

# BRIEFING PAPERS<sup>®</sup> SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

## Deviations From The FAR: Policy And Practice

By Donald E. Mansfield\*

Despite popular criticism for constraining the acquisition system, the Federal Acquisition Regulation (FAR) provides flexibility for agencies looking to innovate. Specifically, FAR 1.402 authorizes agencies to deviate from FAR requirements to meet the specific needs and requirements of the agency.<sup>1</sup> Additionally, the section advises that “the development and testing of new techniques and methods should not be stifled simply because such action would require a FAR deviation. The fact that deviation authority is required should not, of itself, deter agencies in their development and testing of new techniques and acquisition methods.”<sup>2</sup>

In practice, agencies seem to be innovating without the use of deviation authority. None of the “Acquisition Techniques” contained in the Federal Acquisition Institute’s Periodic Table of Acquisition Innovations would require deviations from FAR requirements.<sup>3</sup> Notably, the Table contains information for “Alternative Authorities” such as “Other Transactions,” but no mention of using deviation authority to innovate. Presumably, it is easier to avoid the FAR than to deviate from it. Instead of being a tool for innovation, agencies have opted to use deviation authority to jump-start the rulemaking process for acquisition regulations.

This BRIEFING PAPER examines the policy and practice of agencies’ use of deviations from the FAR. It discusses the FAR’s coverage of deviations, the legal effect of unauthorized deviations, deviations requiring public notice and comment, and the exercise of deviation authority in practice and concludes with a set of practical guidelines.

### FAR Coverage Of Deviations

#### “Deviation” Defined

FAR subpart 1.4 prescribes the policies and procedures for authorizing deviations from the FAR.<sup>4</sup> FAR 1.401 contains the following definition:

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*Deviation* means any one or combination of the following:

(a) The issuance or use of a policy, procedure, solicitation provision (see definition in [FAR] 2.101), contract clause (see definition in [FAR] 2.101), method, or practice of conducting acquisition actions of any kind at any stage of the acquisition process that is inconsistent with the FAR.

(b) The omission of any solicitation provision or contract clause when its prescription requires its use.

(c) The use of any solicitation provision or contract clause with modified or alternate language that is not authorized by the FAR (see definition of “modification” in [FAR] 52.101(a) and definition of “alternate” in [FAR] 2.101(a)).

(d) The use of a solicitation provision or contract clause prescribed by the FAR on a “substantially as follows” or “substantially the same as” basis (see definitions in [FAR] 2.101 and [FAR] 52.101(a)), if such use is inconsistent with the intent, principle, or substance of the prescription or related coverage on the subject matter in the FAR.

(e) The authorization of lesser or greater limitations on the use of any solicitation provision, contract clause, policy, or procedure prescribed by the FAR.

(f) The issuance of policies or procedures that govern the contracting process or otherwise control contracting relationships that are not incorporated into agency acquisition regulations in accordance with [FAR] 1.301(a).

Paragraphs (a) through (e) of the definition are straightforward—the action described contravenes one or more express FAR requirements. The action described in paragraph (f) is not as clear. FAR 1.301(a)(1) provides the following authority to agency heads:

(a)(1) Subject to the authorities in paragraph (c) of this section and other statutory authority, an agency head may issue or authorize the issuance of agency acquisition regulations that implement or supplement the FAR and incorporate, together with the FAR, agency policies, procedures, contract clauses, solicitation provisions, and forms *that govern the contracting process or otherwise control the relationship between the agency, including any of its suborganizations, and contractors or prospective contractors.* [Emphasis added]

Given the similarity in language between FAR 1.301(a)(1) and FAR 1.401(f), it seems that the latter is referring to policies and procedures that are not incorporated into agency acquisition regulations *but should be*. However, the Government Accountability Office (GAO) has twice stated that the inclusion of agency-created contract clauses that prescribe terms in areas not addressed in the FAR are not deviations.<sup>5</sup> In both cases, the clauses in question were not incorporated into the agency acquisition regulation and, presumably, controlled the relationship between the agency and the contractor. Neither case analyzed the language of FAR 1.401(f), so it is difficult to draw any conclusions.

