

# Regulatory/Contractual Update

April 5, 2010

Volume 15, Issue 4

- On March 19, 2010, the Federal Register noticed FAC 2005-39 which includes
  - Extend Use of Simplified Acquisition Procedures for Certain Commercial Items (FAR Case 2009-035). “This final rule amends the FAR to implement section 816 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2010. The rule extends for two more years the commercial items test program in FAR subpart 13.5.”
  - Use of Standard Form 26 - Award/Contract (FAR Case 2008-040). “This final rule modifies the instructions for use of the Standard Form 26, Award/Contract, at FAR subparts 15.5 and 53.2 to clarify that block 18 of the form should not be used to award a negotiated procurement.”
  - Enhanced Competition for Task- and Delivery-Order Contracts--Section 843 of the Fiscal Year 2008 National Defense Authorization Act (FAR Case 2008-006).

“This final rule adopts, with changes, the interim rule published in the Federal Register on September 17, 2008. The interim rule amended FAR subpart 16.5 to implement section 843 of the NDAA for FY 2008. The provisions of section 843 include (1) Limitation on single award task- or delivery-order contracts greater than \$100 million; (2) Enhanced competition for task and delivery orders in excess of \$5 million; and (3) Restriction on protests in connection with issuance or proposed issuance of a task or delivery order except for a protest on orders on the grounds that the order increases the scope, period, or maximum value of the contract under which the order is issued, or a protest of an order valued in excess of \$10 million.”

COMMENT: See DoD Memorandum below.

- Payments Under Fixed-Price Architect-Engineer Contracts (FAR Case 2008-015). “This rule amends FAR 52.232-10, Payments under Fixed-Price Architect-Engineer Contracts, to revise and clarify the retainage requirements.”
- Clarification of Submission of Cost or Pricing Data on Non-Commercial Modifications of Commercial Items (FAR Case 2008-012). “This final rule adopts, with minor changes, the interim rule published in the Federal Register on March 19, 2009.”

COMMENT: And, the Changes clause for Commercial Items requires bilateral action (only) by the parties!

## 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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- On March 31, 2010, OMB noticed in the Federal Register an important request for comments regarding a “proposed policy letter to provide guidance addressing when work must be reserved for performance by federal employees (“inherently governmental”). The policy letter is intended to implement direction in the President’s March 4, 2009, Memorandum on Government Contracting that requires OMB to ‘clarify when governmental outsourcing for services is and is not appropriate, consistent with section 321 of Public Law 110-417 (31 U.S.C. 501 note).’ ” Comments are due on/before June 1, 2010.
- On March 22, 2010, OMB issued a memorandum providing “government-wide guidance on the implementation of Executive Order 13520 (Reducing Improper Payments). This guidance is contained in a new Part III to Appendix C of OMB Circular A-123.” See March 2010 Update.
- On March 23, 2010, the Federal Register noticed FAC 2005-40 which includes
  - Federal Awardee Performance and Integrity Information System (FAPIIS) (FAR case 2008-027). “This final rule adopts, with changes, the proposed rule published in the Federal Register on September 3, 2009 (74 FR 45579); and amends the FAR to implement section 872 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009. Section 872 requires the establishment of a data system, FAPIIS, containing specific information on the integrity and performance of covered Federal agency contractors and grantees. FAPIIS is available for use in award decisions at [www.ppirs.gov](http://www.ppirs.gov). Government input to FAPIIS is accomplished at [www.cpars.csd.disa.mil](http://www.cpars.csd.disa.mil).”
- DoD continues to issue memoranda including the following:
  - March 24, 2010, Class Deviation 2010-00007 to the DFARS. “This Class Deviation...implements section 814 of the Fiscal Year 2010 National Defense Authorization Act (Public Law 111-84) (TAB C). Section 814 was effective when enacted, October 28, 2009. It requires agency heads to notify the congressional defense committees within 30 days after making a determination for any of the reasons at FAR 16.504(c)(1)(ii)(D)(1) (to award a single-source task- or delivery-order contract estimated to exceed \$100 million (including all options))....”
  - March 24, 2010, Joint Contingency Contracting Officer Representative (COR) Handbook. “This memorandum provides information to the Services, Program Support, DAU, DCMA, and J4 requesting a review of the first edition of the Joint Contingency Contracting Officer Representative Handbook.”
- David Drabkin, former Associate Administrator of the General Services Administration, is the new Director, Acquisition Policy with the Northrop Grumman Corporation.

