

for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

\* \* \* \* \*

(c) The Contractor shall deliver under this contract only domestic end products unless, in its offer, it specified delivery of qualifying country end products, Free Trade Agreement country end products other than Moroccan end products, or other foreign end products in the Buy American Act-Free Trade Agreements-Balance of Payments Program Certificate provision of the solicitation. If the Contractor certified in its offer that it will deliver a qualifying country end product or a Free Trade Agreement country end product other than a Moroccan end product, the Contractor shall deliver a qualifying country end product, a Free Trade Agreement country end product other than a Moroccan end product, or, at the Contractor's option, a domestic end product.

\* \* \* \* \*

7. Section 252.225-7045 is amended by revising the clause date, the definition of "Designated country" in paragraph (a), and Alternate I to read as follows:

**252.225-7045 Balance of Payments Program—Construction Material Under Trade Agreements.**

\* \* \* \* \*

Balance of Payments Program—Construction Material Under Trade Agreements (JUN 2006)

(a) \* \* \*

*Designated country* means—

(1) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Aruba, Austria, Belgium, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, or the United Kingdom);

(2) A Free Trade Agreement country (Australia, Canada, Chile, El Salvador, Honduras, Mexico, Morocco, Nicaragua, or Singapore);

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia,

Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(4) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Costa Rica, Dominica, Dominican Republic, Grenada, Guatemala, Guyana, Haiti, Jamaica, Montserrat, Netherlands Antilles, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, or Trinidad and Tobago).

\* \* \* \* \*

Alternate I (JUN 2006). As prescribed in 225.7503(b), add the following definition of "*Mexican construction material*" to paragraph (a) of the basic clause, and substitute the following paragraphs (b) and (c) for paragraphs (b) and (c) of the basic clause:

*Mexican construction material* means a construction material that—

(1) Is wholly the growth, product, or manufacture of Mexico; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in Mexico into a new and different construction material distinct from the materials from which it was transformed.

(b) This clause implements the Balance of Payments Program by providing a preference for domestic construction material. In addition, the Contracting Officer has determined that the WTO GPA and all Free Trade Agreements except NAFTA apply to this acquisition. Therefore, the Balance of Payments Program restrictions are waived for designated country construction material other than Mexican construction material.

(c) The Contractor shall use only domestic or designated country construction material other than Mexican construction material in performing this contract, except for—(1) Construction material valued at or below the simplified acquisition threshold in Part 2 of the Federal Acquisition Regulation; or

(2) The construction material or components listed by the Government as follows:

[Contracting Officer to list applicable excepted materials or indicate "none"].

[FR Doc. E6-9500 Filed 6-15-06; 8:45 am]

BILLING CODE 5001-08-P

**DEPARTMENT OF STATE**

**48 CFR Parts 601, 611, 619, 622, 628, and 652**

[Public Notice 5444]

RIN 1400-AB90

**Rule Title: Department of State Acquisition Regulation**

**AGENCY:** Department of State.

**ACTION:** Final rule.

**SUMMARY:** This rule makes final a proposed rule issued on December 22, 2004, with several revisions. It revises the DOSAR to formalize Department policy regarding the application of the Small Business Act to contracts awarded by domestic contracting activities where contract performance takes place overseas; and, revises the coverage regarding Defense Base Act insurance. The final rule also contains several miscellaneous amendments and corrections not published on December 22, 2004, as outlined below. The Department received public comments from three sources on the proposed rule, which are discussed below.

**DATES:** *Effective Date:* This rule is effective June 16, 2006.

**FOR FURTHER INFORMATION CONTACT:** Gladys Gines, Procurement Analyst, Department of State, Office of the Procurement Executive, 2201 C Street, NW., Suite 603, State Annex Number 6, Washington, DC 20522-0602; e-mail address: [ginesgg@state.gov](mailto:ginesgg@state.gov).

**SUPPLEMENTARY INFORMATION:** The Department published a proposed rule, Public Notice 4938 at 69 FR 76660, December 22, 2004, with a request for comments, amending Parts 619, 625, 628, and 652 of Title 48 of the Code of Federal Regulations. The rule made three changes to the DOSAR: (1) Formalized policy regarding the application of the Small Business Act to contracts awarded by domestic contracting activities where contract performance takes place overseas; (2) added language to deal with U.S. Government support to contractors performing overseas; and (3) revised the coverage regarding Defense Base Act insurance. The proposed rule was discussed in detail in Public Notice 4938. The Department is now promulgating a final rule with changes from the proposed rule.

