

Roundup

An Update on Government Contracts Issues for Clients & Friends

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Interim Recovery Act "Buy American" Rule Amends the FAR and Fills Congressional Gaps Left in Section 1605

By Sarah M. Graves (sarah.graves@akerman.com)

On March 31, 2009, the FAR Councils issued an interim rule amending the Federal Acquisition Regulation to implement the Buy American provisions set forth in Section 1605 of the American Recovery and Reinvestment Act of 2009 (the "Recovery Act"). On a finding of "urgent and compelling reasons," the interim rule was issued without any opportunity for prior public comment. The Councils will, however, take into consideration public comments submitted on or before June 1, 2009 in formulation of the final rule. In the meantime, the interim rule went into effect immediately.

As an initial matter, the interim rule modifies the FAR to add a new Subpart 25.6 entitled "American Recovery and Reinvestment Act—Buy American Act—Construction Materials," along with corresponding Part 52 clauses and confirming changes to various other parts of the FAR. Section 25.601 provides a list of applicable definitions—many of which were crafted by the Councils as a means of providing needed guidance on the meaning of vague terms included in Section 1605. Specifically, the interim rule provides a definition of "steel," as well as manufactured, foreign, and domestic construction material. The rule also cross references FAR 22.401 for the definition of "public work." Because the Recovery Act did not specify a requirement that all components of construction material must also be domestic, the interim rule's definition of "domestic construction material" does not contain any requirements with respect to the origin of components. Finally, the Councils decided to apply Section 1605 to unmanufactured construction material, which was not specifically addressed in the Recovery Act. In making this determination, the Councils decided that "the Recovery Act's purpose of creating jobs and stimulating domestic demand is well served" by applying the requirements to unmanufactured construction materials.

Section 25.602 repeats the policy statement and overall intent of the Recovery Act's Buy American provisions. As a means of clarifying the most substantive difference between Section 1605 and the Buy American Act itself, the policy section also notes that "[t]here is no requirement with regard to the origin of components or subcomponents in other manufactured construction material."

In setting out the exceptions to applicability of the Recovery Act's Buy American restrictions, Section 25.603 closely tracks the exceptions outlined in the Buy American Act itself. One exception, however, is that the Recovery Act requires publication in the Federal Register of the agency's detailed written justification for making an exception to applicability of Section 1605. Further, the Councils have welcomed public comment regarding additions to the final rule which increase the transparency of this process as contemplated in the Recovery Act.

Finally, the remaining sections of the new Subpart 25.6 provide the procedures for determinations of inapplicability, evaluation of offers containing foreign construction material, and the consequences for contractor noncompliance. Section 25.604 makes clear that determinations of inapplicability should be made pre-award. To make a pre-award determination based on claimed unreasonable cost of domestic construction material, the contracting officer is required to apply a 25% price adjustment factor for an offer using non-U.S. iron, steel, or other foreign manufactured construction materials. This price adjustment factor is applied to the entire price of the project—not just to the cost of foreign materials. The contracting officer is also required to apply a 6% price adjustment factor to the cost of foreign unmanufactured construction materials before making a determination of inapplicability based on unreasonable cost. Once a determination of inapplicability is

made, Section 25.605 provides the procedures for evaluation of bids offering foreign construction material. It requires application of the same 25% and 6% price evaluation factors discussed above, with a preference for offers using domestic construction material in the event two or more offers are equal in price. Section 25.606 discusses the circumstances upon which post-award determinations of inapplicability must be based, and Section 25.607 outlines the consequences of contractor noncompliance with Section 1605.

The interim rule implements the Recovery Act's Buy American requirements while also clarifying the scope and providing much-needed specifications with respect to applicability. As a whole, Section 1605 is slightly less cumbersome than the restrictions applicable under the Buy American Act itself, and the interim rule and accompanying commentary have effectively explained the substantive differences—a welcome addition that will assist contractors in understanding the scope of each set of Buy American restrictions.

