



*Office of Inspector General*

JAN - 7 2011

**INFORMATION MEMORANDUM FOR THE ADMINISTRATOR**

FROM: **Donald A. Gambatesa /s/  
Inspector General**

SUBJECT: **National Defense Authorization Act Requirements on Private Security Contractor (PSC) Policies in Afghanistan and Iraq**

The National Defense Authorization Act for Fiscal Year 2008 (NDAA FY08), P.L. 110-181, as amended, contains specific requirements for the oversight of PSCs—including USAID PSCs—in areas of combat operations [attachment 1]. The law requires the Secretary of Defense to promulgate regulations on the selection, training, equipping, and conduct of PSC personnel [attachment 2], and the resulting regulations made Chiefs of Mission responsible for issuing implementing *instructions* for non-Defense Department PSCs [attachment 3]. However, Chiefs of Mission in Afghanistan and Iraq have not issued these implementing instructions. Consequently, the PSC requirements in the law have not flowed down to USAID PSCs.

NDAA FY08 also mandated revision of the Federal Acquisition Regulation (FAR) to ensure contractor compliance with specified statutory requirements. Because the FAR has not been revised as required, USAID PSCs are not contractually obligated to comply with the oversight and reporting requirements in the law.

Despite USAID efforts to independently strengthen PSC oversight, OIG reports [attachments 4 and 5] have noted inconsistencies in PSC reporting on significant security incidents in Iraq and Afghanistan. In Afghanistan, OIG also learned that the mission had not provided subcontracting consent for 17 private security firms and found that two USAID PSCs had not been licensed with the Afghan Government. Because NDAA FY08 requirements address related topics, full implementation of the law could enhance USAID's ability to properly oversee PSCs.

Attachments

1. Discussion of NDAA FY08 PSC oversight requirements and implementation status
2. Sections 862(a),(b), and excerpts of Section 864 of NDAA FY08, as amended
3. Code of Federal Regulations, Chapter 32, Section 159 [Implementing Regulation for NDAA FY08 Section 862(a)]
4. USAID/OIG, *Survey of Security Incidents Reported by Private Security Contractors of USAID/Iraq's Contractors and Grantees*, [Report E-267-11-001-S](#), November 29, 2010.
5. USAID/OIG, *Audit of USAID/Afghanistan's Oversight of Private Security Contractors in Afghanistan*, [Report 5-306-10-009-P](#), May 21, 2010.

## Attachment 1

### Discussion of NDAA FY08 Private Security Contractor (PSC) Oversight Requirements and Implementation Status

The National Defense Authorization Act for Fiscal Year 2008 (NDAA FY08), P.L. 110-181, as amended, contains specific requirements for the oversight of PSCs—including USAID PSCs—in areas of combat operations. For purposes of the act, Afghanistan and Iraq are currently considered areas of combat operations.<sup>1</sup>

Section 862(a) of the act requires the Secretary of Defense to develop regulations on the selection, training, equipping, and conduct of these PSC personnel and includes detailed requirements that the regulations must meet. The act requires the regulations to provide requirements for PSC personnel qualifications, screening, training, and security, and guidance on PSC use of force rules. It also specifically requires that the regulations establish processes for:

- Registering, accounting for, and keeping records of PSC personnel;
- Implementing PSC personnel training requirements;
- Authorizing and accounting for PSC weapons;
- Registering and identifying armored vehicles, helicopters, and other military vehicles operated by PSCs;
- PSC reporting on specific types of security incidents;
- Independent review and investigation of PSC security incidents and allegations of PSC misconduct;
- Removal or replacement of PSC personnel who do not comply with related requirements; and
- Termination of PSC contracts for gross or repeated compliance violations.

The Department of Defense (DOD) promulgated the implementing regulation for this provision of the act in July 2009. This regulation made Chiefs of Mission responsible for issuing implementing *instructions* for non-DOD PSCs in areas of combat operations [32 CFR 159.4(c)]. However, the Chiefs of Mission in Afghanistan and Iraq have not issued NDAA-compliant instructions. As a result, updated PSC oversight requirements have not flowed down to USAID PSCs in Afghanistan and Iraq. USAID does not have final instructions for registering and accounting for PSC personnel or authorizing and accounting for their weapons and vehicles. Nor does USAID have final guidance on PSC qualification, training, and screening requirements or security incident reporting responsibilities.

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<sup>1</sup> *The Ike Skelton National Defense Authorization Act for Fiscal Year 2011* ([H.R. 6523](#)) was recently approved by Congress but had not been signed by the President as of January 4, 2011. If it is signed into law, this measure would extend the applicability of NDAA FY08's PSC requirements to geographic areas that the Secretary of Defense determines to be "areas of other significant military operations."

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Section 862(b) of the act mandates that, not later than July 2008, the Federal Acquisition Regulation (FAR) is to be revised to require that a clause on statutorily specified PSC oversight requirements be inserted into relevant contracts, grants, and cooperative agreements.<sup>2</sup> However, this FAR revision has not been adopted. As a result, USAID PSCs and their personnel are not contractually obligated to comply with the oversight and reporting requirements in the law.

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<sup>2</sup> If it becomes law, Section 831 of *The Ike Skelton National Defense Authorization Act for Fiscal Year 2011* ([H.R. 6523](#)) would mandate that this contract clause also be included in any subcontracts awarded to entities performing private security functions. It would also increase contractor accountability for ensuring PSC compliance with the contract clause and Government responsibility to respond to compliance failures on the part of contractors.

## Attachment 2

### Sections 862 and 864 of *The National Defense Authorization Act for Fiscal Year 2008*, as Amended

#### Sec. 862. Contractors performing private security functions in areas of combat operations.<sup>1</sup>

##### (a) Regulations on contractors performing private security functions.-

**(1) In general.**—Not later than 120 days after the date of the enactment of this Act [Jan. 28, 2008], the Secretary of Defense, in coordination with the Secretary of State, shall prescribe regulations on the selection, training, equipping, and conduct of personnel performing private security functions under a covered contract in an area of combat operations.

**(2) Elements.**—The regulations prescribed under subsection (a) shall, at a minimum, establish—

**(A)** a process for registering, processing, accounting for, and keeping appropriate records of personnel performing private security functions in an area of combat operations;

**(B)** a process for authorizing and accounting for weapons to be carried by, or available to be used by, personnel performing private security functions in an area of combat operations;

**(C)** a process for the registration and identification of armored vehicles, helicopters, and other military vehicles operated by contractors performing private security functions in an area of combat operations;

**(D)** A process under which contractors are required to report all incidents, and persons other than contractors are permitted to report incidents, in which—

- (i)** a weapon is discharged by personnel performing private security functions in an area of combat operations;
- (ii)** personnel performing private security functions in an area of combat operations are killed or injured;
- (iii)** persons are killed or injured, or property is destroyed, as a result of conduct by contractor personnel;
- (iv)** a weapon is discharged against personnel performing private security functions in an area of combat operations or personnel performing such functions believe a weapon was so discharged; or
- (v)** active, non-lethal countermeasures (other than the discharge of a weapon) are employed by the personnel performing private security

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<sup>1</sup> Public Law 110-181, div. A, title VIII, subtitle F, §§ 862 and 864, Jan. 28, 2008, 122 Stat. 254-259; as amended by Public Law 110-417, div. A, title VIII, §§ 853, 854(a), (d), Oct. 14, 2008, 122 Stat. 4544; and Public Law 111-84, div. A, title VIII, § 813(a) to (c), Oct. 28, 2009, 123 Stat. 2406. Codified at 10 U.S.C. 2302 note.

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functions in an area of combat operations in response to a perceived immediate threat to such personnel;

(E) A process for the independent review and, if practicable, investigation of—

- (i) incidents reported pursuant to subparagraph (D); and
- (ii) incidents of alleged misconduct by personnel performing private security functions in an area of combat operations;

(F) requirements for qualification, training, screening (including, if practicable, through background checks), and security for personnel performing private security functions in an area of combat operations;

(G) Guidance to the commanders of the combatant commands on the issuance of—

- (i) orders, directives, and instructions to contractors performing private security functions relating to equipment, force protection, security, health, safety, or relations and interaction with locals;
- (ii) predeployment training requirements for personnel performing private security functions in an area of combat operations, addressing the requirements of this section, resources and assistance available to contractor personnel, country information and cultural training, and guidance on working with host country nationals and military; and
- (iii) rules on the use of force for personnel performing private security functions in an area of combat operations;

(H) a process by which a commander of a combatant command may request an action described in subsection (b)(3); and

(I) a process by which the training requirements referred to in subparagraph (G)(ii) shall be implemented.

**(3) Availability of orders, directives, and instructions.**—The regulations prescribed under subsection (a) shall include mechanisms to ensure the provision and availability of the orders, directives, and instructions referred to in paragraph (2)(G)(i) to contractors referred to in that paragraph, including through the maintenance of a single location (including an Internet website, to the extent consistent with security considerations) at or through which such contractors may access such orders, directives, and instructions.

**(b) Contract clause on contractors performing private security functions.**—

**(1) Requirement under FAR.**—Not later than 180 days after the date of the enactment of this Act [Jan. 28, 2008], the Federal Acquisition Regulation issued in accordance with section 25 of the Office of Federal Procurement Policy Act ([41 U.S.C. 421](#)) shall be revised to require the insertion into each covered contract

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(or, in the case of a task order, the contract under which the task order is issued) of a contract clause addressing the selection, training, equipping, and conduct of personnel performing private security functions under such contract.

**(2) Clause requirement.**—The contract clause required by paragraph (1) shall require, at a minimum, that the contractor concerned shall—

**(A)** Comply with regulations prescribed under subsection (a) [of this note], including any revisions or updates to such regulations, and follow the procedures established in such regulations for—

- (i)** registering, processing, accounting for, and keeping appropriate records of personnel performing private security functions in an area of combat operations;
- (ii)** authorizing and accounting of weapons to be carried by, or available to be used by, personnel performing private security functions in an area of combat operations;
- (iii)** registration and identification of armored vehicles, helicopters, and other military vehicles operated by contractors and subcontractors performing private security functions in an area of combat operations; and
- (iv)** The reporting of incidents in which—
  - (I)** a weapon is discharged by personnel performing private security functions in an area of combat operations;
  - (II)** personnel performing private security functions in an area of combat operations are killed or injured; or
  - (III)** persons are killed or injured, or property is destroyed, as a result of conduct by contractor personnel;

**(B)** Comply with and ensure that all personnel performing private security functions under such contract are briefed on and understand their obligation to act in accordance with—

- (i)** qualification, training, screening (including, if practicable, through background checks), and security requirements established by the Secretary of Defense for personnel performing private security functions in an area of combat operations;
- (ii)** applicable laws and regulations of the United States and the host country, and applicable treaties and international agreements, regarding the performance of the functions of the contractor;
- (iii)** orders, directives, and instructions issued by the applicable commander of a combatant command relating to equipment, force protection, security, health, safety, or relations and interaction with locals; and
- (iv)** rules on the use of force issued by the applicable commander of a combatant command for personnel performing private security functions in an area of combat operations; and

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(C) cooperate with any investigation conducted by the Department of Defense pursuant to subsection (a)(2)(E) by providing access to employees of the contractor and relevant information in the possession of the contractor regarding the incident concerned.

**(3) Noncompliance of personnel with clause.**—The contracting officer for a covered contract may direct the contractor, at its own expense, to remove or replace any personnel performing private security functions in an area of combat operations who violate or fail to comply with applicable requirements of the clause required by this subsection. If the violation or failure to comply is a gross violation or failure or is repeated, the contract may be terminated for default.

**(4) Applicability.**—The contract clause required by this subsection shall be included in all covered contracts awarded on or after the date that is 180 days after the date of the enactment of this Act [Jan. 28, 2008]. Federal agencies shall make best efforts to provide for the inclusion of the contract clause required by this subsection in covered contracts awarded before such date.

**(5) Inspector General report on pilot program on imposition of fines for noncompliance of personnel with clause.**—Not later than March 30, 2008, the Inspector General of the Department of Defense shall submit to Congress a report assessing the feasibility and advisability of carrying out a pilot program for the imposition of fines on contractors for personnel who violate or fail to comply with applicable requirements of the clause required by this section as a mechanism for enhancing the compliance of such personnel with the clause. The report shall include—

(A) an assessment of the feasibility and advisability of carrying out the pilot program; and

(B) if the Inspector General determines that carrying out the pilot program is feasible and advisable—

(i) recommendations on the range of contracts and subcontracts to which the pilot program should apply; and

(ii) a schedule of fines to be imposed under the pilot program for various types of personnel actions or failures.

**(c) Areas of combat operations.**—

**(1) Designation.**—The Secretary of Defense shall designate the areas constituting an area of combat operations for purposes of this section by not later than 120 days after the date of the enactment of this Act [Jan. 28, 2008].

**(2) Particular areas.**—Iraq and Afghanistan shall be included in the areas designated as an area of combat operations under paragraph (1).



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**(3) Additional areas.**—The Secretary may designate any additional area as an area constituting an area of combat operations for purposes of this section if the Secretary determines that the presence or potential of combat operations in such area warrants designation of such area as an area of combat operations for purposes of this section.

**(4) Modification or elimination of designation.**—The Secretary may modify or cease the designation of an area under this subsection as an area of combat operations if the Secretary determines that combat operations are no longer ongoing in such area.

**(d) Exception.**—The requirements of this section shall not apply to contracts entered into by elements of the intelligence community in support of intelligence activities.

...

### Sec. 864. Definitions and other general provisions.

**(a) Definitions.**—In this subtitle [this note]:

**(1) Matters relating to contracting.**—The term ‘matters relating to contracting’, with respect to contracts in Iraq and Afghanistan, means all matters relating to awarding, funding, managing, tracking, monitoring, and providing oversight to contracts and contractor personnel.

**(2) Contract in Iraq or Afghanistan.**—The term ‘contract in Iraq or Afghanistan’ means a contract with the Department of Defense, the Department of State, or the United States Agency for International Development, a subcontract at any tier issued under such a contract, a task order or delivery order at any tier issued under such a contract, a grant, or a cooperative agreement (including a contract, subcontract, task order, delivery order, grant, or cooperative agreement issued by another Government agency for the Department of Defense, the Department of State, or the United States Agency for International Development), if the contract, subcontract, task order, delivery order, grant, or cooperative agreement involves work performed in Iraq or Afghanistan for a period longer than 30 days.

**(3) Covered contract.**—The term ‘covered contract’ means—

**(A)** a contract of a Federal agency for the performance of services in an area of combat operations, as designated by the Secretary of Defense under subsection (c) of section 862 [of this note];

**(B)** a subcontract at any tier under such a contract;

**(C)** a task order or delivery order issued under such a contract or subcontract;

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(D) a grant for the performance of services in an area of combat operations, as designated by the Secretary of Defense under subsection (c) of section 862 [of this note]; or

(E) a cooperative agreement for the performance of services in such an area of combat operations.

**(4) Contractor.**—The term ‘contractor’, with respect to a covered contract, means—

(A) in the case of a covered contract that is a contract, subcontract, task order, or delivery order, the contractor or subcontractor carrying out the covered contract;

(B) in the case of a covered contract that is a grant, the grantee; and

(C) in the case of a covered contract that is a cooperative agreement, the recipient.

**(5) Contractor personnel.**—The term ‘contractor personnel’ means any person performing work under contract for the Department of Defense, the Department of State, or the United States Agency for International Development, in Iraq or Afghanistan, including individuals and subcontractors at any tier.

**(6) Private security functions.**—The term ‘private security functions’ means activities engaged in by a contractor under a covered contract as follows:

(A) Guarding of personnel, facilities, or property of a Federal agency, the contractor or subcontractor, or a third party.

(B) Any other activity for which personnel are required to carry weapons in the performance of their duties.

**(7) Relevant committees of Congress.**—The term ‘relevant committees of Congress’ means each of the following committees:

(A) The Committees on Armed Services of the Senate and the House of Representatives.

(B) The Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives.

(C) The Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives.

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(D) For purposes of contracts relating to the National Foreign Intelligence Program, the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives.

**(b) Classified information.**—Nothing in this subtitle [this note] shall be interpreted to require the handling of classified information or information relating to intelligence sources and methods in a manner inconsistent with any law, regulation, executive order, or rule of the House of Representatives or of the Senate relating to the handling or protection of such information.”

**Regulatory Flexibility Act**

The interim rule will not have a significant economic impact upon a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 605(b), and is deemed by the Commission to be a rule of agency practice that does not substantially affect the rights or obligations of non-agency parties pursuant to Section 804(3)(c) of the Congressional Review Act.

**Unfunded Mandates Reform Act of 1995**

This rule will not cause State, local, or tribal governments, or the private sector, to spend \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. No action under the Unfunded Mandates Reform Act of 1995 is necessary.

**Small Business Regulatory Enforcement Fairness Act of 1996 (Subtitle E—Congressional Review Act)**

This rule is not a “major rule” as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Subtitle E—Congressional Review Act), now codified at 5 U.S.C. 804(2). The rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on the ability of United States-based companies to compete with foreign-based companies. Moreover, this is a rule of agency practice or procedure that does not substantially affect the rights or obligations of non-agency parties, and does not come within the meaning of the term “rule” as used in Section 804(3)(C), now codified at 5 U.S.C. 804(3)(C). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

**List of Subjects in 28 CFR Part 2**

Administrative practice and procedure, Prisoners, Probation and parole.

**The Interim Rule**

■ Accordingly, the U.S. Parole Commission is adopting the following amendment to 28 CFR part 2.

**PART 2—[AMENDED]**

■ 1. The authority citation for 28 CFR part 2 continues to read as follows:

**Authority:** 18 U.S.C. 4203(a)(1) and 4204(a)(6).

■ 2. Amend § 2.80 by revising paragraph (o) to read as follows:

**§ 2.80 Guidelines for DC Code Offenders.**

\* \* \*

(o)(1) A prisoner who is eligible under the criteria of paragraph (o)(2) may receive a parole determination using the 1987 guidelines of the former District of Columbia Board of Parole (hereinafter “the 1987 guidelines”).

(2) A prisoner must satisfy the following criteria to obtain a determination using the 1987 guidelines:

(i) The prisoner committed the offense of conviction after March 3, 1985 and before August 5, 1998;

(ii) The prisoner is not incarcerated as a parole violator;

(iii) The prisoner received his initial hearing after August 4, 1998; and

(iv) The prisoner does not have a parole effective date, or a presumptive parole date before January 1, 2010.

(3) If an eligible prisoner applies for a hearing under the 1987 guidelines, a hearing examiner shall review the case on the record. If the hearing examiner recommends that the prisoner receive a parole effective date and the Commission concurs in the recommendation, the case shall not be scheduled for a hearing. If the hearing examiner does not recommend a parole effective date, the examiner shall recommend a hearing on an appropriate hearing docket.

(4) At the hearing, the hearing examiner shall evaluate the prisoner’s case using the 1987 guidelines as if the prisoner were receiving an initial hearing shortly before the date of parole eligibility. If the prisoner has passed the rehearing date that the examiner determines is appropriate under the circumstances presented by the case, the examiner shall also evaluate the case under the rehearing guidelines. The Commission shall also use the former Board’s policy guidelines in making its determinations under this paragraph, according to the policy guideline in effect at the time of the prisoner’s offense.

(5) If the Commission denies parole after the hearing, and the prisoner received a presumptive parole date under the parole determination that preceded the hearing under this paragraph, the prisoner shall not forfeit the presumptive parole date unless the presumptive date is rescinded for institutional misconduct, new criminal conduct, or for new adverse information.

(6) Decisions resulting from hearings under this paragraph may not be appealed to the Commission.

Dated: July 8, 2009.

**Isaac Fulwood,**

*Chairman, United States Parole Commission.*  
[FR Doc. E9–16969 Filed 7–16–09; 8:45 am]

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**DEPARTMENT OF DEFENSE****Office of the Secretary****32 CFR Part 159**

[DOD–2008–OS–0125/RIN 0790–AI38]

**Private Security Contractors (PSCs) Operating in Contingency Operations**

**AGENCY:** Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

**ACTION:** Interim final rule.

**SUMMARY:** This part establishes policy, assigns responsibilities and provides procedures for the regulation of the selection, accountability, training, equipping, and conduct of personnel performing private security functions under a covered contract during contingency operations. It also assigns responsibilities and establishes procedures for incident reporting, use of and accountability for equipment, rules for the use of force, and a process for administrative action or the removal, as appropriate, of PSCs and PSC personnel. For the Department of Defense, this IFR supplements DoD Instruction 3020.41, “Contractor Personnel Authorized to Accompany the U.S. Armed Forces,” which provides guidance for all DoD contractors operating in contingency operations.

This part is of critical importance. It is being published as an Interim Final Rule because there is insufficient policy and guidance regulating the actions of DoD and other governmental PSCs and their movements in the operational area. It will procedurally close existing gaps in the oversight of Private Security Contractors (PSCs), ensure compliance with laws and regulations pertaining to Inherently Governmental functions, and ensure proper performance by armed contractors. The expansion of troops in Afghanistan will result in a corresponding increase in the number of PSCs performing in that Area of Operations. This part is required to ensure implementation of necessary guidance for all U.S.G. PSCs across the CENTCOM area of responsibility. Further, the publication of this IFR is required to meet the mandate of Section 862 of the 2008 National Defense Authorization Act. The Congress has expressed continuing concern that

regulations for the oversight of PSCs are not yet in place.

**DATES:** This rule is effective July 17, 2009. Comments must be received by August 31, 2009.

**ADDRESSES:** You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301-1160.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey Taylor, (703) 692-3032.

**SUPPLEMENTARY INFORMATION:** This Interim Final Rule is required to meet the mandate of Section 862 of the FY 2008 National Defense Authorization Act. Section 862 of the 2008 NDAA lays out two requirements:

(i) That the Secretary of Defense, in coordination with the Secretary of State shall prescribe regulations on the selection, training, equipping, and conduct of personnel performing private security functions under a covered contract in an area of combat operations; and

(ii) That the FAR shall be revised to require the insertion into each covered contract of a contract clause addressing the selection, training, equipping, and conduct of personnel performing private security functions under such contract.

This Interim Final Rule meets requirement (i). There will be a separate and subsequent **Federal Register** action to meet requirement (ii) to update the FAR.

#### **Executive Order 12866, "Regulatory Planning and Review"**

It has been certified that 32 CFR part 159 does not:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

#### **Public Law 104-121, "Congressional Review Act" (5 U.S.C. 801)**

It has been determined that 32 CFR part 159 is not a "major" rule under 5 U.S.C. 801, enacted by Public Law 104-121, because it will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

#### **Section 202, Public Law 104-4, "Unfunded Mandates Reform Act"**

It has been certified that 32 CFR part 159 does not contain a Federal mandate that may result in expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

#### **Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)**

It has been certified that 32 CFR part 159 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. This rule will apply only to a specific sector of defense industry and a limited number of small entities.

#### **Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)**

It has been certified that 32 CFR part 159 does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These requirements have been approved by OMB and assigned OMB Control Numbers 0704-0460, "Synchronized Predeployment and Operational Tracker (SPOT) System" and 0704-0461, "Qualification to Possess Firearms or Ammunition."

#### **Executive Order 13132, "Federalism"**

It has been certified that 32 CFR part 159 does not have federalism

implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

- (1) The States;
- (2) The relationship between the National Government and the States; or
- (3) The distribution of power and responsibilities among the various levels of Government.

#### **List of Subjects in 32 CFR Part 159**

Contracts, Security measures.

■ Accordingly 32 CFR Part 159 is added to read as follows:

#### **PART 159—PRIVATE SECURITY CONTRACTORS OPERATING IN CONTINGENCY OPERATIONS**

Sec.

- 159.1 Purpose.
- 159.2 Applicability and scope.
- 159.3 Definitions.
- 159.4 Policy.
- 159.5 Responsibilities.
- 159.6 Procedures.

**Authority:** Public Law 110-181; Pub. L. 110-417.

##### **§ 159.1. Purpose.**

This part establishes policy, assigns responsibilities and provides procedures for the regulation of the selection, accountability, training, equipping, and conduct of personnel performing private security functions under a covered contract. It also assigns responsibilities and establishes procedures for incident reporting, use of and accountability for equipment, rules for the use of force, and a process for administrative action or the removal, as appropriate, of PSCs and PSC personnel.

##### **§ 159.2. Applicability and scope.**

This part:

(a) Applies to:

- (1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint 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 as the "DoD Components").

(2) The Department of State and other U.S. Federal agencies insofar as it implements the requirements of section 862 of Public Law 110-181.

Specifically, in areas of operations which require enhanced coordination of PSC and PSC personnel working for U.S. Government (U.S.G.) agencies, the Secretary of Defense may designate such areas as areas of combat operations for the limited purposes of this part. In such an instance, the standards

established in accordance with this part would, in coordination with the Secretary of State, expand from covering only DoD PSCs and PSC personnel to cover all U.S.G.-funded PSCs and PSC personnel operating in the designated area.

(b) Prescribes policies applicable to all:

(1) DoD PSCs and PSC personnel performing private security functions during contingency operations outside the United States.

(2) USG-funded PSCs and PSC personnel performing private security functions in an area of combat operations, as designated by the Secretary of Defense.

### § 159.3. Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

*Area of combat operations.* An area of operations designated as such by the Secretary of Defense for the purpose of this part, when enhanced coordination of PSCs working for U.S.G. agencies is required.

*Contingency operation.* A military operation that is either designated by the Secretary of Defense as a contingency operation or becomes a contingency operation as a matter of law (10 U.S.C. 101(a)(13)). It is a military operation that: a. Is designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing force; or b. Is created by definition of law. Under 10 U.S.C. 101(a)(13)(B), a contingency operation exists if a military operation results in the (1) call-up to (or retention on) active duty of members of the uniformed Services under certain enumerated statutes (10 U.S.C. 688, 12301(a), 12302, 12304, 12305, 12406, or 331–335); and (2) the call-up to (or retention on) active duty of members of the uniformed Services under any other (non-enumerated) provision of law during war or national emergency declared by the President or Congress. These may include humanitarian or peacekeeping operations or other military operations or exercises.

*Contractor.* The contractor, subcontractor, grantee, or other party carrying out the covered contract.

*Covered contract.* A DoD contract for performance of services in an area of contingency operations or a contract of a non-DoD Federal agency for performance of services in an area of combat operations, as designated by the Secretary of Defense;

A subcontract at any tier under such a contract; or

A task order or delivery order issued under such a contract or subcontract.

Also includes contracts or subcontracts funded under grants and sub-grants by a Federal agency for performance in an area of combat operations as designated by the Secretary of Defense. Excludes temporary arrangements entered into by non-DoD contractors or grantees for the performance of private security functions by individual indigenous personnel not affiliated with a local or expatriate security company. Such arrangements must still be in compliance with local law.

*Private security functions.* Activities engaged in by a contractor under a covered contract as follows:

(1) Guarding of personnel, facilities, designated sites, or property of a Federal agency, the contractor or subcontractor, or a third party.<sup>1</sup>

(2) Any other activity for which personnel are required to carry weapons in the performance of their duties. For the DoD, DoDI Instruction 3020.41, “Contractor Personnel Authorized to Accompany the U.S. Armed Forces,”<sup>2</sup> prescribes policies related to personnel allowed to carry weapons for self defense.

*PSC.* During contingency operations “PSC” means a company employed by the DoD performing private security functions under a covered contract. In a designated area of combat operations, the term “PSC” expands to include all companies employed by U.S.G. agencies performing private security functions under a covered contract.

*PSC personnel.* Any individual performing private security functions under a covered contract.

### § 159.4. Policy.

(a) Consistent with the requirements of paragraph (a)(2) of section 862 of Public Law 110–181, the selection, training, equipping, and conduct of PSC personnel including the establishment of appropriate processes shall be coordinated between the DoD and the Department of State.

(b) Geographic Combatant Commanders will provide tailored PSC guidance and procedures for the operational environment in their Area of Responsibility (AOR) in accordance with this part, the Federal Acquisition

<sup>1</sup> Contractors performing private security functions are not authorized to perform inherently governmental functions. In this regard, they are limited to a defensive response to hostile acts or demonstrated hostile intent.

<sup>2</sup> Available at <http://www.dtic.mil/whs/directives/corres/pdf/302041p.pdf>.

Regulation (FAR)<sup>3</sup> and the Defense Federal Acquisition Regulation Supplement (DFARS).<sup>4</sup>

(c) In a designated area of combat operations, the relevant Chief of Mission will be responsible for developing and issuing implementing instructions for non-DoD PSCs and their personnel consistent with the standards set forth by the geographic Combatant Commander in accordance with paragraph (b) of this section. The Chief of Mission has the option to instruct non DoD PSCs and their personnel to follow the guidance and procedures developed by the Geographic Combatant Commander and/or Subordinate Commander.

(d) The requirements of this part shall not apply to contracts entered into by elements of the intelligence community in support of intelligence activities.

### § 159.5. Responsibilities.

(a) The Assistant Deputy Under Secretary of Defense for Program Support, under the authority, direction, and control of the Deputy Under Secretary of Defense for Logistics and Materiel Readiness, shall monitor the registering, processing, and accounting of PSC personnel in an area of contingency operations.

