

Regulatory/Contractual Update

June 24, 2009

Volume 14, Issue 6

- On June 23, 2009, DoD Director, Defense Procurement and Acquisition Policy, Shay Assad issued a memorandum that “supplements” GAO Report No. GAO-08379, dated March 14, 2008, on termination guidance across DoD. Within 60 days of such memo, all Defense agencies and field activities “will verify all termination guidance within their organizations adequately address conditions under which it is appropriate to end programs or contracts.”

Similarly, on June 23rd the Director issued a memorandum that noticed “proposed FAR revisions” on termination guidance has been submitted to the DAR Council “for consideration.” Subsequently, DoD may issue any required “guidance on termination.”

- On June 1, 2009, OMB issued updated “Operational Guidelines” on “reporting requirements necessary to comply with both the Federal Funding Accountability and Transparency Act and the American Recovery and Reinvestment Act.” Additional information is posted at www.usaspending.gov and www.Recovery.gov. And, additional transparency is expected according to an OMB press release dated June 22, 2009.
- On June 4, 2009, DCMA noticed in an “OnPoint” memo that DCMA will move forward with a “geographic organization construct that aligns Contract Management Office in a regional manner.” Further, it is noted therein that DCMA “resources are being increased by more than 25%” and that its oversight activities “are force multipliers and support DoD’s mandate to reinvigorate its acquisition business.”
- On June 15, 2009, the Federal Register noticed FAC 2005-33 dealing with trade agreements—Buy America Act for Costa Rica, Oman, and Peru as well as finalizing a proposed rule from April 8, 2009, “with minor change” on Contractor's Request for Progress Payments (FAR Case 2005-032).
- Employment Eligibility Verification (E-Verify) implementation has been further delayed to September 8, 2009.
- Several requests in connection with extending FAR “information collection” requirements have been posted in the Federal Register including information on professional employee compensation plans, Contract Funding—Limitation of Costs/Funds, advance payments, Anti-kickback procedures, Prompt Payment Act, etc.

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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.

- OMB posted a request for public comments in furtherance of the March 4, 2009, Presidential Memorandum on Government Contracting (also see March Update) on (1) Maximizing the use of competition; (2) improving practices for selecting contract types; (3) strengthening the acquisition workforce; and (4) clarifying when functions should be performed by federal employees and when contractors may be appropriately considered.” AIA submitted a detailed reply on the inappropriate use of fixed price contracts for R&D.
- Christine Rising Hazlett, NCMA CPCM and Fellow passed away on June 22, 2009. She was most recently the Deputy Director, Contracting for the Missile Defense Agency and an enthusiastic and energetic supporter of NCMA.

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

- The International Association for Contract and Commercial Management (IAACM), www.iaccm.com, recently completed its 8th annual survey of “most frequently negotiated terms and conditions.” According to IAACM this study “attracted a record input...from over 4000 (worldwide) participants” from “almost 1,000 corporations.”

The study results are most revealing and suggest to some...are negotiators focusing on the “right” things? Are they insuring against risk or serving the ultimate user and/or enhancing the contracting relationship? The “top” terms and conditions are Limitation of Liability, then Indemnification, Price, et al. Acceptance is seventh on the list of Top 30 with Warranty coming in at eleven. You may want to review the list and see where your priorities are in relationship to this study.

- On June 2, 2009, the U.S. Fed. Circuit Court of Appeals, ruled in McDonnell Douglas Corp. & General Dynamics Corp. v. U.S., No. 07-5111, in “an action involving the government's default termination of a Navy contract to develop a carrier-based stealth aircraft, (the) Court of Federal Claims judgment in favor of defendant is affirmed where: 1) the government satisfied its burden of proving that it was justified in terminating the contract for default as it was justifiably insecure about the contract's timely completion and plaintiff's do not argue that their failure to make progress could be excused; and 2) the default termination of the contract was justified despite the failure of the contracting officer to conduct a Lisbon analysis before the termination, as the government is not required to establish that a contracting officer conducted the analysis necessary to sustain a default under the alternative theory, and a Lisbon analysis cannot be strictly applied where contract did not have a fixed completion date.” (emphasis added)

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- A major contractor recently sent a memorandum to some/all of its suppliers “requesting a 10% price reduction on (specified) purchase orders” as well as another memorandum calling for an immediate change in payment terms, i.e. moving time for payment out under existing purchase orders. No deficiency in supplier performance was noted in those memoranda. Who has the cash flow problem? What does this indicate about the potential need of adequate assurances from the buyer? Finally, what kind of future price increase is expected from suppliers in response to these types of practices? Ultimately, what would the buyer’s ACO/PCOs think of all this and any TINA/estimating system disclosure obligations? What do you think? Talk to counsel.

Future Speaking Topics Include—

- China Lake NCMA Chapter, “ADR.”
- St. Louis Gateway NCMA Chapter, “How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements.”
- Southeast Idaho NCMA Chapter, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements."
- Sooner, Oklahoma City, NCMA Chapter, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements."
- Bandelier, Los Alamos, NCMA Chapter, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements."
- Twin Cities NCMA Chapter, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements."
- Milwaukee NCMA Chapter, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements."

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