Regulatory/Contractual Update

August 24, 2006 Volume 11, Issue 7

- On August 16, 2006, Shay Assad, Director of DoD Defense Procurement and Acquisition Policy, issued a memorandum on "Government Accountability Office High Risk Area of Contract Management" which also included DoD's most recent Improvement Plan in connection therewith—all arising from the February 2005 GAO Report identifying high risk areas of DoD contract management. Self-assessments are highlighted in the plan and each Military Department and Defense Agency "will self-assess the sound use of appropriate contracting and contract administration techniques and approaches, including each of the areas…of Competition, Pricing, Quality assurance surveillance or written oversight plans, and Performance-based approaches." An attachment includes sample questions in those areas. Results are due November 30, 2006.

- OFPP on July 21, 2006, issued an "update" to its September 7, 2004, memorandum, ""Increasing the Use of Performance-Based Service Acquisitions." OFPP stated that the "target achievement level (40% or more of eligible service actions over $25K) is a performance goal, not a quota, designed to encourage acquisition professionals to use PBA methods to achieve results." A management plan is due by October 1, 2006, and should "describe the agency's current and future PBA activities that will result in an annual increase in the number of PBAs."

- On July 31, 2006, DoD issued a memorandum on "Personnel Security Clearances in Industry" calling attention to the "unacceptable" practice being reported whereby "some DoD organizations are denying contractor employees access to Defense facilities and classified information because the employees have a personnel security clearance based on an investigation that is beyond the renewal date." The memo noted that "many periodic reinvestigations are overdue" due to budget, etc. constraints but "personnel security clearances do not 'expire'."

  COMMENT: Will the submittals for compensation for excusable delays decline?

- On July 26, 2006, the Federal Register noticed a proposed rule "to update the required contract clauses that implement provisions of law or executive orders for acquisitions of commercial items." Specifically, the clause at "FAR 52.219-16, Liquidated Damages--Subcontracting Plan… (will be added to) the list of clauses for commercial contracts that the contracting officer may select." Comments are due on/before September 25, 2006.

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- On August 14, 2006, the Federal Register noticed a second proposed rule "to address requirements for preventing unauthorized disclosure of export-controlled information and technology under DoD contracts." Comments are due on/before October 13, 2006.

  On a related note, on July 6, 2006, the US Department of Commerce published in the Federal Register, a proposal "to amend the Export Administration Regulations (EAR) by revising and clarifying United States licensing requirements and licensing policy on exports and reexports of goods and technology to the People's Republic of China (PRC)" and stating it "is the policy of the United States Government to prevent exports that would make a material contribution to the military capability of the PRC, while facilitating U.S. exports to legitimate civil end-users in the PRC." This proposal provides in part

  > "a revision to the licensing review policy for items controlled on the Commerce Control List (CCL) for reasons of national security, including a new control based on knowledge of a military end-use on exports to the PRC of certain CCL items that otherwise do not require a license to the PRC. The items subject to this license requirement will be set forth in a list. This rule further proposes to revise the licensing review policy for items controlled for reasons of chemical and biological proliferation, nuclear nonproliferation, and missile technology for export to the PRC, requiring that applications involving such items be reviewed in conjunction with the revised national security licensing policy. This rule proposes the creation of a new authorization for validated end-users in certain destinations, including the PRC, to whom certain, specified items may be exported or reexported. Such validated end-users would be placed on a list in the EAR after review and approval by the United States Government. Finally, this rule proposes to require exporters to obtain an End-User Certificate, issued by the PRC Ministry of Commerce, for all items that both require a license to the PRC for any reason and exceed a total value of $5,000. The current PRC End-Use Certificate applies only to items controlled for national security reasons. This rule also proposes to eliminate the current requirement that exporters submit PRC End-User Certificates to BIS with their license applications but provides that they must retain them for five years."

  Comments on this latter proposal are due on/before November 3, 2006.

- The Navy Supply Systems Command (NAVSUP) in a memorandum dated August 1, 2006, reaffirmed the Navy's action of April 12, 2006, whereby NAVSUP is the exclusive sourcing agent for office supply contracting requirements, including options and follow-on contracts, and will "limit the number of existing contracting vehicles to maximize potential for leveraging spend and ensuring socio-economic goals are met."

  COMMENT: Will your existing contract be extended? Talk to counsel.

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- Noted in summaries from a recent industry meeting with DoD officials:
  - Two new DoD memos are in coordination on the Berry Amendment with one on pre-award actions in connection with such and the other "Corrective Action Plans and Decision Tree for Identifying Candidates for Domestic Non Availability Determination." DoD has also posted a FAQ site on the Berry Amendment at http://www.acq.osd.mil/dpap/paic/berryamendmentfaq.htm
  - "It would be premature to legislate a preference for fixed-price development until progress is made on…(several enumerated) initiatives."
  - No DoD position (yet) on contractors being subject to Uniform Military Code of Justice.
  - DoD applies Earned Value Management System on firm fixed-price contracts "only under exceptional circumstances" based upon stated rationale.

