

# Regulatory/Contractual Update

December 5, 2011

Volume 16, Issue 10

- On December 2, 2011, the Federal Register noticed a proposed DFARS rule “to incorporate a (47 point) proposal adequacy checklist for proposals in response to solicitations that require submission of certified cost or pricing data.” Comments are due on/before January 31, 2012.
- On November 21, 2011, the Federal Register noticed the following proposed DFARS rules with comments due on/before January 20, 2012:
  - Separation of Combined Provisions and Clauses (DFARS Case 2011-D048). “To separate provisions and clauses that are currently combined, in order to be in compliance with DFARS drafting conventions.”
  - Updates to Wide Area WorkFlow (DFARS Case 2011-D027). To “update policies on the submission of payment requests and receiving reports in electronic format.”
- On November 29, 2011, the Federal Register noticed a proposed FAR rule “to limit the use of generic substitutes instead of Data Universal Numbering System (DUNS) numbers, and update the policies and procedures associated with reporting in the Federal Procurement Data System (FPDS). Additionally, changes are proposed for the clauses requiring contractor registration in the Central Contractor Registration (CCR) database and DUNS number reporting.” Comments are due on/before January 30, 2012.
- Richard Ginman, Director of Defense Procurement and Acquisition, stated at a recent meeting that DCAA has implemented a plan that will address the “backlog of incurred cost audits and bring them totally up to date at the end of a three year period, with metrics in place” including DoD monitoring of this “high priority” area. Another item that was discussed was “a change to the weighted guidelines is in the works and noted that supplier management is going to be a key part of the policies on cost oversight.”
- DoD continues to issue memoranda including the following by the Director of Defense Pricing:
  - November 10, 2011, Direct and Indirect Charging of Contractor Proposal Preparation and Negotiation Support Costs. “This memorandum provides guidance on the Direct and Indirect Charging of Contractor Proposal Preparation and Negotiation Support Costs and announces the future issuance of a proposed DFARS rule (Case No. 2011-D042), ...(published in the December 2, 2011, Federal Register as noted above).”

## Points of Contact

ADROffice@Rumbaugh.net  
www.Rumbaugh.net

*Regulatory/Contractual  
Update  
Volume 16, Issue 10*

*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.*

### Points of Contact

ADROffice@Rumbaugh.net  
www.Rumbaugh.net

Regulatory/Contractual  
Update  
Volume 16, Issue 10

- November 16, 2011, Forward Pricing Rates. “This memorandum reminds the Defense Agencies and Military departments that DCMA, specifically DCMA's Corporate Administrative Contracting Officers (CACOs) and Divisional Administrative Contracting Officers (DACOs) are responsible for Forward Pricing Rate Agreements (FPRAs) and Forward Pricing Rate Recommendations (FPRRs). It also provides the DCMA web link to identify the responsible CACO or DACO office, shown by the company name.”
- On November 18, 2011, the Federal Register noticed several final DFARS rules including those on the following topics:
  - “To require offerors to represent whether former DoD officials who are employees of the offeror are in compliance with post-employment restrictions.”
  - “To add to the list of contract administration functions a requirement to maintain surveillance over contractor compliance with duties and responsibilities pertaining to trafficking in persons when they are incorporated in contracts.”
  - “Adopting as final, without change, an interim rule ...to implement a section of National Defense Authorization Act for Fiscal Year 2011 requiring appropriate consideration of the manufacturing readiness and manufacturing-readiness processes of potential contractors and subcontractors as a part of the source selection process for major defense acquisition programs.”
  - “Adopting as final, without change, an interim rule ...to accelerate payments to all small business concerns.”
  - “For the transition of the Integrated Acquisition Environment systems to the new System for Award Management architecture.”
  - “Adopting as final, with changes, an interim rule ... to implement the National Defense Authorization Act for Fiscal Year 2010 regarding the notification requirements to Congress when awarding a single-award task- or delivery-order contract in excess of (the current amount) \$103 million.”
  - “To extend the date (to 2014) for submittal of applications under the DoD Mentor-Protégé Pilot Program for new Mentor-Protégé agreements and the date mentors may incur costs and/or receive credit towards fulfilling their small business subcontracting goals through an approved Mentor-Protégé agreement (in a modified DFARS Part 219).”
  - “To extend the Government self-insurance policy to Government property provided under negotiated fixed-price contracts that are awarded on a basis other than submission of certified cost or pricing data.”
  - “Adopting as final, with changes, an interim rule ...to implement the section of the National Defense Authorization Act for Fiscal Year 2011 that prohibits specification of the use of fire-resistant rayon fiber in solicitations issued before January 1, 2015.”
  - “Adopting as final, without change, an interim rule...to implement the statutory authority to invoke a simplified acquisition threshold that is two times the normal amount (for) humanitarian or peacekeeping operation.”

- A multi-signatory executive-level letter was sent last week to the Secretary of Defense expressing concern in two areas:
  - “Concurrency Risk”—shifting of “financial risk from the government to industry for programs designed to operate with concurrent development and low rate production activity.”
  - “Conditional Withholding of Program Funds”—“withhold of appropriated funds to reimburse contractors for work ...unless industry accepts ... new contractual conditions.”
- On December 2, 2011, the White House issued an Executive Order on “Implementation of Energy Savings Projects and Performance-Based Contracting for Energy Savings” with a requirement for over \$2Billion dollars of performance-based contracts within 2 years.

---

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

- From the court...”When defendant-appellant Robert W. Hughes failed to close on a real estate purchase and sale agreement (the Agreement), the seller retained his deposit, sold the property to a third party for a lower price, and assigned its claim for the price differential to plaintiff-appellee Jane C. Avery. Avery sued. The defendant resisted, arguing that the circumstances evinced the parties' intent that the deposit would serve as liquidated damages. The district court rejected the defendant's position and construed the Agreement as allowing the recovery of actual damages.” ...The defendant appeals. We affirm.” Avery v. Hughes, No. 10-2379, United States First Circuit, 11/18/2011. Case is available at [http://caselaw.findlaw.com/us-1st-circuit/1585900.html?DCMP=NWL-pro\\_contracts](http://caselaw.findlaw.com/us-1st-circuit/1585900.html?DCMP=NWL-pro_contracts)

ADR Offices of  
**CHARLES E. RUMBAUGH**  
 Arbitrator/Private Judge/Mediator  
 310.373.1981 // 310.373.4182 (fax)

Los Angeles  
 San Francisco

Recent Updates are posted at  
[www.Rumbaugh.net](http://www.Rumbaugh.net)  
 ©MMXI Charles E. Rumbaugh

---

### **Future Speaking Topics Include—**

- NCMA Phoenix and Tucson Chapters, “Is the FAR (System) Out of Control?”