

Regulatory/Contractual Update

September 24, 2007

Volume 12, Issue 8

- On September 13, 2007, the Federal Register noticed an interim DoD rule that would revise the process

“for reporting of Government property in the possession of DoD contractors. The 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. This will result in more efficient and accurate reporting of Government property in the possession of contractors.... The IUID reporting requirements will apply to contracts resulting from solicitations issued on or after the effective date of this interim rule—September 13th. However, DoD contractors with existing contracts containing DD Form 1662 reporting requirements are encouraged to request contract modifications to designate use of the procedures specified in this interim rule as the approved substitute for DD Form 1662, as permitted by the clause at DFARS 252.245-7001.”

Comments are due on/before November 13, 2007.

- On August 28, 2007, the Federal Register noticed an interim DoD rule “to implement Section 1017 of the National Defense Authorization Act for Fiscal Year 2007. Section 1017 requires DoD to establish an evaluation criterion, for use in obtaining carriage of cargo by vessel, that considers the extent to which an offeror has had overhaul, repair, and maintenance work for covered vessels performed in shipyards located in the United States or Guam.... An evaluation preference will be given to offerors of carriage who use domestic shipyards for vessel overhaul, repair, and maintenance work.”
Comments are due on/before October 29, 2007.

- On September 17, 2007, DoD Director, Defense Procurement and Acquisition Policy, Shay Assad issued a memorandum on “Contractor Healthcare Services—Defense Contractors Outside the US.” The memorandum reiterates that healthcare services provided to such contractors “are limited to resuscitative and emergency care, unless authorized by the Combatant Commander.”

COMMENT: What does your contract provide?

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

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- On September 6, 2007, the Federal Register noticed FAC 2005-20 which implements the Federal Funding Accountability and Transparency Act (FFATA), Reporting Requirement of Subcontractor Award Data (FAR Case 2006-029). This final FAR rule “requires that contractors report specific subcontract awards to a public database.... (as part of the) operation of a searchable website that provides public access to information about Federal expenditures. This final rule establishes a pilot program to test the collection and accession of subcontract award data. As a result, subcontracts awarded and funded with Federal appropriated funds will eventually be disclosed to the public in a single searchable website. However, information reported under the pilot program will not be disclosed to the public.” The pilot program will end no later than January 1, 2009.

Implementation is pursuant to a new contract clause FAR 52.204-10, Reporting Subcontract Awards, for use “in all solicitations and contracts with values of \$500,000,000 or more when the contract will be awarded and performed in the United States.... The clause is not required in--

- (1) Solicitations and contracts for commercial items issued under FAR Part 12; or
- (2) Classified solicitations and contracts.”

The rule is effective September 6, 2007.

- On September 6, 2007, the Federal Register noticed several final DoD rules including the following:
 - Adopting as final the October 4, 2006, interim rule which implements “Section 803 of the National Defense Authorization Act for Fiscal Year 2006 (Pub. L. 109-163). Section 803 permits the treatment or acquisition of a major weapon system as a commercial item only if (1) the Secretary of Defense determines that the major weapon system meets the definition of commercial item at 41 U.S.C. 403(12) and such treatment is necessary to meet national security objectives; and (2) the congressional defense committees are notified at least 30 days before such treatment or acquisition occurs.”
 - Technical amendments to update the list of Air Force and Navy contracting activities and to remove obsolete text.
 - Adopting as final the January 22, 2007, interim rule to provide a single reference to DoD-unique acquisition flexibilities that may be used to facilitate and expedite acquisitions of supplies and services during emergency situations.
 - Adopting as final the December 12, 2006, interim rule which for DoD, among other things, “makes mandatory, the FAR option that requires separate fixed hourly rates for each category of labor performed by the contractor and each subcontractor.”

