

Regulatory/Contractual Update

June 27, 2008

Volume 13, Issue 7

- On June 12, 2008, the Federal Register noticed a proposed FAR change “to require certain contractors and subcontractors to use the U.S. Citizenship and Immigration Services' (USCIS) E-Verify system as the means of verifying that certain of their employees are eligible to work in the United States.” Comments are due on/before August 11, 2008.
- On June 18, 2008, the Federal Register noticed a 30 day extension by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council for comments “in determining whether the FARs current guidance on organizational conflicts of interest (OCIs) adequately addresses the current needs of the acquisition community or whether providing standard provisions and/or clauses, or a set of such standard provisions and clauses, might be beneficial.” A similar notice on an extension of time for comments on “service contractor employees' personal conflicts of interest (PCI)” was also published. Comments on both notices are now due on/before July 18, 2008.
- On June 25, 2008, the Office of Government Ethics published a final rule in the Federal Register updating its guidance on post-employment “conflict of interest restrictions of 18 U.S.C. 207 for Government employees terminating service between July 1, 1979 and December 31, 1990. As a result of amendments to section 207 that became effective January 1, 1991, and subsequently, employees terminating service in the executive branch or in an independent agency (or terminating service from certain high-level Government positions) since that date are subject to substantially revised post-employment restrictions. The purpose of these new regulations is to provide regulatory guidance explaining the scope and content of the statutory restrictions as they apply to employees terminating service on or after January 1, 1991. This final rule would expand the regulatory guidance OGE has previously published concerning the current version of section 207 and make minor modifications to those earlier rulemakings. It would also remove the old obsolete regulations from the Code of Federal Regulations.”

COMMENT: Of course, those “new” employers will need to update their processes too.
- On June 6, 2008, the OFPP Administrator issued a memorandum, with an attached sixty-six page June 2008 report, on improving interagency acquisitions.

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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 June 10, 2008, the Federal Register noticed that GSA “is proposing to amend the General Services Acquisition Regulation (GSAR) to establish a GSA Mentor-Protégé Program. The GSA Mentor-Protégé Program is designed to encourage GSA prime contractors to assist small businesses, small disadvantaged businesses, women-owned small businesses, veteran-owned small businesses, service-disabled veteran-owned small businesses, and HUBZone small businesses in enhancing their capabilities to perform GSA contracts and subcontracts, foster the establishment of long-term business relationships between these small business entities and GSA prime contractors, and increase the overall number of small business entities that receive GSA contract and subcontract awards.”

Comments are due on/before August 11, 2008.

COMMENT: Of course, if GSA “adopts” the recent DoD efforts to “curtail” mark-up on subcontracted efforts, where is the financial incentive to subcontract labor? See prior Updates.

- On May 9, 2008 White House Chief of Staff Josh Bolton “issued a memo regarding a stay on new regulations as this Administration winds down.” The memo is available at http://www.whitehouse.gov/omb/inforeg/cos_memo_5_9_08.pdf
- And, the DoD Director of Defense Procurement, Acquisition Policy, and Strategic Sourcing, is reported to have stated at a recent industry meeting on the “standard or measure of whether a contractor is providing value and therefore not subject to disallowance of any ‘**excessive pass-through**’ costs or profit?” The response was reported to be “DoD is trying to be open to the definition of ‘added value’ and DPAP believes that the current language does the job.... Subcontract management and other management functions would generally constitute ‘added value’....”
- It is reported that “the Deputy Assistant Secretary (Contracting), Mr. Correll, issued on June 8, 2008, an *On Point* memo on the current success of strategic sourcing within the Air Force. The memo emphasizes the need to make existing commodity council arrangements, or other AF-wide contracts, the first choice when contracting for these commodities (goods/services) to eliminate duplicate efforts.”
- On June 12, 2008, FAC 2005-26 was issued with an interim rule—effective on the same date—on “Prohibition on Restricted Business Operations in Sudan and Imports from Burma” (FAR Case 2008-004). Comments are due on/before August 11, 2008.

- On June 25, 2008, the Federal Register noticed that GSA “is proposing to amend the GSAR to update language addressing contractor qualifications. This rule is a result of the General Services Administration Acquisition Manual (GSAM) Rewrite initiative undertaken by GSA to revise the GSAM to maintain consistency with the FAR, and to implement streamlined and innovative acquisition procedures that contractors, offerors and GSA contracting personnel can utilize when entering into and administering contractual relationships. The GSAM incorporates the GSAR as well as internal agency acquisition policy. GSA will rewrite each part of the GSAR and GSAM, and as each GSAR Part is rewritten, will publish it in the Federal Register.”

The notice further provides that “there are no major substantive changes to the policies.” This is a continuation of the process commenced by a Federal Register notice on the “re-write initiative” endeavor that was published on February 15, 2006, with the re-write currently targeted for completion this December. Comments are due on/before August 25, 2008. Recent GSA notices on this initiative include the following:

- On June 24, 2008, a proposal to revise GSAR language pertaining to requirements for contract administration and audit services. Comments are due on/before August 25, 2008.
 - On June 24, 2008, a proposal to revise GSAR language pertaining to requirements for contract modifications. Comments are due on/before August 25, 2008.
 - On June 17, 2008, a proposal to update Part 501 of the GSAR. Comments are due on/before August 18, 2008.
 - On June 9, 2008, a proposal to update language pertaining to protests, disputes, and appeals. Comments are due on/before August 8, 2008.
 - On June 6, 2008, a proposal to update the text addressing Part 517, Special Contracting Methods. Comments are due on/before August 5, 2008.
 - On June 6, 2008, a proposal to revise sections of GSAR Part 537 that provide requirements for service contracting. Comments are due on/before August 5, 2008.
 - On June 6, 2008, a proposal to amend the GSAR to revise GSAR language that provides requirements for transportation. Comments are due on/before August 5, 2008.
- DoD continues to issue memoranda including the following:
 - **“Evaluation of effectiveness of Award and Incentive Fees.”**
On June 25, 2008, Shay Assad, the DoD Director of Defense Procurement, Acquisition Policy, and Strategic Sourcing, issued a memorandum requesting “Military Departments and Defense Agencies to submit information related to award fee and incentive fee contracts. This information relates to Section 814 of the 2007 NDAA which required (in part), that the Department collect relevant data on award and incentive fees paid to contractors.”

