

# Regulatory/Contractual Update

October 30, 2006

Volume 11, Issue 10

- Former OFPP Administrator and GSA Chief of Staff David H. Safavian was sentenced on October 27, 2006 “to 18 months in prison on charges of obstructing a GSA proceeding and making false statements....”
- On October 24, 2006, the Federal Register noticed a proposed FAR change to revise the policies and procedures for contract debts. As background, an Accounts Receivable Workgroup was formed in 2003 by the DoD Comptroller “to evaluate the processes and procedures for reporting accounts receivables.” This Workgroup “concluded that Contracting Officers may not be properly reporting contract debts.” Subsequently DoD established a Contract Debt Integrated Process Team (IPT) with the “mission of evaluating the adequacy of DoD’s existing controls and procedures for ensuring that contract debts are identified and recovered in a timely manner, properly accounted for in DoD’s books and records, and properly coordinated with the appropriate Government officials.” This IPT issued a report in 2005 which recommended several FAR changes and this “FAR Case was established to evaluate the DoD recommendations.”

Fifteen proposed changes to FAR Subpart 32.6 are contemplated with corresponding contract clause revisions. Also noted in the proposal was the following: “Concerns have been expressed over the current timeline for computing interest. The Councils agreed to defer this issue for consideration to a later date (including a possible public meeting). Comments are due on/before December 26, 2006.

Unrelated, it is reported that “DFAS has historically paid delivery and cost type invoices (invoices due in 30 days) electronically on the 23rd with the money in the contractor's bank on the 24th. By the end of June 2007, they are moving that up to paying on the 28th with the money in the bank on the 29<sup>th</sup>.”

COMMENT: Profit/mark-up is negotiated, in part, based upon cash flow. If the government is going to change the equation “mid-contract,” should the profit also be adjusted and on a contract-by-contract basis? Perhaps this is a plan that should be rejected from the get-go except if implemented for new contract awards?—talk to your industry rep.

- On October 16, 2006, Shay Assad, Director of DoD Defense Procurement and Acquisition Policy, issued “a class deviation to extend the final date (at DFARS 252.211-7006(a) whereby) certain classes of passive RFID tags will be acceptable ...from September 30, 2006, to February 28, 2007.”

COMMENT: What is in your contract?

## Points of Contact

ADROffice@Rumbaugh.net  
www.Rumbaugh.net

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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.*

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- On October 16, 2006, the DoD Comptroller's office issued a memorandum on "Non-Economy Act Orders," covering purchases from other agencies, with direction that this policy letter should be implemented "immediately." A report of a cursory look/see reveals this is an "update to earlier memos that are attached to it, there is a requirement for a contracting officer to review any obligation over \$500,000 and a restatement of the "bone fide needs" rule." See prior Updates.
- On October 23, 2006, the Federal Register noticed a NASA proposal "to amend part 1266 of Title 14 (of the Code of Federal Regulations) to update and ensure consistency in the use of cross-waiver of liability provisions in NASA agreements. Part 1266 provides the regulatory basis for cross-waiver provisions used in the following categories of NASA mission agreements: Agreements for activities in connection with the 'Agreement Among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America concerning Cooperation on the Civil International Space Station' (commonly referred to as the ISS Intergovernmental Agreement, or IGA); agreements for use of the Space Shuttle; and agreements for NASA's science and space exploration missions that are launched on Expendable Launch Vehicles (ELVs). Among other generally clerical amendments to this Part, NASA is proposing to delete the subsection regarding the cross-waiver of liability during Space Shuttle operations and expand the scope of the ELV provision to encompass Reusable Launch Vehicles (RLVs) as well as other users of the same launch vehicle during the same launch."

Comments are due on/before December 26, 2006.

**COMMENT:** Of course, NASA contractors are required to insert these cross-waivers in all subcontracts, etc. Talk to counsel.

- On October 26, 2006, the Office of the Special Inspector General for Iraq Reconstruction issued an audit report on the inappropriate use of proprietary data markings by one contractor, i.e. it marked ALL submittals as being "Proprietary Data." The report provides interesting lessons in ethics, "misuse" of FAR 3.104, transparency in government, etc. The report is available at <http://www.sigir.mil/reports/pdf/audits/06-035.pdf>.
- On October 17, 2006, DoD noticed that it "is reopening the comment period for the proposed rule published at 71 FR 46434 on August 14, 2006 which closed October 13. The proposed rule contains requirements for preventing unauthorized disclosure of export-controlled information and technology under DoD contracts. The comment period is extended to provide additional time for interested parties to review the proposed changes." Comments are due on/before November 2, 2006. See prior Updates.

- On October 24, 2006, the Federal Register noticed several DoD changes to the DFARS and PGIs including the following:
  - **Combating Trafficking in Persons (DFARS Case 2004-D017) Interim Rule.** “Implements DoD policy prohibiting contractor activities involving trafficking in persons. Contains a contract clause requiring contractors performing outside the United States to establish policy and procedures prohibiting employee activities that support or promote trafficking in persons; provide awareness training for employees; notify the contracting officer of any violations and take appropriate corrective action; and face penalties for failure to comply with the requirements of the contract clause.”
  - **Foreign Acquisition Procedures (DFARS Case 2005-D012) Final Rule.** “Relocates text to the DFARS companion resource, PGI. The relocated text addresses procedures for requesting waivers of foreign source restrictions; for requesting waivers under North Atlantic Treaty Organization cooperative projects; for determining that it is necessary to award a contract for ballistic missile defense research, development, test, and evaluation to a foreign source; and for applying the Balance of Payments Program to an acquisition.”
  - **PAN Carbon Fiber - Deletion of Obsolete Restriction (DFARS Case 2006-D033) Final Rule.**
  - **Definition of Terrorist Country (DFARS Case 2006-D034) Final Rule.**
- On October 19, 2006, NASA noticed a final rule requiring that “NASA's Small Business Innovation Research (SBIR) and the Small Business Technology Transfer (STTR) program contractors to complete a recertification of program compliance prior to final payment. This requirement is being established to facilitate the Government's ability to hold contractors accountable for compliance with Federal statute, regulation, and requirements associated with the SBIR and STTR programs....”

COMMENT: What does your contract say?

ADR Offices of  
**CHARLES E. RUMBAUGH**  
 Arbitrator/Private Judge/Mediator  
 310.373.1981 // 310.373.4182 (fax)  
 888.ADROffice (toll free)

Los Angeles  
 San Francisco

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