

Insights and Commentary from Dentons

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This document was authored by representatives of McKenna Long & Aldridge prior to our combination's launch and continues to be offered to provide our clients with the information they need to do business in an increasingly complex, interconnected and competitive marketplace.

Off the Shelf

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The Coalition for Government Procurement

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The Coalition
for Government
Procurement

*Over 25
Years of
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OFPP RELEASES MUCH-ANTICIPATED INTERAGENCY ACQUISITION GUIDANCE

This month the White House Office of Management and Budget's Office of Federal Procurement Policy released the anticipated guidance on interagency contracting. A checklist of roles and responsibilities for agencies throughout the life of an interagency contract is included in the 70-page document. The intent of the guidance is to assist customer agencies in making sensible business decision to justify the use of interagency acquisitions and strengthen the management of those contracts. Particular emphasis is placed on helping requesting agencies and servicing agencies manager their shared responsibilities in assisted acquisitions.

MACs, or multiagency contracts, are similar to governmentwide acquisition contracts, or GWACs; however, GWACs have the blessing of OFPP prior to award. Agencies can award MACs for any product or service unlike GWACs which are specific to IT products and services and these MACs can be issued independent of OMB approval. This benefit has caused agency Senior Procurement Executives to develop and award their own MACs with unique requirements at an alarming rate. The MAC proliferation has taken a toll on a government contracting industry that is attempting to stay abreast of the myriad procurement opportunities available and going after each for business. OMB estimated a while

ago that there are as many as 40 MACs available, each with different regulations and standards.

In the guidance, OFPP Administrator Paul Denett stated that he intends to work with members of the Chief Acquisition Officers Council to design a business case review process similar to that currently used for the designation of executive agents for GWACs and to define the structure required to support such a process.

A copy of the guidance can be found here: http://www.whitehouse.gov/omb/procurement/interagency_acq/iac_revised.pdf

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MAS ADVISORY PANEL CONTINUES TO HEAR DIVERGENT VOICES

The role of the MAS Program in government acquisition, the roles and responsibilities of different stakeholders, and ensuring fair and reasonable pricing continue to be the focus areas of the Multiple Award Schedule Advisory Panel. This panel, comprised of 15 representatives of government and industry, including Coalition President Larry Allen, was commissioned by then-GSA Administrator Lurita Doan to examine schedule pricing and related matters.

According to Allen, the Panel recently completed its fourth meeting. So far, an extensive array of industry representatives

has made presentations to the panel on a wide variety of MAS topics. Included in these have been multiple calls to abolish or revamp the Price Reductions Clause. Many stakeholders believe that the Clause is no longer a useful price assurance tool, but rather serves to trip up even the most diligent compliance organizations.

Many speakers have also advocated the abolition of the Most Favored Customer negotiation objective. Industry presenters believe that some GSA contract officials take the MFC to be more than an objective, but rather an outright requirement. Government custom-

ers have stated that the MFC term shouldn't be used if the prices negotiated on schedules are something else.

Another topic of discussion is whether separate pricing policies should be instituted for products and services. Speakers have pointed out that the current MAS pricing mechanism was established when most schedule sales were for products. Now, approximately 2/3's of all schedule sales are for services and solutions. Several discussions have been held on how contract level prices for ser-

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**LEGAL
CORNER****THE EXPANDING FAR ETHICS RULE**

As has been widely reported, on November 14, 2007, the Civilian Agency Acquisition Council and the Defense Acquisition Regulation Council (the Councils), at the request of the Department of Justice, proposed an amendment to the Federal Acquisition Regulation (FAR) to add strict new rules for contractor compliance and ethics (the Proposed Rule). 72 Fed. Reg. 64019 (Nov. 14, 2007). Much to the relief of many General Services Administration and Veteran's Administration schedule contractors, the Councils exempted contracts for a "commercial item awarded under FAR Part 12" from application of the new requirements, as well as contracts performed outside the United States..

On Friday, May 16, 2008, the Councils proposed revisions to expand the coverage of the proposed rule to include contracts for commercial items and contracts performed outside of the United States. 73 Fed. Reg. 28,407 (May 16, 2008). The Councils also proposed a new mandatory reporting requirement for all covered contracts. These revisions come on the heels of legislation to "Close the Loopholes" recently passed by the House (H.R. 5712) and introduced in the Senate (S. 2916).