(b) The Director, Defense Procurement and Acquisition Policy, under the authority, direction, and control of the Deputy Under Secretary of Defense for Acquisition and Technology (DUSD(AT)), shall ensure that the DFARS and (in consultation with the other members of the FAR Council) the FAR provide appropriate guidance and contract clauses consistent with this part and paragraph (b) of section 862 of Public Law 110–181.

(c) The Director, Defense Business Transformation Agency, under the authority, direction, and control of the Deputy Chief Management Officer of the Department of Defense, through the DUSD(AT), shall ensure that information systems effectively support the accountability and visibility of contracts, contractors, and specified equipment associated with private security functions.

(d) The Chairman of the Joint Chiefs of Staff shall ensure that joint doctrine is consistent with the principles established by DoD Directive 3020.49 “Orchestrating, Synchronizing, and Integrating Program Management of Contingency Acquisition Planning and

<sup>3</sup> Published in Title 48 of the Code of Federal Regulations.

<sup>4</sup> Published in Title 48 of the Code of Federal Regulations.

Its Operational Execution,”<sup>5</sup> DoD Instruction 3020.41, “Contractor Personnel Authorized to Accompany the U.S. Armed Forces,” and this part.

(e) The geographic Combatant Commanders in whose AOR a contingency operation is occurring, and within which PSCs and PSC personnel perform under covered contracts, shall:

(1) Provide guidance and procedures, as necessary and consistent with the principles established by DoD Directive 3020.49, “Orchestrating, Synchronizing, and Integrating Program Management of Contingency Acquisition Planning and Its Operational Execution,” DoD Instruction 3020.41, “Contractor Personnel Authorized to Accompany the U.S. Armed Forces,”<sup>6</sup> and this part, for the selection, training, accountability and equipping of such PSC personnel and the conduct of PSCs and PSC personnel within their AOR. Individual training and qualification standards shall meet, at a minimum, one of the Military Departments’ established standards.

Within a geographic Combatant Command, Subordinate Commanders shall be responsible for developing and issuing implementing procedures as warranted by the situation, operation, and environment, in consultation with the relevant Chief of Mission in designated areas of combat operations.

(2) Through the Contracting Officer, ensure that PSC personnel acknowledge, through their PSC, their understanding and obligation to comply with the terms and conditions of their covered contracts.

(3) Issue written authorization to the PSC identifying individual PSC personnel who are authorized to be armed. Rules for the use of force, developed in accordance with Chairman of the Joint Chief of Staff Instruction 3121.01B, “Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces,”<sup>7</sup> shall be included with the written authorization.

(4) Ensure that the procedures, orders, directives and instructions prescribed § 159.6(a) of this part are available through a single location (to include an Internet Web site, consistent with

security considerations and requirements).

(f) The Heads of the DoD Components shall:

(1) Ensure that all private security-related requirement documents are in compliance with the procedures listed in § 159.6 of this part and the guidance and procedures issued by the geographic Combatant Command,

(2) Ensure private security-related contracts contain the appropriate clauses in accordance with the applicable FAR clause and include additional mission-specific requirements as appropriate.

#### § 159.6. Procedures.

(a) *Standing Combatant Command Guidance and Procedures.* Each geographic Combatant Commander shall develop and publish guidance and procedures for PSCs and PSC personnel operating during a contingency operation within their AOR, consistent with applicable law; this part; applicable Military Department publications; and other applicable DoD issuances to include DoD Directive 3020.49, “Orchestrating, Synchronizing, and Integrating Program Management of Contingency Acquisition Planning and Its Operational Execution,” DFARS, DoD Directive 2311.01E, “DoD Law of War Program,”<sup>8</sup> DoD 5200.8-R, “Physical Security Program,”<sup>9</sup> CJCSI 3121.01B, “Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces,” and DoD Directive 5210.56, “Use of Deadly Force and the Carrying of Firearms by DoD Personnel Engaged in Law Enforcement and Security Duties.”<sup>10</sup> The guidance and procedures shall:

(1) Contain, at a minimum, procedures to implement the following processes, and identify the organization responsible for managing these processes:

(i) Registering, processing, accounting for and keeping appropriate records of PSCs and PSC personnel in accordance with DoD Instruction 3020.41, “Contractor Personnel Authorized to Accompany the U.S. Armed Forces.”

(ii) PSC verification that PSC personnel meet all the legal, training, and qualification requirements for authorization to carry a weapon in accordance with the terms and conditions of their contract and host country law. Weapons accountability procedures will be established and

approved prior to the weapons authorization.

(iii) Arming of PSC personnel.

Requests for permission to arm PSC personnel shall be reviewed on a case-by-case basis by the appropriate Staff Judge Advocate to the geographic Combatant Commander (or a designee) to ensure there is a legal basis for approval. The request will then be approved or denied by the geographic Combatant Commander or a specifically identified designee, no lower than the flag officer level. Requests to arm non-DOD PSC personnel shall be reviewed and approved in accordance with § 159.4(c) of this part. Requests for permission to arm PSC personnel shall include:

(A) A description of where PSC personnel will operate, the anticipated threat, and what property or personnel such personnel are intended to protect, if any.

(B) A description of how the movement of PSC personnel will be coordinated through areas of increased risk or planned or ongoing military operations, including how PSC personnel will be rapidly identified by members of the U.S. Armed Forces.

(C) A communication plan, to include a description of how relevant threat information will be shared between PSC personnel and U.S. military forces and how appropriate assistance will be provided to PSC personnel who become engaged in hostile situations. DoD contractors performing private security functions are only to be used in accordance with DoD Instruction 1100.22, “Guidance for Determining Workforce Mix,”<sup>11</sup> that is, they are limited to a defensive response to hostile acts or demonstrated hostile intent.

(D) Documentation of individual training covering weapons familiarization and qualification, rules for the use of force, limits on the use of force including whether defense of others is consistent with host nation Status of Forces Agreements or local law, the distinction between the rules of engagement applicable to military forces and the prescribed rules for the use of force that control the use of weapons by civilians, and the Law of Armed Conflict.

(E) Written acknowledgment by the PSC and its individual PSC personnel, after investigation of background of PSC personnel by the contractor, verifying such personnel are not prohibited under U.S. law to possess firearms.

<sup>5</sup> Available from <http://www.dtic.mil/whs/directives/corres/pdf/302040p.pdf>.

<sup>6</sup> Available from <http://www.dtic.mil/whs/directives/corres/html/302041.htm>.

<sup>7</sup> CJCSI 3121.01B provides guidance on the standing rules of engagement (SROE) and establishes standing rules for the use of force (SRUF) for DOD operations worldwide. This document is classified secret. CJCSI 3121.01B is available via Secure Internet Protocol Router Network at <http://js.smil.mil> If the requester is not an authorized user of the classified network, the requester should contact Joint Staff J-3 at 703-614-0425.

<sup>8</sup> Available at <http://www.dtic.mil/whs/directives/corres/html/231101.htm>.

<sup>9</sup> Available at <http://www.dtic.mil/whs/directives/corres/pdf/520008r.pdf>.

<sup>10</sup> Available at <http://www.dtic.mil/whs/directives/corres/html/521056.htm>.

<sup>11</sup> Available at <http://www.dtic.mil/whs/directives/corres/pdf/110022p.pdf>.

(F) Written acknowledgment by the PSC and individual PSC personnel that:

(1) Potential civil and criminal liability exists under U.S. and local law or host nation Status of Forces Agreements for the use of weapons.<sup>12</sup>

(2) Proof of authorization to be armed must be carried by each PSC personnel.

(3) PSC personnel may possess only U.S.G.-issued and/or -approved weapons and ammunition for which they have been qualified according to paragraph (a)(1)(iii)(E) of this section.

(4) PSC personnel were briefed and understand limitations on the use of force.

(5) Authorization to possess weapons and ammunition may be revoked for non-compliance with established rules for the use of force.

(6) PSC personnel are prohibited from consuming alcoholic beverages or being under the influence of alcohol while armed.

(iv) Registration and identification in the Synchronized Predeployment and Operational Tracker (or its successor database) of armored vehicles, helicopters, and other vehicles operated by PSC personnel.

(v) Reporting alleged criminal activity or other incidents involving PSCs or PSC personnel by another company or any other person. All incidents involving the following shall be reported and documented:

(A) A weapon is discharged by an individual performing private security functions;

(B) An individual performing private security functions is killed or injured in the performance of their duties;

(C) A person other than an individual performing private security functions is killed or injured as a result of conduct by PSC personnel;

(D) Property is destroyed as a result of conduct by a PSC or PSC personnel;

(E) An individual performing private security functions has come under attack including in cases where a weapon is discharged against an individual performing private security functions or personnel performing such functions believe a weapon was so discharged; or

(F) Active, non-lethal counter-measures (other than the discharge of a weapon) are employed by PSC personnel in response to a perceived immediate threat in an incident that could significantly affect U.S. objectives

with regard to the military mission or international relations.

(vi) The independent review and, if practicable, investigation of incidents reported pursuant to paragraphs (a)(1)(v)(A) through (a)(1)(v)(F) of this section and incidents of alleged misconduct by PSC personnel.

(vii) Identification of ultimate criminal jurisdiction and investigative responsibilities, where conduct of U.S.G.-funded PSCs or PSC personnel are in question, in accordance with applicable laws to include a recognition of investigative jurisdiction and coordination for joint investigations (i.e., other U.S.G. agencies, host nation, or third country agencies), where the conduct of PSCs and PSC personnel is in question.

(viii) A mechanism by which a commander of a combatant command may request an action by which PSC personnel who are non-compliant with contract requirements are removed from the designated operational area.

(ix) Interagency coordination of administrative penalties or removal, as appropriate, of non-DoD PSC personnel who fail to comply with the terms and conditions of their contract, as is applicable to this part.

(x) Implementation of the training requirements contained below in paragraph (a)(2)(ii) of this section.

(2) Specifically cover:

(i) Matters relating to authorized equipment, force protection, security, health, safety, and relations and interaction with locals in accordance with DoD Instruction 3020.41, "Contractor Personnel Authorized to Accompany the U.S. Armed Forces."

(ii) Predeployment training requirements addressing, at a minimum, the identification of resources and assistance available to PSC personnel as well as country information and cultural training, and guidance on working with host country nationals and military personnel.

(iii) Rules for the use of force and graduated force procedures.

(iv) Requirements and procedures for direction, control and the maintenance of communications with regard to the movement and coordination of PSCs and PSC personnel, including specifying interoperability requirements. These include coordinating with the Chief of Mission, as necessary, private security operations outside secure bases and U.S. diplomatic properties to include movement control procedures for all contractors, including PSC personnel.

(b) *Availability of Guidance and Procedures.* The geographic Combatant Commander shall ensure the guidance

and procedures prescribed in paragraph (a) of this section are readily available and accessible by PSCs and their personnel (e.g., on a Web page and/or through contract terms), consistent with security considerations and requirements.

(c) *Subordinate Guidance and Procedures.* The Subordinate Commander, in consultation with the Chief of Mission, will issue guidance and procedures implementing the standing combatant command publications specified in paragraph (a) of this section, consistent with the situation and operating environment.

(d) *Consultation and Coordination.* The Chief of Mission and the geographic Combatant Commander/Subordinate Commander shall make every effort to consult and coordinate responses to common threats and common concerns related to oversight of the conduct of U.S.G.-funded PSC and their personnel. The Memorandum of Agreement between the Department of Defense and Department of State on U.S.G. Private Security Contractors<sup>13</sup> shall provide the framework for the development of guidance and procedures without regard to the specific locations identified therein.

Dated: July 14, 2009.

**Patricia L. Toppings,**  
*OSD Federal Register Liaison Officer,*  
*Department of Defense.*

[FR Doc. E9-17059 Filed 7-16-09; 8:45 am]

**BILLING CODE 5001-06-P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

#### 32 CFR Part 199

[DOD-2007-HA-0127; RIN 0720-AB18]

#### **TRICARE: Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) Changes Included in the John Warner National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2007; Authorization of Forensic Examinations**

**AGENCY:** Office of the Secretary, Department of Defense.

**ACTION:** Final rule.

**SUMMARY:** This final rule implements section 701 of the John Warner National Defense Authorization Act for FY 2007, Public Law 109-364. Section 701 amends Title 10 of the United States Code (U.S.C.), Chapter 55, Section 1079(a) by authorizing coverage for

<sup>13</sup> Available at [http://www.acq.osd.mil/log/PS/p\\_vault.html](http://www.acq.osd.mil/log/PS/p_vault.html).

<sup>12</sup> This requirement is specific to arming procedures. Such written acknowledgement should not be construed to limit civil and criminal liability to conduct arising from "the use of weapons." PSC personnel could be held criminally liable for any conduct that would constitute a federal offense (see MEJA, 18 USC 3261(a)).



## Attachment 4



### *Office of Inspector General*

November 29, 2010

#### **MEMORANDUM**

**TO:** USAID/Iraq Mission Director, Alex Dickie

**FROM:** Director, Office of Inspector General/Iraq, Lloyd J. Miller /s/

**SUBJECT:** Survey of Security Incidents Reported by Private Security Contractors of USAID/Iraq's Contractors and Grantees (Report Number E-267-11-001-S)

This memorandum transmits our final report on the subject survey. We have carefully considered your comments on the draft report and included your response, without attachments, in Appendix II of the report.

The survey is not an audit. The report contains five recommendations to USAID/Iraq to assist in improving oversight of their private security service subcontractors.

On the basis of information provided by the mission in its response to the draft report, we consider that both a management decision and final action have been taken on Recommendations 2 and 4. Management decisions on Recommendations 1 and 3 can be reached once USAID/Iraq and the Office of Inspector General/Iraq agree on a firm plan of action, with target dates, for completing the implementation of the two recommendations. We added a new Recommendation 5 subsequent to the mission providing its response to the draft report, and consequently this recommendation does not have a management decision. Please provide written notice within 30 days of any actions planned or taken to implement these recommendations.

I want to express my appreciation for the cooperation and courtesies extended to my staff during the survey.

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# BACKGROUND

Private security contractors (PSCs) operating in Iraq provide security services that include the protection of individuals, life support, office facilities, and nonmilitary transport movements. USAID/Iraq does not maintain any direct contracts with PSCs; security services were procured by the mission's implementing partners (contractors and grantees), who have primary oversight responsibilities for their security providers. Nevertheless, in managing its contracts and grant agreements, USAID/Iraq has some degree of oversight for private security activities. In addition, Section 862 of the National Defense Authorization Act for FY 2008 (NDAA FY 2008)<sup>1</sup> establishes a statutory scheme for oversight of all PSCs in areas of combat operations, specifically including Iraq and Afghanistan, through required regulations in subsection (a) and mandatory insertion of contract provisions in subsection (b). Section 862(a) requires that the Secretary of Defense promulgate regulations on the selection, training, equipping, and conduct of PSC personnel that meet specified requirements. Under Section 862(a)(2)(D), these regulations must establish a process under which contractors are required to report all incidents in which:

- A weapon is discharged by personnel performing private security functions in an area of combat operations.
- Personnel performing private security functions in an area of combat operations are killed or injured.
- Persons are killed or injured, or property is destroyed, as a result of conduct by contractor personnel.
- A weapon is discharged against personnel performing private security functions in an area of combat operations or personnel performing such functions believe a weapon was so discharged.
- Active, nonlethal countermeasures (other than the discharge of a weapon) are employed by the personnel performing private security functions in an area of combat operations in response to a perceived immediate threat to such personnel.

To meet the requirements of NDAA FY 2008 Section 862(a), the Secretary of Defense promulgated Interim Final Rule 32 CFR 159<sup>2</sup> on July 17, 2009, about a year after the deadline for the regulation set by NDAA FY 2008 Section 862(a). Prior to the July 2009 effective date for the Interim Final Rule, in May 2008 the U.S. Embassy in Baghdad (Embassy Baghdad) issued policy directives to armed PSCs that addressed some of the concerns of NDAA FY 2008. Although the Embassy Baghdad policy directives required serious incident reporting, it did not require PSC reporting of the specific incidents required to be reported by NDAA FY 2008 Section 862(a)(2)(D), as shown above. In March 2009, the Combatant Commander of the Multi-National Force-Iraq (MNF-I) updated its guidance to private security companies. These directives required PSCs to report serious security incidents. Specifically, the May 2008 Embassy Baghdad policy directives provided PSCs with rules, regulations, and requirements for operating in Iraq that were consistent with a December 2007 memorandum of agreement

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<sup>1</sup> See Appendix IV for the key statutory requirements in Sections 862 and 864 of the National Defense Authorization Act for FY 2008, as amended.

<sup>2</sup> See Appendix V for Interim Final Rule (32 CFR 159).

between the Department of Defense (DOD) and the Department of State (DOS). The policy directives required all PSCs to coordinate their private security detail movements with the Embassy's Regional Security Office's (RSO) Tactical Operations Center and the Contractor Operations Cell of the Multi-National Corps-Iraq. In addition, the policy directives required PSCs to immediately activate their transponder alert system when a serious security incident occurs and to establish two-way communication with the Contractor Operations Cell.

The policy directives also required PSCs to provide verbal or email notification of any serious security incident to the RSO Tactical Operations Center and to the Contractor Operations Cell as soon as practical, but not later than 1 hour after the incident. In addition, PSCs must submit an initial formal incident report in writing within 4 hours of the incident. Finally, a follow-up comprehensive written report of the events surrounding the incident must be provided within 96 hours, unless otherwise directed by the RSO.

From July 1, 2007, to June 30, 2009, USAID/Iraq maintained a portfolio of contracts and grants with 12 implementing partners, who held 17 subcontracts for private security services in Iraq.<sup>3</sup> According to information provided by USAID/Iraq's implementing partners, these 17 subcontracts for security services incurred cumulative expenditures of \$483 million<sup>4</sup> as of December 31, 2009. USAID/Iraq reported that the implementing partners incurred expenditures of \$2.1 billion over the same period. The information provided by the implementing partners and USAID/Iraq shows that security services accounted for approximately 23 percent of the implementing partners' total costs.

In 2009, the Office of Inspector General/Iraq conducted an audit to determine whether USAID/Iraq's implementing partners were providing adequate oversight of their private security service subcontractors in Iraq.<sup>5</sup> The audit included two recommendations, in which we advised USAID/Iraq to require its implementing partners (1) to establish procedures to monitor the reporting of serious security incidents<sup>6</sup> to ensure that such incidents are properly reported and (2) to notify USAID/Iraq of all serious security incidents by including the mission in the reporting of these incidents.

The purpose of this survey was (1) to determine the number of serious security incidents that occurred between July 1, 2007, and June 30, 2009, and (2) to follow up on the effectiveness of the mission's and implementing partners' actions in implementing our March 2009 audit report recommendations.

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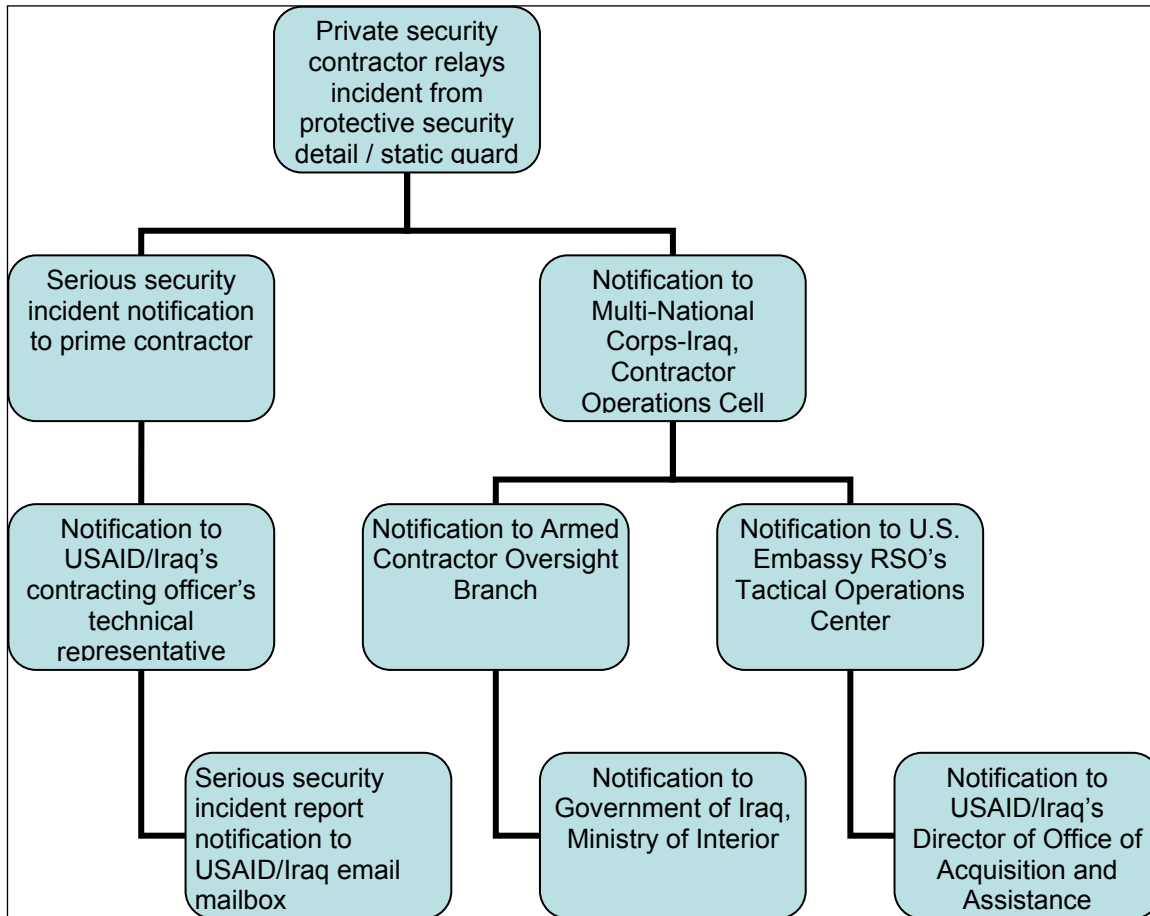
<sup>3</sup> During this period, some USAID/Iraq contractors and grant recipients had more than one contract but only one subcontractor for security services, some contracts expired during the period and new contracts were issued, and one USAID recipient provided its own security services.

<sup>4</sup> We did not verify these expenditure totals.

<sup>5</sup> "Audit of USAID/Iraq's Oversight of Private Security Contractors in Iraq," Audit Report No. E-267-09-002-P, March 4, 2009.

<sup>6</sup> According to DOS and DOD policy directives, the term "serious security incident" involves the use of deadly force, discharge of a weapon, an incident resulting in death, serious injury, or significant property damage (even if a weapon is not involved), or other serious consequences. PSCs shall report serious incidents they observe, suspect, or participate in, including aggressive personal behavior, road rage, criminal acts, traffic accidents, and any incident believed to have possible strategic or operational impact. NDAA FY 2008 and Interim Final Rule 32 CFR 159 simply refer to these as "incidents".

## Security Incident Reporting Process<sup>7</sup>



<sup>7</sup> The security incident reporting process in the diagram is based on the Embassy Baghdad May 2008 policy directive, the Combatant Commander's March 2009 guidance, and USAID guidance to its implementing partners. We also verified these steps with the Coordinator for Armed Contractor Oversight in the Embassy Baghdad Regional Security Office.

# SURVEY FINDINGS

USAID/Iraq's implementing partners did not establish procedures to monitor reporting of serious security incidents and did not consistently report incidents as required by our two prior audit recommendations. Moreover, Embassy Baghdad has not issued instructions to incorporate the statutory and regulatory requirements for PSC oversight described in the background section of this report. However, USAID/Iraq has implemented numerous actions (1) to implement our two prior audit recommendations from March 2009 and (2) to provide oversight and direction of the use of private security contractors (PSCs) by its contractors and grantees. Nevertheless, contractor and subcontractor implementation has not been fully effective. USAID/Iraq actions include the following.

- Issued on March 15, 2009, a formal mission notice<sup>8</sup> to all contractors and grantees specifying procedures for the reporting of security incidents by PSCs.
- Amended all 16 active direct awards to contractors and grantees to include a new provision for serious security incident reporting requirements.
- Set up on March 16, 2009, a central email account as a repository of all serious security incident reports received from implementing partners.
- Added new requirements to the official designation letter for contracting officer's technical representatives (COTRs), such as receiving and reviewing serious security incident reports, using the incident report as a monitoring tool, and seeking clarification from implementing partners on possible program impact.
- Ensured that all PSCs for USAID implementing partners have been registered with the Ministry of Interior of the Government of Iraq.
- Cochaired the Baghdad Joint Incident Review Board with DOD and DOS. The board's purpose is to conduct joint reviews of incidents involving PSCs, identify trends, and serve as a forum for exchanging information and coordinating efforts.
- Participated with DOD and DOS in the RSO-sponsored Armed Contractors Working Group, whose purpose is to review common security issues and lessons learned.
- Attended and gave presentations at quarterly conferences organized by DOD and DOS for Iraq PSCs.

Our March 2009 audit report recommended that USAID/Iraq require its implementing partners (1) to establish procedures to monitor the reporting of serious security incidents and (2) to notify the mission of all serious security incidents. Despite USAID's efforts, Recommendation 1 has not been implemented by implementing partners, and Recommendation 2 has not been consistently implemented. None of USAID/Iraq's implementing partners have established documented internal procedures to monitor the reporting of security incidents to ensure that such incidents are properly reported. In general, the implementing partners perceived that the amendments to their contract or grant agreement with USAID/Iraq had fulfilled the requirement to establish procedures. Nevertheless, contractor and subcontract implementation of USAID/Iraq's guidance has not been fully effective. The weaknesses include:

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<sup>8</sup> Mission Notice 09-03-001.

- Incomplete reporting of security incidents to USAID and the Contractor Operations Cell of the Multi-National Force-Iraq.
- Incomplete records of security incidents by implementing partners.

In addition to issues with contractor and subcontractor implementation, and despite clear guidance, the majority of USAID/Iraq’s own COTRs were not aware of their responsibilities. In addition, the Embassy Baghdad May 2008 policy directive, which is still in use, does outline conditions for reporting but does not explicitly require PSC reporting of the specific incidents required to be reported by NDAA FY 2008 or 32 CFR 159. Below is our discussion of these issues, along with a description of the 94 documented serious security incidents that occurred over the 2 years from July 1, 2007, to June 30, 2009.

## Partners Reported 94 Security Incidents

During the 2 years from July 1, 2007, to June 30, 2009, 94 serious security incidents were documented and reported by USAID/Iraq implementing partners and their PSCs. As summarized in Table 1, two implementing partners (Research Triangle Institute and International Relief and Development) accounted for 72 (74 percent) of the 94 serious incident reports. Security services for the 12 USAID/Iraq prime contractors and grantees were provided through 6 private security subcontractors and 1 cooperative agreement recipient.<sup>9</sup> Appendix III provides details of the 94 security incident reports.

**Table 1. Security Incident Reports From July 1, 2007, to June 30, 2009**

USAID/Iraq Implementer	Private Security Contractor	Number of Serious Security Incident Reports
Cooperative Housing Foundation	Unity Resources Group	2
International Foundation for Electoral Systems	Garda World	0
Research Triangle Institute	Armor Group/Unity Resources Group	43
BearingPoint	Garda World	1
Development Alternatives	Garda World	1
International Business and Technical Consultants	Garda World	0
Louis Berger Group	SallyPort	8
Management Systems International	SallyPort	7
AECOM International Development	SallyPort	1
International Relief and Development	Sabre	29
Relief International	Triple Canopy	2
ACDI-VOCA	No security contractor; security is self-provided	0
<b>Total</b>		<b>94</b>

<sup>9</sup> Some private security companies provided services to more than one USAID implementing partner, and one USAID/Iraq implementer, ACDI-VOCA, provided its own security protection.

As shown in Table 2, of the 94 security incident reports, the more significant categories were 23 incidents involving improvised explosive devices,<sup>10</sup> rockets, or missile attacks; 28 incidents involving a weapon discharge; and 19 incidents involving vehicles or traffic access denied by the Iraqi police.

