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This edition includes Recent Developments and Recent Decisions.

Recent Developments

Contractor Codes of Business Ethics and Conduct: A final rule was issued amending the Federal Acquisition Regulation (FAR) to provide policies and requirements regarding contractor codes of business ethics and conduct. 72 Federal Register (Fed. Reg.) 65873 (Nov. 23, 2007). The rule provides that contractors (and subcontractors) receiving awards in excess of $5 million must within 30 days of award (unless the Contracting Officer establishes a longer time period) have a written code of business ethics and conduct. The rule also provides that such contractors (and subcontractors), other than small business concerns, must within 90 days of award (unless the Contracting Officer establishes a longer time period) establish an ongoing business ethics and business conduct awareness program as well as an internal control system that facilitates the timely discovery of improper conduct in connection with Government contracts and ensures that corrective measures are promptly instituted and carried out. The proposed rule does not apply to commercial item contracts awarded pursuant to FAR Part 12, contracts performed entirely outside the United States, or contracts with performance periods less than 120 days. The rule also contains requirements regarding the workplace display of Office of Inspector General Fraud Hotline Posters. The new requirements went into effect on December 24, 2007.

Contractor Compliance Program and Integrity Reporting: Separately, a proposed rule was issued to amend the FAR to add further requirements relating to contractor codes of business ethics and conduct, to require contractors to establish and maintain specific internal controls to detect and prevent improper conduct, and to require contractors to notify the Government whenever they become aware of violations of Federal criminal law with regard to such contracts or subcontracts. 72 Fed. Reg. 64019 (Nov. 14, 2007). This proposed FAR amendment was requested by the Department of Justice (DOJ). Some of the areas covered by the DOJ's request are included in the final rule addressed above regarding Contractor Codes of Business Ethics and Conduct. However, several aspects of the DOJ's request go beyond the requirements of that final rule. For example, the proposed rule would require contractors to provide written notification to the procuring agency's Office of

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Inspector General and the Contracting Officer whenever the contractor has reasonable grounds to believe that a principal, employee, agent, or subcontractor of the contractor has committed a violation of Federal criminal law in connection with the award or performance of the contract or any subcontract thereunder. Comments to the proposed rule must be submitted by January 14, 2008.

Patents, Data, and Copyrights: A final rule amending the FAR was issued to clarify, streamline, and update FAR Part 27, "Patents, Data, and Copyrights," and associated clauses in FAR Part 52. 72 Fed. Reg. 63045 (Nov. 7, 2007). This "rewrite" does not include substantive changes to FAR Part 27 policies or procedures, except where necessary to comply with current statutory or regulatory requirements or to resolve internal inconsistencies. The rule went into effect on December 7, 2007. (Background information and an overview of these changes were provided with the proposed rule that was published in May 2003. See 68 Fed. Reg. 31790 (May 28, 2003).)

SAFETY Act: An interim rule was issued amending the FAR to implement the Department of Homeland Security (DHS) regulations for the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act). 72 Fed. Reg. 63027 (Nov. 7, 2007). 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." The DHS issued its SAFETY Act regulations in June 2006. See Feature Article, "SAFETY Act: Department of Homeland Security Issues Final Rule Implementing the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002," here. The interim rule adds a new FAR subpart (Subpart 50.2, "SAFETY Act") along with four implementing clauses in FAR Part 52. The interim rule provides that agencies should determine, as early in the acquisition cycle as possible, whether the technology to be procured is appropriate for SAFETY Act protections, and should encourage offerors to seek SAFETY Act protections for their offered technologies, even in advance of the issuance of a solicitation. The rule also states that agencies should not mandate SAFETY Act protections for acquisitions because applying for SAFETY Act protections for a particular technology is the choice of the offeror. In addition, the rule provides that offerors are permitted only in certain limited circumstances to submit offers that are contingent upon the DHS issuing a SAFETY Act designation or certification. The interim rule went into effect on November 7, 2007.

