



UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer and
Assistant Secretary for Administration
Washington, D.C. 20230

JUN 24 2010

PROCUREMENT MEMORANDUM 2010-11

ACTION

**MEMORANDUM FOR: BUREAU PROCUREMENT OFFICIALS
HEADS OF CONTRACTING OFFICES**

FROM: Helen Hurcombe *Helen Hurcombe*
Senior Procurement Executive
and Director for Acquisition Management

SUBJECT: FAR Class Deviation: Inclusion of Clause *Notification of Employee Rights under the National Labor Relations Act* As Prescribed by Pending Revision to FAR Part 22 – *Application of Labor Laws to Government Acquisitions*

Background

Executive Order 13496, Notification of Employee Rights under Federal Labor Laws, dated January 30, 2009, requires contractors and subcontractors to post a notice that informs employees of their rights under Federal labor laws, including the National Labor Relations Act, 29 U.S.C. 151 *et seq.* Subsequently, the Department of Labor (DoL) issued a final rule implementing Executive Order 13496 at pertinent part. The resulting FAR case 2010-006, Notification of Employee Rights under the National Labor Relations Act, has been completed and is awaiting approval. However, formal publication is not anticipated until July 30, 2010. This class deviation directs that contracting officers insert the language contained in the associated draft text of FAR Clause 52.222-40 – Notification of Employee Rights under the National Labor Relations Act in accordance with the DoL final rule dated June 21, 2010. Until the FAR case is codified in a forthcoming Federal Acquisition Circular (FAC), the clause will be incorporated as a special provision without FAR clause number.

Purpose

The purpose of this memorandum is to issue a class deviation in accordance with FAR 1.404 to require that contracting officers insert the attached Clause *Notification of Employee Rights under the National Labor Relations Act* in covered solicitations and contracts issued on or after June 21, 2010. The prescription, exceptions and content for the clause are attached.

Required Action

Contracting officers shall insert the clause *Notification of Employee Rights under the National Labor Relations Act* in covered solicitations and contracts issued on or after June 21, 2010.

Effective Date

This class deviation is effective on June 21, 2010 and remains in effect until publication of the Federal Acquisition Circular incorporating this requirement into the FAR, on or about July 30, 2010.

My point of contact for this matter is Lori Donovan, 202-482-1716 or ldonovan@doc.gov.

Attachment: FAR Excerpts

cc: Acquisition Community
Acquisition Council

CLASS DEVIATION FROM THE FEDERAL ACQUISITION REGULATION

Reference FAR Part 22 – Application of Labor Laws to Government Acquisitions

Determination and Findings

The Department of Commerce is authorizing a class deviation which requires contracting officers to insert clause *Notification of Employee Rights under the National Labor Relations Act* in covered solicitations and contracts issued on or after June 21, 2010.


Findings

1. Executive Order 13496, Notification of Employee Rights under Federal Labor Laws, dated January 30, 2009, required contractors and subcontractors to post a notice that informs employees of their rights under Federal labor laws, including the National Labor Relations Act, 29 U.S.C. 151 *et seq.*
2. Subsequently, the Department of Labor issued a final rule implementing Executive Order 13496, at pertinent part.
3. A resulting FAR case 2010-006, Notification of Employee Rights under the National Labor Relations Act, which modifies FAR Part 22 – Application of Labor Laws to Government Acquisitions and prescribes FAR Clause 52.222-40 – Notification of Employee Rights under the National Labor Relations Act, has been completed and is awaiting approval.
4. The Chairman of the Civilian Agency Acquisition Council issued a memorandum dated June 18, 2010, providing the effect of consultation for class deviation to allow agencies to prescribe that contracting officers insert the draft text of FAR Clause 52.222-40, Notification of Employee Rights under the National Labor Relations Act prior to issuance of the FAC which will incorporate FAR case 2010-006.
4. The attached excerpts from FAR case 2010-006, as provided by the Chairman, Civilian Agency Acquisition Council, define the prescription, exceptions and content for FAR Clause 52.222-40.
5. This class deviation is necessary to comport with the requirements of the Department of Labor's final rule implementing Executive Order 13496, at pertinent part, until the FAR case 2010-006 is codified in the FAR. In the absence of codification in the FAR, the class will be incorporated by title only as a special provision. The associated prescription and exceptions are also referenced by title only.

Determination

In accordance with FAR 1.404, I hereby authorize this class deviation requiring contracting officers to insert the clause *Notification of Employee Rights under the National Labor Relations Act* as a special provision in all covered solicitations and contracts issued on or after June 21, 2010. This determination is based on analysis of the findings described herein.


This class deviation will remain in effect until issuance of the Federal Acquisition Circular incorporating the requirements herein, on or about July 30, 2010.



