Beach Cities NCMA Special Regulatory/Contractual Update

February 2009

- On January 15, 2009, Federal Acquisition Circular (FAC) 2005-30 was issued and included the following (effective on February 17, 2009):
  - **Commercially Available Off-the-Shelf (COTS) Items** (FAR Case 2000-305). "This final rule amends the FAR to implement Section 4203 of the Clinger-Cohen Act of 1996 (41 U.S.C. 431) with respect to the inapplicability of certain laws to contracts and subcontracts for the acquisition of commercially available off-the-shelf items…."
  - **Combating Trafficking in Persons** (FAR Case 2005-012). "This final rule implements Section 3(b) of the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003 (Combating Trafficking In Persons). TVPRA addresses the victimization of countless men, women, and children in the United States and abroad. The United States Government believes that its contractors can help combat trafficking in persons…."

- On January 30, 2009, the Federal Register noticed that "the applicability date (for Employment E-Verify) of FAC 2005-29, Amendment-1, published January 14, 2009, 74 FR 1937, is delayed until May 21, 2009. Contracting officers shall not include the new clause at 52.222-54, Employment Eligibility Verification, in any solicitation or contract prior to the applicability date of May 21, 2009." The DoD Director of Defense Procurement also issued a memorandum on January 30, 2009.

- DoD noticed in the Federal Register on January 12, 2009, a meeting on March 3, 2009, wherein "the agenda … will include consideration of proposed changes to the Uniform Code of Military Justice and the Manual for Courts-Martial, United States, and other matters relating to the operation of the Uniform Code of Military Justice throughout the Armed Forces."
  COMMENT: How will this impact contractors?

- On August 5, 2008, DCAA noticed that it will no longer participate in Integrated Product Teams (IPTs) and thus will "be in compliance with Generally Accepted Government Auditing Standards (GAGAS) on independence." And, DoD will, for unrelated reasons, have the Defense Business Board "examine the overall performance" of DCAA.

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- On December 19, 2008, DCAA issued "Audit Guidance/Audit Management Guidance Memorandum No. 08-PAS-043" which

  "clarifies what constitutes a significant deficiency/material weakness and establishes new guidance on reporting audit opinions on contractors' internal control systems. Effective immediately, audit reports on contractors' internal controls that report any significant deficiencies/material weaknesses will include an opinion that the system is inadequate. **DCAA will no longer report inadequate in part opinions.** In addition, the audit report will identify the portions of the system affected by the deficiencies and recommend that the contracting officer disapprove the system (if applicable) and pursue suspension of a percentage of progress payments or reimbursement of costs. (APPS audit report shells have been revised to reflect the appropriate recommendation depending on the system involved and should be used for any in-process assignments.) **Further, suggestions to improve the system will no longer be reported in internal control audit reports…."** (sic)

- On December 5, 2008, the Federal Register noticed "proposed amendments to 26 CFR part 31 under section 3402(t) (and other sections) of the (Internal Revenue) Code…. Section 3402(t) of the Code was added by section 511 of the Tax Increase Prevention and Reconciliation Act of 2005, Public Law 109-222 (TIPRA), 120 Stat. 345, which was enacted into law on May 17, 2006, …(and) provides that the Government of the United States, every State, every political subdivision thereof, and every instrumentality of the foregoing (including multi-State agencies) making any payment to any person providing any property or services (including any payment made in connection with a government voucher or certificate program which functions as a payment for property or services) shall deduct and withhold from such payment a tax in an amount equal to 3 percent of such payment. Under the statute, section 3402(t) applies to payments made after December 31, 2010." Comments are due on/before March 5, 2009.

