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Recent Regulatory matters that may be of interest since the last Update include---

- On February 20, 2004, the Federal Register noticed an interim rule issued pursuant to the Homeland Security Act

“regarding the receipt, care, and storage of critical infrastructure information voluntarily submitted to the Department of Homeland Security... (in order to) encourage private sector entities to share information pertaining to their particular and unique vulnerabilities, as well as those that may be systemic and sector-wide. As part of its responsibilities under the Homeland Security Act of 2002, this information will be analyzed by the Department of Homeland Security to develop a more thorough understanding of the critical infrastructure vulnerabilities of the nation. By offering an opportunity for protection from disclosure under the Freedom of Information Act for information that qualifies under section 214, the Department will assure private sector entities that their information will be safeguarded from abuse by competitors or the open market. In addition, information from individual private sector entities combined with those from other entities, will create a broad perspective from which the Federal government, State and local governments, and individual entities and organizations in the private sector can gain a better understanding of how to design and develop structures and improvements to strengthen and defend those infrastructure vulnerabilities from future attacks.”

Comments are due on/before May 20, 2004. Additional information is at http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0350.xml

- On February 20, 2004, the Federal Register noticed the DoD suspension in the use of a “price evaluation adjustment for small disadvantaged businesses (SDBs) in DoD procurements, as required by 10 U.S.C. 2323(e)(3), because DoD exceeded its 5 percent goal for contract awards to SDBs in fiscal year 2003. The suspension will be in effect for 1 year and will be reevaluated based on the level of DoD contract awards to SDBs achieved in fiscal year 2004...and is applicable to all solicitations issued during the period from February 24, 2004, to February 23, 2005.” The Director of Defense Procurement and Acquisition had earlier issued a memorandum on January 23, 2004, announcing this suspension.

- The January 29, 2004, Federal Register noticed a “proposed amendment to FAR 31.205-44, Training and education costs, (that) is intended to increase the clarity of this cost principle and to make it consistent with recent statutory changes that cover payment of costs for Federal employee academic degree training. The proposed rule makes training and education costs generally allowable, except for training and education for the sole purpose of obtaining an academic degree or as a means of qualifying for a position that requires a degree, as well as six public policy exceptions that are retained from the current cost principle. The reasonableness of specific contractor training and education costs that are not subject to one of the expressly unallowable cost exceptions can best be assessed by reference to FAR 31.201-3, Determining reasonableness.” Comments are due on/before March 29, 2004.
- The Director of Defense Procurement and Acquisition Policy on February 18, 2004, provided a “heads-up” memo on “Contract Period for Task and Delivery Order Contracts” whereby the contracting community was advised of the forthcoming DFARS change that “limits a task or delivery order contract awarded under 10 USC 2304a to a total period of not more than 5 years.” This change will be “effective for solicitations issued on or after the date of the DFARS interim rule” which is expected to be published in the Federal Register in March 2004.
- The Air Force has issued a “substantially revised” Air Force Instruction (AFI) 63-124 “PERFORMANCE-BASED SERVICES ACQUISITION (PBSA)” under a date of 11 February 2004. “This is the first revision of AFI 63-124...and removes mandated processes, empowers field personnel to tailor the acquisition, introduces the Air Force Program Executive Office for Combat and Mission Support (AFPEO/SV), and supports agile acquisition and procurement transformation.” And, “compliance with this publication (AFI 63-124) is mandatory.” The Government policy is to award contracts over \$25,000 using Performance-Based contracting for 50 percent of total eligible service contracting dollars by FY 2005. As a reminder see the tool, “Seven Steps to Performance-Based Services Acquisitions,” at <http://www.arnet.gov/Library/OFPP/BestPractices/pbsc/home.html>.
 COMMENT: Also, noted at AFI 63-124 §1.4.1 is the statement, “The selected contract type, source selection procedures, and contract incentives must align with performance requirements and objectives to achieve mission success.” With “results-based” SOWs will there be “more” FFP contracts for “services?”
- And, the Navy Space and Naval Warfare Systems Command (SPAWAR) on 17 February 2004, issued a memorandum on “Contracting for Services” reiterating the “prohibition on the acquisition of services through use of a contract or task order that is not performance based unless specified approval is obtained.” The Navy has posted some excellent training material on the topic at <http://www.acq-ref.navy.mil/tools/pbrfp/index.cfm>

