

**FOR FURTHER INFORMATION CONTACT:** Ms. Meredith Murphy, 703-602-1302.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This DFARS case is initiated to partially implement section 812 of the National Defense Authorization Act for Fiscal Year 2010. Section 812 is entitled "Revision of Defense Supplement Relating to Payment of Costs Prior to Definitization." Section 812 has been partially implemented in DFARS Case 2008-D034, and this case implements the balance of section 812, which makes the limitations on payment of costs prior to definitization of unpriced change orders applicable to all categories of undefinitized contractual actions, "including undefinitized task orders and delivery orders." The implementation is accomplished by specifically including the category of "task orders and delivery orders" in the definition of "contract action" at DFARS 217.7401.

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**

DoD does not expect that this interim rule will 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 rule does not impose any additional requirements on small businesses. Therefore, an initial Regulatory Flexibility Analysis has not been performed. DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2009-D035) in correspondence.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the interim rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C., *et seq.*

**D. Determination To Issue an Interim Rule**

A determination has been made under the authority of the Secretary of Defense

(DoD) that urgent and compelling circumstances exist to promulgate this interim rule without prior opportunity for public comments. This action is necessary because section 812 of the National Defense Authorization Act for Fiscal Year 2010 became effective upon enactment. The date of enactment was October 28, 2009. However, pursuant to 41 U.S.C. 418b, DoD will consider public comments received in response to this interim rule in the formation of the final rule.

**List of Subjects in 48 CFR Part 217**

Government procurement.

**Ynette R. Shelkin,**

*Editor, Defense Acquisition Regulations System.*

■ Therefore, 48 CFR part 217 is amended as follows:

**PART 217—SPECIAL CONTRACTING METHODS**

■ 1. The authority citation for 48 CFR part 217 continues to read as follows:

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

■ 2. Section 217.7401 is amended by revising paragraph (a)(2) and adding paragraph (a)(3) to read as follows:

**217.7401 Definitions.**

\* \* \* \* \*

(a) \* \* \*

(2) It includes task orders and delivery orders.

(3) It does not include change orders, administrative changes, funding modifications, or any other contract modifications that are within the scope and under the terms of the contract, *e.g.*, engineering change proposals, value engineering change proposals, and over and above work requests as described in Subpart 217.77. For policy relating to definitization of change orders, see 243.204-70.

\* \* \* \* \*

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**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 237 and 252**

**RIN 0750-AG52**

**Defense Federal Acquisition Regulation Supplement (DFARS); DFARS Case 2009-D017, Continuation of Essential Contractor Services**

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

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

**SUMMARY:** DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to add policy and a contract clause requiring that contractors providing essential contractor services, as determined by the requiring activity, shall be prepared to continue such services during periods of crisis.

**DATES:** *Effective Date:* March 5, 2010.

*Comment Date:* Comments on this interim rule should be submitted in writing to the address shown below on or before May 4, 2010, to be considered in the formation of the final rule.

**ADDRESSES:** You may submit comments, identified by DFARS Case 2009-D017, 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 2009-D017 in the subject line of the message.

*Fax:* 703-602-0350.

*Mail:* Defense Acquisition Regulations System, Attn: Mr. Julian E. Thrash, OUSD(AT&L)DPAP(DARS), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

*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:** Mr. Julian E. Thrash, 703-602-0310.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This action is necessary to ensure that essential contractor services are not interrupted. The current changing threat environment, particularly under the additional challenges caused by such crises as hurricanes, tornados,

earthquakes, blizzards, floods, or pandemic influenza, has increased the need for continuity of operations capabilities and plans that enable agencies to continue their essential functions across a broad spectrum of emergencies and crises. DoD has established a new requirement for contractors to submit their plans to ensure continuation of essential contractor services that support mission-essential functions during a crisis situation.

DoD Instruction (DoDI) 3020.37, Continuation of Essential DoD Contractor Services During Crises, provides the basis for the definition of "essential contractor service," which means a service provided by a firm or individual under contract to DoD to support mission-essential functions, such as support of vital systems, including ships owned, leased, or operated in support of military missions or roles at sea; associated support activities, including installation, garrison, and base support services; and similar services provided to foreign military sales customers under the Security Assistance Program. Services are essential if the effectiveness of defense systems or operations has the potential to be seriously impaired by the interruption of such services, as determined by the appropriate functional commander or equivalent. As a general rule, the designation of services as essential contractor services will not apply to an entire contract but will apply only to those service functions that have been specifically identified as essential contractor services by the functional commander or equivalent.

