

Regulatory/Contractual Update

July 23, 2008

Volume 13, Issue 8

- On July 21, 2008, the Federal Register noticed that DoD has issued an interim rule amending the DFARS “to address requirements for complying with export control laws and regulations when performing DoD contracts. The rule recognizes contractor responsibilities to comply with existing Department of Commerce and Department of State regulations. The rule adds two new clauses to be used when export-controlled items, including information or technology, are expected to be involved in the performance of a contract, or when there is a possibility that export-controlled items, including information or technology, may come to be involved during the period of performance of the contract.” Comments are due on/before September 19, 2008.
- On July 21, 2008, the Federal Register noticed that DoD is proposing to amend the DFARS “to address statutory restrictions on the acquisition of specialty metals not melted or produced in the United States. The proposed rule implements Section 842 of the National Defense Authorization Act for Fiscal Year 2007 and Sections 804 and 884 of the National Defense Authorization Act for Fiscal Year 2008.” When applicable the requirement is a flowdown “to all subcontract tiers.” Comments are due on/before September 19, 2008.
- On July 16, 2008, Shay Assad, the DoD Director of Defense Procurement, Acquisition Policy, and Strategic Sourcing, issued a memorandum on “Coordinated Contract Policy Execution Review Plan,” which, in part, identifies “areas of vulnerability that may lead to contracting fraud, waste, and abuse....” Noted areas include
 - Lack of documentation supporting the determination of a commercial item—written findings from the CO are required for items greater than \$1M.
 - Contract actions are not definitized within the required timeframe.
 - Competition requirements for orders placed against Federal Supply Schedules and Blanket Purchase Agreements are “frequently waived without adequate documentation.”
 - Failure to use available pricing information or adequately document fair and reasonable pricing for sole source awards.

COMMENT: For the second and last noted items, DoD should revisit the absence of policy/tools permitting COs to use ADR to close out those open actions and/or to arrive at fair and reasonable prices! For contractors, have you identified all of your items that have been determined by any CO as being a “commercial item”—for use by other COs?

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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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- On July 18, 2008, OFPP issued a memorandum on “Effective Practices for Enhancing Competition,” which reemphasizes the need “to promote the appropriate use of tools and effective practices to improve and increase the use of competition.” The memo “shares” what Competition Advocates have identified as “practices” needed to remove impediments to competition. A listing of agency Competition Advocates is also provided. The “Competition Advocate” for DoD is Shay Assad.
- On July 14, 2008, the DoD Director of Defense Procurement, Acquisition Policy, and Strategic Sourcing, also issued a memorandum, “Management of Contractor Performance under Time & Material and Labor Hour Contracts for Services,” which provides current policy/requirements for T&M and LH contracts, including interagency acquisitions. These contracts must include a Quality Assurance Surveillance Plan as well as a CO designated “contracting officer’s representative (COR) to assist in the technical monitoring or administration of a contract.”
COMMENT: And the authority of the COR to administer the contract is...?
- The June 15, 2008, Federal Times reports that DoD would prefer having other Government agency personnel assist DoD “understaffed procurement offices” rather than having it “done by contractors, admits the Pentagon’s procurement policy chief, Shay Assad.” He is quoted as saying, “I’d much rather have folks from the Department of Interior or GSA supporting us than going to the contractor work force to do that stuff that is inherently governmental.” Some think the DoD Director should (also) focus on reassigning some of his internal resources through outsourcing “purportedly core efforts” which can be done in a cost effective manner by the commercial sector and without any conflict of interest!
- On July 11, 2008, OMB issued a memorandum on “Plans for Commercial Services Management.”
COMMENT: Must reading for those in the private sector that are of the opinion that the government should be outsourcing all functions that are “inherently non-governmental.”
- GSA continues the process on its “re-write initiative.” See prior Updates.
- The Air Force is “circulating” a new ADR pledge agreement for execution by prime contractors. As in the past, subcontractors are not covered, ADR costs are not expressly allowable, etc. For past agreements, etc. see <http://www.adr.af.mil/factsheets/factsheet.asp?id=9935> and <http://www.adr.af.mil/factsheets/factsheet.asp?id=12638>
Of course, CPR continues to have posted its ADR pledge... at <http://www.cpradr.org/AboutCPR/ADRpledge/tabid/74/Default.aspx>
- DoD noticed that it would reopen the bidding for the AF tanker fleet program.

- For an article on the “added complexity,” etc. (or status report) of DoD’s “Procedures, Guidance and Information,” as a “supplement” to the FAR/DFARS, the July 2008 issue of National Contract Management Association (NCMA) Contract Management should be read. Recommended actions for contractors are provided.

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

THE 2008 OLYMPICS IN BEIJING
Contract Management Implications
By your Contract Manager in Beijing,
LeRoy H. Graw, CPCM, CPP, CPPM, C.P.M., CISC, CISM

As many of you know, I have been operating several purchasing and supply chain management focused businesses in Beijing since the year 2000. I have lived in a “Hutong” near the Central Beijing Railway Station, in an apartment in “Little Korea”, and most recently a (mostly) expatriate apartment near the Lido Holiday Inn in Northeast Beijing (not too far from the Beijing Capitol Airport.). Our businesses conduct training, provide professional certifications, and assist non-Chinese businesses to source in China.

