

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

December 2, 2005, Regulatory/Contractual Update
Volume Ten, Ninth Issue
© MMV Charles E. Rumbaugh

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

- The Court of Federal Claims has released its November 30, 2005, decision in the *ATK Thiokol, Inc. v United States* (No. 99-440C) case, ruling in favor of the plaintiff, ATK Thiokol— a “case centered around determining what technical effort qualifies as IR&D and whether particular efforts are required in the performance of a contract.”

COMMENT: Talk to counsel on this important decision that should incentivize R&D! Opinion available upon request as well as being posted (soon) on www.findlaw.com. Earlier, OFPP had requested that DoD “look at” its FAR Case on allowability of B&P costs—with an “answer” forthcoming.

- President Bush issued a Proclamation on November 3, 2005 revoking the suspension of the application of the Davis-Bacon Act (issued on September 8, 2005) in those areas of Louisiana, Mississippi, Alabama, and Florida affected by Hurricane Katrina. On November 17th, the Department of Labor (DOL) provided implementation guidance with the reinstatement effective for all prime contract bid openings or negotiations concluded prior to November 8, 2005. Also, subcontracts awarded subsequent to November 7th under previously awarded “suspension” contracts are not required to comply with prevailing wage determination. Guidance is located at <https://www.safaq.hq.af.mil/contracting/affars/5322/mandatory/dba-reinstatement.pdf>

And, on a related item, the DoD Chief Acquisition Officers Council issued on November 16, 2005, a message to all Agency Chief Acquisition Officers and Agency Senior Procurement Executives concerning wage determinations on-line. This “heads-up” noted the August 26, 2005, DoL publication of “a final rule (effective September 26, 2005) amending regulations to fully implement the Wage Determinations OnLine (WDOL) website (<http://www.wdol.gov/>). The website serves as the source for federal contracting agencies to use when obtaining wage determinations issued by the DOL for service contracts subject to the Service Contract Act, and construction contracts subject to the Davis-Bacon Act and related statutes. An amendment to the FAR is in process and, upon publication, will revise the wage determination processes in the FAR to comply with the new DOL regulations. Effective immediately, all agency contracting officers may use the website for the purposes of obtaining wage determinations for official contract actions and forego submitting the paper request to DOL.”

- The response date to the September 26, 2005, Federal Register notices to amend the FAR “to expressly authorize the use of time-and-materials (T&M) and labor-hour (LH) contracts for certain categories of commercial services under specified conditions” and payments under those types of contracts has been extended to December 9, 2005.
- On October 21, industry association representatives “met at the U.S. Chamber of Commerce for a roundtable discussion on SAFETY Act implementation issues with Department of Homeland Security Under Secretary Charles McQueary. Of particular interest to attendees was the industry-developed Streamlined SAFETY Act Application Kit, which was sent to Dr. McQueary’s office in early September.... Industry’s overarching concern with the SAFETY Act is the lack of alignment between the SAFETY Act application process and the normal procurement process.” Industry has not received a reply to its submittal to DHS.
- Military Handbook 881A (MIL-HDBK-881A), Work Breakdown Structures for Defense Material Items, “has been updated to reflect advances in technology, changes to the acquisition process, and new development concepts and approaches.” See [https://e-commerce.spawar.navy.mil/Command/02/ACQ/navgenint.nsf/policydocs/307EED894E45E51C882570C20064F9A4/\\$file/MIL-HDBK-881A+FOR+PUBLICATION+FINAL+09AUG05.pdf](https://e-commerce.spawar.navy.mil/Command/02/ACQ/navgenint.nsf/policydocs/307EED894E45E51C882570C20064F9A4/$file/MIL-HDBK-881A+FOR+PUBLICATION+FINAL+09AUG05.pdf)
- OMB noticed a solicitation of input on the topic of “guidance documents” and the growth of same by agencies. OMB will be developing guidance on the developing, issuance, and use of same. Comments are due on/before December 23, 2005.

COMMENT: Concerned by the proliferation of unregulated guidance documents including the absence of requisite reviews before issuance, no Paperwork Reduction Act approvals, nor Federal Register publication and required transparency, etc.? Do you have the necessary visibility in the process?
- On November 9, 2005, DoD noticed in the Federal Register a DFARS proposal “to update text addressing contract administration functions.” This effort is part of the DoD Transformation Initiative. The proposed changes include
 - Update the list of DoD contract administration functions to clarify responsibilities for payment administration and for verification of contractor compliance with earned value management system requirements;
 - Delete obsolete text on mobilization production planning surveys; and
 - Delete procedures for designation of contract payment offices. Text on this subject will be relocated to the new DFARS companion resource, Procedures, Guidance, and Information (PGI).

