

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: August 8, 2008.

**David I. Maurstad,**

*Federal Insurance Administrator of the National Flood Insurance Program, Department of Homeland Security, Federal Emergency Management Agency.*

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 204 and 252

RIN 0750-AF98

#### Defense Federal Acquisition Regulation Supplement; U.S.-International Atomic Energy Agency Additional Protocol (DFARS Case 2004-D003)

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

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

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to add a contract clause requiring a contractor to notify DoD if the contractor is required to report its activities under the U.S.-International Atomic Energy Agency Additional Protocol. The clause would be included in contracts for research and development or major defense acquisition programs involving fissionable materials, other radiological source materials, or technologies directly related to nuclear power production.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before October 17, 2008, to be considered in the formation of the final rule.

**ADDRESSES:** You may submit comments, identified by DFARS Case 2004-D003, using any of the following methods:

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

- E-mail: [dfars@osd.mil](mailto:dfars@osd.mil). Include DFARS Case 2004-D003 in the subject line of the message.

- Fax: 703-602-7887.

- Mail: Defense Acquisition Regulations System, Attn: Ms. Michele Peterson, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062.

- Hand Delivery/Courier: Defense Acquisition Regulations System, Crystal

Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202-3402.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** Ms. Michele Peterson, 703-602-0311.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

Under the U.S.-International Atomic Energy Agency Additional Protocol (U.S.-IAEA AP), the United States is required to declare a wide range of public and private nuclear-related activities to the IAEA and potentially provide access to IAEA inspectors for verification purposes. The Department of Commerce published a proposed rule at 73 FR 43568 on July 25, 2008, to implement the U.S.-IAEA AP.

The U.S.-IAEA AP permits the United States unilaterally to declare exclusions from inspection requirements for activities with direct national security significance. This proposed rule contains a contract clause requiring a DoD contractor to notify the applicable DoD program manager if the contractor is required to report its activities under the U.S.-IAEA AP. Upon such a notification, DoD will determine if access may be granted to IAEA inspectors, or if a national security exclusion should be applied.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

##### B. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the proposed rule applies only to those DoD contractors involved in certain nuclear-related activities. The proposed rule provides for exceptions to inspection requirements that might otherwise apply to such contractors, if DoD determines that an exception is necessary in the interest of national security. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2004-D003.

##### C. Paperwork Reduction Act

This proposed rule contains a new information collection requirement. In compliance with 44 U.S.C. Chapter 35, DoD invites comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology.

*Title:* Defense Federal Acquisition Regulation Supplement (DFARS); U.S.-International Atomic Energy Agency Additional Protocol.

*Type of Request:* New requirement.

*Number of Respondents:* 300.

*Responses per Respondent:* 1.

*Annual Responses:* 300.

*Average Burden per Response:* 1 hour.

*Annual Burden Hours:* 300.

*Needs and Uses:* DoD needs this information to provide for protection of information or activities with national security significance. DoD program managers will use the information to determine if IAEA inspectors may be granted access to a contractor's facility, or if a national security exclusion should be applied.

*Affected Public:* Businesses or other for-profit and not-for-profit institutions.

*Frequency:* On occasion.

*Respondent's Obligation:* Required to obtain or retain benefits.

Written comments and recommendations on the proposed information collection should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget (OMB), Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, with a copy to the Defense Acquisition Regulations System, Attn: Ms. Michele Peterson, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062. Comments can be received from 30 to 60 days after the date of this notice, but comments to OMB will be most useful if received by OMB within 30 days after the date of this notice.

**List of Subjects in 48 CFR Parts 204 and 252**

Government procurement.

**Michele P. Peterson,**

*Editor, Defense Acquisition Regulations System.*

Therefore, DoD proposes to amend 48 CFR parts 204 and 252 as follows:

1. The authority citation for 48 CFR parts 204 and 252 continues to read as follows:

**Authority:** 41 U.S.C. 421 and 48 CFR Chapter 1.

**PART 204—ADMINISTRATIVE MATTERS**

2. Sections 204.470 through 204.470–3 are added to read as follows:

**204.470 U.S.-International Atomic Energy Agency Additional Protocol.****204.470–1 General.**

Under the U.S.-International Atomic Energy Agency Additional Protocol (U.S.-IAEA AP), the United States is required to declare a wide range of public and private nuclear-related activities to the IAEA and potentially provide access to IAEA inspectors for verification purposes.

**204.470–2 National security exclusion.**

(a) The U.S.-IAEA AP permits the United States unilaterally to declare exclusions from inspection requirements for activities, or locations or information associated with such activities, with direct national security significance.

