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Recent Regulatory matters that may be of interest since the last Update include---

1. **DoD NOTICES PROPOSED CONTRACT CLAUSE FOR CONTRACTORS SUPPORTING COMBAT OPERATIONS.** On March 23, 2004, the Federal Register noticed a proposed DFARS rule “to address issues related to contract performance outside the United States...(including a) clause for use in contracts that require contractor employees to accompany a force engaged in contingency, humanitarian, peacekeeping, or combat operations.” Comments are due on/before May 24, 2004.

COMMENT: This proposal could be improved.

- The clause requires the contractor to acknowledge contractor performance is “inherently dangerous” and the contractor “accepts the risks associated with required contract performance in such operations.”
- There are other clause(s) currently in use by the Services which could result in different levels of compliance for the same foreign areas. Should a deviation for their use be required or will they be superseded—see the Army interim rule issued November 28, 2003, and Air Force General Counsel’s November 2003 “guidance document.”
- Should a contractor have a right similar to that expressly provided in the Changes clause in having an equitable adjustment as a result of changes by the Combatant Commander? The clause merely “authorizes” a contractor to submit a request for same without any obligation by the Contracting Officer to provide same.
- Does the clause mandate the required use/level of “weapons/ammunition” for contractors and their employees/subcontractors? Is it clear as to the level of in-country support required by contractors for their employees?
- Should a contractor, upon request, be permitted to amend existing contracts to include the finalized clause?
- An exhaustive, albeit vague, list of “applicable” treaties, regulations, rules, orders, etc. is provided in the clause. The clause should list only those that are directly applicable and where copies are readily available to contractors so that they can—as required in the clause—“ensure that its employees are familiar with and comply with” them. Is it appropriate for contractors to be held to the “The Uniform Code of Military Justice where applicable?”

The risk/pricing associated with this proposal should be discussed with counsel. Further, the re-review of the Contingencies Cost Principle should be undertaken and with appropriate consideration of contractual coverage for unpriced risks that would be fair to the Government **and** contractors—see FAR 31.205-7(c)(2).

2. **DoD IG ISSUES REPORT ON NEGOTIATING FAIR AND REASONABLE PRICING IN CONNECTION WITH AWACS PROGRAM.** On April 14, 2004, the DoD Inspector General issued, “NATO AWACS Mid-Term Modernization Program ‘Global Solution’ - Report No. D-2004-069.” From the Executive Summary/Results the IG concluded that

“Senior level managers did not use appropriate business and contracting procedures as specified in the Federal Acquisition Regulation when they negotiated the Global Solution in September 2002. When the senior level managers were determining whether the \$1.32 billion negotiated price was fair and reasonable, they did not use a Government cost estimate, an integrated product team to analyze the proposed statement of work, a technical evaluation of labor hours and labor mixes, audit assistance to review direct and indirect rates, and weighted guidelines to establish reasonable profit and share ratios. Air Force contracting officials awarded the Global Solution contract modification in December 2002 without knowing whether the \$1.32 billion cost was fair and reasonable....”

(The Air Force) “concur[red] with the intent of all recommendations and stated that the technical and cost analyses would be completed, but the Air Force needs to award production and retrofit options as an undefinitized contract action so that the NATO E-3 Mid-Term Modernization Program can proceed while the Electronic Systems Center and the NATO Airborne Early Warning and Control Programme Management Agency (NAPMO) conduct technical and cost analyses. ... The Deputy Assistant Secretary stated that using an undefinitized contract action provided the most benefit to the NAPMO nations because production and retrofit program content and schedule would remain the same as under the Global Solution and would not be negotiated further and prices could only be equal to or less than the prices the NAPMO nations had previously determined to be acceptable....” And the Audit response thereto included: “The Air Force decision to use an undefinitized contract action as a bridging action does not lessen the responsibility of the Air Force Electronic System Center to obtain and document a fair and reasonable price for the NATO AWACS production and retrofit tasks....”

