

Regulatory/Contractual Update

October 6, 2011

Volume 16, Issue 8

- The August Update noted 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.” The comment due date is now October 7, 2011.

COMMENT: In addition to prior comments... Mr. Richard Ginman Director, Defense Procurement and Acquisition Policy, was recently quoted that “one statistic to support the rule – an Air Force study found that 40% of its acquisitions were single bid acquisitions.” Is the number of single bid acquisitions the litmus test for a deviation from the FAR standard? What is the test in determining “fair and reasonable” prices...the number of offerors?

Where is the specific and unique need for DoD to have a DFARS rule that is different from the FAR? See FAR 1.301, 1.304(c), etc. For example,

- Where is the data that purportedly shows DoD COs incorrectly determined that prices were fair and reasonable based upon a transaction where only one offer was received?
- And, how does that data differ from that by non-DoD COs?
- How many DoD deviations were requested/granted from the FAR "fair and reasonable" standard? If none requested, how can DoD assert the prices for any of those transactions are "somehow" after-the-fact unfair and unreasonable to justify any action?

Merely having “more” TINA related data does not ensure price agreement! Is it a negotiation issue that DoD perceives? The DoD user community needs supplies in a prompt manner not in a way that deters and is more costly in dollars, time, and data collection requirements! The Director is acknowledging, in effect, that it will occur for a significant number of Air Force acquisitions in the future!

- On October 5, 2011, the Federal Register noticed that the CAS Board is proposing “to clarify the application of the exemption from CAS at 48 CFR 9903.201-1(b)(15) for FFP contracts and subcontracts awarded on the basis of adequate price competition without submission of cost or pricing data The proposed rule will revise that FFP exemption to clarify that the exemption applies to FFP contracts and subcontracts awarded on the basis of adequate price competition without submission of certified cost or pricing data.” Comments are due on/before December 5, 2011.

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.

- On September 20, 2011, DoD noticed in the Federal Register a final DFARS rule “to implement sections of the Fiscal Year (FY) 2007 and 2008 National Defense Authorization Act, including special requirements and procedures related to the validation of a contractor's or subcontractor's asserted restrictions on technical data and computer software.”
- On September 20, 2011, DoD noticed in the Federal Register a final DFARS rule “to strongly encourage discussions prior to award for source selections of procurements estimated at \$100 million or more.”
- On September 12, 2011, OFPP noticed in the Federal Register a final “policy letter to provide to Executive Departments and agencies guidance on managing the performance of inherently governmental and critical functions.”
- On October 3, 2011, DoD issued a memorandum on Contract Line Item Pricing Integrity. “This memorandum directs components to conduct corrective training, assign payment to the MOCAS entitlement system if the system they would otherwise use cannot pay properly written cost type contracts, and notifies them that DPAP will measure compliance.” And, on September 20, 2011, DoD noticed in the Federal Register a final DFARS rule “to establish a standard procedure for offerors to propose an alternative line item structure that reflects the offeror's business practices for selling and billing commercial items and initial provisioning spares for weapon systems.”
- On September 20, 2011, DoD noticed in the Federal Register a final DFARS rule amending “Appendix F, Material Inspection and Receiving Report, to incorporate new procedures for using the electronic Wide Area WorkFlow (WAWF) Receiving Report.”
- On September 16, 2011, DoD noticed in the Federal Register a final DFARS rule “to increase the use of fixed-price incentive (firm target) contracts, with particular attention to share lines and ceiling prices.”
- On September 29, 2011, the Federal Register noticed that “DoD has updated its Commercial Item Handbook. The purpose of the Handbook is to help acquisition personnel develop sound business strategies for procuring commercial items. DoD is seeking industry input on the contents before finalizing the Handbook.” Comments are due on/before November 30, 2011.

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

- Don't rest on any claims! "In an appeal from a decision of the Armed Services Board of Contract Appeals dismissing appellant's denial of a termination settlement costs or equitable adjustment claims for lack of jurisdiction, decision is affirmed where appellant failed to bring the termination settlement costs claim within ninety days of receipt of the denial as required by 41 U.S.C. §606 and because the equitable adjustment claims were submitted outside the six-year statute of limitations in 41 U.S.C. §605(a)." Systems Development Corp. v. McHugh, No. 2011-1092. Case is available at http://caselaw.findlaw.com/us-federal-circuit/1581041.html?DCMP=NWL-pro_contracts

Future Speaking Topics Include—

- NCMA Government Contract Management Conference, Bethesda, Maryland, "Key Enabling Decisions for ADR Success."
- 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

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