Regulatory/Contractual Update

August 11, 2010 Volume 15, Issue 8

- On August 10, 2010, DoD noticed in the Federal Register "a final rule to delete the DFARS language implementing section 852 of the National Defense Authorization Act for Fiscal Year 2007 that ensures that pass-through charges on contracts or subcontracts that are entered into for or on behalf of DoD are not excessive in relation to the cost of work performed by the relevant contractor or subcontractor. The interim DFARS rule language, which implements the requirements of section 852, was made obsolete with the publication of the FAR interim rule on October 14, 2009."

  COMMENT: See October 26, 2009, Update on FAR rule.

- On August 10, 2010, DoD noticed in the Federal Register "as final a proposed rule amending the DFARS to make requirements for DoD management and oversight of unpriced change orders consistent with those that apply to other undefinitized contract actions."

  COMMENT: See August 24, 2009, Update on proposed rule. However, DoD "still" does not have a method to ensure closure in the negotiations!

- DoD continues to issue memoranda including the following:
  - July 9, 2010, Revised Posting and Reporting Requirements for the ARRA of 2009. "This memorandum is to update the Defense Procurement and Acquisition Policy instructions for required use of federal Integrated Acquisition Environment (IAE) capabilities to ensure all recovery funds are documented appropriately for these changes."
  - July 15, 2010, Deployment of Subcontract Reporting Requirements for the Federal Funding Accountability and Transparency Act. "The Federal Funding Accountability and Transparency Act of 2006 (FFATA) established a requirement to collect award data on all subcontracts valued at $25,000 or more. On July 8, 2010, the FAR was changed to incorporate an interim rule establishing implementation requirements for contract actions. Prime contractors are now required to report subcontract awards to the FFATA Sub-award Reporting System (FSRS). This memorandum is to communicate the requirements to the components and provide instructions to enable smooth implementation."
  - July 21, 2010, Correctly Identifying Size Status of Contractors. "Current business systems across DoD have each developed methods of indexing contracts independently leading to data integrity problems between data sources. This memorandum aims to eliminate this confusion by establishing a uniform contract indexing methodology across DoD."

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

- On August 10, 2010, DoD noticed in the Federal Register a "final rule to amend the DFARS by deleting the requirement for contractors to report commercially available off-the-shelf items that contain foreign specialty metals and are incorporated into noncommercial end items….and cancelling the clause at 252.225-7029… since the reporting requirement does not extend beyond fiscal year 2009."

  COMMENT: Is this applicable to current contracts with the clause? Talk to counsel.

- On August 2, 2010, DoD noticed in the Federal Register "a final rule amending the DFARS to implement the recurring requirement of section 807 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. Section 807 provides for adjustment every 5 years of statutory acquisition-related thresholds, except for Davis-Bacon Act, Service Contract Act, and trade agreements thresholds. This final rule also adjusts some non-statutory acquisition-related thresholds."

  COMMENT: Should this be applicable to current contracts that have lower threshold(s)? Talk to counsel.

- On July 13, 2010, DoD noticed in the Federal Register "an interim rule that implements section 820 of the National Defense Authorization Act for Fiscal Year 2010. Section 820 is entitled 'Publication of Notification of Bundling of Contracts of the Department of Defense.' The new statute requires DoD contracting officers to publish a notification 'consistent with the requirements' of FAR 10.001(c)(2) on FedBizOpps.gov, or any successor site, at least 30 days prior to the release of a solicitation for a bundled acquisition. In addition, if the DoD agency has determined that 'measurably substantial benefits are expected to be derived as a result of bundling,' the notification must include a brief description of those benefits. The acquisitions covered by section 820 are defined at 820(b) as those that are funded entirely by DoD funds and covered by FAR 7.107, entitled 'Additional requirements for acquisitions involving bundling'…." Comments are due on/before September 13, 2010.

  COMMENT: Is this a valid interim rule? What is the legal basis for DoD not noticing a proposed rule with 60 days for notice/comment when the underlying law/requirement was enacted on October 28, 2009!

