

Regulatory/Contractual Update

November 15, 2010

Volume 15, Issue 11

- On November 12, 2010, the Federal Register noticed the issuance of an interim DFARS rule “to implement section 823 of the National Defense Authorization Act for Fiscal Year 2010 (effective October 28, 2009). Section 823 requires contracting officers to consider reduction or denial of award fee if contractor or subcontractor actions jeopardize the health or safety of Government personnel (through a rule which was required to be adopted within 180 days from October 28th).... This interim rule provides a clause to detail those dispositions where a reduction or denial of award fee is applicable. The clause also allows for the recovery of all or part of any award fees paid for any previous award fee evaluation period during which contractor actions caused serious bodily injury or death of Government personnel.” Comments are due on/before January 12, 2010.
- On October 29, 2010, the Federal Register noticed a final DFARS rule “to implement the exemption from the Balance of Payments Program for construction material that is commercial information technology.”
- On October 29, 2010, the Federal Register noticed a final DFARS rule, “to add policy and a contract clause requiring that contractors providing essential contractor services, as determined by the requiring activity, shall be prepared to continue such services during periods of crisis.”
- On October 29, 2010, the Federal Register noticed the issuance of an interim DFARS rule “to implement section 807 of the National Defense Authorization Act of 2010. Section 807 requires that facilities, infrastructure, and equipment that are intended for use by military or civilian personnel of the DoD, in current or future military operations, should be inspected for safety and habitability prior to use, and that such facilities should be brought into compliance with generally accepted standards for the safety and health of personnel to the maximum extent practicable consistent with the requirements of military operations and the best interests of DoD to minimize the safety and health risk posed to such personnel.... Contracting officers are encouraged to include this rule in solicitations issued before the effective date, provided award occurs after the effective date. Contracting officers are also encouraged to apply this rule to the maximum extent practicable to existing contracts, consistent with FAR 1.108(d).” The issuance of an interim rule is stated to be “necessary because section 807 of the National Defense Authorization Act for Fiscal Year 2010 became effective 60 days after enactment, October 28, 2009.” Comments are due on/before December 28, 2010.

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Items summarized in these Updates are for general informational/discussion/educational purposes only and should not be relied upon in the course of representation or in the forming of decisions in legal matters— independent counsel should be obtained.

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- DoD continues to issue memoranda including the following:
 - November 8 2010, Rescission of Class Deviation 2010-O0009 Temporary Postponement of the Requirement for Debarring and Suspending Officials to Enter Data on an Administrative Agreement in FAPIIS. “This memorandum informs the DoD contracting community that class deviation 2010-O0009 has been rescinded. The class deviation was necessary to temporarily postpone the requirement for debarring and suspending officials to enter data on an administrative agreement in the Federal Awardee Performance and Integrity Information System (FAPIIS).”
 - November 8, 2010, Class Deviation 2011-O0003 - Cessation of the Use of Evaluation Factor and Subfactor for Small Disadvantaged Businesses. “Effective immediately, DoD contracting officers shall not use or apply the evaluation factor and subfactor in FAR 19.12 and DFARS 219.12, Small Business Participation Program. Contracting officers shall modify existing solicitations in accordance with FAR 1.108(d). This class deviation remains in effect until incorporated in the FAR and DFARS or otherwise rescinded.”
- On November 5, 2010, OFPP issued guidance for the civilian agencies in the preparation of the annual inventory of their service contracts.
- On November 3, 2010, the Federal Register noticed the issuance of an interim DFARS rule “to implement section 1038 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84). Section 1038 prohibits contractor personnel from interrogating detainees under the control of the Department of Defense. It also allows the Secretary of Defense to waive the prohibition for a limited period of time, if determined necessary to the national security interests of the United States.... Immediate implementation of this statute is necessary to preclude a contracting officer from inadvertently awarding a contract that allows for the interrogation of detainees by contractor personnel.” Comments are due on/before January 3, 2010.
- On October 25, 2010, the Federal Register noticed the issuance of an interim DFARS rule “to conform (the DFARS) to the FAR by providing DoD-specific policy and procedures related to the Electronic Subcontracting Reporting System (eSRS). The FAR has been revised to reflect use of the eSRS, rather than Standard Form 294--Subcontract Report for Individual Contracts, and Standard Form 295--Summary Subcontract Report, for submission of small business subcontract reports.” Comments are due on/before December 27, 2010.
- On September 9, 2010, DCAA issued a 41 page memorandum on communications, i.e. “Audit Guidance on Auditor Communications” or as otherwise called by DCAA, “The Rules of Engagement.”
COMMENT: And, the guidance is merely “advisory” or is it? See “There's a FAR Better Way,” NCMA Contract Management, July 2010, page 16.

