

Los Angeles
San Francisco

ADR Offices of
CHARLES E. RUMBAUGH
Arbitrator/Private Judge/Mediator
310.373.1981 // 310.373.4182 (fax)
888.ADROffice (toll free)
ADROffice@Rumbaugh.net (e-mail)
www.Rumbaugh.net

P.O. Box 2636
Rolling Hills, California
90274

August 18, 2004 Regulatory Update
Volume Nine, Ninth Issue
© MMIV Charles E. Rumbaugh

Recent Regulatory matters that may be of interest since the last Update include---

1. **DOES THE UNIQUE ITEM IDENTIFICATION (UID) INITIATIVE AND INTELLECTUAL PROPERTY RIGHTS “COLLIDE?”**

Another issue associated with UID has surfaced and caused one industry association to send a letter to Director of Defense Procurement and Acquisition Policy Deidre Lee. Specifically, “one of the issues that must be resolved before industry can move forward is the ownership of the intellectual property associated with the implementation of the 2D (data matrix symbology) marking technology required by the Mil-Std (130, Revision L) and the implementing DFARS clause (252.211.7003, ‘Item Identification and Valuation’)... Our preliminary research indicates that the technologies associated with the implementation of the 2D marking required by DoD (such as marking, reading and verifying methods and tools) are the subjects of numerous patents and likely pending patent applications owned by dozens of companies.”

The letter requested DoD to support UID actions by contractors through “authorization and consent” by the government (see FAR 52.227-1) and requesting DoD to obtain the requisite intellectual property licenses (or reimburse contractors for obtaining those licenses).

COMMENT: Consult with counsel and see prior Updates. The Summer issue of the ABA Public Contract Section “Procurement Lawyer” has an excellent UID article.

2. **DoD PUBLIC/PRIVATE COMPETITIONS PUT ON “HOLD?”** On August 5, 2004, Joseph Sikes, Director of Housing and Competitive Sourcing (Office of the Under Secretary of Defense—Acquisition, Technology and Logistics), issued a memorandum on “Oversight of DoD Public-Private Competitions.” In conjunction with the “significant” revisions to OMB Circular A-76, a “phased-in approach that is measured with an appropriate level of oversight” is required by DoD in the area of public-private competitions.

“Until further notice, DoD Components shall not make public announcement or congressional notification of a public-private competition (standard or streamlined competition) without concurrence of my office.”

Detailed oversight actions are outlined in the memorandum. It is “anticipated” that DoD Components will be “allowed...to execute their programs without this additional oversight by the end of December 2004....”

COMMENT: Timing is everything!

3. **REVISIONS ISSUED TO UNIFORM COMMERCIAL CODE (UCC) ARTICLE 2.** The National Conference of Commissioners on Uniform State Laws and American Law Institute have released revisions to UCC Article 2 (Sales of “Goods” in the United States). These changes will necessitate, in most cases, State legislative action for local implementation.

The impact on “pure” commercial transactions and government commercial item purchases has been described as “historic.” Significant changes involve the following areas: Contract formation (demise of the “Battle-of-the-Forms”), terms of the deal, statute of frauds threshold, statute of limitations, “shipping terms,” etc. Also, see below on presentations on this topic.

4. **ABA ISSUES “WHITE PAPER” ON PUBLICATION OF AGENCY PROCUREMENT REGULATIONS.** The recent Atlanta meeting of the ABA Public Contract Law Section Council resulted in the Council receiving a paper “addressing the effect of removing materials from agency supplements and moving such into guidance which would include the effect on business relations.” An overview of various agency actions is provided. The paper concludes that “it appears that agencies generally are complying with the requirements of the OFPPA (Office of Federal Procurement Policy Act).” Further, the paper recommended that

“agencies should carefully consider and apply the criteria for publication for comment. Some agencies are not doing as well as others in meeting the Freedom of Information Act publication requirements. It is important for agencies to recognize the need for public accessibility, even for what the agency may view as purely internal guidance....” (emphasis added)

COMMENT: A quick reading of the August 4, 2004, changes set forth in Air Force Acquisition Circular (AFAC) 2004-0804 highlight the increasing “mandatory” nature of “stealth” regulations. See below for recent Transformation changes.

