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Dated: July 5, 2006.

William L. Wehrum,

Acting Assistant Administrator for Air and Radiation.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 7, 12, 25, 52

[FAR Case 2005-011; Docket 2006-0020;
Sequence 3]

RIN: 9000-AK42

Federal Acquisition Regulation; FAR Case 2005-011, Contractor Personnel in a Theater of Operations or at a Diplomatic or Consular Mission

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

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to address the issues of contractor personnel that are providing support to the mission of the United States Government in the theater of operations or at a diplomatic or consular mission outside the United States, but are not covered by the DoD clause for contractor personnel authorized to accompany the U.S. Armed Forces.

DATES: Interested parties should submit written comments to the FAR Secretariat on or before September 18, 2006 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR case 2005-011 by any of the following methods:

- Federal eRulemaking Portal: <http://acquisition.gov>. Follow the instructions for submitting comments.

- Agency Web site: <http://acquisition.gov/far/ProposedRules/proposed.htm>. Click on the FAR case number to submit comments.

- E-mail: farcase.2005-011@gsa.gov. Include FAR case 2005-011 in the subject line of the message.

- Fax: 202-501-4067.

- Mail: General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW., Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR case 2005-011 in all correspondence related to this case. All comments received will be posted without change to <http://acquisition.gov/far/ProposedRules/proposed.htm>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Linda Nelson, Procurement Analyst, at (202) 501-1900. The TTY Federal Relay Number for further information is 1-800-877-8973. Please cite FAR case 2005-011. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

SUPPLEMENTARY INFORMATION:

A. Background

This rule proposes to create a new FAR Subpart 25.3 to address issues relating to contractors outside the United States, including new section 25.302, Contractor personnel in a theater of operations or at a diplomatic or consular mission outside the United States. The rule also proposes a new clause entitled "Contractor Personnel in a Theater of Operations or at a Diplomatic or Consular Mission Outside the United States."

The clause applies when contractor personnel are employed outside the United States—

- In a theater of operations during—
- Contingency operations;
- Humanitarian or peacekeeping operations;
- Other military operations; or
- Military exercises designated by the combatant commander; or
- At a diplomatic or consular mission, when specified by the chief of mission.

This new clause clarifies that contractor personnel are civilians. Contractor personnel, except private security contractor personnel, are not authorized to use deadly force against enemy armed forces other than in self defense. Private security contractor personnel are only authorized to use deadly force when necessary to execute their security mission to protect assets/ persons, consistent with the mission statement contained in their contract. It is 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, such as preemptive attacks, or any other types of attacks.

The clause also addresses such issues as responsibility for logistical and security support, compliance with laws and regulations, preliminary personnel requirements, processing and departure points, personnel data lists, removal of contractor personnel, authorization of weapons and ammunition, vehicle or equipment licenses, wearing of military clothing and protective equipment, evacuation, personnel recovery, notification and return of personal effects, mortuary affairs, changes in place of performance or Government-furnished facilities, equipment, material, services, or site, and flowdown of the clause to subcontracts.

In preparation of this proposed rule, the Councils reviewed the proposed rule published by the Department of State in the **Federal Register** on December 22, 2004 (69 FR 76660). The Councils also considered the final rule issued by the Department of Defense on May 5, 2005 (70 FR 23790) (DFARS Case 2003-D087, Contractor Personnel Supporting a Force Deployed Outside the United States).

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.

B. Regulatory Flexibility Act

The Councils do not expect this proposed 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.*, because this rule does not impose economic burdens on contractors. The purpose and effect of this rule is to relieve the current perceived burden on contractors operating in a contingency environment without consistent guidance or a standardized clause. By establishing a standardized clause spelling out the standardized rules, this rule effectively reduces the burden on small business. It establishes a framework within which it will be easier for contractors to operate overseas. In addition, the availability of Government departure centers in the United States will make it easier for small businesses to meet all pre-departure requirements. An Initial Regulatory Flexibility Analysis (IRFA) has therefore not been prepared. The Councils will also consider comments from small entities concerning the affected FAR parts 2, 7, 12, 25, and 52 in accordance with 5 U.S.C. 610. Interested parties should submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR Case 2005-011), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose 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 2, 7, 12, 25, and 52

Government procurement.