No More "No-Bid" Contracts? Obama Calls for Procurement Reform

By Farah Khan (farah.khan@akerman.com)

On March 4th, President Obama introduced an executive memorandum outlining plans for "efficiently and effectively" administering Federal contracts. The reforms are intended to eliminate fraud in government contracting and achieve a cost savings of \$40 Billion a year. The memorandum directs the Office of Management and Budget to work with other agency officials on a report providing new contract procedures by the end of September 2009. On April 3, 2009, the Office of Management and Budget (OMB) published an updated report *Implementing Guidance for the American Recovery and Reinvestment Act of 2009*. Both the Executive Memorandum and the Updated Guidelines seek to:

- Expediently award contracts using available streamlining flexibilities;
- Govern the appropriate use of sole source or other noncompetitive contracts to increase competition in the procurement process;
- Govern the appropriate use of all contract types to maximize efficiency and value on Government projects;
- Assess the ability of Government agencies to develop, oversee and manage acquisitions appropriately; and
- Clarify when government outsourcing is appropriate, what activities are "inherently governmental," and ensure that adequate numbers of qualified government personnel are available to perform inherently governmental functions.

One aspect of government contracting the administration plans to significantly reform is the use of "no-bid" and cost plus contracts in Federal procurement. The executive memorandum states that reliance on sole source or limited source contracts

creates a risk "that taxpayer funds will be spent on contracts that are wasteful, inefficient, or subject to misuse." The Administration posits that these types of contracts can be problematic where there is a lack of accountability on contractors to achieve results. OMB's Updated Guidelines echo the importance of competition in contract awards and calls on agencies to "review their internal procurement review practices to ensure they promote competition to the maximum extent practicable" when obligating stimulus funds.

The call for reform is in response to the significant increase in government spending and perceived chronic cost overruns on government projects. Government spending on goods and services increased from \$200 Billion in 2000 to \$500 Billion in 2008. A study conducted last year by the Government Accountability Office also reported cost overruns in over 90% of "major defense acquisitions." These overruns amount to \$295 Billion over the duration of all of the projects. To help prevent such overruns on projects funded by the stimulus, OMB's Guidelines counsel agencies to ensure they have a sufficient and adequately trained workforce available to "responsibly plan, evaluate, award and monitor contracts."

In an effort to achieve an "open and competitive process," the new procedures would favor fixed price contracts and only allow for cost type contracts where "circumstances do not allow the agency to define requirements sufficiently to allow for a fixed-price type contract." The memorandum cites that between 2000 and 2008, funds obligated under cost reimbursement contracts increased from \$71 Billion in 2000 and \$135 Billion in 2008. Therefore, the Administration touts that such contracts will only be used in limited circumstances where protections are set in place to protect taxpayers against overcharges. This preference for fixed price contracts is also emphasized in obligating stimulus funds. The OMB Guidelines state that "fixed price contracts provide the maximum incentive for the contractor to control costs and perform effectively and impose a minimum burden upon the contracting parties." For projects funded by the stimulus, agencies may use existing fixed price contracts that were competitively bid to "obligate funds expeditiously" however, they must be reported as recovery actions pursuant to FAR Section 4.605(c) and Subpart 5.7. In many ways, the memorandum, the stimulus bill, and the OMB Guidelines are consistent with existing controls in the FAR that favor fixed price contracts, but the new Administration is certainly placing an emphasis on this issue.

In light of the tight credit market, the Guidelines also provide some alternative methods of contract financing to help contractors secure the funds needed for their projects. These alternatives include "structuring contract line items to allow invoicing and payments based upon interim or partial deliverable, milestones or percent of completion." The Guidelines do not say whether these alternatives will be available to projects not funded by the stimulus.

The reforms also seek to stop outsourcing governmental tasks and increase oversight to maximize transparency and accountability. The memorandum refers to

the line between those activities that are inherently governmental and commercial activities that can be provided by the private sector as "blurred and inadequately defined." The Administration seeks to curb outsourcing of inherently governmental activities while still allowing competition within the private sector to provide non-governmental commercial services. The memorandum calls for "clear rules proscribing when outsourcing is and is not appropriate."

