

Regulatory/Contractual Update

January 23, 2007

Volume 12, Issue 1

- On December 29, 2006, Shay Assad, Director of DoD Defense Procurement and Acquisition Policy, issued a memorandum where a recent sampling of contracts awarded in FY 2005 revealed that many contained “ambiguous and imprecise terms, conditions, and deliverables.” The Director has ordered that ALL contracting personnel serving in acquisition positions must complete by May 15, 2007, the DAU module “Contract Format and Structure for the DoD e-Business Environment (CLC033).”

COMMENT: Is this the complete answer/remedy? Have you seen that “audit/sampling” report? What does this directive also say (indirectly) about contractors’ personnel—are they surfacing/correcting the cited “problems” and/or has the current contracting environment created adverse/unintended consequences due to downsizing in number of contracts personnel (industry and government), etc. whereby these “problems” are, in whole/part, policy/funding issues that need to be addressed? Or, what is industry doing to rectify the DoD “problem?”

- On January 16, 2007, the DoD IG issued a 141 page report on recent DoD purchases through the Department of Interior (Report No. D-2007-044, FY 2005) where twenty-two potential Appropriation Act violations are asserted. The findings include, “the DoD internal controls over management of appropriated funds were not adequate...with (what the IG believes for a certain named contracting activity) may have intentionally violated the Antideficiency Act.” On January 2, 2007, the IG issued a separate report on “38 potential Antideficiency Act violations” in connection with “DoD Purchases Made Through Non-DoD Agencies.”

COMMENT: There is a message here—for everyone!

- DoD and GSA entered into a MOA on December 6, 2007, on the topic of “Acquisition Excellence” with 24 action items on the common goal of “providing best value goods and services, in a timely manner, in support of the warfighter....with a focused approach to improving acquisition processes and results....”

- Section 511 of the Tax Increase Prevention and Reconciliation Act of 2005 (P.L. 109-222) requires all federal, state, and local governments to withhold, commencing in 2011, three percent of payments for goods and services, to include Medicare payments, farm aid and certain grants. Recently, efforts have been suggested to accelerate the effective date of this provision to offset increases in various legislative proposals this year.

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

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- On January 22, 2007, DoD noticed in the Federal Register several interim/final rules (effective January 22nd), with ...
 - A final rule “amending the DFARS to add policy regarding notification of potential safety issues under DoD contracts. The rule contains a contract clause (252.246-7003) requiring contractors to promptly notify the Government of any nonconformance or deficiency that could impact item safety.” This clause is, where applicable, a mandatory flow-down.
 - An interim rule “amending the DFARS to provide a single reference to DoD-unique acquisition flexibilities that may be used to facilitate and expedite acquisitions of supplies and services during emergency situations. This DFARS supplements FAC 2005-11. It is noted that “DoD is interested in receiving input (comments due on/before March 23rd) as to whether the provisions sufficiently clarify the existing DFARS flexibilities that can be used in emergency situations or whether more detailed, comprehensive coverage is needed.”
 - An interim rule “amending the DFARS to implement Section 833(b) of the National Defense Authorization Act for Fiscal Year 2006. Section 833(b) (which) expands the foreign source restrictions applicable to the acquisition of clothing to also include clothing materials and components, other than sensors, electronics, or other items added to, and not normally associated with, clothing and the materials and components thereof.” Comments are due on/before March 23, 2007.

- On January 22, 2007, the Federal Register noticed two proposed DoD rules with comments due on/before March 23, 2007...
 - “to address training requirements that apply to contractor personnel who perform information assurance functions for DoD. The rule provides that contractor personnel accessing information systems must meet applicable training and certification requirements.”
 - “to address requirements for validation of Taxpayer Identification Numbers as part of the Central Contractor Registration process.” The notice states “the proposed changes are consistent with changes made to the FAR” in FAC 2005-10—see prior Updates.

- On January 18, 2007, the Federal Register noticed a Navy Advance Notice of Proposed Rulemaking “to solicit comments that can be used to assist the Navy in drafting a proposed Navy Marine Corps Acquisition Regulation Supplement contract clause or statement of work requirements that will incentivize contractors to pursue and implement Continuous Process Improvements (CPI) on Navy major defense contracts. In particular, the primary focus will be to incentivize proactive business process improvement activities that identify increased efficiencies, cost avoidance, and cost savings, and provide the greatest motivation for contractors to share related savings with the Navy to the maximum extent practicable.” Comments are due on/before February 12, 2007.

