

REGULATING UNDER THE RADAR

AGENCY USE OF LOCAL CLAUSES IN
FEDERAL SOLICITATIONS

PROGRAM

- Local clauses defined
- Historical background
- Relevant statutes and regulations
- Agency (non)compliance
- Legal effect of improperly vetted local clauses
- Conclusion

WHAT IS A LOCAL CLAUSE?

- Typical Federal solicitation contains provisions and clauses—
 - Prescribed and included in the FAR (48 CFR Chapter 1)
 - Prescribed and included in agency FAR supplement (48 CFR Chapter __)
 - Not prescribed nor included in Title 48 of the CFR (Local Clauses)

HISTORICAL BACKGROUND

- Commission on Government Procurement Report (1972)

“...encountered a mass of rules and regulations within the procuring agencies that were difficult to understand and subject to *little or no check on proliferation at lower organizational levels.*”

HISTORICAL BACKGROUND

- Solution: The Federal Acquisition Regulations System (Title 48 CFR)
 - Intended to consolidate existing defense and civilian agency regulations
 - “limit occasion or need for additional agency rules, to encourage public participation, and to put regulations in language understandable to all.”

FAR SUBPART 1.3—AGENCY ACQUISITION REGULATIONS

- **Agency acquisition regulations (Publication in *Federal Register* required)**
 - Implement or supplement the FAR
 - Incorporate...contract clauses and solicitation provisions that govern the contracting process or otherwise control the relationship between the agency, *including any of its suborganizations*, and contractors or prospective contractors
- **Internal agency guidance (Publication in *Federal Register* not required)**
 - designations and delegations of authority
 - assignments of responsibilities

FAR SUBPART 1.3—AGENCY ACQUISITION REGULATIONS

- **Agency acquisition regulations limited to—**
 - Those necessary to implement FAR policies and procedures within the agency
 - Additional policies, procedures, solicitation provisions, or contract clauses that supplement the FAR to satisfy the specific needs of the agency
- **Agency acquisition regulations shall not—**
 - Unnecessarily repeat, paraphrase, or otherwise restate material contained in the FAR or higher-level agency acquisition regulations; or
 - Except as required by law or as provided in FAR subpart 1.4 (Deviations from the FAR), conflicting or being inconsistent with FAR content.

STATUTORY PUBLICATION REQUIREMENTS

- Small Business and Federal Procurement Competition Enhancement Act of 1984 (Pub. L. 98-577) (Codified at 41 U.S.C. 1707)
 - No procurement policy, regulation, procedure, or form may take effect until 60 days after it is published for public comment in the Federal Register if it—
 - *has a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form; or*
 - *has a significant cost or administrative impact on contractors or offerors.*

INTENDED REACH OF PUBLICATION REQUIREMENT

“I also like to clarify that section 302 [of P.L. 98-577] would not only apply to proposed changes or additions to the Governmentwide Federal acquisition regulation, but also to agency supplements to the FAR *as well as subagency supplements on down to the lowest level*. In other words, for example, not only would proposed FAR regulations have to be published under section 302, but so would proposed DoD supplemental regulations to the FAR, Air Force supplemental regulations to the DoD supplement, and Air Force Logistics Command supplemental regulations to Air Force supplements.” –Senator Cohen

OTHER STATUTORY REQUIREMENTS

- Paperwork Reduction Act ([44 U.S.C. 3501](#), et seq.) as implemented in 5 CFR 1320
 - Requires OMB approval of any “collection of information” from 10 or more members of the public
 - Proposed collections of information must be published in the *Federal Register*
 - Public may not be penalized for failing to comply with unauthorized information collection
- Regulatory Flexibility Act ([5 U.S.C. 601](#), et seq.)
 - Provides Small Business Administration Office of Advocacy opportunity to comment on proposed regulations

