilots or any of the other groups listed in 38 U.S.C. 106.

#### 5. Weapons (252.225-7040(j))

##### a. Nature of the Authorized Weapons

*Comment:* One respondent stated there is no reasonable limitation on the nature of the weapons that a contractor is to handle, whether as a "self-defense" contractor or a private security contractor. This range could include anything from small arms to major weapons systems.

*DoD Response:* The possible situations are too numerous to permit prescription of specific weapons for each situation. However, it is unlikely that a contractor would attempt to bring a major weapon system onto the battlefield, or that the combatant commander would authorize such weapons.

##### b. Combatant Commander Rules on the Use of Force

*Comment:* One respondent stated that there is no reasonable means by which a combatant commander can generate rules regarding the use of force by contractors. The respondent further stated that the rules must be related to doctrine, dogma, rules of engagement, etc., and these are formulated well above the level of the combatant commander. Since the rules may be different, contractor personnel would be subject to a range of serious risks and liabilities.

*DoD Response:* It is the authority of the combatant commander to perform those functions of command over assigned forces involving organizing and employing commands and forces; assigning tasks; designating objectives; and giving authoritative direction over all aspects of military operations, joint training, and logistics necessary to accomplish the missions assigned. Operational control is inherent in combatant command (command authority) and, therefore, provides full authority to organize and employ commands and forces as the combatant commander considers necessary to accomplish assigned missions. The

combatant commander also establishes rules of engagement in the designated operational area, and does take into consideration many influences such as doctrine. The combatant commander will seek advice from experts in areas such as law and security before making such decisions. Since the rules regarding contractor authorization to carry firearms will vary according to the phase of the conflict, the combatant commander is the most informed and able individual to determine whether a contractor should carry weapons.

##### c. Law of Armed Conflict Issues

*Comment:* One respondent stated that the notion that the Government assumes no responsibility whatsoever for the use of weapons on a battlefield by a contractor authorized and required to use such weapons, as the practical effect of the contract requirements, makes no sense and is certain to cause contractual law of armed conflict and other problems.

*DoD Response:* There have been no issues on the law of armed conflict for contractors carrying weapons, because in the current conflicts there are no enemy armed forces that are lawful combatants and no enemy government to provide them prisoner of war status and protections if captured. DoD also notes that, at the beginning of the current conflict, contractors were not permitted to carry weapons at all. During the post-major operations phase, civilian contractors that have been brought in for a variety of security operations are authorized (and required) to provide their own weapons. The obvious safety/security issues connected with carrying a weapon far outweigh any theoretical issues.

##### d. Liability for Use of Weapons

*Comment:* Several respondents expressed concern that the Government authorizes and sometimes requires contractor personnel to carry weapons, but that it places sole liability for the use of weapons on contractors and contractor personnel, even if the contractor was acting in strict accordance with the contract statement of work or under specific instructions from the contracting officer or the combatant commander (252.225-7040(j)(4)). One respondent considered that statement to be inconsistent with prior regulatory history, citing the statement in the preamble to the final DFARS rule published on May 5, 2005 (70 FR 23792), that "risk associated with inherently Governmental functions will remain with the Government."

*DoD Response:* While a contractor may be authorized to carry and use

weapons, the contractor remains responsible for the performance and conduct of its personnel. A contractor has discretion in seeking authority for any of its employees to carry and use a weapon. The contractor is responsible for ensuring that its personnel who are authorized to carry weapons are adequately trained to carry and use them safely, adhere to the rules on the use of force, comply with law and agreements, and are not barred from possession of a firearm. Inappropriate use of force could subject a contractor or its subcontractors or employees to prosecution or civil liability under the laws of the United States and the host nation. The Government cannot indemnify a contractor and its personnel against claims for damages or injury or grant immunity from prosecution associated with the use of weapons. With regard to the statement on inherently governmental functions, this rule does not authorize contractors to perform any inherently governmental functions.

#### 6. Risk/Liability to Third Parties/Indemnification (252.225-7040(b)(2))

*Comment:* Many respondents expressed concern that the DFARS rule shifts to contractors all risks associated with performing the contract, and may lead courts to deny contractors certain defenses in tort litigation. The respondents cited decisions by State and Federal courts arising out of injuries or deaths to third parties, including military members and civilians. Generally, the courts absolved contractors of liability to third parties where the Government carried ultimate responsibility for the operation. For example—

○ In *Smith v. Halliburton Co.*, No. H-06-0462, 2006 WL 1342823 (S.D. Tex. May 16, 2006) and *Whitaker v. Kellogg Brown & Root, Inc.*, No. 05-CV-78, 2006 WL 1876922 (M.D. Ga. July 6, 2006), the courts found there was no risk and no liability associated with contractor performance when active duty military members were injured in situations where the military (or the injured member himself) was responsible for force protection of military members.

○ In *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), the contractor bore no risk and no liability for military decisions aboard the U.S.S. Vincennes to shoot down an approaching aircraft during a time of war, and the contractor had no responsibility to design or manufacture the Aegis weapon system to prevent such use by military members.

Some respondents expressed concern that the acceptance of risk may preclude

grants of indemnification. One respondent stated that the rule could adversely affect indemnification that would otherwise be available. The clause at FAR 52.228-7, Insurance-Liability to Third Persons, provides limited indemnification, but provides that contractors shall not be reimbursed for liabilities for which the contractor is otherwise responsible under the express terms of any clause specified in the Schedule or elsewhere in the contract. The respondent also stated that the provisions requiring the contractor to accept certain risks and liabilities could also be the basis to deny pre- or post-award requests for indemnification under Public Law 85-804. Another respondent cited a decision by a DoD Contract Appeals Board in which the Board declined a contractor's request for indemnification under Public Law 85-804 because, according to the Board, contractors should not be able to deliberately enter into contractual arrangements with full knowledge that a risk is involved and yet propose unrealistically low prices on the hopes they may later gain indemnification. The respondents recommended that the United States either identify, quantify, and accept all the risk or insert language that would immunize contractors from tort liability. Specifically, several respondents recommended adding the statement, "Notwithstanding any other clause in this contract, nothing in this clause should be interpreted to affect any defense or immunity that may be available to the contractor in connection with third-party claims, or to enlarge or diminish any indemnification a contractor may have under this contract or as may be available under the law." There was also concern that, by accepting all risks of performance, contractors would not be able to obtain workers compensation insurance or reimbursement under the Defense Base Act. One respondent recommended that the contractor's share of risk in the rule be revised as follows: "Except as otherwise provided in the contract, the Contractor accepts the risks associated with required contract performance in such operations."

*DoD Response:* DoD believes that the rule adequately allocates risks, allows for equitable adjustments, and permits contractors to defend against potential third-party claims. Contractors are in the best position to plan and perform their duties in ways that avoid injuring third parties. Contractors are equally or more responsible to research host nation laws and proposed operating environments and to negotiate and price the terms of each contract effectively.

