

direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This proposed rule, if made final, would delay the effective date of the NSR Aggregation Amendments and allow for sufficient time to conduct the reconsideration. Thus, Executive Order 13132 does not apply to these proposed regulation revisions.

In the spirit of Executive Order 13121 and consistent with EPA policy to promote communications between EPA and state and local governments, EPA is soliciting comments on this proposal from state and local officials.

*F. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments*

This action does not have Tribal implications as specified in Executive Order 13175. No tribal government currently has an approved tribal implementation plan under the CAA to implement the NSR program, therefore the Federal government is currently the NSR reviewing authority in Indian country. Thus, tribal governments should not experience added burden from this proposed action. Thus, Executive Order 13175 does not apply.

EPA specifically solicits additional comment on the proposed revisions to the regulations from Tribal officials.

*G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks*

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because this proposal is taking comment on delaying the effective date of the NSR Aggregation Amendments and allows for sufficient time to conduct the reconsideration. However, EPA solicits comments on whether the proposal would result in an adverse environmental effect that would have a disproportionate effect on children.

*H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use*

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law No. 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

*J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The proposed revision is taking comment on delaying the effective date of the NSR Aggregation Amendments and allows for sufficient time to conduct the reconsideration. As such, it does not adversely affect the health or safety of minority or low income populations.

*K. Determination Under Section 307(d)*

Pursuant to sections 307(d)(1)(E) and 307(d)(1)(V) of the CAA, the Administrator determines that this action is subject to the provisions of section 307(d). Section 307(d)(1)(V) provides that the provisions of section 307(d) apply to “such other actions as the Administrator may determine.”

**IV. Statutory Authority**

The statutory authority for this action is provided by sections 307(d)(7)(B), 101, 111, 114, 116, and 301 of the CAA as amended (42 U.S.C. 7401, 7411, 7414, 7416, and 7601). This notice is also subject to section 307(d) of the CAA (42 U.S.C. 7407(d)).

**List of Subjects**

*40 CFR Part 51*

Environmental protection, Administrative practice and procedure, Air pollution control, Baseline emissions, Intergovernmental relations, Aggregation, Major modifications, Reporting and recordkeeping requirements.

*40 CFR Part 52*

Environmental protection, Administrative practice and procedure, Air pollution control, Baseline emissions, Intergovernmental relations, Aggregation, Major modifications, Reporting and recordkeeping requirements.

Dated: March 12, 2009.

**Lisa P. Jackson,**  
Administrator.

[FR Doc. E9–5996 Filed 3–17–09; 8:45 am]

BILLING CODE 6560–50–P

**DEPARTMENT OF HOMELAND SECURITY**

**48 CFR Parts 3009 and 3052**

[Docket No. DHS–2009–0017]

RIN 1601–AA55

**Prohibition on Federal Protective Service Guard Services Contracts With Business Concerns Owned, Controlled, or Operated by an Individual Convicted of a Felony [HSAR Case 2009–001]**

**AGENCY:** Department of Homeland Security (DHS).

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** DHS is proposing to amend the Homeland Security Acquisition Regulation (HSAR) to prohibit DHS from awarding a Federal Protective Service (FPS) contract for guard services to a business concern that is owned, controlled, or operated by an individual who has been convicted of a serious felony. The rule is necessary to implement the provisions of Public Law 110–356, the Federal Protective Service Guard Contracting Reform Act of 2008.

**DATES:** *Comment date:* Interested parties should submit written comments to the

Department of Homeland Security, Office of the Chief Procurement Officer, Acquisition Policy and Legislation, on or before April 17, 2009.

**ADDRESSES:** Please submit written comments, identified by agency name and docket number DHS-2009-0017, by one of the following methods:

(1) Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

(2) By mail to the Department of Homeland Security, Office of the Chief Procurement Officer, Acquisition Policy and Legislation, ATTN: Gloria Sochon, 245 Murray Drive, Bldg. 410 (RDS) Washington, DC 20528.

**FOR FURTHER INFORMATION CONTACT:** Gloria Sochon, Senior Procurement Analyst, at (202) 447-3507 for clarification of content. Please cite HSAR Case 2008-002.

