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

1. **DoD FINALIZES RULE ON "LEVEL OF SUPPORT" FOR CONTRACTORS PERFORMING IN COMBAT AREAS.** The May 5, 2005, Federal Register noticed "a final rule amending the DFARS to address issues related to contract performance outside the United States. The rule contains a clause for use in contracts that require contractor personnel to deploy with or otherwise provide support in the theater of operations to U.S. military forces deployed outside the United States in contingency operations, humanitarian or peacekeeping operations, or other military operations or exercises designated by the combatant commander." DoD has finalized this policy direction in DFARS 225.74 and a clause "Contractor Personnel Supporting a Force Deployed Outside the United States," at 252.225-7040, which is effective for solicitations issued on/after June 6, 2005—the clause must be flowed down to subcontractors. Twenty-seven comments with DoD responses are included in the Federal Register notice with additional guidance issued in the PGI at http://www.acq.osd.mil/dpap/dars/dfars/changenotice/docs/20050505%20files/2003d087pgi.doc. And, DoD has posted supplemental background/informative guidance at http://www.acq.osd.mil/dpap/dars/dfars/changenotice/docs/20050505%20files/2003-D087%20Q&As.doc. According to the notice, additional DoD Directives are to be expected.

   COMMENT: In consultation with counsel, prompt analysis of the clause and the complementary material/direction is a must. Incorporation of this clause into existing contracts may require consideration from the contractor. Be cognizant that this is a DoD regulatory action and does not cover any non-DoD contracts in the same operational area!

2. **DoD ANNOUNCES "AUDIT CLOSE-OUT INITIATIVE."** On April 15, 2005, the DoD Director of Defense Procurement and Acquisition Policy issued a memorandum that kicked-off an initiative "that will ensure that contracting personnel are efficiently working to close-out DCAA audit reports (implementing the findings, disposing of the findings, etc.)" that are six months or older. A calendarized/action plan concluding with a June 30, 2005, report "(a) summarizing the reasons for the open audit reports, (b) providing an implementation strategy for reducing the number of open audit reports (e.g., prioritizing the open reports based on age), and (c) identifying recommend(ed) solutions to any systemic problems impeding audit close-out" is required.

   COMMENT: Contractors, it is only (retention) money at risk in not closing out contracts!

3. **DoD FINALIZES UID RULE AND PROPOSES RFID RULE.** On April 28, 2005, DoD noticed in the Federal Register a final/amended rule establishing "policy for unique identification (UID) and valuation of items delivered under DoD contracts." This action is effective April 22nd finalizes the interim rule that was effective January 1, 2004, which requires the use/marking of machine readable data elements at the item/component level with an unique identifier for supply chain tracking/security purposes. Fifty-seven public questions/comments in connection with UID are discussed in the Federal Register.

   And, on April 27, 2005, DoD noticed in the Federal Register a revised proposal (from that published on April 21, 2005) "pertaining to package marking with passive radio frequency identification (RFID) tags." A contract clause, "Radio Frequency Identification" (252.2111-7XXX) is proposed and is required in contracts for the purchase of certain/identifiable rations, clothing, tents, equipment, personal items, repairables, etc. that will be delivered to the Defense Distribution Depots in Susquehanna, Pa. and San Joaquin, Ca. Acceptable tags are also listed. Comments are due on/before June 27, 2005.

Miscellaneous Items:

- On April 20, 2005, the National Defense Industrial Association (NDIA) wrote the Chair of the OFPP established Services Acquisition Reform Act Acquisition Advisory Panel on the recent Navy SeaPort-E acquisition policy which will, in the opinion of NDIA, cause "harm to the defense industry, hinder competition, reduce the Navy's access to technology enhancements, and will ultimately cost more than currently in place acquisition programs." This SeaPort-E policy is mandated for use by the major commands and "all engineering, financial, and program management contractor support services." Specific NDIA concerns include
  - An 8% fee limitation when the DFARS weighted guidelines are required to be used for those these procurements and a cap of 15% is provided by regulation.
  - Guaranteed savings clause whereby contractors "guarantee" annual saving over the life of the contract with a minimum each year.
  - Cascading small business set asides.
  - Limited competition when work is funneled to a small number of contractors over 15 years.

  COMMENT: Does the Navy seemingly circumvent the FAR requirement on "fair and reasonable" pricing to buyers and sellers? Were deviations issued? And, if so, by whom? Begs the question, "today 8%, tomorrow____?" And, of course, the Federal Register notice/comment requirements seem to wanting. Unrelated, the panel will convene on May 17 and May 23, 2005.

- On April 8, 2005, the Federal Register noticed a proposal to amend the "FAR to implement earned value management system (EVMS) policy" as required "in OMB Circular A-11, Part 7, Planning, Budgeting, Acquisition, and Management of Capital Assets, and the supplement to Part 7, the Capital Programming Guide. Currently, only DoD, NASA, and a few other agencies have developed EVMS clauses and policy." OMB "expects" that EVMS will not be required on acquisitions below $20million. Comments are due on/before June 7, 2005.

- It is reported that Department of Homeland Security Secretary Chertoff recently "promised to ensure that the process of receiving approval under the SAFETY Act would be more 'efficient and hospitable'."

  COMMENT: With limited Public Law indemnification coverage being available, decreasing insurance availability at reasonable prices, increased use in performance-based contracting (and consequently greater use of the contractor's specifications)—resulting in greater likelihood that the "contractor's defense" may not be available to defense contractors, as well as other factors impacting the defense industry if/when an unfortunate accident occurs, is this the time for the government buyer to be responsible—as all other owners are—for the use and/or misuse of the items they own and possess? With some professionals and other industry sectors seeking, and receiving, by the government reduced liability exposure for the use and/or misuse of their services/products, is this the time to further protect the national defense whereby the current government leaders provide industry that that Congress has authorized and is long overdue? When is DHS going to step-up to the plate and provide the required action specified by the SAFETY Act? And, some thought the SAFETY Act certification process should have been self-certification/execution process!

