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September 8, 2004 Regulatory Update  
Volume Nine, Tenth Issue  
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Recent Regulatory matters that may be of interest since the last Update include---

- Assistant Secretary of the Air Force Marvin Sambur issued a memorandum on August 26, 2004, on the subject of “Contractor vs NAF (Non-Appropriated Fund) Memorandum of Agreement (MOA) Performance.” The Air Force placed, in effect, an immediate moratorium on conversion of “contractor-performed services to performance by Non-Appropriated Fund Instrumentality (NAFI) program employees under NAF MOA.” Those services in the past had involved several Air Force bases as well as functions and were purportedly “legally permissible.” The memorandum notes the adverse impacts on current contractors, socioeconomic consequences on small businesses, etc.  
**COMMENT:** Many in industry supported this development. How often does policy (“small person”) “win-out” over “creative/legalistic” changing of the pay structure for critical support individuals?
- The Defense Finance and Accounting Service in Columbus, Ohio, issued a memorandum on the subject of “Electronic submission of Payment Requests, Policy Number 03-CP-04.” This memorandum provides needed electronic payment guidance for DFARS 252.232-7003 (March 2003) covering the requirement that “all new contracts awarded October 1, 2003, or later, should include DFARS 252.232-7003” and, if not, those contracts should be modified to include it. Except in limited situations, contractors will have hard copy invoices returned without payment! In the absence of electronic invoices the DFARS stipulates that the parties must mutually agree to alternative payment method—usually a temporary situation.  
**COMMENT:** Some were “wondering” when/if DFAS was going to be the “gatekeeper” for electronic invoicing—it has arrived by this guidance! Contractors are being advised by their industry organizations to take the “internal steps necessary to submit all payment invoices electronically.” Also, see prior Updates on the topic.
- Acting Under Secretary of Defense, Acquisition Technology and Logistics Michael Wynne on August 16, 2004, issued a memorandum on the subject of “Performance Based Logistics (PBL): Purchasing Using Performance Based Criteria.” PBL “performance” guidance criteria is specified in the memorandum for the areas of operational availability, operational reliability, cost per unit usage, logistics footprint, and logistics response time. Metrics are encouraged.

- Decisions of potential interest:
  - *China Nat'l Metal Prods. v. Apex Digital, Inc.*, No. 03-55231 (9<sup>th</sup> Cir. August 16, 2004) Defendant's appeal of an arbitral award obtained against it following an arbitration proceeding in Beijing is dismissed over its contention that the China International Economic and Trade Arbitration Commission disregarded the parties' arbitration clause by permitting separate arbitration of the claims/counterclaims. Each "claimant" had a choice by the terms of this arbitration clause and elected to proceed against the other in a different venue.
 

**COMMENT:** A not atypical international issue/case where draftsmanship is "an" issue. Be careful how the forum/venue, etc. provisions are drafted. If arbitrations are contemplated to be expedited and "final," one could "unfortunately" end up with two arbitrations—one for the claim and one for the counterclaim.
  - *Azteca Construction v ADR Consulting*, (Cal. App. 4th August 25, 2004). Provisions for arbitrator disqualification established by the California Arbitration Act may not be waived or superseded by a private contract.
 

**COMMENT:** Again, drafting is important. However, here having an appropriate "law for the arbitrator" to follow may be helpful, having an appropriate "severability" provision, AND arguing that the Federal Arbitration Act trumps local law may have been apropos.

But it should be noted that specific affirmative answers to specific questions under the cited California Act (court draft implementation rules) call for "automatic" disqualification of the arbitrator(s)—interestingly, one ground is where a party had previously appeared before the arbitrator. Will the automatic disqualification of so-called "repeat" performers by arbitrators (notwithstanding qualifications) reduce the pool of highly qualified arbitrators to "nothing"? At the same time the courts are not "obligated" to be disqualified for "repeat" performances? Are some States "hostile" to arbitrations—exactly what the FAA was intended to correct with its enactment—almost 80 years ago? Consult counsel.
  - *US ex rel Edward L. Totten v. Bombardier Corporation and Envirovac, Inc.*, DC Cir. No. 03-7128, August 27, 2004, where Amtrak is determined not to be part of the US Government and, thus, a false claim was not submitted to the "Government."
- On August 23, 2004, the Federal Register noticed a proposed amendment to the FAR "to establish that a copy of an original power of attorney, including a photocopy or facsimile copy, when submitted in support of a bid bond, is sufficient evidence of the authority to bind the surety. The authenticity and enforceability of the power of attorney at the time of the bid opening will be treated as a matter of responsibility." Comments are due on/before October 22, 2004.

- On September 2, 2004, the Federal Register noticed a proposed FAR rule which “proposes to amend FAR 19.1103(a) and FAR 19.1307(b) in order to remove the exceptions to the Small Disadvantaged Business (SDB) and HUBZone preference programs that direct the contracting officer not to apply a price evaluation adjustment to offers of eligible products in acquisitions subject to the Trade Agreements Act (19 U.S.C. 2501, et seq.) or where application of the factor would be inconsistent with a Memorandum of Understanding (MOU) or other international agreement.” This proposal was requested by the SBA “in order to remove some of the exceptions to the applicability of the Small Disadvantaged Business (SDB) and HUBZone price evaluation factor.” Comments are due on/before November 1, 2004.
- Last month’s Update stated that “another issue associated with Unique Item Identification (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....’” On August 23, 2004, the Director responded with an “overview” of FAR coverage on “authorization and consent,” etc. and asking that that industry association provide more specifics on “how (cited FAR) procedures fail to adequately address these issue in the context of the UID initiative.”