**SUPPLEMENTARY INFORMATION:**

- I. Request for Comments
- II. Background
- III. Discussion of Proposed Rule
- IV. Regulatory Requirements
  - A. Executive Order 12866 Assessment
  - B. Regulatory Flexibility Act
  - C. Paperwork Reduction Act

**I. Request for Comments**

Interested persons are invited to participate in this rulemaking by submitting written views and arguments on all aspects of this rule. Comments should be organized by HSAR Part, and address the specific section that is being commented on. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. See **ADDRESSES** above for information on how to submit comments. If you submit comments by mail, please submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you would like DHS to acknowledge receipt of comments submitted by mail, please enclose a self addressed stamped post card or envelope. DHS will consider all comments and material received during the comment period.

*Docket:* For access to the docket in order to read background documents or comments received, go to <http://www.regulations.gov>.

**II. Background**

Public Law 110-356, the Federal Protective Service Guard Contracting Reform Act of 2008, prohibits DHS from awarding an FPS contract for guard services to any business concern that is owned, controlled, or operated by an individual who has been convicted of a felony. The proposed rule would implement this prohibition, identify

which serious felonies may prohibit a contractor from being awarded a contract; require contractors to provide information regarding any relevant felony convictions when submitting bids or proposals; provide guidelines for the contracting officer to assess present responsibility, mitigating factors, and the risk associated with the previous conviction, and allow the contracting officer to award a contract under certain circumstances.

The rule proposes that felonies which cast doubt on the integrity or business ethics of a business concern or are of a nature that is inconsistent with the mission of the Federal Protective Service are serious felonies which will prohibit a business concern from being awarded an FPS contract for guard services. Examples of serious felony convictions may include, but are not limited to: Fraud arising out of a contract with the federal, state or local government; bribery, graft or a conflict of interest; threatened or actual harm to a government official, family member or government property; crimes of violence; threat to national security; commercial bribery; counterfeiting, forgery or trafficking in vehicles the identification numbers of which have been altered; obstruction of justice, perjury or subornation of perjury, or bribery of a witness; felony for attempt to evade or defeat Federal tax or felony for willful failure to collect or pay over Federal tax.

The proposed HSAR clause will require offerors to disclose whether they are or are not a business concern owned, controlled or operated by an individual convicted of a felony. If an offeror represents that they are owned, controlled or operated by an individual convicted of a felony they will need to submit a new award request with their bid or proposal or a previously approved award request. The award request will provide the basis for the request and details regarding the felony conviction to include: Name and date of birth of the individual convicted of a felony, the age of the conviction, nature and circumstances surrounding the conviction, protective measures taken by the individual or business concern to reduce or eliminate the risk of further misconduct, whether the individual has made full restitution for the felony and whether the individual has accepted responsibility for past misconduct resulting in the felony conviction.

The proposed clause also provides that after award of an Indefinite Delivery/Indefinite Quantity Contract, Blanket Purchase Agreement, or other contractual instrument that may result in the issuance of task orders, calls, or

exercise of options to extend the term of the contract, the contractor must provide notice of a felony conviction of any person who owns, controls, or operates the business concern. The contracting officer will review the conviction and make a new determination of eligibility prior to the issuance of any task order, call, or exercise of any option.

The proposed rule would allow the contracting officer to review the basis for the award request and assess the risk associated with the felony conviction. Under certain circumstances, the contracting officer could award a contract for guard services to a business concern owned, controlled or operated by an individual convicted of a felony. Prior to such an award, the contracting officer will need to obtain the approval of the Head of the Contracting Activity for U.S. Immigration and Customs Enforcement.

**III. Discussion of Proposed Rule**

The proposed rule would revise HSAR 48 CFR 3009.1 and add a clause 3052.209-XX to implement Public Law 110-356. It also makes technical corrections to HSAR 48 CFR 3009.1.

**IV. Regulatory Requirements**

*A. Executive Order 12866 Assessment*

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. The rule is not a major rule under 5 U.S.C. 804.

*B. Regulatory Flexibility Act*

The Department of Homeland Security certifies that the proposed rule amending HSAR 48 CFR 3009.1 and 3052.209 will not, if promulgated, have a significant impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The factual basis for certification is presented in the following analysis of the economic effects of the proposed rule. Application of the rule is limited to offerors or contractors providing guard services under the Federal Protective Service contract security guard program. Further, for these offerors and contractors, the economic impact of the rule is not expected to be substantial. Currently, FPS administers a contract inventory consisting of approximately 125 contract vehicles for guard services with 46 different guard service vendors. These FPS contracts provide 14,000 contract guards to protect 9,000 federal facilities. In FY2008, DHS issued

approximately 47 solicitations for guard services and awarded 55 contracts. For each solicitation issued, an average of 10 offerors responded.

