

Regulatory/Contractual Update

May 29, 2007

Volume 12, Issue 5

- On May 15, 2007, the Federal Register noticed FAC 2005-17 which covers 34 pages and only one topic, i.e. government property—FAR Part 45—in order “to implement a policy that fosters efficiency, flexibility, innovation and creativity while continuing to protect the Government's interest. This rule simplifies procedures, clarifies language, and eliminates obsolete requirements related to the management and disposition of Government property in the possession of contractors by moving, clarifying, and deleting definitions; establishing a life-cycle approach to property management; and, sanctioning the use of consensus standards and/or industry-leading standards and practices for property management. This rule deletes outdated clauses, combines selected FAR property clauses into a single clause, and implements a new clause designed for military base and installation-level contracts awarded under the OMB Circular A-76 process. FAR language and associated clauses for special tooling, special test equipment and facilities contracts is deleted. **It is not the Government's intention to change the intent or meaning of the language pertaining to ‘title to Government property’.**” (emphasis added)

This final rule is effective June 14, 2007. An exhaustive analysis of the public comments is provided. NCMA will be conducting an audio seminar on this topic on June 26, 2007—additional info at <http://www.ncmahq.org/education/audio.asp>

- On May 15, 2007, Shay Assad, Director of DoD Defense Procurement and Acquisition Policy, issued a supplement to his April 24, 2007, “Proper Use of Award Fee Contracts and Award Fee Provisions” memorandum. This supplement clarifies that the Head of Contracting Activity “shall retain the determination and finding required (in the April 24th memo) for (a) all ACAT programs, and (b) all non-ACAT contracts with an estimated value of \$50 million or more.” See April Update for background info.
- On April 18, 2007, DoD issued a Cost and Software Data Reporting (CSDR) Manual (DoD 5000.04-M-1) which “serves as the primary requirements document for the development, implementation, and operation of the contractor cost data reporting and software resources data reporting systems, collectively referred to as the CSDR system.” A summary of changes is located at <http://dcarc.pae.osd.mil/Policy/CSDR/DidsChanges.pdf>

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Items summarized in these Updates are for general informational/discussion/educational purposes only and should not be relied upon in the course of representation or in the forming of decisions in legal matters— independent counsel should be obtained.

- On May 22, 2007, the Federal Register noticed two requests for public input on two important topics:
 - The first addresses DoD's "review of the Department's contract profit/fee policies." Specifically, "DoD would like to hear the views of interested parties regarding the effectiveness of the profit/fee policies presently used for DoD contracts." Several areas of interest include "weighted guidelines" approach and various issues associated with "contractor risk factors used in DoD's structured approach for developing profit/fee objectives."
 - And, DoD is reviewing its "policies (FAR/DFARS) on ... contract finance issues, including non-commercial item purchase financing; commercial item purchase financing; loan guarantees for defense production; advance payments for noncommercial items; progress payments based on costs; contract debts; contract funding; assignment of claims; prompt payment; performance-based payments; electronic funds transfer; electronic submission and processing of payment requests; and levies on contract payments. DoD is interested in receiving public input on these contract financing policies, particularly with regard to those that are considered to be especially effective or ineffective, along with supporting rationale."

Comments are both notices are due on/before July 23, 2007.

- On May 22, 2007, the DoD Director of Defense Procurement and Acquisition Policy published in the Federal Register his assessment/analysis of the issues/discussion points raised over the last several years on contract close-out process and in particular those concerns arising from the 2005 public meeting on same. Specifically, the Director plans to take the following actions "to enhance the contract closeout process"...
 - Open a DFARS case on contract closeout to establish a comprehensive PGI section to address contract closeout and to assess whether regulatory clarification/revision is needed to address the following:
 - Cumulative Allowable Cost Worksheets.
 - Quick closeout.
 - Subcontract closeout.
 - Final indirect cost rate proposals.
 - Periods of performance.
 - Government property.
 - Alternate contract closing methods.
 - Contractor compliance with data submission requirements related to contract closeout.
 - Identify and make available best practices used by the military departments and defense agencies in completing contract closeouts.
 - Identify any additional training that should be provided on contract closeout.

