

# Regulatory/Contractual Update

September 29, 2008

Volume 13, Issue 10

- On September 17, 2008, Federal Acquisition Circular (FAC) 2005-27 was issued and included the following:

- **Contract Debts** (FAR Case 2005-018).

“This final rule amends and reorganizes FAR Subpart 32.6, Contract Debts, and amends associated other FAR coverage, based on the recommendations of the Department of Defense Contract Debt Integrated Process Team, to improve contract debt controls and procedures and to ensure consistency within and between existing regulations. FAR Subpart 32.6 prescribes policies and procedures for identifying, collecting, and deferring collection of contract debts (including interest, if applicable). Throughout, the term ‘responsible official’ has been replaced with the specific individual/organization responsible for fulfilling the FAR requirement. FAR 32.601 is revised to specify what constitutes a contract debt, rather than how a contract debt may arise. All discussions of contract debt determinations are consolidated in FAR 32.603, including the responsibility of the contracting officer in making debt determinations. All discussions of the demand for payment are consolidated in FAR 32.604, including the requirements for demand letters. All discussions of final decisions are consolidated in FAR 32.605. FAR 32.606 includes all coverage on debt collections, including when responsibility should be transferred to the Department of Treasury. All discussions of interest are consolidated at FAR 32.608, including how to compute interest. The Government's right to make a demand for payment and start the interest clock running under the contract is ensured, as is the Government's right to make a demand for payment without first issuing a final decision of the contracting officer. A final decision is required only if the contractor disagrees with the demand for payment.”

**COMMENT:** Can contractors provide Letters of Credit in lieu of payment pending resolution of the disputed amounts?

- **Extension of Authority for Use of Simplified Acquisition Procedures for Certain Commercial Items** (FAR Case 2008-002). “This final rule amends the Federal Acquisition Regulation to implement Section 822 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181). Section 822 amends Section 4202(e) of the Clinger-Cohen Act of 1996 (division D of Pub. L. 104-106; 110 Stat. 652; 10 U.S.C. 2304 note) by extending until January 1, 2010, the timeframe in which an agency may use simplified procedures to purchase commercial items in amounts greater than the simplified acquisition threshold, but not exceeding \$5,500,000 (\$11 million for acquisitions ...in 13.500(e)).”

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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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- **Cost Accounting Standards (CAS) Administration and Associated Federal Acquisition Regulation Clauses** (FAR Case 2007-002) (Interim). “The subject case is revising the Federal Acquisition Regulation (FAR) clauses concerning the administration of Cost Accounting Standards (CAS) to maintain consistency between the CAS rules and the FAR.”
  - **CAS Administration** (FAR Case 2006-004). (Interim).
  - **Additional Requirements for Competition Advocate Annual Reports** (FAR Case 2007-007). “This final rule amends the Federal Acquisition Regulation 6.502 to require that annual reviews by executive agency competition advocates be provided in writing to both the agency senior procurement executive and the agency chief acquisition officer, and ensure task and delivery orders over \$1,000,000 issued under multiple award contracts are properly planned, issued, and comply with 8.405 and 16.505. The rule provides for one of several initiatives by the Administrator, Office of Federal Procurement Policy, to reinforce the use of competition and related practices for achieving a competitive environment. The rule reinvigorates the role of agencies' competition advocates, strengthens agencies' competition practices, and ensures best value for the taxpayer.”
  - **Enhanced Competition for Task and Delivery Order Contracts--** Section 843 of the Fiscal Year 2008 National Defense Authorization Act (FAR Case 2008-006) (Interim). Note that this rule is “applicable to single award task or delivery order contracts awarded on or after May 27, 2008.”
  - **Online Representations and Certifications Application Review** (FAR Case 2006-025) (Final).
- On September 15, 2008, DoD issued DFARS Change Notice 20080915 and it has several changes including the following:
    - **“Acquisitions in Support of Operations in Iraq or Afghanistan** (DFARS Case 2008-D002).” (Interim Rule) “Provides special procedures for use in the acquisition of products or services in support of operations in Iraq or Afghanistan. Implements Sections 886 and 892 of the National Defense Authorization Act for Fiscal Year 2008.”
    - **Security-Guard Functions** (DFARS Case 2006-D050). (Interim Rule) “Extends, with certain limitations, the period during which contractor performance of security-guard functions at military installations or facilities is authorized to fulfill additional requirements resulting from the terrorist attacks on the United States on September 11, 2001. Implements Section 333 of the National Defense Authorization Act for Fiscal Year 2008.”
    - **Limitation on Service Contracts for Military Flight Simulators** (DFARS Case 2008-D013). (Final Rule) “Amends the conditions under which DoD may waive the prohibition on entering into a service contract to acquire a military flight simulator. Implements Section 883(b) of the National Defense Authorization Act for Fiscal Year 2008.”