Comments are due on/before January 9, 2005.

COMMENT: Concerned by who has the “warrant” in determining how to price/invoice for subcontractor services under a T&M contract, who has the “warrant” in determining overhead rates, etc.?

- On October 3, 2005, DoD issued Instruction 3020.41 concerning policy/procedures addressing contractor/subcontractor personnel authorized to deploy with US Armed Forces in combat situations. “It serves as a comprehensive source of DoD policy and procedures concerning DoD contractor personnel authorized to accompany the U.S. Armed Forces. This includes defense contractors and employees of defense contractors and their subcontractors at all tiers under DoD contracts, including third country national (TCN) and Host Nation (HN) personnel, who are authorized to accompany the U.S. Armed Forces under such contracts.”

And “DoD has issued an interim rule (DFARS Case 2005-D007) amending the DFARS to implement Section 1092 of the National Defense Authorization Act for Fiscal Year 2005. Section 1092 requires that DoD contractor personnel who interact with detainees receive training regarding the applicable international obligations and laws of the United States. This interim rule adds policy at DFARS 237.171 and a contract clause at DFARS 252.237-7019, Training for Contractor Personnel Interacting with Detainees, to implement Section 1092 of the National Defense Authorization Act for Fiscal Year 2005 (Pub. L. 108-375). Section 1092 requires DoD to prescribe policies to ensure that members of the Armed Forces, and all persons acting on behalf of the Armed Forces or within facilities of the Armed Forces, treat persons detained by the U.S. Government in a humane manner consistent with the international obligations and laws of the United States. These policies must include requirements for training of DoD contractor personnel interacting with detainees.... The combatant commander is responsible for providing the training to the individual contractor employee, but the employee and contractor must retain copies of the training receipt through contract close out.”

Further, on October 12, 2005, the ABA Public Contract Law Section sent a letter and a white paper to the Army on Contractor employees performing in “Battle Space” which expressed the concern and need for a coordinated policy. See http://www.abanet.org/contract/federal/regscmm/emerging_007.pdf

- DoD has developed an Unique Item Identification toolkit—<http://www.iuidtoolkit.com/>
- DoD has posted several policy memos on Katrina (as well as other interesting topics) at <http://www.acq.osd.mil/dpap/policy/policyvault/policy.jsp>
- The Navy has issued its annual “Memorandum of Decision under Public Law 85-804” (dated September 22, 2005) which covers the permitted scope of indemnification for prime contractors and subcontractors for specified Navy programs. See <http://acquisition.navy.mil/navyaos/content/view/full/4019>
- A rewrite of FAR Part 30 is expected to be released by the DAR Council for review by the Civilian Council in Spring 2006.

- The recent Industry/DCMA “Crosstalk” had some interesting discussion items:
 - How DCMA can have visibility on the quality/inspection related issues associated with subcontractors when there is an absence of privity? What is the “proper” role of DCMA in subcontract management arena?
 - The Wide Area Workflow (WAWF) “problems” have been resolved with the December issuance of version 3.09 that includes a government property module—this purportedly eliminates the need for DD 1662s.
 - The challenges associated with “private contractors” being subcontracting/partnering to government entities—remains an open issue.

- The Air Force issued a memorandum on October 25, 2005, on “Potential Post-Employment Ethics Liability of Requirements Personnel.” A recent AF IG “investigation” resulted in the IG concluding that the “conventional wisdom on how post-employment ethics rules apply to requirements and procurement work is not well understood by employees or contractors.” Points of contact for additional info are Ms. Jane Love at Jane.Love@pentagon.af.mil or Mr. Greg Snyder at Gregory.snyder@pentagon.af.mil.

- A revised September 2005 CPARs—superseding the February 2004 Guide—has been issued. “There were extensive revisions, so the February 2004 Guide is totally replaced.” Major changes have been identified as including the following:
 - Consolidation and streamlining of the roles and responsibilities of the focal points and assessing officials
 - Links in the Table of Contents and text
 - Additional reporting guidance when an award fee clause is in the contract
 See <https://www.safaq.hq.af.mil/contracting/affars/5342/informational/cpars-guide-sep05.doc>
 COMMENT: See item above on OMB and “guidance” documents.

