

Regulatory/Contractual Update

March 25, 2008

Volume 13, Issue 4

- On March 3, 2008, the Federal Register noticed the issuance of two DoD rules:
 - The adoption “as final, with (minor) changes, an interim rule amending the DFARS to implement Section 832 of the National Defense Authorization Act for Fiscal Year 2002. Section 832 codified and made modifications to the provision of law known as the ‘Berry Amendment,’ which requires the acquisition of certain items from domestic sources.” An exhaustive discussion of the 22 public comments (to the April 26, 2002 interim rule) is also provided.

COMMENT: It has been reported that individual companies are receiving “specific exemptions from the Berry Amendment.”
 - The adoption of a “final rule (that) requires use of the Wide Area WorkFlow (WAWF) electronic system for submission and processing of payment requests and receiving reports under DoD contracts. WAWF, when fully implemented, will eliminate paper documents, eliminate redundant data entry, improve data accuracy, reduce the number of lost or misplaced documents, and result in more timely payments to contractors.” A discussion of the 16 public comments (to the August 14, 2007, proposed rule) is provided. DoD also issued WAWF related memoranda of March 3, 2008, (mandatory use/application of WAWF) and March 20, 2008, (use of “Inspectors/Acceptors” for goods/services and using the appropriate DoD Activity Address Code).
- DoD continues to issue memoranda including the following:
 - **“Proper Use of Time-and-Materials Contract Types.”** On March 20, 2008, Shay Assad, the DoD Director of Defense Procurement, Acquisition Policy, and Strategic Sourcing, issued a memorandum “concerning the proper use of T&M contracts” while expressing the view that “T&M contracts are the least preferred contract type.” A report is due the Director by June 4, 2008, including “the actions that will be taken to reduce the use of T&M contracts whenever possible.” (Also, see below)
 - **“UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations.”** On March 10, 2008, the Secretary of Defense issued subject memo in order to “provide additional guidance to commanders on the exercise of their UCMJ authority during contingency operations, including those supporting the Global War on Terrorism.”

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

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- **Plan for Restricting Government-Unique Contract Clauses on Commercial Contracts.”** And, the DoD Director of Defense Procurement also issued a memorandum on March 17, 2008, with a focus on the need to curtail, monitor, and report clauses in commercial contracts that are inconsistent with commercial practices, etc. A report is due within 120 days.

COMMENT: Will there have been any deviations issued for the use of any of the clauses? What is industry, and in particular small business and subcontractors, experiencing relative to unauthorized contract clauses and not just in the commercial contracting arena...same as the Government will be reporting? Will the DoD findings be published?

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

- Recently the following (US Government) clause was circulated:
“Prime contractor profit will not be allowed on subcontractor-loaded rates. Subcontractor costs will be treated as material costs and are to be paid as actual costs. Allowable loadings specified in FAR 52.232-7(b)(2), “Payments under Time-and-Materials and Labor-Hour Contracts”, may be added and must be specified. If not included in the proposal, they may not be added during contract performance. The Government will not pay subcontractor rates greater than those contained in the contract.”
- Is this a question, in part, that relates to the FAR mandate of “fair and reasonable” prices to the government and the contractor? And, if so, how does this clause satisfy that policy/standard? How can zero profit be authorized? Should a FAR deviation be obtained?
- Is a FAR deviation appropriate if this type of clause is being used on a repetitive basis, i.e. should it be forwarded for incorporation into the noted FAR clause as an alternate with prior Federal Register notice/comment? Have any determinations/findings been issued?
- Is this in effect (also) a recharacterization of labor as material? And, if so, does a PCO have the authority to alter a CAS Disclosure Statement treatment of labor costs, definition of same, etc.? And, are there any “paperwork” issues associated with this recharacterization that requires clearance under the Paperwork Reduction Act—through OFPP?

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- Should the government be contracting directly with those subs and provide (to the prime) that subcontractor effort (otherwise subject to this clause) as government-furnished and therefore assume the risk associated with subcontractors' performance? If there is any risk, why should the contractor assume it without any profit?
- What is the PCO or buying activity "really" saying—zero profit has no impact upon the public?
- If you were the Contracting Officer how would you implement this? If you were a contractor how would respond to this in a solicitation?

Follow-up references for the reader include the DCAA guidance of July 31, 2007, on "Audit Guidance on T&M and Labor Hour Contracts;" the March 2008 NCMA Contract Management article on "The New Time & Materials Rules;" and FAR/DFARS Part 1. Interestingly, the DoD Director of Defense Procurement, in the memorandum noted above, "Plan for Restricting Government-Unique Contract Clauses on Commercial Contracts," dated March 17, 2008, requested, in part, input on a "specific plan to restrict the number of unique clauses that may be included in contracts for commercial items."

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 http://www.acqsolinc.com/asi_training-institute.cfm.
- NCMA Educational Conference, Antelope Valley Chapter and Sacramento/Gold Rush NCMA Chapter, "Contract Negotiations."
- NCMA 2008 Congress NES, April 17, 2008, Cincinnati, Ohio, "Contract Negotiation." Registration information is at <http://www.ncmahq.org/meetings/wc08/seminars.asp>.
- "Solicitations, Bids, Proposals and Source Selection: Building a Winning Contract," NCMA NES, Puget Sound and Central Connecticut Chapters.

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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