DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR–2007–0002, Sequence 10]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–24; Introduction

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

ACTION: Summary presentation of rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2005–24. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at *http://www.regulations.gov*.

DATES: For effective dates and comment dates, see separate documents, which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below in relation to each FAR case. Please cite FAC 2005–24 and the specific FAR case numbers. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

LIST OF RULES IN FAC 2005–24

Item	Subject	FAR case	Analyst
I	Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission.	2005–011	Woodson.
II	Numbered Notes for Synopses	2006–016	Woodson.
III	Trade Agreements—New Thresholds (Interim)	2007–016	Murphy.
IV	New Designated Countries—Dominican Republic, Bulgaria, and Romania	2006–028	Murphy.
V	FAR Part 30—CAS Administration	2005–027	Loeb.
VI	Common Security Configurations	2007–004	Davis.

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow.

For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005–24 amends the FAR as specified below:

Item I—Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission (FAR Case 2005–011)

This final FAR rule addresses the issues of contractor personnel that are providing support to the mission of the United States Government in a designated operational area or supporting a diplomatic or consular mission outside the United States, but are not authorized to accompany the U.S. Armed Forces. This final FAR rule clarifies that contractor personnel are only authorized to use deadly force in self-defense or in the performance of security functions, when use of such force reasonably appears necessary to execute their security mission. The purpose and effect of the rule is to relieve the perceived burden on contractors operating without consistent guidance or a standardized clause in a contingency operation or otherwise risky environment.

Item II—Numbered Notes for Synopses (FAR Case 2006–016)

This final rule amends the Federal Acquisition Regulation (FAR) to update and clarify policy for synopses of proposed contract actions and to delete all references to Numbered Notes (Notes) in the FAR and Federal Business Opportunities (FedBizOpps) electronic publication. The prescriptions for Numbered Notes were deleted from the FAR in a former FAR case and transitioned from the Commerce Business Daily to FedBizOpps actions. This transition resulted in other synopses-related changes that were not captured in the associated FAR language revision. Additionally, the transition to the electronic FedBizOpps publication for solicitation and other announcements rendered these Notes obsolete or outdated.

Item III—Trade Agreements—New Thresholds (FAR Case 2007–016) (Interim)

This interim rule adjusts the thresholds for application of the World Trade Organization Government Procurement Agreement and the other Free Trade Agreements as determined by the United States Trade Representative, according to a formula set forth in the agreements.

Item IV—New Designated Countries—Dominican Republic, Bulgaria, and Romania (FAR Case 2006–028)

This final rule converts, without change, the interim rule published in the **Federal Register** at 72 FR 46357, August 17, 2007. No comments were received in response to the interim rule. The effective date of the rule was August 17, 2007. The interim rule allowed contracting officers to purchase the goods and services of the Dominican Republic without application of the Buy American Act if the acquisition is subject to the Free Trade Agreements. The threshold for applicability of the Dominican Republic-Central America-United States Free Trade Agreement is $67,826 for supplies and services (the same as other Free Trade Agreements to date except Morocco, Bahrain, Israel, and Canada) and $7,443,000 for construction (the same as all other Free Trade Agreements to date except NAFTA and Bahrain). The interim rule also added Bulgaria and Romania to the list of World Trade Organization Government Procurement Agreement countries wherever it appears.

Item V—FAR Part 30—CAS Administration (FAR Case 2005–027)

This final rule amending the Federal Acquisition Regulation (FAR) to implement revisions to the regulations related to the administration of the Cost Accounting Standards (CAS). Among other changes, the final rule streamlines

the process for submitting, negotiating, and resolving cost impacts resulting from a change in cost accounting practice or noncompliance with stated practices.

Item VI—Common Security Configurations (FAR Case 2007–004)

This final rule amends the Federal Acquisition Regulation to require agencies to include common security configurations in new information technology acquisitions, as appropriate. The revision reduces risks associated with security threats and vulnerabilities and will ensure public confidence in the confidentiality, integrity, and availability of Government information. This final rule requires agency contracting officers to consult with the requiring official to ensure the proper standards are incorporated in their requirements.

Dated: February 19, 2008.

Al Matera,

Director, Office of Acquisition Policy.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2005–24 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005–24 is effective February 28, 2008, except for Items I, II, V, and VI which are effective March 31, 2008.

Dated: February 14, 2008.

Shay D. Assad,

Director, Defense Procurement and Acquisition Policy.

Dated: February 19, 2008.

David A. Drabkin,

Acting Chief Acquisition Officer & Senior Procurement Executive, Office of the Chief Acquisition Officer, U.S. General Services Administration.

Dated: February 13, 2008.

James A. Balinskas,

Acting Assistant Administrator for Procurement, National Aeronautics and Space Administration.

[FR Doc. E8–3375 Filed 2–27–08; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

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

[FAC 2005–24; FAR Case 2005–011; Item I; Docket 2008–0001; Sequence 1]

RIN 9000–AK42

Federal Acquisition Regulation; FAR Case 2005–011, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) in order to address the issues of contractor personnel that are providing support to the mission of the United States Government in a designated operational area or supporting a diplomatic or consular mission outside the United States, but are not authorized to accompany the U.S. Armed Forces.

DATES: Effective Date: March 31, 2008.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–24, FAR case 2005–011.

SUPPLEMENTARY INFORMATION:

A. Background

This rule creates a new FAR Subpart 25.3 to address issues relating to contracts performed outside the United States, including new section 25.301, Contractor personnel in a designated operational area or supporting a diplomatic or consular mission outside the United States. The rule also adds a new clause entitled ''Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States.'' This clause will not apply to contractor personnel authorized to accompany the U.S. Armed Forces because they are covered by the Defense Federal Acquisition Regulations Supplement (DFARS) 225.7402 and the clause at 252.225–7040.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 71 FR 40681, July 18, 2006, under the case title ''Contractor Personnel in a Theater of Operations or at a Diplomatic or Consular Mission.'' The public comment period ended on September 18, 2006. Because the FAR proposed rule and the DFARS interim rule under DFARS Case 2005–D013 are similar in many respects, the Councils reviewed the comments on both rules together, except for those issues that applied only to the Department of Defense. The Councils received 6 comments on the FAR rule and 10 comments on the DFARS rule.

The most widespread concern of respondents centered on the paragraph in the clause that sets forth the law of war principles regarding use of deadly force by contractors. There was strong objection to the perception that the U.S. Government is now hiring contractors as mercenaries. These comments on the use of deadly force have been divided into two categories: The right to self-defense, and private security contractors.

1. Right to Self-Defense

a. Distinction Between Self-Defense and Combat Operations (Relates to FAR 52.225–19(B)(3)(I))

Comment: One respondent states that there is an inherently vague line between what constitutes ''defense'' and ''attack'' which is plainly crossed when the terms are applied in asymmetric warfare. It is clear, they say, that contractors employing self-defense measures would have to undertake a wide array of combat activities to assure their safety. They refer to these contracts as ''Self Defense Contracts.''

Response: The FAR language recognizes that individuals have an inherent right to self-defense. The language does not require self-defense, just authorizes it when necessary. It does not authorize preemptive measures.

b. Whether the Right of Self-Defense Should Be Modified to ''Personal'' Self-Defense?

Comment: One respondent recommends insertion of the word ''personal'' before ''self-defense'' in the DFARS rule, stating that this will ''clarify that civilians accompanying the force are authorized to use deadly force only in defense of themselves, rather than the broader concept of unit self-defense or preemptive self-defense.''

Response: The Councils concluded that this is not a problem in the FAR,

because the contractors subject to the FAR rule are not authorized to accompany the force, and ''unit self-defense'' and ''pre-emptive self-defense'' are not civilian concepts.

c. Whether the Right of Self-Defense Should Be Extended to Defense Against Common Criminals?

Comment: One respondent states that, ''since this rule will apply in innumerable asymmetrical environments'', the phrase ''against enemy armed forces'', should be deleted, asserting that the right of self-defense should ''extend beyond enemy armed forces since such defensive actions may be needed as protection against common criminals.''

Response: The Councils concur with this recommendation that the phrase ''against enemy armed forces'' should be deleted from paragraph 52.225–19(b)(3)(i) of the FAR rule, since there are legitimate situations which may also require a reasonable exercise of self-defense against other than enemy armed forces, e.g., defense against common criminals, terrorists, etc. When facing an attacker, it will often be impossible for the contractor to tell whether the attacker is technically an ''enemy armed force'' and probably irrelevant to the decision whether to use deadly force (although it may not be irrelevant to the subsequent consequences, which are outside the control of the contractor and the regulation).

The Councils have also added a reference to the requirements regarding use of force as specified in paragraph 52.225–19(i)(3) of the clause, to remind the contractor of the other limitations on the use of force.

2. Role of Private Security Contractors (52.225–19(B)(3)(Ii))

a. Whether a Separate Category for Private Security Contractors Is Necessary?

Comment: One respondent states that there is no need for private security contractor as a separate category if private security contractors (like other contractors) can only use deadly force in self-defense.

Response: While the right to self-defense applies to all contractors, the rule recognizes that private security contractors have been given a mission to protect other assets/persons and so it is important that the rule reflect the broader authority of private security contractors in regard to use of deadly force, consistent with the terms and conditions of the contract.

b. Hiring Private Security Contractors as Mercenaries Violates Constitution, Law, Regulations, Policy, and American Core Values

Comment: Many respondents had similar comments to the effect that, by allowing contractors to assume combat roles, the rule allows mercenaries in violation of the Constitution and laws of the United States, core American values, and insulting our soldiers.

- One law specifically identified was 5 U.S.C. § 3108, ''Employment of detective agencies; restrictions.'' (The so-called Anti-Pinkerton Act.)
- Also some see this as violating DoD Manpower Mix Criteria and the Federal Activities Inventory Reform (FAIR) Act of 1998, which preclude contracting out core inherently governmental functions, especially combat functions.

Response: While not disputing the many prohibitions against the use of mercenaries, private security contractors are not mercenaries. Private security contractors are not part of the armed forces. The Government does not contract out combat functions. The United States Government has the authority to hire security guards worldwide. The protection of property and persons is not an inherently governmental function (see FAR 7.503(d)(19)).

In Brian X. Scott, Comp. Gen. Dec. B–298370 (Aug. 18, 2006), the Comptroller General of the United States concluded that solicitations for security services in and around Iraq violated neither the Anti-Pinkerton Act, nor DoD policies regarding contractor personnel because the services required are not ''quasi-military armed forces'' activities. The Comptroller General also relied on the language of the interim DFARS rule which prohibits contractor personnel from participating in direct combat activities, as well as the provisions of DoDI 3020.41, which makes it the responsibility of the combatant commander to ensure that private security contract mission statements do not authorize the performance of any inherently Governmental military function. The Comptroller General concluded that ''* * * the services sought under the solicitations appear to comport with the DoD policies and regulations which state that security contractors are not allowed to conduct direct combat activities or offensive operations.''

c. Whether the Standard for Use of Deadly Force Should Be Modified to One of ''Reasonableness''

Comment: Paragraph 52.225–19(b)(3)(ii) of the FAR clause uses the language ''only when necessary'' as the standard when describing the use of deadly force by security contractors. One respondent notes that a ''reasonably appears necessary'' standard is used by the Department of Defense when its personnel perform security functions (see DoDD 5210.56, Use of Deadly Force and the Carrying of Firearms by DoD Personnel Engaged in Law Enforcement and Security Duties, at E2.1.2.3.1). The respondent states that ''While everyone would agree that ''unnecessary'' deadly force is to be avoided, the difference between ''unnecessary'' and ''only when necessary'' remains wide and fails to recognize the ''reasonably appears necessary'' standard that is critical to split-second discretionary decisions, particularly in a war zone.''

Response: The Councils concur with the suggested revision to the wording of paragraph 52.225–19(b)(3)(ii). Since this is the standard applied by the DoD for DoD personnel engaged in law enforcement and security duties, then it is reasonable to apply that standard to private security personnel.

d. Whether Protected Assets/Persons for Private Security Contractors Should Be Limited to Non-Military Objectives

Comment: One respondent says the rule should be clarified to limit private security contractor personnel to protecting assets/persons that are non-military objectives. This omission from the Interim Rule seems to conflict with the Army Field Manual No. 3–100.21, that prohibits the use of contractors in a force protection role. One respondent is also concerned about how to craft statements of work for private security contractors that do not assign to contractors inherently governmental functions.

Response: It is not possible to tell in advance of an actual conflict what may become a military objective. Almost anything worth protecting could become a military target in wartime. As already stated in paragraph A.2.b. of this notice, the Government is not contracting out combat functions. The United States Government has the authority to hire security guards worldwide. The protection of property and persons is not an inherently Governmental function (see FAR 7.503(d)(19)).

e. Use of the Term ''Mission Statement''

Comments: Paragraph 52.225–19(b)(3)(ii) of the FAR clause authorizes private security contractor personnel to ''use deadly force only when necessary to execute their security mission to protect assets/persons, consistent with the mission statement contained in their contract.'' Several respondents felt that

the use of the term ''mission statement'' in that sentence caused confusion and requested clarification of its meaning. Several respondents believed that definition of ''mission statement'' is needed, due to the possibility of different interpretations. Not all contracts for security services will contain a ''mission statement,'' at least using that terminology. Statements of work may contain sections entitled ''objectives,'' ''purpose,'' or ''scope of work,'' which may or may not contain the equivalent of a mission statement. The need to deploy security personnel quickly could ''result in a 'mission statement' (or its equivalent) that may not be as precise as desired and, therefore, ill-suited to serve as part of a standard for when deadly force is authorized.''

One respondent was also concerned about the need for clear provisions establishing who may prepare a mission statement and the Combatant Commander's role in the process. The respondent further noted that the ''Background'' section of the FAR rule contained the following supplemental information concerning the Combatant Commander's role: ''It is the responsibility of the Combatant Commander to ensure that private security contract mission statements do not authorize the performance of any inherently governmental military functions, such as preemptive attacks, or any other types of attacks.'' However, the respondent stressed that, with civilian agencies that have ''non-DoD'' contracts, ''the Combatant Commander will have no involvement and the rule does not provide any mechanism for the non-defense agencies to obtain that determination.''

Respondents also requested clarification whether or not subcontractors would be considered private security contractors, or whether that the term ''private security contractor'' was limited to contractors that have ''a contract directly with the Government''. One respondent commented that ''there is no guidance as to who would qualify as ''private security contractor personnel'', creating uncertainty regarding whether private security companies retained by a prime contractor would be covered if the prime contractor drafted a mission statement for its private security subcontractor.''

Response: The Councils agree that the use of the phrase ''consistent with the mission statement contained in their contract'', in paragraph 52.225–19(b)(3)(ii) of the FAR clause might cause some confusion. The Councils have replaced this phrase with ''consistent with the terms and conditions of the contract.'' ''Terms and conditions'' covers possible placement anywhere in the contract.

For contractors supporting a diplomatic or consular mission, it will be the chief of mission who authorizes the use of weapons. When authorizing the use of weapons, the chief of mission will review and approve the use to which the weapons will be put.

The Councils do not consider that any clarification with regard to subcontractors is necessary. When a clause flows down to subcontractors, the terms are changed appropriately to reflect the relationship of the parties. There is nothing in the proposed rule that indicates that private security contractors cannot be subcontractors.

f. Authority of Combatant Commander/Chief of Mission to ''Create Missions''

Comment: One respondent asserts that the proposed FAR rule delegates extensive authority to combatant commanders to direct contractor actions under both support and security contracts. They contend that granting such ''nearly unlimited'' authority to combatant commanders to ''create missions'' is inconsistent with laws and regulations which convey such authority to contracting officers and serves to undermine their authority.