Approved:

Helen Hurcombe

Senior Procurement Executive and
Director for Acquisition Management



Date:

ATTACHMENT TO PROCUREMENT MEMORANDUM 2010-11 - CLASS DEVIATION
NOTIFICATION OF EMPLOYEE RIGHTS

Clause Prescription.

- (a) Insert the clause *Notification of Employee Rights under the National Labor Relations Act* in all solicitations and contracts, except –
 - (1) Acquisitions under the simplified acquisition threshold. For indefinite quantity contracts, include the clause only if the value of orders in any calendar year of the contract is expected to exceed the simplified acquisition threshold;
 - (2) Contract or subcontracts for work performed exclusively outside the United States; or
 - (3) Contracts covered (in their entirety) by an exemption granted by the Secretary [of Labor].
- (b) A contracting agency may modify the clause *Notification of Employee Rights under the National Labor Relations Act*, if necessary, to reflect an exemption granted by the Secretary [of Labor] (see Exceptions (b)).

Exceptions.

- (a) The requirements do not apply to—
 - (1) Contracts under the simplified acquisition threshold.
 - (2) Contracts or subcontracts for work performed exclusively outside the United States.
- (b) *Exemptions granted by the Secretary [of Labor]*.
 - (1) If the Secretary finds that the requirements of Executive Order 13496 impair the ability of the Government to procure goods or services on an economical and efficient basis or if the special circumstances require an exemption in order to serve the national interest, the Secretary [of Labor] may exempt a contracting department or agency, or groups of departments or agencies, from the requirements of any or all of the provisions of this Executive Order with respect to a particular contract or subcontract, or any class of contracts or subcontracts, including the requirement to include the clause *Notification of Employee Rights under the National Labor Relations Act*, or parts of that clause, in contracts.
 - (2) Requests for exemptions may be submitted in accordance with Department of Labor regulations at 29 CFR 471.3.

Clause Text.

Notification of Employee Rights under the National Labor Relations Act

- (a) During the term of this contract, the Contractor shall post a notice, of such size and in such form, and containing such content as prescribed by the Secretary of Labor, in conspicuous places in and about its plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically, in the languages employees speak, in accordance with 29 CFR 471.2 (d) and (f).

- (1) Physical posting of the employee notice shall be in conspicuous places in and about the Contractor's plants and offices so that the notice is prominent and readily seen by the employees who are covered by the National Labor Relations Act and engage in activities related to the performance of the contract.
 - (2) If the Contractor customarily posts notices to employees electronically, then the Contractor shall also post the required notice electronically by displaying prominently, on any website that is maintained by the Contractor and is customarily used for notices to employees about terms and conditions of employment, a link to the Department of Labor's website that contains the full text of the poster. The link to the Department's website, as referenced in (b)(3) of this section, must read, "Important Notice about Employee Rights to Organize and Bargain Collectively with Their Employers."
- (b) This required notice, printed by the Department of Labor, can be—
- (1) obtained from the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-5609, Washington, DC 20210, (202)693-0123, or from any field office of the Office of Labor-Management Standards or Office of Federal Contract Compliance Programs; or
 - (2) provided by the Federal contracting agency, if requested; or
 - (3) downloaded from the Office of Labor-Management Standards web site at www.dol.gov/olms/regs/compliance/EO12496; or
 - (4) Reproduced and used as exact duplicate copies of the Department of Labor's official poster.
- (c) The required text of the Employee Notification referred to in this clause is located at Appendix A, Subpart A, 29 CFR Part 471.
- (d) The Contractor shall comply with all provisions of the Employee Notice and related rules, regulations, and orders of the Secretary of Labor.
- (e) In the event that the Contractor does not comply with the requirements set forth in paragraphs (a) through (d) of the clause, this contract may be terminate or suspended in whole or in part, and the Contractor may be suspended or debarred in accordance with 29 CFR 471.14 and FAR Subpart 9.4. Such other sanctions or remedies may be imposed as are provided by 29 CFR Part 471, which implements Executive Order 13496 or as otherwise provided by law.
- (f) *Subcontracts.* (1) The Contractor shall include the substance of the provisions of paragraphs (a) through (f) of this clause in every subcontract that exceeds \$10,000 unless exempted by the rules, regulations, or orders of the Secretary of Labor issued pursuant to section 3 of Executive Order 13496 of January 30, 2009, so that such provisions will be binding upon each subcontractor.
- (2) The Contractor and subcontractor are not permitted to procure supplies or services in a way designed to avoid the applicability of Executive Order 13496 or this subpart.
 - (3) The Contractor shall take such action with respect to any such subcontract as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for non-compliance.

(4) However, if the Contractor becomes involved in the litigation with a subcontractor, or is threatened with such involvement, as a result of such direction, the Contractor may request the United States, through the Secretary of Labor, to enter into such litigation to protect the interests of the United States.

(End of Clause)