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

1. **AMERICAN BAR ASSOCIATION REPLIES TO DoD “COMPETITION” MEMORANDUM.** The ABA Public Contract Law Section sent a letter dated October 27, 2004, to Acting Under Secretary of Defense (Acquisition, Technology and Logistics) Michael W. Wynne, in response to the Under Secretary’s July 12, 2004, memorandum on “Selection of Contractors for Subsystems and Components.” The ABA, while acknowledging the Memorandum’s “purpose is to foster competition of major program subsystems and components,...(noted the Memorandum) mandates action by the government during the acquisition planning process and by industry when assembling a team to deliver the required capabilities.” The Memorandum also, among things, refers to pre/post contract award subcontract relationships. The ABA expressed several concerns on the need to address “required” changes in existing regulations if DoD desires to continue the “competition” path outlined in the Memorandum. And, the ABA also validated the Memorandum stated concerns “on subcontractor selection for major program subsystems and components (wherein it) addresses favoritism toward an affiliate, and seeks to promote competition for such subsystems and components.”

COMMENT: See prior Updates on this DoD Memorandum. The consolidation within the industry over the past several years, downsizing of the government acquisition workforce, and the existing government acquisition policies seem to have been overlooked in this Memorandum. There also seems to be confusing aspects of this Memorandum wherein it “covers the waterfront” on various existing policies, e.g. on noncompetitive acquisitions at the prime level, competition (or lack thereof) at the subcontract level, and “suggesting” that postaward subcontract/teaming relationships can “somehow” be set aside notwithstanding prior knowledge (acquiescence/approval) thereof. It is suggested that this could have been mitigated by prior notice/comment in the Federal Register. A “rush-to-implement” without public participation is normally not in the best interests of government/industry and the Transformation Initiative—the public can usually provide constructive input on matters that significantly affect it.

2. **DOD ISSUES ITS “DEFENSE ACQUISITION GUIDEBOOK.”** On October 8, 2004 Acting Under Secretary of Defense (Acquisition, Technology and Logistics) Michael W. Wynne, approved provisional release of the Defense Acquisition Guidebook. The stated “purpose is to provide members of the acquisition community and our industry partners with an interactive, on-line reference to policy and discretionary best practices (and) a valuable resource as you design your programs.” The Guidebook is available at <http://akss.dau.mil/dag/>

3. **DoD USE OF NON-DoD CONTRACTS.** A policy announcement on DoD use of non-DoD contracts is in final internal coordination. There is expected to be an emphasis on the conditions/restrictions on use of funds in the use of same, whether the use of non-DoD contracts is in DoD's best interest, and contemplated DFARS rules on the subject.

COMMENT: "Get it Right!"

4. **ABA RESPONDS TO THE NATIONAL RECONNAISSANCE OFFICE'S POLICY ON "PROHIBITION OF TEAMING."** The ABA Public Contract Law Section sent a letter dated October 25, 2004, to the Contracts Director of the National Reconnaissance Office (NRO) on recent NRO web postings relative to solicitation of comments on the issue of exclusive teaming and the NRO's Exclusive Teaming Prohibition clause that was published in April 2004.

"This...clause prohibits any team arrangement, whether created in writing, through understandings, or by any other means, to team together to pursue an NRO procurement program where the parties further agree not to team with any competitors for that program. The stated concern is that the exclusive team arrangement may unduly limit competition."

The ABA letter reviews in detail past/current government policies in the area of teaming and the industry/government recognition of the benefits of teaming arrangements and concludes by stating

"The (Public Contract) Section strongly supports efforts to protect the integrity of the acquisition process, and seeks to foster competition. This includes the avoidance of anticompetitive behavior. We believe that the issue of exclusive team arrangements and whether such arrangements inhibit competition have been thoroughly examined in the past, and the interests of the federal government would not be served by a blanket prohibition against exclusive team arrangements."

Miscellaneous Items

- Previous Updates have provided information on DoD's Unique Identification (UID) initiative. Previously unreported items of potential interest include...
 - Acting Under Secretary of Defense for Acquisition, Technology, and Logistics Michael Wynne issued a Memorandum dated July 30, 2004, on RFID that prescribes the use/schedule for RFID by industry. See <http://www.acq.osd.mil/log/rfid/index.html> for RFID information including the "DoD Supplier Passive RFID Information Guide." An interim RFID DFARS rule was scheduled to be released in October 2004.
 - An article in the September 27, 2004, Federal Computer Week addresses Radio Frequency Identification (RFID) implementing actions <http://www.fcw.com/fcw/articles/2004/0927/news-rfid-09-27-04.asp>
 - It is reported that MIL STD 130 version M is out for review. This version is a further update to this Mil Std on Parts Marking to improve on version L released 10 Oct 2003 to incorporate DOD's UID requirement. Also, MIL STD 129 is due to be updated to incorporate RFID requirements for Packaging and Shipping.

