Regulatory/Contractual Update

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- Section 851 of PL 109-364 (October 17, 2006), entitled, "Report on Former DoD Officials Employed by Contractors of the DoD," is receiving increased attention since GAO has been "working" with Defense Industry Initiative (DII) contractors on a revolving door questionnaire that contractors will be receiving from GAO. Specifically, a report is due Congress by December 1, 2007, detailing the extent that former DoD Officials are being retained/employed (since January 1, 2001) by contractors that received "more than $500M in contract awards from the DoD in FY 2005."

- On March 30, 2007, the Federal Register noticed a proposed rule that would amend the FAR to expand the areas of offeror responsibility determinations as well as offeror certification obligations. Specifically,

  > "Offerors are currently required to certify whether or not, within a three-year period preceding an offer, they have been convicted of or had a civil judgment rendered against them for tax evasion or are presently indicted for, or otherwise criminally or civilly charged with, the commission of tax evasion. This proposed rule requires offerors to also certify whether or not they have, within a three-year period preceding the offer, been convicted of or had a civil judgment rendered against them for violating any tax law or failing to pay any tax, or been notified of any delinquent taxes for which the liability remains unsatisfied. The offeror also will be required to certify whether or not they have received a notice of a tax lien filed against them for which the liability remains unsatisfied or the lien has not been released. The additional certifications are needed to identify prospective offerors that may have outstanding tax obligations that may be delinquent so that the Government can make an informed responsibility determination, as necessary. If an offeror certifies that any of these conditions exist, the contracting officer may ask the offeror for additional information related to the obligation to evaluate the offeror's ability to perform under the contract."

  Comments are due on/before May 29, 2007.

- On March 2, 2007, Shay Assad, Director of DoD Defense Procurement and Acquisition Policy, issued a memorandum on "Contracts for Services," wherein he reminds the acquisition community that service contracts should not be used for the acquisition of "products, supplies and facilities" that are not "required for, or incidental to, the performance of services contracts." The test turns on what is the "primary purpose" of the contract.

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- On March 20, 2007, the Federal Register noticed a major Government policy change in the area of Alternative Dispute Resolution (ADR) in the form of a new Navy Instruction 5800.15 on the "Use of Binding Arbitration for Contract Controversies." This Instruction applies to all contracting activities of the Department of the Navy and authorizes Contracting Officers "to use binding arbitration procedures contained" in the "Department of the Navy Contract Arbitration Procedural Guidance" that is attached to the Instruction. Briefly, this Instruction, and as amplified in the Guidance, authorizes binding arbitration for issues in controversy, as defined by FAR 33.201, and subject to

  - certain regulatory/statutory provisions on ADR, appropriated and non-appropriated funding;
  - the approval of the "Associate General Counsel (Litigation) (AGC(L)) on a case-by-case basis in consultation with the Assistant General Counsel (Alternative Dispute Resolution);" and
  - "The approval of appropriate contracting officers and other officials ordinarily required for approval of settlements, as measured by the maximum award cap identified for the proposed arbitration."

  COMMENT: Almost 10 years ago Industry recommended, among other things, when the current FAR Part 33 on ADR was first proposed as an implementation of the 1996 Administrative Dispute Resolution Act that the Government permit voluntary "binding arbitration." Other items of comment by industry at that time included the need for clarification on access to the Judgment Fund, clarification that ADR is an allowable Contract Management cost, use of private neutrals, etc.—all, to some, remain open items.

  The prior use of Summary Trials at the BCA level has been subject to controversy given the absence of CO authority to use arbitration. As stated by the Navy, it "becomes the first agency subject to the FAR to have the authority to use binding arbitration."

  The Instruction also provides that "ASBCA has agreed to make administrative judges available to serve as arbitrators under this Instruction." Private neutrals can also be utilized but given the "no-(direct) cost" charge to the litigating parties by use of ASBCA judges, the existing general practice in the non-use of the private sector ADR neutrals may be continued.

  Public comments were neither solicited nor that aspect discussed in the Federal Register publication.

- On April 3rd and 4th 2007, a "summit" on Radio Frequency Identification (RFID) will be held in Washington DC at the Hilton Hotel. Registration/Info is available at http://www.dodrfidsummit.com/

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- On March 21, 2007, the Federal Register noticed a proposed rule that would amend the FAR "to require that contractors report specific subcontract awards to a public database. The Federal Funding Accountability and Transparency Act of 2006 (FFATA) (PL 109-282) requires the existence and operation of a searchable website that provides public access to information about Federal expenditures. The FFATA specifically requires that a pilot program be established to test the collection and accession of subcontract award data. As a result, subcontracts awarded and funded with Federal appropriated funds will be disclosed to the public in a single searchable website." Comments are due on/before May 21, 2007.