Dated: July 10, 2006.

Linda K. Nelson

Acting Director, Contract Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 2, 7, 12, 25, and 52 as set forth below:

1. The authority citation for 48 CFR parts 2, 7, 12, 25, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101(b)(2) by adding, in alphabetical order, the definitions "At a diplomatic or consular mission" and "Theater of operations" to read as follows:

2.101 Definitions.

* * * * *

- (b) * * *
(2) * * *

At a diplomatic or consular mission means any location outside the United States where a contractor performs a contract administered by Federal agency personnel subject to the direction of a Chief of Mission pursuant to Section 207 of the Foreign Service Act of 1980 (22 U.S.C. 3927).

* * * * *

Theater of operations means an area defined by the combatant commander for the conduct or support of specific operations.

* * * * *

PART 7—ACQUISITION PLANNING

3. Amend section 7.105 by revising paragraphs (b)(13)(i) and (b)(19) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

- (b) * * *

(13) Logistics consideration.

Describe—

(i) The assumptions determining contractor or agency support, both initially and over the life of the acquisition, including consideration of contractor or agency maintenance and

servicing (see Subpart 7.3), support for contracts to be performed in a theater of operations or at a diplomatic or consular mission (see 25.302-3); and distribution of commercial items;

* * * * *

(19) Other considerations. Discuss, as applicable, standardization concepts, the industrial readiness program, the Defense Production Act, the Occupational Safety and Health Act, foreign sales implications, special requirements for contracts to be performed in a theater of operations or at a diplomatic or consular mission, and any other matters germane to the plan not covered elsewhere.

* * * * *

PART 12—ACQUISITION OF COMMERCIAL ITEMS

4. Revise section 12.301 by adding paragraph (b)(5) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(b)(5) Insert the clause at 52.225-XX, Contractor Personnel in a Theater of Operations or at a Diplomatic or Consular Mission outside the United States, as prescribed in 25.302-5.

* * * * *

PART 25—FOREIGN ACQUISITION

5. Revise section 25.000 to read as follows:

25.000 Scope of part.

(a) This part provides policies and procedures for—

(1) Acquiring foreign supplies, services, and construction materials; and

(2) Performance of contractor personnel outside the United States.

(b) It implements the Buy American Act, trade agreements, and other laws and regulations.

* * * * *

6. Add Subpart 25.3 to read as follow:

Subpart 25.3—Contractors Outside the United States

Sec

25.301 [Reserved]

25.302 Contractor personnel in a theater of operations or at a diplomatic or consular mission outside the United States.

25.302-1 Scope.

25.302-2 Definitions.

25.302-3 Government support.

25.302-4 Weapons.

25.302-5 Contract clauses.

Subpart 25.3—Contractors Outside the United States

25.301 [Reserved]

25.302 Contractor personnel in a theater of operations or at a diplomatic or consular mission outside the United States.

25.302-1 Scope.

This section applies to contracts requiring contractor personnel to perform outside the United States—

(a) In a theater of operations during—
(1) Contingency operations;
(2) Humanitarian or peacekeeping operations;

(3) Other military operations; or
(4) Military exercises designated by the combatant commander; or

(b) At a diplomatic or consular mission, when designated by the chief of mission.

25.302-2 Definitions.

Chief of mission means the principal officer in charge of a diplomatic mission of the United States or of a United States office abroad which is designated by the Secretary of State as diplomatic in nature, including any individual assigned under section 502(c) of the Foreign Service Act of 1980 (Public Law 96-465) to be temporarily in charge of such a mission or office.

Combatant Commander means the commander of a unified or specified combatant command established in accordance with 10 U.S.C. 161.