### Types Of Deviations

FAR subpart 1.4 describes two types of deviations—individual and class. Individual deviations affect only one contract action.<sup>6</sup> Class deviations affect more than one contract action.<sup>7</sup> The FAR advises agencies to propose a FAR revision if they expect to require a class deviation on a permanent basis.<sup>8</sup> The U.S. Court of Federal Claims has held that a class deviation would be required for an acquisition that would result in multiple contract awards, since each contract award is viewed as a separate “contract action.”<sup>9</sup> In the case of single award indefinite-delivery contracts, it’s unclear whether a class deviation would be required to cover both the initial award and the subsequent orders. In holding that multiple awards were separate contract actions, the court mistakenly relied, in part, on a definition of “contract action” that does not apply outside of FAR part 5 (Publicizing Contract Actions). (The FAR does not contain a definition of “contract action” that applies to FAR subpart 1.4.)<sup>10</sup> Under this definition, orders within the scope of an indefinite-delivery contract that was properly synopsisized would not be “contract actions.”<sup>11</sup> However, there are other definitions of “contract action” in the FAR—also inapplicable to FAR subpart 1.4—that would include orders under indefinite-delivery contracts.<sup>12</sup> The Department of the Navy considers

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deviations involving basic agreements, basic ordering agreements, and master agreements class deviations.<sup>13</sup>

### Approval Of Deviations

Agency heads may authorize individual deviations.<sup>14</sup> This authority is delegable.<sup>15</sup> The procedures for approval of class deviations differ for civilian agencies other than the National Aeronautics and Space Administration (NASA), the Department of Defense (DoD), and NASA.

For civilian agencies other than NASA, agency heads or their designees may authorize class deviations.<sup>16</sup> Agency heads may not delegate this authority below the head of the contracting activity.<sup>17</sup> The agency official who will authorize a class deviation must first consult with the chairperson of the Civilian Agency Acquisition Council (CAAC), unless the agency official determines that consultation is impractical due to urgency.<sup>18</sup> In practice, the CAAC Chairperson will proactively issue letters to civilian agencies that serve as the required consultation for class deviations.<sup>19</sup> Civilian agencies may then issue class deviations if they choose to. These CAAC Letters and responses by civilian agencies that chose to issue class deviations are published on Acquisition.gov.<sup>20</sup>

The Principal Director of Defense Pricing and Contracting (DPC), Office of the Under Secretary of Defense for Acquisition and Sustainment, is the approval authority within DoD for any individual or class deviation from—

- FAR 3.104 (Procurement Integrity)
- FAR subpart 27.4 (Rights in Data and Copyrights)
- FAR part 30 (Cost Accounting Standards Administration)
- FAR subpart 31.1 (Applicability) of FAR part 31 (Contract Cost Principles and Procedures)
- FAR subpart 31.2 (Contracts With Commercial Organizations)
- FAR part 32 (Contract Financing) (except for FAR subparts 32.7 (Contract Funding) and 32.8 (Assignment of Claims) and the payment clauses prescribed by FAR subpart 32.1)<sup>21</sup>

The senior procurement executives for the Army, Navy, and Air Force, and the Directors of the Defense Commissary Agency, the Defense Contract Management Agency, and the Defense Logistics Agency, may approve any other class deviation, provided it does not—

- Have a significant effect beyond the internal operating procedures of the department or agency;
- Have a significant cost or administrative impact on contractors or offerors;
- Diminish any preference given small business concerns by the FAR or Defense FAR Supplement (DFARS); or
- Extend to requirements imposed by statute or by regulations of other agencies such as the Small Business Administration or the Department of Labor.<sup>22</sup>

The first two bullets are triggers for statutory notice-and-comment requirements.<sup>23</sup> Presumably, these limitations are in place to ensure that the military departments and listed defense agencies comply with those requirements.

The Assistant Administrator for Procurement is responsible for controlling and approving class deviations for NASA.<sup>24</sup> The NASA FAR Supplement (NFS) does not contain procedures for processing deviations.

