

Sineath CIV John

From: Sineath CIV John
Sent: Monday, August 09, 2010 8:19 AM
To: M_HQMC_MCFCS_Directors/Deputies
Cc: M_HQMC_LB; Romano CIV Mark; Oliver CIV R. Kaye
Subject: APM 10-13 Class Deviation to DFARS (2010-O0011) Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel
Attachments: DASNALM 06082010.pdf
Signed By: john.sineath@usmc.mil

All,

BACKGROUND:

- a. The attached DPAP memorandum of 26 April 2010 requires contracting officers to use DFARS clause, 252.216-7999, Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel (Deviation), in all solicitations and contracts (including task or delivery orders) that include award fee provisions.
- b. This class deviation implements section 823 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L.111-84). Section 823 provides that the contractor's performance shall be evaluated during the award fee period to include consideration of actions that caused serious bodily injury or death to any civilian or military personnel of the Government through the contractor's gross negligence or with the contractor's reckless disregard for Government personnel safety. The prime contractor's (or its subcontractors') negligence or reckless disregard may be determined through criminal, civil, or administrative proceedings.

POLICY:

- a. In accordance with DPAP memorandum, dated 26 April 2010, the attached DFARS deviation clause 252.216-7999, Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel (Deviation) shall be included in all solicitations and contracts containing award fee provisions.
- b. This class deviation is effective immediately and effects all solicitations and contracts issued on or after 26 April 2010 that include award fee provisions. It remains in effect until DPAP incorporates this requirement into the DFARS or rescinds it.

PROCEDURES:

- a. Ensure the attached deviation clause 252.216-7999, Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel (Deviation) is included in all solicitations and contracts containing award fee provisions as required by the above policy.
- b. If the contract is still open and award fee evaluation periods remain under the contract, Contracting Officers upon receipt of any dispositions of criminal, civil, or administrative proceedings shall consider the impact of the disposition in the evaluation of contractor performance for the relevant award fee period.
- c. If disposition is received and there are no more award fee periods remaining under the contract, or the contract is closed, the Contracting Officer shall consider the impact of the disposition and determine if there is a need to pursue repayment of any award fee paid. Follow the procedures for contract debts set forth in FAR 32.6, DFARS 232.6, and MAPS 32.6.

d. Reporting requirements for Award Fee and Incentive Fees earned are contained in CMPG 5.15.1, Reports on Award Fee and Incentive Fee Contracts. If any active contracts are identified by HQMC, I&L (Contracts) that meet these parameters, the cognizant MCFCS office will be contacted and requested to complete a Report on Award Fee and Incentive Fee Contracts.

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DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
(RESEARCH, DEVELOPMENT AND ACQUISITION)
1000 NAVY PENTAGON
WASHINGTON DC 20350-1000

JUN - 8 2010

MEMORANDUM FOR DISTRIBUTION

SUBJECT: Class Deviation—Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel

The Director, Defense Procurement and Acquisition Policy (DPAP) issued the attached class deviation (DARS Tracking Number 2010-O0011) on April 26, 2010 requiring contracting officers to use a new DFARS clause, 252.216-7999, *Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel (APR 2010) Deviation*, in all solicitations and contracts (including task or delivery orders) that include award fee provisions. This class deviation implements Section 823 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84) which directs the Secretary of Defense to ensure that contracts using award fees:

(1) provide for the consideration, in the evaluation of contractor performance for a relevant award fee period, of any incident that caused serious bodily injury or death to any government civilian or military personnel; and

(2) allow for the reduction or denial of award fees for a relevant award fee period, or for the recovery of all or a part of the award fees previously paid to the contractor for such period, when a disposition from a criminal, civil, or administrative proceeding determines a defense contractor's or its subcontractor's actions to have caused the injury or death, through gross negligence or with reckless disregard for the safety of such personnel, in performing the contract.

To implement this class deviation, DON contracting activities shall follow this interim guidance:

1. If a disposition is received while the affected contract is still open and award fee evaluation periods remain under the contract, consider the impact of the disposition and follow paragraph 7b and 7c of the DON Process for Evaluating, Collecting, and Reporting Award and Incentive Fees Earned issued by the Assistant Secretary of the Navy (Research, Development and Acquisition) on March 1, 2010, which is available at <https://acquisition.navy.mil/rda/content/view/full/6992>.