In particular, the Department is not finalizing that part of the proposed rule dealing with U.S. Government support to contractors performing overseas. The Department of Defense published a final rule on May 5, 2005 (70 FR 23790). That final rule contained a clause for use in

DOD contracts that require contractor personnel to deploy with, or otherwise provide support in the theater of operations, to U.S. military forces deployed outside the United States in contingency operations, humanitarian or peacekeeping operations, or other military operations or exercises designated by the combatant commander. The State Department's proposed rule language was, in part, based on this DOD rule. However, in the interim, the FAR Council has determined that coverage for DOD, State, and other agencies regarding contractor support outside the United States is necessary for those services that are not in direct support of a deployed military force, e.g., reconstruction efforts. A FAR case is being developed to deal with U.S. Government support to contractors operating overseas. The Department of State intends to follow the FAR language when promulgated; therefore, separate DOSAR language will not be required.

The final rule also contains several amendments and corrections that were not published as part of the proposed rule. They are as follows:

- DOSAR 601.106 is revised to add the information collection number and burden estimate for *Department of State Form DS-4053, Department of State Mentor-Protégé Program Application*.

- DOSAR 601.603-70(b) is revised to add an additional DOS office that has been delegated limited procurement authority.

- DOSAR 611.502 is corrected to read 611.501. The FAR citation of 11.502(d) is corrected to read FAR 11.501(d).

- DOSAR 619.803-71(b) is revised to change the reference to the Small Business Administration's PRO-Net database to the Central Contractor Registration (CCR) database. The CCR database is now the official source of vendor data for the Government.

- DOSAR 619.811-3 is revised to remove the reference to Alternate III of FAR clause 52.219-18, Notification of Competition Limited to Eligible 8(a) Concerns. There is no Alternate III to FAR 52.219-18.

- DOSAR 622.604-2 is revised to correct a citation.

These amendments and corrections do not affect the public, and therefore good cause exists to publish the amendments for effect without first soliciting public comment because prior public comment is unnecessary. The amendments are for the purpose of implementing internal changes and making minor corrections.

*Analysis of Comments:* The proposed rule was published for comment on

December 22, 2004 (69 FR 76660). The comment period closed on February 22, 2005. The Department received comments from three sources. The following is a synopsis of the Department's response to the public comments and any changes made to the rule as a result. The comments are grouped by topic.

#### **I. Comments Regarding the Application of the Small Business Act**

1. *Comment:* One commentator disagreed that the language of FAR 19.000(b) is ambiguous, and questioned the Department's policy of applying the Small Business Act to contracts awarded domestically and performed overseas. The commentator pointed out that no other agency has made such an interpretation.

*Response:* Nonconcur. The Department does consider the language of FAR 19.000(b), which states that FAR Part 19, with the exception of Subpart 19.6, applies "only in the United States or its outlying areas", to be ambiguous. The application of the Small Business Act to contracts awarded domestically for performance overseas has been a longstanding practice at the Department of State; this rule merely formalizes that practice.

2. *Comment:* One commentator stated that if the Department implemented the proposed language, it should adopt a regime that reflects the realities of work in a contingency operation or high risk location and that is directly related to the instant procurement requirement.

*Response:* Partially Concur. The Department already does this. DOSAR 619.201(d)(5) requires that the Office of Small and Disadvantaged Utilization (A/SDBU) review requests for acquisitions exceeding the simplified acquisition threshold (\$100,000), and task and delivery orders exceeding \$2 million. The capabilities and capacities of small businesses to perform on any given acquisition, including those in contingency or high risk locations, are taken into consideration by A/SDBU when making set-aside recommendations. Since this requirement is already in the DOSAR, no change to the rule is necessary.

3. *Comment:* One commentator expressed confusion regarding what the Department meant by the term "legislatively specified categories".

*Response:* Concur. The term "legislatively specified categories" refers to the small business programs under the Small Business Act, namely, small business concerns, HUBZone small business concerns, service-disabled veteran-owned small business concerns, 8(a) concerns, women-owned

small business concerns, small disadvantaged business concerns, and veteran-owned small business concerns. However, to avoid confusion, this term has been removed from the final rule.

4. *Comment:* One commentator recommended revising the last sentence of proposed 619.000(b) to state:

"Contracts that are both awarded and performed outside the United States should comply on a voluntary basis."

*Response:* Concur. The sentence has been revised accordingly.

5. *Comment:* One commentator questioned the practicality of the proposed rule, citing the requirement for subcontracting plans and goals and questioning how goals will be negotiated. The commentator questioned how the Department would reconcile these small business subcontracting goals with U.S. treaty obligations and the frequent U.S. foreign policy goal of requiring U.S. contractors to use host country businesses and resources.

