

# Federal Contracting Regulatory and Legislative Update

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## Overview

1. Current rulemaking actions of importance/interest.
2. Discussion of Federal contracting environment.
3. OFPP Mythbusting Campaign.

## Contractor Business Systems (DoD)

- Interim rule published May 18, 2011 (DFARS Case 2009-D038 )
- Comments due July 18, 2011.
- Initial proposed rule for Business Systems-- Definition and Administration (DFARS Case 2009-D038) on January 15, 2010 (75 FR 2457).
- Second proposed rule on December 3, 2010 (75 FR 75550).
- On January 7, 2011, the Ike Skelton National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2011 was signed into law (Pub. L. 111-383)
- Under the rule, contractor business systems are defined as accounting systems, estimating systems, purchasing systems, earned value management systems, material management and accounting systems, and property management systems.
- In addition, the rule includes a clause that allows COs to withhold a percentage of payments when contractor business systems have significant deficiencies.

## Contractor Business Systems (DoD)(cont.)

- The amount of any withhold has been reduced to 5% with a cap of no more than 10% when there is withholding on multiple systems.
- Changed definition of “significant deficiency,” in accordance with the 2011 DOD Authorization Act, to be “a shortcoming in the system that materially affects the ability of officials of the Department of Defense to rely upon information produced by the system that is needed for management purposes.” Therefore, there is a materiality provision previously lacking in the rule.
- The interim rule also applies only to contracts that are subject to Cost Accounting Standards, which means small businesses are exempt. The proposed rule applied to contracts over \$50 million so there are now more contracts affected.

## Contractor Business Systems (DoD)(cont.)

- The Contracting Officer must provide, in an initial written determination, a description of each significant deficiency in sufficient detail to allow a contractor to understand the problem
- Requires a CO's final determination to include a disapproval of a contractor business system and the withholding of payments if a significant deficiency exists after a CO's evaluation of the contractor's response to an initial determination of significant deficiency
- Requires a payment withholding to be reduced by at least 50 percent if a CO has not determined, within 90 days after notice of corrective action by the contractor, whether the contractor has corrected significant deficiencies or if there is a reasonable expectation that corrective actions have been implemented.

## IR&D Reporting (DoD)

- Proposed rule published on March 2, 2011 for Independent Research and Development Technical Descriptions (DFARS Case 2010-D011).
- Contractors would have to report independent research and development (IR&D) projects that cost more than \$50,000 annually under a DFARS proposed rule
- Reporting “will provide in-process information from DOD-sponsored IR&D projects to increase effectiveness by providing visibility into the technical content of industry IR&D activities to meet DOD needs and promote the technical prowess of the industry. Without the collection of this information, DOD will be unable to maximize the value of the IR&D funds the department disburses without infringing on the independence of contractors to choose which technologies to pursue in IR&D programs.”
- The costs would be reported annually and at project completion to the Defense Technical Information Center.
- The rule is opposed by industry because of the threat to contractor data rights that such reporting might create.

## DOD IG Fraud Hotline Posters

- Proposed rule published on March 11, 2011 for Display of DoD Inspector General Fraud Hotline Posters (DFARS Case 2010-D026).
- Would require Contractors to prominently display DOD Inspector General fraud hotline posters in common work areas under contracts and subcontracts worth at least \$5 million.
- Removes long-standing exemption for contractors who have an internal helpline.
- DOD IG finds that this exemption has the potential to make the DOD hotline program less effective by ultimately reducing contractor exposure to DOD IG fraud hotline posters and diminishing the means by which fraud, waste, and abuse can be reported under the protection of federal whistleblower protection laws. Some contractor's posters may not be as effective as the DOD poster in advertising the hotline number, which is integral to the fraud program.
- Comments opposing the rule were submitted by every major trade association, noting that such a requirement might cause internal control systems to be bypassed, hampering contractor efforts to take corrective action.

