Regulatory/Contractual Update

May 5, 2006 Volume 11, Issue 4

- On March 29, 2006, DoD issued its reply to the December 2005 GAO Report entitled "Defense Acquisitions: DoD Has Paid Billions in Award and Incentive Fees Regardless of Acquisition Outcome," No. 06-66 (see prior Updates). This response provides "additional guidance on the proper use of award fees." It is effective "immediately" and the DFARS and/or its PGI are in the process of being revised. Several topics are included including
  - **Link Award Fees to Desired Outcomes**. Among other actions, "award fee provisions must clearly explain how a contractors' performance will be evaluated."
  - **Award Fees Must Be Commensurate with Contractor Performance**. "Performance that is less than satisfactory is not entitled to any award fee."
  - **Rollover of Award Fees**. "Use of a 'rollover' provision should be the exception rather than the rule."

  COMMENT: The Air Force on April 4, 2006, issued a Memorandum in furtherance thereto that provides, in part, "We (AF) must make a cultural shift in the way the Air Force incentivizes contractors" and the AF will be revising associated guides. And, the Navy issued a reminder as a follow-on to its previous promulgated Memorandum of November 2, 2005, on the subject.

  Do these impact your current contracts? Where is the notice/comment opportunity before this cashflow/reward policy is changed—especially when the March 29th Memorandum acknowledged DFARS changes will be forthcoming?

- On May 3, 2006, the Secretary of the Air Force issued a Memorandum on "Data Rights and Acquisition Strategy." This Memorandum highlights the "increasing challenges in meeting 10 USC 2466 50% limitation on contacting out depot-level maintenance…. A key element is appropriate access to the technical data, and rights in that data, necessary to support a source of repair decision during system development and demonstration…." The memo concludes by "directing that the acquisition of technical data and associated rights be addressed specifically in all Acquisition Strategy Plans, reviews, and associated planning documents for ACAT programs and subsequent source selections."

  COMMENT: Look for special provisions in solicitations and increasing challenges to your assertion of rights? Will your proposals be "non-responsive" if you insist upon your rights in data, etc.? Is this another form of "eminent domain" by the Government except now in the area of Government contracting?

- On March 1, 2006, the Navy Comptroller issued a reminder on Antideficiency Act obligations—especially in viewed of the recent $40M violation while "normally" the Navy averages 8 violations a year having an average value of under $1M. "Personal accountability" was emphasized.

  COMMENT: Does the FAR authorize the issuance of oral Purchase Orders and by whom? Government Program people are issuing them! And, "clearly" they can be orally accepted! See FAR Part 13 as well as the March 22, 2006, Federal Register where there is proposed FAR" clarifying" language—comments are due May 22, 2006. What do your "best business practices" prescribe?

Points of Contact
ADROffice@Rumbaugh.net
www.Rumbaugh.net

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- The Navy recently sent a recent reminder to its Contracting Officers in order to reinforce the August 17, 2004, Navy Memorandum on "Selection of Contractor for Subsystems and Components" as well as the July 12, 2004, Memorandum by Michael Wynne on the topic The direction states, "Program managers and contracting officers are directed to establish insight into prime contractors' plans for assembling teams and fostering competition. This is particularly important when an offeror proposes to use one of its own divisions or an affiliate for a particular subsystem or component."

  COMMENT: Why on competitive programs? And, after contract award?

- On April 19, 2006, the Federal Register noticed FAC 2005-09 which included the following final/interim rules:
  - **OMB Circular A-76 (FAR Case 2004-021**). "Amends FAR Subpart 7.3 to provide language that is consistent with OMB Circular A-76 (Revised), Performance of Commercial Activities, dated May 29, 2003. In addition, it provides two new provisions that inform potential offerors of the procedures the Government will follow for streamlined and standard competitions, as they are defined in the Circular."
  - **Expiration of the Price Evaluation Adjustment (FAR Case 2005-002**). "Adopts, without change, an interim rule that amended the FAR to cancel the authority for civilian agencies, other than NASA and the U.S. Coast Guard, to apply the price evaluation adjustment to certain small disadvantaged business concerns in competitive acquisitions. The change was required because the statutory authority for the adjustments had expired. As a result, certain small disadvantaged business concerns will no longer benefit from the adjustments. DoD, NASA, and the U.S. Coast Guard are authorized to continue applying the price evaluation adjustment."
  - **Removal of Sanctions Against Certain European Union Member States (FAR Case 2005-045)**. "This interim rule removes the sanctions in FAR Part 25 against Austria, Belgium, Denmark, Finland, France, Ireland, Italy, Luxembourg, the Netherlands, Sweden, and the United Kingdom on acquisitions not covered by the World Trade Organization Government Procurement Agreement (WTO GPA). These sanctions did not apply to small business set-asides, to acquisitions below the simplified acquisition threshold using simplified acquisition procedures, or to acquisitions by the Department of Defense. Contracting officers may now consider offers of end products, services, and construction that were previously prohibited by the sanctions."
  - **Free Trade Agreements - Morocco (FAR Case 2006-001).** "This interim rule allows contracting officers to purchase the products of Morocco without application of the Buy American Act if the acquisition is subject to the Morocco Free Trade Agreement."
  - **Fast Payment Procedures (FAR Case 2004-031).** "This amendment permits, but does not require, fast payment when invoices and/or outer shipping containers are not marked 'Fast Pay', provided the contract includes the 'Fast Payment Procedure' clause. If the Fast Payment clause is in the contract, such unmarked invoices will no longer be rejected. Instead, they will be paid using either fast payment or normal payment procedures. In addition, the revision deletes the requirement for marking invoices 'No Receiving Report Prepared'." (On May 1, 2006, minor technical corrections were issued to this rule)
  - **Federal Technical Data Solution (FedTeDS) (FAR Case 2004-007)**
  - **Definition of Information Technology (FAR Case 2004-030)**
  - **Combating Trafficking in Persons (FAR Case 2005-012)**
  - **Confirmation of HUBZone Certification (FAR Case 2005-009)**

