Regulatory/Contractual Update

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- On August 14, 2007, the Federal Register noticed a proposed DFARS rule "to require use of the Wide Area WorkFlow-Receipt and Acceptance (WAWF-RA) electronic system for submitting and processing payment requests under DoD contracts." This proposed change will, according to DoD, "increase the efficiency of the payment process." Comments are due on/before October 15, 2007.

  And, on July 12, 2007, DFAS issued a memorandum that "notifies contractors that, beginning 1 October 2007, any invoices not received electronically by the DFAS Columbus and Limestone offices will be rejected, unless the contractor has provided sufficient rationale by 1 September 2007 to show they are unable to submit payment requests in electronic form."

- On August 2, 2007, the Federal Register noticed a proposed DFARS rule "to provide for interim payments under cost-reimbursement contracts for services within 30 days, instead of the current DoD policy of making payments within 14 days. The change will not apply to small business concerns." Comments are due on/before October 1, 2007.

- On August 17, 2007, the Federal Register noticed FAC 2005-19 which provides, in part, for the following—final rules, unless otherwise noted:
  - Reporting of Purchases from Overseas Sources (FAR Case 2005-034)
  - Changes to Lobbying Restrictions (FAR Case 2005-035)
  - Online Representations and Certifications Application Archiving Capability (FAR Case 2005-025)
  - Requirement to Purchase Approved Authentication Products and Services (FAR Case 2005-017)
  - Combating Trafficking in Persons (FAR Case 2005-012) (Interim)
  - Emergency Acquisitions (FAR Case 2005-038)
  - Online Representations and Certifications Application (ORCA) Review (FAR Case 2006-025) (Interim)
  - Free Trade Agreements

- On August 2, 2007, the Federal Register noticed a final DFARS rule "to implement Section 816 of the National Defense Authorization Act for Fiscal Year 2006. Section 816 requires DoD to prescribe guidance on the use of tiered evaluation of offers for contracts and for task or delivery orders under contracts." Final changes include a "prohibition of the contracting officer from using tiered evaluation unless those actions (i.e. market research on sufficiency of qualified business concerns, etc.) have been taken."

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- On July 5, 2007, the Federal Register noticed a final Rules of Procedure of the Civilian Board of Contract Appeals,

  > "which will govern all proceedings before the Board. The Board was established within GSA by section 847 of the National Defense Authorization Act for Fiscal Year 2006 to hear and decide contract disputes between Government contractors and Executive agencies (other than the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the National Aeronautics and Space Administration, the United States Postal Service, the Postal Rate Commission, and the Tennessee Valley Authority) under the provisions of the Contract Disputes Act of 1978 and regulations and rules issued thereunder. Effective January 6, 2007, boards of contract appeals that existed at the General Services Administration and the Departments of Agriculture, Energy, Housing and Urban Development, Interior, Labor, Transportation, and Veterans Affairs were terminated, and their cases were transferred to the new Civilian Board of Contract Appeals. The Board has jurisdiction as provided by section 8(d) of the Contract Disputes Act of 1978, 41 U.S.C. 607(d). In addition, the Board will conduct proceedings as required or permitted under other statutes or regulations. The Board intends to issue final, revised rules after considering all comments on the interim rule. Interested parties should submit written comments to the Board of Contract Appeals on or before September 28, 2007."

- On August 2, 2007, the Federal Register noticed a proposed DFARS rule to "update and clarify requirements for unique identification (UID) and valuation of items delivered under DoD contracts. The proposed rule revises the applicable contract clause to reflect the current requirements." Comments are due on/before October 1, 2007.

  > "This proposed rule revises the clause at DFARS 252.211-7003 to update and clarify instructions for the identification and valuation processes. The changes include: Updating of references to standards and other documents; clarification of the definition of unique item identifier; specifically addressing the DoD recognized unique identification equivalent, where applicable; clarification of data submission requirements for end items and embedded items; and clarification of requirements for inclusion of the clause in subcontracts."

And, the upcoming DoD UID forum in Atlanta, September 11-13, 2007, has an expanded focus this year and will also cover E-business systems. This forum provides an opportunity "on education and information exchange between the Defense Industrial Base, Program Offices, DoD components and UID solution providers."

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- On August 23, 2007, the Air Force issued AFAC 2007-0823 with changes that include the following:
  - Provides new policy and procedures on major system acquisition as commercial items
  - Ratification of Unauthorized Commitments
  - Revises policy and provides new mandatory procedures to be followed when purchasing restricted food, clothing, fabrics, and specialty metals.
  - Revises clause on contractor access to Air Force installations.
  - Revises language on simplified acquisition thresholds.
  - Makes miscellaneous other changes and revisions.

- On August 23, 2007, the DoJ announced that "a former contract employee of the U.S. Army Corps of Engineers has agreed to plead guilty to bribery in connection with a $16 million hurricane protection project for the reconstruction of the Lake Cataouatche Levee, south of New Orleans…. Raul Miranda of Houston was a construction official in the New Orleans office of the U.S. Army Corps of Engineers. He reviewed construction projects in the aftermath of Hurricane Katrina. Between August and October of 2006, Miranda agreed to accept approximately $299,000 from a sand and gravel subcontractor in exchange for providing confidential information used by the Corps to evaluate bids…."