I have been privileged to observe the “building of the Olympics” from an infrastructure point of view and have “swum” in the economy and culture of China since long before China was awarded the 2008 Olympics.

For those of you contemplating business (either sourcing or selling) in China, I caution you to “do your homework”. Read as many of the references I have posted (see below) before you contemplate contracting for anything here. The Chinese do not share with you a respect for complete, well-written contracts. In addition, their business practices are often 180° different from your own. Your failure to adequately prepare for this very different and challenging business environment may result in your own (“Mega-disaster” of Olympic proportions!)

And now on to the fun stuff. You may have heard about some of the “Megastructures” built just for the Olympics. I will focus on the two that have drawn the most attention in the press.

China's National Stadium, known as the "Bird's Nest," was pronounced fully operational on Saturday 12 July. The stadium will host 37 venues for August's Beijing Olympic Games.

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Covering more than 50 acres in the Beijing Olympic Green, the bowl-shaped structure with its prominent girders can seat 91,000 spectators for the Games' opening and closing ceremonies, track and field events, men's soccer, and some events for the Paralympics to be held in September.

The architect engineer for the stadium was Swiss firm Jacques Herzog and Pierre de Meuron in collaboration with the China Architecture Design & Research Institute, and several other firms. The design beat dozens of other entries in a worldwide competition held in 2003.

The construction cost was (in excess of) 500 million U.S. Dollars. Chief Engineer Li Jiulin was worried when given the blueprint because it was the most difficult project he had ever experienced. "The biggest challenge of the stadium lies in its beam structure. The architects came up with several lines in their mind and we had to translate the lines into reality with steel and concrete," he said.

The National Aquatics Center, or Water Cube, lies in the west of the B Zone of the Olympic Green. It is 177 metres long, 177 metres wide and 31 metres tall. It has two floors underground and four floors above ground.

During the Beijing 2008 Olympics, it will serve three disciplines: swimming, diving and synchronized swimming. Forty-two gold medals will be awarded there, trailing only the National Stadium (Olympic Stadium) where 47 gold medals will be awarded.

The Water Cube cost approximately 143 Million US Dollars. It was funded with donations from overseas Chinese.

The total number of seats (17,000) includes 4000 permanent seats, 2000 demountable seats, and 11,000 temporary seats)

The architect engineer was the consortium of Arup, including the architecture firm PTW, the CSCEC (China State Construction and Engineering Corporation) and the CSCEC Shenzhen Design Institute (CSCEC+DESIGN). The contractor was the CSCEC.

The references I submit to you for your "China Business Homework" are ...

- China: A New History. John King Fairbank and Merle Goldman. Belknap Harvard, 2001.
- China Now. N. Mark Lam and John L. Graham. McGraw-Hill, 2007.
- China Streetsmart. John Chan, John V. Thill, and Barbara E. Schat. FT Press, 2003.
- Cultures and Organisations Software of the Mind. Geert Hofstede, McGraw-Hill, 1999.
- The Hidden Dimension, Edward T. Hall, Doubleday, 1965.

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- Doing Business in China. A webinar presented by LeRoy H. Graw, September 16, 2008.
- Chinese Characteristics. Arthur H. Smith. Eastbridge, 2003.
- Doing Business With China, Fourth Edition. Jonathan Reuvid and Li Yong. Kogan Page. 2003.
- Everyday Chinese Wisdom. Cheng Qinhua. Foreign Languages Press, 2007.
- Fernandez, D., Carlson, D., Stepina, L., & Nicholson, J. (1997, February 1). Hofstede's country classification 25 years later. *The Journal of Social Psychology*.
- Contract Negotiations With Chinese. A webinar presented by LeRoy H. Graw, July 22, 2008.
- Harvard Business Review on Doing Business in China (Harvard Business Review Paperback Series). Harvard Business School Press, 2004.
- How to do Business in China. Nick Dallas. McGraw-Hill (Australia), 2007.
- Riding the Waves of Culture: Understanding Cultural Diversity in Business. Fons Trompenaars and Charles Hampden-Turner (Editor), Nicholas Brealey Publishing, 1994.

Dr. Graw can be reached at his office in Beijing at 86-10-6434-8698(v/f) or US Fax 415-651-8884. He can be reached best by email at Latingraw@aol.com or Latingraw@amcertinst.org.

(And, Dr. Graw has PowerPoint slides available upon request: “Contract Negotiations With Chinese” and “Doing Business in China.”)

Future Speaking Topics Include—

- Inland Empire NCMA Chapter, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements."
- Institute for Supply Management (ISM) Seattle Affiliate, “Big Changes to UCC Rules on Contract Formation and Terms of the Deal are Around the Corner— Are You Ready?”
- “Contract Negotiation” workshop, NCMA Houston Chapter.
- "Solicitations, Bids, Proposals and Source Selection: Building a Winning Contract,” NCMA NES, Puget Sound Chapter (registration info: felicia.cannon@gsa.gov) and Central Connecticut Chapter (registration info: tyu@sikorsky.com).

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