Accordingly, the clause retains the current rule of law, holding contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors. This is consistent with existing laws and rules, including the clause at FAR 52.228-7, Insurance-Liability to Third Persons, and FAR Part 50, Extraordinary Contractual Actions, as well as the court and board decisions cited in the comments. The current law regarding the Government Contractor Defense (e.g., the line of cases following *Boyle v. United Technologies*, 487 U.S. 500, 108 S. Ct. 2510 (1988)) extends to manufacturers immunity when the Government prepares or approves relatively precise design or production specifications after making sovereign decisions balancing known risks against Government budgets and other factors in control of the Government. This rule covers service contracts, not manufacturing, and it makes no changes to existing rules regarding liability. The public policy rationale behind *Boyle* does not apply when a performance-based statement of work is used in a services contract, because the Government does not, in fact, exercise specific control over the actions and decisions of the contractor or its employees or subcontractors. Asking a contractor to ensure its employees comply with host nation law and other authorities does not amount to the precise control that would be requisite to shift away from a contractor's accountability for its own actions. Contractors will still be able to defend themselves when injuries to third parties are caused by the actions or decisions of the Government. However, to the extent that contractors are currently seeking to avoid accountability to third parties for their own actions by raising defenses based on the sovereignty of the United States, this rule should not send a signal that would invite courts to shift the risk of loss to innocent third parties. The language in the clause is intended to encourage contractors to properly assess the risks involved and take proper precautions. However, to preclude the misunderstanding that asking the contractor to "accept all risks" is an attempt to shift all risk of performance to the contractor without regard to specific provisions in the contract, the statement in the rule regarding risk has been amended to add the lead-in phrase, "Except as otherwise provided in the contract".

## 7. Definition of Terms (252.225-7040(a))

### a. Theater of Operations

*Comment:* One respondent stated that the term "theater of operations" is unwarranted by any legitimate purposes suggested by the rule, and that this term, if defined at all, should rest in the hands of the President or the Secretary of Defense.

*DoD Response:* The term was included in the interim rule because it defined the geographic area to which the clause was applicable. The combatant commander has the authority to define a "theater of operations" within the geographic area for which the combatant commander is responsible. However, consistent with DoD Joint Publication 3-0, Joint Operations, DoD has determined that the term "designated operational area" is more appropriate to describe the applicability of the rule, as this term includes the theater of operations as well as such descriptors as theater of war, joint operations area, amphibious objective area, joint special operations area, and area of operations. Therefore, the term "theater of operations" has been replaced with the term "designated operational area" throughout the rule.

### b. Other Military Operations

*Comment:* Two respondents noted that the term "other military operations" is very broadly defined. One respondent stated that the term is either over-expansive, or unnecessary, because it is so inclusive as to suggest nearly any type of military engagement likely to be carried out in the first half of the current century.

*DoD Response:* DoD agrees that the definition was very broad, because it was intended to cover every type of military operation. Since the final rule applies to "other military operations" only when designated by the combatant commander, definition of this term is no longer necessary and has been excluded from the final rule.

## 8. Terms Not Defined

### a. Enemy Armed Forces

*Comment:* Two respondents objected to the use of the term "enemy armed forces" in the rule without definition.

*DoD Response:* The term "enemy armed forces" has been excluded from the final rule.

### b. "Law of War," "Law of War Protections," and "Take Direct Part in Hostilities"

*Comment:* One respondent stated that terms of art such as "law of war," "law of war protections," and "take direct part in hostilities" are not defined in the

rule and likely cannot be defined satisfactorily in the DFARS. The respondent further stated that understanding the concepts underlying these terms is crucial to preparing statements of work for and administering contracts that will send contractor employees into hostile environments. Therefore, the respondent recommended that the DFARS text include some discussion of these terms and the need for contracting personnel to seek advice when dealing with these terms.

*DoD Response:* DoD agrees that these terms cannot be defined satisfactorily in the DFARS and has removed the terms from the final DFARS rule. However, DoD is developing law of war training that will be available to contractor personnel.

c. "Mission Essential," "Essential Contractor Services," "Security Support," "Security Mission," "Security Plan," "Mandatory Evacuation," and "Non-Mandatory Evacuation"

*Comment:* Two respondents stated that the interim rule used these terms, which are not defined, and, except for "essential contractor services" and "security plan," are not used in DoD Instruction 3020.41. The respondents considered these terms critical to the contractor in determining and pricing its obligations under a solicitation and resulting contract.

*DoD Response:* "Mission essential" is the term used in DoD Instruction 3020.37, Continuation of Essential DoD Contractor Services During Crises. "Essential contractor services" is defined in DoD Instruction 3020.41. The Government identifies the mission essential personnel and essential contractor services to the contractor, so it is unnecessary to define these terms in the DFARS. "Security support" and "security mission" are used with their common dictionary meaning; however, the terms and conditions of the contract will define the mission and will also specify if security support will be provided. DoD Instruction 3020.41, paragraph 6.3.4, addresses the requirements for a security plan. Since the combatant commander prepares the security plan, these requirements do not need to be repeated in the DFARS. It is also unnecessary to define "mandatory evacuation" and "non-mandatory evacuation" in the DFARS, as these terms are used with their common dictionary meaning, and the Government will identify any evacuation order as mandatory or non-mandatory. The contractor will be given appropriate instructions in the event an evacuation order is issued.

### 9. Scope of Application

#### a. Commercial Items

*Comment:* One respondent expressed concern that DFARS 212.301(f) requires application of the contract clause across-the-board to commercial items. The respondent recommended that the clause apply only if the acquisition of commercial items is for performance of contractor personnel outside the United States in a covered theater of operations.

*DoD Response:* DoD agrees that the clause should apply only if the acquisition of commercial items is for performance of contractor personnel outside the United States in a designated operational area. However, the respondent has misinterpreted the requirement at DFARS 212.301(f)(vii). This paragraph states that the clause at DFARS 252.225-7040 is to be used in accordance with the prescription at DFARS 225.7402-4, which specifies the criteria for use of the clause.

#### b. Military Operations and exercises

*Comment:* One respondent expressed concern regarding application of the rule to a wide range of military operations and exercises that do not require special treatment. The rule prescribes use of the clause when contractor personnel will be required to perform outside the United States in a theater of operations during "other military operations" or "military exercises designated by the combatant commander." The respondent recommended that the final rule include criteria for when the combatant commander should invoke the authority to require use of the clause.

*DoD Response:* DoD has amended the rule to clarify that "designated by the combatant commander" applies to military operations as well as military exercises. However, DoD does not consider it appropriate for the DFARS to prescribe criteria to the combatant commander for use of the clause. The combatant commander is in the best position to determine whether the circumstances in a designated operational area warrant use of the clause. In addition, the final rule clarifies that any of the types of military operations covered by the scope of the rule may include stability operations.

#### c. Designation of Specific Geographic Area

*Comment:* One respondent questioned whether the combatant commander should designate a specific geographic area for applicability of the clause.

*DoD Response:* DoD believes that the scope of the DFARS clause sufficiently defines the area of applicability. The

designated operational area is a specific geographic area, defined by the combatant commander or the subordinate joint force commander for the conduct or support of specified military operations.