The courts have held that a deviation from the precise wording of a prescribed clause without obtaining requisite approval exceeded the contracting officer's authority.<sup>25</sup> However, the Armed Services Board of Contract Appeals (ASBCA) found that deviation approval was not required when, in negotiating a contract modification, a contracting officer bargained for board of contract appeals jurisdiction over a claim specifically excluded from jurisdiction by a mandatory contract clause.<sup>26</sup> The ASBCA reasoned that the government received consideration for the modification and that the "granting of such a waiver was well within the ambit of the contracting officer's authority to administer the contract."<sup>27</sup>

### Special Cases—Deviations From Cost Accounting Standards And Deviations Pertaining To Treaties And Executive Agreements

The FAR does not authorize deviations from the prescriptions at FAR 30.201-3 and 30.201-4 for the provisions and clauses implementing the Cost Accounting Standards (CAS) Program or the requirements of the CAS Board rules and regulations (48 C.F.R. Chapter 99).<sup>28</sup> However, FAR 30.201-5 contains instructions concerning waivers pertaining to the CAS.

The FAR authorizes any deviation that is required to comply with a U.S. treaty, unless the deviation would be inconsistent with FAR coverage based on a law enacted after execution of the treaty.<sup>29</sup> Similarly, the FAR authorizes any

deviation that is required to comply with an “executive agreement” (defined as “Government-to-Government agreements, including agreements with international organizations, to which the United States is a party”),<sup>30</sup> unless the deviation would be inconsistent with FAR coverage based on law (regardless of when the law was enacted).<sup>31</sup>

### Identification Of Authorized Deviations In Provisions And Clauses

Like other FAR provisions and clauses, the contracting officer must identify deviations in provisions and clauses by number, title, and date.<sup>32</sup> In addition, the contracting officer must also insert “(DEVIATION)” after the date and insert in solicitations and contracts the provision at FAR 52.252-5, “Authorized Deviations in Provisions,” and the clause at FAR 52.252-6, “Authorized Deviations in Clauses,” as applicable.<sup>33</sup> Both the provision and clause advise offerors and contractors that the addition of “(DEVIATION)” after the date of the provision or clause indicates that the contracting officer is using the provision or clause with an authorized deviation.<sup>34</sup> Unless the deviation were published, there would probably be no other way for an offeror or contractor to know that the deviation was authorized without obtaining records from the agency.

### Legal Effect Of Unauthorized Deviations

The U.S. Court of Appeals for the Federal Circuit held that an unauthorized deviation from a mandatory FAR clause was void and unenforceable.<sup>35</sup> In *Johnson Management Group CFC, Inc. v. Martinez*,<sup>36</sup> the contracting officer modified the contract to include the clause at FAR 52.232-12, “Advance Payments,” with Alternates II and IV. The contracting officer also included a special provision that considered advance payments liquidated upon submission of invoices. The court found the special provision to be “squarely contrary to the FAR’s Advance Payments clause,” which treats each advance payment as a loan that must be repaid, either directly or through contract performance.<sup>37</sup> By allowing the contractor to satisfy its indebtedness by simply purchasing equipment the special clause would effectively turn what was a loan into a gift in the case of contractor default.<sup>38</sup>

The invalidation of a clause because of the lack of an approved deviation could also work in the contractor’s favor. In *Revere Electric Supply Co.*,<sup>39</sup> the contracting officer included a special clause that authorized the Government 20% retainage of contract payments for accepted supplies pending successful installation and testing by the Government. The board found this clause to be a deviation from the clause at FAR

52.232-1, “Payments,” which provided for payment of the contract price for accepted supplies. Since the contracting officer did not obtain the required approval for the deviation, the board found the special clause unauthorized and unenforceable.<sup>40</sup>

If a class deviation is required, actions under approved individual deviations may be unauthorized and invalid.<sup>41</sup> In *Sunoco, Inc. v. United States*,<sup>42</sup> the contracting officer obtained approval for three individual deviations to use a special economic price adjustment (EPA) clause, issued three solicitations, and awarded five contracts. The court found the deviations unauthorized and the EPA clause unenforceable. Several cases have followed this reasoning.<sup>43</sup>

### Deviations Requiring Public Notice And Comment

#### Statutory Requirements

Although the FAR does not specifically cover publication requirements for deviations, the authority to deviate from the FAR does not exempt agencies from complying with statutory notice-and-comment requirements applicable to acquisition regulations. These requirements are codified at 41 U.S.C.A. § 1707, “Publication of proposed regulations” (the “publication statute”) as follows:

(a) COVERED POLICIES, REGULATIONS, PROCEDURES, AND FORMS.—

(1) REQUIRED COMMENT PERIOD.—Except as provided in subsection (d), a procurement policy, regulation, procedure, or form (including an amendment or modification thereto) may not take effect until 60 days after it is published for public comment in the Federal Register pursuant to subsection (b) if it—

(A) relates to the expenditure of appropriated funds; and

(B)(i) has a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form; or

(ii) has a significant cost or administrative impact on contractors or offerors.