Response: The combatant commander/chief of mission are not authorized to ''create missions'' for private security contractors. The contractors must perform in accordance with the terms and conditions of the contract. The authority of the combatant commander/chief of mission arises through the fact that they must approve when any contractors request authority to carry weapons, and the combatant commander/chief of mission must evaluate whether the planned use of such weapons is appropriate.

g. Approval of Private Security Contractors

Comment: One respondent questioned whether there will be a vetting process and list of approved Private Security Contractors for contractors or their subcontractors to acquire services from? They also wanted to know about any requirements/rules when a contractor subcontracts with a local or third-country firm as private security contractor.

Response: With regard to vetting for private security contractors, FAR 25.301–2 provides that contractors are responsible for providing their own security support. Additionally, 52.225–19(c) echoes 25.301–2 and 52.225–19(e)(2) requires the contractor to insure that all applicable specified security and backgrounds checks are completed before contractor personnel begin performance in the designated operational area or with a diplomatic or consular mission.

The Contractor assumes full responsibility for the selection and performance of its subcontractors. However, the Government may reserve the right to approve subcontracts.

h. Definition of ''Private Security Contractor''

Comment: Several respondents requested a definition of Private Security Contractor.

Response: The Councils considered that a private security contractor is a contractor that has been hired to provide security, either by the Government, or as a subcontractor. In some circumstances a contractor, whose primary function is not security, will directly hire a few personnel to provide security, rather than subcontracting to a private security contractor. The authority for use of deadly force ultimately rests with the individuals who are providing the security, whether as direct hires or as employees of a subcontractor. Therefore, the Councils have revised the language in paragraph 52.225–19(b)(3)(ii) of the clause from ''Private security contractors * * *'' to read ''Contractor personnel performing security functions * * *''

3. Consequences of Inappropriate Use of Force (52.225–19(b)(3)(iii))

a. Loss of ''Law of War'' Protection From Direct Attack

Comment: Paragraph (b)(3)(iii) in the proposed rule stated that ''Civilians lose their law of war protection from direct attack if and for such time as they take a direct part in the hostilities.'' This statement raised many questions as to what the terms mean. One respondent considered this to be a correct statement under the international law of war, but that it may call into questions our foundation for the Global War on Terrorism and targeting ''unlawful combatants'' when they are not taking a direct part in hostilities.

Response: The Councils decided to delete this paragraph. Paragraph (b)(3)(i) sets forth the right to self-defense. Paragraph (b)(3)(ii) sets forth a limited right for some contractor personnel to protect assets/persons. Adding paragraph (b)(3)(iii) does not provide any useful information to contractors on what they are authorized to do. Discussion of the theories of law of war should be handled in law of war

training prior to deployment rather than in the clause.

b. Consequences Other Than ''Law of War'' Consequences

Comment: Several respondents state that as the interim DFARS rule is currently drafted, the notice to contractors relating to the personal and legal impact of directly participating in hostilities is incomplete. They requested inclusion of language from the DoDI 3020.41 relating to possible criminal and civil liability for inappropriate use of force.

Response: Although the comment specifically related to the DFARS rule, and inclusion of the language from the DoDI is not appropriate, the Councils have added to paragraph 52.225–19(b)(3)(i) of the clause a cautionary reference to paragraph 52.225–19(i)(3) of the clause, regarding use of weapons.

4. Contractors Are Not Active Duty (52.225–19(b)(4))

Comment: One respondent was concerned about paragraph (b)(4) in the clause. This paragraph says, ''Service performed by contractor personnel subject to this clause is not active duty or service under 38 U.S.C. 106 Note.'' The respondent points out that the Note under Section 106 in Title 38 of the annotated U.S. Code explains that the Secretary of Defense is to determine what constitutes ''active duty or service'' under this statute for Women's Air Forces Service Pilots who were attached to the Army Air Corps during World War II and persons in similarly situated groups who rendered services in a capacity considered civilian employment or contractual service. The respondent asserts the determination can only be made retrospectively.

Response: The clause correctly states the terms of service for Defense and non-Defense contractors. Contractors should hold no expectation under this clause that their service will qualify as ''active duty or service.'' The Note under 38 U.S.C. 106 requires determinations for any applicant group be based on (1) regulations prescribed by the Secretary, and (2) a full review of the historical records and any other evidence pertaining to the service of any such group. In promulgating the DFARS, the Department of Defense issued a regulation prescribed by the Secretary. This Defense regulation establishes the historical record that shall be used in future review of the historical evidence surrounding a contractor's service under this clause. Defense policy is that contractors operating under this clause shall not be attached to the armed forces in a way similar to the Women's Air Forces Service Pilots of World War II. Contractors today are not being called upon to obligate themselves in the service of the country in the same way as the Women's Air Forces Service Pilots or any of the other groups listed in Section 106. The FAR follows the Defense regulation in this regard, since ''active duty or service'' is a matter uniquely determined by the Secretary of Defense.

5. Weapons (25.301–3 and 52.225–19(i))

a. Nature of the Authorized Weapons

Comment: One respondent claims there is no reasonable limitation on the nature of the ''weapons'' that a contractor is to handle, whether as a ''Self Defense Contractor'' or a Private Security Contractor. The range could include anything from small arms to major weapons systems.

Response: There are too many different situations for individual agencies to be able to prescribe specific weapons for each circumstance. However, it is unlikely a contractor would attempt to bring a major weapon system on the battlefield, or that the combatant commander/chief of mission would approve/authorize such weapons.

b. Combatant Commander/Chief of Mission—Rules on the Use of Force

Comment: One respondent believes there is no reasonable means by which a combatant commander/chief of mission can generate rules regarding the use of force by contractors. They further claim that the rules have to be related to doctrine, dogma, rules of engagement, etc. and these are formulated well above the combatant commander. Since the rules may be different, they assert contractor personnel would be subject to a range of serious risks and liabilities.

Response: It is the authority of a combatant commander to perform those functions of command over assigned forces involving: Organizing and employing commands and forces; assigning tasks; designating objectives; and giving authoritative direction over all aspects of military operations, joint training, and logistics necessary to accomplish the missions assigned. Operational control is inherent in combatant command (command authority) and therefore, provides full authority to organize and employ commands and forces as the combatant commander considers necessary to accomplish assigned missions. The combatant commander also establishes rules of engagement in the designated operational area, and does take into consideration many influences such as doctrine. The combatant commander will also seek advice from experts in areas such as legal and security, prior to making such decisions. Since the rules regarding contractor authorization to carry firearms will vary according to the phase of the conflict, there would be no person other than the combatant commander more informed or able to make the decision on whether a contractor can carry weapons and the rules for use of such weapons.

It is the authority of the chief of mission to establish the rules for use of weapons by contractors supporting a diplomatic or consular mission.

c. Law of Armed Conflict (LOAC) Issues

Comment: One respondent states the notion that the Government assumes no responsibility whatsoever for the use of weapons on a battlefield by a contractor authorized and required to use such weapons as the practical effect of the contract requirements, makes no sense and is certain to cause contractual Law of Armed Conflict issues and other problems.

Response: There have been no issues on the Law of Armed Conflict for contractors carrying weapons because in the current conflicts there are no enemy armed forces that are lawful combatants and no enemy government to provide them prisoner of war status and protections if captured.

The Councils also note that at the beginning of the current conflicts contractors were not allowed to carry weapons at all. During the post-major operations phase, civilian contractors that have been brought in for a variety of security operations are authorized (and required) to provide their own weapons. The obvious safety/security connected with carrying a weapon far outweigh any theoretical issues.

d. Liability for Use of Weapons

Comment: Several respondents express concern that the Government (52.225–19(i)) authorizes (and sometimes requires) contractor personnel to carry weapons but that it places sole liability for the use of weapons on contractors and contractor personnel, ''even if the contractor was acting in strict accordance with the contract statement of work or under specific instructions from the contracting officer, the Chief of Mission, or the Combatant Commander.''

One respondent considers this statement regarding contractor liability for use of weapons to be inconsistent with prior regulatory history, citing the statement that ''the risk associated with inherently Governmental functions will

remain with the Government.'' (70 FR 23792, May 5, 2005.)

Response: While a contractor may be authorized to carry and use weapons, the contractor remains responsible for the performance and conduct of its personnel. A contractor has discretion in seeking authority for any of its employees to carry and use a weapon. Each contractor is responsible for ensuring its personnel who are authorized to carry weapons are adequately trained to carry and use them safely, adhere to the rules on the use of force, comply with law, agreements, and are not barred from possession of a firearm. Inappropriate use of force could subject a contractor, its subcontractor, or employees to prosecution or civil liability under the laws of the United States and the host nation. The Government cannot indemnify a contractor and its personnel against claims for damages or injury or grant immunity from prosecution associated with the use of weapons.

With regard to the statement regarding inherently governmental functions, this rule does not authorize contractors to carry out any inherently governmental functions.

6. Risk/Liability to Third Parties/ Indemnification (52.225–19(b)(2))

Comment: Many respondents expressed concern that the proposed FAR rule shifts to contractors all risks associated with performing the contract and may lead courts to deny contractors certain defenses in tort litigation. The respondents cited decisions by state and federal courts arising out of injuries or deaths to third parties, including military members and civilians. Generally, the courts absolved contractors of liability to third parties where the Government carried ultimate responsibility for the operation.

Some respondents are concerned that the acceptance of risk may preclude grants of indemnification and that the rule could adversely affect indemnification that would otherwise be available. FAR clause 52.228–7 provides limited indemnification, but provides that contractors shall not be reimbursed for liabilities for which the contractor is otherwise responsible under the express terms of any clause specified in the Schedule or elsewhere in the contract.

One respondent states that the provisions stating that the contractor accepts certain risks and liabilities could also be the basis to deny pre- or post-award request for indemnification under Public Law 85–804. One respondent also cited a decision by a Defense Department Contract Appeals Board in which the Board declined a contractor's request for indemnification under Public Law 85–804 because, according to the Board, contractors should not be able to ''deliberately enter into contractual arrangements with full knowledge that a risk is involved'' and yet propose unrealistically low prices on the hopes they may later gain indemnification. Therefore, the rule could adversely affect indemnification that would otherwise be available.

The respondents recommend that the United States should either identify, quantify, and accept all the risk or should insert language that would immunize contractors from tort liability. Specifically, several respondents recommend adding a sentence saying, ''Notwithstanding any other clause in this contract, nothing in this clause should be interpreted to affect any defense or immunity that may be available to the contractor in connection with third-party claims, or to enlarge or diminish any indemnification a contractor may have under this contract or as may be available under the law.''

There was also concern that by accepting all risks of performance, contractors would not be able to obtain workers compensation insurance or reimbursement under the Defense Base Act.

One respondent suggests that the final rule should be revised to modify the contractor's acceptance of risk as follows: ''Except as otherwise provided in the contract, the Contractor accepts the risks associated with required contract performance in such operations.''

Response: The Councils believe the rule adequately allocates risks, allows for equitable adjustments, and permits contractors to defend against potential third party claims. Contractors are in the best position to plan and perform their duties in ways that avoid injuring third parties. Contractors are equally or more responsible to research host nation laws and proposed operating environments and to negotiate and price the terms of each contract effectively. Accordingly, the clause retains the current rule of law holding contractors accountable for the negligent or willful actions of their employees, officers and subcontractors. This is consistent with existing laws and rules, including FAR clause 52.228–7, Insurance-Liability to Third Parties, and FAR Part 50, Extraordinary Contractual Actions (Indemnification), as well as the court and board decisions cited in the comments.

The current law regarding the Government Contractor Defense (e.g., the line of cases following *Boyle* v. *United Technologies*, 487 U.S. 500, 108 S. Ct. 2510 (1988)) extends to manufacturers immunity when the Government prepares or approves relatively precise design or production specifications after making sovereign decisions balancing known risks against Government budgets and other factors in control of the Government. This rule covers service contracts, not manufacturing, and it makes no changes to existing rules regarding liability. The public policy rationale behind *Boyle* does not apply when a performance-based statement of work is used in a services contract because the Government does not, in fact, exercise specific control over the actions and decisions of the contractor, its employees or subcontractors. Asking a contractor to ensure its employees comply with host nation law and other authorities does not amount to the precise control that would be requisite to shift away from a contractor accountability for its own actions.

Contractors will still be able to defend themselves when injuries to third parties are caused by the actions or decisions of the Government, its officers and employees. To the extent that contractors are currently seeking to avoid accountability to third parties for their own actions by raising defenses based on the sovereignty of the United States, this clause should not send a signal that would invite courts to shift the risk of loss to innocent injured parties. The recommended language would open the door to attempts to shift to innocent victims all the burden of their injuries and would encourage contractors to avoid proper precautions needed to prevent injury to others. The language in the clause is intended to encourage contractors to properly assess the risks involved and take proper precautions.

However, to preclude the misunderstanding that asking the contractor to ''accept all risks'' is an attempt to ''shift to the contractor all risk of performance without regard to specific provisions in the contract,'' the Councils have accepted the suggestion to modify the requirement with the lead-in phrase: ''Except as otherwise provided in the contract,''.

7. Terms Defined (2.1 and 52.225–19(a))

a. Theater of Operations

Comment: One respondent states that the term ''theater of operations'' is unwarranted by any legitimate purposes suggested by the interim rule.'' This is a term which if defined at all, should rest in the hands of the President or the Secretary of Defense.''

Response: There was a legitimate purpose for the use of this term because it defined the geographic area in which the clause was applicable. The combatant commander has the authority to define a ''theater of operations'' within the geographic area for which the combatant commander is responsible. However, after discussion with military experts and review of the Joint Publication 3–0 Chapter 5, the Councils have determined that the term ''theater of operations'' is too restrictive, that the appropriate term is ''designated operational area,'' which includes theater of operations, but also would include such descriptors as theater of war, joint operations area, amphibious objective area, joint special operations area, and area of operations. The Councils have added a definition of ''designated operational area'' at FAR Part 2 and in the clause, and replaced the term ''theater of operations'' throughout the text and clause.

b. Contingency Operations and Humanitarian or Peacekeeping Operations

Comment: One respondent is concerned that the rule defines the terms ''contingency operation'' and ''humanitarian or peacekeeping operation'' in military terms and does not address the civilian ''humanitarian, contingency, disaster assistance, and developmental assistance'' authorities that govern the United States Agency for International Development (USAID) and other civilian agency international programs.

Response: The definitions of ''contingency operations'' and ''humanitarian or peacekeeping operations'' are defined in military terms, as defined at 10 U.S.C. 101(a)(13) and 10 U.S.C. 2302(8) and 41 U.S.C. 259(d), because the purpose of this rule and clause as set forth in the scope at 25.301–1(a) is intended to be applied during military operations. To make it more clear that the rule is not referring to the type of contingency, humanitarian, or peacekeeping operations in which USAID is involved, the term ''military'' has been included in the definition of ''designated operational area.''

c. Other Military Operations

Comment: Several respondents note that the term ''other military operations'' is very broadly defined. One respondent states that it is ''either over expansive, or unnecessary, because it is so inclusive as to suggest nearly any type of military engagement likely to be carried out in the first half of the current century.''

Response: The Councils concur that this definition was very broad, because it was intended to cover every type of military operation. However, the Councils have deleted this definition, because the Councils have agreed to limit application of this rule and clause to ''other military operations'' only when so designated by the Combatant Commander. Since the clause will only be applied to other military operations when designated by the Combatant Commander, it is unnecessary to define the term in the text and clause.

d. At a Diplomatic or Consular Mission

Comment: One respondent states that the term ''at a diplomatic or consular mission'' connotes the physical location of the embassy or consulate, which seems more limited than the FAR definition contemplates. A more descriptive phrase for the geographical location where the FAR clause should apply would be helpful. One respondent also objects to the statutory reference in the definition.

