

# Regulatory/Contractual Update

April 20, 2009

Volume 14, Issue 4

- On March 31, 2009, the Federal Register noticed Federal Acquisition Circular 2005-32; addressing the “American Recovery and Reinvestment Act of 2009 (the Recovery Act)” and in furtherance of earlier OMB direction—see below. Specifically, the following interim rules were issued with comments due on/before June 1, 2009:
  - Buy American Requirements for Construction Material.
  - Publicizing Contract Actions.
  - Reporting Requirements on use of funds.
  - Whistleblower Protections. “This rule prohibits non-Federal employers from discharging, demoting, or discriminating against an employee as a reprisal for disclosing information.”
  - GAO/IG Access. Wherein, contracting officers are directed to “modify, on a bilateral basis, in accordance with FAR 1.108(d)(3), existing contracts to include the FAR clauses (Alternates) for future orders, if Recovery Act funds will be used. In the event that a contractor refuses to accept such a modification, the contractor will not be eligible for receipt of Recovery Act funds.”

COMMENT: And, the consideration is ... you may continue to receive contracts?

In addition FAC 2005-32 noticed an interim rule on “GAO Access to Contractor Employees” which is intended to “implement Section 871 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA) (Pub. L. 110-417) which allows the Government Accountability Office to interview current contractor employees during the audit of the contractor's records.”

And, OMB issued on April 3, 2009, a memorandum on “Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009,” with a 172 page attachment on “government-wide guidance on carrying out the program and activities included in that Act.” This memorandum complements the President’s March 4, 2009, direction—see prior Update. Subsequent revisions to the memo are planned and the Guidance is [http://www.whitehouse.gov/omb/assets/memoranda\\_fy2009/m09-15.pdf](http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-15.pdf)

- The April 13, 2009, Federal Register noticed “the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend the FAR to implement revisions to the Small Business Administration's HUBZone Program as a result of revisions to SBA regulations.” Comments are due on/before June 12, 2009.

## 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.*

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- DoD continues to issue memoranda including the following:
  - April 16, 2009, on the “Electronic Subcontracting Reporting System (eSRS).” “The DoD has fully deployed the eSRS. Every Service or Agency using Federal Procurement Data System (FPDS) for their unclassified contracts should be using eSRS to capture subcontracting report activity. This memorandum provides additional guidance on ‘acknowledge receipt/reject’ functions in eSRS reports.”
  - April 8, 2009, on release of the “Joint Contingency Contracting Handbook.” “A Joint Handbook for the 21st Century 2nd Edition developed in cooperation with the Air Force Logistics Management Agency (AFLMA).”
  - March 18, 2009, on “Linking Financial Data to Contract Documents.” “The Standard Financial Information Structure (SFIS) data standard, established by OUSD (Comptroller) in 2005, assumed that finance data would be linked to contracts using a Demand Unique ID or DUID. Over the last year the USD(AT&L) has worked with Comptroller and the Business Transformation Agency to establish an alternative means to link financial data and procurement/execution information. This revised data strategy will require that financial data elements be linked to contract data by the finance functional owner, passing minimum data between financial and procurement systems.”
  - March 13, 2009, on “Posting Pre-Solicitation and Award Notices; Reporting Contract Actions; and Reporting Performance Assessments for Actions Funded by the American Recovery and Re-Investment Act of 2009.” “This memorandum provides instructions for employing specific federal Integrated Acquisition Environment (IAE) and specific DoD capabilities that...(must be used) to implement and comply with the transparency and accountability requirements associated with the supplemental appropriations provided by the American Recovery and Re-Investment Act of 2009 (Recovery Act), Pub.L. 111-5. These instructions are in addition to the initial implementation guidance published by the Office of Management and Budget (OMB) on February 18, 2009.”
  - March 13, 2009, “Study of Competed Contracts.” “In June 2008, DUSD(A&T) approved a study on the reasons for single offers on competed contracts for services. The offices of Industrial Policy and of Procurement and Acquisition Policy are cosponsoring the study. This memorandum informs the Military Departments and Defense Agencies that interviews will be conducted with DoD program and contracting offices and their staffs to collect data not captured in the Federal Procurement Data System.”
- The U.S. General Services Administration (GSA) Multiple Award Schedule Advisory Panel (MAS Panel), a Federal Advisory Committee, will hold a public meeting on Friday, May 1, 2009, 9:00-5:00. U.S. General Services Administration, Federal Acquisition Service, 2200 Crystal Drive, Room L1301, Arlington, VA 22202.