These requirements are more applicable to class deviations, as it would be unusual for an individual deviation to meet the conditions for mandatory publication. DoD codifies permanent class deviations in the DFARS.<sup>44</sup>

#### Nonconforming Economic Price Adjustment (EPA) Clauses

Much of the case law regarding the requirement to publish class deviations stems from the use of EPA clauses in fuel

contracts awarded by the Defense Energy Supply Center (DESC) in the 1990s.<sup>45</sup> In 1992, the Court of Federal Claims held that the EPA clause used by DESC deviated from the FAR because the basis of the price adjustment was reported market prices.<sup>46</sup> The court generally followed this reasoning in subsequent cases.<sup>47</sup> In October 1995, DESC issued a class deviation authorizing the use of these price-based EPA clauses. At the time, contractors challenged the validity of the class deviation on the grounds that DESC did not publish the clause for comment in the *Federal Register*. Regardless, DESC awarded contracts with the EPA clause and the contractors performed them.

The EPA clauses ended up costing the contractors and a flood of litigation followed.<sup>48</sup> In *La Gloria Oil & Gas Co. v. United States*<sup>49</sup> and *Tesoro Hawaii Corp. v. United States*,<sup>50</sup> the court agreed with the contractors regarding the requirement for publication in the *Federal Register*. The court summarized its reasoning in *Tesoro* as follows:

Nothing in the FAR specifically addresses publication requirements for class deviations. However, as pointed out by the court in *La Gloria*, the FAR does require that “for significant revisions” to FAR provisions, “the opportunity to submit written comments on the proposed significant revisions shall be provided by placing notice in the Federal Register.” *La Gloria*, 56 Fed. Cl. at 220 (citing FAR §§ 1.505-1, 1.502-2). Under subpart 1.5 of the FAR, a revision is only considered “significant” if it “alters the substantive meaning of any coverage in the FAR System having significant cost or administrative impact on contractors [or having] . . . a significant effect beyond the internal operating procedures of the issuing agency.” FAR § 1.505-1.<sup>51</sup>

The court then analyzed the publication statute and noted that, despite not specifically addressing class deviations, class deviations could arguably be placed in each category listed (i.e., “Procurement policy, regulation, procedure, or form”). The court stated that a class deviation was “surely a ‘regulation,’ that is, a plan to deviate immediately from FAR 16.203 [“Fixed-Price Contracts with Economic Price Adjustment”], as well as a change in ‘form,’ that is, the approval of the immediate use of the non-standard EPA clause.”<sup>52</sup> Ultimately, the court ruled that failure to provide the required notice made the deviation invalid and the EPA clause unenforceable.<sup>53</sup>

In these cases, the Government unsuccessfully argued that the contractors waived their rights by fully performing these contracts when they knew or should have known that the EPA clauses were invalid. In *Tesoro*, the court explained:

It is well settled that “if government officials make a contract they are not authorized to make, in violation of a law enacted for the contractor’s protection, the contractor is not bound by estoppel, acquiescence, or failure to protest.”<sup>54</sup>

Relying on Federal Circuit precedent,<sup>55</sup> the court found that a contractor had not waived its claim that an EPA clause was nonconforming despite entering into 37 contracts with the clause from 1983 to 1999.<sup>56</sup> The court also rejected the waiver defense in *Gold Line Refining, Ltd. v. United States*<sup>57</sup> and *Phoenix Petroleum Co. v. United States*.<sup>58</sup> In *Hermes Consolidated, Inc. v. United States*,<sup>59</sup> the Government successfully argued the waiver defense in a lawsuit filed in 2002 for nine contracts performed from 1988 to 1994. In that case, the court found the contractor’s conduct in waiting 14 years to file suit more egregious than the Government’s conduct in using an unauthorized clause.<sup>60</sup>

## Deviation Authority In Practice

Although the policy for deviations at FAR 1.402 explains that the need for approval of a deviation should not stifle innovation, it likely does just that. If the absence of deviation authority on the Periodic Table of Acquisition Innovations is any indication,<sup>61</sup> using alternative authorities (i.e., other transactions, prize competitions) to innovate is more popular than obtaining a deviation from the FAR. That is not to say that deviation authority has not found a place in acquisition. In practice, deviation authority has become a default method to implement new acquisition rules on an interim basis while the rulemaking process works itself out.

