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

1. **DoD LAUNCHES THE NEW PROCEDURES, GUIDANCE, AND INFORMATION AS A “COMPANION” TO THE DFARS.** The Defense Acquisition Regulations System Directorate announced November 1, 2004, “phase one of a web site that enables the DoD to more rapidly communicate internal administrative and procedural information to the acquisition workforce. The new Procedures, Guidance, and Information (PGI) site serves as a companion to the DFARS. PGI is an online resource to help acquisition professionals more effectively and efficiently do their jobs.... PGI was created as a tool to rapidly assist the acquisition community by providing DoD internal procedures and other information that does not require implementation in the formal regulation,” i.e. other than requirements of law, DoD-wide policies, delegations of FAR authorities, deviations from FAR requirements and policies, and procedures that have significant effect beyond the internal operating procedures of the DoD or have a significant impact on the public. PGI is located at <http://www.acq.osd.mil/dpap/dars/pgi/>.

2. **DoD ALSO NOTICES (ADDITIONAL) FINAL RULES AS PART OF ITS TRANSFORMATION INITIATIVE.**

Rules that are final as of November 1, 2004, include the following:

- Publicizing Contract Actions (DFARS Case 2003-D016). “Deletes unnecessary text on cooperative agreement holders, paid advertisements, and synopsis requirements; and relocates a synopsis format to PGI.”
- Cost Principles and Procedures (DFARS Case 2003-D036). “Deletes obsolete and duplicative text on contract cost principles; and relocates procedural text on Government responsibilities relating to contractor restructuring costs to PGI.”
- Laws Inapplicable to Commercial Subcontracts (DFARS Case 2003-D018). “Removes the Trade Agreements Act and the Buy American Act from the list of laws inapplicable to subcontracts for the acquisition of commercial items. Inclusion of these laws on the list is unnecessary, because the Government does not apply the restrictions of the Buy American Act or the Trade Agreements Act at the component level. In addition, inclusion of these laws on the list could be misleading because -- (1) Inclusion of the Buy American Act on the list has sometimes been misinterpreted to mean that commercial components do not count in the calculation of whether domestic components exceed 50 percent of the value of the components of an end item; and (2) Inclusion of both Acts on the list has

sometimes been misinterpreted to mean that the prime contractor need not comply with the Acts for subcontracted end items. Waiver of the Buy American Act or the Trade Agreements Act is not applicable if the prime contractor is reselling or distributing commercial items of another contractor without adding value. The prime contractor is nevertheless responsible for providing an end product that meets the requirements of the Acts.” (emphasis added). DoD notes that no objections were received in response to this when originally published as a proposed rule.

Rules that are final as of November 10, 2004, include the following:

- “Contractor Qualifications Relating to Contract Placement (DFARS Case 2003-D011) Deletes obsolete text pertaining to Intermediate Range Nuclear Forces Treaty inspections; deletes unnecessary first article testing and approval requirements; and relocates procedures for requesting pre-award surveys and obtaining approval for product qualification requirements to PGI.
- “Insurance (DFARS Case 2003-D037) Relocates procedural text on risk-pooling insurance arrangements and requests for waiver of overseas workers' compensation requirements to PGI.
- “Research and Development Contracting (DFARS Case 2003-D067) Deletes unnecessary text on solicitation and contract content; updates statutory references; updates a clause pertaining to contractor submission of scientific and technical reports; and relocates procedures for maintenance of scientific and technical reports to PGI.
- “Acquisition of Commercial Items (DFARS Case 2003-D074) Deletes unnecessary text pertaining to structuring of contracts; and updates a FAR reference.
- “Sealed Bidding (DFARS Case 2003-D076) Deletes unnecessary text on structuring of contracts, providing copies of documents, and preparation of solicitations; and updates the list of officials authorized to permit correction of mistakes in bid.”

3. **DoD ISSUES POLICY ON USE OF Non-DoD CONTRACTS.** The policy memorandum, mentioned in the last Regulatory Update, on DoD use of Non-DoD contracts was issued. The memorandum is entitled, "Proper Use of Non-DoD Contracts," is dated October 29, 2004, and jointly signed by Acting Under Secretary of Defense (Acquisition, Technology, and Logistics) Michael Wynne and the DoD Principal Deputy Under Secretary of Defense (Comptroller) Robert Henke. It “requires the Military Departments and Defense Agencies (to) establish procedures for reviewing and approving the use of non-DoD contract vehicles when procuring supplies and services for amounts greater than \$100,000 (current simplified acquisition threshold). The policy is effective January 1, 2005.” An extensive list of topics that should be covered in those procedures is also provided.

