

# Regulatory/Contractual Update

June 16, 2010

Volume 15, Issue 6

- On June 8, 2010, DoD noticed in the Federal Register “an interim rule amending the DFARS to implement section 819 of the National Defense Authorization Act for Fiscal Year 2010. Section 819 places limitations on certain types of line items and contract options that may be included in contracts initially awarded pursuant to competitive solicitations. When the prohibition applies, it limits the dollar value, period of performance, and time for exercise of such contract line items or contract options.” Comments are due on/before August 9, 2010.
- On May 19, 2010, DoD noticed in the Federal Register “an interim rule (effective May 19, 2010) to implement section 8116 of the DoD Appropriations Act for Fiscal Year 2010. Section 8116 restricts the use of (certain) mandatory arbitration agreements when using funds appropriated or otherwise made available by this DoD Appropriations Act to award contracts that exceed \$1 million. It allows the Secretary of Defense to waive applicability to a particular contractor or subcontractor, if determined necessary to avoid harm to national security.” Comments are due on/before July 19, 2010. See prior Updates on the topic.  
**COMMENT:** Does this rule accomplish a literal reading of the legislation or is the rule fundamentally flawed for international arbitration prohibitions with employees? How will arbitration provisions be mandated for your domestic/international employees—uniform or...? Discuss with counsel.
- On May 7, 2010, DoD noticed in the Federal Register a proposed DFARS “rule to implement section 802(b) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2007 and section 815(a)(2) of the NDAA for FY 2008. This proposed rule implements special requirements and procedures related to the validation of a contractor's or subcontractor's asserted restrictions on technical data and computer software.” Comments are due on/before July 6, 2010.
- On May 7, 2010, DoD noticed in the Federal Register a proposed DFARS rule “to set forth DoD Cost and Software Data Reporting (CSDR) system requirements for major defense acquisition programs and major automated information system programs.” Comments are due on/before July 6, 2010.  
**COMMENT:** And, those requirements are provided in its CSDR Manual, DoD 5000.04-M-1—have you been provided the opportunity to review and comment on this manual or is now the time?

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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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- On June 16, 2010, the Federal Register noticed FAC 2005-42 which is effective as of June 16, 2010, except as noted, and includes
  - American Recovery and Reinvestment Act (the Recovery Act) of 2009--Whistleblower Protections (FAR Case 2009-012). “This rule adopts as final, with changes, an interim rule published in the Federal Register on March 31, 2009, amending the FAR to implement the Recovery Act with respect to section 1553 of Division A, Protecting State and Local Government and Contractor Whistleblowers. This rule prohibits non-Federal employers from discharging, demoting, or discriminating against an employee as a reprisal for disclosing information.”
  - Electronic Subcontracting Reporting System (eSRS)(FAR Case 2005-040) (effective July 16, 2010). “This rule amends the FAR to adopt as final, with changes, an interim FAR rule published in the Federal Register on April 22, 2008, amending the FAR to implement the use of the eSRS to fulfill small business subcontracting reporting requirements. The eSRS, a web-based system, replaces the Standard Forms 294 and 295 as the mechanism for submitting reports required by the small business subcontracting program. In addition, this rule adds a new Alternate III to FAR clause 52.219-9 to recognize that there is a circumstance under which contractors will need to use SF 294, rather than eSRS, to submit an Individual Subcontract Report. The contractor will use SF 294 if a contract is not reported in the Federal Procurement Data System because reporting it in that system may disclose information that would compromise national security.”
  - American Recovery and Reinvestment Act of 2009--Publicizing Contract Actions (FAR Case 2009-010) (effective July 16, 2010). “This rule adopts as final, with minor changes, the interim rule published in the Federal Register on March 31, 2009. The interim rule amended the FAR to implement section 6.2 of the Office of Management and Budget (OMB) Memorandum M-09-10, dated February 18, 2009, entitled ‘Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009’....”
  - Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts--Section 844 of the National Defense Authorization Act for Fiscal Year 2008 (FAR Case 2008-003) (effective July 16, 2010). This final rule adopts, with changes, an interim rule published in the Federal Register on January 15, 2009. The rule amends the FAR to implement the requirements of Section 844 of the National Defense Authorization Act for Fiscal Year 2008. The interim rule required the head of an executive agency to make certain justification and approval documents relating to the use of noncompetitive procedures in Federal contracting be posted on the website of an agency and through FedBizOpps. The final rule requires that if the justification is a brand name justification under FAR 6.302-1(c) then it must be posted with the solicitation. Justifications must remain posted for a minimum of 30 days. The final rule clarifies that posting the