- On September 24, 2008, DoD noticed in the Federal Register a proposed DFARS change “to update text addressing management of Government property in the possession of contractors. The DFARS changes are consistent with changes made to the FAR.” Comments are due on/before November 24, 2008.
- On September 19, 2008, John Young, Under Secretary of Defense for Acquisition, Technology and Logistics, issued a memorandum which provides in part...

“The acquisition community should strive to meet warfighting requirements. However, the acquisition team also has an obligation to spend the taxpayer's money carefully, ensuring we get maximum value for every dollar. From day one, you should constantly review the reasonableness of requirements and engage all stakeholders when a requirement is driving your program to inefficiently spend tax dollars....

“Another lesson from the tanker program is the excessive requirements for the program. There were 37 mandatory requirements, but the program also had roughly 800 tradable requirements. The Air Force rightly tried to put many requirements in the trade space in order to avoid excluding any competitor's commercial design. However, one of the GAO findings reasonably determined that the Air Force did not inform the competitors of the relative value and ranking of the tradable requirements. The technical evaluation of a proposal against requirements is truly fertile ground for protests, especially given industry's propensity for protest. The tanker program is not unique—I have recently encountered a number of programs with requirements documents that were 700 pages or more in length.

“This trend needs to stop, and this discussion really needs to start with the acquisition team. First, it is not likely that 800 requirements are really all essential to the warfighter - we need to push back on any such number and volume of requirements. Second, we need to make clear that it is not going to be possible to conduct a competition or manage a program with 800 requirements - if everything is important, then nothing is important. Finally, we actually reduce industry flexibility and increase government cost by chasing too many requirements. Secretary Gates fully recognized and considered all of these issues in his decision on how to proceed with the tanker program, noting that any future competition should not be based on 800 requirements.”

**COMMENT:** Have you read the GAO report?

- DoD is working on an Award Fee Guide and on the FAR Case implementing OFPP Administrator Denett’s memo on award fees.

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- “The Program Executive Office for Enterprise Information Systems (PEO EIS) in partnership with the Assistant Secretary of the Army for Acquisition, Logistics, and Technology (ASA(ALT)) is conducting market research (through a RFI) to identify industry capabilities involving the acquisition, processing, transfer, and storage of controlled unclassified information (CUI). CUI, as defined in Presidential Memorandum entitled ‘Designation and Sharing of Controlled Unclassified Information,’ dated May 9, 2008, is information that does not meet the standards for National Security Classification under Executive Order 12958, as amended, but is pertinent to the national interests of the United States or to the important interests of entities outside the U.S. Federal Government, and under law or policy requires protection from unauthorized disclosure, special handling safeguards, or prescribed limits on exchange or dissemination. This memorandum applies to CUI provided by either party for use under or produced under a DoD contract, cooperative agreement, grant, other transaction, or any other legal relationship.” The RFI is posted at [www.fbo.gov/spg/GSA/FTS/FEDSIM/GSC-TFMG-08-RX02/listing.html](http://www.fbo.gov/spg/GSA/FTS/FEDSIM/GSC-TFMG-08-RX02/listing.html)

