

NDIA Robotics Division Meeting: Some Key Emerging Issues in Q4

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Agenda

- 1. Budgeting and Funding: A Budget and Appropriations Primer**
- 2. Some Developments**
- 3. Counterfeit Parts**
- 4. Cybersecurity**
- 5. Small Business**
- 6. Labor Initiatives**

1. Budgeting and Funding

- Budget Authorization, Appropriation and Spending
 - Authority under U.S. Constitution
 - President submits Budget.
 - Congress responds.
 - President signs it into law.
- Role of Congress
 - GPRA & Budget Control Act
 - Laws, Sequestration & Ryan/Murray Reprieve [Expires 2015]
 - Signed Authorization / Appropriation Acts, or Continuing Resolutions
- Role of Executive Branch
 - President
 - OMB
 - Agency
 - Program and Contract levels
- Scoring, Apportionment, Allotment, Obligation, Expenditure of Available Appropriated Funds, Sequestration, Impoundment
- Anti-Deficiency Act
- Recordation of Statute Act

1. Budgeting and Funding (continued)

- OMB Circular A-11 (revised 2015) covers
 - Overview of the budget process, includes basic laws that regulate the budget process and the terms and concepts.
 - How agencies prepare and submit budgets.
 - Sequestration instruction
 - Checklist for budget apportionment and reappportionment.
 - GPRA and Performance Management
- Applies to all Executive departments and establishments, government-sponsored entities.

1. Budgeting and Funding

- Contract Procurement
 - Mission and Needs Identification
 - Scoring, Procurement Type and Money Allocation
 - Requirements Definition (e.g., SOW, CLIN, SLIN, CDRL)
 - Procurement and Award
 - Options
- Funding Clauses
 - Limitation of Cost, Limitation of Funds, Availability of Funds, Crossing Fiscal Years, etc.
 - ACRN Obligations
- Invoicing and Payment Terms
- Contractor, Contracting Officer (PCO, ACO)/DCMA, DFAS

2. And, Some Developments

- **National Defense Authorization Act FY '16**
 - Proposed Bill, H.R. 1735, passed both Houses, now in reconciliation
 - Some key provisions
 - Department of Defense technology offset program to build and maintain the military technological superiority of the United States. Funding applications for contracts, cooperative agreements, or other transaction agreements entered into pursuant to section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103–160; 10 U.S.C. 2371 note) with appropriate entities for the fielding or commercialization of technologies.
 - Amendments to other transaction authority. Amount of the potential transaction, authority to enter into, would apply procurement ethics rules, would change definition of Nontraditional Defense Contractor.

2. Some Developments (continued)

- **National Defense Appropriation Act FY '16**
 - Proposed Bill, S. 1558, introduced in Senate
 - Also has a number of provisions of note regarding unmanned systems, cybersecurity, supply chain assurance (counterfeit and cybersecurity)
 - Status

2. Some Developments (continued)

- **Federal Strategic Sourcing Initiatives**
 - Strategic sourcing is the structured and collaborative process of critically analyzing an organization's spending patterns to better leverage its purchasing power, reduce costs and improve overall performance.
 - Different agencies assigned responsibility for particular areas.
- **GSA Transactional Data Reporting Rule - Proposed**
 - GSA Hearing
 - Comment period
 - Hearing on Hill re Impact on Small Business
- **DFARS Evaluating Price Reasonableness for Commercial Items - Proposed**
 - Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Basic

2. Some Developments (continued)

- **Better Buying Power 3.0**

- Achieving Dominant Capabilities through Technical Excellence and Innovation (April 2015).
- “The technological superiority of the United States is now being challenged by potential adversaries in ways not seen since the Cold War.”
- Emphasis on innovation, technical excellence and quality of products to achieve “field dominant military capabilities.”
- Use of prototyping and experimentation.
- Use of modular open systems architecture to stimulate innovation.
- Increase return on and access to small business research and development.
- “Remove unproductive requirements imposed on industry”.
- Promote effective competition and life cycle cost reductions, etc.