justification does not apply if it would disclose the executive agency's needs and disclosure of such needs would compromise national security or create other security risks. The final rule also establishes procedures at FAR 13.501 similar to procedures at FAR 6.305. The rule is intended to enhance competition in Federal contracting and provide greater transparency to the taxpayer.”

- Additional Requirements for Market Research (FAR Case 2008-007) (Interim). This interim rule amends the FAR at parts 10, 44, and 52 by adding market research requirements. This change implements Section 826 of Pub. L. 110-181, the National Defense Authorization Act for Fiscal Year 2008. As a matter of policy, this provision of law is applied to contracts awarded by all executive agencies. This rule requires that market research must be accomplished before an agency places an indefinite-delivery/indefinite-quantity (ID/IQ) task or delivery order in excess of the simplified acquisition threshold. In addition, a prime contractor with a contract in excess of \$5 million for the procurement of items other than commercial items is required to conduct market research before making purchases that exceed the simplified acquisition threshold when the contractor is acting as a purchasing agent for the Government. This interim rule is applicable to any solicitations issued and contracts (to include any subcontracts issued under such contracts) awarded on or after the effective date (June 16, 2010) of the rule.”

COMMENT: No prior opportunity for notice/comment!

- American Recovery and Reinvestment Act of 2009--GAO/IG Access (FAR Case 2009-011) (effective July 16, 2010). “This final rule adopts, with changes, the interim rule published in the Federal Register on March 31, 2009. This final rule amends the FAR to implement sections 902, 1514, and 1515 of the Recovery Act. Collectively, these sections provide for the audit and review of both contracts and subcontracts, and the ability to interview such contractor and subcontractor personnel under contracts containing Recovery Act funds....”
- Nonavailable Articles (FAR Case 2009-013) (effective July 16, 2010). This final rule amends FAR 25.104(a) to add certain items to the list of articles not available from domestic sources in sufficient and reasonably available commercial quantities of a satisfactory quality. ... Unless the contracting officer learns before the time designated for receipt of bids in sealed bidding or final offers in negotiation that an article on the list is available domestically in sufficient and reasonably available quantities of a satisfactory quality, the Buy American Act does not apply to acquisition of these items as end products, and the contracting officer may treat foreign components of the same class or kind as domestic components.”
- Compensation for Personal Services (FAR Case 2009-026) (Interim).

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- Disclosure and Consistency of Cost Accounting Practices for Contracts Awarded to Foreign Concerns (FAR Case 2009-025) (Interim). “This interim rule amends the FAR to align the existing FAR clause 52.230-4 with the (March 26, 2008) changes made in Cost Accounting Standards (CAS) Board clause, Disclosure and Consistency of Cost Accounting Practices--Foreign Concerns....”
- Payrolls and Basic Records (FAR Case 2009-018) (Interim). This interim rule implements changes that the Department of Labor (DOL) instituted regarding the submission of payroll data in their final rule, Protecting the Privacy of Workers: Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction, published in the Federal Register on December 19, 2008. The rule revises FAR 52.222-8, Payrolls and Basic Records, to delete the requirement for submission of full social security numbers and home addresses of individual workers, prime contractor, on weekly payroll transmittals as required on covered construction contracts. The rule requires contractors and subcontractors to maintain the full social security number and current address of each covered worker, and shall provide them upon request to the contracting officer, the contractor, or the Wage and Hour Division of the DOL for purposes of an investigation or audit of compliance with prevailing wage requirements. The rule recognizes DOL's finding that complete social security numbers and home addresses for individual workers is personal information to the worker and that any unnecessary disclosure and submittal of such information creates an exposure to identity theft and the invasion of privacy for workers.”
- On June 11, 2010, the Federal Register noticed a proposed rule to “remove and relocate the requirements for conducting a Contractor Insurance/Pension Review from Procedures, Guidance, and Information to the Defense Acquisition Regulation Supplement.” Comments are due on/before August 10, 2010.  
**COMMENT:** Kudos to DoD—for acknowledging that insurance/pensions involve contractors and thus the public, the proposed movement to the DFARS, and with a full 60 days for comments—will industry respond?
- On May 24, 2010, the Federal Register noticed a proposed FAR rule which would “provide clarification to the prescription for the FAR clause at 52.249-1, Termination for Convenience of the Government (Fixed Price) (Short Form), located in FAR 49.502(a), to apprise contracting officers that there are alternative clauses that can be used for terminations up to the simplified acquisition threshold. In addition, references to the FAR clauses at 52.212-4 and 52.213-4 are added in the prescription for FAR 52.249-1 at FAR 49.502(a) and in FAR 49.002, Applicability.” Comments are due on/before July 19, 2010.

