

# Regulatory/Contractual Update

April 30, 2011

Volume 16, Issue 4

- DoD continues to issue memoranda including the following:
  - April 28, 2011, Cash Flow Tool for Evaluating Alternative Financial Arrangements. “On September 14, 2010, Dr. Ashton Carter, Under Secretary of Defense for Acquisition, Technology and Logistics, issued a memorandum on the subject of Better Buying Power for the Department. In that memorandum, the Director of Defense Procurement and Acquisition Policy was directed to develop a cash flow model to be used by all contracting officers contemplating financing other than customary progress payments, such as Performance Based Payments (PBP). This memorandum directs contracting officers to utilize this tool whenever performance based payments are used to give adequate consideration to the Government for improved contractor cash flow.” Contracting officers are required to “utilize the tool...on new fixed price type contract awards resulting from solicitations issued on or after July 1, 2011, whenever PBPs are contemplated for contract financing.” This tool is available at [http://www.acq.osd.mil/dpap/cpf/Performance\\_based\\_payments.html](http://www.acq.osd.mil/dpap/cpf/Performance_based_payments.html)
  - April 27, 2011. Improving Competition in Defense Procurements -- Amplifying Guidance. “This memorandum provides amplifying guidance to the contracting community in response to questions and comments received regarding the November 24, 2010, DPAP memorandum ‘Improving Competition in Defense Procurement.’ It clarifies that the November 24, 2010, guidance is applicable only to competitive procurements above the simplified acquisition threshold and specifically identifies its applicability to commercial items.” This direction continues a new DoD TINA definition for “adequate price competition.”

**COMMENT:** The memo does not reflect all the “questions and comments” DoD received! Also, note that the currently scheduled DFARS implementation date (third revision) is December 31, 2011, and without any opportunity for Federal Register notice/comment. See prior Updates.

- April 27, 2011, Class Deviation 2011-O0007 - Requirement for Accelerated Payments to Small Businesses. “Effective immediately, the DoD will commence implementation of the requirement at the DFARS 232.903 and 232.906 to make accelerated payments to small businesses. All DoD entitlement and payment systems need to be modified to accommodate this policy change. As a result, accelerating payments to small businesses will be accomplished in a phased approach as these systems are modified.”

**COMMENT:** A notice of an interim rule was also published in the Federal Register on April 27<sup>th</sup> with comments due on/before June 27, 2011.

## 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.*

- On April 26, 2011, the Federal Register noticed that “DoD, GSA, and NASA are proposing to amend the FAR to provide revised regulatory coverage on organizational conflicts of interest (OCIs), provide additional coverage regarding contractor access to nonpublic information, and add related provisions and clauses (under FAR Case 2011-001). Section 841 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 required a review of the FAR coverage on OCIs. This proposed rule was developed as a result of a review conducted in accordance with Section 841 by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council and the OFPP, in consultation with the Office of Government Ethics. This proposed rule was preceded by an Advance Notice of Proposed Rulemaking (ANPR), under FAR Case 2007-018 (73 FR 15962), to gather comments from the public with regard to whether and how to improve the FAR coverage on OCIs.” It is noted that the FAR OCI coverage has remained “largely unchanged” since 1984. Comments are due on/before June 27, 2011.
- On April 19, 2011, the Federal Register noticed that “DoD is proposing to amend the DFARS 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.” Comments are due on/before June 20, 2011.
- On April 19, 2011, the Federal Register noticed that “DoD is adopting as final, with minor editorial changes, an interim rule (published July 19, 2009) amending the DFARS to implement sections 805 and 815 of the National Defense Authorization Act for Fiscal Year 2008.... Section 805 specified when time-and-materials or labor-hour contracts may be used for commercial item acquisitions. Section 815 provided clarification regarding situations under which a major weapon system, subsystems of major weapon systems, or components and spare parts for major weapon systems may be acquired using procedures established for the acquisition of commercial items.”
- On April 19, 2011, the Federal Register noticed that “DoD is proposing to amend the DFARS to establish a standard procedure for offerors to propose an alternative line-item structure that reflects the offeror's business practices for selling and billing commercial items and initial provisioning spares for weapon systems. A new solicitation provision is provided to facilitate offerors' ability to propose such changes to the solicitation structure in their offer.” Comments are due on/before June 20, 2011.
- On April 22, 2011, DoD issued a memorandum entitled, “Joint Memorandum on Savings Related to ‘Should Cost’” including guidance on “Implementation of Will-Cost and Should-Cost Management.”  
**COMMENT:** This “negotiation tool” will (purportedly) have the “anticipated” savings being retained by the Services! Again, no Federal Register notice/comment opportunity.

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

- On April 25, 2011, DoD noticed in the Federal Register a proposed rule on “Alternative Dispute Resolution (ADR) and Conflict Management,” wherein it “establishes policy and assigns responsibilities (and) establishes a framework for encouraging the expanded use of alternative means of dispute resolution and conflict management practices as an integral part of normal business practices within the Department of Defense.”

DoD continues to ignore several aspects that can enhance the use of ADR. First, where is it stated that ADR related efforts are allowable costs? Some think the DCAA Audit Manual is not supportive! And, can ADR endeavors permit access—without certification—to the Judgment Fund for settlement payment purposes? Finally, the non-recognition of “final-offer” arbitration (“Baseball Arbitration”) as a negotiation tool to facilitate closure for contract (formation) impasses is wanting. DoD has yet to realize that having “sufficient” price/cost information does **not** ensure a “fair and reasonable” agreement...it is a two-step **process**, i.e. first disclosure **and then negotiation!** Comments are due on/before June 24, 2011.

See [http://www.rumbaugh.net/docs/ADR\\_BB\\_Part1.pdf](http://www.rumbaugh.net/docs/ADR_BB_Part1.pdf) and [http://www.rumbaugh.net/docs/ADR\\_BB\\_Part2.pdf](http://www.rumbaugh.net/docs/ADR_BB_Part2.pdf)

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## Future Speaking Topics Include—

- Paso del Norte NCMA Chapter, El Paso, Texas, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements" and “Is the FAR (System) Out of Control?”
- Washington DC Pentagon NCMA Chapter, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements" and “Is the FAR (System) Out of Control?”
- Georgia/Carolina NCMA, NAPM/ISM, & APICS Chapters, “How to Negotiate Fair Prices in Sole Source Procurements (Baseball Arbitration).”
- Research Triangle Park (Raleigh, NC) NCMA Chapter, “Drafting the Ultimate ADR Clause for Subcontracts” and “How to Negotiate Fair Prices in Sole Source Procurements (Baseball Arbitration).”

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