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- On May 2, 2006, the Federal Register noticed the finalization of the earlier interim rule published on December 4, 2003, whereby the Department of Homeland Security (DHS) establishes "the Department of Homeland Security Acquisition Regulation (HSAR). This regulation supplements the Federal Acquisition Regulation (FAR) and provides a uniform department-wide acquisition regulation for DHS. The HSAR provides specificity about the Department's organization, policies, procedures, and delegations of authority. The FAR and HSAR apply to all DHS entities, except the Transportation Security Administration (TSA)." The HSAR should also be read in conjunction with the previously "promulgated Homeland Security Acquisition Manual (HSAM), which provides procedural guidance on internal acquisition matters that need not be set out in a regulation." An insightful discussion of the public comments was also provided. This rule is effective June 1, 2006.

- On April 12, 2006, the Federal Register noticed a proposed DFARS rule that "amends the DFARS to implement provisions of annual appropriations acts that authorize an exemption from the Buy American Act for the acquisition of commercial information technology."

- On April 24, 2006, OMB issued a "reminder" Memorandum on the subject of "Competitive Sourcing under Section 842(a) of Public Law 109-115," i.e. the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, FY 2006. This Section "addresses the use of public-private competition to convert activities from government to contractor performance," the results of the OMB review of agency data on those competitions over the past two years, the restrictive nature of the Section, and OMB's intention to seek repeal of the Section.

- On April 17, 2006, OFPP issued a Memorandum on "Publication of Brand Name Justifications" calling attention to the new publication requirements (>$25K) of brand name justifications. "FAR Case 2005-037, Brand Name Specifications, was opened to address this subject."

  COMMENT: Why is OFPP issuing mandatory guidance before FAR implementation? And, it is included in DoD PGI 211.105!

- On April 12, 2006, the Federal Register noticed a final DFARS rule "to address the use of incrementally funded fixed-price contracts" and also "replace" the interim guidance that was in effect since September 1, 1993. The new rule allows contracting officers to award fixed-price contracts in specific circumstances where full funding is not available and incremental funding is statutorily permitted. Significant changes from the interim rule include:
  - New language addressing incremental funding for severable services;
  - Elimination of the requirement for approval by the Head of the Contracting Agency (HCA) for incremental funding of base services and hazardous/toxic waste remediation contracts; and,
  - **New language emphasizing that contractors are "not authorized" to continue work without funding.**

  "The final rule maintains the clear preference for fully funded fixed-price contracts and requires the use of a standard Limitation of Government's Obligation (LOGO) clause in the limited and clearly defined circumstance where incremental funding is used."

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- GAO has replaced the April 2002 edition of the bid protest Guide to GAO Protective Orders with a May 2006 edition. The new edition incorporates the recent changes GAO has made to its bid protest Protective Order and to the related Applications for access to protected material. See http://www.gao.gov/special.pubs/d06716sp.pdf

- On April 12, 2006, the Federal Register noticed a final DFARS rule associated with it Transformation Initiative to update the text regarding the application of labor laws to Government contracts.

- On April 12, 2006, the Federal Register noticed two final DFARS rules:
  - to implement Section 847 of the National Defense Authorization Act for Fiscal Year 2004. Section 847 authorizes DoD to carry out a pilot program that permits the use of streamlined contracting procedures for the production of items or processes begun as prototype projects under other transaction agreements.
  - to implement a statutory prohibition on foreign taxation under contracts funded by U.S. assistance programs.

- On March 31, 2006, the Federal Register noticed a final Department of Energy rule revising its requirements for make-or buy plans from its management and operating contactors.

- OMB announced that the "determination of the maximum benchmark compensation amount that will be allowable under government contracts during contractors FY 2006, is $546,689."

- On April 12, 2006, the Federal Register noticed a proposed DFARS rule that "amends DFARS Part 225 and associated provisions and clauses to clarify the distinction between foreign acquisition policies that apply only to top-level components of end products and those that apply to both top-level and lower-tier components of end products. As used in this background discussion, 'top-level components' are those components that are incorporated directly into the end product; and 'lower-tier components' are components that are incorporated into a component of the end product." Comments are due on/before June 12, 2006.

