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

**1. UNIQUE ITEM IDENTIFICATION (UID) POLICY GUIDANCE ISSUED.**

On July 9, 2004, Director of Defense Procurement and Acquisition Policy Deidre Lee, issued a memorandum attaching "guidance" on "Contract Pricing and Cost Accounting—Compliance with DFARS 252.211.7003, 'Item Identification and Valuation.'" The Director states that that "guidance should be used by all DoD contracting personnel in pricing and accounting for DoD contracts subject to the provisions of FAR Part 31 and the applicable Cost Accounting Standards." The attachment intends to address "questions (that) have been raised concerning the pricing and accounting for costs in order to comply with" that DFARS clause in connection with DoD's unique item identification (UID) initiative.

Specifically, the guidance provides that "costs necessary to comply with DFARS 252.211-7003 are generally allowable, provided they comply with applicable assignment and allocability requirements of the CAS and FAR Part 31." There are four major headings/subjects in the memo: "Assignment of Costs to Accounting Periods," "Allocation of Costs to Contracts," "Pricing Costs in New Contracts," and "Pricing Costs in Existing Contracts." Sub-topics including "Tangible/Intangible Capital Assets and Other Than Capital Assets (Recurring and Non-Recurring) are also discussed.

**COMMENT:** The UID rule was issued by DoD as an interim rule on December 30, 2003. As was noted in earlier Updates, a major issue was application of UID to prior contracts—a topic not covered in the current UID policy/clause. DoD is "acknowledging" a need for same wherein the statement is now made, "some contractors may choose to implement item identification on a company wide basis." Further, in applying UID to existing contracts the "Contracting Officer should negotiate an equitable adjustment to the contract price when a contract modification is issued that applies the requirement to comply with DFARS 252.211-7003...." Upward adjustment? It is submitted that numerous contract modifications may be administratively inappropriate yet PL 85-804 could be considered in modifying existing contracts through one document with appropriate consideration from the government in having this policy applied on a retroactive basis.

DoD is also realizing the difficulty of contractor estimating/compliance costs (in new contracts) and is also "suggesting" that a "Contracting Officer should consider using a re-opener clause in compliance with applicable agency procedures to adjust for the difference between anticipated and actual costs."

No mention is made in the guidance to a contractor's CAS Disclosure Statement—which clearly is part of this equation, especially when dealing with UID software.

Some have suggested that this guidance/logic could be transferred to other segments of the government including, for example, Department of Homeland Security (DHS) SAFETY Act proposals in connection with Designations/Certifications that are “slowly” being issued by DHS. Should DHS proposals, and anti-terrorism technology, offered in the war on terrorism not receive similar, and timely, cost/pricing consideration in view of the complementary need for UIDs in connection with that war?

Finally, those interested in additional reading on UID should consult prior Regulatory Updates, UID website [www.acq.osd.mil/uid](http://www.acq.osd.mil/uid) (including Joint Requirements Implementation Board—JRIB—minutes), and the January 2004 National Contract Management Association (NCMA) Contract Management article by Ed Will. Further, it is highly recommended that the reader look at the excellent article in the July 2004 issue of Inside Supply Management published by the Institute for Supply Management (ISM) on “The Sunrise Effect: Bar Codes Compete With RFID.” This latter article traces the history and status (and shortcomings) of current bar code technology while looking at the “developing technology” for low-cost radio-frequency identification (RFID). If you are considering using RFID—and you should—this ISM article is a “must read.”

- 2. DoD ISSUES GUIDANCE ON “COMPETITION” AT THE SUBCONTRACTOR LEVEL.** On July 12, 2004, Acting Undersecretary of Defense for Acquisition, Technology and Logistics, Michael Wynne, issued a memorandum under the subject “Selection of Contractors for Subsystems and Components.” DoD is concerned about recent industry consolidation and the impact upon the competitive environment including prime contractor selection of affiliated business units for contract work and the “potential for bias” in the selection of affiliated “subcontractors.” Accordingly, the memorandum emphasizes the need for an effective acquisition strategy by contracting officers including the manner a contractor assembles a team to develop the required systems. “Incentive” tools including appropriate “fee” for contractor use of competition in structuring that team are discussed.

DCMA is tasked to assist in the review of “subcontractor competition plans.” Increased “consideration” will be used when post-award subcontract approvals are required pursuant to FAR Subpart 44.2. And, government's direct purchase of subsystem(s)/component(s) and furnishing them as GFE is a possibility where “bias cannot be mitigated.” The overall goal seems to be finding “best value” in the overall subcontractor approach selected.

**COMMENT:** The use of the small business sector is not mentioned in this memorandum. On a related note, OFPP was quoted on July 21, 2004, as stating “that it will grant a request to appoint a senior-level representative from the SBA to a new advisory panel established to help guide and develop procurement polices ensuring that small firms have greater opportunities to compete for federal contracts.”