### 10. Logistical and Security Support (225.7402-3 and 252.225-7040(C))

#### a. Lack of Force Protection Represents a Change in Policy

*Comment:* Two respondents stated that the lack of committed force protection represents a drastic change in policy for contractors accompanying U.S. Armed Forces. Another respondent considered that this is the penultimate paragraph in the transfer of responsibility for force protection from the military to contractors, and that it is ill-considered. One of the respondents noted that, prior to the interim rule, the DFARS required the combatant commander to develop a security plan for protection of contractor personnel through military means unless the terms of the contract placed the responsibility with another party. That respondent strongly opposed the changes made by the interim rule, which limit the requirement for the combatant commander to develop a security plan to those locations where there is not sufficient or legitimate civil authority and where the commander decides the provision of security is in the interests of the Government. The respondent stated that this reversal of policy will—

(1) Have a significant impact on the ability of contractors to provide future support to DoD (bid/proposal costs will reflect higher costs related to the contractor's assumption of security costs);

(2) Have a direct effect on systems contractors supporting major weapons systems; and

(3) Substantially increase contract prices.

The respondent also cited DoD Joint Publication 4-0, Chapter V, and Enclosure 2 to DoD Instruction 3020.41 as support for the statements that DoD affirmatively had the obligation to provide force protection for contractors providing direct support to the military. Another of the respondents questioned how the decision that DoD presumably will not provide a security plan is consistent with protecting contractor resources vital to accomplishing the U.S. mission.

*DoD Response:* In most areas of the world, it is the responsibility of the host nation to provide protection for civilians working in their country. It is clearly unnecessary for the combatant commander to prepare a security plan in

locations where there is sufficient legitimate civil authority. The added provisions are from DoD Instruction 3020.41, which provides that the combatant commander must decide that to provide security is in the interests of the Government. The combatant commander is in the best position to judge the circumstances in the designated operational area and what resources are available to him and to the contractors. The writers of the regulations cannot commit the U.S. Armed Forces to provide protection to contractor personnel performing in areas of conflict, beyond what is provided for in DoD Instruction 3020.41. With regard to the reference to DoD Joint Publication 4-0, Chapter V, this chapter (paragraph 13a.) specifically states that force protection responsibility for DoD contractor employees is a contractor responsibility, unless valid contract terms place that responsibility with another party. With regard to the reference to Enclosure 2 to DoD Instruction 3020.41, the definition of "Contractors Deploying with the Force" in Enclosure 2 states that contractors deploying with the force usually receive Government-furnished support similar to DoD civilians. This statement addresses logistics support, not force protection.

The rule does not state that the combatant commander will not provide a security plan. The rule specifically states that the combatant commander will provide a security plan for protection of contractor personnel in locations where there is not sufficient legitimate civil authority and the combatant commander decides it is in the interests of the Government to provide security, especially if threat conditions necessitate security through military means. The rule focuses the application of limited resources in those situations where most needed.

#### b. Timing of Disclosure

*Comment:* One respondent stated that timing of the disclosure of agency support could impact an offeror's proposal costs and recommended that, at a minimum, agencies be required to include support information, not just in the contract, but also in the solicitation. Another respondent stated that the solicitation should specify whether DoD will provide a security plan. Contractors need sufficient time to decide whether they want to bear the additional risk of performance or make suitable arrangements with a private security firm or its own personnel. A third respondent requested that the final rule clarify whether a security plan, if any,

will be developed prior to the release of the solicitation.

*DoD Response:* DoD agrees that the timing of the disclosure of the agency's decision to provide or not provide support could have an impact on proposal costs. Therefore, DFARS 225.7402-3(c) has been amended to add a requirement for identification of this information in the solicitation.

#### c. Changes in Government-Provided Support

*Comment:* One respondent recommended that any changes to Government-provided security support should expressly require an equitable adjustment to the contract.

*DoD Response:* DoD does not believe it is necessary to expressly address this issue in the DFARS rule. Any need for equitable adjustment will be evaluated in accordance with the Changes clause included in the contract.

#### d. Agency/Combatant Commander Cannot Know if Adequate Support is Available

*Comment:* One respondent commented that one of the conditions precedent to Government support is a determination by the Government that adequate support cannot be obtained by the contractor from other sources. The respondent stated that, whether or not competitors can obtain adequate support from other sources is outside of an agency's knowledge and that this kind of knowledge involved marketplace issues that vary significantly by the size and experience of the contractor. The respondent also stated that two of the three key elements of the combatant commander's decision required by the DFARS rule are outside of his expertise and scope of knowledge—namely whether the specific contractor can obtain effective security services and whether effective security services are available at a reasonable price.

*DoD Response:* DoD does not agree that the Government would not be able to determine whether the contractor was able to obtain adequate support from other sources. The Government official/ combatant commander would not be making a decision in a vacuum, but would have staff to perform necessary market research and consult with the contractor as necessary. The final rule contains an amendment at 225.7402-3(b)(2) to include "reasonable cost" as a criterion for contractor-obtained support, consistent with the language at 252.225-7040(c)(1)(i)(B).

#### e. Security Costs Should Be a Cost-Reimbursement Line Item

*Comment:* One respondent stated that security costs should be a cost-reimbursement line item, even in a fixed-price contract, or should provide for equitable adjustment to reflect material changes in the threat environment.

*DoD Response:* In accordance with FAR 16.103, selecting the appropriate contract type is generally a matter of negotiation and requires the exercise of sound judgment. The contractor's responsibility for the performance costs and the profit/fee incentives offered are tailored to the uncertainties involved in contract performance. While DoD acknowledges that there may be a high degree of uncertainty in the costs for security, the determination of how to handle that uncertainty is a matter of negotiation rather than regulation.

#### f. Shift Mid-Stream

*Comment:* One respondent stated that existing contracts with military force protection could be impacted midstream by the DFARS rule and that contractors will be required to either shift their work plan and price such changes accordingly or decline the work.

*DoD Response:* This rule does not impact existing contracts. DoD does not plan to retroactively modify contracts. If the combatant commander has established a security plan and is currently providing force protection, there is no reason to believe that this rule would result in a change to the existing arrangements.

#### g. Firms Unwilling To Bid

*Comment:* One respondent stated that many firms, aware that they might no longer be provided military force protection, might decline new overseas DoD work due to the often dangerous or austere conditions.

*DoD Response:* The conditions are often dangerous or austere, and military protection may not be available. If firms are unwilling to cope with such conditions, they should not bid.

#### h. Insufficient Infrastructure

*Comment:* Regarding non-security support, one respondent noted that paragraph (c)(3) of the DFARS clause states that, unless specified elsewhere in the contract, the contractor is responsible for all other support required for its personnel engaged in a theater of operations. The respondent further noted that, in some theaters of operations, the local infrastructure might be insufficient or the military situation may limit or restrict the

contractor's ability to provide such support.

*DoD Response:* Because of such difficulties, the DFARS clause provides for logistical support when such support is needed to ensure continuation of essential contractor services and the contractor cannot obtain adequate services. However, the contractor cannot assume that such services will be provided unless it has been arranged and is specified in the contract.

i. Provision of Care

*Comment:* One respondent noted that paragraph (c)(2)(i) of the DFARS clause states that all contractor personnel "may be provided" certain types of care. The respondent expressed concern that this paragraph implies there is discretion not to provide such care, but with no guidance as to how this discretion is to be exercised. The respondent recommended revision of the phrase "may be provided" to "are authorized to receive."

*DoD Response:* There was no intent to imply that access to such care would be denied, but rather that DoD could not commit to providing it in all circumstances. The phrase has been revised as recommended by the respondent.

11. Compliance With Laws, Regulations, Directives (252.225-7040(d))

a. Lack of Access to Necessary Information on Laws, Regulations, and Directives

Paragraph (d) of the DFARS clause requires the contractor to comply with, and ensure that its deployed personnel are familiar with and comply with, all applicable laws, rules, and regulations, including those of the host country, all treaties and international agreements, all U.S. regulations, and all orders, directives, and instructions issued by the combatant commander.

