



**COALITION PROVISIONAL AUTHORITY ORDER NUMBER 3 (REVISED)
(AMENDED)**

WEAPONS CONTROL

Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003),

Recognizing that weapons control is necessary in order to ensure a secure environment for the people of Iraq and to promote public order and safety,

I hereby promulgate the following:

**Section 1
Definitions**

- 1) "Coalition Forces" includes any and all personnel, including contractors, from Coalition Member States under the command or direction of the Coalition Provisional Authority or the Coalition Force Commander,
- 2) "Criminal Proceedings Law" means Criminal Proceedings Law No. 23 of 1971, as amended, including amendments contained in CPA Memorandum Number 3, Criminal Procedures, CPA/MEM/18 June 2003/03.
- 3) "Firearms" mean automatic (7.62mm (.308 caliber) and under) and non-automatic rifles, shotguns and pistols for personal use, and associated ammunition. Such firearms are subject to licensing by the Ministry of Interior. Firearms do not include weapons rendered permanently inoperable, replicas, antiques or ceremonial weapons.
- 4) "Iraqi security forces" include any and all Iraqi personnel from the Iraqi Police Service, Iraqi Civil Defense Corps, Facilities Protection Service, Iraqi Border and Customs Police or any organization whose mission includes physical security that may be established by the CPA or under Iraqi law subsequent to the signing of this Order.
- 5) "Iraqi Weapons Code 1992" means the Law of Arms No. (13) of 1992, as amended by Law No. (15) of 2000.
- 6) "Military Weapons" are any weapons systems, ammunition or explosives or explosive devices of any type designed for use by any military forces but not including "Firearms" as defined in this Order. Military Weapons do not include weapons



rendered permanently inoperable, replicas, antiques or ceremonial weapons. Military Weapons include "Special Category Weapons."

- 7) "Penal Code" means the Penal Code Law No. (111) of 1969, as amended, including Law (1) 2002 and CPA Order Number 7, Penal Code, CPA/ORD/9 June 2003/07.
- 8) "Public places" mean state-owned property, places of worship, holy sites, hospitals, schools, gathering places such as town squares and parks, streets and such other places that may be designated by the CPA,
- 9) "Special Category Weapons" are any explosives, improvised explosives or incendiary devices, grenades, rockets, shells or mines and any means of discharging such items, crew-served weapons of any kind, and Man Portable Air Defense Systems of any kind.

Section 2

Relation to Existing Law

- 1) Article 6.2 of the Iraqi Weapons Code 1992 is hereby amended to suspend the exemption set out therein for employees of the governmental and social sector.
- 2) Article 8.2 of the Iraqi Weapons Code 1992, concerning licensing requirements, is amended to allow possession of no more than 50 rounds of ammunition for any licensed firearm.
- 3) In all other respects, including the penalties provisions (with the exception of the death penalty) the Iraqi Weapons Code 1992 remains in effect unless specifically inconsistent with this Order, in which event this order will take precedence.
- 4) CPA/ORD/23 May 2003/03 is superceded by this Order.

Section 3

Authorized Possession and Use of Firearms and Military Weapons

- 1) The following individuals are authorized to possess and use issued Firearms and Military Weapons, including Special Category Weapons:
 - a) Coalition Forces,
 - b) Iraqi security forces, and

- c) groups and individuals who have been authorized to carry weapons in the course of their duties by the CPA or Commander, Coalition Forces or their duly authorized delegates.
- 2) Private security firms may be licensed by the Ministry of the Interior to possess and use licensed Firearms and Military Weapons, excluding Special Category Weapons, in the course of their duties, including in public places.
- 3) Individuals may be authorized to possess Firearms for personal use by obtaining authorization from the Ministry of Interior, as described in Section 5 of this Order.

Section 4 General Prohibitions

- 1) Unauthorized possession, transport, distribution, or use of Firearms or Military Weapons, including Special Category Weapons, is prohibited.
- 2) Other than as provided for in Section 3, no person shall possess or use any Firearms or Military Weapons, including Special Category Weapons, in public places.
- 3) Other than by Coalition Forces and duly authorized Iraqi security forces whose duty position requires the carrying of concealed weapons in the course of their duties, the carrying of concealed weapons is prohibited.
- 4) All sales of Firearms and Military Weapons are prohibited, except as authorized by the CPA.

Section 5 Weapons Authorization and Licensing

Individuals not otherwise authorized to possess or use Firearms or Military Weapons by this or any other CPA instrument may apply for weapons authorization. The licensing requirements for weapons set forth in the Iraqi Weapons Code 1992 and administered by the Ministry of Interior remain in effect. Firearms for personal use located in homes or places of business under rescinded Order Number 3 (CPA/ORD/23 May 2003/03) are subject to these licensing provisions. The Ministry of Interior shall issue procedures and establish timelines for licensing such Firearms. Possession of unlicensed Firearms in one's home or place of business for personal use, as permitted under rescinded Order Number 3, will continue to be authorized until the new procedures for licensing such Firearms become effective in accordance with a Public Notice to that effect.

Section 6

Penalties

- 1) Firearms or Military Weapons, including Special Category Weapons, possession or use of which is unauthorized, are subject to confiscation by Coalition Forces and other relevant authorities.
- 2) Any person in violation of this Order may be detained, arrested, and prosecuted. If convicted, all lawful punishments may be adjudged, and the following terms of imprisonment will apply:
 - a. For the conviction of unauthorized possession, transport, distribution, sale, or use of a Military Weapon, excluding Special Category Weapons, a minimum term of imprisonment of 6 months and maximum term of imprisonment of life imprisonment.
 - b. For the conviction of possession, transport, distribution, sale, or use of a Special Category Weapon, a minimum term of imprisonment of 30 years, unless the proviso at paragraph 3 applies, and maximum term of imprisonment of life imprisonment. Where a person may be convicted of another offense relating to the use of a Special Category Weapon, the mandatory minimum term of imprisonment of 30 years, unless the proviso at paragraph 3 applies, shall also be applied to that conviction.
- 3) The mandatory minimum term of imprisonment of 30 years is subject to the proviso that in exceptional circumstances relating to the offender or the offense, the punishment may be reduced. The transport, distribution, sale or use of a Special Category Weapon shall never constitute exceptional circumstances.
- 4) Except as provided in paragraphs 2 and 3 of this Section, sentences for convictions of offenses under this Order or the Iraqi Weapons Code 1992 and which involve Military Weapons, including Special Category Weapons, may not be reduced as a result of mitigating excuse pursuant to paragraph 130 of the Penal Code. Persons convicted of committing these offenses shall not be eligible for Conditional Discharge as set forth in paragraph 331 of the Criminal Proceedings Law.
- 5) For the purposes of this Order, sentences of life imprisonment shall mean the remaining natural life of the person.

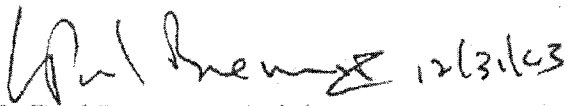
- 6) Authorized officials of the CPA or Coalition Forces may grant a certificate of immunity from prosecution for offenses under this Order or the Iraqi Weapons Code 1992 to a person who provides information that leads to the apprehension and conviction of persons in relation to whom information is sought by the CPA and Coalition Forces, or that results in the prevention of a significant crime against public security, the CPA or Coalition Forces.

Section 7 Administrative Instructions

The interim Minister of the Interior, in consultation with the CPA Director of Interior Policy, may issue such Administrative Instructions as are necessary to carry out this Order.

Section 8 Entry into Force

This Order shall enter into force on the date of signature.


L. Paul Bremer, Administrator
Coalition Provisional Authority



DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
1000 NAVY PENTAGON
WASHINGTON, DC 20350-1000

SECNAVINST 5500.29C
N09N
27 August 2003

SECNAV INSTRUCTION 5500.29C

From: Secretary of the Navy
To: All Ships and Stations

Subj: USE OF DEADLY FORCE AND THE CARRYING OF FIREARMS BY
PERSONNEL OF THE DEPARTMENT OF THE NAVY IN CONJUNCTION
WITH LAW ENFORCEMENT, SECURITY DUTIES AND PERSONAL
PROTECTION

Ref: (a) OPNAVINST 5530.14C
(b) OPNAVINST 5580.1A
(c) OPNAVINST 3591.1C
(d) MCO 3574.2J
(e) MCO 5500.6F
(f) CJCSI 3121.01 (S) (NOTAL)

Encl: (1) DoD Directive 5210.56 of 1 Nov 01

1. Purpose. To implement enclosure (1).

2. Cancellation. SECNAVINST 5500.29B.

3. Applicability. This instruction applies to all Department of the Navy military and civilian personnel or contract security forces of the Department of the Navy who carry firearms as specified in enclosure (1). For contract security forces, the applicable contents of this instruction will be invoked in the contractual agreement between the Department of the Navy and the other contracting party.

4. Policy.

a. Department of the Navy personnel regularly engaged in law enforcement and security duties shall be armed when actually engaged in such duties. Such personnel may not carry firearms when in off-duty status, unless they are otherwise assigned to do so by higher authority. Prior to being armed, they shall be qualified per references (a) through (e), as appropriate. Individuals will remain so qualified during the period in which they are armed. Commanders and commanding officers may revoke an individual's authorization to carry a firearm as a result of a safety, legal, or policy violation.

b. The Director, Naval Criminal Investigative Service (DIRNCIS), is delegated authority to arm appropriately trained NCIS personnel engaged in law enforcement, security, and counterintelligence duties. He may further delegate this authority to Assistant Directors, Deputy Assistant Directors, and Special Agents in Charge. The Director, NCIS may authorize NCIS personnel to carry non-government-issued handguns for use in the performance of duties. Except for NCIS special agents, authorization to carry a non-government weapon shall include a termination date, not later than one year from the date of the authorization and must be revalidated each year. The authorization shall also advise the individual that only government provided ammunition may be used in the weapon while the individual is "performing official duties." All such handguns shall be certified as meeting Department of the Navy and NCIS safety and operational standards.

c. The Chief of Naval Operations (CNO) and the Commandant of the Marine Corps (CMC) are delegated authority to arm appropriately trained military and civilian personnel of the Navy and Marine Corps assigned to law enforcement, security, and counterintelligence duties. They may further delegate this authority.

d. NCIS personnel engaged in law enforcement, security, and counterintelligence duties and Navy/Marine Corps Criminal Investigators assigned to NCIS, and Marine Corps Military Police Investigators shall be issued credentials that reflect their authority to carry firearms. The carrying of firearms by NCIS personnel outside the Continental United States (CONUS) shall be consistent with the applicable Status of Forces Agreement and or host nation law and regulations.

e. Authority to arm military or civilian personnel of the Navy for personal protection outside the CONUS, under paragraph E1.1.3 of enclosure (1), is delegated to the CNO, Vice Chief of Naval Operations (VCNO), and U.S. Navy Unified Command Component Commanders.

f. Authority to arm military or civilian personnel of the Marine Corps for personal protection outside the CONUS, under paragraph E1.1.3 of enclosure (1), is delegated to the CMC and

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the Assistant Commandant of the Marine Corps (ACMC).

g. Military and civilian personnel of the Department of the Navy not involved in full time law enforcement, security or counter-intelligence duties shall not carry government-issued firearms for personal protection within the CONUS or when they have been provided an official protective service detail, unless specifically authorized by the CNO, VCNO, CMC, ACMC, or DIRNCIS, respectively.

h. Military and civilian personnel of the Navy and Marine Corps who are involved in full time law enforcement, security, or counterintelligence duties shall not carry government-issued firearms for personal protection within the CONUS when not actually engaged in law enforcement, security, or counter-intelligence duties, unless specifically authorized by the CNO, VCNO, CMC, or ACMC, respectively.

i. All military and civilian personnel of the Navy and Marine Corps authorized under this instruction to carry firearms must receive annual firearms safety instruction, weapons qualification, sustainment training, and instruction regarding the use of deadly force required by references (a) through (e), as appropriate. DIRNCIS must ensure weapons qualification and training requirements for personnel assigned to NCIS, who are authorized to carry weapons, meet federal law enforcement standards.