- On Thursday, November 18, 2004, the Office of Federal Procurement Policy (OFPP) will launch the online Acquisition Center of Excellence (ACE) for Services. “The ACE for Services is an online central clearinghouse for public and private.” A public launching has been noticed for Thursday, November 18, 2004, from 9:00 a.m. to 12:00 at the General Services Administration (GSA) Auditorium, 18th & F Streets, NW, Washington, DC 20405.
- On October 4, 2004, the Federal Register noticed “an interim rule amending the FAR to extend the micro-purchase exemption for purchasing electronic and information technology (EIT) that conforms to the requirements of Section 508 of the Rehabilitation Act of 1973 from October 1, 2004, to April 1, 2005. No further extensions will be granted. The extension until April 1, 2005, will provide agencies time to update their purchase card training modules on the 508 requirements and train their personnel.” Comments are due on/before December 6, 2004.
- On October 4, 2004, the Federal Register noticed an interim FAR rule that implements §1428 of Public Law 108-136, and, specifically in furtherance thereof, provides in FAR Part 7.108 that
 - “an agency shall generally not discourage a contractor from allowing its employees to telecommute in the performance of Government contracts. Therefore, agencies shall not--
 - (a) Include in a solicitation a requirement that prohibits an offeror from permitting its employees to telecommute unless the contracting officer first determines that the requirements of the agency, including security requirements, cannot be met if telecommuting is permitted. The contracting officer shall document the basis for the determination in writing and specify the prohibition in the solicitation; or
 - (b) When telecommuting is not prohibited, unfavorably evaluate an offer because it includes telecommuting, unless the contracting officer first determines that the requirements of the agency, including security requirements, would be adversely impacted if telecommuting is permitted. The contracting officer shall document the basis for the determination in writing and address the evaluation procedures in the solicitation.”
 - Comments are due on/before December 6, 2004.
 - COMMENT:** A contract clause is not proposed. Does this rule only impact direct contract related costs/efforts or a complete business entity? Read those solicitations (and resulting contracts)!
- The October 2004 issue of NCMA Contract Management magazine has an excellent article on “Contractors on the Battlefield—A Danger for Both Government and Contractor.” An overview of the legal environment, applicable international agreements (Status of Forces Agreements), Customs, treaties, current/planned regulations, etc. is provided.

- On October 18, 2004, the Air Force Office of Assistant Secretary issued a Memorandum on “Justifications for Non-competitive Contracts Under Exception 1 to the Competition in Contracting Act (CICA).” This Memorandum provides an overview/reminder on the criteria/justification on non-competitive awards.
COMMENT: Does a contractor compliance review of proposed contracts cover the basis for a sole source award?
- On October 20, 2004, Executive Order 13360, “Providing Opportunities for Service-Disabled Veteran Businesses To Increase Their Federal Contracting and Subcontracting,” was issued which, among other things, requires agency heads
 - “(i) reserving agency contracts exclusively for service-disabled veteran businesses;
 - “(ii) encouraging and facilitating participation by service-disabled veteran businesses in competitions for award of agency contracts;
 - “(iii) encouraging agency contractors to subcontract with service-disabled veteran businesses and actively monitoring and evaluating agency contractors' efforts to do so;
 - “(iv) training agency personnel on applicable law and policies relating to participation of service-disabled veteran businesses in Federal contracting; and
 - “(v) disseminating information to service-disabled veteran businesses that would assist these businesses in participating in awards of agency contracts.”
- On October 18, 2004, the SBA published three notices in the Federal Register relative to expanding the list of items “waived” so that entities, “other than small businesses,” may manufacture/provide those noted items.
- On October 22, 2004, OFPP announced the third annual competition to recognize outstanding uses of ADR by federal agencies and private companies in acquisition matters. Nominations are due by December 31, 2004, and additional information is available at www.adr.gov
- **COMMENT:** Finally everyone should follow the on-going exchange/dispute between Boeing/Airbus since it could have wide-ramifications on local/state/national “benefits” any contractor receives, i.e. are they “improper” tariff/non-tariff subsidies under WTO? What does your competition “think?” A negotiated resolution is in everyone's best interest.

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 in connection with various aspects of Alternative Dispute Resolution (ADR) and basic/advanced negotiation techniques— seminars/workshops—may be arranged by sending a message to ADROffice@Rumbaugh.net