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January 3, 2005 Regulatory/Contractual Update
Volume Ten, First Issue
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Happy New Year!

Below are recent Regulatory/Contractual matters that may be of interest. However, this issue marks the beginning of the 10th year of publication. Thank you for your support and submissions whereby each and every month you reaffirm the notion that this is truly a “reader-supported” endeavor—without those submissions, this Update would not exist!

- On December 29, 2004, the Federal Register noticed a “public meeting to address ‘Privacy and Security Issues in a Common Identification Standard for Federal Employees and Contractors’ and will focus on the specific issues raised in Homeland Security Presidential Directive (HSPD)-12 (with the intent of) establishing a mandatory, Government-wide standard for secure and reliable forms of identification issued by the Federal Government to its employees and contractors (including contractor employees).... The public meeting is on January 19, 2005, from 8:30 a.m. to noon at the Auditorium of the Potomac Center Plaza, 550 12th Street, SW., Washington, DC 20202. The meeting is open to the public.... All attendees must pre-register and present government-issued photo identification to enter the building....” Contact/registration information is available from Sara Caswell, sara@nist.gov or contacting her at 301-975-4634.

COMMENT: This government (digitally stored photo/fingerprint) identity card program could involve contract/pricing issues.

- On December 20, 2004, the Federal Register noticed Federal Acquisition Circular 2001-26 covering several final rules including the following:
 - Electronic Representations and Certifications (FAR Case 2002-024). “This final rule requires offerors to provide representations and certifications electronically via the Business Partner Network (BPN) website; to update the representations and certifications as necessary, but at least annually to keep them current, accurate and complete....” On December 17, 2004, Deidre Lee, Director of Defense Procurement and Acquisition Policy issued a related memorandum on this requirement.
 - Notification of Employee Rights Concerning Payment of Union Dues or Fees (FAR Case 2004-010). “This interim rule amends FAR Parts 2, 22, and 52 to implement Executive Order (E.O.) 13201, Notification of Employee Rights Concerning Payment of Union Dues or Fees, and Department of Labor regulations at 29 CFR part 470. The rule requires Government contractors and subcontractors to post notices informing their employees that under Federal law they cannot be required to join a union or maintain membership in a union to retain their jobs.”

- Special Emergency Procurement Authority (FAR Case 2003-022). This final rule “increases the amount of the micro-purchase threshold and the simplified acquisition threshold for procurements of supplies or services by or for an executive agency that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or the recovery from nuclear, biological, chemical or radiological attack....” These latter acquisitions can also be treated as “commercial items.”

On November 24, 2004, Deidre Lee, Director of Defense Procurement and Acquisition Policy issued a memorandum on these increases and stated, for outside the United States, the micro-purchase threshold is \$25,000 and the simplified acquisition threshold is \$1,000,000 for the specified procurements.

- Excluded Parties List System Enhancement (FAR Case 2002-023). “This final rule amends the FAR to incorporate the Excluded Parties List System (EPLS), GSA's new searchable on-line electronic list of parties excluded from doing business with the Federal Government.”
 - Applicability of the Cost Principles and Penalties for Unallowable Costs (FAR Case 2001-018). “This final rule increases the threshold at FAR 42.709(b) and FAR 42.709-6 from \$500,000 to \$550,000 for contracts subject to penalties if a contractor includes expressly unallowable costs in a claim for reimbursement.”
- On December 23, 2004, Acting Under Secretary of Defense (Acquisition, Technology and Logistics) Michael W. Wynne, issued a policy update on Unique Identification (UID) on legacy items with the out-year schedule on UID markings for personal property in inventory and GFP. Also, the January-February 2005 issue of “Defense AT&L” has an excellent article on UIDs.