The 46 vendors that provide guard services to FPS represent less than one percent of the industry. In 2005, the Small Business Administration, based on Bureau of Census data, estimated that there were 4,853 firms in Security Guards and Patrol Services Industry, North American Industry Classification System (NAICS) 561612 (Reference **Federal Register** notices of November 10, 2005 (70 FR 68368) and June 30, 2006 (71 FR 37490)). The Central Contractor Registration database (<http://www.ccr.gov>) currently lists 5,784 active records for NAICS 561612. Of these, 2,361, or 41 percent are identified as small businesses.

Only those vendors that represent that they are owned, controlled, or operated by an individual convicted of a felony will need to submit a new award request with their bid or proposal or a previously approved award request. After award, a contractor will need to disclose felony convictions that occur during the term of the contract. DHS estimates that this may affect ten percent of offerors (fewer than 50 per year – 47 solicitations × 10 offerors per solicitation × .1) and ten percent of contractors (fewer than five per year— 46 guard service vendors × .1)). The award request must provide the basis for the request and details regarding the felony conviction to include: The age of the conviction, nature and circumstances surrounding the conviction, protective measures taken by the individual or business concern to reduce or eliminate the risk of further misconduct, whether the individual has made full restitution for the felony and whether the individual has accepted responsibility for past misconduct resulting in the felony conviction. Under certain circumstances, the contracting officer may still award a contract for guard services to a business concern owned, controlled or operated by an individual convicted of a felony. Only those felonies that cast doubt on the integrity or business ethics of the business concern or are of a nature that are inconsistent with the mission of the Federal Protective Service will prohibit a business concern from being awarded an FPS contract for guard services. Examples of serious felony convictions may include, but are not limited to: fraud arising out of a contract with the federal, state or local government, bribery, graft or a conflict of interest, threatened or actual harm to a government official, family member or government property, crimes of

violence, threat to national security, commercial bribery, counterfeiting, forgery or trafficking in vehicles the identification numbers of which have been altered, obstruction of justice, perjury or subornation of perjury, or bribery of a witness, felony for attempt to evade or defeat Federal tax or felony for willful failure to collect or pay over Federal tax.

Therefore, DHS has not performed an initial regulatory flexibility analysis. DHS invites comments from small businesses and other interested parties. DHS also will consider comments from small entities concerning the affected HSAR subpart in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite HSAR Case 2008–0002.

#### *C. Paperwork Reduction Act*

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies because the rule contains information collection requirements.

(1) The clause at 3052.209–XX requires each offeror for FPS contract guard services to disclose whether it is owned, controlled or operated by an individual convicted of a felony. The representation is necessary to evaluate the offeror's responsibility related to performing the required services in accordance with Public Law 110–356. An offeror that is owned, controlled or operated by a felon must also submit an award request with supporting documentation. DHS has determined that the burden for the responses is within the total estimated burden for information requested from prospective contractors in response to agency-issued solicitations approved under OMB Control No. 1600–0005. Based on FY2008 statistics, DHS has approximately 470 respondents to solicitations for contract guard services per year (47 solicitations with an average of 10 offers per solicitation), all of whom will make the representation. Of these, DHS estimates that 10 percent (47 per year) may submit award requests. DHS estimates the total burden on offerors to be 211.5 hours. This represents .1 percent of the total burden hours under OMB Control No. 1600–0005.

(2) The clause at 3052.209–XX requires the contractor to report felony convictions after award of an Indefinite Delivery/Indefinite Quantity Contract, Blanket Purchase Agreement, or other contractual instrument that may result in the issuance of task orders, calls, or exercise of options to extend the term of the contract. The notice applies to a felony conviction of any person who owns, controls, or operates the business

concern. DHS has determined that the burden for the responses is within the total estimated burden for information requested from contractors in response to OMB Control No. 1600–003 for information requested from contractors as part of post-contract award administration by DHS acquisition officials. DHS has 125 contracts for FPS guard services. Of these, DHS estimates that 10 percent will also submit a notice of felony conviction. DHS estimates the total burden on contractors to be 25 hours. This represents less than .001 percent of the total burden hours under OMB Control No. 1600–0003.

#### **List of Subjects in 48 CFR Parts 3009 and 3052**

Government procurement.