(1) Firearms qualifications for Navy military and civilian personnel, who will be armed for personal protection shall at a minimum, consist of the course of fire in reference (c).

(2) Marine Corps military and civilian personnel shall qualify per reference (d).

j. Navy military and civilian personnel, and Marine Corps military personnel whose duties require the carrying of concealed firearms and Marine Corps civilian personnel whose duties require the carrying of firearms shall be issued OPNAV Form 5512/2, which shall be signed by the appropriate authorizing official (commanding officer or individual designated in writing by the commanding officer). This form shall be in the possession of the individual while armed. The

authorization must be withdrawn whenever the person to whom issued no longer meets the training, qualification or proficiency requirements, or no longer needs to be armed.

(1) The exceptions are NCIS personnel engaged in law enforcement, security, and counterintelligence duties, Marine Corps criminal investigators, Marine Military Police Investigators and Navy and Marine Corps protective service personnel, whose credentials authorize the carrying of firearms.

k. This instruction does not apply to Navy and Marine Corps personnel performing operational missions. Personnel engaged in those missions overseas are subject to the Standing Rules of Engagement in reference (f) or mission specific rules of engagement. Domestic military activities will be conducted under authority in this instruction, unless other superseding rules are specifically identified.

l. The Gun Control Act of 1968, as amended (18 U.S.C. § 922), makes it a felony for a person to ship, transport, possess, or receive firearms or ammunition if that person has been convicted of a misdemeanor crime of domestic violence. Per paragraph E1.1.10 of enclosure (1), there is no exception for law enforcement, security, and counterintelligence personnel.

m. Navy and Marine Corps personnel engaged in law enforcement and security duties shall refer to enclosure (2) of DOD Directive 5210.56 (enclosure (1)) for guidance on the use of deadly force. Paragraphs E2.1.2.3.2 of enclosure (1) provide guidance for the use of deadly force to protect DoD assets specifically designated as "vital to national security." DoD assets shall be specifically designated as "vital to national security" only when their loss, damage, or compromise would seriously jeopardize the fulfillment of a national defense mission. The CNO and the CMC are given the authority to designate those assets under their cognizance as "vital to national security." Combatant Commanders have this authority for assets under their cognizance; authority may be delegated to the Naval Component Commander. Whenever naval assets are designated as being "vital to the national security" or asset designation status changes, the Naval Component Commander will keep the CNO or CMC informed of these changes.

n. Paragraph E2.1.2.3.5 of enclosure (1) provides guidance

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for U.S. military forces to protect critical public infrastructure.

5. Action. CNO and CMC will issue or revise as necessary all orders, regulations and instructions to comply with the provisions of this instruction.

6. Form. OPNAV 5512/2 (Rev 6-81), Authorization to Carry Firearms, S/N 0107-LF-055-1400, may be obtained at <http://forms.daps.mil>.

Distribution:

SNDL Parts 1 and 2

MARCORPS Codes PCN 71000000000 and 71000000100



Department of Defense DIRECTIVE

NUMBER 5210.56

November 1, 2001

Administrative Reissuance Incorporating Change 1, January 24, 2002

ASD(C3I)

SUBJECT: Use of Deadly Force and the Carrying of Firearms by DoD Personnel
Engaged in Law Enforcement and Security Duties

References: (a) DoD Directive 5210.56, "Use of Force by Personnel Engaged in Law Enforcement and Security Duties," February 25, 1992 (hereby canceled)
(b) Section 1585 of title 10, United States Code
(c) Title 14, Code of Federal Regulations, Part 108.11, "Carriage of Weapons," current edition
(d) Section 1472 of title 49, United States Code
(e) Section 922(g)(9) of title 18, United States Code

1. REISSUANCE AND PURPOSE

This Directive reissues reference (a) and implements the provisions of reference (b) that govern the carrying of firearms *and the use of deadly force* by DoD military and civilian personnel performing law enforcement and security duties, and references (c) and (d) that apply to the carrying of firearms by DoD military and civilian personnel aboard commercial aircraft.

2. APPLICABILITY AND SCOPE

This Directive:

2.1. Applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of

Defense (hereafter referred to collectively as "the DoD Components"). The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps.

2.2. Authorizes DoD personnel to carry firearms while engaged in law enforcement or security duties, protecting personnel, vital Government assets, or guarding prisoners.

2.3. Does not apply to DoD personnel engaged in military operations and subject to authorized rules of engagement, or assigned to duty in the following areas or situations, as defined by an executive order or a DoD Directive:

2.3.1. In a combat zone in time of war.

2.3.2. In a designated hostile fire area when rules of engagement apply, or when the combatant commander issues operations orders setting forth different criteria.

2.3.3. Under the operational control of another Federal Agency carrying firearms in support of the mission, subject to the approval and requirements of both the Federal Agency and the DoD Component.

2.3.4. Civil disturbance mission area.

2.3.5. Military Services personnel performing training missions.

2.4. Requires that the principles defined in this Directive on use of deadly force with firearms be applied equally to personnel using any weapon or equipment which, when properly employed in their intended application, would exert deadly force.

2.5. Requires establishing criteria for compliance with its provisions by contract security forces.

3. DEFINITIONS

3.1. Armed. Equipped with a loaded firearm.

3.2. Deadly Force. Force that a person uses causing, or that a person knows or should know would create a substantial risk of causing, death or serious bodily harm. Deadly force shall be used only as set forth in enclosure 2.

3.3. Defense Criminal Investigative Organizations (DCIOs). The Naval Investigative Service Command, the Air Force Office of Special Investigations, the Army Criminal Investigations Command, and the Defense Criminal Investigative Service, and any successor organizations.

3.4. Imminent. The determination of whether a particular threat or danger is "imminent" is based on an assessment of all the circumstances known to DoD personnel at the time. "Imminent" does not necessarily mean "immediate" or "instantaneous."

3.5. Locking Device for Firearms

3.5.1. A device that when installed on a firearm and secured by a key or mechanically, electronically, or electro-magnetically operated combination lock prevents the firearm from being discharged without first deactivating or removing the device by means of a key or mechanically, electronically, or electro-magnetically operated combination lock; or

3.5.2. A mechanical, electrical, or electro-magnetic locking mechanism incorporated into the design of the firearm that prevents discharge of the weapon by anyone not having access to the key or other device designed to unlock and allow discharge of the firearm.

3.6. Serious Bodily Harm. Does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to the internal organs, and other life-threatening injuries.

4. POLICY

It is DoD policy:

4.1. To limit and control the carrying of firearms by DoD military and civilian personnel. The authorization to carry firearms shall be issued only to qualified personnel when there is a reasonable expectation that life or DoD assets will be jeopardized if firearms are not carried. Evaluation of the necessity to carry a firearm shall be made considering this expectation weighed against the possible consequences of accidental or indiscriminate use of firearms. DoD personnel regularly engaged in law enforcement or security duties shall be armed. In addition, safety lock devices and instructions for their proper use shall be provided with all firearms issued to such personnel who have been authorized to retain firearms at their residence or

non-government locations. Procedures on authorization to carry and the carrying of firearms are in enclosure 1.

4.2. That DoD military and civilian personnel engaged in law enforcement or security duties shall avoid the use of force where they can carry out their duties without resorting to its use. In such cases where the use of force is warranted, DoD personnel shall use the minimum amount of force necessary to reach their objective. Deadly force shall only be used as described in enclosure 2.

4.3. That when personnel must carry firearms aboard aircraft, either on their person or in baggage, commercial airline or military passenger service representatives shall be notified before the flight departure. Personnel shall carry written authorization to carry the firearm and proper identification to include a full-face photograph. If the firearm is carried in baggage, the weapon shall be unloaded and securely locked in the baggage. Procedures for the authorization and carrying of firearms on commercial and/or military aircraft are in enclosure 3.

5. RESPONSIBILITIES

5.1. The Assistant Secretary of Defense for Command, Control, Communications and Intelligence shall monitor compliance with this Directive as it relates to counterintelligence, law enforcement and security matters.

5.2. The Inspector General of the Department of Defense shall monitor compliance with this Directive as it relates to criminal investigative policy and law enforcement functions in the DCIOs.

5.3. The Heads of the DoD Components shall:


5.3.1. Authorize DoD personnel to carry firearms in accordance with this Directive. The Director of Administration and Management shall also exercise this authority for OSD and the Defense Legal Services Agency.

5.3.2. Establish, as needed, implementing procedures to ensure compliance with this Directive, and to ensure that all bargaining obligations have been satisfied prior to implementation.

5.3.3. Ensure that local commanders develop criteria, consistent with this Directive and local law, for the carrying of firearms and the use of force by contract security forces.

6. EFFECTIVE DATE

This Directive is effective immediately.



Paul Wolfowitz
Deputy Secretary of Defense

Enclosures - 3

- E1. Guidance on the Arming of DoD Law Enforcement and Security Personnel
- E2. Guidance on Use of Deadly Force
- E3. Guidance for DoD Personnel Who Carry Firearms While Aboard Commercial and Military Aircraft

E1. ENCLOSURE 1

GUIDANCE ON THE ARMING OF DoD LAW ENFORCEMENT AND SECURITY
PERSONNEL

E1.1.1. Authorizations to carry firearms shall be granted by the Heads of the DoD Components or their designees. Personnel to be issued a firearm shall be briefed thoroughly on their individual responsibilities and shall receive the mandatory training as required by this Directive.

E1.1.2. An authorization to carry firearms may be granted to personnel authorized to be engaged and in fact engaged in the following activities:

E1.1.2.1. Law enforcement activities, including investigations of espionage, sabotage, and other serious crimes in which DoD programs, personnel, or property are the victim; in cases where DoD personnel are involved in serious crimes; or where investigations are conducted in hazardous areas or under hazardous circumstances.

E1.1.2.2. Protecting classified information, systems, or equipment.

E1.1.2.3. Protecting the President of the United States, high ranking Government officials, DoD personnel, or foreign dignitaries.

E1.1.2.4. Protecting DoD assets and personnel.

E1.1.2.5. Guarding prisoners.

E1.1.3. DoD military and civilian personnel may be authorized to carry firearms for personal protection in overseas areas when the DoD Component headquarters intelligence center identifies a credible and specific threat against DoD personnel in that regional area. Firearms shall not be issued indiscriminately for that purpose. The Heads of the DoD Components, or their designees, must approve authorizations. Before individuals are authorized to carry a firearm for protection under this Directive, the Heads of the DoD Components or their designees must evaluate the probability of the threat in a particular location, the adequacy of support by DoD protective personnel, the adequacy of protection by U.S. or host nation authorities, and the effectiveness of other means to avoid personal attacks.

E1.1.4. Except in situations requiring immediate action to protect life or vital Government assets, all authorizations to carry firearms by personnel shall be in writing, signed by the appropriate authorizing official, and issued only to personnel who

satisfactorily have completed qualification training, proficiency testing, and use of deadly force training within the preceding 12 months. Written authorization does not have to be maintained by the person while the weapon is carried except as noted in paragraph 4.3., above, of this Directive. As a minimum, annual firearm qualification training is also required of all personnel issued and maintaining firearms. Records of individual qualification results must be retained for as long as the individual possesses a firearm.

E1.1.5. DoD military and civilian personnel regularly assigned to law enforcement or security duties may be given a continuing authorization to carry firearms provided they pass the required yearly qualification standards. Personnel assigned firearms for personal protection under the provisions of paragraph E1.1.3., above, shall be authorized to carry firearms on a case-by-case basis only for the duration of specific assignments or threats. Procedures shall be established to ensure that any individual being issued a firearm has written authorization in effect before the actual issuance of the weapon.