In response to the Memorandum, the members of Congress have created a seven member Panel on Defense Acquisition Reform. The Panel is charged with reviewing the defense acquisition program and releasing a report with its findings after 6 months. The report will specifically address proper methods to evaluate the performance and value of weapons systems, administrative pressures, including Congress' role in procurement, that negatively impact the system and recommendations made by previous studies. Although the report will be one of hundreds of studies of its kind conducted since World War II, there seems to be a consistent bi-partisan push within Congress and the Obama administration for reforms that the Obama Administration believe are "long overdue." Whether such reforms take shape remains to be seen, however it is clear that moving forward, there is an emphasis on providing results-oriented services to the government that promote efficiency and accountability among Federal contractors.

Stimulus Contractors & Old-Timers: Beware the *New Audit Clause!*

By J. Michael Littlejohn (michael.littlejohn@akerman.com)

On March 31, 2009, the FAR Councils issued interim rules to change the audit clauses found in federal contracts. Both rules expand the traditional Audit and Records Clause to allow the Government to interview contractor employees involved in the "transaction" – an expansion from the right to review records. In addition, though, businesses that receive contracts funded with appropriations from the American Recovery and Reinvestment Act of 2009 (the "Recovery Act") will be subject to more expansive audits at the contractor and subcontractor level. These expanded audits are the result of Congressional acts over the last few months.

First, in October 2008, as part of the National Defense Authorization Act, Congress added the right to "interview any current employee regarding such transactions" to the powers of the Comptroller General under the under 10 U.S.C. § 2313(c)(1) and 41 U.S.C. § 254d(c)(1). On March 31, 2009, the FAR Councils issued an interim rule on an "urgent and compelling" basis to amend the audit clauses at FAR 52.214-26 and FAR 52.215-2 to allow the GAO "interview any current employee regarding" the contract or subcontracts issued under the contract. In addition, FAR 12.603, regarding the laws that apply to commercial item transactions, is now amended to state that the new legislation expanding the GAO's audit rights now applies.

This change still does not change the portions of the Audit and Records clause providing the Contracting Officer and its authorized representative (usually DCAA) to examine costs or review cost or pricing data submissions. For the last few months, the DCAA has also been pressing on access to contractor employees though. In a December 19, 2008 audit guidance regarding contractor delays in providing access to records, the DCAA contends that "support" for an audit "includes access to personnel, in addition to documentation/data supporting the contractor's assertion.... Auditors should generally obtain supporting documentation directly from the person responsible for the information." That Audit Guidance also stated that contractors should be ready to provide documentation requested by DCAA in the course of an audit in a "reasonable time period" depending on the circumstances. For instance, it noted that contractors should be ready to provide support for labor hours on the same day it is requested – and DCAA counts access to employees to be part of that support. The consequence of failing to provide information "by the requested due date" without an explanation is that the DCAA will report a "formal denial of access to records" to appropriate government personnel and will withhold payment of all unsupported costs. Many contractors have questioned this procedure, especially DCAA's authority to gain access to employees since there is no specific statutory authority and the Audit and Records clause in existing contracts only requires contractors to make available "records" for review. Thus, while DCAA will continue to push for access to employees, there is still an open question as to whether DCAA has that authority or has been given that authority through the newly published regulations.

Also on March 31, the FAR Councils implemented the portions of the Recovery Act relating to the Government's audit rights. The FAR Councils note that the Recovery Act included a number of provisions aimed at preventing "fraud, waste and abuse." In Section 902 of the Recovery Act, Congress gave the power to the GAO to review records or any contractor or subcontractor, or state or local agency administering a contract awarded with Recovery Act funds. In addition, it gave the GAO the right to interview "any officer or employee of the contractor or any of its subcontractors, or of any State or local government agency" administering a contract funded with Recovery Act funds. In Section 1514 and 1515, Congress provided the agency Inspectors General with the authority to review records of any contractor, grantee, subgrantee, subcontractor, or state or local agency that receives funds under the Act and to interview "any officer or employee of the contractor, grantee, subgrantee, or agency" regarding any contract or grant awarded with covered funds. The FAR Councils reconciled all of these provisions by amending the audit clause of contracts issued under FAR Part 12, 14, and 15 to grant additional audit rights for Recovery Act funded contracts. Accordingly, the GAO now has the right to audit subcontracts on Part 12 procurements, audit contracts and subcontracts on Part 14 procurements, and to interview employees on Part 12, 14, or 15 procurements, and these authorities pertain even on contracts below the simplified acquisition threshold and the purchase of Commercial Off-the-Shelf Items. The audit language of FAR

