Regulatory/Contractual Update

October 12, 2006 Volume 11, Issue 9

- On September 21, 2006, Shay Assad, Director of DoD Defense Procurement and Acquisition Policy, issued another "Berry Amendment" memorandum on "Implementation Guidance for Pre-Award Berry Amendment Compliance." This "addendum" to his memorandum of August 18th—see September Update—specifies that a contractor must deliver compliant items "if a domestic non-availability determination (DNAD) is not approved." If, prior to award, a DNAD is in process, the guidance provides that "the contracting officer **may** award a contract which includes DFARS 252.225-7014."

  COMMENT: And, is the Contingencies Cost Principle 31.205-7 applicable for the "unknowns" resulting from these actions by the government? Was a deviation to that cost principle obtained by the contracting officer? Meanwhile, it is reported that DCMA is "holding up shipments because they 'suspect' non-compliance."

- On October 4, 2006, the Federal Register noticed several DFARS rules including the following:
  - "An interim rule amending the DFARS to implement Section 803 of the National Defense Authorization Act for Fiscal Year 2006. Section 803 places limitations on the acquisition of a major weapon system as a commercial item." Comments are due on/before December 4, 2006.
  - An interim rule implementing "Section 1031(a)(37) of the National Defense Authorization Act for Fiscal Year 2004. Section 1031(a)(37) amended the requirements for submission of a notification to Congress before the award of a contract for architectural and engineering services or construction design in connection with military construction, military family housing, or restoration or replacement of damaged or destroyed facilities." Comments are due on/before December 4, 2006.
  - **Berry Amendment Notification Requirement.** "An interim rule amending the DFARS to implement Section 833(a) of the National Defense Authorization Act for Fiscal Year 2006. Section 833(a) requires the posting of a notice on the FedBizOps Internet site, when certain exceptions to domestic source requirements apply to an acquisition." Comments are due on/before December 4, 2006.

    COMMENT: On October 18, 2006, NCMA is offering an online seminar on the Berry amendment—www.ncmahq.org.
  - "A final rule amending 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."

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- On September 28, 2006, Federal Acquisition Circular (FAC) 2005-13 was issued and included the following:
  - **Implement OMB Policy on the Use of Brand Name Specifications (Interim) (FAR Case 2005-037)**. "Implements the memoranda issued by the Office of Management and Budget dated April 11, 2005 and April 17, 2006, requiring agencies to publish on the Governmentwide point of entry (GPE) or e-Buy the documentation required by the FAR to support the use of a brand name specification. The rule is intended to limit the use of brand name specifications and provide for maximum competition." Comments are due on/before November 27, 2006.
  - **Information Technology Security (FAR Case 2004-018).** This final rule amends "FAR Parts 1, 2, 7, 11, and 39 to implement the Information Technology (IT) Security provisions of the Federal Information Security Management Act of 2002 (FISMA), (Title III of Public Law 107-347, the E-Government Act of 2002 (E-Gov Act)). The rule focuses on the importance of system and data security by contracting officials and other members of the acquisition team. The intent of adding specific guidance in the FAR is to provide clear, consistent guidance to acquisition officials and program managers; and to encourage and strengthen communication with IT security officials, chief information officers, and other affected parties."
  - **Online Representations and Certifications Application (ORCA) Archiving Capability (Interim)(FAR Case 2005-025)**. "This interim rule amends FAR Parts 4, 12, 14, and 15 to address the record retention policy where the Online Representations and Certifications Application (ORCA) is used to submit an offeror's representations and certifications…."
  - **Inflation Adjustment of Acquisition-Related Thresholds (FAR Case 2004-033).** "This final rule… increases the micro-purchase threshold (FAR 2.101) from $2,500 to $3,000;…the Federal Procurement Data System reporting threshold (FAR 4.602(c)) raised from $2,500 to $3,000; Commercial Items test program ceiling (FAR 13.500) raised from $5,000,000 to $5,500,000; and the cost and pricing data threshold (FAR 15.403-4) will be raised from $550,000 to $650,000. The prime contractor subcontracting plan (FAR 19.702) floor will be raised from $500,000 to $550,000, but for construction ($1,000,000) is unchanged."
  - **Reporting of Purchases from Overseas Sources (Interim) (FAR Case 2005-034).** "This interim rule amends FAR Part 25 and adds a provision in FAR 52.225 to implement Section 837 of Division A of the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006 (Pub. L. 109-115). Section 837 requires the head of each Federal agency to submit a report to Congress relating to acquisitions of articles, materials, or supplies that are manufactured outside the United States…."

    COMMENT: On October 2, 2006, the Defense Procurement and Acquisition Policy Director issued a memorandum on "Reporting of Purchases from Overseas Sources."
  - **Exception to the Buy American Act for Commercial Information Technology (FAR Case 2005-022).**

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- On September 21, 2006, Shay Assad, Director of DoD Defense Procurement and Acquisition Policy, issued a "reminder" to "contracting officers to structure indefinite delivery contracts consistent with the FAR and required supplies and services be furnished through the issuance of a task or delivery order. The memo addresses anomalies uncovered during DoD's transition to the Federal Procurement Data System - Next Generation (FPDS-NG)."

