

# Regulatory/Contractual Update

December 18, 2010

Volume 15, Issue 13

- On December 13, 2010, Federal Acquisition Circular 2005-47 was published in the Federal Register and included the following:
  - Limitations on Pass-Through Charges (FAR Case 2008-031). “This final rule adopts the interim rule published in the Federal Register on October 14, 2009, ... with minor changes.... To enable agencies to ensure that pass-through charges are not excessive, the interim rule included a solicitation provision and a contract clause requiring offerors and contractors to identify the percentage of work that will be subcontracted, and when subcontract costs will exceed 70 percent of the total cost of work to be performed, to provide information on indirect costs and profit/fee and value added with regard to the subcontract work.”  
**COMMENT:** And the CAS impact is...?
  - Uniform Suspension and Debarment Requirement (FAR Case 2009-036) (Interim). “This interim rule amends the FAR at parts 9 and 52 to implement section 815 of the National Defense Authorization Act for Fiscal Year 2010, Public Law 111-84. The law requires that suspension and debarment requirements flow down to all subcontracts except contracts for the acquisition of commercially available off-the-shelf items, and in the case of contracts for the acquisition of commercial items, first-tier subcontracts only. This requirement will protect the Government against contracting with entities at any tier who are suspended, debarred or proposed for debarment....”
  - Notification of Employee Rights Under the National Labor Relations Act (FAR Case 2010-006) (Interim). “This interim rule amends the FAR to implement Executive Order 13496, Notification of Employee Rights Under Federal Labor Laws, as implemented by the Department of Labor.”
  - Small Disadvantaged Business Program Self-Certification of Subcontractors (FAR Case 2009-019) (Interim). “This interim rule amends the FAR by allowing small disadvantaged businesses (SDBs) to self-represent their SDB status to prime contractors in good faith when seeking Federal subcontracting opportunities.”
  - Preventing Abuse of Interagency Contracts (FAR Case 2008-032) (Interim). “This interim rule implements section 865 of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009. FAR subpart 17.5 now addresses all interagency acquisitions, not just those made under the Economy Act authority. A new subsection 17.502-1 is added to require that all interagency acquisitions include a determination of best procurement approach....”
  - HUBZone Program Revisions (FAR Case 2006-005).

## Points of Contact

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- On December 3, 2010, DoD noticed in the Federal Register another proposed rule on its action “to amend the DFARS to improve the effectiveness of DoD oversight of contractor business systems (defined as accounting systems, estimating systems, purchasing systems, earned value management systems (EVMS), material management and accounting systems (MMAS), and property management systems).” At that time, comments were due on January 3, 2010, but an extension to January 10, 2011, has been noticed. An “analysis” of received comments is provided in the current notice.

**COMMENT:** The OFPP Act and FAR Part 1 normally require a 60 day period for notice/comment. And, this proposal when adopted as final will be implemented by a contract clause. How will you price this overhead endeavor? Will this be incorporated on a retroactive basis for all contracts or phased in? Or, will this result in multiple overhead rates and the cost impact will be...?

- On December 8, 2010, the Federal Register noticed DoD is “converting an interim rule to a final rule with changes... (on its implementation of) section 8116 of the DoD Appropriations Act for Fiscal Year 2010 to restrict the use of mandatory arbitration agreements when awarding contracts that exceed \$1 million when using Fiscal Year 2010 funds appropriated or otherwise made available by the DoD Appropriations Act.”

- On November 24, 2010, the Federal Register noticed DoD is “proposing to amend the DFARS to strongly encourage discussions prior to award for source selections of procurements estimated at \$100 million or more. The proposed change was recommended by the DoD Source Selection Joint Analysis Team.”

**COMMENT:** One reader provided... “this is a step in the right direction. The Government should hold discussions with industry after the performance of market research, then put multiple drafts of the RFP out for comment and discussion. During source selections the Government should discuss ratings after competitive range, and after request for final proposal revisions. During the discussion phase, communication should not only be by evaluation notices but can include face to face discussions and teleconferences. The more discussion and understanding of proposals by both parties leads to a better contract. This is positive for DoD.” And your input is due on/before January 24, 2011.

- On December 3, 2010, the Federal Register noticed DoD is “proposing to amend the DFARS to revise DFARS part 245, Government Property, to reflect the recent revisions to FAR part 45, Government Property.” Comments are due on/before February 1, 2011.

