

Regulatory/Contractual Update

October 25, 2010

Volume 15, Issue 10

- On Sept 29, 2010, Federal Acquisition Circular 2005-46 was published in the Federal Register and included the following:
 - Award-Fee Language Revision (FAR Case 2008-008). “This final rule (effective Oct. 29, 2010) converts the interim rule published in the Federal Register at 74 FR 52856 on October 14, 2009, to a final rule with minor changes. This final rule amends the FAR to implement section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007 and section 867 of the Duncan Hunter 2009 National Defense Authorization Act for Fiscal Year 2009. This rule requires agencies to--
 - (1) Link award fees to acquisition objectives in the areas of cost, schedule, and technical performance;
 - (2) Clarify that a base fee amount greater than zero may be included in a cost-plus-award-fee type contract at the discretion of the contracting officer;
 - (3) Prescribe narrative ratings that will be utilized in award-fee evaluations;
 - (4) Prohibit the issuance of award fees for a rating period if the contractor's performance is judged to be below satisfactory;
 - (5) Conduct a risk and cost-benefit analysis and consider the results of the analysis when determining whether to use an incentive-fee type contract or not;
 - (6) Include specific content in the award-fee plans; and
 - (7) Prohibit the rolling over of unearned award fees to subsequent rating periods.“This FAR change will integrate where appropriate, FAR part 7, Acquisition Planning, and FAR part 16, Contract Types, to improve agency use and decision making when using incentive contracts.”
 - Certification Requirement and Procurement Prohibition Relating to Iran Sanctions (FAR Case 2010-012) (Interim). “This interim rule amends the FAR by enhancing efforts to enforce sanctions with Iran. The rule implements requirements imposed by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (Pub. L. 111-195), specifically sections 102 and 106....”
 - Termination for Default Reporting (FAR Case 2008-016). “This final rule amends the FAR to revise the contractor performance information process....”
 - Offering a Construction Requirement--8(a) Program (FAR Case 2009-020). “This final rule amends the FAR to revise FAR subpart 19.8, Contracting with the Small Business Administration (The 8(a) Program), specifically FAR 19.804-2(b) to conform to the SBA regulations....”

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- Equal Opportunity for Veterans (FAR Case 2009-007) (Interim). “This interim rule with request for comments implements the Department of Labor's (DoL) Office of Federal Contract Compliance Programs (OFCCP) final rule published in the Federal Register at 72 FR 44393 on August 8, 2007....” It is stated to be an “interim” rule because “this action is necessary to implement the Department of Labor (DoL) final rule on Veterans' Employment and Training Service (VETS) published in the Federal Register at 73 FR 28710 on May 19, 2008, and a DoL final rule, published in the Federal Register on August 8, 2007....”

COMMENT: Over two years since the underlying triggering event yet no notice/comment in the form of a proposed rule! See prior Updates.

- Encouraging Contractor Policies To Ban Text Messaging While Driving (FAR Case 2009-028) (Interim). “This interim rule (effective Sept. 29, 2010) amends the FAR to implement Executive Order 13513, entitled ‘Federal Leadership on Reducing Text Messaging while Driving,’ which was issued on October 1, 2009 (74 FR 51225, October 6, 2009). Section 4 of the Executive order requires each Federal agency, in procurement contracts, entered into after the date of the order, to encourage contractors and subcontractors to adopt and enforce policies that ban text messaging while driving company-owned or -rented vehicles or Government-owned vehicles; or privately-owned vehicles when on official Government business or when performing any work for or on behalf of the Government. Section 4 also requires Federal agencies to encourage contractors to conduct initiatives such as establishment of new rules and programs or re-evaluation of existing programs to prohibit text messaging while driving, and education, awareness, and other outreach programs to inform employees about the safety risks associated with texting while driving. This requirement applies to all solicitations and contracts. Contracting officers are encouraged to modify existing contracts to include the FAR clause.”

COMMENT: A new clause issued over 12 months after the underlying action with no notice/comment.

- Buy American Exemption for Commercial Information Technology--Construction Material (FAR Case 2009-039) (Interim). “This interim rule implements section 615 of Division C, Title VI, of the Consolidated Appropriations Act, 2010 (Pub. L. 111-117) (that was effective December 16, 2009). Section 615 authorizes exemption from the Buy American Act for acquisition of information technology that is a commercial item.”

