

Regulatory/Contractual Update

July 8, 2010

Volume 15, Issue 7

- On May 27, 2010, DCAA “replied” to the December 4, 2009, DoD Director of Defense Procurement and Acquisition Policy memorandum on “resolving contract audit recommendations”—see December 19, 2009, Update. Briefly, DoD had earlier announced the institution of an escalation process within DoD and usually if a CO “sustains less than 75% of the total DCAA questioned costs.”

The latest DCAA memo provides, among other things, specified timeframes for its actions in response to a CO “decision.” While DCAA provides that resolution of “open items” with the CO should be at the lowest levels, the DCAA guidance provides that “consistent with DCAA’s current practices, it should continue to elevate disagreements (sic) **or** significant issues through the DoD... and where “resolution is not reached, significant disagreements may need to be elevated.”

COMMENT: Are all disagreements going to be “elevated?”

- On June 28, 2010, Pentagon officials announced to industry a Defense Acquisition Initiative “to try to cut as much as \$100 billion over the next five years out of the billions of dollars spent annually in buying weapons systems and other services from outside contractors. ...Defense Secretary Robert M. Gates said he wants contracts scrutinized more closely for inefficiencies and unneeded overhead. He said the savings could be shifted to support U.S. troops around the globe. Pentagon officials said they're looking for annual savings in the \$400 billion spent on goods and services....”

COMMENT: Is this (also) an opportunity for a review of the FAR/DFARS processes and the cost savings on regulatory/contractual compliance endeavors? Aerospace Industries Association, in its support of this Initiative, cites, among other things, a prior study reflecting 18% added product costs by unnecessary contract regulations! And, the National Defense Industrial Association stated, in part, “this is an opportunity to think creatively and to be innovative and supportive in our solutions and actions.” OMB also “posted” on July 7, 2010, its support for DoD endeavors.

However, the DoD Director of Defense Procurement is reported to have stated last week at the Coalition for Government Procurement breakfast, “If only one bid comes in on a contract, acquisition workers will be required to conduct a detailed cost analysis and negotiate the price.” Will the “competition” rules be changing which may increase costs?

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- On July 2, 2010, the Federal Register noticed FAC 2005-43 which is effective as of July 2, 2010, except as noted, and includes
 - Recovery Act Subcontract Reporting Procedures (FAR Case 2010-008) (Interim). “This interim rule amends the FAR to revise the clause at FAR 52.204-11, American Recovery and Reinvestment Act--Reporting Requirements. The revised clause will require first-tier subcontractors with Recovery Act funded awards of \$25,000 or more, to report jobs information to the prime contractor for reporting into FederalReporting.gov. It also will require the prime contractor to submit its first report on or before the 10th day after the end of the calendar quarter in which the prime contractor received the award, and quarterly thereafter. The revised clause will be used for all new solicitations and awards issued on or after the effective date of this interim rule. This clause is not required for any existing contracts, or task and delivery orders issued under a contract, that contain the original clause FAR 52.204-11 (March 2009). Therefore, this interim rule does not require renegotiation of existing Recovery Act contracts that include the clause dated March 2009.”
 - Government Property (FAR Case 2008-011) (effective August 2, 2010). “This final rule amends the FAR to revise FAR part 45 and its associated clauses. Changes are being made to FAR parts 2, 4, 15, 32, 42, 45, and 52. These changes are to clarify and correct the previous FAR rule for part 45, Government Property, published under FAC 2005-17, FAR case 2004-025, May 15, 2007. Minor changes are made to the proposed rule published August 6, 2009. The rule specifically impacts contracting officers, property administrators, and contractors responsible for the management of Government property. The rule does not affect the method of managing Government property. The rule merely clarifies and corrects the previous FAR rule.”
 - Registry of Disaster Response Contractors (FAR Case 2008-035) (effective August 2, 2010). “This final rule adopts, without change, the interim rule implementing Public Law 109-295, the Department of Homeland Security Appropriations Act, 2007, section 697, which requires the establishment and maintenance of a registry of disaster response contractors. The Disaster Response Registry is located at <http://www.ccr.gov>.... and covers domestic disaster and emergency relief activities.”
 - Clarification of Criteria for Sole Source Awards to Service-Disabled Veteran-Owned Small Business Concerns (FAR Case 2008-023) (effective August 2, 2010).
 - Trade Agreements Thresholds (FAR Case 2009-040) (Interim). “This interim rule adjusts the thresholds for application of the World Trade Organization Government Procurement Agreement and the free trade agreements as determined by the United States Trade Representative, according to a pre-determined formula under the agreements.”