DoD is adding a new Subpart 237.76, Continuation of Essential Contractor Services, and the new clause at 252.237-7023, Continuation of Essential Contractor Services. This clause is required in solicitations and contracts for services that are in support of mission-essential functions. In accordance with FAR 1.108(d)(3), contracting officers may, at their discretion, include these changes in any existing contract with appropriate consideration.

This regulatory action was 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

DoD does not expect this interim 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 rule allows equitable adjustment for additional costs that are incurred during a crisis situation. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2009-D017) in correspondence.

### C. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies, because this interim rule contains an information collection requirement. DoD invites comments on the following aspects of the interim rule: (a) Whether the 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 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. The following is a summary of the information collection requirement.

*Title:* Defense Federal Acquisition Regulation Supplement (DFARS) 2009-D017; Continuation of Essential Contractor Services.

*Type of Request:* New collection.

*Number of Respondents:* 7,600.

*Responses per Respondents:* 1.25.

*Annual Responses:* 9,500.

*Average Burden per Response:* 2.

*Total Annual Burden Hours:* 19,000.

*Needs and Uses:* DoD needs this information to ensure essential contractor functions are performed for continuity of operations.

*Affected Public:* Businesses or other for-profit institutions.

*Frequency:* On occasion.

*Respondent's Obligation:* Required to obtain contract.

Written comments and recommendations on the information collection proposal should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, with a copy to the Defense Acquisition Regulations System, Attn: Mr. Julian

Thrash, OUSD(AT&L)DPAP(DARS), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

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.

To request more information on this information collection proposal or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Acquisition Regulations System, Attn: Mr. Julian Thrash.

### D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comments. This action is necessary to ensure that essential contractor services are not interrupted by crises such as those caused by hurricanes, tornados, earthquakes, blizzards, floods, or pandemic influenza. DoD Instruction (DoDI) 3020.37, Continuation of Essential DoD Contractor Services During Crises, established the basis for implementing policy, assigning responsibilities, and prescribing procedures, to provide a reasonable assurance for the continuation of essential contractor services (*see <http://www.dtic.mil/whs/directives/corres/pdf/302037p.pdf>*). This DoDI requires DoD components to rely on the most effective mix of the total force, cost and other factors considered, including Active, Reserve, civilian, host-nation, and contract resources necessary to fulfill assigned peacetime and wartime missions. DoD must take action now to ensure essential contractor services are ready to support a total force response. The impact to operations posed by not issuing an interim rule presents an unacceptable risk to DoD's mission to provide a total force response during crisis situations.

This interim rule clarifies the limited use of the clause for only those essential contractor services determined by the functional commander, or equivalent, to be necessary to prevent the impairment of defense systems or operations. Furthermore, this interim rule also clarifies that an equitable adjustment may be appropriate for an increase or decrease in the cost incurred in continuing the performance of essential contractor services during a crisis situation.

**List of Subjects in 48 CFR Parts 237 and 252**

Government procurement.

**Ynette R. Shelkin,**

*Editor, Defense Acquisition Regulations System.*

■ Therefore, 48 CFR parts 237 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 237 and 252 continues to read as follows:

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

**PART 237—SERVICE CONTRACTING**

■ 2. Subpart 237.76 is added to read as follows:

**SUBPART 237.76—CONTINUATION OF ESSENTIAL CONTRACTOR SERVICES**

Sec.

237.7600 Scope.  
237.7601 Definitions.  
237.7602 Policy.  
237.7603 Contract clause.

**SUBPART 237.76—CONTINUATION OF ESSENTIAL CONTRACTOR SERVICES****237.7600 Scope.**

This subpart prescribes procedures for the acquisition of essential contractor services, which support mission-essential functions.

**237.7601 Definitions.**

As used in this subpart—

*Essential contractor service* means a service provided by a firm or individual under contract to DoD to support mission-essential functions, such as support of vital systems, including ships owned, leased, or operated in support of military missions or roles at sea; associated support activities, including installation, garrison, and base support services; and similar services provided to foreign military sales customers under the Security Assistance Program, that are essential if the effectiveness of defense systems or operations has the potential to be seriously impaired by the interruption of these services, as determined by the appropriate functional commander or equivalent.