And, it seems ironic that this DoD competition “policy” may be (primarily) directed at the government's sole source acquisitions since the weighted guidelines are also mentioned as a tool.

3. **NASA FAR SUPPLEMENT CHANGES ANNOUNCED.** On July 27, 2004, the Federal Register noticed a NASA rule which adopts “as final without change, the proposed rule published in the Federal Register on April 22, 2004. This final rule amends the NASA FAR Supplement (NFS) by removing from the Code of Federal Regulations (CFR) those portions of the NFS containing information that consists of internal Agency administrative procedures and guidance that does not control the relationship between NASA and contractors or prospective contractors. This change is consistent with the guidance and policy in FAR Part 1 regarding what comprises the Federal Acquisition Regulations System and requires publication for public comment.... The NFS will continue to integrate into a single document both regulations subject to public comments and internal Agency guidance and procedures that do not require public comment.... NASA personnel must comply with all regulatory and internal guidance and procedures contained in the NFS.”

**COMMENT:** The NASA FAR Supplement will include items not requiring, in the opinion of NASA, anything calling for public notice/comment but it **SHALL** be followed by contracting officers. NASA noted that it did not receive any public comments as a result of the earlier April 22<sup>nd</sup> publication.

### **Miscellaneous Items:**

- The Federal Register noticed on July 15, 2004, a FAR proposal to incorporate the “class deviations regarding use and charges and special tooling” that DoD has been using since 1998. The proposal “establishes, as the basis for rental charges, the time property is actually used for commercial purposes, rather than time available for use; permits contractors to obtain property appraisals from independent appraisers; permits appraisal-based rentals for all property; and allows contracting officers to consider alternate bases for determining rentals.” Comments are due on/before September 13, 2004.
- The Federal Register noticed on July 21, 2004, a proposed FAR Case “changing the terms ‘performance-based contracting (PBC) and performance-based service contracting (PBSC)’ to ‘performance-based acquisition (PBA) or performance-based service acquisition (PBSA)’ in areas of the FAR where appropriate; adding applicable PBSA definitions clarifying the order of precedence for requirements; modifying the regulation to broaden the scope of PBA and give agencies more flexibility in applying PBSA methods to contracts and orders of varying complexity and reduce the burden of force-fitting contracts and orders into PBA, when it is not appropriate.” Comments are due on/before September 20, 2004.
- The Federal Register noticed on July 2, 2004 a proposed FAR case to authorize share-in-savings contracts for Information Technology. Comments are due on/before August 21, 2004.

Subsequently, GSA “awarded six companies blanket purchase agreements worth up to \$500 million to help agencies develop share-in-savings (IT) contracts.”
- The Air Force issued AFAC 2004-0721 which implements new source selection procedures including Mandatory Procedures in connection with same.

- DARPA, in a memorandum dated February 2, 2004, has stated, due to some security issues, that it will issue all DD Form 254s for DARPA funded contracts.
- The government continues to “lag” in the timely processing of security clearances with an “officially” stated backlog of 148,000 individuals in the queue for background investigations—unofficially the number heard on the street is in excess of 300,000.
- Its reported that a KPMG Audit of Iraq Funds concluded that funds “have been accounted for, but better controls are needed.” Independently, a joint DoD/GSA initiative called “Get It Right,” will address “significant deficiencies in government contracting, many of which have been laid bare by an ongoing investigation of GSA contracting as well as reports of misuse of contracts for military and reconstruction efforts in Iraq.”
- The Facilities Cost of Money Rate for the period July 1, 2004 through December 31, 2004 is 4.50%.
- NDIA has issued a revised edition of its “Study of the Applicability of FAR Clauses to Subcontracts under Prime Defense and NASA Contracts.” This “book” and the “Guide to Fixed-Price Supply Subcontract Terms and Conditions” issued by the ABA Strategic Alliances, Teaming, and Subcontracting Committee are the “bible” in ensuring that the “correct” clauses are considered for flow down to subcontractors AND that the prime is flowing down “appropriate” clauses. Information on the NDIA publication is available at [astockwell@ndia.org](mailto:astockwell@ndia.org) and information on the ABA publication is at <http://www.abanet.org/contract/federal/subkcomm/updates.html>.
- The Defense Supply Center Columbus Suppliers Conference/Exhibition, “Forging Alliance...Charting the Course,” is scheduled for August 30—September 1, 2004. Conference info is available through the NDIA website at [www.ndia.org](http://www.ndia.org).
- Looking for a career in government contracting? Several professional organizations have “opportunities” listed/identified for same for members, e.g. NCMA and ISM. You may also want to consider looking at [www.careerjournal.com](http://www.careerjournal.com) and search under words such as “procurement,” “contracting,” “contracts,” etc.

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