E1.1.6. Firearms shall be returned to a designated control point on completion of the assignment for storage and accountability in accordance with Component procedures. The Secretaries of the Military Departments and the Inspector General, Department of Defense may authorize exceptions to this requirement for the DCIOs.

E1.1.7. An individual authorized to carry a firearm is responsible for ensuring proper safeguards to prevent loss, theft, or unauthorized use. All firearms issued to DoD security or law enforcement personnel, who have been authorized to retain such firearms at their residence or

non-government locations, shall be accompanied by safety lock devices and instructions for their proper use.

E1.1.8. The Heads of the DoD Components, or their designees, shall authorize weapons to be carried off an installation by DoD personnel engaged in official duties.

E1.1.9. Only Government-owned and issued weapons and ammunition are authorized to be carried by DoD personnel while performing official duties. The Secretaries of the Military Departments and the Inspector General, Department of Defense, may authorize an exception to this requirement for the DCIOs.

E1.1.10. The Domestic Violence Amendment to the Gun Control Act (reference (e)) makes it a felony for anyone who has ever been convicted of a misdemeanor crime of domestic violence at any time prior to or after the passage of the September 30, 1996 law to possess any firearm or ammunition. There is no exception for law enforcement and security personnel. For any individual who has ever been convicted of a misdemeanor crime of domestic violence within the meaning of this statute, continued retention of any firearm or ammunition, whether Government-issued or privately owned, is illegal and may subject that individual to felony criminal penalties. Penalties may include a sentence of imprisonment of up to 10 years and a fine of up to \$250,000, as well as administrative actions.

E1.1.10.1. Law enforcement or security personnel who have qualifying convictions:

E1.1.10.1.1. May not possess any firearm or ammunition.

E1.1.10.1.2. Must immediately return any Government-issued firearm or ammunition to their supervisor.

E2. ENCLOSURE 2

GUIDANCE ON USE OF DEADLY FORCE

E2.1.1. Guidance regarding the use of deadly force is provided in paragraph E2.1.2., below. The Heads of the DoD Components shall consult, as appropriate, with the General Counsel, Department of Defense, the General Counsel of the DoD Component, or their designees, for legal sufficiency of the Component's use of deadly force implementing guidance. The Heads of the DoD Components, or their designees, may impose further restrictions on the use of deadly force if deemed necessary in their judgment and if such restrictions would not unduly compromise the national security interests of the United States.

E2.1.2. Deadly force is justified only under conditions of extreme necessity and when all three of the following circumstances are present:

E2.1.2.1. Lesser means have been exhausted, are unavailable, or cannot be reasonably employed;

E2.1.2.2. The risk of death or serious bodily harm to innocent persons is not significantly increased by use; and

E2.1.2.3. The purpose of its use is one or more of the following:

E2.1.2.3.1. Self-Defense and Defense of Others. When deadly force reasonably appears to be necessary against a hostile person(s) to protect law enforcement or security personnel who reasonably believe themselves or others to be in imminent danger of death or serious bodily harm by the hostile person(s).

E2.1.2.3.2. Assets Involving National Security. When deadly force reasonably appears necessary to prevent the actual theft or sabotage of assets vital to national security. DoD assets shall be specifically designated as "vital to national security" only when their loss, damage, or compromise would seriously jeopardize the fulfillment of a national defense mission. Examples include nuclear weapons; nuclear command, control, and communications facilities; and designated restricted areas containing strategic operational assets, sensitive codes, or special access programs.

E2.1.2.3.3. Assets Not Involving National Security But Inherently Dangerous To Others. When deadly force reasonably appears to be necessary to prevent the actual theft or sabotage of resources, such as operable weapons or ammunition, that are inherently dangerous to others; i.e., assets that, in the hands of an

unauthorized individual, present a substantial potential danger of death or serious bodily harm to others. Examples include high-risk portable and lethal missiles, rockets, arms, ammunition, explosives, chemical agents, and special nuclear material.

E2.1.2.3.4. Serious Offenses Against Persons. When deadly force reasonably appears necessary to prevent the commission of a serious crime that involves imminent danger of death or serious bodily harm (for example, setting fire to an inhabited dwelling or sniping), including the defense of other persons, where deadly force is directed against the person threatening to commit the crime. Examples include murder, armed robbery, and aggravated assault.

E2.1.2.3.5. Protect Public Health or Safety. When deadly force reasonably appears to be necessary to prevent the destruction of public utilities or similar critical infrastructure vital to public health or safety, the damage to which, would create an imminent danger of death or serious bodily harm.

E2.1.2.3.6. Arrest or Apprehension. When deadly force reasonably appears to be necessary to arrest or apprehend a person who, there is probable cause to believe, has committed one of the serious offenses referred to in subparagraphs E2.1.2.3.2. through E2.1.2.3.5., above.

E2.1.2.3.7. Escape. When deadly force has been specifically authorized by the Heads of the DoD Components and reasonably appears to be necessary to prevent the escape of a prisoner, provided there is probable cause to believe that such person:

E2.1.2.3.7.1 Has committed or attempted to commit one of the serious offenses referred to in subparagraphs E2.1.2.3.2. through E2.1.2.3.5., above; and

E2.1.2.3.7.2 Would pose an imminent danger of death or serious bodily harm to law enforcement or security personnel or to any other person.

E2.1.3. For contract security forces, use of deadly force criteria shall be established consistent with this Directive and local law.

E2.1.4. Personnel shall not be permitted to perform law enforcement or security duties requiring the use of weapons until they have received instruction on applicable regulations for the use of deadly force in the performance of such duties. Additionally, annual refresher training shall be given to all personnel assigned to those duties to ensure that they continue to be thoroughly familiar with all restrictions on the use of deadly force.

E2.1.5. Personnel carrying weapons for personal protection under the provisions of paragraph E1.1.3, enclosure 1, shall have the necessary training on deadly force commensurate with that prescribed by this Directive.

E2.1.6. Additional requirements for the use of firearms:

E2.1.6.1. Warning shots are prohibited.

E2.1.6.2. When a firearm is discharged, it will be fired with the intent of rendering the person(s) at whom it is discharged incapable of continuing the activity or course of behavior prompting the individual to shoot.

E2.1.6.3. Shots shall be fired only with due regard for the safety of innocent bystanders.

E2.1.6.4. In the case of holstered weapons, a weapon should not be removed from the holster unless there is reasonable expectation that use of the weapon may be necessary.

E2.1.6.5. The Heads of the DoD Components may establish additional considerations in implementing procedures over the use of firearms.

E3. ENCLOSURE 3

GUIDANCE FOR DoD PERSONNEL WHO CARRY FIREARMS WHILE ABOARD COMMERCIAL AND MILITARY AIRCRAFT

E3.1.1. The following rules satisfy both the Federal Aviation Administration administrative regulations and military directives for DoD personnel who carry firearms aboard commercial and/or military aircraft: (Those rules were developed to ensure the safety of aircraft and the personnel on the aircraft.)

E3.1.2. DoD personnel authorized to carry firearms aboard commercial and/or military aircraft shall follow the following rules:

E3.1.2.1. Personnel shall possess written authorization to carry firearms, such as a letter of authorization or the DoD Component credentials. Exceptions shall only occur as a result of prior coordination with competent authority.

E3.1.2.2. If the firearm is not required during the flight, the person carrying the firearm shall:

E3.1.2.2.1. Declare to the commercial airline representative or military passenger service representative before the baggage is checked that a firearm is in the baggage and that the firearm is unloaded.

E3.1.2.2.2. Inform the commercial airline representative or military passenger service representative that the container is appropriate for air transportation. If the firearm is a handgun or other weapon that normally is not fired from the shoulder position, the baggage shall be locked and the key shall be kept by the person carrying the firearm.

E3.1.2.3. If a firearm must be accessible during flight, the person carrying the firearm shall:

E3.1.2.3.1. Notify the airlines or passenger service representative at least 1 hour before the plane departs that the weapon shall be carried on the aircraft. If an emergency occurs and the airline cannot be notified 1 hour before the plane departs, then the airline shall be notified expeditiously.

E3.1.2.3.2. Present official Government identification and written authorization, which contain his or her full-face picture, signature, and the official seal of the authorizing organization, to the airline's attendant.

E3.1.2.3.3. Consume no alcoholic beverages eight hours before or during the flight.

E3.1.3. When the total cabin load of an aircraft on a flight for DoD purposes is used exclusively by the DoD Components, the following conditions apply to everyone except law enforcement or security personnel whose duties require that they be armed.

E3.1.3.1. No firearms shall be loaded (i.e., no magazine inserted or rounds in the chambers) and all bolts to such firearms shall be locked in the "open" position and the safety engaged, as appropriate.

E3.1.3.2. Before DoD personnel board the aircraft, the commercial airlines representative or the passenger service representative shall be notified by the unit commander (or officer in charge of the charter) that weapons shall be carried aboard the aircraft.

[REDACTED] (O-6)

From: [REDACTED]@us.army.mil]

Sent: Monday, November 24, 2003 5:40 PM

To: [REDACTED] (E-mail)

Cc: (b)(6)

Subject: FW: Convoy Security

(b)(6)

(b)(5)

Attorney/Advisor
US Army LOGCAP, and
U.S. Army Field Support Command
Rock Island, IL

DSN [REDACTED]

(c)(b)(6)

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Contractor on the Battlefield Resource Library: NEW ADDRESS

-----Original Message-----

From: (b)(6)

Sent: Monday, November 24, 2003 7:20 AM

To: (b)(6)

Subject: FW: Convoy Security

-----Original Message-----

From: (b)(6)

Sent: Sunday, November 23, 2003 4:26 PM

To: [REDACTED]

Cc: [REDACTED]

(b)(6)

Subject: RE: Convoy Security

(b)(5)

(b) (5) (A), (b) (5) (D)



(b) (5) (A), (b) (5) (D)

(b)(5)

V/R,

CDR (b)(6)

Commander, DCMA Kuwait

377th TSCC (DCMA)

APO AE 09366

email (b)(6)

Cell (b)(6)

DSN (b)(6)

-----Original Message-----

From: (b)(6) COL 143 TRANSCOM

Sent: Sunday, November 23, 2003 7:54 AM

To: (b)(6) CDR CLFCC/3A-FWD DCMA

Subject: RE: Convoy Security

(b)(6)

I will be unable to attend. I will be at the APOD picking up our replacements. Will depart Arifjan at approximately 1500hrs. I do not know BG Whitehead's schedule.

-----Original Message-----

From: (b)(6) CLFCC/3A-FWD DCMA

Sent: Saturday, November 22, 2003 11:15 AM

To:

(b)(6)

Cc:

Subject: Convoy Security

Generals, (b)(6)

I would like to get together tomorrow afternoon, 1600 in the KBR Conference room here at Arifjan to go (b)(5)

(b)(5)

(b)(5)

General Geoghan, Sir, we will try to conference you in via phone, Sir if that is acceptable. Please let me know if you can make this.