- **COMMENT:** Is the Berry Amendment is "a nuisance" for Contract Officers by having to determine if a particular billing should have a withhold for theoretical nonconforming parts and refunding if the parts turn out to be conforming? It is reported that takes quite a bit of administrative labor to evaluate all of the invoices. Should the government be providing more items as government furnished? Would it be more cost-effective to find additional contracting vehicles?

- The Office of Management and Budget announces five meetings of the Acquisition Advisory Panel established in accordance with the Services Acquisition Reform Act of 2003. Public meetings of the Panel will be held on May 18th, May 31st, June 14th, July 7th and July 21st 2006. All meetings will begin at 9 a.m. Eastern Time and end no later than 5 p.m. Except for the July 7th meeting, all public meetings will be held at the Small Business Administration (SBA), 409 Third Street, SW., Washington, DC, 2nd Floor Eisenhower Conference Room. The July 7th meeting will be held at the new FDIC Building, 3501 N. Fairfax Drive, Arlington, VA 22226, Room 203.

- Paul Dennett (ESI International) has been nominated to be OFPP Administrator.

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

- On May 3, 2006, the Wall Street Journal published an article on some of the pitfalls of e-commerce, i.e**. some emails are not being received due to ISP span filters!** Do you have a protocol/trading agreement with your customers/suppliers on transmission/reception of emails? Can some unreceived emails be impacting contract formation, performance, etc."

- And, on the topic of B2B electronic commerce… the United Nations has an **E-Contracts Convention for international contracting** currently open for signature until January 16, 2008. The US State Department is requesting input on whether the United States should sign this treaty. The treaty is available at www.un.org by using the search term "A/Res/60/21."

- The recent Court of Appeals decision in Albert M. Higley Company v. N/S Corporation (6th Circuit, No. 05-3393, April 17, 2006) is an interesting case that involves a prime/subcontractor dispute under a government contract where the ultimate customer is the Greater Cleveland Regional Transit Authority. Subcontractor, N/S, during the course of performance raised some questions as to compliance with the "Buy America" provisions in the Subcontract which ultimately escalated into a dispute and then to negotiations and a mediation—all to no avail. Subsequently Higley sued N/S for material breach of the terms of the subcontract in federal district court and N/S filed a motion to stay litigation and compel arbitration. The motions were denied and appealed to the Court of Appeal.

  On appeal the thrust of the inquiry was over the interpretation of a subcontract covering how disputes were to be handled. Specially, that provision read,

  > "Should (N/S) and (Higley) be unable to resolve said dispute(s) through mediation, any and all dispute(s), at the sole discretion of (Higley), shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association."

  It was Higley's position that the clause gives it the right to decide "at its sole discretion" and, in accordance with another clause, all disputes not resolved by arbitration shall be resolved by litigation in any court having jurisdiction. N/S argued that the clause should have been clearer and is ambiguous if the decision on the use of arbitration was solely that of Higley. Finally, N/S asserted application of the principle that "ambiguous contractual language be construed against the drafter of the contract."

  The court ruled in this business dispute that Higley possessed the unilateral and sole right to decide whether this dispute went to arbitration or litigation.

  This non-consumer/employment decision may give pause in the drafting of bilateral B2B dispute clauses and the criteria for deciding on the use thereof.

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- The reported discussions/negotiation involving major automobile suppliers including for example Delphi, raises some interesting risk analyses questions as well as the performance impact of all subcontracts in that supply chain …
  - Will the performance by any subcontractors in the automobile industry impact any of your contracts or subcontracts?
  - Are you prepared to respond to Contracting Officers inquiries on same?

- "Subcontractor's employee on a public works project cannot sue the prime or general contractor on theories of statutory or contractual liability for the nonpayment of prevailing wages by the subcontractor; prevailing wage statutes authorize no private right of action by a subcontractor's employee against other parties than the subcontractor, nor may recovery against other parties be premised on principles of third-party breach of contract or unfair competition." Violante v. Communities Southwest Development and Construction Company - filed March 16, 2006, publication ordered April 17, 2006, Fourth District, Div. Two Case is at http://www.metnews.com/sos.cgi?0406%2FE037333

- "Grant of summary judgment in favor of defendant and dismissal of state tort law claims arising out of plaintiffs' participation in a federal program is affirmed where defendant government contractor's transmittal of information to federal agencies that plaintiffs posed a possible terrorist threat is protected by official immunity. Murray v. Northrop Grumman Info. Tech. (04/10/06 - No. 04-5097." Case is at http://caselaw.lp.findlaw.com/data2/circs/2nd/045097p.pdf

Future Speaking Topics Include—

- West Sound, Washington, NCMA Chapter, "Baseball Arbitration."
- Puget Sound NCMA Chapter National Educational Seminar, "Best Contracting Practices for Businesses."
- California State Bar Annual Meeting, "Thinking Again For The First Time About Advocacy In Arbitrations."
- 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!"

ADR Offices of
CHARLES E. RUMBAUGH
Arbitrator/Private Judge/Mediator
310.373.1981 // 310.373.4182 (fax)
888.ADROffice (toll free)

Los Angeles
San Francisco

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