

Government Contracts

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This edition includes Recent Developments, Recent Decisions, and a Feature Article titled "SAFETY Act: Department of Homeland Security Issues Final Rule Implementing the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002."

Recent Developments

Prompt Payment Interest Rate: The Department of the Treasury announced that, for the six month period of July 1, 2006 to December 31, 2006, the interest rate applicable to the Prompt Payment Act and claims under the Contract Disputes Act is 5 3/4 percent per year. 71 Federal Register (Fed. Reg.) 37638 (June 30, 2006). The interest rate for the six-month period ending on June 30, 2006 was 5 1/8 percent per year.

Wage Determinations OnLine: An interim rule was issued to amend the Federal Acquisition Regulation (FAR) to direct federal contracting agencies to obtain Service Contract Act and Davis-Bacon Act wage determinations from the Department of Labor's Wage Determinations OnLine internet website. 71 Fed. Reg. 36930 (June 28, 2006). The website, which is also available to the general public, is located at <http://www.wdol.gov>. Comments to the interim rule must be submitted by August 28, 2006.

Contractor Personnel Authorized to Accompany U.S. Armed Forces: The Department of Defense (DOD) issued an interim rule amending Defense FAR Supplement (DFARS) 225.7402 to implement DOD policy regarding contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States. 71 Fed. Reg. 34826 (June 16, 2006). The rule addresses the status of contractor personnel as civilians accompanying the U.S. Armed Forces and the responsibilities of the combatant commander regarding their protection. Among other things, the rule provides that contractor personnel (other than private security contractor personnel) may use deadly force against enemy armed forces only in self defense. The rule also provides that all liability for the use of any weapon by contractor personnel rests solely with the contractor and the contractor employee using the weapon. Comments to the interim rule must be submitted by August 15, 2006.



Contractor Personnel in a Theater of Operations or at a Diplomatic or Consular Mission: A proposed rule was issued to add a new section to the FAR (FAR Subpart 25.3) to address issues relating to contractors outside the United States, including contractor personnel in a theater of operations or at a diplomatic or consular mission outside the United States that are not covered by the DOD regulations (DFARS 225.7402) for contractor personnel authorized to accompany U.S. Armed Forces (see item above). 71 Fed. Reg. 40681 (July 18, 2006). The proposed rule addresses such issues as: responsibility for logistical and security support; compliance with laws and regulations; preliminary personnel requirements; processing and departure points; personnel data lists; removal of contractor personnel; authorization of weapons and ammunition; vehicle and equipment licenses; wearing of military clothing and protective equipment; evacuation; personnel recovery; notification and return of personnel effects; mortuary affairs; changes in place of performance or Government-furnished facilities, equipment, material, services, or sites; and flowdown of requirements to subcontracts. Comments to the proposed rule must be submitted by September 18, 2006.

Berry Amendment: On June 1, 2006, the Under Secretary of Defense for Acquisition, Technology & Logistics issued a memorandum addressing contractor non-compliance with the provision of the Berry Amendment, 10 USC 2533a, that restricts the DOD's procurement of specialty metals that are not melted in the United States. After disclosing that "[i]t has come to my attention that certain specialty metal parts used in the performance of some defense contracts may be non-compliant with the Berry Amendment," the Under Secretary's memorandum states that immediately pursuing certain remedies may in some cases seriously impact the DOD's ability to meet military needs. The memorandum states that, in such instances, a conditional acceptance and withholding of payment may be appropriate until a long-term remedy can be implemented. Conditional acceptance must clearly protect the Government's rights to pursue the full range of potential remedies, including rework, replacement, and correction. The memorandum states that withholding the cost of "the lowest auditable part that contains the specialty metal (with appropriate burdens)" should be sufficient. The memorandum further states that it is imperative that contractors be required to provide an action plan to correct the non-compliance no later than 180 days after conditional acceptance. The Under Secretary's memorandum is available at <http://www.acq.osd.mil/dpap/policy/policyvault/2006-1181-AT.pdf>.

DOD Contracting Fraud, Waste, and Abuse: The U.S. Government Accountability Office (GAO) issued a report addressing DOD vulnerabilities to contracting fraud, waste, and abuse. GAO-06-838R (July 7, 2006). The GAO identified vulnerabilities resulting from weaknesses in five key areas, including: (1) lack of sustained senior leadership, due in part to the fact that certain senior positions have remained unfilled for long periods of time; (2) acquisition workforce conditions, such as significantly increased workload and growing reliance on contractors for services; (3) pricing risks stemming from non-competitive contracting actions, delays in setting requirements for undefinitized contracts, failure to use available pricing information, and misclassification of items as commercial items; (4) misuse of alternative contracting approaches and techniques, such as interagency contracts, multiple-award indefinite delivery, indefinite quantity contracts, General Services Administration multiple-award schedules, and award and incentive fees; and (5) insufficient contract surveillance. The GAO noted that the DOD has taken several

steps to address these vulnerabilities, but that it is too soon to determine what impact these initiatives may have.