- On November 18, 2005, CODSIA, provided a 67 page response to the September 19, 2005, Federal Register FAR proposal which addressed proposed “radical changes” in the overall approach to the way the Federal Government manages government property.

- Noted the passing of good friend and former NCMA President Greg MacFarlan.

Consolidated Overview of Recent DFARS and FAR Change Notices—

- On November 9, 2005, the Office of the Director of Defense Procurement and Acquisition Policy published DFARS Change Notice 20051109 covering the following final rules except where noted (summaries available upon request).
 - Information Technology Equipment - Screening of Government Inventory (DFARS Case 2003-D054).
 - Acquisition of Telecommunications Services (DFARS Case 2003-D055).
 - Update of Clauses for Telecommunications Services (DFARS Case 2003-D053).
 - Contract Administration (DFARS Case 2003-D023).
 - Contract Modifications (DFARS Case 2003-D024). Deletes unnecessary text on contract modifications; clarifies procedures for determining if a request for equitable adjustment requires contractor certification; and relocates to PGI, procedures for identifying foreign military sales requirements, for obligating or deobligating contract funds, and for review and definitization of change orders.
 - Subcontracting Policies and Procedures (DFARS Case 2003-D025).
 - Extraordinary Contractual Actions (DFARS Case 2003-D048).
 - Amends the clause at 252.211-7005, Substitutions for Military or Federal Specifications and Standards, to update the Internet address for obtaining a list of processes accepted under the DoD Single Process Initiative.
 - Contract Administration Functions (DFARS Case 2003-D051)—proposed change. (Comments are due on/before January 9, 2006).

- On October 11, 2005, the Office of the Director of Defense Procurement and Acquisition Policy published DFARS Change Notice 20051011 covering a final rule on Payment and Billing Instructions (DFARS Case 2003-D009). “Improves procedures for payment and billing under DoD contracts. The revisions include: (1) addition of a contract clause addressing line item information needed in contractor payment requests; (2) amendment of material inspection and receiving report requirements to update invoice instructions; and (3) relocation of text addressing distribution of contracts and numbering of contract line items to PGI. In addition, to eliminate the need for non-standard local payment clauses, a list of standard payment instructions has been added to PGI for use in Section G of the contract.”

- On September 30, 2005, DoD published DFARS Change Notice 20050930 covering the following rules (summaries available upon request).
 - Prohibition of Foreign Taxation on U.S. Assistance Programs (DFARS Case 2004-D012)—interim rule.
 - Extension of Partnership Agreement - 8(a) Program (DFARS Case 2005-D020)—final rule.
 - Defense Logistics Agency Waiver Authority (DFARS Case 2005-D019)—final rule.
 - Quality Control of Aviation Critical Safety Items and Related Services (DFARS Case 2003-D101)—final rule.
 - Central Contractor Registration (DFARS Case 2003-D040).
 - Advisory and Assistance Services (DFARS Case 2003-D042)—final rule.

- On September 16, 2005, DoD published DFARS Change Notice 20050916 covering the following final rules (summaries available upon request).
 - Multiyear Contracting (DFARS Case 2004-D024).
 - Provision of Information to Cooperative Agreement Holders (DFARS Case 2004-D025).

- On September 30, 2005, Federal Acquisition Circular (FAC) 2005-06 was issued and amends the Federal Acquisition Regulation (FAR) with the following final rules (summaries available upon request).
 - Information Technology Security (FAR Case 2004-018).
 - Improvements in Contracting for Architect-Engineer Services (FAR Case 2004-001).
 - Title 40 of United States Code Reference Corrections (FAR Case 2005-010).
 - Implementation of the Anti-Lobbying Statute (FAR Case 1989-093).
 - Increased Justification and Approval Threshold for DoD, NASA, and Coast Guard (FAR Case 2004-037).
 - Addition of Landscaping and Pest Control Services to the Small Business Competitiveness Demonstration Program (FAR Case 2004-036).
 - Powers of Attorney for Bid Bonds (FAR Case 2003-029).
 - Expiration of the Price Evaluation Adjustment (Interim) (FAR Case 2005-002).
 - Accounting for Unallowable Costs (FAR Case 2004-006).
 - Reimbursement of Relocation Costs on a Lump-Sum Basis (FAR Case 2003-002).
 - Training and Education Cost Principle (FAR Case 2001-021).