The November 18, 2004, issue of the Wall Street Journal had an article on the “difficulty” of Wal-Mart suppliers complying with RFID requirements.
 - On December 28, 2004, the Federal Register noticed Federal Acquisition Circular 2001-27 covering an interim rule (effective January 1, 2005) on Free Trade Agreements--Australia and Morocco which “allows contracting officers to purchase the products of Australia and Morocco without application of the Buy American Act if the acquisition is subject to the Free Trade Agreements.”
 - On December 20, 2004, the Federal Register noticed the GAO “is proposing to amend its Bid Protest Regulations... to implement the requirements in the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005... where a public-private competition has been conducted under Office of Management and Budget (OMB) Circular A-76.” This amendment will permit designated “in-house competitors” to participate as intervenors in GAO protests.
 - FAA Acquisition Management practices/policies “have improved” but more may be needed, according to the GAO—Report 05-23, dated November 12, 2004.

- On December 20, 2004, the Federal Register noticed a final SBA rule that will implement the OMB October 2002 report, entitled “Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business.” Specifically this rule

“provides a list of factors to consider in evaluating a prime contractor's performance and good-faith efforts to achieve the requirements in its subcontracting plan. The final rule also authorizes the use of goals in subcontracting plans, and/or past performance in meeting such goals, as a factor in source selection when placing orders against Federal Supply Schedules, government-wide acquisition contracts, and multi-agency contracts. In addition, this final rule implements statutory provisions and other administrative procedures relating to subcontracting goals and assistance. In particular, the final rule lists the various categories of small businesses that must be afforded maximum practicable subcontracting opportunities, and clarifies the responsibilities of prime contractors and SBA's Commercial Market Representatives (CMR) under the subcontracting assistance program. The final rule also supplies guidance on Subcontracting Orientation and Assistance Reviews, which CMRs perform to assist prime contractors in their efforts to understand and comply with the requirements governing the small business subcontracting assistance program.”
- On December 15, 2004, the Federal Register noticed an interim DFARS rule that would “implement Section 843 of the National Defense Authorization Act for Fiscal Year 2004 and Section 813 of the National Defense Authorization Act for Fiscal Year 2005. Section 843 (had) placed a 5-year limit on the period of task or delivery order contracts awarded under 10 U.S.C. 2304a. Section 813 further amended 10 U.S.C. 2304a to permit a total period of up to 10 years, which may be exceeded if the head of the agency determines in writing that exceptional circumstances require a longer contract period. The DFARS rule clarifies that the 10-year limit applies to the ordering period, establishes a limit on the length of orders, and includes other key information regarding applicability.” Comments are due on/before February 14, 2005.
- On December 22, 2004, the Federal Register noticed a proposed rule that would make three changes to the Department of State Acquisition Regulations (DOSAR). The proposal would revise “the DOSAR to (i) Formalize Department policy regarding the application of the Small Business Act to contracts awarded by domestic contracting activities where contract performance takes place overseas; (ii) add language to deal with U.S. Government support to contractors performing overseas; and, (iii) revise the coverage regarding Defense Base Act insurance.” Comments are due on/before 60 days from publication.

COMMENT: These changes may significantly impact certain contractors’ oversea operations including subcontractors. For example...

As noted in this Federal Register publication, “essentially, the (Department of State) policy requires that contractors furnish their own in-country non-U.S. Government administrative, logistical, and security support. If the Department authorizes the use of U.S. Government-provided support, that support shall be set

forth in the Statement of Work. An associated contract clause is added at 652.225-72.” The basis on when US will provide that support is also noticed.

And, this proposal will “clarify the application of Defense Base Act insurance to local and third country nationals” and when local Workers Compensation coverage may be required of contractors.