Contractors in the Federal Workplace: On July 28, 2006, the DOD Standards of Conduct Office issued revised guidance addressing ethics issues involving contractors in the Federal workplace. The guidance notes that, although the growing use of contractor employees in the Federal workplace increases the frequency and the likelihood that ethics issues will arise, there are no regulations or policies that specifically address this unique situation. The guidance is available at http://www.dod.mil/dodgc/defense_ethics/resource_library/guidance.htm.

Recent Decisions

Small Business Set Asides: The U.S. Court of Federal Claims (COFC) sustained a bid protest challenging the decision of the Department of Veterans Affairs (VA) to award two small business set-aside contracts for home oxygen equipment because the VA failed to examine each offeror's intent to comply with the "non-manufacturer rule." *Rotech Healthcare Inc. v. United States*, No. 06-303 C (Fed. Cl. July 24, 2006). The non-manufacturer rule requires non-manufacturer recipients of small business set-aside contracts for manufactured products to provide the products of domestic small manufacturers or processors under the contracts. The rule serves to prevent small business concerns from acting as mere conduits for the products of large manufacturers on small business set-aside contracts. The COFC rejected the VA's argument that the non-manufacturer rule did not apply to the contracts because the contracts included some services and were not solely for the provision of manufactured goods. The COFC held that, notwithstanding any Small Business Administration decisions to the contrary, the non-manufacturer rule applies to contracts for the supply of manufactured items which also require the provision of some services.

Lack of Discussions: The GAO sustained a bid protest challenging the award of Air Force contracts for design, engineering, and technical support services because the agency engaged in discussions with the awardees but failed to engage in discussions with the protester. *University of Dayton Research Institute*, Comp. Gen. Dec. B-296946.6, June 15, 2006. Although the Air Force argued that its communications with the awardees were merely clarifications of minor flaws and were not discussions, the GAO disagreed because the communications resulted in several offerors making changes to dozens of pricing rates, the overall effect of which was to alter the total evaluated price of some offerors by millions of dollars. The GAO therefore recommended that the Air Force conduct meaningful discussions with all offerors in the competitive range, request revised proposals, and perform a new evaluation and source selection determination.

Technical Evaluations: The GAO sustained a bid protest challenging the award of an Air Force contract for direct care clinical support services because the agency failed to reasonably evaluate the protester's proposal under one of three technical evaluation subfactors. *Magnum Medical Personnel, A Joint Venture*, Comp. Gen. Dec. B-297687.2, June 20, 2006. The GAO concluded that the record was devoid of any

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explanation of the substantive differences in the proposals of the protester and the awardee that would justify the Air Force's determination that the awardee's proposal for satisfying security requirements was superior to the protester's proposal for satisfying security requirements. In fact, the GAO stated that it could reasonably be argued that the protester's proposal was superior to the awardee's proposal in addressing these requirements. Because the protester's lower priced proposal would have been rated higher overall than the awardee's proposal had this evaluation error not been made, the GAO recommended that the Air Force, which awarded five contracts in the procurement, also make an award to the protester. The GAO further recommended that, if the Air Force could not make such a sixth award, the agency should terminate the challenged awardee's contract and award a contract to the protester instead. Separately, the GAO recently released a decision issued in October 2005 in which it sustained a protest in another Air Force procurement because the agency, in evaluating the adequacy of the offerors' proposed "innovation and efficiency" initiatives, applied a more exacting standard to the protester than it did to the awardee. *BAE Technical Services, Inc.*, Comp. Gen. Dec. B-296699, Oct. 5, 2005.

Responsibility Determinations: The GAO sustained a bid protest challenging the award of an Army contract for the overhaul of helicopter tail rotor gearboxes because the agency's rejection of the small business protester's offer constituted a nonresponsibility determination that should have been referred to the Small Business Administration (SBA). *Fabritech, Inc.*, Comp. Gen. Dec. B-298247 et al., July 27, 2006. The Army's decision to reject the protester's proposal was based upon the perceived inability of the protester to obtain required parts from an approved source. The GAO stated that this was a concern that related directly to the offeror's ability or capability to perform, necessitating a referral to the SBA under the certification of competency program.

