

Regulatory/Contractual Update

August 18, 2011

Volume 16, Issue 7

- On June 10, 2011, DoD replied to the May 26, 2011, letter of the Council of Defense and Space Industry Associations (CODSIA) that had expressed concern on the increasing reliance on use of interim rules. Specifically, DoD is of the view that interim rules can be issued before legislative deadline, the OFPP Act minimum 30-day Federal Register publication “applies to final rules, **not** temporary interim rules.” And, the OFPP Act provides “waivers for this (sic) and other requirements when urgent and compelling circumstances make compliance impracticable.”

COMMENT: See prior Updates. No requirement of Federal Register notice/comment for interim rules!

- On August 17, 2011, DoD issued, by memorandum, for internal input a draft of its DoD Guidebook for Contract Property Administration, which will replace the 1991 version of DoDI 4161.2-M. Comments are due by August 31, 2011.

COMMENT: This guide will **not** be published for comment in the Federal Register and will be incorporated into the PGI.

- On July 25, 2011, the Federal Register noticed a proposed “DFARS rule to address acquisitions using competitive procedures in which only one offer is received. With some exceptions, the contracting officer must resolicit for an additional period of at least 30 days, if the solicitation allowed fewer than 30 days for receipt of proposals and only one offer is received. If a period of at least 30 days was allowed for receipt of proposals, the contracting officer must determine prices to be fair and reasonable through price or cost analysis or enter negotiations with the offeror.” Comments are due on/before September 23, 2011.

COMMENT: And the competition rule for subcontract awards is...not changed! And, then there is the FAR rule! This is contrary to the FAR which states competition can exist when there is only one offeror. On November 24, 2010, DoD issued initial direction on this issue without any deviation, nor showing of unique DoD need for any such rule, and without any Federal Register publication or OIRA clearance. See prior Updates.

- On July 25, 2011, the Federal Register noticed a DoD request for “public comments on the definition of ‘produced’ in DFARS 225.7003, Restrictions on Acquisition of Specialty Metals.” Input is requested by September 8, 2011, in order for DoD to determine “if a revision to the definition is necessary and appropriate.”

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

Regulatory/Contractual
Update
Volume 16, Issue 7

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.

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

Regulatory/Contractual
Update

Volume 16, Issue 7

- The DCMA, Cost and Pricing Center, Financial Capability Group, has issued its list of 23 items used in a contractor Financial Capability Review.
- On June 28, 2011, the Federal Register noticed a proposed FAR rule “to provide Government-wide standardized past performance evaluation factors and performance ratings, and to require all past performance information be entered into the Contractor Performance Assessment Reporting System (CPARS), the Government-wide past performance feeder system.” Comments are due on/before September 29, 2011 (revised date).
- On July 5, 2011, Federal Acquisition Circular 2005-53 was published in the Federal Register and included the following final rules, except where noted:
 - Equal Opportunity for Veterans (FAR Case 2009-007)
 - Unique Procurement Instrument Identifier (FAR Case 2009-023)
 - Uniform Suspension and Debarment Requirement (FAR Case 2009-036)
 - Extension of Sunset Date for Protests of Task and Delivery Orders (FAR Case 2011-015) (Interim)
 - Encouraging Contractor Policies To Ban Text Messaging While Driving (FAR Case 2009-028)
 - TINA Interest Calculations (FAR Case 2009-034)
- On August 10, 2011, the Federal Register noticed that OFPP is issuing “a final rule to eliminate the exemption from regulations regarding Cost Accounting Standards for contracts executed and performed entirely outside the United States, its territories, and possessions.”
- On July 27, 2011, the Federal Register noticed a proposed FAR rule “to make necessary revisions to accommodate the authorization to use time-and-materials and labor-hour contract payment requirements.” Areas of proposed changes comprise Commercial Time-and-Material (T&M) Contracts (including termination for cause), Payment for Nonconforming Supplies and Services, Noncommercial Time-and-Materials, etc. Comments are due on/before September 26, 2011.
- On July 12, 2011, the Federal Register noticed that OFPP is issuing an interim rule, effective August 11, 2011, whereby “the threshold for application of Cost Accounting Standards will increase from \$650,000 to \$700,000 in keeping with a corresponding increase in the Truth in Negotiations Act cost and pricing data threshold that went into effect last October. Future increases in the CAS threshold are now tied to any changes in the TINA threshold.”

COMMENT: No justification is stated on why an interim rule was issued and why the change (delay) at this time when the FAR thresholds were increased on August 30, 2010?
- Pentagon acquisition chief Ashton Carter has been nominated by the president to become the next deputy defense secretary, replacing William Lynn.

- On July 8, 2011, the Federal Register noticed that NASA “is issuing a final rule to delete the requirement in the NASA FAR Supplement for contractors to establish and maintain an Earned Value Management System (EVMS) for firm-fixed-price (FFP) contracts. The final rule recognizes the reduction in risk associated with FFP contracts and intends to relieve contractors of an unnecessary reporting burden”

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

- The International Association for Contract & Commercial Management (IACCM) issued its 2011 survey on “Top Terms in Negotiation.” At the top of the list (for five straight years) is Limitation of Liability, followed by Indemnification, Price and Price Change, and Intellectual Property clauses with a listing of 20 terms. Additional information available from this international survey include Seller’s and Buyer’s terms of interest; breakout of data by specific industries; breakout by geographical areas; and by applicable law e.g. UCC, English, French, Middle East, China, etc. <http://www.iaccm.com/>
- Some listservs recently had posted some inquiries on the recommended/preferred “choice of law” for a particular field of endeavor as well as in drafting the contract to cover a specific transaction. Some thought that this posting could raise a number of corollary issues which come up from time to time and may suggest to some closer coordination between the contracts, transaction attorney and litigator from the get-go.

For example, given the "final" choice of law on how the contract should be interpreted...what about its conflict of laws? If an international transaction, what about treaties, e.g. the Convention on Int'l Sales of Goods, which allows one to opt out. Is the severability clause appropriate for the transaction? Should there be a sunset provision when the law changes or is it an evergreen document that is operative in all areas or environments? Looking at these issues may ensure an integrated contract from the front-end and could greatly mitigate issues arising down the road. Discuss with counsel.

- “In a dispute arising from a contest to a termination and re-procurement decision by the Army Corps of Engineers vitiating a contract award to plaintiff for the construction of a government hospital, judgment of the district court is affirmed where it properly concluded that the Army’s decision to follow the GAO’s termination and re-procurement recommendation was unreasonable.” *Turner Construction Company, Inc. v. US*, No. 2010-5146, US Federal Circuit, July 14, 2011. The case is available at <http://www.cafc.uscourts.gov/images/stories/opinions-orders/10-5146.pdf>

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

*Regulatory/Contractual
Update
Volume 16, Issue 7*

Future Speaking Topics Include—

- San Fernando Valley NCMA Chapter, “When is arbitration ‘right’ for you?”
- 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