

Regulatory/Contractual Update

October 26, 2009

Volume 14, Issue 10

- On October 14, 2009, the Federal Register noticed significant regulatory changes by Federal Acquisition Circular 2005-37 and they include:
 - Registry of Disaster Response Contractors (FAR Case 2008-035) (Interim) which “amends the FAR at parts 2, 4, 7, 10, 13, 18, 26, and 52 to implement the Registry of Disaster Response Contractors provision, section 697 of the Department of Homeland Security (DHS) Appropriations Act, 2007 (6 U.S.C. 796).” Comments are due on/before December 14, 2009.
 - Limiting Length of Noncompetitive Contracts in “Unusual and Compelling Urgency” Circumstances (FAR Case 2007-008) (final) which “amends the FAR to require that contracts awarded under the authority of FAR 6.302-2, Unusual and compelling urgency, may not exceed the time necessary to meet the unusual and compelling requirements, may not exceed the time for the agency to enter into another contract for the required goods and services through the use of competitive procedures, and may not exceed one year unless the head of the agency entering into the contract determines that exceptional circumstances apply. The determination may be made after contract award when making the determination prior to award would unnecessarily delay the award. The rule applies to any contract in an amount greater than the simplified acquisition threshold....”
 - Use of Commercial Services Item Authority (FAR Case 2008-034) (Interim) which implements “Section 868 (of the Duncan Hunter NDAA for Fiscal Year 2009 and) provides that the FAR shall be amended with respect to the procurement of commercial services that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered and sold competitively in substantial quantities in the commercial marketplace. Such services may be considered commercial items only if the contracting officer has determined in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for these services....”

Comments are due on/before December 14, 2009.

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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.

➤ Limitations on Pass-Through Charges (FAR Case 2008-031) (Interim) in order

“to minimize excessive pass-through charges by contractors from subcontractors, or of tiers of subcontractors, that add no or negligible value, and to ensure that neither a contractor nor a subcontractor receives indirect costs or profit/fee (i.e., pass-through charges) on work performed by a lower-tier subcontractor to which the higher-tier contractor or subcontractor adds no, or negligible, value. To enable agencies to ensure that pass-through charges are not excessive, this interim rule includes a solicitation provision and a contract clause requiring offerors and contractors to identify the percentage of work that will be subcontracted, and when subcontract costs will exceed 70 percent of the total cost of work to be performed, to provide information on indirect costs and profit/fee and value added with regard to the subcontract work.”

COMMENT: Will this clause preclude the use of renegade/non-standard clauses currently in use—DoD is reported as stating that it will defer to the final FAR rule! Independently, it is noted that DoD has requested components to report on the use of such clauses by the end of November. Comments on the above interim rule are due on/before December 14, 2009.

➤ Award Fee Language Revision (FAR Case 2008-008) (Interim) which “requires agencies to--

(1) Link award fees to acquisition objectives in the areas of cost, schedule, and technical performance;

(2) Clarify that a base fee amount greater than zero may be included in a cost plus award fee type contract at the discretion of the contracting officer;

(3) Prescribe narrative ratings that will be utilized in award fee evaluations;

(4) Prohibit the issuance of award fees for a rating period if the contractor's performance is judged to be below satisfactory;

(5) Conduct a risk and cost benefit analysis and consider the results of the analysis when determining whether to use an award-fee type contract or not;

(6) Include specific content in the award-fee plans; and

(7) Prohibit the rolling over of unearned award fees to subsequent rating periods....”

COMMENT: Will micro-managing the award policy area remove “necessary” tools from the program manager? And, will penalizing a contractor by not rolling over unearned fees for potential award in the future incentivize performance? Comments are due on/before December 14, 2009.

➤ GAO Access to Contractor Employees (FAR Case 2008-026) which “converts the interim rule published in the Federal Register at 74 FR 14649, March 31, 2009, to a final rule without change.”

- DoD continues to issue memoranda including the following:
 - October 20, 2009, Guidance on section 163 of the Continuing Resolution Regarding the Association of Community Organizations for Reform Now (ACORN) wherein DoD references include the October 7, 2009, direction from OMB and requirement on compliance with section 163.
 - October 13, 2009, CPARS on DoD compliance with an earlier DoDIG report recommending reconciliation of databases “to include the Architect-Engineer Contract Administration Support System and Construction Contractor Appraisal Support System modules and employ a standard reconciliation process across DoD.”
 - October 6, 2009, DoD Warranty Guide. “DoD relies heavily on warranties to support mission critical needs and must ensure a capability to track warranties for Item Unique Identification (IUID) required items, Government Furnished Property/Material and Equipment (GFP/GFM/GFE) and items covered by the Procurement Data Standard (PDS).”

COMMENT: This new September 2009 “guide” must be used and is based upon Air Force and Army documents. It is available at [http://www.acq.osd.mil/dpap/pdi/uid/docs/departmentofdefensewarrantyguide\[1\].doc](http://www.acq.osd.mil/dpap/pdi/uid/docs/departmentofdefensewarrantyguide[1].doc)

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

- International Association for Contract and Commercial Management (IACCM) recently asked its members to nominate the companies that they admire most for their negotiation capabilities. This worldwide survey resulted in the nomination of hundreds of companies and IACCM published the top 100. The report is available at <http://www.iaccm.com/loggedin/library/nonphp/Top%20Companies%20in%20Negotiation%202009.pdf>
- NDIA has available for purchase a revision to the June 2008 publication “A Study of the Applicability of Federal Acquisition Regulation (FAR) Clauses to Subcontracts under Prime Defense and NASA Contracts.” The new edition, dated July 2009, includes an analysis of the flow down requirements contained in the FAR, DFARS, and NFS. Further info is available from Ruth Franklin at NDIA rfranklin@ndia.org

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- The increasing attempts at non-party discovery in arbitrations “suggests” some of the "outer-limits" of arbitral authority—one of the reasons parties (perhaps) select arbitration, i.e. not to be burdened by the "rules downtown," and this is also an important facet in selection of ADR and clause drafting! The recent article by David Lannetti, "Protecting Contracting Parties in Construction Arbitrations Based on the Availability--or Nonavailability--of Nonparty Discovery," covers this topic and it may be of interest. (ABA Construction Lawyer, vol. 29, no. 4 Fall 2009). He provides a good summary of the current law, problems, as well as some recommendations. An ecopy is also available.

Future Speaking Topics Include—

- Sacramento NCMA Chapter, “How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements.”
- Seattle South Sound and Puget Sound NCMA Chapters, National Education Seminar, “Risk Management for Complex U.S. Government Contracts and Projects” Registration info: Tami Grant, grantt@wsdot.wa.gov
- International Association for Contract and Commercial Management (IACCM), audio seminar, “Drafting the Ultimate Arbitration Clause.”

Current Articles Include—

- **“Conflict Resolution Techniques...The Answer to Legislative Impasses?”** Published in NCMA Contract Management, magazine July 2009. E-copy is available at www.Rumbaugh.net

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