AGENCY (NON)COMPLIANCE

- Aerospace Industries Association (AIA) Procurement Techniques Committee
 - Compiled compendium of unauthorized clauses, regulations, and policies (Dec. 1987)
 - Requested action by Undersecretary of Defense for Acquisition to enforce existing laws (Dec. 1988)
- Acquisition Reform Working Group
 - Provided Congressional testimony regarding need for control of “Nonstandard Clauses” (1994)
 - Pushed legislation to curb use of nonstandard clauses and public protection provision against their enforcement
 - Federal Acquisition Streamlining Act included provision to curb use of nonstandard clauses (41 U.S.C.A. 1304)—not implemented by FAR Councils

AGENCY (NON)COMPLIANCE

- Association of American Universities/Council on Government Relations
 - Issued joint report: “Restrictions on Research Awards: Troublesome Clauses 2007/2008”
 - Criticized lack of vetting for “homegrown” clauses
- National Defense Industrial Association
 - Letter to USD(AT&L) of Nov 2012 criticizing “regulation by guidance” practices of Navy relating to “Tripwires” policy and NAVAIR “Savings” clause
 - Neither policy nor clause has ever gone through rulemaking process

AGENCY (NON)COMPLIANCE

- **Small Business Government Contracting and National Defense Authorization Act of 2013 Amendments (81 FR 34243, 31 May 2016)**
 - SBA removed proposed requirement for small businesses to keep records & report compliance with limitation on subcontracting clause
 - May require reporting in the future—would necessitate notice and public comment
- **NAVSEA Seaport-e contracts**
 - Require reporting on limitation on subcontracting compliance through local clause
 - No approved OMB control number for this information collection

LEGAL EFFECT OF LOCAL CLAUSES

- **La Gloria Oil & Gas Co. v. U.S., 56 Fed. Cl. 211 (2003), overruled in part on other grounds**
 - DLA used local EPA clause that deviated from FAR (use of price index v. cost index)
 - Court invalidated local clause holding DLA did not comply with 41 U.S.C. 1707 (Publication Statute)
 - Contractor did not waive right to challenge legality of clause by completing contracts
- **Munitions Carriers Conference, Inc. v. U.S., 932 F. Supp. 334 (D.D.C. 1996), overruled on other grounds, 147 F.3d 1027 (D.C.Cir. 1998)**
 - DoD agency used local clause requiring bidders to use same rate for FMS and non-FMS shipments
 - Court invalidated local clause holding agency did not comply with 41 U.S.C. 1707
 - Held that 41 U.S.C. 1707 not limited to FAR—applies down to lowest level in agency

LEGAL EFFECT OF LOCAL CLAUSES

- Johnson Management Group, CFC, Inc. v. Martinez, 308 F.3d 1245 (Fed. Cir. 2002)
 - CO included local clause permitting satisfaction of advance payment indebtedness by equipment purchase
 - Court declined to enforce the clause—CO exceeded her authority
 - Contractor had to return unliquidated advance payments under T4D
- DaVita, Inc., v. U.S., 110 Fed. Cl. 71 (March 28, 2013)
 - Government argued it was not bound by CO following procedure in invalidly published regulation
 - Court did not decide effect of the lack of publication

CONCLUSION

- “Agency Avoidance of Rulemaking Procedures”, by Connor Raso, Admin. Law Review
 - Agencies avoided Administrative Procedures Act notice and comment requirements on 52% of all rules and 37% of major rules (1995 to 2012)
 - Avoidance inversely related to litigation risk
- Mercatus Center study: only 8% of final rules underwent Paperwork Reduction Act review (2004 to 2013)
- No reason to believe situation will change

TAKEAWAYS

- Local clauses that meet the standards for publication of 41 U.S.C. 1707 must be published for comment
- Courts have invalidated local clauses for agency failure to comply with publication requirements (does not matter that parties agreed)
- Local clauses imposing a “collection of information” must be cleared by OMB under the Paperwork Reduction Act
- Agencies prohibited from penalizing anyone who does not comply with an unauthorized “collection of information” (5 C.F.R. 1320.6)

QUESTIONS?

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