

Regulatory/Contractual Update

September 24, 2009

Volume 14, Issue 9

- On September 2, 2009, the Federal Register notice a proposed FAR rule “to establish procedures for contracting officers to provide contractor information into the Past Performance Information System (PPIRS). This case sets forth requirements for reporting defective cost or pricing data and terminations for cause or default. Evaluation of past performance information, especially terminations, manages risks associated with timely, effective and cost efficient completion of contracts, a key objective of the President's March 4, 2009, Memorandum on Government Contracting.” Comments are due on/before November 2, 2009.

COMMENT: When is an allegation a “penalty” without a prior due process? Will purported DCAA “findings” result PPIRS input?

- DoD continues to issue memoranda including the following:
 - September 22, 2009, on Award and Incentive Fees—New GAO Report and Evaluation of Data wherein DoD applauds the submission of DoD component data on the topic but also provides, in part,
“GAO reported (May 2009 report) our (DoD) award fee policy is consistent with the OMB’s award fee guidance, they found cases where our policy is not being applied.... Contracts issued before the April 27, 2007, the effective date of the (DoD) 2007 guidance, should be reviewed to identify opportunities to apply the guidance when efficiencies can be obtained through unilateral decisions at a minimal cost to the government....”

COMMENT: “Unilateral decisions”...does this mean retroactive application of the 2007 policy to old contracts?

- September 14, 2009, on Competition on DoD Acquisition. “This memorandum asks Defense components to reinvigorate and expand the role of competition advocates, and reinforce the importance of competition for all involved in the acquisition process. To facilitate this effort, a working group of representatives from various DoD components developed a standardized competition training tool to educate and focus all DoD agencies on current competition policy and guidance. This training is available at: <http://www.acq.osd.mil/dpap/cpic/cp/docs/training.ppt>”

COMMENT: Who is the DoD Competition Advocate?

- On September 2, 2009, on Implementation of Employment Eligibility Verification. “On November 14, 2008, the final rule implementing the FAR requirement entitled Employment Eligibility Verification was published at 73 FR 67650 as FAC 2005-29. This rule had an effective date of January 15, 2009. Four amendments were published to the Federal

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

Regulatory/Contractual
Update

Volume 14, Issue 9

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.

Acquisition Circular, resulting in an effective date of January 19, 2009, and an applicability date of September 8, 2009. The FAR Council has agreed to proceed with implementation of the rule.” And on September 8, 2009, the US Department of Homeland Security issued an “E-Verify Supplemental Guide for Federal Contractors.”

- On September 2, 2009, on Use of Wide Area Workflow (WAWF) for Purchase Card Transactions. “This memorandum explains upcoming changes to Wide Area Workflow to enable creation of receiving reports for purchase card actions. This will enable tracking of property acquired with the card in accordance with requirements of the 2009 National Defense Authorization Act. In order to identify actions paid with the card, the code ‘CRCARD’ will be substituted for the paying office Department of Defense Activity Address Code. A review of current contracts showed this to be the most common code currently in use for this purpose.”
- On August 27, 2009, on Appointment of a DoD Ombudsman for EVM Issues. “This memorandum designates the Director, Program Acquisition and Contingency Contracting as the Department's Ombudsman for Earned Value Management (EVM) issues. The Ombudsman will resolve differences in interpretation of EVM policy between DoD and Industry; in interpretation of policy, practice, and requirements among DoD Components; and will represent DoD in resolving differences with other Federal agencies.”
- A September 24, 2009, notice in the Federal Register may be of interest: “Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the FAR Secretariat will be submitting to the OMB a request to review and approve a reinstatement of a previously approved information collection requirement concerning Make-or-Buy Program. Requests for public comments were published in the Federal Register at 74 FR 32164, July 7, 2007. No comments were received.”

COMMENT: This typical notice is very telling, i.e. industry is not submitting comments nor challenging any information collection requirements imposed upon them—including the consequent systemic costs associated with same, burdens upon small business, etc. And, we’re reminded that a recent industry submittal to the government related to the determination of “commercial items” was similarly void of any assertion of OIRA reviews. The time for—excessive, non-value added efforts, etc.—reviews by Contracting Officers cannot be ignored—as the Air Force found in the early 1990s in connection with submission of cost/pricing data! The forthcoming increase in Contracting Officers is not being justified merely to conduct “excessive” reviews, etc.! There have been similar notices dealing with VE, extraordinary contractual relief, pollution prevention info, etc.

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

*Regulatory/Contractual
Update*

Volume 14, Issue 9

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

- The September 2009 issue of NCMA Contract Management magazine has an excellent article (case analysis) by Jack Horan, Esq. entitled, “A Trap for the Unwary: Broad Release Language in Contract Modifications.”

Numerous situations have arisen where there are subsequent disputes arising, in part, over and from prior releases.

Review with counsel.

- The September 24, 2009, front page, Wall Street Journal, “Teed-Off Residents Drive Developer to Brink of Ruin,” provides insight into the purported world of illusory contracts and reminders of the necessary due diligence in contract matters. Further, it brings to mind that one needs to consult local law on the availability of, ramifications of having, non-recourse loan(s) obtained in the acquisition of an owner-occupied home, i.e. the so-called “Anti-deficiency” legislation that several States have.

Review with counsel.

Future Speaking Topics Include—

- Sacramento and China Lakes NCMA Chapters, “How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements.”
 - 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

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