

ACQUISITION CORNER

A. New Acquisition Rules

1. **Federal Acquisition Regulation**

a. Special Simplified Procedures for Purchases of Commercial Items in Excess of the Simplified Acquisition Threshold

FAR Final Rule – FAR Case 2002-028 – Effective Date: 1 January 2003

This rule amends FAR Subpart 13.5 to extend through January 1, 2004, the test of special simplified procedures for purchases of commercial items greater than the simplified acquisition threshold, but not exceeding \$5 million.

67 Federal Register 80320 – 80321, December 31, 2002.

b. Section 508 Micro-Purchase Exception Sunset Provision

Interim Rule – FAR Case 2002-012 Effective Date: 1 January 2003

Comments due on or before March 3, 2003

This rule extends the electronic and information technology micro-purchase exception until October 1, 2004.

67 Federal Register 80321 – 80322, December 31, 2002.

c. Procurements for Defense Against or Recovery from Terrorism or Nuclear, Biological, Chemical or Radiological Attack

Interim Rule – FAR Case 2002-026 Effective Date: 24 January 2003

Comments due on or before March 28, 2003

For a one year period (starting on date of enactment of the Homeland Security Act [Public Law 107-296] – November 25, 2002), increases the amount of the micro-purchase threshold and, in certain situations, the simplified acquisition threshold and provide streamlined procedures for the procurements of supplies or services by or for an executive agency that are to be used to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack.

68 Federal Register 4048 – 4054, January 27, 2003

d. Commercially Available Off-The-Shelf Items

Advanced notice of proposed rulemaking FAR Case 2000-305

Comments are due on or before March 31, 2003.

The Federal Acquisition Regulatory Council is soliciting comments regarding the implementation of section 4203 of the Federal Acquisition Reform Act with respect to Commercially Available Off-The-Shelf Item Acquisition. The Act requires the Federal Acquisition Regulation to list certain provisions of law that are inapplicable to contracts for the acquisition of such items. Certain laws have already been determined to be

inapplicable to all commercial items as a result of the implementation of the Federal Acquisition Streamlining Act of 1994 (see FAR 12.503).

68 *Federal Register* 4874, January 30, 2003

e. Depreciation Cost Principle

Proposed Rule FAR Case 2001-026

Comments are due on or before March 31, 2003

It is proposed to revise the depreciation cost principle -- FAR 31.205-11
68 *Federal Register* 4876-4877, January 30, 2003

f. Insurance and Pension Costs

Proposed Rule FAR Case 2001-037

Comments are due on or before March 31, 2003.

Proposed amendment to the insurance and indemnification cost principle (FAR 31.205-19) and the portion of the compensation cost principle relating to pension costs (FAR 31.205-6(j)).

68 *Federal Register* 4880 - 4883, January 30, 2003

g. Contract Bundling

Proposed FAR Rule FAR Case 2002-029

Comments are due on or before 1 April 2003

The rule proposes to amend the FAR to implement the recommendations of the OMB in its report entitled "A Strategy for Increasing Opportunities for Small Business" [October 2002].

68 *Federal Register* 5138 - 5142, January 31, 2003

2. Department of Defense Federal Acquisition Regulation Supplement

a. Extension of the DOD Pilot Mentor-Protege Program

Final Rule – DFARS Case 2002-D029 Effective Date: December 20, 2002

This rule extends through September 30, 2005, the period during which companies may enter into agreements under the DOD Pilot Mentor-Protégé Program.

67 *Federal Register* 77936 – 77937, December 20, 2002.

b. Trade Agreements Act – Exception for U.S. Made End Products

Final Rule – DFARS Case 2002-D008 Effective Date: December 20, 2002

This rule implements the determination of the Under Secretary of Defense (Acquisition, Technology, and Logistics) that, for procurements subject to the Trade Agreements Act, it would be inconsistent with the public interest to apply the Buy American Act to U.S. made end products that are substantially transformed in the United States.

67 *Federal Register* 77937 – 77939, December 20, 2002

3. Office of Management and Budget

Prompt Payment – 5 CFR Part 1315

Effective Date: December 20, 2002

This rule was a revision to the OMB rules on Prompt Payment Act. Agencies are required to pay an interest penalty whenever they make an interim payment under a cost-reimbursement contract for services more than 30 days after the agency receives a proper invoice for payment from the contractor.