V/R,

(b)(6)

CDR (b)(6)

Commander, DCMA Kuwait

377th TSCC (DCMA)

APO AE 09366

12/7/2003

(b)(6)

Cell	(b)(6)
DSN	(b)(6)

(b)(6) GS-14)

From: (b)(6)@us.army.mil
Sent: Tuesday, December 23, 2003 3:44 PM
To: (b)(6) (GS-14)
Cc: (b)(6) (O-6); Whiteford, David A. (O-4)
Subject: Re: Contractor Security Question

Mr. (b)(6)

(b)(5); (b)(6)

Thanks.

v/r

----- Original Message -----

From: (b)(6) (GS-14) "**(b)(6)**"
Date: Saturday, December 20, 2003 1:50 pm
Subject: Contractor Security Question

> Mr. (b)(6)

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> (b)(5); (b)(6)

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> VR

> (b)(6)

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(b)(6) (GS-14)

From: (b)(6) (O-6)

Sent: Tuesday, December 23, 2003 9:45 PM

To: (b)(6) (GS-14)

Subject: Security Guard Contract

(b)(6)

(b)(5); (b)(6)

12/24/2003

(GS-14)

From: [REDACTED]@us.army.mil
Sent: Tuesday, December 23, 2003 9:58 PM
To: [REDACTED] (GS-14)
Cc: [REDACTED] (O-6)
Subject: Re: RE: Contractor Security Question

Mr. [REDACTED]

I hope you all have an opportunity to join us tomorrow for our Holiday Party. (I sent the invitation to COL [REDACTED].)

v/r
[REDACTED]

----- Original Message -----

From: [REDACTED] (GS-14) "[REDACTED]"
Date: Tuesday, December 23, 2003 4:39 pm
Subject: RE: Contractor Security Question

> Hello CPT,

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> -----Original Message-----

> From: [REDACTED]@us.army.mil [REDACTED]
>
> Sent: Tuesday, December 23, 2003 3:44 PM
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> (b)(5); (b)(6)
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> (b)(5) Thank you.
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These search terms have been highlighted: **prohibition security guards**

Page 1

April 15, 2003

Mr. Stephen Cohen
Defense Acquisition Regulations Council
OUSD (AT&L)DPAP(DAR)
IMD 3C132
3062 Defense Pentagon
Washington, D.C. 20301-3062
Re: DFARS Case 2002-D042

Dear Mr. Cohen:

The Contract Services Association of America (CSA) appreciates the opportunity to comment on the February 14, 2003 DFARS rule on "Contractor Performance of **Security** Guard Functions" – which strongly support.

CSA is the premier industry representative for private sector companies that provide a wide array of services to Federal, state, and local governments. Our members are involved in everything from maintenance contracts at military bases and within civilian agencies to high technology services, scientific research and engineering studies. Many of our members are small businesses, including 8(a) certified companies, small disadvantaged businesses, women-owned, veteran-owned and Native American owned firms. Our goal is to put the private sector to work for the public good.

This DFARS interim rule would implement section 332 of the National Defense Authorization Act of Fiscal Year 2003 (P.L. 107-314) which authorizes the Department to waive the **prohibition** on contracting out of **security** guard functions at military installations or facilities. This is intended to meet the increasing **security** requirements necessary since September 11, 2001.

CSA members recognize that heightened **security** at Department of Defense installations is of paramount

concern. Indeed, several highly qualified CSA member firms currently augment these **security** requirements. Nevertheless, a large number of **security** guard positions have remained off limits to competitive outsourcing due to the **prohibition** in 10 U.S.C. 2465 on contracting for performance of

security guard functions at any military installation or facility. This affects approximately 12,200 **se** guard positions. Additionally, increased use of active duty, Guard and Reserve personnel in **security** related activities has further reduced the Department's ability to better utilize these personnel for oth warfighting duties, and potentially hurts the Department's ability to preserve vital national readiness. interim rule would address these issues.

Today's **security** activities include access control, perimeter control, plant and property protection, a

monitoring of intrusion detection systems. We believe that strict Federal oversight and training along heightened performance standards for the **security guards** will provide the proper level of **security** a military installations. Indeed, CSA members involved with **security** already undertake strict backgro screening and other methods to ensure a high level of quality service to their commercial and Federa customers.

Last year, an interim rule was published in the Defense Federal Acquisition Regulation Supplement

(DFARS) that would implement Section 1010 of the USA Patriot Act. That section allows an excepti to the **prohibition** on contracting for **security** functions at a military installation or facility during th that the U.S. military is involved in Operation Enduring Freedom and 180 days afterwards. CSA also supported this important interim measure.

1

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For the reasons outlined above, the Contract Services Association of America strongly supports the interim rule on "contractor performance of **security** functions."

Thank you for this opportunity to comment. If you have any questions, please do not hesitate to cont me directly or Cathy Garman, CSA's Vice President for Public Policy, at 703-243-2020.

Thank you for your consideration.

Sincerely,

Gary Engenbretson
President

RESIDENT

Contract Services Association of America
1000 Wilson Blvd, Suite 1800
Arlington, VA 22209
703-243-2020

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Part 237-Service Contracting

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SUBPART 237.1--SERVICE CONTRACTS--GENERAL

(Revised October 01, 2003)

237.101 Definitions.

"Increased performance of security-guard functions," as used in this subpart, means--

- (1) In the case of an installation or facility where no security-guard functions were performed as of September 10, 2001, the entire scope or extent of the performance of security-guard functions at the installation or facility after such date; and
- (2) In the case of an installation or facility where security-guard functions were performed within a lesser scope of requirements or to a lesser extent as of

September 10, 2001, than after such date, the increment of the performance of security-guard functions at the installation or facility that exceeds such lesser scope of requirements or extent of performance.

237.102-70 Prohibition on contracting for firefighting or security-guard functions.

(a) Under 10 U.S.C. 2465, the DoD is prohibited from entering into contracts for the performance of firefighting or security-guard functions at any military installation or facility unless-

- (1) The contract is to be carried out at a location outside the United States (to include any U.S. commonwealth, territory, or possession) at which members of the armed forces would have to be used for the performance of firefighting or security-guard functions at the expense of unit readiness;
- (2) The contract will be carried out on a Government-owned but privately operated installation; or
- (3) The contract (or renewal of a contract) is for the performance of a function under contract on September 24, 1983.

(b) Under Section 2907 of Pub. L. 103-160, this prohibition does not apply to services at installations being closed (see Subpart 237.74).

(c) Under Section 1010 of Pub. L. 107-56, this prohibition does not apply to any contract that--

- (1) Is entered into during the period of time that United States armed forces are engaged in Operation Enduring Freedom or during the period 180 days thereafter;

(2) Is for the performance of security functions at any military installation or facility in the United States;

(3) Is awarded to a proximately located local or State government, or a combination of such governments, whether or not any such government is obligated to provide such services to the general public without compensation; and

(4) Prescribes standards for the training and other qualifications of local government law enforcement personnel who perform security functions under the contract in accordance with criteria established by the Secretary of the department concerned.

(d) Under Section 332 of Pub. L. 107-314, this prohibition does not apply to any contract that is entered into for any increased performance of security-guard functions at a military installation or facility undertaken in response to the terrorist attacks on the United States on September 11, 2001, if--

(1) Without the contract, members of the Armed Forces are or would be used to perform the increased security-guard functions;

(2) The agency has determined that--

(i) Recruiting and training standards for the personnel who are to perform the security-guard functions are comparable to the recruiting and training standards for DoD personnel who perform the same security-guard functions;

(ii) Contractor personnel performing such functions will be effectively supervised, reviewed, and evaluated; and

(iii) Performance of such functions will not result in a reduction in the security of the installation or facility; and

(3) Contract performance will not extend beyond December 1, 2005.

237.104 Personal services contracts.

(b)(i) Authorization to acquire the personal services of experts and consultants is included in Pub. L. 101-165, Section 9002. Personal service contracts for expert and consultant services must also be authorized by a determination and findings (D&F) in accordance with department/agency regulations.

(A) Generally, the D&F should authorize one contract at a time; however, an authorizing official may issue a blanket D&F for classes of contracts.

(B) Prepare each D&F in accordance with FAR 1.7 and include a

determination that-

- (1) The duties are of a temporary or intermittent nature;
- (2) Acquisition of the services is advantageous to the national defense;
- (3) DoD personnel with necessary skills are not available;
- (4) Excepted appointment cannot be obtained;
- (5) A nonpersonal services contract is not practicable;
- (6) Statutory authority, 5 U.S.C. 3109 and other legislation, apply; and
- (7) Any other determination required by statutes has been made.

(ii) Personal services contracts for health care are authorized by 10 U.S.C. 1091.

(A) This authority may be used to acquire-

- (1) Direct health care services provided in medical treatment facilities; and
- (2) Services of clinical counselors, family advocacy program staff, and victim's services representatives to members of the Armed Forces and covered beneficiaries who require such services, provided in medical treatment facilities or elsewhere. Persons with whom a personal services contract may be entered into under this authority include clinical social workers, psychologists, psychiatrists, and other comparable professionals who have advanced degrees in counseling or related academic disciplines and who meet all requirements for State licensure and board certification requirements, if any, within their fields of specialization.

(B) Sources for personal services contracts with individuals under the authority of 10 U.S.C. 1091 shall be selected through the procedures in this section. These procedures do not apply to contracts awarded to business entities other than individuals. Selections made using the procedures in this section are exempt by statute from FAR Part 6 competition requirements (see 206.001(b)).

(C) Approval requirements for-

- (1) Direct health care personal service contracts (see 237.104(b)(ii)(A) (1)) and a pay cap are in DoDI 6025.5, Personal Services Contracts

for Health Care Providers. Requests to enter into a personal service contract for direct health care services must be approved by the commander of the medical/dental treatment facility where the services will be performed.

(2) Services of clinical counselors, family advocacy program staff, and victim's services representatives (see 237.104(b)(ii)(A)(2)), shall be in accordance with agency procedures.

(D) The contracting officer must ensure that the requiring activity provides a copy of the approval with the purchase request.

(E) The contracting officer must provide adequate advance notice of contracting opportunities to individuals residing in the area of the facility. The notice must include the qualification criteria against which individuals responding will be evaluated. The contracting officer shall solicit applicants through at least one local publication which serves the area of the facility. Acquisitions under this section for personal service contracts are exempt from the posting and synopsis requirements of FAR Part 5.

(F) The contracting officer shall provide the qualifications of individuals responding to the notice to the commander of the facility for evaluation and ranking in accordance with agency procedures. Individuals must be considered solely on the basis of the professional qualifications established for the particular personal services being acquired and the Government's estimate of reasonable rates, fees, or other costs. The commander of the facility shall provide the contracting officer with rationale for the ranking of individuals, consistent with the required qualifications.

(G) Upon receipt from the facility of the ranked listing of applicants, the contracting officer shall either-

(1) Enter into negotiations with the highest ranked applicant. If a mutually satisfactory contract cannot be negotiated, the contracting officer shall terminate negotiations with the highest ranked applicant and enter into negotiations with the next highest.

(2) Enter into negotiations with all qualified applicants and select on the basis of qualifications and rates, fees, or other costs.

(H) In the event only one individual responds to an advertised requirement, the contracting officer is authorized to negotiate the contract award. In this case, the individual must still meet the minimum qualifications of the requirement and the contracting officer must be able to make a determination that the price is fair and reasonable.

(I) If a fair and reasonable price cannot be obtained from a qualified individual, the requirement should be canceled and acquired using procedures other than those set forth in this section.

(f)(i) Payment to each expert or consultant for personal services under 5 U.S.C. 3109 shall not exceed the highest rate fixed by the Classification Act Schedules for grade GS-15 (see 5 CFR 304.105(a)).

(ii) The contract may provide for the same per diem and travel expenses authorized for a Government employee, including actual transportation and per diem in lieu of subsistence for travel between home or place of business and official duty station.

(iii) Coordinate with the civilian personnel office on benefits, taxes, personnel ceilings, and maintenance of records.

237.106 Funding and term of service contracts.

(1) Personal service contracts for expert or consultant services shall not exceed 1 year. The nature of the duties must be-

(i) Temporary (not more than 1 year); or

(ii) Intermittent (not cumulatively more than 130 days in 1 year).

(2) The contracting officer may enter into a contract, exercise an option, or place an order under a contract for severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the contract awarded, option exercised, or order placed does not exceed 1 year (10 U.S.C. 2410a).

237.109 Services of quasi-military armed forces.

See 237.102-70 for prohibition on contracting for firefighting or security-guard functions.

237.170 Approval of contracts and task orders for services.

237.170-1 Scope.

This section-

(a) Implements 10 U.S.C. 2330; and

(b) Applies to services acquired for DoD, regardless of whether the services are acquired through--

(1) A DoD contract or task order; or

(2) A contract or task order awarded by an agency other than DoD.

