DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 25, and 52

[FAC 2005–67; FAR Case 2011–029; Item I; Docket 2011–0029, Sequence 1]

RIN 9000–AM20

Federal Acquisition Regulation; Contractors Performing Private Security Functions Outside the United States

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement Governmentwide requirements in National Defense Authorization Acts that establish minimum processes and requirements for the selection, accountability, training, equipping, and conduct of personnel performing private security functions outside the United States.

DATES: *Effective Date:* July 22, 2013.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–67, FAR Case 2011–029.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 77 FR 43039 on July 23, 2012, to implement section 862, as amended, of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008 (Pub. L. 110–181). Section 862, entitled ''Contractors Performing Private Security Functions in Areas of Combat Operations or other Significant Military Operations,'' was amended by section 853 of the NDAA for FY 2009 (Pub. L. 110–417, enacted October 14, 2008) and sections 831 and 832 of the NDAA for FY 2011 (Pub. L. 111–383, enacted January 7, 2011). See 10 U.S.C. 2302 Note. The statute required (1) the establishment of Governmentwide policies and (2) FAR coverage implementing the Governmentwide policies specified in the statutes and the resulting Governmentwide policy document.

The proposed FAR rule set forth the applicability, pertinent definitions, underlying policy, and a clause to implement minimum processes and requirements for personnel performing private security functions in designated areas outside the United States (*i.e.,* in combat operations, during certain contingency operations, or in an area of other significant military operations as appropriately designated). Four respondents submitted comments on the proposed rule.

II. Determinations

The Federal Acquisition Regulatory (FAR) Council has made the following determinations with respect to the rule's applicability of section 862 of the NDAA for FY 2008 (Pub. L. 110–181), as amended, entitled ''Contractors Performing Private Security Functions in Areas of Combat Operations or other Significant Military Operations,'' to contracts in amounts not greater than the simplified acquisition threshold (SAT), contracts for the acquisition of commercial items, and contracts for the acquisition of commercially available off-the-shelf (COTS) items.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the SAT. It is intended to limit the applicability of laws to acquisitions that are not greater than the SAT. However, section 1905 provides that contracts or subcontracts at or below the SAT will not be exempt from a provision of law if it contains criminal or civil penalties; specifically refers to 41 U.S.C. 1905 and states that the law applies to contracts and subcontracts in amounts not greater than the SAT; or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts in amounts not greater than the SAT from the provision of law.

The requirements of section 862, as amended, should apply to all prime contracts and subcontracts regardless of dollar value because the Act requires a contract clause addressing the selection, training, equipping, and conduct of personnel performing private security functions to be inserted into every covered contract. A ''covered contract'' is defined by section 864 of the NDAA for FY 2008 as ''(A) a contract of a Federal agency for the performance of services in an area of combat operations, as designated by the Secretary of Defense under subsection (c) of section 862; (B) a subcontract at any tier under such a contract; or (C) a task order or delivery order issued under such a contract or subcontract.'' Since the NDAA specifically defines which contracts are covered, it is not in the best interest of the Federal Government to waive the applicability of these requirements to contracts in amounts not greater than the SAT because it would exclude a significant number of acquisitions and not fully meet the intent of the Act.

B. Applicability to Contracts for the Acquisition of Commercial Items

41 U.S.C. 1906 governs the applicability of laws to the acquisition of commercial items. It is intended to limit the applicability of laws to the acquisition of commercial items. However, section 1906 provides that the acquisition of commercial items will not be exempt from a provision of law if it contains criminal or civil penalties; specifically refers to 41 U.S.C. 1906 and states that the law applies to the acquisition of commercial items; or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt the acquisition of commercial items from the provision of law.