Response: The Councils have changed the final rule to make the wording clearer, with less emphasis on location and more emphasis on the performance under the contract. The Councils have also deleted the statutory reference. Contracting officers know when they are subject to the direction of a Chief of Mission.

e. Chief of Mission

Comment: One respondent does not object to the definition of ''Chief of Mission.'' However, the respondent requests a reasonable and consistent means for identifying the individual who occupies the position. Another respondent requests that the contract clause should include a blank to be completed to identify the chief of mission. This respondent also requests explanation of the distinction between an ambassador at an embassy and a chief of mission at a diplomatic or consular mission.

Response: The Chief of Mission can be identified through the Department of State. The Councils do not consider it advisable to put that information in the contract because it changes frequently. Although the ambassador may be the chief of mission, many diplomatic missions do not have an ambassador. As stated in the definition, the Chief of Mission is whoever is in charge of a diplomatic mission, as designated by the Secretary of State.

f. Location of Definitions

Comment: One respondent stated that all of the definitions should be included in either FAR 2.101 or 25.302–2 and in the clause, or provided only in the clause. ''At a diplomatic or consular mission'' and ''theater of operations'' are defined in the clause but not at 25.302 (now 25.301).

Response: In the proposed rule, ''at a diplomatic or consular mission'' and ''theater of operations'' are defined in FAR 2.101 rather than at 25.301, because the terms are used in more than one part of the FAR. In the final rule, the definition of ''designated operational area'' has been substituted for the definition of ''theater of operations'' and the definition of ''supporting a diplomatic or consular mission'' has replaced the definition of ''at a diplomatic or consular mission''. In addition, the definitions of ''chief of missions'' and ''combatant commander'' have also been moved to Part 2, because those terms are used in the definitions of ''designated operational area'' and ''supporting a diplomatic or consular mission,'' respectively.

8. Terms Not Defined

a. Enemy Armed Forces

Comment: One respondent objects to the lack of definition of the term ''enemy armed forces,'' stating that this term is critical to the contractor in determining and pricing its obligations under a solicitation or resulting contract.

Response: The FAR rule has been revised to delete use of the term ''enemy armed forces.''

b. ''Law of War,'' ''Law of War Protections,'' and ''Take Direct Part in Hostilities''

Comment: One respondent states that there are several terms of art that are undefined in the FAR rule that likely cannot be defined satisfactorily in the FAR. The respondent states that understanding the concepts underlying these terms is crucial to preparing statements of work for and administering contracts that will send contractor employees into hostile environments. Therefore, the FAR text should include some discussion of them and the need for contracting personnel to seek advice when dealing with these terms. Such terms include ''law of war,'' ''law of war protections,'' and ''take a direct part in hostilities;'' the latter is perhaps the most important phrase for private security contractors and those drafting the statements of work or mission statements. The difficulty of understanding the concept ''take a direct part in hostilities'' is illustrated by the fact that the International Team of the Red Cross has held three conferences for the purpose of defining

this term without consensus and that the DoDI 3020.41 provides explicit instructions about the need for legal counsel's advice to sufficiently address the many aspects of direct participation in hostilities.

Response: It is beyond the scope of the FAR rule to include definitions of ''law of war,'' ''law of war protections,'' and ''take direct part in hostilities.'' The respondent acknowledged that the terms cannot be satisfactorily defined in the FAR. These terms have been removed from the final FAR rule. The Department of Defense is developing ''law of war'' training that will be available to contractor personnel.

c. ''Security Support,'' ''Security Mission,'' ''Mandatory Evacuation,'' and ''Non-Mandatory Evacuation''

Comment: One respondent states that the DoD interim rule uses these terms that are not defined. These terms are also used in the FAR rule. The respondent considers that these terms are critical to the contractor in determining and pricing its obligations under a solicitation and resulting contract.

Response: Aside from the fact that the terms ''security support'' and ''security mission'' are used in their plain English meaning, whatever the contractor needs to know about them is set forth in the solicitation and contract. The terms and conditions of the contract define the mission and also specify if any security support will be provided.

Since the Government will not provide security support except as specified in the contract, the abstract meaning of the term ''security support'' is irrelevant in determining and pricing the contractor's obligations under the contract. With regard to mandatory evacuation and non-mandatory evacuation, it is unnecessary to define these terms in the clause. Aside from the plain English meaning of the terms, an evacuation order will be identified as mandatory or non-mandatory. The contractor will be told what it needs to know in the case such an order is issued.

d. ''Contractor''

Comment: One respondent proposes that ''contractor'' needs to be defined in the FAR rule. The respondent states that the current definition ''contractor personnel are civilians'' does not address the broad range of implementing partners and types of contractors used by the foreign assistance community.

Response: The Councils consider that regardless of the type of contractors used by the foreign assistance community they are still civilians. Therefore, it does not enhance the clarity of this rule to attempt such a definition. If an individual agency finds a need for such a definition to address their particular circumstances, it can be included in their individual agency FAR supplements.

Further, the FAR only applies to contracts as defined in FAR Part 2, not to the entire broad range of partners, ventures, and other types of contractors that may be used by the foreign assistance community.

e. Definitions Reflecting Civilian Agency Authorities for Disaster, Humanitarian, Transitions, and Development Assistance

Comment: One respondent states that while the current and proposed definitions are suitable to military operations, the section requires additional definitions reflecting civilian agency authorities for disaster, humanitarian, transitions, and development assistance as set out in Foreign Assistance legislation and in implementing regulations.

Response: The Councils did not define these terms, such as ''disaster,'' ''humanitarian,'' ''transitions,'' etc., since the focus of the rule is on the status of contractor personnel in a designated operational area or supporting a diplomatic or consular mission. Therefore, it is more appropriate to address the particulars of civilian agency authority for disaster and humanitarian efforts in the individual agency FAR supplements.

f. Area of Performance

Comment: One respondent states that the term ''area of performance'' in the FAR rule is not defined; without a definition, an area of performance could mean anywhere a contractor performs—both overseas and in the U.S.—creating ambiguity. When used in the proposed FAR rule, it would appear that ''area of performance'' can be deleted or the term ''theater of operations or diplomatic or consular mission'' can be substituted if done with care.

Response: The term ''area of performance'' has a broad meaning within the proposed FAR rule, which is discernable from the plain English meaning of the terms. The term ''area of performance'' is used in the FAR rule to avoid unnecessarily cumbersome repetition of the phrases ''designated operational area'' and ''supporting a diplomatic or consular mission'' and to be more specific in such cases when the ''designated operational area'' or ''supporting a diplomatic or consular mission'' might encompass a broader area within which the laws and regulations might vary from place to place. However, in paragraph 52.225–19(d), Compliance with laws and regulations, the term ''area of performance'' was considered duplicative and has been removed.

The uses of the term ''area of performance'' in paragraphs 52.225–19(f), (j), and (o) of the clause are not ambiguous. First, the title of the clause itself and paragraph 52.225–19(b) define the applicability of the clause to contractor personnel employed outside the United States in a designated operational area or supporting a diplomatic or consular mission. The usage in paragraphs 52.225–19(d) and (f) reiterates the restriction of the meaning to an area within the designated operational area or supporting a diplomatic or consular mission. The statement on paragraph 52.225–19(j) would be true wherever performance occurs, and the usage in paragraph 52.225–19(o) with regard to who is responsible for mortuary affairs upon death of a contractor in the area of performance is unambiguously not referring to death in the United States.

9. Consistent Terminology

a. Performance Outside the United States

Comment: One respondent states that the prescription at 25.000(a)(2) provides that Part 25 applies to ''performance of contractor personnel outside the United States.'' The scope of the proposed prescription at 25.302–1 (now 25.301–1) applies to ''contracts requiring contractor personnel to perform outside the United States.'' By contrast, 25.302–5 (now 25.301–4) directs contracting officers to insert the clause ''when contract performance requires that contractor personnel be available to perform outside the United States'' while the clause at 52.225–19(b) directs that the clause applies ''when contractor personnel are employed outside the United States.'' The respondent considers that these four provisions must be uniform and consistent. The respondent recommends that all four provisions be revised to state that they apply only when ''contractor personnel are to be deployed outside the United States to perform a covered contract.''

Response: The Councils concur that the language of the proposed rule could be more consistent. However, the language for the scope of the Part and title of the Subpart is supposed to be broader than the specific language in the text and clause.

- The Councils have changed the language in FAR 25.000, Scope of the

part to ''Contracts performed outside the United States.'' The term ''acquiring'' at 25.000(a)(1) was also changed to ''acquisition'' for parallel construction.

- The title of FAR subpart 25.3 has been revised to read ''Contracts Performed Outside the United States.''
- The clause prescription and paragraph 52.225–19(b) of the clause have been modified to more closely conform to 25.301–1(a) (renumbered):

§ 25.301–1(a)—''This section applies to contracts requiring contractor personnel to perform outside the United States * * *''.

§ 25.301–4—''Insert the clause * * * in solicitations and contracts that will require contractor personnel to perform outside the United States * * *''.

§ 52.225–19(b)—''This clause applies when contractor personnel are required to perform outside the United States.''

b. When Designated by the Chief of Mission

Comment: One respondent also notes that the prescription at 25.302–1(b) (now 25.301–1(b)) states it applies ''when designated'' by the Chief of the Mission while the clause at 52.225–19(b)(1)(ii) states that it applies ''when specified'' by the Chief of Mission. While not significant differences, the respondent believes the two applications should be identical.

Response: This issue is now moot, because the language in question has been replaced by different criteria for applicability of the clause when used for performance with a diplomatic or consular mission.

10. Scope of Application

a. Commercial Items

Comment: One respondent is concerned that the proposed language at FAR 12.301 requires application of the new clause across-the-board to commercial items. This respondent recommends that the clause should only apply if the acquisition of commercial items is for performance of contractor personnel outside the United States in a covered theater of operations.

Response: The Councils concur that the clause should only apply if the acquisition of commercial items is for performance of contractor personnel outside the United States in a designated operational area or supporting a diplomatic or consular mission. However, the respondent has misinterpreted the requirement at FAR 12.301. FAR 12.301 states that the clause at 52.225–19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States, is to be inserted as prescribed at 25.302–4. That takes the contracting officer back to the clause prescription that applies the specific limitations on use of the clause. No change to the proposed rule is required.

b. Military Operations and Exercises

Comment: One respondent is concerned about the application of this rule to a wide range of military operations and exercises that do not require special treatment. The proposed rule prescribes use of the clause when contractor personnel will be required to perform outside the United States in a theater of operations during ''other military operations,'' or military exercises designated by the combatant commander. One respondent recommends that the final FAR rule should include criteria for when the combatant commander should invoke the authority to require use of the clause.

Response: The Councils agree that ''designated by the Combatant Commander'' should apply to ''other military operations'' as well as military exercises. Other military operations is so broadly defined that it does include situations in which use of the clause would probably be unnecessary. The Councils do not consider it appropriate for the acquisition regulations to prescribe to the combatant commanders the criteria for designating the required use of the clause. The combatant commanders are in the best position to determine whether the circumstances in a particular designated operational area warrant its use. The Councils also added clarification that any of the types of military operations included in the scope of this rule may include stability operations.

c. Paragraph 25.301–1(a) of the Scope Applies to Military Operations

Comment: One respondent wants it made clear that 25.302–1(a) (now 25.301–1(a)) only applies to military operations.

Response: The Councils resolved this concern by replacing the term ''theater of operations'' with the term ''designated operational area,'' which includes the term ''military'' in the definition.

d. Relation to the DFARS Rule

Comment: One respondent recommends modifying the scope of the FAR rule to state that it covers contractor personnel not covered by the DFARS clause. The regulation should also address task and delivery orders when the umbrella contract might be issued by a civilian agency, e.g., GSA, but the task order is issued by a DoD agency authorizing personnel to ''accompany the force.''

Response: These are issues that must be addressed by DoD, not the FAR. The FAR generally only includes regulations that affect more than one agency, and leaves it to individual agencies to address their unique issues in agency supplements.

e. Applicability to Contractors Supporting a Diplomatic or Consular Mission

Comment: One respondent was concerned about the meaning of ''when designated by the chief of mission.'' Further, a respondent objected that no criteria were provided for this exercise of discretion by the chief of mission.

Another respondent also considered it unclear how the fact that ''the contract is administered by federal agency personnel subject to the direction of a chief of mission'' signifies that the conditions in that location may require the use of the proposed FAR clause.

Response: The Councils do not agree that the meaning of ''when designated by a chief of mission'' is unclear. However, the Councils have agreed that the clause should be used for contracts supporting a diplomatic or consular mission that has been designated by the Secretary of State as a danger pay post (see *http://aoprals.state.gov/Web920/danger_pay_all.asp*), or at the discretion of the contracting officer.

With regard to the respondent's concern about the significance of whether a contract is administered by Federal agency personnel subject to the direction of a chief of mission, that has to do with whether the contract to be performed is supporting a diplomatic or consular mission, not with the decision as to whether the clause is applicable.

f. Designation of Specific Geographic Area

Comment: One respondent questions whether the combatant commander or chief of mission should designate a specific geographic area for applicability of the clause.

Response: The Councils agree that the changes to the scope of the FAR clause sufficiently define the area of applicability. An area designated by the Secretary of State as a danger pay post is quite specific, and the designated operational area is also a specific geographic area, defined by the combatant commander or the subordinate joint force commander for the conduct or support of specified military operations.

g. Applicability to Personal Service Contractors

Comment: One Government respondent comments that some civilian agencies have the authority to hire personal services contractors to assist with programs outside the United States. These workers are considered to be part of the workforce. They request that the final FAR rule should not apply to personal services contractors.

Response: The Councils have agreed to modify the scope at 25.301–1(c) to exclude personal services contractors, unless otherwise provided in agency procedures. A similar exclusion has been added to the clause prescription at 25.301–4.

h. Outside the Authority of the Chief of Mission

Comment: One respondent requests that the FAR rule should clarify when the FAR clause is to be included if the contract is otherwise outside the authority of the chief of mission. The respondent states that many USAID and other agency contracts state that the contractors performing these contracts are ''outside of the authority'' of the chief of mission. In Afghanistan today, contractors ''under the authority of the chief of mission'' are required to live in the Embassy compound and are prohibited from traveling within the country.

Response: Contractors are not under the authority of the Chief of Mission except as provided by the contract. The fact that currently in Afghanistan contractors under the authority of the Chief of Mission may be required to live in the embassy compound is particular to the immediate circumstances in that country. In most cases, contractors under the authority of the chief of mission are not required to live in the embassy and are not prohibited from travel in the country.

11. Logistical and Security Support (25.301–2 and 52.225–19(c))

a. Lack of Force Protection Represents Change in Policy

Comment: Several respondents consider that shifting the responsibility for force protection to the contractor when a hostile force is operating in the area is a major policy change that the FAR rule does not explain. The respondents claim that security for contractor personnel supporting U.S. missions in an area wrought with conflict with armed enemy forces should normally be a DoD responsibility. One respondent considers that this is the ''penultimate paragraph'' in the transfer of responsibility for force protection from the military to contractors, and that it is ill-considered. Another respondent contends that, in locations ''where the military controls the theater of operations,'' the combatant commander should always have a security plan that covers contractors on the battlefield, whether those contractors accompany the U.S. Armed Forces or not.

