



NCMA Twin Cities



## CAPITAL CONNECTIONS

### Contributed by the Government Contract Lawyers at Eckland & Blando LLP

“Capital Connections” is a new newsletter of the NCMA Twin Cities Chapter. We will discuss recent legislation, changes to regulations and judicial decisions of interest to the government contracting community. Although the focus will be on developments in Washington DC, from time to time we will also feature news of interest to those engaged in state and local procurement.

#### **Final Rule on Contractor Code of Business Ethics and Conduct**

On November 23, 2007 the Federal Acquisition Regulation (FAR) was amended to include **FAR Subpart 3.10 – Contractor Code of Business Ethics and Conduct**. The new rule requires that contracts valued at more than \$5 million with a performance period of 120 days or more include new **FAR Clause 52.203-13**. Under this clause, the contractor is required to have, within 30 days of contract award, a written code of business ethics and conduct and to provide a copy of the code to each employee engaged in work on the contract. The clause also requires the contractor to (i) promote compliance with its business ethics code, (ii) establish a business ethics awareness program, and (iii) establish an internal control program, all designed to facilitate detection of improper conduct in connection with government contracts and ensure corrective measures are promptly carried out.

In addition, the new “**Contractor Code of Business Ethics and Conduct**” clause suggests, but does not require, that a contractor’s

internal control program provide for periodic reviews of internal policies and procedures, an internal mechanism for employees to report wrongdoing, internal or external audits, and disciplinary action for improper conduct.

A separate clause, **FAR Clause 52.203-14**, mandating display of agency hotline posters in contractor facilities is required in non-commercial item contracts valued at more than \$5 million. Individual agencies will determine the content of hotline posters and may establish lower dollar thresholds for mandatory display of the posters. Both of the new clauses include flow down provisions, which require the substance of the clauses in all subcontracts, other than commercial item subcontracts, in excess of \$5 million.

The final rule includes a significant change from the proposed rule intended to ease the burden of compliance on small business. Small businesses are exempt from the requirement to maintain an awareness program and internal controls.

The new rules go into effect on December 24, 2007. For more information, contact Tim Connelly at (612) 236-0165 or [tim@ecklandblando.com](mailto:tim@ecklandblando.com).

## **New Proposed Rule on “Contractor Compliance Program and Integrity Reporting”**

On November 14, 2007 the FAR Council proposed another significant set of new business ethics rules for federal government contractors. At the request of the Department of Justice, the proposed rule would (i) provide for suspension and debarment of government contractors for failure timely to disclose an overpayment on a government contract or a violation of federal criminal law in connection with a contract award or performance, (ii) require agencies to consider a prospective contractor’s code of ethics and business conduct as an element of past performance, and (iii) specify the content of certain contractors’ codes of business ethics and conduct.

The new rule would amend **FAR Part 42** to include “the contractor’s record of integrity and business ethics” as an example of a contractor’s past performance to be evaluated under **FAR 9.104-1**. Currently, under FAR 9.104-1 past performance evaluations require only that “[t]o be determined responsible, a prospective contractor must—[h]ave a satisfactory record of integrity and business ethics.” The result would be that a contractor might be found minimally responsible for purposes of award, but nonetheless be disadvantaged when compared to another competitor or when being evaluated for an award fee based on FAR Part 42 criteria.

The most significant aspect of the proposed rules, however, might be a mandate that contractor ethics programs include specific elements, including training and reporting requirements. Perhaps not surprisingly, the specific requirements are similar to the United States Sentencing Guidelines applicable to determining whether an organization has an effective compliance and ethics program. For example, the new proposed rule would require due

diligence (i) to screen out of the hiring process persons who have violated government ethics violations in the past and (ii) for periodic assessments of the risks of such violations in a contractor’s current operations – key ingredients of a successful program under the Guidelines. The rule would also directly impact contractor-subcontractor relationships by requiring a contractor to report in writing to the agency inspector general and the contracting officer any suspected improper conduct by its subcontractors. If implemented, this requirement would greatly increase prime contractors’ interest in subcontractors’ internal business ethics and conduct policies and programs.

Both this proposed rule and the rule discussed above reflect a continuing concern within the federal government to promote ethical business practices and to combat fraud in government programs, a trend that will likely continue well into the new year. Comments on these new proposed rules are due by January 14, 2008. If you would like assistance in drafting comments on the proposed rule, contact Tim Connelly at (612) 236-0165 or tim@ecklandblando.com.

### **New FAR Part 27 Not Intended to Make Changes to Rules**

Several members of the Twin Cities Chapter have inquired about the purpose and effect of the new **FAR Part 27, Patents, Data, and Copyrights, which goes into effect on December 7, 2007**. The short answer is that the new rules are not intended to change any substantive provision of the FAR. Rather, the new provisions focus on rewriting the FAR into “plain language,” to make the policies and procedures more understandable. Nonetheless, sweeping rewrites inevitably introduce new and unfamiliar language that can lead to confusion or ambiguity, especially when considered in light of past practice and understanding. If you have any questions about the rewritten rules, contact Jeff Eckland at (612) 236-0161 or jeff@ecklandblando.com.