

Regulatory/Contractual Update

September 2, 2008

Volume 13, Issue 9

- On August 12, 2008, DoD issued several DFARS changes including the following:
 - **“Competition Requirements for Purchases from Federal Prison Industries”** (DFARS Case 2008-D015). This interim rule “adds requirements for the use of competitive procedures in the acquisition of items for which Federal Prison Industries has a significant share of the DoD market. Implements Section 827 of the National Defense Authorization Act for Fiscal Year 2008.” Comments are due on/before October 14, 2008.
 - **“Item Identification and Valuation Clause Update”** (DFARS Case 2007-D007). This final rule revises the “clause at DFARS 252.211-7003, Item Identification and Valuation, to update and clarify requirements for unique identification and valuation of items delivered under DoD contracts.”
 - **“Conforming Changes - Standards of Conduct and Extraordinary Contractual Actions”** (DFARS Case 2008-D004). This final rule “updates DFARS and PGI text addressing contractor standards of conduct and the handling of extraordinary contractual actions, for consistency with changes made to the FAR.”
 - **“Trade Agreements - New Thresholds”** (DFARS Case 2007-D023). “Finalizes, without change, an interim rule published on January 24, 2008, to incorporate increased dollar thresholds for application of the World Trade Organization Government Procurement Agreement and the Free Trade Agreements, as determined by the United States Trade Representative.”
 - **“Ship Critical Safety Items”** (DFARS Case 2007-D016). “Finalizes, without change, an interim rule published on January 10, 2008, to establish requirements for quality control in the procurement, modification, repair, and overhaul of ship critical safety items. The rule implements Section 130 of the National Defense Authorization Act for Fiscal Year 2007.”
- DoD continues to issue memoranda including the following:
 - On August 27, 2008, the DoD Director of Defense Procurement, Acquisition Policy, and Strategic Sourcing, issued a memorandum, “Earned Value Management (EVM) Requirements and Reporting,” which covers some EVM System implementation issues including:
 - Failure to include the applicable EVM requirements in contracts and solicitations

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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.

- Incorrectly tailoring the data item descriptions for the Contract Performance Report and the Integrated Master Schedule
- Inappropriately modifying EVM contract requirements
- Specifying contract requirements in special provisions and/or statements of work that are not consistent with the EVM policy and EVMS guidelines
- Using contract incentives that counter EVM's objectives!

An EVM Contract Requirements Checklist is available at <http://www.acq.osd.mil/pm/>

- On August 27, 2008, the DoD Director also issued a memorandum, "Procurement Management Review Program," calling attention to the "independent review of the procurement function of each Other Defense Agency and Defense component that performs contracting operations."
 - On August 27, 2008, the DoD Director also issued a memorandum, "Increasing Contracting Opportunities with the AbilityOne Program" with specific reference to FAR Subpart 8.7.
 - On August 14, 2008, the DoD Director also issued a memorandum, "DoD Deployment of Past Performance Information Retrieval System-Statistical Reporting."
 - On August 12, 2008, the DoD Director also issued a memorandum, "Acquisition of Services Policy and Oversight," which highlights the statutorily required "review structure and process for the acquisition of services in the Department." The Director had earlier been reviewing service acquisitions over \$1Billion. The memorandum also provides that he would "like to review...the processes and procedures ...to ensure effective management and oversight" and institutionalization at all Department levels in the acquisition of services. A summary of review items is attached thereto.
 - On August 4, 2008, a memorandum on a DAU "Green Procurement Online Course."
 - On August 4, 2008, a "Class Deviation from DFARS 237.102-71, Limitation on Service Contracts for Military Flight Simulators."
- DoD noticed that is "will begin using the Electronic Subcontracting Reporting System (eSRS) during the October 2008 subcontracting reporting period."
 - On August 21, 2008, NDIA sent a letter to the DoD Director of Defense Procurement, Acquisition Policy, and Strategic Sourcing, on the Army Communications and Electronics Command's continued misapplication of its "no-profit" policy to primes on T&M subcontracted work.
 - On August 5, 2008, DCAA noticed that it will no longer participate in Integrated Product Teams (IPTs) and thereby be in compliance with Generally Accepted Government Auditing Standards (GAGAS) on independence. And, DoD will, for unrelated reasons, have the Defense Business Board "examine the overall performance" of DCAA.

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

Insurer Beware

Darrell J. Oyer

Recently a court ruled that: “Water damage to insured’s shipyards caused by Hurricane Katrina falls within ordinary and plain meaning of word “flood” as used in policy excluding flood damage from coverage. Although insured’s primary policy may be consulted in interpreting insured’s excess policy, both documents cannot be treated as one contract. Northrop Grumman Corporation v. Factory Mutual Insurance Company - filed August 14, 2008. Cite as 07-56760. Full text at <http://www.metnews.com/sos.cgi?0808%2F0756760>

So if the Katrina damage is not covered by insurance in the instance, is the actual loss of property an allowable contract cost? No, Federal Acquisition Regulation FAR 31.205-19(d)(3) states “Actual losses are unallowable unless expressly provided for in the contract, except —(i) Losses incurred under the nominal deductible provisions of purchased insurance, in keeping with sound business practice, are allowable; and (ii) Minor losses, such as spoilage, breakage, and disappearance of small hand tools that occur in the ordinary course of business and that are not covered by insurance, are allowable.”

The FAR and Cost Accounting Standards (CAS) rules consider “no insurance” to be “self-insurance.” Thus, although an actual loss is an unallowable cost, CAS 416 would permit a self-insurance charge for the projected average loss. Specifically, CAS 416-50 (a) (2) provides that “For exposure to risk of loss which is not covered by the purchase of insurance or by payments to a trusteed fund, the contractor shall follow a program of self-insurance accounting according to the following criteria: (i) Except as provided in subdivisions (a)(2)(ii) and (iii) of this subsection, actual losses shall not become a part of insurance costs. Instead, the contractor shall make a self-insurance charge for each period for each type of self-insured risk which shall represent the projected average loss for that period.” The CAS further provides that “(c) (4) Self-insurance charges for risks of catastrophic losses are unallowable (CAS 416-50 (c) (4).”

Contractors should be reminded to review their insurance coverage to assure that an appropriate level of purchased insurance or self-insurance (as measured by the cost of purchased insurance) is approved by the Contracting Officer. Otherwise, losses could cause a big hit to profit or cause a greater loss. And, when pricing contracts be sure to include an appropriate amount for self-insurance.

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Future Speaking Topics Include—

- Inland Empire National Contract Management Association (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?"
- "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).
- "Contract Negotiation" workshop, NCMA Houston Chapter.
- "Baseball Arbitration," ISM Miami Affiliate.
- "ADR," NCMA South Florida Chapter.
- "Mentoring," NCMA Albuquerque Chapter.

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