COMMENT: As has been publicized elsewhere there are numerous and very important issues associated with this NATO program that the Air Force was negotiating. It should be noted that the Contracting Officer did not have the lead in negotiating the price nor did s/he certify that the price was reasonable.

However, the (contemplated) use of undefinitized contractual actions (UDAs) is emphasized above. The methodology of arriving at a fair and reasonable price should have been expanded upon. Does “having all the analyses/reports, etc.” ensure a “fair and reasonable” price in a sole source, commercial, change order, etc. situation? What is the incentive for the parties to negotiate a fair price when the “default” mode is a Contracting Officer’s unilateral determination of the price? Should contractors and subcontractors have a policy that accepts UDAs when the current regulations/methodologies do not provide the parties with the requisite negotiating “tools?” **Should there be a regulatory methodology that incentivizes the parties to arrive at a fair price, e.g. like the use of “Baseball Arbitration”?**

Miscellaneous Items:

- On March 23, 2004, the Federal Register noticed an interim DoD rule “to implement Section 843 of the National Defense Authorization Act for Fiscal Year 2004. Section 843 provides that the contract period of a task or delivery order contract awarded (by DoD) pursuant to 10 U.S.C. 2304a may cover a total period of not more than 5 years.... The rule clarifies that the total period includes all options or modifications.” Comments are due on/before May 24, 2004.

COMMENT: While the February 21, 2004, Regulatory Update referred to the Director of Defense Procurement and Acquisition Policy earlier stating in a memorandum that this change will be “effective for solicitations issued on or after the date of the DFARS interim rule,” this Federal Register notice does not so provide. Will this rule impact existing contracts including so-called award term contracts as well as others? Talk to counsel.

- On April 6, 2004, the Federal Register noticed a proposed FAR rule whereby the “Department of Defense in an effort to streamline and transform itself in order to more effectively achieve its mission and in recognition that the military departments have the necessary expertise to manage programs efficiently is proposing to transfer the management of the Mentor Protégé program to the military departments and defense agencies. The Office of the Secretary of Defense will maintain oversight and policy development responsibilities. Accordingly, the FAR is amended to state that the Director, Small and Disadvantaged Business Utilization of the cognizant DoD military department or defense agency will be the approval authority for mentor-Protégé agreements.” Comments are due on/before June 7, 2004.

Earlier on March 19, 2004, the Federal Register noticed that the Small Business Administration is proposing to “modify its small business size standards by establishing size standards in terms of the number of employees of a business concern for most industries and SBA programs.” Comments are due on/before May 18, 2004.

- On March 25, 2004, the DoD Inspector General issued a report “Export-Controlled Technology at Contractor, University, and Federally Funded Research and Development Center Facilities” - Report No. D-2004-061 on the adequacy of DoD’s export-control technology policies and concluded, in part, that “DoD does not have adequate processes to identify unclassified export-controlled technology and to prevent unauthorized disclosure to foreign nationals. Of the 11 contractors, 6 universities, and 3 Federally Funded Research and Development Centers visited:
 - 15 relied on the contract to identify whether the technology was export controlled.
 - Three of the 11 contractors and 1 of the 3 Federally Funded Research and Development Centers were unaware of Federal export laws and regulations related to export-controlled technology.”

COMMENT: Talk to counsel.