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- On May 24, 2010, the Federal Register noticed a proposed FAR rule which would “provide additional regulatory coverage in Subpart 4.13 and in 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.” Comments are due on/before July 23, 2010.
- On May 13, 2010, the Federal Register noticed a proposed rule whereby the Government is “seeking information that will assist in determining how best to amend the FAR to enable public posting of contract actions, should such posting become a requirement in the future, without compromising contractors' proprietary and confidential commercial or financial information. This transparency effort is intended to promote efficiency in Government contracting through an open acquisition process and improve Federal spending accountability consistent with the Administration's memorandum entitled Transparency and Open Government (January 21, 2009) (Published in the Federal Register at 74 FR 4685, January 26, 2009).” Comments are due on/before July 12, 2010.
- On May 7, 2010, DoD noticed in the Federal Register a proposed DFARS “rule to require contractors to tag, label, or mark items of Government-furnished property identified in the contract when the Government-furnished material and Government-furnished property are subject to serialized item management.” Comments are due on/before July 6, 2010.
- On May 7, 2010, DoD noticed in the Federal Register a proposed DFARS “rule to implement section 815 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009. Section 815 requires acquisition plans for major weapons systems to include a plan for the preservation and storage of special tooling associated with the production of hardware for major defense acquisition programs through the end of the service life of the related weapons system.” Comments are due on/before July 6, 2010.
- On June 8, 2010, DoD noticed in the Federal Register a “final rule amending the DFARS to revise and combine contract clauses addressing assumption of risk of loss under contracts that furnish aircraft to the Government. The final rule establishes requirements that apply consistently to all contract types.” An earlier proposed rule was published in 2007.
- On June 15, 2010, DoD noticed in the Federal Register an extension to July 21, 2010 for comments to the proposed DFARS OCI rule changes in connection with Weapons System Acquisitions. See previous Update.
- On June 8, 2010, DoD noticed in the Federal Register it “is adopting as final, without change, a proposed rule amending the DFARS to clarify requirements regarding definitization of letter contracts. The rule specifies that DoD letter contracts will be definitized using the DFARS procedures applicable to all other undefinitized contract actions.”

- DoD continues to issue memoranda including the following:
  - June 7, 2010, Full & Open Competition Required for Congressionally Directed Spending Items & Earmarks. “Section 8121 of the DoD Appropriations Act, 2010 (Pub. Law No. 111-118), imposes competition requirements on congressionally directed spending items and earmarks intended for award to a ‘for-profit’ entity. The statutory competition requirements mandated by section 8121 are more stringent for congressionally directed spending items and earmarks intended for award to a ‘for-profit’ entity sponsored solely by members of the House of Representatives than for those sponsored by members of the Senate. This memorandum provides compliance guidance with respect to section 8121.”
  - May 21, 2010, Class Deviation 2010-O0012, Delegation of Approval for Use of Incentive-Fee Contracts. “This Class Deviation 2010-O0012 provides DoD departments and agencies with a standard delegation of authority when implementing the requirement at FAR 16.401(d) for the head of the contracting activity to sign the determination and finding to justify the use of an award-fee or other incentive contract....”

