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

1. **TASK FORCE RECOMMENDS ACTIONS TO ENSURE ACQUISITION INTEGRITY.** A Defense Science Board (DSB) Task Force issued its March 2005 final report on “Management Oversight in Acquisition Organizations.” Included in the report is a Memorandum from William Schneider, Jr., DSB Chairman, stating this DSB effort

“was one leg ...of a three point plan as a result of the Darleen Druyun pleadings. The Task Force reviewed the management and oversight structure of acquisition activities within DoD to assess best practices and recommend changes to improve checks and balances to ensure acquisition integrity.

“One of the Task Force’s key findings is that while current acquisition practices make an incident on the scale of the Druyun case unlikely, there are currently no structural or policy mandates in place that would prevent this situation from recurring. The Task Force has focused its recommendations (to the Administration and the Congress) on process, oversight, leadership and people, and outlines a strategy to address both near term change as well as enduring change that would move DoD to a ‘best in class’ high integrity.”

2. **DFAS “REMINDS” CONTRACTORS OF JULY 1<sup>ST</sup> REQUIREMENT TO USE E-PAYMENT REQUESTS.** The Defense Finance and Accounting Service (DFAS) will be sending “reminder letters” to Defense contractors in June—and as a follow-up to the DFAS memorandum of April 7, 2005—on electronic Submission of Payment Requests. Effective July 1, 2005, DFAS will “enforce the requirement to use Electronic Commerce Submission, when the DFARS clause governs the contract (252.232-7003).” An excellent article on “WAWF (Wide Area Workflow) Progress Payments,” is in the May 2005 NCMA Contract Management magazine.

**COMMENT:** The Army is reported to have provided “official notification” that it will not be fully engaged in WAWF until mid-2006. Also, there is a reported concern that all PCOs may not have access to WAWF to approve invoices electronically.

Is this going to impact your cashflow?

3. **BOEING ACTIVELY SUPPORTS RFID.** “Boeing has become the first defense contractor to support a Department of Defense initiative to use Radio Frequency Identification (RFID) to better manage its receipt of goods from the defense industry.  
“A Boeing shipment of F-15 parts sent in late April was the first to transmit data electronically from a boxed shipment through the DoD's e-commerce system, Wide Area Workflow, using RFID technology.  
“The move to RFID facilitates more refined and smarter asset visibility, and efficient tracking capabilities for the DoD, which increases the speed and accuracy of deliveries of critical items to military troops across the globe...”
4. **IS THE FEDERAL INFORMATION SECURITY ACT “TRIGGERING” “REVIEWS”?** Are you subject to a "site security review" by the government? And, all conducted pursuant to the Federal Information Security Management Act of 2002, which “requires Federal agencies to adopt policies and programs designed to ensure the security of agency information, including agency information held by contractors?” It is reported that some contractors are being subject to these reviews notwithstanding the absence of implementing regulations or contract clauses.  
**COMMENT:** Talk to counsel before someone “knocks” at your door!

### **Miscellaneous Items:**

- On May 25, 2005, defense contractors were “advised” by the US Attorney in Alexandria that its previously established federal procurement “fraud task force” was “sending a message of deterrence by jumping on fraud cases early.” Over 20 government agencies are reported to be involved in that initiative.
- On May 9, 2005, DoD noticed in the Federal Register an interim rule on Multiyear Contracting which  
“amends multiyear contracting policy to implement Section 8008 of the Defense Appropriations Act for Fiscal Year 2005 and Section 814 of the National Defense Authorization Act for Fiscal Year 2005. Section 814 requires DoD to provide notice and supporting rationale to Congress before awarding a multiyear contract containing a cancellation ceiling exceeding \$100 million that is not fully funded. Section 8008 places the following conditions on the award of a multiyear contract using fiscal year 2005 funds: (1) DoD must have submitted a budget request to Congress for full funding of the units to be procured; (2) contract cancellation provisions must not include consideration of recurring costs associated with the production of unfunded units; (3) payments under the contract must not be made in advance of incurred costs on funded units; and (4) the contract must not provide for a price adjustment based on a failure to award a follow-on contract.”