The requirements of section 862, as amended, should apply to all prime contracts and subcontracts because the Act requires a contract clause addressing the selection, training, equipping, and conduct of personnel performing private security functions to be inserted into every covered contract. A ''covered contract'' is defined by section 864 of the NDAA for FY 2008 as ''(A) a contract of a Federal agency for the performance of services in an area of combat operations, as designated by the Secretary of Defense under subsection (c) of section 862; (B) a subcontract at any tier under such a contract; or (C) a task order or delivery order issued under such a contract or subcontract.'' Since the NDAA specifically defines which contracts are covered, it is not in the best interest of the Federal Government to waive the applicability of these requirements to the acquisition of commercial items because it would exclude a significant number of acquisitions and not fully meet the intent of the Act.

C. Applicability to Contracts for the Acquisition of COTS Items

41 U.S.C. 1907 governs the applicability of laws to the acquisition of commercially available off-the-shelf (COTS) items. It is intended to limit the applicability of laws to the acquisition of COTS items. However, 41 U.S.C. 1907

provides that the acquisition of COTS items will not be exempt from a provision of law if it contains criminal or civil penalties; specifically refers to 41 U.S.C. 1907 and states that the law applies to the acquisition of COTS items; concerns authorities or responsibilities under the Small Business Act (15 U.S.C. 644) or bid protest procedures developed under the authority of 31 U.S.C. 3551 *et seq.;* 10 U.S.C. 2305(e) and (f); or 41 U.S.C. 3706 and 3707; or if the Administrator for Federal Procurement Policy makes a written determination that it would not be in the best interest of the Federal Government to exempt the acquisition of COTS items from the provision of law.

The requirements of section 862, as amended, should apply to all prime contracts and subcontracts because the Act requires a contract clause addressing the selection, training, equipping, and conduct of personnel performing private security functions to be inserted into every covered contract. A ''covered contract'' is defined by section 864 of the NDAA for FY 2008 as ''(A) a contract of a Federal agency for the performance of services in an area of combat operations, as designated by the Secretary of Defense under subsection (c) of section 862; (B) a subcontract at any tier under such a contract; or (C) a task order or delivery order issued under such a contract or subcontract.'' Since the NDAA specifically defines which contracts are covered, it is not in the best interest of the Federal Government to waive the applicability of these requirements to the acquisition of COTS items because it would exclude a significant number of acquisitions and not fully meet the intent of the Act.

III. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes

• An ''Applicability'' paragraph was added to the contract clause at FAR 52.225–26 in order to address situations where contract performance was to take place partially in a designated area and partially in a different, non-designated area.

• The applicability statement at FAR 25.302–3(a)(3) was revised to match the clause prescription at FAR 25.302–6(a)(1) so that the agreement of the Secretary of State is required for designations of an area of ''other significant military operations'' for purposes of applicability of this rule to a DoD acquisition.

B. Analysis of Public Comments

1. Support for the Rule

Comment: One respondent expressed support for the rule, stating that the proposed amendment is crucial to our national security. The respondent concluded that the actions of private security contractors have far-reaching impacts on our international reputation and the success of worldwide peacekeeping and reconstruction efforts. The respondent stated that the record-keeping requirements of this rule will curb the illicit trade of weapons and other defense articles and increase the emphasis on qualification, training, and screening to improve the professionalism of security contractor personnel.

Response: Noted.

2. Applicability

Comment: One respondent suggested that FAR 25.302–2(a) and (b) (now 25.302–3(a) and (b)) should be amended to delete the phrase ''for supplies and services'' and refer only to ''contracts.'' The respondent made a related comment at FAR 25.302–2(d).

Response: Concur. This change removes the likelihood of confusion as to whether requirements such as construction, reconstruction, commodities, or utilities are included. While all these categories could be considered either supplies or services, it removes the possibility of misinterpretation.

3. Clause Prescription

Comment: One respondent recommended that the clause prescription at 25.302–6(a)(1) be changed by deleting ''of services and/or delivery of supplies,'' and that a similar change be made at (a)(2). The respondent also recommends substituting ''in, or with significant likelihood of performance in, an area of''.

Response: The Councils agree to the recommended deletion at 25.302–6(a)(1) and (a)(2) in order to remove the likelihood of confusion as to whether requirements such as construction, reconstruction, commodities, or utilities are included. The Councils do not agree with requiring the contracting officer to insert the clause when performance in a designated area is only likely. This would require offerors to account for this in proposals and unnecessarily raise proposed prices. Instead, the contracting officer should modify the solicitation or contract to add the clause if requirements change so that performance is needed in a designated area.

