

**§ 485.641 Condition of participation: Periodic evaluation and quality assurance review.**

\* \* \* \* \*

(b) \* \* \*

(4) The quality and appropriateness of the diagnosis and treatment furnished by doctors of medicine or osteopathy at the CAH are evaluated by—

(i) One hospital that is a member of the network, when applicable;

(ii) One QIO or equivalent entity;

(iii) One other appropriate and qualified entity identified in the State rural health care plan;

(iv) In the case of distant-site physicians and practitioners providing telemedicine services to the CAH's patients under a written agreement between the CAH and a distant-site hospital, the distant-site hospital; or

(v) In the case of distant-site physicians and practitioners providing telemedicine services to the CAH's patients under a written agreement between the CAH and a distant-site telemedicine entity, one of the entities listed in paragraphs (b)(4)(i) through (iii) of this section; and

\* \* \* \* \*

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare Supplementary Medical Insurance Program). (Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: January 27, 2011.

**Donald M. Berwick,**

*Administrator, Centers for Medicare & Medicaid Services.*

Approved: April 29, 2011.

**Kathleen Sebelius,**

*Secretary.*

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 211 and 237

**RIN 0750-AG72**

#### Defense Federal Acquisition Regulations Supplement; Guidance on Personal Services (DFARS Case 2009-D028)

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

**ACTION:** Final rule.

**SUMMARY:** DoD has adopted as final, with changes, the interim rule that

amended the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 831 of the National Defense Authorization Act for Fiscal Year 2009, which required DoD to develop guidance on personal services contracts.

**DATES:** *Effective Date:* May 5, 2011.

**FOR FURTHER INFORMATION CONTACT:** Mr. Dustin Pitsch, 703-602-1014.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Section 831 required DoD to mitigate the risks associated with personal services by developing guidance enabling contracting officers to better distinguish between personal services and nonpersonal services. The interim rule amended DFARS parts 211 and 237 to (1) require that statements of work or performance work statements clearly distinguish between Government employees and contractor employees and (2) ensure that procedures are adopted to prevent contracts from being awarded or administered as unauthorized personal services contracts. The interim rule included an internal requirement for a program manager, or equivalent, certification that the service contract requirement does not include an unauthorized personal services arrangement. Because of the differing missions of DoD agencies, the interim rule required agencies to adopt their own procedures.

DoD published an interim rule at 75 FR 54524 on September 8, 2010, to implement section 831 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417, enacted October 28, 2009). The period for public comment closed on November 8, 2010. Five respondents provided public comments on the interim rule.

##### II. Discussion and Analysis

###### A. Support for DoD Actions

*Comment:* A respondent noted the DFARS requirement for agency-level procedures to ensure that service contract requirements are vetted and approved in a manner that will prevent them from being awarded or administered as unauthorized personal services contracts. The respondent stated its support for Defense agencies taking internal action to ensure that no unauthorized personal services contracts are requested. Another respondent expressed support for the rule and stated that it “helps create a boundary separating contractor and government employees in all workplace environments.”

*Response:* The respondents' support is noted. No change to the DFARS in this area was requested or made.

###### B. Limit Applicability

*Comment:* Two respondents specified that the DFARS should highlight and limit applicability of this rule solely to personal services contracts, not the general service contract population.

*Response:* No change was made in the final rule in response to this comment. It is precisely because of the potential for a migration of a “general service contract” into what is effectively a “personal services contract” that the rule is necessary. DoD, with strong encouragement from the DoD Office of Inspector General, has determined that there is a need to review all services for the purpose of ensuring the services do not become personal services.

###### C. Add More Guidance

*Comment:* A respondent stated that DFARS 211.106 provides no actual guidance to the agencies as to what the distinction between Government employees and contractor employees is or how an agency is to make such a determination. At a minimum, the respondent states, it may be appropriate to include in DFARS 211.106 a cross reference to the characteristics and descriptive elements in FAR 37.104. The respondent thinks the rule does not provide any actionable direction to contractors on what behaviors would be acceptable for contractor employees based on the policies and practices of the location where the contractor employee is assigned.

*Response:* A cross reference to FAR 37.104 and the characteristics and descriptive elements therein has been added to DFARS 211.106. However, the DFARS cannot unnecessarily repeat, paraphrase, or otherwise restate material contained in the FAR (see FAR 1.304(b)), so the DFARS addition was limited to a reference. Further, the agency-level procedures are the appropriate location for the actionable, agency-specific direction to contractors on acceptable behaviors.