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

- Considering the recent inflationary adjustment to cost or pricing data and other thresholds (effective on October 1, 2010), is consideration required for changing the dollar threshold on existing contracts or will the new thresholds automatically apply to existing prime contracts by operation of the regulation? See previous Updates. Consult with counsel.
- Holmes v. Summer, California Court of Appeal, 10/06/2010. “In homebuyers' suit against the seller's brokers, claiming that the brokers were under an obligation to disclose to the buyers that the property was overencumbered and cannot in fact be sold to them at the agreed upon purchase price, trial court's judgment sustaining the brokers' demurrer to the complaint is reversed as, under the facts of this case, the brokers were obligated to disclose to the buyers that there was a substantial risk that the seller could not transfer title free and clear of monetary liens and encumbrances.” While this is “merely” a residential case, to whom does the/your broker owe a duty? How does this impact negotiations/drafting of agreements? Does that duty cover other situations? Similar result for arbitrations? The case is available at <http://www.metnews.com/sos.cgi?1010%2FG041906>
- In re: Katrina Canal Breaches Litigation, United States Fifth Circuit, 09/15/2010. “Washington Group International, Inc. (“WGI”) provided engineering, The United States Army Corps of construction, and management services. Engineers (“the Corps”) contracted with WGI for a large project in New Orleans. The plaintiffs sued WGI, claiming that its negligent and improper actions in fulfilling the contract were a cause of flood damage resulting from Hurricane Katrina. The district court granted summary judgment for WGI based on Katrina. Because the specifications for the government-contractor immunity (“GCI”) work at issue were not reasonably precise, WGI has no GCI, so we reverse the summary judgment and remand.” Without indemnification, etc. provided by contract, how is this type of risk priced/negotiated into the contract from the get-go? The case is available at http://caselaw.findlaw.com/us-5th-circuit/1538309.html?DCMP=NWL-pro_govtcontracts
- Eighteen companies are identified by the Air Force as having signed “Corporate ADR Industry Pledges with the Air Force.” Do those companies commit to use ADR in their supply chain—with your company? See the listing of companies at <http://www.adr.af.mil/factsheets/factsheet.asp?id=9935>
- The Salans law firm continues to post timely articles about aspects of contracting in the international forum as well as on international arbitration. <http://www.salans.com/>

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Future Speaking Topics Include—

- NCMA Government Contract Management Conference, Arlington, Virginia, “And...the Rules-of-the-Road for the Promulgation of Government Contract Clauses/Regulations are...?”
- 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."

*Information on speaking engagements in connection with various aspects of
Alternative Dispute Resolution (ADR) and basic/advanced negotiation techniques
— seminars/workshops—
may be arranged by sending a message to ADROffice@Rumbaugh.net*

Recent Publications Include—

- “Winning US Federal Government Contracts,” Gregory A. Garrett, principal author. The book that provides the most current and highly practical guide on the topic! (Reviewer)
- “Conflict Resolution Techniques...The Answer to Legislative Impasses?" NCMA Contract Management magazine, July 2009. An innovative approach for the timely resolution of budget, tax, etc. issues where there is a super-majority voting requirement imposed on state governments.