

# Regulatory/Contractual Update

February 1, 2011

Volume 16, Issue 1

- On January 24, 2011, Federal Acquisition Circular 2005-49 was published in the Federal Register and included the following:

- Public Access to the Federal Awardee Performance and Integrity Information System (FAR Case 2010-016) (Interim).

“This interim rule amends the FAR to implement section 3010 of the Supplemental Appropriations Act, 2010 (Pub. L. 111-212), enacted July 29, 2010. Section 3010 requires that the Administrator of the General Services post all information contained in the Federal Awardee Performance and Integrity Information System (FAPIIS), excluding past performance reviews, on a publicly available Web site. This interim rule notifies contractors that FAPIIS data, excluding past performance reviews, will be available to the public after a certain date (expected to be April 15, 2011), and creates a new FAR clause to support the posting of information in FAPIIS. Contracting officers are encouraged to the extent feasible to amend existing solicitations in accordance with FAR 1.108(d), in order to include this revised clause in contracts to be awarded on or after the effective date (January 24, 2011) of this rule. ... Prior to April 15, 2011, contracting officers will be required to bilaterally modify existing contracts (including indefinite-delivery indefinite-quantity contracts) that contain the FAR clause 52.209-8, if a six-month update will be due on or after April 15, 2011. The modification shall replace the FAR clause 52.209-8 with the new FAR clause 52.209-9.”

Comments are due on/before March 25, 2011.

**COMMENT:** No rationale for urgent or compelling action for an interim rule other than a statute that was effective on July 29, 2010!

- On January 6, 2011, the Army noticed in the Federal Register that an “Interim Change to the Military Freight Traffic Unified Rules Publication (MFTURP) NO. 1” is being released and will be effective January 1, 2011, (sic). “The interim change updates the personnel security requirements for Dual Driver Protective Service (DDP) and Protective Security Service (PSS) in the MFTURP No.1... The MFTURP No. 1 governs the purchase of surface freight transportation in the Continental United States (CONUS) by DoD using FAR exempt transportation service contracts.”

**COMMENT:** Comments are solicited in this after-the-fact publication with no stated due date for same.

## Points of Contact

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*Regulatory/Contractual  
Update  
Volume 16, Issue 1*

*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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- On December 30, 2010, Federal Acquisition Circular 2005-48 was published in the Federal Register and included the following:
  - Personal Identity Verification of Contractor Personnel (FAR Case 2009-027). “This final rule amends the FAR to provide additional regulatory coverage in subpart 4.13 and in FAR clause 52.204-9 to reinforce the requirement of collecting from contractors all forms of Government-provided identification once they are no longer needed to support a contract. The contracting officer may delay final payment under a contract if the contractor fails to comply with these requirements.”
  - Terminating Contracts (FAR Case 2009-031). “This final rule amends the FAR to clarify procedures regarding the applicability of FAR part 49, Termination of Contracts, to commercial item contracts....”
  - Repeal of the Small Business Competitiveness Demonstration Program (FAR Case 2011-005). “This change is necessary to address the requirements of section 1335 of the Small Business Jobs Act of 2010 (Pub. L. 111-240) which repealed the Small Business Competitiveness Demonstration Program.”
  - Payrolls and Basic Records (FAR Case 2009-018).
  
- On January 18, 2011, the White House issued an Executive Order on “Improving Regulation and Regulatory Review.” This Order provides in part,
  - “Regulations shall be adopted through a process that involves public participation....
  - Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify);
  - Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations;
  - Select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);
  - To the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and
  - Identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public....”

