

DEPARTMENT OF THE TREASURY

Office of the Secretary

31 CFR Part 10

[TD 9527]

RIN 1545-BH01

Regulations Governing Practice Before the Internal Revenue Service; Correction

AGENCY: Office of the Secretary, Treasury.

ACTION: Correcting amendment.

SUMMARY: This document contains amendments to the regulations governing practice before the Internal Revenue Service to correct errors in final regulations (TD 9527) that were published in the Federal Register on Friday, June 3, 2011. The regulations affect individuals who practice before the IRS and providers of continuing education programs. The regulations modify the rules governing of practice before the IRS and the standards with respect to tax returns.

DATES: This correction is effective on August 11, 2011 and is applicable beginning August 2, 2011.

FOR FURTHER INFORMATION CONTACT: Matthew D. Lucey, (202) 622-4940 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulation (TD 9527) that is the subject of this correction is under section 330 of Title 31 of the United States Code.

Need for Correction

As published on June 3, 2011, at 76 FR 32286, TD 9527 contains errors that may prove to be misleading and is in need of clarification.

List of Subjects in 31 CFR Part 10

Accountants, Administrative practice and procedure, Lawyers, Reporting and recordkeeping requirements, Taxes.

Correction of Publication

Accordingly, 31 CFR part 10 is corrected by making the following correcting amendments:

PART 10—PRACTICE BEFORE THE INTERNAL REVENUE SERVICE

Paragraph 1. The authority citation for part 31 continues to read in part as follows:

Authority: Sec. 3, 23 Stat. 258, secs. 2-12, 60 Stat. 237 et seq.; 5 U.S.C. 301, 500, 551-559; 31 U.S.C. 321; 31 U.S.C. 330; Reorg. Plan

No. 26 of 1950, 15 FR 4935, 64 Stat. 1280, 3 CFR, 1949-1953 Comp., p. 1017.

Par. 2. Section 10.5 is amended by revising paragraph (g) to read as follows:

Section 10.5 Application to become an enrolled agent, enrolled retirement plan agent, or registered tax return preparer.

(g) Effective/applicability date. This section is applicable to applications received on or after August 2, 2011.

Par. 3. Section 10.60 is amended by revising paragraphs (a) and (b) to read as follows:

Section 10.60 Institution of proceeding.

(a) Whenever it is determined that a practitioner (or employer, firm or other entity, if applicable) violated any provision of the laws governing practice before the Internal Revenue Service or the regulations in this part, the practitioner may be reprimanded or, in accordance with Section 10.62, subject to a proceeding for sanctions described in Section 10.50.

(b) Whenever a penalty has been assessed against an appraiser under the Internal Revenue Code and an appropriate officer or employee in an office established to enforce this part determines that the appraiser acted willfully, recklessly, or through gross incompetence with respect to the proscribed conduct, the appraiser may be reprimanded or, in accordance with Section 10.62, subject to a proceeding for disqualification. A proceeding for disqualification of an appraiser is instituted by the filing of a complaint, the contents of which are more fully described in Section 10.62.

Par. 4. Section 10.69 is amended by revising paragraph (a) to read as follows:

Section 10.69 Representation; ex parte communication.

(a) Representation. (1) The Internal Revenue Service may be represented in proceedings under this part by an attorney or other employee of the Internal Revenue Service. An attorney or an employee of the Internal Revenue Service representing the Internal Revenue Service in a proceeding under this part may sign the complaint or any document required to be filed in the proceeding on behalf of the Internal Revenue Service.

(2) A respondent may appear in person, be represented by a practitioner, or be represented by an attorney who has not filed a declaration with the Internal Revenue Service pursuant to Section 10.3. A practitioner or an attorney representing a respondent or proposed respondent may sign the answer or any

document required to be filed in the proceeding on behalf of the respondent.

Par. 5. Section 10.90 is amended by revising paragraph (a)(6)(i) to read as follows:

Section 10.90 Records.

(a) (6) (i) Who have obtained a qualifying continuing education provider number; and

Treena V. Garrett, Federal Register Liaison, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, Procedure and Administration.

[FR Doc. 2011-20380 Filed 8-10-11; 8:45 am]

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 159

[DOD-2008-OS-0125/RIN 0790-AI38]

Private Security Contractors (PSCs) Operating in Contingency Operations, Combat Operations or Other Significant Military Operations

AGENCY: Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

ACTION: Final rule.

SUMMARY: This Rule establishes policy, assigns responsibilities and provides procedures for the regulation of the selection, accountability, training, equipping, and conduct of personnel performing private security functions under a covered contract during contingency operations, combat operations or other significant military operations. It also assigns responsibilities and establishes procedures for incident reporting, use of and accountability for equipment, rules for the use of force, and a process for administrative action or the removal, as appropriate, of PSCs and PSC personnel. For the Department of Defense, this Rule supplements DoD Instruction 3020.41, "Contractor Personnel Authorized to Accompany the U.S. Armed Forces," which provides guidance for all DoD contractors operating in contingency operations.

This Rule was published as an Interim Final Rule on July 17, 2009 because there was insufficient policy and guidance regulating the actions of DoD and other governmental PSCs and their

movements in operational areas. This Rule ensures compliance with laws and regulations pertaining to Inherently Governmental functions, and ensures proper performance by armed contractors.

**DATES:** *Effective Date:* This rule is effective September 12, 2011.

**FOR FURTHER INFORMATION CONTACT:** Chris Mayer, Director, Armed Contingency Contractor Policy and Programs, Office of the Deputy Assistant Secretary of Defense (Program Support), (571) 232-2509.

**SUPPLEMENTARY INFORMATION:** The publication of this Rule is required to meet the mandate of Section 862 of the 2008 National Defense Authorization Act (NDAA), as amended by Section 813(b) of the 2010 NDAA and Section 832 of the 2011 NDAA. DoD has determined that the updates implementing Section 832 of the 2011 NDAA do not require additional public comment. These updates are in direct compliance with current statute, do not set a precedent in updating the interim final, and any delay in implementing these updates would be detrimental to U.S. security.

