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

- Unique Item Identification and Valuation continues in the news! And, the “pronouncements” continue. Acting Under Secretary of Defense Michael Wynne issued several related memoranda over the past months.
 - DoD is planning an UID workshop in March 2004 in conjunction with its planned migration to the Defense Logistics Management System (January 5, 2004 memo) and the elimination the Military Standard Systems.
 - Finalized changes are expected (another January 5, 2004 memo) to limit source inspection for contracts valued under \$250K with greater reliance on the Wide Area Workflow (WAWF). Separately, note also that “UID is currently scheduled to be implemented in phases in WAWF with the first phase being piloted with ... (only two) vendors.”
 - His October 2, 2003, policy document on use of Radio Frequency Identification (RFID). A summit meeting with industry on 6-7 April 2004 is planned and implementation of RFID begins in 2005.
 - And a January 2, 2004, memorandum on quick closeout and expected revisions to FAR 42.708 and associated contract clauses in order to incentivize the use of that “quick” process.

COMMENT: “Must” reading is the Q/A with Honorable Michael Wynne in the Jan-Feb 2004 issue of “Defense AT&L,” published by the Defense Acquisition University, wherein he discusses the interplay, and relationship, of these various initiatives. With all these memos, did the public obtain appropriate notice/comment opportunity? Also, see prior Updates.

- “The FY02 DoD Authorization Act, P.L. 107-107, codified as 10 USC 2330, required certain approvals for the acquisition of services that are not performance-based and for the use of non-DoD service contracts. In addition, it also required DoD to institute a management structure for the acquisition of services similar to that in place for supplies.” NAVAIR recently issued a memorandum on its approval procedures for issuing nonperformance-based contracts for services.

COMMENT: We continue to hear about contractors not “believing” this change toward performance-based servicing contracting. Do contractors expect their contracting officers to seek approvals for nonperformance-based contracts? Perhaps the “problem,” if there is one, is with the statute and not the customer?

- Dr. Marvin Sambur, Assistant Secretary of the Air Force issued a memorandum on January 7, 2004, on “Revitalizing Air Force and Industry Systems Engineering—Increment 2.” Specifically, an online Systems Engineering (SE) guide is expected to be published next month at <http://cse.afit.edu> with “appropriate language” (samples will be in the guide) for inclusion on the following:
 - Solicitations to “clearly convey the scalability/expandability/variability requirement, require offerors to adequately describe how their SE approach will achieve the required endstate (‘delivers high-quality, best value products (capabilities) that fully meet the operators’ needs, and are designed to easily and inexpensively accommodate growth, i.e., with consideration for scalability/expandability/variability of capabilities in subsequent increments’) and elevate the importance of SE when establishing source selection criteria.”
 - Award Fee Plan/Incentive Fee Contract to specify how “technical performance should be weighted appropriately towards achieving the endstate”—noted above. Unawarded fee may be rolled forward for future periods.
 - Contracts “shall consider incorporating the SE approach proposed by the offeror, appropriate leading indicators, as well as traditional cost, schedule, and performance indicators, should be used to measure contractor performance and as a basis for incentives.” (emphasis added)

COMMENT: Is this a “fundamental” shift in SE, as advertised? Is this the “next” step in the “evolution” of SE, i.e. from Total System Performance Requirement contracts (and FFP contracts) as the Air Force portrays? Stay tuned.

- The FY 2004 Defense Authorization Act directed establishment of a “Procurement Reform Panel” comprised of government/industry representatives, under the chair of the OFPP Administrator. The focus of this Panel will be an examination of procurement laws/regulations and removal of barriers for commercial firms. David Safavian, chief of staff at the General Services Administration, is expected to be nominated as OFPP Administrator with an Administration agenda on competitive sourcing of government requirements. And, “information technology contractor Harris Corp. will join 2,700 Federal Aviation Administration workers in a public-private job competition involving 58 flight service stations throughout the U.S....Under the arrangement...Harris and FAA flight service specialists will vie as a team against other companies in the competition.”