**Table 2. Security Incident Reports by Incident Type**

USAID/Iraq Implementer	Improvised Explosive Device or Rockets or Missile Attacks	Weapon Discharge	Flare Shot	Negligent, Accidental, or Malfunction Discharge	Traffic Accident or Access Denial	Armed Robbery or Theft	Off-Duty Injury, Abduction, Threat
Cooperative Housing Foundation	2	0	0	0	0	0	0
International Foundation for Electoral Systems	0	0	0	0	0	0	0
Research Triangle Institute	5	17	6	6	7	1	1
BearingPoint	1	0	0	0	0	0	0
Development Alternatives	0	0	0	0	0	0	1
International Business & Technical Consultants	0	0	0	0	0	0	0
Louis Berger Group	0	5	1	0	1	0	1
Management Systems International	4	0	0	0	2	0	1
AECOM International Development	0	0	0	0	1	0	0
International Relief and Development	9	6	0	4	8	2	0
Relief International	2	0	0	0	0	0	0
ACDI-VOCA	0	0	0	0	0	0	0
<b>Total</b>	<b>23</b>	<b>28</b>	<b>7</b>	<b>10</b>	<b>19</b>	<b>3</b>	<b>4</b>

## Reporting of Security Incidents to USAID/Iraq Was Incomplete

In response to our March 2009 “Audit of USAID/Iraq’s Oversight of Private Security Contractors in Iraq,” USAID/Iraq issued a formal mission notice to all contractors and grantees specifying procedures for the reporting of security incidents by PSCs. These procedures required contractors and grantees (1) to establish procedures and to monitor the serious incident reporting by their PSCs and (2) to inform the mission of any and all serious security incidents. In addition, the mission amended all direct awards to contractors and grantees to include a new provision for “serious incident reporting requirements.” These reporting requirements stated that PSCs must:

- Provide notification, verbally or by email, of any serious incident to the RSO Tactical Operation Center and to the Contractor Operations Cell not later than 1 hour after the incident.

<sup>10</sup> The term “improvised explosive device” (IED) includes vehicle-borne IED, vehicle-carried IED, victim-detonated IED, and remote-controlled IED. The difference between “vehicle borne” and “vehicle carried” is that a “vehicle borne” IED is generally suicidal, whereas a “vehicle carried” IED is generally not suicidal.



- Submit an initial formal incident report in writing within 4 hours to the prime contractor/recipient, USAID/Iraq, the RSO Tactical Operation Center, and the Contractor Operations Cell.
- Provide a follow-up comprehensive written report of events within 96 hours to the prime contractor/recipient, the RSO Tactical Operation Center, and USAID/Iraq.

In addition, in May 2008, Embassy Baghdad issued policy directives to armed PSCs and, in March 2009, the Multi-National Force-Iraq (MNF-I) issued guidance to PSCs. These directives require serious incident reporting, as described in the USAID/Iraq mission notice.

During the period April to June 2009,<sup>11</sup> PSCs did not always report serious security incidents to USAID/Iraq. For example, records at implementing partners and their PSCs showed nine security incidents reported. Records at the Contractor Operations Cell and the Armed Contractor Oversight Branch showed 11 security incidents, and records at the USAID/Iraq mailbox showed 7 incidents. However, each source should show the same number of reported incidents. Table 3 provides the number of security incident reports from each source for the 3-month period following the issuance of new mission guidance in March 2009.

**Table 3. Security Incident Reports, April 1–June 30, 2009**

<b>USAID/Iraq Implementer Partners</b>	<b>Reports at Private Security Contractors</b>	<b>Reports at Contractor Operations Cell or Armed Contractors Oversight Branch</b>	<b>Reports at USAID/Iraq Mailbox</b>
Cooperative Housing Foundation	0	1	0
International Foundation for Electoral Systems	0	0	0
Research Triangle Institute	3	2	2
BearingPoint/Deloitte	0	0	0
Development Alternatives	1	1	0
International Business and Technical Consultants	0	0	0
Louis Berger	0	0	0
AECOM	0	0	0
Management Systems International	1	1	1
International Relief and Development	4	6	4
Relief International	0	0	0
ACDI-VOCA	0	0	0
<b>Total</b>	<b>9</b>	<b>11</b>	<b>7</b>

<sup>11</sup> We reviewed these 3 months because the period was subsequent to the March 2009 USAID/Iraq mission notice to all the contractors and grantees specifying procedures for the reporting of security incidents by PSCs.

In a more recent example in February 2010, one private security contractor reported six security incidents in its monthly threat report to USAID/Iraq. However, during the same interval, only two incidents were reported to USAID/Iraq's mailbox.

The disparity in reporting happened for two reasons. First, almost all of USAID/Iraq's implementing partners relied on their PSCs to report and maintain records of their security incidents. Only one partner had custody of its security incident reports and was able to provide records of them. Second, implementing partner staffs do not always understand reporting procedures. For example, one implementing partner stated that he sends security incident reports only to the RSO Tactical Operations Center and thought the RSO had the responsibility to forward the reports to USAID/Iraq. In another case, a security incident involving the negligent discharge of a weapon was not reported to USAID/Iraq. A USAID COTR learned of the incident when the Embassy's RSO asked about it. USAID/Iraq ultimately obtained a copy of the incident report only after the COTR had requested it. As noted earlier, none of USAID/Iraq's implementing partners had established documented internal procedures to monitor the reporting of security incidents to ensure that such incidents are properly reported.

Implementing partners did not always provide sufficient oversight of their PSCs with respect to incident reporting. This lack of monitoring led to reporting deficiencies and missing security incident reports. Because of USAID/Iraq's ineffective implementation of our March 2009 recommendations, we are restating our original recommendation and adding a requirement for the mission to verify implementing partners' actions.

***Recommendation 1.*** We recommend that USAID/Iraq require its implementing partners to establish procedures to monitor the reporting of security incidents to ensure that such incidents are properly reported in accordance with Embassy and USAID guidance and verify that each implementing partner has completed this corrective action.

***Recommendation 2.*** We recommend that USAID/Iraq provide training for the implementing partners to coordinate and reinforce roles and responsibilities and to address control weaknesses in security incident reporting requirements.

## **Records of Security Incidents Were Incomplete**

The Government Accountability Office's (GAO) *Standards for Internal Control in the Federal Government* states that internal controls and all transactions and other significant events need to be clearly documented and that the documentation should be readily available for examination.<sup>12</sup> A serious security incident qualifies as a significant event.

In response to our March 2009 audit, USAID/Iraq noted that in addition to GAO standards, its new procedures will require the partners at a minimum to (1) ensure that they receive a copy of all serious security incident reports issued by their PSC; (2) maintain detailed records (e.g., copies of incident reports) documenting all reported incidents to facilitate monitoring; (3) review applicable procedural guidance to gain a clear understanding of the current prescribed procedures for reporting serious security incidents; and (4) regularly review their PSC's actual reporting procedures to ensure that they are consistent with those current and prescribed by the U.S. Embassy. USAID/Iraq's March 2009 mission notice and the award amendments stipulate that the prime contractor/recipient must ensure that all records are maintained on file.

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<sup>12</sup> GAO/AIMD-00-21.3.1 (November 1999), page 15

None of USAID/Iraq's implementing partners were able to fully account for all serious security incident reports. Of 10 implementing partners, one (Research Triangle Institute) had security incident reports on file. However, even this implementer had only incomplete records. For instance, from July 1, 2007, to June 30, 2009, this implementer had 39 security incident reports on file, while its PSC had 21 security incident reports on file for the same period.

The implementing partners were not able to account for all security incident reports because they had been relying on the PSCs to report and track the reports. Implementing partners felt that since they were colocated with the PSCs, maintaining separate recordkeeping of security incident reports would amount to duplicated efforts. However, implementing partners had no controls in place to ensure that all security incident reports were accurately accounted for and safeguarded. Furthermore, because implementing partners lacked complete records of security incidents, they were not in a position to detect inaccuracies and inconsistencies associated with the reports.

The prime contractors are responsible for ensuring that all subawardees are familiar with relevant rules and regulations and comply with them. Complete and reliable reporting and recordkeeping of security incidents is needed to ensure that security risks are promptly addressed and that coordination of information with other U.S. Government agencies is not hindered. Moreover, jurisdiction of private security contractors has been turned over to the Iraqi Government. Therefore, it is critical that implementing partners and their PSCs adhere to policies, procedures, and requirements.

***Recommendation 3.** We recommend that USAID/Iraq require its implementing partners to establish and maintain records of reported serious security incidents and verify that each implementing partner has completed this corrective action.*

## **USAID/Iraq Agreement or Contracting Officer's Technical Representatives Were Not Aware of Responsibilities**

USAID's Automated Directives System 302 and 303 require that the agreement or contracting officer's technical representative (AOTR or COTR) should monitor, review, and verify reports and deliverables. In addition, according to their designation letter, the AOTR or COTR serves as the mission's point person for receiving and reviewing the serious incident reports. Further duties include:

- Using the serious security incident report as a monitoring tool and seeking clarifications from the implementing partner on any impact an incident may have on the implementation of the program.
- Alerting the contracting or agreement officer if the incident has potential cost or scope limitations.
- Forwarding a copy of the serious security incident report and any perceived impact to the USAID/Iraq mailbox designated for these reports.

However, some COTRs stated that they had not been provided guidance about their oversight responsibilities or their roles and responsibilities regarding security incident reporting procedures. In addition, some COTRs did not understand that one of their responsibilities was

to submit security incident reports that they received from the implementing partners or PSCs to the USAID/Iraq mailbox.

The USAID/Iraq special mailbox for security incident reports is monitored by the deputy mission director and the executive officer. However, if these technical representatives are not fulfilling their duties as designated, the mailbox will not have a complete record of incidents for consideration by mission management.

***Recommendation 4.*** *We recommend that USAID/Iraq develop and provide training for its agreement/contracting officer's technical representatives for their roles in receiving, reviewing, and forwarding serious security incident reports to the designated USAID/Iraq mailbox and other required security incident responsibilities.*

## **Embassy Baghdad Has Not Issued Instructions in Accordance With Regulation Implementing Statutory Requirements**

As discussed in the background section, the statutory scheme under NDAA FY 2008 Section 862(a) for oversight of all PSCs in combat operation areas is implemented by Interim Final Rule 32 CFR 159, promulgated in July 2009 by the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics<sup>13</sup>. Under 32 CFR 159.4(c), the Chief of Mission for Iraq is responsible for issuing implementing instructions for non-DOD PSCs and their personnel consistent with the standards set forth by the geographic Combatant Commander, and has the option to instruct non-DOD PSCs and their personnel to follow the guidance and procedures developed by the Geographic Combatant Commander and/or Subordinate Commander. However, Embassy Baghdad has not issued instructions in accordance with 32 CFR 159.4(c) and its May 2008 policy directive does not incorporate the statutory requirements for PSC security incident reporting implemented by 32 CFR 159.

The Embassy Baghdad May 2008 policy directive, which is still in use, does outline conditions for reporting including small arms fire, improvised explosive devices, indirect fire, PSC weapons discharges, traffic accidents, rules for use of force incidents, and graduated force response incidents. Nevertheless, the policy directive does not explicitly require PSC reporting of the specific incidents required to be reported by NDAA FY 2008 Section 862(a)(2)(D) or 32 CFR 159.6(a)(1)(v)<sup>14</sup>. According to officials, the Embassy does plan to update the policy, but the update was not intended to incorporate statutory and regulatory requirements.

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<sup>13</sup> According to officials within the DOD's Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, all US government private security contractors in Iraq are covered by Interim Final Rule 32 CFR 159. The Department of State, DOD, and USAID are operating with the understanding that both Iraq and Afghanistan are designated areas of combat operations for the purposes of this provision. DOD and the Department of State are currently planning the transition to the Department of State as the lead agency in Iraq. When that happens, for the purposes of this provision, Iraq will no longer be considered an area of combat operations. The policy and guidance for the management of PSCs operating in Iraq after the transition are currently being developed. However, the officials do not believe that there will be a significant change in requirements for the management and oversight of PSCs.

<sup>14</sup> The categories of security incidents under NDAA FY 2008 and 32 CFR 159 are essentially the same. 32 CFR 159 splits the statute's category, "persons are killed or injured, or property is destroyed, as a result of conduct by contractor personnel", into two categories: (1) persons are killed or injured and (2) property is destroyed.

As earlier noted, reported security incidents from July 2007 to June 2009 identified 94 security incidents. 65 of these 94 security incidents were among the incidents required to be reported by NDAA FY 2008 Section 862(a)(2)(D) or 32 CFR 159.6(a)(1)(v). Table 4 distinguishes the 94 security incident reports according to these conditions, including an “other” category for reports that did not specifically align with the statute’s conditions.

**Table 4. Security Incident Reports by Statutory Conditions**

National Defense Authorization Act for Fiscal Year 2008 Conditions for Reporting Security Incidents	Number of Security Incidents Reported <sup>15</sup>
A weapon is discharged by personnel performing private security functions in an area of combat operations.	35
Personnel performing private security functions in an area of combat operations are killed or injured.	13
Persons are killed or injured, or property is destroyed, as a result of conduct by contractor personnel.	8 <sup>16</sup>
A weapon is discharged against personnel performing private security functions in an area of combat operations or personnel performing such functions believe a weapon was so discharged.	15
Active, nonlethal countermeasures (other than the discharge of a weapon) are employed by the personnel performing private security functions in an area of combat operations in response to a perceived immediate threat to such personnel.	22
Other types of security incidents reported.	29
<b>Total</b>	<b>122</b>

In order to align PSC security incident reporting with statutory and regulatory requirements, the audit is making the following recommendation.

**Recommendation 5.** *We recommend that USAID/Iraq request Embassy Baghdad to issue instructions for private security contractors and their personnel in accordance with Interim Final Rule 32 CFR 159.4(c).*

<sup>15</sup> In some cases, the 94 security incident reports covered more than one condition as outlined in NDAA FY 2008, for a total of 122 conditions.

<sup>16</sup> The 8 security incident reports from the column “persons are killed or injured, or property is destroyed, as a result of conduct by contractor personnel” include 3 reports of persons injured, 1 report of a person killed (pedestrian killed in collision with security convoy), 3 reports of property destroyed, and 1 report of both persons injured and property destroyed.

# EVALUATION OF MANAGEMENT COMMENTS

The mission agreed with the four recommendations in the draft report and described actions planned and taken to address each of the recommendations.

In regard to recommendations 1 and 3, the mission revised the language of the “Serious Incident Reporting” (SIR) clause to be included in all mission award documents. Although it was a positive response to the recommendation, revising the clause language does not address all the elements of the recommendations—specifically, the need to verify that each implementing partner has completed corrective actions. Page 9 of the report states that, due to ineffective implementation of our March 2009 recommendations, we are restating our original recommendation and adding a requirement for the mission to verify implementing partners’ actions. In our opinion, such verification is essential. Furthermore, the mission response does not address when the language revisions will be incorporated into mission award documents. Management decisions for Recommendations 1 and 3 can be made when the mission submits an action plan, with target dates for completion, for implementing the recommendations including verification of implementing partners’ actions.

In regard to recommendation 2, the mission stated that they will use the quarterly partner meetings as the forum to provide information and guidance on the implementation of the requirements contained in the SIR clause set forth in the mission’s response to Recommendation 1. The management comments from the mission did not state a target date for completion of the training, however, subsequently, the mission provided additional documentation to support that the quarterly partner meetings were used as a forum to provide information and guidance on the implementation of the requirements. As a result, Recommendation 2 has a management decision and final action.

In regard to recommendation 4, the mission included a specific section on the handling of review, reporting, and distribution of the serious incident reports in its AOTR/COTR designation letters, and in July 2010, the mission added a mandatory briefing with the Office of Acquisition and Assistance to the mission’s check-in process for COTR/AOTRs. The briefing includes a detailed review of the SIR reporting procedures and their delegated responsibilities. We consider that a management decision has been made and final action taken for Recommendation 4.

In regard to recommendation 5, we added a new recommendation subsequent to the mission providing its response to the draft report, and consequently this recommendation does not have a management decision.

# SCOPE AND METHODOLOGY

## Scope

The purpose of this survey was (1) to determine the number of serious security incidents that occurred between July 1, 2007, and June 30, 2009, and (2) to follow up on the effectiveness of the mission's and implementing partners' actions in implementing the audit recommendations from our "Audit of USAID/Iraq's Oversight of Private Security Contractors in Iraq," issued March 4, 2009. This survey reviewed all incident reports from all 12 prime contractors and 6 private security subcontractors that were active during any part of the period from July 1, 2007, to June 30, 2009. According to information provided by USAID/Iraq's implementing partners, the 17 subcontracts for security services during this period incurred expenditures of \$483 million<sup>17</sup> as of December 31, 2009, from inception of each subcontract.

We examined significant internal controls at USAID/Iraq, the implementing partners, and the private security contractors (PSCs). For USAID/Iraq, we examined:

- The March 2009 guidance to implementing partners.
- The mailbox established to receive security incident reports.
- Contracts and grant agreements (including amendments) with implementing partners to identify security requirements.

For the implementing partners, in addition to the controls listed above, we examined:

- Subcontracts and subawards with PSCs.
- Sample security incident reports from time of occurrence and filing of first report, interim, and final report.
- Records of all security incident reports for accuracy and completeness.
- Internal written procedures to monitor and supervise PSCs.
- Sample monthly or weekly reports to USAID/Iraq Office of Acquisition and Assistance.

For the PSCs, in addition to the controls and records listed above, we examined:

- Logs and records of incidents reported from July 1, 2007, to June 30, 2009.
- Monthly threat reports to USAID/Iraq Office of Acquisition and Assistance.
- Rules and regulations for protective security detail and protective security specialists.
- Task order schedule and statement of work.

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<sup>17</sup> We did not verify these expenditure totals.

Survey fieldwork was performed from September 23, 2009, to March 30, 2010, at the USAID/Iraq Mission and the in-country offices of eight prime contractors and their eight associated private security subcontractors whose offices were located in Baghdad, Iraq. Four of these offices were in the Red Zone, and four were in the International Zone. We also collected information from two additional implementing partners at the USAID/Iraq offices outside of Baghdad, and we collected information through electronic correspondence from two implementing partners whose contracts had expired and no longer had a presence in-country.

## Methodology

To determine the number of serious security incidents from July 1, 2007, to June 30, 2009, we took the following actions:

- Interviewed USAID/Iraq Office of Acquisition and Assistance staff and contracting officer's technical representatives (COTRs).
- Identified all PSCs used by USAID/Iraq's prime contractors and grantees for the period under review.
- Visited and interviewed all active implementing partners and the PSCs.
- Obtained records of serious security incident reports from the implementing partners, the PSCs, the Armed Contractor Oversight Branch, the Contractor Operations Cell of the Multi-National Corps-Iraq, and USAID/Iraq's mailbox; we then compared the data.
- Reviewed PSCs' monthly threat reports.
- Reviewed all serious security incident reports for accuracy, completeness, and compliance with rules and regulations.
- Compared records received from each reporting entity to determine whether all serious security incident reports were reported to the appropriate authorities.
- Performed a walk-through of the PSCs' operations, including observation of protective security detail dispatch movements and surveillance monitoring.
- Reviewed Department of Defense, Department of State, and USAID regulations and guidance on private security services in Iraq.

We also followed up on two prior audit recommendations, in which we had advised USAID/Iraq to require its implementing partners (1) to establish procedures to monitor the reporting of serious security incidents and (2) to notify the mission of all serious security incidents. In addition to the actions described above, our assessment included whether the prime contractors and their private security subcontractors had established controls, had communicated all the serious security incident reports to USAID/Iraq management, and were using sample security incident reports consistent with data requirements established in policy directives. We also obtained an understanding of the guidance on security incident reporting requirements by reviewing the following rules and regulations:

- Policy Directives for Armed Private Security Contractors in Iraq, U.S. Embassy in Baghdad, Iraq, May 2008.



- “Overarching FRAGO for Requirements, Communications, Procedures, Responsibilities for Control, Coordination, Management, and Oversight of Armed Contractors/DoD Civilians and Private Security Companies,” Fragmentary Order 09-109, Multi-National Force-Iraq, February–March 2009 updates.<sup>18</sup>
- USAID/Iraq Mission Notice, “Private Security Contractors—Incident Reporting,” No. 09-03-001, March 15, 2009.
- USAID/Iraq’s AOTR and COTR designations.
- USAID Automated Directives System, Chapters 302 and 303.
- Key Statutory Requirements in Sections 862 and 864 of the National Defense Authorization Act for Fiscal Year 2008, as amended
- 32 CFR Part 159 Private Security Contractors Operating in Contingency Operations.

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<sup>18</sup> Fragmentary Order 09-109, March 2009, replaced earlier orders. MNF-I FRAGO 09-109 is a revision of prior PSC guidance that was required in the National Defense Authorization Acts of Fiscal Years 2008 and 2009 and was committed to in earlier interagency agreements. The FRAGO is intended to apply equally to DOD and DOS PSCs by virtue of the memorandum of agreement signed by the Departments on December 5, 2007.

# MANAGEMENT COMMENTS



August 29, 2010

**MEMORANDUM**  
**UNCLASSIFIED**

**TO:** Lloyd Miller, Office of the Inspector General/Iraq

**FROM:** Alex Dickie, Mission Director /s/

**SUBJECT:** Management Comments in Response to Draft Survey of Security Incidents Reported by Private Security Contractors of USAID/ Iraq's Contractors and Grantees (Report Number E-267-10-00X-S)

On July 29, 2010, the Office of the Inspector General/Iraq (OIG/Iraq) transmitted its draft Survey of Security Incidents Reported by Private Security Contractors of USAID/ Iraq's Contractors and Grantees (Report Number E-267-10-00X-S) (Tab A). The draft report contains four recommendations:

***Recommendation 1.** We recommend that USAID/Iraq require its implementing partners to establish procedures to monitor the reporting of security incidents to ensure that such incidents are properly reported in accordance with Embassy and USAID guidance and verify that each implementing partner has completed this corrective action.*

***Recommendation 2.** We recommend that USAID/Iraq provide training for the implementing partners to coordinate and reinforce roles and responsibilities and to address control weaknesses in security incident reporting requirements.*

***Recommendation 3.** We recommend that USAID/Iraq require its implementing partners to establish and maintain records of reported serious security incidents and verify that each implementing partner has completed this corrective action.*

***Recommendation 4.** We recommend that USAID/Iraq develop and provide training for its agreement/contracting officer's technical representatives for their roles in receiving, reviewing, and forwarding serious security incident reports to the designated USAID/Iraq mailbox and other associated security incident responsibilities.*

## **Management Comments in Response to Recommendations 1 & 3:**

The Mission concurs with Recommendations 1 and 3, and in response to the OIG's previous audit concerning management of contracts and grants such that implementing partners provided adequate oversight of Private Security Contractors (PSC), USAID issued Mission Notice 09-03-001 dated March 15, 2009 (Tab B) establishing procedures for the reporting of incidents by PSCs.

Among these procedures was the establishment of a special requirement on the reporting of Serious Incidents (SI) included via administrative modification in all Mission awards.

To facilitate more efficient and effective implementation of the procedures for monitoring the reporting of serious incidents and maintaining records of the Serious Incident Reports (SIR), USAID has revised the language of the SIR clause as reproduced verbatim below and will include it in all Mission award documents.

### **H.XX SERIOUS INCIDENT REPORTING**

#### **Definitions:**

**Private Security Contractor (PSC):** A private company, and or its personnel that provides physical protection to or security for persons, places, buildings, facilities, supplies, or means of transportation.

**Contractors Operations Cell (CONOC):** United States Forces-Iraq (USF-I) operated coordination center for all PSCs supporting/protecting USG funded operations in Iraq, and all follow-on entities performing the same function.

**Protective Security Specialist (PSS):** An individual performing static or mobile security functions on a personnel protective security detail assignment, as authorized by contract.

**Protective Security Detail (PSD):** A team of PSS personnel that provides physical protective services for the movement of protected persons and/or property.

**Static Guards:** An individual who is providing security at facilities and/or check-points.

**Serious Incident (SI):** An incident involving the use of deadly force, the discharge of a weapon (other than in training or into a clearing barrel) by a PSS or against a PSS, use of non-lethal countermeasures by a PSS, and/or an incident that resulted in death, serious injury, significant property damage (even if a weapon is not involved), or other serious consequences.

**Serious Incident Report (SIR):** A comprehensive, formal written report of the events surrounding a SI. This report will document the SI based upon the notification and initial written incident report provided to the CONOC and any follow-up investigation.

## Reporting Requirements:

The following reporting requirements apply to all PSCs (including static guards). The Prime contractor shall establish policies and procedures to ensure that:

- (1) All PSD movements shall be coordinated through the United States Forces – Iraq (USF-I) Contractor Operations Cell (CONOC), or any successor entity.
- (2) The Prime contractor's PSCs provide *notification*, either verbal or in writing via email, of any serious incident to the CONOC and the Prime – as soon as practical, but not later than one hour after the incident. This notification must provide as many details about the incident, as possible. PSCs must submit an *initial written incident report* within 4 hours of the incident to the CONOC and the Prime. The initial written report shall include the name of the company, where the incident occurred, the time when the incident occurred, a brief description of the events leading up to the incident, and a point of contact for the company.
- (3) As soon as practical after the Prime is aware of a serious incident, but not later than one hour after receiving the initial verbal or written report from the PSC or PSD, the Prime shall inform the cognizant Contracting Officer's Technical Representative (COTR) or Agreement Officer's Technical Representative (AOTR) of the incident verbally followed by a confirming email to both. The Prime will send the PSC's initial written incident report to the COTR or AOTR immediately upon receipt by the Prime.
- (4) The Prime shall verify in the contract file that the initial (1 hour) notification and the initial written incident report (4 hour) are appropriately disseminated to the CONOC (as specified above) and sent to the COTR or AOTR as specified above.
- (5) The SIR shall be provided with confirmed receipt to the CONOC and COTR or AOTR within 96 hours. All further follow-up reports produced by the PSC will likewise be submitted as soon as received with confirmed receipt to the CONOC and to the COTR or AOTR.
- (6) The SIRs received are reviewed by the Prime to determine whether they reveal any special vulnerability or other conditions that require adjustment in project implementation or other implications for the security of personnel and/or property. All vulnerabilities identified shall be discussed with USAID and the PSC. This process shall be documented in the contract file of the Prime and copied to the COTR or AOTR.
- (7) All SIRs and associated documentation shall be maintained by the Prime in the contract file for the life of the project. The prime shall also produce and maintain as a separate comprehensive document a complete, accurate and up to date inventory of all SIRs during the life of the project. The Prime shall make this file available to U.S. Government investigators and/or auditors upon request.
- (8) All incident reports will generally be reviewed by the Regional Security Office

(RSO) and a follow-up investigation will be conducted by the RSO Force Investigations Unit (FIU) if required. The FIU will notify the prime, either directly or through the COTR, AOTR or the Contracting/Agreement Officer, of their need to conduct a full investigation as soon as that determination is made.

(9) All sub-awardees are familiar with and comply with this provision (H.XX), all relevant Chief of Mission and US Military policies, rules and requirements, all additional USAID requirements and applicable Iraqi law.

Based upon the foregoing, USAID/Iraq requests OIG/Iraq's concurrence that final action has been taken on Recommendations 1 & 3.

#### **Management Comments in Response to Recommendation 2:**

The Mission concurs with Recommendation 2. The Mission will use the quarterly partner meetings as the forum to provide information and guidance on the implementation of the requirements contained in the "Serious Incident Reporting" clause set forth above. The meetings will also be used to review the procedures for maintaining and reporting SIs and to identify partner security concerns in order to discuss ways to counter vulnerabilities that may be shared by more than one partner. Additionally, this will serve a compliance monitoring function by verifying that partners are keeping SIR records in the manner prescribed, that communication between the PSCs, CONOC, PRIME and COTR/AOTR has been conducted as prescribed, and that each partner has taken corrective action as appropriate.

Based upon the foregoing, USAID/Iraq requests OIG/Iraq's concurrence that final action has been taken on Recommendation 2.

#### **Management Comments in Response to Recommendation 4:**

The Mission concurs with Recommendation 4. Mission Notice 09-03-001 establishes the responsibilities of COTR/AOTRs regarding receiving, reviewing and forwarding SIRs to the designated USAID/Iraq mailbox. Furthermore, the COTR/AOTR Designation Letters issued by the Contracting Officer for each of the Mission's awards include a specific section on how COTRs/AOTRs are to handle review, reporting and distribution of SIRs, which mirrors the procedures established in the Mission Notice. By signing the Designation Letter, the COTRs/AOTRs acknowledge and take responsibility for following those procedures. As an additional measure to reinforce COTR/AOTR knowledge, in July 2010, USAID/Iraq added a mandatory briefing with OAA to the Mission's check-in process for COTR/AOTRs. This briefing includes detailed review of the SIR reporting procedure and a reminder of their delegated responsibilities in that regard.

Based upon the foregoing, USAID/Iraq requests OIG/Iraq's concurrence that final action has been taken on Recommendation 4.