**Richard K. Gunderson,**

*Acting Chief Procurement Officer,  
Department of Homeland Security.*

■ Accordingly, DHS amends 48 CFR parts 3009 and 3052 as follows:

■ 1. The authority citation for 48 CFR parts 3009 and 3052 continues to read as follows:

**Authority:** 41 U.S.C. 418b (a) and (b).

#### **PART 3009—CONTRACTOR QUALIFICATIONS**

■ 2. Redesignate section 3009.104–70 as section 3009.170 and redesignate sections 3009.104–71 through 3009.104–75 as sections 3009.170–1 through 3009.170–5, respectively.

■ 3. Add sections 3009.171 through 3009.171–9 to subpart 3009.1 to read as follows:

**3009.171 Prohibition on Federal Protective Service guard services contracts with business concerns owned, controlled, or operated by an individual convicted of a felony.**

##### **3009.171–1 General.**

Except as provided in HSAR 48 CFR 3009.171–6, the Department of Homeland Security (DHS) may not enter into a contract for guard services under the Federal Protective Service (FPS) guard services program with any business concern owned, controlled, or operated by an individual convicted of a serious felony.

##### **3009.171–2 Definitions.**

As used in this subpart—

*Business concern* means a commercial enterprise and the people who constitute it.

*Convicted of a felony* means any conviction of a felony in violation of state or federal criminal statutes, including the Uniform Code of Military Justice, whether entered on a verdict or

plea, including a plea of *nolo contendere*, for which a sentence has been imposed.

*Felony* means an offense punishable by death or imprisonment for a term exceeding one year.

*Individual* means any person, corporation, partnership, or other entity with a legally independent status.

**3009.171-3 Determination of eligibility for award of FPS guard service contracts.**

(a) Contracting officers shall make a determination of eligibility for award of FPS guard service contracts upon identification of the apparent successful offeror as a result of a solicitation for offers

(b) Contractors shall be required to immediately notify the contracting officer in writing upon any felony conviction of personnel who own, control or operate a business concern as defined in (HSAR) 48 CFR 3009.171-4 at any time during the duration of an Indefinite Delivery/Indefinite Quantity Contract, Blanket Purchase Agreements, or other contractual instrument that may result in the issuance of task orders, calls or option to extend the terms of a contract. Upon notification of a felony conviction the contracting officer will review and make a new determination of eligibility prior to the issuance of any task order, call or exercise of an option.

**3009.171-4 Determination of ownership, control, or operation.**

(a) The extent to which an individual owns, controls, or operates a business concern is determined on a case-by-case basis and depends on the specific facts of the individual's situation. Upon the request of the contracting officer, and prior to contract award, such individual must provide documentation to the contracting officer to use in determining ownership, control, or operation. The refusal to provide or to timely provide such documentation may serve as grounds to preclude contract award.

(b) The interest of a spouse or other family member in the same business concern will be imputed to the individual in determining the extent to which the individual owns, controls, or operates the business concern.

(c) The following are examples of when an individual owns, controls, or operates a business concern. The examples are not inclusive.

(1) The individual is the president or chief executive officer of the business concern.

(2) The individual is a senior level executive within the business concern, such as the Chief Financial Officer, Chief Operating Officer or Chief contracting official.

(3) The individual is a general partner in the business concern.

(4) An individual who is a general partner in a limited partnership has control. An individual with a limited partnership interest of 25% or more has ownership or control.

(5) An individual owns, controls, or operates a business concern when the individual has the:

(i) Power to vote, directly or indirectly, 25% or more interest in any class of voting stock of the business concern;

(ii) Ability to direct in any manner the election of a majority of the business concern's directors or trustees; or

(iii) Ability to exercise a controlling influence over the business concern's management and policies.

**3009.171-5 Serious felonies prohibiting award.**

(a) Not all felony convictions will prohibit a business concern from being awarded a contract for FPS guard services. Those felonies that cast doubt on the integrity or business ethics of the business concern, or are of a nature that are inconsistent with the mission of the Federal Protective Service, are considered serious felonies that will prohibit contract award.

(b) The following are examples of serious felonies prohibiting contract award.

(1) Conviction of a felony involving fraud arising out of a contract with the federal, state or local government.

(2) Conviction of a felony for bribery, graft or a conflict of interest.

(3) Conviction of a felony involving threatened or actual harm to a government official or family member.

(4) Conviction of a felony involving threatened or actual harm to government property.

(5) Conviction of a felony involving a crime of violence.

