

# Regulatory/Contractual Update

September 13, 2010

Volume 15, Issue 9

- On September 8, 2010, DoD noticed in the Federal Register “an interim rule amending the DFARS to enable further implementation of section 831 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 to require DoD to develop guidance related to personal services contracts.”

**COMMENT:** This notice provides, in part, “determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule without prior opportunity for public comment pursuant to U.S.C. 418b and FAR 1.501-3(b). This action is necessary because the statute became effective upon enactment on October 14, 2008, and it is imperative that DoD program managers and contracting officers be provided with the means to distinguish between personal and non-personal services.” Almost 2 years after enactment of the underlying statute and it is now “determined” to be an urgent and compelling reason to issue an interim rule so that DoD can now, as stated, “distinguish between personal and non-personal service”! Discuss with counsel.

- On August 30, 2010, the Federal Register noticed Federal Acquisition Circular 2005-45 which included the following final rules:
  - Definition of Cost or Pricing Data (FAR Case 2005-036). “This final rule amends the FAR by redefining ‘cost or pricing data,’ adding a definition of ‘certified cost or pricing data,’ and changing the term ‘information other than cost or pricing data,’ to ‘data other than certified cost or pricing data.’ The rule clarifies the existing authority for contracting officers to require certified cost or pricing data or data other than certified cost or pricing data, and the existing requirements for submission of the various types of pricing data....”
  - Inflation Adjustment of Acquisition--Related Thresholds (FAR Case 2008-024).
  - American Recovery and Reinvestment Act of 2009 (the Recovery Act)--Buy American Requirements for Construction Materials (FAR Case 2009-008).
- On August 30, 2010, the Federal Register noticed a proposed DFARS rule “to implement a policy memorandum of the Undersecretary of Defense for Acquisition, Technology, and Logistics dated February 6, 2007, that required definition of the requirements to track warranties for items subject to Item Unique Identification in the Item Unique Identification registry. This proposed rule stresses that the enforcement of warranties is essential to the effectiveness and efficiency of DoD's material readiness.” Comments are due on/before October 29, 2010.

## Points of Contact

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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:
  - September 9, 2010, Contract Destination Acceptance Procedures. “This memorandum directs corrective actions to resolve issues with destination acceptance procedures as identified in the September 16, 2008, memorandum issued by the Director, Defense Procurement and Acquisition Policy.” The earlier memo resulted in an “investigation” of “destination acceptance processes for compliance with the requirements of FAR Part 32.905 and the record keeping requirements of the Prompt Payment Act.” Detailed “corrective actions” for Components, Contracting Activities and Contracting Officers are provided with a Component status report due DoD 90 days from the date of such memo.

COMMENT: The September 2008 memo is not available.
  - August 31, 2010, Class Deviation 2010-O0014: Additional Contractor Requirements and Responsibilities. “Class Deviation 2010-O0014 replaces and supersedes class deviation 2009-O0014 for contracts performed in Iraq and Afghanistan. The new clause (252.225-7997, “Additional Requirements and Responsibilities relating to Alleged Crimes by or against Contractor Personnel in Iraq and Afghanistan (DEVIATION) (AUG 2010) is attached to the memo and) provides information to contractor personnel who perform work on a contract in Iraq or Afghanistan, before beginning such work, about (1) how and where to report an alleged crime; and (2) where to seek assistance.”

COMMENT: No Federal Register notice/comment. “Estimated” to be incorporated into the FAR/DFARS by January 31, 2011!
  - August 20, 2010, Annual Review of the Acquisition of Services Policy and Oversight. “This memorandum provides notification of the upcoming annual review of the acquisition of services policy and oversight. Similarly, we (DoD) conducted this review in 2008 and 2009 by meeting individually with the senior contracting leaders of each department, agency and DoD field activity.”
  - August 17, 2010, Class Deviation - Authorizing Direct Submission of Interim Vouchers. “Effective immediately, this class deviation deletes the words ‘for contractors with approved billing systems’ from DFARS 242.803(b)(i)(C). This deviation eases the requirements, especially for small businesses, to qualify for direct billing, thereby reducing DoD administration and conserving resources in processing low risk payment vouchers.”