- On May 24, 2005, DoD noticed in the Federal Register several interim and proposed changes to the DFARS including...
  - DoD Pilot Mentor-Protégé Program (DFARS Case 2004-D028). “Extends the DoD Pilot Mentor-Protégé Program for 5 additional years, and expands the Program to permit service-disabled veteran-owned small business concerns and HUBZone small business concerns to participate as protégé firms. The Program provides incentives for DoD contractors to assist protégé firms in enhancing their capabilities and increasing their participation in Government and commercial contracts.”
  - Approval of Service Contracts and Task and Delivery Orders / Proper Use of Non-DoD Contracts (DFARS Case 2002-D024). “Requires agency review and approval of acquisitions made through the use of non-DoD contracts in amounts exceeding the simplified acquisition threshold. Amends the interim rule published on October 1, 2003 (DFARS Change Notice 20031001), which contained approval requirements for the acquisition of services. This second interim rule contains more comprehensive review and approval requirements and applies to the acquisition of both supplies and services. The rule implements Section 801 of the National Defense Authorization Act for Fiscal Year 2002; Section 854 of the National Defense Authorization Act for Fiscal Year 2005; and the DoD policy memorandum of October 29, 2004, on proper use of non-DoD contracts, which became effective on January 1, 2005.”

Implementing procedures are required and are required to include the following:

- “(a) Evaluating whether using a non-DoD contract for the acquisition is in the best interest of DoD. Factors to be considered include--
  - (1) Satisfying customer requirements;
  - (2) Schedule;
  - (3) Cost effectiveness (taking into account discounts and fees); and
  - (4) Contract administration (including oversight);
- (b) Determining that the tasks to be accomplished or supplies to be provided are within the scope of the contract to be used;
- (c) Reviewing funding to ensure that it is used in accordance with appropriation limitations;
- (d) Providing unique terms, conditions, and requirements to the assisting agency for incorporation into the order or contract as appropriate to comply with all applicable DoD-unique statutes, regulations, directives, and other requirements; and
- (e) Collecting data on the use of assisted acquisition for analysis.”

- Incentive Program for Purchase of Capital Assets Manufactured in the United States (DFARS Case 2005-D003). “Adds policy on considering the use of capital assets (including machine tools) manufactured in the United States, in source selections and award fee determinations for contracts under major defense acquisition programs. Implements Section 822 of the National Defense Authorization Act for Fiscal Year 2004, which requires DoD to provide incentives for contractors to purchase capital assets manufactured in the United States.”

- DoD Transformation Initiative proposed rule on Quality Assurance (DFARS Case 2003-D027). “Proposed change updates and clarifies requirements for Government contract quality assurance and use of warranties; deletes unnecessary definitions and unnecessary text on technical requirements matters, responsibilities of contract administration offices, and material inspection and receiving reports; and relocates to PGI, procedures for preparation of quality assurance instructions, procedures for use of quality inspection approval stamps, and information on types of quality evaluation data.”

Comments are due on/before July 25, 2005.

- The Task Force on Service Contracting issued its May 17, 2005, report, “Removing Federal Services Acquisition Barriers And Balancing Public and Private Interest.” The report is available at [http://www.pscouncil.org/pdfs/ServicesContractingTaskForce-FinalReport\(5-17-2005\).pdf](http://www.pscouncil.org/pdfs/ServicesContractingTaskForce-FinalReport(5-17-2005).pdf)
- It was reported on May 31, 2005, that the United States “has decided to take an aircraft subsidy dispute to the World Trade Organization. The case is expected to be the most expensive dispute brought before WTO. The U.S. believes European jetmaker Airbus receives unfair state subsidies. Airbus has asserted that U.S.-based Boeing receives subsidies in the form of defense contracts. A WTO case usually takes two years or longer to resolve....”  
**COMMENT:** A negotiated settlement would be in the best interests of all—especially those not directly impacted by this dispute! See prior Updates and the June 1, 2005, Wall Street Journal for an interesting discussion on the WTO ADR process, etc.
- On May 17, 2005 Air Force Acquisition Circular (AFAC) 2005-0517 was issued and “implements the new Life Cycle Management Plan (LCMP) which is effective 1 May 2005.... The LCMP consolidates the Single Acquisition Management Plan (SAMP) and the Product Support Management Plan (PSMP). The LCMP Guide, dated 4 Mar 2005, and the SAMP Guide, dated 24 August 2004, are available” under “informational guidance” at <https://www.safaq.hq.af.mil/contracting/affars/5307/library-5307.html>
- The Air Force issued its May 2005 “Air Force Guide—Performance Price Tradeoff (PPT)” as a “technique for source selection, explains when and how to use PPT, and provides samples of provisions and documents for use with PPT.... The PPT process is a simplified best value source selection strategy that permits a tradeoff between price and performance in reaching the award decision. It applies to both commercial and non-commercial acquisitions.” The Guide is available at <https://www.safaq.hq.af.mil/contracting/affars/5315/informational/ppt-guide-may05.doc>

- A teleconference/seminar on recent developments in teaming agreements is scheduled for June 15, 2005, by the ABA Section of Public Contract Law Section, “Contractor Teaming Arrangements: Competitive solution or Legal Liability”—considerations in forming that all-important “dream team!” Seminar outline includes...