*Comment:* One respondent stated that rarely will contractors, let alone offerors, have access to any (and certainly not all) relevant orders, directives, instructions, policies, and procedures of the combatant commander, even in those narrow functional areas specified in the clause. The respondent also states that frequently a contractor is asked to deploy to countries or areas of the world on short notice without extended advance notice and without meaningful access to information on relevant foreign and local laws.

*DoD Response:* Paragraph (d) of the DFARS clause reinforces the existing obligation for contractor personnel to comply with the laws and regulations

applicable to the contract. Contractors have access to all of these laws and regulations, and country studies are available online at <http://www.state.gov>. Therefore, a contractor may ascertain on its own the laws and regulations necessary to comply with paragraph (d) of the clause. In addition, a contractor supporting contingency operations should have access to any orders, directive, instructions, policies, and procedures of the combatant commander that affect contract performance in the designated operational area. The Web site at [http://www.acq.osd.mil/dpap/pacc/cc/areas\\_of\\_responsibility.html](http://www.acq.osd.mil/dpap/pacc/cc/areas_of_responsibility.html) links directly to individual combatant commands and countries to provide the information necessary for operating in that area.

b. Varying Need for Extensive Information

*Comment:* One respondent stated that deployed employees may have no need for certain types of information that are unrelated to their specific work assignments.

*DoD Response:* The DFARS clause only requires knowledge of applicable laws and regulations. If certain laws or regulations are not applicable to particular employees, the information provided to those employees should be tailored as appropriate.

c. Inconsistency Between U.S. Laws and Host or Third Country National Laws

*Comment:* One respondent recommended that the DFARS clause address how U.S. contractors are to resolve conflicts between compliance with U.S. law and any inconsistent host or third country national laws. Another respondent recommended establishment of an order of precedence among the contract, statement of work, DFARS clauses, DoD instructions and directives, and combatant commander orders (written or oral).

*DoD Response:* DoD does not agree with the recommended changes. The resolution of conflicts between U.S. and host or third country national laws must be analyzed on a case-by-case basis and, therefore, is beyond the scope and intent of the regulations. Also, paragraph (d) of the DFARS clause is a reminder of the existing obligation to comply with the applicable laws, regulations, and international agreements specified therein. It is the contractor's responsibility to make the best possible interpretations and determinations when deciding which law or regulation takes precedence in the event of a conflict. With regard to

the orders of the combatant commander, see the following paragraph.

d. Authority of the Combatant Commander

*Comment:* One respondent expressed concern that the broad authority in paragraph (d)(4) of the DFARS clause would allow the combatant commander to become unduly involved in the contracting process. In addition, this paragraph could be interpreted as empowering combatant commanders to issue instructions for individual contracts on a wide spectrum of matters.

*DoD Response:* Paragraph (d)(4) of the clause is a reminder of the existing obligation for contractor personnel to comply with laws and regulations applicable to the contract. It does not provide new authority for combatant commanders to direct the contracting activities of other Government agencies. However, paragraph (d)(4) has been amended to clarify that only the contracting officer is authorized to modify the terms and conditions of the contract.

e. Ensure That the Statement of Work Does Not Violate Host Nation or International Law

*Comment:* One respondent stated that the rule should direct the contracting officer to ensure that the statement of work does not require the contractor to violate host nation or international law. This would be consistent with many provisions in DoD Instruction 3020.41 that the DFARS rule omits.

*DoD Response:* The requiring activity and the combatant commander have primary responsibility for the statement of work, and they must follow the requirements of DoD Instruction 3020.41. Therefore, it is unnecessary to repeat this requirement in the DFARS.

12. Preliminary Personnel Requirements (252.225-7040(e))

a. Immunizations

*Comment:* One respondent recommended that contractors be required to comply with immunization requirements to the "best of their knowledge" rather than requiring that they be aware of all such requirements, since they may not have ready access to all of the vaccines, documents, and medical and physical requirements that may be applicable to a specific deployment.

*DoD Response:* Contractors should be aware of all immunization requirements, since the Government is required to provide specific information in the contract regarding those requirements.

## b. Foreign Visas

*Comment:* One respondent stated that contractors should not have to obtain foreign government approval through entrance or exit visas before implementing a contract.

*DoD Response:* DoD does not have the authority to waive the visa requirements of foreign governments. If a contractor is experiencing problems obtaining any necessary visas, it should advise the contracting officer so that the U.S. Government can assist if possible.

## c. Isolated Personnel Training

*Comment:* One respondent requested explanation of the phrase "isolated personnel training."

*DoD Response:* "Isolated personnel training" refers to training for military or civilian personnel who may be separated from their unit or organization in an environment requiring them to survive, evade, or escape while awaiting rescue or recovery. For additional clarity, paragraph (e)(1)(vi) of the DFARS clause has been amended to add a reference to DoD Instruction 1300.23, Isolated Personnel Training for DoD Civilian and Contractors.

## 13. Personnel Data List (252.225–7040(g))

*Comment:* One respondent questioned whether the Privacy Act will apply to the implementation of a personnel database.

*DoD Response:* The Privacy Act (5 U.S.C. 552a) applies to any system of records established by the Government. The final rule designates the Synchronized Predeployment and Operational Tracker (SPOT) as the applicable system for maintaining data on deployed personnel. The **Federal Register** notice for the SPOT system, as required by the Privacy Act, was published at 70 FR 56646 on September 28, 2005.

## 14. Changes (252.225–7040(p))

## a. Expansion of Changes Clause

*Comment:* One respondent stated that paragraph (p) of the DFARS clause represented an unnecessary sweeping expansion of the standard FAR "Changes" clause; and that the standard clause is limited for important reasons, one of which is to ensure that Government contracts remain within clearly defined scopes. Another respondent stated that inclusion of change in place of performance in paragraph (p) could be interpreted to require a contractor to move from Iraq to Kuwait or from East Timor to Lebanon. Although the respondent strongly supported the premise that

changes are subject to the Changes clause and, therefore, subject to equitable adjustment when appropriate, the respondent also recommended that an equitable adjustment be explicitly required.

*DoD Response:* DoD does not consider paragraph (p) of the DFARS clause to be a sweeping change, since it is patterned after the standard Changes clause for construction contracts, which includes changes in site performance. Because this DFARS clause is not limited to construction contracts, the more generic term "place of performance" was substituted for "site." The Changes clause requires that changes be within the scope of the contract and that equitable adjustment be provided when appropriate. Since paragraph (p) of the DFARS clause states that any change order will be subject to the Changes clause, it is not necessary to repeat the principles of the Changes clause in the DFARS clause.

## b. Interim Rule Preamble

*Comment:* One respondent stated that the description of the changes to paragraph (p) of the DFARS clause, in the preamble to the interim rule published at 71 FR 34826 on June 16, 2006, was not accurate, because it only addressed place of performance, when the changes also included Government-furnished facilities, equipment, material, and services.

*DoD Response:* The preamble accurately described the changes made by the interim rule published on June 16, 2006. The references to Government-furnished facilities, equipment, material, and services were already in the clause prior to the interim rule.