*Response:* Nonconcur. As indicated previously, this policy is not new. In point of fact, the Department has not experienced difficulties in implementing this policy. FAR 19.702(b) states that subcontracting plans are not required for contracts that will be performed entirely outside of the United States, so contracts that are performed overseas are already exempted from the subcontracting plan requirements. Additionally, the Omnibus Diplomatic Security and Antiterrorism Act (Public Law 99-399) stipulates that ten percent of the monies appropriated for diplomatic security should, to the extent practicable, be awarded to minority owned business concerns, and another 10 percent to small businesses. In making any set-aside recommendations, A/SDBU takes into account all of the issues raised by the commentator, including any limitations that foreign governments may impose. No change to the rule is therefore necessary.

6. *Comment:* One commentator suggested that, instead of applying the policy, the Department use small business performance as a competitive evaluation factor in appropriate solicitations.

*Response:* Partially Concur. The Department already does this. DOSAR 619.705-3 encourages contracting officers to consider the adequacy of subcontracting plans and/or past performance in achieving negotiated goals, as part of the overall evaluation of proposals. Since this requirement is already in the DOSAR, no change to the rule is necessary.

7. *Comment:* One commentator recommended that the Department conduct a public meeting to discuss the rule, as well as separate this revision from the other parts of the proposed rule.

*Response:* Nonconcur. The Department does not see the need for a public meeting, nor to separate this from the rest of the rule. As indicated previously, this has been a longstanding practice and the Department has not experienced any difficulties in its implementation.

## II. Comments Regarding Defense Base Act (DBA) Insurance

1. *Comment:* One commentator expressed concern about how vendors would know, at the time of the solicitation, whether a country has a workers' compensation law.

*Response:* Concur. The Department agrees that this information should be provided by the Government in the solicitation. The solicitation provision at 652.228-70 has been revised so that the contracting officer will check a block to indicate if a country does or does not have such laws.

2. *Comment:* One commentator requested that the rule be revised so that contractors would be allowed to purchase their own Defense Base Act insurance rather than use the insurance broker that the Department has under contract.

*Response:* Nonconcur. The contract with the insurance broker is a requirements contract. This means that the Department has an obligation to require that its contractors purchase all of their DBA insurance from the insurance broker. In addition, the Department has negotiated more favorable rates since the contractor has been assured of the volume of work. Since the cost of the DBA insurance premiums is a direct reimbursable cost under the Department's contracts, contractors do not incur additional costs in procuring the DBA insurance from the Department's contractor.

3. *Comment:* All commentators, including the Department of Labor (DOL), expressed concern regarding the coverage on Section 16 of the State Department Basic Authorities Act. This statutory provision provides that the Defense Base Act shall not apply with respect to such contracts as the Secretary of State determines are contracts with persons employed to perform work for the Department on an intermittent basis for not more than 90 days in a calendar year. Specifically, commentators pointed out that the rule did not address how to request a waiver, under what circumstances a waiver

would be approved, how the Department would notify exempted individuals, and what workers' compensation coverage these exempted employees would have.

*Response:* Concur. The Department agrees that more detail is required. The language in the State Department Basic Authorities Act was added in the early 1980s, before the Department had a contract with an insurance broker for DBA insurance. At that time, contractors that had short-term contracts with the Department for overseas performance were paying relatively high DBA insurance premiums. However, State worker's compensation programs protected workers based in that State when they performed short out-of-state assignments, even foreign assignments. Since the workers had the protection of the State's workers' compensation law, additional DBA insurance was not needed for these short-term assignments.

In response to these comments, the Department has revised the language of the proposed rule to: (1) List the information that a contractor must submit in order for a waiver to be considered; (2) conditioned the waiver on the contractor's presentation of evidence of alternative workers' compensation coverage (e.g., from the State); and (3) limited the waiver to U.S. citizens and residents, not local or third country nationals. We believe that these changes address the concerns raised regarding what coverage these exempted employees would have. We also have added language that the contracting officer will provide the contractor with the original of any approved waivers, thereby addressing the concern of how contractors will be notified. The Department believes that since we now have a contract with an insurance broker for DBA insurance at reasonable rates, requests for waivers should be rare.

To further clarify DBA coverage, we have added language, based on guidance from DOL, that individuals who are self-employed (i.e., are not incorporated) do not meet the definition of an employee; therefore, no DBA insurance is required when contracting with these individuals. The language was added because the Department does contract with individuals (e.g., eligible family members) to perform tasks (e.g., prepare a monthly embassy newsletter), and the question was raised as to whether these individuals needed to procure DBA insurance.