- On March 24, 2010, DoD noticed in the Federal Register a “final rule” which updates the “Charter of the Armed Services Board of Contract Appeals (ASBCA), dated May 14, 2007. The ASBCA is chartered to serve as the authorized representative of the Secretary of Defense and the Secretaries of the Army, Navy, and Air Force in hearing, considering, and determining appeals by contractors from decisions of contracting officers or their authorized representatives or other authorities regarding claims on contracts under the Contract Disputes Act of 1978 or other remedy-granting provisions.”

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

- The standardize international trade terms of Incoterms 2000 is undergoing updating/revision which is expected to be completed in the fall with Incoterms 2010 being effective January 1, 2011.
- “Where contract provided that contractor was to commence work and negotiate a price at a later date or else contractor would be paid documented actual cost of work performed, but contract did not obligate contractor to document its actual costs--and custom and practice in public works industry was for negotiated lump sum change orders--contractor was entitled to a trial on contract interpretation. (California) Public Contracts Code Sec. 7105 does not expressly abrogate common law or impact the permissible method of proof for contract damages. A contractor can recover on a modified total cost theory in California.” Dillingham-Ray Wilson v. City of Los Angeles (CBI Services, Inc.), March 18, 2010, California Court of Appeal, No. B192900. Case is available at [Dillingham](#)
- The US Federal Circuit Court of Appeals on March 22, 2010, issue a decision in ATK Thiokol, Inc. v. US (No. 09-5036) whereby “Development Effort costs for plaintiff’s upgraded rocket motor were chargeable as indirect independent research and development (IR&D costs) ... (and it) was proper for plaintiff to treat its Development Effort costs as indirect costs as the research and development costs were related to a contract with Mitsubishi, but not specifically required by that contract. Case is available at [ATK](#)

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- And in a reverse-FOIA, “actions seeking to prevent the release of certain Defense Contract Management Agency (DCMA) documents evaluating plaintiff defense contractors' respective quality control processes, summary judgment for defendants is reversed where DCMA's decision to release the documents was arbitrary and capricious in that it failed to properly apply Exemption 4 of the Freedom of Information Act.” See United Technologies Corporation v. DoD, No. 08-5435 (Federal Circuit Court of Appeals for DC, March 23, 2010). Case is available at [UTC](#)

- In an interesting decision by the US Supreme Court in Graham County Soil & Water Conservation District v. US ex rel. Wilson, No. 08-304, (March 30, 2010), the court found in the context of the US False Claims Act that disclosure of the alleged “false claim item” in certain state/local administrative documents, etc. will operate as a bar (as do federal sources) to any *qui tam* claim under the FCA.

“In an action claiming that county conservation districts and local and federal officials knowingly submitted false payment claims to the U.S. in violation of the False Claims Act, the Fourth Circuit's reversal of the district court's dismissal of the action for lack of jurisdiction is reversed where the reference to ‘administrative’ reports, audits, and investigations contained in 31 U.S.C. section 3730(e)(4)(A) (the FCA's public disclosure bar) encompasses disclosures made in state and local sources, as well as federal sources.” Case is available at [Graham County](#)

- In proceedings that could widen the scope of forums to compel arbitration, etc. the US 9<sup>th</sup> Circuit Court of Appeals in Geographic Expeditions, Inc. v. Estate of Lhotka, No. 09-15069, on March 31, 2010, ruled that the “District court erred in ruling that plaintiff had to prove by a preponderance of the evidence that the amount in controversy exceeded \$75,000 for court to take jurisdiction over petition to compel arbitration because plaintiff had not removed the case from state to federal court but commenced the action in federal court. Legal certainty standard applies when a party files a petition in federal court to compel arbitration, even when the opposing party is suing the federal petitioner in state court; good faith allegations in plaintiff's petition as to the amount in controversy are sufficient to establish jurisdictional amount unless it appears legally certain that the amount in dispute is \$75,000 or less....” The contractual cap on liability (less than \$75,000) will not control! The case is available at [Geographic Expeditions](#)

- Nicholas Sanders has authored an informative article entitled, “The Year of Change for the Defense Contract Audit Agency,” in the April 2010 issue of NCMA Contract Management magazine. Article is available at [DCAA](#)

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## Future Speaking Topics Include—

- Seattle South Sound & Puget Sound NCMA Chapters and Golden Gate (San Francisco) NCMA Chapter, National Education Seminar, “Risk Management for Complex U.S. Government Contracts and Projects.”
- Jacksonville and Mid Florida NCMA Chapters, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements."
- Golden Gate (San Francisco) NCMA Chapter, National Education Seminar, “Risk Management for Complex U.S. Government Contracts and Projects.”

*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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