

Regulatory/Contractual Update

July 7, 2009

Volume 14, Issue 7

- On July 1, 2009, DoD noticed in the Federal Register that it “is in the process of updating its Commercial Item Handbook. The purpose of the Handbook is to help acquisition personnel develop sound business strategies for procuring commercial items. DoD is seeking industry input on the contents of the draft Handbook.” A draft of the Handbook is available at http://www.acq.osd.mil/dpap/cpic/cp/docs/draftcihandbook_06172009.doc Comments are due on/before July 31, 2009.

COMMENT: While an excellent overall tool the Handbook continues to miss the point by not addressing available commercial negotiation techniques/methodology for factfinding and to get through impasse situations in finding that a price is “fair and reasonable” for sole source purchases! While first published in 2001, why isn’t this in the FAR? What is the unique need that “continues” for DoD in having this publication? If an item was previously determined to be commercial, should there be any repetition of the earlier determination process? Is the specified “reasonable business judgment” test sufficient for measuring a prime contractor’s decision of a commerciality finding—who can challenge that test? What are your experiences? And, having only a 30 day notice/comment period for this publication fails to recognize the regulatory/publication requirements including the normal 60 day requirement in the OFPP Act as well as oversight by Office of Information and Regulatory Affairs (of OMB) of the Paperwork Reduction Act. See Far Part 1.

- On July 1, 2009, Federal Acquisition Circular 2005-34 was issued which includes
 - Contractor Performance Information (FAR Case 2006-022). “This final rule amends the FAR to revise the contractor performance information process” and to ensure the use of the Past Performance Information Retrieval System at <http://www.ppirs.gov>.
 - Prohibition on Contracting with Inverted Domestic Corporations (FAR Case 2008-009). “This interim rule implements Section 743 of Division D of the Omnibus Appropriations Act, 2009 (Public Law 111-8), which prohibits the award of contracts using appropriated funds to any foreign incorporated entity that is treated as an inverted domestic corporation or to any subsidiary of one....”
 - Role of Interagency Committee on Debarment and Suspension (FAR Case 2008-028). “This final rule amends Federal Acquisition Regulation Subpart 9.4 to clarify the role of the Interagency Committee on Debarment and Suspension when more than one agency has an interest in the debarment or suspension of a contractor....”

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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.

- For the period beginning July 1, 2009, and ending on December 31, 2009, the prompt payment interest rate is 4 7/8 per centum per annum.
- On July 6, 2009, DoD Director, Defense Procurement and Acquisition Policy, Shay Assad issued a memorandum on the use of purchase cards for the American Recovery and Reinvestment Act.
- Several FAR notices requesting comments regarding the reinstatement of previously existing OMB clearances were noticed in the Federal Register.
- Jack Paul, Esq., through Federal Procurement Conferences, Inc., has noticed his upcoming “Concentrated Course on Government Contract Costs and Pricing: Practical Applications of Cost Accounting Standards (CAS), FAR and TINA Principles.” Course locations include New York, Virginia, Los Angeles, and San Diego. Additional information is available at 310.234.0200 or Jackpaul@aol.com.

Future Speaking Topics Include—

- Several NCMA Chapters, “How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements.”
- University of California, Irvine, lecture, “Recent Developments in International Purchasing/Contracting.”

Current Articles Include—

“Conflict Resolution Techniques... The Answer to Legislative Impasses?”

ABSTRACT: Given the greater reliance by local governments for budget support from their respective State governments, the need for prompt legislative budget action and approval is a necessity so that procurement dollars can be contractually committed at the local government level. This article offers a methodology which ensures prompt legislative action through a creative approach of resolving deadlocks in certain legislative processes—especially those mandating super-majority legislator approvals. Published in NCMA Contract Management magazine, July 2009—available at <http://www.ncmahq.org/files/Articles/CM0709%20-%2058-63.pdf>

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