Other military operations means a range of military force responses that can be projected to accomplish assigned tasks. Such operations may include one or a combination of the following: civic action, humanitarian assistance, civil affairs, and other military activities to develop positive relationships with other countries; confidence building and other measures to reduce military tensions; military presence; activities to convey messages to adversaries; military deceptions and psychological operations; quarantines, blockades, and harassment operations; raids; intervention operations; armed conflict involving air, land, maritime, and strategic warfare operations; support for law enforcement authorities to counter international criminal activities (terrorism, narcotics trafficking, slavery, and piracy); support for law enforcement authorities to suppress domestic rebellion; and support for insurgency, counterinsurgency, and civil war in foreign countries.

25.302-3 Government support.

(a) Generally, contractors are responsible for providing their own logistical and security support,

including logistical and security support for their employees. The agency shall provide logistical or security support only when the appropriate agency official, in accordance with agency guidance, determines that Government provision of such support is needed to ensure continuation of essential contractor services and adequate support cannot be obtained by the contractor from other sources.

(b) The contracting officer shall specify in the contract the exact support to be provided, and whether this support is provided on a reimbursable basis, citing the authority for the reimbursement.

25.302-4 Weapons.

The contracting officer shall follow agency procedures and the weapons policy established by the combatant commander or the chief of mission when authorizing contractor personnel to carry weapons (see paragraph (i) of the clause at 52.225-XX, Contractor Personnel in a Theater of Operations or at a Diplomatic or Consular Mission outside the United States).

25.302-5 Contract clauses.

Insert the clause at 52.225-XX, Contractor Personnel in a Theater of Operations or at a Diplomatic or Consular Mission outside the United States, in solicitations and contracts when contract performance requires that contractor personnel be available to perform outside the United States—

- (a) In a theater of operations during—
- (1) Contingency operations;
 - (2) Humanitarian or peacekeeping operations;
 - (3) Other military operations; or
 - (4) Military exercises designated by the combatant commander; or
- (b) At a diplomatic or consular mission, when specified by the chief of mission.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. Add section 52.225-XX to read as follows:

52.225-XX Contractor Personnel in a Theater of Operations or at a Diplomatic or Consular Mission outside the United States.

As prescribed in 25.302-5, insert the following clause:

CONTRACTOR PERSONNEL IN A THEATER OF OPERATIONS OR AT A DIPLOMATIC OR CONSULAR MISSION OUTSIDE THE UNITED STATES (INSERT ABBREVIATED MONTH AND YEAR OF PUBLICATION IN THE FEDERAL REGISTER)

- (a) *Definitions.* As used in this clause—
At a diplomatic or consular mission means any location outside the United States where

a Contractor performs a contract administered by Federal agency personnel subject to the direction of a Chief of Mission pursuant to Section 207 of the Foreign Service Act of 1980 (22 U.S.C. 3927).

Chief of mission means the principal officer in charge of a diplomatic mission of the United States or of a United States office abroad which is designated by the Secretary of State as diplomatic in nature, including any individual assigned under section 502(c) of the Foreign Service Act of 1980 (Public Law 96-465) to be temporarily in charge of such a mission or office.

Combatant Commander means the commander of a unified or specified combatant command established in accordance with 10 U.S.C. 161.

Other military operations means a range of military force responses that can be projected to accomplish assigned tasks. Such operations may include one or a combination of the following: civic action, humanitarian assistance, civil affairs, and other military activities to develop positive relationships with other countries; confidence building and other measures to reduce military tensions; military presence; activities to convey messages to adversaries; military deceptions and psychological operations; quarantines, blockades, and harassment operations; raids; intervention operations; armed conflict involving air, land, maritime, and strategic warfare operations; support for law enforcement authorities to counter international criminal activities (terrorism, narcotics trafficking, slavery, and piracy); support for law enforcement authorities to suppress domestic rebellion; and support for insurgency, counterinsurgency, and civil war in foreign countries.