237.170-2 Prohibition on acquisition of services.

Unless approval is obtained in accordance with 237.170-3, do not acquire services through use of a contract or task order that-

- (a) Is not performance based; or
- (b) Is awarded by an agency other than DoD.

237.170-3 Approval requirements.

(a) Acquisition of services through a DoD contract or task order that is not performance based.

(1) For acquisitions at or below \$50,000,000, obtain the approval of the official designated by the department or agency.

(2) For acquisitions exceeding \$50,000,000, obtain the approval of the senior procurement executive.

(b) Acquisition of services through any contract or task order awarded by an agency other than DoD. Obtain approval in accordance with department or agency procedures.

SUBPART 237.2--ADVISORY AND ASSISTANCE SERVICES

(Revised October 01, 2001)

237.201 Definition.

"Advisory and assistance services," as used in this subpart, means services in the following three major categories when provided by nongovernmental sources (10 U.S.C. 2212):

(1) *Management and professional support services.* This category consists of services that-

(i) Provide engineering or technical support, assistance, advice, or training for the efficient and effective management and operation of organizations, activities, or systems;

(ii) Are closely related to the basic responsibilities and mission of the using organization; and

(iii) Include efforts that support or contribute to improved organization or

program management, logistics management, project monitoring and reporting, data collection, budgeting, accounting, auditing, and administrative or technical support for conferences and training programs.

(2) *Studies, analyses, and evaluations.* This category consists of services that-

(i) Provide organized, analytic assessments to understand or evaluate complex issues to improve policy development, decision-making, management, or administration;

(ii) Result in documents containing data or leading to conclusions or recommendations; and

(iii) May include databases, models, methodologies, and related software created in support of a study, analysis, or evaluation.

(3) *Engineering and technical services.* This category consists of services that take the form of advice, assistance, training, or hands-on training necessary to maintain and operate fielded weapon systems, equipment, and components (including software when applicable) at design or required levels of effectiveness.

237.203 Policy.

(1) Every contract for engineering and technical services, alone or as part of an end item, shall-

(i) Show those services as a separately priced line item;

(ii) Contain definitive specifications for the services; and

(iii) Show the work-months involved.

(2) Agency heads may authorize personal service contracts for engineering and technical services provided on site at Defense locations to meet an unusual essential mission need. The authorization will be for an interim period only.

237.270 Acquisition of audit services.

(a) *General policy.*

(1) Departments and agencies shall not contract for audit services unless the cognizant DoD audit organization determines that expertise required to perform the audit is not available within the DoD audit organization, or temporary audit assistance is required to meet audit reporting requirements mandated by law or DoD regulation.

(2) DoDD 7600.2, Audit Policies, provides DoD audit policies.

(3) DoDI 7600.6, Audit of Nonappropriated Fund Instrumentalities and Related Activities, provides guidance to audit organizations for audits of nonappropriated fund organizations.

(4) DoD 7600.7-M, Internal Audit Manual, Chapter 20, provides policy and guidance to DoD audit organizations for the monitoring of audit services provided by non-Federal auditors.

(b) *Contract period.* Except in unusual circumstances, contracts for recurring audit services shall be awarded for a 1-year period with at least 2 option years.

(c) *Approvals.* Contracting officers shall not issue a solicitation for audit services unless the requiring activity provides evidence that the cognizant DoD audit organization has approved the statement of work. The requiring agency shall obtain the same evidence of approval for subsequent material changes to the statement of work.

(d) *Solicitation provisions and contract clauses.*

(1) Use the provision of 252.237-7000, Notice of Special Standards of Responsibility, in solicitations for audit services.

(2) Use the clause at 252.237-7001, Compliance with Audit Standards, in solicitations and contracts for audit services.

237.271 Management controls.

DoD procedures are in DoDD 4205.2, Acquiring and Managing Contracted Advisory and Assistance Services (CAAS).

237.272 Requesting activity responsibilities.

(b) On acquisitions for studies, the purchase request package must contain a signed statement from the technical officer responsible for the study stating that the Defense Technical Information Center (DTIC) and other information sources have been queried, that evidence of those queries are on file, and no existing scientific or technical report could fulfill the requirement.

(c) The authority, without redelegation authority (see DoDD 4205.2), to approve the use of advisory and assistance services in contracts over \$50,000 is-

(i) An SES manager;

(ii) A general or flag officer;

(iii) An officer in O-6 grade filling a general or flag officer level position; or

- (iv) An officer in O-6 grade who has subordinate SES personnel.

SUBPART 237.6--PERFORMANCE-BASED CONTRACTING

(Added December 06, 2001)

237.601 General.

See 212.102 for the use of FAR Part 12 procedures with performance-based contracting.

SUBPART 237.70--MORTUARY SERVICES

237.7000 Scope.

This subpart contains acquisition procedures for contracts for mortuary services (the care of remains) for military personnel within the United States. Departments/agencies may use these procedures as guidance in areas outside the United States for both deceased military and civilian personnel.

237.7001 Method of acquisition.

(a) *Requirements type contract.* By agreement among the military activities, one activity in each geographical area will contract for the estimated requirements for the care of remains for all military activities in the area. Use a requirements type contract (see FAR 16.503) when the estimated annual requirements for the activities in the area are ten or more.

(b) *Purchase order.* Where no contract exists, use DD Form 1155, Order for Supplies and Services/Request for Quotations, to obtain mortuary services.

237.7002 Area of performance.

Determine and define the geographical area to be covered by the contract using the following general guidelines-

(a) Use political boundaries, streets, or other features as demarcation lines.

(b) The size should be roughly equivalent to the contiguous metropolitan or municipal area enlarged to include the activities served.

(c) If the area of performance best suited to the needs of a particular contract is not large enough to include a carrier terminal commonly used by people within such area, the contract area of performance shall specifically state that it includes such terminal as a pickup or delivery point.

237.7003 Distribution of contracts.

In addition to normal contract distribution, send three copies of each contract to each

activity authorized to use the contract, and two copies to each of the following-

(a) HQDA (TAPC-PEC-D)

Alexandria, VA 22331

(b) Commander, Naval Medical Command

Department of the Navy (MED 3141)

23rd and E Streets, NW

Washington, DC 20372

(c) Headquarters, AFMPC-MPCCM

Randolph AFB, TX 78150

237.7004 Solicitation provisions and contract clauses.

(a) Use the provision at 252.237-7002, Award to Single Offeror, in all sealed bid solicitations for mortuary services. Use the basic provision with its Alternate I in all negotiated solicitations for mortuary services.

(b) Use the following clauses in all mortuary service solicitations and contracts, except do not use the clauses at 252.237-7004, Area of Performance, and 252.237-7010, Facility Requirements, in solicitations or contracts that include port of entry requirements-

(1) 252.237-7003, Requirements, (insert activities authorized to place orders in paragraph (e) of the clause);

(2) 252.237-7004, Area of Performance;

(3) 252.237-7005, Performance and Delivery;

(4) 252.237-7006, Subcontracting;

(5) 252.237-7007, Termination for Default;

(6) 252.237-7008, Group Interment;

(7) 252.237-7009, Permits;

(8) 252.237-7010, Facility Requirements; and

(9) 252.237-7011, Preparation History.

(c) Use the clause at FAR 52.245-4, Government-Furnished Property (Short Form), in solicitations and contracts that include port of entry requirements.

SUBPART 237.71--LAUNDRY AND DRY CLEANING SERVICES

237.7100 Scope.

This subpart contains acquisition procedures for laundry and dry cleaning services within the United States. It may be used as guidance in all other locations.

237.7101 General.

(a) Except for hospital requirements, acquire laundry and dry cleaning services on a count-of-articles basis.

(b) Laundry services in support of hospitals may be acquired on the basis of a count-of-articles or by bulk weight.

(1) Acquisitions by weight may be on either a presorted (bag type) or unsorted (simple bulk weight) basis.

(2) In selecting the basis, consider such factors as price, administrative costs, aseptic requirements, risk of contamination or cross-contamination, and volume and nature of articles to be serviced.

237.7102 Solicitation provisions and contract clauses.

(a) Use the provision at 252.237-7012, Instruction to Offerors (Count-of-Articles), in solicitations for laundry and dry cleaning services to be provided on a count-of-articles basis.

(b) Use the provision at 252.237-7013, Instruction to Offerors (Bulk Weight), in solicitations for laundry services to be provided on a bulk weight basis.

(c) Use the clause at 252.237-7014, Loss or Damage (Count-of-Articles), in solicitations and contracts for laundry and dry cleaning services to be provided on a count-of-articles basis.

(d) Use the clause at 252.237-7015, Loss or Damage (Weight of Articles), in solicitations and contracts for laundry and dry cleaning services to be provided on a bulk weight basis.

(1) Insert a reasonable per pound price in paragraph (b) of the clause, based on the average per pound value. When the contract requires laundry services on a bag type basis, insert reasonable per pound prices by bag type.

(2) Insert an appropriate percentage in paragraph (e) of the clause, not to exceed eight percent.

(e) Use the clause at 252.237-7016, Delivery Tickets, in all solicitations and contracts for laundry and dry cleaning services.

(1) Use the clause with its Alternate I when services are for bag type laundry to be provided on a bulk weight basis.

(2) Use the clause with its Alternate II when services are unsorted laundry to be provided on a bulk weight basis.

(f) Use the clause at 252.237-7017, Individual Laundry, in solicitations and contracts for laundry and dry cleaning services to be provided to individual personnel.

(1) Insert the number of pieces of outer garments in paragraphs (d)(1) and (2) of the clause.

(2) The number of pieces and composition of a bundle in paragraphs (d)(1) and (2) of the clause may be modified to meet local conditions.

(g) Use the clause at 252.237-7018, Special Definitions of Government Property, in all solicitations and contracts for laundry and dry cleaning services.

SUBPART 237.72--EDUCATIONAL SERVICE AGREEMENTS

(Revised September 14, 1999)

237.7200 Scope.

(a) This subpart prescribes acquisition procedures for educational services from schools, colleges, universities, or other educational institutions. This subpart does not include tuition assistance agreements, i.e., payment by the Government of partial tuition under the off-duty educational program.

(b) As used in the subpart-

(1) "Facilities" does not include the institution's dining rooms or dormitories; and

(2) "Fees" does not include charges for meals or lodging.

237.7201 Educational service agreement.

(a) An educational service agreement is not a contract, but is an ordering agreement under which the Government may order educational services.

(b) Educational service agreements provide for ordering educational services when-

(1) The Government pays normal tuition and fees for educational services provided to a student by the institution under its normal schedule of tuition and fees applicable to all students generally; and

(2) Enrollment is at the institution under the institution's normal rules and in courses and curricula which the institution offers to all students meeting admission requirements.

237.7202 Limitations.

(a) Make no agreement under this subpart which will result in payment of Government funds for tuition or other expenses for training in any legal profession, except in connection with the detailing of commissioned officers to law schools under 10 U.S.C. 2004.

(b) Educational service agreements are not used to provide special courses or special fees for Government students.

237.7203 Duration.

(a) Educational service agreements are for an indefinite duration and remain in effect until terminated.

(b) The issuing activity must establish procedures to review each educational service agreement at least once each year. Review dates should consider the institution's academic calendar and occur at least 30 days before the beginning of a term. The purpose of the review is to incorporate changes to reflect requirements of any statute, Executive Order, FAR, or DFARS.

(c) If the contracting officer and the institution do not agree on required changes, terminate the agreement.

237.7204 Format and clauses for educational service agreements.

Educational service agreements under this subpart shall be in the following format. Add to the schedule any other provisions necessary to describe the requirements, if they are consistent with the following provisions and the policy of acquiring educational services in the form of standard course offerings at the prevailing rates of the institution.

EDUCATIONAL SERVICE AGREEMENT

Agreement No. _____

1. This agreement entered into on the _____ day of _____ 19__, is between the Government, represented by the Contracting Officer, and the

Contractor, _____ (name of institution) _____, an educational institution located in _____ (city) _____, _____ (state) _____.

