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

- On September 28, 2004, the Federal Register noticed that “The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend the FAR by revising language regarding accounting for unallowable costs.” The history of prior related notices/proposals and public responses are included in this notice. Public feedback is requested in the following areas:
  - Retention of requirement to segregate unallowable costs.
  - Optional technique on use of statistical sampling.
  - Interplay of penalties: Statistical sampling verification versus segregation.
  - Statistical sampling advance agreements.
  - Materiality threshold applied to directly associated unallowable costs—percentage threshold not supported by DoD.
  - Definition of directly associated cost.
  - Treatment of salary expenses of employees that participate in activities that generate unallowable costs.Comments are due on/before November 29, 2004.
  
- On September 20, 2004, the Federal Register noticed an advance notice of proposed rulemaking and notice of public meeting and a solicitation of “comments that can be used to assist in the implementation of ...Public Law 108-136 ...to expressly authorize the use of time-and-materials and labor-hour contracts for the procurement of commercial services.... Current policies were designed only to support purchases through firm-fixed price contracts and fixed-price contracts with economic price adjustments. A public meeting will be held on October 19, 2004, from 10:00 a.m. to 4:30 p.m. EST, in the GS Building Auditorium, 1800 F Street, NW, Washington, DC, 20405, to facilitate an open dialogue between the Government and interested parties....” Comments are due on/before November 19, 2004.
  
- On August 18, 2004, the Director of Defense Procurement and Acquisition Policy and the Deputy Chief Financial Officer issued a joint memorandum stating that when a “vendor uses WAWF (Wide Area Workflow) to process vouchers (cost reimbursable, T&M, and Labor Hour contracts), it fulfills all requirements for distribution.”

- On September 13, 2004, the Director of Defense Procurement and Acquisition Policy issued a policy “alert” to “establish new approval levels for sole source orders under FSS (Federal Supply Schedules) and MAC (Multiple Award Contracts) contracts. A Sole Source Justification meeting the requirement of FAR 6.303-2 and approval levels of FAR 6.304 are now required.” Non-DoD ordering agencies must comply with FAR 8.405-6. “Contracting officers must ensure requirements offices provide adequate information to support determinations to waive competition, to include the results of market research and data to support why further competition is not in the government’s best interest.” These changes are effective October 1, 2004 and remain in effect until DFARS changes are made.
- On September 30, 2004, the Federal Register noticed that “DoD is proposing to amend the DFARS to add a clause pertaining to patent rights under contracts awarded to large business concerns for experimental, developmental, or research work. The clause is substantially the same as a clause that is presently found in the FAR, but has been proposed for removal from the FAR (52.227-12, Patent Rights--Retention by the Contractor) because it applies only to DoD.” Proposed changes are in the areas of definitions of “made” and “subject invention,” “Domestic university,” etc. “Small business concern” is deleted, “‘provisional’ and ‘nonprovisional’ have been used to describe a patent application to be filed, instead of the current term ‘initial,’” “‘convey’ has been replaced with the term ‘assign’ with regard to transfer of title to a subject invention.” Comments are due on/before November 1, 2004.
- On September 17, 2004, the Federal Register noticed an “interim rule that amends the DFARS to implement Section 801 of the National Defense Authorization Act for Fiscal Year 2004. Section 801 adds 10 U.S.C. 2382, which places restrictions on the consolidation of two or more requirements of a DoD department, agency, or activity into a single solicitation and contract, when the total value of the requirements exceeds \$5,000,000. The objective of the rule is to ensure that decisions regarding consolidation of contract requirements are made with a view toward providing small business concerns with appropriate opportunities to participate in DoD procurements as prime contractors and subcontractors.” Comments are due on/before November 16, 2004.

The September 30, 2004, Wall Street Journal noted that a report was due from the Democrats on the House Committee on Small Business that federal agencies slightly missed the 23% goal set by law on contracts awarded to small businesses.

On September 30, 2004, the Federal Register noticed a “final rule amending the DFARS to reflect an extension in the expiration date of a partnership agreement between DoD and the Small Business Administration (SBA). The partnership agreement permits DoD to award contracts to 8(a) Program participants on behalf of SBA.”

- Performance Based Contracting continues in the news...
  - On September 9, 2004, the Federal Register noticed that the “Director of Defense Procurement and Acquisition Policy (DPAP) is currently conducting an internal assessment regarding the use of performance-based payments as a method of financing for DoD contracts. As part of this assessment, DPAP would like to hear the views of interested parties on what they believe are potential areas for improving DoD's use of performance-based payments.” Specific areas of input are requested on the following...
    - What should be done to increase the number of contracts that utilize performance-based payments,
    - What should be done to improve the use of performance-based payments on those contracts that provide for such contract financing,
    - Experience in using performance-based payments on DoD contracts, and
    - What they believe to be the most important advantages and disadvantages that performance-based payments have with respect to progress payments.
 Comments are due on/before October 25, 2004.