67 *Federal Register* 79515 – 79516, December 20, 2002

4. **General Accounting Office – Revision of Its Bid Protest Rules**

67 *Federal Register* 80321 – 80322, December 31, 2002

B. Interesting General Accounting Office Decisions

1. **Appropriation Opinions**

a. Use of Conservation Operations Appropriation to Fund Technical Assistance for Conservation Programs Enumerated in Section 2701 of the 2002 Farm Bill, B-300325, December 13, 2002

A violation of the Purpose Act and Anti-Deficiency Act.

b. Bureau of Land Management: Payment of Pocatello Field Office Photocopying Costs, B-290901, December 16, 2002

DIGEST: "Photocopying services procured by a Bureau Land Management field office from a commercial source in violation of 44 USC 501, requiring that all such services be procured through the Government Printing Office absent a waiver, were not authorized and may not be paid with federal funds."

c. U.S Department of Education's Use of Fiscal Year Appropriations to Award Multiple Year Grants. B-289801, December 30, 20

The questions presented concerned the use of appropriations available for only one fiscal year to fund grant awards for multiple years. The two general legal conclusions of the GAO opinion were that (1) for grants, the principle of severability is irrelevant to a *bona fide* need determinations, and (2) a *bona fide* need analysis in the grant context focuses on whether the grants are made during the period of availability of the appropriation charged and further the purposes of program legislation.

d. Use of Appropriated Funds to Purchase Light Refreshments at Conferences, B-288266, January 27, 2003

GAO Conclusion: "GSA does not have the authority to permit agencies to use appropriated funds to pay for employees' food and refreshments except as part of an employee's travel subsistence allowance. . . . Certifying officers should not rely on GSA's travel regulation on conference planning to authorize light refreshments at conferences for employees in nontravel status. Agencies (and their accountable officers) should rely on existing, relevant statutory authority as interpreted by the Comptroller General."

2. **Bid Protest Decisions**

a. USA Information Systems, Inc., B-291488, 2002 U.S. Comp. Gen. LEXIS 203, December 2, 2002

End of the fiscal year procurement case.

b. All Seasons Construction, Inc., B-291166.2, 2002 U.S. Comp. Gen. LEXIS 208, December 6, 2002

DIGEST: "Contracting officer reasonably determined bid bond accompanied by power of attorney bearing computer printer-generated signatures unacceptable because signatures were not applied to the document after its creation and thus do not serve to authenticate its contents."

See the Court of Federal Claims opinion on this case at C.2

c. Warden Associates, Inc., B-291238, 2002 U.S. Comp. Gen. LEXIS 206, December 9, 2002

DIGEST: "Agency [Social Security Agency] was not required to conduct discussions with protester regarding evaluated weaknesses in its quotation where the quotation was effectively eliminated from consideration as unacceptable and, in any case, agency did not conduct discussions with other vendors."

d. JGB Enterprises, Inc., B-291432, 2002 U.S. Comp. Gen. LEXIS 210, December 9, 2002

DIGEST: "Protest that agency [UNICOR (Federal Prison Industries)] improperly evaluated the protester's past performance is denied where the agency has provided a reasonable explanation for its evaluation and the protester has failed to rebut it."

A best value award where the past performance evaluation was only difference between the two quotations received. The awardee received a perfect score for past performance because its three references rated its performance as "excellent". On the other hand, the protester received a lower score for past performance because two of its references rated its performance as "excellent" and one rated it as "good". The person

who gave the protester a good rating was not the person named in its submission because the named reference had retired. Instead, the good rating came from the Director of Contracting at Fort Lee, who had personal knowledge of the protester's contract performance and also provided narrative comments and responded to specific questions regarding the protester performance on the referenced contract.

e. ITT Federal Services International Corporation, B-289863.4; B-289863.6; B-289863.7; B-289863.8, 2002 U.S. Comp. Gen. LEXIS 221, December 16, 2002

Sustained Protest

DIGEST: "Protest challenging agency's [Army Corps of Engineers] cost realism evaluation is sustained where record shows that evaluation contained errors that, if corrected, could significantly reduce the amount of awardee's cost advantage, and also could affect the agency's technical evaluation of proposals, so that the award decision could be different."