2. This agreement is for educational services to be provided by the Contractor to Government personnel at the Contractor's institution. The Contractor shall provide instruction with standard offerings of courses available to the public.
3. The Government shall pay for services under the Contractor's normal schedule of tuition and fees applicable to the public and in effect at the time the services are performed.
4. The Government will review this agreement annually before the anniversary of its effective date for the purpose of incorporating changes required by statutes, executive orders, the Federal Acquisition Regulation, or the Defense Federal Acquisition Regulation Supplement. Changes required to be made by modification to this agreement or by issuance of a superseding agreement. If mutual agreement on the changes cannot be reached, the Government will terminate this agreement.
5. The parties may amend this agreement only by mutual consent.
6. This agreement shall start on the date in paragraph 1 and shall continue until terminated.
7. The estimated annual cost of this agreement is \$ _____. This estimate is for administrative purposes only and does not impose any obligation on the Government to request any services or make any payment.
8. Advance payments are authorized by 10 U.S.C. 2396(a)(3).
9. Submit invoices to: _____ (name and address of activity) _____.

SCHEDULE PROVISIONS

1. *Ordering procedures and services to be provided.*

(a) The Contractor shall promptly deliver to the Contracting Officer one copy of each catalog applicable to this agreement, and one copy of any subsequent revision.

(b) The Government will request educational services under this agreement by a (insert type of request, such as, delivery order, official Government order, or other written communication). The (insert type of request, such as, delivery order, official Government order, or other written communication) will contain the number of this agreement and will designate as students at the Contractor's institution one or more Government-selected persons who have already been accepted for admission under the Contractor's usual admission standards.

(c) All students under this agreement shall register in the same manner, be subject to the same academic regulations, and have the same privileges, including the use of all facilities and equipment as any other students enrolled in the institution.

(d) Upon enrolling each student under this agreement, the Contractor shall, where the resident or nonresident status involves a difference in tuition or fees-

(i) Determine the resident or nonresident status of the student;

(ii) Notify the student and the Contracting Officer of the determination. If there is an appeal of the determination;

(iii) If there is an appeal of the determination, process the appeal under the Contractor's standard procedures;

(iv) Notify the student and Contracting Officer of the result; and

(v) Make the determination a part of the student's permanent record.

(e) The Contractor shall not furnish any instruction or other services to any student under this agreement before the effective date of a request for services in the form specified in paragraph (b) of this schedule.

2. *Change in curriculum.* The Contracting Officer may vary the curriculum for any student enrolled under this agreement but shall not require or make any change in any course without the Contractor's consent.

3. *Payment.*

(a) The Government shall pay the Contractor the normal tuition and fees which the Contractor charges any students pursuing the same or similar curricula, except for any tuition and fees which this agreement excludes. The Contractor may change any tuition and fees, provided-

(1) The Contractor publishes the revisions in a catalog or otherwise publicly announces the revisions;

(2) Applies the revisions uniformly to all students studying the same or similar curricula;

(3) Provides the Contracting Officer notice of changes before their effective date.

(b) The Contractor shall not establish any tuition or fees which apply solely to students under this agreement.

(c) If the Contractor regularly charges higher tuition and fees for nonresident students, the Contractor may charge the Government the normal nonresident tuition and fees for students under this agreement who are nonresidents. The Government shall not claim resident tuition and fees for any student solely on the basis of the student residing in the State as a consequence of enrollment under this agreement.

(d) The Contractor shall charge the Government only the tuition and fees which relate directly to enrollment as a student. Tuition and fees may include-

(i) Penalty fees for late registration or change of course caused by the Government;

(ii) Mandatory health fees and health insurance charges; and

(iii) Any flat rate charge applicable to all students registered for research that appears in the Contractor's publicly announced fee schedule.

(e) The Contractor shall not charge the Government for-

(i) Permit charges, such as vehicle registration or parking fees, unless specifically authorized in the request for service; and

(ii) Any equipment, refundable deposits, or any items or services (such as computer time) related to student research.

(f) Normally, the Contractor shall not directly charge individual students for application fees or any other fee chargeable to this agreement. However, if the Contractor's standard procedures require payment of any fee before the student is enrolled under this agreement, the Contractor may charge the student. When the Contractor receives payment from the Government, the Contractor shall fully reimburse the student.

(g) For each term the Contractor enrolls students under this agreement, the Contractor shall submit _____ copies of an invoice listing charges for each student separately. The Contractor shall submit invoices within _____ days after the start of the term and shall include-

(i) Agreement number and inclusive dates of the term;

(ii) Name of each student;

(iii) A list showing each course for each student if the school charges by credit hour;

(iv) The resident or nonresident status of each student (if applicable to the Contractor's school); and

(v) A breakdown of charges for each student, including credit hours, tuition, application fee, and other fees. Provide a total for each student and a grand total for all students listed on the invoice.

(h) If unforeseen events require additional charges that are otherwise payable under the Contractor's normal tuition and fee schedule, the Contractor may submit a supplemental invoice or make the adjustment on the next regular invoice under this agreement. The Contractor shall clearly identify and explain the supplemental invoice or the adjustment.

(i) The Contractor shall apply any credits resulting from withdrawal of students, or from any other cause under its standard procedures, to subsequent invoices submitted under this agreement. Credits should appear on the first invoice submitted after the action resulting in the credits. If no subsequent invoice is submitted, the Contractor shall deliver to the Contracting Officer a check drawn to the order of the office designated for contract administration. The Contractor shall identify the reason for the credit and the applicable term dates in all cases.

4. *Withdrawal of students.*

(a) The Government may, at its option and at any time, withdraw financial support for any student by issuing official orders. The Government will furnish _____ copies of the orders to the Contractor within a reasonable time after publication.

(b) The Contractor may request withdrawal by the Government of any student for academic or disciplinary reasons.

(c) If withdrawal occurs before the end of a term, the Government will pay any tuition and fees due for the current term. The Contractor shall credit the Government with any charges eligible for refund under the Contractor's standard procedures for any students in effect on the date of withdrawal.

(d) Withdrawal of students by the Government will not be the basis for any special charge or claim by the Contractor other than charges under the Contractor's standard procedures.

5. *Transcripts.* Within a reasonable time after withdrawal of a student for any reason, or after graduation, the Contractor shall send to the Contracting Officer (or to an address supplied by the Contracting Officer) one copy of an official transcript showing all work by the student at the institution until such withdrawal or graduation.

6. *Student teaching.* The Government does not anticipate the Contractor awarding fellowships and assistantships to students attending school under this agreement. However, for graduate students, should both the student and the Contractor decide it

to be in the student's best interests to assist in the institution's teaching program, the Contractor may provide nominal compensation for part-time service. Base the compensation on the Contractor's practices and procedures for other students of similar accomplishment in that department or field. The Contractor shall apply the compensation as a credit against any invoices presented for payment for any period in which the student performed the part-time teaching service.

7. Termination of agreement.

(a) Either party may terminate this agreement by giving 30 days advance written notice of the effective date of termination. In the event of termination, the Government shall have the right, at its option, to continue to receive educational services for those students already enrolled in the contractor's institution under this agreement until such time that the students complete their courses or curricula or the Government withdraws them from the Contractor's institution. The terms and conditions of this agreement in effect on the effective date of the termination shall continue to apply to such students remaining in the Contractor's institution.

(b) Withdrawal of students under Schedule provision 4 shall not be considered a termination within the meaning of this provision 7.

(c) Termination by either party shall not be the basis for any special charge or claim by the Contractor, other than as provided by the Contractor's standard procedures.

GENERAL PROVISIONS

Use the following clauses in educational service agreements:

1. FAR 52.202-1, Definitions, and add the following paragraphs (h) through (m).

(h) "Term" means the period of time into which the Contractor divides the academic year for purposes of instruction. This includes "semester," "trimester," "quarter," or any similar word the Contractor may use.

(i) "Course" means a series of lectures or instructions, and laboratory periods, relating to one specific representation of subject matter, such as Elementary College Algebra, German 401, or Surveying. Normally, a student completes a course in one term and receives a certain number of semester hours credit (or equivalent) upon successful completion.

(j) "Curriculum" means a series of courses having a unified purpose and belonging primarily to one major academic field. It will usually include certain required courses and elective courses within established criteria. Examples include Business Administration, Civil Engineering, Fine and Applied Arts, and Physics. A curriculum normally covers more than one term and leads to a

degree or diploma upon successful completion.

(k) "Catalog" means any medium by which the Contractor publicly announces terms and conditions for enrollment in the Contractor's institution, including tuition and fees to be charged. This includes "bulletin," "announcement," or any other similar word the Contractor may use.

(l) "Tuition" means the amount of money charged by an educational institution for instruction, not including fees.

(m) "Fees" means those applicable charges directly related to enrollment in the Contractor's institution. Unless specifically allowed in the request for services, fees shall not include-

(1) Any permit charge, such as parking and vehicle registration; or

(2) Charges for services of a personal nature, such as food, housing, and laundry.

2. FAR 52.203-3, Gratuities.

3. FAR 52.203-5, Covenant Against Contingent Fees.

4. FAR 52.204-1, Approval of Contract, if required by department/agency procedures.

5. FAR 52.215-2, Audit and Records--Negotiation.

6. FAR 52.215-8, Order of Precedence--Uniform Contract Format.

7. Conflicts Between Agreement and Catalog. Insert the following clause:

CONFLICTS BETWEEN AGREEMENT AND CATALOG

If there is any inconsistency between this agreement and any catalog or other document incorporated in this agreement by reference or any of the Contractor's rules and regulations, the provisions of this agreement shall govern.

8. FAR 52.222-3, Convict Labor.

9. Under FAR 22.802, FAR 22.807, and FAR 22.810, use the appropriate clause from FAR 52.222-26, Equal Opportunity.

10. FAR 52.233-1, Disputes.

11. Assignment of Claims. Insert the following clause:

ASSIGNMENT OF CLAIMS

No claim under this agreement shall be assigned.

12. FAR 52.252-4, Alterations in Contract, if required by department/agency procedures.

SIGNATURE PAGE

Agreement No. _____ Date _____

THE UNITED STATES OF AMERICA

BY: _____

(Contracting Officer)

Activity _____

Location _____

(NAME OF CONTRACTOR)

BY: _____

(Title) _____

**SUBPART 237.73--SERVICES OF STUDENTS AT RESEARCH AND DEVELOPMENT
LABORATORIES**

(Revised January 15, 1999)

237.7300 Scope.

This subpart prescribes procedures for acquisition of temporary or intermittent services of students at institutions of higher learning for the purpose of providing technical support at defense research and development laboratories (10 U.S.C. 2360).

237.7301 Definitions.

As used in this subpart-

(a) "Institution of higher learning" means any public or private post-secondary school, junior college, college, university, or other degree granting educational institution that-

- (1) Is located in the United States, its possessions, and Puerto Rico;
- (2) Has an accredited education program approved by an appropriate accrediting body; and
- (3) Offers a program of study at any level beyond high school.

(b) "Nonprofit organization" means any organization described by Section 501(c)(3) of Title 26 of the U.S.C. which is exempt from taxation under Section 501(a) of Title 26.

(c) "Student" means an individual enrolled (or accepted for enrollment) at an institution of higher learning before the term of the student technical support contract. The individual shall remain in good standing in a curriculum designed to lead to the granting of a recognized degree, during the term of the contract.

(d) "Technical support" means any scientific or engineering work in support of the mission of the DoD laboratory involved. It does not include administrative or clerical services.

237.7302 General.

Generally, agencies will acquire services of students at institutions of higher learning by contract between a nonprofit organization employing the student and the Government. When it is in the best interest of the Government, contracts may be made directly with students. These services are not subject to the requirements of FAR Part 19, FAR 13.003 (b)(1), or DFARS Part 219. Award authority for these contracts is 10 U.S.C. 2304(a)(1) and 10 U.S.C. 2360.

