

Regulatory/Contractual Update

March 30, 2006

Volume 11, Issue 3

- On March 21, 2006, the Federal Register noticed DFARS Change Notice 20060321 which finalized several matters including the following:
 - Approval of Service Contracts and Task and Delivery Orders (DFARS Case 2002-D024). DoD has adopted as final, with changes, an interim rule published May 24, 2005, “requiring DoD activities to comply with review and approval requirements when acquiring supplies or services through the use of non-DoD contracts in amounts exceeding the SAT.”
 - Acquisition of Ball and Roller Bearings (DFARS Case 2003-D021). “Updates requirements for the acquisition of ball and roller bearings from domestic sources, and clarifies the applicability of these requirements to components of commercial items. Addresses the provisions of annual DoD appropriations acts and eliminates text addressing obsolete statutory provisions.”
 - Component Breakout (DFARS Case 2003-D071). “DoD has issued a final rule amending the DFARS to remove procedures for breaking out components of end items for future acquisitions. These procedures have been relocated to the new DFARS companion resource, Procedures, Guidance, and Information.”
 - Consolidation of Contract Requirements (DFARS Case 2003-D109). DoD has adopted as final, with changes, an interim rule published September 17, 2004, “amending the DFARS to implement Section 801 of the National Defense Authorization Act for Fiscal Year 2004. Section 801 places restrictions on the consolidation of two or more requirements of a DoD department, agency, or activity into a single solicitation and contract with a total value exceeding \$5,000,000.”
 - Contractor Performance of Acquisition Functions Closely Associated With Inherently Governmental Functions (DFARS Case 2004-D021). DoD has adopted as final, with changes, an interim rule published March 23, 2005, “amending the DFARS to implement Section 804 of the National Defense Authorization Act for Fiscal Year 2005. Section 804 places limitations on the award of contracts for the performance of acquisition functions closely associated with inherently governmental functions.”
 - Incentive Program for Purchase of Capital Assets Manufactured in the United States (DFARS 2005–D003). DoD has adopted as final, with changes, an interim rule published May 24, 2005, “amending the DFARS to implement Section 822 of the National Defense Authorization Act for Fiscal Year 2004. Section 822 requires the Secretary of Defense to establish an incentive program for contractors to purchase capital assets manufactured in the United States, and to provide consideration for offerors with eligible capital assets in source selections for major defense acquisition programs.”
 - Competition Requirements for Federal Supply Schedules and Multiple Award Contracts (DFARS Case 2004-D009). “DoD has issued a final rule amending the DFARS to update and clarify requirements for competition in the placement of orders under Federal Supply Schedules and multiple award contracts.”

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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.

- On March 22, 2006, the Federal Register noticed a proposed rule that purports “to correct the inadvertent omission of appropriate references in the FAR (Part 13) pertaining to termination for cause of those purchase orders that have been accepted in writing.” Comments are due on/before May 22nd.

COMMENT: This proposal should be reviewed for what it says and for what it doesn't say and in particular after reviewing FAR Part 12 and 13 where oral agreements are authorized!

First, this notice is clearly misleading in that the proposed changes do not merely impact purchase orders accepted in writing--it also impacts oral agreements. Second, the FAR policy direction on how to terminate (for cause or convenience) may not have been "part of the deal" in any oral contract yet the FAR expressly states the CO is authorized to do so notwithstanding the terms of the underlying oral commercial agreement may be void of any understanding for same! Lastly, "who has the warrant," is seemingly a non-issue on these oral arrangements which can run into millions of dollars!

Do you know where these oral arrangements are being consummated within your company and/or with your client? Do these actions represent the best practices in commercial contracting?

