

# Regulatory/Contractual Update

May 1, 2010

Volume 15, Issue 5

- DoD continues to issue memoranda without any Federal Register publication, OIRA clearance, etc. including the following:
  - April 19, 2010, Class Deviation 2010-00010 to the DFARS. “Effective immediately, this class deviation requires that contracting officers shall use the provided clause in solicitations and contracts (including task and delivery orders) for construction, installation, repair, maintenance, or operation of facilities, infrastructure, or for equipment configured for occupancy, planned for use by DoD military or civilian personnel during military operations performed outside the United States, Guam, Puerto Rico, and the Virgin Islands.”
  - April 29, 2010, DoD Source Selection Procedures. “This memorandum requests components to provide their review/comments of the attached DoD source selection procedure which provides the direction for the execution of negotiated, competitive acquisitions utilizing FAR Part 15 procedures.”
  - April 26, 2010, Class Deviation 2010-O0011 - Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel. “This Class Deviation instructs the contracting community to reduce or deny award fees to companies found to jeopardize the health or safety of government personnel and provides a DFARS clause (252.216-7999, Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel, (Deviation), (April 2010)) for use in all solicitations and contracts containing award fee provisions.”
  - April 6, 2010, Examining Use of Advance Payments When Making Small Business Awards. “This memorandum provides guidance to DoD contracting officers on the consideration of using advance payments when making small business awards.”
- On April 14, 2010, the Federal Register noticed a proposed FAR rule “to implement Executive Order 13494, Economy in Government Contracting, issued on January 30, 2009, and amended on October 30, 2009. This order 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.” Comments are due on/before June 14, 2010.

## Points of Contact

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*Regulatory/Contractual  
Update  
Volume 15, Issue 5*

*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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*Regulatory/Contractual  
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*Volume 15, Issue 5*

- On April 30, 2010, DoD noticed in the Federal Register a ***final*** DFARS rule “to ensure that the requirement for a quality assurance surveillance plan is addressed for each contract with a dollar value above the simplified acquisition threshold, and that contracts for services have appropriate performance management or surveillance plans prepared for the work being performed under the contract.” DoD also adds in this posting that it “is issuing this rule as a final rule because this rule does not have a significant effect beyond the internal operating procedures of DoD and does not have a significant cost or administrative impact on contractors or offerors. Therefore, public comment is not required in accordance with 41 U.S.C. 418b(a).”
- On April 30, 2010, DoD noticed in the Federal Register a proposed DFARS rule to “revise guidance for award-fee evaluations and payments and to eliminate the use of provisional award-fee payments. One new clause is provided as part of this rule to detail the use of award fees. In addition, this rule incorporates DoD policy guidance on the use of objective criteria.” Comments are due on/before June 29, 2010.
- On April 30, 2010, DoD noticed in the Federal Register a proposed DFARS rule to “amend the DFARS 211.274 to require contractors to apply Government-assigned serial numbers, such as tail numbers/hull numbers and equipment registration, in human-readable format on major end items, when required by law, regulation, or military operational necessity. The rule establishes a standard DoD method of specifying Government-assigned serial numbers contractually, and requires the contractor to associate these serial numbers with the Unique Item Identifier (UII) assigned by the contractor and to register them in the DoD Item Unique Identification (IUID) Registry along with the UII. The rule also requires agreement between the Government and contractor prior to use of the serial numbers in constructing the end item UII.” Comments are due on/before June 29, 2010.
- On April 22, 2010, DoD noticed in the Federal Register a proposed DFARS rule to “amend the DFARS to implement section 207 of the Weapons System Acquisition Reform Act of 2009 (WSARA) (Pub. L. 111-23). Section 207 requires DoD to revise the DFARS to provide uniform guidance and tighten existing requirements for organizational conflicts of interest (OCIs) by contractors in major defense acquisition programs. The law sets out situations that must be addressed and allows DoD to establish such limited exceptions as are necessary to ensure that DoD has continued access to advice on systems architecture and systems engineering matters from highly qualified contractors, while ensuring that such advice comes from sources that are objective and unbiased.” Comments are due on/before June 21, 2010