(6) Conviction of a felony involving a threat to national security.

(7) Conviction of a felony for commercial bribery, counterfeiting, forgery or trafficking in vehicles the identification numbers of which have been altered.

(8) Conviction of a felony for obstruction of justice, perjury or subornation of perjury, or bribery of a witness.

(9) Conviction of a felony for attempt to evade or defeat Federal tax.

(10) Conviction of a felony for willful failure to collect or pay over Federal tax.

(11) Conviction on any other felony that meets the criteria of paragraph (a) of this subsection.

**3009.171-6 Guidelines for contracting officers.**

(a) In accordance with FAR subpart 9.4, a contracting officer may not award a contract for FPS guard services to any business concern that is suspended, debarred or proposed for debarment unless the agency head determines that there is a compelling reason for such action.

(b) The contracting officer shall not award a contract for FPS guard services to any business concern that is otherwise nonresponsible on the same contract.

(c) The contracting officer shall not award an FPS guard services contract to any business concern that is owned, controlled or operated by an individual convicted of a serious felony as defined in (HSAR) 48 CFR 3009.171-5 except as provided in paragraph (e) of this subsection.

(d) In making the determination of (HSAR) 48 CFR 3009.171-7, the contracting officer may not review the fact of the conviction itself, but may consider any information provided by the individual or business concern, and any information known to the contracting officer. Factors that the contracting officer may consider include, but are not limited to:

(1) The age of the conviction.

(2) The nature and circumstances surrounding the conviction.

(3) Protective measures taken by the individual or business concern to reduce or eliminate the risk of further misconduct.

(4) Whether the individual has made full restitution for the felony.

(5) Whether the individual has accepted responsibility for past misconduct resulting in the felony conviction.

(e) The contracting officer may determine that the conviction of an otherwise serious felony is of such age, or committed under such circumstances, that the underlying felonious misconduct no longer calls into question the individual or business concern's integrity or business ethics, or that it is not inconsistent with the mission of the Federal Protective Service. Any such determination must be approved by the Head of the Contracting Activity (HCA) for U.S. Immigration and Customs Enforcement.

**3009.171-7 Contract award approval procedures for contractors with felony convictions.**

(a) The HCA for U.S. Immigration and Customs Enforcement has sole discretion to approve a request to permit award of a contract for FPS guard services to a business concern owned,

controlled, or operated by an individual convicted of a felony, for any reason permitted by this regulation. This authority is not delegable.

(b) A business concern owned, operated or controlled by an individual convicted of a felony may submit an award request to the contracting officer. The basis for such request shall be that the subject felony is not a serious felony as defined by this regulation, or that such individual no longer owns, controls or operates the business concern. The business concern shall bear the burden of proof for award requests.

(c) A copy of the award approval request with supporting documentation or the approved request shall be attached with the bid or proposal.

(d) An award approval request shall contain the basis for the request. If the basis for the request is that the subject felony is not a serious felony as defined by this regulation the award approval request shall contain, at a minimum, the following information:

(1) Name and Date of Birth of Individual Convicted of a felony

(2) Date sentenced

(3) Statute/Charge

(4) Docket/Case Number

(5) Court/Jurisdiction

(6) The nature and circumstances surrounding the conviction

(7) Protective measures taken by the individual or business concern to reduce or eliminate the risk of further misconduct.

(8) Whether the individual has made full restitution for the felony

(9) Whether the individual has accepted responsibility for past misconduct resulting in the felony conviction.

(e) If the contracting officer is unable to affirmatively determine that the subject felony is not a serious felony as defined by this regulation, or that such individual no longer owns, controls or operates the business concern, the contracting officer shall deny the award approval request and not forward such request to the HCA for U.S. Immigration and Customs Enforcement

(f) If the contracting officer affirmatively determines that the subject felony is not a serious felony as defined by this regulation, or that such individual no longer owns, controls or operates the business concern, the contracting officer shall refer the request to the HCA for U.S. Immigration and Customs Enforcement with a recommendation that the request be approved.

#### **3009.171-8 Ineligible contractors.**

Any business concern determined to be ineligible for award under (HSAR) 48

CFR 3009.171-4 shall be ineligible to receive a contract for guard services under the Federal Protective Service guard program until such time as:

(a) The concern demonstrates that it has addressed and resolved the issues that resulted in the determination of ineligibility, and

(b) Either:

(1) The contracting officer makes an affirmative determination that the business concern is not owned, operated, or controlled by an individual convicted of a felony based on current information, or

(2) The HCA for U.S. Immigration and Customs Enforcement approves an award request under (HSAR) 48 CFR 3009.171-6.