The Councils also are clarifying the clause to show that, if the contract is performed both in a designated area and in an area that is not designated, the clause only applies to the designated area. A new paragraph (b) is added to the clause that specifies that the clause applies to (1) DoD contracts to be performed in an area of (i) contingency operations outside the United States, (ii) combat operations, as designated by the Secretary of Defense, or (iii) other significant military operations as designated by the Secretary of Defense, only upon agreement of the Secretary of Defense and the Secretary of State; and (2) contracts issued by a non-DoD agency for performance in an area of (i) combat operations, as designated by the Secretary of Defense, or (ii) other significant military operations, as designated by the Secretary of Defense, and only upon agreement of the Secretary of Defense and the Secretary of State.

4. Accounting for Weapons

Comment: A respondent proposed to modify the contractor requirements at paragraph (b)(1)(ii) of the clause at FAR 52.225–26, Contractors Performing Private Security Functions Outside the United States, to add to the current requirement to authorize and account for weapons, additional requirements to authorize and account for ''International Trafficking in Arms (ITAR)-restricted items, if issued, and items designated as Sensitive Items by the Commander or Chief of Mission.'' The respondent stated that accounting solely for weapons was insufficient to protect deployed military and civilian personnel from the dangers of sensitive equipment getting into the hands of enemy combatants due to poor contractor accountability. As an example, the respondent noted that, if enemy combatants or terrorists secure uniforms, it will be much harder to identify them.

Response: This FAR rule implements statutory requirements that are unique to contractors performing private security functions. While the concerns cited by the respondent may be valid, they are not unique to the performance of private security functions and are therefore outside the scope of this rule. Further, other laws and policies cover accountability for the items cited by the respondent. For example, an ITAR

license includes accountability requirements for the specific items covered by the license.

5. Clarifications for **Federal Register** Notice

Comment: One respondent recommended that the preamble of the final rule clarify that contractors do not waive any applicable privileges in order to be found to have sufficiently cooperated in a Government-authorized investigation, and that contractors should not be penalized in past performance evaluations or responsibility evaluations if the contractor provides access to an employee but the employee chooses not to cooperate.

Response: The Councils agree with these comments, on how the actions of contractors and their employees would be handled under United States law. These are similar to principles found in FAR 52.203–13, Contractor Code of Business Ethics and Conduct, in the definition of ''full cooperation''. The Councils however note that foreign country local law is also involved and cannot be changed by this rule.

6. Editorial Comments

Comment: A respondent recommended deleting the term ''subpart'' at FAR 25.302, as this is a section, not a subpart, of the FAR.

Response: This recommended change is made in the final rule.

Comment: A respondent noted that the applicability section of FAR 25.302 had been erroneously placed at 25.302–2, prior to the definitions section (at FAR 25.302–3). The FAR drafting convention is to place the definitions after the ''scope'' portion but prior to the ''applicability'' section of a rule.

Response: FAR section 25.302 is reordered in the final rule as noted by the respondent.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

The case implements sections of the National Defense Authorization Act for Fiscal Year 2008, as amended by subsequent NDAAs (see 10 U.S.C. 2302 Note), that establish minimum processes and requirements for the selection, accountability, training, equipping, and conduct of personnel performing private security functions outside the United States.

No comments on the initial regulatory flexibility analysis were received from the Chief Counsel for Advocacy of the Small Business Administration or the public in response to the publication of the proposed rule.

The impact on small business entities will be minor, for several reasons. Not all contracts involve the performance of private security functions, in which case the clause does not apply. In these situations, therefore, there is no impact on small business entities. Also, most contracts that require the performance of private security functions in the areas of Iraq and Afghanistan are being awarded to firms based in those countries. Most contracts for these services have not been awarded to small businesses because they are awarded and performed overseas. In the few cases in which a contractor is both a U.S. small business and is performing private security functions, the costs of compliance will be included in the proposed and negotiated subcontract cost. Further, the publication of 32 CFR part 159 provides consistency in reporting requirements and accountability for private security personnel and their weapons (as required by the law). This increased clarity serves to relieve the burdens on small businesses.