Contractor Airfare Costs: A proposed rule was issued to revise the travel cost principle, FAR 31.205-46, to clarify the limitations on allowable contractor airfare costs. 72 Fed. Reg. 72325 (Dec. 20, 2007). FAR 31.205-46(b) currently limits allowable contractor airfare costs to "the lowest customary standard, coach, or equivalent airfare offered during normal business hours," with some exceptions. This limitation has been subject to inconsistent interpretations, with some interpreting it to mean lowest coach fare available to the contractor and others interpreting it to mean lowest coach fare available to the general public. The proposed rule would clarify that the limitation means lowest coach fare available to the contractor. Comments to the proposed rule must be submitted by February 19, 2008.

False Claims Act: The U.S. Department of Justice (DOJ) recently announced that, for fiscal year 2007, it recovered $2 billion in settlements and judgments in cases involving allegations of fraud against the Government. Of the $2 billion recovered, lawsuits brought by whistleblowers under the False Claims Act's qui

tam provisions accounted for $1.45 billion. Health care fraud, including cases initiated by whistleblowers and cases initiated by the Government, accounted for $1.54 billion. Major Government contract-related recoveries included a record General Services Administration (GSA) settlement with Oracle Corporation, in which Oracle agreed to pay $98.5 million to resolve defective pricing allegations under a GSA Multiple Award Schedule contract. The Government also won a $90 million judgment against several companies who conspired to rig bids on Egyptian construction contracts financed by the U.S. Agency for International Development. The DOJ's press release is available here.

Bid Protest Statistics: The U.S. Government Accountability Office (GAO) recently released its bid protest statistics for fiscal year 2007. Of 335 decisions on the merits, the GAO sustained 91 protests. This represents a sustain rate of 27 percent, down slightly from the 29 percent sustain rate in fiscal year 2006. The number of protests filed increased to 1,411 cases, up 6 percent from the 1,327 cases in fiscal year 2006. For the fourth year in a row, the GAO also reported that there was no instance in which a federal agency did not fully implement a recommendation made by the GAO in connection with a bid protest. The statistics are available here.

Top Small Business Government Contractors: The U.S. Small Business Administration (SBA) recently issued a "Top 100 Small Business Government Contractors" report that lists the 100 small businesses that received the most federal procurement dollars in fiscal year 2006. The small business receiving the most procurement dollars ($364.1 million) was Procurenet, Inc., which – like 15 other companies on the Top 100 list – has outgrown its size standard and is now identified as other than small. In addition, ten other companies on the list are no longer considered small because they were acquired by, or merged with, other firms. The SBA's report is available here.

Prompt Payment Interest Rate: The Department of the Treasury announced that, for the six month period of January 1, 2008 to June 30, 2008, the interest rate applicable to the Prompt Payment Act and claims under the Contract Disputes Act is 4 3/4 percent per year. 72 Fed. Reg. 74408 (Dec. 31, 2007). The interest rate for the six-month period ending on December 31, 2007 was 5 3/4 percent per year.

Public Database of Federal Contracts: On December 13, 2007, the Office of Management and Budget launched a searchable website that provides the public with access to a database containing information regarding Government contracts, grants, and other awards. The database includes the name and location of the entities receiving the awards, the amounts of the awards, and other information such as the transaction types and the funding agencies. Searches can be conducted using the names of contractors or contracting agencies, the locations of performance, the products or services being purchased, the level of competition permitted during the bidding process, and other criteria. The website is located at www.USASpending.gov.

Recent Decisions

Improper Procurement Methods: The U.S. Court of Federal Claims (COFC) held that a U.S. Army Corps of Engineers solicitation for maintenance dredging and shore protection projects was unlawful because, instead of employing sealed bidding procedures as in the past, it contemplated the award of negotiated indefinite-delivery,

