

Regulatory/Contractual Update

January 2, 2008

Volume 13, Issue 1

- On December 26, 2007, Federal Acquisition Circular (FAC) 2005-23 was issued and included the following which are effective on December 26, 2007, except as noted:
 - **Performance-Based Payments** (FAR Case 2005-016). “This final rule amends the Federal Acquisition Regulation to increase the use of performance-based payments as the method of contract financing on Federal Government contracts and improve the efficiency of performance-based payments when used on these contracts. These changes originated from recommendations submitted by the Department of Defense Performance-Based Payments Working Group in their March 8, 2005, report.” (Effective January 25, 2008)
 - **Electronic Products Environmental Assessment Tool** (FAR Case 2006-030). “This interim rule amends the Federal Acquisition Regulation to require use of the Electronic Products Environmental Assessment Tool (EPEAT) when acquiring personal computer products such as desktops, notebooks..., and monitors pursuant to the Energy Policy Act of 2005 and Executive Order 13423, ‘Strengthening Federal Environmental, Energy, and Transportation Management.’ The interim rule revises Subpart 23.7, and prescribes a new clause in 52.223 (also included in 52.212-5 for acquisition of commercial items) in all solicitations and contracts for the acquisition of personal computer products, services that require furnishing of personal computer products for use by the Government, and services for contractor operation of Government-owned facilities.”
 - **Contracts With Religious Entities** (FAR Case 2006-019). This “rule adopts as final, without change, the interim rule published in the Federal Register on March 22, 2007. The interim rule amended the Federal Acquisition Regulation Parts 22 and 52 to implement Executive Order (E.O.) 11246, as amended, Equal Employment Opportunity, to incorporate the exemption for religious entities prescribed in E.O. 13279. Section 4 of E.O. 13279 amended Section 204 of E.O. 11246 to exempt religious corporations, associations, educational institutions and societies from certain nondiscrimination requirements. E.O. 11246, as amended, permits religious entities to consider employment of individuals of a particular religion to perform work connected with carrying on the entity's activities. Religious entities are not exempt from other requirements of the executive order.”
- On December 1, 2007, Undersecretary of Defense John J. Young, Jr., issued a memorandum on the indirect cost limitation for basic research awards, i.e. a cap of “35 percent of the total cost of the contract, grant, or agreement....”

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

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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.

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- DoD continues to issue memoranda including the following:
 - A “Class Deviation (dated December 21, 2007) from FAR Parts 45 and 52 deletes the definition of ‘Plant Equipment’ and amends the definition of Real Property to remove the reference to ‘Plant Equipment.’ The term Plant Equipment is no longer used within DoD. This class deviation is mandatory for all solicitations issued after January 1, 2008 where ‘Real Property’ is addressed and will remain in-place indefinitely, or until such time as the FAR is revised to delete the definition of Plant Equipment and its use within the definition of Real Property.”
 - A memorandum dated December 31, 2007, that “requests the military departments, and defense agencies to submit their report on service charges as per Section 813 of the National Defense Authorization Act for Fiscal Year 2006 Public Law 109-163 required by the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD (AT&L). The report is requested for Fiscal Years 2005 and 2006 data and should be for all actions greater than the Simplified Acquisition Threshold of \$100,000, where fees were paid to another DoD component for contracting services.” (Format for reporting is attached to the memo)
 - A memorandum dated December 4, 2007, that “reiterates the importance of compliance with the mandatory completion of the Defense Acquisition University, Continuous Learning Course 033 - Contract format/structure for DoD e-business and IUID policy by all DoD Procurement professionals. Additionally the memorandum requests the military departments, defense agencies and DoD field activities to adopt survey practices to report compliance with this mandatory policy. Format and guidelines for survey reporting are provided with the memorandum.”
 - A memorandum dated December 7, 2007, that “requests the military department and defense agencies to designate a financial management and acquisition lead for the Intragovernmental Transactions (IGT) working group by December 14, 2007. This group is part of the Department-wide initiative to support improved financial performance, strategic sourcing, and compliance with fiscal and acquisition regulations when using intragovernmental transactions.”
 - A memorandum dated December 7, 2007, that “addresses the operational security issues raised by the intelligence communities regarding reporting unclassified contract actions to Federal Procurement Data System-Next Generation (FPDS-NG)—see FAR 4.6. Due to the potential risk of insight to agency individual missions and budgets associated with reporting (through website posting), a waiver to not report unclassified actions to FPDS-NG at this time has been granted....”
 - A memorandum dated December 20, 2007, that “directs Department of Defense acquisition agencies to perform a review of existing contracts to ensure they comply with USCENTCOM and Multi-National Forces-Iraq (MNF-I)/CJTF82 policies and directives. Assignment of contract administration to JCC-I/A shall be conducted following the instructions contained in FAR Part 42.202.” (Compliance/Instructions are also included with the memorandum)