List of 94 Serious Security Incidents				
No.	Date of Incident	Contractor/ Subcontractor	Description of Incident	Injury or Damage
1	7/30/2007	Research Triangle Institute-Unity Resources Group (RTI-URG)	Flare shots	No
2	8/5/2007	RTI-URG	Weapon discharge	Yes
3	8/6/2007	RTI-URG	Warning shot	No
4	8/7/2007	RTI-URG	Weapon discharge	No
5	8/7/2007	RTI-URG	Indirect-fire attack	No
6	8/13/2007	RTI-URG	Accidental discharge	Yes
7	8/31/2007	RTI-URG	Theft of weapon	No
8	9/7/2007	RTI-URG	Weapon discharge	No
9	9/8/2007	RTI-URG	Vehicle hijacking	No
10	9/9/2007	RTI-URG	Weapon discharge	Yes
11	9/14/2007	RTI-URG	Vehicle accident	No
12	9/24/2007	RTI-URG	Warning shots	No
13	10/9/2007	RTI-URG	Weapon discharge	Yes
14	11/13/2007	RTI-URG	Improvised explosive device	No
15	11/17/2007	RTI-URG	Improvised explosive device	No
16	11/29/2007	RTI-URG	Negligent discharge	No
17	12/23/2007	RTI-URG	Warning shots	No
18	12/27/2007	RTI-URG	Warning shot	No
19	1/7/2008	RTI-URG	Vehicle accident	No
20	1/16/2008	RTI-URG	Vehicle accident	No
21	1/29/2008	RTI-URG	Warning shot	No
22	1/29/2008	RTI-URG	Warning shot	No
23	1/31/2008	RTI-URG	Warning shots	No
24	2/13/2008	RTI-URG	Flare and warning shots	No
25	2/16/2008	RTI-URG	Warning shot	No
26	2/29/2008	RTI-URG	Collision with parked car	No
27	3/17/2008	RTI-URG	Warning shots	No
28	3/24/2008	RTI-URG	Warning Shots	No
29	3/27/2008	RTI-URG	Improvised explosive device	Yes
30	3/28/2008	RTI-URG	Gunfight exchange	Unknown
31	4/10/2008	RTI-URG	Warning shot	No
32	4/12/2008	RTI-URG	Nonbattle off-duty injury	Yes
33	5/20/2008	RTI-URG	Flare shots	No
34	6/10/2008	RTI-URG	Stray bullet	No
35	9/12/2008	RTI-URG	Negligent discharge	No
36	12/11/2008	RTI-URG	Accidental discharge	No
37	1/3/2008	RTI-URG	Flare shot	No
38	10/2/2008	RTI-URG	Flare shots	No
39	10/6/2008	RTI-URG	Traffic accident	No
40	12/1/2008	RTI-URG	Traffic accident	No

<b>List of 94 Serious Security Incidents</b>				
<b>No.</b>	<b>Date of Incident</b>	<b>Contractor/ Subcontractor</b>	<b>Description of Incident</b>	<b>Injury or Damage</b>
41	4/16/2009	Research Triangle Institute-Armor Group	Warning shot	No
42	5/14/2009	Research Triangle Institute-Armor Group	Explosive formed projectile attack	Yes
43	6/14/2009	Research Triangle Institute-Armor Group	Disabling shot	No
44	7/16/2007	International Relief Development-Sabre International Security (IRD-Sabre)	Celebrative shooting spree	No
45	11/14/2007	IRD-Sabre	Gunfight exchange	Yes
46	12/9/2007	IRD-Sabre	Weapon discharge	No
47	12/16/2007	IRD/Sabre	Victim-detonated improvised explosive device	Yes
48	2/19/2008	IRD-Sabre	Rocket-missile attack	No
49	3/8/2008	IRD-Sabre	Negligent discharge	Yes
50	3/19/2008	IRD-Sabre	Negligent discharge	Yes
51	3/24/2008	IRD-Sabre	Rollover accident	Yes
52	4/15/2008	IRD-Sabre	Vehicle-borne improvised explosive device	Unknown
53	6/30/2008	IRD-Sabre	Armed robbery	No
54	8/6/2008	IRD-Sabre	Vehicle accident	Yes
55	10/7/2008	IRD-Sabre	Armed robbery	Yes
56	10/8/2008	IRD-Sabre	Victim-detonated improvised explosive device	Yes
57	10/20/2008	IRD-Sabre	Malfunctioning weapon discharge	No
58	11/3/2008	IRD-Sabre	Improvised explosive device	No
59	11/23/2008	IRD-Sabre	Improvised explosive device	No
60	12/12/2008	IRD-Sabre	Stray-projectile injury	Yes
61	1/14/2009	IRD-Sabre	Small-arms fire	No
62	1/17/2009	IRD-Sabre	Unexploded ordnance under car	No
63	1/29/2009	IRD-Sabre	Small-arms-fire exchange	Yes
64	2/5/2009	IRD-Sabre	Small-arms fire	No
65	2/10/2009	IRD-Sabre	Vehicle accident	No
66	2/27/2009	IRD-Sabre	Vehicle accident	Yes
67	3/9/2009	IRD-Sabre	Indirect-fire attack	No
68	3/19/2009	IRD-Sabre	Collision with pedestrian	Yes
69	4/3/2009	IRD-Sabre	Traffic accident	No
70	5/25/2009	IRD-Sabre	Weapon discharge	No
71	6/10/2009	IRD-Sabre	Iraqi Army traffic control incident	No
72	6/10/2009	IRD-Sabre	Traffic incident	Yes
73	9/28/2007	Louis Berger Group-SallyPort Global Services (LBG-SallyPort)	Guard abduction	No
74	11/12/2007	LBG-SallyPort	Warning shot	No
75	11/27/2007	LBG-SallyPort	Assassination	Yes
76	12/30/2007	LBG-SallyPort	Warning shots	No

<b>List of 94 Serious Security Incidents</b>				
<b>No.</b>	<b>Date of Incident</b>	<b>Contractor/ Subcontractor</b>	<b>Description of Incident</b>	<b>Injury or Damage</b>
77	2/14/2008	LBG-SallyPort	Warning shots	No
78	4/16/2008	Louis Berger Group-SallyPort Global Services (LBG-SallyPort)	Warning shot	No
79	7/20/2008	LBG-SallyPort	Collision accident	No
80	8/3/2008	LBG-SallyPort	Flare shot	No
81	7/25/2007	Management Systems International-SallyPort Global Services (MSI-SallyPort)	Vehicle-borne improvised explosive device	Yes
82	9/16/2007	MSI-SallyPort	Vehicle-borne improvised explosive device	No
83	9/27/2007	MSI-SallyPort	Guard abduction	No
84	3/16/2008	MSI-SallyPort	Vehicle-borne improvised explosive device	No
85	8/27/2008	MSI-SallyPort	Collision accident	Yes
86	9/22/2008	MSI-SallyPort	Collision accident	No
87	4/20/2009	MSI-SallyPort	Improvised explosive device	No
88	2/3/2009	Cooperative Housing Foundation-Unity Resources Group	Improvised explosive device attack	Yes
89	3/11/2009	Cooperative Housing Foundation-Unity Resources Group	Improvised explosive device attack	No
90	3/3/2009	Relief International-Triple Canopy	Improvised explosive device	Yes
91	4/5/2009	Relief International-Triple Canopy	Improvised explosive device	Yes
92	3/19/2009	AECOM International Development-SallyPort	Iraqi Army traffic control incident	No
93	5/4/2008	BearingPoint-Garda World	Rocket attack	Yes
94	6/23/2009	Development Alternatives International-Garda World	Death threat	No



# Key Statutory Requirements in Sections 862 and 864 of the National Defense Authorization Act for Fiscal Year 2008, as Amended

## **Sec. 862. Contractors performing private security functions in areas of combat operations.<sup>1</sup>**

### **(a) Regulations on contractors performing private security functions.--**

**(1) In general.**—Not later than 120 days after the date of the enactment of this Act [Jan. 28, 2008], the Secretary of Defense, in coordination with the Secretary of State, shall prescribe regulations on the selection, training, equipping, and conduct of personnel performing private security functions under a covered contract in an area of combat operations.

**(2) Elements.**—The regulations prescribed under subsection (a) shall, at a minimum, establish—

**(A)** a process for registering, processing, accounting for, and keeping appropriate records of personnel performing private security functions in an area of combat operations;

**(B)** a process for authorizing and accounting for weapons to be carried by, or available to be used by, personnel performing private security functions in an area of combat operations;

**(C)** a process for the registration and identification of armored vehicles, helicopters, and other military vehicles operated by contractors performing private security functions in an area of combat operations;

**(D)** A process under which contractors are required to report all incidents, and persons other than contractors are permitted to report incidents, in which—

**(i)** a weapon is discharged by personnel performing private security functions in an area of combat operations;

**(ii)** personnel performing private security functions in an area of combat operations are killed or injured;

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<sup>1</sup> Public Law 110-181, div. A, title VIII, subtitle F, §§ 862 and 864, Jan. 28, 2008, 122 Stat. 254-259; as amended by Public Law 110-417, div. A, title VIII, §§ 853, 854(a), (d), Oct. 14, 2008, 122 Stat. 4544; and Public Law 111-84, div. A, title VIII, § 813(a) to (c), Oct. 28, 2009, 123 Stat. 2406. Codified at 10 U.S.C. 2302 note.

**(iii)** persons are killed or injured, or property is destroyed, as a result of conduct by contractor personnel;

**(iv)** a weapon is discharged against personnel performing private security functions in an area of combat operations or personnel performing such functions believe a weapon was so discharged; or

**(v)** active, non-lethal countermeasures (other than the discharge of a weapon) are employed by the personnel performing private security functions in an area of combat operations in response to a perceived immediate threat to such personnel;

**(E)** A process for the independent review and, if practicable, investigation of—

**(i)** incidents reported pursuant to subparagraph (D); and

**(ii)** incidents of alleged misconduct by personnel performing private security functions in an area of combat operations;

**(F)** requirements for qualification, training, screening (including, if practicable, through background checks), and security for personnel performing private security functions in an area of combat operations;

**(G)** Guidance to the commanders of the combatant commands on the issuance of—

**(i)** orders, directives, and instructions to contractors performing private security functions relating to equipment, force protection, security, health, safety, or relations and interaction with locals;

**(ii)** predeployment training requirements for personnel performing private security functions in an area of combat operations, addressing the requirements of this section, resources and assistance available to contractor personnel, country information and cultural training, and guidance on working with host country nationals and military; and

**(iii)** rules on the use of force for personnel performing private security functions in an area of combat operations;

**(H)** a process by which a commander of a combatant command may request an action described in subsection (b)(3); and

**(I)** a process by which the training requirements referred to in subparagraph (G)(ii) shall be implemented.

**(3) Availability of orders, directives, and instructions.**—The regulations prescribed under subsection (a) shall include mechanisms to ensure the provision and availability of the orders, directives, and instructions referred to in paragraph (2)(G)(i) to contractors referred to in that paragraph, including through the maintenance of a single location (including an Internet website, to the extent consistent with security considerations) at or through which such contractors may access such orders, directives, and instructions.

**(b) Contract clause on contractors performing private security functions.—**

**(1) Requirement under FAR.**—Not later than 180 days after the date of the enactment of this Act [Jan. 28, 2008], the Federal Acquisition Regulation issued in accordance with section 25 of the Office of Federal Procurement Policy Act (41 U.S.C. 421) shall be revised to require the insertion into each covered contract (or, in the case of a task order, the contract under which the task order is issued) of a contract clause addressing the selection, training, equipping, and conduct of personnel performing private security functions under such contract.

**(2) Clause requirement.**—The contract clause required by paragraph (1) shall require, at a minimum, that the contractor concerned shall—

**(A)** Comply with regulations prescribed under subsection (a) [of this note], including any revisions or updates to such regulations, and follow the procedures established in such regulations for—

**(i)** registering, processing, accounting for, and keeping appropriate records of personnel performing private security functions in an area of combat operations;

**(ii)** authorizing and accounting of weapons to be carried by, or available to be used by, personnel performing private security functions in an area of combat operations;

**(iii)** registration and identification of armored vehicles, helicopters, and other military vehicles operated by contractors and subcontractors performing private security functions in an area of combat operations; and

**(iv)** The reporting of incidents in which—

**(I)** a weapon is discharged by personnel performing private security functions in an area of combat operations;

**(II)** personnel performing private security functions in an area of combat operations are killed or injured; or

**(III)** persons are killed or injured, or property is destroyed, as a result of conduct by contractor personnel;

**(B)** Comply with and ensure that all personnel performing private security functions under such contract are briefed on and understand their obligation to act in accordance with—

**(i)** qualification, training, screening (including, if practicable, through background checks), and security requirements established by the Secretary of Defense for personnel performing private security functions in an area of combat operations;

**(ii)** applicable laws and regulations of the United States and the host country, and applicable treaties and international agreements, regarding the performance of the functions of the contractor;

**(iii)** orders, directives, and instructions issued by the applicable commander of a

combatant command relating to equipment, force protection, security, health, safety, or relations and interaction with locals; and

(iv) rules on the use of force issued by the applicable commander of a combatant command for personnel performing private security functions in an area of combat operations; and

(C) cooperate with any investigation conducted by the Department of Defense pursuant to subsection (a)(2)(E) by providing access to employees of the contractor and relevant information in the possession of the contractor regarding the incident concerned.

**(3) Noncompliance of personnel with clause.**—The contracting officer for a covered contract may direct the contractor, at its own expense, to remove or replace any personnel performing private security functions in an area of combat operations who violate or fail to comply with applicable requirements of the clause required by this subsection. If the violation or failure to comply is a gross violation or failure or is repeated, the contract may be terminated for default.

**(4) Applicability.**—The contract clause required by this subsection shall be included in all covered contracts awarded on or after the date that is 180 days after the date of the enactment of this Act [Jan. 28, 2008]. Federal agencies shall make best efforts to provide for the inclusion of the contract clause required by this subsection in covered contracts awarded before such date.

**(5) Inspector General report on pilot program on imposition of fines for noncompliance of personnel with clause.**—Not later than March 30, 2008, the Inspector General of the Department of Defense shall [...deleted for the purposes of this appendix]

**(c) Areas of combat operations.**—

**(1) Designation.**—The Secretary of Defense shall designate the areas constituting an area of combat operations for purposes of this section by not later than 120 days after the date of the enactment of this Act [Jan. 28, 2008].

**(2) Particular areas.**—Iraq and Afghanistan shall be included in the areas designated as an area of combat operations under paragraph (1).

**(3) Additional areas.**—The Secretary may designate any additional area as an area constituting an area of combat operations for purposes of this section if the Secretary determines that the presence or potential of combat operations in such area warrants designation of such area as an area of combat operations for purposes of this section.

**(4) Modification or elimination of designation.**—The Secretary may modify or cease the designation of an area under this subsection as an area of combat operations if the Secretary determines that combat operations are no longer ongoing in such area.

**(d) Exception.**—The requirements of this section shall not apply to contracts entered into by elements of the intelligence community in support of intelligence activities.

## **Sec. 864. Definitions and other general provisions.**

### **(a) Definitions.**—In this subtitle [this note]:

**(1) Matters relating to contracting.**—The term ‘matters relating to contracting’, with respect to contracts in Iraq and Afghanistan, means all matters relating to awarding, funding, managing, tracking, monitoring, and providing oversight to contracts and contractor personnel.

**(2) Contract in Iraq or Afghanistan.**—The term ‘contract in Iraq or Afghanistan’ means a contract with the Department of Defense, the Department of State, or the United States Agency for International Development, a subcontract at any tier issued under such a contract, a task order or delivery order at any tier issued under such a contract, a grant, or a cooperative agreement (including a contract, subcontract, task order, delivery order, grant, or cooperative agreement issued by another Government agency for the Department of Defense, the Department of State, or the United States Agency for International Development), if the contract, subcontract, task order, delivery order, grant, or cooperative agreement involves work performed in Iraq or Afghanistan for a period longer than 30 days.

**(3) Covered contract.**—The term ‘covered contract’ means—

**(A)** a contract of a Federal agency for the performance of services in an area of combat operations, as designated by the Secretary of Defense under subsection (c) of section 862 [of this note];

**(B)** a subcontract at any tier under such a contract;

**(C)** a task order or delivery order issued under such a contract or subcontract;

**(D)** a grant for the performance of services in an area of combat operations, as designated by the Secretary of Defense under subsection (c) of section 862 [of this note]; or

**(E)** a cooperative agreement for the performance of services in such an area of combat operations.

**(4) Contractor.**—The term ‘contractor’, with respect to a covered contract, means—

**(A)** in the case of a covered contract that is a contract, subcontract, task order, or delivery order, the contractor or subcontractor carrying out the covered contract;

**(B)** in the case of a covered contract that is a grant, the grantee; and

**(C)** in the case of a covered contract that is a cooperative agreement, the recipient.

**(5) Contractor personnel.**—The term ‘contractor personnel’ means any person performing work under contract for the Department of Defense, the Department of State, or the United States Agency for International Development, in Iraq or Afghanistan, including individuals and subcontractors at any tier.

**(6) Private security functions.**—The term ‘private security functions’ means activities engaged in by a contractor under a covered contract as follows:

**(A)** Guarding of personnel, facilities, or property of a Federal agency, the contractor or subcontractor, or a third party.

**(B)** Any other activity for which personnel are required to carry weapons in the performance of their duties.

**(7) Relevant committees of Congress.**—The term ‘relevant committees of Congress’ means each of the following committees:

**(A)** The Committees on Armed Services of the Senate and the House of Representatives.

**(B)** The Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives.

**(C)** The Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives.

**(D)** For purposes of contracts relating to the National Foreign Intelligence Program, the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives.

**(b) Classified information.**—Nothing in this subtitle [this note] shall be interpreted to require the handling of classified information or information relating to intelligence sources and methods in a manner inconsistent with any law, regulation, executive order, or rule of the House of Representatives or of the Senate relating to the handling or protection of such information.”

# Federal Register / Vol. 74, No. 136 / Friday, July 17, 2009 / Rules and Regulations (Interim Final Rule, 32 CFR Part 159)

## DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 159

[DOD–2008–OS–0125/RIN 0790–AI38]

### Private Security Contractors (PSCs) Operating in Contingency Operations

**AGENCY:** Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

**ACTION:** Interim final rule.

**SUMMARY:** This part establishes policy, assigns responsibilities and provides procedures for the regulation of the selection, accountability, training, equipping, and conduct of personnel performing private security functions under a covered contract during contingency operations. It also assigns responsibilities and establishes procedures for incident reporting, use of and accountability for equipment, rules for the use of force, and a process for administrative action or the removal, as appropriate, of PSCs and PSC personnel. For the Department of Defense, this IFR supplements DoD Instruction 3020.41, “Contractor Personnel Authorized to Accompany the U.S. Armed Forces,” which provides guidance for all DoD contractors operating in contingency operations.

This part is of critical importance. It is being published as an Interim Final Rule because there is insufficient policy and guidance regulating the actions of DoD and other governmental PSCs and their movements in the operational area. It will procedurally close existing gaps in the oversight of Private Security Contractors (PSCs), ensure compliance with laws and regulations pertaining to Inherently Governmental functions, and ensure proper performance by armed contractors. The expansion of troops in Afghanistan will result in a corresponding increase in the number of PSCs performing in that Area of Operations. This part is required to ensure implementation of necessary guidance for all U.S.G. PSCs across the CENTCOM area of responsibility. Further, the publication of this IFR is required to meet the mandate of Section 862 of the 2008 National Defense Authorization Act. The Congress has expressed continuing concern that regulations for the oversight of PSCs are not yet in place.

**DATES:** This rule is effective July 17, 2009. Comments must be received by August 31, 2009.

**ADDRESSES:** You may submit comments, identified by docket number and/or RIN

number and title, by any of the following methods:

- *Federal Rulemaking Portal:* [http:// www.regulations.gov](http://www.regulations.gov). Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey Taylor, (703) 692–3032.

**SUPPLEMENTARY INFORMATION:** This Interim Final Rule is required to meet the mandate of Section 862 of the FY 2008 National Defense Authorization Act. Section 862 of the 2008 NDAA lays out two requirements:

- (i) That the Secretary of Defense, in coordination with the Secretary of State shall prescribe regulations on the selection, training, equipping, and conduct of personnel performing private security functions under a covered contract in an area of combat operations; and
- (ii) That the FAR shall be revised to require the insertion into each covered contract of a contract clause addressing the selection, training, equipping, and conduct of personnel performing private security functions under such contract.

This Interim Final Rule meets requirement (i). There will be a separate and subsequent **Federal Register** action to meet requirement (ii) to update the FAR.

#### **Executive Order 12866, “Regulatory Planning and Review”**

It has been certified that 32 CFR part 159 does not:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.

#### **Public Law 104–121, “Congressional Review Act” (5 U.S.C. 801)**

It has been determined that 32 CFR part 159 is not a “major” rule under 5 U.S.C. 801, enacted by Public Law 104– 121, because it will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

#### **Section 202, Public Law 104–4, “Unfunded Mandates Reform Act”**



It has been certified that 32 CFR part 159 does not contain a Federal mandate that may result in expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

**Public Law 96–354, “Regulatory Flexibility Act” (5 U.S.C. 601)**

It has been certified that 32 CFR part 159 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. This rule will apply only to a specific sector of defense industry and a limited number of small entities.

**Public Law 96–511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)**

It has been certified that 32 CFR part 159 does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These requirements have been approved by OMB and assigned OMB Control Numbers 0704–0460, “Synchronized Predeployment and Operational Tracker (SPOT) System” and 0704–0461, “Qualification to Possess Firearms or Ammunition.”

**Executive Order 13132, “Federalism”**

It has been certified that 32 CFR part 159 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

- (1) The States;
- (2) The relationship between the National Government and the States; or
- (3) The distribution of power and responsibilities among the various levels of Government.

**List of Subjects in 32 CFR Part 159**

Contracts, Security measures.

■ Accordingly 32 CFR Part 159 is added to read as follows:

**PART 159—PRIVATE SECURITY CONTRACTORS OPERATING IN CONTINGENCY OPERATIONS**

Sec.

159.1 Purpose.

159.2 Applicability and scope.

159.3 Definitions.

159.4 Policy.

159.5 Responsibilities.

159.6 Procedures.

**Authority:** Public Law 110–181; Pub. L. 110–417.

§ 159.1. Purpose.

This part establishes policy, assigns responsibilities and provides procedures for the regulation of the selection, accountability, training, equipping, and conduct of personnel performing private security functions under a covered contract. It also assigns responsibilities and establishes procedures for incident reporting, use of and accountability for equipment, rules for the use of force, and a process for administrative action or the removal, as appropriate, of PSCs and PSC personnel.

## **§ 159.2. Applicability and scope.**

This part:

(a) Applies to:

(1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint 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 as the “DoD Components”).

(2) The Department of State and other Federal agencies insofar as it implements the requirements of section 862 of Public Law 110–181. Specifically, in areas of operations which require enhanced coordination of PSC and PSC personnel working for Government (U.S.G.) agencies, the Secretary of Defense may designate such areas as areas of combat operations for the limited purposes of this part. In such an instance, the standards established in accordance with this part would, in coordination with the Secretary of State, expand from covering only DoD PSCs and PSC personnel to cover all U.S.G.-funded PSCs and PSC personnel operating in the designated area.

(b) Prescribes policies applicable to all:

(1) DoD PSCs and PSC personnel performing private security functions during contingency operations outside the United States.

(2) USG-funded PSCs and PSC personnel performing private security functions in an area of combat operations, as designated by the Secretary of Defense.

## **§ 159.3. Definitions.**

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

*Area of combat operations.* An area of operations designated as such by the Secretary of Defense for the purpose of this part, when enhanced coordination of PSCs working for U.S.G. agencies is required.

*Contingency operation.* A military operation that is either designated by the Secretary of Defense as a contingency operation or becomes a contingency operation as a matter of law (10 U.S.C. 101(a)(13)). It is a military operation that: a. Is designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing force; or b. Is created by definition of law. Under 10 U.S.C. 101(a)(13)(B), a contingency operation exists if a military operation results in the (1) call-up to (or retention on) active duty of members of the uniformed Services under certain enumerated statutes (10 U.S.C. 688, 12301(a), 12302, 12304, 12305, 12406, or 331–335); and (2) the call-up to (or retention on) active duty of members of the uniformed Services under any other (non-enumerated) provision of law during war or national emergency declared by the President or Congress. These may include humanitarian or peacekeeping operations or other military operations or exercises.

*Contractor.* The contractor, subcontractor, grantee, or other party carrying out the covered contract.

*Covered contract.* A DoD contract for performance of services in an area of contingency operations or a contract of a non-DoD Federal agency for performance of services in an area of combat operations, as designated by the Secretary of Defense; A subcontract at any tier under such a contract; or

A task order or delivery order issued under such a contract or subcontract.

Also includes contracts or subcontracts funded under grants and sub-grants by a Federal agency for performance in an area of combat operations as designated by the Secretary of Defense. Excludes temporary arrangements entered into by non-DoD contractors or grantees for the performance of private security functions by individual indigenous personnel not affiliated with a local or expatriate security company. Such arrangements must still be in compliance with local law.

*Private security functions.* Activities engaged in by a contractor under a covered contract as follows:

(1) Guarding of personnel, facilities, designated sites, or property of a Federal agency, the contractor or subcontractor, or a third party.<sup>1</sup>

(2) Any other activity for which personnel are required to carry weapons in the performance of their duties. For the DoD, DoDI Instruction 3020.41, "Contractor Personnel Authorized to Accompany the U.S. Armed Forces,"<sup>2</sup> prescribes policies related to personnel allowed to carry weapons for self defense.

*PSC.* During contingency operations "PSC" means a company employed by the DoD performing private security functions under a covered contract. In a designated area of combat operations, the term "PSC" expands to include all companies employed by U.S.G. agencies performing private security functions under a covered contract.

*PSC personnel.* Any individual performing private security functions under a covered contract.

#### **§ 159.4. Policy.**

(a) Consistent with the requirements of paragraph (a)(2) of section 862 of Public Law 110–181, the selection, training, equipping, and conduct of PSC personnel including the establishment of appropriate processes shall be coordinated between the DoD and the Department of State.

(b) Geographic Combatant Commanders will provide tailored PSC guidance and procedures for the operational environment in their Area of Responsibility (AOR) in accordance with this part, the Federal Acquisition Regulation (FAR)<sup>3</sup> and the Defense Federal Acquisition Regulation Supplement (DFARS).<sup>4</sup>

(c) In a designated area of combat operations, the relevant Chief of Mission will be responsible for developing and issuing implementing instructions for non-DoD PSCs and their personnel consistent with the standards set forth by the geographic Combatant Commander in accordance with paragraph (b) of this section. The Chief of Mission has the option to instruct non DoD PSCs and their personnel to follow the guidance and procedures developed by the Geographic Combatant Commander and/or Subordinate Commander.

(d) The requirements of this part shall not apply to contracts entered into by elements of the intelligence community in support of intelligence activities.

#### **§ 159.5. Responsibilities.**

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<sup>1</sup> Contractors performing private security functions are not authorized to perform inherently governmental functions. In this regard, they are limited to a defensive response to hostile acts or demonstrated hostile intent.

<sup>2</sup> Available at <http://www.dtic.mil/whs/directives/corres/pdf/302041p.pdf>.

<sup>3</sup> Published in Title 48 of the Code of Federal Regulations.

<sup>4</sup> Published in Title 48 of the Code of Federal Regulations.

(a) The Assistant Deputy Under Secretary of Defense for Program Support, under the authority, direction, and control of the Deputy Under Secretary of Defense for Logistics and Materiel Readiness, shall monitor the registering, processing, and accounting of PSC personnel in an area of contingency operations.

(b) The Director, Defense Procurement and Acquisition Policy, under the authority, direction, and control of the Deputy Under Secretary of Defense for Acquisition and Technology (DUSD(AT)), shall ensure that the DFARS and (in consultation with the other members of the FAR Council) the FAR provide appropriate guidance and contract clauses consistent with this part and paragraph (b) of section 862 of Public Law 110-181.

(c) The Director, Defense Business Transformation Agency, under the authority, direction, and control of the Deputy Chief Management Officer of the Department of Defense, through the DUSD(AT), shall ensure that information systems effectively support the accountability and visibility of contracts, contractors, and specified equipment associated with private security functions.

(d) The Chairman of the Joint Chiefs of Staff shall ensure that joint doctrine is consistent with the principles established by DoD Directive 3020.49 “Orchestrating, Synchronizing, and Integrating Program Management of Contingency Acquisition Planning and Its Operational Execution,”<sup>5</sup> DoD Instruction 3020.41, “Contractor Personnel Authorized to Accompany the U.S. Armed Forces,” and this part.

(e) The geographic Combatant Commanders in whose AOR a contingency operation is occurring, and within which PSCs and PSC personnel perform under covered contracts, shall:

(1) Provide guidance and procedures, as necessary and consistent with the principles established by DoD Directive 3020.49, “Orchestrating, Synchronizing, and Integrating Program Management of Contingency Acquisition Planning and Its Operational Execution,” DoD Instruction 3020.41, “Contractor Personnel Authorized to Accompany the U.S. Armed Forces,”<sup>6</sup> and this part, for the selection, training, accountability and equipping of such PSC personnel and the conduct of PSCs and PSC personnel within their AOR. Individual training and qualification standards shall meet, at a minimum, one of the Military Departments’ established standards. Within a geographic Combatant Command, Subordinate Commanders shall be responsible for developing and issuing implementing procedures as warranted by the situation, operation, and environment, in consultation with the relevant Chief of Mission in designated areas of combat operations.

(2) Through the Contracting Officer, ensure that PSC personnel acknowledge, through their PSC, their understanding and obligation to comply with the terms and conditions of their covered contracts.