  And, on March 5, 2007, DoD issued an updated memorandum, "DoD Implementation of the Electronic Subcontracting Reporting System (eSRS)." Paper submittal of SFs 294/295 continues today and the memo "suggests" that more "personpower" is needed to complete the tasks for the out-periods on the eSRS implementation.

- On March 27, 2007, the Federal Register noticed a Department of Energy notice to ascertain/receive public comments and/or recommendations on how "to address the challenge it faces due to increasing costs and liabilities associated with contractor employee pension and medical benefits. Under the Department's unique Management and Operating (M&O) and other site management contracts, DOE reimburses its contractors for allowable costs incurred in providing employee pension and medical benefits to current employees and retirees who are eligible to participate in the contractors' pension and medical benefit plans. DOE has established a Web site for the public to submit comments and/or recommendations on how it should address the financial challenge it faces on contractor employee pension and medical benefits."

  COMMENT: What does this portend for the future—curtailing such costs?

- On February 14, 2007, the GSA issued a memorandum on "GSA Support to DoD" that included a "package…designed to convey to the top levels of our largest customer that GSA is positioned to be a civilian and uniformed 'force multiplier' through fast, compliant and responsible acquisitions…(with the) hope that the package will dispel the perception in parts of DoD that it is not acceptable for DoD to do business with GSA." The package includes slides and talking points ("DoD/GSA Partnership") to be used in meetings with DoD in order to "demonstrate the advantages that accrue to DoD by multiplying its capabilities through utilizing GSA's service, to tell them about recent changes at GSA, and to assure them that they can count upon us and trust us to meet their needs." Action items, prior memos, and DoD direction on "Non-Economy Act Orders" are included.

  Independently, it is reported some recent GSA/DoD agreements may not have "fully vetted within GSA" and "all DoD annual appropriations must be obligated on contract before they expire."

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And, on February 20, 2007, the Navy also issued a memorandum on "Financial Management of Non-Economy Act Orders with Non-DoD Agencies," with direction on use of funds including advance payments as well as an extensive "checklist" on compliance related issues.

- On March 27, 2007, the Federal Register noticed several DoD final/interim rules (except as noted) including
  - Updating the "policy addressing requirements for DoD contractors to submit payment requests in electronic form. The rule clarifies the situations under which DoD will grant exceptions to requirements for electronic submission of payment requests."
  - Implementation of "Section 1211 of the National Defense Authorization Act for Fiscal Year 2006. Section 1211 prohibits DoD from acquiring United States Munitions List items from Communist Chinese military companies."
  - Implementation of the "Dominican Republic-Central America-United States Free Trade Agreement with respect to the Dominican Republic. The rule also adds Bulgaria and Romania to the list of countries covered by the World Trade Organization Government Procurement Agreement."
  - Implementation of the "United States-Bahrain Free Trade Agreement and the Dominican Republic-Central America-United States Free Trade Agreement with respect to Guatemala. The Free Trade Agreements waive the applicability of the Buy American Act for some foreign supplies and construction materials and specify procurement procedures designed to ensure fairness."
  - Proposed rule "to remove text addressing DoD procedures for closeout of contract files. The text proposed for removal will be relocated to the DFARS companion resource, Procedures, Guidance, and Information." Comments due on/before May 29, 2007.

- On March 22, 2007, the Federal Register noticed FAC 2005-16 with several final items including
  - Termination or Cancellation of Purchase Orders (FAR Case 2005-029). The "rule revises the FAR to correct the inadvertent omission (sic) of an appropriate reference in FAR Part 13.302-4(a) for termination for cause of those purchase orders that have been accepted in writing. This FAR revision is a correction to a reference and not a change to the contract termination options available in 52.212-4(l) or (m). If a purchase order that has been accepted in writing by the contractor is to be terminated, (it can be)… for cause as well as … for convenience."
  - Contract Terms and Conditions Required to Implement Statute or Executive Orders--Commercial Items (FAR Case 2006-012). "The final rule revises the FAR to update the required contract clauses that implement provisions of law or executive orders for acquisitions of commercial items."
  - Implementation of Wage Determinations OnLine (FAR Case 2005-033).
  - Contracts with Religious Entities (FAR Case 2006-019) (Interim)

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

- From Where In Federal Contracting, "What's the problem with federal contracting? Is it too much congressional oversight? Could it be too much inspector general oversight? How about too many people accepting inspector general reports at face value? Is it too much work and even too much form filling? What about too many rules?" Vernon J. Edwards has published an interesting piece on the topic, "Poor Leadership, Not Excessive Oversight, Is What Troubles Contracting," at http://www.wifcon.com/anal/LeadershipFinal.doc

Future Speaking Topics Include—

- "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."

- Los Angeles Gateway NCMA Chapter, "How to Negotiate Fair and Reasonable Prices in Sole Source Government/Commercial Procurements."

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