

Regulatory/Contractual Update

February 2, 2009

Volume 14, Issue 2

- On January 21, 2009, OMB issued implementation instructions to the January 20th memorandum by the Assistant to the President and Chief of Staff on “Regulatory Review,” wherein guidance is provided on the effectiveness any new regulations, etc.

- On January 15, 2009, Federal Acquisition Circular (FAC) 2005-30 was issued and included the following (effective on February 17, 2009):
 - **Federal Procurement Data System (FPDS)** (FAR Case 2004-038). “This final rule amends the FAR Subpart 4.6 to revise the process for reporting contract actions to the Federal Procurement Data System....”
 - **Commercially Available Off-the-Shelf (COTS) Items** (FAR Case 2000-305). “This final rule amends the FAR to implement Section 4203 of the Clinger-Cohen Act of 1996 (41 U.S.C. 431) with respect to the inapplicability of certain laws to contracts and subcontracts for the acquisition of commercially available off-the-shelf items....”
 - **Exemption of Certain Service Contracts from the Service Contract Act (SCA)**. (FAR Case 2001-004). “This rule finalizes, with changes, the interim rule that was published in the Federal Register ...and is required to implement the U.S. Department of Labor’s final rule published in the Federal Register on January 18, 2001, amending 29 CFR Part 4. This rule revises the current Service Contract Act (SCA) exemption in the FAR and adds an SCA exemption for contracts for certain additional services that meet specific criteria....”
 - **Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts-Section 844 of the National Defense Authorization Act for Fiscal Year 2008** (Interim) (FAR Case 2008-003). “This interim rule amends FAR 6.305 to require agencies to make available for public inspection within 14 days after contract award the justification required by 6.303-1, on the website of the agency and at the Governmentwide Point of Entry (www.fedbizopps.gov)....”
 - **SAFETY Act: Implementation of DHS Regulations** (FAR Case 2006-023). “This final rule converts the interim rule published in the Federal Register on November 7, 2007 to a final rule with changes. This final rule implements the SAFETY Act in the FAR....”
 - **Trade Agreements--New Thresholds** (FAR Case 2007-016). This final rule converts the interim rule published in the Federal Register on February 28, 2008, and amended on March 28, 2008, to a final rule without change....”

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

*Regulatory/Contractual
Update
Volume 14, Issue 2*

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.

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

*Regulatory/Contractual
Update
Volume 14, Issue 2*

- **Electronic Products Environmental Assessment Tool (EPEAT)** (FAR Case 2006-030). “The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have adopted as final, without change, the interim rule that amended the FAR to require use of the Electronic Products Environmental Assessment Tool (EPEAT) when acquiring personal computer products such as desktops, notebooks (also known as laptops), and monitors pursuant to the Energy Policy Act of 2005 and Executive Order 13423, ‘Strengthening Federal Environmental, Energy, and Transportation Management’”
- **Combating Trafficking in Persons** (FAR Case 2005-012). “This final rule implements Section 3(b) of the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003 (Combating Trafficking In Persons). TVPRA addresses the victimization of countless men, women, and children in the United States and abroad. The United States Government believes that its contractors can help combat trafficking in persons....”
- On January 15, 2009, DoD issued several rules including the following:
 - DoD has “issued a final rule amending the DFARS to address the procedures that apply when it is necessary to award to a contractor that is otherwise excluded from Federal procurement programs due to a violation of the Clean Air Act or the Clean Water Act.”
 - DoD has “issued a final rule amending the DFARS to address determination requirements with regard to the use of emergency acquisition flexibilities for contract actions supporting contingency operations or facilitating defense against or recovery from nuclear, biological, chemical, or radiological attack. The rule lowers the DoD level of approval for such determinations.”
 - DoD has “issued a final rule amending the DFARS to address FAR provisions that permit the award of a single source task or delivery order contract exceeding \$100 million, if the head of the agency determines it is necessary in the public interest. The DFARS rule specifies that the authority to make such a determination may not be delegated below the level of the senior procurement executive.”
 - DoD has “issued a final rule amending the DFARS to address requirements for DoD contractors to institute effective programs to prevent violations of the law of war by contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States.” (Also see below noticed DoD meeting).
 - DoD has “issued a final rule amending the DFARS to address procedures for notifying the appropriate DoD office of any information indicating that a firm or a subsidiary of a firm may be owned or controlled by the Government of a terrorist country. The notifications will facilitate maintenance of a list of such firms, as required by statute.”