(3) Issue written authorization to the PSC identifying individual PSC personnel who are authorized to be armed. Rules for the use of force, developed in accordance with Chairman of the Joint Chief of Staff Instruction 3121.01B, “Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces,”<sup>7</sup> shall be included with the written authorization.

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<sup>5</sup> Available from <http://www.dtic.mil/whs/directives/corres/pdf/302040p.pdf>.

<sup>6</sup> Available from <http://www.dtic.mil/whs/directives/corres/html/302041.htm>.

<sup>7</sup> CJCSI 3121.01B provides guidance on the standing rules of engagement (SROE) and establishes standing rules for the use of force (SRUF) for DOD operations worldwide. This document is classified secret. CJCSI 3121.01B is available via Secure Internet Protocol Router Network at <http://js.smil.mil> If the requester is not an authorized user of the classified network, the requester should contact Joint Staff J-3 at 703-614-0425.

(4) Ensure that the procedures, orders, directives and instructions prescribed § 159.6(a) of this part are available through a single location (to include an Internet Web site, consistent with security considerations and requirements).

(f) The Heads of the DoD Components shall:

(1) Ensure that all private security-related requirement documents are in compliance with the procedures listed in § 159.6 of this part and the guidance and procedures issued by the geographic Combatant Command,

(2) Ensure private security-related contracts contain the appropriate clauses in accordance with the applicable FAR clause and include additional mission-specific requirements as appropriate.

#### **§ 159.6. Procedures.**

(a) *Standing Combatant Command Guidance and Procedures.* Each geographic Combatant Commander shall develop and publish guidance and procedures for PSCs and PSC personnel operating during a contingency operation within their AOR, consistent with applicable law; this part; applicable Military Department publications; and other applicable DoD issuances to include DoD Directive 3020.49, "Orchestrating, Synchronizing, and Integrating Program Management of Contingency Acquisition Planning and Its Operational Execution," DFARS, DoD Directive 2311.01E, "DoD Law of War Program,"<sup>8</sup> DoD 5200.8-R, "Physical Security Program,"<sup>9</sup> CJCSI 3121.01B, "Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces," and DoD Directive 5210.56, "Use of Deadly Force and the Carrying of Firearms by DoD Personnel Engaged in Law Enforcement and Security Duties."<sup>10</sup> The guidance and procedures shall:

(1) Contain, at a minimum, procedures to implement the following processes, and identify the organization responsible for managing these processes:

(i) Registering, processing, accounting for and keeping appropriate records of PSCs and PSC personnel in accordance with DoD Instruction 3020.41, "Contractor Personnel Authorized to Accompany the U.S. Armed Forces."

(ii) PSC verification that PSC personnel meet all the legal, training, and qualification requirements for authorization to carry a weapon in accordance with the terms and conditions of their contract and host country law. Weapons accountability procedures will be established and approved prior to the weapons authorization.

(iii) Arming of PSC personnel. Requests for permission to arm PSC personnel shall be reviewed on a case-by-case basis by the appropriate Staff Judge Advocate to the geographic Combatant Commander (or a designee) to ensure there is a legal basis for approval. The request will then be approved or denied by the geographic Combatant Commander or a specifically identified designee, no lower than the flag officer level. Requests to arm non-DOD PSC personnel shall be reviewed and approved in accordance with § 159.4(c) of this part. Requests for permission to arm PSC personnel shall include:

(A) A description of where PSC personnel will operate, the anticipated threat, and what property or personnel such personnel are intended to protect, if any.

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<sup>8</sup> Available at <http://www.dtic.mil/whs/directives/corres/html/231101.htm>.

<sup>9</sup> Available at <http://www.dtic.mil/whs/directives/corres/pdf/520008r.pdf>.

<sup>10</sup> Available at <http://www.dtic.mil/whs/directives/corres/html/521056.htm>.

(B) A description of how the movement of PSC personnel will be coordinated through areas of increased risk or planned or ongoing military operations, including how PSC personnel will be rapidly identified by members of the U.S. Armed Forces.

(C) A communication plan, to include a description of how relevant threat information will be shared between PSC personnel and U.S. military forces and how appropriate assistance will be provided to PSC personnel who become engaged in hostile situations. DoD contractors performing private security functions are only to be used in accordance with DoD Instruction 1100.22, "Guidance for Determining Workforce Mix,"<sup>11</sup> that is, they are limited to a defensive response to hostile acts or demonstrated hostile intent.

(D) Documentation of individual training covering weapons familiarization and qualification, rules for the use of force, limits on the use of force including whether defense of others is consistent with host nation Status of Forces Agreements or local law, the distinction between the rules of engagement applicable to military forces and the prescribed rules for the use of force that control the use of weapons by civilians, and the Law of Armed Conflict.

(E) Written acknowledgment by the PSC and its individual PSC personnel, after investigation of background of PSC personnel by the contractor, verifying such personnel are not prohibited under U.S. law to possess firearms.

(F) Written acknowledgment by the PSC and individual PSC personnel that:

(1) Potential civil and criminal liability exists under U.S. and local law or host nation Status of Forces Agreements for the use of weapons.<sup>12</sup>

(2) Proof of authorization to be armed must be carried by each PSC personnel.

(3) PSC personnel may possess only U.S.G.-issued and/or -approved weapons and ammunition for which they have been qualified according to paragraph (a)(1)(iii)(E) of this section.

(4) PSC personnel were briefed and understand limitations on the use of force.

(5) Authorization to possess weapons and ammunition may be revoked for non-compliance with established rules for the use of force.

(6) PSC personnel are prohibited from consuming alcoholic beverages or being under the influence of alcohol while armed.

(iv) Registration and identification in the Synchronized Predeployment and Operational Tracker (or its successor database) of armored vehicles, helicopters, and other vehicles operated by PSC personnel.

(v) Reporting alleged criminal activity or other incidents involving PSCs or PSC personnel by another company or any other person. All incidents involving the following shall be reported and documented:

(A) A weapon is discharged by an individual performing private security functions;

(B) An individual performing private security functions is killed or injured in the performance of their duties;

(C) A person other than an individual performing private security functions is killed or injured as a result of conduct by PSC personnel;

(D) Property is destroyed as a result of conduct by a PSC or PSC personnel;

(E) An individual performing private security functions has come under attack including in cases where a weapon is discharged against an individual performing private security

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<sup>11</sup> Available at <http://www.dtic.mil/whs/directives/corres/pdf/110022p.pdf>.

<sup>12</sup> This requirement is specific to arming procedures. Such written acknowledgement should not be construed to limit civil and criminal liability to conduct arising from "the use of weapons." PSC personnel could be held criminally liable for any conduct that would constitute a federal offense (see MEJA, 18 USC 3261(a)).

functions or personnel performing such functions believe a weapon was so discharged;  
or

(F) Active, non-lethal counter-measures (other than the discharge of a weapon) are employed by PSC personnel in response to a perceived immediate threat in an incident that could significantly affect U.S. objectives with regard to the military mission or international relations.

(vi) The independent review and, if practicable, investigation of incidents reported pursuant to paragraphs (a)(1)(v)(A) through (a)(1)(v)(F) of this section and incidents of alleged misconduct by PSC personnel.

(vii) Identification of ultimate criminal jurisdiction and investigative responsibilities, where conduct of U.S.G.-funded PSCs or PSC personnel are in question, in accordance with applicable laws to include a recognition of investigative jurisdiction and coordination for joint investigations (i.e., other U.S.G. agencies, host nation, or third country agencies), where the conduct of PSCs and PSC personnel is in question.

(viii) A mechanism by which a commander of a combatant command may request an action by which PSC personnel who are non-compliant with contract requirements are removed from the designated operational area.

(ix) Interagency coordination of administrative penalties or removal, as appropriate, of non-DoD PSC personnel who fail to comply with the terms and conditions of their contract, as is applicable to this part.

(x) Implementation of the training requirements contained below in paragraph (a)(2)(ii) of this section.

(2) Specifically cover:

(i) Matters relating to authorized equipment, force protection, security, health, safety, and relations and interaction with locals in accordance with DoD Instruction 3020.41, "Contractor Personnel Authorized to Accompany the U.S. Armed Forces."

(ii) Predeployment training requirements addressing, at a minimum, the identification of resources and assistance available to PSC personnel as well as country information and cultural training, and guidance on working with host country nationals and military personnel.

(iii) Rules for the use of force and graduated force procedures.

(iv) Requirements and procedures for direction, control and the maintenance of communications with regard to the movement and coordination of PSCs and PSC personnel, including specifying interoperability requirements. These include coordinating with the Chief of Mission, as necessary, private security operations outside secure bases and U.S. diplomatic properties to include movement control procedures for all contractors, including PSC personnel.

(b) *Availability of Guidance and Procedures.* The geographic Combatant Commander shall ensure the guidance and procedures prescribed in paragraph

(a) of this section are readily available and accessible by PSCs and their personnel (e.g., on a Web page and/or through contract terms), consistent with security considerations and requirements.

(c) *Subordinate Guidance and Procedures.* The Subordinate Commander, in consultation with the Chief of Mission, will issue guidance and procedures implementing the standing combatant command publications specified in paragraph (a) of this section, consistent with the situation and operating environment.

(d) *Consultation and Coordination.* The Chief of Mission and the geographic Combatant Commander/Subordinate Commander shall make every effort to consult and coordinate responses to common threats and common concerns related to oversight of the conduct of U.S.G.-funded PSC and their personnel. The Memorandum of Agreement between

the Department of Defense and Department of State on U.S.G. Private Security Contractors<sup>13</sup> shall provide the framework for the development of guidance and procedures without regard to the specific locations identified therein.

Dated: July 14, 2009.

**Patricia L. Toppings,**

*OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. E9-17059 Filed 7-16-09; 8:45 am]

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<sup>13</sup> Available at [http://www.acq.osd.mil/log/PS/p\\_vault.html](http://www.acq.osd.mil/log/PS/p_vault.html).



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# OFFICE OF INSPECTOR GENERAL

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## Audit of USAID/Afghanistan's Oversight of Private Security Contractors in Afghanistan

AUDIT REPORT NO. 5-306-10-009-P  
MAY 21, 2010

MANILA, PHILIPPINES



*Office of Inspector General*

May 21, 2010

**MEMORANDUM**

**TO:** USAID/Afghanistan Mission Director, William M. Frej

**FROM:** Regional Inspector General/Manila, Bruce N. Boyer /s/

**SUBJECT:** Audit of USAID/Afghanistan's Oversight of Private Security Contractors in Afghanistan (Audit Report No. 5-306-10-009-P)

This memorandum transmits our final report on the subject audit. In finalizing the report, we considered your comments on the draft report and included the comments in their entirety in appendix II.

The report contains eight audit recommendations to strengthen USAID/Afghanistan's oversight of private security contractors contracted by its implementing partners. On the basis of the information provided by the mission in response to the draft report, we determined that a management decision has been achieved on recommendations 1, 2, 3, 4, 6, 7, and 8. A determination of final action will be made by the Audit Performance and Compliance Division upon completion of the planned corrective actions addressing these seven recommendations. Final action has been achieved on recommendation 5.

I want to thank you and your staff for the cooperation and courtesies extended to us during this audit.

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# SUMMARY OF RESULTS

USAID relies on private security contractors (PSCs) to protect its implementing partners in hostile environments. PSCs support U.S. efforts to stabilize and reconstruct Afghanistan, and they free military forces for their core missions. However, the murder of 4 security contractors in Iraq in 2004 and the killing of 17 Iraqi civilians by security contractors in 2007 raised concerns about failures to supervise contractor performance adequately and to properly investigate alleged killings by security contractors. The incidents prompted legislative and regulatory reforms to prevent a recurrence and to ensure proper investigations should such incidents occur.

The Regional Inspector General/Manila carried out this audit to answer the following questions:

- What types of serious security incidents have been reported by private security firms contracted with USAID/Afghanistan's implementing partners during the period from October 1, 2006, through June 30, 2009?
- Has USAID/Afghanistan ensured that its implementing partners subcontracted with responsible private security firms?
- How much has been spent by USAID/Afghanistan's implementing partners for private security services, and has there been effective oversight of these security costs?

The statutory and regulatory provisions intended to oversee the qualifications and conduct of all non-Department of Defense (non-DOD) PSCs in Afghanistan are to be implemented through formal instructions issued Mission-wide.<sup>1</sup> We have been informed by the regional security officer that Mission-wide instructions have been drafted but not issued, and USAID/Afghanistan has not issued its own instructions. The absence of Mission-wide instructions has resulted in USAID/Afghanistan's not having reasonable assurance that PSCs are reporting all serious security incidents, are suitably qualified, and are authorized to operate in Afghanistan.

More specifically, with regard to the first question above, USAID/Afghanistan received 149 incident reports from October 1, 2006, through June 30, 2009, 44 of which met the definition of a serious incident. However, the audit found that USAID/Afghanistan is not receiving all reports of casualties and serious incidents because it has no standard provision in its agreements that would require such reports. Also, USAID/Afghanistan has only an informal process for handling reported incidents. Therefore, there is no assurance that USAID/Afghanistan has reliable or complete reports on the types and numbers of incidents that have occurred. (See page 6.)

Regarding the second question, USAID/Afghanistan's oversight of private security firms contracted by its implementing partners has not ensured that only responsible private security firms are employed. (See pages 11-13.) Although USAID/Afghanistan

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<sup>1</sup> In this report, the term "Mission" refers to the departments and agencies under the authority of the Chief of Mission.

established a safety and security office, and USAID/Afghanistan's contracting office has used some of the existing oversight tools available to it, these efforts have not ensured that only responsible firms are employed, because USAID/Afghanistan has provided only limited oversight and direction relative to standards and requirements for security. For example, two PSCs were not licensed with the Afghan Government, and USAID/Afghanistan did not provide subcontracting consent for 17 private security firms or include in its contracts a clause to require various security measures. Moreover, USAID/Afghanistan has no standard assistance (grant) award provision related to security, so about a third of USAID/Afghanistan's awards with subcontracted security have no standard security requirements.

Even if USAID/Afghanistan had properly addressed these matters, its efforts would not have been sufficient, because statutory and regulatory provisions intended to provide for the oversight of the qualifications and conduct of PSCs in Afghanistan have not been implemented through formal Mission-wide instructions. Consequently, PSCs have not been subjected to contract provisions and regulations contemplated by these governing laws to ensure that such contractors are qualified and responsible.

With regard to the third question, on security costs, USAID/Afghanistan's prime implementing partners reported that, for the period October 1, 2006, through June 30, 2009, they had charged about \$167 million for subcontracted PSC services. On average, these services accounted for 8.3 percent of award disbursements. Implementing partners also charged about \$12 million for other security services and security-related items. (See pages 20-23.) With regard to effective oversight of security costs, USAID/Afghanistan and others faced challenges in providing such oversight. The audit found no specific requirements applicable to this category of costs and few requirements relative to the audit of subcontractor costs. Recommended improvements to subcontracting consent will clarify USAID/Afghanistan's procedures for funding security firms, thus providing better opportunities for oversight.

To address these matters, the report recommends (pages 9, 11, 14–17, and 20) that:

- In the absence of Mission-wide instructions, USAID/Afghanistan's Director of Acquisition and Assistance include a clause or provision in all acquisition and assistance agreements to require the implementing partner to report information on casualties as well as serious incidents.
- In the absence of Mission-wide instructions, USAID/Afghanistan devise and implement a formal process for its employees to forward reports of serious incidents and casualties to a designated office that will collect the reports.
- USAID/Afghanistan's Director of Acquisition and Assistance provide written notification to the implementing partners responsible for the two awards to unlicensed private security contractors to use only licensed private security contractors.
- USAID/Afghanistan's Director of Acquisition and Assistance require that the implementing partners—to which the 17 private security companies have been subcontracted—provide what would customarily be advance notification to

USAID/Afghanistan, so that consent to subcontract may be considered and granted or refused.

- USAID/Afghanistan's Director of Acquisition and Assistance issue written guidance to existing implementing partners and the office's contracting officers, reminding them of the requirements of using only licensed security contractors.
- USAID/Afghanistan's contracting officer add Federal Acquisition Regulation Clause 52.225-19, "Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States," to all its existing acquisition awards and issue guidance to include the clause in future awards.
- USAID/Afghanistan's contracting officer request in writing that the Chief of Mission issue Mission-wide instructions for non-DOD (Department of Defense) PSCs and their personnel, as required by the Interim Final Rule as codified in the Code of Federal Regulations (32 CFR 159.4(c)), to either (1) implement standards set forth by the geographic combatant commander or (2) instruct non-DOD PSCs and their personnel to follow the guidance and procedures developed by the geographic combatant commander and/or subordinate commander.
- In the absence of Mission-wide instructions, USAID/Afghanistan's contracting officer request in writing that the Office of Acquisition and Assistance provide acquisition and assistance award language to regulate subcontracted private security services.

The Office of Inspector General evaluated the mission's response to the draft report and determined that a management decision has been achieved on recommendations 1, 2, 3, 4, 6, 7, and 8. Final action has been achieved on recommendation 5. (See pages 9, 11, 14–17, and 20.) Management comments are included in their entirety in appendix II. (See page 28.)

# BACKGROUND

Although security support in areas of combat operations has traditionally been considered primarily a military responsibility, USAID relies on private security contractors (PSCs) to supply an array of security services for its implementing partners in Afghanistan. Given the many demands on U.S. troops, PSCs are viewed by some as a vital support to U.S. efforts to stabilize and reconstruct Afghanistan. These contractors free military forces for their core missions and provide protection to USAID's implementing partners in hostile environments.

However, not all opinions about the U.S. Government's use of PSCs are positive. The murder of four Blackwater (now Xe Services, LLC) security contractors in Fallujah, Iraq, in 2004 and the killing of 17 Iraqi civilians by Blackwater employees in Baghdad's Nisur Square in 2007 heightened the visibility of PSC activities. Intensified scrutiny of private security revealed a breakdown in basic contract management procedures. Among the concerns voiced were U.S. Government failures to supervise contractor performance adequately or to properly investigate killings allegedly committed by PSC personnel. The two Blackwater incidents prompted regulatory and legislative reforms to bring about accountability for and oversight of PSCs. Clearly, two intents of initiating these reforms were to prevent a recurrence of incidents like those involving Blackwater and to ensure proper investigations should such incidents occur.

One of the most notable legislative reforms was articulated in sections 861 and 862 of the National Defense Authorization Act for Fiscal Year 2008, enacted on January 28, 2008 (NDAA FY 2008). NDAA FY 2008 section 861 directed the Secretary of Defense, the Secretary of State, and the Administrator of USAID to execute a memorandum of understanding regarding matters relating to contracting in Iraq or Afghanistan, such as security contracting procedures, the establishment of common databases, and accountability for PSCs. NDAA FY 2008 section 862 set forth requirements to ensure oversight of PSCs in areas of combat operations, including Afghanistan, through regulatory measures and mandatory insertion of contract provisions.

Section 862(a) required that the Secretary of Defense, in coordination with the Secretary of State, prescribe regulations on the selection, training, equipping, and conduct of personnel performing private security functions under a covered contract in an area of combat operations. The Office of the Secretary of Defense accordingly promulgated an Interim Final Rule on July 17, 2009, codified at 32 CFR 159, governing DOD and non-DOD PSC oversight in designated combat areas, including Afghanistan. (See appendix IV.) As of the date of this report, a Mission-wide policy is being developed.

Section 862(b) required that the Federal Acquisition Regulation be revised to mandate insertion into each covered contract of a clause containing specified oversight requirements, including a requirement that the contractor comply with regulations prescribed under section 862(a).

The Commission on Wartime Contracting in Iraq and Afghanistan noted that some of these reforms have been significant. However, the same report<sup>2</sup> noted a disparity

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<sup>2</sup> *At What Cost? Contingency Contracting in Afghanistan and Iraq*, issued June 10, 2009.



between the ways these reforms were implemented in Iraq versus Afghanistan, with Afghanistan trailing behind in terms of PSC oversight. Although the memorandum of understanding required by section 861 became effective in July 2008, not all of the memorandum's provisions have been put into practice in Afghanistan. Additionally, it is notable that policies governing USAID-funded armed PSC employees have been issued for Iraq, but no corresponding policies have been issued for Afghanistan. This vacuum of procedural guidance has caused USAID to perform little oversight and to institute few requirements with respect to USAID's PSCs in Afghanistan.

## **AUDIT OBJECTIVES**

The Inspector General directed that audits be performed in both Iraq and Afghanistan. Accordingly, the Regional Inspector General/Manila carried out this audit as part of its FY 2009 annual audit plan to answer the following questions:

- What types of serious security incidents have been reported by private security firms contracted with USAID/Afghanistan's implementing partners during the period from October 1, 2006, through June 30, 2009?
- Has USAID/Afghanistan ensured that its implementing partners subcontracted with responsible private security firms?
- How much has been spent by USAID/Afghanistan's implementing partners for private security services, and has there been effective oversight of these security costs?

Appendix I contains a discussion of the audit's scope and methodology.

# AUDIT FINDINGS

## **What types of serious security incidents have been reported by private security firms contracted with USAID/Afghanistan's implementing partners during the period from October 1, 2006, through June 30, 2009?**

USAID/Afghanistan received 44 reports between October 1, 2006, and June 30, 2009, that met the definition of a serious incident involving employees of private security contractors (PSCs). As detailed in the table on page 8, the reports disclosed that in 140 instances, PSC personnel were killed or injured; in 26, PSC personnel discharged a weapon; and in 41, PSC personnel came under attack.<sup>3</sup> However, USAID/Afghanistan received additional reports, beyond those meeting the definitions of a serious incident involving a PSC. These reports detailed a wide range of incidents, from minor accidents that took place during off-duty hours to violent attacks against PSC employees and implementing partners working at project sites. Examples range from "rock falling on head" and "burned by oil in the kitchen" to vague accounts of events such as "ambush" or "disappeared" with no other explanation as to what had occurred. USAID/Afghanistan also received many detailed accounts of grave attacks against personnel at project sites, such as the following:

On 09-Dec-2008 at approximately 09:50 . . . two USPI . . . escort vehicles were returning from Lashkar Gah city after buying food for the guards. . . . The three USPI guards in the vehicle were killed instantaneously and the vehicle completely destroyed in the explosion. This attack took place 15 km NE from Lashkar Gah City on the main road leading to HWY 1.

USAID/Afghanistan is not receiving all reports of casualties and serious incidents because, in the absence of security guidance and Mission-wide instructions, it has no standard clause or provision in its agreements that would require such reports to be provided to USAID/Afghanistan. Consequently, USAID/Afghanistan's awards generally do not require implementing partners to report serious incidents. Just 6 of 31 awards reviewed included a requirement to report security incidents. All six were task orders under the Afghanistan Infrastructure Rehabilitation Program, and only one of these provided any detail about what should be reported. Implementing partners voluntarily provide USAID/Afghanistan with such information because they see a benefit in sharing and exchanging such reports.

Complicating the reporting, USAID/Afghanistan has two reporting needs: (1) reporting casualties among contractor personnel and (2) reporting serious incidents involving PSC personnel. USAID/Afghanistan's lack of defined reporting requirements or a formal reporting process caused the database of serious incidents involving PSC personnel to be incomplete and therefore unreliable. The following section discusses how USAID/Afghanistan could expand the number of reports it receives and improve its internal process for handling them.

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<sup>3</sup> The types of incidents statutorily required to be reported are set forth in Appendix III at Section 862(a)(2)(D) of the National Defense Authorization Act for Fiscal Year 2008, as amended.

## **USAID/Afghanistan’s Database of Serious Incidents Is Incomplete and Unreliable**

**Summary.** Section 862(a)(2)(D) of NDAA FY08 requires implementing regulation to establish a process under which PSCs are required to report all specified security incidents. Similarly, the Government Accountability Office has requested that USAID/Afghanistan share information on its implementing partners’ casualties. Not all of USAID/Afghanistan’s partners provide information on serious incidents and casualties because, in the absence of preemptive Mission-wide instructions, USAID/Afghanistan has neither a standard clause in its contracts nor a standard provision in its agreements that would define casualties and serious incidents and require that they be reported. Consequently, although many events have been voluntarily reported, much of the reporting does not meet USAID/Afghanistan’s information requirements. Many more incidents have not been reported.

The requirements set forth by NDAA FY 2008 section 862 and the Interim Final Rule codified in the Code of Federal Regulations at 32 CFR 159, intended to ensure oversight of all PSCs in Afghanistan, have not been implemented by non-DOD (Department of Defense) PSCs in Afghanistan because the Chief of Mission has not issued implementing instructions to non-DOD PSCs. As a result, USAID’s non-DOD PSCs and their personnel are not reporting certain serious security incidents—in particular, persons killed or injured as a result of their conduct—that they would be required to report if the Interim Final Rule were implemented for non-DOD PSCs. Although not fully implemented, the NDAA FY 2008 section nevertheless requires that a mechanism be created by which Federal agencies will be notified of violent incidents involving PSCs.

The Government Accountability Office (GAO) has asked USAID/Afghanistan to track casualties that have occurred in conjunction with USAID/Afghanistan’s projects. The data required is not confined to casualties involving PSC personnel but covers all types of casualties related to USAID/Afghanistan’s projects. USAID/Afghanistan’s Program and Project Development Office (Program Office) has been tracking these incidents and reporting them to GAO for several years. Additionally, other Government organizations—such as the Armed Contractor Oversight Division and the International Security Assistance Force—as well as USAID/Afghanistan’s implementing partners seek information on serious incidents and casualties for their own security awareness and planning.

Some implementing partners provide USAID/Afghanistan with casualty and serious incident reports, but some do not. Before USAID/Afghanistan established its Safety and Security Office, the Program Office had compiled all casualty and serious incident reports in a USAID/Afghanistan casualties report. The table below presents the numbers of serious incident reports involving PSC personnel, extracted from the USAID/Afghanistan casualties report.

**Serious Incidents Reported to USAID/Afghanistan  
October 1, 2006–June 30, 2009**

<b>Types of Serious Incidents Involving Private Security Contractors (PSCs)</b>	<b>Number of Serious Incident Reports Received by USAID/Afghanistan</b>
Weapon is discharged by a PSC.	26
PSC is killed or injured as a result of an attack.	140
Other persons are killed or injured, or property is destroyed, as a result of PSC actions.	0
PSC comes under attack or believes a weapon was discharged.	41
Active nonlethal countermeasures are employed by PSC personnel in response to a perceived immediate threat.	0

However, when queried, a selection of 39 implementing partners provided information about incidents that took place between October 1, 2006, and June 30, 2009. Our review of the USAID/Afghanistan casualties report and information received from implementing partners found a disparity between the two. For example, the implementing partners identified many more cases of weapons being discharged by PSCs (71 versus 26) and PSCs coming under attack (92 versus 41) than were accounted for in the USAID/Afghanistan casualties report. Because the 39 responses do not represent all of USAID/Afghanistan’s implementing partners, the audit concluded that this gap in data would be even greater if more partners had been asked about such incidents.

We found additional disparities, beyond the total number of serious incidents USAID/Afghanistan lists in its casualties report and implementing partners’ responses. These differences further demonstrate that USAID/Afghanistan is not receiving all reports of serious incidents involving a PSC. For example, a sample of 25 reports of serious incidents obtained from one of USAID/Afghanistan’s implementing partners, compared against the USAID/Afghanistan casualties report, found that only 3 of the 25 incidents (12 percent) appeared in USAID/Afghanistan’s report.

Therefore, USAID/Afghanistan is not receiving all reports of casualties and serious incidents. As discussed in the Background section of this report, the contract clause required by NDAA FY 2008 section 862(b) must include a requirement that the contractor comply with the regulations prescribed under NDAA FY 2008 section 862(a). Procedures for reporting serious incidents set forth by the Interim Final Rule at 32 CFR 159.6(a)(1)(v), however, have not yet been made applicable to USAID’s non-DOD PSCs through Mission-wide instructions as required by 32 CFR 159.4(c) (see pages 18–20).

Of the 31 awards reviewed, only 5 required “daily security/incident reports,” and 1 required reporting on incidents that have a “substantive impact on progress/costs.” Neither contract requirement is sufficiently specific to prompt reporting that meets either serious incident or casualty reporting needs. USAID/Afghanistan receives information on casualties and serious incidents only because implementing partners see a benefit in sharing and exchanging such information. Additionally, some implementing partner

employees believe that this reporting will eventually become a requirement, so they have already established a system to communicate incidents to USAID/Afghanistan.

Consequently, many events have been reported voluntarily, but much of the reporting does not meet USAID/Afghanistan's information requirements. Also, since statutory reporting requirements have not been implemented at the Mission level, contractors can censor or omit incident reports that might reflect poorly on them. Complete and reliable reporting of security incidents is needed to ensure that security risks are promptly addressed. Incomplete reporting hinders the coordination of information with other Government organizations that would benefit from such information, such as the Armed Contractor Oversight Division and the International Security Assistance Force. Finally, the PSC oversight envisioned in NDAA FY 2008 is not achieved by such incomplete reporting.

