

of Former DoD Officials (JAN 2009)
(Section 847 of Pub. L. 110-181).

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[FR Doc. E9-679 Filed 1-14-09; 8:45 am]

BILLING CODE 5001-08-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750-AG09

Defense Federal Acquisition Regulation Supplement; Whistleblower Protections for Contractor Employees (DFARS Case 2008-D012)

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

ACTION: Interim rule with request for comments.

SUMMARY: DoD has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 846 of the National Defense Authorization Act for Fiscal Year 2008 and Section 842 of the National Defense Authorization Act for Fiscal Year 2009. These laws address protections for contractor employees who disclose information to Government officials with regard to waste or mismanagement, danger to public health or safety, or violation of law related to a DoD contract.

DATES: *Effective date:* January 15, 2009.

Comment date: Comments on the interim rule should be submitted in writing to the address shown below on or before March 16, 2009, to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2008-D012, using any of the following methods:

○ *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

○ *E-mail:* dfars@osd.mil. Include DFARS Case 2008-D012 in the subject line of the message.

○ *Fax:* 703-602-7887.

○ *Mail:* Defense Acquisition Regulations System, Attn: Ms. Angie Sawyer, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062.

○ *Hand Delivery/Courier:* Defense Acquisition Regulations System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202-3402.

Comments received generally will be posted without change to <http://>

www.regulations.gov, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Angie Sawyer, 703-602-8484.

SUPPLEMENTARY INFORMATION:

A. Background

10 U.S.C. 2409 and 41 U.S.C. 251 *et seq.* prohibit Government contractors from discharging, demoting, or otherwise discriminating against employees as a reprisal for disclosing to Government officials information relating to a substantial violation of law related to a contract. 10 U.S.C. 2409 and 41 U.S.C. 251 *et seq.* are implemented in Subpart 3.9 of the Federal Acquisition Regulation. Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181) and Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417) amended 10 U.S.C. 2409 to establish protections for DoD contractor employees that differ from those specified in 41 U.S.C. 251 *et seq.* and the Federal Acquisition Regulation. Therefore, this interim rule adds a new DFARS subpart to address DoD requirements related to whistleblower protections. The differences between the FAR and the new DFARS policy include: Expansion of the types of information to which the protections apply; expansion of the categories of Government officials to whom information may be disclosed without reprisal; establishment of time periods within which the Inspector General and the agency head must take action with regard to a complaint filed by a contractor employee; establishment of a *de novo* right of action in federal district court for contractor employees who have exhausted their administrative remedies under 10 U.S.C. 2409; and addition of a contract clause requiring contractors to inform employees in writing of their whistleblower rights and protections.

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 does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Although the rule contains a new requirement for contractors to inform employees in writing of their whistleblower rights and protections, compliance with this requirement is not expected to have a significant cost or administrative impact on contractors.

Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2008-D012.

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.*

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181) and Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417). These laws address whistleblower protections for DoD contractor employees and require DoD to ensure that DoD contractors inform their employees in writing of whistleblower rights and protections. Comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Parts 203 and 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 203 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR Parts 203 and 252 continues to read as follows:

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

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 2. Subpart 203.9 is added to read as follows:

Subpart 203.9—Whistleblower Protections for Contractor Employees

Sec.

203.900 Scope of subpart.

203.903 Policy.

203.904 Procedures for filing complaints.

- 203.905 Procedures for investigating complaints.
 203.906 Remedies.
 203.970 Contract clause.

Subpart 203.9—Whistleblower Protections for Contractor Employees

203.900 Scope of subpart.

This subpart implements 10 U.S.C. 2409 as amended by Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181) and Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417).

203.903 Policy.

The following policy applies to DoD instead of the policy at FAR 3.903:

(1) 10 U.S.C. 2409 prohibits contractors from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the following entities, information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, a substantial and specific danger to public health or safety, or a violation of law related to a DoD contract (including the competition for or negotiation of a contract):

- (i) A Member of Congress.
- (ii) A representative of a committee of Congress.
- (iii) An Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of DoD.
- (iv) The Government Accountability Office.
- (v) A DoD employee responsible for contract oversight or management.
- (vi) An authorized official of an agency or the Department of Justice.

(2) A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.

203.904 Procedures for filing complaints.

In addition to the procedures at FAR 3.904, any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.

203.905 Procedures for investigating complaints.

The following procedures apply to DoD instead of the procedures at FAR 3.905:

(1) The DoD Inspector General will make a determination as to whether a complaint is frivolous or merits further investigation.

(2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—

(i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;

(ii) Conduct an investigation; and

(iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.

(3) The DoD Inspector General—

(i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and

(ii) If unable to submit a report within 180 days, will submit the report within the additional time period to which the person submitting the complaint agrees.

203.906 Remedies.

(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency—

(i) Shall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and

(ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury.

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(c).

203.970 Contract clause.

Use the clause at 252.203–7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Section 252.203–7002 is added to read as follows:

252.203–7002 Requirement to Inform Employees of Whistleblower Rights.

As prescribed in 203.970, use the following clause:

REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS (JAN 2009)

The Contractor shall inform its employees in writing of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in Subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.

(End of clause)

[FR Doc. E9–672 Filed 1–14–09; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204 and 252

RIN 0750–AF98

Defense Federal Acquisition Regulation Supplement; U.S.-International Atomic Energy Agency Additional Protocol (DFARS Case 2004–D003)

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

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to add a contract clause requiring a contractor to notify DoD if the contractor is required to report its activities under the U.S.-International Atomic Energy Agency Additional Protocol. The clause will be included in contracts for research and development or major defense acquisition programs involving fissionable materials, other radiological source materials, or technologies directly related to nuclear power production.

DATES: *Effective Date:* January 15, 2009.

FOR FURTHER INFORMATION CONTACT: Ms. Michele Peterson, Defense Acquisition Regulations System, OUSD (AT&L)