Miscellaneous Items

- On November 10, 2004, the Federal Register noticed a proposal to amend the DFARS regarding the “Geographic Use of the Term ‘United States’ (DFARS Case 2001-D003) (which) proposes to update references to the ‘United States’ and other geographic terms throughout the DFARS. The proposed changes clarify the meaning of these terms and provide consistency with definitions found in FAR 2.101.” Comments are due on/before January 10, 2005.
- On November 1, 2004, the Federal Register noticed a DFARS interim rule regarding the “Transition of Weapons-Related Prototype Projects to Follow-On Contracts (DFARS Case 2003-D106) (which) establishes a pilot program that permits contracting officers to use FAR Part 12 (Acquisition of Commercial Items) procedures to award follow-on contracts for the production of items begun as prototype projects under other transaction agreements. The follow-on contract must be awarded to a nontraditional defense contractor; must not exceed \$50,000,000; and must be either firm-fixed-price or fixed-price with economic price adjustment. This change implements Section 847 of the National Defense Authorization Act for Fiscal Year 2004 and is intended to ease the transition of nontraditional defense contractors from prototype transactions to standard contracts.” Comments are due on/before January 3, 2005.
- On November 1, 2004, the Federal Register noticed a proposal to amend the FAR “to provide for the access and distribution of solicitation requirements or other documents (e.g., technical specifications, maps, building designs, schedules, etc.), when (security related) controls are necessary according to agency procedures, through the Federal Technical Data Solution (FedTedS) website in lieu of the Governmentwide Point of Entry (GPE).” Comments are due on/before January 3, 2005
- Previous Updates have provided information on DoD’s Unique Identification (UID) initiative. An Excellent “note” on the evolution from bar codes to RFID is at: <http://www.manh.com/pdfs/RFID.pdf?PHPSESSID=786ba7671a33ef4710e4011adfd6525#error>
- On October 23, 2004, the Navy Assistant Secretary, Research, Development, and Acquisition, John Young, Jr., issued an important, and exhaustive (42 pages including attachment on “Guidance on Acquisition and Conversion of Product/Technical Data to Digital Form), policy memorandum on “Digital Product/Technical Information.” This memorandum, in part, sets forth an implementation time table for digital formatting for new contracts (as well as modification of existing contracts) and can be accessed at [https://e-commerce.spawar.navy.mil/Command/02/ACQ/navgenint.nsf/policydocs/729AF403C0A2583D88256F4800679FCC/\\$file/Digital_.pdf](https://e-commerce.spawar.navy.mil/Command/02/ACQ/navgenint.nsf/policydocs/729AF403C0A2583D88256F4800679FCC/$file/Digital_.pdf).

