

Regulatory/Contractual Update

November 25, 2008

Volume 13, Issue 12

- On November 12, 2008, the Federal Register noticed Federal Acquisition Circular 2005-28 which finalizes a rule on Contractor Business Ethics Compliance Program and Disclosure Requirements (FAR Case 2007-006). “This final rule amends the FAR to amplify the requirements for a contractor code of business ethics and conduct, an internal control system, and disclosure to the Government of certain violations of criminal law, violations of the civil False Claims Act, or significant overpayments. The rule provides for the suspension or debarment of a contractor for knowing failure by a principal to timely disclose, in writing, to the agency Office of the Inspector General, with a copy to the contracting officer, certain violations of criminal law, violations of the civil False Claims Act, or significant overpayments. The final rule implements ‘The Close the Contractor Fraud Loophole Act,’ Public Law 110-252, Title VI, Chapter 1. The statute defines a covered contract to mean ‘any contract in an amount greater than \$5,000,000 and more than 120 days in duration.’ The final rule also provides that the contractor's Internal Control System shall be established within 90 days after contract award, unless the Contracting Officer establishes a longer time period (See FAR 52.203-13(c)). The internal control system is not required for small businesses or commercial item contracts.” The rule is effective on/after December 12, 2008. On November 14, 2008, OFPP, issued a memorandum on “Preventing Fraud in Federal Contracting,” which called further attention to this “serious matter.”

The ABA Public Contract Law Section will have a meeting to discuss this on December 1st, Washington DC. Contact is vmakell@akingump.com

- On November 14, 2008, the Federal Register noticed FAC 2005-29 which finalizes the Employment Eligibility Verification (FAR Case 2007-013) rule which “implements Executive Order 12989, as amended June 6, 2008, and the selection of the Secretary for Homeland Security of the E-Verify system as the electronic system to be used for certain contractors and subcontractors as the means of verifying that certain of their employees are eligible to work in the United States. This final rule inserts a clause into Federal contracts that are above the simplified acquisition threshold and have a performance period of at least 120 days, committing Government contractors to use the U.S. Citizenship and Immigration Services' E-Verify system to verify that all of the contractors' new hires, and all employees (existing and new) directly performing work under Federal contracts, are authorized to work in the United States.” “Exemptions include contracts that are for commercially available off-the-shelf (COTS) items and items that would be COTS items but for minor modifications. The final rule requires prime contractors to include the clause in subcontracts over \$3,000 for services or for construction.”

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*Regulatory/Contractual
Update
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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 November 24, 2008, the Federal Register noticed several new DFARS rules including the following:
 - Defense Federal Acquisition Regulation Supplement; Carriage Vessel Overhaul, Repair, and Maintenance (DFARS Case 2007-D001—Final rule). “The objective of the rule is to maintain a strong national ship repair industrial base. Therefore, the rule provides an evaluation preference for use in DoD solicitations for carriage of cargo by vessel, to apply to those entities that use domestic shipyards for vessel overhaul, repair, and maintenance. The rule is expected to have a positive effect on entities owning domestic shipyards, by encouraging the use of those shipyards. DoD will use the information required by the solicitation provision to evaluate offers and to prepare annual reports to Congress, as required by Section 1017 of Public Law 109-364.”
 - Defense Federal Acquisition Regulation Supplement; Limitations on DoD Non-Commercial Time-and-Materials Contracts (DFARS Case 2007-D021). Adopted as a final rule the 2007 interim rule “amending the DFARS to address review and documentation requirements pertaining to the use of time-and-materials contracts for the acquisition of non-commercial services. The rule provides for the same level of review for both commercial and non-commercial DoD time-and-materials contracts.”
 - Defense Federal Acquisition Regulation Supplement; Reports of Government Property (DFARS Case 2005-D015). “DoD has adopted as final, with changes, an interim rule amending the DFARS to update requirements for reporting of Government property in the possession of DoD contractors. The rule replaces DD Form 1662 reporting requirements with requirements for DoD contractors to electronically submit, to the Item Unique Identification (IUID) Registry, the IUID data applicable to the Government property in the contractor's possession.”
- “The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are seeking comments from both Government and industry on whether the FAR should be revised to include a requirement that contractors selling information technology (IT) products (including computer hardware and software) represent that such products are authentic. The Councils are also interested in comments regarding contractor liability if IT products sold to the Government, by contractors, are not authentic. Additionally, the Councils are seeking comments on whether contractors who are resellers or distributors of computer hardware and software should represent to the Government that they are authorized by the original equipment manufacturer (OEM) to sell the information technology products to the Government. Finally, the Councils invite comments on (1) whether the measures contemplated above should be extended to other items purchased by the Government; and (2) whether the rule should apply when information technology is a component of a system or assembled product.” A public meeting will be held on December 11, 2008, in Washington DC. A presentation on this topic can be made then by contacting GSA, Edward N. Chambers, at 202-501-3221.