4. *Comment:* The paragraph numbering of proposed DOSAR 628.305 is incorrect. The paragraphs are

numbered (b) through (f) instead of (a) through (e).

*Response:* Nonconcur. The DOSAR follows the FAR numbering convention. We are implementing paragraphs (b) through (e) of the FAR, but not implementing paragraph (a) of FAR 28.305, since that paragraph (a) is merely a definition of "public-work contract."

5. *Comment:* DOL supports the new definition of "covered contractor employees", as well as the acknowledgement that local and third country nationals are covered by DBA if there is no local workers' compensation law.

*Response:* Concur. No revision is necessary.

6. *Comment:* One commentator recommended that in the clause prescriptions at DOSAR 628.309-70(a) and (b), we retain the reference to 628.309(b) only in both instances, as opposed to (b)(1). By only referring to (b)(1), we have unintentionally excluded the recognized exceptions to coverage that are cross-referenced in 628.305(b)(2).

*Response:* Concur. We have revised the section accordingly.

7. *Comment:* One commentator recommended that we either delete the repetitious definition of "covered contractor employee" in the provision at 652.228-74 and simply provide a cross-reference to the language at 628.305(a), or add at the end of paragraph (a) of 652.228-74 a new sentence that recognizes the exception for intermittent employees where the Procurement Executive has granted a waiver.

*Response:* Nonconcur. We believe that it is important to have the definition of "covered contractor employee" in the solicitation provision so that vendors will not have to refer back to other parts of the regulation. At the time of the solicitation, vendors will not know whether they will have any exempted employees, since any waiver is approved after contract award. They will need to include the DBA insurance costs for those employees in terms of preparing their cost proposal. Should a waiver be approved after contract award, the contractor simply would not request reimbursement for any employees that are exempted under the waiver, since the DBA insurance costs are a direct reimbursable cost under the contract.

8. *Comment:* One commentator recommended that the Department conduct a public meeting to discuss the rule, as well as separate this revision from the other parts of the proposed rule.

*Response:* Nonconcur. The Department does not see the need for a public meeting, nor to separate this from the rest of the rule. As indicated, most of the comments regarding the DBA coverage center around the waiver for intermittent employees, and the Department believes that these waivers will be a rare occurrence.

### III. Comments Regarding U.S. Government Support to Contractors Overseas

The Department received numerous comments regarding this section of the proposed rule. However, since the Department is rescinding this part of the proposed rule, and will adopt the FAR language, no discussion of the comments is required. The public will have an opportunity to comment on the FAR language.

#### Regulatory Findings

##### *Administrative Procedure Act*

The Department is publishing this rule as a final rule with changes after it was published as a proposed rule on December 22, 2004 (see **SUPPLEMENTARY INFORMATION**).

##### *Regulatory Flexibility Act*

The Department of State, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities.

##### *Unfunded Mandates Act of 1995*

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$1 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

##### *Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign based companies in domestic and import markets.

##### *Executive Order 13132*

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement.

##### *Executive Order 12866: Regulatory Review*

This regulation has been reviewed by the Office of Management and Budget.

##### *Paperwork Reduction Act*

Information collection requirements have been approved under the Paperwork Reduction Act of 1980 by OMB, and have been assigned OMB control number 1405-0050. The information and recordkeeping requirements for Form DS-4053, *Department of State Mentor-Protégé Program Application*, have been approved by OMB under OMB Control Number 1405-0161.

##### **List of Subjects in 48 CFR Parts 601, 611, 619, 622, 628, 652**

Government procurement.

■ Accordingly, for the reasons set forth in the preamble, title 48, chapter 6 of the Code of Federal Regulations is amended as follows:

■ 1. The authority citation for 48 CFR parts 601, 611, 619, 622, 628, and 652 continues to read as follows:

**Authority:** 40 U.S.C. 486(c); 22 U.S.C. 2658.

##### **Subchapter A—General**

##### **PART 601—DEPARTMENT OF STATE ACQUISITION REGULATION SYSTEM**

■ 2. Section 601.106 is amended by adding the following sentence at the end:

##### **601.106 OMB approval under the Paperwork Reduction Act.**

\* \* \* The information and recordkeeping requirements for Form DS-4053, *Department of State Mentor-Protégé Program Application*, have been approved by OMB under OMB Control Number 1405-0161; the burden estimate is 294 hours.