- DoD has “issued a final rule amending the DFARS to address use of the Past Performance Information Retrieval System (PPIRS) in determining contractor responsibility. PPIRS is a Web-based application that stores information regarding contractor performance on Government contracts.”
- DoD has “issued an interim rule amending the DFARS to implement Section 824 of the National Defense Authorization Act for Fiscal Year 2009. Section 824 amended the DoD pilot program for transition to follow-on contracting after use of other transaction authority, to establish a new program expiration date and to include items developed under research projects within the scope of the program.”
- DoD has “issued an interim rule amending the DFARS to implement Section 847 of the National Defense Authorization Act for Fiscal Year 2008. Section 847 addresses requirements for senior DoD officials to obtain a post-employment ethics opinion before accepting a position from a DoD contractor within two years after leaving DoD service.”
- DoD has “issued a final rule amending the DFARS to address requirements for the separation of functions in source selection. The rule requires the military departments and defense agencies to certify every two years that no senior leader has performed multiple roles in the acquisition of a major weapon system or major service.”
- An “interim rule that amends DFARS provisions and clauses addressing the Buy American Act/Balance of Payments Program to implement a determination made by the Administrator for Federal Procurement Policy, on February 14, 2008, regarding laws applicable to the acquisition of commercially available off-the-shelf (COTS) items. The determination included a partial waiver of the Buy American Act (41 U.S.C. 10a and 10b), limited to the Act's domestic component test. The waiver allows a COTS item to be treated as a domestic end product if it is manufactured in the United States, without tracking the origin of the item's components.”
- DoD has “issued an interim rule amending the DFARS to implement Section 846 of the National Defense Authorization Act for Fiscal Year 2008 and Section 842 of the National Defense Authorization Act for Fiscal Year 2009. These laws address protections for contractor employees who disclose information to Government officials with regard to waste or mismanagement, danger to public health or safety, or violation of law related to a DoD contract.”

- On January 30, 2009, the Federal Register noticed that “the applicability date (for Employment E-Verify) of FAC 2005-29, Amendment-1, published January 14, 2009, 74 FR 1937, is delayed until May 21, 2009. Contracting officers shall not include the new clause at 52.222-54, Employment Eligibility Verification, in any solicitation or contract prior to the applicability date of May 21, 2009.” The DoD Director of Defense Procurement also issued a memorandum on January 30, 2009.

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

*Regulatory/Contractual
Update
Volume 14, Issue 2*

- DoD noticed in the Federal Register on January 12, 2009, a meeting on March 3, 2009, wherein “the agenda ... will include consideration of proposed changes to the Uniform Code of Military Justice and the Manual for Courts-Martial, United States, and other matters relating to the operation of the Uniform Code of Military Justice throughout the Armed Forces.”
COMMENT: How will this impact contractors?
- On January 9, 2009, the Federal Register noticed a proposed FAR rule “to specifically require the incorporation of the FAR clauses regarding Fair Labor Standards Act and Service Contract Act-Price Adjustment (Multi-Year and Option Contracts) and Fair Labor Standards Act and Service Contract Act-Price Adjustment in time-and-materials and labor-hour service contracts that are subject to the Service Contract Act.” Comments are due on/before March 10, 2009.

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

- The Air Force announced its intent to “update” the ADR commitment it “requires” from its “top contractors” by sending them a letter. The prior commitment is over 10 years old.

It is noted that this updated “agreement to agree” to consider ADR, still does not include any commitment to use ADR on a program basis, i.e. subcontractors are not specifically included—how can ADR be used without all the subcontractors being invited to the “party?” And, the silence on allowability of costs for ADR is deafening. Then, the use of arbitration as a tool to facilitate the negotiation of impasses, etc. is noticeable by its absence as an ADR process.

Finally, this clearly impacts the public and should be subject to Federal Register notice/comment.

- Crossroads of Conflict—Israel 2008: Commentary and pictures www.Rumbaugh.net

Points of Contact
ADROffice@Rumbaugh.net
www.Rumbaugh.net

*Regulatory/Contractual
Update
Volume 14, Issue 2*

Future Speaking Topics Include—

- Beach Cities National Contract Management Association (NCMA) Chapter and University of California annual educational conference, “Update on Regulatory/Contractual Changes in Government Contracting,”
- Ft. Worth NCMA Chapter, “Contract Negotiations,” NES.
- San Fernando Valley NCMA Chapter, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements."
- “Contract Negotiation: Deal or No Deal!” NCMA Houston Space City Chapter.
- “Baseball Arbitration,” ISM Miami Affiliate.
- “ADR,” NCMA South Florida Chapter.

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

Recent Updates are posted at
www.Rumbaugh.net
©MMIX Charles E. Rumbaugh