### Background

This Final Rule<sup>1</sup> is required to meet the mandate of Section 862 of the FY 2008 NDAA, as amended, which lays out two requirements:

(i) That the Secretary of Defense, in coordination with the Secretary of State, shall prescribe regulations on the selection, training, equipping, and conduct of personnel performing private security functions under a covered contract in an area of combat operations or other significant military operations; and

(ii) That the FAR shall be revised to require the insertion into each covered contract (or, in the case of a task order, the contract under which the task order is issued) of a contract clause addressing the selection, training, equipping, and conduct of personnel performing private security functions under such contract.

This Final Rule meets requirement (i). There will be a separate and subsequent **Federal Register** action to meet requirement (ii) to update the FAR. On July 17, 2009, an Interim Final Rule (32 CFR Part 159 DOD-2008-OS-125/RIN 0790-AI38) was published and public comments were solicited. At the end of the comment period, we received comments from 9 respondents,

including the American Bar Association, IPOA, NGO groups and members of the public. These comments are discussed below by topic.

### Comment: Extent of Delegation of Implementation Authority to Each Geographic Combatant Commander

*Response:* We believe that it is appropriate for DoD to provide the Geographic Combatant Commanders with the requirements to be included in their respective guidance and procedures. Situations change significantly from one geographic region to another. The Geographic Combatant Commanders (GCC) must have the flexibility to apply the overarching policy, tailoring their guidance and procedures as necessary to meet the particular circumstances within their respective areas of responsibility at any particular time. This is consistent with the approach that we are currently taking in the CENTCOM Area Of Responsibility (AOR) without significant issue.

We do not believe that differing or conflicting regulations will be adopted within a single AOR. The GCC will establish the overarching guidance and Subordinate Commanders (down to Joint Task Force level) will develop implementing instructions. Specific requirements will be made available to Private Security Contractors through the GCC Web site.

### Comment: Absence of Department-Wide Guidance

*Response:* We believe that a decentralized approach is the most appropriate way to implement the requirements of Section 862 of the FY08 NDAA. There is sufficient uniformity of guidance provided through policy, including this Rule and existing acquisition regulations. The intent of the policy is that all PSC personnel operating within the designated area are required to have the required training, not only those who are deploying. A FAR case has been opened to incorporate the required revisions based upon the publication of this Final Rule.

### Comment: Lack of Uniformity Across Organizations

*Response:* Following publication of this Final Rule, these requirements will be added to the FAR and DFARS and subsequently incorporated into appropriate contracts. This will provide a basis for the management of PSC compliance.

### Comment: Chief of Mission Should Be Required to Opt Out of DoD PSC Processes

*Response:* We believe that the arrangement set out in Section 159.4(c) is appropriate and meets the congressional intent of a consistent approach towards PSCs operating in combat operations or other significant military operations, across USG agencies.

### Comment: Any Procedures or Guidance Issued Under the Requirements of This Rule Should be Subject to an Adequate Opportunity for Public Comment

*Response:* The relevant provisions of this Final Rule will be implemented through military regulations and orders, in accordance with existing procedures.

### Comment: The Rule is Not Integrated with Standard Contracting Processes

*Response:* The requirements associated with GCC guidance and procedures will be included in any solicitations and therefore potential bidders will be aware of GCC specific procedures prior to submitting their proposals. AOR specific procedures such as training requirements are required to be placed on GCC Web sites immediately after a declared contingency so that the requirements can get into the appropriate contracts as soon as possible.

### Comment: The Rule Should Fully Explain How DoD Determines a PSC Law of War Status

*Response:* It is not the role of the Rule to make statements regarding international law. Department Of Defense Instruction 3020.41, the overarching Defense policy document for this Rule, provides in paragraph 6.1.1 that:

Under applicable law, contractors may support military operations as civilians accompanying the force, so long as such personnel have been designated as such by the force they accompany and are provided with an appropriate identification card under the provisions of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW) (reference (j)). If captured during armed conflict, contingency contractor personnel accompanying the force are entitled to prisoner of war status.

The comments regarding direct participation in hostilities are unsupportable. There is no agreement within the international community or among recognized authorities in international humanitarian law (LOAC) on a universally applicable definition for "Direct Participation in Hostilities."

<sup>1</sup> Nothing in this Final Rule is intended to reflect the views of the DoD or the United States regarding the merits of any claim or defense that may be asserted by a private party in any pending or future litigation or disputes.

(Public address by Dr. Jakob Kellenberger, President, International Committee of the Red Cross, 11 September 2009.) Again, contracting regulations are not the place to define terms that are not yet defined under international law. The Rule specifies that command rules for the use of force will be consistent with Chairman of the Joint Chiefs of Staff Instruction 3121.01B. This will provide commonality regarding the Rules for the Use of Force (RUF) but with the flexibility for commands to interpret it in accordance with local, and sometimes transitory, circumstances.

**Comment: The Rule may benefit from additional guidance on inter-agency cooperation**

*Response:* Interagency coordination is essential to successful contingency planning. The Rule, as written supports flexible, agile, and focused contingency planning and DoD, DoS and USAID believe the rule provides sufficient strategic direction for interagency coordination relative to PSC oversight and conduct. DoD disagrees with the respondent's assertion that "many coordination issues will be common across AORs." Some may, many more may not. The flexibility to adapt procedures to local circumstances is essential. As the same respondent notes in this same section, "guidance and procedures in the Iraq Memorandum of Agreement (MOA) are not easily transferrable to contingency operations outside of Iraq." The MOA between DoD and DoS in place in Iraq has proven to be extremely successful and serves as a good example of interagency coordination. It was referenced in the IFR as an example or point of departure for developing GCC guidance and procedures. However, to avoid confusion, in the Final Rule we have removed the last sentence in Section 159.6(d) which references the MOA. DoD, DoS and USAID recognize that some PSC or PSC personnel activities may require coordination with other Federal agency partners who contract for private security services.