■ 3. Section 601.603-70 is amended by adding a new paragraph (b)(8) to read as follows:

##### **601.603-70 Delegations of authority.**

\* \* \* \* \*

(b) \* \* \*

(8) Bureau of Administration, Office of Operations. The authority to enter into and administer simplified acquisition transactions for emergency or contingency operations necessary to protect life or federal property. This authority is limited to cases when a contracting officer in the Office of Acquisitions Management is unavailable.

##### **Subchapter B—Competition and Acquisition Planning**

##### **PART 611—DESCRIBING AGENCY NEEDS**

##### **611.502 [Redesignated as 611.501] and 611.501 [Amended]**

■ 4. Section 611.502 is redesignated as section 611.501. New section 611.501 is amended by correcting the citation at the end of paragraph (d) to read “FAR 11.501(d).”

##### **Subchapter D—Socioeconomic Programs**

##### **PART 619—SMALL BUSINESS PROGRAMS**

■ 5. A new section 619.000 is added to read as follows:

##### **619.000 Scope of part.**

(b) It is the Department's policy to provide maximum opportunities for U.S. small businesses to participate in the acquisition process. DOS contracts that are awarded domestically for performance overseas shall be subject to the Small Business Act as a matter of policy. Contracts that are both awarded and performed overseas should comply on a voluntary basis.

##### **619.803-71 [Amended]**

■ 6. Section 619.803-71 is amended by removing the words “SBA's PRO-Net database on the Internet (<http://www.sba.gov>)” and inserting the words “Central Contractor Registration database (<http://www.ccr.gov>)” in their place in paragraph (b).

##### **619.811-3 [Amended]**

■ 7. Section 619.811-3 is amended by removing the words “with its Alternate III” in paragraph (d)(3).

##### **PART 622—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS**

##### **622.604-2 [Amended]**

■ 8. Section 622.604-2 is amended by revising the citation to read “FAR 22.604-2(b)(1)” at the end.

## Subchapter E—General Contracting Requirements

### PART 628—BONDS AND INSURANCE

■ 9. Subpart 628.3 is revised to read as follows:

#### Subpart 628.3—Insurance

Sec.

628.305 Overseas workers' compensation and war-hazard insurance.

628.309 Contract clauses for workers' compensation insurance.

628.309-70 DOSAR provisions and clauses.

#### Subpart 628.3—Insurance

##### 628.305 Overseas workers' compensation and war-hazard insurance.

(b)(1) Acquisitions for services, including construction but excluding personal services contracts, requiring contractor personnel to perform work outside of the United States, shall include the contractual obligation for coverage under the Defense Base Act (42 U.S.C. Sections 1651-1654, as amended), for covered contractor employees. For the purposes of this section, "covered contractor employees" includes the following individuals:

(i) United States citizens or residents;

(ii) Individuals hired in the United States or its possessions, regardless of citizenship; and,

(iii) Local nationals and third country nationals where contract performance takes place in a country where there are no local workers' compensation laws.

(2) Individuals who are self-employed (*i.e.*, they have not incorporated) do not meet the definition of an employee. No Defense Base Act insurance is required when contracting with these individuals.

(3) Exceptions are discussed in paragraphs (e)(1) and (f) of this section.

(c) The Department of State has entered into a contract with an insurance broker and carrier to provide Defense Base Act insurance (at a fixed rate for services and construction) to cover DOS contracts that require performance overseas by covered contractor employees. Upon award of a contract that requires Defense Base Act insurance, the contracting officer shall provide the contractor with the name of the insurance broker from which the contractor must acquire the Defense Base Act insurance.

(d) The authority to recommend a waiver from the Defense Base Act, as set forth in FAR 28.305(d), is reserved to the Secretary of State.

(e)(1) The Secretary of Labor has waived the applicability of the Defense Base Act to all DOS service contracts, including construction, for contractor employees who are local nationals or

third country nationals. This waiver is conditioned on the requirement for the contractor to provide workers' compensation benefits against the risk of work injury or death and assume liability toward the employees and their beneficiaries for war-hazard injury, death, capture, or detention as prescribed by the local workers' compensation laws.

(2) In cases where a contract is performed in a country where there are no local workers' compensation laws, local and third country national contractor employees are considered to be "covered contractor employees", and the contractor shall acquire Defense Base Act insurance for those employees pursuant to the contract between the Department of State and the Defense Base Act insurance broker.