- On October 3, 2006, the Federal Register noticed several OFPP proposed CAS related changes associated with the following—comments are due on/before December 4, 2006—…
  - FAR 30.201-4(c), Consistency in Cost Accounting Practices. "This part is renamed as Disclosure and Consistency of Cost Accounting Practices for Contracts Awarded to Foreign Concerns. It is also being revised to delete the language related to contracts awarded to United Kingdom contracts and to add language that addresses contracts subject to CAS 401 and 402 under 48 CFR 9903.201-(1)(b)(4)."
  - FAR 52.230-4, Consistency in Cost Accounting Practices. "The clause is renamed as Disclosure and Consistency of Cost Accounting Practices for Contracts Awarded to Foreign Concerns."
  - "To implement (several government and industry) recommendations to change the regulations related to the administration of the CAS."

- On October 4, 2006, OFPP Administrator Paul Denett issued a memorandum on "Review of Commercially Available Online Procurement Services," wherein he is requesting agency participation in a new "working group to review the regulations, policies, and business considerations associated with using commercially available online procurement services." The working group will consider the following:
  - Compiling lessons learned from agency procurements that used online procurement services.
  - Creating and issuing an OFPP Best Practices Guide for using online procurement services.
  - Developing a model requirements document to support acquisitions for these services.
  - Drafting any FAR changes that may be needed to increase the effective use of online procurement services.
  - Obtaining information from the private sector on their use of online procurement services.

- On September 20, 2006, the Federal Register noticed a Department of Commerce final rule which amends "the Defense Priorities and Allocations System Regulation to provide additional guidance on how persons in Canada and other foreign nations may apply for priority rating authority and special priorities assistance to obtain items in the United States, and to provide information on how persons in the United States may obtain informal (sic) assistance in Italy, the Netherlands, Sweden, and the United Kingdom to obtain items in support of approved programs."

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- The Department of Justice Criminal Division announced on October 10, 2006, the formation of a "new national procurement fraud initiative … to promote the early detection, prevention and prosecution of procurement fraud associated with increased contracting activity for national security and other government programs." Additional information is available at http://www.usdoj.gov/opa/pr/2006/October/06_odag_688.html. And, "unrelated," DoJ also announced on October 10th that "Oracle Corporation has agreed to pay the United States $98.5 million to settle its liability for defective pricing disclosures (understated discounts to commercial customers) made by PeopleSoft Inc. during the negotiation of a contract under the General Services Administration Multiple Award Schedule (MAS) program…(in connection with) the sale of software licenses and related maintenance services."

- On October 2, 2006, Under Secretary of Defense Kenneth Kreig issued a policy memorandum on "Acquisition of Services Policy." The National Defense Authorization Act for FY2006, requires the establishment and implementation of a management structure for the acquisition of services in DoD. This memorandum supersedes prior direction on the subject. "The policy is intended to ensure that the acquisition of services support and enhance the warfighting capabilities of the DoD and achieve the following objectives:
  - Acquisition of services are based on clear, performance-based requirements
  - Expected cost, schedule, and performance outcomes are identifiable and measurable
  - Acquisition of services are properly planned and administered to achieve outcomes consistent with customer's need(s)
  - Services are acquired by business arrangements which are in the best interests of the DoD and are in compliance with applicable statutes, regulations, policies, and other requirements, whether the services are acquired by or on behalf of the DoD
  - Services are acquired using a strategic, enterprise-wide approach, which is applied to both the planning and the execution of the acquisition.

  "The policy addresses management structure, acquisition of services categories, acquisition strategy requirements, notification procedures for proposed acquisitions of services, and data collection requirements. The new policy and other complementary guidance is intended to strengthen DoD management of the acquisition of services at the strategic and tactical level and will be included in the next revision of DoD Instruction 5000.2."

- LeAntha Sumpter, UID Program Manager, Office of the Under Secretary of Defense (AT&L) announced

> "the October 4, 2006 publication of ISO/IEC 15434.3, *Transfer Syntax for High Capacity ADC Media*, which establishes '12' as the approved Format Code for Text Element Identifiers. This update is the result of a collaborative effort between the Department of Defense, national and international standards bodies, and industry to develop an interoperable solution for automatic identification and data capture that leverages multiple, widely-used international standards. Under ISO 15434.3, enterprises can now choose between Text Element Identifiers maintained by the Air Transport Association's Common Support Data Dictionary, Application Identifiers maintained by GS1 (formerly UCC.EAN), and Data Identifiers maintained by Material Handling Industry (MH10 SC 8) of the American National Standards Institute (ANSI).
>
> "UID policy has allowed for the use of a Format Code 'DD' while the update to ISO 15434 was being undertaken. For organizations that have been using Format Code 'DD', the DoD encourages a rapid transition to the use of Format Code '12' with a target date of January 1, 2007 to cease using the 'DD' format for any newly marked items.
>
> (DoD) expects that there are and will continue to be parts with Format Code 'DD' for Text Element Identifiers and they will exist in the operational inventory until supplies are exhausted. This will necessitate imaging devices and supporting AIS systems to recognize both 'DD' and '12' since both will be acceptable by DoD for the foreseeable future. <u>There is no intent or direction to re-mark any items that have used the 'DD' Format Code</u>…." (emphasis added)