### Lifecycle Of A Class Deviation

Agencies typically issue class deviations that have agency-wide applicability as internal memoranda.<sup>62</sup> For DoD, these memoranda typically conclude with a statement that “this class deviation remains in effect until incorporated in the FAR [or DFARS] or until otherwise rescinded.” In most cases, the FAR Councils or the agency will open a case to implement the policy contained in the class deviation in Title 48 of the Code of Federal Regulations (C.F.R.). In other cases, the memorandum remains on the list of active class deviations and collects dust until it is rescinded. As of this writing, there is an active class deviation listed on the Defense Pricing and Contracting Web site that was issued on October 8, 2010.<sup>63</sup>

Eventually, either the FAR Councils or the agency will issue a proposed or interim rule in the *Federal Register*, request public comment, then issue a final rule amending Title 48 of the C.F.R. If the policy contained in the deviation becomes part of the FAR, it is no longer a deviation. If the policy becomes part of the agency supplement, then it will supersede the memorandum. In either case, the agency rescinds the memorandum if it has not already expired.

## A Pragmatic Solution?

The preceding description of a class deviation's lifecycle might raise the question—is that how things are supposed to work? Probably not. The publication statute, 41 U.S.C.A. § 1707, contains provisions for urgent circumstances as follows:

(2) EXCEPTION.—A policy, regulation, procedure, or form may take effect earlier than 60 days after the publication date when there are compelling circumstances for the earlier effective date, but the effective date may not be less than 30 days after the publication date.<sup>64</sup>

The statute also provides for waiver authority in cases of urgency, but contains some conditions regarding effectiveness of the “policy, regulation, procedure, or form”:

(d) WAIVER.—The requirements of subsections (a) and (b) may be waived by the officer authorized to issue a procurement policy, regulation, procedure, or form if urgent and compelling circumstances make compliance with the requirements impracticable.

(e) EFFECTIVENESS OF POLICY, REGULATION, PROCEDURE, OR FORM.—

(1) TEMPORARY BASIS.—A procurement policy, regulation, procedure, or form for which the requirements of subsections (a) and (b) are waived under subsection (d) is effective on a temporary basis if—

(A) a notice of the policy, regulation, procedure, or form is published in the Federal Register and includes a statement that the policy, regulation, procedure, or form is temporary; and

(B) provision is made for a public comment period of 30 days beginning on the date on which the notice is published.

(2) FINAL POLICY, REGULATION, PROCEDURE, OR FORM.—After considering the comments received, the head of the agency waiving the requirements of subsections (a) and (b) under subsection (d) may issue the final procurement policy, regulation, procedure, or form.<sup>65</sup>

If an agency needed to implement a policy that would deviate from the FAR, but could not wait for the rulemaking process, they could waive the 60- or 30-day waiting period and issue an interim rule in the *Federal Register*. This would make the policy effective on the date of publication. So why issue the class deviation as an internal memorandum? Why not give the policy immediate legal effect by publishing the notice in the *Federal Register*?

Most likely, agencies are choosing expediency over formal compliance. If the class deviation is implementing a statute or regulation contained in a different C.F.R. title, the legal effect of the internal memorandum may not be an issue. In other cases, the legal effect of an internal memorandum before pub-

lication of a rule in the *Federal Register* is questionable. For example, DoD was roundly criticized for eliminating, by internal memorandum, the statutory “adequate price competition” exception to the requirement for submission of certified cost or pricing data when only one proposal is received.<sup>66</sup> Although the memorandum was not styled as a class deviation, it was as much a class deviation as any other issued by DoD. The Defense Acquisition Regulation (DAR) Council eventually implemented this policy,<sup>67</sup> but it was an unpublished class deviation with arguably no legal effect until it appeared in Title 48 of the C.F.R. over 19 months later.<sup>68</sup>

## Guidelines

These *Guidelines* are intended to assist you in understanding FAR deviations. They are not, however, a substitute for professional representation in any specific situation.