- On September 7, 2004, the Office of Federal Procurement Policy (OFPP) “issued new goals for the use of PBSA (Performance-Based Service Acquisition) contracts for FY 05. The new goal is 40% of eligible services actions greater than \$25,000 to include contracts, task orders, modifications, and options awarded in FY 05, as measured in dollars. OFPP will be monitoring the DD350 system for compliance. Activities should be crafting Performance Work Statements or Statements of Objectives for new service requirements. There are some exceptions however:
  - (1) Architect-engineering services FSC Code starting with C\*\*\*;
  - (2) Construction FSC Code starting with Y\*\*\*;
  - (3) Utility Services FSC Code starting with S1\*\*;
  - (4) Services that are incidental to supply purchases.
  - (5) Research and development to include Basic Research, Applied Research, Advanced Technology Demonstrations and Validation and Engineering and Manufacturing Development, FSC Codes A\*\*1 through A\*\*5;
  - (6) Professional Medical Services FSC Code starting with Q501 through Q527;
  - (7) Tuition, Registration & Membership fees, FSC Code U005.

“If more than 50% of the requirement is performance based, as measured in dollars, the service can be coded as PBSA.

“OFPP strongly recommends using the "Seven Steps to Performance-Based Service Acquisition" as guidance. It can be found at the following site: [www.acqnet.gov](http://www.acqnet.gov). The Guide is updated regularly by an interagency team. It contains samples and best practices that have been reviewed and selected by the team.

“The...OFPP memorandum for Senior Procurement Executives outlines the FY 05 goals and reporting requirements for PBSA.”

- The GAO issued an August 2004 Report to the Subcommittee on the Readiness and Management Support, Committee on Armed Services, US Senate, on “Opportunities to Enhance the Implementation of Performance-Based Logistics.” Topics include DoD practices do not “reflect the practices of private-sector companies that support expensive and complex equipment with life-cycle management issues,” use of different contract vehicles by private-sector companies, and rights in technical data.
- In response to the October 30, 2003, DoD IG review, “Contracts for Professional, Administrative, and Management Support Services (D-2004-015),” the Director of Defense Procurement and Acquisition Policy issued a memorandum on “Requirements for Service Contracts” calling for “increased vigilance and government oversight during the acquisition planning phase of contracts for services that are planned to be issued on a cost-reimbursement or T&M basis” with the appointment of contracting officer representatives (COR) on such contracts. Further, follow-on contracts should have a determination made
  - “if any portion can be broken out and ordered on a fixed-price basis.... Finally, there is a statutory preference for the use of performance based specifications, which clearly define desired outcomes, as an additional step that facilitates using fixed-price contracts. Fixed-price contracts result in significant cost savings and efficiencies for the Department, including the need for less oversight.”

**COMMENT:** More fixed price contracting? The Navy on September 21, 2004, also issued supplementing direction; however, the Navy cautioned about “always” using fixed price contracts and reminded “contracting officer will make the type of contract decision based on FAR Part 16 and the circumstances of the specific requirement.”

- On September 17, 2004, the Federal Register noticed “an interim DFARS rule ... to implement Section 802 of the National Defense Authorization Act for Fiscal Year 2004. “Section 802 requires DoD to establish a quality control policy for the procurement of aviation critical safety items and the modification, repair, and overhaul of those items.... This interim rule--
  - Identifies the responsibilities of the head of the design control activity for quality control of aviation critical safety items and related services; and
  - Specifies that DoD may enter into a contract for the procurement, modification, repair, or overhaul of an aviation critical safety item only with a source approved by the head of the design control activity.” (emphasis added)
 Comments are due on/before November 16, 2004.
- The September 30, 2004, Wall Street Journal noted that a Defense contractor agreed to a \$6 million settlement over claims that deliverables included prohibited foreign parts rather than US parts.

- Previous Updates have provided information on DoD's Unique Item Identification (UID) initiative. Recent items of potential interest include...
  - Article in the September 20, 2004, Computerworld under the heading, "Boeing Readies RFID (radio frequency identification) Standards for Release to Suppliers in 2005," Boeing is reported "on track to issue a set of radio frequency identification specifications to its suppliers sometime during the first half of next year.... However, there will be no mandate from Boeing requiring suppliers to implement RFID tagging right away...."
  - And Acting Under Secretary of Defense for Acquisition, Technology, and Logistics Michael Wynne is reported to have issued a September 3, 2004, UID "policy documents" that encourages an "'evolutionary approach' to implementing UID policy on existing items in inventory and in operational use.... (According to reports this requires) by fiscal year 2007, (1) all existing serialized assets should be entered into the UID registry, and (2) UID marking capabilities should be established for all existing items and embedded assets so that marking can begin as equipment is returned for maintenance. By Dec. 31, 2010, all UID marking of items and embedded assets in existing items should be completed.... By January 2005, Army, Navy, Air Force, and Defense Logistics Agency CAEs should develop and present to Wynne plans to develop infrastructure, modify Automated Information Systems (AIS), and propose exempted systems that will be phased out of inventory before UID implementation."
  - The September 2004 issue of Electronics Supply & Manufacturing, magazine has an excellent article on DoD implementation of RFID, "Where Is My Ammo?" The role of Savi Technology Inc. in the RFID areas at DoD is highlighted.

