

Regulatory/Contractual Update

December 19, 2009

Volume 14, Issue 12

- On Dec 4, 2009, DoD Director of Contract Policy Shay Assad issued an important memorandum on Resolving Contract Audit Recommendations. “This memorandum sets forth DoD's policy (process and escalation within DoD) for resolving disagreements when the contracting officer does not include significant audit report recommendations (excluding unsupported costs) from the DCAA in establishing his/her pre-negotiation objective. For the purposes of this memorandum, a significant disagreement is when the contracting officer in the pre-negotiation objective plans to sustain less than 75 percent of the total recommended questioned costs in a DCAA audit report on a contractor proposal valued at \$10 million or more.” Unrelated, on December 15, 2009, Shay Assad was appointed Assistant Secretary of Defense for Acquisition.

COMMENT: This memo also provides an important pillar on the role of the Contracting Officer on DCAA recommendations. However, who “ultimately” has the warrant on any dollar-sized procurement? Will DCAA “return” to the acquisition team in order to expedite contractual actions?

- On Dec 8, 2009, OMB issued an important memorandum on “Open Government Directive” providing direction on “three principles of transparency, participation, and collaboration form the cornerstone of an open government. Transparency promotes accountability by providing the public with information about what the Government is doing. Participation allows members of the public to contribute ideas and expertise so that their government can make policies with the benefit of information that is widely dispersed in society. Collaboration improves the effectiveness of Government by encouraging partnerships and cooperation within the Federal Government, across levels of government, and between the Government and private institutions.....” Action items are included in the memo.

Earlier on October 27, 2009, the Federal Register noticed an OMB Office of Information and Regulatory Affairs (OIRA) request for comments on its oversight responsibilities in connection with the Paperwork Reduction Act (PRA) requirements and compliance therewith! Comments are due on/before December 28, 2009.

COMMENT: Will the industry associations “accept” these opportunities and weigh in and offer their input on improving components/all of these “cornerstones” and the “lapse” in compliances under the PRA?

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*Regulatory/Contractual
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- Based upon Committee Report language of the DoD Appropriations Bill, this Act will require changes “to current/future DoD related contracts whereby contractors/subcontractors are prohibited from having/entering into certain arbitration agreements covering resolution of the noted types of disputes.”
COMMENT: A short timeline for contractor action is required by this Senator Franken sponsored amendment—discuss with counsel.
- On December 10, 2009, the Federal Register noticed Federal Acquisition Circular 2005-38 and significant aspects include the following (all final rules):
 - **Revocation of Executive Order 13201, Notification of Employee Rights Concerning Payment of Union Dues or Fees** (FAR Case 2009-017). “Executive Order 13201 required contractors to post a notice informing employees of their rights concerning payment of union dues or fees and detailed that employees could not be required to join unions or maintain membership in unions to retain their jobs. Executive Order 13496, of January 30, 2009, Notification of Employee Rights under Federal Labor Laws, revoked Executive Order 13201.”
 - **Government-wide Commercial Purchase Card Restrictions for Treasury Offset Program Debts** (FAR Case 2006-026). “This final rule facilitates the collection of delinquent debts owed to the Government by requiring contracting officers to determine whether the Central Contractor Registration (CCR) database indicates that the contractor has delinquent debt that is subject to collection under the Treasury Offset Program....”
 - **Postretirement Benefits (PRB), FAS 106** (FAR Case 2006-021). “Currently FAR 31.205-6(o) allows contractors to choose among three different accounting methods for PRB costs; pay-as-you-go (cash basis), terminal funding, and accrual basis using generally accepted accounting principles by applying Statement 106 of Financial Accounting Standards (FAS 106). The FAR also requires that any accrued PRB costs be paid to an insurer or trustee. This final rule amends the FAR to permit the use of Internal Revenue Code sections 419 and 419A contribution rules as an alternative method of determining the amount of accrued PRB costs on Government cost-based contracts.”
 - **Travel Costs** (FAR Case 2006-024). “This final rule amends the FAR to change the travel cost principle (FAR 31.205-46) to ensure a consistent application of the limitation on allowable contractor airfare costs....”
 - **Internet Protocol Version 6 (IPv6)** (FAR Case 2005-041).
 - **Federal Food Donation Act of 2008** (Pub. L. 110-247) (FAR Case 2008-017).
- On December 4, 2009, DoD issued “Directive-Type Memorandum (DTM) 09-027—Implementation of the Weapon Systems Acquisition Reform Act of 2009” with extensive DoD Acquisition Policy Amendments.