2. Some Developments (continued)

- **GSA Proposed FAR Deviation to Commercial Supplier Agreement (CSA) Terms Inconsistent with Federal Law** (March 2015). Deviation to 52.212-4 proposed to cover 15 areas and automatically revise CSA terms, e.g.:
 - Govt employees or persons not personally bound by Commercial Supplier Agreement terms.
 - Click through terms will not bind the Gov't or any authorized end-user.
 - Automatic license renewals do not apply.
 - Future fees or penalties, remedies only where authorized.
 - No deemed acceptance of third party terms.
 - Designated State/foreign law does not apply.
 - Contractor no unilateral right to terminate or modify agreement.
 - CSA terms and final contract pricing not confidential, other info. may be.

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3. Counterfeit Parts

- NDAA FY 2012, § 818, Detection and Avoidance of Counterfeit Electronic Parts, and other NDAAAs.
- And, now Non-Conforming, Substandard, and Counterfeit Parts.
- FAR 52.246-11 Higher-Level Contract Quality Requirement (December 2014)
 - Designates higher level quality standards
 - Requires flowdown to lower tier subcontractors
 - Covers any subcontract for critical and complex items, or when technical requirements require control of design, work operations, in process controls, testing, inspection, documentation, etc.
- Proposed FAR Case 2013-002, Expanded Reporting of Nonconforming Items
 - Would expand requirements for reporting of nonconforming items.

3. Counterfeit Parts (continued)

- DFARS 252.246-7003 Notification of Potential Safety Issues (June 2013)
 - Duty to notify Government of all non-conformance of critical safety items, or where non-conformance or deficiency may pose safety impact for systems, or subsystems, assemblies, subassemblies, or parts integral to a system, acquired by or serviced for the Government under the contract. Flowdown to subcontracts, including those for commercial items.
- DFARS 252.246-7007 Contractor Counterfeit Electronic Part Detection and Avoidance System (May 2014)
 - Buy from OM, Authorized Dealer, Trusted Suppliers.
 - Contractor shall establish and maintain an acceptable counterfeit electronic part detection and avoidance system. Failure to maintain an acceptable system may result in CO disapproval of the purchasing system and/or withholding of payments.
 - Detecting, reporting, mitigating requirements too.
 - CAS-covered prime, required flowdown to all subcontractors at all tiers.

3. Counterfeit Parts (continued)

- DFARS 252.239-7017 Notice of Supply Chain Risk (November 2013)
 - Government may use the authorities provided by P.L. No. 111-383, § 806, considering public and non-public information, including all-source intelligence, relating to an offeror and its supply chain to limit disclosure of information.
 - No such action shall be subject to review in a bid protest before the Government Accountability Office or in any Federal court.
- DFARS 252.239-7018 Supply Chain Risk (November 2013)
 - For IT contracts involving national security systems, Contractor shall maintain controls in the provision of supplies and services to the Government to minimize supply chain risk.
 - Government may exclude contractor due to its or supply chain risk.
 - Flowdown to subcontracts involving development/delivery of IT supplies or services.

3. Counterfeit Parts (continued)

- DOD Instruction 4140.67 Counterfeit Prevention Policy (April 2013).
- DCMA Instruction 1205 Counterfeit Mitigation (July 2015)
 - Implements NDAA FY 2012, § 818; **also covers all materiel where counterfeit is a threat.**
 - To enhance DCMA oversight, surveillance, detection activities to mitigate risk of introduction of counterfeit materiel into the supply chain.
 - SAE Standards, AS5533 Rev A, Fraudulent/Counterfeit Electronic Parts: Avoidance, Detection, Mitigation, and Disposition (January 2013).
 - SAE AS6081, Fraudulent/Counterfeit Electronic Parts: Avoidance, Detection, Mitigation, and Disposition – Distributors (November 2012).
 - DCMA surveillance of prime and subcontract levels, includes COTS.

3. Counterfeit Parts (continued)

- DCMA Instruction 1205 (Continued)
 - DCMA Contractor Counterfeit Detection and Avoidance System Checklist, includes:
 - Preaward surveys
 - Risk assessment to establish surveillance method and frequency
 - Support Contractor Purchasing System Review (CPSR) and process reviews
 - Performance risks
 - Quality of products
 - Conformance to drawings, specifications, reporting of defects found.
 - Supply chain counterfeit risks
 - Required to add counterfeit risk provisions to contracts as needed.
 - DCMA to contact Contract Integrity Center when any suspicion of fraud or counterfeit encountered.
 - Counterfeit documentation to be maintained and properly marked as FOUO.
 - Distribution on a “need to know” basis.

