

Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364).

(End of clause)

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 207 and 237

RIN 0750-AF87

#### Defense Federal Acquisition Regulation Supplement; Functions Exempt From Private Sector Performance (DFARS Case 2007-D019)

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

**ACTION:** Final rule.

**SUMMARY:** DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to address procedures for preparation of the written determination required by the Federal Acquisition Regulation (FAR), that none of the functions to be performed by contract are inherently governmental.

**DATES:** *Effective Date:* January 10, 2008.

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael Benavides, Defense Acquisition Regulations System, OUSD (AT&L) DPAP(DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone 703-602-1302; facsimile 703-602-7887. Please cite DFARS Case 2007-D019.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This final rule amends the DFARS to address procedures for preparation of the written determination required by FAR 7.503(e), that none of the functions to be performed by contract are inherently governmental. The rule requires DoD personnel to prepare the determination using DoD Instruction 1100.22, Guidance for Determining Workforce Mix, and to also include a determination that none of the functions to be performed are exempt from private sector performance, as addressed in DoD Instruction 1100.22.

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

##### B. Regulatory Flexibility Act

This rule will not have a significant cost or administrative impact on

contractors or offerors, or a significant effect beyond the internal operating procedures of DoD. Therefore, publication for public comment under 41 U.S.C. 418b is not required. However, DoD will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should cite DFARS Case 2007-D019.

##### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any 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 207 and 237

Government procurement.

**Michele P. Peterson,**

*Editor, Defense Acquisition Regulations System.*

■ Therefore, 48 CFR parts 207 and 237 are amended as follows:

■ 1. The authority citation for 48 CFR parts 207 and 237 continues to read as follows:

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

#### PART 207—ACQUISITION PLANNING

■ 2. Section 207.503 is amended by adding paragraph (e) to read as follows:

##### 207.503 Policy.

(e) The written determination required by FAR 7.503(e), that none of the functions to be performed by contract are inherently governmental—

(i) Shall be prepared using DoD Instruction 1100.22, Guidance for Determining Workforce Mix; and

(ii) Shall include a determination that none of the functions to be performed are exempt from private sector performance, as addressed in DoD Instruction 1100.22.

\* \* \* \* \*

#### PART 237—SERVICE CONTRACTING

■ 3. Section 237.102 is added to read as follows:

##### 237.102 Policy.

(c) In addition to the prohibition on award of contracts for the performance of inherently governmental functions, contracting officers shall not award contracts for functions that are exempt from private sector performance. See 207.503(e) for the associated documentation requirement.

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 209, 217, and 246

RIN 0750-AF86

#### Defense Federal Acquisition Regulation Supplement; Ship Critical Safety Items (DFARS Case 2007-D016)

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

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

**SUMMARY:** DoD has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 130 of the National Defense Authorization Act for Fiscal Year 2007. Section 130 requires DoD to establish a quality control policy for the procurement, modification, repair, and overhaul of ship critical safety items.

**DATES:** *Effective date:* January 10, 2008.

*Comment date:* Comments on the interim rule should be submitted in writing to the address shown below on or before March 10, 2008, to be considered in the formation of the final rule.

**ADDRESSES:** You may submit comments, identified by DFARS Case 2007-D016, 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 2007-D016 in the subject line of the message.
- *Fax:* 703-602-7887.
- *Mail:* Defense Acquisition Regulations System, Attn: Mr. Michael Benavides, 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:** Mr. Michael Benavides, 703-602-1302.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This interim rule implements Section 130 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364). Section 130 requires DoD to prescribe in regulations a quality

control policy for the procurement of ship critical safety items and the modification, repair, and overhaul of those items.

Section 802 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) contained a similar requirement applicable to aviation critical safety items, which is implemented in DFARS 209.270–1 through 209.270–4. This interim rule amends DFARS 209.270–1 through 209.270–4 and related text to address ship critical safety items as well as aviation critical safety items. The rule identifies the responsibilities of the head of the design control activity with regard to quality control of critical safety items and related services.

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 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 primarily relates to internal DoD responsibilities for ensuring quality control of ship critical safety items. In addition, the Navy already has implemented stringent quality control programs with regard to such items. 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 2007–D016.