Theater of operations means an area defined by the combatant commander for the conduct or support of specific operations.

(b) *General.* (1) This clause applies when contractor personnel are employed outside the United States—

- (i) In a theater of operations during—
 - (A) Contingency operations;
 - (B) Humanitarian or peacekeeping operations;
 - (C) Other military operations; or
 - (D) Military exercises designated by the combatant commander; or
- (ii) At a diplomatic or consular mission, when specified by the chief of mission.

(2) Contract performance may require work in dangerous or austere conditions. The Contractor accepts the risks associated with required contract performance in such operations.

(3) Contractor personnel are civilians.

(i) Except as provided in paragraph (b)(3)(ii) of this clause, Contractor personnel are not authorized to use deadly force against enemy armed forces other than in self defense.

(ii) Private security Contractor personnel are authorized 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.

(iii) Civilians lose their law of war protection from direct attack if and for such time as they take a direct part in hostilities.

(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.* Unless specified elsewhere in the contract, the Contractor is responsible for all logistical and security support required for Contractor personnel engaged in this contract.

(d) *Compliance with laws and regulations.* The Contractor shall comply with, and shall ensure that its personnel in the area of performance in the theater of operations or at the diplomatic or consular mission 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 Chief of Mission or the Combatant Commander relating to mission accomplishments, force protection, security, health, safety, or relations and interaction with local nationals.

(e) *Preliminary personnel requirements.* (1) Specific requirements for paragraphs (e)(2)(i) through (e)(2)(vi) of this clause will be set forth in the statement of work, or elsewhere in the contract.

(2) Before Contractor personnel depart from the United States or a third country, and before Contractor personnel residing in the host country begin contract performance in the theater of operations or at the diplomatic or consular mission, the Contractor shall ensure the following:

- (i) All applicable specified security and background checks are completed.
- (ii) All personnel are medically and physically fit and have received all required vaccinations.
- (iii) All personnel have all necessary passports, visas, entry permits, and other documents required for contractor personnel to enter and exit the foreign country, including those required for in-transit countries.
- (iv) All personnel have received—
 - (A) A country clearance or special area clearance, if required by the chief of mission; and
 - (B) A theater clearance, if required by the Combatant Commander.
- (v) All personnel have received personal security training. The training must at a minimum—
 - (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.
- (vii) All personnel who are U.S. citizens are registered with the U.S. Embassy or Consulate with jurisdiction over the area of operations on-line at <http://www.travel.state.gov>.

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

(i) If this contract is with the Department of Defense, or the contract relates to supporting the mission of the Department of Defense outside the United States, 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 (see the Military Extraterritorial Jurisdiction Act of 2000 (18 U.S.C. 3261 *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 violation of the law of war 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 United States diplomatic, consular, military or other United States Government missions outside the United States (18 U.S.C. 7(9)).

(f) *Processing and departure points.* The Contractor shall require its personnel who are arriving from outside the area of performance to perform in the theater of operations or at the diplomatic or consular mission to—

(1) Process through the departure center designated in the contract or complete another process as directed by the Contracting Officer;

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

(3) Process through a reception center designated by the Contracting Officer upon arrival at the place of performance.

(g) *Personnel data list.* (1) The Contractor shall establish and maintain with the designated Government official a current list of all contractor personnel in the areas of performance. The Contracting Officer will inform the Contractor of the Government official designated to receive this data and the appropriate system to use for this effort.

(2) The Contractor shall ensure that all employees on this list have a current record of emergency data, for notification of next of kin, on file with both the Contractor and the designated Government official.

(h) *Contractor personnel.* 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 clause. Such action may be taken at the Government's discretion without prejudice to its rights under any other provision of this contract, including termination for default or cause.