Response: In most areas of the world, it is the responsibility of the host nation to provide protection for civilians working in their country. Even for contractors authorized to accompany the force, the responsibility for force protection resides with the contractor unless otherwise specified in the contract (DoD Joint Publication 4–0, Chapter V). The writers of the regulations cannot commit the U.S. Armed Forces to provide protection to contractor personnel performing in areas of conflict, particularly those contractors not accompanying the U.S. Armed Forces, because there is no authorization to do so.

b. Timing of Disclosure

Comment: While one respondent acknowledges that most contractors who do not accompany the U.S. Forces understand that they are primarily responsible for their own logistics and security, the respondent notes that timing of the disclosure of agency support could impact an offeror's proposal costs, and recommends that, at a minimum, agencies be required to include support information, not just in the contract, but also in the solicitation. Another respondent also requests that the final rule should clarify whether a security plan, if any, will be developed prior to the release of the solicitation.

Response: The Councils agree with respondents' comment that the timing of the disclosure of agency's decision to provide or not provide support could have an impact on the offerors' proposal/bid costs. In order to enhance the reasonableness and accuracy of bid and proposal costs, it is in the Government's interest to provide support information available at the time of solicitation. The Councils have revised the text at 25.301–2(b) to require the contracting officer to specify in the solicitation, if possible, the exact support to be provided.

c. Changes in Government-Provided Support

Comment: One respondent comments that any changes to Government-provided security support should expressly require an equitable adjustment to the contract.

Response: The Councils do not concur with the respondent's statement that changes to Government-provided security should expressly require an equitable adjustment to the contract. The need for equitable adjustments will be evaluated in accordance with existing FAR changes clauses.

d. Agency Cannot Know if Adequate Support Is Available

Comment: One respondent comments that one of the conditions precedent to Government support is a determination by the Government that ''adequate support cannot be obtained by the contractor from other sources.'' The respondent asserts that whether or not competitors can obtain adequate support from other sources ''is outside of an agency's knowledge,'' further noting that this kind of knowledge involved ''marketplace issues that vary significantly by the size and experience of the contractor.''

Response: The Councils do not concur with the assertion that the Government would not be able to determine whether the contractor was able to obtain adequate support from other sources. The Government official would not be making decisions in a vacuum, but would perform necessary market research and consult with the contractor as necessary. In addition, the Councils also added that the agency shall provide logistical or security support only when the appropriate agency official, in accordance with agency guidance, determines that such Government support is available and is needed.

e. Reasonable Cost

Comment: One respondent states that there is a difference between the FAR and DFARS standards for support, and asserts that paragraph (c)(1)(i)(B) of the DFARS clause includes a consideration of reasonableness, which the proposed FAR rule does not, specifically: ''Effective security services are unavailable at a reasonable cost.''

Response: The Councils concur that the FAR text should also include a consideration of reasonable cost. The Councils have modified the wording of paragraph 25.301–2(a)(2) by adding the words ''at a reasonable cost.''

f. Security Costs Should Be a Cost Reimbursement Line Item

Comment: One respondent states that security costs should be a cost reimbursement line item, even in a fixed-price contract, or provide equitable adjustment to reflect material changes in the threat environment.

Response: According to FAR 16.103, selecting the appropriate contract type

is generally a matter of negotiation and requires the exercise of sound judgment. The contractor's responsibility for the performance costs and the profit/fee incentives offered are tailored to the uncertainties involved in contract performance. While the Councils acknowledge that there may be a high degree of uncertainty in the costs for security, the determination of how to handle that uncertainty is a matter of negotiation, rather than regulation.

12. Compliance With Laws, Regulations, and Directives (52.225–19(d))

Paragraph (d) of the proposed rule clause required the contractor to comply with, and ensure that its deployed personnel are familiar and will comply with, all applicable laws, rules and regulations, including those of the ''host country,'' all treaties and international agreements, all U.S. regulations, and all orders, directives and instructions issued by the Chief of Mission or Combatant Commander relating to mission accomplishments.

a. Lack of Access to Necessary Information on Laws, Regulations, and Directives

Comment: One respondent states that rarely will contractors, let alone offerors, have access to any (and certainly not all) relevant orders, directives, instructions, policies and procedures of the Chief of Mission or the Combatant Commander, even in those ''narrow'' functional areas specified in the clause. The respondent also states that frequently a contractor is asked to deploy to countries or areas of the world on short notice without extended advance notice and without meaningful access to information on relevant foreign and local laws.

Response: Paragraph 52.225–19(d) of the clause is a requirement of the existing obligation for contractor personnel to comply with the laws and regulations applicable to the contract. Contractors have access to all of these laws and regulations and are required to comply with them. Country studies are available online at *http://www.state.gov.* Such available online resources indicate that a contractor may ascertain on its own the laws and regulations necessary to comply with paragraph 52.225–19(d). In addition, the contractor supporting contingency operations should have access to any orders, directives, instructions, policies, and procedures of the Chief of Mission or Combatant Commander that have an effect or impact contract performance in the designated operational area.

b. Varying Need for Extensive Information

Comment: One respondent states that deployed employees may have no need for certain types of information that are unrelated to their specific work assignment.

Response: The clause only requires knowledge of applicable laws. If the laws or regulations are not applicable to a particular employee, then the information should be tailored as appropriate.

c. Inconsistency Between U.S. Laws and Host or Third Country National Laws and Between Orders of the Combatant Commander/Chief of Mission

Comment: One respondent recommends that the clause address how U.S. contractors are to resolve conflicts between compliance with U.S. law and any inconsistent law of host or third country national laws. The respondent also recommends that the clause address how U.S. contractors are to resolve conflicts between the Chief of Mission and the Combatant Commander. Another respondent notes that there is a lack of guidance on how to resolve conflicts between a directive or order given by the Chief of Mission and the Combatant Commander. The respondent believes that the roles of the Chief of Mission and Combatant Commander should be defined in the rule.

Another respondent also states that the roles of the Combatant Commander and Chief of Mission are intermingled in the FAR clause and not adequately distinguished. They note that both the Combatant Commander and the Chief of Mission have authority to require compliance with directives, evacuation orders, and the use of force in using weapons. The respondent believes that because the Combatant Commander and the Chief of Mission's authority will overlap, the rule should describe expected coordination between the two and should establish an order of precedence.

Response: The Councils do not concur that the clause should address how U.S. contractors are to resolve conflicts between compliance with U.S. law and any inconsistent law of host or third country national laws or conflicts between the Chief of Mission and the Combatant Commander. The resolution of such conflicts are required to be analyzed on a case-by-case basis, and, therefore, are beyond the scope and intent of the regulations.

Orders of the Combatant Commander and the Chief of Mission ordinarily should not conflict since each of these individuals is assigned to lead a different type of mission—one diplomatic or humanitarian and the other a military operation within the designated operational area. The respective roles of the Combatant Commanders and Chief of Mission are not defined further for purposes of the FAR clause in order to allow their roles to be defined on a case-by-case basis for each specific mission because each mission will have to address different requirements and in-country conditions. The roles of the Combatant Commander and Chief of Mission are defined at the activity level, and cannot be further defined in the regulation.

Furthermore, paragraph 52.225–19(d) is a reminder of the existing obligation to comply with the applicable laws, regulations, and international agreements specified therein. It is the contractor's responsibility to make the best possible interpretation and determination when deciding which law or regulation takes precedence in the event of a conflict.

d. Too Much Authority to Combatant Commander/Chief of Mission to Become Involved in the Contracting Process

Comment: One respondent states that it recognizes that the Chief of Mission has general oversight authority of operations under its control. However, the respondent believes that the proposed rule would significantly expand that authority and permit the Chief of Mission to insert himself in the contracting process. The respondent is particularly concerned that under paragraph 52.225–19(d)(4) of the clause, the Chief of Mission's or Combatant Commander's authority is so broadly worded that it would allow the Combatant Commander or Chief of Mission to become unduly involved in the contracting process, and to direct contractor activities of U.S. agencies. The respondent states that paragraph 52.225–19(d) could be interpreted as empowering ambassadors and Chiefs of Mission to issue instructions for individual contracts on a wide spectrum of matters. This authority should be rephrased to limit ''orders, directives, and instructions'' that apply to all United States nationality contractors in country and then only with respect to security and safety matters. The ''relations and interactions with local nationals,'' language is too broad and should be deleted.

Response: Paragraph 52.225–19(d)(4) of the clause is a reminder of the existing obligation for contractor personnel to comply with laws and regulations applicable to the contract. It does not provide new authority for

Combatant Commanders/Chiefs of Mission to direct the contracting activities of other U.S. Government agencies.

The Councils do not agree that the phrase should be limited to orders, directives and instructions that apply to all United States nationality contractors in country as the respondent suggests. There may be foreign companies that are awarded contracts to support U.S. Armed Forces deployed abroad for specific requirements. To narrow the scope of the application of the rule in the manner the respondent suggests would preclude such companies from being covered. Additionally, orders of the Combatant Commander extend beyond just security and safety matters. Health and force protection are additional issues that the scope of the orders may also encompass.

However, the Councils have reworded paragraph 52.225–19(d)(4) of the FAR clause to limit it to force protection, security, health, and safety orders, directives, and instructions issued by the Chief of Mission or the Combatant Commander. The phrases regarding ''mission accomplishment'' and ''relations and interaction with local nationals'' have been deleted from the FAR clause as being less applicable to contractors that are not authorized to accompany the U.S. Armed Forces. The paragraph also now reiterates that only the contracting officer is authorized to modify the terms and conditions of the contract.

13. Preliminary Personnel Requirements (52.225–19(e))

a. Already Have Comparable Agency Requirements

Comment: One respondent notes that the agency they represent already has requirements that satisfy those in (e)(2)(i)–(vii), with the exception of personal security training and registration with the Embassy.

Response: If the agency already has requirements that satisfy most of those in (e)(2)(i)–(vii), they will meet the clause requirement that specific information be set forth elsewhere in the contract by ensuring that this language is included in the contract.

b. Background Checks Acceptable

Comment: One respondent recommends that the language of subparagraph (e)(2)(i) be changed to read ''All required security and background checks are completed and acceptable,'' because the language, as written, omits the notion of ''acceptability''.

Response: The Councils concur with the recommended change to subparagraph (e)(2)(i).

c. Immunizations

Comment: One respondent recommends that the contractor be required to comply with the requirements of (e)(2)(ii) ''to the best of their knowledge'' rather than requiring that they be aware of all such requirements, since they may not have ready access to all of the vaccines, documents and medical and physical requirements that may be applicable to a specific deployment.

Response: The Councils believe that the contractor should be aware of all of the security and background checks and vaccinations, since the Government is required to provide specific information in the contract regarding these requirements.

Comment: The respondent also comments that the FAR clause in subparagraph (e)(2)(ii) places on the contractor the cost of immunizations. The respondent questions why there is a difference in the FAR policy versus the DoD policy, since DoD provides the relevant immunizations to contractor personnel.

Response: Individual agencies have policies relating to the provision of required vaccinations for contractor personnel, and those individual policies must be reflected elsewhere in the contract where they conflict with the clause. For example, the Department of State's policy is not to provide contractor employees with routine or travel immunizations. Contractors must factor this cost into their proposals when responding to solicitations where the requirement applies. Should there be any exceptions to this policy, it will be specifically outlined in the statement of work or elsewhere in the contract, as required by paragraph (e)(1) of the clause.

d. Foreign Visas

Comment: One respondent states that contactors should not have to obtain foreign government approval through entrance or exit visas before implementing a contract.

Response: The Councils note that they do not have the authority to waive the visa requirements of foreign governments. Where a contractor is experiencing problems obtaining any necessary visas, it should advise the contracting officer so that the Government can take action to assist, if possible.

e. Isolated Personnel Training

Comment: One respondent requests that the phrase ''isolated personnel training'' be explained.

Response: ''Isolated personnel training'' refers to training for military or civilian personnel who may be separated from their unit or organization in an environment requiring them to survive, evade, or escape while awaiting rescue or recovery. The Councils have added an explanation of isolated personnel training as requested.

f. Further Explanation of Requirement To Register With U.S. Embassy or Consulate ((e)(2)(vii))

Comment: One respondent observes that only subparagraphs 52.225–19(e)(2)(i)–(vi) are required to be included in the statement of work or elsewhere in the contract, and recommends that subparagraph (vii) also be included for further explanation.

Response: Subparagraph (e)(2)(vii), registration with the Embassy, stands on its own and does not require any further implementation or explanation.

g. Geneva Conventions Identification Card

Comment: One respondent questions why the FAR language does not provide for a Geneva Convention identification card for contractor employees, as the DFARS clause provides. The respondent contends that civilian agencies may award contracts that could be in support of U.S. Armed Forces, which would trigger the requirement for Geneva Convention identification cards. The respondent points to the language in (e)(3)(i) that applies the Military Extraterritorial Jurisdiction Act of 2000 (MEJA) to contracts awarded by civilian agencies in support of DoD's mission, and states that since MEJA applies to contractor personnel ''accompanying the force'', by extension, so should the Geneva Convention identification card requirements.

Response: The requirements for application of the Geneva Conventions and the Military Extraterritorial Jurisdiction Act (MEJA) are different. With respect to the Geneva Conventions identification card, according to DoDI 1000.1, Identity Cards Required by Geneva Conventions, Geneva Conventions Identity Cards (DD Form 489) are issued only to contractors who are accompanying the U.S. Armed Forces in regions of combat and who are liable to capture and detention by the enemy as prisoners of war. MEJA applies to all contractors employed by DoD or any other Federal agency or provisional authority, to the extent such

employment relates to supporting the mission of DoD overseas. These contractors are not necessarily ''authorized to accompany the force'' as that term is used in the DFARS clause and the Geneva Conventions. The term ''accompanying the Armed Forces outside the United States'' in MEJA extends to dependents of contractors employed by the Armed Forces outside the United States, whereas the Geneva Conventions card does not. Dependents would not be present with the Armed Forces during an armed conflict. The Councils cannot think of any circumstances where civilian agencies would award contracts under which contractor personnel are authorized to accompany U.S. military forces during an armed international conflict. That is the direct responsibility of DoD.

14. Processing and Departure Points (52.225–19(f))

a. Economic Burden

Comment: One respondent commented that the clause requirement in paragraph (f), for departure and reception centers, would impose economic burdens on contractors. The respondent suggested that processing requirements ''only be applicable to situations when contractors are entering a specific ''theater of operations.''

Response: The clause was written in a way intended to provide flexibility to agencies. Furthermore, the Councils do not concur with the assertion that the requirement for departure and reception centers would impose economic burdens on contractors. Processing through an established departure center and reception center could provide the necessary information and training to contractor personnel at less expense than if the contractor has to provide it. With regard to subparagraph (f)(3), the Councils agreed to insert the word ''as'' in front of ''designated'' in (f)(3), in order to maintain the same flexibility as appears in (f)(1) and (f)(2).

b. FAR Requirement for Joint Reception Centers

Comment: One respondent states that the DFARS requires contractor employees to process through a Joint Reception Center, which will brief contractor personnel on theater specific policies and procedures. The respondent states that the FAR should have the same requirement as in the DFARS.

Response: The Councils concur that this would be a good idea, but civilian agencies do not necessarily have access to reception centers. Therefore, the language was left more flexible, to be as designated by the Contracting Officer.

15. Personnel Data List (52.225–19(g))

a. Privacy Act

Comment: One respondent poses the question of whether the Privacy Act will apply to the implementation of a Personnel Data List database.

Response: The Privacy Act (5 U.S.C. 552a) does apply to any system of records established by the Government. Paragraph (e)(4) of the Privacy Act requires that an agency publish in the Federal Register, upon establishment or revision, a notice of the existence and character of the system of records. To the extent that an agency is entering the contractor data into a Government system of records, each agency must ensure compliance with the Privacy Act.

b. Agency Has Data Clause

Comment: The respondent also comments that the agency that they represent has an existing personnel data clause for tracking their contractor personnel.