3. Counterfeit Parts (continued)

- Contracting Officers and Inspectors General
- Defense Microelectronic Working Group
- Defense Microelectronic Agency (DMEA)
- National Intellectual Property Rights Coordination Center (IPR Center)
 - Collaboration
 - IPR Center Operation Chain Reaction
- DOJ Computer Crime & Intellectual Property Section (CCIPS)

4. Cybersecurity

- Continuum of Counterfeit Parts Concerns, many emerging threats/intrusions into Government/Commercial Entities in news.
- Laws being enacted, e.g.,
 - Federal Information Security Modernization Act, amending Federal Information Security Management Act of 2002 (“FISMA”); Federal Information Technology Acquisition Reform Act (“FITARA”)(2014).
- Executive Orders and Presidential Policy Directives being issued:
 - EO 13556: Controlled Unclassified Information (“CUI”) (2010)
 - EO 13636: Improving Critical Infrastructure Cybersecurity (2013).
 - PPD-21: Critical Infrastructure Security and Resilience (2013).
 - EO 13691: Promoting Private Sector Cybersecurity Information Sharing (2015).
 - EO 13694: Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities (2015).

4. Cybersecurity (continued)

- WH, DOD, GSA, NIST, DHS Cyber Working Group.
- NIST Framework for Improving Critical Infrastructure Cybersecurity Version 1.0 (2014).
- NIST Special Publication 800-171, Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations (June 2015)
 - Issued to ensure that sensitive federal information remains confidential when stored in nonfederal information systems and organizations.
 - Would standardize CUI terms and definitions.
 - Guidelines for information systems development, acquisition, management and protection.

4. Cybersecurity (continued)

- DOD Insider Threat Management and Analysis Center (“DITMAC”) (December 2014)
- DOD Instruction 5000.02 Operation of the Defense Acquisition System (January 7, 2015).
 - Requires Government to address cyber security throughout the procurement process/spectrum.
- DOD Cyber Strategy Fact Sheet (April 2015)
 - Cyber missions:
 - Defend DoD networks, systems, and information.
 - Defend the United States and its interests against cyberattacks of significant consequence.
 - Provide integrated cyber capabilities to support military operations and contingency plans.

4. Cybersecurity (continued)

- DFARS 252.204-7000 Disclosure of Information (August 2013).
- DFARS 252.204-7012 Safeguarding of Unclassified Controlled Technical Information (November 2013).
- DFARS 252.239-7017 Notice of Supply Chain Risk (November 2013)
- DFARS 252.239-7018 Supply Chain Risk (November 2013)
- Proposed Rule: FAR Case 2011-020 Basic Safeguarding of Contractor Information Systems.
- Proposed Rule: FAR Case 2014-021 Contractor Use of Information

4. Cybersecurity (continued)

- **DOJ CCIPS Best Practices 1.0 (April 2015)**
 - Your Crown jewels need to be identified.
 - Cybersecurity action plan needs to be developed.
 - Appropriate technology and services need to be in place before an intrusion occurs.
 - Obtain appropriate authorizations to permit network monitoring against system misuse or intrusions.
 - Reduce your response time in the event of an incident by making sure your organization/counsel are familiar with technology and cyber incident management beforehand.
 - Align your organization's policies with your cybersecurity action plan.

4. Cybersecurity (continued)

- DOJ CCIPs Best Practices (continued)
 - Know who to call before an incident arises so you can act immediately when needed. Engage law enforcement before you have a problem.
 - Maintain relationships with cyber information sharing organizations, so you timely learn about current and emerging risk areas in your industry.
 - Implement your action plan if an issue arises.