**Recommendation 1.** *We recommend that, in the absence of Mission-wide instructions, USAID/Afghanistan's Director of Acquisition and Assistance include a clause or provision in all acquisition and assistance agreements to require the implementing partner to report information on casualties as well as serious incidents.*

## **USAID/Afghanistan Should Implement a Formal Incident Reporting Process**

**Summary.** A GAO report—*Standards for Internal Control in the Federal Government*—asserts that by defining key areas of authority and responsibility, and by establishing appropriate lines of reporting, organizational goals may be better achieved and operational problems minimized. In addition, 32 CFR 159.6 outlines the formal reporting process for PSCs. USAID/Afghanistan does not have a formal process for handling reports of serious incidents and casualties. This lack of a formal reporting process has led to discrepancies in information within USAID/Afghanistan and increases the risk that information will be lost or filtered by employees.

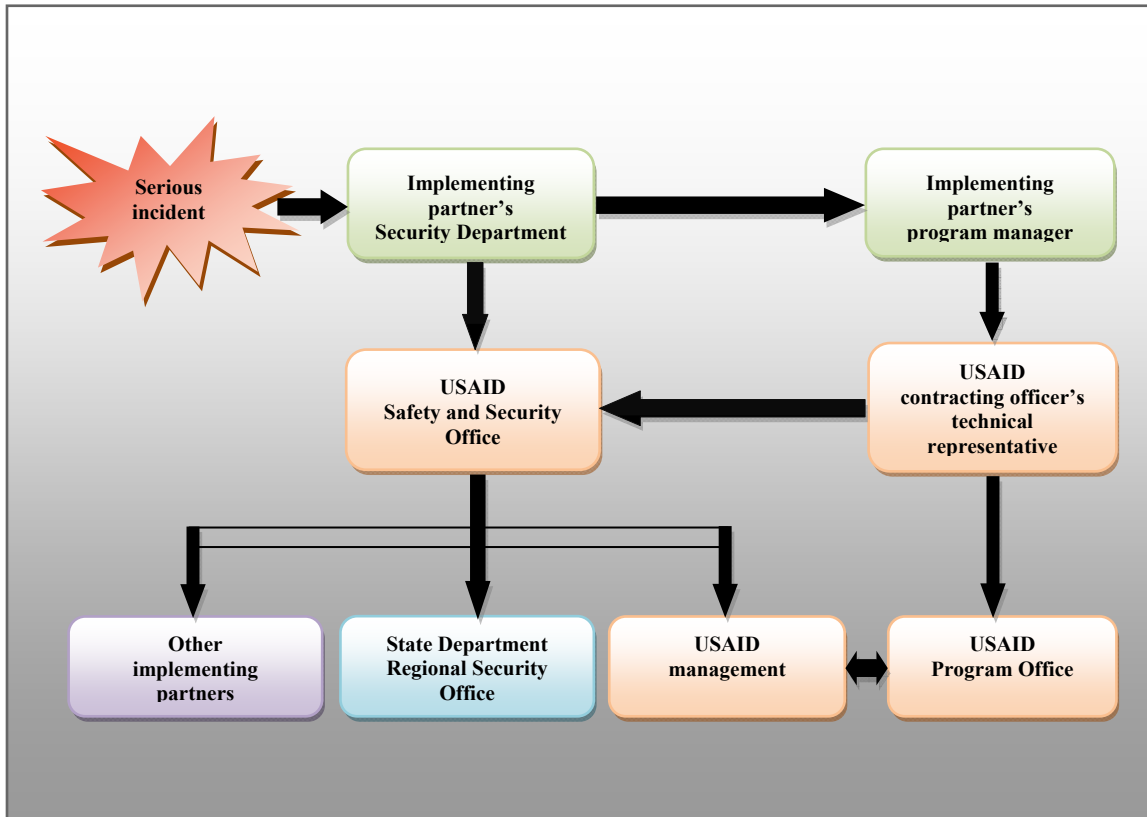
GAO's 1999 report, *Standards for Internal Control in the Federal Government*, provides<sup>4</sup> guidance to help agencies better achieve their objectives and minimize operational problems. To attain such outcomes, the report notes that agency processes must (1) clearly define key areas of authority and responsibility and (2) establish appropriate lines of reporting. These actions create discipline and structure in a formal process that will increase the success of USAID/Afghanistan objectives. The formal reporting process for PSCs is outlined in 32 CFR 159.6.

USAID/Afghanistan does not have a formal process for receiving and processing reports of serious incidents. Implementing partners who report casualties among their PSCs or partners have no single point of contact at USAID/Afghanistan to whom they can direct information, nor does USAID/Afghanistan have a clear way of internally disseminating

<sup>4</sup> GAO AIMD-00-21.3.1.

the information once USAID/Afghanistan personnel have been notified of a security incident. When USAID/Afghanistan employees are notified of an incident, they may not know who should receive such reports. Reports are variously sent directly or through a supervisor to the Safety and Security Office, the Embassy’s Regional Security Office, and/or the Program Office. In summary, USAID/Afghanistan’s internal reporting process lacks a clear line for reporting incidents and a designated office responsible for receiving such information. The following figure depicts the current reporting process.

### USAID/Afghanistan’s Serious Incident Reporting Process



When the Safety and Security Office receives information about serious incidents, its personnel provide it to three groups—the State Department Regional Security Office, USAID management, and other USAID/Afghanistan implementing partners. Information on security incidents is sent to other implementing partners not only to make them aware of events in the field but also to further encourage them to report such incidents to USAID/Afghanistan.

USAID/Afghanistan has not devised or implemented a formal process of reporting serious incidents because of a perception that it already has a functioning informal reporting process in place. However, the lack of a formal process has contributed to discrepancies in information within the two offices that need the information. Also, with no formal process, the risk increases that information will be lost between USAID/Afghanistan employees or that employees will filter out or disregard vital information they deem not serious enough to report. Without a formal process, USAID/Afghanistan cannot effectively gather, analyze, and disseminate information on serious incidents taking place throughout Afghanistan.

**Recommendation 2.** *We recommend that, in the absence of Mission-wide instructions, USAID/Afghanistan devise and implement a formal process, consistent with standards specified in 32 CFR 159.6, for its employees to forward reports of serious incidents and casualties to a designated office that will collect and coordinate the reports.*

## **Has USAID/Afghanistan ensured that its implementing partners subcontracted with responsible private security firms?**

USAID/Afghanistan's oversight of private security firms contracted by its implementing partners has not ensured that those contractors employ only responsible private security firms, because USAID/Afghanistan has provided only limited oversight and almost no direction relative to standards and requirements for security. Indeed, USAID/Afghanistan contracting officials were not aware of every private security firm with which its prime implementing partners had subcontracted. USAID/Afghanistan's practice has been to delegate responsibility and oversight for security to its implementing partners. Accordingly, inasmuch as responsible private security firms have been subcontracted, this practice has resulted from the efforts of the PSC subcontractors and implementing partners to institute processes for personnel and weapons accountability, rules of engagement, procedures for movement coordination, and vetting of armed personnel.

USAID/Afghanistan did initiate some efforts to provide oversight and direction for contractors that provide security to its implementing partners, however. For example, in July 2009, USAID/Afghanistan established an office to advise its Contracting Office on safety and security issues and assist in collecting and disseminating incident and threat information. The Safety and Security Office also serves as USAID/Afghanistan's liaison with the Embassy's Regional Security Office. The Embassy has detailed an assistant regional security officer to the Safety and Security Office to provide advice and serve as a direct link with Embassy security experts.

Additionally, USAID/Afghanistan's Contracting Office has provided some oversight. For example, the Contracting Office made security plans a deliverable in just under half of the 31 contracts reviewed by the audit. In a few cases, USAID/Afghanistan even provided general stipulations about elements that the implementing partner's security plan should include, such as "providing for adequate requirements for protecting contract personnel" or ensuring that security complies with "applicable United States Government regulations." The office also provided consent to subcontract for some security firms contracted to USAID/Afghanistan's implementing partners. In a few exceptional instances, USAID/Afghanistan specified security requirements in award provisions.

However, USAID/Afghanistan did not provide such oversight in more than half of the contracts reviewed by the audit. Rather than providing oversight, USAID/Afghanistan typically delegated security responsibilities to its implementing partners. The following excerpt from a USAID/Afghanistan contract dated February 2007 is instructive:

Security for the Contractor's personnel and offices is the responsibility of the Contractor. The Contractor shall assess the security situation in Afghanistan and

particularly in the provinces targeted by the program, and institute appropriate measures.

Such contract language distances USAID/Afghanistan from bearing responsibility for the security services it funds. The paradigm by which USAID/Afghanistan provides for the security of implementing partners that carry out its programs limits USAID/Afghanistan's oversight of security subcontractors. Notably, USAID/Afghanistan lacks privity of contract<sup>5</sup> with the subcontracted security providers. By designing its awards so that security is the responsibility of implementing partners, USAID/Afghanistan places oversight and accountability of PSCs in the hands of others, not the U.S. Government. Such contract language shifts responsibility for preventing the recurrence of serious incidents and their investigation from the U.S. Government to its implementing partners, including lower-tier implementing partners, and their contracted security providers. This practice creates risks for the Agency and is inconsistent with the detailed regulatory and contract clause requirements for Government oversight of PSCs required by NDAA FY 2008 section 862.

No discussion of whether USAID/Afghanistan had ensured that its implementing partners' PSCs are responsible would be complete without mention of the fraud perpetrated by one security contractor. In September 2009, the co-owners of that security company pleaded guilty to contract fraud related to activities involving a major USAID infrastructure program in Afghanistan. During the period October 1, 2006, through June 30, 2009, the company billed almost \$39 million for security costs. Plea agreements with the co-owners required them to forfeit \$3 million in proceeds that could be traced to fraud. The co-owners and the company have been suspended from participating in any new Federal awards.

Another case casts doubt on efforts to ensure that the security subcontractors protecting USAID/Afghanistan's implementing partners are responsible. In November 2009, a security coordinator for an implementing partner for USAID/Afghanistan's \$1.4 billion Afghanistan Infrastructure Rehabilitation Project pleaded guilty for his role in a scheme to solicit kickbacks. He admitted that he had conspired to solicit kickbacks from private security vendors in return for favorable treatment in the award of subcontracts.

Accordingly, to better meet congressional intent regarding the regulation of contractors performing private security functions and to effect a de facto shift of responsibility for the oversight of subcontracted security back into U.S. Government hands, USAID/Afghanistan should do more to oversee the subcontracted PSCs it funds. Specifically, the audit found the following areas where improvements should be made:

- USAID/Afghanistan did not always ensure that PSCs were licensed with the host government.
- USAID/Afghanistan did not always provide consent for implementing partners to subcontract for security services—and did not know whether proposed subcontractors were responsible, whether the price was reasonable, or whether the subcontract was appropriate for the risks involved.

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<sup>5</sup> "Privity of contract" is defined by *Black's Law Dictionary* as "that connection or relationship which exists between two or more contracting parties."



- USAID/Afghanistan did not include a standard Federal Acquisition Regulation clause (FAR 52.255-19) on security-related standards in any of its contracts.
- USAID/Afghanistan did not develop detailed guidance on matters such as the use of deadly force, personnel and weapons accountability, and the investigation of incidents.

These topics are discussed below, along with recommendations to ensure better oversight of PSCs.

## **USAID/Afghanistan-Funded Security Contractors Must Comply With Afghan Licensing Requirements**

**Summary.** Federal contractors must comply with applicable laws and regulations. However, two of USAID/Afghanistan’s implementing partners reported having charged a total of almost \$3 million for the services of PSCs that were not licensed with the Islamic Republic of Afghanistan. The partners contracted with unlicensed contractors because of confusion about changes to Afghan laws. Use of unlicensed firms creates risks for USAID/Afghanistan.

Generally, U.S. Government contractors must comply with applicable laws and regulations of host countries. A guide issued by the Islamic Republic of Afghanistan’s Ministry of Interior at the end of FY 2007 states that PSCs must be licensed by the Afghan Government. The guide notes that the Afghan Government cannot allow any gaps in assuring the Afghan people that illegal armed groups will not re-emerge as PSCs. The guide further emphasizes that “as a conflict-torn country, Afghanistan cannot afford to contend with anything less than strict regulations on the establishment and operation of private security companies.”

Nevertheless, two of USAID/Afghanistan’s implementing partners reported having charged USAID/Afghanistan awards for the services of PSCs that were not licensed by the Government of the Islamic Republic of Afghanistan. Charges for services of the two firms commenced after FY 2007. The table below identifies the unlicensed PSCs and provides the amounts and awards charged.

**Amounts Charged to USAID/Afghanistan Awards  
for Unlicensed Firms**

<b>Unlicensed Private Security Firm</b>	<b>Award Charged</b>	<b>Amount Charged (\$)</b>
Business Solutions, Inc.	306-M-00-05-00516-001	25,600
Greystone Limited	306-A-00-08-00529-00	2,914,940
Total		2,940,540

Changes in 2007 to the Afghan Ministry of Interior’s regulations regarding licensing caused confusion about the implications of the new Afghan Government’s regulations.

The use of unlicensed security firms undermines Afghan law and eliminates the protections provided by the licensing process. Such unregulated firms may have criminal connections or may be irresponsible in other ways. These circumstances put USAID/Afghanistan at risk.

**Recommendation 3.** *We recommend that USAID/Afghanistan's Director of Acquisition and Assistance provide written notification to the implementing partners responsible for the two awards (detailed in the table on page 13) directing them to use only private security contractors licensed by the Government of the Islamic Republic of Afghanistan.*

## **Contracting Officers Should Provide or Deny Consent to Security Subcontracts**

**Summary.** A Federal Acquisition Regulation provision typically applicable in Afghanistan requires that contracting officers responsible for providing or denying subcontracting consent review notifications and supporting data to ensure that the proposed subcontractors are responsible. Of 29 USAID/Afghanistan-funded PSCs, 17 lacked documentation of consent. Such consent was not granted because the subcontracts were not the essential objective of those awards, and contracting officials overlooked them. Consequently, USAID/Afghanistan did not know all of its subcontracted private security firms, nor did USAID/Afghanistan know whether such firms were responsible, whether the subcontract prices were reasonable, or whether these subcontracts were appropriate for the risks involved.

The Federal Acquisition Regulation (FAR) governs, in large part, the process through which the U.S. Government acquires goods and services. FAR 44.2 provides requirements concerning the consent to subcontract. According to USAID/Afghanistan contracting officers, USAID contractors are typically required to provide advance notification under FAR 44.201-2 before forming a new subcontract. For example, if the security situation changes after the initial award is made, and the implementing partner seeks to add or change a subcontracted security provider, then consent is required. According to FAR 44.202-2, the contracting officer responsible for providing or denying consent reviews contractor notifications and supporting data to ensure that the proposed subcontractor is responsible, the price is reasonable, and the subcontract is appropriate for the risks involved, consistent with current policy, and in accordance with sound business judgment.

USAID/Afghanistan's contracting officers did not provide consent to subcontract in every case in which a subcontracted security firm was added or changed, nor were they even aware of all of the implementing partners' subcontracted security firms. Broadly speaking, USAID/Afghanistan reported that its prime implementing partners had used just 14 PSCs. Of these 14, only 11 proved to be subcontracted to prime implementing partners. Three did not have a subcontract, were not a security company, or were already counted but mislabeled. However, 39 implementing partners reported that they

had subcontracted with 21 different PSCs—twice the number of which USAID/Afghanistan officials were aware.<sup>6</sup>

In reviewing 17 of USAID/Afghanistan’s contracts, the audit identified 31 separate subcontracts with private security firms, 29 of which required consent because a PSC had been added or changed after the initial award. The 17 contracts shown in the table below contain no evidence that USAID/Afghanistan’s contracting officer had granted consent to the implementing partner to subcontract a PSC.

**Private Security Firms for Which  
Subcontracting Consent Was Not Given**

	Implementing Partner	Award Number	Security Subcontractor
1.	Development Alternative Inc.	DFD-I-00-05-00250-08	USPI
2.	Creative Associates International	306-M-00-06-00508-06	Kroll/GardaWorld
3.	Aircraft Charter Solutions (Norse Air) Inc.	306-C-00-04-00558-07	Global Strategies Group
4.	Deloitte Consulting (previously BearingPoint)	GEG-I-00-04-0004-00	RONCO
5.	Deloitte Consulting (previously BearingPoint)	GEG-I-00-04-0004-00	ASG
6.	Deloitte Consulting (previously BearingPoint)	GEG-I-00-04-0004-00	GardaWorld
7.	Deloitte Consulting (previously BearingPoint)	GEG-I-00-04-0004-00	Watan Group
8.	Deloitte Consulting (previously BearingPoint)	306-C-00-07-00508-09	Global Strategies Group
9.	Deloitte Consulting (previously BearingPoint)	306-C-00-07-00508-09	RONCO
10.	Deloitte Consulting (previously BearingPoint)	306-C-00-07-00508-09	AEGIS
11.	Chemonics International	306-M-00-05-00516-00	Business Solutions
12.	Chemonics International	306-M-00-05-00516-00	USPI
13.	Chemonics International	306-C-00-07-00501-00	Hart Security
14.	ECODIT	EPP-I-02-06-00010	TOR
15.	SUNY	DFD-I-801-04-00128-10	USPI
16.	SUNY	DFD-I-801-04-00128-10	Olive Group
17.	SUNY	DFD-I-801-04-00128-10	Watan Group

The need to provide consent to the subcontracts was overlooked because security was not the main purpose of the prime contracts.

Without consent, USAID/Afghanistan is not aware of what subcontracted PSCs are working for their implementing partners, whether the security companies are responsible, or whether USAID/Afghanistan is receiving a good value for the amount of funds expended.

**Recommendation 4.** *We recommend that USAID/Afghanistan’s Director of Acquisition and Assistance require that the implementing partners—to which the 17 private security companies (identified in the audit report) have been subcontracted—provide what would customarily be advance notification to USAID/Afghanistan, so that consent to subcontract may be considered and granted or refused.*

<sup>6</sup> The regional security officer in Kabul requested on November 22, 2009, that all agencies and sections under Chief of Mission authority identify, by name, all PSCs “they are contracting or subcontracting with, or that are contracted or subcontracted by any of their prime contractors, implementing partners, or grantees.”

**Recommendation 5.** *We recommend that USAID/Afghanistan's Director of Acquisition and Assistance issue written guidance to existing implementing partners and the office's contracting officers, reminding them of the requirements of Federal Acquisition Regulation part 44.2.*

## **USAID/Afghanistan Should Use Existing Contract Clause To Impose Some Security Standards**

**Summary.** Federal Acquisition Regulation clause 52.225-19, which relates to some of NDAA FY08 section 862(b)'s contract clause requirements for PSCs, must be included in all of USAID/Afghanistan's acquisition awards issued since March 2008. None of 31 USAID/Afghanistan contracts reviewed included the clause, because most were made prior to March 2008 and contracting officers did not see the need to amend existing awards. Without the clause, USAID/Afghanistan's contractors and the PSCs with which they subcontract are left with little or no guidance and few enforceable requirements for contractor personnel performing security functions.

Effective March 2008, Federal Acquisition Regulation (FAR) Clause 52.225-19, "Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States," must be included in contracts that will require contractor personnel to perform outside the United States in support of a diplomatic mission designated as a danger-pay post. Because USAID/Afghanistan is part of such a mission, the clause must be included in all of USAID/Afghanistan's acquisition awards issued since March 2008. The FAR does not require inclusion of the clause in awards made prior to that date.

FAR clause 52.225-19, as prescribed in FAR 25.301-4, is the only standard contract clause applicable to USAID's acquisition awards that our audit identified as imposing security-related requirements on PSCs and their personnel in Afghanistan. The clause provides general requirements related to security. For example, the clause authorizes the use of deadly force under specified circumstances and requires contractor compliance with all applicable laws, treaties, and U.S. regulations, directives, instructions, policies, and procedures. In a few cases, it provides specific requirements applicable to security contractors. For example, the clause prohibits PSC personnel from wearing military clothing, unless specifically authorized by the combatant commander. The clause notes that, if military clothing is authorized, "contractor personnel must wear distinctive patches, armbands, nametags, or headgear, in order to be distinguishable from military personnel." The clause also specifies that contractors must be familiar with host country laws and comply with them. Moreover, the clause requires that the substance of the clause be incorporated in all subcontracts that require subcontractor personnel to perform outside the United States during specified operations and circumstances, including that of supporting a diplomatic mission designated by the Department of State as a danger-pay post.

As discussed in the Background section, NDAA FY 2008 section 862(b) requires that the FAR be revised to require insertion into each covered contract of a clause containing specified oversight requirements, including a requirement that the contractor comply with the regulations prescribed under section 862(a). Although FAR clause 52.225-19 touches on many of the topics presented in NDAA FY 2008 section 862(b), it does not meet the specific requirements of section 862(b) and it provides few details. For example, the clause is silent on the matters of incident reporting and investigation. Also, the clause provides limited guidance on the use of deadly force. It says deadly force may be used in “self-defense” and “when it reasonably appears necessary” to protect assets and people.

Significantly, an OIG audit report<sup>7</sup> noted that USAID/Iraq had ensured that all of its contracts with subcontracted PSCs either contained the clause or had been amended to include it. However, none of 31 USAID/Afghanistan acquisition agreements with an identified subcontracted PSC included the FAR clause. Of these, four were issued in March 2008 or later. Some of the 31 awards included provisions related to security, but the scope of those provisions varied significantly from one award to another; most awards either were silent on security matters or included language purporting to place primary responsibility for security on the implementing partner. The 27 awards issued before March 2008 contained no specified requirement that the clause be added in existing awards. Additionally, USAID/Afghanistan officials saw no need to include the clause in the older awards, because, as discussed below, guidance referenced in the clause had not yet been issued.

Without the clause in their contracts, USAID/Afghanistan’s implementing partners and the PSCs with which they subcontract are left with little or no guidance and few enforceable requirements for contractor personnel performing security functions. This vacuum of applicable security guidance does not satisfy congressional intent that personnel performing private security functions under contracts in Afghanistan should be regulated.

Inclusion of the FAR clause in USAID/Afghanistan’s contracts would help in closing the gaps between the level of oversight of PSCs in Iraq and Afghanistan and in more fully meeting congressional intent for the regulation of PSCs. However, adding the clause is not sufficient in and of itself. The FAR clause refers repeatedly to “Chief of Mission guidance,” which has been issued for Iraq but not for Afghanistan. This guidance is critical for fulfilling the requirements of section 862 of NDAA FY 2008. For example, the act requires that regulations be prescribed to account for weapons. The FAR clause requires that contractors “adhere to all guidance and orders issued by the Combatant Commander or the Chief of Mission regarding possession, use, safety, and accountability of weapons and ammunition.” Without Mission-wide instructions, the FAR clause is not fully effective in regulating PSCs (see the subsequent finding on pages 18–20).

**Recommendation 6.** *We recommend that USAID/Afghanistan’s contracting officer add Federal Acquisition Regulation Clause 52.225-19, “Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or*

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<sup>7</sup> Audit Report No. E-267-09-002-P, March 4, 2009, *Audit of USAID/Iraq’s Oversight of Private Security Contractors in Iraq*.

*Consular Mission Outside the United States,” to all its existing acquisition awards and issue guidance to include the clause in future awards.*

## **Formal Security Instructions Are Needed**

**Summary.** Despite congressional interest and the availability of policies and procedures for contracted security services in Iraq, USAID/Afghanistan’s contracting and agreement officers lack similar guidance applicable to Afghanistan. Without guidance, USAID/Afghanistan’s contracts and grants will continue to avoid statutory and regulatory requirements for PSC oversight, and USAID/Afghanistan-funded security firms will devise their own standards.

Congress has expressed continuing interest in the role and regulation of PSCs in Afghanistan and Iraq. The Senate Armed Services Committee conducted an investigation in 2009 that examined the role of USAID’s subcontracted PSCs in Afghanistan and Iraq. Further demonstrating such interest, Congress passed section 862 of NDAA FY 2008, described in the Background section of this report, and Congress amended it in FY 2009 and 2010 to strengthen its oversight of PSCs in Iraq and Afghanistan.

In Iraq, policies and procedures were provided through Mission-wide instructions. In May 2008, the Chief of Mission in Iraq issued a policy directive on armed PSCs in Iraq. That directive provided PSCs in Iraq with requirements that are mandatory for PSCs working under “a contract (at any tier) or grant” for USAID or any agency under Chief of Mission authority. The directive addressed such matters as rules for the use of force, permissible weapons, ammunition, vehicles, and uniforms, movement coordination, and reporting and investigation of serious incidents.

Additionally, in April 2009, the Director of USAID/Washington’s Office of Acquisition and Assistance issued an acquisition and assistance policy directive that provided an assistance (grant) provision for use in agreements involving activities in Iraq. The provision required the use of a database for contract and contractor personnel information. Significantly, the provision required that PSCs comply with Chief of Mission guidance. A requirement for compliance with Chief of Mission guidance is also included in FAR clause 52.225-19. For Iraq, both the assistance provision and the FAR clause link USAID awards to Mission-wide instructions.

Despite congressional interest and the issuance of specific policies and procedures for contracted security services in Iraq, USAID/Afghanistan’s contracting and agreement officers have no similar Mission-wide instruction for the PSCs funded by USAID/Afghanistan. USAID/Afghanistan has no standard clause relative to the provision of security services to include in its assistance awards. Even if USAID/Afghanistan were to consistently insert FAR clause 52.225-19 as required, that clause’s requirement that contractors comply with applicable regulations would be of little value with respect to the statutory and regulatory scheme for PSC oversight mandated by NDAA FY 2008 section 862, given that the scheme has not been implemented for non-DOD PSCs in Afghanistan until the Chief of Mission issues instructions under 32 CFR 159.4(c).

Of the 59 awards that USAID/Afghanistan's Office of Acquisition and Assistance identified as having subcontracted private security, 20 were assistance awards. Consequently, about a third of USAID/Afghanistan's awards with subcontracted security have no standard security requirements. As mentioned previously, the one standard clause for contracts, FAR clause 52.225-19, imposes some requirements on PSCs, but it refers repeatedly to guidance that has not yet been issued.

Accordingly, USAID/Afghanistan awards typically are silent on requirements for subcontracted private security services, or they specify that security is the implementing partner's responsibility. The following language from a USAID/Afghanistan award illustrates this point:

There are no minimal operational standards for security to which the contractor must adhere. The Contractor shall develop and prudently manage a security program for its personnel and other resources which facilitates safe and successful accomplishment of work.

A Mission-wide policy directive on armed PSCs for Afghanistan has been drafted but has not yet been issued. The regional security officer explained that conflicts between Afghan law and policies of the State Department's Bureau of Diplomatic Security regarding the firing of warning shots have stalled the issuance of the policy directive.

Furthermore, although section 862 of the NDAA FY 2008 and its implementing Interim Final Rule at 32 CFR 159 are intended to ensure oversight of all PSCs in Afghanistan, they have not been implemented for non-DOD PSCs because the Mission has not issued implementing instructions. The Interim Final Rule, promulgated by the Secretary of Defense in coordination with the Secretary of State, requires that the subordinate commanders within a geographic combatant command (in this case, Central Command) be responsible for developing and issuing procedures implementing the requirements of NDAA FY 2008 section 862 "as warranted by the situation, operation, and environment, in consultation with the relevant Chief of Mission, in designated areas of combat operations." The Interim Final Rule also provides, at 32 CFR 159.4(c):

The relevant Chief of Mission will be responsible for developing and issuing implementing instructions for non-DoD PSCs and their personnel consistent with the standards set forth by the geographic Combatant Commander [and] has the option to instruct non DoD PSCs and their personnel to follow the guidance and procedures developed by the Geographic Combatant Commander and/or Subordinate Commander.<sup>8</sup>

In the absence of Mission-wide guidance, USAID/Afghanistan's contracts and grants will continue to avoid providing oversight of and direction to PSCs. Such a practice is contrary to the intent that Congress made clear in NDAA FY 2008. More to the point, in the absence of stipulated policies and procedures, USAID/Afghanistan-funded PSCs will continue to devise their own standards and will continue to be self-regulating.

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<sup>8</sup> According to DOD's designated contact for the Interim Final Rule, in February 2009, U.S. Forces Afghanistan (the subordinate commander) issued Operational Order 09-03, which contains detailed procedures implementing NDAA FY 2008's PSC oversight requirements in Afghanistan.

Managers at four USAID/Afghanistan PSCs—which constitute more than 59 percent of USAID/Afghanistan’s projected security expenditures for 2009—indicated that they have been largely self-regulated and that they have devised their own standards. They drew from prior military experience or their experience from security work in other countries, and they worked in conjunction with the requirements of the USAID/Afghanistan implementing partners with which they had contracted. Some noted other sources that they had used in formulating their standards, such as Ministry of Interior standards, standards imposed by DOD, and guidance from the security firm’s legal counsel, but in no instance had USAID/Afghanistan played a significant role in that process. Indeed, few reported having anything more than limited contact with USAID/Afghanistan. Consequently, in the absence of USAID/Afghanistan-stipulated policies and procedures, USAID/Afghanistan-funded PSCs will continue to devise their own standards for matters such as the use of deadly force, security-related training, requirements for personnel and weapons accountability, vetting of personnel, and investigation of incidents.