indefinite-quantity (IDIQ) multiple-award task order contracts. Weeks Marine, Inc. v. United States, No. 07-700C (Fed. Cl. Nov. 6, 2007). 10 U.S.C. 2304(a) requires agencies to solicit sealed bids if: (1) time permits the solicitation, submission, and evaluation of sealed bids; (2) the award will be made on the basis of price and other price-related factors; (3) it is not necessary to conduct discussions with the bidders; and (4) there is a reasonable expectation of receiving more than one sealed bid. Although the Army asserted that time did not permit the use of sealed bidding for this $2 billion procurement, the COFC concluded that the only time savings the Army would realize from the task order approach would be the avoidance of a 15-day notice period for proposed contract actions, which would be offset by whatever amount of time the agency would consume in evaluating task order proposals during the five year ordering period. The COFC also rejected the Army's assertion that the award decisions would be based on factors other than price. The court observed that the Army's evaluation of technical capability consists merely of the offeror demonstrating that it possesses or has access to dredging equipment. For past performance, the court stated that the dredging industry consists of a small group of highly specialized contractors who are well known to the Army and that, under these circumstances, where new entrants to the business are rare, a responsibility determination under FAR 9.104 should suffice. In that regard, the court noted that the record indicated that the Army expected to notify successful offerors of award within as little as two hours after receipt of task order proposals, which "indicates how little analysis the agency anticipates for evaluating factors other than price."

Improper Solicitation Cancellations: The U.S. Government Accountability Office (GAO) concluded that the Department of Health and Human Services (HHS) acted improperly when it decided to cancel a solicitation for grants management training courses. Gonzales-McCaulley Investment Group, Inc., Comp. Gen. Dec. B-299936.2, Nov. 5, 2007. The HHS initially selected three offerors for award, but then rescinded one of the awards based upon the agency's determination that the company had plagiarized material from the website of the incumbent contractor. After this offeror filed a bid protest with the GAO challenging the HHS's rescission of its award, the HHS cancelled the solicitation because it discovered that the contracting activity (the HHS University) lacked the necessary delegated procurement authority to conduct the acquisition. Although the GAO noted that such a lack of authority ordinarily would provide a reasonable basis to cancel a solicitation, it concluded that doing so here was improper because the cancellation was essentially a pretext to avoid further scrutiny of the offeror's bid protest. The record showed that this was the only acquisition – out of hundreds of acquisitions that had been conducted by this contracting activity without properly delegated authority, including several ongoing procurements – that was cancelled when HHS became aware of the lack of authority. The GAO further concluded that the HHS's decision to rescind the protester's award was not reasonably based because the HHS did not attempt to properly investigate its suspicions of plagiarism. In that regard, the record indicated that the material that the awardee allegedly plagiarized from the incumbent's website (specifically, course descriptions and learning objectives) was virtually identical to material contained in publicly available Government training catalogs, including HHS University catalogs.

Price Evaluations: The GAO sustained a bid protest regarding the award of a $3 billion U.S. Navy contract for warfighter field operations customer support services because, where the awardee proposed inconsistent labor rates in two different tables, the Navy failed to calculate the offeror's total evaluated price using the higher rates as required by the solicitation. General Dynamics Information Technology, Comp. Gen. Dec. B-299873,

Sept.19, 2007. For the "B.2" table, offerors were instructed to include fully burdened hourly labor rates for various specified labor categories at specified locations, which were to be included in the Navy's calculation of total evaluated price. For the "B.4" table, offerors were instructed to include fully burdened labor rates for all labor categories at all potential locations, which were not to be included in the Navy's calculation of total evaluated price. Although the B.4 table rates would not be included in the calculation of total evaluated price, the solicitation stated that the two tables would be compared to ensure consistency and that, in the event of an inconsistency, the higher of the proposed rates would be included in the calculation. The awardee's proposed rates for approximately 40 labor categories were higher on its B.4 table than on its B.2 table and, in addition, the two tables contained inconsistent escalation factors. The Navy, however, failed to use the higher rates in its calculation of the awardee's total evaluated price. As a result, the Navy's calculation of the awardee's total evaluated price was understated by $97 million.