1. The FAR accommodates an agency's need to innovate and test new acquisition methods by permitting deviations. However, current practice seems to favor the use of alternative authorities instead of seeking deviation authority.

2. The definition of “deviation” in FAR 1.401 is broader than merely “inconsistent with the FAR.” It also encompasses an agency's issuance of policies or procedures that “govern the contracting process or otherwise control or otherwise control contracting relationships that are not incorporated into agency acquisition regulations in accordance with [FAR] 1.301(a).”

3. There are two types of deviations—individual and class. Individual deviations affect one contract action. Class deviations affect more than one contract action. An acquisition deviating from the FAR that would result in the award of more than one contract (i.e., multiple award contracts) would require a class deviation. If approval of a class deviation was required, actions under individual deviations will not be authorized.

4. Agency heads may approve individual deviations. They may delegate this authority. Approval authority for class deviations differs for civilian agencies other than NASA, DoD, and NASA. For civilian agencies other than NASA, the agency head must coordinate with the Chairperson of the CAAC. For DoD, delegations of authority and procedures for approving deviations are in the DFARS. NASA has not published procedures for approving class deviations.

5. Agency heads may not deviate from CAS Program requirements but may seek waivers in accordance with CAS regulations.

6. Contracting officers must identify authorized deviations in provisions and clauses by adding “(DEVIATION)” after the date. They must also insert in solicitations and contracts the provision at FAR 52.252-5, “Authorized Deviations in Provisions,” and the clause at FAR 52.252-6, “Authorized Deviations in Clauses,” as applicable. The provision and clause communicate to offerors and contractors that the deviation is authorized.

7. The courts and boards have generally found unauthorized deviations from mandatory FAR clauses void and unenforceable.

8. To have legal effect, class deviations must be published in the *Federal Register* for public comment if they meet the conditions stated in 41 U.S.C.A. § 1707. In practice, agencies tend to ignore this requirement and issue notices of class deviations—typically stated as having immediate effect—using internal memoranda. This is often a temporary measure until a proposed or interim rule can be published in the *Federal Register*. The legal status of such class deviations before publication in the *Federal Register* is uncertain.

## ENDNOTES:

<sup>1</sup> FAR 1.402.

<sup>2</sup> FAR 1.402.

<sup>3</sup> <https://www.fai.gov/periodic-table>.

<sup>4</sup> FAR 1.400.

<sup>5</sup> Engineered Air Sys. Inc., Comp. Gen. Dec. B-236932, 90-1 CPD ¶ 75; Tracor Jitco, Inc., Comp. Gen. Dec. B-220139, 85-2 CPD ¶ 710.

<sup>6</sup> FAR 1.403.

<sup>7</sup> FAR 1.404.

<sup>8</sup> FAR 1.404.

<sup>9</sup> La Gloria Oil & Gas Co. v. United States, 56 Fed. Cl. 211 (2003), abrogated by Tesoro Haw. Corp. v. United States, 405 F.3d 1339 (Fed. Cir. 2005); Tesoro Haw. Corp. v. United States, 58 Fed. Cl. 65 (2003), rev’d on other grounds, 405 F.3d 1339 (Fed. Cir. 2005).

<sup>10</sup> FAR 5.001 (“Contract action, *as used in this part*, means. . . .”) (emphasis added).

<sup>11</sup> FAR 5.001.

<sup>12</sup> FAR 4.601 (“*As used in this subpart*—Contract action means. . . .”) (emphasis added).

<sup>13</sup> Navy Marine Corps Acquisition Regulation Supplement (NMCARS) 5201.404.

<sup>14</sup> FAR 1.403.

<sup>15</sup> FAR 1.108(b).

<sup>16</sup> FAR 1.404(a).

<sup>17</sup> FAR 1.404(a).

<sup>18</sup> FAR 1.404(a)(1).

<sup>19</sup> <https://www.acquisition.gov/content/caac-letters>.

<sup>20</sup> <https://www.acquisition.gov/content/caac-letters>.

<sup>21</sup> DFARS 201.402(1).

<sup>22</sup> DFARS 201.404(b).

<sup>23</sup> 41 U.S.C.A. § 1707(a)(1).

<sup>24</sup> FAR 1.404(c).