**COMMENT:** Is your company and/or trade association identifying “candidates” for action under this Executive Order?

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- DoD continues to issue memoranda including the following:
  - January 26, 2011, Rescission of Award Fee Contracts Memoranda. “This memorandum provides guidance on award fee contracts. With the publication of a final FAR case, which updated FAR 16.4, some of the policy contained in the attached memoranda on incentive contracting became obsolete. Accordingly, the Director for Defense Procurement and Acquisition Policy is rescinding the following memoranda - Subject: Award Fee Contracts, March 29, 2006 - Subject: Proper Use of Award Fee Contracts and Award Fee Provisions, April 24, 2007 - Subject: Award and Incentive Fees - Data Collection, April 24, 2007. For current guidance on award fee contracts, see FAR 16.4, DFARS 216.4 and its companion resource, PGI 216.4.”
  - January 19, 2011, Continuing Appropriations Act Authorities. “This memorandum serves as a reminder that the DoD has been operating under the Continuing Appropriations Act for FY 2011 (Pub. L. 111-242, as amended by Pub. L. 111-290, Pub. L. 111-317, and Pub. L. 111-322), which extends the FY 2010 DoD Appropriations Act authorities and conditions through March 4, 2011. The Continuing Appropriations Act requires that all of the authorities and conditions of the prior year's Act carry forward unless the Continuing Appropriations Act specifies otherwise.” The memo specifically references as “examples” as continuing “restrictions relating to use of domestic sources” and prohibition on “mandatory arbitration.”
  - January 19, 2011, Rescission of Class Deviation 2010-O0002 -- Reporting Requirement for Prime Vendor Contracts. “This memorandum rescinds class deviation 2010-O0002. The class deviation was necessary to implement a statutory requirement to prohibit the award of prime vendor contracts for depot-level maintenance and repair of a weapon system or other military equipment prior to 30 days after congressional notification. Section 322 of the National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383) repealed this requirement.”
  - January 4, 2011, Align DCMA and DCAA Processes to Ensure Work is Complementary. “This memorandum provides guidance for obtaining greater efficiency and productivity in defense spending. The USD(AT&L) September 14, 2010, "Better Buying Power" memorandum called for a better work alignment and reduction in Defense Contract Management Agency (DCMA) and Defense Contract Audit Agency (DCAA) overlap to ensure work is complementary.”

**COMMENT:** What is “more” noteworthy is the absence of metrics to measure success under the previous regime and none provided in this memorandum! Contracting Officers (and contractors) need timely and accurate audit reports that are legally compliant...even with/from all the new DCAA hires!

- On December 22, 2010, DoD noticed in the Federal Register that it “proposes to amend the DFARS to revise and expand reporting requirements for Government-furnished property to include items uniquely and non-uniquely identified, and to clarify policy for contractor access to Government supply sources.” Comments are due on/before February 22, 2011.
- On December 29, 2010, the Federal Register noticed DoD a “final rule to amend the DFARS to implement section 207 of the Weapon Systems Acquisition Reform Act of 2009. Section 207 addresses organizational conflicts of interest in major defense acquisition programs.” A discussion and analysis of public comments are provided.

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

- In a situation that is unusual, albeit in a consumer context, one should not ignore the underlying concept...
 

“Plaintiff, who alleged that bank promised to assist in her efforts to maintain ownership of her home after she fell behind in payments, but failed to make such efforts and completed foreclosure proceedings in violation of that promise, stated claims for promissory estoppel and fraud where plaintiff could have reasonably relied on the bank’s promise to work on a loan reinstatement and modification if she did not seek bankruptcy relief under chapter 13, the promise was sufficiently concrete to be enforceable, and plaintiff’s decision to forgo chapter 13 relief was detrimental because it allowed the bank to foreclose on the property.”

Aceves v. U.S. Bank, N.A. - filed January 27, 2011, California Second District Court of Appeals. Case is available at <http://www.metnews.com/sos.cgi?0111%2FB220922>
- And the following concept...
 

“Parol evidence of a prior promise made without any intention of performing it that directly contradicts the provisions of the written contract must be distinguished from parol evidence of a contemporaneous factual misrepresentation of the terms contained in a written agreement submitted for signing. Plaintiff’s evidence of defendant’s oral misrepresentations of the terms contained in a written agreement between the parties, made at the time of execution of the agreement and inducing the execution of the contract, fell within the fraud exception to the parol evidence rule.”

Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Association - filed January 3, 2011, California Fifth District, Court of Appeals. Case is at <http://www.metnews.com/sos.cgi?0111%2FF058434>

Discuss all cases with counsel.

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## Future Speaking Topics Include—

- Institute for Supply Management, San Fernando Valley Affiliate, “How to Negotiate Fair Prices in Sole Source Procurements.”
- 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."

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