Regulatory/Contractual Update

April 30, 2007 Volume 12, Issue 4

- On April 26, 2007, the Federal Register noticed an interim rule amending the DFARS "to implement Section 852 of the National Defense Authorization Act for Fiscal Year 2007. Section 852 requires DoD to prescribe regulations to ensure that pass-through charges on contracts or subcontracts (or task or delivery orders) that are entered into for or on behalf of DoD are not excessive in relation to the cost of work performed by the relevant contractor or subcontractor." This rule "contains a solicitation provision (252.215-7003) and a contract clause (252.215-7004) requiring offerors and contractors to identify the percentage of work that will be subcontracted and, when subcontract costs will exceed 70 percent of the total cost of work to be performed, to provide information on indirect costs and profit and value added with regard to the subcontract work. Excepted contracts and flow-down subcontracts include the following:
  - Firm-fixed-price contracts (including those with EPA) awarded on the basis of adequate price competition; or
  - Firm-fixed-price contracts (including those with EPA) for the acquisition of a commercial item.

  "Excessive pass-through charge, with respect to a Contractor or subcontractor that adds no or negligible value to a contract or subcontract, means a charge to the Government by the Contractor or subcontractor that is for indirect costs or profit on work performed by a subcontractor (other than charges for the costs of managing subcontracts and applicable indirect costs and profit based on such costs). No or negligible value means the Contractor or subcontractor cannot demonstrate to the Contracting Officer that its effort added substantive value to the contract or subcontract in accomplishing the work performed under the contract." The rule is effective on April 26th and comments are due on/before June 25, 2007.

  COMMENT: What is the value of a contractor being responsible for acceptance/warranty/latent defects, etc. for all of the subcontracted work? If the purported value of the higher-tier contractor is deemed to be "none," or of "negligible value," perhaps DoD could provide that subcontractor effort as government furnished!

- On April 10, 2007, Shay Assad, Director of DoD Defense Procurement and Acquisition Policy, issued a memorandum on "Class Determination, Domestic Non-Availability (DNAD) for Fasteners Including all Items in Federal Stock Classes 5305, 5306, 5307, 5310, 5320 and 5325, or NAICS code 332722 (excluding cotter pins, dowel pins, hose clamps, spring pins and turnbuckles)."

  COMMENT: Since DoD elects not to provide the specialty metals directly to contractors, is this the process of choice? See prior Updates on the subject.

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- On March 23, 2007, Shay Assad, Director of DoD Defense Procurement and Acquisition Policy, issued a memorandum on "Waivers Under the Truth In Negotiations Act" wherein he states, it is issued "to make it clear that the standard to be met for granting a TINA waiver is extremely high (as well as) to establish a quarterly meeting to assist in early identification of potential waiver issues." Further, the Director states, "TINA waivers should not be granted to contractor business segments that normally perform Government contracts subject to TINA."

  COMMENT: Now, it seems, that the basis for a waiver depends upon the business mix in the applicable business unit! Is this the law? While industry on several occasions recommended a commercial business unit approach to TINA rather than always on a product-by-product approach, nothing was ever finalized. DoD seems to be saying, "if you have *any* TINA Government contracts, then a waiver is unlikely notwithstanding the particulars associated with specific products! Again, no public notice/comment on this policy change! Should the trade associations (again) request TINA exemptions based, in part, upon the business mix and, thus, permit more companies to sell items to the Government?

- On April 23, 2007, the Federal Register noticed a proposed FAR rule "to revise the definition of 'cost or pricing data'; change the term 'information other than cost or pricing data' to 'data other than certified cost or pricing data'; add a definition of 'certified cost or pricing data' to make the terms and definitions consistent with 10 U.S.C. 2306a and 41 U.S.C. 254b and more understandable to the general reader; change terminology throughout the FAR; and clarify the need to obtain data other than certified cost or pricing data when there is no other means to determine fair and reasonable pricing during price analysis." Comments are due on/before June 25, 2007.

  COMMENT: What is the "real" problem? Does everyone (really) know how to ascertain whether a price is "fair and reasonable"—to both parties? It is submitted that having "additional" information does not necessarily make a price "fair and reasonable" in the opinion of that requesting party, if not, both parties. Could the Government provide additional contract management tools to assist Contracting Officers obtain a fair and reasonable price to both parties? The Navy recently implemented a policy change that is a step in that direction—see last month's Update on recent Navy ADR changes.

- On April 26, 2007, the Federal Register noticed a final rule amending the DFARS "to address requirements for the separation of Government functions for oversight, source selection, contract negotiation, and contract award. The rule contains best practice policies (through a new section at DFARS 203.170) for use by the military departments and defense agencies."

- On April 23, 2007, the Federal Register noticed a 30 day extension to comment on the proposed changes in connection with Contractor Code of Ethics and Business Conduct and OIG Fraud Hotline Poster." See February 2007 Update. Comments are now due on/before May 23, 2007.

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- On April 24, 2007, Shay Assad, Director of DoD Defense Procurement and Acquisition Policy, issued a memorandum on ""Proper Use of Award Fee Contracts and Award Fee Provisions." While referring to FAR 16.104 in the selection/use of such contracts, Mr. Assad states, "it is the policy of the Department that objective criteria will be utilized, whenever possible, to measure contract performance." Otherwise, the Head of the Contracting Activity must sign a D&F that "work to be performed is such that it is neither feasible nor effective to devise predetermined objective incentive targets applicable to cost, technical performance or schedule."