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- **“Class Deviation from Implementation of the Electronic Subcontracting Reporting System.”** On June 3, 2008, the DoD Director of Defense Procurement, Acquisition Policy, and Strategic Sourcing, also issued a memorandum on a class deviation that “announces and implements ... a DoD phased approach for implementing the Electronic Subcontracting Reporting System (eSRS). At this time, only the entities listed in the memorandum (DCMA, DFAS, DSCA, Army, and Navy) will implement eSRS. All others will deviate from the FAR by continuing to follow the FAR in effect on February 28, 2008, FAC 2005-024, as it relates to subcontract reporting.”
- **“Enhanced Competition for Task and Delivery Order Contracts.”** Further, on May 23, 2008, the DoD Director issued a memorandum on Task and Delivery Order Contracts whereby the Military Departments and Defense Agencies are to comply “with Section 843 of the National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181 ‘Enhanced Competition Requirements for Task and Delivery Order Contracts’ effective May 27, 2008. Further details and guidance is provided within the memorandum.” Direction includes approvals that are required for the issuance of certain dollar level contracts. The Air Force on May 28, 2008, issued similar guidance.

- “On 16 June 2008 DoD Instruction 8320.04, Item Unique Identification (IUID) Standards for Tangible Personal Property was signed and its requirements are effective immediately. The Instruction assigns responsibilities across the Office of the Secretary of Defense and the DoD Components to leverage IUID capabilities throughout policy, standards, and data systems. DoDI 8320.04 establishes the IUID Registry as the master data source for Government Furnished Property (GFP) and as the authoritative source of Government unit acquisition cost for items with Unique Item Identifiers (UIIs) acquired after January 1, 2004.”

Requirements of DoDI 8320.04 include direction to the Heads of the DoD Components and the following:

- Develop and issue guidance for IUID
- Implement IUID across all programs and systems
- Ensure IUID compliant marking of all new and legacy items meeting the IUID criteria and populate the DoD IUID Registry with all UII data
- Use the UII or DoD-approved IUID equivalent in all unique item tracking, serial number tracking, and SIM programs
- Resource IUID requirements and implementation strategies to ensure commonality and interoperability with all automatic identification technology infrastructure requirements and IUID data management
- Modernize acquisition, logistics, and property management Automated Information Systems with UII requirements including use of the IUID Registry as defined in Enclosure 2 of the DoDI.

The Instruction is available at <http://www.dtic.mil/whs/directives/corres/pdf/832004p.pdf>

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

Alan Dickson, Esq. from the law firm of Holland + Knight LLP shares his timely analysis/thoughts on...

The Tanker Protest Decision: Surprisingly Basic Selection Errors at Heart of GAO's Ruling

On June 18, 2008 the Government Accountability Office issued its decision (B-311344 et al.) in the protest of The Boeing Company against the Air Force's award to Northrop Grumman Systems Corporation of a contract to design and produce aerial refueling tankers. This procurement, designated as a "Major Defense Acquisition Program", was for the first phase (including up to 80 aircraft) of a series of planned procurements to replace the aging KC-135 and KC-10 tanker fleets.

While many "best value" procurements can involve sophisticated technical issues and very close judgments of the source selection authorities, and are accordingly difficult to overcome, the GAO decision (released in a redacted version on June 25) revealed that the Air Force had made a number of mistakes in its evaluation process, including several that violated basic FAR competitive procurement procedures and specific instructions in the Request for Proposals. For example,

- What the AF termed a key technical discriminator in favor of Northrop—in one of the "key performance parameters" (KPP) that the AF said Northrop exceeded to a greater degree than Boeing—was a point specifically negated by the RFP, which said that no consideration would be provided for exceeding KPP objectives.
- The AF deemed merely "administrative" a solicitation requirement that Northrop's proposal took exception to.
- The AF did not reasonably evaluate Northrop's ability to refuel all current and programmed fixed wing receiver aircraft as specifically required by the RFP.
- The AF told Northrop during discussions that it had only partially satisfied the KPP objective of "Net-Ready Capability", allowing Northrop to further address this point in its final proposal, but told Boeing that it had "met" the objective, and then changed its mind after final proposal submissions, finding Boeing had only partially met the objective.

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This was a hard-fought protest on many grounds beyond those noted above. It included an oral hearing, review of voluminous documentation including some classified materials, and detailed submissions by the parties' attorneys. 46 named attorneys participated on behalf of the three parties, including 15 for Boeing. GAO recommended that the Air Force reimburse Boeing for its protest costs, including attorneys' fees.

This is also a program of critical importance to the ability of the United States to deploy its military forces around the world. One hopes that, in the reopening of discussions and re-evaluation of proposals which GAO recommends, the Air Force can avoid at least the most basic missteps.

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The decision is available at <http://www.gao.gov/decisions/bidpro/311344.pdf>

Future Speaking Topics Include—

- ISM Seattle Affiliate, “Big Changes to UCC Rules on Contract Formation and Terms of the Deal are Around the Corner— Are You Ready?”
- "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).
- Inland Empire NCMA Chapter, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements."

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