COMMENT: How will the “Panel” affect the DoD Transformation Initiative? Or, is this (another) opportunity for industry to get on board? And, given the purported “severe contracting problems at the Federal Technology Services’ Client Support Centers,” cited in a recent letter by Sen. Charles Grassley to the GSA, will this “impact” the appointment of a new OFPP Administrator from GSA and/or the establishment/effectiveness of the “Panel?” Also, the Federal Acquisition Council has posted a “Competitive Sourcing Management Assessment Guide” at <http://www.fac.gov>.

- The Base Realignment and Closure (BRAC)--2005 efforts are “warming-up” with a reported excessive base infrastructure of 20-25 percent. A draft BRAC selection criteria was released on December 23, 2003.
- “2003 PEO/SYSCOM Commanders Conference was held December 3-5, 2003. One can view the website that includes the (outstanding) agenda, special topic session presentations, and biographies of speakers. In addition, DAU is making available videos taken at the conference of the Opening Remarks by the Michael W. Wynne, Acting under Secretary of Defense (Acquisition, Technology, and Logistics) and a Keynote address by LTGEN James E. Cartwright (USMC), Joint Staff (J8) Director, Force Structure, Resources, and Assessment taken at the conference. These are available under the new content section in the AKSS Menu on the left side of the AKSS Home Page under "DAU Video Library.” <http://akss.dau.mil/jsp/default.jsp> Agenda/presentations are available at <http://www.peosyscom.com/agenda.aspx>.
- On December 22, 2004, SBA announce that its “Pro-Net and DOD's Central Contractor Registration (CCR) are being merged into one portal for entering and searching for small business sources. After Dec 31, CCR will assume all of Pro-Net's search capabilities and functions and small businesses will no longer need to manually register in both Pro-Net and CCR. To conduct market research and confirm eligibility for SBA's procurement preference programs, users will go to the CCR Web Site at <http://www.ccr.gov>.” Separately the SBA is in the process of “revisiting/updating” its rules on size standards, e.g. on December 23, 2003, they were published for testing laboratories industry and information technology.
- The January 15, 2004, Federal Register noticed an updated FAR listing of laws “inapplicable” to commercial off-the-shelf items. On January 21, 2004, the Federal Register also noticed a clarification on “what FAR definitions apply to FAR solicitation provisions and contract clauses.”

COMMENT: While the FAR listing of inapplicable statutes is Congressionally mandated, contracts are inclusive documents. Would it also be helpful to identify in the FAR which statutes are applicable thereto for proper/fair pricing of contracts?
- “Department of Energy (DoE) Office of Engineering and Construction Management issued a sample project Acquisition Strategy guidance tool on October 21, 2003, for Federal Project Directors. It provides a sample format, situational scenarios and consolidated guidance that meet the Department's intent for project Acquisition Strategies required under DOE M 413.3-1 Project Management for the Acquisition of Capital Assets. The Acquisition Strategy addresses alternatives analyses, accounts for project risks and mitigation strategies, and lays out anticipated funding as part of Critical Decision - 1 Approve Alternatives Selection and Cost Range. The tool is posted under References and Guides at <http://oecm.energy.gov>.”

- “DoE Office of Procurement and Assistance Management has posted a draft Model Contract for Demolition Contracts at <http://professionals.pr.doe.gov/ma5/ma-5web.nsf/?Open>. ... Over the last few months, DOE has been getting information on various formats and contracts for a broader range of commercial demolition contracts, obtaining information from the industry, and identifying specific challenges to moving to a more commercial model. The first solicitation was issued for work at Savannah River site at <http://doe-iips.pr.doe.gov>, RFP (DE-RP09-04SR22277).”
- It is reported that a National Defense Authorization Act Section on “Quality Control in Procurement of Aviation Critical Safety Items” may be of concern and the implementation phase is closely approaching. For added background on this, see the earlier material from the Joint Aeronautical Commanders’ Group at Wright Patterson and in particular the August 28, 2002, memorandum issued by that Group—which includes the military departments, NASA, FAA, etc..

COMMENT: Critically of safety in aircraft parts (civilian/military) is of paramount importance at this time. Who is tracking this within your company? See prior/current discussions on UIDs!
- Finally, DFAS announced on January 20, 2004, that it had “recently completed a Business Case Analysis for its Disbursing function as part of its corporate transformation process” and determined to become a “value-based organization” rather than conducting an A-76 competition.

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, “Drafting Critical Dispute Resolution Clauses” and “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.”

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