- On November 22, 2004, the Federal Register noticed two proposals to amend the DFARS relative to contracts for telecommunications services and one proposal on the acquisition of information technology equipment. Comments are due on/before January 21, 2005.
- On November 22, 2004, and December 15, 2004, the Federal Register noticed several DoD Transformation Initiative rule changes including in the latter notice one on “Debarment, suspension, and business ethics; improper business practices and contractor qualifications” which includes ...
 - “Consolidation of requirements for reporting violations and suspected violations of certain requirements into a new section at DFARS 203.070....
 - “Streamlining of text at DFARS 203.570-1 and 203.570-2 relating to prohibitions on persons convicted of fraud or other defense-contract-related felonies.
 - “Revision of the clause at 252.203-7001, Prohibition on Persons Convicted of Fraud or Other Defense-Contract-Related Felonies, to remove unnecessary references to first-tier subcontracts in paragraphs (b) and (d). Paragraph (g) of the clause adequately addresses requirements for flow down to first-tier subcontracts.
 - “Deletion of text at DFARS 203.570-3 relating to internal DoD procedures for waiver of the 5-year period for prohibitions on persons convicted of fraud or other defense-contract-related felonies; and deletion of text at DFARS 209.105-2, 209.406-3, and 209.407-3 containing internal DoD procedures for referral of matters to agency debarment and suspension officials. This text has been relocated to the new DFARS companion resource, Procedures, Guidance, and Information (PGI).”
- On November 22, 2004, the Federal Register noticed a DoD request for comments on the use of SF 1443, “Contractor’s Request for Progress Payments.” Specifically solicited are needed improvements that “could be made to the form, including the instructions, for use on DoD contracts.” Comments are due on/before January 6, 2005.
- It was reported that a “new share-in-savings” proposal has been sent to OFPP for approval and subsequent Federal Register publication. This proposal would expand the use of shared-savings arrangements beyond that that is currently authorized for IT procurements.
- The Navy issued a memorandum dated December 10, 2004, on its “review and approve” process for “purchasing, renting, or leasing new or upgraded (IT) servers or application hosting services for CONUS ashore use.”

- On October 22, 2004, the Army, Navy, and Air Force Acquisition officials joined Acting Under Secretary of Defense (Acquisition, Technology and Logistics) Michael W. Wynne in issuing a memorandum on “Acquisition Workforce Ethics Training.” The focus is “Acquisition Excellence with Integrity” coupled with availability of an on-line DAU training module on “Ethics Training for Acquisition Technology and Logistics 2004.” See <http://clc.dau.mil>
- The Navy has launched its SeaPort website at <http://www.seaport.navy.mil/> and includes information on Multiple Award Contracts (MACs). “Seaport Enhanced (SeaPort-e) made electronic procurement of Engineering, Technical and Programmatic support services at NAVSEA a reality. The Navy Virtual SYSCOM Commanders (NAVAIR, NAVSEA, NAVSUP and SPAWAR) have decided to leverage the successes and efficiencies of the SeaPort-e business model by designating SeaPort-e the vehicle of choice for future Engineering, Financial, and Program Management contractor support services. This decision emphasizes the Navy Virtual SYSCOM's focus on implementing cost-effective and integrated business practices to better support our Navy.”

COMMENT: Have you navigated this website? As one Contracting Officer stated, “This initiative will have a significant effect on the way the Navy does business!” Seaport contracts are the “vessel” of the future!
- The December 2004 Air Force Directors Conference (Acquisition Center of Excellence--ACE) had briefings covering “Navigating the OSD IPT process, Acquisition Process Value Stream Analysis, updates on Systems Engineering, Expectations Management, ACE NET, and Pathfinder Initiatives, as well as updates from Center ACEs.” Briefing charts are available at <http://www.safaq.hq.af.mil/ACE/December2004DirectorsConference.html>
- On November 9, 2004, the Defense Acquisition Excellence Council met. Agenda, notes, attendees (government/industry), etc. are provided at http://www.acq.osd.mil/dpap/Docs/DAEC/november9_04/DAEC-Notesfor110904.doc
- The Navy issued its April 2004 “Desk Guide for Service Contract Price Adjustments.” This Guide is used by Contracting Officers in “processing contract price adjustments that result from wage determinations issued under the Service Contract Act or from amendments changing the minimum wage required by the Fair Labor Standard Act.”
- For the period beginning January 1, 2005 and ending on June 30, 2005, the prompt payment interest rate is 4.250 per centum per annum.