(b) In order to ensure that all relevant activities are reviewed for direct national security significance, both current and former activities, and associated locations or information, are to be considered for applicability for a national security exclusion.

(c) If a DoD program manager receives notification from a contractor that the contractor is required to report its activities in accordance with the U.S.-IAEA AP, the program manager will—

(1) Conduct a security assessment to determine if, and by what means, access may be granted to the IAEA; or

(2) Provide written justification to the component or agency treaty office for a national security exclusion, in accordance with DoD Instruction 2060 XX, Application of the National Security Exclusion to U.S.-IAEA Safeguards.

**204.470–3 Contract clause.**

Use the clause at 252.204–7XXX, Contractor Notification of Requirement to Report Activities Under the U.S.-International Atomic Energy Agency

Additional Protocol, in solicitations and contracts for research and development or major defense acquisition programs involving—

(a) Any fissionable materials (e.g., uranium, plutonium, neptunium, thorium, americium);

(b) Other radiological source materials; or

(c) Technologies directly related to nuclear power production, including nuclear or radiological waste materials.

**PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

3. Section 252.204–7XXX is added to read as follows:

**252.204–7XXX Contractor Notification of Requirement to Report Activities Under the U.S.-International Atomic Energy Agency Additional Protocol.**

As prescribed in 204.470–3, use the following clause:

**CONTRACTOR NOTIFICATION OF REQUIREMENT TO REPORT ACTIVITIES UNDER THE U.S.-INTERNATIONAL ATOMIC ENERGY AGENCY ADDITIONAL PROTOCOL (XXX 2008)**

(a) If the Contractor is required to report its activities in accordance with Department of Commerce regulations (15 CFR part 781 *et seq.*) or Nuclear Regulatory Commission regulations (10 CFR part 75) in order to implement the declarations required by the U.S.-International Atomic Energy Agency Additional Protocol (U.S.-IAEA AP), the Contractor shall—

(1) Immediately provide written notification to the following DoD Program Manager:

[Contracting Officer to insert Program Manager's name, mailing address, e-mail address, telephone number, and facsimile number];

(2) Include in the notification—

(i) Where the DoD contract activities or information are located relative to the activities or information to be declared to the Department of Commerce or the Nuclear Regulatory Commission; and

(ii) If or when any current or former DoD contract activities and the activities to be declared to the Department of Commerce or the Nuclear Regulatory Commission have been or will be co-located or located close enough to one another to result in disclosure of the DoD activities during an IAEA inspection or visit; and

(3) Provide a copy of the notification to the Contracting Officer.

(b) After receipt of a notification submitted in accordance with paragraph (a) of this clause, the DoD Program Manager will—

(1) Conduct a security assessment to determine if and by what means access may be granted to the IAEA; or

(2) Provide written justification to the component or agency treaty office for a national security exclusion, in accordance with DoD Instruction 2060 XX, Application of the National Security Exclusion to U.S.-IAEA Safeguards. DoD will notify the Contractor if a national security exclusion is applied.

(c) If the DoD Program Manager determines that a security assessment is required—

(1) DoD will, at a minimum—

(i) Notify the Contractor that DoD officials intend to conduct an assessment of vulnerabilities to IAEA inspections or visits;

(ii) Notify the Contractor of the time at which the assessment will be conducted, at least 30 days prior to the assessment;

(iii) Provide the Contractor with advance notice of the credentials of the DoD officials who will conduct the assessment; and

(iv) To the maximum extent practicable, conduct the assessment in a manner that does not impede or delay operations at the Contractor's facility; and

(2) The Contractor shall provide access to the site and shall cooperate with DoD officials in the assessment of vulnerabilities to IAEA inspections or visits.

(d) Following a security assessment of the Contractor's facility, DoD officials will notify the Contractor as to—

(1) Whether the Contractor's facility has any vulnerabilities where potentially declarable activities under the U.S.-IAEA AP are taking place;

(2) Whether additional security measures are needed; and

(3) Whether DoD will apply a national security exclusion.

(e) If DoD applies a national security exclusion, the Contractor shall not grant access to IAEA inspectors.

(f) If DoD does not apply a national security exclusion, the Contractor shall apply managed access to prevent disclosure of program activities, locations, or information in the U.S. declaration.

(g) The Contractor shall incorporate the substance of this clause, including this paragraph (g), in all subcontracts that are subject to the provisions of the U.S.-IAEA AP.

(End of clause)

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