

Regulatory/Contractual Update

April 7, 2011

Volume 16, Issue 3

- On March 16, 2011, Federal Acquisition Circular 2005-50 was published in the Federal Register and included the following:
 - Proper Use and Management of Cost-Reimbursement Contracts (FAR Case 2008-030) (Interim). “This interim rule amends the FAR to implement section 864 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417). This law aligns with the goal of the Presidential Memorandum on Government Contracting, issued on March 4, 2009, which is to reduce waste, fraud, and abuse in Government contracting. This rule provides internal regulatory guidance on the proper use and management of all contracts, specifically cost-reimbursement contracts. The rule identifies (1) circumstances when cost-reimbursement contracts are appropriate; (2) acquisition plan findings required to support the contract type selection; and (3) the acquisition resources necessary to award and manage a cost-reimbursement contract.”
 - Requirements for Acquisitions Pursuant to Multiple-Award Contracts (FAR Case 2007-012) (Interim). This interim rule amends the FAR to implement section 863 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417). Section 863 mandates enhanced competition for orders placed under multiple-award contracts, including GSA’s Federal Supply Schedules. If an order over the simplified acquisition threshold does not follow the section 863 competitive procedures, section 863 requires that a notice and the determination of an exception be published in FedBizOpps within 14 days after award....” Comments are due on/before May 16, 2011.

COMMENT: There was no proposed rule noticed in the Federal Register and the purported justification of this “interim rule” is “this action is necessary because section 864 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, enacted October 14, 2008, directs that it must be implemented within 270 days from enactment.” And, almost 2 years have passed!
 - Justification and Approval of Sole-Source 8(a) Contracts (2009-038) (Interim).
 - Additional Requirements for Market Research (FAR Case 2008-007). “This final rule adopts, with changes, the interim rule that amended the FAR to implement section 826 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181). Section 826, entitled ‘Market Research,’ established new requirements for agencies subject to Title 10, United States Code. As a matter of policy, this provision of law was applied to contracts awarded by all executive agencies. The rule requires that market research must be conducted before an agency places a task or

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

*Regulatory/Contractual
Update
Volume 16, Issue 3*

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.

delivery order in excess of the simplified acquisition threshold under an indefinite-delivery indefinite-quantity contract. In addition, a prime contractor with a contract in excess of \$5 million for the procurement of items other than commercial items is required to conduct market research before making purchases that exceed the simplified acquisition threshold. Among other changes, the final rule also deletes the language added to FAR 52.244-6 (Alternate I) and relocates it to a new FAR clause 52.210-1, Market Research.”

- Socioeconomic Program Parity (FAR Case 2011-004) (Interim).
 - Use of Commercial Services Item Authority (FAR Case 2008-034) (Final).
 - Trade Agreements Thresholds (FAR Case 2009-040) (Final).
 - Disclosure and Consistency of Cost Accounting Practices for Contracts Awarded to Foreign Concerns (FAR Case 2009-025) (Final).
 - Compensation for Personal Services (FAR Case 2009-026) (Final).
- On March 2, 2011, the Federal Register noticed that “DoD is proposing to amend the DFARS to increase the use of fixed-price incentive (firm target) contracts, with particular attention to share lines and ceiling prices.” Comments are due on/before May 2, 2011.
 - On March 2, 2011, the Federal Register noticed that “DoD is proposing to amend the DFARS to require contractors to report IR&D projects generating annual costs in excess of \$50,000.” Comments are due on/before May 2, 2011.
 - On March 2, 2011, the Federal Register noticed that “DoD is proposing to amend the DFARS to update and clarify the requirements for multiyear contracting. No statutory changes are incorporated in this proposed rule.” Comments are due on/before May 2, 2011.
 - On April 4, 2011, the Federal Register noticed that “DoD, GSA, and NASA are proposing to amend the FAR to clarify current FAR policy with respect to the proper disposition of contractor inventory. However, a number of other changes were made, aimed at enhancing the management of Government contract property in the hands of contractors. The changes are the result of questions raised by contractors and Government personnel, Government and industry exchanges, and lessons learned. In addition, some comments from the previous FAR Case 2008-011, published in the Federal Register on July 2, 2010, that were deemed to be outside the scope of that case, are addressed in this case.” Comments are due on/before June 3, 2011.
 - On March 11, 2011, the Federal Register noticed that “DoD is proposing to issue a rule amending the DFARS to require contractors to display the DoD fraud hotline poster in common work areas.” Comments are due on/before May 10, 2011.

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

*Regulatory/Contractual
Update
Volume 16, Issue 3*

- On April 1, 2011, Federal Acquisition Circular 2005-51 was published in the Federal Register and included the following:
 - Women-Owned Small Business (WOSB) Program (FAR Case 2010-015) (Interim). “This interim rule amends the FAR to add subpart 19.15, Women-Owned Small Business Program, which will assist Federal agencies in achieving the 5 percent statutory goal for contracting with women-owned small business (WOSB) concerns....” Comments due on/before May 31, 2011.
 - Clarification of Standard Form 26--Award/Contract (FAR Case 2009-029). “This final rule amends the FAR to revise FAR part 53 to amend the Standard Form (SF) 26, Award/Contract, above blocks 17 and 18 and in block 18 to clarify that block 18 should not be used when awarding a negotiated procurement and should only be checked when awarding a sealed bid contract....”