### C. Paperwork Reduction Act

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

### D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements Section 130 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364). Section 130 requires DoD to prescribe in regulations a quality control policy for the procurement of

ship critical safety items and the modification, repair, and overhaul of those items. Comments received in response to this interim rule will be considered in the formation of the final rule.

### List of Subjects in 48 CFR Parts 209, 217, and 246

Government procurement.

**Michele P. Peterson,**

*Editor, Defense Acquisition Regulations System.*

■ Therefore, 48 CFR parts 209, 217, and 246 are amended as follows:

■ 1. The authority citation for 48 CFR parts 209, 217, and 246 continues to read as follows:

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

### PART 209—CONTRACTOR QUALIFICATIONS

■ 2. Sections 209.202, 209.270, and 209.270–1 are revised to read as follows:

#### 209.202 Policy.

(a)(1) Except for aviation or ship critical safety items, obtain approval in accordance with PGI 209.202(a)(1) when establishing qualification requirements. See 209.270 for approval of qualification requirements for aviation or ship critical safety items.

#### 209.270 Aviation and ship critical safety items.

##### 209.270–1 Scope.

This section—

(a) Implements—

(1) Section 802 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136); and

(2) Section 130 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364); and

(b) Prescribes policy and procedures for qualification requirements in the procurement of aviation and ship critical safety items and the modification, repair, and overhaul of those items.

■ 3. Section 209.270–2 is amended by revising the definition of “Design control activity” and adding a definition of “Ship critical safety item” to read as follows:

##### 209.270–2 Definitions.

\* \* \* \* \*

*Design control activity*—(1) With respect to an aviation critical safety item, means the systems command of a military department that is specifically responsible for ensuring the air worthiness of an aviation system or equipment in which an aviation critical safety item is to be used; and

(2) With respect to a ship critical safety item, means the systems command of a military department that is specifically responsible for ensuring the seaworthiness of a ship or ship equipment in which a ship critical safety item is to be used.

*Ship critical safety item* means any ship part, assembly, or support equipment containing a characteristic the failure, malfunction, or absence of which could cause—

(1) A catastrophic or critical failure resulting in loss of or serious damage to the ship; or

(2) An unacceptable risk of personal injury or loss of life.

■ 4. Section 209.270–3 is revised to read as follows:

##### 209.270–3 Policy.

(a) The head of the contracting activity responsible for procuring an aviation or ship critical safety item may enter into a contract for the procurement, modification, repair, or overhaul of such an item only with a source approved by the head of the design control activity.

(b) The approval authorities specified in this section apply instead of those otherwise specified in FAR 9.202(a)(1), 9.202(c), or 9.206–1(c), for the procurement, modification, repair, and overhaul of aviation or ship critical safety items.

■ 5. Section 209.270–4 is amended by revising paragraph (a) to read as follows:

##### 209.270–4 Procedures.

(a) The head of the design control activity shall—

(1) Identify items that meet the criteria for designation as aviation or ship critical safety items. See additional information at PGI 209.270–4;

(2) Approve qualification requirements in accordance with procedures established by the design control activity; and

(3) Qualify and identify aviation and ship critical safety item suppliers and products.

\* \* \* \* \*

### PART 217—SPECIAL CONTRACTING METHODS

■ 6. Section 217.7502 is amended in paragraph (b)(2) by revising the last sentence to read as follows:

#### 217.7502 General.

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \* See 209.270 for requirements applicable to replenishment parts for aviation or ship critical safety items.

\* \* \* \* \*

**PART 246—QUALITY ASSURANCE**

■ 7. Section 246.407 is amended by revising paragraph (S-70) to read as follows:

**246.407 Nonconforming supplies or services.**

\* \* \* \* \*

(S-70) The head of the design control activity is the approval authority for acceptance of any nonconforming aviation or ship critical safety items or nonconforming modification, repair, or overhaul of such items (see 209.270). Authority for acceptance of minor nonconformances in aviation or ship critical safety items may be delegated as determined appropriate by the design control activity. See additional information at PGI 246.407.

■ 8. Section 246.504 is revised to read as follows:

**246.504 Certificate of conformance.**

Before authorizing a certificate of conformance for aviation or ship critical safety items, obtain the concurrence of the head of the design control activity (see 209.270).