#### **3009.171-9 Clause.**

Insert the clause (HSAR) 48 CFR 3052.209-XX, Prohibition on Federal Protective Service guard services contracts with business concerns owned, controlled, or operated by an individual convicted of a felony, in all solicitations and contracts for FPS guard services.

### **PART 3052—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 4. Add section 3052.209-XX as follows:

#### **3052.209-XX Prohibition on Federal Protective Service guard services contracts with business concerns owned, controlled, or operated by an individual convicted of a felony**

As prescribed at (HSAR) 48 CFR 3009.171-9, insert the following clause:

#### **Prohibition on Federal Protective Service Guard Services Contracts With Business Concerns Owned, Controlled, or Operated by an Individual Convicted of a Felony (Date)**

(a) Prohibitions. Section 2 of the Federal Protective Service Guard Contracting Reform Act of 2008, Public Law 110-356, prohibits the Department of Homeland Security from entering into a contract for guard services under the Federal Protective Service (FPS) guard services program with any business concern owned, controlled, or operated by an individual convicted of a serious felony.

(b) Definitions. As used in this clause:

*Business concern* means a commercial enterprise and the people who constitute it.

*Felony* means an offense punishable by death or imprisonment for a term exceeding one year.

*Convicted of a felony* means any conviction of a felony in violation of state or federal criminal statutes, including the Uniform Code of Military Justice, whether entered on a verdict or plea, including a plea of *nolo contendere*, for which a sentence has been imposed.

*Individual* means any person, corporation, partnership, or other entity with a legally independent status.

(c) The extent to which an individual owns, controls, or operates a business concern is determined on a case-by-case basis and depends on the specific facts of the individual's situation. Upon the request of the Contracting Officer, and prior to contract award, such individual must provide documentation to the Contracting Officer to use in determining ownership, control, or operation. The refusal to timely provide such documentation may serve as grounds to preclude contract award.

(1) The interest of a spouse or other family member in the same organization will be imputed to the individual in determining the extent to which the individual owns, controls, or operates a business concern.

(2) The following are examples of when an individual owns, controls, or operates a business concern. The examples are not inclusive.

(i) The individual is the president or chief executive officer of the business concern.

(ii) The individual is a senior level executive within the business concern, such as the Chief Financial Officer, Chief Operating Officer or Chief contracting official.

(iii) The individual is a general partner in the business concern.

(iv) An individual who is a general partner in a limited partnership has control. An individual with a limited partnership interest of 25% or more has ownership or control.

(v) An individual owns, controls, or operates a business concern when the individual has the:

(A) Power to vote, directly or indirectly, 25% or more interest in any class of voting stock of the business concern; Ability to direct in any manner the election of a majority of the business concern's directors or trustees; or

(B) Ability to exercise a controlling influence over the business concern's management and policies.

(d) Award request.

(1) A business concern owned, operated or controlled by an individual convicted of a felony may submit an award request to the Contracting Officer. The basis for such request shall be that the subject felony is not a serious felony as defined by this regulation, or that such individual no longer owns, controls or operates the business concern. The business concern shall bear the burden of proof for award requests.

(2) If the Contracting Officer, in his or her sole discretion, is unable to affirmatively determine that the subject felony is not a serious felony as defined by this regulation, or that such individual no longer owns, controls or operates the business concern, the Contracting Officer shall deny the award request. The Head of the Contracting Activity for U.S. Immigration and Customs Enforcement has sole discretion to approve an award request.

(3) A copy of the award request with supporting documentation or the approved award request shall be attached with the bid or proposal.

(4) An award request shall contain the basis for the request. If the basis for the

request is that the subject felony is not a serious felony as defined by this regulation the award request shall contain, at a minimum, the following information:

- (i) Name and Date of Birth of Individual Convicted of a felony.
- (ii) Date sentenced.
- (iii) Statute/Charge.
- (iv) Docket/Case Number.
- (v) Court/Jurisdiction.
- (vi) The nature and circumstances surrounding the conviction.
- (vii) Protective measures taken by the individual or business concern to reduce or eliminate the risk of further misconduct.
- (viii) Whether the individual has made full restitution for the felony
- (ix) Whether the individual has accepted responsibility for past misconduct resulting in the felony conviction.