## 15. Subcontract Flowdown (252.225–7040(q))

## a. Obligation and Role of the Parties

*Comment:* Two respondents recommended that the Government more clearly state what parts of the clause are to flow down and whether, for each provision, the contractor is to act in the Government's stead.

*DoD Response:* The language in paragraph (q) of the DFARS clause is consistent with the language normally included in FAR/DFARS clauses requiring flowdown of requirements to subcontractors. The specific language "shall incorporate the substance of this clause" is intended to allow latitude in correctly stating the relationship of the parties. The Government does not have privity of contract with subcontractors.

## b. Flowdown of Support

*Comment:* One respondent, while not objecting to the policy for subcontract

flowdown, questions the ability of the prime contractor to flow down provisions to subcontractors that have the effect of committing the Government to undertake affirmative support of each subcontractor (including third country national firms) retained to provide support.

*DoD Response:* The provision for flowdown of the clause to all subcontracts where subcontractor personnel are authorized to accompany U.S. Armed Forces outside the United States reflects the intent that resuscitative care, stabilization, hospitalization at level III military treatment facilities, and assistance with patient movement in certain emergencies is authorized for such subcontractor personnel. The Government has no privity of contract with subcontractors. Therefore, all parts of the clause should be flowed down to subcontractors to ensure that subcontractors supporting deployed forces receive appropriate coverage. With regard to other types of support, the contract will specify what support will be provided and to whom.

## c. Flowdown to Private Security Contractors

*Comment:* One respondent expressed concern that flowing down the clause to private security contractors means that a prime contractor can authorize a subcontractor to use deadly force.

*DoD Response:* Although the prime contractor flows down clause requirements, use of deadly force is always subject to the authority of the combatant commander, who authorizes the possession of weapons and the rules for their use.

## 16. Defense Base Act

*Comment:* One respondent stated that "self-defense contracts" and private security contracts continue, as a matter of law, to include compliance with the Defense Base Act; and that, with the interim rule's expansion of the functions to be performed by contractor personnel, it becomes unclear that coverage under the Defense Base Act will be available to contractors.

*DoD Response:* The DFARS rule does not expand functions to be performed by contractor personnel. In addition, the courts have determined that the Defense Base Act applies to any overseas contract that has a nexus to either a national defense activity or a facility construction or improvement project. DoD's private security contracts fall within Defense Base Act coverage, as they are services to be performed outside the United States and relate to national defense activities. DoD

includes the clause at FAR 52.228-3, Workers' Compensation Insurance (Defense Base Act), in all service contracts to be performed entirely or in part outside the United States and in supply contracts that require the performance of employee services overseas. Defense Base Act coverage exists as long as contract performance falls within the scope of the statutory requirements. This DFARS rule does not change or preclude Defense Base Act coverage. If there is concern about the unavailability of Defense Base Act coverage because of the high cost of insurance or unwillingness of insurance providers when high risk is involved, activities such as the Army Corps of Engineers have negotiated arrangements with insurance companies to make insurance available to contractors. Also, the Government will reimburse insurance companies for expenses incurred relating to war hazards, the biggest risk.

*Comment:* One respondent expressed concern that, by accepting all risks of performance, contractors would not be able to obtain workers compensation insurance or reimbursement under the Defense Base Act.

*DoD Response:* The statement regarding risk at 252.225-7040(b)(2) was intended to reinforce the general rule that the contractor is responsible for fulfilling its contractual obligations, even in dangerous and austere conditions. It was not intended to conflict with any other provisions of the contract. For clarity, the introductory phrase, "Except as provided elsewhere in the contract," has been added to the statement as requested by the respondent.

#### 17. Basis and Need for DFARS Rule

##### a. DoD Instruction 3020.41, Contractor Personnel Authorized To Accompany the U.S. Armed Forces

*Comment:* One respondent considered that the interim DFARS rule was written in response to DoD Instruction 3020.41, but that the legal and policy predicate of the instruction is unclear. The instruction follows by only 5 months the predecessor DFARS rule. In turn, the earlier changes had themselves been predicated on DoD Instruction 3020.37, Continuation of Essential DoD Contractor Services During Crises.

*DoD Response:* The predecessor DFARS rule was published at 70 FR 23790 on May 5, 2005, and was not predicated on DoD Instruction 3020.37. That rule was developed by DoD specialists familiar with the problems occurring with contracts requiring contractor personnel to accompany U.S.

Armed Forces deployed overseas. When the DFARS rule was published on May 5, 2005, DoD Instruction 3020.41 was still in draft form. The drafters of the DFARS rule worked closely with the drafters of DoD Instruction 3020.41 to achieve maximum consistency. When DoD Instruction 3020.41 was published on October 3, 2005, it contained changes that had not been anticipated when the DFARS rule was published. Therefore, DoD issued an interim DFARS rule on June 16, 2006, to incorporate the additional changes included in DoD Instruction 3020.41.

##### b. DoD Directive 2311.01E, DoD Law of War Program

*Comment:* One respondent stated that the DFARS rule is not consistent with DoD Directive 2311.01E, particularly sections 5.7.2 and 5.7.4.

*DoD Response:* DoD has reviewed these sections of the DoD Instruction and has found no inconsistencies. Section 5.7.2 requires heads of DoD components to institute and implement effective programs to prevent violations of the law of war. Section 5.7.4 requires that contract work statements for contractors comply with DoD Directive 2311.01E and DoD Instruction 3020.41 and require contractors to institute and implement effective programs to prevent violations of the law of war by their employees and subcontractors, including law of war training. DoD is presently preparing training for contractors law of war and is drafting DFARS changes to incorporate contractor training requirements (73 FR 1853, January 10, 2008).

##### c. Need for Separate DFARS Rule With Unique Requirements

*Comment:* One respondent stated that there should be a single coherent regulation generated that does not devolve combat activities on civilian contractors. In addition, the respondent stated that the fact that the DFARS changes have been made effective in advance of the proposed FAR changes suggest that the deviation requirements of FAR Subpart 1.4 may have been violated. Another respondent stated that there are inconsistencies between the requirement applicable to contractors accompanying the U.S. Armed Forces and those for all other contractors.

*DoD Response:* Neither the FAR nor the DFARS rule devolves combat activities on civilian contractors. Both rules are needed because of essential differences between contractors that are authorized to accompany the U.S. Armed Forces deployed outside the United States and all other contractors that are performing in a designated

operational area or supporting a diplomatic or consular mission, whether under contract with DoD or a civilian agency. In addition, the requirements of FAR Subpart 1.4 have not been violated. In accordance with FAR 1.401(f), deviation requirements do not apply to policies or procedures that have been incorporated into agency acquisition regulations in accordance with 1.301(a).

##### d. Need for Interim DFARS Rule

*Comment:* Several respondents questioned the need for an interim rule, providing no opportunity for public comment prior to putting these changes into effect. One respondent added that, to the extent that any of the protocols specified in the interim rule have become essential, there is considerable evidence that those protocols have been in use for two or more years.

*DoD Response:* DoD considered it imperative to amend the DFARS rule to correct the inconsistencies with DoD Instruction 3020.41. Also, the fact that personnel are finding it necessary to take action without regulatory coverage provides more, not less, reason to issue the regulations necessary to provide structure and boundaries for such activities.