- DoD issued an “Information Release” (also expected to be covered in a forthcoming Federal Register notice) announcing it has commenced the solicitation of industry input on “identifying appropriate incentives for industry to use machine tools and other capital assets produced in the United States.” This is a result of Section 822 of the National Defense Authorization Act for FY 2004 which mandates the Secretary of Defense to establish such a program. “The provision also directs the Secretary to provide consideration in source selection for contractors with eligible assets for major defense systems.”
- On April 5, 2004, Federal Acquisition Circular 2001-22 was issued covering final rules in the following areas...
 - Item I--Government Property Disposal (FAR Case 1995-013)
 - “This final rule amends FAR Parts 1, 2, 8, 45, 49, 52, and 53 to simplify procedures, reduce recordkeeping, and eliminate requirements related to the disposition of Government property in the possession of contractors.”
 - Item II--General Provisions of the Cost Principles (FAR Case 2001-034)
 - “This final rule amends the FAR to revise certain general provisions of the cost principles contained at FAR 31.201-1, Composition of total cost; FAR 31.201-2, Determining allowability; FAR 31.202, Direct costs; and FAR 31.203, Indirect costs. The rule revises the cost principles by improving clarity and structure, and removing unnecessary and duplicative language. The final rule also adds the definition of ‘direct cost’ and revises the definition of ‘indirect cost’ at FAR 2.101, Definitions, to be consistent with the terminology used in the cost accounting standards (CAS)....”
 - Item III--Unique Contract and Order Identifier Numbers (FAR Case 2002-025)
 - “The interim rule published in the Federal Register at 68 FR 56679, October 1, 2003, is converted to a final rule, without change....”
 - Item IV--Unsolicited Proposals (FAR Case 2002-027)
 - “This final rule amends the FAR to implement section 834 of the Homeland Security Act of 2002 (Pub. L. 107-296)...(which) requires that a valid unsolicited proposal not address a previously published agency requirement. It also requires that, before initiating a comprehensive evaluation, the agency must determine that the proposal contains sufficient cost related or price related information for evaluation, and that it has overall scientific, technical, or socioeconomic merit.”
- Finally, the continued negotiation—and soon to be finalized/ratified—foreign free trade agreements by the United States, e.g. Central American Free Trade Agreement, could result in those free trade agreements causing local/state “preferences” in contracting to be preempted.

- The National Contract Management Association (NCMA) is planning its World Congress 2004 in Orlando, Florida, from April 26-28, 2004, with several concurrent tracks. Items of note in the area of Alternative Dispute Resolution include...
 - A two part program on “The Evolution of ADR: What's New, What's Hot” on Tuesday, April 27, 1:30pm-3:45pm. This session will bring you up-to-date on current trends in ADR, and get you thinking about what the next step might be for your organization in preventing and resolving conflict. Panelists from Government and industry will discuss ADR trends, with emphasis on specific, practical examples. Panel Moderator is Elizabeth Grant, Associate General Counsel, Defense Logistics Agency.
 - A two part program on “ADR and the Board Case - Why, When, How and at What (and Whose) Cost?” on Wednesday, April 28, 10:30am-12:40pm. All docketing notices issued by boards routinely include a notice relating to the possible resolution of the appeal via alternate disputes resolution procedures and the boards' offer to facilitate that process. Whether to accept that offer raises a host of issues. This panel will address these issues from the different perspectives of those choosing to participate, or not as the case may be, in the ADR process, i.e., the Appellant, the Respondent, (hopefully) the Board, and finally the accountant/auditor who must opine on the cost accounting treatment for the process. Panel Moderator is John Chierichella, J.D., Sheppard, Mullin, Richter & Hampton and the panel includes Judges from the Armed Services Board of Contract Appeals.
 - A two part program on “Designing the Ultimate Dispute Resolution Clause for Enhanced Subcontractor Relationships” on Wednesday, April 28, 1:50pm-4:00pm. One crucial ingredient in any successful prime/sub or lower tier business relationship, in government or commercial contracting, is a methodology for addressing the post-award resolution of conflicts, disagreements, or disputes. This interactive session will focus on the use of ADR techniques in the resolution of disputes with an emphasis on the considerations in drafting an effective arbitration clause by the Contracts/Subcontracts professional. Speaker is Charles Rumbaugh.

Information on the Congress can be obtained at <http://www.ncmahq.org/meetings/WC04/>.

Items summarized in all Regulatory 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.

Information on arranging speaking/teaching engagements on the above and/or various aspects of Alternative Dispute Resolution (ADR), basic/advanced negotiation techniques seminars/workshops, or on substantive topics may be arranged by sending a message to ADROffice@rumbaugh.net