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

- The June 2010 NCMA Contract Management article by Jack Horan, Esq. entitled, “Termination for Failure to Make Progress in Contract Performance” is must reading! What can the Government do when there is no schedule? Is the schedule whatever is “reasonable” or whatever the Government unilaterally determines to be “reasonable?” What is presumed to be “reasonable” and should that have been in the default clause? When should the action of the Government be deemed an acceleration order when there is no schedule? Read and plan accordingly!
- Is there a problem with the written document as implemented by e-commerce? “Where lease authorized electronic service of notices, as well as service by personal delivery and certified mail, but did not identify an individual to whom notice should be directed or provide an e-mail address at which tenant agreed to accept service, service by e-mail of notice to pay rent or quit was inadequate where tenant actually received the notice but landlord failed to present any evidence the e-mail had been delivered to the street address specified in the lease.” Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc., June 14, 2010, California Second District, Div. Seven. Case is available at <http://www.metnews.com/sos.cgi?0610%2FB217037> Discuss with counsel

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- More e-Discovery ahead? The following is from the May/June 2010 ABA Business Law Today.  
“Lawyers are familiar with uncovering e-mail and other electronically stored information under e-discovery, but what about information from copy machines? An article in Out-of-the-Box Lawyering (a legal blog found at [www.outoftheboxlawyering.com](http://www.outoftheboxlawyering.com)) notes that today's copy machines and printers have a hard drive similar to those found in PCs and laptops. These machines automatically store on their hard drive any document that has been printed or copied. The fact that sensitive data may be stored on the machine's hard drive presents a series of issues, including discovery matters, as well as security concerns that could result in a data breach. The blog states, ‘Usually when several copies of a document are needed, the document is scanned just once and the copies are made from the file that has been saved on the hard disk. The data can be accessed by removing the hard drive from the printer or copy machine and connecting it to a PC or an erasure station. There are no existing standards which state how the data on these devices should be permanently removed. However the same measures must be practiced as when erasing computer hard drives.’ Ethics issues and discovery opportunities are also present regarding fax machines that retain digital versions of faxes having either been sent or received. According to Kim Komando, a columnist and radio host on technical issues, when retiring an old copier, the hard drive should always be removed in the owner's presence and handed over for disposal....” Discuss with counsel.
- Salans, LLP has posted its most recent guide on “Protecting Investment in Challenging Environments.” This fifth edition “addresses the main considerations for directors and officers of companies operating” in the identified countries. The guide is available at <http://www.salans.com/~media/Assets/Salans/Publications/2010/Salans%20OBook%202010%20for%20upload%20-%20reduit.ashx>
- The ABA International Law Section, Procurement Committee, posted an update on links to the various international procurement laws. The listing is available at [http://meetings.abanet.org/webupload/commupload/IC760000/newsletterpubs/International\\_Procurement\\_Links\\_\(2009\).pdf](http://meetings.abanet.org/webupload/commupload/IC760000/newsletterpubs/International_Procurement_Links_(2009).pdf)
- The International Association for Contract and Commercial Management (IACCM) has posted the results of its 2009 survey on a study of the “most negotiated terms and conditions.” The top 30 terms with industries/jurisdictions are provided. The survey report is available at [http://www.iaccm.com/userfiles/file/CE\\_April2.pdf](http://www.iaccm.com/userfiles/file/CE_April2.pdf)

- Margaret G. Rumbaugh (no relation) has published a book on “Understanding Government Contract Source Selection”—the “one reference for all government acquisition professionals and contractors....” Further information is available at <http://www.managementconcepts.com/portal/server.pt?open=512&objID=275&PageID=643&mcTarget=publication&mcTargetID=management/ContractSourceSelection.asp&cached=true&mode=2&userID=238>

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## **Future Speaking Topics Include—**

- Jacksonville and Mid-Florida NCMA Chapters, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements."
- Beach Cities NCMA Chapter, “Is the FAR Out of Control?”

*Information on speaking/teaching engagements in connection with various aspects of  
Alternative Dispute Resolution (ADR) and basic/advanced negotiation techniques  
— seminars/workshops —  
may be arranged by sending a message to [ADROffice@Rumbaugh.net](mailto:ADROffice@Rumbaugh.net)*

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