Response: The Councils have added the words ''unless personnel data requirements are otherwise specified in the contract,'' so that agencies can continue to implement their own data systems, until a Governmentwide agreement is reached on a central database.

c. Collect General Location

Comment: One respondent questions why the FAR clause does not specify that the list will collect information on general location in the theater of operations.

Response: The FAR rule leaves it to the discretion of the civilian agencies what data to collect at this time.

16. Contractor Personnel (52.225–19(h))

Comment: One respondent comments that the authority in this paragraph is rather sweeping, although analogous to existing language in USAID rules. However, it appears to delegate down to the contracting officer authority that is currently exercised under USAID regulations by the chief of mission or mission director.

Response: For the contractor, the contracting officer is the point of contact with the Government. The contracting officer is unlikely to take these actions independent of the chief of missions and is subject to the control of agency regulations. The Councils have also deleted the phrase ''jeopardize or interfere with mission accomplishment'' from the FAR rule because it is more a military than a civilian concept. In addition, the Councils have changed the word ''clause'' to ''contract'', because personnel can be removed for violation of any of the requirements of the contract, not just this clause.

17. Military Clothing (52.225–19(k))

Comment: One respondent recommends that if contractor personnel are authorized to wear military uniforms, they should be required to carry the written authorization with them at all times, as required in the DFARS. The omission may place an additional hazard on contractor personnel, because such authorization would provide further evidence that they are not military personnel.

Response: There is no Governmentwide policy requiring or providing standard letters of authorization for contractor personnel that are not authorized to accompany the U.S. Armed Forces. Therefore, the FAR does not require carrying of written authorization. However, carrying such authorization would be a good idea, and the contractor can require its personnel to carry such authorization with them.

18. Changes (52.225–19(p))

Comments: One respondent does not believe that ''so sweeping an expansion'' to the Changes clause is justified; the standard Changes clause is limited for important reasons, one of which is to insure that Government contracts remain within clearly defined scopes. Similarly, another respondent objects that such expansion of 52.225–19(p) to include change in the place of performance could be interpreted to require a contractor to move from Iraq to Kuwait or from East Timor to Lebanon. Although the respondent strongly supports the requirement that changes are subject to the changes clause, and therefore provides for equitable adjustment when appropriate, the respondent also suggests that an equitable adjustment should be explicitly required.

Response: The Councils do not consider the expansion of the Changes clause to be a sweeping change, since it is patterned after the standard ''Changes'' clause for construction contracts, which includes changes in site performance. However, since this Changes clause is not limited to use in construction contracts, a more generic terminology, i.e., ''place of performance'' is more appropriate to use here than ''site.'' FAR 52.225–19(p) requires that any change orders issued under that paragraph are subject to the provisions of the Changes clause of the contract. Whichever Changes clause is included in the contract, it requires that any changes be within scope of the

contract, and provides for equitable adjustment when appropriate. Therefore, it is not necessary to restate those principles here.

19. Subcontract Flowdown (52.225–19(q))

a. Obligation and Role of the Parties (Government/Contractor)

Comment: Several respondents suggest that the Government should more clearly state what parts of the clause are to be flowed down and whether for each provision, the contractor is to act in the Government's stead.

Response: The language contained in this clause is not any different than the language contained in other acquisition clauses that require certain clauses to be flowed down to subcontractors. The clause authorizes flow down to subcontracts, when subcontract personnel meet the criteria for applicability. The language ''shall incorporate the substance of this clause'' is meant to allow latitude in correctly stating the relationship of the parties. The Government does not have privity of contract with subcontractors.

b. Flow Down of Support

Comment: One respondent states that the clause at 52.225–19(q) requires the prime contractor to incorporate the substance of the clause, including this paragraph, in all subcontracts that require subcontractor employees to perform outside the U.S. in stated operations. While the respondent does not object to the policy, they are concerned about the ability of the prime contractor to flow down provisions to subcontractors that have the effect of committing the Government to undertake affirmative support of each subcontractor (including third country national firms) retained to provide support.

Response: Since the FAR clause does not promise any support to contractors, the flow down does not commit the Government to undertake affirmative support of subcontractors.

c. Flow Down to Private Security Contractors

Comment: One respondent is concerned that flowing down the clause to private security contractors means that a prime contractor can authorize a subcontractor to use deadly force.

Response: Although the prime contractor flows down the clause, the use of deadly force is always subject to the authority of the chief of mission/combatant commander, who authorizes the possession of weapons and the rules for their use.

20. Defense Base Act

a. Expansion of Functions

Comment: One respondent states that ''self defense contracts'' and private security contracts continue, as a matter of law, to include compliance with the Defense Base Act. The respondent states that, with this expansion in the rule of the functions to be performed by contractor personnel, it becomes unclear that coverage will be available to contractors.

Response: There is no expansion of the functions to be performed by contractor personnel related to the FAR rule that the respondent envisions.

Furthermore, the courts have determined that the Defense Base Act (DBA) applies to any overseas contract that has a nexus to either a national defense activity or a facility construction or improvement project. There is no current legal ruling applying the DBA to private security contracts with non-DoD agencies or for work other than facility construction or improvement projects to be performed outside the United States. However, almost any contract with a U.S. Government agency for work outside the United States will likely require Defense Base Act coverage, if the contract is deemed necessary by national security. Contracting officers will have to determine whether any particular contract should include the FAR 52.228–3, Workers' Compensation Insurance (DBA) clause in service contracts to be performed (either entirely or in part) outside of the United States as well as in supply contracts that also require the performance of employee services overseas. DBA coverage exists as long as contract performance falls within the scope of the statutory requirements. The proposed rule does not change or preclude DBA coverage.

If the respondent was concerned about unavailability of DBA coverage because of high cost, or unwillingness of insurance providers to make available when high risk is involved, many agencies such as the Department of State and USAID have negotiated arrangements with insurance companies to make insurance available to their contractors. Further, expenses incurred relating to war hazards, the biggest risk, will be reimbursed to the insurance companies.

b. Accepting All Risks

Comment: Another respondent was concerned that by accepting all risks of performance, contractors would not be able to obtain workers compensation insurance or reimbursement under the Defense Base Act. The respondent thinks that the statement of accepting all risks could be interpreted to mean that the Government is trying to restrict, supersede, or alter contract or government rights under the Defense Base Act.

Response: The statement regarding risk was intended to restate the general rule that the contractor is responsible for fulfilling its contract obligations, even in dangerous and austere conditions. It was not intended to conflict with other provisions of the contract. The Councils have added the requested phrase, ''Except as provided elsewhere in the contract.''

21. Acquisition Plan

Comment: The rule adds a proposal to 7.105(b)(13) and (19) requiring the contracting office to determine contractor or agency support and special requirements of contracts to be performed in a theater or operations or at a diplomatic or consular mission. The respondent supports the proposal and suggests that the rule also require coordination with affected Combatant Commander and Chief of the Mission.

Response: FAR 7.104(a) provides that acquisition planning begin as soon as the agency need is identified, and requires that the acquisition planner form a team consisting of all those who will be responsible for significant aspects of the acquisition. The section identifies the contracting, fiscal, and legal, and technical personnel, for example, as members of the team. Given the critical nature of acquisitions associated with contractor personnel in a designated operational area or supporting a diplomatic or consular mission outside the United States, the Councils agree to revise FAR 7.104 to require the planner to coordinate the requirements of such acquisition plans with combatant commanders or chiefs of mission, as appropriate.

22. Regulatory Flexibility Act

Comment: One respondent asserts that it is entirely possible that the rule would render much of the Stability Operations contracting, now primarily accomplished by large, experienced and well-financed international construction and engineering companies, the province of many small businesses. The respondent questions the consideration that went into the determination that small business would not be affected by the rule.

Response: The purpose and effect of the rule is to relieve the perceived burden on contractors operating without consistent guidance or a standardized clause in a contingency environment.

By establishing a standardized clause spelling out uniform rules, the rule effectively reduces the burden on small business. Additionally, the availability of Government departure centers in the United States will make it easier for small business to meet all the pre-departure requirements. The Councils believe that the rule will be helpful to small businesses and minimize any perceived burdens small businesses may encounter in the performance of contract to which the rule applies.

The respondent does not provide justification for the statement that Stability Operation contracting will shift from large businesses to small businesses, or that it will cause harm to small business if it were to occur.

Comment: One respondent disagrees with the statement that the rule will not impose economic burdens on contractors, citing the requirement to process through a departure center, use specific transportation modes and process through a reception center will have a tremendous impact on cost. The respondent goes on to provide examples of impacts contractors suffered undergoing required background checks for personnel in Bosnia and chemical, biological and nuclear training requirements in Iraq. The respondent suggests that processing requirements only be applicable to situations when contractors are entering a specific ''theater of operations.''

Response: Processing through the departure center or using a specific point of departure and transportation mode is at the direction of the contracting officer, as is processing through a reception center upon arrival. The Councils do not concur with the assertion that the requirement for departure and reception centers would impose economic burdens on contractors. The rule is written in general terms and provides great flexibility.

The Councils did not receive any responses from small businesses indicating that this rule would impose burdens on them.

23. Information Collection Requirements

Comment: One respondent contends that rule would impose substantial information collection requirements on the contracting communities; suggesting that transmogrification of battlefield contractors into combatants portends huge increases in their information collection and management responsibilities that are anything but usual and customary and are well outside the ''normal course of business.''

Response: The Councils do not agree with the respondent's contention. The rule does not provide for the transmogrification of battlefield contractors into combatants or require huge increases in their collection and management responsibilities. Although the rule requires contractors to establish and maintain a current list of contractor personnel in the area of performance with a designated Government official, such information should be a part of the contractor's personnel database and routinely maintained by the contractor. Therefore, the Councils did not change the Paperwork Reduction Act statement.

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. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the purpose and effect of the rule is to relieve the perceived burden on contractors operating without consistent guidance or a standardized clause in a contingency environment. By establishing a standardized clause spelling out uniform rules, the rule effectively reduces the burden on small business. Additionally, the availability of Government departure centers in the United States will make it easier for small business to meet all the pre-departure requirements. The Councils believe that the rule will be helpful to small businesses and minimize any perceived burdens small businesses may encounter in the performance of the contract to which the rule applies.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* Although the final clause requires contractors to maintain a current list of all employees in the area of operations in support of the military force, the Councils believe that these requirements are usual and customary and do not exceed what a contractor would maintain in the normal course of business.

List of Subjects in 48 CFR Parts 2, 7, 12, 25, and 52

Government procurement.

Dated: February 19, 2008.

Al Matera,

Director, Office of Acquisition Policy.

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

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

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

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) by adding, in alphabetical order, the definitions ''Chief of mission'', ''Combatant commander'', ''Designated operational area'', and ''Supporting a diplomatic or consular mission'' to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

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

* * * * *

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

* * * * *

Designated operational area means a geographic area designated by the combatant commander or subordinate joint force commander for the conduct or support of specified military operations.

* * * * *

Supporting a diplomatic or consular mission means performing outside the United States under a contract administered by Federal agency personnel who are subject to the direction of a Chief of Mission.

* * * * *

PART 7—ACQUISITION PLANNING

■ 3. Amend section 7.104 by revising paragraph (a) to read as follows:

7.104 General procedures.

(a) Acquisition planning should begin as soon as the agency need is identified, preferably well in advance of the fiscal year in which contract award or order placement is necessary. In developing the plan, the planner shall form a team consisting of all those who will be responsible for significant aspects of the acquisition, such as contracting, fiscal, legal, and technical personnel. If contract performance is to be in a designated operational area or supporting a diplomatic or consular mission, the planner shall also consider inclusion of the combatant commander or chief of mission, as appropriate. The planner should review previous plans for similar acquisitions and discuss them with the key personnel involved in those acquisitions. At key dates specified in the plan or whenever significant changes occur, and no less often than annually, the planner shall review the plan and, if appropriate, revise it.

* * * * *

■ 4. Amend section 7.105 by—

■ a. Revising paragraph (b)(13)(i);

■ b. Removing from paragraph (b)(19)(vi) the word ''and'';

■ c. Redesignating paragraph (b)(19)(vii) as paragraph (b)(19)(viii); and

■ d. Adding a new paragraph (b)(19)(vii) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) * * *

(13) *Logistics consideration.* Describe—(i) The assumptions determining contractor or agency support, both initially and over the life of the acquisition, including consideration of contractor or agency maintenance and servicing (see Subpart 7.3), support for contracts to be performed in a designated operational area or supporting a diplomatic or consular mission (see 25.301–3); and distribution of commercial items;

* * * * *

(19) * * *

(vii) Special requirements for contracts to be performed in a designated operational area or supporting a diplomatic or consular mission; and

* * * * *

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 5. Amend section 12.301 by revising paragraph (d) to read as follows:

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

* * * * *

(d) *Other required provisions and clauses.* (1) Notwithstanding prescriptions contained elsewhere in the FAR, when acquiring commercial items, contracting officers shall be required to use only those provisions and clauses prescribed in this part. The provisions and clauses prescribed in this part shall be revised, as necessary, to reflect the applicability of statutes and executive orders to the acquisition of commercial items.

(2) Insert the clause at 52.225–19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States, as prescribed in 25.301–4.

* * * * *

PART 25—FOREIGN ACQUISITION

■ 6. Revise section 25.000 to read as follows:

25.000 Scope of part.

(a) This part provides policies and procedures for—

(1) Acquisition of foreign supplies, services, and construction materials; and

(2) Contracts performed outside the United States.

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

25.002 [Amended]

■ 7. Amend the table in section 25.002 in the third row titled 25.3 as follows:

■ a. In the second column by removing ''[Reserved]'' and adding ''Contracts Performed Outside the United States'' in its place;

■ b. In the fourth and sixth columns removing ''—'' and adding ''X'' in its place; and

■ c. In the eighth column adding ''X''.

■ 8. Add Subpart 25.3 to read as follows:

Subpart 25.3—Contracts Performed Outside the United States

Sec.

25.301 Contractor personnel in a designated operational area or supporting a diplomatic or consular mission outside the United States.
25.301–1 Scope.
25.301–2 Government support.
25.301–3 Weapons.
25.301–4 Contract clause.

Subpart 25.3—Contracts Performed Outside the United States

25.301 Contractor personnel in a designated operational area or supporting a diplomatic or consular mission outside the United States.

25.301–1 Scope.

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

(1) In a designated operational area during—

(i) Contingency operations;

(ii) Humanitarian or peacekeeping operations; or

(iii) Other military operations or military exercises, when designated by the combatant commander; or

(2) When supporting a diplomatic or consular mission—

(i) That has been designated by the Department of State as a danger pay post (see *http://aoprals.state.gov/Web920/danger_pay_all.asp*); or

(ii) That the contracting officer determines is a post at which application of the clause at FAR 52.225–19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States, is appropriate.

(b) Any of the types of operations listed in paragraph (a)(1) of this section may include stability operations such as—

(1) Establishment or maintenance of a safe and secure environment; or

(2) Provision of emergency infrastructure reconstruction, humanitarian relief, or essential governmental services (until feasible to transition to local government).

(c) This section does not apply to personal services contracts (see FAR 37.104), unless specified otherwise in agency procedures.

25.301–2 Government support.

(a) Generally, contractors are responsible for providing their own logistical and security support, including logistical and security support for their employees. The agency shall provide logistical or security support only when the appropriate agency official, in accordance with agency guidance, determines that—

(1) Such Government support is available and is needed to ensure continuation of essential contractor services; and

(2) The contractor cannot obtain adequate support from other sources at a reasonable cost.

(b) The contracting officer shall specify in the contract, and in the solicitation if possible, the exact support to be provided, and whether this

support is provided on a reimbursable basis, citing the authority for the reimbursement.

25.301–3 Weapons.