237.7303 Contract clauses.

Contracts made directly with students are nonpersonal service contracts but shall include the clauses at FAR 52.232-3, Payments Under Personal Services Contracts, and FAR 52.249-12, Termination (Personal Services).

SUBPART 237.74--SERVICES AT INSTALLATIONS BEING CLOSED

237.7400 Scope.

This subpart prescribes procedures for contracting, through use of other than full and open competition, with local governments for police, fire protection, airfield operation, or other community services at military installations to be closed under the Defense Authorization Amendments and Base Closure and Realignment Act (Pub. L. 100-526), as amended, and the Defense Base Closure and Realignment Act of 1990 (Pub. L. 101-510), as amended.

237.7401 Policy.

The authority in 206.302-5(b)(ii) to contract with local governments-

- (a) May be exercised without regard to the provisions of 10 U.S.C. Chapter 146, Contracting for Performance of Civilian Commercial or Industrial Type Functions;
- (b) May not be exercised earlier than 180 days before the date the installation is scheduled to be closed;
- (c) Requires a determination by the head of the contracting activity that the services being acquired under contract with the local government are in the best interests of the Department of Defense.
- (d) Includes the requirement of Subpart 222.71, Right of First Refusal of Employment, unless it conflicts with the local government's civil service selection procedures.

237.7402 Contract clause.

Use the clause at 252.237-7022, Services at Installations Being Closed, in solicitations and contracts based upon the authority of this subpart.

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September 23, 1992

September 23, 1992

**POLICY LETTER 92-1
TO THE HEADS OF EXECUTIVE AGENCIES AND
DEPARTMENTS**

SUBJECT: Inherently Governmental Functions

1. **Purpose.** This policy letter establishes Executive Branch policy relating to service contracting and inherently governmental functions. Its purpose is to assist Executive Branch officers and employees in avoiding an unacceptable transfer of official responsibility to Government contractors.
2. **Authority.** This policy letter is issued pursuant to section 6(a) of the Office of Federal Procurement Policy (OFPP) Act, as amended, codified at 41 U.S.C. [[section]] 405.
3. **Exclusions.** Services obtained by personnel appointments and advisory committees are not covered by this policy letter.
4. **Background.** Contractors, when properly used, provide a wide variety of useful services that play an important part in helping agencies to accomplish their missions. Agencies use service contracts to acquire special knowledge and skills not available in the Government, obtain cost effective services, or obtain temporary or intermittent services, among other reasons.

Not all functions may be performed by contractors, however. Just as it is clear that certain functions, such as the command of combat troops, may not be contracted, it is also clear that other functions, such as building maintenance and food services, may be contracted. The difficulty is in determining which of these services that fall between these extremes may be acquired by contract. Agencies have occasionally relied on contractors to perform certain functions in such a way as to raise questions about whether Government policy is being created by private persons. Also, from time to time questions have arisen regarding the extent to which de facto control over contract performance has been transferred to contractors. This policy letter provides an illustrative list of functions, that are, as a matter of policy, inherently governmental (see Appendix A)(, and articulates the practical and policy considerations that underlie such determinations (see [[section]] 7).

As stated in [[section]] 9, however, this policy letter does not purport to specify which functions are, as a legal matter, inherently governmental, or to define the factors used in making such legal determination. Thus, the fact that a function is listed in Appendix A, or a factor is set forth in [[section]] 7(b), does not necessarily mean that the function is inherently governmental as a legal matter or that the factor would be relevant in making the legal determination.

5. **Definition.** As a matter of policy, an "inherently governmental function" is a function that is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities that require either the exercise of discretion in applying Government authority or the making of value judgments in making decisions for the Government.

Governmental functions normally fall into two categories: (1) the act of governing, i.e., the discretionary exercise of Government authority, and (2) monetary transactions and entitlements.

An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to:

- (a) bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- (b) determine, protect, and advance its economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
- (c) significantly affect the life, liberty, or property of private persons;
- (d) commission, appoint, direct, or control officers of employees of the United States; or
- (e) exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.

Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include functions that are primarily ministerial and internal in nature, such as building security; mail operations; operation of cafeterias; housekeeping; facilities operations and maintenance, warehouse operations, motor vehicle fleet management and operations, or other routine electrical or mechanical services.

The detailed list of examples of commercial activities found as an attachment to Office of Management and Budget (OMB) Cir. No. A-76 is an authoritative, nonexclusive list of functions that are not inherently governmental functions. These functions therefore may be contracted.

6. **Policy.**

(a) **Accountability.** It is the policy of the Executive Branch to ensure that Government action is taken as a result of informed, independent judgments made by Government officials who are ultimate accountable to the President. When the Government uses service contracts, such informed, independent judgment is ensured by:

- (1) prohibiting the use of service contracts for the performance of inherently governmental functions (See Appendix A);
- (2) providing greater scrutiny and an appropriate enhanced degree of management oversight (see subsection 7(f)) when contracting for functions that are not inherently governmental but closely support the performance of inherently governmental functions (see Appendix B);
- (3) ensuring, in using the products of those contracts, that any final agency action complies with the laws and policies of the United States and reflects the independent conclusions of agency officials and not those of contractors who may have interests that are not in concert with the public interest, and who may be beyond the reach of management controls otherwise applicable to

public employees; and

(4) ensuring that reasonable identification of contractors and contractor work products is made whenever there is a risk that the public, Congress, or other persons outside of the Government might confuse them with Government officials or with Government work products, respectively.

(b) **OMB Circular No. A-76.** This policy letter does not purport to supersede or otherwise effect any change in OMB Circular No. A-76, Performance of Commercial Activities.

(c) **Drafting of Congressional testimony, responses to Congressional correspondence, and agency responses to audit reports from an Inspector General, the General Accounting Office, or other Federal audit entity.** While the approval of a Government document is an inherently governmental function, its drafting is not necessarily such a function. Accordingly, in most situations the drafting of a document, or portions thereof, may be contracted, and the agency should review and revise the draft document, to the extent necessary, to ensure that the final document expresses the agency's views and advances the public interest. However, even though the drafting function is not necessarily an inherently government function, it may be inappropriate, for various reasons, for a private party to draft a document in particular circumstances. Because of the appearance of private influence with respect to documents that are prepared for Congress or for law enforcement or oversight agencies and that may be particularly sensitive, contractors are not to be used for the drafting of Congressional testimony; responses to Congressional correspondence; or agency responses to audit reports from an Inspector General, the General Accounting Office, or other Federal audit entity.

7. **Guidelines.** If a function proposed for contract performance is not found in Appendix A, the following guidelines will assist agencies in understanding the application of this policy letter, determining whether the function is, as a matter of policy, inherently governmental and forestalling potential problems.

(a) **The exercise of discretion.** While inherently governmental functions necessarily involve the exercise of substantial discretion, not every exercise of discretion is evidence that such a function is involved. Rather, the use of discretion must have the effect of committing the Federal Government to a course of action when two or more alternative courses of action exist (e.g., purchasing a minicomputer than a mainframe computer, hiring a statistician rather than an economist, supporting proposed legislation rather than opposing economist, supporting proposed legislation rather than opposing it, devoting more resources to prosecuting one type of criminal case than another, awarding a contract to one firm rather than another, adopting one policy rather than another, and so forth).

A contract may thus properly be awarded where the contractor does not have the authority to decide on the course of action to be pursued but is rather tasked to develop options to inform an agency decision maker, or to develop or expand decisions already made by Federal officials. Moreover, the mere fact that decisions are made by the contractors in performing his or her duties (e.g., how to allocate the contractor's own or subcontract resources, what techniques and procedures to employ, whether and whom to consult, what research alternatives to explore given the scope of the contract, what conclusions to emphasize, how frequently to test) is not determinative of whether he or she is performing an inherently government function.

(b) **Totality of the circumstances.** Determining whether a function is an inherently governmental function often is difficult and depends upon an analysis of the factors of the case. Such analysis

involves consideration of a number of factors, and the presence or absence of any one is not in itself determinative of the issue. Nor will the same emphasis necessarily be placed on any one factor at different times, due to the changing nature of the Government's requirements.

The following factors should be considered when deciding whether award of a contract might effect, or the performance of a contract has effected, a transfer of official responsibility:

(1) Congressional legislative restrictions or authorizations.

(2) The degree to which official discretion is or would be limited, i.e., whether the contractor's involvement in agency functions is or would be so extensive or his or her work product is so far advanced toward completion that the agency's ability to develop and consider options other than those provided by the contractor is restricted.

(3) In claims adjudication and related services,

(i) the finality of any contractor's action affecting individual claimants or applicants, and whether or not review of the contractor's action is **de novo** (i.e., to be effected without the appellate body's being bound by prior legal rulings or factual determinations) on appeal of his or her decision to an agency official;

(ii) the degree to which contractor activities may involve wide-ranging interpretations of complex, ambiguous case law and other legal authorities, as opposed to being circumscribed by detailed laws, regulations, and procedures.

(iii) the degree to which matters for decision by the contractor involve recurring fact patterns or unique fact patterns; and

(iv) The contractor's discretion to determine an appropriate award or penalty.

(4) The contractor's ability to take action that will significantly and directly affect the life, liberty, or property of individual members of the public, including the likelihood of the contractor's need to resort to force in support of a police or judicial function; whether force, especially deadly force, is more likely to be initiated by the contractor or by some other person; and the degree to which force may have to be exercised in public or relatively uncontrolled areas. (Note that contracting for guard, convoy security, and plant protection services, armed or unarmed, is not proscribed by these policies.)

(5) The availability of special agency authorities and the appropriateness of their application to the situation at hand, such as the power to deputize private persons.

(6) Whether the function in question is already being performed by private persons, and the circumstances under which it is being performed by them.

(c) **Finality of agency determinations.** Whether or not a function is an inherently governmental function, for purposes of this policy letter, is a matter for agency determination. However, agency decisions that a function is or is not an inherently governmental function may be reviewed, and, if necessary, modified by appropriate OMB officials.

(d) **Preaward responsibilities.** Whether a function being considered for performance by contract

is an inherently governmental function is an issue to be addressed prior to issuance of the solicitation.

(e) Post-award responsibilities. After award, even when a contract does not involve performance of an inherently governmental function, agencies must take steps to protect the public interest by playing an active, informed role in contract administration. This ensures that contractors comply with the terms of the contract and that Government policies, rather than private ones, are implemented. Such participation should be appropriate to the nature of the contract, and should leave no doubt that the contract is under the control of Government officials. This does not relieve contractors of their performance responsibilities under the contract. Nor does this responsibility to administer the contract require Government officials to exercise such control over contractor activities to convert the contract, or portion thereof, to a personal service contract.

In deciding whether Government officials have lost or might lose control of the administration of a contract, the following are relevant considerations: the degree to which agencies have effective management procedures and policies that enable meaningful oversight of contractor performance, the resources available for such oversight, the actual practice of the agency regarding oversight, the duration of the contract, and the complexity of the tasks to be performed.

(f) Management controls. When functions described in Appendix B are involved, additional management attention to the terms of the contract and the manner of performance is necessary. How close the scrutiny or how extensive or stringent the management controls need to be is for agencies to determine. Examples of additional control measures that might be employed are:

- (1) developing carefully crafted statements of work and quality assurance plans, as described in OFPP Policy Letter 91-2 **Service Contracting**, that focus on the issue of Government oversight and measurement of contractor performance;
- (2) establishing audit plans for periodic review of contracts by Government auditors;
- (3) conducting preaward conflict of interest reviews to ensure contract performance in accordance with objective standards and contract specifications;
- (4) physically separating contractor personnel from Government personnel at the worksite; and
- (5) requiring contractors to (a) submit reports that contain recommendations and that explain and rank policy or action alternatives, if any, (b) describe what procedures they used to arrive at their recommendations, (c) summarize the substance of their deliberations, (d) report any dissenting views, (e) list sources relied upon, and/or (f) otherwise make clear the methods and considerations upon which their recommendations are based.