(i) *Weapons.* (1) If the Contracting Officer, subject to the approval of the Combatant Commander or the Chief of Mission, authorizes the carrying of weapons—

(1) The Contracting Officer may authorize an approved Contractor to issue Contractor-owned weapons and ammunition to specified employees; or

(ii) The [specify individual, e.g. Contracting Officer Representative, Regional Security Officer, etc.] may issue Government-furnished weapons and ammunition to the Contractor for issuance to specified contractor employees.

(2) The Contractor shall provide to the Contracting Officer a specific list of personnel for whom authorization to carry a weapon is requested.

(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 or the Chief of Mission; 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 or the Chief of Mission regarding possession, use, safety, and accountability of weapons and ammunition.

(4) Upon revocation by the Contracting Officer of the Contractor's authorization to possess weapons, the Contractor shall ensure that all Government-furnished weapons and unexpended ammunition are returned as directed by the Contracting Officer.

(5) 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.

(j) *Vehicle or equipment licenses.* Contractor personnel shall possess the required licenses to operate all vehicles or equipment necessary to perform the contract in the area of performance.

(k) *Military clothing and protective equipment.* (1) Contractor personnel are prohibited from wearing military clothing unless specifically authorized by the Combatant Commander. If authorized to wear military clothing, Contractor personnel must wear distinctive patches, arm bands, nametags, or headgear, in order to be distinguishable from military personnel, consistent with force protection measures.

(2) Contractor personnel may wear specific items required for safety and security, such as ballistic, nuclear, biological, or chemical protective equipment.

(l) *Evacuation.* (1) If the Chief of Mission or Combatant Commander orders a mandatory evacuation of some or all personnel, the Government will provide to United States and third country national Contractor personnel the level of assistance provided to private United States citizens.

(2) In the event of a non-mandatory evacuation order, the Contractor shall maintain personnel on location sufficient to meet contractual obligations unless instructed to evacuate by the Contracting Officer.

(m) *Personnel recovery.* (1) In the case of isolated, missing, detained, captured or abducted Contractor personnel, the Government will assist in personnel recovery actions.

(2) Personnel recovery may occur through military action, action by non-governmental organizations, other U.S. Government-approved action, diplomatic initiatives, or through any combination of these options.

(3) The Department of Defense has primary responsibility for recovering DoD contract service employees and, when requested, will provide personnel recovery support to other agencies in accordance with DoD Directive 2310.2, Personnel Recovery.

(n) *Notification and return of personal effects.* (1) The Contractor shall be responsible for notification of the employee-designated next of kin, and notification as soon as possible to the U.S. Consul responsible for the area in which the event occurred, if the employee—

(i) Dies;

(ii) Requires evacuation due to an injury; or

(iii) Is isolated, missing, detained, captured, or abducted.

(2) The Contractor shall also be responsible for the return of all personal effects of deceased or missing Contractor personnel, if appropriate, to next of kin.

(o) *Mortuary affairs.* Mortuary affairs for Contractor personnel who die in the area of performance will be handled as follows:

(1) If this contract was awarded by DoD, the remains of Contractor personnel will be handled in accordance with DoD Directive 1300.22, Mortuary Affairs Policy.

(2)(i) If this contract was awarded by an agency other than DoD, the Contractor is responsible for the return of the remains of Contractor personnel from the point of identification of the remains to the location specified by the employee or next of kin, as applicable, except as provided in paragraph (o)(2)(ii) of this clause.

(ii) In accordance with 10 U.S.C. 1486, the Department of Defense may provide, on a reimbursable basis, mortuary support for the disposition of remains and personal effects of all U.S. citizens upon the request of the Department of State.

(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 place of performance or Government-furnished facilities, equipment, material, services, or site. Any change order issued in accordance with this paragraph 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 that require subcontractor personnel to perform outside the United States—

(1) In a theater of operations during—

- (i) Contingency operations;
- (ii) Humanitarian or peacekeeping operations;
- (iii) Other military operations; or
- (iv) Military exercises designated by the Combatant Commander; or

(2) At a diplomatic or consular mission, when specified by the chief of mission.
(End of clause)

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