(f)(1) Section 16 of the State Department Basic Authorities Act (22 U.S.C. 2680a), as amended, provides that the Defense Base Act shall not apply with respect to such contracts as the Secretary of State determines are contracts with persons employed to perform work for the Department of State on an intermittent basis for not more than 90 days in a calendar year. The Department of State has established that "persons" includes employees hired by companies under contract with the Department. The Procurement Executive has the authority to issue the waivers for employees who work on an intermittent or short-term basis. Waivers may be issued only for employees who are U.S. citizens and residents, and only where the contractor provides evidence of alternative workers' compensation coverage for those employees. Waivers may not be issued for local or third country nationals.

(2) The contractor shall submit waiver requests to the contracting officer. The request shall contain the following information:

(i) Contract number;

(ii) Name of contractor;

(iii) Brief description of the services to be provided under the contract and country of performance;

(iv) Name and position title of individual(s);

(v) Nationality of individual(s) (must be U.S. citizen or resident);

(vi) Dates (or timeframe) of performance at the overseas location; and

(vii) Evidence of alternative workers' compensation coverage for these employees (*e.g.*, evidence that the State workers' compensation program covers workers on short-term foreign assignments).

(3) The contracting officer shall review the request for completeness and

accuracy. If the request is complete and accurate, the contracting officer shall forward the request to the Procurement Executive. If the contractor does not provide complete and accurate information, the contracting officer shall return the request to the contractor with an explanation as to what additional information is required.

(4) The Procurement Executive shall review requests for waiver forwarded by the contracting officer and either approve or disapprove the request. The Procurement Executive shall return the request indicating his/her approval or disapproval to the contracting officer. Any request that is not approved shall describe the reason(s) why the request was not approved. The contracting officer shall provide the contractor with the original of the approved or disapproved document and maintain a copy in the contract file.

##### 628.309 Contract clauses for workers' compensation insurance.

##### 628.309-70 DOSAR provisions and clauses.

(a) The contracting officer shall insert the provision at 652.228-70, Defense Base Act—Covered Contractor Employees, in all solicitations for services and construction to be performed outside of the United States.

(b) The contracting officer shall insert the clause at 652.228-71, Workers' Compensation Insurance (Defense Base Act)—Services, in solicitations and contracts for services to be performed outside of the United States when there is a reasonable expectation that offers will include covered contractor employees, as defined in 628.305(b). If the contracting officer is unsure as to whether offers will include covered contractor employees, the contracting officer shall insert the clause. If the contract is for construction, the contracting officer shall insert the clause with its Alternate I.

(c) The contracting officer shall insert the provision at 652.228-74, Defense Base Act Insurance Rates—Limitation, in solicitations for services or construction to be performed outside of the United States when there is a reasonable expectation that offers will include covered contractor employees, as defined in 628.305(b). If the contracting officer is unsure as to whether offers will include covered contractor employees, the contracting officer shall insert the provision.

**Subchapter H—Clauses and Provisions**

**PART 652—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 10. Section 652.228–70 is added to read as follows:

**652.228–70 Defense Base Act—Covered Contractor Employees.**

As prescribed in 628.309–70(a), insert the following provision:

**Defense Base Act—Covered Contractor Employees (MO/YR)**

(a) Bidders/offerors shall indicate below whether or not any of the following categories of employees will be employed on the resultant contract, and, if so, the number of such employees:

Category	Yes/No	Number
(1) United States citizens or residents		
(2) Individuals hired in the United States, regardless of citizenship		
(3) Local nationals or third country nationals where contract performance takes place in a country where there are no local workers' compensation laws.	.....	Local nationals: _____ Third country nationals: _____
(4) Local nationals or third country nationals where contract performance takes place in a country where there are local workers' compensation laws.	.....	Local nationals: _____ Third country nationals: _____

(b) The contracting officer has determined that for performance in the country of [contracting officer insert country of performance and check the appropriate block below]

Workers' compensation laws exist that will cover local nationals and third country nationals.

Workers' compensation laws do not exist that will cover local nationals and third country nationals.

(c) If the bidder/offeror has indicated "yes" in block (a)(4) of this provision, the bidder/offeror shall not purchase Defense Base Act insurance for those employees. However, the bidder/offeror shall assume liability toward the employees and their beneficiaries for war-hazard injury, death, capture, or detention, in accordance with the clause at FAR 52.228–4.

(d) If the bidder/offeror has indicated "yes" in blocks (a)(1), (2), or (3) of this provision, the bidder/offeror shall compute Defense Base Act insurance costs covering those employees pursuant to the terms of the contract between the Department of State and the Department's Defense Base Act insurance carrier at the rates specified in DOSAR 652.228–74, Defense Base Act Insurance Rates—Limitation. If DOSAR provision 652.228–74 is not included in this solicitation, the bidder/offeror shall notify the contracting officer before the closing date so that the solicitation can be amended accordingly.