**Comment: Confusion about Geographic Combatant Commander Delegation Authority to Subordinate Commander**

*Response:* Geographic combatant commands themselves do not follow a uniform organizational structure and commanders are free to assign different responsibilities to the most appropriate components of their staffs. The language in the Final Rule has been changed to provide more specificity as to the subordinate level to which GCCs can delegate responsibility for

implementation. Through the Rule, the phrase "Subordinate Commander" has been replaced with "sub unified commanders or combined/joint task force commanders".

**Comment: The rule needs to include reference to existing powers of removal of a PSC and personnel**

*Response:* Such language is unnecessary in so far as it is already addressed in our existing regulations. Section 862(b)(3) of the 2008 NDAA as amended includes the following language: "NONCOMPLIANCE OF PERSONNEL WITH CLAUSE—The contracting officer for a covered contract may direct the contractor, at its own expense, to remove or replace any personnel performing private security functions in an area of combat operations or other significant military operations who violate or fail to comply with applicable requirements of the clause required by this subsection. If the violation or failure to comply is a gross violation or failure or is repeated, the contract may be terminated for default." Incorporation of this statutory language will be considered in the DFARS case implementing Section 862.

**Comment: The rule fails to address subcontractors providing security for the prime contractor**

*Response:* The definition of "covered contract" has been revised in the Rule to cover contracts for the performance of services and/or the delivery of supplies. Further, we will ensure that regulatory guidance developed subsequent to the publication of this Rule makes clear that subcontractors providing security for prime contractors must comply.

**Comment: Recommend application of the rule to PSCs working under contract to the DoD whether domestically or internationally**

*Response:* As required by Section 862 of the 2008 NDAA, as amended, this Rule applies to PSCs working for any U.S. Government agency in an area of combat operations or other significant military operations. It also applies to PSCs working for DoD in contingency operations outside the United States. The arrangements for PSC employment in the United States are outside the scope of this Rule.

**Comment: Section 159.4(a) "Consistent with the requirement of paragraph (a)(2) \* \* \*" should include at the end of the section, "Coordination shall encompass the contemplated use of PSC personnel during the planning stages of contingency operations so to allow guidance to be developed under parts (b) and (c) herein and promulgated under 159.5 in a timely manner that is appropriate for the needs of the contingency operation"**

*Response:* The language has been revised in the Final Rule.

**Comment: Section 159.6(a)(i) "Contain at a minimum procedures to implement the following process \* \* \*" should include, "That the Secretary of Defense, in coordination with the Secretary of State, shall prescribe regulations on the selection, training, equipping, and conduct of personnel performing private security functions under a covered contract in an area of combat operations"**

*Response:* We believe that the current wording is correct, as it reflects our intent.

**Comment: Section 159.6(a)(ii) "PSC verification that PSCs meet all the legal, training, and qualification requirements \* \* \*" should include "That the FAR shall be revised to require the insertion into each covered contract of a contract clause; addressing the selection, training, equipping and conduct of personnel performing private security functions under such a contract"**

*Response:* A FAR clause will be drafted to incorporate all of the requirements of this Rule.

**Comment: Section 159.6(a)(v) "Reporting alleged criminal activity and other incidents involving PSCs or PSC personnel by another company or any other personnel. All incidents shall be reported and documented." These reporting requirements are already required**

*Response:* Many of the requirements in this rule are already in effect in the CENTCOM AOR. With this Rule, we are establishing the requirements for all Geographic Combatant Commanders and Chiefs of Mission in order to extend guidance and procedures globally and to the wider interagency community.

**Comment: Questions of the propriety of having PSCs represent the U.S. in contingency operations relative to the U.S. Constitution and the Anti Pinkerton Act**

*Response:* The DoD's use of contractors, including private security

contractors, is entirely consistent with existing U.S. Government policy on inherently governmental functions. We are guided by four main documents when determining whether an activity or function is inherently governmental: DoD Instruction 1100.22 "Policy and Procedures for Determining Workforce Mix"; the Federal Acquisition Regulations (FAR); the Performance of Commercial Activities and the Federal Activities Inventory Reform Act, or FAIR Act, of 1998; and, Office of Management and Budget (OMB) Policy Letter 92-1, issued in 1992. The DoD recognizes that there are specific security functions that are inherently governmental and cannot be contracted. The DoD does not contract those functions, but there are other security functions that are appropriate to contract. The DoD, the Government Accountability Office (GAO), the Office of Management and Budget (OMB), the Congressional Budget Office (CBO), and the Congressional Research Service (CRS) have continuously reviewed the use of PSCs, the potential for their performance of inherently governmental functions, and the appropriateness and manner in which they are employed.

**Comment: Opposition to the use of mercenaries in the U.S. Department of Defense**

*Response:* The DoD does not use mercenaries. Article 47 of Additional Protocol I to Geneva Conventions provides an internationally accepted definition of mercenaries. The elements of that definition clearly exclude PSCs under contract to DoD. Private security contractors do not perform military functions, but rather, they carry out functions similar to those performed by security guards in the United States and elsewhere. We agree that the behavior of PSCs may affect the national security goals of the U.S. and for this reason we have published guidance on the selection, oversight, and management of private security contractors operating in contingency operations.

**Comment: DoD personnel do not want PSCs in a combat situation**

*Response:* The primary role of the armed forces is combat: to close with and destroy enemy armed forces through firepower, maneuver, and shock action. Defense of military personnel and activities against organized attack is a military responsibility. DoD allocates military personnel to these high priority combat and other critical combat support missions. Private Security Companies contracted by the U.S. government protect personnel, facilities and activities against criminal activity,

including individual acts of terrorism. They are specifically prohibited from engaging in combat (offensive) operations and certain security functions. DoD PSCs have performed well and are very important to our mission accomplishment in the CENTCOM area of responsibility.

**Comment: PSCs should receive Veteran's Affairs benefits for injuries sustained while protecting the country**

*Response:* PSCs and other contractors employed by the U.S. government who perform work outside of the United States are covered by the Longshore and Harbor Workers' Compensation Act (LHWCA). The LHWCA provides disability compensation and medical benefits to employees and death benefits to eligible survivors of employees of U.S. government contractors who perform work overseas.