The contracting officer shall follow agency procedures and the weapons policy established by the combatant commander or the chief of mission when authorizing contractor personnel to carry weapons (see paragraph (i) of the clause at 52.225–19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States).

25.301–4 Contract clause.

Insert the clause at 52.225–19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States, in solicitations and contracts, other than personal service contracts with individuals, that will require contractor personnel to perform outside the United States—

(a) In a designated operational area during—

(1) Contingency operations;

(2) Humanitarian or peacekeeping operations; or

(3) Other military operations or military exercises, when designated by the combatant commander; or

(b) When supporting a diplomatic or consular mission—

(1) That has been designated by the Department of State as a danger pay post (see *http://aoprals.state.gov/Web920/danger_pay_all.asp*); or

(2) That the contracting officer determines is a post at which application of the clause FAR 52.225–19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States, is appropriate.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 9. Add section 52.225–19 to read as follows:

52.225–19 Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States.

As prescribed in 25.301–4, insert the following clause:

Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States (Mar 2008)

(a) *Definitions.* As used in this clause—

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

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

Designated operational area means a geographic area designated by the combatant commander or subordinate joint force commander for the conduct or support of specified military operations.

Supporting a diplomatic or consular mission means performing outside the United States under a contract administered by Federal agency personnel who are subject to the direction of a chief of mission.

(b) *General.* (1) This clause applies when Contractor personnel are required to perform outside the United States—

(i) In a designated operational area during—

(A) Contingency operations;

(B) Humanitarian or peacekeeping operations; or

(C) Other military operations; or military exercises, when designated by the Combatant Commander; or

(ii) When supporting a diplomatic or consular mission—

(A) That has been designated by the Department of State as a danger pay post (see *http://aoprals.state.gov/Web920/danger_pay_all.asp*); or

(B) That the Contracting Officer has indicated is subject to this clause.

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

(3) Contractor personnel are civilians.

(i) Except as provided in paragraph (b)(3)(ii) of this clause, and in accordance with paragraph (i)(3) of this clause, Contractor personnel are only authorized to use deadly force in self-defense.

(ii) Contractor personnel performing security functions are also authorized to use deadly force when use of such force reasonably appears necessary to execute their security mission to protect assets/persons, consistent with the terms and conditions contained in the contract or with their job description and terms of employment.

(4) Service performed by Contractor personnel subject to this clause is not active duty or service under 38 U.S.C. 106 note.

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

(d) *Compliance with laws and regulations.* The Contractor shall comply with, and shall ensure that its personnel in the designated operational area or supporting the diplomatic or consular mission are familiar with and comply with, all applicable—

(1) United States, host country, and third country national laws;

(2) Treaties and international agreements;

(3) United States regulations, directives, instructions, policies, and procedures; and

(4) Force protection, security, health, or safety orders, directives, and instructions issued by the Chief of Mission or the Combatant Commander; however, only the Contracting Officer is authorized to modify the terms and conditions of the contract.

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

(2) Before Contractor personnel depart from the United States or a third country, and before Contractor personnel residing in the host country begin contract performance in the designated operational area or supporting the diplomatic or consular mission, the Contractor shall ensure the following:

(i) All required security and background checks are complete and acceptable.

(ii) All personnel are medically and physically fit and have received all required vaccinations.

(iii) All personnel have all necessary passports, visas, entry permits, and other documents required for Contractor personnel to enter and exit the foreign country, including those required for in-transit countries.

(iv) All personnel have received—

(A) A country clearance or special area clearance, if required by the chief of mission; and

(B) Theater clearance, if required by the Combatant Commander.

(v) All personnel have received personal security training. The training must at a minimum—

(A) Cover safety and security issues facing employees overseas;

(B) Identify safety and security contingency planning activities; and

(C) Identify ways to utilize safety and security personnel and other resources appropriately.

(vi) All personnel have received isolated personnel training, if specified in the contract. Isolated personnel are military or civilian personnel separated from their unit or organization in an environment requiring them to survive, evade, or escape while awaiting rescue or recovery.

(vii) All personnel who are U.S. citizens are registered with the U.S. Embassy or Consulate with jurisdiction over the area of operations on-line at *http://www.travel.state.gov*.

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

(i) If this contract is with the Department of Defense, or the contract relates to supporting the mission of the Department of Defense outside the United States, such employees, and dependents residing with such employees, who engage in conduct outside the United States that would constitute an offense punishable by imprisonment for more than one year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States, may potentially be subject to the criminal jurisdiction of the

United States (see the Military Extraterritorial Jurisdiction Act of 2000 (18 U.S.C. 3261 *et seq.*);

(ii) Pursuant to the War Crimes Act, 18 U.S.C. 2441, Federal criminal jurisdiction also extends to conduct that is determined to constitute a war crime when committed by a civilian national of the United States; and

(iii) Other laws may provide for prosecution of U.S. nationals who commit offenses on the premises of United States diplomatic, consular, military or other United States Government missions outside the United States (18 U.S.C. 7(9)).

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

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

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

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

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

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

(h) *Contractor personnel.* The Contracting Officer may direct the Contractor, at its own expense, to remove and replace any Contractor personnel who fail to comply with or violate applicable requirements of this contract. Such action may be taken at the Government's discretion without prejudice to its rights under any other provision of this contract, including termination for default or cause.

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

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

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

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

(3) The Contractor shall ensure that its personnel who are authorized to carry weapons—

(i) Are adequately trained to carry and use them—

(A) Safely;

(B) With full understanding of, and adherence to, the rules of the use of force issued by the Combatant Commander or the Chief of Mission; and

(C) In compliance with applicable agency policies, agreements, rules, regulations, and other applicable law;

(ii) Are not barred from possession of a firearm by 18 U.S.C. 922; and

(iii) Adhere to all guidance and orders issued by the Combatant Commander or the Chief of Mission regarding possession, use, safety, and accountability of weapons and ammunition.

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

(5) Whether or not weapons are Government-furnished, all liability for the use of any weapon by Contractor personnel rests solely with the Contractor and the Contractor employee using such weapon.

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

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

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

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

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

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

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

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

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

(i) Dies;

(ii) Requires evacuation due to an injury; or

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

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

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

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

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

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

(p) *Changes.* In addition to the changes otherwise authorized by the Changes clause of this contract, the Contracting Officer may, at any time, by written order identified as a change order, make changes in place of performance or Government-furnished facilities, equipment, material, services, or site. Any change order issued in accordance with this paragraph shall be subject to the provisions of the Changes clause of this contract.

(q) *Subcontracts.* The Contractor shall incorporate the substance of this clause, including this paragraph (q), in all subcontracts that require subcontractor personnel to perform outside the United States—

(1) In a designated operational area during—

(i) Contingency operations;

(ii) Humanitarian or peacekeeping operations; or

(iii) Other military operations; or military exercises, when designated by the Combatant Commander; or

(2) When supporting a diplomatic or consular mission—

(i) That has been designated by the Department of State as a danger pay post (see *http://aoprals.state.gov/Web920/danger_pay_all.asp*); or

(ii) That the Contracting Officer has indicated is subject to this clause.

(End of clause)

[FR Doc. E8–3364 Filed 2–27–08; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5, 6, 10, 12, and 25

[FAC 2005–24; FAR Case 2006–016; Item II; Docket 2008–0001; Sequence 2]

RIN 9000–AK70

Federal Acquisition Regulation; FAR Case 2006–016, Numbered Notes for Synopses

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to update and clarify policy for synopses of proposed contract actions and to delete all references to Numbered Notes (hereafter referred to as ''Notes'').

DATES: *Effective Date:* March 31, 2008

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–24, FAR case 2006–016.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 72 FR 10964, March 12, 2007, requesting comments on amending the Federal Acquisition Regulation (FAR) to update and clarify policy for synopses of proposed contract actions and to delete all references to Notes in the FAR and Federal Business Opportunities (FedBizOpps) electronic publication. The comment period closed May 11, 2007. Four sources submitted comments on the proposed rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided below:

Comment A: One commenter noted that the Notes were helpful when the buyer fails to provide the required information in the body of the synopsis and stated there should be more drop-down boxes to replace the Notes in order to get more standardized synopses.

Response: Drop-down menus are provided only for those information elements that are mandatory, regardless of the synopsis action and procurement requirement (e.g., classification code, country code, and set-aside code) and that are conducive to incorporation in such menus. Incorporating all potential information that might be relevant to a synopsis into the form of drop-down menus would make the FedBizOpps design lengthy, cumbersome and costly to implement and maintain. The Councils believe that information formerly contained in the Numbered Notes that is valuable to potential offerors should be included in full text in the body of the synopsis where it can be fully explained as it pertains to the proposed acquisition.

Comment B: Another commenter recommended additional language in FAR 5.207 or additional drop-down boxes in FedBizOpps for six specific former Notes:

(1) Note 8: Recommended a drop-down box and language in FAR 5.207 addressing access to data designated as Militarily Critical Technical Data.

Response: Information similar to that contained in this Note is valuable to potential bidders and offerors and should be placed in the body of the synopsis. Buying offices that knew previously to include this Note will know now to include instructions regarding this certification. There is no reference to militarily critical technical data in the FAR as this requirement is unique to DoD procurement; therefore, language in FAR 5.207 or a drop down menu in FedBizOpps is not deemed appropriate.

(2) Note 12: The commenter noted the proposed rule language to be added to FAR 52.207(c)(13) addressing Trade Agreement requirements, but also recommended including the suggested notices as choices in drop-down boxes in FedBizOpps.

Response: The proposed FAR 52.207(c)(13) revision provides exact language appropriate for inclusion in the body of the synopsis. Use of a drop-down menu is not deemed appropriate.

(3) Note 13: The commenter agreed with deletion of the Note, but recommended adding language to FAR 5.207 to require the synopsis to address any restrictions on competition.

Response: This Note referred to restrictions on competition in accordance with FAR 6.302–3; however, FAR 5.202(a)(10) provides for an exception to publishing a synopsis in that case. Further, restrictions on competition for other reasons are already covered at 5.207(c)(14).

(4) Note 22: The commenter recommended including the language from the current Note as a drop-down box selection in FedBizOpps.

Response: This Note refers to single/sole source intentions pursuant to FAR 6.302. Rather than relying on a drop down menu with a generic statement and no further explanation, the Councils believe that detailed rationale for the lack of competition should be placed in the body of the synopsis, as currently required by 5.207(c)(14).

(5) Note 23: The commenter recommended including the language from the current Note (updated as necessary) as a drop-down box selection in FedBizOpps.

Response: Information contained in this Note pertains to qualification requirements and should be placed in the body of the synopsis, where tailored language can explain the type of qualification requirement. Use of a drop-down menu is not deemed appropriate.

(6) Note 24: The commenter recommended including the language from the current Note as a drop-down box selection in FedBizOpps.

Response: This Note is an extensive discussion of Brooks Act requirements regarding architect-engineer offerors. FAR 36.603(b) provides guidance to contracting officers on qualification data submission requirements, and based upon value to potential offerors, appropriate tailored information should be placed in the body of the synopsis. Use of a drop-down menu is not deemed appropriate.

In summary, the purpose of the synopsis is to provide sufficient information for prospective respondents to determine their interest and capability regarding the pending solicitation. Therefore, information contained in the Notes has value to the synopsis. However, since there is no longer a need to restrict the content of a synopsis, the updated substance of these Notes should, at the discretion of the organization and as applicable to the solicitation, be placed in full text in the synopsis. No change to the proposed rule is required to satisfy this comment.

Comment C: One commenter questioned why we had retained the prohibition at 5.207(g) regarding posting cancellations of synopses or solicitations on FedBizOpps. The commenter suggested that the original reasons for this prohibition had possibly gone away with the transition from the hard copy Commerce Business Daily (CBD) to the electronic FedBizOpps and indicated that many contracting officers

were already violating this prohibition and posting cancellations there.

Response: The Councils agree. Research into the original rationale for this prohibition indicates it was part of the overall attempt by the Department of Commerce to limit the number and length of announcements on the CBD, due to space limitations and the cost of each announcement. The CBD format and cost are no longer obstacles, and the Department of Commerce indicates it would not be opposed to a change in this area. To make it easier for potential bidders and offerors to know that a solicitation has been canceled and, thereby, to save the cost and time that would go into useless offers without such knowledge, the Councils have agreed to new language at FAR 5.207(f) making it permissive for contracting officers to post cancellations on FedBizOpps.

Comment D: A final commenter indicated that there is confusion as to what is being sought from industry in Note 22, where the Note states ''Interested parties may identify their interest and capability to respond to the requirement or submit proposals'' in response to a sole source synopsis. He noted that, at the point in time when the synopsis is published, there is no solicitation available, and therefore, using the standard FAR definition, a proposal cannot be submitted. He suggested clarifying in the final rule that a submission identifying interest and capability to submit a proposal would be adequate.

Response: The Councils agree. In researching pertinent FAR sections, we noted that 5.207(c)(15) suggested inserting a statement in the synopsis that all responsible sources may submit '' * * * a bid, proposal, or quotation which shall be considered by the agency.'' Further, 6.302–1(d)(2) currently states only that '' * * * the notices required by 5.201 shall have been published and any bids and proposals must have been considered.'' These references have been revised to be consistent and to allow ''capability statements'' to be added to the list of responses from industry.

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. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because it makes no significant change to the policy for the synopses of proposed contract actions.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

List of Subjects in 48 CFR Parts 5, 6, 10, 12, and 25

Government procurement.

Dated: February 19, 2008.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 5, 6, 10, 12, and 25 as set forth below:

■ 1. The authority citation for 48 CFR parts 5, 6, 10, 12, and 25 continue to read as follows:

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

PART 5—PUBLICIZING CONTRACT ACTIONS

■ 2. Amend section 5.203 by revising the last sentence of the introductory text of paragraph (a) to read as follows:

5.203 Publicizing and response time.

* * * * *

(a) * * * The notice must be published at least 15 days before issuance of a solicitation, or a proposed contract action the Government intends to solicit and negotiate with only one source under the authority of 6.302, except that, for acquisitions of commercial items, the contracting officer may—

* * * * *

■ 3. Amend section 5.205 by revising the fifth sentence following the paragraph heading of paragraph (a) to read as follows:

5.205 Special situations.

(a) * * * Advanced notices must be entitled ''Research and Development Sources Sought'' and include the name and telephone number of the contracting officer or other contracting activity official from whom technical details of the project can be obtained. * * *

* * * * *

■ 4. Amend section 5.207 by—

■ a. Removing paragraph (a)(4) and redesignating paragraphs (a)(5) through (a)(19) as (a)(4) through (a)(18) respectively;

■ b. Revising the newly redesignated paragraph (a)(9);

■ c. Revising paragraphs (c)(13), (c)(14), (c)(15), and (d);

■ d. Removing paragraph (e), and redesignating paragraphs (f) and (g) as (e) and (f), respectively; and

■ e. Revising the newly redesignated paragraph (f).

The revised text reads as follows:

5.207 Preparation and transmittal of synopses.

(a) * * *

(9) Closing Response Date.

* * * * *

(c) * * *

(13)(i) If the solicitation will include the FAR clause at 52.225–3, Buy American Act-Free Trade Agreements-Israeli Trade Act, or an equivalent agency clause, insert the following notice in the synopsis: ''One or more of the items under this acquisition is subject to Free Trade Agreements.''

(ii) If the solicitation will include the FAR clause at 52.225–5, Trade Agreements, or an equivalent agency clause, insert the following notice in the synopsis: ''One or more of the items under this acquisition is subject to the World Trade Organization Government Procurement Agreement and Free Trade Agreements.''