In a further illustration of the consequences of this absence of guidance, USAID/Afghanistan’s subcontracted security providers are not bound by agreement terms to undergo an independent review or investigation of serious incidents. During the period October 1, 2006, through June 30, 2009, 314 people working on USAID/Afghanistan’s projects were reported killed or injured. However, only one implementing partner reported having performed any investigations into the reported incidents. All of the investigations reported were conducted by the PSC’s own employees, although two investigations also involved local police, who had responded to the attack on the security contractor. None cited any independent investigation of serious incidents reported, and none of the investigations found any fault with the actions of the PSC’s personnel.

***Recommendation 7.*** *We recommend that USAID/Afghanistan’s contracting officer request in writing that the Chief of Mission issue Mission-wide instructions for non-DOD PSCs and their personnel, as required by Interim Final Rule 32 CFR 159.4(c), to either (1) implement standards set forth by the geographic combatant commander, or (2) instruct non-DOD PSCs and their personnel to follow the guidance and procedures developed by the geographic combatant commander and/or subordinate commander.*

***Recommendation 8.*** *We recommend that, in the absence of Mission-wide instructions, USAID/Afghanistan’s contracting officer request in writing that the Office of Acquisition and Assistance provide acquisition and assistance award language to regulate subcontracted private security services.*

## **How much has been spent by USAID/Afghanistan’s implementing partners for private security services, and has there been effective oversight of these security costs?**

USAID/Afghanistan’s prime implementing partners with identified PSCs reported that they had charged their awards over \$167 million for the costs of private security services during the period October 1, 2006, through June 30, 2009. USAID/Afghanistan faced challenges in providing effective oversight of security costs. No specific requirements apply to this category of costs, and few requirements address the audit of subcontractor



costs. Recommended improvements to subcontracting consent (see recommendation 4 on page 15) will provide clarity about what security firms USAID/Afghanistan funds, thus allowing for better opportunities for oversight. However, unless Federal and Agency policies change, audit responsibility over such costs will continue to be dispersed among various parties. This report includes no recommendations to change these policies.

In addition to the \$167 million for the costs of private security services, implementing partners charged \$12 million during the same period for other security services and security-related items, bringing the total for security services for the period to \$179 million. The charges for other security services covered the costs for security equipment, physical security improvements, and security managers, guards, and vehicles for implementing partners.

The \$179 million in reported charges includes some but not all security costs. Private security costs of second-tier<sup>9</sup> or lower implementing partners may not have been included in every case. For example, of the 36 prime implementing partners that reported having charged security costs, 1 noted that 2 of its second-tier implementing partners had incurred costs exceeding \$7 million. Another identified over \$3.5 million in costs for one of its second-tier partners.<sup>10</sup> Consequently, the total security costs of lower-tier implementing partners could be significant. According to a financial management official at USAID/Afghanistan, such categories of costs at the lower tiers are neither seen nor tracked by USAID/Afghanistan, because they are embedded in prime implementing partner's costs.

To put the reported amounts charged for security in perspective, PSC subcontractor costs accounted on average for roughly 8.3 percent of award disbursements. Subcontracting costs varied widely as a percentage of total disbursements. For example, the award for one program spent 34 percent of total disbursements on subcontracted private security firms, while another spent only 0.5 percent.

These percentages fall within USAID/Afghanistan's expected range for security costs. On the low end, one award that used a "low-profile approach" to security expended 1.9 percent of costs on PSC subcontractors. Another award estimated security costs to be 6.5 percent of the award. USAID/Afghanistan officials noted that they expect costs to run approximately 8 to 10 percent for areas that are deemed relatively safe, and that security can go up to 20, 30, or even 50 percent in areas considered extremely dangerous.

USAID/Afghanistan faced challenges in providing effective oversight of such security costs. No specific requirements cover financial oversight of this category of costs, and few requirements for USAID/Afghanistan address the audit of subcontractor costs. Federal requirements governing the oversight of subcontractor costs precluded more effective oversight of security costs charged to USAID/Afghanistan's awards. For example, (1) responsibility for such oversight is, in accordance with Federal Government and Agency policy, dispersed among many parties; (2) USAID/Afghanistan personnel have no accurate or comprehensive understanding of what security firms are providing

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<sup>9</sup> "Second-tier implementing partners" are organizations with which prime implementing partners have made agreements to carry out USAID/Afghanistan's programs.

<sup>10</sup> These additional reported costs are not included in the \$179 million cited.

security services; and (3) the total amount charged to USAID/Afghanistan awards for security services is not known with any degree of precision.

In accordance with Federal Government and Agency policy, the responsibility for the oversight of implementing partners' subcontracted security costs rests among many parties. According to Automated Directives System (ADS) chapter 591.3.6, USAID missions have the right to audit a subrecipient if they identify a potential for waste or fraud. However, Agency policy generally does not require USAID missions to perform audits of subrecipients. Such responsibilities belong to prime implementing partners and, in some cases, rely on risk assessments performed by an office in Washington.

Further complicating oversight, relevant policies vary depending on the differing natures of USAID partners and differing types of subcontractors receiving funding. Applicable Federal Government and Agency requirements generally focus on whether a recipient is a for-profit or non-profit organization and whether the recipient is U.S.-based or foreign. For example, ADS 591.3.1.2, which addresses U.S. for-profit organizations, requires that "at least annually, M/OAA/CAS<sup>11</sup> must assess risks associated with all U.S. for-profit organizations performing under direct contracts, grants, cooperative agreements, or cost-reimbursable host country contracts, and subcontracts to determine when these organizations should be audited." The chapter also notes that "USAID's legal relationship is with the prime recipient. Therefore, USAID is not responsible for directly monitoring subrecipients."

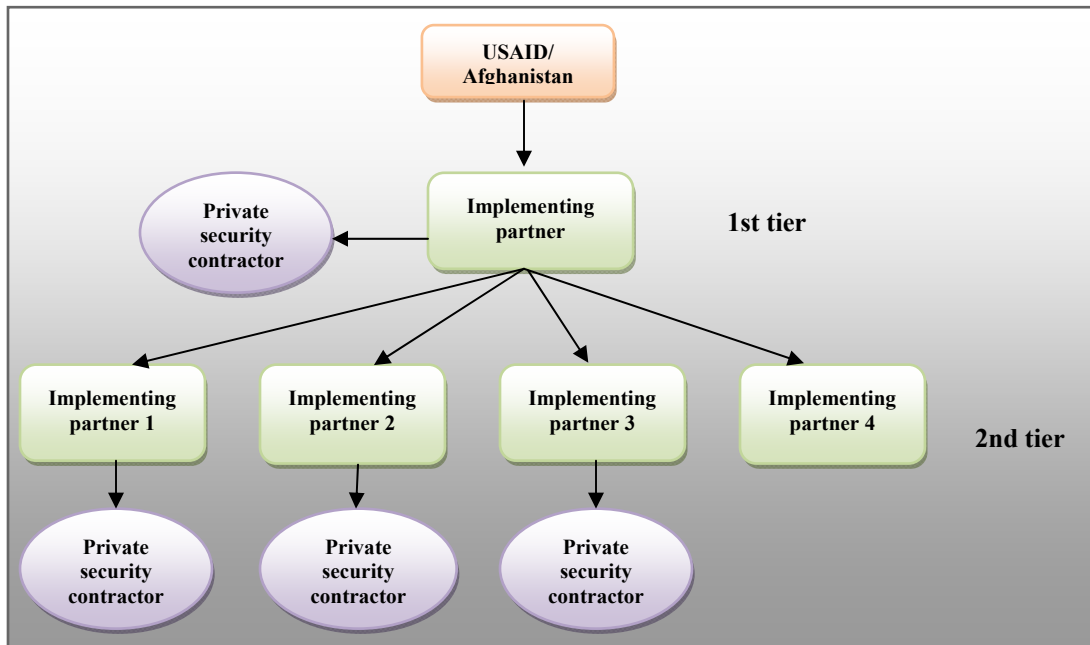
Even if USAID/Afghanistan were responsible for all such audits, USAID/Afghanistan would not have an accurate or comprehensive understanding of the security firms that provide services to its prime implementing partners. USAID/Afghanistan has even less clarity concerning lower-tier implementing partners that have contracted their own security. In the instance of one USAID program, a second level of implementing organizations exists below USAID/Afghanistan's prime implementing partner, and three of the four second-tier implementing partners purchased their own security service. (See diagram on following page.)

In addition, USAID/Afghanistan does not see all security costs charged to its awards because security costs are not always separately identified. USAID/Afghanistan has demonstrated, through its conduct of partner financial reviews, that it provides a certain degree of oversight regarding the security costs of prime implementing partners. However, as discussed previously, some implementing partners have made agreements with others to carry out award objectives. These lower-level costs are not separately identified by cost categories. These multiple levels of implementing partners, though necessary to carry out the award objectives, can obscure the amounts of specific categories of cost.

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<sup>11</sup> M/OAA/CAS is the Contract Audit and Support Division within the Office of Acquisition and Assistance at USAID's Washington headquarters.

## Multiple Tiers of PSC Subcontracting



In summary, recommended improvements to subcontractor consent (page 15) will create increased clarity about what security firms USAID/Afghanistan funds and will provide better opportunities for oversight. However, unless Federal and Agency policies change, audit responsibility for specific categories of costs and subcontractor costs will continue to be dispersed among various parties. This report makes no recommendations for such policy changes because the scope of this audit was not sufficient to prompt changes to Federal and Agency policies governing the financial oversight of subcontractor costs. Also, new policies affecting a single category of costs—security costs—are not warranted without a consideration of all categories of costs.

# EVALUATION OF MANAGEMENT COMMENTS

In response to the draft report, USAID/Afghanistan agreed, at least in principle, with all recommendations, except recommendation 8. For that recommendation, USAID/Afghanistan did agree that it can reinforce the forthcoming Chief of Mission guidance and ensure that the guidance will be applicable to its assistance awards. The Office of Inspector General reviewed USAID/Afghanistan's response to the draft report and determined that management decisions have been reached on recommendations 1, 2, 3, 4, 6, 7, and 8. Final action has been achieved on recommendation 5. The status of each of the eight recommendations is discussed below.

USAID/Afghanistan management agreed with recommendation 1 and indicated that its Office of Acquisition and Assistance is coordinating with its counterpart office at USAID/Washington to obtain approval of standard provisions or clauses. When it receives approval, USAID/Afghanistan plans to modify the acquisition and assistance agreements as recommended. USAID/Afghanistan management expects to complete these actions by August 31, 2010. We conclude that a management decision has been reached on this recommendation.

USAID/Afghanistan management agreed with recommendation 2 and indicated that it would formalize its process for collecting and coordinating the reporting of incidents to the mission's Office of Safety and Security. USAID/Afghanistan management expects to complete these actions by May 31, 2010. Accordingly, we conclude that a management decision has been reached on this recommendation.

USAID/Afghanistan management agreed with recommendation 3. Management indicated that the cognizant contracting officers for the two agreements would provide written notification to the implementing partners responsible for the two awards, directing them to use only PSCs licensed by the Government of the Islamic Republic of Afghanistan. USAID/Afghanistan management expects to complete these actions by May 31, 2010. We, therefore, conclude that a management decision has been reached on this recommendation.

USAID/Afghanistan management agreed with recommendation 4 and indicated that its Office of Acquisition and Assistance will review the list of 17 implementing partners and identify those on the list with unexpired contracts and subcontractors for which consent is required and has not been granted. As recommended, these implementing partners will be required to provide the customary advance notification to USAID/Afghanistan, so that the cognizant contracting officer can provide consent to subcontract. USAID/Afghanistan management indicated that it would use a status report to document the completion of these activities. Management expects to complete these actions by August 31, 2010. In light of the planned actions, we conclude that a management decision has been reached on this recommendation.

USAID/Afghanistan management agreed with recommendation 5 and indicated that the director of its Office of Acquisition and Assistance has issued written guidance. That

guidance was provided as an attachment to management's comments and on April 26, 2010, was circulated in an e-mail to USAID/Afghanistan's contracting officers for them to forward to implementing partners. The guidance addresses the requirements of the Federal Acquisition Regulation part 44.2 and notes that subcontractor approval extends beyond PSCs and is required when subcontractors are added or replaced. Additionally, the guidance cautions partners about the use of unauthorized PSCs and warns that such actions could result in disallowed costs. We conclude that final action has been achieved and that the recommendation should be closed.

USAID/Afghanistan management generally agreed with recommendation 6 and indicated that its Office of Acquisition and Assistance will review its existing active acquisition awards and ensure that Federal Acquisition Regulation Clause 52.225-19, "Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States," is included in existing awards. Additionally, the office's director will issue guidance to its contracting officers directing them to include the clause in all future awards. This matter was not addressed in the Director's April 26 message mentioned in conjunction with recommendation 5, but it will be covered in separate guidance. USAID/Afghanistan management expects to issue the guidance by August 31, 2010. Accordingly, we conclude that a management decision has been reached on this recommendation.

USAID/Afghanistan management agreed "in principle" with recommendation 7 and indicated that the USAID/Afghanistan Mission Director would write to the Ambassador to request that he issue Mission-wide instructions for non-Department of Defense PSCs and their personnel, as required by Interim Final Rule 32 CFR 159.4(c). USAID/Afghanistan management expects to write to the Ambassador by May 15, 2010. In light of USAID/Afghanistan's actions, we conclude that a management decision has been reached on this recommendation. Final action will be achieved when the letter is issued to the Ambassador.

Although USAID/Afghanistan management did not agree with the wording of recommendation 8, it has proposed an action to address the deficiencies noted in the audit finding. USAID/Afghanistan's Office of Acquisition and Assistance, in coordination with USAID/Washington's Office of Acquisition and Assistance, will develop clauses or provisions to require assistance award partners in Afghanistan to comply with forthcoming Chief of Mission guidance for security firms and personnel. In light of USAID/Afghanistan's proposed action, we conclude that a management decision has been reached on this recommendation. Final action will be achieved when USAID/Afghanistan's Office of Acquisition and Assistance completes development of pertinent clauses or provisions to be used in acquisition and assistance agreements.

# SCOPE AND METHODOLOGY

## Scope

The Regional Inspector General/Manila conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

The audit had three objectives, which addressed (1) what types of serious security incidents have been reported by security firms contracted by USAID/Afghanistan's implementing partners; (2) whether USAID/Afghanistan has ensured that its implementing partners subcontracted with responsible private security firms; and (3) how much has been spent by implementing partners for private security services, and whether oversight of these costs has been effective.

The audit covers the period from October 1, 2006, through June 30, 2009, and addresses security services of USAID/Afghanistan's implementing partners. The audit involved reviews of 39 implementing partners with acquisition and/or assistance awards funding private security contractors (PSCs). The audit did not include USAID/Afghanistan's one direct contract with a security firm. The audit sought to identify all security costs charged by USAID/Afghanistan's prime implementing partners during that period. These costs do not include the security costs of second-tier and lower implementing partners. The amounts identified by the audit could not be verified by USAID/Afghanistan, and we relied entirely on responses from implementing partners for this data. RIG/Manila's resident audit staff in Afghanistan performed this audit in Kabul, Afghanistan, at the offices of USAID/Afghanistan, offices of selected PSCs, and the U.S. Embassy's Regional Security Office, and in communication with USAID/Afghanistan's implementing partners. The audit relied on the following sources of evidence: reviews of Agency policies, internal controls, prior audits, and contracts; interviews with and information requests of implementing partners, PSCs, and USAID/Afghanistan officials; and site visits to PSC sites. We performed audit fieldwork between July 27, 2009, and November 23, 2009.

## Methodology

To answer the audit's three objectives, the audit relied on information requested from (1) USAID/Afghanistan; (2) 40 implementing partners/projects that USAID/Afghanistan identified as having subcontracted with PSCs and/or having incurred other security costs; and (3) 14 private security firms that USAID/Afghanistan identified as subcontracted by USAID/Afghanistan's implementing partners. These requests obtained information that was useful for the objectives, but the audit team obtained additional evidence and insights through interviews with USAID/Afghanistan and Embassy officials, reviews of implementing partner contracts, and other confirmations. We obtained additional evidence on subcontracted private security firms from interviews with officials from the four private security firms that had expended almost 60 percent of

USAID/Afghanistan projected security costs for 2009 and more than 50 percent of USAID/Afghanistan-identified security subcontracts.

Specifically, to answer the first objective, we reviewed USAID/Afghanistan's incident reports and other documents that the audit team obtained directly from implementing partners and subcontracted PSCs. We also considered how USAID/Afghanistan encourages reporting and how it processes the reports it receives.

To answer the second objective, we evaluated contract and grant agreement requirements specifically applicable to security. The audit team could then devise test procedures used in reviewing 19 of 20 contracts and 12 task orders within 1 of the awards. USAID/Afghanistan had identified the 20 contractors as having subcontracted private security. As there were no such agreement requirements for assistance awards, we reviewed only contract records. We also asked USAID/Afghanistan personnel about other ways in which the USAID/Afghanistan might have ensured that responsible PSCs are used by its implementing partners. Implementing partners and subcontracted PSCs were similarly queried about any such efforts by USAID/Afghanistan.

To answer the first part of the third objective, we reviewed and calculated amounts billed by 39 USAID/Afghanistan-identified implementing partners for security services. To answer the second part of the objective, we evaluated oversight requirements and reviewed financial oversight that USAID/Afghanistan and implementing partners had performed.

# MANAGEMENT COMMENTS



## MEMORANDUM

**TO:** Bruce N. Boyer, Regional Inspector General/Manila

**From:** William M. Frej, Mission Director, USAID/Afghanistan /s/

**DATE:** May 3, 2010

**SUBJECT:** Audit of USAID/Afghanistan's Oversight of Private Security Contractors in Afghanistan (Audit Report No. 5-306-10-00X-P)

**REFERENCE:** BBoyer/WFrej memo dated March 22, 2010

Thank you for providing the Mission the opportunity to review the subject draft audit report. We would like to express our gratitude for the professionalism, flexibility, resourcefulness, and hard work exhibited by the audit team. We are providing confirmation of the actions that have been taken or are planned to be taken to address the recommendations in the audit report.

## MISSION RESPONSES TO AUDIT RECOMMENDATIONS

*Recommendation 1. We recommend that, in the absence of Mission-wide instructions, USAID/Afghanistan's Director of Acquisition and Assistance include a clause or provision in all acquisition and assistance agreements to require the implementing partner to report information on casualties as well as serious incidents.*

The Mission agrees with this recommendation.

### Actions To Be Taken:

USAID/Afghanistan's Office of Acquisition and Assistance (USAID/Afghanistan's OAA) is coordinating additional reporting requirements with USAID/Washington's Management Bureau/OAA (M/OAA). The additional standard provisions or clauses in agreements are subject to the Paperwork Reduction Act and require approval by OMB. Upon approval of the standard provisions or clauses, USAID/Afghanistan's OAA will modify the acquisition and assistance agreements accordingly. The target date for completion of these actions is August 31, 2010.



Based on the actions identified above, the Mission requests RIG/Manila concurrence that a management decision has been reached and that this audit recommendation will be deemed closed when OAA includes the clauses or provisions in all acquisition and assistance agreements.

***Recommendation No 2: We recommend that, in the absence of Mission-wide instructions, USAID/Afghanistan devise and implement a formal process, consistent with standards specified in 39 CFR 159.6, for its employees to forward reports of serious incidents and casualties to a designated office that will collect and coordinate the reports.***

The Mission agrees with this recommendation.

**Actions Taken:**

In July 2009, the Mission established an in-house Office of Safety and Security to, among other duties, coordinate the reporting of serious incidents and casualties. Serious incidence reporting has increased as has general cooperation on security issues with the implementing partners. The Safety and Security Offices collects and issues daily reports on security incidents. While there is an extensive process in place and a designated office to collect and coordinate reporting of incidents, the process has not been formalized in a Mission Order. The Mission will formalize the process for employees to forward reports of serious incidents and casualties to the designated office by May 31, 2010.

Based on the actions identified above, the Mission requests RIG/Manila concurrence that a management decision has been reached and that this audit recommendation will be deemed closed when the Mission formalizes the process in a Mission Notice.

***Recommendation No 3: We recommend that USAID/Afghanistan's Director of Acquisition and Assistance provide written notification to the implementing partners responsible for the two awards (detailed in the table on page 13) directing them to use only private security contractors licensed by the Government of the Islamic Republic of Afghanistan.***

The Mission agrees with this recommendation.

**Actions To Be Taken:**

The Ministry of Interior's list of approved security firms has been provided to the cognizant Contracting Officers for the two agreements. The cognizant Contracting Officers will provide written notification to the implementing partners responsible for the two awards directing the partners only to use private security contractors licensed by the Government of the Islamic Republic of Afghanistan. The target date for completion of this action is May 31, 2010.

Based on the actions identified above, the Mission requests RIG/Manila concurrence that a management decision has been reached and that this audit recommendation will be deemed closed when the cognizant Contracting Officers provide written notification to the implementing partners responsible for the two awards.

***Recommendation No 4: We recommend that USAID/Afghanistan's Director of Acquisition and Assistance require that the implementing partners—to which the 17 private security companies (identified in the audit report) have been subcontracted—provide what would customarily be advance notification to USAID/Afghanistan, so that consent to subcontract may be considered and granted or refused***

The Mission agrees with this recommendation.

**Actions To Be Taken:**

USAID/Afghanistan's OAA will review the list of 17 implementing partners and identify those partners on the list who's contracts have not expired and who have not subsequently received consent to subcontract. These implementing partners will be required to provide what would customarily be advance notification to USAID/Afghanistan, so that the cognizant Contracting Officer can provide consent to subcontract. A status report of the 17 implementing partners detailed in the report containing the status of their awards and approved consent to subcontract will be prepared to document the completion of these activities by August 31, 2010.

Based on the actions identified above, the Mission requests RIG/Manila concurrence that a management decision has been reached and that this audit recommendation will be deemed closed when the Mission demonstrates consent to subcontract has been provided to the remaining active contracts identified in the report.

***Recommendation 5. We recommend that USAID/Afghanistan's Director of Acquisition and Assistance issue written guidance to existing implementing partners and the office's contracting officers, reminding them of the requirements of Federal Acquisition Regulation part 44.2.***

The Mission agrees with this recommendation.

**Actions To Be Taken:**

On April 25, 2010 USAID/Afghanistan's OAA Director issued written guidance to the existing implementing partners and the office's Contracting Officers, reminding them of the requirements of Federal Acquisition Regulation part 44.2.

Based on the actions identified above, the Mission requests RIG/Manila concurrence that a management decision has been reached and that this audit recommendation is closed. Please refer to Attachment 1 for a copy of the guidance.

***Recommendation 6. We recommend that USAID/Afghanistan's contracting officer add Federal Acquisition Regulation Clause 52.225-19, "Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States," to all its existing acquisition awards and issue guidance to include the clause in future awards.***

The Mission agrees with this recommendation, in general.

**Actions To Be Taken:**

USAID/Afghanistan's OAA will review its existing active acquisition awards and ensure the required clause is included in the awards. Additionally, the Director of USAID/Afghanistan's OAA will issue guidance to the Contracting Officers directing them to include the clause in all future awards. The target date for completion is August 31, 2010.

Based on the actions identified above, the Mission requests RIG/Manila concurrence that a management decision has been reached and that this audit recommendation will be deemed closed when: 1) the USAID/Afghanistan Director of OAA makes a determination that all contracts have the required clause included in the award, and 2) the Director of USAID/Afghanistan's OAA has issued guidance to the Contracting Officers.

***Recommendation 7. We recommend that USAID/Afghanistan's contracting officer request in writing that the Chief of Mission issue Mission-wide instructions for non-DOD PSCs and their personnel, as required by Interim Final Rule 32 CFR 159.4(c), to either (1) implement standards set forth by the geographic combatant commander, or (2) instruct non-DOD PSCs and their personnel to follow the guidance and procedures developed by the geographic combatant commander and/or subordinate commander.***

The Mission agrees in principle with the recommendation.

The Chief of Mission (COM) is aware of this issue and COM guidance on the use of private security contractors has been prepared by the U.S. Embassy/Kabul Regional Security office. The guidance is currently with the Department of State Legal Office in Washington D.C. The USAID/Afghanistan Mission Director will formally write to the Ambassador and express to the Ambassador the finding in this audit report by May 15, 2010.

Based on the above discussion, the Mission requests RIG/Manila's concurrence that a management decision has been reached and that this audit recommendation will be closed when the Mission Director formally writes to the Ambassador.

***Recommendation 8. We recommend that, in the absence of Mission-wide instructions, USAID/Afghanistan's contracting officer request in writing that the Office of***

***Acquisition and Assistance provide acquisition and assistance award language to regulate subcontracted private security services.***

The Mission does not agree with this recommendation as written. The Mission notes that Chief of Mission standards for security firms and personnel are issued by the U.S. Embassy/Kabul's Regional Security Officer. USAID does not have the expertise or authority to issue weapons standards, training and certification requirements, rules of engagement, incident review and sanctioning for improper execution of duties. The Mission is proposing alternative action which will address the deficiencies noted in the audit finding.

**Alternative Actions To Be Taken:**

The Mission does agree that there is action USAID/Afghanistan can take to reinforcing the forthcoming Chief of Mission guidance, ensuring the COM guidance will be applicable to the Mission's assistance awards. The finding highlights an important disparity between assistance award provisions applicable to Iraq and Afghanistan. Unlike Iraq, Afghanistan has no assistance award clause requiring partners to comply with Chief of Mission guidance.

As indicated in our response to recommendation 1 (above), USAID/Afghanistan's OAA is coordinating additional provisions and clauses with USAID/Washington's M/OAA and that USAID/Afghanistan's OAA will develop clauses or provisions that will require assistance award partners to comply with Chief of Mission guidance. The target date for completion of this action is August 31, 2010.

Based on the action identified above, the Mission requests RIG/Manila's concurrence that a management decision has been reached and that this audit recommendation will be deemed closed when USAID/Afghanistan's OAA completes the development of pertinent clauses or provisions to be utilized in acquisition and assistance agreements.

Attachment: 1 – OAA Letter to Implementing Partners

# Key Statutory Requirements in Sections 862 and 864 of the National Defense Authorization Act for Fiscal Year 2008, as Amended

## **Sec. 862. Contractors performing private security functions in areas of combat operations.**<sup>12</sup>

### **(a) Regulations on contractors performing private security functions.--**

**(1) In general.**—Not later than 120 days after the date of the enactment of this Act [Jan. 28, 2008], the Secretary of Defense, in coordination with the Secretary of State, shall prescribe regulations on the selection, training, equipping, and conduct of personnel performing private security functions under a covered contract in an area of combat operations.

**(2) Elements.**—The regulations prescribed under subsection (a) shall, at a minimum, establish—

**(A)** a process for registering, processing, accounting for, and keeping appropriate records of personnel performing private security functions in an area of combat operations;

**(B)** a process for authorizing and accounting for weapons to be carried by, or available to be used by, personnel performing private security functions in an area of combat operations;

**(C)** a process for the registration and identification of armored vehicles, helicopters, and other military vehicles operated by contractors performing private security functions in an area of combat operations;

**(D)** A process under which contractors are required to report all incidents, and persons other than contractors are permitted to report incidents, in which—

**(i)** a weapon is discharged by personnel performing private security functions in an area of combat operations;

**(ii)** personnel performing private security functions in an area of combat operations are killed or injured;

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<sup>12</sup> Public Law 110-181, div. A, title VIII, subtitle F, §§ 862 and 864, Jan. 28, 2008, 122 Stat. 254-259; as amended by Public Law 110-417, div. A, title VIII, §§ 853, 854(a), (d), Oct. 14, 2008, 122 Stat. 4544; and Public Law 111-84, div. A, title VIII, § 813(a) to (c), Oct. 28, 2009, 123 Stat. 2406. Codified at 10 U.S.C. 2302 note.

(iii) persons are killed or injured, or property is destroyed, as a result of conduct by contractor personnel;

(iv) a weapon is discharged against personnel performing private security functions in an area of combat operations or personnel performing such functions believe a weapon was so discharged; or

(v) active, non-lethal countermeasures (other than the discharge of a weapon) are employed by the personnel performing private security functions in an area of combat operations in response to a perceived immediate threat to such personnel;

(E) A process for the independent review and, if practicable, investigation of—

(i) incidents reported pursuant to subparagraph (D); and

(ii) incidents of alleged misconduct by personnel performing private security functions in an area of combat operations;

(F) requirements for qualification, training, screening (including, if practicable, through background checks), and security for personnel performing private security functions in an area of combat operations;

(G) Guidance to the commanders of the combatant commands on the issuance of—

(i) orders, directives, and instructions to contractors performing private security functions relating to equipment, force protection, security, health, safety, or relations and interaction with locals;

(ii) predeployment training requirements for personnel performing private security functions in an area of combat operations, addressing the requirements of this section, resources and assistance available to contractor personnel, country information and cultural training, and guidance on working with host country nationals and military; and

(iii) rules on the use of force for personnel performing private security functions in an area of combat operations;

(H) a process by which a commander of a combatant command may request an action described in subsection (b)(3); and

(I) a process by which the training requirements referred to in subparagraph (G)(ii) shall be implemented.