###### D. Add More Specific Contract Administration Procedures

*Comment:* A respondent noted the absence in the interim rule, in DFARS parts 237 or 242, of procedures, guidance, or information focusing on postaward contract administration to prevent actual administration of a contract as an unauthorized personal services contract. The respondent recommended (a) referencing FAR 37.104(d) in DFARS 237.503 and (b)

possibly adding coverage in DFARS part 242 relating to contract administration.

*Response:* DoD has added a cross reference to FAR 37.104(d) at DFARS 237.503. In this final rule, no changes are made to DFARS subpart 242.

#### *E. Editorial Recommendations*

*Comment:* A respondent proposed several clarifying edits. The respondent suggested moving some coverage from DFARS 237.503 to DFARS 237.104 and providing additional cross references. The respondent also proposed to revise the title of the form at PGI 237.503(c).

*Response:* Some of these recommendations have been accommodated in the changes noted above and as follows:

- New coverage at DFARS 237.104(d) has been added to point readers to the section entitled “Agency-head responsibilities” at DFARS 237.503 to ensure awareness of the certification requirement.

- The title of the certification at PGI 237.503(c) has been changed to “Certification of Nonpersonal Services.”

### **III. Executive Order 12866 and Executive Order 13563**

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget. This rule is not a major rule under 5 U.S.C. 804.

### **IV. Regulatory Flexibility Act**

DoD certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the change solely impacts internal Government operating procedures and will therefore not have a significant cost or administrative impact on contractors, subcontractors, or offerors. An initial regulatory flexibility analysis was not performed. No comments were received from small entities on this rule.

### **V. Paperwork Reduction Act**

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### **List of Subjects in 48 CFR Parts 211 and 237**

Government procurement.

**Mary Overstreet,**

*Editor, Defense Acquisition Regulations System.*

Therefore, the Defense Acquisition Regulations system confirms as final the interim rule published at 75 FR 54524 on September 8, 2010, with the following changes:

■ 1. The authority citation for 48 CFR parts 211 and 237 continues to read as follows:

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

#### **PART 211—DESCRIBING AGENCY NEEDS**

■ 2. Revise section 211.106 to read as follows:

##### **211.106 Purchase descriptions for service contracts.**

Agencies shall require that purchase descriptions for service contracts and resulting requirements documents, such as statements of work or performance work statements, include language to provide a clear distinction between Government employees and contractor employees. Agencies shall be guided by the characteristics and descriptive elements of personal-services contracts at FAR 37.104. Service contracts shall require contractor employees to identify themselves as contractor personnel by introducing themselves or being introduced as contractor personnel and displaying distinguishing badges or other visible identification for meetings with Government personnel. In addition, contracts shall require contractor personnel to appropriately identify themselves as contractor employees in telephone conversations and in formal and informal written correspondence.

#### **PART 237—SERVICE CONTRACTING**

■ 3. Amend section 237.104 by adding paragraph (d) as follows:

##### **237.104 Personal services contracts.**

\* \* \* \* \*

(d) See 237.503(c) for requirements for certification and approval of requirements for services to prevent

contracts from being awarded or administered in a manner that constitutes an unauthorized personal services contract.

\* \* \* \* \*

■ 4. Revise section 237.503 to read as follows:

##### **237.503 Agency-head responsibilities.**

(c) The agency head or designee shall employ procedures to ensure that requirements for service contracts are vetted and approved as a safeguard to prevent contracts from being awarded or administered in a manner that constitutes an unauthorized personal services contract. Contracting officers shall follow the procedures at PGI 237.503, include substantially similar certifications in conjunction with service contract requirements, and place the certification in the contract file. The program manager or other official responsible for the requirement, at a level specified by the agency, should execute the certification. In addition, contracting officers and program managers should remain aware of the descriptive elements at FAR 37.104(d) to ensure that a service contract does not inadvertently become administered as a personal-services contract.

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### **DEPARTMENT OF DEFENSE**

#### **Defense Acquisition Regulations System**

#### **48 CFR Parts 216 and 252**

**RIN 0750–AH20**

#### **Defense Federal Acquisition Regulation Supplement (DFARS); Electronic Ordering Procedures (DFARS Case 2009–D037)**

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

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to address electronic business procedures for placing orders. This final rule adds a new DFARS clause to clarify this process.

**DATES:** *Effective date:* May 5, 2011.

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

**SUPPLEMENTARY INFORMATION:**