- The Army has issued a revised Acquisition Regulation 70-1, dated 31 December 2003, which is effective 31 January 2004. A copy of major update is available at http://www.usapa.army.mil/pdffiles/r70_1.pdf.
- On February 12, 2004, the Air Force notified contracting officers of significant omissions in obtaining approvals in providing contract required “services and base support” for contractors in overseas locations. Specifically, authorization for contractor “use of commissary and exchange privileges, medical treatment, etc.” requires approval before contract award pursuant to DFARS 225.802-70.
- The January 5, 2004, “Guide for the use of Robust Engineering in Air Force Acquisition Programs” (Guide on Systems Engineering) that was referred to in last month’s Update is now available at http://cse.afit.edu/SEGuide_6_Jan_2004.pdf.
- The Navy posted an excellent tutorial on “Doing Business With The Navy.” Ten steps to success on doing business with the Navy are provided with a particular focus on Small Businesses finding an “entry portal” to the US Navy. Download this January 30, 2004, presentation at <http://acquisition.navy.mil/>
- The Beach Cities NCMA Chapter is sponsoring its Annual Educational Conference, “Sharpening the Skills of the Contracts/Subcontracts Professionals” on March 5, 2004. Registration information is available at 714-896-1774 or by email at william.e.vargo@boeing.com.
- The February 2004 issue of National Defense published by the National Defense Industrial Association (NDIA) has an excellent article by Jim McAleese on “Safe Harbors of Ethical Conduct Needed in Defense Procurement” with an overview of applicable procurement integrity principles. He also provides a “Do’s and Don’ts” Procurement checklist for Contractor and Government personnel—must reading!
- Additional insight on the new DFARS policy on Unique Item Identification and Valuation—covered in recent Updates—is available in an article by Leantha Sumpter (DoD) and Ed Will (Boeing) published in the January 2004 issue of NCMA Contract Management magazine. The authors will also be leading a great panel on the topic at the March 1, 2004, NDIA educational seminar in St. Petersburg, Florida. Registration information is available at 703-247-2598 or rfranklin@ndia.org.
- The 2004 DoD Procurement Conference, “The Transformation of Defense Procurement – People, Policy, Processes” will be held May 25-28, 2004, in Orlando, Florida.

Future Speaking Topics Include—

- ISM San Fernando Valley Affiliate and ISM Phoenix Affiliate, "How 'Baseball Arbitration' will help in Negotiating Sole Source Procurements--or how to get through Impasse."
- California State Bar Business Law Conference, "Utilization of ADR in Franchise and Securities Industries."
- NCMA Dayton Chapter, "Hot Topics in ADR."
- ISM 89th Annual International Purchasing Conference, Philadelphia, Pennsylvania, "An Effective Dispute Resolution Process for Subcontractors" and "Update on DoD Transformation Initiative."
- NCMA World Congress, Orlando, Florida, "Designing the Ultimate Dispute Resolution Clause for Enhanced Subcontractor Relationships."
- ISM Los Angeles Affiliate Executive Council, "Using ADR Tools for Impasses."
- National Purchasing Institute, "'How to get through Impasse—Can Baseball Arbitration be the Answer?'"
- Beach Cities NCMA Chapter and University of California, Irvine Annual Educational Symposium, "Current Issues Impacting the Government Contracting/Buying Professional."

Items summarized in all Regulatory 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.

Information on arranging speaking/teaching engagements on the above and/or various aspects of Alternative Dispute Resolution (ADR), basic/advanced negotiation techniques seminars/workshops, or on substantive topics may be arranged by sending a message to ADROffice@rumbaugh.net