

Regulatory/Contractual Update

November 9, 2011

Volume 16, Issue 9

- On November 2, 2011, Federal Acquisition Circular 2005-54 was published in the Federal Register and included the following final, except where noted, rules:
 - Labor Relations Costs (FAR Case 2009-006). “This final rule amends the FAR to implement Executive Order (E.O.) 13494, Economy in Government Contracting, issued on January 30, 2009, and amended on October 30, 2009. This E.O. treats as unallowable the costs of any activities undertaken to persuade employees, whether employees of the recipient of Federal disbursements or of any other entity, to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively through representatives of the employee's own choosing.”
 - Notification of Employee Rights Under the National Labor Relations Act (FAR Case 2010-006).
 - Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions (FAR Case 2008-025).
 - Small Disadvantaged Business Program Self-Certification (FAR Case 2009-019).
 - Certification Requirement and Procurement Prohibition Relating to Iran Sanctions (FAR Case 2010-012)
 - Representation Regarding Export of Sensitive Technology to Iran (FAR Case 2010-018) (Interim).
 - Set-Asides for Small Business (FAR Case 2011-024) (Interim).
- On November 4, 2011, the Federal Register noticed a proposed revision to Part 165 of the US Code of Regulations—Recoupment of Nonrecurring Costs (NC) on Sales of US Items—which will “update policy, responsibilities, and procedures to conform with section 21(e)(1)(B) of Public Law 90-629, as amended, and section 9701 of title 31, United States Code (U.S.C.), for calculating and assessing NC recoupment charges on sales of items developed for or by the Department of Defense to non-U.S. Government customers.” Comments are due on/before January 3, 2012.

On a related item, DoD noticed in the October 20, 2011, Federal Register a “Request for Public Comments on How the Department of Defense Can Improve the Way It Procures Defense Items and Defense Services in Support of Foreign Military Sales (FMS) Programs.” Comments are due on/before December 2, 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 October 28, 2011, DoD noticed in the Federal Register that it “is hosting a public meeting to initiate a dialogue with industry and Government agencies regarding the proposed rule (published on June 29, 2011, in the Federal Register) for the safeguarding of unclassified information....” The public meeting is scheduled for November 15, 2011, 9:30-12:00, in the General Services Administration, Central Office Auditorium, 1800 F Street NW., Washington, DC 20405.” Written comments are currently due on/before December 16, 2011. Interested parties in attending the meeting may register at http://www.acq.osd.mil/dpap/dars/safeguarding_unclassified_DoD_information.html
- On October 19, 2011, the Federal Register noticed a DFARS proposal “to revise and expand reporting requirements for Government-furnished property to include items uniquely and non-uniquely identified and clarify policy for contractor access to Government supply sources.” A public meeting to discuss the proposed rule is scheduled for November 17, 2011, at 1 p.m. at Defense Acquisition Regulations Council (DARC) Conference Room, 241 18th Street South, Suite 200A, Arlington, VA 22202-3409.
As background, DoD had previously “published a proposed rule under DFARS Case 2009-D043 at on December 22, 2010. The due date for public comments under DFARS Case 2009-D043 was extended from February 22, 2011, to April 8, 2011, by 76 FR 9527 on February 18, 2011. DoD has closed that case into this new case, DFARS Case 2012-D001, but will address the comments received in response to that case in this Federal Register notice for DFARS Case 2012-D001.”
- On October 14, 2011, the Federal Register noticed a proposed FAR rule “to require contractors to complete training that addresses the protection of privacy, in accordance with the Privacy Act of 1974, and the handling and safeguarding of personally identifiable information.” Comments are due on/before December 13, 2011.
- Dan Gordon, Administrator for the Office of Federal Procurement Policy, announced that later this year he will be leaving the post to serve as Associate Dean for Government Contracts Law at the George Washington University Law School.

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

- The [Cross-Industry Benchmarking: Cross-Industry Metric Report](#), dated June 2011, published by an affiliate (CAPS Research) of the Institute for Supply Management (ISM) provides insight into specific industries in the supply chain area for key metrics/benchmarks. The Aerospace/Defense industry is one of 10 surveyed industries in this sequel to the 2008 report. This report provides a top-level view of 20 critical categories/benchmarks in the supply chain with Aerospace/Defense industry being the highest for “supply management operating expense as percentage of total spend,” one of the lowest in “total spend per supply management employee,” higher than most other industries for “average cycle time from requisition approval to purchase order placement of direct goods,” etc.

Where is your organization? Where are your suppliers...especially those with whom you are teamed? Buyers, how do your suppliers “rank?” And, the impact on “your” rates is...? The survey is available at

<http://www.capsresearch.org/publications/pdfs-protected/CI201106Metric.pdf>

Future Speaking Topics Include—

- NCMA 30th Annual Government Contract Management Conference, Bethesda, Maryland, “Key Enabling Decisions for ADR Success.”
- NCMA Phoenix and Tucson Chapters, “Is the FAR (System) Out of Control?”

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