COMMENT: Another interim rule.

- On October 20, 2010, the Federal Register noticed that OFPP and Cost Accounting Standards Board, “solicit public comments concerning a Notice of Proposed Rule to eliminate an exemption from the CAS for contracts executed and performed entirely outside the United States, its territories, and possessions.” OFPP was directed by Congress to address this issue and see whether or not that exemption should be eliminated. Comments are due on/before December 20, 2010.

- On October 15, 2010, the Air Force issued a memorandum, effective on that date, whereby “there are no MAJCOM supplements to the AFFARS” and prior “regulations” will be incorporated into the AFFARS or issued in the form of memoranda.
- On September 27, 2010, the Federal Register noticed a proposed DFARS rule “to update text on patents, data, and copyrights. The proposed rule removes text and clauses that are obsolete or unnecessary; relocates and integrates the coverage for computer software and computer software documentation with the coverage for technical data to eliminate redundant coverage for these subjects while retaining the necessary distinctions; eliminates or combines the clauses associated with technical data and computer software, consistent with the revised and streamlined regulatory coverage; relocates, reorganizes, and clarifies the coverage for rights in works; and relocates to the DFARS companion resource, Procedures, Guidance, and Information (PGI), text that is not regulatory in nature and does not impact the public.” Comments are due on/before November 26, 2010.
- On September 17, 2010, the Federal Register noticed a proposed DFARS rule Appendix F, Material Inspection and Receiving Report, to incorporate procedures for using the electronic Wide Area Workflow Receiving Report required for use in most contracts in lieu of the DD Form 250, Material Inspection and Receiving Report, which is now used mostly on an exception basis.” Comments are due on/before November 16, 2010.
- On September 22, 2010, the Federal Register noticed a proposed FAR rule “to revise the clauses at FAR 52.214-27, 52.215-10 and 52.215-11 to require compound interest calculations be applied to Government overpayments as a result of defective cost or pricing data.” Comments are due on/before November 22, 2010.
- On September 27, 2010, the Federal Register noticed a proposed FAR rule “to implement recommendations of the GAO Report 09-579 dated June 2009 to Congressional Committees on ‘Minimal Compliance with New Safeguards for Time-and-Materials Contracts for Commercial Services and Safeguards Have Not Been Applied to GSA Schedules Program.’ Comments are due on/before November 26, 2010.
- On October 13, 2010, the Air Force announced the issuance of an “Air Force Proposal Adequacy Checklist (that) is intended to help contractors reduce their proposal preparation times and prepare adequate/qualifying proposals in response to sole source RFPs, including proposals for Undefinitized Contract Actions (UCAs), when the contract value is anticipated to exceed the threshold for obtaining certified cost or pricing data.”

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- DoD continues to issue memoranda including the following:
 - October 13, 2010, Theatre Business Clearance/Contract Administration Delegation. “Extends the October 1, 2010, effective date for expansion of Theater Business Clearance/Contract Administration Delegation (TBC/CAD) coverage within the USCENTCOM AOR, applicable to Kuwait and Pakistan, to November 1, 2010 and announces that SPOT and TBC will be integrated to preclude issuance of SPOT-generated LOAs without a TBC approval effective January 15, 2011.”
 - October 12, 2010, Implementation of FAR Final Rule, Termination for Default Reporting. “This memorandum announces the implementation of the new FAR Rule, Termination for Default Reporting (FAR Case 2008-016) published in the Federal Register on Wednesday, September 29, 2010. Effective date of October 29, 2010.” See above.
 - October 12, 2010, Class Deviation 2011-O0001--Public Access to the Federal Awardee Performance and Integrity Information System. “Effective immediately, contracting officers in all departments and agencies shall use the clause at attachment 1 in lieu of FAR clause 52.209-8, Updates Regarding Responsibility Matters (APR 2010). The new clause shall be used in DoD solicitations where the resultant contract value is expected to exceed \$500,000 and in resultant contracts in which the offeror has indicated that it has current active Federal contracts and grants with total value greater than \$10,000,000.”
 - September 21, 2010, Assignment of Call Order Codes for DoD Contracts. “This memorandum announces the update to the call order codes, prescribed by the DFARS 204.7004(d). The new re-baselined list of call order code assignments has been posted on the DPAP website and are effective for use immediately. The Program Development and Implementation office within DPAP will subsume the responsibilities for maintenance of all code assignments. DFARS 204.7005 will be updated to include the new process for obtaining a call order code by December 31, 2010.”
- On October 1, 2010, the Federal Register noticed a proposed DFARS rule “to make electronic distribution procedures a routine part of order issuance. This case establishes a standard method for issuance of orders via electronic means....” A new contract clause that implements the changes in DFARS 216.506(a) is proposed. Comments are due on/before November 30, 2010.