COMMENT: No Federal Register notice/comment! “Estimated” to be incorporated into the DFARS by August 30, 2011!
  - August 17, 2010, Defense Contingency COR Handbook 1st Edition. “Defense Procurement and Acquisition Policy (DPAP) is pleased to announce the release of Defense Contingency Contracting Officer Representative Handbook 1st Edition.”

COMMENT: The 216 page Handbook is available at [http://www.acq.osd.mil/dpap/ccap/cc/docs/DCCORH\\_full\\_6-30-10.pdf](http://www.acq.osd.mil/dpap/ccap/cc/docs/DCCORH_full_6-30-10.pdf)

- On September 8, 2010, DoD noticed in the Federal Register “it is adopting as final, without change, an interim rule (March 5, 2010, “Payment of Costs Prior to Definitization...”) amending the DFARS to implement the National Defense Authorization Act for Fiscal Year 2010 to amend the definition of ‘contract action’ to include task orders and delivery orders.”
- On September 8, 2010, the Federal Register noticed a proposed FAR rule “to revise (a) the header for blocks 17 and 18 and (b) block 18 of the Standard Form (SF) 26 to clarify that block 18 should not be used when awarding a negotiated procurement and should only be checked when awarding a sealed-bid contract.” Comments are due on/before November 8, 2010.
- On September 8, 2010, DoD noticed in the Federal Register “it is adopting as final, without change, an interim rule (February 24, 2010) amending the DFARS to implement the Weapon Systems Acquisition Reform Act of 2009, to improve the organization and procedures of DoD for the acquisition of major weapon systems.”
- On September 8, 2010, DoD noticed in the Federal Register “it is adopting as final, with minor editorial corrections, an interim rule (March 1, 2010) amending the DFARS to implement the National Defense Authorization Act for Fiscal Year 2008, section 811, entitled “Requirements Applicable to Multiyear Contracts for the Procurement of Major Systems of the Department of Defense.”
- On September 8, 2010, DoD noticed in the Federal Register “it is adopting as final, without change, an interim rule (November 23, 2009) that amended the DFARS to implement section 825 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 and the Vessel Hull Design Protection Amendments of 2008. Section 825 clarifies the Government's rights in technical data in the designs of a DoD vessel, boat, craft, or components thereof.”
- On August 27, 2010, DoD noticed in the Federal Register that it had adopted as final, without change, effective August 20, 2010, the interim rule (“Acquisition of Commercial Items”) that amended the DFARS to implement sections 805 and 815 of the National Defense Authorization Act for Fiscal Year 2008. Subsequently, public comments on the interim rule were located, which had not been addressed in finalization of the interim rule. These public comments must be addressed in the formulation of a final rule.”
- On August 16, 2010, DoD noticed in the Federal Register that it had “issued a final rule in the Federal Register on August 10, 2010, (see last month’s Update) under DFARS Case 2006-D057, Excessive Pass-Through Charges. That final rule incorrectly removed and reserved two Code of Federal Regulations sections. DoD is issuing this technical amendment to correct that error in the final rule.”

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- The Air Force issued, what it calls “significant changes,” through its release of Air Force Acquisition Circular (AFAC) 2010-0903:
  - Approval authority for fair opportunity exceptions
  - Procedures for approving special contract requirements to recognize costs related to last lot inefficiency
  - Delegation of approval for use of award-fee contracts
  - Limitation on single award task or delivery contracts
  - UCA waivers pursuant to DFARS 217.7404-5
  
- The Institute for Supply Management ([www.ism.ws](http://www.ism.ws)) has posted on its CAPS website (free registration) its excellent May 2010 report, “*Cross-Industry Report of Standard Benchmarks*, published twice-yearly, containing data on commonly referenced benchmarks. The May 2010 report includes data provided by more than 200 companies representing 14 different industry sectors (including Aerospace/Defense). This report includes 20 key performance indicators for different industry sectors, including purchasing operating expense, training spend, diversity spend, total spend as a percent of revenue, supply management organization operating costs, purchase order cycle times and employee retention.”
 

COMMENT: Contractors, where are you and your competition? Buyers, where are your bidders?’

## Future Speaking Topics Include—

- Jacksonville and Mid-Florida NCMA Chapters, “How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements.”
  
- Beach Cities and Sacramento/Gold Rush NCMA Chapters, “Is the FAR Out of Control?”

*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](mailto:ADROffice@Rumbaugh.net)*

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