

Regulatory/Contractual Update

June 9, 2011

Volume 16, Issue 6

- On May 26, 2011, the Council of Defense and Space Industry Associations (CODSIA) sent a letter to DoD “to express ... concern with increasing reliance on the use of interim rules.... We believe that the ever increasing reliance upon the use of an interim rule violates the spirit of the Office of Federal Procurement Policy Act, at a minimum, and misuses the ‘urgent and compelling’ exception to the standard notice and comment process outlined in the FAR. As you know, Section 418b(a) of the OFPP Act and FAR 1.501 require that procurement regulations that create a significant cost or administrative impact on contractors or offerors be published for public comment unless a waiver is approved or an exception applies....”

On June 8, 2011, CODSIA sent a similar letter of “concern” to OFPP.

COMMENT: See prior Updates.

- On May 31, 2011, Federal Acquisition Circular 2005-52 was published in the Federal Register and included the following:
 - Contract Closeout (FAR Case 2008-020). “This final rule amends the FAR procedures for closing out contracts... and revises procedures and sets forth a timeframe for clearing final patent reports; updates quick-closeout procedures, including applicable thresholds; sets forth a description of an adequate final indirect cost rate proposal and supporting data; and adds language for withholding fees to protect the Government's interest and encourage timely submissions of an adequate final indirect cost rate proposal.”

COMMENT: And, DCAA will complete audits on a timely basis?
 - Oversight of Contractor Ethics Programs (FAR Case 2010-017). “This final rule modifies FAR 42.302, Contract Administration Functions, to add to the list of contract administration functions, the function of ensuring that contractors have implemented FAR 52.203-13, Contractor Code of Business Ethics and Conduct. Contracting officers may ask to see a contractor's code of ethics or a contractor's ethics program, but the contracting officer is not required to ask for a copy of any documents.”
 - Sustainable Acquisition (FAR Case 2010-001). “This interim rule amends the FAR to implement EO 13514, Federal Leadership in Environmental, Energy, and Economic Performance, and EO 13423, Strengthening Federal Environmental, Energy, and Transportation Management.”
 - Buy American Exemption for Commercial Information Technology-- Construction Material (FAR Case 2009-039).

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

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- On June 8, 2011, the Federal Register noticed that DoD is issuing a “final rule amending the DFARS to implement section 826 of the National Defense Authorization Act for Fiscal Year 2011. Section 826 amended the DoD pilot program for transition to follow-on contracting after use of other transaction authority, to establish that the threshold limitation of \$50 million for contracts and subcontracts under the program includes the dollar value of all options.”
- On June 8, 2011, the Federal Register noticed that DoD is issuing a “final rule to amend the DFARS to implement a policy memorandum of the Undersecretary of Defense for Acquisition, Technology and Logistics dated February 6, 2007, which required definition of the requirements to track warranties for Item Unique Identification-required items in the DoD Item Unique Identification Registry.”
- On June 6, 2011, the Federal Register noticed that DoD “is issuing a proposed rule to amend the definition of ‘qualifying country end product’ by eliminating the component test for qualifying country end products that are commercially available off-the-shelf items.” Comments are due on/before August 5, 2011.
- On June 6, 2011, the Federal Register noticed that DoD “is proposing to amend the DFARS to require that offerors represent whether former DoD officials employed by the offeror are in compliance with post-employment restrictions.” Comments are due on/before August 5, 2011.
- Mr. Shay Assad is the new DoD Director of Contract Pricing and Mr. Richard Ginman is the new DoD Director of Defense Procurement and Acquisition Policy.
- On June 7, 2011, “The European Commission is consulting stakeholders in all EU Member States for their views on a new policy on access to the EU's public procurement markets as announced in the Single Market Act of April 2011. An on-line questionnaire was launched today and will be open for contributions until 2 August. Replies will feed into legislation on this issue later this year. The aim is to create increased leverage for negotiating access to the procurement markets of other trading partners. This should help expand business opportunities for EU companies, as outlined in the EU's renewed trade strategy ‘Trade, Growth and World Affairs’ presented in November 2010. In addition, the legislation seeks to establish clear terms of access to the EU's 1,800 billion government procurement market for suppliers from outside the EU. This should bring more legal certainty for both the EU public entities that need goods and services and their prospective international suppliers. “

Additional info is available at
[http://ec.europa.eu/internal_market/consultations/2011/access
_EU_public_procurement_en.htm](http://ec.europa.eu/internal_market/consultations/2011/access_EU_public_procurement_en.htm)

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- Noted, the passing on May 7, 2011, of Hyman (Hy) Silver, defense industry executive, marketing expert, and educator.

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

- One is reminded that in the recent endeavors for a "lower" negotiated price, the legal pricing baselines provided by state and federal courts should be re-reviewed with counsel. For example, since 1997 a maximum resale price maintenance agreement has been validated under a rule of reason by the US Supreme Court (State Oil Co. v. Khan 522 US 3) and in 2007 a minimum resale price maintenance agreement was similarly approved by the US Supreme Court (Leegin Creative Leather Products Inc. v. PSKS, Inc. 551 US 877). How are you buying/selling commercial items? Are they subject to a floor or cap on any re-sale? Does local law inhibit any such actions? Discuss with counsel your negotiation strategy of "choice."

Future Speaking Topics Include—

- Twin Cities NCMA Chapter, "Is the FAR (System) Out of Control?"
- Wisconsin NCMA Chapter and Wisconsin Procurement Institute, "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)."
- South Florida NCMA Chapter, "Contract Negotiation" National Educational Seminar.

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Articles Include—

“Twelve-Step Guide to Cost-Effective Customer-Focused Arbitration”

ABSTRACT: The on-going dynamics in the evolution of the rules-of-the-road for complex arbitrations implores contracts and transactional attorneys, as well as litigators, to be cognizant of the intertwined ingredients involved in this dispute resolution process. This article provides a 12-step approach of key components in the deliberative analysis that is required toward an effective ADR clause with a “pitfall avoidance” mindset leading to a successful arbitration process that is cost-effective and expeditious for the contracting parties. Scheduled for publication in the August 2011 issue of NCMA Contract Management.

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

Los Angeles
San Francisco

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