This topic was also discussed at an August DoD/industry meeting. Additional background material is available at <http://www.whitehouse.gov/news/releases/2008/05/20080509-6.html>

- On August 29, 2008, the DoD Director of Defense Procurement, Acquisition Policy, and Strategic Sourcing, issued a memorandum on “Implementation and Enforcement of Requirements Applicable to Undefined Contractual Actions.” “This memorandum provides guidance on the proper use of Undefined Contractual Actions (UCA), and requests the Military Departments and Defense Agencies to submit UCA management plans within 30 days as well as submit by 31 October 2008 (and semi-annually thereafter) a consolidated report detailing all UCAs with an estimated value of more than \$5M.”

**COMMENT:** Again, DoD misses the target by not providing the requisite contract negotiation/management tools for definitization in a timely/equitable manner! See prior Updates.

- The International Procurement Committee of the ABA has planned a program on “***World Bank Activities in Procurement Reform, Capacity-building and Related Anti-corruption Efforts***” on November 16, 2008, at Miller & Chevalier, 655 Fifteenth Street, N.W., Suite 900, Washington, D.C. 20005. Reservations (and nominal fee) are required to attend in DC—**mamos@milchev.com**. Dial-in is also provided through Ready-Access Number: 1-800-504-8071 (free in North America) International Ready-Access Number: +1 3032480281. 7-Digit Access Code: 6621672

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

- **Contract Management Crisis?**

Is the current global crisis impacting contracting and your current/future obligations? Are “uncertainties” in particular industries including banking, automotive, airlines, etc. a cause of concern in the contracting community? Is it time to review your suppliers and, yes, some of your customers (including their viability)? For example, are some of them involved in those “particular industries” with potential fallout to you? Are your programs subject to potential termination for convenience (or default)?

What is your crisis management plan? Or, is it an execution issue? What is the level of due diligence required during this particular timeframe—for/to your customers, suppliers, shareholders, etc.? Are all suppliers (and customers) “responsible” contractors? And are adequate/additional assurances from suppliers requested/required—and what form should that take? Or, is it business as usual?

- A Guide that may be of assistance in forming partnerships/corporations in foreign venues is available at <http://www.salans.com/FileServer.aspx?oID=2370&IID=0>
- “Under ‘completed and accepted’ doctrine, when a contractor completes work that is accepted by the owner, the contractor is not liable to third parties injured as a result of the condition of the work, even if the contractor was negligent in performing the contract, unless the defect in the work was latent or concealed. Undisputed evidence that machine whose alleged defect caused plaintiff’s injuries had been fully installed prior to the accident, and that defendant electrical contractor did no work on the machine thereafter, was sufficient to show that work had been ‘completed,’ even though defendant maintained workers in other parts of the project area pursuant to the contract and building inspectors had not yet signed off on the work on the machines.”  
Jones v. P.S. Development Company, Inc. - filed September 3, 2008, Second District, Div. Four. Case is available at <http://www.metnews.com/sos.cgi?0908%2FB198464>

Consult with counsel if/when this holding may apply to you.

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## Future Speaking Topics Include—

- Inland Empire National Contract Management Association (NCMA) Chapter, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements."
- Institute for Supply Management (ISM) Seattle Affiliate, "Big Changes to UCC Rules on Contract Formation and Terms of the Deal are Around the Corner— Are You Ready?"
- "Solicitations, Bids, Proposals and Source Selection: Building a Winning Contract," NCMA NES, Puget Sound Chapter (registration info: [felicia.cannon@gsa.gov](mailto:felicia.cannon@gsa.gov)).
- "Contract Negotiation" workshop, NCMA Houston Chapter.
- "Baseball Arbitration," ISM Miami Affiliate.
- "ADR," NCMA South Florida Chapter.
- "Mentoring," NCMA Rio Grande Chapter, Albuquerque, New Mexico.

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