52.214-26 and FAR 52.215-2 now contains language stating that the Comptroller General or an appropriate Inspector General, or their authorized representatives, now has “access to and the right to –

- (i) Examine any of the Contractor’s or any subcontractor’s records that pertain to and involve transactions relating to this contract or subcontract hereunder; and
- (ii) Interview any officer or employee regarding such transactions.”

The clause at FAR 52.212 contains similar language although it leaves out the term “or subcontract hereunder” in its language. Again, this change still establishes a distinction between the authority of the GAO and Inspectors General – who have the authority to interview employees – and the DCAA which was not given specific authority under the Recovery Act.

These clauses reflect the heightened scrutiny that businesses face in doing business with the Government, and the particular sensitivity involved when receiving funds under the Recovery Act. As noted in the Recovery Act language, businesses and state and local agencies should expect to see these types of audit rights in contracts as well as grants and subgrants. Such audit powers reinforce the need for businesses and agencies to ensure adequate financial controls to track federal funds and to make sure their charges are allowable, allocable and reasonable to avoid audit problems. They also need to make sure that they have documentation to support their costs and to provide documents to government auditors in a timely manner to reduce the chance that the GAO or the DCAA would ask to expand the audit to interview employees. The Government’s increased access to employees raises the risk that auditors will question costs as employees that may not be familiar with billing policies or financial issues become the focus of Government reviews. Contractors will need to monitor such interviews to ensure that the Government does not expand its questions beyond the scope of the “transactions” involved or delve into potentially privileged areas. Furthermore, contractors will need to ensure that they flow down audit clauses appropriately in their subcontracts. While the new rules may provide more transparency of contractor spending and may expose some improper billing practices, it may also increase the transaction costs of government audits for all contractors.

Fore! -- What's The Problem With a Few Golf Gifts Between Friends?

By Pavan Khoobchandani (pavan.khoobchandani@akerman.com)

A gift of two golf clubs from a government contractor employee to his friend who was also the government official responsible for preparing a performance evaluation of the contractor was recently deemed a violation of the illegal gratuity statute. In United States v. Hoffmann, No. 06-4007, February 25, 2009, the United

States Court of Appeals for the Eighth Circuit affirmed a jury's conviction of a project manager under 18 U.S.C. § 201(c)(1)(A) for giving a gift to a government official while the contractor was seeking a performance evaluation from the official.

Before and during the performance of the contract, the project manager and the government official had frequent professional and personal contact that often revolved around golf. Subsequent to the end of the contract and prior to the time that the performance evaluation was completed, the project manager gave the official two golf clubs as a gift, paid for with a corporate credit card. The two also exchanged e-mails which discussed both the performance evaluation and the gift of the golf clubs. Before the evaluation was submitted, an investigation into the relationship was commenced and the government official never submitted the performance evaluation. Eventually, both the project manager and the government official were indicted, and a jury found the project manager guilty of violating the federal bribery statute, and the project manager appealed.

The Court of Appeals rejected the project manager's argument that because the government official did not commit to (and ultimately did not) submit a performance evaluation, there was no illegal gratuity. It also viewed skeptically the project manager's assertion that the gifts were simply intended "to treat a friend" and nothing more. The court held that, based on the circumstances, a reasonable juror could conclude that the project manager intended to influence the official. The court also concluded that the fact that the project manager did not pay for the clubs personally, but rather with a corporate credit card, suggested that the gift was not personal but rather intended to improperly influence the evaluation.

The federal Bribery statute, 18 U.S.C. § 201(c)(1)(A), provides that it is a violation to "directly or indirectly give[], offer[], or promise[] anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official," unless provided for by law. Guidance on what is proper and improper is found at 5 CFR § 2635 dealing with the standards of ethical conduct for government employees. The lesson of Hoffmann is clear: the definition of "anything of value" is broad and the "friendship" exception is extremely narrow. Accordingly, contractors should not risk violating the bribery statute by providing government officials – even friends -- with gifts or things of value unless there is clear authorization under the applicable government regulations.