- On February 22, 2006, the Federal Register noticed a final DFARS rule that implements the requirements of Military Extraterritorial Jurisdiction Act of 2000 (Chapter 212 of title 18, United States Code). This Act “establishes Federal criminal jurisdiction over whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than one year (i.e., a felony offense) while employed by or accompanying the Armed Forces outside the United States, certain members of the Armed Forces subject to the Uniform Code of Military Justice (Chapter 47 of title 10, United States Code), and former members of the Armed Forces. This rule is established to correspond with the Department of Defense Instruction 5525.11, ‘Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members,’ that the Deputy Secretary of Defense approved on March 3, 2005.” Note that this rule was effective March 3, 2005.
- On February 23, 2006, the Federal Register noticed DFARS Change Notice 20060223 which finalized several matters including the following:
 - Business Restructuring Costs--Delegation of Authority To Make Determinations Relating to Payment (DFARS Case 2003-D084). DoD has adopted as final, without change, an interim rule published on July 26, 2005, “amending the DFARS to implement section 819 of the National Defense Authorization Act for Fiscal Year 2005. Section 819 contains changes concerning delegation of authority to make determinations relating to payment of defense contractors for business restructuring costs.”
 - Construction Contracting (DFARS Case 2003-D034).
 - Contractor Insurance/Pension Reviews (DFARS Case 2003-D050). DoD has issued a final rule amending the DFARS “to update text pertaining to Government review of contractor insurance programs, pension plans, and other deferred compensation plans.”
 - Uniform Contract Line Item Numbering (DFARS Case 2003-D082).
- It is reported that more and more companies are being “requested” to develop company-wide subcontracting plans as well as individual contract plans. Which one is it?

- On March 21, 2006, the Federal Register noticed a proposed DFARS rule that “updates policy regarding requirements for DoD contractors to submit payment requests in electronic form. The proposed rule clarifies the situations under which DoD will grant exceptions to requirements for electronic submission of payment requests.” Comments are due on/before May 22nd.
- On March 21, 2006, the Federal Register noticed a proposed DFARS rule “to revise requirements for reporting of Government property in the possession of DoD contractors. The proposed rule replaces existing DD Form 1662 reporting requirements with requirements for DoD contractors to electronically submit, to the Item Unique Identification (IUID) Registry, the IUID data applicable to the Government property in the contractor's possession.” Comments are due on/before April 20th.
- On March 23, 2006, the Acting DoD Director of Defense Procurement and Acquisition Policy issued a “reminder” memorandum under the heading, “Acquisitions Under Contracts Involving Classified Information,” on the necessity of personnel having the appropriate security clearances.
- On March 13, 2006, Under Secretary of Defense for Acquisition, Technology & Logistics, Kenneth Krieg, issued a memorandum on “Acquisition System Management,” calling for clarification of “overall acquisition control system and the procedures the Department employs to evaluate proposed acquisition approaches, including leasing.” This memorandum flows from a “recent review of the management of the KC-767-A Tanker Program.”
- An excellent benchmarking project on the use of various international commercial contracting terms and conditions was recently undertaken by the Institute for Supply Management (ISM) and the International Association of Commercial Contracting Managers. The results of this project are posted in five reports covering the spectrum of practices by buyers and sellers. While the interesting aspects associated with the percentage of buyer/sellers that did, or did not, use a particular clause will be of interest; it is noticeable the apparent non-use of letters of credits, parent company guarantees, etc. Recommended reading! The reports are available at www.ism.ws
- The National Defense Industrial Association (NDIA) has made available powerpoint slides from most of the presentations at its recent educational conference in Florida. The slides are posted at http://www.ndia.org/Content/ContentGroups/Divisions1/Procurement/6PC3_Agenda.htm Presentation/slides include several “hot” topics, e.g. Berry Amendment, international contracting/accounting “issues,” Organizational Conflicts of Interest (OCIs), emergency/contingency contracting, etc. The program next year is in San Antonio.
- “The Navy-Air Force Interface (NAFI) used (by Contracting Officers for) contract document distribution and viewing is being phased out. It is being replaced by the Department of Defense Electronic Document Access System (DoD EDA).... The electronic routing of our contract document distribution from the NAFI web site to the EDA web site (planned to be completed in mid-March).... In order to use the EDA site, you must have an EDA account.” And, unlike NAFI, contractors will be able to view their contracts on EDA. URL at <http://eda.ogden.disa.mil/> is the site for contractor registration.