- On December 12, 2008, the Air Force issued a memorandum, "Plan for Restricting Government-Unique Contract Clauses on Commercial Contracts." The Summary of this memo provides,

  "It is DoD policy to limit the number of unique clauses in commercial item acquisitions consistent with stated statutory and regulatory requirements. Unique clauses or instructions incorporated into solicitations and contracts for commercial items in addition to those prescribed in the FAR and DFARS shall not be used, unless the contracting activity can demonstrate that inclusion of such instruction or clause is essential. Air Force contracting officers are directed to prepare contracts for commercial items in accordance with FAR 12.301 which requires, to the maximum extent practicable, only those clauses required to implement provisions of law or executive orders

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applicable to the acquisition of commercial items, or determined to be consistent with customary practice. To ensure appropriate oversight for inclusion of any unique clauses in contracts for commercial items, all MAJCOM/DRUs will establish a management and oversight plan on their efforts to reduce the use of government-unique clauses in commercial contracts."

- On November 12, 2008, the Federal Register noticed Federal Acquisition Circular 2005-28 which finalizes a rule on Contractor Business Ethics Compliance Program and Disclosure Requirements (FAR Case 2007-006). "This final rule amends the FAR to amplify the requirements for a contractor code of business ethics and conduct, an internal control system, and disclosure to the Government of certain violations of criminal law, violations of the civil False Claims Act, or significant overpayments. The rule provides for the suspension or debarment of a contractor for knowing failure by a principal to timely disclose, in writing, to the agency Office of the Inspector General, with a copy to the contracting officer, certain violations of criminal law, violations of the civil False Claims Act, or significant overpayments. The final rule implements 'The Close the Contractor Fraud Loophole Act,' Public Law 110-252, Title VI, Chapter 1. The statute defines a covered contract to mean 'any contract in an amount greater than $5,000,000 and more than 120 days in duration.' The final rule also provides that the contractor's Internal Control System shall be established within 90 days after contract award, unless the Contracting Officer establishes a longer time period (See FAR 52.203-13(c)). The internal control system is not required for small businesses or commercial item contracts." The rule is effective on/after December 12, 2008. On November 14, 2008, OFPP, issued a memorandum on "Preventing Fraud in Federal Contracting," which called further attention to this "serious matter."

- "The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are seeking comments from both Government and industry on whether the FAR should be revised to include a requirement that contractors selling information technology (IT) products (including computer hardware and software) represent that such products are authentic. The Councils are also interested in comments regarding contractor liability if IT products sold to the Government, by contractors, are not authentic. Additionally, the Councils are seeking comments on whether contractors who are resellers or distributors of computer hardware and software should represent to the Government that they are authorized by the original equipment manufacturer (OEM) to sell the information technology products to the Government. Finally, the Councils invite comments on (1) whether the measures contemplated above should be extended to other items purchased by the Government; and (2) whether the rule should apply when information technology is a component of a system or assembled product."

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- The Summer 2008 issue of NCMA's Journal of Contract Management has an exhaustive article on the background, then current status, etc. of the DoD Specialty Metals Restrictions (and exceptions) as well as the Berry Amendment.

- On September 19, 2008, John Young, Under Secretary of Defense for Acquisition, Technology and Logistics, issued a memorandum which provides in part...

> "The acquisition community should strive to meet warfighting requirements. However, the acquisition team also has an obligation to spend the taxpayer's money carefully, ensuring we get maximum value for every dollar. From day one, you should constantly review the reasonableness of requirements and engage all stakeholders when a requirement is driving your program to inefficiently spend tax dollars….
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> "Another lesson from the tanker program is the excessive requirements for the program. There were 37 mandatory requirements, but the program also had roughly 800 tradable requirements. The Air Force rightly tried to put many requirements in the trade space in order to avoid excluding any competitor's commercial design. However, one of the GAO findings reasonably determined that the Air Force did not inform the competitors of the relative value and ranking of the tradable requirements. The technical evaluation of a proposal against requirements is truly fertile ground for protests, especially given industry's propensity for protest. The tanker program is not unique—I have recently encountered a number of programs with requirements documents that were 700 pages or more in length.
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> "This trend needs to stop, and this discussion really needs to start with the acquisition team. First, it is not likely that 800 requirements are really all essential to the warfighter - we need to push back on any such number and volume of requirements. Second, we need to make clear that it is not going to be possible to conduct a competition or manage a program with 800 requirements - if everything is important, then nothing is important. Finally, we actually reduce industry flexibility and increase government cost by chasing too many requirements. Secretary Gates fully recognized and considered all of these issues in his decision on how to proceed with the tanker program, noting that any future competition should not be based on 800 requirements."