DoD contractors and subcontractors currently are required by another clause to register equipment and personnel using the DoD's Synchronized Predeployment and Operational Tracker (SPOT) System. The associated paperwork burden was previously approved for DoD under OMB control number 0704–0460, Synchronized Predeployment and Operational Tracker (SPOT) System. There is, at present, no reporting system that has been developed by non-DoD agencies. An information collection request for non-DoD agencies was submitted to the Office of Management and Budget with the proposed rule. The impact of this rule is limited to those few firms that are both a U.S. small business and are performing private security functions. The reporting burden has been limited to those items specifically required by law, and the use of the automated SPOT system enables easy and quick updates as necessary.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies. DoD's information collection has been approved previously under OMB Control Number 0704–0460, Synchronized Predeployment and Operation Tracker (SPOT) System. However, SPOT does not include reporting of specified incidents in which personnel performing private security functions under a contract are involved (see paragraph (c)(1)(iv) of the clause at FAR 52.225–26). In addition, there is a new information collection requirement for non-DoD agencies and incident reporting for DOD agencies that was previously submitted to the Office of Management and Budget and approved under OMB Control Number 9000–0184, Contractors Performing Private Security Functions Outside the United States.

List of Subjects in 48 CFR Parts 1, 25, and 52

Government procurement.

Dated: June 13, 2013.

William Clark,

Acting Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 25 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 25, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

■ 2. Amend section 1.106, in the table following the introductory text, by adding in numerical sequence, FAR segment ''25.302'' and its corresponding OMB Control No. ''9000–0184''.

PART 25—FOREIGN ACQUISITION

■ 3. Add sections 25.302 through 25.302–6 to subpart 25.3 to read as follows:

25.302 Contractors performing private security functions outside the United States.

25.302–1 Scope.

This section prescribes policy for implementing section 862 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008 (Pub.

L. 110–181), as amended by section 853 of the NDAA for FY 2009 (Pub. L. 110–417), and sections 831 and 832 of the NDAA for FY 2011 (Pub. L. 111–383) (see 10 U.S.C. 2302 Note).

25.302–2 Definitions.

As used in this section—

Area of combat operations means an area of operations designated as such by the Secretary of Defense when enhanced coordination of contractors performing private security functions working for Government agencies is required.

Other significant military operations means activities, other than combat operations, as part of a contingency operation outside the United States that is carried out by United States Armed Forces in an uncontrolled or unpredictable high-threat environment where personnel performing security functions may be called upon to use deadly force (see 25.302–3(b)(2)).

Private security functions means activities engaged in by a contractor, as follows—

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

(2) Any other activity for which personnel are required to carry weapons in the performance of their duties in accordance with the terms of the contract.

25.302–3 Applicability.

(a) *DoD:* This section applies to acquisitions by Department of Defense components under a contract that requires performance—

(1) During contingency operations outside the United States;

(2) In an area of combat operations as designated by the Secretary of Defense; or

(3) In an area of other significant military operations as designated by the Secretary of Defense, and only upon agreement of the Secretary of Defense and the Secretary of State.

(b) *Non-DoD agencies:* This section applies to acquisitions by non-DoD agencies under a contract that requires performance—

(1) In an area of combat operations as designated by the Secretary of Defense; or

(2) In an area of other significant military operations as designated by the Secretary of Defense, and only upon agreement of the Secretary of Defense and the Secretary of State.

(c) These designations can be found at *http://www.acq.osd.mil/dpap/pacc/cc/designated_areas_of_other_significant_military_operations.html* and *http://www.acq.osd.mil/dpap/pacc/cc/designated_areas_of_combat_operations.html.*

(d) When the applicability requirements of this subsection are met, contractors and subcontractors must comply with 32 CFR part 159, whether the contract is for the performance of private security functions as a primary deliverable or the provision of private security functions is ancillary to the stated deliverables.