- The Air Force on October 3, 2006 issued AFAC 2006-1003 which included "adding individual or class deviations to legal review section; providing updates to Acquisition Plan, Acquisition Strategy Panel, and LCMP/CAMP/IPS procedures; establishing mandatory procedures for submission of annual reports of cost accounting standards waivers and cost-and-pricing data waivers and exceptions; providing direction on notification to DOL of anticipated terminations or reductions; making changes to templates in the Other-Than-Full-and-Open Competition Justification and Approval Guide; providing changes to the Multi-Year Contracting Guide; and other miscellaneous changes and corrections."

- On October 12, 2006, the <u>Federal Register</u> noticed an Army rule which removes Section 5152.225-74-9000 from the AFARS since it is "superseded" by DFARS Subpart 225.74, Defense Contractors Outside the United States.

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

- Contract Management 101? One recent development suggests a "hypothetical" which may be of interest...

  Assume the Board of Directors of a publicly traded company (with a business base that includes significant government contracts) is very concerned about the "leaks" of information/discussions at its Board of Directors meetings, potential SEC/DoD issues associated with same, etc. and desires to "plug that leak." Also assume that each Board member has an agreement with the company regarding his/her services as a Director, compensation, obligations, etc. AND an arbitration clause that covers any and all controversies/disputes between the individual Director and the Company. What are some of the issues associated with the Company in its investigation of those leaks and how can an arbitration clause be a "first step" in finding those leaks and plugging them?

  Initially a focus could be on a possible outside investigation by consultants, etc. in order to ascertain who may have made personal phone calls, emails, etc. to the press as well as others. In addition to relevant code of ethical considerations there is within a government contract context some cost/overhead issues associated with FAR 31.205-31 and DCAA guidance in the area, e.g. "Audit Program for Consultant and Professional Service Costs," Version 5.2 dated December 2005, available at the DCAA website, www.DCAA.mil –and is there a safe harbor in that approach? Or, if those Company/Board agreements were reviewed, the company may consider filing "a friendly" arbitration demand against each/all the directors with that demand calling for injunctive/declaratory relief, request consolidation of the individual arbitrations, convening of an early preliminary hearing on the scheduling of procedural matters (including discovery), execution of confidentiality agreements (even if the proceedings are otherwise "private"), and ultimately requesting subpoenas (for records) against non-parties and parties for (otherwise personal) telephone records, e-mails, etc.?

  You may want to discuss with counsel and/or review relevant agreements on where and how arbitration agreements may provide a methodology in "new" areas, e.g. "leaks."

- The Termination for Convenience clause "was not intended to limit damages caused by a government breach that is independent of an attempt to cancel or terminate a contract. Therefore, the clause did not apply to limit damages … where the government breached the contract by hindering the contractor's ability to perform." (Ardco, Inc., AGBCA, ¶91,786)

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- The recent TINA decision in Wynne, Sec'y of the Air Force v. United Technologies Corp., CA-FC, 50 CCF ¶78,603 may be of interest wherein "the contractor presented evidence that the government did not review the cost or pricing data it submitted prior to contract award. The Armed Services Board of Contract Appeals ruled in favor of the contractor. The Air Force appealed the decision, arguing that it is not necessary to establish reliance on defective cost or pricing data. The Federal Circuit, however, rejected the Air Force argument, holding that reliance on data is a necessary element in a TINA claim and that the government had not provided evidence of such reliance.

Future Speaking Topics Include—

- Naval Postgraduate School, "International Contracting."
- Beach Cities NCMA Chapter, "International Contracting Trends—Benchmarking to CISG."
- New Orleans and Huntsville NCMA Chapters, National Educational Seminar, "Performance-Based Acquisition."
- Inland Empire ISM Affiliate, "Big Changes to UCC Rules on Contract Formation and Terms of the Deal are Around the Corner— Are You Ready?"
- "Contract Negotiations," NCMA World Congress NES, Dallas, Texas. Information/registration available at www.ncmahq.org
- ISM International Conference, Las Vegas, "Update on Recent Developments in International Purchasing/Contracting" and "Factors in Drafting/Negotiating a Dispute Resolution Clause with Customers/Suppliers."
- Phoenix and Tucson NCMA Chapters, "International Contracting Trends—Benchmarking to CISG."

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