- On June 30, 2010, National Security Adviser James Jones announced “the creation of a new and independent agency that will merge all export licensing activities under a board of directors reporting to the president.” Additional info available at <http://thehill.com/business-a-lobbying/106597-new-agency-will-house-export-rules>
- DoD continues to issue memoranda including the following:
 - June 21, 2010, Class Deviation 2010 DO0013- Notification of Employee Rights under the National Labor Relations Act. “This memorandum informs the DoD contracting community of the requirements of Executive Order 13496, Notification of Employee Rights under Federal Labor Laws, and provides an implementing clause.” The deviation is not an interim rule but is effective on June 21, 2010.
 - June 29, 2010, Theater Business Clearance/Contract Administration Delegation (TBC/CAD) Update. “This memorandum updates TBC/CAD guidance to delineate the new TBC/CAD policy; and, reiterate authorities and responsibilities of DOD contracting activities specified in USCENTCOM FRAGO, 09-1640, ‘Realignment of the Joint Contracting Command-Iraq/Afghanistan to a Joint Theater Support Contracting Command’.”
 - July 8, 2010, Contract Indexing Standard. “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.”
 - July 8, 2010, Wide Area Workflow Database Clean-Up. “In an effort to streamline and improve response times for the Department of Defense's invoicing and receipt/acceptance system, Wide Area Workflow (WAWF), recommendations have been made to initiate an active database clean-up effort. This memo authorizes the first round of systematic elimination of all aged and erroneous documents in the active database prior to July 30, 2009. The components will receive a full listing of aged documents prior to the cleanup effort and will have the opportunity to specify if select documents should not be eliminated.”
- On June 23, 2010, DoD noticed in the Federal Register “an interim rule to implement revisions to DoD Directive-Type Memorandum (DTM) 09-019, ‘Policy Guidance for Foreign Ownership, Control, or Influence (FOCI).’ The DTM revises the description of communications security material that is ‘proscribed information’.” Changes are incorporated into DFARS 209.104-1. Comments are due on/before August 23, 2010.
- On June 28, 2010, OMB announced several related initiatives that focus on greater oversight, actions, etc. on financial systems Information Technologies projects.

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- It is reported... on Tuesday, July 27, 2010, from 11-12:30, at the World Bank's "J" Building (701 18th Street NW) Washington DC, as part of the week-long XVIIIth International Congress of Comparative Law, a special panel will be held on international and comparative procurement law. This free session will focus on emerging issues in World Bank procurement, as a model for examining trends in other legal regimes. The panel will include Daniel Gordon, Administrator, OFPP; Pascale Dubois, Sanctions Evaluation and Suspension Officer, The World Bank; Laurence Folliot-Lalliot Senior Counsel, The World Bank; Eli Whitney Debevoise, Arnold & Porter LLP (former U.S. Executive Director, World Bank); Christopher Yukins & Steven Schooner, Associate Professors & Co-Directors, Government Procurement Law Program, The George Washington University Law School.

“The panel will discuss recent advances in the Bank's procurement policies, including its anti-corruption efforts. The panel will take a special look at how the Bank might address common issues in procurement worldwide, such as organizational conflicts of interest. The session will be an important opportunity for the U.S. procurement law community to learn more of how the World Bank's policies and practices, which shape billions of dollars in procurement each year, are advancing in parallel with international reforms.” Attendance can be confirmed through rdotson@law.gwu.edu

COMMENT: The World Bank establishes the terms and conditions for International procurements by its lending to borrowing countries. See prior Updates on related International/UNCITRAL Procurement Rules as well as UNCITRAL link below.