Cost Realism Assessments: In another recent U.S. Navy procurement, in this case a procurement for execution, planning, maintenance, repair, and alterations of FFG-7 class frigates, the GAO sustained a bid protest because the Navy conducted a flawed cost realism assessment of both the awardee's and the protester's proposals. Earl Industries, LLC, Comp. Gen. Dec. B-309996 et al., Nov. 5, 2007. Regarding the awardee, the Navy failed to resolve an inconsistency between the offeror's cost and technical proposals regarding the number of labor hours that would be assigned to a certain subcontractor whose direct labor rates were significantly lower than those of the awardee and other subcontractors. Regarding the protester, the Navy applied the company's historic division-wide composite labor rate, rather than its proposed labor rate, without meaningfully considering the protester's explanations during discussions that the firm's division-wide rate included labor categories that would not be used during contract performance. The GAO stated that, in the absence of such consideration, what the Navy did was nothing more than a verification of the protester's historical rate, and not an adequate cost realism analysis assessing the firm's probable cost of performing the contract in accordance with its proposed technical approach. In addition, the GAO also sustained the protest because the Source Selection Authority did not reasonably assess the respective technical merits associated with the awardee's and the protester's proposals in his decision to select the awardee's proposal for award based upon its lower evaluated cost.

Past Performance Evaluations: The GAO sustained a bid protest challenging the award of an Environmental Protection Agency (EPA) Federal Supply Schedule task order for the procurement and installation of window retrofits because the EPA improperly considered past performance information for projects that were outside the five year window established in the solicitation. GlassLock, Inc., Comp. Gen. Dec. B-299931 et al., Oct. 10, 2007. Contrary to the solicitation instructions, the awardee provided an introductory letter with its proposal that included past performance references for projects that the company had performed more than five years earlier. Although the EPA argued that the awardee's introductory letter was not the basis for the agency's evaluation of the offeror's past performance, the record showed that the earlier projects were recognized as strengths and were a significant part of the EPA's evaluation and source selection decision. The GAO also sustained the protest because the EPA essentially "double counted" the awardee's past performance information when, in addition to considering this information under the experience and past performance evaluation factor, the agency assigned related strengths under the project plan/schedule technical factor, which

did not encompass evaluation of an offeror's experience and past performance. Finally, the GAO also sustained the protest because, contrary to the solicitation's "best value" evaluation scheme, which provided for a tradeoff analysis with technical factors being more important than price, the EPA's source selection decision was made on a lowest-priced, technically acceptable basis.

Capacity to Sue: The COFC held that an unsuccessful offeror in a Defense Commissary Agency procurement for daily fresh produce lacked the capacity to continue pursuing a bid protest because the plaintiff relinquished its rights to the lawsuit when it sold its assets to another company during the proceeding. Emerald Coast Finest Produce Co. v. United States, No. 06-742C (Fed. Cl. Nov. 26, 2007). The Purchase Agreement listed certain items that were not to be included in the asset sale. Although this list did not expressly identify the lawsuit, it included "accounts receivable," which the plaintiff argued encompassed the lawsuit. The COFC rejected the plaintiff's claim that a lawsuit was an account receivable. Because the lawsuit thus was included in the sale, the COFC dismissed the protest.

Contract Disputes Act: The Armed Services Board of Contract Appeals (ASBCA) held that it lacked jurisdiction to consider a contractor's appeal regarding the U.S. Navy's denial of a breach of contract claim because the contractor's claim failed to allege damages in a "sum certain" as required by the Contract Disputes Act. Rex Systems, Inc., ASBCA No. 54436, Nov. 6, 2007. In its claim to the Navy for alleged unauthorized use of the company's drawings for a receiver transmitter component, the contractor identified damages as "at a minimum . . . 15% of the value of all transactions" made possible by any such use, plus "any unjust enrichment earned by the Government." The ASBCA concluded that "[f]ifteen percent 'at a minimum,' is not a specific percentage. It is 15 percent or more." The ASBCA further noted that the phrase "at a minimum" is indistinguishable from the modifying phrases "no less than," "not less than," and "in excess of," which the board has previously found to disqualify a stated amount as a sum certain. The ASBCA also stated that there was a complete absence in the claim of any quantification of the "unjust enrichment" to which the contractor claimed it was entitled. The board therefore dismissed the appeal.

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