Regulatory/Contractual Update

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- On November 14, 2007, the Federal Register noticed a proposed FAR rule to amend the FAR "in order to require contractors to have a code of ethics and business conduct, establish and maintain specific internal controls to detect and prevent improper conduct in connection with the award or performance of Government contracts or subcontracts, and to notify contracting officers without delay whenever they become aware of violations of Federal criminal law with regard to such contracts or subcontracts."

  A contract clause will be required for all contracts over $5M where there is a performance period over 120 days. The clause does not apply to acquisition of commercial items (either at the prime or subcontract levels) or contracts or subcontracts performed outside the United States.

  The notice provides, in part, that "this rule is an expanded version of the one noticed February 16, 2007, (FAR Case 2006-007 and see below) and public comments are requested on the new changes not included in prior FAR Case 2006-007. Comments are also requested on mandatory disclosure, and full cooperation, which were in FAR case 2006-007 as examples in the clause of an internal control system…. Further public comment and analysis of the relationship to waiver of the attorney-client privilege" is solicited.

  And, as alluded to above this expanded clause specifically provides, "the Contractor shall notify, in writing, the agency Office of the Inspector General, with a copy to the Contracting Officer, whenever the Contractor has reasonable grounds to believe that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of Federal criminal law in connection with the award or performance of this contract or any subcontract thereunder." And, this includes "full cooperation with any Government agencies responsible for audit, investigation, or corrective actions." Comments are due on/before January 14, 2008.

  COMMENT: What happened to the Defense Industry Initiative that had had the (tacit) approval of the Government? What are the remedies for "breach"—disbarment and suspension? And, now there will be more non-statutory indemnification clauses that are inherent in this endeavor! Are compliance efforts a direct charge to the contract since the requirement arises under a specific contract/clause? How does one fairly price (to both) "full cooperation" into a fixed price contract including "purported" violations, investigations prior to disclosure, subsequent lawsuits, etc.? Will the Contingency Cost Principle be used in pricing with a reopener clause? Talk to counsel.

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- DoD continues to issue memoranda including the following:
  - A memorandum dated November 16, 2007, by the DoD Director, Defense Procurement and Acquisition Policy, that updates the one issued on November 5, 2007, on "Iraq/Afghanistan Business Theater Clearances" with a 28 page compliance/checklist attachment (dated November 12, 2007) for submitting Clearance requests. DoD also issued memoranda dated October 19 and 25, 2007, on Iraq/Afghanistan contracting.
  - A memorandum dated November 7, 2007, by the Director which "reiterates the guidance for complying with small business subcontracting plan requirements. In particular, when there are no subcontracting opportunities specified in the subcontracting plan, a determination must be approved at one level above the contracting officer."
  - A memorandum dated November 27, 2007, by the Director on the importance of collecting/documenting past performance information on contractors.

- On November 23, 2007, the Federal Register noticed FAC 2005-22 (effective Dec. 24, 2007).
  - Implementation of Section 104 of the Energy Policy Act of 2005 (FAR Case 2006-008). "This final rule implements Section 104 of the Energy Policy Act of 2005. Section 104 requires that all acquisitions of energy consuming-products and all contracts that involve the furnishing of energy-consuming products require acquisition of ENERGY STAR or Federal Energy Management Program (FEMP) designated products. The final rule provides a clause for the Contracting Officer to insert in solicitations and contracts to ensure that suppliers and service and construction contractors recognize when energy-consuming products must be ENERGY STAR or FEMP-designated."
  - Contractor Code of Business Ethics and Conduct (FAR Case 2006-007). "This final rule amends Federal Acquisition Regulation (FAR) Parts 2, 3, and 52 to address the requirements for a contractor code of business ethics and conduct and the display of Federal agency Office of the Inspector General (OIG) Fraud Hotline Posters. In response to public comments, this final rule reduces the burden on small entities by making the requirements for a formal training program and internal control system inapplicable to small businesses. If a small business subsequently finds itself in trouble ethically during the performance of a contract, the need for a training program and internal controls will likely be addressed by the Federal Government at that time, during a criminal or civil lawsuit or debarment or suspension."

- On November 27, 2007, OFPP noticed that it will be conducting a "Government-wide Survey on the use of Reverse Auctions." Interesting, the memorandum has no mention of soliciting input from the private Supply Chain community.

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- On November 7, 2007, the Federal Register noticed an interim FAR rule with new FAR Subpart 50.2 that implements the Department of Homeland Security (DHS) regulations on the SAFETY Act. A summary of this 13 page notice includes

  "This section 50.204 provides the overarching policy for implementing the SAFETY Act in Government acquisitions. For example, paragraph (a) provides that agencies should--

  - Determine whether the technology to be procured is appropriate for SAFETY Act protections;
  - Encourage offerors to seek SAFETY Act protections for their offered technologies, even in advance of the issuance of a solicitation; and
  - Not mandate SAFETY Act protections for acquisitions because applying for SAFETY Act protections for a particular technology is the choice of the offeror.