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- OFPP has issued memoranda including the following:
 - A memorandum dated December 4, 2007, on the “Appropriate Use of Incentive Contracts” with an attachment to be used as “a guide” by government Acquisition Officers, etc. to “review/update existing agency guidance on incentive fee contract practices to ensure that fees are awarded in accordance with current regulations and that (that)...guidance addresses the concerns expressed in the (OFPP) memorandum.” Specially, FAR 16.4 should be consulted; market research conducted to plan the desired outcomes, etc.; conduct a risk and cost/benefit analyses that support use of an incentive type contract; ensure evaluation factors are meaningful, directly linked to cost/schedule/performance results, etc.; ensure an incentive plan that (as a “good business practice”) allows a base fee of more than 0%; and ensure that rollover fees are allowed only in limited circumstances in accordance with agency policy.”
 - A memorandum dated December 5, 2007, on the topic of Performance-Based Acquisition Performance goals for FY2008 with the emphasis on achieving the FY 2007 goal of 45% (for applicable actions) and a request to Chief Acquisition Officers and Senior Procurement Executives to report on progress toward achieving the 2007 performance goals established in their five-year, agency-wide PBA Management Plan—(due to OFPP by January 31, 2008). The goal for FY2008 is 50 percent for applicable contracts.
 - A “reminder” on December 19, 2007, “to further ensure competition” when acquiring Information Technology and Using Common Security Configurations with a reference to an earlier/relevant OFPP memorandum—located at <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-11.pdf>. Similarly, a reminder was also issued by OFPP on November 28, 2007, on the use of brand name or equal purchase descriptions.
- On December 20, 2007, the Federal Register noticed a proposed FAR rule “to change the travel cost principle to ensure a consistent application of the limitation on allowable contractor airfare costs.” The primary area of interest is where the FAR currently limits allowability to “the lowest customary standard, coach, or equivalent airfare offered during normal business hours” and the purported inconsistent interpretation of same, e.g. airfare to the public or to a contractor. Comments are due on/before February 19, 2008.
- On November 29, 2007, the Air Force issued supplemental guidance (to the DoD memorandum of November 7, 2007) on access to records with exclusive distributors/dealers where the requisite amount of information to determine fairness/reasonableness of pricing is wanting. Beginning January 2, 2008, “in the event of an exigent situation when the Head of a Contracting Activity has approved award without obtaining requested cost data, the contracting activity will notify its Headquarters activity” which will subsequently advise DoD.

- On December 7, 2007, the Federal Register noticed final/proposed DFARS rules as follows:
 - A final rule to “add a clause at DFARS 252.227-7038, Patent Rights-Ownership by the Contractor (Large Business). The DFARS clause is similar to the clause previously found at FAR 52.227-12, Patent Rights-Retention by the Contractor (Long Form). The FAR clause was removed by the final rule published at 72 FR 63045 on November 7, 2007, because DoD was the only agency using the clause.” (effective December 7, 2007)
 - A proposed DFARS rule “to address limitations on the allowability of contractor costs associated with the leasing of Government equipment for display or demonstration. The proposed rule specifies that monies paid to the Government for the leasing of Government equipment are unallowable, except in the case of foreign military sales contracts.... DoD Directive 7230.8, Leases and Demonstrations of DoD Equipment, contains policy on the leasing of DoD equipment to defense contractors for demonstration to foreign governments or for display or demonstration at international trade shows and exhibitions.” Comments are due on/before February 5, 2008.
 - A proposed DFARS rule “to revise and combine contract clauses addressing assumption of risk for loss under contracts involving the furnishing of aircraft to the Government. The proposed rule establishes requirements that apply consistently to all contract types.” Comments are due on/before February 5, 2008.

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

- The Air Force in a memorandum dated November 30, 2007, on the subject of “Open Communication with Industry,” aims to improve open communication with industry. No change in current regulations are planned since “there are sufficient flexibilities provided within our (AF) current processes....” The importance of mid-term briefings and debriefings to industry are also emphasized.

Are more open meetings on proposed regulatory/policy changes (also) needed as well as opportunities for public comments and inputs through greater Federal Register publications by all the Services? After all, contractors are part of the acquisition team—see FAR 1.102(c).

- In the recent US District Court Case of Dominic F. Baragona, et al., v. KUWAIT GULF LINK TRANSPORT COMPANY, et al., (ND GA No. 1:05-cv-1267-WSD), the court in a wrongful death tort case by the parents of an Army lieutenant colonel killed in Iraq, when his Humvee was struck by a truck driven by an employee of defendant contractor, finds for the plaintiff after the court analyzes Iraq and Georgia law. Default judgment in the amount of \$4,907,048 was awarded.

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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 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>

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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