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

- Limitation on damages/liability appears to be in the "news." Below are some recent net summaries of court decisions that may be of interest in strategies especially in connection with negotiations with insurance carriers, negotiation of contract limitations on liability, notices of contract noncompliance, arbitration, etc. ...
 - “Helicopter maintenance manual was not ‘part’ of the helicopter, so action in which plaintiff alleged injury resulting from crash caused by defective maintenance instructions was not barred by General Aviation Revitalization Act of 1994, which generally subjects claims arising from aviation accidents to an 18-year period of repose.” Rogers v. Bell Helicopter Textron, Inc. - filed June 4, 2010, California, Third District. <http://www.metnews.com/sos.cgi?0610%2FC061943>
 - “In apportioning fault under (California) Proposition 51, which abolished joint-and-several tort liability, trial court erred in failing to account for the negligence of the U.S. Navy, even though the Navy is immune from liability.” Collins v. Plant Insulation Company - filed June 3, 2010, California First District. <http://www.metnews.com/sos.cgi?0610%2FA124268>
 - “In an action seeking a declaration that plaintiff-insurer owed defendant no duty to defend a suit arising out of a blown-out oil well, summary judgment for defendant is reversed where: 1) the parties intended the legal definition of professional services to exclude coverage for professional services in any of defendant's operations; and 2) the underlying suit alleges the existence of and failure to fulfill a contract, the very subject of which was defendant's expertise in drilling operations.” U.S. 5th Circuit Court of Appeals, May 26, 2010 Admiral Ins. Co. v. Ford, No. 09-50671. <http://caselaw.findlaw.com/us-5th-circuit/1524912.html>
 - “In an action against a seller of an airplane that allegedly failed to comport with the contract and with the representations by the seller, judgment for plaintiff is reversed where the district court abused its discretion in refusing to instruct the jury on plaintiff's duty to provide timely notice of the plane's alleged nonconformity with the contract.” U.S. 8th Circuit Court of Appeals, May 25, 2010 Friedman & Friedman, Ltd. v. Tim McCandless, Inc., No. 08-2976. <http://caselaw.findlaw.com/us-8th-circuit/1525119.html>

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- “In a homeowners association's suit for construction defects, trial court's denial of developers' motion to compel arbitration is affirmed as the recorded CC&R's, standing alone, are not a contract between the developer and the homeowners association, which only came into existence after the CC&Rs were recorded, and thus, here there has been no showing the association entered into a binding arbitration agreement.” California Appellate Districts, May 27, 2010 Villa Vicenza Homeowners Ass'n v. Nobel Court Dev., LLC, No. D054550.
http://caselaw.lp.findlaw.com/data2/californiastatecases/d054550.pdf?D CMP=NWL-pro_contracts
- Noticed in the recent issue of the ABA Business Law Section Commercial Law Newsletter several links that may be of interest
 - U. Penn's archive of National Conference of Commissioners on Uniform State Laws final acts and drafts can be accessed at <http://www.law.upenn.edu/bll/archives/ulc/ulc.htm>
 - Pace University's database of CISG decisions can be accessed at <http://cisgw3.law.pace.edu/>
 - Gonzaga University's new Commercial Law Center has a variety of links to useful sites and can be accessed at http://www.law.gonzaga.edu/Centers-Programs/commercial_law_center/default.asp
 - Information on the work of The United Nations Commission on International Trade Law (“UNCITRAL”) (including the work of its working groups on Procurement, International Arbitration and Conciliation, Transport Law, Electronic Commerce and Insolvency Law) can be accessed at <http://www.uncitral.org/uncitral/en/index.html>

Future Speaking Topics Include—

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

*Alternative Dispute Resolution (ADR) and basic/advanced negotiation techniques
— seminars/workshops —
may be arranged by sending a message to ADROffice@Rumbaugh.net*