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- On December 4, 2007, Dr. Delores Etter, Assistant Secretary of the Navy, issued a memorandum on “Acquisition Program Cost Growth; Management of Engineering Change Proposals.” This Memorandum restricts the use of Engineering Change Proposals. Specifically it
 - “provides the direction that PMs may not approve any change proposals that increases cost unless it falls into 1 of 5 (defined) categories (under the following headings):
 - 1) Safety
 - 2) Contractual Defects
 - 3) Unavailable CFE
 - 4) Testing deficiencies
 - 5) Statutory & regulatory changes
 - ...
 - "The direction above gives each Program Manager an ability to say ‘no’ to seemingly good ideas that drain down the engineering change order budget."

COMMENT: Knowing the rules-of-the-road from the get-go may be better.
- On January 11, 2007, the Federal Register noticed a Department of Homeland Security (DHS) proposed rule to amend its “acquisition regulation to reflect a statutorily-mandated jurisdictional change for the agency Board of Contract Appeals from the Department of Transportation Board of Contract Appeals to the Civilian Board of Contract Appeals. DHS is also making several non-substantive amendments to its acquisition regulation in order to reflect organization changes.” Comments are due on/before February 12, 2007.

COMMENT: On the topic of the new Civilian Board of Contract Appeals which started work on January 8, 2007, it is reported that the contemplated Board rules may severely restrict/limit subpoenas to/on other agencies! It is not clear if this impacts subpoenas for discovery and/or evidence. Talk about an uneven playing field—or is this denial of justice? Why not permit access to where the facts reside especially with increased inter-agency buying? Who is drafting/issuing these proposed rules?
- On January 10, 2007 Colonel Casey Blake was named Presiding Chair of the DAR Council as the Deputy Director, Defense Acquisition Regulations Systems.

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

- The Institute for Supply Management has posted on its CAPS Research website (<http://www.capsresearch.org>) a “Cross Industry Comparison of Standard Benchmarks” for 20 industries including “Aerospace/Defense” on several categories of “purchase” related activities. Interesting items noted from this November 2006 published research (for 2005) on the (just) Aerospace/Defense segment includes...
 - Purchase spend as Percent of Sales Dollar—45.9% (7th highest of reported industries)
 - Purchase Operating Expense as Percent of Sales Dollar—1.12% (highest of all industries)
 - Purchase Employees as a Percent of Company Employees—3.1% (2nd highest)
 - Percent of Purchased Spend Offshore—14.52%
 - Average Annual Spend on Training per Purchasing Employee--\$1,252
 - Percent of Purchase Spend with Diversity Suppliers—11.62% (3rd highest of those industries reporting)
 - Percent of Active Suppliers who are eProcurement Enabled—33.88% (2nd highest industry)
 - Purchase Spend via eProcurement—43.48% (highest of all industries)
 - Purchase Spend via eAuctions—1.92%
 - Purchase Spend via Strategic Alliances—25.86% (3rd highest of those industries reporting)
- Other recent ISM/CAPS Benchmarking reports noted include
 - Measuring the Organizational Effectiveness of Procurement Shared Services Centers
 - Outsourcing/Offshoring Your Services Spend
 - eProcurement
- Who can make an award fee determination? Only the Fee Determination Official specified in the contract. See The Boeing company...v. US, COFC No. 91-1362C, January 17, 2007
- “Bid on a (local) public agency contract cannot be declared nonresponsive by the public agency on the ground that the bidder has listed an unlicensed subcontractor on the bid forms; nothing in statutes requires that subcontractors be licensed as of the time of the submission of the prime bid. Where agency erroneously declared plaintiff’s bid nonresponsive, trial court’s order canceling contract and requiring agency to contract the remainder of the work to plaintiff based on its bid was error; correct remedy was to require agency to conduct a due process hearing to determine whether plaintiff was a responsible bidder.” D. H. Williams Construction, Inc. v. Clovis Unified School District (Emmett’s Excavation, Inc.) - filed January 10, 2007, Fifth District Full text <http://www.metnews.com/sos.cgi?0107%2FF049526>

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Future Speaking Topics Include—

- “Contract Negotiations,” NCMA World Congress NES, Dallas, Texas. Information/registration available at www.ncmahq.org
- Los Angeles/South Bay NCMA Chapter, “Putting the International Business Deal Together—The Latest Benchmarking In International Contracting.”
- New Orleans, Alamo, and Huntsville NCMA Chapters, National Educational Seminar, “Performance-Based Acquisitions.”
- “International Contracting,” Naval Postgraduate School.
- 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.”
- Sierra Vista NCMA Chapter, “Contract Negotiations.”
- Phoenix and Tucson NCMA Chapters, “Drafting the Ultimate ADR Clause for Government Subcontracts.”
- Rio Grande NCMA Chapter, “Baseball Arbitration.”

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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