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

- Mike Slonecker, Esq. an Intellectual Property attorney based out of Florida, offers, what he calls a “little nugget,” to keep in mind for foreign military sales (FMS) in those “situations where the US Government is proposing an FMS sale from stock of excess defense equipment in direct competition with contractors. Prior to the addition of Section 2761(k) (of 22 US Code) the only limitation upon such sales was that ‘combat readiness’ not be adversely affected. [See: Section 2761(i)] While it certainly seemed appropriate that ‘combat readiness’ should be interpreted to include the impact of a proposed sale on the defense industrial base, this interpretation was never applied. Accordingly, subpara. (k) was added to impose a limitation on FMS sales by the Government. In a typical scenario, a contractor may be engaged in contract negotiations with a customer for the direct sale of a system. Prior to the addition of subpara. (k) it was not unusual for the US Government to contact the customer and propose an FMS sale of excess equipment in lieu of a direct sale between the customer and the contractor. With this change to 22 USC 2761 USG interference with the direct sale was significantly curtailed.

“Subpara. (k) is an aspect of Section 2761 that has largely gone unnoticed by both the US Government and contractors. Hopefully, this note will give it the recognition within the contract management community of the commercial sector it has long deserved.”

Mike can be contacted at slonecker@earthlink.net

- Interesting case for a discussion of the argument/theory on estoppel under which a non-signatory is bound to an arbitration agreement (found not to be applicable here). This is also a good case on contract negotiation/drafting "depending upon which side of the table you are on" if you want to flow-down certain contract clauses (especially) in the ADR area. Interesting that the distributor and in this case had not seen this issue before notwithstanding their "long-term" contractual arrangement as such. Are representations/warranties sufficient AND/OR should manufacturers "review" the terms and conditions utilized by their distributors in their purchase orders? And the risk of each is....

Noble Drilling Servs. Inc. v. Certex USA, Inc., 5th Circuit Court of Appeals. “In plaintiff’s appeal from the district court’s dismissal of its case pursuant to an arbitration clause incorporated into two agreements to which plaintiff was not a party, the order is reversed where, because no evidence supported a conclusion that plaintiff knew of the terms of the agreements, plaintiff could not have the knowledge necessary to support the ‘knowingly exploited’ theory of direct benefits estoppel.” Case is available at http://caselaw.findlaw.com/us-5th-circuit/1538344.html?DCMP=NWL-pro_contracts

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- Noted (again) that some manufacturers continue to “dictate” reselling minimum pricing. For example, Bose Corp. maker of audio products, is reported to state that “it has a policy of announcing to resellers the minimum price for certain Bose products....” And, your supplier prices are based upon...?
- An excellent article entitled, “Ethical Challenges of Bid Shopping,” in the Summer 2010 issue of *The Construction Lawyer*, published by the ABA Forum on the Construction Industry, may be of interest. Bid shopping “occurs when a general contractor discloses the bid price of one subcontractor (or suppliers) to its competitors in an attempt to obtain a lower bid than the one on which the general contractor based its bid to the owner.” And, your practice (or Code of Ethics) is to do...?
- John S. Pachter, Esq. has an excellent article entitled, “The Incredible Shrinking Contracting Officer,” in the Summer 2010 issue of the *ABA Public Contract Law Journal*. Therein, John highlights the Contracting Officer’s role and how it is shrinking starting with past/current role, foundation issues, oversight from “outside” sources (including court decisions), as well as the dilemma confronting the CO today.

Future Speaking Topics Include—

- Jacksonville, Florida and Mid-Florida NCMA Chapters, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements."
- Antelope Valley, Ridgecrest/China Lake, and Orange County NCMA Chapters, “Is the FAR Out of Control?”
- NCMA Government Contract Management Conference, Arlington, Virginia, “And...the Rules-of-the-Road for the Promulgation of Government Contract Clauses/Regulations are...?”

*Information on speaking 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

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