- On March 2, 2011, the Federal Register noticed that “DoD is issuing an interim rule amending the DFARS to implement section 821 of the National Defense Authorization Act for Fiscal Year 2010. Section 821 provides authority for certain types of Government support contractors to have access to proprietary technical data belonging to prime contractors and other third parties, provided that the technical data owner may require the support contractor to execute a non-disclosure agreement having certain restrictions and remedies. Additionally, this interim rule amends the DFARS to provide needed editorial changes.” Comments are due on/before May 2, 2011.

COMMENT: DoD states the basis of an interim rule without opportunity for comments is its need to implement the noted Act that was effective October 2, 2009. However, no reason is provided for the delay.

- On March 2, 2011, the Federal Register noticed that “DoD is adopting as a final rule, with minor changes, an interim rule that amended the DFARS to implement exemptions from the Prompt Payment Act. The interim rule exempted military payments related to contingencies and certain payments related to emergencies and the release or threatened release of hazardous substances.”

- On March 2, 2011, the Federal Register noticed that “DoD is issuing a final rule amending the DFARS to implement section 815 of the National Defense Authorization Act for Fiscal Year 2009. Section 815 addresses the preservation of tooling for major defense acquisition programs.”

- On April 1, 2011, the Federal Register noticed “a final FAR rule amending the FAR to include clarifications to Standard Form (SF) 26, Award/Contract. This revised form includes changes above blocks 17 and 18 and in block 18 to clarify that block 18 should not be used when awarding a negotiated procurement and should only be checked when awarding a sealed bid contract.” This rule is effective May 2, 2010.

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

*Regulatory/Contractual
Update
Volume 16, Issue 3*

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

*Regulatory/Contractual
Update
Volume 16, Issue 3*

- DoD continues to issue memoranda including the following:
 - April 4, 2011, “Myth Busting”: Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process. “OFPP issued same subject memorandum on February 2, 2011, in response to the OMB's 25-point plan for improving the government's information technology (IT) acquisitions and management. The memorandum required the 24 Chief Financial Officer (CFO) Act agencies to develop a vendor communication plan; to make their plans available to their workforce and the public, as appropriate; and to update them at least annually. In order to provide OMB with one vendor communication plan for the Department, this memorandum is requesting all policies, procedures, and plans from all DoD components that address their communication plans with industry.
 - April 1, 2011, Role of DCMA. “This memorandum reinforces to the Defense Agencies and Military Departments the role of the Defense Contracting Management Agency as established by DoD to perform contract administration.”
 - March 28, 2011, Class Deviation 2011-O0009 -- Simplified Acquisition Threshold for Humanitarian or Peacekeeping Operations. “Effective immediately, for any contract to be awarded and performed, or purchase to be made, outside the United States in support of a humanitarian or peacekeeping operation, contracting officers shall use the attached definition of the simplified acquisition threshold. This class deviation is effective upon signature, and remains in effect until incorporated in the DFARS or is otherwise rescinded.”
 - March 21, 2011, Class Deviation 2011-O0008, Designation of Contracting Officer's Representative. “Effective immediately, contracting officers shall use the provided text included in this memorandum in lieu of DFARS 201.602-2(2)(i). This substitution clarifies that a contracting officer's representative (COR) must be an employee, military or civilian, of the U.S. Government, a foreign government, or NATO/Coalition partners, and clarifies that contractor personnel may not serve as CORs. This class deviation remains in effect until incorporated into the DFARS or until rescinded.”
 - March 4, 2011, DoD Source Selection Procedures. “This memorandum establishes DoD procedures that outline mandatory requirements for conducting competitively negotiated acquisitions under FAR Part 15 and outlines a...set of principles/procedures for conducting such acquisitions.”

COMMENT: The operative part of this memo is intended only to be incorporated into the PGI. Yet, the attached 42 page Source Selection Procedure document is required in connection with all competitive procurements on/after July 1, 2011.
 - February 25, 2011, Improving Contractor Past Performance Assessments “This memorandum provides the Department's acquisition community with OFPP's memorandum and reiterates the need for continued timely input of contractor past performance assessments into the past performance collection and retrieval systems.”