  Further, the ratings (with definitions) and applicable award fee pool are specified in the memorandum:

  Unsatisfactory……0% award fee pool earned
  Satisfactory……No greater than 50% award fee pool earned
  Good……..50-70% award fee pool earned
  Excellent……75-90% award fee pool earned
  Outstanding…….. .90-100% award fee pool earned

  The policies are applicable for "all solicitations issued commencing on 1 August 2007, and will be incorporated into the DFARS and DFARS PGI, as appropriate."

  COMMENT: No opportunity for public comment prior to implementation! No Paperwork Reduction Act clearances!

- On March 2, 2007, the office of Shay Assad, Director of DoD Defense Procurement and Acquisition Policy, issued a memorandum "on requiring a determination in writing that the commercial item definition has been met for all acquisitions exceeding $1 million for solicitations and awards under FAR Part 12. Contracting Officers are tasked to ensure that contract files fully and adequately document the market research and rationale supporting such conclusions, with particular care for those involving items 'offered for sale' but not actually sold and modifications of a type customarily available in the marketplace."

- On April 25, 2007, OFPP issued a memorandum on "The Federal Acquisition Certification for Program and Project Managers" which rolls out a FEI led effort "to develop common, essential competencies (for certification) for the program and project management community."

- On April 17, 2007, the Air Force issued a policy memorandum on "Debriefing Offerors" wherein contracting officers were reminded of the importance of transparency in acquisitions through debriefing of unsuccessful offerors. Apparently the prior use of multiple award contracts issued by "other agencies" for the AF precluded any communication with unsuccessful offerors. This direction prohibits the use of other contracting vehicles that prohibit post-award communications.

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- With DoD supplemental funding requests "stalled" between Congress/Administration, what are the notice requirements, etc. in your contract relative to the expiration of any funding?

- On April 13, 2007, OMB issued a memorandum on "Validating the Results of Public-Private Competition" in order to "provide guidance to help agencies substantiate that savings are achieved and performance is improved through public-private competition." An attachment thereto describes the various responsibilities in tracking of cost/performance data.

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

- The decision of Trianco v. IBM, 466 F.Supp.2d 600 (No. 06-3533, December 21, 2006, US District Court, ED Pennsylvania) is a "must read" case for those contemplating teaming arrangements and how a winning prime proposal resulted in the team member not being awarded a subcontract notwithstanding the teaming arrangement. The case is important on various aspects including the selection of team members, drafting of the teaming agreement, methods on resolving "open issues" including price, use of UCC "good faith" obligation in negotiation of the final subcontract price, etc.

  The decision turns on the absence of finalization of a subcontract price or a methodology to arrive at same in the teaming agreement.

  At the "end-of-the-day one must ask: Where are prime contractors in the future when they are looking for "teaming" arrangements? Will subcontractors proceed on a similar vein or should all parties explore other alternatives to resolve impasse or open-ended provisions? What alternatives are business professionals/attorneys providing their clients?

  In last month's Update reference was made to the new Navy ADR policy on binding arbitration. Letter contracts/subcontracts are another contractual form used where the price is open and the question is presented there—should they be accepted without some form of arbitration, i.e. what is the incentive for a buyer to "close the deal?" (For some, DoD Weighted Guidelines usually answers that question—"none," for production items) But letter arrangements are not unlike this teaming decision. Why is the business arrangement structured without a default position and what could also be considered on that topic—and for primes, to facilitate "more" potential subcontractors to "sign up" and be a part of a potential team?

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To some, a form of Baseball Arbitration (final offer arbitration) could have been a viable alternative that may have been considered, i.e. the parties need a definitive alternative to further, and enhance, their negotiations! While there are several articles, etc. in the literature on how this "negotiation tool" provides the requisite environment for a negotiated resolution, there is a two part article on my website that covers the topic under Publications, i.e. "Negotiations Part I and II" and it discusses the basics for various transactions including where "formation of the deal" is important and where this method of ADR "works!" It is time to move ADR to the left so that it is a tool in contract formation!

And, it is interesting that IBM, and not (by my research) Trianco, signed a public commitment to use ADR! The website for the International Institute for Conflict Prevention and Resolution at http://www.cpradr.org/ identifies over 4000 organizations that have committed to use ADR!

Further, I'm reminded that one should be concerned about the status, or viability, of any Proprietary Information Agreements under/related to a teaming arrangement where the arrangement "went South" due to other open issues in a teaming environment!

Finally, it comes back to the Contracting Officers, e.g. how important in the prime contract award process was it to have the team in-place? Is it clear what a prime contractor can or cannot do relative to team members? After all, if a "new" subcontractor comes on-board and agrees to a lower price for the work, **where do those delta dollars go**?

- John Miller, an attorney in Texas and Missouri, wrote an excellent article on indemnification clauses that includes a 40 point checklist on various aspects to consider in the use/drafting of same. The article is available in the March 2007 NCMA Contract Management magazine.

Future Speaking Topics Include—

- ISM International Conference, Las Vegas, "Update on Recent Developments in International Purchasing/Contracting."
- ISM International Conference, Las Vegas, "Factors in Drafting/Negotiating Dispute Resolution Clauses with Customers/Suppliers."

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