SUBJECT: Class Deviation—Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel

2. If a disposition is received and the affected contract is open and there are no more award fee periods remaining under the contract, or the contract is closed, consider the impact of the disposition and determine if there is a need to pursue repayment of any award fees paid. Follow the policy and procedures for contract debts set forth in FAR 32.6, DFARS 232.6, and NMCARS 5232.6. This effort requires close coordination between the contracting officer, fee determining official, program and technical manager, financial manager, counsel, and other personnel, as appropriate.

This class deviation is effective immediately and affects all solicitations and contracts issued on or after April 26, 2010 that include award fee provisions. It remains in effect until DPAP incorporates this requirement into the DFARS or rescinds it.

Please disseminate this information to all personnel involved in the award fee determination process. My point of contact for this memorandum is Ms. Evelyn Ortiz at (703) 614-9640 or evelyn.ortiz@navy.mil.



Elliott B. Branch
Executive Director
DASN(A&LM)

Attachments:
As stated

Distribution:
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SUBJECT: Class Deviation—Award Fee Reduction or Denial for Jeopardizing the
Health or Safety of Government Personnel

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ACQUISITION,
TECHNOLOGY
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

APR 26 2010

In reply refer to
DARS Tracking Number: 2010-O0011

MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT), DASA(P)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(ACQUISITION & LOGISTICS MANAGEMENT),
DASN(A&LM)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING), SAF/AQC
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DOD FIELD ACTIVITIES

SUBJECT: Class Deviation-- Award Fee Reduction or Denial for Jeopardizing the
Health or Safety of Government Personnel

Effective immediately, when issuing solicitations or contracts (including task or
delivery orders) with award fee provisions, contracting officers shall use the attached
clause, 252.216-7999, Award Fee Reduction or Denial for Jeopardizing the Health or
Safety of Government Personnel.

This class deviation implements section 823 of the National Defense
Authorization Act for Fiscal Year 2010 (Pub. L. 111-84). Section 823 provides that the
contractor's performance shall be evaluated during the award fee period to include
consideration of actions that caused serious bodily injury or death to any civilian or
military personnel of the Government through the contractor's gross negligence or with
the contractor's reckless disregard for Government personnel safety. The prime
contractor's (or its subcontractors') negligence or reckless disregard may be determined
through criminal, civil, or administrative proceedings.

This deviation remains in effect until incorporated in the DFARS or otherwise
rescinded. My staff point of contact for this matter is Ms. Cassandra R. Freeman,
703-602-8383 or cassandra.freeman@osd.mil.

Shay D. Assad
Director, Defense Procurement
and Acquisition Policy

Attachment:
As stated

Clause prescription.

Use the following clause 252.216-7999 (Deviation), Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel, in all solicitations and contracts containing award fee provisions.

252.216-7999 Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel. (Deviation)**AWARD FEE REDUCTION OR DENIAL FOR JEOPARDIZING THE HEALTH OR SAFETY OF GOVERNMENT PERSONNEL (APR 2010) (Deviation)**

(a) *Definitions.* As used in this clause-

"Covered incident"-(1) Means any incident in which the contractor-

(i) Has been determined, through a criminal, civil, or administrative proceeding that results in a disposition listed in paragraph (2) of this definition in the performance of this contract to have caused serious bodily injury or death of any civilian or military personnel of the Government through gross negligence or with reckless disregard for the safety of such personnel; or

(ii) Has been determined through a criminal, civil, or administrative proceeding that results in a disposition listed in paragraph 2 of this definition to be liable for actions of a subcontractor of the Contractor that caused serious bodily injury or death to any civilian or military personnel of the Government through gross negligence or with reckless disregard for the safety of such personnel.

(2) Shall include those incidents that have resulted in any of the following dispositions:

(i) In a criminal proceeding, a conviction.

(ii) In a civil proceeding, a finding of fault or liability that results in the payment of a monetary fine, penalty, reimbursement, restitution, or damage of \$5,000 or more.

(iii) In an administrative proceeding, a finding of fault and liability that results in -

Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel

(A) The payment of a monetary fine or penalty of \$5,000 or more; or

(B) The payment of a reimbursement, restitution, or damages in excess of \$100,000.

(iv) In a criminal, civil or administrative proceeding, a disposition of the matter by consent or compromise with an acknowledgment of fault by the Contractor if the proceeding could have led to any of the outcomes specified in subparagraphs (a)(2)(i), (a)(2)(ii) or (a)(2)(iii).

"Serious bodily injury" means a grievous physical harm that result in a permanent disability.

(b) The award fee of the Contractor may be reduced or denied, if its performance under this contract for the relevant award fee period results in a covered incident.

(End of Clause)