Compliance and Ethics Program Requirements

The Proposed Rule, as revised, requires contractors to have a Code of Ethics and Business Conduct (Code), conduct business ethics and compliance program training and establish and maintain strict internal controls to prevent and detect improper conduct in connection with government contracts. The contractor's system must include the following:

- *assignment of responsibility at a sufficiently high level of the organization and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system;
- *reasonable efforts to avoid hiring principals persons who have engaged in conduct that is illegal or otherwise in conflict with the Contractor's Code;
- *periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Contractor's Code and the special requirements of government contracting covering specified areas;
- *an internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, available for employees to report suspected instances of improper conduct, and instructions that encourage employees to make such reports; and
- *disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct.

Small businesses remain exempt from the business ethics awareness and internal control requirements of the rule.

Self-Reporting Requirement

In the May 16, 2008 revisions, the Councils proposed a further expansion of the most striking requirement of the Proposed Rule -- that a contractor or subcontractor notify the agency Inspector General and the Contracting Officer in writing whenever the contractor has reasonable grounds to believe that a principal employee, agent, or subcontractor of the contractor has committed a violation of the Federal Criminal Law in connection with the award or performance of any government contract or subcontract over \$5 million with performance periods of 120 days or more. The May 16, 2006 revisions require contractors to notify, in writing, the agency OIG and the Contracting Officer whenever the Contractor has reasonable grounds to believe that the Contractor or any of its subcontractors has violated the civil False Claims Act (FCA).

The Proposed Rule provides that contractors may be suspended and debarred for a knowing failure timely to disclose a possible crime, civil FCA violation, or an overpayment on a government contract. Further, contractors must have internal control systems that mandate these disclosures and require "full cooperation" with any government investigation.

Remaining Issues

The Proposed Rule, as revised, leaves many open questions, including the following: (1) what constitutes "reasonable grounds to believe" a possible crime, FCA violation, or an overpayment has occurred; (2) does "crimes" include non-procurement violations; (3) what rights do individual employees have when a contractor conducts an investigation into potential violations; (4) how does the mandatory report affect any applicable attorney-client privilege; and (5) will government consider the mandatory report a "voluntary disclosure."

Opportunity to Comment

The Councils will accept comments on the proposed revisions submitted to the FAR Secretariat on or before July 15, 2008. The Councils will consider comments in the formulation of the final rule.

Jack Horan is a partner with the Washington, DC office of McKenna Long and Aldridge. If you have further questions please contact Jack at jhoran@mckennalong.com.

2008 EIP AWARDS

It's that time of year again! Please join us for the 2008 Excellence in Partnership Awards and Dinner. This spectacular sell-out event, which will be held at the Renaissance Mayflower Hotel in Washington, DC on Thursday, October 23, 2008, is a long time favorite for both the industry and government. Over 400 attendees will be there to celebrate and honor the innovators in procurement as we celebrate the FAS organization and its programs. Awards will be given to FAS, its customers and its vendors.

The Coalition for Government Procurement is now accepting nominations for the EIP Awards. This is a great opportunity to recognize the innovators in the procurement world. Here is your chance to thank folks in FAS, its customers and its contractors. Or two or three. Do you know of a contractor who has made environmentally-friendly products available on the schedules program? Or do you know of a government agency that has demonstrated the best use of FAS programs to meet the critical needs of the agency mission? Or do you know of a contracting officer who deserves recognition? All are invited to nominate a deserving individual and/or organization for one of these prestigious awards. Submitting a nomination will cost you nothing, takes only seconds, and can be done anonymously. With your nomination, please provide several sentences as to why one should win. You can nominate your organization, yourself, or any deserving individual/organization. Just go to <http://www.eipawards.org/awardcategories2.asp> and nominate by **September 1, 2008**.

You can also show your support for FAS by sponsoring a table at the dinner or purchasing an ad in the EIP program. To purchase a table or an ad, please contact Kathy Lamb at klamb@thecgp.org or 202-315-1052. For more information, go to <http://www.eipawards.org>.

The Coalition for Government Procurement Presents:

MAS Boot Camp

July 22-23, 2008

LMI

McLean, VA

Join us to learn/review how to obtain your schedule or MOD, the evolution of the MAS program, business ethics, marketing success and more!

The deadline to register is July 16, 2008

Members: \$750

Premier Members: \$640

Non-members: \$995

For more information or to register, please contact Kathy Lamb at klamb@thecgp.org

THE COALITION FOR GOVERNMENT PROCUREMENT PRESENTS:

2008 Golf Tournament

Thursday, October 9, 2008

This year, the golf tournament will be held at an all-new location in MD at Whiskey Creek in Ijamsville (just 35 miles north of D.C). The course will be completely dedicated to our tournament for the afternoon.

For more information or to register, please contact Kathy Lamb, at klamb@thecgp.org.



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