#### 18. Information Collection Requirements

*Comment:* One respondent stated that the rule would impose substantial information collection requirements on the contracting communities, suggesting that transmogrification of battlefield contractors into combatants portends huge increases in their information collection and management responsibilities that are anything but usual and customary and are well outside the normal course of business.

*DoD Response:* DoD does not agree that the rule provides for transmogrification of battlefield contractors into combatants or requires huge increases in their information collection and management responsibilities. Although the rule requires contractors to establish and maintain a current list of contractor personnel in the area of performance with a designated Government official, such information should be routinely maintained by the contractor as part of the contractor's personnel data base.

#### 19. Additional Changes

The final rule also includes the following changes:

- Addition of Subpart 225.3 to supplement the final FAR rule published at 73 FR 10943 on February 28, 2008. The DFARS subpart: (1) Clarifies the meaning of the term

“performance in a designated operational area”; (2) specifies that, for DoD, FAR 25.301 also applies to personal services contracts, since DoD does not have the same authorities as the civilian agencies with regard to personal services contractors; (3) provides that the clause at FAR 52.225–19 will not be used in solicitations and contracts when all contractor personnel performing outside the United States will be covered by the clause at 252.225–7040; and (4) specifies the automated system for use in maintaining DoD contractor personnel data under the clause at FAR 52.225–19.

○ At 225.7402–4(a), clarification that the contract clause applies to solicitations and contracts that “authorize” contractor personnel to accompany U.S. Armed Forces deployed outside the United States. This is consistent with the terminology used in 225.7402–1, Scope.

○ Revision of 252.225–7040(e)(2)(iv) to reflect the provisions of Section 552 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364), which amended 10 U.S.C. 802(a)(10) to make the Uniform Code of Military Justice applicable to persons accompanying the U.S. Armed Forces in a contingency operation.

○ Amendment of 252.225–7040(h)(1) to clarify that the contracting officer may direct the contractor to remove and replace contractor personnel who fail to comply with or violate applicable contract requirements.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

## B. Regulatory Flexibility Act

DoD has prepared a final regulatory flexibility analysis consistent with 5 U.S.C. 604. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows:

This rule amends the DFARS to implement DoD Instruction 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces. The objective is to provide consistent policy and a standard clause applicable to DoD contracts that authorize contractor personnel to accompany U.S. Armed Forces deployed outside the United States. Application of the rule is limited to entities with DoD contracts that authorize contractor personnel to accompany U.S. Armed forces deployed outside the United States in contingency operations, humanitarian or peacekeeping operations, or other military operations or military exercises when designated by the combatant

commander. The rule requires contractors to maintain data on its personnel that are authorized to accompany U.S. Armed Forces deployed outside the United States, and designates the Synchronized Predeployment and Operational Tracker (SPOT) web-based system for entering of the data. No special skills are required for use of the SPOT system, and the information that must be entered into the system is of the type that a contractor would normally maintain with regard to its personnel.

## C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any 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 Parts 212, 225, and 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Accordingly, the interim rule amending 48 CFR parts 212, 225, and 252, which was published at 71 FR 34826 on June 16, 2006, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 212, 225, and 252 continues to read as follows:

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

## PART 225—FOREIGN ACQUISITION

■ 2. Subpart 225.3 is added to read as follows:

### Subpart 225.3—Contracts Performed Outside the United States

Sec.

225.301 Contractor personnel in a designated operational area or supporting a diplomatic or consular mission outside the United States.

225.301–1 Scope.

225.301–4 Contract clause.

### Subpart 225.3—Contracts Performed Outside the United States

**225.301 Contractor personnel in a designated operational area or supporting a diplomatic or consular mission outside the United States.**

**225.301–1 Scope.**

(a) *Performance in a designated operational area*, as used in this section, means performance of a service or construction, as required by the contract. For supply contracts, the term includes services associated with the

acquisition of supplies (e.g., installation or maintenance), but does not include production of the supplies or associated overhead functions.

(c) For DoD, this section also applies to all personal services contracts.

### 225.301–4 Contract clause.

(1) Use the clause at FAR 52.225–19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States, in accordance with the prescription at FAR 25.301–4, except that—

(i) The clause shall also be used in personal services contracts with individuals; and

(ii) The clause shall not be used when all contractor personnel performing outside the United States will be covered by the clause at 252.225–7040.

(2) When using the clause at FAR 52.225–19, the contracting officer shall inform the contractor that the Synchronized Predeployment and Operational Tracker (SPOT) is the appropriate automated system to use for the list of contractor personnel required by paragraph (g) of the clause. Information on the SPOT system is available at <http://www.dod.mil/bta/products/spot.html>.

■ 3. Sections 225.7402 through 225.7402–4 are revised to read as follows:

### 225.7402 Contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States.

For additional information on contractor personnel authorized to accompany the U.S. Armed Forces, see PGI 225.7402.

### 225.7402–1 Scope.

(a) This section applies to contracts that involve contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States in—

(1) Contingency operations;

(2) Humanitarian or peacekeeping operations; or

(3) Other military operations or military exercises, when designated by the combatant commander.

(b) Any of the types of operations listed in paragraph (a) of this subsection may include stability operations such as—

(1) Establishment or maintenance of a safe and secure environment; or

(2) Provision of emergency infrastructure reconstruction, humanitarian relief, or essential governmental services (until feasible to transition to local government).

**225.7402-2 Definition.**

See PGI 225.7402-2 for additional information on designated operational areas.

**225.7402-3 Government support.**

(a) Government support that may be authorized or required for contractor personnel performing in a designated operational area may include, but is not limited to, the types of support listed in PGI 225.7402-3(a).

(b) The agency shall provide logistical or security support only when the appropriate agency official, in accordance with agency guidance, determines in coordination with the combatant commander that—

(1) Such Government support is available and is needed to ensure continuation of essential contractor services; and

(2) The contractor cannot obtain adequate support from other sources at a reasonable cost.

(c) The contracting officer shall specify in the solicitation and contract—

(1) Valid terms, approved by the combatant commander, that specify the responsible party, if a party other than the combatant commander is responsible for providing protection to the contractor personnel performing in the designated operational area as specified in 225.7402-1;

(2) If medical or dental care is authorized beyond the standard specified in paragraph (c)(2)(i) of the clause at 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States; and

(3) Any other Government support to be provided, and whether this support will be provided on a reimbursable basis, citing the authority for the reimbursement.

(d) The contracting officer shall provide direction to the contractor, if the contractor is required to reimburse the Government for medical treatment or transportation of contractor personnel to a selected civilian facility in accordance with paragraph (c)(2)(ii) of the clause at 252.225-7040.

(e) Contractor personnel must have a letter of authorization (LOA) issued by a contracting officer in order to process through a deployment center or to travel to, from, or within the designated operational area. The LOA also will identify any additional authorizations, privileges, or Government support that the contractor personnel are entitled to under the contract. For a sample LOA, see PGI 225.7402-3(e).

**225.7402-4 Contract clauses.**

(a) Use the clause at 252.225-7040, Contractor Personnel Authorized to

Accompany U.S. Armed Forces Deployed Outside the United States, instead of the clause at FAR 52.225-19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States, in solicitations and contracts that authorize contractor personnel to accompany U.S. Armed Forces deployed outside the United States in—

(1) Contingency operations;  
(2) Humanitarian or peacekeeping operations; or

(3) Other military operations or military exercises, when designated by the combatant commander.