## Organizational Conflict of Interest

- Proposed rule published April 26, 2011 (FAR Case 2011-001).
- Comments due June 27, 2011.
- This follows the issuance of a final rule late last year that modified the DFARS on OCIs in Major Defense Acquisition Programs (MDAPs) as required by the Weapons Systems Acquisition Reform Act (WSARA).
- Motivated by changes in Government and Industry:
  - Industry consolidation;
  - Agencies' growing reliance on contractors for services, especially where the contractor is tasked with providing advice to the Government; and
  - The use of multiple-award task- and delivery-order contracts, which permit large amounts of work to be awarded among a limited pool of contractors.

## Organizational Conflict of Interest (cont.)

The proposed rule:

- Defines OCIs with regard to the two types of situations giving rise to concerns in this area: (a) harm to the integrity of the competitive acquisition process and (b) harm to the government's interest.
- Moves coverage of OCIs from FAR subpart 9.5 to a new subpart 3.1206;
- Requires agencies to examine and address organizational conflicts of interest on a case-by-case basis (i.e., no blanket policy on OCI)
- Requires the contracting officer to take action to substantially reduce or eliminate the risk if an OCI is such that it risks impairing the integrity of the competitive acquisition process

## Organizational Conflict of Interest (cont.)

- Grants the contracting officer broad discretion to select the appropriate method for addressing the conflict, **including the discretion to conclude that the Government can accept some or all of the performance risk if the only risk created by an OCI is a performance risk relating to the Government's business interests**
- States that OCIs may be addressed by means of avoidance, limitations on future contracting, mitigation, **or the Government's assessment that the risk inherent in the conflict is acceptable.**
- The proposed rule does not treat unequal access to information – one of the three commonly accepted forms of OCI – as an OCI at all. The proposed rule moves coverage of unequal access to nonpublic information and the requirement for resolving any resulting unfair competitive advantage out of the domain of OCIs and treats it separately in FAR Part 4.

## Sustainable Acquisition

- Interim rule issued May 31, 2011 (FAR Case 2010-001)
- Comments due by August 1, 2011.
- Implements Executive Order 13514 (October 5, 2009), Federal Leadership in Environmental, Energy, and Economic Performance, and Executive Order 13423, Strengthening Federal Environmental, Energy, and Transportation Management.
- 95 percent of new contract actions, including task and delivery orders, for products and services, with the exception of acquisition of weapon systems, are energy-efficient, where such products and services meet agency performance requirements.
- contractors are required, if not using electronic commerce methods, to submit paper documents to the Government on double-sided 30 percent post-consumer fiber paper, whenever practicable.

## Defense Authorization Bill 2012 H.R. 1540

- Passed by the House on May 26.
- Would modify a temporary suspension of procedures for public-private competition for federal work that President Obama ordered in a March 2009 [memorandum](#).
- SEC 803. Senior Executive Benchmark Compensation Amount For Purposes Of Allowable Cost Limitations Under Defense Contracts extended to 'any individual performing under the covered contract' for costs of compensation incurred after January 1, 2012.
- SEC. 823. Secretary of Defense may examine the records of a foreign contractor performing a contract in support of a contingency operation in Iraq or Afghanistan, does not apply to a foreign contractor that is a foreign government or agency thereof or that is precluded by applicable laws from making its records available for examination.

## 3% Withhold Rule

- Tax Increase Prevention and Reconciliation Act of 2005 requires Federal, State, and local government entities to automatically withhold income tax when making payments to persons providing property or services.
- Intended to prevent government money from going to individuals and companies with outstanding tax debts.
- Withhold 3% of all payments for products and services worth more than \$10,000, including nonconfidential or classified contracts, grants to for-profit companies, and farm and Medicare payments.
- Requirement will mean most contractors — even if they don't have any tax liability or other delinquency — will have 3 percent of every payment through the life of their contracts withheld.
- Three bills before Congress seek to repeal the withholding requirement: HR 674, introduced by Rep. Wally Herger, R-Calif.; S 89, from Sen. David Vitter, R-La.; and S 164, from Sen. Scott Brown, R-Mass.
- Suspended until January 2013.