- On March 17, 2011, the Federal Register noticed that “DoD is adopting as final, without change, an interim rule amending the DFARS to implement section 807 of the National Defense Authorization Act for Fiscal Year 2010. Section 807 requires that facilities, infrastructure, and equipment that are intended for use by military or civilian personnel of the DoD, in current or future military operations, should be inspected for safety and habitability prior to use, and that such facilities should be brought into compliance with generally accepted standards for the safety and health of personnel to the maximum extent practicable consistent with the requirements of military operations and the best interests of DoD to minimize the safety and health risk posed to such personnel.”
- On March 17, 2011, the Federal Register noticed that “DoD is proposing to amend the DFARS to add a contract clause that clearly identifies any items being purchased that are critical safety items so that the proper risk-based surveillance can be performed.” Comments are due on/before May 16, 2011.
- “The next draft of the national Industrial Security Program Operating Manual (NISPOM) is scheduled for release for comment in late April 2011. Several areas could have significant changes (Chapter 5, Safeguarding Classified Information; Chapter 8, Information System Security; and Chapter 10, International Security Requirements). Additionally, there will be an Appendix D on ‘special security’ requirements (SAP & SCI) to replace the NISPOM Supplement which will reference the new DoD Special Access Program Security Manual.”
- AIA reports, “the government is taking action to reform defense-related export controls in an effort that should do much to help the defense industry as the U.S. moves to cut back on defense spending. A plan announced by Defense Secretary Robert Gates last year would consolidate exports to produce a single export-control list, a single licensing agency and single enforcement and information technology systems to allow officials to concentrate on key technologies. Aerospace Industries Association President and CEO Marion Blakey applauded the effort: ‘It really goes to the health of our industrial base... because if you do not have enough demand for any given technology, you'll lose the capability to produce it,’ she said.”
- Stan Wilker, previously a Contracts executive with TRW and a prior National President of NCMA, passed away on March 26, 2011.
- Eleanor Spector, retired vice president of Contracts for Lockheed Martin has joined Fluor Government Group as vice president to lead its Contract Management Function.

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

*Regulatory/Contractual
Update
Volume 16, Issue 3*

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.

- Over the years DeMars & Associates (<http://www.demarsassociates.com/>) has collaborated with a number of organizations and formed alliances for joint projects. Recently, DeMars agreed to provide services to support an established national program managed by one of those organizations. DeMars & Associates is actively recruiting individuals to perform professional services in about 750 specific locations in all fifty states. Agents sign up for the days and times they are available to work. Assignments are received about three days prior to the transaction.

Specifically, the work involves coordinating the transfer process between automotive manufacturers and their vehicle owners. These transfers usually take place following a mediation or arbitration, when the manufacturer has agreed to repurchase or to replace the vehicle. Transfers are completed at the dealership. A number of documents need to be completed and signed; a vehicle inspection is made which includes taking photos to verify the vehicle condition. We are requesting the agent be a Notary Public. Additional info is available from dpinkowski@demarsassociates.com

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

- In the case below, the New York Convention could not be used to deny confirmation of an International Arbitration award for alleged fraud (and as noted by the court) in the original award of applicable subcontract but NOT in the arbitration proceedings. Should the alleged fraud, etc. been initially raised in the arbitration proceeding...with a stay requested there and/or a letter of credit negotiated ensuring payment when the other proceedings are concluded? And your suggested action would be...? Are appeals expected? What follows is from the net.

TAMIMI GLOBAL COMPANY LIMITED v. TAMIMI GLOBAL COMPANY LIMITED, SD TX No. 11-0585, March 24, 2011.

"Tamimi moves to enforce a Foreign Arbitration Award against KBR. Tamimi was a subcontractor to KBR to provide dining services to the military in Iraq. KBR opposes the confirmation and seeks a stay pending proceeding in the COFC and the United States. KBR 'argues that it would be against public policy to confirm an arbitration award involving a contract procured through fraud.' The court denies the stay and confirms the arbitration award concluding 'that a stay is not warranted and confirmation is appropriate because the allegations made by the United States in the Court of Claims, even if proven, would not lead this Court to refuse confirmation on public policy grounds. In this case, the allegations by the United States are that KBR

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

*Regulatory/Contractual
Update
Volume 16, Issue 3*

was a participant in the alleged fraud. To the extent Tamimi was paying kickbacks to obtain dining services subcontracts, KBR--through its managerial employees--was accepting those kickbacks. The 'irregularities' were reported to KBR higher level personnel, but KBR elected not to investigate. If the United States proves its allegations, it will prove that KBR does not have clean hands, having engaged in fraud to the same extent as Tamimi. Enforcement of an arbitration award or other judgment in favor of one party alleged to have committed fraud against the other party allegedly engaged in the same fraudulent misconduct does not violate the most basic notions of morality and justice'."

Future Speaking Topics Include—

- Leatherstocking (Rome, NY) NCMA Chapter, “Is the FAR (System) Out of Control?”
- Washington DC Pentagon NCMA Chapter, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements" and “Is the FAR (System) Out of Control?”
- Georgia/Carolina NCMA, NAPM/ISM, & APICS Chapters, “How to Negotiate Fair Prices in Sole Source Procurements (Baseball Arbitration).”
- Research Triangle Park (Raleigh, NC) NCMA Chapter, “Drafting the Ultimate ADR Clause for Subcontracts” and “How to Negotiate Fair Prices in Sole Source Procurements (Baseball Arbitration).”

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
©MMXI Charles E. Rumbaugh