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- The Office of the Under Secretary of Defense for AT&L, Unique Identification (UID) Program Office, has announced that they will sponsor three UID Forums in 2006 to provide practical guidance to military program managers and DoD contractors to help with successful UID implementation as required by DoD policy (DFARS 211.274) with the first UID forum scheduled for Providence, Rhode Island, April 19-20, 2006. Information on the UID Forums and registration is available at <http://www.UIDforum.com>. NCMA also is in the planning stages for another UID audio conference on this important topic! Finally, the March 2006 issue of Inside Supply Management magazine—published by ISM—has a timely article on “Using RFID Strategically.”
- DoD will “revisit” award/program incentives as a result of the December 2005 GAO report on the subject. Are you ready for a significant change in the way they are drafted/administered? Will there be public notice of the proposed changes?
- The ABA Public Contract Law Section has formed a working group to focus, among other things, on the purported “inefficiencies” in practice at the Boards of Contract Appeals being reported by a “number of practitioners.” A multi-phased approach is planned with group membership comprising Board administrative judges, agency counsel and government contracts attorneys.
COMMENT: Should the role/charter of the Boards in ADR be “revisited” in the interest of “efficiency”? And, if so, should the ADR community be participating?
- The article, “Challenges of the International Contracting Environment,” by Ernest Gabbard in the March 2006 issue of NCMA Contract Management magazine is a must read.
- Shay Assad, currently the top contracts official with the Marine Corps (previously a senior executive with Raytheon), will assume the post of DoD Director of Defense Procurement and Acquisition Policy on April 2nd. It is also reported that Mr. Assad will be speaking at the NCMA Congress in Atlanta in April—see www.ncmahq.org for registration info. And, Dave Capitano is the new Director of the DAR Council.

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Comments on items that may be of potential interest in contract negotiation and contract drafting/management—

- From the DoJ... “Insight Public Sector, Inc., a company providing technology products and services to federal government agencies, has agreed to pay the United States \$1 million to settle false claims allegations. The government alleged that a predecessor corporation, Comark Government & Education Services (CGES), falsely certified itself as a “small business” on its application for inclusion on the General Services Administration’s Multiple Award Schedule (MAS).”
- More from the DoJ—allegations...

“An employee of a government contractor working in Iraq has been arrested on a charge of offering to bribe an Iraqi police official, Assistant Attorney General Alice S. Fisher of the Criminal Division and U.S. Attorney Kenneth L. Wainstein of the District of Columbia announced today.

“Faheem Mousa Salam, 27, of Livonia, Michigan, was arrested at Dulles International Airport Thursday upon returning from Iraq. He was charged with offering to bribe a foreign official under the Foreign Corrupt Practices Act. Salam is a naturalized U.S. citizen employed by Titan Corporation, and had been living in Baghdad, Iraq.

“According to a criminal complaint filed in the District of Columbia, Salam offered a senior Iraqi police official approximately \$60,000 for the official’s assistance with facilitating the purchase by a police training organization of approximately 1,000 armored vests and a sophisticated map printer for approximately \$1 million. The complaint alleges that Salam later made final arrangements with an undercover agent of the Office of the Special Inspector General for Iraq Reconstruction – posing as a procurement officer for the multinational Civilian Police Assistance Training Team (CPATT) in Iraq – for the map printer and vests, along with a separate \$28,000 to \$35,000 “gift” to process the contracts....”

- The recent US Supreme Court decision in Buckeye Check Cashing Inc. v. Cardegna, February 21, 2006, (<http://www.supremecourtus.gov/opinions/05pdf/04-1264.pdf>) involved a consumer transaction but may be of interest in contract drafting/interpretation when an arbitration clause is potentially challenged. Specifically, the decision addresses a recurring issue that can also arise in commercial contracting, i.e. a challenge to the validity of an arbitration clause in the underlying agreement between the parties. The court “granted certiorari to determine whether a court or an arbitrator should consider a claim that a contract containing an arbitration provision is void for illegality. The Court (7-1 opinion) stated the (earlier) Prima Paint and Southland cases established three propositions that resolve the issue: (1) As a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract; (2) Unless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance; and (3) This arbitration law applies in state as well as federal courts.... The Court reaffirmed that regardless of whether a challenge is brought in federal or state court, a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”

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Future Speaking Topics Include—

- Antelope Valley NCMA Chapter Annual Education Conference, “Go Ahead, Make my (Contract) Day!”
- NCMA Atlanta, Georgia, National Educational Seminar, "Contract Negotiations."
- West Sound, Washington, NCMA Chapter, “Baseball Arbitration.”
- NCMA World Congress, Atlanta, Georgia, "Drafting the Ultimate ADR Clause for Government Subcontracts.”
- Central Connecticut NCMA Chapter, National Educational Seminar, “Best Contracting Practices for Businesses.”
- California State Bar Annual Meeting, “Thinking Again For The First Time About Advocacy In Arbitrations.”
- Puget Sound NCMA Chapter workshop on “New UCC Rules on Contract Formation and Terms of the Deal are Around the Corner! Are You Ready?” and “Go Ahead, Make my (Contract) Day!”
- Los Angeles Gateway and Southern Nevada NCMA Chapters, National Educational Seminar, “Performance-Based Acquisitions.”
- International Commercial Contracting, Philippines

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