

**Hot Topics Impacting Government
Subcontracting/Supply Chain Management**

Charles E. Rumbaugh, J.D., C.P.C.M.

P.O. Box 2636

Rolling Hills, CA 90274

310.373.1981 or FAX 310.373.4182

ADROffice@ieee.org

<http://home.earthlink.net/~cerumbaugh/>

Abstract:

Effective contract writing/formation/management of Government subcontracts requires buying professionals have information/insight on current Government regulations applicable to the transaction. This facilitated session will provide an overview/analysis of the then recently promulgated U.S. Government regulations aimed at “making” better subcontracts AND provide a forum for the interactive exchange of “novel” concepts impacting Government subcontracts.

Opportunities:

An overview will be presented of recent U.S. Government regulations which drives the annual multi-billion dollar Government contracting actions and constitutes the essential framework for Government Supply Chain subcontracting. Many policy and regulatory promulgations affect the Government prime contract level and have a flowdown requirement that directly affects lower tier subcontracts. The buying professional—whether buying government unique items, military hardware/software, and/or commercial items—needs to know the opportunities these new “regulatory-rules/tools-of-the-road” present. By concentrating on these opportunities the buying professional will achieve higher levels of effective subcontract writing and subcontract administration/management and, thus, mitigate risks, disputes, and ensure subcontractor deliveries.

As of this writing the following regulatory actions were announced and will, with other announcements between now and the Conference in Nashville, be the topics for this session:

1. **HOW DOES THE NEW HOMELAND SECURITY AGENCY AND FORTHCOMING ACQUISITION RULES IMPACT YOU AND YOUR CUSTOMERS?** What are buyers doing to mitigate the risks associated with “Homeland Security” issues? Is Government indemnification available for the commercial/consumer use of military items? What is the “real” risk to small businesses? How does the new legislation/Agency impact professional buyers and customers? Why are vulnerability risk assessments important? What does “transitioning” to a wartime environment mean to the buying professional? Will enactment of the Homeland Security legislation revive the availability of terrorism insurance coverage but at what cost/surcharge?
2. **TEAMING AGREEMENTS/ALLIANCES MAY (AGAIN) BE HAZARDOUS TO YOUR HEALTH?** A recent ASBCA decision held that proposal preparation costs under a so-called “Memorandum of Agreement (MOA)” could not be characterized as allowable Bid and Proposal costs under FAR 31.205-18. This TRW, Inc. decision (No. 51530) decided

July 30, 2002, is a parallel/similar result reached earlier in a Federal District Court action. The MOA called for no funding from the other party but the MOA was held to be the type of contract “requirement” which precluded allowability of B&P costs. How does this decision, if not reversed on appeal, impact the subcontracting function?

3. **OFFICE OF FEDERAL PROCUREMENT POLICY (OFPP) ISSUES MAJOR “BUNDLING” REPORT/RECOMMENDATION ACTION PLAN.** OFPP issued a report on “Contract Bundling, A Strategy for Increasing Federal Contracting Opportunities for Small Business (dated October 2002)” which will, when fully implemented, significantly impact subcontractors and small businesses. What is “contract bundling?” It has been defined as, “Consolidation of two or more procurement requirements for goods/service previously provided or performed under separate, smaller contracts into a solicitation of offers for a single contract that is unlikely to be suitable for award to a small business concern.”

The OFPP Administrator in an October 29, 2002, letter to the President stated, in part, that the accompanying “report provides an aggressive strategy for holding agencies accountable for eliminating unnecessary contract bundling and mitigating the effects of necessary contract bundling. The recommendations propose a series of regulatory changes to ensure maximum compliance with current contract bundling laws and full use of the resources of the Small Business Administration and agency Offices of Small and Disadvantaged Business Utilization.” Specific changes include...

- a) Contract bundling reviews for task and delivery orders under multiple award contracts.
- b) Review of proposed agency acquisitions over a specified dollar amount for unnecessary bundling.
- c) Mitigating the effect of bundling through greater agency strengthening/compliance of subcontracting plans.
- d) Mitigate effects of contract bundling by facilitating development of small business teams and joint ventures.

4. **BUY AMERICA ACT AT NASA.** On November 12, 2002, NASA noticed in the Federal Register that it “is proposing to amend the NASA FAR Supplement to implement the determination of the (NASA) Assistant Administrator for Procurement that, for procurements subject to the Trade Agreements Act, it would be inconsistent with the public interest to apply the Buy American Act for U.S.-made end products that are substantially transformed in the United States.” Consequently, if adopted as proposed, the Buy American Act is “not applicable to U.S.-made end products,” i.e. “the cost of domestic components exceeds the cost of all components by more than 50 percent.” What will the focus of buyers be in “transforming” goods in the United States and adding “value?”

5. **REVERSE AUCTIONS.** The Summer 2002 issue of the Journal of the Defense Acquisition University has a timely article entitled, “Auctions in Defense Acquisition: Theory and Experimental Evidence”— “theory and experimental evidence of auctions in the defense acquisition process.” How have reverse auctions assisted the buying professional in government subcontracting?