(End of provision)

■ 11. Section 652.228–71 is revised to read as follows:

**652.228–71 Workers' Compensation Insurance (Defense Base Act)—Services.**

As prescribed in 628.309–70(b), insert the following clause:

**Workers' Compensation Insurance (Defense Base Act)—Services (MO/YR)**

(a) This clause supplements FAR 52.228–3. For the purposes of this clause, "covered contractor employees" includes the following individuals:

- (1) United States citizens or residents;

(2) Individuals hired in the United States or its possessions, regardless of citizenship; and

(3) Local nationals and third country nationals where contract performance takes place in a country where there are no local workers' compensation laws.

(b) The Contractor shall procure Defense Base Act (DBA) insurance pursuant to the terms of the contract between the Department of State and the Department's DBA insurance carrier for covered contractor employees, unless the Contractor has a DBA self-insurance program approved by the Department of Labor. The Contractor shall submit a copy of the Department of Labor's approval to the contracting officer upon contract award, if applicable.

(c) The current rate under the Department of State contract is [contracting officer insert rate] of compensation for services.

(d) The Contractor shall insert a clause substantially the same as this in all subcontracts. The Contractor shall require that subcontractors insert a similar clause in any of their subcontracts.

(e) Should the rates for DBA insurance coverage increase or decrease during the performance of this contract, the contracting officer shall modify this contract accordingly.

(f) The Contractor shall demonstrate to the satisfaction of the contracting officer that the equitable adjustment as a result of the insurance increase or decrease does not include any reserve for such insurance. Adjustment shall not include any overhead, profit, general and administrative expenses, etc.

(g)(1) Section 16 of the State Department Basic Authorities Act (22 U.S.C. 2680a), as amended, provides that the Defense Base Act shall not apply with respect to such contracts as the Secretary of State determines are contracts with persons employed to perform work for the Department of State on an intermittent basis for not more than 90 days in a calendar year. "Persons" includes individuals hired by companies under contract with the Department. The Procurement Executive has the authority to issue the waivers for Contractor employees who work on an intermittent or short-term basis.

(2) The Contractor shall submit waiver requests to the contracting officer. The request shall contain the following information:

- (i) Contract number;
- (ii) Name of Contractor;
- (iii) Brief description of the services to be provided under the contract and country of performance;
- (iv) Name and position title of individual(s);
- (v) Nationality of individual(s) (must be U.S. citizen or U.S. resident);
- (vi) Dates (or timeframe) of performance at the overseas location; and,
- (vii) Evidence of alternative workers' compensation coverage for these employees (e.g., evidence that the State workers' compensation program covers workers on short-term foreign assignments).

(3) The contracting officer shall provide to the Contractor the original of the approved or disapproved document and maintain a copy in the contract file.

(End of clause)

**Alternate I. (MO/YR)** If the contract is for construction, as prescribed in 628.309–70(b), substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) The current rate under the Department of State contract is [contracting officer insert rate] of compensation for construction.

■ 12. Section 652.228–74 is revised to read as follows:

**652.228–74 Defense Base Act Insurance Rates—Limitation.**

As prescribed in 628.309–70(c), insert the following provision:

**Defense Base Act Insurance Rates—Limitation (MO/YR)**

(a) The Department of State has entered into a contract with an insurance carrier to provide Defense Base Act (DBA) insurance to Department of State covered contractor employees at a contracted rate. For the purposes of this provision, "covered

contractor employees" includes the following individuals:

- (1) United States citizens or residents;
- (2) Individuals hired in the United States or its possessions, regardless of citizenship; and
- (3) Local nationals and third country nationals where contract performance takes place in a country where there are no local workers' compensation laws.

(b) In preparing the cost proposal, the bidder/offeror shall use the following rates in computing the cost for DBA insurance:

Services @[contracting officer insert current rate] of compensation; or

Construction @[contracting officer insert current rate] of compensation.

(c) Bidders/offerors shall compute the total compensation (direct salary plus differential, but excluding per diem, housing allowance and other miscellaneous allowances) to be paid to covered contractor employees and the cost of the DBA insurance in their bid/offer using the foregoing rate. Bidders/offerors shall include the estimated DBA insurance costs in their proposed total fixed price or estimated cost. However, the DBA insurance costs shall be identified in a separate line item in the bid/proposal.

(End of provision)

#### 652.228-75 and 652.228-76 [Removed]

■ 13. Sections 652.228-75 and 652.228-76 are removed.

Dated: June 6, 2006.