Contractor team arrangements, which for this program means alliances formed to pursue federal contracting opportunities, are common today; in fact, competition for large federal contracts today frequently is team versus team, and not company versus company.

Because of the frequency with which they are entered into, there is a belief that there is little risk in forming a contractor team arrangement. However, while team arrangements are common, they also present challenges. Making another company a team member, particularly a company that may also be a competitor, carries considerable legal implications, and courts are reviewing such arrangements as well as their enforceability with increasing frequency. Putting together an effective team can enhance your competitive position; however, an imprudent choice of a team member or a poorly drafted agreement can become a legal liability. This program will cover the best practices for forming teaming arrangements, and for negotiating teaming agreements.

Among the topics to be addressed are:

- Why are contractor team arrangements so common?
- What are the benefits and risks that companies and their counsel must consider?
- What are the best practices in drafting and negotiating teaming agreements, and how can counsel help ensure that a teaming agreement will be enforceable?
- What are the specific issues that subcontractors, including small businesses, should consider?

Registrations info should be available at

<http://www.abanet.org/contract/admin/future.html>

### **Decisions/Items of potential interest in contract negotiation, drafting, and contract management—**

- The May 23, 2005, 1<sup>st</sup> Circuit Court opinion in Roderick Campbell v. General Dynamics Government Systems Corporation et al (04-1828) set new ground in confirming that electronic messages can satisfy the “writing” requirement for finding an “agreement to arbitrate” under the Federal Arbitration Act (FAA) and, thus, upholding the Electronic Signatures in Global and National Commerce Act. However, the court also found that a “mass” email did not provide sufficient notice to employees “on the nature of the arbitration agreement” in order to “limit statutory rights” under the Americans with Disabilities Act (ADA).

- “Where solicitation required that offerors provide letters of commitment for key personnel and further required that such commitment letters ‘reflect mutually agreed position, salary, and benefits,’ and record establishes that, contrary to the awardee’s representations, awardee did not discuss salary, benefits or location of employment with certain key personnel it proposed, GAO finds, in an advisory opinion, that the protest is meritorious.” Patriot Contract Services -- Advisory Opinion, B-294777.3, May 11, 2005.

COMMENT: Does this “requirement” help the incumbent or merely reflect a desire to have an offeror confirm that which is (or should be) represented in its proposal? Be careful what is represented to your customer!

- For a case involving multiple issues including applicable international Bill of Lading, a foreign forum selection clause, limitation on liability, Carriage of Goods at Sea Act provisions, non-declaration of higher valuation than that specified in the Bill, etc. coupled with the shipper “suing on” the Bill of Lading—then the recent/recurring litigation in Kukje Hwajae Insurance Co., Ltd. v. M/V Hyundai Liberty, may be of interest (9<sup>th</sup> Circuit, May 26, 2005 No. 0056970). See the opinion at <http://www.metnews.com/sos.cgi?0505%2F0056970>

### **Book review that should be of interest—**

- And, Jack Friery, Esq. has provided his exclusive review on the recently revised/updated copy of the Guide to Fixed-Price Supply Subcontract Terms and Conditions—a “required resource” for any contracting/supply chain professional...

#### **New ABA Subcontracting Guide Published**

By Jack Friery, Esq.

The Public Contract Section of the American Bar Association has just released the fourth edition of its renowned *Guide to Fixed-Price Supply Subcontract Terms and Conditions*. The Guide helps both prime contractors and subcontractors decide what clauses in the Federal Government’s prime contract must, should, or may be flowed down by the prime to its subcontractors. The publication is a product of the Strategic Alliances, Teaming and Subcontracting Committee of the Public Contract Section.