- On August 24, 2006, the Federal Register noticed a proposed FAR rule "to require Internet Protocol Version 6 (IPv6) capable products be included in information technology procurements to the maximum extent practicable." Comments are due on/before October 23, 2006.

- On August 23, 2006, the Federal Register noticed a proposed FAR rule "to address the acquisition of products and services for personal identity verification that comply with requirements in Homeland Security Presidential Directive (HSPD) 12, 'Policy for a Common Identification Standard for Federal Employees and Contractors,' and Federal Information Processing Standards Publication (FIPS PUB) 201, 'Personal Identity Verification of Federal Employees and Contractors'." Comments are due on/before October 23, 2006.

- On August 4, 2006, Federal Acquisition Circular (FAC) 2005-12 was issued and included an interim rule on "Local Community Recovery Act of 2006" (FAR Case 2006-014) which "adds a local area set-aside to the FAR for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities. The contracting officer defines the set-aside area. The rule implements the Local Community Recovery Act of 2006, which strengthens the government's ability to promote local economic recovery. The local area set-aside does not replace small business set-asides. Both can be used at the same time. The rule imposes subcontracting restrictions when a local area set-aside is used. No competition justification is required for the local area set-aside."

- On August 1, 2006, the Federal Register noticed a proposed NASA regulatory change to amend the NASA FAR Supplement clause 1852.204-76, Security Requirements for Unclassified Information Technology Resources, "to reflect the updated requirements of NASA Procedural Requirements 2810." Comments are due on/before October 2, 2006.

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- On August 8, 2006, the Federal Register noticed several DoD regulatory actions as part of its Transformation Initiative (and changes in PGI) including the following final rules:
  - Revise text pertaining to DoD implementation of small business programs and, in part, removes requirements for DoD small business specialists to review proposed acquisitions that are under $100,000 and totally set aside for small business concerns.
  - Update text addressing functions performed by DoD contract administration offices "to clarify responsibilities for payment administration and for verification of contractor compliance with earned value management system requirements; deletes obsolete text on mobilization production planning surveys; and relocates procedures for designation of contract payment offices to PGI."
  - Update text addressing DoD requirements for reporting of contracting actions by relocating "internal DoD contract action reporting requirements to PGI."
  - The interim DFARS rule entitled "Contractor Personnel Authorized to Accompany U.S. Armed Forces," published in the Federal Register on June 16, 2006, is reportedly causing great concern to contractors due, in part, to the change in the equation through a "significant and unexplained departure from the long-standing Defense Department doctrine of the military providing force protection for those contractors supporting the deployed forces." Talk to counsel.

  In addition, on July 18, 2006, the FAR Council published in the Federal Register a proposed FAR rule entitled "Contractor Personnel in a Theater of Operations or at a Diplomatic or Consular Mission," for actions not covered by the DoD clause. Comments are due on/before September 18, 2006.

- On July 11, 2006, the Federal Register noticed some DoD regulatory actions including the following:
  - As part of its Transformation Initiative (and changes in PGI)
    - a final rule on "addressing acquisitions made through Government supply sources."
    - a final rule "to update text on the selection and use of contract types; streamline text on the use of economic price adjustment clauses; increase, from 3 to 5 years, the standard maximum ordering period under basic ordering agreements; delete obsolete text on the use of cost-plus-fixed-fee contracts for environmental restoration; delete unnecessary text on design stability and use of incentive provisions; and delete procedures for selecting contract type and for use of special economic price adjustment clauses, incentive contracts, and BOAs."
    - a final rule "to delete obsolete procedures for the exchange or sale of Government-owned information technology."
    - a final rule "to update text on the acquisition of information technology."

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- A final rule on "Extension of Contract Goal for Small Disadvantaged Businesses and Certain Institutions of Higher Learning."
- A final rule "to relocate text addressing trade sanctions, to reflect the removal of the corresponding subpart of the Federal Acquisition Regulation."

- The American Bar Association Section of Public Contract Law "Board of Contract Appeals (BCA) Practice Working Group" is conducting a survey that is seeking attorney and non-attorney responses. Specifically, the Group,

> "composed of government, law firm and in-house attorneys, and BCA judges, has completed its preparation of its Survey that is designed to obtain your input regarding practice from the various Boards of Contract Appeals. The Survey is an on-line survey located at http://www.surveymonkey.com/s.asp?u=503201913554. The Group has attempted to make the Survey as flexible and user-friendly as possible; while the Group wants and needs substantial and meaningful participation, the Survey is designed such that you can answer only the portions that pertain to your experience, which can be done relatively quickly; also, you can interrupt your completion of the Survey and return to complete it without losing your prior responses. While we pose many questions regarding specific aspects of BCA practice, the fundamental question posed by the Survey is simple: Do you think that BCA practice and procedure can and should be changed to make it more efficient? If so, how?"