6. **DoD PROPOSES THE PAYMENT OF “PROVISIONAL AWARD FEES” PRIOR TO EVALUATION.** On November 22, 2002, the Federal Register noticed the long awaited proposed rule, which if adopted, would permit the “use of provisional award fee payments under cost-plus-award-fee contracts. The rule provides for successfully performing contractors to receive a portion of award fees within an evaluation period, prior to an interim or final evaluation for that period.” The rule would permit no more frequently than monthly payments with a percentage payment cap from available award fee amounts. What is the impact on subcontracts?
7. **FEDERAL ACQUISITION CIRCULAR 2001-10 ISSUED (November 22, 2002).** Final rule changes include...
Financing Policies. “The rule removes the restriction on use of performance-based payments on fixed-price contracts prior to definitization; and permits large businesses, in their billings to the Government, to include certain vendor and subcontractor costs that have been incurred, but not actually paid, provided that, ordinarily, they pay the subcontractor within 30 days.” Is this effective on existing prime contracts and, if so, how does that impact cash-flow to/for subcontractors and small businesses? Does this form of financing assist subcontracting efforts?
- The Director of Defense Procurement recently reported that in FY 2001 “almost two-thirds of all contract financing payments made by DoD were performance-based, while the remainder were progress payments based on cost.” What are performance-based contracts/payments? Are they good? Why the trend? What contract-type is the “type-of-choice?”
8. **ELECTRONIC SUBMITTAL OF PROPOSALS.** The recent GAO decision in Sea Box, Inc., B-291056 (October 31, 2002) reinforces the need to realize that electronic proposals “may” have to be “at the initial point of entry to the Government” on the working day before the due date when such proposals are subsequently mishandled by the government. See FAR 15.208 and FAR 52.215-1(c) (3)(ii)(A)(1). What is the “rule” in subcontracting with the prime?
9. **DoD DIRECTOR OF DEFENSE PROCUREMENT ISSUES MEMORANDUM ON PURPOSE OF DoD “GUIDANCE”** On September 10, 2002, Deidre Lee, Director of Defense Procurement, issued a memorandum on “Purpose and Applicability of Guidance Issued By Director, Defense Procurement.” When is guidance by the Director the “law-of-the-(procurement) land?”
10. **OFFICE OF MANAGEMENT AND BUDGET (OMB) PROPOSES MAJOR REVISIONS TO A-76 AND “COMPETITION PROCESSES.”** On November 19, 2002, OMB noticed in the Federal Register major changes in the way the government intends to conduct commercial acquisitions. Specifically, major revisions to Circular No. A-76 are proposed “to improve the management of commercial activities that are needed to conduct the business of government. The revisions would expand the use of public-private competitions to all activities performed in-house and through commercial inter-service support agreements (ISSAs). The revisions would also incorporate principles of the Federal Acquisition Regulation (FAR) into the competitive sourcing process, including the ability to conduct an expanded best value cost-technical trade-off source selection

process. In addition, the revisions would provide guidance for the development of inventories identifying the commercial and inherently governmental activities agencies perform, and prescribe limitations regarding the reimbursable services federal agencies may provide to state and local governments. To accomplish these changes, OMB is proposing to revise and incorporate the following documents into a revised Circular A-76:

- the “Revised Supplemental Handbook to OMB Circular A-76” (March 1999);
- OMB Circular A-76 Transmittal Memoranda Nos. 1-24;
- Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, “Inherently Governmental Functions;” and
- OMB Circular A-97, “Provision of Specialized or Technical Services to State and Local Units of Government by Federal Agencies Under Title III of the Intergovernmental Cooperation Act of 1968.”

These stand-alone documents would be rescinded. Copies of OMB Circular A-76 may be obtained at the OMB home page at <www.whitehouse.gov/OMB/circulars/index.html>.

11. What is happening in Alternative Dispute Resolution (ADR) at the government subcontractor level? Does the Government treat ADR at the subcontractor level with the same “passion” as it does with prime contractors?
12. What is new in “contract closeout” that impacts buyers?
13. What is the impact of “award term” prime contracts at the subcontract level? And, the impact on pricing of subcontracts for the out-years?
14. What are “rated orders?” Are “rated orders” good? Are “letter subcontracts” beneficial in subcontracting? What are the pros/cons in using them?
15. **DoD CHANGES ACQUISITION CULTURE BY CANCELING DoD DIRECTIVE 5000.1, INSTRUCTION 5000.2 AND DoD 5000.2-R.** Does this October 30, 2002, change impact subcontracting for current programs and future programs?

Updated/current information will be provided to ISM for distribution/handouts in Nashville.

ARTICLES OF INTEREST:

“Having Trouble Getting to the Negotiation Table? Try Baseball Arbitration,” two-part series on incentivizing parties to negotiate, appeared in NCMA Contract Management magazine, October and November 2002 issues.

NCMA Contract Management magazine had a three-part monthly series (January-March 2002) on an important part of most arbitrations, i.e. the Preliminary Hearing process.

Articles are also posted at <http://www.ncmahq.org/COI/adr/ADR-overview.html>

REFERENCES:

Regulatory Updates published by the author—recent issues are posted at <<http://www.ncmalasb.org/Regulatory%20Updates.htm>>. Contact the author for future Updates.