(e) Privacy Statement. The offeror will provide the following statement to any individual whose information will be submitted in an award request pursuant to paragraph (d)(4) of this clause.

Privacy Act Notice. The collection of this information is authorized by the Federal Protective Service Guard Contracting Reform Act of 2008 (Pub. L. 110-356) and Department of Homeland Security (DHS) implementing regulations at Homeland Security Acquisition Regulation (HSAR) 48 CFR 3009.171. This information is being collected to determine whether an individual that owns, controls, or operates the business concern submitting this offer has been convicted of a felony that would disqualify the offeror from receiving an award. This information will be used by and disclosed to DHS personnel and contractors or other agents who require this information to determine whether an award request should be approved or denied. Additionally, DHS may share this personal information with the U.S. Justice Department and other Federal and State agencies for collection, enforcement, investigatory, or litigation purposes, or as otherwise authorized pursuant to its published Privacy Act system of records notice. Submission of this information by the individual is voluntary, however, failure to provide it may result in denial of an award to the offeror.

(f) Disclosure. The offeror under this solicitation represents that [Check one]:

it is not a business concern owned, controlled, or operated by an individual convicted of a felony; or

it is a business concern owned, controlled, or operated by an individual convicted of a felony, and has submitted an award request pursuant to paragraph (d) of this clause.

(g) If a request is applied for, the offeror shall attach the request with supporting documentation, to the bid or proposal. The supporting documentation may include copies of prior award requests granted to the offeror.

(h) The notification in this paragraph applies if this is an indefinite delivery/indefinite quantity contract, blanket purchase agreement, or other contractual instrument that may result in the issuance of task orders, calls or option to extend the terms of a contract. The Contractor must immediately

notify the Contracting Officer in writing upon any felony conviction of personnel who own, control or operate a business concern as defined in paragraph (c) of this clause at any time during the performance of this contract. Upon notification of a felony conviction the Contracting Officer will review and make a new determination of eligibility prior to the issuance of any task order, call or exercise of an option.

(End of clause)

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 622

[Docket No. 090220217-9226-01]

RIN 0648-AX66

#### Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Resources of the Gulf of Mexico; Commercial Sector of the Reef Fish Fishery of the Gulf of Mexico; Control Date

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

**ACTION:** Advance notice of proposed rulemaking; consideration of a control date.

**SUMMARY:** NMFS announces that it is establishing a revised control date that may be used to control future access to the commercial sector of the reef fish fishery operating in the exclusive economic zone (EEZ) of the Gulf of Mexico (Gulf). If changes to the management regime are developed and implemented under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), a control date could be used to limit the number of participants in the fishery. This announcement is intended, in part, to promote awareness of the potential eligibility criteria for future access so as to discourage speculative entry into the fishery while the Gulf of Mexico Fishery Management Council (Council) and NMFS consider whether and how access to the commercial sector of the reef fish fishery should be controlled.

**DATES:** Comments must be received on or before 5 p.m., eastern time, April 17, 2009.

**ADDRESSES:** You may submit comments, identified by RIN 0648-AX66, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal <http://www.regulations.gov>.

- Mail: Cynthia Meyer, NMFS Southeast Regional Office, Sustainable Fisheries Division, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

To submit comments through the Federal e-Rulemaking Portal: <http://www.regulations.gov>, enter "NOAA-NMFS-2009-0039" in the keyword search, then select "Send a Comment or Submission." NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

**SUPPLEMENTARY INFORMATION:** The commercial sector of the Gulf reef fish fishery is managed under the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP). The FMP was prepared by the Council, and implemented under the authority of the Magnuson-Stevens Act. A moratorium on the issuance of new commercial reef fish permits was established by Amendment 4 to the FMP in May 1992. The moratorium has been maintained since that time with the implementation of Amendments 9, 11, and 17. The Council implemented Amendment 24 on August 17, 2005, to replace the commercial reef fish permit moratorium that was set to expire on December 31, 2005, with a permanent limited access system.

This notice would inform participants in the Gulf reef fish fishery of the Council's intention to consider further limiting access within the commercial sector of the Gulf reef fish fishery. Specifically, the Council may consider creating additional restrictions including limiting participation by gear type or by specific species to only those vessels or participants that have catch histories in excess of some minimum landings threshold. Should the Council take such future action to further restrict participation in the commercial sector of the Gulf reef fish fishery, it intends to use December 31, 2008, as a possible control date regarding the eligibility of