The Defense Base Act is an extension of the LHWCA. The Defense Base Act covers the following employment activities: (1) Work for private employers on U.S. military bases or on any lands used by the U.S. for military purposes outside of the United States, including those in U.S. Territories and possessions; (2) Work on public work contracts with any U.S. government agency, including construction and service contracts in connection with national defense or with war activities outside the United States; (3) Work on contracts approved and funded by the U.S. under the Foreign Assistance Act, which among other things provides for cash sale of military equipment, materials, and services to its allies, if the contract is performed outside of the United States; or (4) Work for American employers providing welfare or similar services outside the United States for the benefit of the Armed Services, e.g. the United Service Organizations (USO). If any one of the above criteria is met, all employees engaged in such employment, regardless of nationality (including U.S. citizens and residents, host country nationals (local hires), and third country nationals (individuals hired from another country to work in the host country)), are covered under the Act.

**Comment: Requirements jeopardize NGO security posture**

*Response:* This Rule applies only to personnel performing private security functions under a covered contract. A covered contract is defined by Section 864(a)(3) of the FY 2008 NDAA, as amended by Section 813(b) of the FY 2010 NDAA.

**Comment: USAID involvement is not evident**

*Response:* USAID has been actively involved in various working groups implementing the Interim Final Rule and developing the Final Rule.

**Comment: PSC rules should be consistent with the spirit and intent of Guidelines for Relations between U.S. Armed Forces and Non-Governmental Humanitarian Agencies in Hostile or Potentially Hostile Environments**

*Response:* The purpose of publishing the IFR in the **Federal Register** was to obtain the comments of affected agencies, NGOs, contractors and the public. The respondent was not specific about any perceived conflicts that needed to be addressed in the PSC rule, and should work with their USAID and other agency counterparts to provide specific inputs on implementing the Final Rule.

**Comment: PSC rules should not apply to unarmed guard forces**

*Response:* We believe that the current language is correct. When contractors providing guard services are not armed, those aspects of the rule which are specific to armed contractors (*i.e.* arming procedures) are not relevant.

**Comment: Procedures associated with PSC rules must be adapted to contexts in which NGOs have long-standing programs or minor amounts of U.S. Government funding**

*Response:* This Rule applies only to personnel performing private security functions under a covered contract. A covered contract is defined by Section 864(a)(3) of the FY 2008 NDAA, as amended by Section 813(b) of the FY 2010 NDAA.

**Comment: SPOT's use for intelligence gathering and vetting is unclear**

*Response:* The Synchronized Pre-deployment and Operational Tracker (SPOT) is a Web-based database which is used to gain visibility over contracts and contractors supporting U.S. Government agencies during contingency operations. The SPOT system serves multiple purposes; it allows contractors to request and receive specific logistics support such as meals, housing, transportation, medical support while working in-country; it provides Contracting Officer Representatives and Grants Officer Representatives with information on what contractor and grantee employees are working in what locations which makes approval of invoices and inspection of work easier; it allows Contracting Officer Representatives,

Grants Officer Representatives, and other personnel to review the credentials of individuals requesting the authority to carry weapons (either government furnished or contractor acquired) in the performance of a U.S. government contract or grant; it allows agencies to report to Congress and other oversight organizations on the size of contractor and grantee presence in areas of combat operations or other significant military operations. Congress believes the system is necessary. Section 861 of FY 2008 NDAA provides that the Secretary of Defense, the Secretary of State, and the Administrator of USAID must agree to adopt a common database for contractors in Iraq and Afghanistan. SPOT is not used for intelligence gathering or vetting of personnel. Background checks of PSCs are conducted by the contractor and validated by the contracting officer. This validation is only annotated in SPOT.

**Comment: Applicable guidelines must be effectively disseminated to NGOs**

*Response:* Contracting Officers and Grants Officers will remain the primary point of contact for contractors and grantees on issues affecting performance. Rules impacting contractors across multiple agencies will be promulgated via the FAR with appropriate opportunities for contractor and public comment during the rulemaking process. Rules impacting grantees across multiple agencies will be promulgated by the Office of Management and Budget (OMB) Office of Federal Financial Management (OFFM) as part of its responsibility to issue government-wide grants policy. The DoD will ensure that a single location, readily accessible to both contractors and grantees, exists for the publication and maintenance of all guidance relating to PSC rules. The Department of State and USAID will provide any agency unique implementing guidance to DoD for publication on this same Web site.

**Areas for Clarification and Definitions**

**Comment: "Private Security Functions" needs to be better defined**

*Response:* The term "private security functions" is defined by section 864 of the FY 2008 NDAA; the IFR used this definition. The Rule provides requirements for the management and oversight of companies contracted to perform private security functions and certain employees who may be required to carry and use arms in the performance of their duties. Companies and their personnel contracted to provide training, maintenance, or other

support functions that are not required to carry a weapon in the performance of their duties are not addressed by this Rule. For clarification, in the Final Rule we have added "in accordance with the terms of their contract".

**Comment: Enforcement and liability pending adoption of FAR clauses**

*Response:* A FAR case has been opened to incorporate the required revisions based upon the publication of this Rule.

**Comment: The Rule should address foreseeable issue concerning host nation law**

*Response:* The Geographic Combatant Commander has legal and political staffs capable of addressing the concerns expressed in this comment.

**Comment: Obligations of non-PSC prime contractors**

*Response:* The definition of "covered contract" has been reworded to cover contracts for the performance of services and/or the delivery of supplies.

**Comment: IFR applicability to contingency operations in the U.S. and distinction between "combat operations" and "contingency operations"**

*Response:* The Rule does not apply to operations within the United States. We have clarified this in the definition of "covered contract."

