

# Regulatory/Contractual Update

February 22, 2011

Volume 16, Issue 2

- On February 17, 2011, DoD noticed in the Federal Register a request for public input on its cost-reduction initiatives. “The Department of Defense understands that some of its mandates, reporting requirements, and other acquisition practices encourage industry to adopt processes and make investments that increase costs, especially overhead costs, but do not contribute to value added in systems and services delivered to the Department. To implement the memorandum from Under Secretary of Defense (Acquisition, Technology, and Logistics) Dr. Ashton Carter, dated September 14, 2010, Memorandum to Acquisition Professionals, DoD is requesting information from the industrial base to identify the sources of these costs, backed by specific, credible, convincing data. DoD's goal is to develop a fact-based program to reform cost-inflating practices.... During the summer of 2010 industry had furnished nearly 500 suggestions.” Input/comments are due on/before March 31, 2011.

COMMENT: See prior Updates and this writer's powerpoint slide presentation at 2010 NCMA Government Contract Management Conference under “Professional Teaching Experience” posted at [www.Rumbaugh.net](http://www.Rumbaugh.net).

- On February 16, 2011, the Federal Register noticed that “DoD, GSA, and NASA are proposing to amend the FAR to update references to authoritative accounting standards owing to the Financial Accounting Standards Board's (FASB's) Accounting Standards Codification (ASC) of Generally Accepted Accounting Principles (GAAP) (‘Codification of GAAP’).” Comments are due on/before April 18, 2011.
- On February 14, 2011, DoD noticed in the Federal Register a “final rule amending the DFARS to address award-fee contracts, including eliminating the use of provisional award-fee payments.” A DoD analysis of the three comments (Making 40 Percent of the Award-Fee Pool Available for the Final Evaluation, Elimination of Provisional Award-Fee Payments, and Selection of Contract Type) that were submitted in response to the proposed rule are also included in the notice. NASA on February 8, 2011, also noticed in the Federal Register an interim rule that implements the FAR Award Fee changes in FAC 2005-46...with comments due on/before April 11, 2011.
- On February 11, 2011, the Federal Register noticed a “proposed rule to update the Rules of the Armed Services Board of Contract Appeals (ASBCA). The proposed rule implements statutory increases in the thresholds relating to the submission and processing of contract appeals and updates statutory references and other administrative information.” Comments are due on/before March 14, 2011.

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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 February 2, 2011, OFPP issued a memorandum on “Acquisition ‘Myth-Busting’: Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process.” The purposes of the memorandum are to:
  - 1) identify common misconceptions about vendor engagement that may be unnecessarily hindering agencies’ appropriate use of the existing flexibilities, and provide facts and strategies to help acquisition professionals benefit from industry’s knowledge and insight;
  - 2) direct agencies to remove unnecessary barriers to reasonable communication and develop vendor communications plans, consistent with existing law and regulation, that promote responsible and constructive exchanges; and
  - 3) outline steps for continued engagement with agencies and industry to increase awareness and education.

And on January 27, 2011, NCMA issued “An Open Letter Addressing the Need for Cooperation between Government and Industry” which is posted at [www.ncmahq.org](http://www.ncmahq.org)
- On February 2, 2011, DoD noticed in the Federal Register “a final rule amending the DFARS to require contractors to tag, label, or mark Government-furnished property items identified in the contract as subject to serialized item management.” Similarly, DoD on February 2, 2011, noticed a “final rule amending the DFARS to require contractors to report loss of Government property to the DCMA eTools application.”
- On February 10, 2011, NASA noticed in the Federal Register a proposed rule to revise the requirements in the NASA FAR Supplement (NFS) for contractors to establish and maintain an Earned Value Management System (EVMS) for firm-fixed-price (FFP) contracts. The proposal recognizes the reduction in risk associated with FFP contracts and intends to relieve contractors of an unnecessary reporting burden.” Comments are due on/before April 11, 2011.
- On February 4, 2011, OFPP issued a memorandum on “Attracting Talent to the Acquisition Workforce” whereby it noticed it has worked with the Office of Personnel Management (OPM) to develop a guide that provides hiring flexibilities—which is attached to the memo. Several resources are noted therein.
- Aviation Week reports, “The Air Force is expected to make a decision as soon as this week on the winning bid for the aerial refueling tanker contract potentially worth \$35 billion, but a protest on the decision is expected from the losing bidder. The effort to replace the existing tanker has hit numerous snags over a decade, and the Air Force is said to be preparing for the likelihood of a protest that would further delay the contract.”