(g) Identification of contractor personnel and acknowledgment of contractor participation. Contractor personnel attending meetings, answering Government telephones, and working in other situations where their contractor status is not obvious to third parties must be required to identify themselves as such to avoid creating an impression in the minds of members of the public or the Congress that they are Government officials, unless, in the judgment of the agency, no harm can come from failing to identify themselves. All documents or reports produced by contractors are to be suitably marked as contractor products.

(h) **Degree of reliance** The extent of reliance on service contractors is not by itself a cause for concern. Agencies must, however, have a sufficient number of trained and experienced staff to manage Government programs properly. The greater the degree of reliance on contractors the greater the need for oversight by agencies. What number of Government officials is needed to oversee a particular contract is a management decision to be made after analysis of a number of factors. These include, among others, the scope of the activity in question; the technical complexity of the project or its components; the technical capability, numbers, and workload of Federal oversight officials; the inspection techniques available; and the importance of the activity. Current contract administration resources shall not be determinative. The most efficient and cost effective approach shall be utilized.

(i) **Exercise of approving or signature authority.** Official responsibility to approve the work of contractors is a power reserved to Government officials. It should be exercised with a thorough knowledge and understanding of the contents of documents submitted by contractors and a recognition of the need to apply independent judgment in the use of these work products.

8. Responsibilities.

(a) **Heads of agencies.** Heads of departments and agencies are responsible for implementing this policy letter. While these policies must be implemented in the Federal Acquisition Regulation (FAR), it is expected that agencies will take all appropriate actions in the interim to develop implementation strategies and initiate staff training to ensure effective implementation of these policies.

(b) **Federal Acquisition Regulatory Council.** Pursuant to subsections 6(a) and 25(f) of the OFPP Act, as amended, 41 U.S.C. [[section]][[section]] 405(a) and 421(f), the Federal Acquisition Regulatory Council shall ensure that the policies established herein are incorporated in the FAR within 210 days from the date this policy letter is published in the **Federal Register**. Issuance of final regulations within this 210-day period shall be considered issuance "in a timely manner" as prescribed in 41 U.S.C. [[section]] 405(b).

(c) **Contracting officers.** When requirements are developed, when solicitations are drafted, and when contracts are being performed, contracting officers are to ensure:

(1) that functions to be contracted are not among those listed in Appendix A of this letter and do not closely resemble any functions listed here;

(2) that functions to be contracted that are not listed in Appendix A, and that do not closely resemble them, are not inherently governmental functions according to the totality of the circumstances test in subsection 7(b), above;

(3) that the terms and the manner of performance of any contract involving functions listed in Appendix B of this letter are subject to adequate scrutiny and oversight in accordance with subsection 7(f), above; and

(4) that all other contractible functions are properly managed in accordance with subsection 7(e), above.

(d) **All officials.** When they are aware that contractor advice, opinions, recommendations,

ideas, reports, analyses, and other work products are to be considered in the course of their official duties, all Federal Government officials are to ensure that they exercise independent judgment and critically examine these products.

9. **Judicial review.** This policy letter is not intended to provide a constitutional or statutory interpretation of any kind and it is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person. It is intended only to provide policy guidance to agencies in the exercise of their discretion concerning Federal contracting. Thus, this policy letter is not intended, and should not be construed, to create any substantive or procedural basis on which to challenge any agency action or inaction on the ground that such action or inaction was not in accordance with this policy letter.
10. **Information contact.** For information regarding this policy letter contact Richard A. Ong, Deputy Associate Administrator, the Office of Federal Procurement Policy, 725 17th Street, N.W., Washington, DC 20503. Telephone (202) 395-7209.
11. **Effective date.** This policy letter is effective 30 days after the date of publication.

(signed by)
Allan V. Burman
Administrator

APPENDIX A

The following is an illustrative list of functions considered to be inherently governmental functions: (footnote: With respect to the actual drafting of Congressional testimony, of responses to Congressional correspondence, and of agency responses to audit reports from the Inspector General, the General Accounting Office, or other Federal audit entity, see special provisions in subsection 6(c) of the text of the policy letter)

1. The direct conduct of criminal investigation.
2. The control of prosecutions and performance of adjudicatory functions (other than those relating to arbitration or other methods of alternative dispute resolution).
3. The command of military forces, especially the leadership of military personnel who are members of the combat, combat support or combat service support role.
4. The conduct of foreign relations and the determination of foreign policy.
5. The determination of agency policy, such as determining the content and application of regulations, among other things.
6. The determination of Federal program priorities or budget requests.
7. The direction and control of Federal employees.
8. The direction and control of intelligence and counter-intelligence operations.

9. The selection or nonselection of individuals for Federal Government employment.
10. The approval of position descriptions and performance standards for Federal employees.
11. The determination of what Government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices with specified ranges and subject to other reasonable conditions deemed appropriate by the agency).
12. In Federal procurement activities with respect to prime contracts,
 - (a) determining what supplies or services are to be acquired by the Government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency);
 - (b) participating as a voting member on any source selection boards;
 - (c) approval of any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria;
 - (d) awarding contracts;
 - (e) administering contracts (including ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services);
 - (f) terminating contracts; and
 - (g) determining whether contract costs are reasonable, allocable, and allowable.
13. The approval of agency responses to Freedom of Information Act requests (other than routine responses that, because of statute, regulation, or agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and the approval of agency responses to the administrative appeals of denials of Freedom of Information Act requests.
14. The conduct of administrative hearings to determine the eligibility of any person for a security clearance, or involving actions that affect matters of personal reputation or eligibility to participate in Government programs.
15. The approval of Federal licensing actions and inspections.
16. The determination of budget policy, guidance, and strategy.
17. The collection, control, and disbursement of fees, royalties, duties, fines, taxes and other public funds, unless authorized by statute, such as title 31 U.S.C. [[section]] 952 (relating to private collection contractors) and title 31 U.S.C. [[section]] 3718 (relating to private attorney collection services), but not including:
 - (a) collection of fees, fines, penalties, costs or other charges from visitors to or patrons of mess halls, post or base exchange concessions, national parks, and similar entities or activities, or from other persons, where the amount to be collected is easily calculated or predetermined and the

funds collected can be easily controlled using standard cash management techniques, and

(b) routine voucher and invoice examination.

18. The control of the treasury accounts.

19. The administration of public trusts

APPENDIX B

The following list is of services and actions that are not considered to be inherently governmental functions. However, they may approach being in that category because of the way in which the contractor performs the contract or the manner in which the government administers contractor performance. When contracting for such services and actions, agencies should be fully aware of the terms of the contract, contractor performance, and contract administration to ensure that appropriate agency control is preserved.

This is an illustrative listing, and is not intended to promote or discourage the use of the following types of contractor services:

1. Services that involve or relate to budget preparation, including workload modeling, fact finding, efficiency studies, and should-cost analyses, etc.
2. Services that involve or relate to reorganization and planning activities.
3. Services that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy.
4. Services that involve or relate to the development of regulations.
5. Services that involve or relate to the evaluation of another contractor's performance.
6. Services in support of acquisition planning.
7. Contractors' providing assistance in contract management (such as where the contractor might influence official evaluations of other contractors).
8. Contractors' providing technical evaluation of contract proposals.
9. Contractors' providing assistance in the development of statements of work.
10. Contractors' providing support in preparing responses to Freedom of Information Act requests.
11. Contractors' working in any situation that permits or might permit them to gain access to confidential business information and/or any other sensitive information (other than situations covered by the Defense Industrial Security Program described in FAR 4.402(b)).

12. Contractors' providing information regarding agency policies or regulations, such as attending conferences on behalf of an agency, conducting community relations campaigns, or conducting agency training courses.
 13. Contractors' participating in any situation where it might be assumed that they are agency employees or representatives.
 14. Contractors' participating as technical advisors to a source selection board or participating as voting or nonvoting members of a source evaluation board.
 15. Contractors' serving as arbitrators or providing alternative methods of dispute resolution.
 16. Contractors' constructing buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.
 17. Contractors' providing inspection services.
 18. Contractors' providing legal advice and interpretations of regulations and statutes to Government officials.
 19. Contractors' providing special non-law enforcement, security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details.
 - 20.
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OFFICE OF MANAGEMENT AND BUDGET

Office Of Federal Procurement Policy

AGENCY:

Office of Management and Budget, Executive Office of the President, Office of Federal Procurement Policy.

ACTION:

Policy Letter on Inherently Governmental Functions.

SUMMARY:

The Office of Federal Procurement Policy (OFPP) publishes today the final version of a policy letter providing guidance to Executive Departments and agencies on (1) what functions are inherently governmental functions that must only be performed by Government officers and employees and (2) what contractible functions so closely support Government officers and employees in their performance of inherently governmental functions that the terms and performance of those contracts require closer scrutiny from Federal officials. This policy letter has been developed because executive agencies, members of Congress, the General Accounting Office, and the public have from time to time either

requested guidance regarding, or inquired about, the propriety of awarding contracts for certain types of functions or administering contracts in certain ways. Previous guidance on this issue has also not been as detailed as that which we now provide..

FOR FURTHER INFORMATION CONTACT:

Richard A. Ong, Deputy Association Administrator, Office of Federal Procurement Policy, 725 17th Street, NW---Suite 9001, Washington, DC 20503 (202) 395-7209. To obtain a copy of this policy letter, please call OMB's Publication Office at (202) 395-7332.

SUPPLEMENTARY INFORMATION

Comments received. We received 34 comments in response to our proposed policy letter published in the **Federal Register** on December 16, 1991 (56 Fed. Reg. 65279): eight from industry or trade groups, four from private individuals, two from employee organizations, one from a Federally funded research and development center, and 19 from Government agencies.

1. **Purpose of the policy letter.** This policy letter on inherently governmental functions is being published to provide guidance on what kinds of functions, as a matter of policy, must be performed by officials of the Executive Branch of the United States and what kinds of functions may be performed by private persons under contract with the Federal Government.

Previous guidance on these matters that has been available to the Executive Branch has not been detailed and sometimes Federal agencies have permitted contractors to perform functions that should be performed by Government personnel. We now provide more detailed guidance.

2. **Relationships of policy letter to other OFPP publications on service contracting.** This policy letter is also one of several that the Office of Federal Procurement Policy (OFPP) has published recently that have focused on some aspect of service contracting in the Federal Government. At this time, OFPP has determined it is best to deal with individual aspects of service contracting rather than trying to publish comprehensive guidance in one document. We will consider collecting all of the guidance on service contracts in one document in the future.

Thus, we do not cover in detail in this policy letter such matters as cost effectiveness of contracting for services, conflicts of interest of service contractors, and management of service contracts. These issues are dealt with in OMB Circular No. A-76, Performance of Commercial Activities, August 4, 1983 (under revision); OFPP Policy Letter 89-1, Conflict of interest Policies Applicable to Consultants, 54 Fed. Reg. 51,805 (December 18, 1989); OFPP Memorandum for Agency Senior Procurement Executives, Government-Wide Guidance on Contract Administration (March 15, 1991); OFPP Policy Letter 91-2, Service Contracting, 56 Fed. Reg. 15110 (April 15, 1991); proposed OFPP Policy Letter 91-____, Past Performance Information, 56 Fed. Reg. 63988 (December 6, 1991); and proposed OFPP Policy Letter 92-____, Management of Service Contracting, 56 Fed. Reg. 66091 (December 20, 1991).

3. **Relationship to OMB Circular No. A-76.** One commenter asked that we make clear our apparent intent to clarify rather than alter the guidance originally found in OMB Circular No. A-76 on inherently government functions. This is our intent. No fundamental change is intended.

We have altered the form of the original Circular A-76 definition of an inherently governmental function in the interest of clarity. Specific examples cited in the original A-76 definition have been