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

- On November 23, 2004, Acting Under Secretary of Defense (Acquisition, Technology and Logistics) Michael W. Wynne, issued an updated Memorandum on “Functional Independence of Contract Officers.” While focusing on the role of contracting officers in providing “vital support to program offices,” their expertise, etc.; “the ability to act independently without improper influence on business decisions” is required and highlighted including the need to have “input from program managers when evaluating contracting personnel.”

**COMMENT:** Are there 360° reviews/evaluations needed in order to ensure everything is “proper”?

- On January 3, 2005, Assistant Secretary of the Air Force for Acquisition Marvin Stampur signed a policy memo directing the modification of “source selection procedures to further emphasize the assessment of cost risk where probable cost analyses are developed.... A proposal risk rating shall be assigned on ACAT programs to the cost/price evaluation factor when a government probable cost estimate analysis is conducted.” Supplemental Air Force guidance has summarized this direction as including its use in connection with “non-ACAT programs, (where) a proposal risk rating may be assigned to the cost/price factor at the discretion of the SSA when a government probable cost/price analysis is conducted... (and that) this new policy directive will be incorporated into the AFFARS with the next AFAC with an expected implementation date for all source selection plans approved after 1 MAR 05.”

**COMMENT:** Could proposed offerors be “better” informed of the budget/probable cost estimates and provide feedback in preproposal/bidders meetings as well as assessments by proposed offerors to see if they “really” understand the requirements driving those estimates, etc. Subsequently, contractors could realistically assess whether they can “achieve” those requirements in a cost effective manner, and, if so, submit a responsive bid or otherwise, “no-bid” the program? How can limited B&P resources be more effectively used?

- OFPP Administrator David Safavian issued a memorandum dated December 12, 2005, (sic) entitled “Contracting with Service-Disabled Veterans’ Businesses”—providing guidance on EO #13360 in order to increase federal contracting and subcontracting opportunities for service-disabled veteran businesses. Agencies have until February 7, 2005, to input properly formatted strategies to accomplish the specified tasks.

- On December 22, 2004, SBA noticed that “the statutory authority for the Small Disadvantaged Business (SDB) price evaluation adjustment for civilian agencies has lapsed”—starting December 9, 2004. Deidre Lee, Director of Defense Procurement and Acquisition Policy issued a memorandum dated January 24, 2005, that DoD contracting activities will continue to suspend (February 24, 2005 through February 23, 2006) FAR 19.11 and DFARS 219.11 price evaluation adjustments for SDBs since DoD had exceeded its 5% goal in SDB contracting.
- “On November 17th, 2004, Michael Wynne, the Acting Under Secretary of Defense (Acquisition, Technology, and Logistics) formally completed the introduction of the Defense Acquisition Guidebook by changing its status from provisional to final. The final Guidebook contains updated chapter content, a new tutorial, advanced search capability and a new Integrated Defense AT&L Life Cycle Management Framework Chart. The final Guidebook, identified as v1.00, is an interactive, web-based resource designed to provide the acquisition workforce and their industry partners with instant online access to best business practices as well as supporting policy, statute, and lessons learned. The Guidebook is available on the internet at <http://www.akss.dau.mil/dag>.”
- On December 23, 2004, Assistant Secretary of the Navy John Young, Jr. issued a memorandum on “Contract Profit and Incentives Arrangements” which provides “clarification” to prior direction on the subject. Specifically, flexibility in structuring contract profit and incentive arrangements is stressed in order to “best motivate contractor performance....” For example, when award fee arrangements are justified, objective and subjective criteria should be the basis for the award fee pool and incentives should be based upon past performance and not projected performance.  

COMMENT: Clearly, award fee policy guidance affects the public and should be published in the Federal Register.
- The Federal Acquisition Institute and Defense Acquisition University are co-sponsoring a free seminar, “Acquisition Workforce Initiatives” on February 2, 2005, at the GSA National Capital Region- Auditorium, 301 7<sup>th</sup> Street, SW, Washington, D.C. Registration info: [jamie.ready@gsa.gov](mailto:jamie.ready@gsa.gov) or (703) 558-4092.
- Recent Freedom of Information Act decisions are posted at <http://www.usdoj.gov/oip/foiapost/2005foiapost1.htm>
- The Professional Services Council has published a “business case” on the need for contractors to consider engaging in Congressional lobbying—[http://www.gsinsider.com/psc\\_column/columns/Policy\\_and\\_Regs\\_Jan\\_2005.pdf](http://www.gsinsider.com/psc_column/columns/Policy_and_Regs_Jan_2005.pdf)

## **Upcoming presentations include...**

- University of California, Irvine and NCMA Beach Cities Chapter annual Educational Conference. “Current Contract/Regulatory Issues Affecting Contracting Professionals.”
- Halifax, Nova Scotia, Atlantic Public Purchasing Association Chapter, NIGP, "How 'Baseball Arbitration' will help in Negotiating Sole Source Procurements."
- ISM—Phoenix, Arizona, Affiliate, "How 'Baseball Arbitration' will help in Negotiating Sole Source Procurements--or how to get through Impasse."
- NCMA, Los Angeles Chapter, “FAR/DFARS Update.”
- ISM—Los Angeles Affiliate, San Fernando Valley Affiliate and San Diego Affiliate, "Big Changes to UCC Rules on Contract Formation and Terms of the Deal are Around the Corner--Are you Ready?"
- NCMA San Diego Chapter, Finger Lakes Chapter (Rochester, New York) and Los Angeles/South Bay Chapter, "Preparing for the Big Changes to UCC Rules on Contract Formation and Terms of the Deal."
- ISM 2005 Annual International Conference, San Antonio, Texas, “May the New (UCC) Force Be With You!”
- NCMA International Congress 2005, Phoenix, Arizona, “Creating an Effective Dispute Resolution Clause—Rules-of-the-Road in Drafting an Arbitration Clause” and “Are You Prepared for the 21<sup>st</sup> Century Rules on Buying/Selling ‘Goods’ Under the *New and Improved* UCC Article 2?”
- NCMA National Education Seminars, Inland Empire Chapter and Ft. Worth, Texas Chapter, “Contract Negotiations.”

*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.*

*Information on arranging speaking/teaching engagements in connection with various aspects of Alternative Dispute Resolution (ADR) and basic/advanced negotiation techniques— seminars/workshops—may be arranged by sending a message to [ADROffice@Rumbaugh.net](mailto:ADROffice@Rumbaugh.net)*