  SAFETY Act considerations. New section 50.205-1 ensures that SAFETY Act considerations are made an integral part of each agency's acquisition planning procedures, and that contracting officers give adequate lead time in their acquisition plans to account for DHS's review process of SAFETY Act applications. A reference to the SAFETY Act was also added at 7.105, Contents of written acquisition plan.

  Block designation and block certification. In 50.205-1(a), this case includes coverage for block designations and block certifications. The requiring activity must check with DHS as to whether a block designation or block certification exists. If one does, then the requiring activity must inform the contracting officer. The contracting officer will then incorporate the block designations and block certifications, as applicable, in any solicitation or advanced public notice to inform potential offerors.

  Pre-qualification designation notice. In accordance with 50.205-2, if a block designation or block certification does not exist, then the requiring activity must request DHS to issue a pre-qualification designation notice and inform the contracting officer if DHS issues the notice. The contracting officer will then incorporate the pre-qualification designation notice in any solicitation or advanced public notice to inform potential offerors of the notice."

  The rule is effective November 7, 2007, and comments are due on/before January 7, 2008.

- On November 26, 2007, OFPP noticed that it has established "a structured training program for Contracting Officer Technical Representative and other individuals performing these functions, including Contracting Officer Representatives, that standardizes competencies and training across civilian agencies and improves…collective stewardship of taxpayer dollars." The "Federal Acquisition Certification attached thereto "reflects the interagency working group recommendations on the subject."

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- On November 7, 2007, the Federal Register noticed an interim FAR rule "as a 'plain language' rewrite of FAR Part 27 and its associated clauses in Part 52. Part 27 implements a number of statutes and executive orders pertaining to patents, data, and copyrights. This effort focused on clarifying, streamlining, and updating the text, with the ultimate goal of making the policies and procedures more understandable to the reader…. This rewrite was not intended to include substantive changes to Part 27 policies or procedures, except where necessary to comply with current statutory or regulatory requirements, or to resolve internal inconsistencies within FAR Part 27 and its associated clauses."
  The rule is over 30 pages and is effective December 7, 2007.

- On September 21, 2007, DoD issued a 15 page guidance on "Item Unique Identification of Government Property Guidebook: Reporting Government Property In the Possession of the Contractor (PIPC), Guidance for Defense Federal Acquisition Regulation (DFARS) 252.211-7007, Item Unique Identification of Government Property."
  And, on November 7, 2007, the Wall Street Journal reported, "Despite its initial promise to revolutionize the supply chain, radio-frequency identification technology never took off in line with the wild projections made by many analysts and venture capitalists. But the technology has begun to make a slow resurgence with wireless devices that track the physical location of assets, such as expensive manufacturing equipment or hospital beds, within a company or hospital…."

- On the subject of expansion of contract management activities, "when Katrina struck in August 2005, FEMA had only 36 contracting officers on staff. The agency now employs nearly 200 procurement professionals, FEMA's Chief Acquisition Officer Deidre Lee said last month at a conference of the Government Electronics and Information Technology Association."

- On November 19, 2007, the Federal Register noticed that the GAO and GSA Office of Inspector General, "have reported that some Federal agencies using the delegated leasing authority issued to Federal agencies on September 25, 1996, are not following properly the instructions specified as a condition for use of the leasing delegation…. (There was also issued a) bulletin (which) re-emphasizes and updates the conditions, restrictions and reporting requirements specified in the delegation of authority and its supporting information."

- On November 7, 2007, the Federal Register noticed an interim FAR rule "to revise the current Service Contract Act exemption and to add a SCA exemption for contracts for certain additional services that meet specific criteria." Comments are due on/before January 7, 2008.

- On November 23, 2007, DoD announced that John J. Young Jr. has taken over the duties as the undersecretary of defense for acquisition, technology and logistics.

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Future Speaking Topics Include—

- "Contract Negotiation" seminar as part of the Acquisition Solutions, Inc. Performance-Based Acquisition Master's Certificate Program—"one-of-a-kind Master's Certificate Program in performance based acquisition facilitates…command of the knowledge, tools, and techniques needed to plan, negotiate, and manage contracts and programs using the performance-based approach." Seminars are offered nation-wide. Scheduling/registration information is at www.acquisitionsolutions.com.

- National Contract Management Association (NCMA), "Drafting the Ultimate Arbitration Clause," Audio Seminar. Registration information is at http://www.ncmahq.org/education/audio.asp

- NCMA Vandenberg Chapter, "Contract Negotiations."

- NCMA Beach Cities Chapter, "Current Government Contracting Issues That Impact the Contracting/Buying Professional!"

- Institute of Electrical and Electronic Engineers workshop, Long Beach State University, "Dispute Resolution for Entrepreneurs and Engineers."

- NCMA 2008 Congress NES, April 17, 2008, Cincinnati, Ohio, "Contract Negotiation." Registration information is at http://www.ncmahq.org/meetings/wc08/seminars.asp

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