Evaluator Conflicts of Interest: In denying a bid protest regarding an Army procurement for conventional ammunition demilitarization services, the GAO concluded that a conflict of interest did not exist merely because the same procuring agency employees who provided past performance references also served as technical evaluators. *TPL, Inc.*, Comp. Gen. Dec. B-297136.10 et al., June 29, 2006. The GAO stated that the roles of past performance reference and technical evaluator required neutrality and precluded advocacy, and that the protester had failed to demonstrate that, because of these multiple roles, the agency employees were somehow unable or potentially unable to provide impartial evaluations.

Proposed Corrective Action: Where the Department of Housing & Urban Development (HUD), in response to a bid protest regarding a procurement for single family housing management and marketing services, proposed to take corrective action by reopening discussions and obtaining an updated proposal from only one of two offerors, the COFC held that the proposed action was irrational and unlawful because it violated basic principles of full and open competition and, moreover, was not in the Government's best interests. *Chapman Law Firm Co. v. United States*, No. 06-330C (Fed. Cl. June 6, 2006). The COFC noted that the two proposals before HUD were more than a year old and likely did not reflect the offerors' current personnel and resources. In addition, HUD planned to issue a solicitation amendment updating its work requirements. The COFC therefore stated that HUD should reopen discussions and request updated proposals from both offerors.

Service Contract Act Price Adjustments: The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) reversed an April 2005 decision of the Armed Services Board of Contract Appeals (ASBCA) in which the board held that a contractor was not entitled to a Service Contract Act (SCA) price adjustment for the increased costs of furnishing health and welfare benefits to its union employees in an option renewal period under a fixed-price Air Force contract for aircraft maintenance. *Lear Siegler Services, Inc. v. Rumsfeld*, No. 06-1080 (Fed. Cir. July 28, 2006). The ASBCA concluded that an SCA price adjustment was not authorized because the increased costs did not result from a change in the Collective Bargaining Agreement between the contractor and its employees' union or from a change in the scope of the benefits to be provided. Instead, the increased costs resulted from changes in health insurance costs and the fact that the contractor agreed in the Collective Bargaining Agreement to provide a "defined benefit" plan under which employees would receive fixed benefits regardless of the cost to the employer. The Federal Circuit, however, found that an SCA price adjustment was triggered by changes in the employer's cost of compliance with the terms of the Collective Bargaining Agreement, and the fact that there was no change in the level of benefit provided by the defined benefit plan was "simply irrelevant." The Federal Circuit therefore reversed the ASBCA and granted summary judgment in favor of the contractor.

Feature Article

SAFETY Act: Department of Homeland Security Issues Final Rule Implementing the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002

On June 8, 2006, the Department of Homeland Security (DHS) issued a final rule implementing the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act). 71 Federal Register (Fed. Reg.) 33147 (June 8, 2006). The SAFETY Act provides incentives for the development and deployment of anti-terrorism technologies by providing liability protections for providers of "qualified anti-terrorism technologies" (QATTs). The SAFETY Act's liability protections include: (1) exclusive jurisdiction in Federal court for suits against sellers of QATTs; (2) a limitation of liability for sellers to an amount of liability insurance coverage specified for each QATT; (3) a prohibition on joint and several liability such that sellers can only be liable for the percentage of noneconomic damages that is proportionate to their responsibility; (4) a complete bar on punitive damages and prejudgment interest; (5) the reduction of a plaintiff's recovery by the amount of collateral source compensation, such as insurance or government benefits; and (6) a rebuttable presumption that sellers are entitled to the "government contractor defense," which provides contractor immunity from liability in certain circumstances. The DHS's "Designation" of a QATT confers each of these liability protections except for the rebuttable presumption that sellers are entitled to the government contractor defense, which requires an additional "Certification" by the DHS.

The final rule amends the interim rule, which the DHS issued in October 2003, to incorporate changes resulting from public comments. The final rule also reflects procedural improvements based upon the DHS's three years of experience in administering the program under the interim rule, a period in which more than 70 technologies received SAFETY Act protections. These changes include the following:

- The final rule protects the confidential information, intellectual property, and trade secrets of SAFETY Act applicants by restricting the use and disclosure of non-public information voluntarily submitted to the DHS under the SAFETY Act regulations, and by providing that the agency will utilize all appropriate exemptions from public disclosure under the Freedom of Information Act (FOIA). In discussing these changes, the DHS further stated that it believes that all information that is submitted as part of a SAFETY Act application, including the fact that a particular entity has submitted an application, is confidential commercial information exempt from disclosure under FOIA.