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- DoD continues to issue memoranda including the following:
 - December 14, 2009, Class Deviation to Implement Additional Contractor Requirements wherein the “memorandum informs the DoD contracting community that a class deviation has been approved to implement additional contractor requirements and responsibilities relating to alleged crimes by or against contractor personnel in Iraq and Afghanistan, as required by section 854 of the national Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)....”
 - On December 15, 2009, DoD Panel on Contracting Integrity - Prime Contract/Subcontract Surveillance Information Request where “Section 813 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364), directed DoD to establish a ‘Panel on Contracting Integrity’ comprised of a DoD-wide cross section of senior contracting leaders.... and that Panel identified 28 initial actions for implementation during 2009, which were included in the 2008 Report to Congress. As one of its published actions for 2009, the Panel reviewed subcontract pricing coverage in the FAR, DFARS and PGI. They determined the guidance appeared adequate. However, in light of DoDIG findings, there is concern coverage is not being effectively implemented, and the subcommittee decided to solicit additional information. This memorandum requests input on specific policies, procedures, and best practices in place at the Component level to ensure that prime contractors are properly monitoring their subcontractors....”
 - December 16, 2009, Guidance on Reviewing Contractor Reports Required by the ARRA of 2009, which “provides Contracting Officer guidance on reviewing contractor reports as required by the Recovery Act....”
- GAO issued a report on November 20, 2009, entitled “Further Actions Needed to Address Weaknesses in DOD's Management of Professional and Management Support Contracts,” wherein it “finds Department of Defense policies do not require assessments of the risks associated with contractors closely supporting inherently governmental functions at key points in the acquisition process....which could lead to the loss of government control over mission-related policy and program decisions. The report also concludes DoD faces challenges in defining requirements and outcome-based measures when using a performance-based approach to acquire professional and management services.... Although objective measures were widely used to assess cost and schedule performance, subjective measures were generally used to assess the quality of the contractors work. The report also cites concerns with ...trained surveillance personnel...to monitor contract performance.”
- On December 11, 2009, the Federal Register noticed that DoD waived “the limitation of 10 U.S.C. 2534 for certain (enumerated) defense items produced in the United Kingdom. 10 U.S.C. 2534 limits DoD procurement of certain items to sources in the national technology and industrial base....”

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

- The recent California Third Appellate District decision of Martin Brothers Construction, Inc. v. Thompson Pacific Construction, Inc., December 4, 2009, No. C058944, provides a good discussion of the travails of a general contractor/subcontractor in a public works project and the interplay (and importance) of drafting which “may” trump the legislative mandates in the area of retention and progress payments. California Public Contract Code Sec. 7107(e) allows a general contractor who has received retention proceeds from a public entity owner to withhold all or a portion of such retentions from a subcontractor “if a bona fide dispute exists” between them. It applies to any good faith dispute between a general contractor and subcontractor and the “plain meaning of (California) Business and Professions Code Section 7108.5 authorizes contractual variation from that statute’s (progress) payment requirements.” The case is available at <http://www.metnews.com/sos.cgi?1209%2FC058944>
- Salans has published a paper on attachment of assets in France...posted at [Attachment of Assets in France](#)

Future Speaking Topics Include—

- Seattle South Sound and Puget Sound NCMA Chapters, National Education Seminar, “Risk Management for Complex U.S. Government Contracts and Projects” Registration info: Tami Grant, grantt@wsdot.wa.gov
- International Association for Contract and Commercial Management (IACCM), audio seminar, “Drafting the Ultimate Arbitration Clause.”

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