## Insourcing/Inherently Governmental

- H.R. 1540 would modify Obama's temporary suspension of procedures for public-private competition for federal work.
- DoD Gates memo March 2011 "all insourcing will be on a case-by-case basis, after careful consideration of critical need, whether a function is inherently governmental, and benefit demonstrated by a cost-benefit analysis. Additional insourcing must be supportable within current budget levels."
- The Correction of Longstanding Errors in Agencies Unsustainable Procurements (CLEAN UP) Act (Mikulski) vs. the Freedom from Government Competition Act (Thune/Duncan).
- OFPP issued the draft definition of inherently governmental more than a year ago, and is expected to issue a final rule in the coming months. It's been almost a year since OFPP stopped accepting comments on the proposed changes to inherently governmental.

## Executive Order for Disclosure of Political Spending by Government Contractors

- Proposed executive order:
  - “Every contracting department and agency shall require all entities submitting offers for federal contracts to disclose certain political contributions and expenditures that they have made within two years prior to submission of their offer.”
- Required when aggregate amount of all contributions by company, officers, directors, and affiliates exceeds \$5,000 to a given recipient in a given year.

## Executive Order for Disclosure of Political Spending by Government Contractors (cont.)

- All data will be published on data.gov.
- Minimize the cost to contractors and not interfere with their ability to engage in political activities to the extent permitted by law.
- Becomes effective for all solicitations once the FAR Council adopts rules and regulations to implement the order, due by the end of 2011.

## Executive Order for Disclosure of Political Spending by Government Contractors (cont.)

- Addressing the perception that political campaign spending provides enhanced access to or favoritism in the contracting process.
- Cited as best practice: states adopted “pay-to-play” laws that limit contributions from the company, but also the officers and affiliates of the company.
- Intention is to provide transparency.

## Executive Order for Disclosure of Political Spending by Government Contractors (cont.)

- HUGE opposition from industry, the Congress.
- Introduces politics into the procurement system.
- Contracting officer will not do anything with the data. Will not affect source selection process.
- Reporting requirements for political contributions already exist.
- Imposes an undue burden for reporting by federal contractors that would not apply to other individuals or organizations.
- House Committee on Oversight and Government Reform hearing on 5-12-2011 "Politicizing Procurement: Would President Obama's Proposal Curb Free Speech and Hurt Small Business?"

<http://oversight.house.gov/>

## Defense Procurement Policy

- Better Buying Initiative: Dr. Carter “do more without more.”
  - Targeting affordability and controlling cost growth, providing incentives for defense industry productivity and innovation, promoting competition, improving the acquisition of services, and reducing bureaucracy.
- Shay Assad assigned as director, defense pricing, Office of the Under Secretary of Defense (Acquisition, Technology and Logistics).
  - Dick Ginman named director, defense procurement and acquisition policy (DPAP) (was the deputy).
  - This is a new position, reflecting DoD focus on contract pricing, should-cost analyses.

## Commission on Wartime Contracting

- Since its creation in 2008, the independent, bipartisan Commission has conducted 24 formal hearings, participated in more than 1,000 meetings, and made repeated fact-finding trips to theater.
  - The Commission has published two interim reports and four special reports to Congress. A final report to Congress will be issued at the end of July 2011.
1. Transition of Iraq responsibilities from DoD to State.
  2. Overreliance on contractors during contingency operations.
  3. DoD must improve oversight of contractor business systems.

## Federal procurement budget

- Competition is becoming fiercer because many segments of the federal budgets are flat or shrinking.
- Customers are pushing for solutions to help them become more efficient.
- The leading companies are reshaping themselves to lower costs and emphasizing their capabilities in areas where there is growth.
- The increasing intensity of competition is being driven by the government's overall flat budget and the prospect of cuts in the near future. But the shrinkage is not across the board. While reductions are happening in some areas, other areas such as cybersecurity, homeland security, energy, command and control systems, and health care IT are growing.