  FAR 1.501-3 provides an exception to the normal 60 day pre-effectiveness publication requirement but only when urgent and compelling circumstances make solicitation of comments impracticable prior to the effective date of coverage, such as when a new statute **must** be implemented in a relatively short period of time and in such case the coverage shall be issued on a temporary basis and shall provide for at least a 30 day public comment period. Yet, the OFPP Act does not provide for this "expanded" FAR provision—see 41 USC 418b (d)(2).

  Discuss with counsel.

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

Regulatory/Contractual Update
Volume 15, Issue 8

- On July 13, 2010, DoD noticed in the Federal Register "an interim DFARS rule that implements section 814 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84), enacted October 28, 2009. Section 814 is entitled 'Amendment to Notification Requirements for Awards of Single-Source Task or Delivery Orders.' 10 U.S.C. 2304a(d)(3)(A) prohibits the award of a sole-source task or delivery order that is estimated to exceed $100 million (including options) unless the head of the agency" makes certain determinations. Comments are due on/before September 13, 2010.

  COMMENT: See above.

- On July 13, 2010, DoD noticed in the Federal Register an interim DFARS rule "to bring DoD into compliance with OMB implementation of the Prompt Payment Act by exempting military contingencies, and certain payments related to emergencies and the release or threatened release of hazardous substances." Comments are due on/before September 13, 2010.

- The Defense Acquisition/Affordability Initiative cited in last month's Update continues with industry associations also setting forth how this can be a win-win endeavor!

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

- NCMA has posted the presentation slides from the various workshops from its 2010 World Congress at
  http://www.ncmahq.org/Events/WC10Detail.cfm?ItemNumber=6125&navItemNumber=4039

- "A provision in a commercial general liability insurance policy requiring the insurer to "defend the insured against any 'suit' seeking...damages" to which the insurance applies includes the duty to defend the insured in proceedings under the Calderon Act (California Civil Code §1375 et seq), which requires a common interest development association to satisfy certain dispute resolution requirements with respect to the builder, developer, or general contractor before the association may file a complaint in court for construction or design defects."

  Clarendon America Insurance Company v. Starnet Insurance Company - filed July 27, 2010, Fourth District, Div. Three Cite as G042353 Case is available at http://www.metnews.com/sos.cgi?0710%2FG042353

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

Regulatory/Contractual Update
Volume 15, Issue 8

- "In an Argentinian corporation's breach of contract suit against a New Jersey corporation under the United Nations Convention on Contracts for the International Sale of Goods (CISG), district court's grant of defendant's motion for summary judgment is vacated and remanded where: 1) the district court incorrectly concluded that Argentina's declaration, opting out of the provision in the Convention allowing a contract to be proved even if it was not in writing, imposed a writing requirements and that the absence of a written contract in this case precluded the plaintiff's claim; and 2) where, as here, one party's country of incorporation has made a declaration while the other's has not, a court must first decide, based on the forum state's choice-of-law rules, which forum's law applies, and then apply the law of the forum designated by the choice-of-law analysis." Forestal Guarani S.A. v. Daros Int'l, Inc., United States Third Circuit, 07/21/2010. Case is available at http://caselaw.findlaw.com/us-3rd-circuit/1532328.html?DCMP=NWL-pro_contracts

  Do you know which countries have signed the CISG treaty—it impacts significant portions of international trade and most international agreements that involve "goods" (as defined)? Discuss with counsel.

Future Speaking Topics Include—

- Jacksonville and Mid-Florida NCMA Chapters, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements."
- Beach Cities and Albuquerque NCMA Chapters, "Is the FAR Out of Control?"

ADR Offices of
CHARLES E. RUMBAUGH
Arbitrator/Private Judge/Mediator
310.373.1981 // 310.373.4182 (fax)

Los Angeles
San Francisco

Recent Updates are posted at
www.Rumbaugh.net