*Mission-essential functions* means those organizational activities that must be performed under all circumstances to achieve DoD component missions or responsibilities, the failure of which would significantly affect DoD's ability to provide vital services or exercise authority, direction, and control.

**237.7602 Policy.**

(a) Contractors providing services designated as essential contractor services by a requiring activity shall be prepared to continue providing such

services, in accordance with the terms and conditions of their contracts, during periods of crisis. As a general rule, the designation of services as essential contractor services will not apply to an entire contract but will apply only to those service functions that have been specifically identified as essential contractor services by the functional commander or equivalent.

(b) Contractors who provide Government-determined essential contractor services shall have a written plan to ensure the continuation of these services in crisis situations. Contracting officers shall consult with a functional manager to assess the sufficiency of the contractor-provided written plan. Contractors will activate such plans only during periods of crisis, as directed by the appropriate functional commander or equivalent.

(c) The contracting officer shall follow the procedures at PGI 207.105(b)(20)(C) in preparing an acquisition plan.

**237.7603 Contract clause.**

Use the clause at 252.237–7023, Continuation of Essential Contractor Services, in solicitations and contracts for services that are in support of mission-essential functions.

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

■ 2. Section 252.237–7023 is added to read as follows:

**252.237–7023, Continuation of Essential Contractor Services.**

As prescribed in 237.7603, use the following clause:

**Continuation of Mission Essential Functions (Date)**

(a) The Government has identified all or a portion of the services performed under this contract as essential contractor services in support of mission-essential functions. The contractor-provided services that have been determined to be essential contractor services in support of mission-essential functions are listed in attachment \_\_\_\_\_.

Mission-Essential Contractor Services, dated \_\_\_\_\_.

(b) The Contractor shall provide a written plan for continuing the performance of essential contractor services identified in paragraph (a) of this section during a crisis.

(1) The Contractor shall identify in the plan the provisions made for the acquisition of essential personnel and resources, if necessary, for continuity of operations for up to 30 days or until normal operations can be resumed;

(2) The plan must, at a minimum, address—

(i) Challenges associated with maintaining essential contractor services during an extended event, such as a pandemic that occurs in repeated waves;

(ii) The time lapse associated with the initiation of the acquisition of essential personnel and resources and their actual availability on site;

(iii) The components, processes, and requirements for the identification, training, and preparedness of personnel who are capable of relocating to alternate facilities or performing work from home;

(iv) Any established alert and notification procedures for mobilizing identified

“essential contractor service” personnel; and

(v) The approach for communicating expectations to contractor employees regarding their roles and responsibilities during a crisis.

(3) The Contractor shall maintain and update its plan as necessary and adhere to its requirements throughout the contract term. The Contractor shall not materially alter the plan without the Contracting Officer's consent.

(4) As directed by the Contracting Officer, the Contractor shall participate in training events, exercises, and drills associated with Government efforts to test the effectiveness of continuity of operations procedures and practices.

(c) In the event the Contractor anticipates not being able to perform any of the essential contractor services identified in paragraph (a) of this section during a crisis situation, the Contractor shall notify the Contracting Officer or other designated representative as expeditiously as possible and use its best efforts to cooperate with the Government in the Government's efforts to maintain the continuity of operations.

(d) The Government reserves the right in such crisis situations to use Federal employees of other agencies or contract support from other contractors or to enter into new contracts for essential contractor services. Any new contracting efforts would be conducted in accordance with OFPP letter, “Emergency Acquisitions” May 2007 and FAR and DFARS subparts 18 and 218, respectively, or any other subsequent emergency guidance issued.

(e) Changes. The Contractor shall segregate and separately identify all costs incurred in continuing performance of essential services in a crisis situation. The Contractor shall notify the Contracting Officer of an increase or decrease in costs within ninety days after continued performance has been directed by the Contracting Officer, or within any additional period that the Contracting Officer approves in writing, but not later than the date of final payment under the contract. The Contractor's notice shall include the Contractor's proposal for an equitable adjustment and any data supporting the increase or decrease in the form prescribed by the Contracting Officer. The parties shall negotiate an equitable price adjustment to the contract price as soon as is practicable after receipt of the Contractor's proposal.

The Contractor shall include the substance of this clause, including this paragraph (f), in subcontracts for the essential services.

(End of Clause)

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