**Corey M. Rindner,**

*Procurement Executive, Bureau of Administration, Department of State.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 060608158-6158-01; I.D. 051806E]

RIN 0648-AU47

#### Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Emergency Rule

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

**ACTION:** Temporary rule; emergency interim rule and request for comments.

**SUMMARY:** NMFS is implementing an observer service provider program for the Atlantic sea scallop (scallop) fishery including criteria for becoming an approved observer service provider, observer certification criteria, decertification criteria, and observer

deployment logistics. Through this emergency rule, NMFS is re-activating the industry-funded observer program implemented under the Atlantic Sea Scallop Fishery Management Plan (FMP) through a scallop total allowable catch (TAC) and days-at-sea (DAS) set-aside program that helps vessel owners defray the cost of carrying observers. Under this emergency action, scallop vessel owners, operators, or vessel managers are required to procure certified fishery observers for specified scallop fishing trips from an approved observer service provider. This emergency rule maintains the existing requirements for scallop vessel owners to pay for observers whether or not scallop TAC or DAS set-aside is available.

**DATES:** Effective from June 16, 2006 through December 13, 2006. Comments must be received at the appropriate address or fax number (see **ADDRESSES**) by 5 p.m., local time, on July 17, 2006.

**ADDRESSES:** Written comments should be submitted by any of the following methods:

- Mail: Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope, "Comments on Scallop Emergency Action."
- Email: [ScallopAU47@noaa.gov](mailto:ScallopAU47@noaa.gov)
- Fax: (978) 281-9135
- Electronically through the Federal e-Rulemaking portal: <http://www.regulations.gov>.

Written comments regarding the burden-hour estimate or other aspects of the collection-of-information requirement contained in this proposed rule should be submitted to the Regional Administrator at the address above and by e-mail to [David\\_Rostker@omb.eop.gov](mailto:David_Rostker@omb.eop.gov), or fax to (202) 395-7285.

**FOR FURTHER INFORMATION CONTACT:** Peter W. Christopher, Fishery Policy Analyst, 978-281-9288; fax 978-281-9135.

**SUPPLEMENTARY INFORMATION:** Since 1999, NMFS has required scallop vessels operating in Sea Scallop Access Areas (Access Areas) to pay for observer coverage. The Scallop FMP requires vessel owners to provide advance notification to NMFS of upcoming scallop trips. This information is used to select trips on which an at-sea observer will be deployed. Observers were deployed through a contractual arrangement between NMFS and an observer provider until June 2004. The contractual arrangement was not renewed at that time because of

unresolved concerns regarding use of a sole contractor to administer the industry-funded observer program. The prior contract arrangement had enabled vessel owners to pay the observer contractor directly for observer deployments, with details of the observer deployment requirements specified through the contract. The expiration of the contract arrangement eliminated the mechanism that allowed vessel owners to make these payments and, in the absence of this contractual program, NMFS did not require vessel owners to pay for the cost of observers. Thus, NMFS has not utilized the observer set-aside program since 2004.

Observer coverage in the scallop fishery is necessary to monitor the bycatch of finfish, including yellowtail flounder, skates, monkfish, cod, and other species. Monitoring of yellowtail flounder bycatch in the Scallop Access Areas within the year-round closed areas under the Northeast (NE) Multispecies FMP is of particular concern because the scallop fishery is constrained by a fishery-specific TAC of yellowtail flounder, which is part of the stock-wide yellowtail flounder TACs set by the NE Multispecies FMP to achieve specified mortality targets for the species. Observer coverage is also needed to monitor interactions of the scallop fishery with endangered and threatened sea turtles.

Through fiscal year (FY) 2005, the Northeast Fisheries Science Center (NEFSC) funded the necessary levels of observer coverage in the sea scallop fishery to evaluate bycatch of groundfish and sea turtles by utilizing observer funding that was carried over from FY 2004. However, in FY 2006 the NEFSC's level of funding for the observer program is sufficient to provide only minimal observer coverage in the scallop fishery. The NEFSC did not receive its observer program budget until February 2006 and has been working to reconcile the shortfall ever since. In April 2006 NMFS determined that it could not reconcile the reduced level of observer coverage in the scallop fishery with available budget. Consequently, without the program established through this emergency rule, observer coverage would be constrained to levels below those recommended in the Scallop FMP for precise estimates of yellowtail flounder bycatch TAC in Access Areas. In addition, the lower level of coverage could make it more difficult to monitor and estimate interactions between the scallop fishery and sea turtles in the Mid-Atlantic, particularly during the June through October period, when such interactions are most likely.