**Comment: Applicability to foreign actors**

*Response:* When applicable conditions are met, the Rule covers all companies and personnel providing private security functions, regardless of the country of registration of the company or national origin of its employees. We believe that this is already made clear by sections 159.2 (b)(1) and (2) which state the policy prescription. The Rule applies to government entities and prescribes policies for the oversight and management of PSCs and PSC personnel. The clause in section 159.2 (2)(a)(2) starting with "specifically" describes the conditions under which this part would apply beyond DoD, to DoS and other Federal agencies. The acquisition regulations, rather than this rule, will serve as the implementing mechanisms for PSC companies.

**Comment: Further define intelligence operations**

*Response:* This language implements Section 862 (d) of the FY 2008 NDAA.

**Comment: "Active non-lethal countermeasure" would benefit from a clear definition and examples**

*Response:* The following clarification has been added to the Rule: "Active non-lethal systems include laser optical distracters, acoustic hailing devices, electro-muscular TASER guns, blunt-trauma devices like rubber balls and sponge grenades, and a variety of riot-control agents and delivery systems."

**Comment: Definition of Contingency Operation is a slight variation of the definition of contingency operation in FAR 2.101**

*Response:* The definition in the Rule has been updated; it is taken verbatim from U.S. Code Title 10, 101(a)(13).

**Comment: Definition of Covered Contract excludes temporary arrangements outside of DoD for private security functions when contracted for by a non-DoD contractor or a grantee**

*Response:* The genesis for this provision was a USAID concern that development projects undertaken by USAID may engage local personnel as security on an ad hoc basis, and that such arrangements should be excluded from complying with the requirements of this regulation. These arrangements cannot realistically be regulated in the same manner as traditional contracts.

**Comment: Regarding the Standing rules on the use of force consider stating: "Issue written authorization to the PSC identifying individual PSC personnel who are authorized to be armed. Rules for the Use of Force shall be included with the written authorization, if not previously provided to the contractor in the solicitation or during the course of contract administration. Rules for the Use of Force shall conform to the guidance in the Chairman of the Joint Chiefs of Staff Instruction 3121.01B, "Standing Rules of Engagement/ Standing Rules for the Use of Force for U.S. Forces"**

*Response:* Agreed. The Rule has been revised to reflect the proposed change in wording.

**Regulatory Procedures**

*Executive Order 12866, "Regulatory Planning and Review" and Executive Order 13563, "Improving Regulation and Regulatory Review"*

It has been certified that 32 CFR part 159 does not:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy;

productivity; competition; jobs; the environment; public health or safety; or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in these Executive Orders.

*Public Law 104-121, "Congressional Review Act" (5 U.S.C. 801)*

It has been determined that 32 CFR part 159 is not a "major" rule under 5 U.S.C. 801, enacted by Pub. L. 104-121, because it will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

*Section 202, Public Law 104-4, "Unfunded Mandates Reform Act"*

It has been certified that 32 CFR part 159 does not contain a Federal mandate that may result in expenditure by State, local and Tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

*Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)*

It has been certified that 32 CFR part 159 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. This rule will apply only to a specific sector of defense industry and a limited number of small entities.

*Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)*

It has been certified that 32 CFR part 159 does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These requirements have been approved by OMB and assigned OMB Control Numbers 0704-0460, "Synchronized Predeployment and Operational Tracker (SPOT) System" and 0704-0461, "Qualification to Possess Firearms or Ammunition."

*Executive Order 13132, "Federalism"*

It has been certified that 32 CFR part 159 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(1) The States;

(2) The relationship between the National Government and the States; or

(3) The distribution of power and responsibilities among the various levels of Government.

**List of Subjects in 32 CFR Part 159**

Contracts, Security measures.

Accordingly, the interim rule amending 32 CFR part 159 which was published at 74 FR 34691 on July 17, 2009, is adopted as a final rule with the following change. Part 159 is revised to read as follows:

**PART 159—PRIVATE SECURITY CONTRACTORS OPERATING IN CONTINGENCY OPERATIONS**

Sec.

159.1 Purpose.

159.2 Applicability and scope.

159.3 Definitions.

159.4 Policy.

159.5 Responsibilities.

159.6 Procedures.

**Authority:** Pub. L. 110-181; Pub. L. 110-417.

**§ 159.1 Purpose.**

This part establishes policy, assigns responsibilities and provides procedures for the regulation of the selection, accountability, training, equipping, and conduct of personnel performing private security functions under a covered contract. It also assigns responsibilities and establishes procedures for incident reporting, use of and accountability for equipment, rules for the use of force, and a process for administrative action or the removal, as appropriate, of PSCs and PSC personnel.

**§ 159.2 Applicability and scope.**

This part:

(a) Applies to:

(1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter referred to as the "DoD Components").

(2) The Department of State and other U.S. Federal agencies insofar as it implements the requirements of section 862 of Public Law 110-181, as amended. Specifically, in areas of

operations which require enhanced coordination of PSC and PSC personnel working for U.S. Government (U.S.G.) agencies, the Secretary of Defense may designate such areas as areas of combat operations or other significant military operations for the limited purposes of this part. In such an instance, the standards established in accordance with this part would, in coordination with the Secretary of State, expand from covering only DoD PSCs and PSC personnel to cover all U.S.G.-funded PSCs and PSC personnel operating in the designated area. The requirements of this part shall not apply to a nonprofit nongovernmental organization receiving grants or cooperative agreements for activities conducted within an area of other significant military operations if the Secretary of Defense and the Secretary of State agree that such organization may be exempted. An exemption may be granted by the agreement of the Secretaries under this paragraph on an organization-by-organization or area-by-area basis. Such an exemption may not be granted with respect to an area of combat operations.

(b) Prescribes policies applicable to all:

(1) DoD PSCs and PSC personnel performing private security functions during contingency operations outside the United States.

(2) USG-funded PSCs and PSC personnel performing private security functions in an area of combat operations or, with the agreement of the Secretary of State, other significant military operations as designated by the Secretary of Defense.

**§ 159.3 Definitions.**

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

*Area of combat operations.* An area of operations designated as such by the Secretary of Defense for the purpose of this part, when enhanced coordination of PSCs working for U.S.G. agencies is required.