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

Which takes precedence, the “rule of two” or the “fair opportunities act” in competitions for task and delivery orders under multiple-award contracts?

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Recently the General Accountability Office (GAO) issued a decision (B-400403) which may have a significant impact on multiple-award indefinite delivery/indefinite quantity (ID/IQ) contracts. In a decision involving a protest filed by Delex Systems, Inc., the GAO found among other things that “[T]he set-aside provisions of Federal Acquisition Regulation (FAR) 19.502-2(b) apply to competitions for task and delivery orders issued under multiple award contracts.”

The GAO sustained a protest against the terms of a delivery order proposal request issued by the Department of the Navy. According to the GAO, the Navy failed to comply with the set-aside provisions of FAR 19.505-2 (b), so-called “rule of two”, when issuing on an unrestricted basis, the solicitation with a delivery order under the TSC II contracts. The Navy awarded training systems contracts (TSCII) to eight firms – four which were small businesses and four other than small businesses. Delex was one of the small business awardees. All eight awardees had the right to compete for the award of delivery orders. The Navy also reserved the right to solicit individual orders on a small business set-aside basis.

The delivery order under protest was originally issued as a small business set-aside but was amended and issued on an unrestricted basis since the contracting officer believed that there were not sufficient small businesses that could perform this effort. It should be noted that the Small Business Specialist did not agree with the contracting officer and in fact believed that at least two small businesses could perform this effort.

In response to the protest, the Navy raised several issues. Critical was the Navy contention that FAR 16.505(b) (1) (ii) [fair opportunity] exempts task orders and delivery orders from the requirements of FAR 19.5. Specifically the statement in FAR 16.505 that “[T]he competition requirements in part 6 and the policies in subpart 15.3 do not apply to the ordering process.” The GAO rejected this argument because during the task or delivery order process an agency cannot hold a full and open competition contemplated by part 6 since any competition is limited to only those contractors that were awarded ID/IQ contracts. Specifically the GAO had “no basis to conclude that this

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*Regulatory/Contractual
Update
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limited, and appropriate exemption for the requirements of full and open competition in FAR part 6 can exempt agencies from the requirements of FAR 19.505-2 when placing orders”.

The Navy also argued that Congress never intended that the small business set-aside provisions apply to task and delivery orders. The GAO rejected this argument as well.

The bottom line of this decision is the GAO has held that the so-called “rule of two” applies to individually competed task or delivery orders under multiple award contracts. This appears to override the fair opportunities provisions and requires the contracting officer to perform market research among the small business concerns holding the ID/IQ contracts to determine if two or more of them can perform at reasonable prices and not assume that the fair opportunities automatically applies to task and delivery orders.

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Future Speaking Topics Include—

- Rio Grande (Albuquerque, New Mexico) National Contract Management Association (NCMA) Chapter, “Update on Regulatory/Contractual Changes in Government Contracting.”
- “Baseball Arbitration,” ISM Miami Affiliate.
- Inland Empire NCMA Chapter, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements."
- “Contract Negotiation” workshop, NCMA Houston Chapter.
- “ADR,” NCMA South Florida Chapter.