f. CSE Construction, B-291268.2, 2002 U.S. Com. Gen. LEXIS 212, December 16, 2002

Sustained Protest

DIGEST(1): " In a negotiated procurement for a fixed-price construction contract [a new range at Fort Leonard Wood], based upon a price/technical tradeoff, the selection of the higher-rated priced proposal was unreasonable where the source selection authority [Corps of Engineers] did not credit the protester for its substantially lower proposed price, but improperly viewed the protest's low price as too low and demonstrating the protester's lack of understanding of contract requirements, where the solicitation did not provide for an evaluation of offerors' understanding."

g. Martin Electronics, Inc., B-290846.3; B-290846.4, 2002 U.S. Comp. Gen. LEXIS 234, December 23, 2002

Sustained Protest

AMC Protest

DIGEST: "Protest is sustained where agency (Joint Munitions Command, old OSC) conducted exchanges with offerors in a manner that favored one over the other and where, in evaluating awardee's past performance, agency failed to include consideration of negative past performance information that occurred within the period defined by the solicitation as "recent" contract performance.

h. The CDM Group, Inc., B-291304.2, 2002 U.S. Comp. Gen. LEXIS 214, December 23, 2002

DIGEST: "Where an agency [National Guard] solicited a requirement under the Federal Supply Schedule (FSS) program, it properly rejected a quote from a vendor that did not possess a FSS contract covering the solicited requirement."

i. Consolidated Engineering Services, Inc., B-291345; B-291345.2, 2002 U.S. Comp. Gen. LEXIS 229, December 23, 2002

Sustained Protest

A-76 Protest

DIGEST: "Protest is sustained where the record fails to reasonably support the agency's [DOD] decision to eliminate from consideration as technically unacceptable the only proposal received from a commercial offeror in the private-sector portion of the competition conducted pursuant to Office of Management and Budget Circular A-76."

j. Warden Associates, Inc., B-291440; B-291440.2, 2002 U.S. Comp. Gen. LEXIS 219, December 27, 2002

DIGEST: "Protest that agency established unreasonably short deadline to respond to request for quotation issued under the Federal Supply Schedule program is denied, where protester essentially admits it could have timely responded but chose not to."

k. Department of the Army - - Request for Modification of Recommendation B-290682.2, 2003 U.S. Comp. Gen. LEXIS 3, January 9, 2003

DIGEST: "Agency [Army] request for modification of recommendation in LBM, Inc., B-290682, Sept. 18, 2002, 2002 CPD 157 [2002 U.S. Comp. Gen. LEXIS 138], to recognize that the agency may limit the competition to small business holders of indefinite-delivery/indefinite-quantity contracts in conduct a small business set-aside required by Federal Acquisition Regulation 19.502-2(b) **is denied** because the Competition in Contracting Act of 1984 provides for full and open competition among eligible small business concerns for acquisitions required to be set aside for small businesses."

l. SKJ & Associates, Inc., B-291533, 2003 U.S. Comp. Gen. LEXIS 5, January 13, 2003

Sustained Protest

DIGEST: "Agency [Health and Human Services] did not have a reasonable basis to reject the protester's quotation under request for quotations (RFQ) for training services where the RFQ required submission of a technical proposal but gave no guidance as to its content or how it would be evaluated; the protester submitted a technical proposal; and the agency then rejected the proposal as "unresponsive" because it was too short and too general and failed to provide evidence that the firm understood how to perform the work or to include a plan showing how the firm would implement the substance of the work."

m. McKesson Automation Systems, Inc., B-290969.2; B-290969.3, 2003 U.S. Comp. Gen. LEXIS 11, January 14, 2003

DIGEST: "Protest that procuring agency [DLA, Defense Supply Center Philadelphia] improperly proposed award to a firm on a sole-source basis for the procurement and installation of a pharmacy robotic refill system is denied where the record shows that the

agency's [Air Force] justification for concluding that only one responsible source could meet its needs is reasonable."

n. HpkWebDac, B-291538.2, 2003 U.S. Comp. Gen. LEXIS 9, January 22, 2003

Of interest to the Protest Bar is the second footnote in the Decision:
"HpkWebDac's assertion that the individual representing the agency in preparing the agency report on this protest is not a lawyer provides no basis to challenge the award. There is no requirement that a lawyer represent the agency in a protest."