*Contingency operation.* A military operation that is either designated by the Secretary of Defense as a contingency operation or becomes a contingency operation as a matter of law (10 U.S.C. 101(a)(13)). It is a military operation that:

(1) Is designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) Results in the call or order to, or retention on, active duty of members of

the uniformed services under section 688, 12301(a), 12302, 12304, 12305, 12406, of 10 U.S.C., chapter 15 of 10 U.S.C. or any other provision of law during a war or during a national emergency declared by the President or Congress.

**Contractor.** The contractor, subcontractor, grantee, or other party carrying out the covered contract.

**Covered contract.** (1) A DoD contract for performance of services and/or delivery of supplies in an area of contingency operations outside the United States or a contract of a non-DoD Federal agency for performance of services and/or delivery of supplies in an area of combat operations or other significant military operations, as designated by the Secretary of Defense; a subcontract at any tier under such a contract; or a task order or delivery order issued under such a contract or subcontract.

(2) Also includes contracts or subcontracts funded under grants and sub-grants by a Federal agency for performance in an area of combat operations or other significant military operations as designated by the Secretary of Defense.

(3) Excludes temporary arrangements entered into by non-DoD contractors or grantees for the performance of private security functions by individual indigenous personnel not affiliated with a local or expatriate security company. Such arrangements must still be in compliance with local law.

**Other significant military operations.** For purposes of this part, the term 'other significant military operations' means activities, other than combat operations, as part of an overseas contingency operation that are 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.<sup>1</sup>

**Private security functions.** Activities engaged in by a contractor under a covered contract as follows:

(1) Guarding of personnel, facilities, designated sites, or property of a Federal agency, the contractor or subcontractor, or a third party.<sup>2</sup>

<sup>1</sup> With respect to an area of other significant military operations, the requirements of this part shall apply only upon agreement of the Secretary of Defense and the Secretary of State. Such an agreement of the Secretaries may be made only on an area-by-area basis. With respect to an area of combat operations, the requirements of this part shall always apply.

<sup>2</sup> Contractors performing private security functions are not authorized to perform inherently governmental functions. In this regard, they are limited to a defensive response to hostile acts or demonstrated hostile intent.

(2) Any other activity for which personnel are required to carry weapons in the performance of their duties in accordance with the terms of their contract. For the DoD, DoDI Instruction 3020.41, "Contractor Personnel Authorized to Accompany the U.S. Armed Forces,"<sup>3</sup> prescribes policies related to personnel allowed to carry weapons for self defense.

**PSC.** During contingency operations "PSC" means a company employed by the DoD performing private security functions under a covered contract. In a designated area of combat operations or other significant military operations, the term "PSC" expands to include all companies employed by U.S.G. agencies performing private security functions under a covered contract.

**PSC personnel.** Any individual performing private security functions under a covered contract.

#### § 159.4 Policy.

(a) Consistent with the requirements of paragraph (a)(2) of section 862 of Public Law 110-181, the selection, training, equipping, and conduct of PSC personnel including the establishment of appropriate processes shall be coordinated between the DoD and the Department of State. Coordination shall encompass the contemplated use of PSC personnel during the planning stages of contingency operations so as to allow guidance to be developed under paragraphs (b) and (c) of this section and promulgated under section 159.5 of this part in a timely manner that is appropriate for the needs of the contingency operation.

(b) Geographic Combatant Commanders will provide tailored PSC guidance and procedures for the operational environment in their Area of Responsibility (AOR) in accordance with this part, the Federal Acquisition Regulation (FAR)<sup>4</sup> and the Defense Federal Acquisition Regulation Supplement (DFARS).<sup>5</sup>

(c) In a designated area of combat operations or other significant military operations, the relevant Chief of Mission will be responsible for developing and issuing implementing instructions for non-DoD PSCs and their personnel consistent with the standards set forth by the geographic Combatant Commander in accordance with paragraph (b) of this section. The Chief of Mission has the option to instruct non-DoD PSCs and their personnel to

<sup>3</sup> Available at <http://www.dtic.mil/whs/directives/corres/pdf/302041p.pdf>.

<sup>4</sup> Published in Title 48 of the Code of Federal Regulations.

<sup>5</sup> Published in Title 48 of the Code of Federal Regulations.

follow the guidance and procedures developed by the geographic Combatant Commander and/or a sub unified commander or joint force commander (JFC) where specifically authorized by the Combatant Commander to do so and notice of that authorization is provided to non-DoD agencies.

(d) The requirements of this part shall not apply to contracts entered into by elements of the intelligence community in support of intelligence activities.

#### § 159.5 Responsibilities.

(a) The Deputy Assistant Secretary of Defense for Program Support, under the authority, direction, and control of the Assistant Secretary of Defense for Logistics and Materiel Readiness, shall monitor the registering, processing, and accounting of PSC personnel in an area of contingency operations.

(b) The Director, Defense Procurement and Acquisition Policy, under the authority, direction, and control of the Under Secretary of Defense for Acquisition, Technology and Logistics, shall ensure that the DFARS and (in consultation with the other members of the FAR Council) the FAR provide appropriate guidance and contract clauses consistent with this part and paragraph (b) of section 862 of Public Law 110-181.

(c) The Deputy Chief Management Officer of the Department of Defense shall direct the appropriate component to ensure that information systems effectively support the accountability and visibility of contracts, contractors, and specified equipment associated with private security functions.

(d) The Chairman of the Joint Chiefs of Staff shall ensure that joint doctrine is consistent with the principles established by DoD Directive 3020.49, "Orchestrating, Synchronizing, and Integrating Program Management of Contingency Acquisition Planning and Its Operational Execution,"<sup>6</sup> DoD Instruction 3020.41, "Contractor Personnel Authorized to Accompany the U.S. Armed Forces," and this part.

(e) The geographic Combatant Commanders in whose AOR a contingency operation is occurring, and within which PSCs and PSC personnel perform under covered contracts, shall:

(1) Provide guidance and procedures, as necessary and consistent with the principles established by DoD Directive 3020.49, "Orchestrating, Synchronizing, and Integrating Program Management of Contingency Acquisition Planning and Its Operational Execution," DoD Instruction 3020.41, "Contractor

<sup>6</sup> Available from <http://www.dtic.mil/whs/directives/corres/pdf/302040p.pdf>.