- On August 21, 2007, OFPP/GSA noticed in the Federal Register the intent to collect information from two on-line surveys with public input being solicited on the Paperwork Reduction Act aspects of this proposal. Specifically, "the National Defense Authorization Act for Fiscal Year 2006 (P. L. 109-360) requires OFPP, in consultation with the Federal Acquisition Regulatory Council, to review the use of online procurement services, such as reverse auction services, and identify types of commercial item procurements that are suitable for the use of such services; and features that should be provided by online procurement services that are used by Federal agencies. To conduct this review, a survey will be issued to the Government and industry buying activities and to reverse auction service providers. The information collected through the surveys will be used to determine how the Government buying activities can most effectively use reverse auctions as a tool to support Government requiring activities and ensure that the U.S. taxpayer is best served." The draft surveys are located at http://www.acquisition.gov

- The Advanced Weapons Laboratory at the Naval Air Warfare Center, Weapons Division China Lake, is working toward a follow-on contract and as part of that process has issued a survey request about experiences with "software intensive systems contracts." The survey is available at https://vovici.com/wsb.dll/WSPersistentSurveyList

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

- On August 17, 2007, the US Court of Appeals for the Federal Circuit affirmed the ASBCA decision involving Grumman Aerospace Corp. v. Wynne, No. 2006-1482. This decision should be of interest to all in the solicitation/proposal preparation, those concerned about the absence of sufficient discussions with bidders, the lack on any discussion of "required" regulatory deviations for a special contract clause, etc.

  This long-running contract had its origins in the 1980s which involved numerous disputes but culminating in this decision whereby the court affirmed the Board in deciding to deny "the superior knowledge claim…and there was no abuse of discretion in denying the jury verdict method of claim" of Grumman. This matter arose "from Grumman's contract with the Air Force to modernize the avionics of certain F-111 aircraft" as a result of a competitive procurement in which Grumman was competing against the incumbent contractor. The appeal included issues surrounded the availability of the requisite library information/data as well as reasonableness of the damages calculations on the sustained claims. On the former, the Court stated that the contractor was "on notice of no warranty of information or recognition of any contract obligation to do so." A special contract clause provided, in part, that the

  > "Government in no way warrants the data contained in the …Data Library. The Government will not reimburse the Contractor for any cost incurred as a result of using data provided in the data library or allow a schedule slippage due to defects in the data provided."

  The Court further stated the contractor "entered the contract 'with its eyes open'." Yet, the court cited with apparent approval the post-award conference wherein the Air Force told the contractor "…additional data (beyond that in the library) must be obtained via the appropriate sub or associate contractors."

  Interestingly is the dissent which stated, in part, that the fact that there was a discrepancy of $100 million in bids between the incumbent and Grumman indicated a "flaw in the bidding information" and that the "impossibility of performance should have been communicated before, not after, the contract was awarded and performance was undertaken."

- The recent publication of quality issues associated with certain foreign (commercial/consumer) supplies/products emphasize the potential need to revisit outsourcing policies, contractual clauses, scope/reliability of audits, etc. In particular is the acceptance, warranties, etc. criteria only as good as the supplier? Or, is your reputation, etc. only as good as your suppliers?

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- The July 3, 2007, Seventh Circuit decision In Re: Craig Wright, No. 07-1483, brings to the forefront the need to understand recourse verses non-recourse financing. And, in this era of a seemingly "collapsed" of the housing industry/financing it becomes readily apparent.

  Wright involved an appeal from a

  > "bankruptcy court denial of a Chapter 13 plan that would allow debtors to surrender a vehicle to a creditor and pay nothing on account of the difference between the (purchase money) loan's balance and the collateral's market value. (This court) affirmed (that decision whereby it)… interprets a 2005 amendment to the Bankruptcy Code as giving the creditor the right to an unsecured deficiency judgment after surrender of the collateral in a situation where the debt exceeds the current value of the collateral, unless the loan contract itself provides that the loan is without recourse against the borrower."

  When does non-deficiency/non-recourse loans arise—only when expressly stated in the loan contract?

- The October 12, 2006, Update had noted under the caption of "Contract Management 101," a "hypothetical" corporation that used "unconventional" surveillance techniques in attempting to ascertain "leaks" to the press which were purportedly being made by members of the Board of Directors as well as others. Recently, individuals that were the subject of that type of surveillance have commenced lawsuits wherein the claim is made as to "illegal and reprehensible conduct" by a "non-hypothetical" corporation. As stated before, "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'."

Future Speaking Topics Include—

- International Association for Contract and Commercial Management (IACCM), "Drafting the Ultimate Arbitration Clause," Audio Seminar.
- National Contract Management Association (NCMA), "Understanding the (Un)Intended Consequences of Boilerplate Provisions in Commercial Contracts and Government Subcontracts," Audio Seminar.
- NCMA San Diego Chapter, "Regulatory/Contractual Update."
- NCMA Leatherstocking Chapter, Rome, New York, "Alternative Dispute Resolution."

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