



Government Contracts Advisory

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Department of Defense Interim Rule Would Establish New Processes, Requirements and Remedies for Contracts Involving Private Security Functions

On August 19, 2011, the Department of Defense (DoD) issued an interim rule to amend the Defense Federal Acquisition Regulation (DFARS) – DFARS Case 2011-D023 - to establish new minimum processes and requirements for contractors performing private security functions. 76 Fed. Reg. 52133. The DoD did so without following the normal process that would enable the FAR Council to solicit and consider industry comments. The interim rule defines "private security functions" as activities engaged in by a contractor, including (1) the guarding of personnel, facilities, designated sites, or property of a Federal agency, the contractor or subcontractor, or a third party; and (2) any other activity for which personnel are required to carry weapons in the performance of their duties. This interim rule implements various sections of past National Defense Authorization Acts that pertain to private security contractors (PSCs) and purports to focus solely on implementing statutorily mandated contractual language and a contract clause applicable to DoD contracts.

This Interim Rule pursues an initiative that was begun by DoD in 2005 with the issuance of DoD I 3020.41 and an earlier interim rule issued in 2006. The thrust of the earlier activity was to shift to contractors substantial portions of the burden of providing protection for their overseas operations, including those in combat theaters. We filed objections to these changes in responsibilities because, in our view, such changes threatened to place contractors in unprecedented combat roles that may not be supportable under existing law.

Under this new interim rule, contractor employees responsible for performing private security functions would be required to comply with orders, directives, and instructions for, among other things:

- (1) Registering, processing, accounting for, managing, overseeing, and keeping appropriate records of personnel performing private security functions;
- (2) Authorizing and accounting for weapons to be carried by or available to be used by contractor personnel;
- (3) Registering and identifying armored vehicles, helicopters, and other military vehicles operated by contractors performing private security functions;
- (4) Reporting incidents in which (a) a weapon is discharged by contractor personnel, (b) contractor personnel are attacked,

killed, or injured, (c) persons are killed or injured or property is destroyed as a result of actions by contractor personnel, (d) a weapon is discharged against contractor personnel or contractor personnel believe a weapon was discharged, and (e) active, non-lethal countermeasures (other than the discharge of a weapon) are employed by contractor personnel in response to a perceived threat.

Contractors also would be required to brief their employees on applicable U.S., host nation and international laws, treaties and regulations regarding the performance of private security functions and relevant DoD rules and regulations. In addition, contractor cooperation with government investigations would be mandatory.

The interim rule would give the government new remedies. Contracting Officers (COs) would be permitted to direct contractors, at the contractors' own expense, to remove and replace contractor personnel who fail to comply with or violate applicable requirements. COs could terminate for default contractors who refuse to comply with government direction to remove or replace such personnel. The interim rule directs COs to report PSC performance failures to cognizant suspension and debarment officials. COs also would be required to include a contractor's failure to comply with the requirements of the rule in past performance databases and to consider such failures when making contractor responsibility determinations. In the case of award-fee contracts, the interim rule would require COs to consider a contractor's failure to comply with the requirements of the rule and would permit such failures to be a basis for reducing or denying award fees, or for recovering previously paid award fees.

For contractors, this interim rule has several practical implications. First, the rule so broadly defines "private security function" that virtually any activity in which an employee carries a weapon would be subject to the rule's mandates, even if the activity of the contractor is unrelated to providing security to personnel. As in the case of the earlier interim rule, the new interim rules does not seem to differentiate between the defensive protection of the contractor's work and functions that are "combat" in nature.

Moreover, the rule's requirements would apply not just in traditional areas of contingency operations but also in designated areas of "other military operations or exercises." Under the broad definitions, the interim rule would apply, for example, to a supplier of construction material if the supplier subcontracts with a PSC to protect its supplies and/or employees during transportation, warehousing and construction operations even though the supplier is not performing typical private security functions.

The interim rule also would require that contractors create and maintain databases to track employees who perform private security functions – including contractors who merely subcontract to have this work performed, as well as to track weapons and other equipment. Further, although the interim rule provides remedies for failures by the contractor to comply with the various record keeping and reporting requirements, the rule is silent about whether and how a contractor must provide notice to the government about its record keeping. The lack of clarity regarding record keeping details and reporting requirements seems likely to spawn disputes should the government seek to enforce newly authorized remedies. Permitting the government to recover previously paid award fees seems particularly draconian and is inconsistent with the notion that award fees are based on cost, schedule, and performance assessments during specified periods. FAR 16.401(e). The broad scope of this rule – which includes contractors who do not perform typical private security functions – creates potential liability for contractors supporting contingency

and other military operations. New training, record keeping and reporting requirements are certain to add cost and create substantial administrative burdens for contractors.

We believe the implications of this interim rule require a response. We intend to submit comments and invite readers of this Alert to contact the authors with suggestions that we may include in our submission. Comments on the interim rule are due on or before October 18, 2011, and we would ask that suggested topics for our response be provided to us no later than September 30.

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