**COMMENT:** The Director is scheduled to speak before the Los Angeles/South Bay NCMA Chapter on September 22, 2004—info at <http://www.ncmalasb.org/>. Is this an opportunity to raise UID/RFID issues?

And, the National Defense Industrial Association (NDIA) has partnered with the Defense Acquisition University and other elements of the Department of Defense, members of defense industry, and a variety of UID/RFID vendors to present a UID/RFID Seminar on Friday, September 24, 2004 from 8:00 a.m. to 4:00 p.m. This full-day seminar is being presented at the Anaheim Convention Center, Anaheim, California.

Again, see prior Updates on UID/RFID.

- Visiting the Air Force ADR website <http://www.adr.af.mil/> one is reminded of the various and numerous AF/Prime Contractor agreements (corporate and program unique) embedding overarching principles between the signatories on the use of ADR. Noticeable is the absence is any reference to subcontractors. Those subcontractors having any concern on using ADR may want to visit this AF website and ascertain whether your higher tier customer has executed any such mutual commitment and, thus, reflecting a corporate policy to use ADR.
- The next DoD/Industry Defense Acquisition Excellence Council meeting is scheduled for September 21, 2004, in Washington, DC.

- On September 1, 2004, DoD “announced an important step forward in its efforts to align mission and environmental stewardship by issuing a new ‘green procurement’ policy. The policy affirms a goal of 100 percent compliance with federal laws and executive orders requiring purchase of environmentally friendly, or ‘green,’ products and services. The policy also outlines a strategy for meeting those requirements along with metrics for measuring progress....”
- The WTO dispute resolution mechanism is moving forward (again). Anti-dumping tariffs have been collected and “reimbursed” to an affected US industry—and found to be improper under WTO. Accordingly, absent some other resolution, the “complaining” countries will be able to assess tariffs on (unrelated) US exports to their countries.

**COMMENT:** New meaning to tic-for-tac? As noted in previous Updates, the pricing of products needs to consider the potential impact of WTO (as well as contractual language), other free trade agreements, etc. on products, i.e. products unrelated those involved in an international trade dispute!

For example, when the quotas on textiles expire January 1, 2005, will your company be impacted?

Discuss with counsel.

- Last month’s Regulatory Update announced the Navy/Marine Corps Award Fee Guide (July 2004). A reader provided the following summary of that Guide:

“The Guide provides information on the development of award fee plans, management of the process, evaluating contractor performance and determining the award fee to be paid. In the appendices, it also offers an Award-Fee Plan template, sample evaluation criteria, references, and the all-important ‘Lessons Learned.’

“Some of the important topics the Guide covers:

- The selection criteria,
- When and how to include a base fee,
- How to administer the Award Fee pool,
- The roles and responsibilities of the various players in the Award Fee process,
- The Award Fee Plan, and
- The Award Fee Evaluation Process

“An award-fee arrangement rewards good performance, incentivizes a contractor to improve performance, and records the Government’s assessment of the contractor’s performance. Contracts containing the award-fee incentive require additional administrative and management effort and should only be used when the contract amount, performance period, and expected benefits warrant the additional administrative and management effort. Also, keep in mind that the award-fee must be

sufficient to provide motivation for excellence in such areas as quality, timeliness, technical ingenuity, and cost-effective management to be effective and worth the effort!

“It is important to remember that, ‘since the available award fee during the evaluation period must be earned, the contractor begins each evaluation period with 0% of the available award fee and works up to the evaluated fee for each evaluation period. Contractors do not begin with 100% of the available award fee and have deductions taken to arrive at the evaluated fee for each evaluation period. However, the potential for the contractor to earn 100% of the award fee amount should be a mutual goal as it demonstrates the program’s objectives were clearly communicated and achievable.’

“Things to consider when determining if an award-fee contract is worthwhile or feasible for your acquisition:

- Complexity of the work and the resources required for contract performance.
  - Reliability of the cost estimate in relation to the complexity and duration of the contract task.
  - The performance factor you are attempting to improve or goal you are attempting to obtain and the motivation necessary to make that happen.
  - The degree of cost responsibility and associated risk that the contractor will assume because of a contract with an award-fee clause.” (emphasis added)
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- The University of San Diego is hosting its 19th Annual Strategic Supply Chain Management Forum on September 30-October 1, 2004. Additional program and registration info is available at <http://scmi.sandiego.edu/events/forum2004/index.htm>. This year’s program focuses on the development and management of supply alliances.
  - 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. 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.

- Noted:
  - The passing of Helen Copley—former trustee member of the Howard Hughes Medical Institute.
  - The passing of Robert Langdon, Jr.— Architect of the substantial Hughes Aircraft facility (>2 million square feet) in El Segundo which provided a “home” for the former Culver City corporate site of Hughes and relocation of over 10,000 employees.

### **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?"
- November 9, 2004, NCMA Beach Cities Chapter, "Preparing for the Big Changes to UCC Rules on Contract Formation and Terms of the Deal!"
- 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, "Big Changes to UCC Rules on Contract Formation and Terms of the Deal are Around the Corner--Are you Ready?"
- May 8-11, 2005, ISM 2005 Annual International Conference, San Antonio, Texas, “May the New (UCC) Force Be With You!”
- 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.*

*Information on arranging speaking/teaching engagements in connection with the above items and/or various aspects of Alternative Dispute Resolution (ADR) and basic/advanced negotiation techniques— seminars/workshops—may be arranged by sending a message to ADROffice@Rumbaugh.net*