Personnel Authorized to Accompany the U.S. Armed Forces,”<sup>7</sup> and this part, for the selection, training, accountability and equipping of such PSC personnel and the conduct of PSCs and PSC personnel within their AOR. Individual training and qualification standards shall meet, at a minimum, one of the Military Departments’ established standards. Within a geographic combatant command, a sub unified commander or JFC shall be responsible for developing and issuing implementing procedures as warranted by the situation, operation, and environment, in consultation with the relevant Chief of Mission in designated areas of combat operations or other significant military operations.

(2) Through the Contracting Officer, ensure that PSC personnel acknowledge, through their PSC, their understanding and obligation to comply with the terms and conditions of their covered contracts.

(3) Issue written authorization to the PSC identifying individual PSC personnel who are authorized to be armed. Rules for the Use of Force shall be included with the written authorization, if not previously provided to the contractor in the solicitation or during the course of contract administration. Rules for the Use of Force shall conform to the guidance in the Chairman of the Joint Chiefs of Staff Instruction 3121.01B, “Standing Rules of Engagement/ Standing Rules for the Use of Force for U.S. Forces.” Access by offerors and contractors to the rules for the use of force may be controlled in accordance with the terms of FAR 52.204–2 (Aug 1996), DFARS 252.204–7000 (Dec 1991), or both.<sup>8</sup>

(4) Ensure that the procedures, orders, directives and instructions prescribed in § 159.6(a) of this part are available through a single location (to include an Internet Web site, consistent with security considerations and requirements).

(f) The Heads of the DoD Components shall:

(1) Ensure that all private security-related requirement documents are in compliance with the procedures listed in § 159.6 of this part and the guidance

and procedures issued by the geographic Combatant Command,

(2) Ensure private security-related contracts contain the appropriate clauses in accordance with the applicable FAR clause and include additional mission-specific requirements as appropriate.

#### § 159.6 Procedures.

(a) *Standing Combatant Command Guidance and Procedures.* Each geographic Combatant Commander shall develop and publish guidance and procedures for PSCs and PSC personnel operating during a contingency operation within their AOR, consistent with applicable law; this part; applicable Military Department publications; and other applicable DoD issuances to include DoD Directive 3020.49, “Orchestrating, Synchronizing, and Integrating Program Management of Contingency Acquisition Planning and Its Operational Execution,” DFARS, DoD Directive 2311.01E, “DoD Law of War Program,”<sup>9</sup> DoD 5200.8–R, “Physical Security Program,”<sup>10</sup> CJCSI 3121.01B, “Standing Rules of Engagement/ Standing Rules for the Use of Force for U.S. Forces,” and DoD Directive 5210.56, “Use of Deadly Force and the Carrying of Firearms by DoD Personnel Engaged in Law Enforcement and Security Duties.”<sup>11</sup> The guidance and procedures shall:

(1) Contain, at a minimum, procedures to implement the following processes, and identify the organization responsible for managing these processes:

(i) Registering, processing, accounting for and keeping appropriate records of PSCs and PSC personnel in accordance with DoD Instruction 3020.41, “Contractor Personnel Authorized to Accompany the U.S. Armed Forces.”

(ii) PSC verification that PSC personnel meet all the legal, training, and qualification requirements for authorization to carry a weapon in accordance with the terms and conditions of their contract and host country law. Weapons accountability procedures will be established and approved prior to the weapons authorization.

(iii) Arming of PSC personnel. Requests for permission to arm PSC personnel shall be reviewed on a case-by-case basis by the appropriate Staff Judge Advocate to the geographic Combatant Commander (or a designee)

to ensure there is a legal basis for approval. The request will then be approved or denied by the geographic Combatant Commander or a specifically identified designee, no lower than the flag officer level. Requests to arm non-DOD PSC personnel shall be reviewed and approved in accordance with § 159.4(c) of this part. Requests for permission to arm all PSC personnel shall include:

(A) A description of where PSC personnel will operate, the anticipated threat, and what property or personnel such personnel are intended to protect, if any.

(B) A description of how the movement of PSC personnel will be coordinated through areas of increased risk or planned or ongoing military operations, including how PSC personnel will be rapidly identified by members of the U.S. Armed Forces.

(C) A communication plan, to include a description of how relevant threat information will be shared between PSC personnel and U.S. military forces and how appropriate assistance will be provided to PSC personnel who become engaged in hostile situations. DoD contractors performing private security functions are only to be used in accordance with DoD Instruction 1100.22, “Guidance for Determining Workforce Mix,”<sup>12</sup> that is, they are limited to a defensive response to hostile acts or demonstrated hostile intent.

(D) Documentation of individual training covering weapons familiarization and qualification, rules for the use of force, limits on the use of force including whether defense of others is consistent with host nation Status of Forces Agreements or local law, the distinction between the rules of engagement applicable to military forces and the prescribed rules for the use of force that control the use of weapons by civilians, and the Law of Armed Conflict.

(E) Written acknowledgment by the PSC and its individual PSC personnel, after investigation of background of PSC personnel by the contractor, verifying such personnel are not prohibited under U.S. law to possess firearms.

(F) Written acknowledgment by the PSC and individual PSC personnel that:

(1) Inappropriate use of force by contractor personnel authorized to accompany the U.S. Armed Forces may subject such personnel to United States

<sup>7</sup> Available at <http://www.dtic.mil/whs/directives/corres/html/302041.htm>.

<sup>8</sup> CJCSI 3121.01B provides guidance on the standing rules of engagement (SROE) and establishes standing rules for the use of force (SRUF) for DOD operations worldwide. This document is classified secret. CJCSI 3121.01B is available via Secure Internet Protocol Router Network at <http://js.smil.mil>. If the requester is not an authorized user of the classified network, the requester should contact Joint Staff J-3 at 703-614-0425.