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**DEPARTMENT OF DEFENSE****Defense Acquisition Regulations System****48 CFR Parts 239 and 252**

RIN 0750-AF52

**Defense Federal Acquisition Regulation Supplement; Information Assurance Contractor Training and Certification (DFARS Case 2006-D023)**

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

**ACTION:** Final rule.

**SUMMARY:** DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to address training requirements that apply to contractor personnel who perform information assurance functions for DoD. Contractor personnel accessing information systems must meet applicable training and certification requirements.

**DATES:** *Effective Date:* January 10, 2008.

**FOR FURTHER INFORMATION CONTACT:** Ms. Felisha Hitt, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone 703-602-0310;

facsimile 703-602-7887. Please cite DFARS Case 2006-D023.

**SUPPLEMENTARY INFORMATION:****A. Background**

This final rule implements requirements of the Federal Information Security Management Act of 2002 (44 U.S.C. 3541, *et seq.*); DoD Directive 8570.1, Information Assurance Training, Certification, and Workforce Management; and DoD Manual 8570.01-M, Information Assurance Workforce Improvement Program. The rule contains a clause for use in contracts involving contractor performance of information assurance functions. The clause requires the contractor to ensure that personnel accessing information systems are properly trained and certified.

DoD published a proposed rule at 71 FR 2644 on January 22, 2007. Seven sources submitted comments on the proposed rule. A discussion of the comments is provided below:

1. *Comment:* One respondent recommended a change to DFARS 239.7102-3(b) to allow contractors to meet information assurance training certification requirements in a manner suitable to the service or agency chief information officer.

*DoD Response:* Basic information assurance training certification requirements have been established by the Assistant Secretary of Defense for Networks and Information Integration/DoD Chief Information Officer. These requirements are applicable DoD-wide. However, in accordance with 44 U.S.C. 3541, *et seq.*, and DoD policy, departments and agencies may establish additional requirements as needed.

2. *Comment:* One respondent stated that DoD Manual 8570.01-M, Information Assurance Workforce Improvement Program, already requires contractors to comply with DoD Directive 8570.1, Information Assurance Training, Certification, and Workforce Management.

*DoD Response:* DoD Directive 8570.1 requires the development of DFARS clauses to reflect the requirements of the Directive relating to contracts and contractors. This DFARS rule provides a uniform means of specifying the training and certification requirements in DoD contracts.

3. *Comment:* One respondent suggested that DoD address some of the information assurance training restrictions encountered by capable contractors attempting to gain compliance with the new training and certification requirements.

*DoD Response:* DoD is not aware of any information assurance training

restrictions. DoD training is provided by the National Defense University and other training sources such as the Defense Information Systems Agency computer-based training module. Training is also available in multiple commercial venues outside of the DoD training structure.

4. *Comment:* One respondent expressed concern as to how the new training and certification requirements will affect competition of future service contracts, specifically when the contractor already has its personnel trained and certified on unique programs and systems and other competitors have not worked on those systems. The respondent further questioned whether the Government will fund and provide training and certification to contractors who wish to compete for follow-on service contracts.

*DoD Response:* Having an appropriately trained workforce is one of many ways prospective contractors can become competitive for any acquisition. Information assurance training is available through a variety of sources and is available to all prospective contractors. In accordance with FAR 31.205-44, the costs of training and education that are related to the field in which the employee is working or may reasonably be expected to work are allowable (with exceptions).

5. *Comment:* One respondent questioned how the new certification requirements reconcile with Section 813 of the National Defense Authorization Act for Fiscal Year 2001 (Pub. L. 106-398).

*DoD Response:* Section 813 of Public Law 106-398 discusses the appropriate use of requirements for experience and education of contractor personnel in the procurement of information technology services. DoD needs the assurance that a contractor is qualified to perform the information system security functions required to protect DoD networks, as permitted by Section 813(b). The training certifications required by this DFARS rule provide that assurance to DoD.

6. *Comment:* One respondent suggested that DFARS 239.7103(b) be clarified to identify any thresholds, breadth of coverage, and applicability, and include examples of when to use the clause.

*DoD Response:* DFARS 239.7103(b) specifies that the clause at 252.239-7001 must be used in solicitations and contracts involving performance of information assurance functions as described in DoD 8570.01-M. The contracting officer will rely on the requiring activity to identify information assurance requirements and