- On April 11, 2005, OFPP issued a reminder to government agencies that the use of Brand-name specifications in agency solicitations is restricted by FAR 11.105. OFPP has found the increased use of same in "IT procurements with brand name microprocessors that are associated with a single manufacturer." Agencies are advised to "articulate a benchmark for performance," or "specify the requirement for applications and interoperability"— with examples for each situation.

  And, on a related note, DoD issued a memorandum on March 29, 2005, by Louis Kratz, Assistant Deputy Under Secretary of Defense (Logistics Plans and Programs), "reaffirming" the direction that Contracting Officers can cite military specifications and standards in solicitations/contracts <u>without any "waiver" being required</u>.

- The Defense Finance and Accounting Service (DFAS) issued a memorandum on April 7, 2005, on electronic Submission of Payment Requests. Effective July 1, 2005, DFAS will "<u>enforce</u> the requirement to use Electronic Commerce Submission, when the DFARS clause governs the contract (252.232-7003)."

- On April 18, 2005, OFPP noticed in the <u>Federal Register</u> its "Developing and Managing the Acquisition Workforce" Policy Letter 05-01 "to promote uniform implementation of a program to develop the federal acquisition workforce." This Policy Letter "more broadly defines the acquisition workforce."

  COMMENT: Where is the problem: Not enough contracting officers? Will this result in more individuals being deemed as such but without (in the near term) the requisite education and training?

- On April 11, 2005, FAC 2005-03 was issued and includes final FAR coverage on Purchases from Federal Prison Industries, Extension of Electronic and Information Technology micropurchase exception, as well as some technical amendments.

- DoD noticed in the Federal Register several proposed, except as noted, rules as part of its DFARS Transformation Initiative with several inclusions into its Procedures, Guidance, and Information (PGI). Changes include those in the following areas:
  - "DoD is proposing to amend the DFARS to add policy permitting assignment of an additional identification number to an existing contract for administrative purposes." Published on May 5, 2005 and comments are due on/before July 5, 2005.

    COMMENT: Are your software programs impacted by an additional number?
  - Updating of text pertaining to contract financing. "Proposed change clarifies requirements for establishing due dates for contract financing payments; deletes text that is unnecessary or duplicative of FAR/DFARS policy on financial consultation matters, contract payment instructions, and use of the Governmentwide commercial purchase card; and relocates to PGI, text on department/agency contract financing offices, approvals for advance payments or unusual progress payments, debt collection procedures, and bankruptcy reporting." Published on May 5, 2005 and comments are due on/before July 5, 2005.
  - A proposal to "delete the text at DFARS 244.304 containing examples of weakness in a contractor's purchasing system that may indicate the need for a review. This text will be relocated to the" PGI. Published on April 12, 2005 and comments are due on/before June 13, 2005.

    COMMENT: Let's rephrase this: DoD will now have the criteria—that triggers ACO special reviews of specific weaknesses in a contractor's purchasing system—in the PGI that does not require a notice/comment, etc. on changes thereto and which are mandatory for use by the government. Industry should have input on this.
  - Proposals to update text addressing uniform line item numbering in DoD contracts; administrative matters related to contract placement; update text pertaining to the environment, occupational safety, and a drug-free workplace; update requirements for use of the Governmentwide commercial purchase card for actions at or below the micro-purchase threshold; the use of simplified acquisition procedures; and update text pertaining to socioeconomic considerations in DoD contracting. Published on April 12, 2005 and comments are due on/before June 13, 2005.

- On April 4, 2005, the Air Force noticed that it was issuing revised procedures for Military Interdepartmental Purchase Requests (MIPRs) included in an Air Force MIPR Policy Guide.

Recent Publications Include—

- "The New (and Improved) Article 2 to the UCC," NCMA Contract Management magazine, December 2004, republished in the National Association of Credit Management Business Credit magazine, March 2005—available at www.Rumbaugh.net

Future Speaking Topics Include—

- "Thinking Again For The First Time About Advocacy In Arbitrations," various Bar meetings.

- ISM Orange County Affiliate, "Big Changes to UCC Rules on Contract Formation and Terms of the Deal are Around the Corner—Are you Ready?"

- ISM 2005 Annual International Conference, San Antonio, Texas, "May the New (UCC) Force Be With You!"

- Finger Lakes and Rome AF Base NCMA Chapters, New York, "Preparing for the Big Changes to UCC Rules on Contract Formation and Terms of the Deal."

- Norfolk, Virginia, NCMA Chapter and NAPM/ISM of New Hampshire, "How 'Baseball Arbitration' will help in Negotiating Sole Source Procurements—or how to get through Impasse."

- Maple Leaf, Toronto, Canada, NCMA Chapter, "What Hockey and Baseball Have in Common—A Discussion on Alternative Dispute Resolution."

- Halifax, Nova Scotia, Canada, Atlantic Public Purchasing Association Chapter, NIGP, "How 'Baseball Arbitration' will help in Negotiating Sole Source Procurements."

- Houston NCMA Chapter, "Preparing for the Big Changes to UCC Rules on Contract Formation and Terms of the Deal."

- ABA Public Contract Law Audio Seminar, "Contractor Team Arrangements: Competitive Solution or Legal Liability.

Items summarized in these 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