DOE Following DOD Lead with Business Systems Rule

On August 5, 2013, the U.S. Department of Energy (DOE) quietly adopted slightly modified versions of the Business Systems clauses finalized by DOD on February 24, 2012.Like the DOD clauses, the DOE versions implement "compliance enforcement mechanisms in the form of [a general] business systems clause and [system-specific] related clauses that require the contractor to have acceptable business systems that comply with system criteria." The DOE clauses were published via an Acquisition Letter (AL).

As with the DOD clauses, the DOE versions provide that "[w]hen a contractor's business system contains identified significant deficiencies, the contracting officer will be able to withhold a percentage of payments in accordance with the applicable system clause." The AL exempts Management and Operating (M&O) contracts from coverage, stating that the new rule "applies to DOE and NNSA for non-M&O contracts in support of Capital Assets (as prescribed in DOE Order 413.3 B or latest version) or non-capital asset projects (other than M&O)."

Unlike the DOD implementation, the DOE AL says that the new clauses will apply to existing contracts and directs contracting officers to "negotiate bilaterally with the contractor[s] who hold affected contract[s] to incorporate the clauses of this AL into the affected contract within 90 days." Contracting officers are also instructed to incorporate the clauses into affected contracts before extending them or exercising options under them by negotiating bilaterally with the contractors.

Interestingly, DOE adopted only five of the six DOD business systems — specific criteria for acceptability of Material Management Accounting Systems (MMAS) will not be imposed on DOE contractors.

On February 12, 2013, DOE issued further guidance via Acquisition Letters (ALs). In addition, there is also a Policy Flash (2014-17) which summarizes the changes from the Business System ALs.

DOE provided both background and context along with some direction to the acquisition teams.

DOE contractors that don't have approved accounting and purchasing systems may not be found "responsible," as that term is defined at FAR 9.1. The AL states, "The contracting officer shall ensure that the offeror/contractor has an approved accounting system and purchasing system for use under the contract." Contractors whose systems have not been assessed at all will be evaluated via the SF 1408 Pre-Award Survey.

DOE contracting officers are also directed to obtain business system information from contractors "not later than 60 days after contract award." Contractors must submit "written documentation that each business system meets the system criteria required in each clause."

Like with the DOD rule, the real impact of this rule will not be withholding of payments as a result of deficiencies. Sure, there will be a few of those, but there will be many more contractors eliminated from competing on certain solicitations because their systems are either not adequate or unassessed.

Too many contractors don't invest in business systems until they have to. For some, that will be too late. The DOE guidance is crystal clear that deficient or unassessed systems will put you at a competitive disadvantage. Anything that does that could cost you a contract – especially in today's LPTA environment.

Have your systems reviewed. If the Government won't do it, use a commercial audit firm. In fact, using a commercial firm is preferable because they will help you fix the issues they identify and keep re-examining the problem areas until everything is clean. The Government won't do that. They come in, conduct the audit, issue a report and leave.

Of course, they'll come back to look at your fixes – in a year or two. What will you do in the meantime?

Don't get stuck trying to win with non-compliant systems.