**COMMENT:** "Where is your/my stuff?" Are contractors being compensated for retroactive application of UID on pre-2004 contracts?

- The Navy (SPAWAR) has posted its July 2004 "Contract Management Process Guide" at [http://enterprise.spawar.navy.mil/cmpg/public\\_cmpg\\_index.htm](http://enterprise.spawar.navy.mil/cmpg/public_cmpg_index.htm). This Guide covers acquisition planning, solicitation, source selection/evaluation, award (documentation), post-award (contract modification, etc.) processes.
- The 43<sup>rd</sup> Western Briefing Conference on Government Contracting is scheduled for October 28-29, 2004, at the Palace Hotel in San Francisco. Sponsored by the Professional Services Council and the Federal Bar Association, 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.
- The October 1, 2004, electronic version of the Wall Street Journal reports, "Former senior Air Force official Darleen Druyun ...was sentenced today to nine months in prison."

- Decision of potential interest:

In a case that sheds tremendous light on the importance in drafting of arbitration clauses; the interplay of an arbitration clause with other contract provisions; whether, and to the extent, parties/attorneys need/desire to have a “reasoned” arbitration award; and the advocacy role by lawyers, the US 8<sup>th</sup> Circuit Court of Appeals in Stark v. Sandberg, Phoenix & von Gontard, No. 03-2366, 2004 WL 1900319, on August 26, 2004, upheld the award of an arbitrator. The case involved an underlying business investment with a debt secured with a lender that was subject to the Fair Debt Collection Practices and the resulting (alleged wrongful) actions of that lender when the borrower failed to make the required payments. The arbitrator awarded \$6,000,000 in punitive damages and actual damages of \$4,000. In addition to this “must-read” decision whereby the court affirmed those damages, the analysis and discussion should be enlightening in several areas including...

- The grounds for vacating/modifying an award under the Federal Arbitration Act,
- The (federal) non-statutory grounds for vacating an award if found to be in “manifest disregard of the law,”
- The drafting of an exculpatory clause that on its face precluded an arbitral award of punitive damages yet (i) applicable law prohibited limiting such damages for the alleged torts and (ii) the contract permitted borrowers to seek damages to the “fullest extent permitted by law,”
- Contract ambiguities and interpretation of other impacted provisions in the contract.

Opinion is available at <http://caselaw.lp.findlaw.com/data2/circs/8th/032366p.pdf>

## **Recent/Future Publications Include—**

- “The New (and Improved) Article 2 to the UCC,” NCMA [Contract Management](#) magazine, December 2004.
- Visit our website for other articles, [www.Rumbaugh.net](http://www.Rumbaugh.net), from the main menu select “Publications”

## **Future Speaking Topics Include—**

- 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.”
- National Purchasing Institute, Los Angeles, California, "How to get through Impasse—Can Baseball Arbitration be the Answer?"
- NCMA Beach Cities Chapter, "Preparing for the Big Changes to UCC Rules on Contract Formation and Terms of the Deal!"
- NCMA Audio Seminar, “Preparing for the Big Changes to UCC Rules on Contract Formation and Terms of the Deal!”
- University of California, Irvine and NCMA Beach Cities Chapter annual Educational Conference. “Current Contract/Regulatory Issues Affecting Contracting Professionals.”
- ISM—San Diego Affiliate, "Big Changes to UCC Rules on Contract Formation and Terms of the Deal are Around the Corner--Are you Ready?"
- NCMA, San Diego Chapter, "Preparing for the Big Changes to UCC Rules on Contract Formation and Terms of the Deal!"
- ISM—Phoenix, Arizona, Affiliate, "How 'Baseball Arbitration' will help in Negotiating Sole Source Procurements--or how to get through Impasse."
- ISM—Los Angeles Affiliate, "Big Changes to UCC Rules on Contract Formation and Terms of the Deal are Around the Corner--Are you Ready?"
- ISM—San Fernando Valley Affiliate, "Big Changes to UCC Rules on Contract Formation and Terms of the Deal are Around the Corner--Are you Ready?"
- ISM 2005 Annual International Conference, San Antonio, Texas, “May the New (UCC) Force Be With You!”

*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.*