Upcoming Events

Mandatory Disclosure - What Every Federal Contractor Needs to Know

April 28, 2009 – Ritz Carlton, McLean, Virginia

(7:30 am – 10 am) (Claude Goddard & Michael Littlejohn)

New provisions of the Federal Acquisition Regulation (FAR), effective December 12, 2008, impose significant mandatory reporting requirements on all federal contractors. Whenever a federal contractor has "credible evidence" that an employee, agent, or subcontractor has committed a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuities, or a violation of the civil False Claims Act, the federal contractor must "timely" report the violation to the Office of Inspector General (OIG) for the agency concerned. Federal contractors are also required to report any significant overpayment on a contract to the contracting officer. The new FAR provisions make non-compliance a perilous proposition—a knowing failure to timely disclose violations or overpayments may result in suspension or debarment from federal contracting. Because of these possible sanctions, federal contractors must fully understand their obligations under this new mandatory reporting regime. *Go to www.akerman.com/events for more information or call Amy Carson at (703) 790-8750.*

Professional Women in Construction, D.C. Chapter Presents:

What Can The Economic Stimulus Do For You?

April 30, 2009, 5:00 pm, Grand Hyatt Washington

(Sarah M. Graves & Brian P. Waagner)

Moderated by Sarah Graves with an introduction to the Recovery Act presented by Brian Waagner, this event features a panel of agency representatives from FTA, WMATA, MWAA, and Washington Suburban Sanitary Commission discussing upcoming transportation and infrastructure projects funded under the Recovery Act, and how contractors can obtain work under these projects. The cost of the event is \$75 for PWC members and \$100 for non-members, including cocktails and appetizers. To register for this event or find out about sponsorship opportunities, contact Sarah M. Graves (sarah.graves@akerman.com).

Doing Business With the Postal Service –

May 28, 2009, Ritz Carlton, McLean, Virginia

8:00 am to 4 p.m. (David Hendel and Steve Hurlbut)

If You Do Business with the U.S. Postal Service, You Know that Times Have Never Been More Challenging. Facing unprecedented drops in mail volume and multi-billion dollar losses, the Postal Service has never felt more threatened. To stem this tide, the Postal Service commenced its "rapid renegotiation initiative," in hopes of wringing another \$1 billion in savings from its contractors. All of this is taking place in a procurement environment that differs vastly from those of other agencies or private companies. While the Postal Service is a federal agency, it is exempt from many rules that would otherwise apply and has its own special procurement regulations and policies. The seminar will help new and experienced contractors better understand how to do business within this ever-changing, complicated, and dynamic agency. We don't just describe the rules that apply, we explain how they impact you. We don't just describe the procedure for resolving claims, we give you pointers on how to avoid them in the first place. And if we haven't addressed your specific concerns, pose your own mind-bending questions directly to us during the question and answer session. *Go to www.akerman.com/events for more information or call Amy Carson at (703) 790-8750.*

About Our Government Contracts Group

The Government Contracts Group at Akerman Senterfitt assists large and small businesses with all types of federal government contracts issues. To do business with the federal government, contractors must deal with a unique and complicated series of statutes, regulations and procedures. We help clients work with this system to maximize contracting opportunities with federal government agencies. We provide counseling and representation to clients in the areas of contract compliance issues, bid protests, Small and Disadvantaged Business matters, contractor and subcontractor claims administration, construction contracts, information technology contracts, and international contracts. In addition, we are uniquely qualified to advise and assist contractors who provide goods or services to the U.S. Postal Service.

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This monthly publication of the Government Contracts Group of Akerman Senterfitt, with offices in Florida, California, New York, Virginia, Wisconsin, Colorado, and the District of Columbia, is intended to inform firm clients and friends about legal developments in the area of government contracts law, including recent decisions of various courts and administrative bodies. Nothing in this publication should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this publication without seeking the advice of legal counsel. Moreover, this newsletter does not create an attorney-client relationship.

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