- For an article on the "added complexity," etc. (or status report) of DoD's "Procedures, Guidance and Information," as a "supplement" to the FAR/DFARS, the July 2008 issue of National Contract Management Association (NCMA) Contract Management should be read. Recommended actions for contractors are provided.

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- On August 21, 2008, NDIA sent a letter to the DoD Director of Defense Procurement, Acquisition Policy, and Strategic Sourcing, on the Army Communications and Electronics Command's continued misapplication of its "no-profit" policy to primes on T&M subcontracted work. On May 13, 2008, the Federal Register noticed a DoD request for comments to a (revised) interim DFARS rule (to that issued April 26, 2007) on "regulations to ensure that pass-through charges on contracts or subcontracts that are entered into for or on behalf of DoD are not excessive in relation to the cost of work performed by the relevant contractor or subcontractor." DoD has also published an extensive response to the prior public input. Comments are due on/before July 14, 2008.

- DoD continues to issue memoranda including the following:
  - On September 29, 2008, the DoD Director of Defense Procurement, Acquisition Policy, and Strategic Sourcing, issued a policy memorandum, "Peer Reviews of Contracts for Supplies and Services." The memo set forth the policy on Peer Reviews with the three-fold stated objective
    - to ensure the Contracting Officers across the Department are implementing policy and regulations in a consistent and appropriate manner;
    - to continue to improve the quality of contracting processes across the Department; and
    - to facilitate cross-sharing of best practices and lessons learned across the Department.

    COMMENT: On a "somewhat" related topic is the October 20, 2008, Wall Street Journal article/critique, "Get Rid of the Performance Review!" The subtitle to which is "It destroys morale, kills teamwork and hurts the bottom line. And that's just for starters." The author is Dr. Samuel A. Culbert, consultant, author and professor of management at the UCLA Anderson School of Management in Los Angeles.

  - On August 29, 2008, the DoD Director issued a memorandum on "Implementation and Enforcement of Requirements Applicable to Undefinitized Contractual Actions." "This memorandum provides guidance on the proper use of Undefinitized Contractual Actions (UCA), and requests the Military Departments and Defense Agencies to submit UCA management plans within 30 days as well as submit by 31 October 2008 (and semi-annually thereafter) a consolidated report detailing all UCAs with an estimated value of more than $5M."

  - "Enhanced Competition for Task and Delivery Order Contracts." On May 23, 2008, the DoD Director issued a memorandum on Task and Delivery Order Contracts whereby the Military Departments and Defense Agencies are to comply "with Section 843 of the National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181 'Enhanced Competition Requirements for Task and Delivery Order Contracts' effective May 27,

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2008. Further details and guidance is provided within the memorandum." Direction includes approvals that are required for the issuance of certain dollar level contracts. The Air Force on May 28, 2008, issued similar guidance.

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

- The Air Force announced its intent to "update" the ADR commitment it "requires" from it "top contractors"—the prior commitment is over 10 years old.

  It is noted that this updated "agreement to agree" to consider ADR, still does not include any commitment to use ADR on a program basis, i.e. subcontractors are not specifically included—how can ADR be used without all the subcontractors being invited to the "party?" And, the silence on allowability of costs for ADR is deafening. Then, the use of arbitration as a tool to facilitate the negotiation of impasses, etc. is noticeable by its absence as an ADR process.

  And, this clearly impacts the public and should be subject to Federal Register notice/comment.