<sup>25</sup> Johnson Mgmt. Group CFC, Inc. v. Martinez, 308 F.3d 1245 (Fed. Cir. 2002); McDonnell Douglas Corp. v. United States, 229 Ct. Cl. 323, 670 F.2d 156 (1982).

<sup>26</sup> Whittaker Corp., ASBCA 18422, 81-1 BCA ¶ 15,055.

<sup>27</sup> Whittaker Corp., ASBCA 18422, 81-1 BCA ¶ 15,055.

<sup>28</sup> FAR 1.402.

<sup>29</sup> FAR 1.405(b).

<sup>30</sup> FAR 1.405(a).

<sup>31</sup> FAR 1.405(c).

<sup>32</sup> FAR 52.103(a).

<sup>33</sup> FAR 52.103(a).

<sup>34</sup> FAR 52.103(a).

<sup>35</sup> Johnson Mgmt. Group CFC, Inc. v. Martinez, 308 F.3d 1245 (Fed. Cir. 2002).

<sup>36</sup> Johnson Mgmt. Group CFC, Inc. v. Martinez, 308 F.3d 1245 (Fed. Cir. 2002).

<sup>37</sup> Johnson Mgmt. Group CFC, Inc. v. Martinez, 308 F.3d 1245, 1256 (Fed. Cir. 2002).

<sup>38</sup> Johnson Mgmt. Group CFC, Inc. v. Martinez, 308 F.3d 1245, 1256 (Fed. Cir. 2002).

<sup>39</sup> Revere Elec. Supply Co., ASBCA No. 46413, 95-1 BCA ¶ 27,385.

<sup>40</sup> Revere Elec. Supply Co., ASBCA No. 46413, 95-1 BCA ¶ 27,385.

<sup>41</sup> Sunoco, Inc. v. United States, 59 Fed. Cl. 390 (2004), abrogated by Tesoro Haw. Corp. v. United States, 405 F.3d 1339 (Fed. Cir. 2005).

<sup>42</sup> Sunoco, Inc. v. United States, 59 Fed. Cl. 390 (2004), abrogated by Tesoro Haw. Corp. v. United States, 405 F.3d 1339 (Fed. Cir. 2005).

<sup>43</sup> E.g., Calcasieu Refin. Co. v. United States, No. 02-1219C, 2003 WL 22049528 (Fed. Cl. July 31, 2003).

<sup>44</sup> DFARS 201.301(a)(1)(iv) (“The DFARS contains . . . [d]eviations from FAR requirements[.]”).

<sup>45</sup> See “Nonconforming Economic Price Adjustment Clauses: Myriad Issues,” 18 No. 1 Nash & Cibinic Rep. ¶ 4 (Jan. 2004).

<sup>46</sup> Mapco Alaska Petroleum, Inc. v. United States, 27 Fed. Cl. 405 (1992), abrogated by Tesoro Haw. Corp. v. United States, 405 F.3d 1339 (Fed. Cir. 2005).

<sup>47</sup> Gold Line Refin., Ltd. v. United States, 54 Fed. Cl. 285 (2002), abrogated by Tesoro Haw. Corp. v. United States, 405 F.3d 1339 (Fed. Cir. 2005); La Gloria Oil & Gas Co. v. United

States, 56 Fed. Cl. 211 (2003), abrogated by *Tesoro Haw. Corp. v. United States*, 405 F.3d 1339 (Fed. Cir. 2005). The opposite result was reached in *Williams Alaska Petroleum, Inc. v. United States*, 57 Fed. Cl. 789 (2003).

<sup>48</sup>*Gold Line Ref., Ltd. v. United States*, 54 Fed. Cl. 285 (2002), abrogated by *Tesoro Haw. Corp. v. United States*, 405 F.3d 1339 (Fed. Cir. 2005); *La Gloria Oil & Gas Co. v. United States*, 56 Fed. Cl. 211 (2003) abrogated by *Tesoro Haw. Corp. v. United States*, 405 F.3d 1339 (Fed. Cir. 2005); *Williams Alaska Petroleum, Inc. v. United States*, 57 Fed. Cl. 789 (2003); *Tesoro Haw. Corp. v. United States*, 58 Fed. Cl. 65 (2003), rev'd on other grounds, 405 F.3d 1339 (Fed. Cir. 2005); *Phoenix Petroleum Co. v. United States*, No. 97-315C (Fed. Cl. Apr. 30, 2003); *Hermes Consol., Inc. v. United States*, 58 Fed. Cl. 409 (2003), rev'd sub nom. *Tesoro Haw. Corp. v. United States*, 405 F.3d 1339 (Fed. Cir. 2005).