Comments on items that may be of potential interest in contract negotiation and contract drafting/management—

- A case that highlights the for caution in drafting of Value Engineering agreements (and properly identifying the applicable units subject to VE savings) is Allied Cos. v. Harvey (07/14/06 - No. 05-1511) where "the plain language of value engineering clause in a contract between an air conditioner manufacturer and the Army unambiguously indicates that the manufacturer is not entitled to share in future savings from the Army's switch to commercially available parts for its specific units, nor is it able to share in savings on all air conditioners because of its general proposal to use commercial parts." The case is available at http://caselaw.lp.findlaw.com/data2/circs/fed/051511p.pdf

- All of the recent reports and now indictments on the timing/issuance of stock options raises some interesting government contracting related issues. Darrell Oyer, Government Contract Specialist in McLean, Virginia, provided the following on the topic, "If in fact, and legally, an option exercise price is

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lower than the then current market price (ALL at the time the option is granted for the shares), the delta is an amount that is income to the recipient AND an allowable cost to the issuer, i.e. there can be no allowable cost to the issuer if there was no income on the other side of the transaction." Is this an ethics issue, government contract issue, tax issue, etc.? And, on July 7, 2006, the DCAA issued "Audit Guidance on Compensation Costs Arising from Stock Options."

On July 17, 2006, the Wall Street Journal reported that "major U.S. and European defense contractors for the first time are jointly developing voluntary ethical standards that would apply to contracts on both sides of the Atlantic."

The ABA Public Contract Law Section's Summer 2006 The Procurement Lawyer has an excellent article entitled, "Jamming the Revolving the Door, Making It More Efficient, or Simply Making It Spin Faster: How Is the Federal Acquisition Community Reacting to the Darleen Druyun and Other Recent Ethics Scandals?"

Seems that industry is not "pushing" the government to address, what is perceived by some as, other major issues from/through the recent scandals, e.g. why are close/certain relatives of senior acquisition officials associated with contractors or, stated otherwise, should those officials be automatically recused if those relatives are associated with companies that are (otherwise) subject to the oversight of such officials? Professionals in certain other areas are subject to mandatory recusal/disqualification if close relationships are present.

- An interesting commercial US Court of Appeals (6th Circuit) decision involving several issues that may warrant review involved "late" notification of breach (alleged overcharging by a supplier) by the buyer under the UCC (2-607) resulting in a limitation in the amount of damages, the use of parol evidence, course of performance actions of the parties, etc. (UCC 2-202) on pricing arrangements as well as other UCC aspects. Johnson Controls, Inc. v. Jay Indus., Inc. (08/18/06 - No. 05-1826, 05-1879). Decision is available at http://caselaw.lp.findlaw.com/data2/circs/6th/051826p.pdf

- And the case of Lipton-U. City, LLC v. Shurgard Storage Ctrs. (07/31/06 - No. 06-1282) is an interesting case involving the drafting of arbitration clauses. The case involved a commercial real estate lease with option to purchase. An earlier court decision had invalidated the option purchase price. Subsequently the lessee attempted to initiate arbitration whereas the arbitrators would determine "the option price of the property." This court held that that arbitration provision was to only address "additional terms/conditions" of any purchase which did not include price. The decision is available at http://caselaw.lp.findlaw.com/data2/circs/8th/061282p.pdf

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Future Speaking Topics Include—

- West Sound, Washington, NCMA Chapter, "Baseball Arbitration."
- Puget Sound NCMA Chapter workshop on "New UCC Rules on Contract Formation and Terms of the Deal are Around the Corner! Are You Ready?" and "Go Ahead, Make my (Contract) Day!" **Information/registration info available at www.ncmaps.org**
- California State Bar Annual Meeting, Monterey, California, "Thinking Again For The First Time About Advocacy In Arbitrations." **Presentation material posted under "Teaching" at www.Rumbaugh.net**
- Silicon Valley NCMA Chapter, "How Baseball is a Big Player in (Most) Negotiations Or How 'Baseball Arbitration' is a Valuable Tool for Contract Professionals."
- Naval Postgraduate School, "International Contracting."
- "Contract Negotiation," NCMA World Congress NES, Dallas, Texas.
- Phoenix and Tucson NCMA Chapters, "International Contracting Trends—Benchmarking to CISG."
- "Contract Negotiation," workshop, Sierra Vista, Arizona, NCMA Chapter.

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