- On March 10, 2009, Under Secretary of Defense John J. Young issued a memorandum flowing from the February 26, 2009 court decision of Rothe Development Corp v. DoD, (SA-98-CV-1011-XR: US Dist. Ct. Western Dist. Of Texas). The memorandum provides in part, “Effective February 26, 2009, any activity, which includes but is not limited to the award of contracts and orders under contracts, advance payments, and the award of grants or scholarships or the addition of funds to existing grants and scholarships, that rely exclusively on the authority of 10 USC §2323 should cease.”
- On March 19, 2009, the Federal Register noticed Federal Acquisition Circular 2005-31 which includes the following:
  - Small Business Size Representation (FAR Case 2006-032) (Final Rule)
  - Clarification of Submission of Cost or Pricing Data on Non-Commercial Modifications of Commercial Items (FAR Case 2008-012) “An interim final rule amending the Federal Acquisition Regulation (FAR) to harmonize the thresholds for cost or pricing data on non-commercial modifications of commercial items to reflect the Truth In Negotiation Act (TINA) threshold for cost and pricing data.”
  - Amendments to Incorporate New Wage Determinations (FAR Case 2008-014) (Final Rule).
  - Least Developed Countries that are Designated Countries (FAR Case 2008-021) (Final Rule).
- The GAO has posted its 9<sup>th</sup> Edition, 2009, version of “Bid Protests at the GAO...,” available at <http://www.gao.gov/decisions/bidpro/bid/d09417sp.pdf>
- The Department of Defense, General Services Administration, and National Aeronautics and Space Administration have agreed to delay the applicability date of FAR Case 2007-013, Employment Eligibility Verification, to June 30, 2009.

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

- Recent cases that raise important concepts in negotiating/drafting/managing contracts include the following—
  - The recent decision in Breaux v. Halliburton Energy Service v. Era Aviation Inc., Rowan Companies, March 6, 2009, (No. 07-30964, Fifth Circuit Court of Appeals) involved, in part, indemnification arising out of a helicopter crash. Specifically, the opinion provides a critical analysis on provisions including cross-indemnification, additional insureds, and indemnity for contractual obligations—here in two contracts. The case should be read. At the end of the day, the appellate court confirmed “the district court (decision which) held that the reciprocal obligations created a circular indemnity resulting in no party being entitled to indemnity from the other....” A good discussion is provided the reader on the need to exercise great care in this area in drafting/negotiation. The case is at <http://caselaw.lp.findlaw.com/data2/circs/5th/0730964cv0p.pdf>
  - The March 11, 2009, U.S. 9th Circuit Court of Appeals, case of Kam-Ko Bio-Pharm Trading Co. v. Mayne Pharma Inc., No. 07-35449, highlights an important lesson in drafting arbitration clauses or, for that matter, any/all provisions in a contract! When “in an action seeking a declaratory judgment that the fees imposed by an arbitration organization were unconscionably high, the dismissal of Plaintiff’s complaint is affirmed, where Plaintiff itself selected the organization and the fee was based on the amount of Plaintiff’s claim.” The case is available at <http://caselaw.lp.findlaw.com/data2/circs/9th/0735449p.pdf>
- Crossroads of Conflict—Israel 2008: Commentary and pictures [www.Rumbaugh.net](http://www.Rumbaugh.net)

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## Future Speaking Topics Include—

- Gold Rush/Sacramento NCMA Chapter, “Contract Negotiations,” NES.
- ISM Miami Affiliate, “Baseball Arbitration.”
- South Florida NCMA Chapter, “Contract Negotiations,” NES.