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- On February 22, 2011, DoD noticed in the Federal Register it was “adopting as final, without change, an interim rule amending the DFARS to implement the Fiscal Year 2010 National Defense Authorization Act, section 820, entitled “Publication of Notification of Bundling of Contracts of the Department of Defense.” The July 13, 2010, interim rule resulted in no comments being received and “added a requirement at DFARS 205.205-70 to publish a notification of the intention to bundle a DoD procurement at least 30 days prior to (1) the release of a solicitation or (2) placing an order without a solicitation.”
- On February 22, 2011, DoD noticed in the Federal Register it was “adopting as final, without change, an interim rule amending the DFARS to implement section 806 of the National Defense Authorization Act for Fiscal Year 2010. Section 806 authorizes an agency that is an element of the intelligence community to award a contract for supplies or services in excess of the simplified acquisition threshold for the performance of a joint program conducted to meet the needs of DoD and the non-DoD agency.” DoD did not receive any comments in response to its June 8, 2010, interim rule.
- On February 22, 2011, DoD noticed in the Federal Register a final rule that “amends the DFARS by deleting subpart DFARS 219.10 to meet the requirements of section 1335 of the Small Business Jobs Act of 2010, (Pub. L. 111-240). Section 1335 amended the Business Opportunity Development Reform Act of 1988 (Pub. L. 100-656) by striking title VII (15 U.S.C. 644 note). The repeal of the Small Business Competitiveness Demonstration Program became effective immediately upon the enactment. It will apply to the first full fiscal year after the September 27, 2010, date of enactment (Fiscal Year 2011). Therefore, the text at DFARS subpart 219.10 is obsolete.”
- On February 22, 2011, DoD noticed in the Federal Register a proposed DFARS rule to “update requirements relating to the use of passive Radio Frequency Identification (RFID).” Comments are due on/before April 25, 2011.

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

- Given the current world events have you recently reviewed your *force majeure* terms and/or defense priority ratings?
- A recent case, albeit in the insurance industry context, reminds one of “the level of duty” required between contracting parties. What is your level of duty under the contract(s)? What are the priorities among the various (non-rated) contracts? Can that duty be that of a fiduciary? Can your “important” contracts “rise to another level?”

An insurance broker does not have a common-law fiduciary duty to disclose to its customers "incentive" arrangements that the broker has entered into with insurance companies.... (The New York Attorney General's complaint) does not allege, however, that Wells Fargo made any affirmative misrepresentations or that any customer suffered demonstrable harm from the incentive arrangements. There is no allegation that any customer was persuaded to buy inferior, or overpriced, insurance in order to help Wells Fargo earn its incentives.”

The People of New York v. Wells Fargo Insurance Services, is available at <http://www.nycourts.gov/ctapps/decisions/2011/feb11/6opn11.pdf>

Also, see a related item, “What Do You Know?” article in the February 7, 2011, Wall Street Journal, page R4, where the SEC, among other things, is considering a staff report that “certain brokers be held to the same legal standards as investment advisers,” e.g. the higher “fiduciary duty” standard. Discuss all cases with counsel.

- On February 25, 2011, NDIA will be hosting a Will-Cost/Should-Cost forum on Friday, from 2:00-5:00 p.m. in the ground floor conference room of The Boeing Company, 1200 Wilson Boulevard, Arlington, VA 22209.
- “The UNCITRAL Working Group on Government Procurement has recently completed work on revisions to the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services. The new text, entitled ‘Model Law on Public Procurement,’ is set forth in UNCITRAL documents A/CN.9/729 and Add.1-8. These documents can be accessed through the link below. The Working Group is currently developing a draft Guide to Enactment that would accompany the new Model Law. The draft Guide will be considered at the next meeting of the Working Group, March 14-18. The full Commission will consider adoption of the new Model Law during its annual meeting June 27-July 15, 2011.”

For more info see <http://www.uncitral.org/uncitral/en/index.html>

**COMMENT:** This Model Law will determine the terms/conditions for numerous international/government procurements and flow-down provisions!

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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."
- 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)."
- Huntsville, Alabama NCMA Chapter, National Education Seminar, "Risk Management for Complex U.S. Government Contracts and Projects."
- Leatherstocking (Rome, NY) NCMA Chapter, "Is the FAR (System) Out of Control?"

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