Miscellaneous Items:

- DoD has published the following DFARS changes under the auspices of its “DFARS Transformation initiative” with comments due on/before 60 days from the date of notice of same:
 - DoD proposed on August 10, 2004, “to update text pertaining to resolution of tax problems under DoD contracts.”
 - DoD proposed on August 10, 2004, “to update text pertaining to the use of fidelity and forgery bonds under DoD contracts.”
 - DoD proposed on August 2, 2004, “to update text pertaining to tax relief for acquisitions conducted in certain foreign countries.”
- The Department of Homeland Security has posted recent “Designations and Certifications” under the SAFETY Act. The four Anti-terrorism Technologies receiving same were Lockheed Martin (Risk Assessment Platform), Michael Stapleton Associates (SmartTech System and Explosion Detection Services), Northrop Grumman (Biohazard Detection System), and Teledyne Brown Engineering (Mobile Fluid Jet Access System). Also, NDIA announced today it is surveying its corporate members on any difficulties encountered under the SAFETY Act.

- Cases of potential interest:
 - NYULASSY v. LOCKHEED MARTIN CORP. (07/27/04 - No. H026704), California Court of Appeals (not Supreme Court). The importance in ADR system design cannot be overstated as evidenced by this decision involving a California employer. And, the role of employee’s counsel in the negotiation/drafting of employer/employee agreements cannot be ignored.
 - KEYSTONE LAND & DEVELOPMENT COMPANY v XEROX CORPORATION, 9th Circuit Court of Appeals, No. 02-35847, filed August 4, 2004. Can a contract that purports to bind one to negotiate the terms of a purchase/sale for a subsequent land agreement be binding on the owner of that land? Perhaps “not” under applicable law! And, the counterclaim by the owner for damages associated with any proceeding by a “prospective” buyer may be expensive!
 - CW GOVERNMENT TRAVEL INC., v. US and NORTHROP GRUMMAN SPACE & MISSION SYSTEMS CORPORATION, intervenor, COFC No. 13-1274C, Reissued August 3, 2004, filed under seal July 26, 2004. Court finds “that a modification to the contract was a cardinal change which thus violated CICA....”
 - McDONNELL DOUGLAS CORPORATION v. US DEPARTMENT OF THE AIR FORCE and F. WHITTEN PETERS, SECRETARY OF THE AIR FORCE, DC Circ. No. 02-5342, July 27, 2004. “Court reverses, in part, the earlier District Court decision and holds that the option year prices and vendor CLIN prices are protected from disclosure....”
- On August 4, 2004, Director of Defense Procurement and Acquisition Policy Deidre Lee, issued a memorandum on “Instructions for Preparation of Electronically Recorded Data submitted to the Defense Contract Action Data System (DCADS), Fiscal Year (FY) 2005 Edition.” These Instructions—effective October 1, 2004—were issued pursuant to DFARS 204.670-5(b) and are included as an attachment. “Migration to the new Federal Procurement Data System—Next Generation reporting requirement” necessitate the new Instructions. Additional information can be obtained from lisa.rommey@osd.mil.
- The Department of the Navy, Navy-Marine Corps Award Fee Guide (July 2004) has been issued and contains policy and procedures for awarding and administering Award Fee contracts.
- On August 12, 2004, OMB issued a memorandum on “Updated Administration Research and Development Budget Priorities.” This current guidance on the direction of the Administration’s R&D priorities/standards is the latest roadmap in science and technology.

- The 43rd Western Briefing Conference on Government Contracting is scheduled for October 28-29, 2004, at the Palace Hotel in San Francisco. This premier educational Conference is being revitalized and should not be missed—topics include legislative/regulatory/cases “year in review,” commercial contracting “primer,” and managing the big risks (Indemnification, SAFETY Act, etc.). Information can be obtained from Ms. Melissa Browning at 703.875.8059.

Future Speaking Topics Include—

- September 17, 2004, NCMA Puget Sound Chapter, Seattle, Washington, “Baseball and Negotiations are Always In Season!”
- October 14, 2004, NCMA South Nevada Chapter, Las Vegas, Nevada, “How Baseball is a Big Player in (Most) Negotiations Or How ‘Baseball Arbitration’ is a Valuable Tool for Contract Professionals.”
- October 18, 2004, National Purchasing Institute, Los Angeles, California, "How to get through Impasse—Can Baseball Arbitration be the Answer?"
- January 12, 2005, NCMA Audio Seminar, “Preparing for the Big Changes to UCC Rules on Contract Formation and Terms of the Deal.”
- March 10, 2005, ISM Phoenix, Arizona, Affiliate, "How 'Baseball Arbitration' will help in Negotiating Sole Source Procurements--or how to get through Impasse."
- April 7, 2005, ISM—Los Angeles Affiliate, “Preparing for the Big Changes to UCC Rules on Contract Formation and Terms of the Deal.”
- May 17, 2005, NCMA Los Angeles/South Bay Chapter, “Changes to UCC Article 2.”

Items summarized in all Regulatory Updates are for general informational/discussion/educational purposes only and should not be relied upon in the course of representation or in the forming of decisions in legal matters— independent counsel should be obtained.