- OFPP noticed (www.adr.gov) the OFPP/OMB 2004 ADR competition for agencies and private sector companies with nominations due December 31, 2004.
- On October 22, 2004, Acting Under Secretary of Defense for Acquisition, Technology, and Logistics Michael Wynne issued a memorandum requesting that the Services provide Congressional notification when a determination is made that foreign purchases of titanium are contemplated. Accordingly, that “notification to the Congressional defense committees (should be) 10 days prior to the award of a contract that relies on such a determination for the procurement of titanium or a product containing titanium....”
- The ABA Public Contract Law Section letter expressing concerns on “the substantial revision of the US Postal Service (USPS) purchasing regulations” is posted (as well as USPS reply) on the Section website at <http://www.abanet.org/contract/federal/regscmm/home.html>. This website is an excellent resource/access to past letters that the Section has sent on prior regulatory/policy issues. Also, see below.
- On October 4, 2004, Acting Under Secretary of Defense for Acquisition, Technology, and Logistics Michael Wynne issued a “reminder” memorandum on DPAS rating and using the DX rating for contracts, i.e. ensure that the contract rating corresponds to the (approved) program DPAS rating.
- The Army announced that a public meeting will be held on **December 7, 2004**, involving “surge planning and contracting issues with Army in support of unforeseen operational requirements. The Assistant Secretary of the Army for Acquisition, Logistics and Technology would like to hear the views of interested parties regarding the improvement of Army's ability to acquire needed but unforeseen operational requirements for producing additional weapon systems, parts, and services. Possible issues include procedures for establishing the meaningful contract options or other commitments without the need to have a legal reservation of funds. Other issues include an inability to forecast these requirements with precision, buying from nontraditional suppliers, buying nonstandard items and other issues submitted by attendees.” The meeting will be from 1:00-5:00 in the Presidential Towers, Army Conference Room 11100, 11th Floor, located at 2511 Jefferson Davis Highway, Arlington, VA.
- The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council announced that a public meeting will be held on November 23, 2004, in order “to facilitate an open dialogue between the Government and interested parties on proposed amendments to the Federal Acquisition Regulation regarding hazardous material safety data”—draft final rule is available at http://www.acq.osd.mil/dpap/dars/pdfs/FAR_Case_1998_020.pdf). The meeting will be from 9:00-4:00, in Room 5141A, General Services Administration, 1800 F Street, NW, Washington, DC. Interested parties may register, etc. at <http://www.acq.osd.mil/dpap/dars/coming.htm>.

- The Air Force issued AFAC 2004-1103 which updates the AFFARS as well as providing “new Informational Guidance (IG5307.104-93) on how to implement and operate Air Force commodity councils.”

- Decisions of potential interest:
 - The US Supreme court decision of November 9, 2004, in Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd. (No. 02-1028 <http://laws.findlaw.com/us/000/02-1028.html>) may be of interest for those situations where the risk associated in shipping transactions, and allocation of same by contract, is of importance. A maritime bill of lading limiting liability for containers was found to also cover the shipper’s independent subcontractors, effectively preempted local state law by federal admiralty law for an accident that occurred over the land leg of the sea/land shipment.

 - A Marine Reservist may not waive his right to a jury trial under the Uniformed Services Employment and Reemployment Rights Act and therefore is not subject to binding arbitration of an employee/employer dispute. Michael Garrett v. Circuit City Stores Inc., 2004 WL 2358284 (U.S. Dist. Ct., N.D. Tex., Oct. 19, 2004).

 - And, as a reminder on good drafting and contract management practices, the U.S. 5th Circuit Court of Appeals in BOTT v. J.F. SHEA CO. (10/19/04 - No. 03-41305) involved a suit for breach of a subcontract resulting from the (alleged) failure to procure insurance. Summary judgment in favor of defendant-contractor was reversed where that contractor was deemed to have waived its contractual right to require the subcontractor to obtain insurance. Must reading! <http://caselaw.lp.findlaw.com/data2/circs/5th/0341305p.pdf>

- At the recent ABA Public Contract Law Section Council meeting it approved the Section’s Strategic Alliances, Teaming and Subcontracting Committee’s “highly successful” Guide to Fixed-Price Supply Subcontract Terms and Conditions. Publication and website posting will be forthcoming. All Contracts and Supply Chain professionals should have a copy readily available!

COMMENT: The recently reported substantial decrease in agricultural exports and corresponding substantial increase in imports of same, when coupled with increasing imports of consumer items, will add increased pressure on the US dollar and domestic borrowing. This should provide greater opportunities for exports of military/defense systems and should be pursued in order to (also) stem the (in)balance of payments.

- Noted:
The passing of Chuck Culver—good friend and associate of many in the acquisition community. Long time member of professional associations including NCMA and supporter of numerous NCMA educational endeavors including its SW Regional Chapters. He was employed in senior positions in the airline industry and later with the Aerospace Corporation as its Director of Contracts. He was the moving force for the Contract Management Program at Northrop University and an active member on several Contracts and Supply Chain Advisory Committees including those at California State University, Northridge.

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, from the main menu select “Publications”

Future Speaking Topics Include—

- 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?"
- NCMA Finger Lakes Chapter, Rochester, New York, "Preparing for the Big Changes to UCC Rules on Contract Formation and Terms of the Deal."
- ISM 2005 Annual International Conference, San Antonio, Texas, “May the New (UCC) Force Be With You!”

Items summarized in these 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.