- On November 26, 2010, DoD extended the deadline for comments to December 27, 2010, on its DFARS proposal of September 27, 2010, “to update text on patents, data, and copyrights.”

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- On December 14, 2010, the Army Space and Missile Defense Command issued a memo on customary progress payments, milestone payments and performance-based performance payments stating, in part,

“As you know, these payments are a form of Government financing (vice the contractor obtaining financing arrangements) and the USG must receive consideration for agreeing to such payments. The USG's position is always that no USG financing will be offered; however, if determined to be beneficial, the USG may entertain such. Please also be advised that the USG feels such payment requests provide the contractor a competitive advantage.

“The bottom line - no task order financing will be permitted unless appropriate consideration is demonstrated. With that, if financing is proposed, the contractor shall present a price absent financing requests, and a separate proposal requesting USG financing (and the form) with clearly articulated consideration. Consideration should be monetary, unless tangible non-monetary consideration is clearly presented. Both proposals will be evaluated during task order evaluation.”

**COMMENT:** Where is unique need for this Army action (see FAR Part 1)? Should this have been escalated for (possible) incorporation into the FAR? Does FAR 32.005 cover the consideration issue? Is DPAP measuring FAR compliance...see immediately below.

- DoD continues to issue memoranda including the following:
  - December 8, 2010, Contractor Unique Identification. “Contracting Officers are routinely citing the wrong contractor name, address, and Commercial and Government Entity (CAGE) code on orders placed against contracts, agreements, and schedules causing confusion and data integrity problems. This memorandum directs components to conduct corrective training and notifies them that DPAP is measuring compliance.”
  - November 23, 2010, Request for Information - Mandatory Arbitration Agreements. “This memorandum requests data from the Military Departments and Defense Agencies regarding the inclusion of DFARS clause 252.222-7999 in covered contracts.”
  - November 23, 2010, Publication of Draft Data Standards for Warranty Data and Government Furnished Property. “Final DFARS PGI case 2010-P001, ‘Stewardship of Government Contract Property’, published 23 July 2010, and DFARS Proposed Rule 2009-D018, ‘Warranty Tracking of Serialized Items,’ published 30 August 2010, establish data requirements in tabular form to support tracking of property and warranty data capture in requirements and contract transactions, respectively. In order to enable use of automation for these cases, associated data standards are being developed as addenda to the previously published Procurement Data Standard (PDS) and Purchase Request Data Standard (PRDS). This memorandum requests comments on the draft data standards for warranty and government property.”

- On November 24, 2010, the Federal Register noticed DoD a final rule for its Cost and Software Data Reporting System (DFARS Case 2008-D027) “to address DoD Cost and Software Data Reporting system requirements for Major Defense Acquisition Programs and Major Automated Information Systems.”

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### **Comments on items that may be of potential interest in contract negotiation and contract drafting/management—**

- In a decision that does not resolve the merits, 97,000 current/former “employees of Starbucks whose (unencrypted) names, addresses, and social security numbers were stolen when a company laptop was stolen--but whose personal information was not misused--suffered an injury sufficient to confer (federal court) standing where they alleged a credible threat of real and immediate harm stemming from the theft of the laptop. (However) plaintiffs’ class actions alleging negligence and breach of implied contract failed to allege a cognizable injury under Washington law.” Identity theft is a real possibility! Krottner v. Starbucks Corporation - filed December 14, 2010. Case is available at <http://www.metnews.com/sos.cgi?1210%2F09-35823>
- “In an action claiming that defendant DHL failed to remit collect-on-delivery (COD) payments totaling \$21,991.72 to plaintiff, summary judgment for defendant is affirmed where plaintiff failed to present any summary judgment evidence that true conversion had occurred, instead merely offering the fact that it did not receive the checks.” And the limitation on liability applies except when...? Tran Enters., LLC v. DHL Express (USA), Inc., United States Fifth Circuit, 12/14/2010. Case is available at [Tran Enters](#)
- The International Association for Contract & Commercial Management (IACCM) is undertaking its 10<sup>th</sup> annual survey/study of “The Most Negotiated Terms and Conditions.”

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## Future Speaking Topics Include—

- Jacksonville, Florida NCMA Chapter, National Education Seminar, "Risk Management for Complex U.S. Government Contracts and Projects."
- Orange County, California NCMA Chapter, "Is the FAR Out of Control?"
- Huntsville, Alabama NCMA Chapter, National Education Seminar, "Risk Management for Complex U.S. Government Contracts and Projects."

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