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- On May 22, 2007, OFPP Administrator Paul Denett issued a memorandum on “Using Performance-Based Acquisition to Meet Program Needs—Performance Goals, Guidance, and Training.” In that memorandum the OFPP Administrator covers 3 primary themes in order to “ensure this acquisition strategy is used effectively”...
 - Appropriate PBA performance goals of 40% of eligible service contract actions.
 - Guidance including a new website for the “Seven Steps to Performance-Based Service Acquisition Guide” at <http://acquisition.gov/sevensteps> and monthly OFPP-led PBA Interagency Working Group meetings.
 - Training opportunities as specified in its April 25, 2007, memorandum “The Federal Acquisition Certification for Program and Project Managers.”
COMMENT: Only “thing” missing is industry participation, i.e. those that are receiving the contracts—industry is part of the “acquisition team!”
- On April 4, 2007, the CAS Board convened and approved the following final rules:
 - Alternative Disclosure Statements for United Kingdom Contractors.
 - Time-and-Material/Labor-Hour Contracts for Commercial Items.
 - Adjustment of Thresholds for Inflation.The Board also approved a proposed rule on “Contract Clause for Foreign Concerns” and prioritized prior/open initiatives including
 - Employee Stock Ownership Plans
 - CAS 403, Operating Revenue Threshold
 - Computing the Cost Impact of a Change in Accounting Practice
 - CAS Exemption for Contracts Executed and Performed Outside the United States
 - CAS Comprehensive Review
 - CAS 410, Appendix A, Transition from a cost of sales or sales base to a cost input base
 - Disclosure Statements
 - CAS 404 and 409, Tangible Capital Assets
 - Catastrophic Losses
- On May 22, 2007, OFPP Administrator Paul Denett issued a memorandum on “Strategic Sourcing Progress,” wherein “best practices” from agencies participation in the Federal Strategic Sourcing Initiative are cited. Additional info on this Initiative is available at <https://acc.dau.mil/strategicsourcing> (User/password required).
- On May 22, 2007, the Federal Register noticed a proposed DFARS rule “to address statutory provisions relating to leasing. The proposed rule permits the lease of a vessel, aircraft, or combat vehicle only if the contract will be long-term or will provide for a substantial termination liability.” Comments are due on/before July 23, 2007.

- Following-up on the OFPP April 25, 2007, memorandum on “The Federal Acquisition Certification for Program and Project Managers” (see last month’s Update) GSA noticed on May 24, 2007, that the
“Federal Acquisition Institute (FAI) will hold a vendor meeting to provide information on the ... announced Federal Acquisition Certification in Program/Project Management (FAC-P/PM) to include program details, target timeline, and opportunities for vendors to support the training of federal program and project managers. The purpose of this certification program is to establish the competencies, training, and experience requirements for program and project managers in civilian agencies. The FAC-P/PM focuses on essential competencies needed for program and project managers; the program does not include functional or technical competencies, such as those for information technology, or agency-specific competencies. The certification requirements will be accepted by, at minimum, all civilian agencies as evidence that an employee meets the core competencies, training and experience requirements....The meeting will be held June 13, 2007, from 2:30 p.m. to 4 p.m. at OPM’s Auditorium located at 1900 E Street, NW., Washington, DC 20415.”
- On May 4, 2007, the Navy issued supplemental guidance to the DoD interim rule of April 26, 2007, (see last month’s Update) on purported “excessive pass through charges on DoD on contracts.” This guidance clearly addresses the “work performed at all tiers.”
- The Air Force has posted a summary video on its 2006 Worldwide Contracting Training Conference in St. Louis at <https://134.205.252.194/saf/aqc/conference/worldwide2006/index.cfm>
- The next DoD Procurement Conference will be held May 12-15, 2008 in Orlando.

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

- On May 21, 2007, the California Supreme Court in Wagner Construction. Co. v. Pacific Mechanical Corp., No. S136255, ruled in a case where parties have agreed to arbitrate any dispute arising out of their contract, the affirmative defense that the statute of limitations has run is for the arbitrator rather than the court to decide.
- On May 14, 2007, the 9th Circuit Court of Appeals in Starrag v. Maersk, No. 04-56771, in a shipping case the court limited damages for goods originally valued at over \$600,000 to only \$1,500 where the Carriage of Goods by Sea Act (COGSA), contract, and bill of lading law limited same.
- Is a foreign government a third-party beneficiary of a foreign military sales contract between DoD and a defense contractor? No, according to the 9th Circuit Court of Appeal holding in Secretary of State for Defence (UK) v. Trimble Navigation Ltd. No. 06-1062, decided May 10, 2007.
- Findlaw has posted a sampling of various contract forms, etc. at <http://contracts.corporate.findlaw.com/index.html>. Consult with counsel before using same.
- NCMA has posted most of the presentations from its World Congress 2007 in Dallas at <http://www.ncmahq.org/meetings/WC07/> And, ISM has similarly posted most of the presentations from its International Conference 2007 in Las Vegas at <http://www.ism.ws/education/content.cfm?itemnumber=16160>

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