- On July 27, 2005, Federal Acquisition Circular (FAC) 2005-05 was issued and amends the Federal Acquisition Regulation (FAR) covering the following rules (summaries available upon request).
 - Definition of Information Technology (FAR Case 2004-030).
 - Documentation Requirement for Limited Sources under Federal Supply Schedules (FAR Case 2005-004).
 - Payment Withholding (FAR Case 2004-003).
 - Confirmation of HUBZone Certification (FAR Case 2005-009).
 - Government Property Rental and Special Tooling (FAR Case 2002-015).

- On June 8, 2005, Federal Acquisition Circular (FAC) 2005-04 was issued and amends the Federal Acquisition Regulation (FAR) with the following rules coupled (summaries available upon request).
 - Notification of Employee Rights Concerning Payment of Union Dues or Fees (FAR Case 2004-010).
 - Telecommuting for Federal Contractors (FAR Case 2003-025).
 - Incentives for Use of Performance-Based Contracting for Services (FAR Case 2004-004).
 - Submission of Cost or Pricing Data on Noncommercial Modifications of Commercial Items (FAR Case 2004-035).

- Applicability of SDB and HUBZone Price Evaluation Factor (FAR Case 2003-015).
- Labor Standards for Contracts Involving Construction (FAR Case 2002-004).
- Deferred Compensation and Postretirement Benefits Other Than Pensions (FAR Case 2001-031).
- Gains and Losses (FAR Case 2004-005).

- **Items of potential interest in contract negotiation and drafting/management—**

- Noted “Liability Caps” being initiated by accounting/auditing firms whereby their audits are “subject to alternative dispute resolution procedures and an exclusion of punitive damages.” Are “your” engagement letters being reviewed by legal counsel and are appropriate ADR provisions being negotiated?
- Any “extra” procurement integrity and due diligence needed due to the revelations/plea agreement by former Congressman Randy Cunningham? How are your subcontracts being reviewed and priced? Are all contracts being priced to satisfy the FAR required “fair and reasonable” standard?
- The European Union is reported to have “reversed” some direction on sharing of airline passenger information with US authorities—does this impact employment movement between the States and Europe?
- Noted proposed Congressional legislation may bar tax deductions for “punitive damages and parts of government settlements.” Apparently the concern is a current practice of negotiating settlement agreements that may result in some partial tax deductions that are not currently deductible when paid in the absence of a settlement agreement. What impact will this have to mediations and other forms of ADR? Talk to counsel.
- The on-going “dispute/dialogue” continues between the European Community and the United States over purported aircraft subsidies. Will other industries be indirectly, or adversely, affected through, e.g. increased tariffs, if resolution is not achieved?
- On November 16, 2005, the Air Force issued a memorandum “suggesting” that Contracting Officers, in view of “budget constraints,” consider the “stretching” the currently available funds by incrementally funding existing service contracts. While the memorandum refers to the need for a (purported) no cost agreement with contractors for an amendment to existing contracts in order to incorporate the applicable clause at DFARS 252.232-7007 including the requirements of obtaining the HCA approval, contractors should be cognizant of the requirements of DFARS 232.703-1 which provides the conditions on use of this technique. First, it is not a mandatory technique, nothing therein provides that the amendment be at “no cost,” and, where applicable, the approval of the HCA can only be for “base services contracts or hazardous/toxic waste remediation contracts.” Talk to counsel.

Future Speaking Topics Include—

- “Thinking Again For The First Time About Advocacy In Arbitrations,” various Bar meetings.
- Beach Cities NCMA Chapter, “Go Ahead, Make my (Contract) Day!”
- ISM Arizona Affiliate, "Big Changes to UCC Rules on Contract Formation and Terms of the Deal are Around the Corner—Are You Ready?"
- NCMA Atlanta, Georgia, National Educational Seminar, "Contract Negotiations."
- Tampa Bay Suncoast NCMA Chapter, “Contracts and ADR.”
- NCMA World Congress, Atlanta, Georgia, "Drafting the Ultimate ADR Clause for Government Subcontracts.”

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.

Information on arranging speaking/teaching engagements in connection with 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