  Finally, the Air Force has issued its September 2008 ADR Newsletter which includes an article on the "revised" ADR agreement/pledge between the AF and contractors. The Newsletter is located at

  http://www.adr.af.mil./shared/media/document/AFD-081001-069.pdf

- The recent case of Fireman's Fund Insurance Company v. Sizzler USA Real Property, Inc. provides a reminder on "subrogation" in contracts in general and in real estate leases in particular. Here the "landlord and tenant entered into a lease agreement that provided subrogation was waived as to all risks covered by 'any insurance policies carried by the parties.' Such waiver barred insurer's claim in subrogation to recover amounts paid to indemnify landlord from tenant." Fireman's Fund Insurance Company v. Sizzler USA Real Property, Inc. - filed December 18, 2008, Second District, Div. Fireman's Fund Insurance Company v. Sizzler USA Real Property, Inc. - filed December 18, 2008. Opinion is at http://www.metnews.com/sos.cgi?1208%2FB201536

  Consult with counsel on the ramifications of subrogation waivers, or absence thereof, in your contracts.

- On that Election Day, November 4, 2008, the United States Court of Appeals for the Federal Circuit issued an opinion in Rothe Development Corporation v. DoD, et al (2008-1017), … in its "third opinion in this case, we must decide whether Section 1207, on its face, as reenacted in 2006, violates the right to equal protection (as incorporated against the federal government by the Due Process Clause of the Fifth Amendment). Because we will hold that Congress did **not** have a "strong basis in evidence" before it in 2006, upon which to conclude that DOD was a passive participant in racial discrimination

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in relevant markets across the country and that therefore race-conscious remedial measures were necessary, we will reverse the district court's judgment in part, and will hold that Section 1207 (i.e., 10 U.S.C. § 2323) is unconstitutional on its face."

- The May 22, 2008, Update reported on the original decision in Trianco v. IBM, 466 F.Supp.2d 600 (No. 06-3533, December 21, 2006, US District Court, ED Pennsylvania), stating that that case was a "must read"

  > "for those contemplating teaming arrangements and how a winning prime proposal resulted in the team member not being awarded a subcontract notwithstanding the teaming arrangement. The case is important on various aspects including the selection of team members, drafting of the teaming agreement, methods on resolving 'open issues' including price, use of UCC 'good faith' obligation in negotiation of the final subcontract price, etc.
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  > "On April 2, 2008, the Third Circuit Court of Appeals (No. 07-1095) affirmed that earlier decision in part and remanded the case on one issue, i.e. "whether Trianco's compliant states a cause of action for unjust enrichment."

  On October 15, 2008, in the remand to the District Court, that court found against Trianco and dismissed its unjust enrichment argument. It is reported the case is (now) on appeal (back) to the Court of Appeals.

- Contractors should be reminded to review their insurance coverage to assure that an appropriate level of purchased insurance or self-insurance (as measured by the cost of purchased insurance) is approved by the Contracting Officer. Otherwise, losses could cause a big hit to profit or cause a greater loss. And, when pricing contracts be sure to include an appropriate amount for self-insurance. Northrop Grumman Corporation v. Factory Mutual Insurance Company - filed August 14, 2008. Cite as 07-56760. Full text at http://www.metnews.com/sos.cgi?0808%2F0756760

- The American Bar Association Public Contract Section has published its Guide to Service Subcontract Terms and Conditions. The book is available at www.ababooks.org.

- Professor Peter Fitzgerald, Stetson University College of Law, has completed a study of the "value and utility" of the Convention on the International Sale of Goods (CISG) and the UNIDROIT (International Institute for the Unification of Private Law) Principles of International Commercial Contracts. The study results/analysis are scheduled to be published as an article in the Fall 2008, volume 27, issue of the Journal of Law and Commerce.

- Crossroads of Conflict—Israel 2008: Commentary and pictures www.Rumbaugh.net

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