The Guide, which is in excess of 240 pages, is organized into five sections. Section A contains definitions applicable to subcontracts. For example, “Buyer,” “Seller,” and “Government” are defined. Section B, in a slight detour from the Guide’s theme, suggests clauses that are not true flowdowns, but that are general clauses recommended for all subcontracts. For example, this section suggests such clauses as Payments, Choice of Law, and Disputes. (The Guide makes a valuable suggestion that there should actually be two disputes clauses in a typical subcontract under a US

Government prime contract: a standard commercial disputes provision to cover prime/subcontractor controversies, and an additional clause to handle situations where a Government decision affects the subcontractor, but not the prime.) Section B is a “best practices” section of full-text versions of Representations and Certifications the prime should require of the subcontractor, together with dollar thresholds for each rep and cert. Section C gets back to the Guide’s theme. Here there are contained short-form (“incorporate by reference”) versions of the FAR clauses for typical US Government fixed-price supply contracts. With each clause, the authors describe the dollar threshold for its application, and provide detailed tailoring of the FAR clause to make it applicable to the subcontract. For those who do business with the US Department of Defense, Sections D and E provide the same guidance for DFARS clauses. The second half of the Guide replicates Sections C, D, and E, but this time with full-text versions of FAR and DFARS clauses.

One footnote about the FAR and DFARS clauses that the Guide recommends: obviously, the clauses that the Government dictates as mandatory subcontract flowdowns are included. This takes in, for example, FAR clause 52.227-1, Authorization and Consent. But the Guide also includes FAR clauses that, while not mandatory flowdowns, are “must-haves” that should be contained in subcontracts to protect the prime contractor. These include FAR 52.242-15, Stop Work Order, FAR 52.249-2, Termination for Convenience, and several other clauses.

What is not covered by the Guide? Obviously, from the title of the book, cost-type contracts, time and material contracts, and service and construction contracts are not treated. Additionally, the Guide does not cover subcontracts under US Government commercial item contracts (so-called FAR Part 12 contracts). However, the Guide does have limited advice on how to marry up mandatory FAR clauses and standard commercial terms and conditions in US Government commercial item procurements.

What’s good and what’s bad with the latest edition of the Guide? First, the good. For those of us who have had the tedious task of reviewing dozens of FAR and DFARS clauses to ferret out flowdown requirements, the Guide is a godsend. In one place, the flowdown clauses are all there—must-haves and should-haves, together with dollar threshold applicability and tailoring guidance. The Guide also includes a clever form that allows the prime and sub to simply incorporate the Guide itself by reference into the subcontract, and to check “yes” or “no” with regard to specified alternate versions of certain clauses. Finally, the problem of early obsolescence of any flowdown guide because of FAR and DFARS changes has been anticipated—the authors intend to periodically update the Guide by publishing changes on the Committee’s website at <http://www.abanet.org/dch/committee.cfm?com=PC404500>.

What can be improved? Expanding the Guide to cover cost-type and T&M contracts, plus service contracts, would be a welcome addition. Perhaps the Committee can consider that for the fifth edition. But the most serious shortfall is that the Guide is only available in hard-copy. CD and web-based versions of the Guide would be invaluable, for the obviously needed tools of word-searching and “cutting and pasting” clauses for use in subcontracts. The Committee and the Public Contract Section of the ABA are strongly urged to modernize the Guide in this regard.

Copies of the Guide can be ordered from the ABA website at <http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5390233>. The cost is \$50 (\$40 for members of the Public Contract Section). It will be money well-spent.

*For more information about the Guide or related topics, please contact Jack Friery at [friery@earthlink.net](mailto:friery@earthlink.net) or (619) 218-7342.*

### **Recent Publications Include—**

- “The New (and Improved) Article 2 to the UCC,” NCMA Contract Management magazine, December 2004, republished in the National Association of Credit Management Business Credit magazine, March 2005—available at [www.Rumbaugh.net](http://www.Rumbaugh.net)

### **Future Speaking Topics Include—**

- ABA Public Contract Law Audio Seminar, “Contractor Team Arrangements: Competitive Solution or Legal Liability.”
- Houston NCMA Chapter, “Award Term Contracting.”
- “Thinking Again For The First Time About Advocacy In Arbitrations,” various Bar meetings.
- ISM Orange County Affiliate, "Big Changes to UCC Rules on Contract Formation and Terms of the Deal are Around the Corner—Are you Ready?"
- Norfolk, Virginia and Central Virginia, NCMA Chapters and NAPM/ISM of New Hampshire, "How 'Baseball Arbitration' will help in Negotiating Sole Source Procurements—or how to get through Impasse."

- Maple Leaf, Toronto, Canada, NCMA Chapter, “What Hockey and Baseball Have in Common—A Discussion on Alternative Dispute Resolution.”
- Halifax, Nova Scotia, Canada, Atlantic Public Purchasing Association Chapter, NIGP, "How 'Baseball Arbitration' will help in Negotiating Sole Source Procurements."
- Houston NCMA Chapter, "Preparing for the Big Changes to UCC Rules on Contract Formation and Terms of the Deal."

*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](mailto:ADROffice@Rumbaugh.net)*