<sup>49</sup>*La Gloria Oil & Gas Co. v. United States*, 56 Fed. Cl. 211 (2003), abrogated by *Tesoro Haw. Corp. v. United States*, 405 F.3d 1339 (Fed. Cir. 2005).

<sup>50</sup>*Tesoro Haw. Corp. v. United States*, 58 Fed. Cl. 65 (2003), rev'd on other grounds, 405 F.3d 1339 (Fed. Cir. 2005).

<sup>51</sup> *Tesoro Haw. Corp. v. United States*, 58 Fed. Cl. 65, 71 (2003), rev'd on other grounds, 405 F.3d 1339 (Fed. Cir. 2005).

<sup>52</sup>*Tesoro Haw. Corp. v. United States*, 58 Fed. Cl. 65, 71 (2003), rev'd on other grounds, 405 F.3d 1339 (Fed. Cir. 2005).

<sup>53</sup>*Tesoro Haw. Corp. v. United States*, 58 Fed. Cl. 65, 72 (2003), rev'd on other grounds, 405 F.3d 1339 (Fed. Cir. 2005).

<sup>54</sup> *Tesoro Haw. Corp. v. United States*, 58 Fed. Cl. 65, 72 (2003), rev'd on other grounds, 405 F.3d 1339 (Fed. Cir. 2005).

<sup>55</sup>*Beta Sys. Inc. v. United States*, 838 F.2d 1179 (Fed. Cir. 1988).

<sup>56</sup>*Tesoro Haw. Corp. v. United States*, 58 Fed. Cl. 65,

72-75 (2003), rev'd on other grounds, 405 F.3d 1339 (Fed. Cir. 2005).

<sup>57</sup>*Gold Line Ref., Ltd. v. United States*, 54 Fed. Cl. 285 (2002), abrogated by *Tesoro Haw. Corp. v. United States*, 405 F.3d 1339 (Fed. Cir. 2005).

<sup>58</sup>*Phoenix Petroleum Co. v. United States*, No. 97-315C (Fed. Cl. Apr. 30, 2003).

<sup>59</sup>*Hermes Consol., Inc. v. United States*, 58 Fed. Cl. 409 (2003), rev'd sub nom. *Tesoro Haw. Corp. v. United States*, 405 F.3d 1339 (Fed. Cir. 2005).

<sup>60</sup>*Hermes Consol., Inc. v. United States*, 58 Fed. Cl. 409, 418 (2003), rev'd sub nom. *Tesoro Haw. Corp. v. United States*, 405 F.3d 1339 (Fed. Cir. 2005).

<sup>61</sup>See <https://www.fai.gov/periodic-table>.

<sup>62</sup>For example, see Class Deviation 2023-O0006—Limitations on the Procurement of DoD Non-Tactical Vehicles (10 May 2023), issued by the Under Secretary of Defense for Acquisition and Sustainment to the DoD components, available at [https://www.acq.osd.mil/dpap/dars/class\\_deviations.html](https://www.acq.osd.mil/dpap/dars/class_deviations.html).

<sup>63</sup>See Class Deviation 2011-O0002—Congressional Notification on Significant Contract Termination, issued by the Under Secretary of Defense for Acquisition and Sustainment to the DoD components, available at [https://www.acq.osd.mil/dpap/dars/class\\_deviations.html](https://www.acq.osd.mil/dpap/dars/class_deviations.html).

<sup>64</sup> 41 U.S.C.A. § 1707(a)(2).

<sup>65</sup> 41 U.S.C.A. § 1707(d)–(e).

<sup>66</sup>“Agency Policy Memos: The Statutory Publication and Public Comment Rules Apply,” 25 No. 2 *Nash & Cibinic Rep.* ¶ 9 (Feb. 2011).

<sup>67</sup>FAR 15.403-1(c)(1).

<sup>68</sup>Defense Acquisition Regulations System; Defense Federal Acquisition Regulation Supplement; Only One Offer (DFARS Case 2011-D013), 77 Fed. Reg. 39,126 (June 29, 2012).



# NOTES:

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# BRIEFING PAPERS