- Decisions/Items of potential interest in contract drafting/management:
 - A recent multiparty mediation involving the customer, prime contractor, and various subcontractors provides a good “lesson learned” for Contracts/Supply Chain professionals. Here an incident at the customer’s facility triggered claims and counterclaims for the resultant property related damages. Unfortunately, it was not realized until the mediation—when the insurers arrived (who were seeking reimbursement of their out-of-pocket costs to the insureds)—that the contracting parties had “neglected” to have any “waiver of subrogation” in the contracts/subcontracts. While the mediation was successful, professionals are reminded to consult with counsel on when (cost effective) waiver of subrogation rights should be considered in drafting legal documents.
 - While the case of Bickel v. Subway Development may be of particular interest to franchisors and franchisees it is as the court stated, “a study in the art of protracted litigation.” However, it also provides insight for Contracts/Supply Chain professionals. Briefly...

The litigation commenced in the early 1994 when the franchisee filed in state court an action against two "related" parties (only one of which had entered into an arbitration agreement with the franchisee) on claims of fraud, breach of contract, and sought a declaratory judgment that the arbitration clauses in their two franchise agreements were "void and unenforceable" with damages of \$400,000. A timely appearance in that action was not made and a default judgment was entered. Then the "protracted" litigation ensued including an arbitration award being entered over seven years later.

This court decision upheld the default judgment but set aside the damages amount since, in part, the law provides for a trial on damages even in a default judgment on liability. Finally, this court determined that the earlier arbitration award (confirmed by a separate court in 2003) between the parties wherein the franchisee was awarded \$46,440 did not bar the franchisee by res judicata or collateral estoppel from pursuing enforcement of the original default judgment in 1994. Bickel et al v. Subway Development of Chicagoland, Inc. et al, No. 5-96-0029 in the Appellate Court of Illinois Fifth District (Filed Dec. 15, 2004) <http://www.state.il.us/court/Opinions/AppellateCourt/2004/5thDistrict/December/Html/5960029.htm>

Lessons learned include... Be cognizant of potential parties in an arbitration since normally the arbitration agreement only binds those that sign it and the final fees/costs associated with this type of litigation/arbitration could be clearer in the drafting of the contract. A "case that has something for everyone."

- And, where a contractor did not disclose its invention through the use of the prescribed form, title to the invention was deemed forfeited regardless of whether the Army suffered any harm as a result. Campbell Plastics Engineering & Mfg. Inc. v. Acting Secretary of the Army, Fed. Cir., No. 03-1512, 11/10/04.

- For an “interesting” contract pricing dispute over the supply and pricing of chemical products the court decision in Gage Products Co. v. Henkel Corporation (12/09/04 - No. 03-2362, 6th Circuit Court of Appeals) may be of interest. Here the “battle-of-the-forms” and various UCC provisions on contract formation/terms are the focal point. Clearly the parties could have finalized the terms of the deal better but this case highlights what could happen. As an aside the Revised Article 2 to the UCC may have provided a less arduous result—even in the absence of a more definitive/executed contract. Case is available at <http://caselaw.lp.findlaw.com/data2/circs/6th/032362p.pdf>
- A Wall Street Journal article in the November 24, 2004, electronic posting at www.wsj.com highlighted the risk of not having the requisite export license. This article discussed the holding in the case of US v Lachman et al. Circuit, 10/25/04 (available at www.findlaw.com). You may want to read the case with your counsel whenever there is a possibility of any “gray” areas in the necessity of obtaining an export license.

Upcoming speaking topics include...

- NCMA Audio Seminar, “Preparing for the Big Changes to UCC Rules on Contract Formation and Terms of the Deal!”
- Halifax, Nova Scotia, Atlantic Public Purchasing Association Chapter, NIGP, "How 'Baseball Arbitration' will help in Negotiating Sole Source Procurements."
- University of California, Irvine and NCMA Beach Cities Chapter annual Educational Conference. “Current Contract/Regulatory Issues Affecting Contracting Professionals.”
- ISM—Phoenix, Arizona, Affiliate, "How 'Baseball Arbitration' will help in Negotiating Sole Source Procurements--or how to get through Impasse."

Various presentations on Revised Article 2 to the Uniform Commercial Code

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