- On April 8, 2010, DoD noticed several rules in the Federal Register including
  - Acquisitions in Support of Operations in Iraq or Afghanistan (DFARS Case 2008-D002), “adopting as final, with minor changes, an interim rule amending the DFARS to implement sections 886 and 892 of the National Defense Authorization Act for Fiscal Year 2008. Section 886 provides authority for DoD to limit competition when acquiring products or services in support of operations in Iraq or Afghanistan. Section 892 addresses competition requirements for the procurement of small arms for assistance to Iraq or Afghanistan.”
  - Export-Controlled Items (DFARS Case 2004-D010). “DoD is adopting as final, with changes, an interim rule amending DFARS to address requirements for complying with export control laws and regulations when performing DoD contracts. The rule recognizes contractor responsibilities to comply with existing Department of Commerce and Department of State regulations and prescribes a contract clause to address those responsibilities.”
  - Research and Development Contract Type Determination (DFARS Case 2006-D053). DoD is adopting as final, without change, an interim rule that requires the Milestone Decision Authority (MDA) for a major defense acquisition program (MDAP) to select the contract type for a development program that is consistent with the level of program risk in accordance with section 818 of the National Defense Authorization Act (NDAA) for Fiscal Year 2007.”
  - Minimizing Use of Hexavalent Chromium (DFARS Case 2009-D004). DoD is proposing to amend the DFARS to address requirements for minimizing the use of hexavalent chromium in defense weapon systems, subsystems, components, and other items. The proposed rule prohibits the delivery of items containing hexavalent chromium under DoD contracts unless an exception applies.” Comments are due on/before June 7, 2010.
  
- On April 15, 2010, OFPP determined that the “benchmark compensation amount for certain executives that will be allowable under Government contracts during contractors' Fiscal Year 2010--\$693,951.”
  
- On April 13, 2010, the Federal Register noticed FAC 2005-41, a final rule on “Use of Project Labor Agreements for Federal Construction Projects (FAR Case 2009-005).”

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- Our great friend, wonderful colleague, outstanding lawyer, and long time "NCMAer" Irv Becker passed away last week. Comments from others on his passing include...
  - Another of the old guard that worked passionately at building and protecting the NCMA infrastructure.
  - A friend and a great professional in Government contracts, concentrating on data rights among other topics.
  - A very fine gentleman.
  - He was always gracious and willing to lend a hand for Chapter and friends. I enjoyed our conversations -- and always parted feeling I had learned something from an experienced master.
  - A mentor to all!

Over his professional career Irv was affiliated in various capacities as counsel to a number of private and public companies as well as having a private law practice and being a very proactive Judge pro tem. He was a long time member of NCMA and its Los Angeles/South Bay Chapter where he had been Chapter President among other leadership positions.

One "light" aspect about Irv was he was on a team within Bank of America in the 1950s that developed the first consumer credit card, BankAmericard—we have him to "blame" for our tool on credit! God Bless.

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

- On April 29, 2010, the legal advisor at the European Union's highest court "rejected arguments that attorney-client privilege should apply to in-house corporate lawyers in EU cases...." It is reported that the court normally accepts the direction of its legal advisors with a final court ruling later this year in relevant case, Alzo Nobel at [http://curia.europa.eu/jcms/jcms/j\\_6/](http://curia.europa.eu/jcms/jcms/j_6/)
- On April 27, 2010, the US Supreme decided that class arbitrations cannot be "implied" from an arbitration agreement under the Federal Arbitration Act and therefore "a party cannot be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that a party agreed to do so. See Stolt-Nielsen A.A. v. AnimalFeeds International Corp. Case No. 08-1198, available at <http://www.supremecourt.gov/opinions/09pdf/08-1198.pdf>

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- The International Association for Contract and Commercial Management (IACCM) has published an overview article resulting from its most recent annual survey of worldwide contract negotiators to discover the focus of negotiations. Specifically, what are the terms and conditions that are of most concern to international companies? The article highlights risks taking, relational versus transactional contracting as well as other timely issues. It's available at [http://www.iaccm.com/userfiles/file/CE\\_April2.pdf](http://www.iaccm.com/userfiles/file/CE_April2.pdf)
- The United Nations UNCITRAL Government Procurement Working Group just completed its week long New York session “discussing” recommended updates and amendments to the UN 1994 Model Procurement Law that is used in developing countries. It will reconvene again this fall in Austria as this multi-year endeavor closes in on final changes to the Model law. This law is the one utilized by developing countries and lending institutions in putting the deal together, i.e. the terms and conditions of the international supplier contract. The US State Department represented US interests. One observation on the process that was perceived...
  - Except for one noticeable A/E group in attendance, there were no suppliers of goods or other services that would be impacted by this law. Either other trade groups "were not invited to the party" or declined to participate. The latter would be very surprising. Summaries (overview and detailed line in/out) could be reviewed by other trade/seller oriented associations. The thrust of the law should be clear to them, i.e. the buyers **and** the lenders for major third world purchases of goods/services/projects are having the terms and conditions for the deal formulated and potential sellers are not at the table!
- The Spring 2010 issue of the ABA International Law Section publication, International Law News, has several arbitration related articles that may be of interest including “Arbitrating Disputes with Middle Eastern Entities” by Katlyn Thomas (thomkatbus@aol.com).
- Gregory Garrett has published a timely article in the April 2010 issue of NCMA Contract Management magazine on “Contract Interpretation Guidelines and Best Practices” under his ongoing author theme/heading of Contract Administration.

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## **Future Speaking Topics Include—**

- Seattle South Sound & Puget Sound NCMA Chapters NCMA Chapters, 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.”
- South Florida 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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