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- Also, on September 17, 2007, DoD Director, Defense Procurement and Acquisition Policy, Shay Assad issued a memorandum on “Contracting Practices—Independent Government Estimates, Government Surveillance, and Contract Quality Assurance.” The memorandum follows-up on a DoDIG Report (D2007-036) on the findings on subject and specifically requests, “reinforcement” in the applicable areas of the FAR, i.e. FAR 15.406-1(a), FAR 16.301-3(a)(2), and FAR 46.401(a).
- On September 10, 2007, DoD Director, Defense Procurement and Acquisition Policy, Shay Assad issued a “reminder” memorandum on an annual report (due to his office by November 30, 2007) required by Congress on TINA and CAS waivers. In particular, the report must cover where TINA was not applied due to the services/goods being deemed commercial items and the “basis for the determination... that the items were commercial and the specific steps taken to ensure price reasonableness.”
- On August 31, 2007, the Federal Register noticed a final rule, “Limitations on Terms of Consumer Credit Extended to Service Members and Dependents,” which, in part, implements 10 U.S.C. 987 and “directs the Secretary of Defense to establish and implement regulations concerning consumer credit services for Service members.... 10 U.S.C. 987 makes it unlawful for any creditor to extend consumer credit to a covered borrower with respect to which...(3) The creditor requires the covered borrower to submit to arbitration or imposes other onerous legal notice provisions in the case of a dispute.” 32 CFR 932.9(d) provides the following, “Notwithstanding 9 U.S.C. 2 (Federal Arbitration Act—FAA), or any other Federal or State law, rule, or regulation, no agreement to arbitrate any dispute involving the extension of consumer credit to a covered borrower pursuant to this part shall be enforceable against any covered borrower, or any person who was a covered borrower when the agreement was made.” The rules are part of Part 32 of the Code of Federal Regulations and are effective on October 1, 2007.

COMMENT: Legislated/selective exceptions to the FAA mandate for the enforcement of arbitration agreements. In this case, covering Service personnel and predispute arbitration agreements in credit transactions. And, consumers must accept similar provisions?
- And, the electronic version of the Washington Post reported on September 24, 2007, “The FBI is investigating a major information technology firm with a \$1.7 billion Department of Homeland Security contract after it allegedly failed to detect cyber break-ins traced to a Chinese-language Web site and then tried to cover up its deficiencies, according to congressional investigators....”

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

- An excellent analysis including background on international dispute resolution as well as methodology of settling disputes under the WTO Dispute Settlement Body and applicable WTO Agreement on Government Procurement is provided by Don Arnavas in his August 2007 article in the International Government Contractor published by Thomson/West.
- The 2nd Circuit decision on September 11, 2007, of Eli Lilly do Brazil v. Federal Express Corp., No. 06-0530 involved a “dispute arising from drums of pharmaceuticals stolen during transit in Brazil, judgment granting defendant enforcement of a damage limitation clause in a waybill governing the transportation of cargo is affirmed where the limitation on liability in the waybill is enforceable as federal common law, and not Brazilian law, applies.” The role of private insurance cannot be minimized. <http://caselaw.lp.findlaw.com/data2/circs/2nd/060530p.pdf>
- And, the recent 9th Circuit Court of Appeals decision in Corrie v. Caterpillar, Inc., No. 05-36210 may be of interest to those in the international sales arena. “In an action brought against Caterpillar by plaintiffs whose family members were killed or injured when the Israeli Defense Forces demolished homes in the Palestinian Territories using bulldozers defendant manufactured (with payments by the US Government), dismissal of the action is affirmed as plaintiffs' claims presented nonjusticiable political questions (e.g. issues on support by the US Government involving military aid, foreign relations and political branches of the Government, etc.) that deprived the district court of subject matter jurisdiction when construed under” applicable rules. The case is available at <http://caselaw.lp.findlaw.com/data2/circs/9th/0536210p.pdf>
- A September 17, 2007, article in the International Herald Tribune addresses a possible limitation of the attorney-client privilege in Europe where it is reported that a “top European Union court banned the Dutch chemical company Akzo Nobel from keeping communications between executives and in-house lawyers confidential.” What are the “current” rules? Talk to counsel. The article is at <http://www.ihrt.com/articles/2007/09/17/business/akzo.php>
- A second SAFETY Act workshop hosted by several trade associations including the National Defense Industrial Association and the Professional Services Council will be held on Wednesday, October 10, 2007, at The Boeing Company in Arlington, Virginia. This event will discuss the following topics: improvements and remaining impediments to the SAFETY Act application process; integration of the Act application process with the procurement process; and emerging issues such as international liability considerations. To register, or to learn more about the conference, including viewing the most up-to-date agenda, visit www.ndia.org/meetings/832a

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Future Speaking Topics Include—

- International Association for Contract and Commercial Management (IACCM), “Drafting the Ultimate Arbitration Clause,” Audio Seminar.
- National Contract Management Association (NCMA), “Understanding the (Un)Intended Consequences of Boilerplate Provisions in Commercial Contracts and Government Subcontracts,” Audio Seminar.
- NCMA San Diego Chapter, “Regulatory/Contractual Update.”
- NCMA Leatherstocking Chapter, Rome, New York, “Alternative Dispute Resolution.”
- Institute of Electrical and Electronic Engineers workshop, Long Beach State University, “Dispute Resolution for Entrepreneurs and Engineers.”
- NCMA 2008 Congress NES, Cincinnati, Ohio, “Contract Negotiation.”
- NCMA Vandenberg Chapter workshop, “Contract Negotiation.”

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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