(e) The requirements of section 25.302 shall not apply to—

(1) Contracts entered into by elements of the intelligence community in support of intelligence activities; or

(2) Temporary arrangements entered into on a non-DoD contract for the performance of private security functions by individual indigenous personnel not affiliated with a local or expatriate security company. These temporary arrangements must still comply with local law.

25.302–4 Policy.

(a) *General.* (1) The policy, responsibilities, procedures, accountability, training, equipping, and conduct of personnel performing private security functions in designated areas are addressed at 32 CFR part 159, entitled ''Private Security Contractors (PSCs) Operating in Contingency Operations, Combat Operations, or Other Significant Military Operations.'' Contractor responsibilities include ensuring that employees are aware of, and comply with, relevant orders, directives, and instructions; keeping appropriate personnel records; accounting for weapons; registering and identifying armored vehicles, helicopters, and other military vehicles; and reporting specified incidents in which personnel performing private security functions under a contract are involved.

(2) In addition, contractors are required to cooperate with any Government-authorized investigation into incidents reported pursuant to paragraph (c)(3) of the clause at 52.225–26, Contractors Performing Private Security Functions Outside the United States, by providing access to employees performing private security functions and relevant information in the possession of the contractor regarding the incident concerned.

(b) *Implementing guidance.* In accordance with 32 CFR part 159—

(1) Geographic combatant commanders will provide DoD contractors performing private security functions with guidance and procedures for the operational environment in their area of responsibility; and

(2) In a designated area of combat operations, or areas of other significant military operations, as designated by the Secretary of Defense and only upon agreement of the Secretary of Defense and the Secretary of State, the relevant Chief of Mission will provide implementing instructions for non-DoD contractors performing private security functions and their personnel consistent with the standards set forth by the geographic combatant commander. In accordance with 32 CFR 159.4(c), the Chief of Mission has the option of instructing non-DoD contractors performing private security functions and their personnel to follow the guidance and procedures of the geographic combatant commander and/or a sub-unified commander or joint force commander where specifically authorized by the combatant commander to do so and notice of that authorization is provided to non-DoD agencies.

25.302–5 Remedies.

(a) In addition to other remedies available to the Government—

(1) The contracting officer may direct the contractor, at its own expense, to remove and replace any contractor or subcontractor personnel performing private security functions who fail to comply with or violate applicable requirements. Such action may be taken at the Government's discretion without prejudice to its rights under any other contract provision, *e.g.,* termination for default;

(2) The contracting officer shall include the contractor's failure to comply with the requirements of this section in appropriate databases of past performance and consider any such failure in any responsibility determination or evaluation of past performance; and

(3) In the case of award-fee contracts, the contracting officer shall consider a contractor's failure to comply with the requirements of this subsection in the evaluation of the contractor's performance during the relevant evaluation period, and may treat such failure as a basis for reducing or denying award fees for such period or for recovering all or part of award fees previously paid for such period.

(b) If the performance failures are severe, prolonged, or repeated, the contracting officer shall refer the matter to the appropriate suspending and debarring official.

25.302–6 Contract clause.

(a) Use the clause at 52.225–26, Contractors Performing Private Security Functions Outside the United States, in

the following solicitations and contracts:

(1) A DoD contract for performance in an area of—

(i) Contingency operations outside the United States;

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

(iii) Other significant military operations, as designated by the Secretary of Defense only upon agreement of the Secretary of Defense and the Secretary of State.

(2) A contract of a non-DoD agency for performance in an area of—

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

(ii) Other significant military operations, as designated by the Secretary of Defense and only upon agreement of the Secretary of Defense and the Secretary of State.