5. Small Business

- Other Transaction Agreements
 - “Nontraditional Defense Contractor” means “an entity that is not currently performing and has not performed, for at least the one-year period preceding the solicitation of sources by the Department of Defense for the procurement or transaction, any of the following for the Department of Defense: (A) Any contract or subcontract that is subject to full coverage under the cost accounting standards prescribed pursuant to chapter 15 of title 41 and the regulations implementing such chapter. (B) Any other contract in excess of \$500,000 under which the contractor is required to submit certified cost or pricing data under section 2306a of this title.”
 - Pending NDAA FY’16 legislative proposal to expand classes covered. H.R. 1735, § 852
- DAU Ask the Professor Q&A: “Will an SBIR award impact the Nontraditional Defense Contractor status of a small business?” 23

6. Labor Initiatives

- **EO 13658 Minimum Wage**
 - Raising the minimum wage to \$10.10 effective for new contracts beginning January 1, 2015.
 - FAR 52.222-50 Minimum Wages Under Executive Order 13658 (12/14)
- **FAR 52.222-50 Combating Trafficking in Persons (3/15)**
 - EO
 - Prior DFARS
 - New rule to be included in all solicitations and contracts.
 - Zero tolerance for Human Trafficking.
 - Requires immediate reporting.
 - New requirement for certifications and plan where:
 - Any portion of the contract (i) is for supplies, other than COTS, acquired outside the United States, or services to be performed outside the United States; and (ii) Has an estimated value that exceeds \$500,000.

6. Labor Initiatives

- **EO Fair Pay and Safe Workplaces**
- 5/28/15 Proposed FAR Regs and DOL Guidance to enforce selected Federal and State labor laws.
- Expansive set of proposed changes, including:
 - Requires offeror where expect exceed \$500,000 proposal to provide representation of whether “violated” 14 Federal and equivalent State labor laws.
 - CO to require such offeror to provide “violation” information when CO commences responsibility determination.
 - Information to be provided to CO, ALCA, posted in SAM.
 - Contractor may provide explanatory information to CO, not posted.
 - Following award, provide representation/information every 6 months.
 - Prime flowdown of these requirements to its non-COTS supply chain, responsibility determinations.
 - Other provisions. Numerous concerns. Comments due August 26th.

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6. Labor Initiatives

- Draft E.O. Paid Sick Leave (NYT 8/5/15) - Draft leaked
 - Would require any company that contracts with the Federal Government to issue paid leave to employees that are sick, seeking medical attention, or need to care for a sick relative.
 - “Relative” and “Medical Attention” are broadly defined.
 - Minimum of 56 hours/year
 - Require employers to allow unused paid leave to accrue, year after year.
 - Paid leave is NOT contingent on finding replacement.
 - Says no impact on payment of “prevailing wage” of the area in which work done under federal contract.
- Draft indicates Labor to issue regulations by Sept. 30.

Conclusion

- This is the tip of the iceberg.
- There have been other significant developments in this area.
- More may be on the way.
- Stay tuned.
- Read your solicitations, and the clauses identified.
- Understand and make sure you can address the requirements
 - In your proposal.
 - In your contract.
 - In your subcontracts.
 - When you perform.
- If new requirements are added, understand the impacts to you and your subcontractors. You may have recourse.

Questions?



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Susan Warshaw Ebner is a shareholder at Fortney & Scott, LLC. Her practice concentrates on advising and representing businesses, as well as non-profit, academe and consortium clients on a broad spectrum of Federal, state and local government procurement matters, including bid protests, contract procurement and administration issues, claims, audits, investigations, compliance program and other matters. She has represented clients in a variety of courts and forums, including the U.S. Court of Federal Claims, U.S. Government Accountability Office, Boards of Contract Appeals, U.S. District and Appellate Courts, and state courts.

Previously, as a government attorney, Ms. Ebner advised and represented the Department of the Navy, the Department of Defense and the U.S. Office of Personnel Management in complex litigation before Federal District and Appellate courts, administrative boards and the U.S. Court of Federal Claims. Ms. Ebner was also appointed as a Special Assistant United States Attorney for the Northern District of Florida. In addition to her private practice experience, she was in-house counsel at Cincinnati Bell Incorporated and its spin-off, Convergys Corporation, and Chief Counsel at NCR Government Systems Corporation.

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