C. Notable Court Decisions

1. **Court of Appeals for the Federal Circuit**

a. Fireman's Fund Insurance Company v. Secretary of the Navy, 313 F.3d 1344, 2002 U.S. App. LEXIS 24238, Court of Appeals for the Federal Circuit, November 27, 2002.

Surety had no "contract" with the U.S. Government.

b. Rumsfeld v. Applied Companies, Inc., Court of Appeals for the Federal Circuit No. 01-1630, 2002 U.S. App. LEXIS 25237, December 10, 2002.

The question for decision in the case was whether anticipatory profits should be included in the measure of contract breach damages for grossly inaccurate estimates.

c.. Metric Constructors, Inc. v. United States, Court of Appeals for the Federal Circuit 02-5086, 2002 U.S. App. LEXIS 26093, December 18, 2002.

A "Severin" case – on release signed by subcontractor.

d. Information Technology & Applications Corporation v. United State, Court of Appeals for the Federal Circuit 02-5048, 2003 U.S. App. LEXIS 404, January 10, 2003.

The Court of Appeals for the Federal Circuit affirms the Court of Federal Claims in a review of a bid protest decision that involves the distinction between "clarifications" and "discussions" under FAR 15.306.

e. Rumsfeld v. United Technologies Corporation, Pratt & Whitney, Court of Appeals for the Federal Circuit, 02-1071, 2003 U.S. App. LEXIS 569, decided January 15, 2003

An appeal from the Armed Services Board of Contract Appeals (ASBCA). ASBCA found that payments made to Pratt's foreign suppliers to acquire parts under

"collaboration agreements" were not "costs" for purposes of calculating indirect cost pool (overhead) allocation bases under the Cost Accounting Standards (CAS).

f. Eastman Kodak Company v. Rumsfeld, Court of Appeals for the Federal Circuit 02-1058, 2003 U.S. App. LEXIS 593, January 16, 2003.

Court of Appeals for the Federal Circuit in an opinion by Chief Judge Mayer affirms the Armed Services Board of Contract Appeals (ASBCA) finding that Kodak's claimed pension costs were not allocable to the cost objectives of its government contracts and the government was entitled to a refund of the reimbursed pension costs for the period 1984 through 1986.

g. Allegheny Teledyne Incorporated et al. v. United States, Court of Appeals for the Federal Circuit 02-5008, 5009, 5010, 5011, 2003 U.S. App. LEXIS 1014, January 23, 2003

The Court of Appeals for the Federal Circuit (opinion by Judge Michel) affirms a decision by the Court of Federal Claims (Judge Firestone) on government claims regarding a pension surplus or deficit due to one of the parties as a result of a "segment closing" within the meaning of Cost Accounting Standard (CAS) 413.

2. **Court of Federal Claims**

All Seasons Construction, Inc. v. United States, Witherinton Construction Corp., Intervenor, Court of Federal Claims 02-1895, 2003 U.S. Claims LEXIS 10, January 23, 2003 -- A Post Award Protest Case. Basically, the Court of Federal Claims affirms the GAO decision in All Seasons Construction, Inc., B-291166.2, December 6, 2002 that a computer-generated signature is not acceptable on a bid bond. The Court does not directly review GAO decisions, but it found that the Contracting Officer had a rational basis when it found the bid bond non-responsive based upon GAO precedents that photocopied powers of attorney are not acceptable.

D. Miscellaneous

1. Walker v. Cheney, 2002 U.S. Dist LEXIS 23385, U. S. District Court for the District of Columbia, Civil Action No. 02-0340, December 9, 2002 (Judge John D. Bates)

The District Court found that the Comptroller General does not have the personal, concrete, and particularized injury required under Article III Standing Doctrine, either himself or as the agent of Congress to bring the lawsuit seeking records from the Vice President of the United States.

2. The Supreme Court argument on the Contract Dispute Act is scheduled for March 4, 2003. The question presented: **Where a National Park Service regulation that states that National Part Service concession agreements are not**

contracts within the meaning of the Contract Dispute act of 1978, 41 U.S.C. 601 *et seq.* is valid.”

See National Park Hospitality Association v. Department of the Interior, et al., 2002 U.S. LEXIS 8331.

Larry D. Anderson
Associate Counsel
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