(b) The clause is not required to be used for—

(1) Contracts entered into by elements of the intelligence community in support of intelligence activities; or

(2) Temporary arrangements entered into by non-DoD contractors for the performance of private security functions by individual indigenous personnel not affiliated with a local or expatriate security company.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraphs (b)(43) through (b)(51) as paragraphs (b)(44) through (b)(52), respectively;

■ c. Adding a new paragraph (b)(43);

■ d. Redesignating paragraphs (e)(1)(xiii) and (e)(1)(xiv) as paragraphs (e)(1)(xiv) and (e)(1)(xv), respectively; and

■ e. Adding a new paragraph (e)(1)(xiii).

The revised and added text reads as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (Jul 2013)

* * * * *

(b) * * *

___(43) 52.225–26, Contractors Performing Private Security Functions Outside the United States (Jul 2013) (Section 862, as amended, of the National Defense Authorization Act for Fiscal Year 2008; 10 U.S.C. 2302 Note).

* * * * *

(e)(1) * * *

(i) * * *

(xiii) 52.225–26, Contractors Performing Private Security Functions Outside the United States (Jul 2013) (Section 862, as amended, of the National Defense Authorization Act for Fiscal Year 2008; 10 U.S.C. 2302 Note).

* * * * *

■ 5. Add section 52.225–26 to read as follows:

52.225–26 Contractors Performing Private Security Functions Outside the United States.

As prescribed in 25.302–6 insert the following clause:

Contractors Performing Private Security Functions Outside the United States (Jul 2013)

(a) *Definition.*

Private security functions means activities engaged in by a Contractor, as follows:

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

(2) Any other activity for which personnel are required to carry weapons in the performance of their duties in accordance with the terms of this contract.

(b) *Applicability.* If this contract is performed both in a designated area and in an area that is not designated, the clause only applies to performance in the designated area.

(1) For DoD contracts, designated areas are areas of—

(i) Contingency operations outside the United States;

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

(iii) Other significant military operations, as designated by the Secretary of Defense, and only upon agreement of the Secretary of Defense and the Secretary of State.

(2) For non-DoD contracts, designated areas are areas of—

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

(ii) Other significant military operations, as designated by the Secretary of Defense, and only upon agreement of the Secretary of Defense and the Secretary of State.

(c) *Requirements.* The Contractor is required to—

(1) Ensure that all employees of the Contractor who are responsible for performing private security functions under this contract comply with 32 CFR part 159, and with any orders, directives, and instructions to Contractors performing private security functions that are identified in the contract for—

(i) Registering, processing, accounting for, managing, overseeing, and keeping appropriate records of personnel performing private security functions;

(ii) Authorizing and accounting for weapons to be carried by or available to be used by personnel performing private security functions;

(iii) Registering and identifying armored vehicles, helicopters, and other military vehicles operated by Contractors performing private security functions; and

(iv) Reporting incidents in which—

(A) A weapon is discharged by personnel performing private security functions;

(B) Personnel performing private security functions are attacked, killed, or injured;

(C) Persons are killed or injured or property is destroyed as a result of conduct by Contractor personnel;

(D) A weapon is discharged against personnel performing private security functions or personnel performing such functions believe a weapon was so discharged; or

(E) Active, non-lethal countermeasures (other than the discharge of a weapon) are employed by personnel performing private security functions in response to a perceived immediate threat;

(2) Ensure that the Contractor and all employees of the Contractor who are responsible for performing private security functions under this contract are briefed on and understand their obligation to comply with—

(i) Qualification, training, screening (including, if applicable, thorough background checks), and security requirements established by 32 CFR part 159, Private Security Contractors (PSCs) Operating in Contingency Operations, Combat Operations, or Other Significant Military Operations;

(ii) Applicable laws and regulations of the United States and the host country and applicable treaties and international agreements regarding performance of private security functions;

(iii) Orders, directives, and instructions issued by the applicable commander of a combatant command or relevant Chief of Mission relating to weapons, equipment, force protection, security, health, safety, or relations and interaction with locals; and

(iv) Rules on the use of force issued by the applicable commander of a combatant command or relevant Chief of Mission for personnel performing private security functions; and

(3) Cooperate with any Government-authorized investigation of incidents reported pursuant to paragraph (c)(1)(iv) of this clause and incidents of alleged misconduct by personnel performing private security functions under this contract by providing—

(i) Access to employees performing private security functions; and

(ii) Relevant information in the possession of the Contractor regarding the incident concerned.