- The final rule clarifies when termination of SAFETY Act protection may occur due to a QATT modification. The rule provides that routine modifications to a QATT that do not take the QATT outside the scope of the description set forth in the QATT Designation or Certification shall not adversely affect the force or effect of the Designation or Certification, and do not require notice to the DHS. However, when the modifications may cause the QATT to no longer be within the scope of the QATT Designation or Certification, the seller is required to submit a Modification Notice to the DHS. Upon receipt of the Modification Notice, the DHS has 60 days to determine whether the QATT as modified is outside the scope of the Designation or Certification, and to take appropriate action. A seller is not required to notify the DHS of any modification that is made post-sale by a purchaser unless the seller has consented expressly to the modification. The rule further provides that a seller's original QATT Designation or Certification will continue in full force and effect unless modified, suspended, or terminated by the DHS, and that in no event will any Designation or Certification terminate automatically or retroactively.

- The final rule clarifies the definition of "Technology" to emphasize that SAFETY Act protections are not limited to product-based anti-terrorism technologies. Technologies eligible for SAFETY Act coverage now expressly include "any product, equipment, service (including support services), device, or technology (including information technology) or any combination of the foregoing." In addition, the rule provides that "[d]esign services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security" may also be deemed a Technology.

- The final rule provides for Developmental Testing and Evaluation (DT&E) Designations for certain anti-terrorism technologies still in the development process that could serve as an important homeland security resource but require additional developmental testing and evaluation. DT&E Designations will facilitate the deployment of promising anti-terrorism technologies in the field either for test and evaluation purposes or in response to exigent circumstances by providing, on a limited basis, the liability protections offered by the SAFETY Act. In general, DT&E designations will include limitations on the use and deployment of the covered technology, will remain terminable at will by the DHS should any concerns regarding the safety of the technology come to light, and will have a limited term (presumptively not

longer than 36 months) to allow testing or evaluation of the technology. The SAFETY Act liability protections associated with a DT&E Designation will apply only to acts that occur during the period set forth in the Designation.

- The final rule articulates the DHS's intention to extend SAFETY Act liability protections to well-defined categories of anti-terrorism technologies by issuing "Block Designations" and "Block Certifications." Block Designations and Block Certifications will announce that the DHS has determined that a QATT satisfies the technical criteria for either Certification or Designation and that no additional technical analysis will be required in evaluating SAFETY Act applications from potential sellers of the QATT. The terms of the Block Designations and Block Certifications will establish the procedures and conditions upon which an applicant may receive SAFETY Act coverage. Applications from potential sellers of a QATT that has received a Block Designation or Block Certification will receive expedited review and will not require submission of information concerning the technical merits of the underlying technology. All Block Designations and Block Certifications will be published within ten days of issuance at <http://www.safetyact.gov>.
- The final rule incorporates provisions that establish a flexible approach for more closely coordinating consideration of SAFETY Act applications with the Government procurement process. For example, a Government agency may seek a preliminary determination of SAFETY Act applicability (a "Pre-Qualification Designation Notice") with respect to a technology to be procured, which would enable the selected contractor to receive expedited DHS review of a streamlined SAFETY Act application and, in most instances, would establish a presumption that the technology under consideration constitutes a QATT. The DHS may also expedite SAFETY Act review for technologies subject to ongoing procurement processes. In addition, the DHS may unilaterally determine that the subject of a procurement is eligible for SAFETY Act protections and give notice of such determination in connection with a Government solicitation. If the technology has previously received Block Designation or Block Certification, or if the technology is based on established, well-defined specifications, the DHS may indicate in DHS procurements, or make recommendations with respect to procurements of other public entities, that the contractor will affirmatively receive Designation or Certification with respect to such technology, provided the contractor satisfies each of the other applicable requirements set forth in the SAFETY Act regulations.

The final rule, which is codified at 6 CFR Part 25, went into effect on July 10, 2006. In implementing these changes, the DHS also announced that, in response to complaints regarding the burdens of preparing SAFETY Act applications, the agency is in the process of streamlining the SAFETY Act Application Kit, a revised version of which will be made available as soon as practicable.

If you have any questions concerning this Feature Article or any other Government contracting issues, please contact any of the partners, counsel, or associates in the Fried Frank Government Contracts Practice Group listed below.

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