(b) For additional guidance on clauses to consider when using the clause at 252.225-7040, see PGI 225.7402-4(b).

**PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 4. Section 252.225-7040 is revised to read as follows:

**252.225-7040 Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States.**

As prescribed in 225.7402-4(a), use the following clause:

**CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY U.S. ARMED FORCES DEPLOYED OUTSIDE THE UNITED STATES (MAR 2008)**

(a) *Definitions.* As used in this clause—  
*Combatant Commander* means the commander of a unified or specified combatant command established in accordance with 10 U.S.C. 161.

*Designated operational area* means a geographic area designated by the combatant commander or subordinate joint force commander for the conduct or support of specified military operations.

*Subordinate joint force commander* means a sub-unified commander or joint task force commander.

(b) *General.*

(1) This clause applies when Contractor personnel are authorized to accompany U.S. Armed Forces deployed outside the United States in—

(i) Contingency operations;  
(ii) Humanitarian or peacekeeping operations; or

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

(2) Contract performance in support of U.S. Armed Forces deployed outside the United States may require work in dangerous or austere conditions. Except as otherwise provided in the contract, the Contractor accepts the risks associated with required contract performance in such operations.

(3) Contractor personnel are civilians accompanying the U.S. Armed Forces.

(i) Except as provided in paragraph (b)(3)(ii) of this clause, Contractor personnel

are only authorized to use deadly force in self-defense.

(ii) Contractor personnel performing security functions are also authorized to use deadly force when such force reasonably appears necessary to execute their security mission to protect assets/persons, consistent with the terms and conditions contained in their contract or with their job description and terms of employment.

(iii) Unless immune from host nation jurisdiction by virtue of an international agreement or international law, inappropriate use of force by contractor personnel authorized to accompany the U.S. Armed Forces can subject such personnel to United States or host nation prosecution and civil liability (see paragraphs (d) and (j)(3) of this clause).

(4) Service performed by Contractor personnel subject to this clause is not active duty or service under 38 U.S.C. 106 note.

(c) *Support.* (1)(i) The Combatant Commander will develop a security plan for protection of Contractor personnel in locations where there is not sufficient or legitimate civil authority, when the Combatant Commander decides it is in the interests of the Government to provide security because—

(A) The Contractor cannot obtain effective security services;

(B) Effective security services are unavailable at a reasonable cost; or

(C) Threat conditions necessitate security through military means.

(ii) The Contracting Officer shall include in the contract the level of protection to be provided to Contractor personnel.

(iii) In appropriate cases, the Combatant Commander may provide security through military means, commensurate with the level of security provided DoD civilians.

(2)(i) Generally, all Contractor personnel authorized to accompany the U.S. Armed Forces in the designated operational area are authorized to receive resuscitative care, stabilization, hospitalization at level III military treatment facilities, and assistance with patient movement in emergencies where loss of life, limb, or eyesight could occur. Hospitalization will be limited to stabilization and short-term medical treatment with an emphasis on return to duty or placement in the patient movement system.

(ii) When the Government provides medical treatment or transportation of Contractor personnel to a selected civilian facility, the Contractor shall ensure that the Government is reimbursed for any costs associated with such treatment or transportation.

(iii) Medical or dental care beyond this standard is not authorized unless specified elsewhere in this contract.

(3) Unless specified elsewhere in this contract, the Contractor is responsible for all other support required for its personnel engaged in the designated operational area under this contract.

(4) Contractor personnel must have a letter of authorization issued by the Contracting Officer in order to process through a deployment center or to travel to, from, or within the designated operational area. The

letter of authorization also will identify any additional authorizations, privileges, or Government support that Contractor personnel are entitled to under this contract.

(d) *Compliance with laws and regulations.* The Contractor shall comply with, and shall ensure that its personnel authorized to accompany U.S. Armed Forces deployed outside the United States as specified in paragraph (b)(1) of this clause are familiar with and comply with, all applicable—

(1) United States, host country, and third country national laws;

(2) Treaties and international agreements;

(3) United States regulations, directives, instructions, policies, and procedures; and

(4) Orders, directives, and instructions issued by the Combatant Commander, including those relating to force protection, security, health, safety, or relations and interaction with local nationals. However, only the Contracting Officer is authorized to modify the terms and conditions of the contract.

(e) *Pre-deployment requirements.* (1) The Contractor shall ensure that the following requirements are met prior to deploying personnel in support of U.S. Armed Forces. Specific requirements for each category may be specified in the statement of work or elsewhere in the contract.

(i) All required security and background checks are complete and acceptable.

(ii) All deploying personnel meet the minimum medical screening requirements and have received all required immunizations as specified in the contract. The Government will provide, at no cost to the Contractor, any theater-specific immunizations and/or medications not available to the general public.

(iii) Deploying personnel have all necessary passports, visas, and other documents required to enter and exit a designated operational area and have a Geneva Conventions identification card, or other appropriate DoD identity credential, from the deployment center. Any Common Access Card issued to deploying personnel shall contain the access permissions allowed by the letter of authorization issued in accordance with paragraph (c)(4) of this clause.

(iv) Special area, country, and theater clearance is obtained for personnel. Clearance requirements are in DoD Directive 4500.54, Official Temporary Duty Abroad, and DoD 4500.54-G, DoD Foreign Clearance Guide. Contractor personnel are considered non-DoD personnel traveling under DoD sponsorship.

(v) All personnel have received personal security training. At a minimum, the training shall—

(A) Cover safety and security issues facing employees overseas;

(B) Identify safety and security contingency planning activities; and

(C) Identify ways to utilize safety and security personnel and other resources appropriately.

(vi) All personnel have received isolated personnel training, if specified in the contract, in accordance with DoD Instruction 1300.23, Isolated Personnel Training for DoD Civilian and Contractors.

(2) The Contractor shall notify all personnel who are not a host country national, or who are not ordinarily resident in the host country, that—

(i) Such employees, and dependents residing with such employees, who engage in conduct outside the United States that would constitute an offense punishable by imprisonment for more than one year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States, may potentially be subject to the criminal jurisdiction of the United States in accordance with the Military Extraterritorial Jurisdiction Act of 2000 (18 U.S.C. 3621, *et seq.*);

(ii) Pursuant to the War Crimes Act (18 U.S.C. 2441), Federal criminal jurisdiction also extends to conduct that is determined to constitute a war crime when committed by a civilian national of the United States;

(iii) Other laws may provide for prosecution of U.S. nationals who commit offenses on the premises of U.S. diplomatic, consular, military or other U.S. Government missions outside the United States (18 U.S.C. 7(9)); and

(iv) In time of declared war or a contingency operation, Contractor personnel authorized to accompany U.S. Armed Forces in the field are subject to the jurisdiction of the Uniform Code of Military Justice under 10 U.S.C. 802(a)(10).

(f) *Processing and departure points.*

Deployed Contractor personnel shall—

(1) Process through the deployment center designated in the contract, or as otherwise directed by the Contracting Officer, prior to deploying. The deployment center will conduct deployment processing to ensure visibility and accountability of Contractor personnel and to ensure that all deployment requirements are met, including the requirements specified in paragraph (e)(1) of this clause;

(2) Use the point of departure and transportation mode directed by the Contracting Officer; and

(3) Process through a Joint Reception Center (JRC) upon arrival at the deployed location. The JRC will validate personnel accountability, ensure that specific designated operational area entrance requirements are met, and brief Contractor personnel on theater-specific policies and procedures.