(d) *Remedies.* In addition to other remedies available to the Government—

(1) The Contracting Officer may direct the Contractor, at its own expense, to remove and replace any Contractor or subcontractor personnel performing private security functions who fail to comply with or violate applicable requirements of this clause or 32 CFR part 159. Such action may be taken at the Government's discretion without prejudice to its rights under any other provision of this contract.

(2) The Contractor's failure to comply with the requirements of this clause will be included in appropriate databases of past performance and considered in any

responsibility determination or evaluation of past performance; and

(3) If this is an award-fee contract, the Contractor's failure to comply with the requirements of this clause shall be considered in the evaluation of the Contractor's performance during the relevant evaluation period, and the Contracting Officer may treat such failure to comply as a basis for reducing or denying award fees for such period or for recovering all or part of award fees previously paid for such period.

(e) *Rule of construction.* The duty of the Contractor to comply with the requirements of this clause shall not be reduced or diminished by the failure of a higher- or lower-tier Contractor or subcontractor to comply with the clause requirements or by a failure of the contracting activity to provide required oversight.

(f) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (f), in all subcontracts that will be performed in areas of—

(1) *DoD contracts only:* Contingency operations, combat operations, as designated by the Secretary of Defense, or other significant military operations, as designated by the Secretary of Defense upon agreement of the Secretary of State; or

(2) *Non-DoD contracts:* Combat operations, as designated by the Secretary of Defense, or other significant military operations, upon agreement of the Secretaries of Defense and State that the clause applies in that area.

(End of clause)

■ 6. Amend section 52.244–6 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraph (c)(1)(ix) as paragraph (c)(1)(x); and

■ c. Adding a new paragraph (c)(1)(ix).

The revised and added text reads as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (Jul 2013)

* * * * *

(c)(1) * * *

(ix) 52.225–26, Contractors Performing Private Security Functions Outside the United States *Jul 2013)* (Section 862, as amended, of the National Defense Authorization Act for Fiscal Year 2008; 10 U.S.C. 2302 Note).

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[FR Doc. 2013–14610 Filed 6–20–13; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1 and 7

[FAC 2005–67; FAR Case 2013–004; Item II; Docket 2013–0004, Sequence 1]

RIN 9000–AM52

Federal Acquisition Regulation; Contracting Officer's Representative

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to improve contract surveillance by clarifying the contracting officer's representative (COR) responsibilities.

DATES: *Effective Date:* July 22, 2013.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–67, FAR Case 2013–004.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are issuing a final rule to improve contract surveillance by clarifying the COR responsibilities in FAR 1.602–2(d). In addition, a corresponding change is also made at FAR 7.104(e).

This case originated from a DoD Panel on Contracting Integrity recommendation. The DoD Panel on Contracting Integrity, an internal DoD panel, consists of senior-level DoD officials from across DoD working to review progress made by DoD to eliminate areas of vulnerability of the defense contracting system that allow fraud, waste, and abuse to occur, and recommend changes in law, regulations, and policy to eliminate the areas of vulnerability. In order to improve the contracting environment, this rule provides additional explanation in the FAR to ensure that CORs understand their duties and responsibilities to survey contractor performance.

II. Publication of This Final Rule for Public Comment Is Not Required by Statute

Publication of proposed regulations, 41 U.S.C. 1707, is the statute which applies to the publication of the Federal Acquisition Regulation. Paragraph (a)(1) of the statute requires that a procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it has either a significant effect beyond the internal operation procedures of the agency issuing the policy, regulation, procedure, or form or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment because it only involves internal Government procedures regarding the appointment of CORs and the clarification of COR responsibilities. This rule does not have a significant effect beyond the internal operation procedures of the agency issuing the policy, regulation, procedure, or form, and there is no significant cost or administrative impact on contractors or offerors.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant FAR revision and 41 U.S.C. 1707 does not require publication for public comment.

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).