(iii) If the solicitation will include the FAR clause at 52.225–11, Buy American Act-Construction Materials under Trade Agreements, or an equivalent agency clause, insert the following notice in the synopsis: ''One or more of the items under this acquisition is subject to the World Trade Organization Government Procurement Agreement and Free Trade Agreements.''

(14) In the case of noncompetitive contract actions (including those that do not exceed the simplified acquisition threshold), identify the intended source and insert a statement of the reason justifying the lack of competition.

(15)(i) Except when using the sole source authority at 6.302–1, insert a statement that all responsible sources may submit a bid, proposal, or quotation which shall be considered by the agency.

(ii) When using the sole source authority at 6.302–1, insert a statement that all responsible sources may submit a capability statement, proposal, or quotation, which shall be considered by the agency.

* * * * *

(d) *Set-asides.* When the proposed acquisition provides for a total or partial small business program set-aside, or when the proposed acquisition provides

for a local area set-aside (see Subpart 26.2), the contracting officer shall identify the type of set-aside in the synopsis and in the solicitation.

* * * * *

(f) *Notice of solicitation cancellation.* Contracting officers may publish notices of solicitation cancellations (or indefinite suspensions) of proposed contract actions in the GPE.

PART 6—COMPETITION REQUIREMENTS

■ 5. Amend section 6.302–1 by revising paragraph (d)(2) to read as follows:

6.302–1 Only one responsible source and no other supplies or services will satisfy agency requirements.

* * * * *

(d) * * *

(2) For contracts awarded using this authority, the notices required by 5.201 shall have been published and any bids, proposals, quotations, or capability statements must have been considered.

PART 10—MARKET RESEARCH

10.002 [Amended]

■ 6. Amend section 10.002 in paragraph (d)(2) by removing ''(see 5.207(e))''.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

12.603 [Amended]

■ 7. Amend section 12.603 by removing paragraph (c)(2) (xv), and redesignating paragraphs (c)(2)(xvi) and (c)(2) (xvii) as paragraphs (c)(2)(xv) and (c)(2)(xvi), respectively.

PART 25—FOREIGN ACQUISITION

■ 8. Amend section 25.408 by revising paragraph (a)(2) to read as follows:

25.408 Procedures.

(a) * * *

(2) Comply with the requirements of 5.207, Preparation and transmittal of synopses;

* * * * *

[FR Doc. E8–3379 Filed 2–27–08; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 22, 25, and 52

[FAC 2005–24; FAR Case 2007–016; Item III]

[Docket 2008–0001; Sequence 3]

RIN 9000–AK89

Federal Acquisition Regulation; FAR Case 2007–016, Trade Agreements—New Thresholds

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

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) have agreed to issue an interim rule amending the Federal Acquisition Regulation (FAR) to incorporate increased thresholds for application of the World Trade Organization Government Procurement Agreement and the Free Trade Agreements, as determined by the United States Trade Representative (USTR).

DATES: *Effective Date:* February 28, 2008.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before April 28, 2008 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–24, FAR case 2007–016, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting ''FAR Case 2007–016'' under the heading ''Comment or Submission''. Select the link ''Send a Comment or Submission'' that corresponds with FAR Case 2007–016. Follow the instructions provided to complete the ''Public Comment and Submission Form''. Please include your name, company name (if any), and ''FAR Case 2007–016'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4035, ATTN: Diedra Wingate, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–24, FAR case 2007–016, in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*. Please include your name and company name (if any) inside the document.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Meredith Murphy, Procurement Analyst, at (202) 208–6925. For information pertaining to status or publication schedules, contact the FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501–4755. Please cite FAC 2005–24, FAR Case 2007–016.

SUPPLEMENTARY INFORMATION:

A. Background

Every two years, the trade agreements thresholds are escalated according to a pre-determined formula set forth in the agreements. The USTR, in the **Federal Register**, at 72 FR 71166, December 14, 2007 and 72 FR 73904, December 28, 2007, specified the following new thresholds:

Trade agreement	Supply contract (equal to or exceeding)	Service contract (equal to or exceeding)	Construction contract (equal to or exceeding)
WTO GPA FTAs	$194,000	$194,000	$7,443,000
Australia FTA	67,826	67,826	7,443,000
Bahrain FTA	194,000	194,000	8,817,449
CAFTA–DR (El Salvador, Dominican Republic, Guatemala, Honduras, and Nicaragua)	67,826	67,826	7,443,000
Chile FTA	67,826	67,826	7,443,000
Morocco FTA	194,000	194,000	7,443,000
NAFTA:			
—Canada	25,000	67,826	8,817,449
—Mexico	67,826	67,826	8,817,449
Singapore FTA	67,826	67,826	7,443,000
Israeli Trade Act	50,000		

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. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

This interim rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The dollar threshold changes are designed to keep pace with inflation and thus maintain the status quo. Therefore, we have not performed an Initial Regulatory Flexibility Analysis. We invite comments from small business concerns and other interested parties on this issue. The Councils will also consider comments from small entities concerning the affected FAR subparts 22, 25, and 52 in accordance with 5 U.S.C. 610. Interested parties should submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR Case 2007–016), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply, because the interim rule affects the prescriptions for use of the certifications at 52.225–4 (OMB Control 9000–0130), 52.225–6 (OMB Control 9000–0025), and the clauses at 52.225–9 and 52.225–11 (OMB Control 9000–0141), which contain information collection requirements approved under the specified OMB control numbers by the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* However, there is no impact on the estimated burden hours, because the threshold changes are in line with inflation and maintain the status quo.

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration, that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This interim rule incorporates increased dollar thresholds for application of the World Trade Organization Government Procurement Agreement and the Free Trade Agreements, as determined by the USTR. This action is necessary because the new thresholds are scheduled to go into effect January 1, 2008. However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 22, 25, and 52

Government procurement.

Dated: February 19, 2008.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 22, 25, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 22, 25, and 52 continues to read as follows:

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

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.1503 [Amended]

■ 2. Amend section 22.1503 by:

■ a. Removing from paragraph (b)(3) ''$64,786'' and adding ''$67,826'' in its place; and

■ b. Removing from paragraph (b)(4) ''$193,000'' and adding ''$194,000'' in its place.

PART 25—FOREIGN ACQUISITION

25.202 [Amended]

■ 3. Amend section 25.202 in paragraph (c) by removing ''$7,407,000'' and adding ''$7,443,000'' in its place.

■ 4. Amend section 25.402 by revising the table that follows paragraph (b) to read as follows:

25.402 General.

* * * * *

(b) * * *

Trade Agreement	Supply contract (equal to or exceeding)	Service contract (equal to or exceeding)	Construction contract (equal to or exceeding)
WTO GPA FTAs	$194,000	$194,000	$7,443,000
Australia FTA	67,826	67,826	7,443,000
Bahrain FTA	194,000	194,000	8,817,449
CAFTA–DR (El Salvador, Dominican Republic, Guatemala, Honduras, and Nicaragua)	67,826	67,826	7,443,000
Chile FTA	194,000	194,000	7,443,000
Morocco FTA	25,000	67,826	8,817,449
NAFTA:			
—Canada	67,826	67,826	8,817,449
—Mexico	67,826	67,826	7,443,000
Singapore FTA	50,000		
Israeli Trade Act.			

25.1101 [Amended]

■ 5. Amend section 25.1101 by:

■ a. Removing from paragraph (b)(1)(i)(A) ''$193,000'' and adding ''$194,000'' in its place;

■ b. Removing from paragraphs (b)(1)(iii) and (b)(2)(iii) ''$64,786'' and adding ''$67,826'' in its place; and

■ c. Removing from paragraphs (c)(1) and (d) ''$193,000'' and adding ''$194,000'' in its place.

25.1102 [Amended]

■ 6. Amend section 25.1102 by:

■ a. Removing from paragraphs (a) and (c) ''$7,407,000'' and adding ''$7,443,000'' in its place; and

■ b. Removing from paragraphs (c)(3) and (d)(3) ''$7,407,000'' and ''$8,422,165'' and adding ''7,443,000'' and ''$8,817,449'', respectively, in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Amend section 52.212–5 by revising the date of the clause and paragraph (b)(17) to read as follows:

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

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (FEB 2008)

* * * * *

(b) * * *

(17) 52.222–19, Child Labor—Cooperation with Authorities and Remedies (FEB 2008) (E.O. 13126).

* * * * *

■ 8. Amend section 52.213–4 by revising the date of the clause and the first sentence in paragraph (b)(1)(i) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL ITEMS) (FEB 2008)

* * * * *

(b) * * *

(1) * * *

(i) 52.222–19, Child Labor—Cooperation with Authorities and Remedies (FEB 2008) (E.O. 13126).

* * * * *

■ 9. Amend section 52.222–19 by:

■ a. Revising the date of the clause;

■ b. Removing from paragraph (a)(3) ''$64,786'' and adding ''$67,826'' in its place; and

■ c. Removing from paragraph (a)(4) ''$193,000'' and adding ''$194,000'' in its place.

The revised text reads as follows:

52.222–19 Child Labor—Cooperation with Authorities and Remedies.

* * * * *

CHILD LABOR—COOPERATION WITH AUTHORITIES AND REMEDIES (FEB 2008)

* * * * *

[FR Doc. E8–3390 Filed 2–27–08; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 22, 25 and 52

[FAC 2005–24; FAR Case 2006–028; Item IV; Docket 2008–0001; Sequence 4]

RIN 9000–AK77

Federal Acquisition Regulation; FAR Case 2006–028, New Designated Countries—Dominican Republic, Bulgaria, and Romania

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed to adopt the interim rule published in the **Federal Register** at 72 FR 46357, August 17, 2007, as a final rule without change. This final rule amends the Federal Acquisition Regulation (FAR) to implement the Dominican Republic-Central America-United States Free Trade Agreement with respect to the Dominican Republic.

DATES: *Effective Date:* February 28, 2008.

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Procurement Analyst, at (202) 208–6925 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–24, FAR case 2006–028.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published an interim rule with request for comments in the **Federal Register** at 72 FR 46357, August 17, 2007. The comment period closed October 16, 2007. No public comments were received in response to the interim rule.

The interim rule amended FAR part 25 and the corresponding clauses in FAR part 52 to implement the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA–DR) with respect to the Dominican Republic. Congress approved this trade agreement in the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (Pub. L. 109–53). This trade agreement waives the applicability of the Buy American Act for some foreign supplies and construction materials from the Dominican Republic and specifies procurement procedures designed to ensure fairness in the acquisition of supplies and services.

The Dominican Republic has the same thresholds as the other CAFTA–DR countries ($67,826 for supply and service contracts, $7,443,000 for construction contracts).

The interim rule also added Bulgaria and Romania to the list of World Trade Organization Government Procurement Agreement countries wherever it appears, whether as a separate definition, part of the definition of designated countries, or as part of the list of countries exempt from the prohibition of acquisition of products produced by forced or indentured child labor (FAR parts 22.1503, 25.003, 52.222–19, 52.225–5, and 52.225–11).

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. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. Although the rule opens up Government procurement to the goods and services of Bulgaria, the Dominican Republic, and Romania, the Councils do not anticipate any significant economic impact on U.S. small businesses. No comments were received from small business concerns. Therefore, a Final Regulatory Flexibility Analysis was not performed.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Numbers 9000–0025, 9000–0130, 9000–0136, and 9000–0141 respectively. The final rule affects the certification and information collection requirements in the provisions at FAR 52.212–3, 52.225–4, 52.225–6, and 52.225–11.

List of Subjects in 48 CFR Parts 22, 25, and 52

Government procurement.

Dated: February 19, 2008.

Al Matera,

Director, Office of Acquisition Policy.

Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR parts 22, 25, and 52 which was published at 72 FR 46357, August 17, 2007, is adopted as a final rule without change.

[FR Doc. E8–3386 Filed 2–27–08; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 30 and 52

[FAC 2005–24; FAR Case 2005–027; Item V; Docket 2006–0020; Sequence 9]

RIN 9000–AK60

Federal Acquisition Regulation; FAR Case 2005–027, FAR Part 30–CAS Administration

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement revisions to the regulations related to the administration of the Cost Accounting Standards (CAS).

DATES: Effective Date: March 31, 2008.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Loeb, Procurement Analyst, at (202) 501–0650 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–24, FAR case 2005–027.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 71 FR 58338, October 3, 2006 to make administrative corrections to FAR Part 30, ''CAS Administration,'' subsequent to the issuance of the final rule (FAR case 1999–025) at 70 FR 11743, March 9, 2005. Among other changes, the Council's March 9, 2005 final rule streamlined the process for submitting, negotiating, and resolving cost impacts resulting from a change in cost accounting practice or noncompliance with stated practices. The Councils received public comments in response to the proposed rule. The Councils' responses to the public comments received in response to the proposed rule follow.

The Use of Auditors and Other Technical Advisors

Comment: One commenter recommended elimination of the words ''as appropriate'' from FAR 30.601(c) since it would be imprudent for the CFAO not to request and consider the expert advice of the contract auditor in performing CAS administration. The commenter also recommended that the phrase be eliminated from FAR 1.602–2(c) for consistency.

Response: Nonconcur. The Councils agree that it is generally prudent for the CFAO to consider the advice of auditors and other specialists in performing contract administration responsibilities. However, the Councils believe the CFAO is in the best position to determine the need for technical assistance on a particular issue, as well as the nature of the technical assistance required. Accordingly, it may not be necessary for the CFAO to obtain audit or technical advice in all cases in order to effectively and responsibly perform his/her duties. In those cases, requiring the CFAO to obtain such advice would infringe on the CFAO's authority and may unnecessarily delay the administration of contracts. Any revision to FAR 1.602–2(c) would be beyond the purview of this case.

Cost Impacts of CAS Noncompliances That Affect Both Cost Estimates and Cost Accumulations

Comment: One commenter recommended that contractors be required to submit separate cost impacts when a single noncompliance affects both cost estimates and cost accumulations (one for the impact on cost estimating and another for the cost impact on cost accumulations). The commenter also recommended that those separate cost impacts be administered separately, rather than considered as a whole. The commenter opined that while ''it might be convenient for the contractor to combine the cost impacts, it could make it difficult for the Government to analyze the noncompliance(s) and to determine whether the cost impacts are material or not.''

Response: Nonconcur. The Councils believe that the recommendation would not comply with paragraph (a)(5) of the clause at 48 CFR 9903.201–4(a) and 48 CFR 9903.201–6 which require the Government to recover the increased costs in the aggregate of a noncompliance. These provisions are intended to ensure the Government's full recovery of any increased costs in the aggregate while also prohibiting the recovery of more than the increased costs in the aggregate. The recommendation would require the calculation and recovery of the impact on cost estimates separately and apart from the calculation and recovery of the impact on cost accumulations, when both are the result of a single noncompliance. The Councils believe that the separate consideration of the impacts on cost estimating and on cost accumulations may result in the Government's recovery of an amount which is either more or less than the cost impact in the aggregate of a particular noncompliance.

As it is currently written, FAR 30.605(h) provides a systematic approach to the calculation of the increased or decreased costs in the aggregate of a noncompliance that affects both cost estimates and cost accumulations. Pursuant to FAR 30.605(h)(6), the cost impact of the cost estimating noncompliance (calculated in accordance with FAR 30.605(h)(3)) is combined with the cost impact of the cost accumulation noncompliance (calculated in accordance with FAR 30.605(h)(4)) and the impact on profit and fee (calculated in accordance with FAR 30.605(h)(5)), in order to arrive at the cost impact in the aggregate of a noncompliance that affects both cost estimates and cost accumulations. The Councils believe that this approach to determining the cost impact of a noncompliance affecting both cost estimates and cost accumulations complies with the CAS Board's Rules and Regulations.