*From "leading contractors responding to a tough market?" found at [Washingtontechnology.com](http://Washingtontechnology.com) on May 31.*

## Myth-Busting Campaign

- OFPP Memo February 2, 2011: Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process
- Identify common misconceptions about vendor engagement that may be unnecessarily hindering agencies' appropriate use of the existing flexibilities, and provide facts and strategies to help acquisition professionals benefit from industry's knowledge and insight;
- Direct agencies to remove unnecessary barriers to reasonable communication and develop vendor communications plans, consistent with existing law and regulation, that promote responsible and constructive exchanges; and
- Outline steps for continued engagement with agencies and industry to increase awareness and education.

## Myth-Busting Campaign (cont.)

- Misconception 1 – “We can’t meet one-on-one with a potential offeror.”
- Fact – Government officials can generally meet one-on-one with potential offerors as long as no vendor receives preferential treatment.

## Myth-Busting Campaign (cont.)

- Misconception 2 – “Since communication with contractors is like communication with registered lobbyists, and since contact with lobbyists must be disclosed, additional communication with contractors will involve a substantial additional disclosure burden, so we should avoid these meetings.”
- Fact – Disclosure is required only in certain circumstances, such as for meetings with registered lobbyists. Many contractors do not fall into this category, and even when disclosure is required, it is normally a minimal burden that should not prevent a useful meeting from taking place.

## Myth-Busting Campaign (cont.)

- Misconception 3 – “A protest is something to be avoided at all costs - even if it means the government limits conversations with industry.”
- Fact – Restricting communication won't prevent a protest, and limiting communication might actually increase the chance of a protest – in addition to depriving the government of potentially useful information.

## Myth-Busting Campaign (cont.)

- Misconception 4 – “Conducting discussions/negotiations after receipt of proposals will add too much time to the schedule.”
- Fact –Whether discussions should be conducted is a key decision for contracting officers to make. Avoiding discussions solely because of schedule concerns may be counter-productive, and may cause delays and other problems during contract performance.

## Myth-Busting Campaign (cont.)

- Misconception 5 – “If the government meets with vendors, that may cause them to submit an unsolicited proposal and that will delay the procurement process.”
- Fact – Submission of an unsolicited proposal should not affect the schedule. Generally, the unsolicited proposal process is separate from the process for a known agency requirement that can be acquired using competitive methods.

## Myth-Busting Campaign (cont.)

- Misconception 6 – “When the government awards a task or delivery order using the Federal Supply Schedules, debriefing the offerors isn’t required so it shouldn’t be done.”
- Fact – Providing feedback is important, both for offerors and the government, so agencies should generally provide feedback whenever possible.

## Myth-Busting Campaign (cont.)

- Misconception 7 – “Industry days and similar events attended by multiple vendors are of low value to industry and the government because industry won’t provide useful information in front of competitors, and the government doesn’t release new information.”
- Fact – Well-organized industry days, as well as pre-solicitation and pre-proposal conferences, are valuable opportunities for the government and for potential vendors – both prime contractors and subcontractors, many of whom are small businesses.

## Myth-Busting Campaign (cont.)

- Misconception 8 – “The program manager already talked to industry to develop the technical requirements, so the contracting officer doesn’t need to do anything else before issuing the RFP.”
- Fact – The technical requirements are only part of the acquisition; getting feedback on terms and conditions, pricing structure, performance metrics, evaluation criteria, and contract administration matters will improve the award and implementation process.

## Myth-Busting Campaign (cont.)

- Misconception 9 – “Giving industry only a few days to respond to an RFP is OK since the government has been talking to industry about this procurement for over a year.”
- Fact – Providing only short response times may result in the government receiving fewer proposals and the ones received may not be as well-developed - which can lead to a flawed contract. This approach signals that the government isn't really interested in competition.

## Myth-Busting Campaign (cont.)

- Misconception 10 – “Getting broad participation by many different vendors is too difficult; we’re better off dealing with the established companies we know.”
- Fact – The government loses when we limit ourselves to the companies we already work with. Instead, we need to look for opportunities to increase competition and ensure that all vendors, including small businesses, get fair consideration.