

Regulatory/Contractual Update

March 17, 2010

Volume 15, Issue 3

- On March 5, 2010, DoD noticed in the Federal Register that it “is issuing an interim rule amending the DFARS to implement section 812 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84, enacted October 28, 2009).... It “makes the limitations on payment of costs prior to definitization of unpriced change orders applicable to all categories of undefinitized contractual actions, ‘including undefinitized task orders and delivery orders.’ The implementation is accomplished by specifically including the category of ‘task orders and delivery orders’ in the definition of ‘contract action’ at DFARS 217.7401.” Comments are due on/before May 4, 2010.
COMMENT: And the methodology on “how to get to closure” is wanting, i.e. is there a negotiation process to arrive at a fair/reasonable price—or merely upon unilateral determination as the “default?”
- On March 3, 2010, DoD noticed in the Federal Register that it “is seeking comments from Government and industry on potential changes to the DFARS to address requirements for the safeguarding of unclassified information. The changes would add a new subpart and associated contract clauses for the safeguarding, proper handling, and cyber intrusion reporting of unclassified DoD information within industry.” DoD is seeking information on best practices in 13 enumerated areas. A public meeting will be held on April 22, 2010. Otherwise, comments are due on/before May 3, 2010.
- On March 4, 2010, NASA noticed in the Federal Register that it is issuing a “proposed rule that amends the NASA FAR Supplement to clarify the policy and procedures regarding the release of contractors' restricted information and the handling and protection of restricted information by contractors....” Comments are due on/before May 3, 2010.
- On March 1, 2010, DoD noticed in the Federal Register that it is issuing an “interim rule amending the DFARS to implement Section 811 of the National Defense Authorization Act (NDAA) for Fiscal Year 2008. Section 811 is applicable to multiyear contracts for the procurement of major systems of DoD.” Comments are due on/before April 30, 2010.
- On March 10, 2010, the President announced that "Payment Recapture Audits," will be undertaken in detecting and recapturing payment errors. OMB will issue guidance within 90 days.

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

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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.

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- DoD continues to issue memoranda including the following:
 - March 12, 2010. Class Deviation 2010-O0006, Immediate Cessation of the Use of Price Evaluation Adjustment for Small Disadvantaged Businesses. “Effective immediately, Department of Defense (DoD) contracting officers shall not use FAR 19.11, Price Evaluation Adjustment For Small Disadvantaged Business Concerns, and DFARS 219.11. Contracting officers shall modify existing solicitations in accordance with FAR 1.108(d). This class deviation remains in effect until incorporated in the FAR and DFARS or otherwise rescinded.” This was issued without any Federal Register publication but with a “request for comments” that could be utilized in the formation of a subsequent interim rule.
 - March 3, 2010. DoD Deployment of Purchase Card On-Line System (PCOLS) Capability. “The DoD purchase card program continues to be a high risk environment as witnessed by the continued high frequency of audits along with Congressional interest. To mitigate this risk this memorandum requests all activities with purchase card programs who have not provided their plan and schedule to implement PCOLS are to provide a new implementation plan for PCOLS within 30 days from the date of this memorandum.”
 - March 3, 2010. Survey of Agency Policies and Practices Regarding Contractor Tax Delinquencies. “The Director, OFPP, issued a memorandum on February 25, 2010, to Chief Acquisition Officers and Senior Procurement Executives requesting agencies to respond to a survey designed to gather information about agency policies and practices regarding contractors' certifications of tax delinquencies. The survey requires responses regarding actions by contracting officers and suspension and debarment officials. This memorandum requests responses be provided to DPAP for consolidation and input to the OMB MAX system.”
 - February 12, 2010. Class Deviation 2010-O0003, Responsibility and Liability for Government Property. “This memorandum provides a class deviation that adds fixed-price contracts awarded on the basis of adequate competition to the list of contract types under which contractors are not held liable for loss, damage, destruction, or theft of Government property. Effective immediately, contracting officers shall use the attached deviation from FAR 45.104, Responsibility and liability for Government property. This deviation is effective until it is incorporated in the FAR or DFARS, or is otherwise rescinded.”
- On February 24, 2010, DoD noticed in the Federal Register that it is issuing “an interim rule amending the DFARS to implement the Weapon Systems Acquisition Reform Act of 2009, section 202, Acquisition Strategies to Ensure Competition throughout the Lifecycle of Major Defense Acquisition Programs (MDAP).... The Weapon Systems Acquisition Reform Act (Pub. L. 111-23) was enacted to improve the organization and procedures of DoD for the acquisition of major weapon systems. This law establishes new oversight entities within

DoD, as well as new and varied weapon system acquisition and management reporting requirements. Section 202 directs the Secretary of Defense (SECDEF) to ensure that the acquisition strategy for each MDAP includes: (1) Measures to ensure competition at both the prime contract and subcontract level of the MDAP throughout its life cycle as a means to improve contractor performance; and (2) adequate documentation of the rationale for selection of the subcontractor tier or tiers. It also outlines measures to ensure such competition. Furthermore, it requires the SECDEF: (1) To take specified actions to ensure fair and objective ‘make-buy’ decisions by prime contractors on MDAPs; and (2) whenever a decision regarding the source of repair results in a plan to award a contract for performance of maintenance and sustainment of a major weapon system, to ensure that such contract is awarded on a competitive basis with full consideration of all sources.” (emphasis added)

Comments are due April 26, 2010.

Future Speaking Topics Include—

- 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
- Mid Florida and Jacksonville NCMA Chapters, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements."
- Southeast Idaho NCMA Chapter, National Education Seminar, “Risk Management for Complex U.S. Government Contracts and Projects.”

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

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