Combining Cost Impacts of Multiple Unilateral Cost Accounting Practice Changes

Comment: One commenter recommended that the combination of cost impacts resulting from unilateral cost accounting practice changes be permitted as prescribed in DoD CAS Working Group Paper 76–8, Interim Guidance on the Use of the Offset Principle in Contract Price Adjustments Resulting from Accounting Changes. The commenter ''disagrees with the Councils' interpretation of the statute

and believes that current statutory language permits aggregation of the impact of a unilateral change affecting more than one cost accounting practice rather than prohibiting the combining of cost impacts for two or more unilateral changes'' and opined that the Councils' reading of 41 U.S.C. 422(h)(1)(B) is ''overly narrow.''

Response: Nonconcur. The Councils have previously considered the commenter's recommendation in the publication of their final rule amending FAR Part 30, effective April 8, 2005 at 70 FR 11743, March 9, 2005. The Councils' comments in the discussion of Public Comments, Item 35, follow:

(c) *Combining unilateral changes and/or noncompliances.* When the individual cost-impact of each unilateral change and each noncompliance is increased costs in the aggregate, the Councils agree that the change and noncompliance may be combined for administrative ease in resolving cost-impacts, as indicated at FAR 30.606(a)(3)(ii). Such combinations can only be made by mutual agreement of both parties.

The Councils further believe that combining the cost-impacts of unilateral changes and/or noncompliances must be precluded if any of the individual changes or noncompliances involved results in decreased costs in the aggregate. When there are two or more unilateral changes/ noncompliances, some with increased costs and others with decreased costs, combining the cost-impact of those changes does not comply with the statutory requirement that the Government recover the increased costs in the aggregate for each unilateral change/ noncompliance. There is no statutory provision that permits offsetting the cost-impact of one unilateral change/ noncompliance with the cost-impact of any other unilateral change/ noncompliance.

As stated above, the Councils found that combining multiple cost impacts, where one or more of those cost impacts is decreased costs to the Government, does not comply with the CAS Board's requirement that the Government recover the increased costs in the aggregate for each unilateral change. The 1988 statute (41 U.S.C. 422(h)(3)) and subsequent revisions to 48 CFR 9903.201–4, both of which added the words ''in the aggregate'' in describing the amounts to be recovered as a result of a unilateral cost accounting practice change or noncompliance, effectively supersede Working Group Paper 76–8 and preclude the combination of the cost impacts of multiple unilateral cost accounting practice changes.

The Councils agree with the commenter that the Councils have construed the CAS narrowly. The Councils believe that to do otherwise would be a violation of 41 U.S.C 422(f) since that statute provides that only the CAS Board may interpret their rules, regulations and standards. Accordingly, the Councils have an obligation to construe the CAS as narrowly as possible when promulgating regulations so as to refrain from interpreting the CAS Board's rules and regulations, and second guessing the CAS Board's intent.

At its July 5, 2005 meeting, the CAS Board instructed its staff to establish a working group to evaluate whether revisions or interpretations to its rules and regulations are needed regarding the term ''increased costs in the aggregate'' and to consider how increased costs in the aggregate are to be computed when a contractor makes multiple accounting changes that take effect on the same date. After the CAS Board has considered these issues, the Councils may take additional actions to implement any changes to the CAS Board's rules and regulations.

Availability of Funds

Comment: One commenter recommended that the provision at FAR 30.603–2(b)(3)(iii) be deleted since the lack of available funds to pay any increased costs may compel CFAOs to deny virtually all requests that cost accounting practice changes be determined desirable.

Response: Nonconcur. The Councils believe the consideration of funding availability at FAR 30.603–2(b)(3)(iii) is necessary to ensure that CFAOs act within their authority in obligating the Government and to avoid potential noncompliance with the requirements of the Anti-Deficiency Act (31 U.S.C. 1341) in determining whether a contractor's cost accounting practice change is desirable. In instances where a CFAO's determination that a cost accounting practice change is desirable may obligate the Government to pay increased costs, it is incumbent upon the CFAO to ensure that funds are available on affected contracts to pay those increased costs.

Definition of ''Increased Costs''

Comment: One commenter opined that the ''Councils have exceeded their authority by including in FAR Part 30 language that in essence defines 'increased costs' by indicating what costs can and cannot be combined'' and that only the CAS Board has the authority to define the term.

Response: Nonconcur. The Councils believe they have taken actions that are consistent with the CAS Board's definition of ''increased costs'' at 48 CFR 9903.306, and have not exceeded their authorities or redefined the term ''increased costs'' by their narrow application of the Board's Rules and Regulations, as asserted by the commenter. In accordance with their narrow reading of the CAS, the Councils believe that the CAS Board's consistent use of the terms ''a change'' and ''the change'' in describing cost accounting practice changes dictates that each such change, including the related cost impact, must be considered separately.

As discussed in the comments above, the CAS Board is taking steps to determine whether or not additional rules and regulations are needed to clarify the meaning of the term ''increased costs in the aggregate.'' In the interim, the Councils have adopted regulations that reflect their understanding of the CAS Board's existing rules and regulations.

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. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because contracts and subcontracts awarded to small businesses are exempt from the Cost Accounting Standards.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 30 and 52

Government procurement.

Dated: February 19, 2008.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 30 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 30 and 52 continues to read as follows:

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

PART 30—COST ACCOUNTING STANDARDS ADMINISTRATION

■ 2. Amend section 30.001 by—

■ a. Removing from the definition ''Cognizant Federal agency official (CFAO)'' the word ''administer'' and adding ''administer the'' in its place;
■ b. Removing from the definition ''Desirable change'' the word ''unilateral'' and adding ''compliant'' in its place; and
■ c. Revising paragraph (1) of the definition ''Required change'' to read as follows:

30.001 Definitions.

* * * * *

Required change means—

(1) A change in cost accounting practice that a contractor is required to make in order to comply with applicable Standards, modifications or interpretations thereto, that subsequently becomes applicable to an existing CAS-covered contract or subcontract due to the receipt of another CAS-covered contract or subcontract; or

* * * * *

■ 3. Amend section 30.601 by removing from paragraph (b) ''52.230–6(b)'' and adding ''52.230–6(l), (m), and (n)'' in its place; and by adding paragraph (c) to read as follows:

30.601 Responsibility.

* * * * *

(c) In performing CAS administration, the CFAO shall request and consider the advice of the auditor as appropriate (see 1.602–2).

■ 4. Amend section 30.602 by revising paragraph (d) to read as follows:

30.602 Materiality.

* * * * *

(d) For required, unilateral, and desirable changes, and CAS noncompliances, when the amount involved is material, the CFAO shall follow the applicable provisions in 30.603, 30.604, 30.605, and 30.606.

■ 5. Amend section 30.604 by—
■ a. Removing from the introductory text of paragraphs (b) and (f) '', with the assistance of the auditor,'';
■ b. Revising the introductory text of paragraph (g);
■ c. Revising paragraph (h)(4); and
■ d. Removing from paragraph (i)(1) ''With the assistance of the auditor, estimate'' and adding ''Estimate'' in its place.

The revised text reads as follows:

30.604 Processing changes to disclosed or established cost accounting practices.

* * * * *

(g) *Detailed cost-impact proposal.* If the contractor is required to submit a DCI proposal, the CFAO shall promptly evaluate the DCI proposal and follow the procedures at 30.606 to negotiate and resolve the cost impact. The DCI proposal—

* * * * *

(h) * * *

(4) For required or desirable changes, negotiate an equitable adjustment as provided in the Changes clause of the contract.

* * * * *

■ 6. Amend section 30.605 by—
■ a. Removing from the introductory text of paragraph (c)(2) '', with the assistance of the auditor,'';
■ b. Revising the introductory text of paragraph (f);
■ c. Removing from paragraph (h)(5) ''; and'' and adding '';'' in it place; and
■ d. Redesignating paragraph (h)(6) as (h)(7) and adding a new paragraph (h)(6).

The revised text reads as follows:

30.605 Processing noncompliances.

* * * * *

(f) *Detailed cost-impact proposal.* If the contractor is required to submit a DCI proposal, the CFAO shall promptly evaluate the DCI proposal and follow the procedures at 30.606 to negotiate and resolve the cost impact. The DCI proposal—

* * * * *

(h) * * *

(6) Determine the cost impact of each noncompliance that affects both cost estimating and cost accumulation by combining the cost impacts in paragraphs (h)(3), (h)(4), and (h)(5) of this section; and

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Amend section 52.230–6 by—
■ a. Revising the date of the clause; and
■ b. Amending paragraph (a) by—
■ i. In the definition ''Flexibly-priced contracts and subcontracts'' by revising paragraph (1); and
■ ii. In the definition ''Required change'' revising paragraph (1).

The revised text reads as follows:

52.230–6 Administration of Cost Accounting Standards.

* * * * *

ADMINISTRATION OF COST ACCOUNTING STANDARDS (MAR 2008)

* * * * *

(a) * * *

Flexibly-priced contracts and subcontracts means—

(1) Fixed-price contracts and subcontracts described at FAR 16.203–1(a)(2), 16.204, 16.205, and 16.206;

* * * * *

Required change means—

(1) A change in cost accounting practice that a Contractor is required to make in order to comply with applicable Standards, modifications or interpretations thereto, that subsequently become applicable to existing CAS-covered contracts or subcontracts due to the receipt of another CAS-covered contract or subcontract; or

* * * * *

(End of clause)

[FR Doc. E8–3371 Filed 2–27–08; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 39

[FAC 2005–24; FAR Case 2007–004; Item VI; Docket 2008–0001; Sequence 5]

RIN 9000–AK88

Federal Acquisition Regulation; FAR Case 2007–004, Common Security Configurations

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to require agencies to include common security configurations in new information technology acquisitions, as appropriate. The revision reduces risks associated with security threats and vulnerabilities and will ensure public confidence in the confidentiality, integrity, and availability of Government information. This final rule requires agency contracting officers to consult with the requiring official to ensure the proper standards are incorporated in their requirements.

DATES: *Effective Date:* March 31, 2008.

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia Davis, Procurement Analyst, at (202) 219–0202 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–24, FAR case 2007–004.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the Federal Acquisition Regulation to include a requirement in Federal contracts to ensure common security configurations are used when acquiring information technology, as required by the Office of Management and Budget Memorandum M–07–18 dated June 1, 2007.

Common security configurations provide a baseline of security, reduce risk from security threats and vulnerabilities, and save time and resources. This allows agencies to improve system performance, decrease operating costs, and ensure public confidence in the confidentiality, integrity, and availability of Government information.

This final rule will assist agency adoption of common security configurations by ensuring affected information technology providers (*i.e.*, those who provide products for which the National Institute of Standards and Technology (NIST) has established a common security configuration) incorporate common security configurations when delivering agencies their products.

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. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98–577, and publication for public comments is not required. However, the Councils will consider comments from small entities concerning the affected FAR Part 39 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, et seq. (FAC 2005–24, FAR case 2007–004), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

List of Subjects in 48 CFR Part 39

Government procurement.

Dated: February 19, 2008.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 39 as set forth below:

PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

■ 1. The authority citation for 48 CFR part 39 continues to read as follows:

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

■ 2. Amend section 39.101 by revising paragraph (d) to read as follows:

39.101 Policy.

* * * * *

(d) In acquiring information technology, agencies shall include the appropriate information technology security policies and requirements, including use of common security configurations available from the National Institute of Standards and Technology's Web site at *http://checklists.nist.gov*. Agency contracting officers should consult with the requiring official to ensure the appropriate standards are incorporated.

[FR Doc. E8–3367 Filed 2–27–08; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR–2007–0002, Sequence 11]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–24; Small Entity Compliance Guide

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

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration. This Small Entity Compliance Guide has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2005–24 which amend the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2005–24 which precedes this document. These documents are also available via the Internet at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Diedra Wingate, FAR Secretariat, (202) 208–4052. For clarification of content, contact the analyst whose name appears in the table below.

LIST OF RULES IN FAC 2005–24

Item	Subject	FAR case	Analyst
I	Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission.	2005–011	Woodson.
II	Numbered Notes for Synopses	2006–016	Woodson.
III	Trade Agreements—New Thresholds (Interim)	2007–016	Murphy.
IV	New Designated Countries—Dominican Republic, Bulgaria, and Romania	2006–028	Murphy.
V	FAR Part 30—CAS Administration	2005–027	Loeb.
VI	Common Security Configurations	2007–004	Davis.

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005–24 amends the FAR as specified below:

Item I—Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission (FAR Case 2005–011)

This final FAR rule addresses the issues of contractor personnel that are providing support to the mission of the United States Government in a designated operational area or supporting a diplomatic or consular mission outside the United States, but are not authorized to accompany the U.S. Armed Forces. This final FAR rule clarifies that contractor personnel are only authorized to use deadly force in self-defense or in the performance of security functions, when use of such force reasonably appears necessary to execute their security mission. The purpose and effect of the rule is to relieve the perceived burden on contractors operating without consistent guidance or a standardized clause in a contingency operation or otherwise risky environment.

Item II—Numbered Notes for Synopses (FAR Case 2006–016)

This final rule amends the Federal Acquisition Regulation (FAR) to update and clarify policy for synopses of proposed contract actions and to delete all references to Numbered Notes (Notes) in the FAR and Federal Business Opportunities (FedBizOpps) electronic publication. The prescriptions for Numbered Notes were deleted from the FAR in a former FAR case and transitioned from the Commerce Business Daily to FedBizOpps actions. This transition resulted in other synopses-related changes that were not captured in the associated FAR language revision. Additionally, the transition to the electronic FedBizOpps publication for solicitation and other announcements rendered these Notes obsolete or outdated.

Item III—Trade Agreements—New Thresholds (FAR Case 2007–016) (Interim)

This interim rule adjusts the thresholds for application of the World Trade Organization Government Procurement Agreement and the other Free Trade Agreements as determined by the United States Trade Representative, according to a formula set forth in the agreements.

Item IV—New Designated Countries—Dominican Republic, Bulgaria, and Romania (FAR Case 2006–028)

This final rule converts, without change, the interim rule published in the **Federal Register** at 72 FR 46357, August 17, 2007. No comments were received in response to the interim rule. The effective date of the rule was August 17, 2007. The interim rule allowed contracting officers to purchase the goods and services of the Dominican Republic without application of the Buy American Act if the acquisition is subject to the Free Trade Agreements. The threshold for applicability of the Dominican Republic-Central America-United States Free Trade Agreement is $67,826 for supplies and services (the same as other Free Trade Agreements to date except Morocco, Bahrain, Israel, and Canada) and $7,443,000 for construction (the same as all other Free Trade Agreements to date except NAFTA and Bahrain). The interim rule also added Bulgaria and Romania to the list of World Trade Organization Government Procurement Agreement countries wherever it appears.

Item V—FAR Part 30—CAS Administration (FAR Case 2005–027)

This final rule amending the Federal Acquisition Regulation (FAR) to implement revisions to the regulations related to the administration of the Cost Accounting Standards (CAS). Among other changes, the final rule streamlines the process for submitting, negotiating, and resolving cost impacts resulting from a change in cost accounting practice or noncompliance with stated practices.

Item VI—Common Security Configurations (FAR Case 2007–004)

This final rule amends the Federal Acquisition Regulation to require agencies to include common security configurations in new information technology acquisitions, as appropriate. The revision reduces risks associated with security threats and vulnerabilities and will ensure public confidence in the confidentiality, integrity, and availability of Government information. This final rule requires agency contracting officers to consult with the requiring official to ensure the proper standards are incorporated in their requirements.

Dated: February 19, 2008.

Al Matera,

Director, Office of Acquisition Policy.

[FR Doc. E8–3363 Filed 2–27–08; 8:45 am]

BILLING CODE 6820–EP–P