(g) *Personnel data.* (1) The Contractor shall enter before deployment and maintain data for all Contractor personnel that are authorized to accompany U.S. Armed Forces deployed outside the United States as specified in paragraph (b)(1) of this clause. The Contractor shall use the Synchronized Predeployment and Operational Tracker (SPOT) web-based system, at <http://www.dod.mil/bta/products/spot.html>, to enter and maintain the data.

(2) The Contractor shall ensure that all employees in the database have a current DD Form 93, Record of Emergency Data Card, on file with both the Contractor and the designated Government official. The Contracting Officer will inform the Contractor of the Government official designated to receive this data card.

(h) *Contractor personnel.* (1) The Contracting Officer may direct the

Contractor, at its own expense, to remove and replace any Contractor personnel who jeopardize or interfere with mission accomplishment or who fail to comply with or violate applicable requirements of this contract. Such action may be taken at the Government's discretion without prejudice to its rights under any other provision of this contract, including the Termination for Default clause.

(2) The Contractor shall have a plan on file showing how the Contractor would replace employees who are unavailable for deployment or who need to be replaced during deployment. The Contractor shall keep this plan current and shall provide a copy to the Contracting Officer upon request. The plan shall—

(i) Identify all personnel who are subject to military mobilization;

(ii) Detail how the position would be filled if the individual were mobilized; and

(iii) Identify all personnel who occupy a position that the Contracting Officer has designated as mission essential.

(i) *Military clothing and protective equipment.* (1) Contractor personnel are prohibited from wearing military clothing unless specifically authorized in writing by the Combatant Commander. If authorized to wear military clothing, Contractor personnel must—

(i) Wear distinctive patches, arm bands, nametags, or headgear, in order to be distinguishable from military personnel, consistent with force protection measures; and

(ii) Carry the written authorization with them at all times.

(2) Contractor personnel may wear military-unique organizational clothing and individual equipment (OCIE) required for safety and security, such as ballistic, nuclear, biological, or chemical protective equipment.

(3) The deployment center, or the Combatant Commander, shall issue OCIE and shall provide training, if necessary, to ensure the safety and security of Contractor personnel.

(4) The Contractor shall ensure that all issued OCIE is returned to the point of issue, unless otherwise directed by the Contracting Officer.

(j) *Weapons.* (1) If the Contractor requests that its personnel performing in the designated operational area be authorized to carry weapons, the request shall be made through the Contracting Officer to the Combatant Commander, in accordance with DoD Instruction 3020.41, paragraph 6.3.4.1 or, if the contract is for security services, paragraph 6.3.5.3. The Combatant Commander will determine whether to authorize in-theater Contractor personnel to carry weapons and what weapons and ammunition will be allowed.

(2) If the Contracting Officer, subject to the approval of the Combatant Commander, authorizes the carrying of weapons—

(i) The Contracting Officer may authorize the Contractor to issue Contractor-owned weapons and ammunition to specified employees; or

(ii) The *[Contracting Officer to specify the appropriate individual, e.g., Contracting Officer's Representative, Regional Security*

Officer] may issue Government-furnished weapons and ammunition to the Contractor for issuance to specified Contractor employees.

(3) The Contractor shall ensure that its personnel who are authorized to carry weapons—

(i) Are adequately trained to carry and use them—

(A) Safely;

(B) With full understanding of, and adherence to, the rules of the use of force issued by the Combatant Commander; and

(C) In compliance with applicable agency policies, agreements, rules, regulations, and other applicable law;

(ii) Are not barred from possession of a firearm by 18 U.S.C. 922; and

(iii) Adhere to all guidance and orders issued by the Combatant Commander regarding possession, use, safety, and accountability of weapons and ammunition.

(4) Whether or not weapons are Government-furnished, all liability for the use of any weapon by Contractor personnel rests solely with the Contractor and the Contractor employee using such weapon.

(5) Upon redeployment or revocation by the Combatant Commander of the Contractor's authorization to issue firearms, the Contractor shall ensure that all Government-issued weapons and unexpended ammunition are returned as directed by the Contracting Officer.

(k) *Vehicle or equipment licenses.*

Contractor personnel shall possess the required licenses to operate all vehicles or equipment necessary to perform the contract in the designated operational area.

(l) *Purchase of scarce goods and services.*

If the Combatant Commander has established an organization for the designated operational area whose function is to determine that certain items are scarce goods or services, the Contractor shall coordinate with that organization local purchases of goods and services designated as scarce, in accordance with instructions provided by the Contracting Officer.

(m) *Evacuation.* (1) If the Combatant Commander orders a mandatory evacuation of some or all personnel, the Government will provide assistance, to the extent available, to United States and third country national Contractor personnel.

(2) In the event of a non-mandatory evacuation order, unless authorized in writing by the Contracting Officer, the Contractor shall maintain personnel on location sufficient to meet obligations under this contract.

(n) *Next of kin notification and personnel recovery.* (1) The Contractor shall be responsible for notification of the employee-designated next of kin in the event an employee dies, requires evacuation due to an injury, or is isolated, missing, detained, captured, or abducted.

(2) In the case of isolated, missing, detained, captured, or abducted Contractor personnel, the Government will assist in personnel recovery actions in accordance with DoD Directive 2310.2, Personnel Recovery.

(o) *Mortuary affairs.* Mortuary affairs for Contractor personnel who die while

accompanying the U.S. Armed Forces will be handled in accordance with DoD Directive 1300.22, Mortuary Affairs Policy.

(p) *Changes.* In addition to the changes otherwise authorized by the Changes clause of this contract, the Contracting Officer may, at any time, by written order identified as a change order, make changes in the place of performance or Government-furnished facilities, equipment, material, services, or site. Any change order issued in accordance with this paragraph (p) shall be subject to the provisions of the Changes clause of this contract.

(q) *Subcontracts.* The Contractor shall incorporate the substance of this clause, including this paragraph (q), in all subcontracts when subcontractor personnel are authorized to accompany U.S. Armed Forces deployed outside the United States in—

(1) Contingency operations;

(2) Humanitarian or peacekeeping operations; or

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

(End of clause).

[FR Doc. E8-6582 Filed 3-28-08; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 679

[Docket No. 071106671-8010-02]

RIN 0648-XG73

#### Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Area 620 in the Gulf of Alaska

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS is prohibiting directed fishing for pollock in Statistical Area 620 in the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the B season allowance of the 2008 total allowable catch (TAC) of pollock for Statistical Area 620 in the GOA.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), March 26, 2008, through 1200 hrs, A.l.t., August 25, 2008.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Hogan, 907-586-7228.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North

Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The B season allowance of the 2008 TAC of pollock in Statistical Area 620 of the GOA is 7,576 metric tons (mt) as established by the 2008 and 2009 harvest specifications for groundfish of the GOA (73 FR 10562, February 27, 2008).

In accordance with § 679.20(d)(1)(i), the Regional Administrator has determined that the A season allowance of the 2008 TAC of pollock in Statistical Area 620 of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 7,566 mt, and is setting aside the remaining 10 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for pollock in Statistical Area 620 of the GOA.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

#### Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of pollock in Statistical Area 620 of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of March 25, 2008.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.