**(3) Availability of orders, directives, and instructions.**—The regulations prescribed under subsection (a) shall include mechanisms to ensure the provision and availability of the orders, directives, and instructions referred to in paragraph (2)(G)(i) to contractors referred to in that paragraph, including through the maintenance of a single location (including an Internet website, to the extent consistent with security considerations) at or through which such contractors may access such orders, directives, and instructions.

**(b) Contract clause on contractors performing private security functions.—**

**(1) Requirement under FAR.—**Not later than 180 days after the date of the enactment of this Act [Jan. 28, 2008], the Federal Acquisition Regulation issued in accordance with section 25 of the Office of Federal Procurement Policy Act ([41 U.S.C. 421](#)) shall be revised to require the insertion into each covered contract (or, in the case of a task order, the contract under which the task order is issued) of a contract clause addressing the selection, training, equipping, and conduct of personnel performing private security functions under such contract.

**(2) Clause requirement.—**The contract clause required by paragraph (1) shall require, at a minimum, that the contractor concerned shall—

**(A)** Comply with regulations prescribed under subsection (a) [of this note], including any revisions or updates to such regulations, and follow the procedures established in such regulations for—

**(i)** registering, processing, accounting for, and keeping appropriate records of personnel performing private security functions in an area of combat operations;

**(ii)** authorizing and accounting of weapons to be carried by, or available to be used by, personnel performing private security functions in an area of combat operations;

**(iii)** registration and identification of armored vehicles, helicopters, and other military vehicles operated by contractors and subcontractors performing private security functions in an area of combat operations; and

**(iv)** The reporting of incidents in which—

**(I)** a weapon is discharged by personnel performing private security functions in an area of combat operations;

**(II)** personnel performing private security functions in an area of combat operations are killed or injured; or

**(III)** persons are killed or injured, or property is destroyed, as a result of conduct by contractor personnel;

**(B)** Comply with and ensure that all personnel performing private security functions under such contract are briefed on and understand their obligation to act in accordance with—

**(i)** qualification, training, screening (including, if practicable, through background checks), and security requirements established by the Secretary of Defense for personnel performing private security functions in an area of combat operations;

**(ii)** applicable laws and regulations of the United States and the host country, and applicable treaties and international agreements, regarding the performance of the functions of the contractor;

(iii) orders, directives, and instructions issued by the applicable commander of a combatant command relating to equipment, force protection, security, health, safety, or relations and interaction with locals; and

(iv) rules on the use of force issued by the applicable commander of a combatant command for personnel performing private security functions in an area of combat operations; and

(C) cooperate with any investigation conducted by the Department of Defense pursuant to subsection (a)(2)(E) by providing access to employees of the contractor and relevant information in the possession of the contractor regarding the incident concerned.

**(3) Noncompliance of personnel with clause.**—The contracting officer for a covered contract may direct the contractor, at its own expense, to remove or replace any personnel performing private security functions in an area of combat operations who violate or fail to comply with applicable requirements of the clause required by this subsection. If the violation or failure to comply is a gross violation or failure or is repeated, the contract may be terminated for default.

**(4) Applicability.**—The contract clause required by this subsection shall be included in all covered contracts awarded on or after the date that is 180 days after the date of the enactment of this Act [Jan. 28, 2008]. Federal agencies shall make best efforts to provide for the inclusion of the contract clause required by this subsection in covered contracts awarded before such date.

**(5) Inspector General report on pilot program on imposition of fines for noncompliance of personnel with clause.**—Not later than March 30, 2008, the Inspector General of the Department of Defense shall [...deleted for the purposes of this appendix]

**(c) Areas of combat operations.**—

**(1) Designation.**—The Secretary of Defense shall designate the areas constituting an area of combat operations for purposes of this section by not later than 120 days after the date of the enactment of this Act [Jan. 28, 2008].

**(2) Particular areas.**—Iraq and Afghanistan shall be included in the areas designated as an area of combat operations under paragraph (1).

**(3) Additional areas.**—The Secretary may designate any additional area as an area constituting an area of combat operations for purposes of this section if the Secretary determines that the presence or potential of combat operations in such area warrants designation of such area as an area of combat operations for purposes of this section.

**(4) Modification or elimination of designation.**—The Secretary may modify or cease the designation of an area under this subsection as an area of combat operations if the Secretary determines that combat operations are no longer ongoing in such area.

**(d) Exception.**—The requirements of this section shall not apply to contracts entered into by elements of the intelligence community in support of intelligence activities.



## **Sec. 864. Definitions and other general provisions.**

**(a) Definitions.**—In this subtitle [this note]:

**(1) Matters relating to contracting.**—The term ‘matters relating to contracting’, with respect to contracts in Iraq and Afghanistan, means all matters relating to awarding, funding, managing, tracking, monitoring, and providing oversight to contracts and contractor personnel.

**(2) Contract in Iraq or Afghanistan.**—The term ‘contract in Iraq or Afghanistan’ means a contract with the Department of Defense, the Department of State, or the United States Agency for International Development, a subcontract at any tier issued under such a contract, a task order or delivery order at any tier issued under such a contract, a grant, or a cooperative agreement (including a contract, subcontract, task order, delivery order, grant, or cooperative agreement issued by another Government agency for the Department of Defense, the Department of State, or the United States Agency for International Development), if the contract, subcontract, task order, delivery order, grant, or cooperative agreement involves work performed in Iraq or Afghanistan for a period longer than 30 days.

**(3) Covered contract.**—The term ‘covered contract’ means—

**(A)** a contract of a Federal agency for the performance of services in an area of combat operations, as designated by the Secretary of Defense under subsection (c) of section 862 [of this note];

**(B)** a subcontract at any tier under such a contract;

**(C)** a task order or delivery order issued under such a contract or subcontract;

**(D)** a grant for the performance of services in an area of combat operations, as designated by the Secretary of Defense under subsection (c) of section 862 [of this note]; or

**(E)** a cooperative agreement for the performance of services in such an area of combat operations.

**(4) Contractor.**—The term ‘contractor’, with respect to a covered contract, means—

**(A)** in the case of a covered contract that is a contract, subcontract, task order, or delivery order, the contractor or subcontractor carrying out the covered contract;

**(B)** in the case of a covered contract that is a grant, the grantee; and

**(C)** in the case of a covered contract that is a cooperative agreement, the recipient.

**(5) Contractor personnel.**—The term ‘contractor personnel’ means any person performing work under contract for the Department of Defense, the Department of State, or the United States Agency for International Development, in Iraq or Afghanistan, including individuals and subcontractors at any tier.

**(6) Private security functions.**—The term ‘private security functions’ means activities engaged in by a contractor under a covered contract as follows:

**(A)** Guarding of personnel, facilities, or property of a Federal agency, the contractor or subcontractor, or a third party.

**(B)** Any other activity for which personnel are required to carry weapons in the performance of their duties.

**(7) Relevant committees of Congress.**—The term ‘relevant committees of Congress’ means each of the following committees:

**(A)** The Committees on Armed Services of the Senate and the House of Representatives.

**(B)** The Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives.

**(C)** The Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives.

**(D)** For purposes of contracts relating to the National Foreign Intelligence Program, the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives.

**(b) Classified information.**—Nothing in this subtitle [this note] shall be interpreted to require the handling of classified information or information relating to intelligence sources and methods in a manner inconsistent with any law, regulation, executive order, or rule of the House of Representatives or of the Senate relating to the handling or protection of such information.”

# Interim Final Rule Implementing Section 862(a) of the National Defense Authorization Act for Fiscal Year 2008

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**DEPARTMENT OF DEFENSE**

**Office of the Secretary**

**32 CFR Part 159**

[DOD-2008-OS-0125/RIN 0790-A138]

**Private Security Contractors (PSCs)  
Operating in Contingency Operations**

**AGENCY:** Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

**ACTION:** Interim final rule.

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**SUMMARY:** This part establishes policy, assigns responsibilities and provides procedures for the regulation of the selection, accountability, training, equipping, and conduct of personnel performing private security functions under a covered contract during contingency operations. It also assigns responsibilities and establishes procedures for incident reporting, use of and accountability for equipment, rules for the use of force, and a process for administrative action or the removal, as appropriate, of PSCs and PSC personnel. For the Department of Defense, this IFR supplements DoD Instruction 3020.41, "Contractor Personnel Authorized to Accompany the U.S. Armed Forces," which provides guidance for all DoD contractors operating in contingency operations.

This part is of critical importance. It is being published as an Interim Final Rule because there is insufficient policy and guidance regulating the actions of DoD and other governmental PSCs and their movements in the operational area. It will procedurally close existing gaps in the oversight of Private Security Contractors (PSCs), ensure compliance with laws and regulations pertaining to Inherently Governmental functions, and ensure proper performance by armed contractors. The expansion of troops in Afghanistan will result in a corresponding increase in the number of PSCs performing in that Area of Operations. This part is required to ensure implementation of necessary guidance for all U.S.G. PSCs across the CENTCOM area of responsibility. Further, the publication of this IFR is required to meet the mandate of Section 862 of the 2008 National Defense Authorization Act. The Congress has expressed continuing concern that

regulations for the oversight of PSCs are not yet in place.

**DATES:** This rule is effective July 17, 2009. Comments must be received by August 31, 2009.

**ADDRESSES:** You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

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

- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301-1160.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey Taylor, (703) 692-3032.

**SUPPLEMENTARY INFORMATION:** This Interim Final Rule is required to meet the mandate of Section 862 of the FY 2008 National Defense Authorization Act. Section 862 of the 2008 NDAA lays out two requirements:

(i) That the Secretary of Defense, in coordination with the Secretary of State shall prescribe regulations on the selection, training, equipping, and conduct of personnel performing private security functions under a covered contract in an area of combat operations; and

(ii) That the FAR shall be revised to require the insertion into each covered contract of a contract clause addressing the selection, training, equipping, and conduct of personnel performing private security functions under such contract.

This Interim Final Rule meets requirement (i). There will be a separate and subsequent **Federal Register** action to meet requirement (ii) to update the FAR.

#### **Executive Order 12866, "Regulatory Planning and Review"**

It has been certified that 32 CFR part 159 does not:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

#### **Public Law 104-121, "Congressional Review Act" (5 U.S.C. 801)**

It has been determined that 32 CFR part 159 is not a "major" rule under 5 U.S.C. 801, enacted by Public Law 104-121, because it will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

#### **Section 202, Public Law 104-4, "Unfunded Mandates Reform Act"**

It has been certified that 32 CFR part 159 does not contain a Federal mandate that may result in expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

#### **Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)**

It has been certified that 32 CFR part 159 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. This rule will apply only to a specific sector of defense industry and a limited number of small entities.

#### **Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)**

It has been certified that 32 CFR part 159 does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These requirements have been approved by OMB and assigned OMB Control Numbers 0704-0460, "Synchronized Predeployment and Operational Tracker (SPOT) System" and 0704-0461, "Qualification to Possess Firearms or Ammunition."

#### **Executive Order 13132, "Federalism"**

It has been certified that 32 CFR part 159 does not have federalism

implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(1) The States;  
 (2) The relationship between the National Government and the States; or  
 (3) The distribution of power and responsibilities among the various levels of Government.

#### **List of Subjects in 32 CFR Part 159**

Contracts, Security measures.

■ Accordingly 32 CFR Part 159 is added to read as follows:

#### **PART 159—PRIVATE SECURITY CONTRACTORS OPERATING IN CONTINGENCY OPERATIONS**

Sec.

159.1 Purpose.

159.2 Applicability and scope.

159.3 Definitions.

159.4 Policy.

159.5 Responsibilities.

159.6 Procedures.

**Authority:** Public Law 110-181; Pub. L. 110-417.

#### **§ 159.1. Purpose.**

This part establishes policy, assigns responsibilities and provides procedures for the regulation of the selection, accountability, training, equipping, and conduct of personnel performing private security functions under a covered contract. It also assigns responsibilities and establishes procedures for incident reporting, use of and accountability for equipment, rules for the use of force, and a process for administrative action or the removal, as appropriate, of PSCs and PSC personnel.

#### **§ 159.2. Applicability and scope.**

This part:

(a) Applies to:

(1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint 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 as the "DoD Components").

(2) The Department of State and other U.S. Federal agencies insofar as it implements the requirements of section 862 of Public Law 110-181.

Specifically, in areas of operations which require enhanced coordination of PSC and PSC personnel working for U.S. Government (U.S.G.) agencies, the Secretary of Defense may designate such areas as areas of combat operations for the limited purposes of this part. In such an instance, the standards

established in accordance with this part would, in coordination with the Secretary of State, expand from covering only DoD PSCs and PSC personnel to cover all U.S.G.-funded PSCs and PSC personnel operating in the designated area.

(b) Prescribes policies applicable to all:

(1) DoD PSCs and PSC personnel performing private security functions during contingency operations outside the United States.

(2) USG-funded PSCs and PSC personnel performing private security functions in an area of combat operations, as designated by the Secretary of Defense.

### § 159.3. Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

*Area of combat operations.* An area of operations designated as such by the Secretary of Defense for the purpose of this part, when enhanced coordination of PSCs working for U.S.G. agencies is required.

*Contingency operation.* A military operation that is either designated by the Secretary of Defense as a contingency operation or becomes a contingency operation as a matter of law (10 U.S.C. 101(a)(13)). It is a military operation that: a. Is designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing force; or b. Is created by definition of law. Under 10 U.S.C. 101(a)(13)(B), a contingency operation exists if a military operation results in the (1) call-up to (or retention on) active duty of members of the uniformed Services under certain enumerated statutes (10 U.S.C. 688, 12301(a), 12302, 12304, 12305, 12406, or 331-335); and (2) the call-up to (or retention on) active duty of members of the uniformed Services under any other (non-enumerated) provision of law during war or national emergency declared by the President or Congress. These may include humanitarian or peacekeeping operations or other military operations or exercises.

*Contractor.* The contractor, subcontractor, grantee, or other party carrying out the covered contract.

*Covered contract.* A DoD contract for performance of services in an area of contingency operations or a contract of a non-DoD Federal agency for performance of services in an area of combat operations, as designated by the Secretary of Defense;

A subcontract at any tier under such a contract; or

A task order or delivery order issued under such a contract or subcontract.

Also includes contracts or subcontracts funded under grants and sub-grants by a Federal agency for performance in an area of combat operations as designated by the Secretary of Defense. Excludes temporary arrangements entered into by non-DoD contractors or grantees for the performance of private security functions by individual indigenous personnel not affiliated with a local or expatriate security company. Such arrangements must still be in compliance with local law.

*Private security functions.* Activities engaged in by a contractor under a covered contract as follows:

(1) Guarding of personnel, facilities, designated sites, or property of a Federal agency, the contractor or subcontractor, or a third party.<sup>1</sup>

(2) Any other activity for which personnel are required to carry weapons in the performance of their duties. For the DoD, DoDI Instruction 3020.41, "Contractor Personnel Authorized to Accompany the U.S. Armed Forces,"<sup>2</sup> prescribes policies related to personnel allowed to carry weapons for self defense.

*PSC.* During contingency operations "PSC" means a company employed by the DoD performing private security functions under a covered contract. In a designated area of combat operations, the term "PSC" expands to include all companies employed by U.S.G. agencies performing private security functions under a covered contract.

*PSC personnel.* Any individual performing private security functions under a covered contract.

### § 159.4. Policy.

(a) Consistent with the requirements of paragraph (a)(2) of section 862 of Public Law 110-181, the selection, training, equipping, and conduct of PSC personnel including the establishment of appropriate processes shall be coordinated between the DoD and the Department of State.

(b) Geographic Combatant Commanders will provide tailored PSC guidance and procedures for the operational environment in their Area of Responsibility (AOR) in accordance with this part, the Federal Acquisition

<sup>1</sup> Contractors performing private security functions are not authorized to perform inherently governmental functions. In this regard, they are limited to a defensive response to hostile acts or demonstrated hostile intent.

<sup>2</sup> Available at <http://www.dtic.mil/whs/directives/corres/pdf/302041p.pdf>.

Regulation (FAR)<sup>3</sup> and the Defense Federal Acquisition Regulation Supplement (DFARS).<sup>4</sup>

(c) In a designated area of combat operations, the relevant Chief of Mission will be responsible for developing and issuing implementing instructions for non-DoD PSCs and their personnel consistent with the standards set forth by the geographic Combatant Commander in accordance with paragraph (b) of this section. The Chief of Mission has the option to instruct non DoD PSCs and their personnel to follow the guidance and procedures developed by the Geographic Combatant Commander and/or Subordinate Commander.

(d) The requirements of this part shall not apply to contracts entered into by elements of the intelligence community in support of intelligence activities.

### § 159.5. Responsibilities.

(a) The Assistant Deputy Under Secretary of Defense for Program Support, under the authority, direction, and control of the Deputy Under Secretary of Defense for Logistics and Materiel Readiness, shall monitor the registering, processing, and accounting of PSC personnel in an area of contingency operations.

(b) The Director, Defense Procurement and Acquisition Policy, under the authority, direction, and control of the Deputy Under Secretary of Defense for Acquisition and Technology (DUSD(AT)), shall ensure that the DFARS and (in consultation with the other members of the FAR Council) the FAR provide appropriate guidance and contract clauses consistent with this part and paragraph (b) of section 862 of Public Law 110-181.

(c) The Director, Defense Business Transformation Agency, under the authority, direction, and control of the Deputy Chief Management Officer of the Department of Defense, through the DUSD(AT), shall ensure that information systems effectively support the accountability and visibility of contracts, contractors, and specified equipment associated with private security functions.

(d) The Chairman of the Joint Chiefs of Staff shall ensure that joint doctrine is consistent with the principles established by DoD Directive 3020.49 "Orchestrating, Synchronizing, and Integrating Program Management of Contingency Acquisition Planning and

<sup>3</sup> Published in Title 48 of the Code of Federal Regulations.

<sup>4</sup> Published in Title 48 of the Code of Federal Regulations.

Its Operational Execution,"<sup>5</sup> DoD Instruction 3020.41, "Contractor Personnel Authorized to Accompany the U.S. Armed Forces," and this part.

(e) The geographic Combatant Commanders in whose AOR a contingency operation is occurring, and within which PSCs and PSC personnel perform under covered contracts, shall:

(1) Provide guidance and procedures, as necessary and consistent with the principles established by DoD Directive 3020.49, "Orchestrating, Synchronizing, and Integrating Program Management of Contingency Acquisition Planning and Its Operational Execution," DoD Instruction 3020.41, "Contractor Personnel Authorized to Accompany the U.S. Armed Forces,"<sup>6</sup> and this part, for the selection, training, accountability and equipping of such PSC personnel and the conduct of PSCs and PSC personnel within their AOR. Individual training and qualification standards shall meet, at a minimum, one of the Military Departments' established standards.

Within a geographic Combatant Command, Subordinate Commanders shall be responsible for developing and issuing implementing procedures as warranted by the situation, operation, and environment, in consultation with the relevant Chief of Mission in designated areas of combat operations.

(2) Through the Contracting Officer, ensure that PSC personnel acknowledge, through their PSC, their understanding and obligation to comply with the terms and conditions of their covered contracts.

(3) Issue written authorization to the PSC identifying individual PSC personnel who are authorized to be armed. Rules for the use of force, developed in accordance with Chairman of the Joint Chief of Staff Instruction 3121.01B, "Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces,"<sup>7</sup> shall be included with the written authorization.

(4) Ensure that the procedures, orders, directives and instructions prescribed § 159.6(a) of this part are available through a single location (to include an Internet Web site, consistent with

security considerations and requirements).

(f) The Heads of the DoD Components shall:

(1) Ensure that all private security-related requirement documents are in compliance with the procedures listed in § 159.6 of this part and the guidance and procedures issued by the geographic Combatant Command,

(2) Ensure private security-related contracts contain the appropriate clauses in accordance with the applicable FAR clause and include additional mission-specific requirements as appropriate.

#### § 159.6. Procedures.

(a) *Standing Combatant Command Guidance and Procedures.* Each geographic Combatant Commander shall develop and publish guidance and procedures for PSCs and PSC personnel operating during a contingency operation within their AOR, consistent with applicable law; this part; applicable Military Department publications; and other applicable DoD issuances to include DoD Directive 3020.49, "Orchestrating, Synchronizing, and Integrating Program Management of Contingency Acquisition Planning and Its Operational Execution," DFARS, DoD Directive 2311.01E, "DoD Law of War Program,"<sup>8</sup> DoD 5200.8-R, "Physical Security Program,"<sup>9</sup> CJCSI 3121.01B, "Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces," and DoD Directive 5210.56, "Use of Deadly Force and the Carrying of Firearms by DoD Personnel Engaged in Law Enforcement and Security Duties."<sup>10</sup> The guidance and procedures shall:

(1) Contain, at a minimum, procedures to implement the following processes, and identify the organization responsible for managing these processes:

(i) Registering, processing, accounting for and keeping appropriate records of PSCs and PSC personnel in accordance with DoD Instruction 3020.41, "Contractor Personnel Authorized to Accompany the U.S. Armed Forces."

(ii) PSC verification that PSC personnel meet all the legal, training, and qualification requirements for authorization to carry a weapon in accordance with the terms and conditions of their contract and host country law. Weapons accountability procedures will be established and

approved prior to the weapons authorization.

(iii) Arming of PSC personnel. Requests for permission to arm PSC personnel shall be reviewed on a case-by-case basis by the appropriate Staff Judge Advocate to the geographic Combatant Commander (or a designee) to ensure there is a legal basis for approval. The request will then be approved or denied by the geographic Combatant Commander or a specifically identified designee, no lower than the flag officer level. Requests to arm non-DOD PSC personnel shall be reviewed and approved in accordance with § 159.4(c) of this part. Requests for permission to arm PSC personnel shall include:

(A) A description of where PSC personnel will operate, the anticipated threat, and what property or personnel such personnel are intended to protect, if any.

(B) A description of how the movement of PSC personnel will be coordinated through areas of increased risk or planned or ongoing military operations, including how PSC personnel will be rapidly identified by members of the U.S. Armed Forces.

(C) A communication plan, to include a description of how relevant threat information will be shared between PSC personnel and U.S. military forces and how appropriate assistance will be provided to PSC personnel who become engaged in hostile situations. DoD contractors performing private security functions are only to be used in accordance with DoD Instruction 1100.22, "Guidance for Determining Workforce Mix,"<sup>11</sup> that is, they are limited to a defensive response to hostile acts or demonstrated hostile intent.

(D) Documentation of individual training covering weapons familiarization and qualification, rules for the use of force, limits on the use of force including whether defense of others is consistent with host nation Status of Forces Agreements or local law, the distinction between the rules of engagement applicable to military forces and the prescribed rules for the use of force that control the use of weapons by civilians, and the Law of Armed Conflict.

(E) Written acknowledgment by the PSC and its individual PSC personnel, after investigation of background of PSC personnel by the contractor, verifying such personnel are not prohibited under U.S. law to possess firearms.

<sup>5</sup> Available from <http://www.dtic.mil/whs/directives/corres/pdf/302040p.pdf>.

<sup>6</sup> Available from <http://www.dtic.mil/whs/directives/corres/html/302041.htm>.

<sup>7</sup> CJCSI 3121.01B provides guidance on the standing rules of engagement (SROE) and establishes standing rules for the use of force (SRUF) for DOD operations worldwide. This document is classified secret. CJCSI 3121.01B is available via Secure Internet Protocol Router Network at <http://js.smil.mil> If the requester is not an authorized user of the classified network, the requester should contact Joint Staff J-3 at 703-614-0425.

<sup>8</sup> Available at <http://www.dtic.mil/whs/directives/corres/html/231101.htm>.

<sup>9</sup> Available at <http://www.dtic.mil/whs/directives/corres/pdf/520008r.pdf>.

<sup>10</sup> Available at <http://www.dtic.mil/whs/directives/corres/html/521056.htm>.

<sup>11</sup> Available at <http://www.dtic.mil/whs/directives/corres/pdf/110022p.pdf>.

(F) Written acknowledgment by the PSC and individual PSC personnel that:

(1) Potential civil and criminal liability exists under U.S. and local law or host nation Status of Forces Agreements for the use of weapons.<sup>12</sup>

(2) Proof of authorization to be armed must be carried by each PSC personnel.

(3) PSC personnel may possess only U.S.G.-issued and/or -approved weapons and ammunition for which they have been qualified according to paragraph (a)(1)(iii)(E) of this section.

(4) PSC personnel were briefed and understand limitations on the use of force.

(5) Authorization to possess weapons and ammunition may be revoked for non-compliance with established rules for the use of force.

(6) PSC personnel are prohibited from consuming alcoholic beverages or being under the influence of alcohol while armed.

(iv) Registration and identification in the Synchronized Predeployment and Operational Tracker (or its successor database) of armored vehicles, helicopters, and other vehicles operated by PSC personnel.

(v) Reporting alleged criminal activity or other incidents involving PSCs or PSC personnel by another company or any other person. All incidents involving the following shall be reported and documented:

(A) A weapon is discharged by an individual performing private security functions;

(B) An individual performing private security functions is killed or injured in the performance of their duties;

(C) A person other than an individual performing private security functions is killed or injured as a result of conduct by PSC personnel;

(D) Property is destroyed as a result of conduct by a PSC or PSC personnel;

(E) An individual performing private security functions has come under attack including in cases where a weapon is discharged against an individual performing private security functions or personnel performing such functions believe a weapon was so discharged; or

(F) Active, non-lethal counter-measures (other than the discharge of a weapon) are employed by PSC personnel in response to a perceived immediate threat in an incident that could significantly affect U.S. objectives

<sup>12</sup> This requirement is specific to arming procedures. Such written acknowledgement should not be construed to limit civil and criminal liability to conduct arising from "the use of weapons." PSC personnel could be held criminally liable for any conduct that would constitute a federal offense (see MEJA, 18 USC 3261(a)).

with regard to the military mission or international relations.

(vi) The independent review and, if practicable, investigation of incidents reported pursuant to paragraphs (a)(1)(v)(A) through (a)(1)(v)(F) of this section and incidents of alleged misconduct by PSC personnel.

(vii) Identification of ultimate criminal jurisdiction and investigative responsibilities, where conduct of U.S.G.-funded PSCs or PSC personnel are in question, in accordance with applicable laws to include a recognition of investigative jurisdiction and coordination for joint investigations (i.e., other U.S.G. agencies, host nation, or third country agencies), where the conduct of PSCs and PSC personnel is in question.

(viii) A mechanism by which a commander of a combatant command may request an action by which PSC personnel who are non-compliant with contract requirements are removed from the designated operational area.

(ix) Interagency coordination of administrative penalties or removal, as appropriate, of non-DoD PSC personnel who fail to comply with the terms and conditions of their contract, as is applicable to this part.

(x) Implementation of the training requirements contained below in paragraph (a)(2)(ii) of this section.

(2) Specifically cover:

(i) Matters relating to authorized equipment, force protection, security, health, safety, and relations and interaction with locals in accordance with DoD Instruction 3020.41, "Contractor Personnel Authorized to Accompany the U.S. Armed Forces."

(ii) Predeployment training requirements addressing, at a minimum, the identification of resources and assistance available to PSC personnel as well as country information and cultural training, and guidance on working with host country nationals and military personnel.

(iii) Rules for the use of force and graduated force procedures.

(iv) Requirements and procedures for direction, control and the maintenance of communications with regard to the movement and coordination of PSCs and PSC personnel, including specifying interoperability requirements. These include coordinating with the Chief of Mission, as necessary, private security operations outside secure bases and U.S. diplomatic properties to include movement control procedures for all contractors, including PSC personnel.

(b) *Availability of Guidance and Procedures.* The geographic Combatant Commander shall ensure the guidance

and procedures prescribed in paragraph (a) of this section are readily available and accessible by PSCs and their personnel (e.g., on a Web page and/or through contract terms), consistent with security considerations and requirements.

(c) *Subordinate Guidance and Procedures.* The Subordinate Commander, in consultation with the Chief of Mission, will issue guidance and procedures implementing the standing combatant command publications specified in paragraph (a) of this section, consistent with the situation and operating environment.

(d) *Consultation and Coordination.* The Chief of Mission and the geographic Combatant Commander/Subordinate Commander shall make every effort to consult and coordinate responses to common threats and common concerns related to oversight of the conduct of U.S.G.-funded PSC and their personnel. The Memorandum of Agreement between the Department of Defense and Department of State on U.S.G. Private Security Contractors<sup>13</sup> shall provide the framework for the development of guidance and procedures without regard to the specific locations identified therein.

Dated: July 14, 2009.

**Patricia L. Toppings,**  
OSD Federal Register Liaison Officer,  
Department of Defense.

[FR Doc. E9-17059 Filed 7-16-09; 8:45 am]

BILLING CODE 5001-06-P

<sup>13</sup> Available at [http://www.acq.osd.mil/log/PS/p\\_vault.html](http://www.acq.osd.mil/log/PS/p_vault.html).

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