

Regulatory/Contractual Update

January 18, 2010

Volume 15, Issue 1

Happy New Year!

- On January 15, 2010, DoD noticed in the Federal Register that it “is proposing to amend the DFARS to improve the effectiveness of DoD oversight of contractor business systems.” As background, DoD provides the following:

“Contractor business systems and internal controls are the first line of defense against waste, fraud, and abuse. Weak control systems increase the risk of unallowable and unreasonable costs on Government contracts.

And to improve the effectiveness of DCMA and DCAA oversight of contractor business systems, DoD is considering a rule to clarify the definition and administration of contractor business systems as follows:

1. DoD is proposing to define contractor business systems as accounting systems, estimating systems, purchasing systems, earned value management systems (EVMS), material management and accounting systems (MMAS), and property management systems.

2. DoD is proposing to implement compliance enforcement mechanisms in the form of a business systems clause which includes payment withholding that allows administrative contracting officers to withhold a percentage of payments, under certain conditions, when a contractor's business system contains deficiencies. Under such circumstances, payments could be withheld on--

Interim payments under--

- Cost reimbursement contracts;
- Incentive type contracts;
- Time-and-materials contracts;
- Labor-hour contracts;

Progress payments; and

Performance-based payments.”

COMMENT: Can this be a contract-by-contract requirement as the new clause suggests or does this, in effect, impose retroactive obligations under existing contracts and, if so, how are they being priced? Is a DFARS rule needed or should this have an underlying FAR rule? The Paperwork Reduction Act requirements are noted in the proposal. Comments are due on/before March 16, 2010, except for OIRA requirements where they are requested within 30 days.

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

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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.

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- DoD continues to issue memoranda including the following:
 - January 14, 2010, Achieving Better Value from Our Acquisitions. “OMB issued a memorandum on December 22, 2009, highlighting the initiatives the government is taking to meet President Obama's goal of saving \$40 billion annually. In addition, the memorandum provided guidance on more effective use of Blanket Purchase Agreements (BPAs). This memorandum...forwards the guidance to the procurement community and urges them to use policies and procedures that make the most effective use of taxpayer dollars....”
 - January 11, 2010, Government Furnished Property (GFP). “This memorandum describes the requirements for strengthening the accountability and management of personal property owned by the DoD when this property is used on contracts, and requests assistance in the development of a DoD GFP Business Environment Concept of Operations (CONOPS) to define a framework for ensuring that DoD is focused on the basic fundamentals of GFP management....”
 - January 11, 2010, Contract Acquired Property (CAP) under Cost Reimbursement Contracts and Line Items. “This memorandum is issued to clarify DoD business rules for CAP. CAP, as defined by the FAR 45.101, is property acquired, fabricated, or otherwise provided by the contractor for performing a contract and to which the Government has title. Business rules relative to CAP are exclusive to cost-reimbursement contracts as well as cost reimbursement line items under mixed type contracts and cost reimbursement delivery orders under indefinite delivery contracts or basic ordering agreements.”
- On December 29, 2009, DoD noticed in the Federal Register that it “is adopting as final, with a minor change, the (September 6, 2007) interim rule that amended the DFARS (§207.106) to implement Section 802(a) of the National Defense Authorization Act for Fiscal Year 2007 and DoD policy requirements. Section 802(a) contains requirements for DoD to assess long-term technical data needs when acquiring major weapon systems and subsystems. DoD policy requires similar assessment for computer software needs.”
- The Air Force reportedly issued a December 23, 2009, memorandum that “provides clarification and guidance concerning the release of unit prices during debriefings and in award notices. In many cases, the successful offeror's unit prices may be protected from release under FOIA Exemption 4 and the Trade Secrets Act. The memo explains that when considering the release of unit prices, Contracting Officers should read the applicable FAR requirements in harmony.”

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

- As a reminder...based upon §8116 language in the DoD Appropriations Bill—signed into law by the President—this Act will require changes (as a result of the Franken Amendment thereto) “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.” There is a specified timeframe for actions.

What is the status of your contracts/subcontracts? Discuss with counsel

- For an excellent discussion on the obligations associated with mitigation of contract damages as well as critical drafting considerations for bill of lading (risk of loss) and responsibilities flowing there from, the recent Second Circuit decision of APL Co. Pte. Ltd. v. Blue Water Shipping U.S. Inc., No. 08-1516, No. 08-1516, January 8, 2010, may be of interest. “In an action for breach of contract based on expenses related to cargo shipped as agreed but left uncollected by its owner at the dock, judgment for plaintiff with a reduced damages award against defendant is vacated in part where the trial court's obligation was to determine whether the mitigation efforts actually chosen in those unaccustomed shoes were reasonable, not whether hindsight suggested that an objectively better choice was available.” Case is available at [APL](#)
- The relief/recovery efforts in and for Haiti also provides a harsh reminder to review organizational crisis management plans and requisite scope/implementation, important supply chain plans, as well as those of a personal nature.
- The US Postal Service noticed in the Federal Register on January 12, 2010, “its final rules revising its regulations governing the supplier disagreement resolution (SDR) process to clarify and explain the purposes of that process, and to remove extraneous and duplicative language.” Specific changes are in the areas of 39 Code of Federal Regulations, Section 601.107 (Initial Disagreement Resolution) and Section 601.108 (Supplier Dispute Resolution Disagreement Resolution) and mandate certain timelines for filings, time for lodging non-agreement, appellate procedures, etc.
COMMENT: Note there is nothing that suggests that these ADR provisions are included in any contract clause. Are the supplier actions effective for any/all contracts? Discuss with Counsel.

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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

ADR Offices of
CHARLES E. RUMBAUGH
Arbitrator/Private Judge/Mediator
310.373.1981 // 310.373.4182 (fax)
888.ADROffice (toll free)

Los Angeles
San Francisco

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