<sup>9</sup> Available at <http://www.dtic.mil/whs/directives/corres/html/231101.htm>.

<sup>10</sup> Available at <http://www.dtic.mil/whs/directives/corres/pdf/520008r.pdf>.

<sup>11</sup> Available at <http://www.dtic.mil/whs/directives/corres/html/521056.htm>.

<sup>12</sup> Available at <http://www.dtic.mil/whs/directives/corres/pdf/110022p.pdf>.



or host nation prosecution and civil liability.<sup>13</sup>

(2) Proof of authorization to be armed must be carried by each PSC personnel.

(3) PSC personnel may possess only U.S.G.-issued and/or -approved weapons and ammunition for which they have been qualified according to paragraph (a)(1)(iii)(E) of this section.

(4) PSC personnel were briefed about and understand limitations on the use of force.

(5) Authorization to possess weapons and ammunition may be revoked for non-compliance with established rules for the use of force.

(6) PSC personnel are prohibited from consuming alcoholic beverages or being under the influence of alcohol while armed.

(iv) Registration and identification in the Synchronized Predeployment and Operational Tracker (or its successor database) of armored vehicles, helicopters, and other vehicles operated by PSC personnel.

(v) Reporting alleged criminal activity or other incidents involving PSCs or PSC personnel by another company or any other person. All incidents involving the following shall be reported and documented:

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

(B) An individual performing private security functions is killed or injured in the performance of their duties;

(C) A person other than an individual performing private security functions is killed or injured as a result of conduct by PSC personnel;

(D) Property is destroyed as a result of conduct by a PSC or PSC personnel;

(E) An individual performing private security functions has come under attack including in cases where a weapon is discharged against an individual performing private security functions or personnel performing such functions believe a weapon was so discharged; or

(F) Active, non-lethal counter-measures (other than the discharge of a weapon) are employed by PSC personnel in response to a perceived immediate threat in an incident that could significantly affect U.S. objectives with regard to the military mission or international relations. (Active non-lethal systems include laser optical

distracters, acoustic hailing devices, electro-muscular TASER guns, blunt-trauma devices like rubber balls and sponge grenades, and a variety of riot-control agents and delivery systems).

(vi) The independent review and, if practicable, investigation of incidents reported pursuant to paragraphs (a)(1)(v)(A) through (a)(1)(v)(F) of this section and incidents of alleged misconduct by PSC personnel.

(vii) Identification of ultimate criminal jurisdiction and investigative responsibilities, where conduct of U.S.G.-funded PSCs or PSC personnel are in question, in accordance with applicable laws to include a recognition of investigative jurisdiction and coordination for joint investigations (*i.e.*, other U.S.G. agencies, host nation, or third country agencies), where the conduct of PSCs and PSC personnel is in question.

(viii) A mechanism by which a commander of a combatant command may request an action by which PSC personnel who are non-compliant with contract requirements are removed from the designated operational area.

(ix) Interagency coordination of administrative penalties or removal, as appropriate, of non-DoD PSC personnel who fail to comply with the terms and conditions of their contract, as they relate to this part.

(x) Implementation of the training requirements contained below in paragraph (a)(2)(ii) of this section.

(2) Specifically cover:

(i) Matters relating to authorized equipment, force protection, security, health, safety, and relations and interaction with locals in accordance with DoD Instruction 3020.41, "Contractor Personnel Authorized to Accompany the U.S. Armed Forces." (ii) Predeployment training requirements addressing, at a minimum, the identification of resources and assistance available to PSC personnel as well as country information and cultural training, and guidance on working with host country nationals and military personnel.

(iii) Rules for the use of force and graduated force procedures.

(iv) Requirements and procedures for direction, control and the maintenance of communications with regard to the movement and coordination of PSCs and PSC personnel, including specifying interoperability requirements. These include coordinating with the Chief of Mission, as necessary, private security operations outside secure bases and U.S. diplomatic properties to include movement control procedures for all contractors, including PSC personnel.

(b) *Availability of Guidance and Procedures.* The geographic Combatant Commander shall ensure the guidance and procedures prescribed in paragraph (a) of this section are readily available and accessible by PSCs and their personnel (*e.g.*, on a Web page and/or through contract terms), consistent with security considerations and requirements.

(c) *Subordinate Guidance and Procedures.* A sub unified commander or JFC, in consultation with the Chief of Mission, will issue guidance and procedures implementing the standing combatant command publications specified in paragraph (a) of this section, consistent with the situation and operating environment.

(d) *Consultation and Coordination.* The Chief of Mission and the geographic Combatant Commander/sub unified commander or JFC shall make every effort to consult and coordinate responses to common threats and common concerns related to oversight of the conduct of U.S.G.-funded PSCs and their personnel.

Dated: August 3, 2011.

**Patricia L. Toppings,**  
*OSD Federal Register Liaison Officer,*  
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## DEPARTMENT OF DEFENSE

### Office of the Secretary

#### 32 CFR Part 319

[Docket ID DOD-2011-OS-0022]

#### Privacy Act; Implementation

**AGENCY:** Defense Intelligence Agency, DoD.

**ACTION:** Direct final rule with request for comments.

**SUMMARY:** The Defense Intelligence Agency is deleting an exemption rule for LDIA 0275, "DoD Hotline Referrals" in its entirety. This direct final rule makes nonsubstantive changes to the Defense Intelligence Agency Privacy Program rules. These changes will allow the Department to transfer these records to another system of records LDIA 0271, "Investigations and Complaints" (July 19, 2006, 71 FR 41006). This will improve the efficiency and effectiveness of DoD's program by preserving the exempt status of the records when the purposes underlying the exemption are valid and necessary to protect the contents of the records. This rule is being published as a direct final rule as the Department of Defense does not

<sup>13</sup> This requirement is specific to arming procedures. Such written acknowledgement should not be construed to limit potential civil and criminal liability to conduct arising from "the use of weapons." For example, PSC personnel could be held criminally liable for any conduct that would constitute a Federal offense (see MEJA, 18 U.S.C. 3261(a)).