

Regulatory/Contractual Update

January 26, 2008

Volume 13, Issue 2

- On January 24, 2008, DoD issued several final DFARS rules including the following which are effective on January 24th, except as noted:
 - **Commercial Item Determinations** (DFARS Case 2007-D005) “to address requirements for DoD contracting officers to ensure that an item meets the definition of ‘commercial item’ specified in the FAR when using commercial item procedures for acquisitions exceeding \$1 million in value.”
 - **Research and Development Contract Type Determination** (DFARS Case 2006-D053) “an interim rule to implement Section 818 of the National Defense Authorization Act for Fiscal Year 2007. Section 818 requires DoD to modify regulations regarding the determination of contract type for major development programs to address assessment of program risk.” Comments are due on/before March 24, 2008.
 - **Trade Agreements--New Thresholds** (DFARS Case 2007-D023) “an interim rule amending the DFARS to incorporate increased dollar thresholds for application of the World Trade Organization Government Procurement Agreement and the Free Trade Agreements, as determined by the United States Trade Representative.” Comments are due on/before March 24, 2008.
 - **Closeout of Contract Files** (DFARS Case 2006-D045) “to remove text addressing DoD procedures for closeout of contract files. Text on this subject has been relocated to the DFARS companion resource, Procedures, Guidance, and Information.”
 - **Combating Trafficking in Persons** (DFARS Case 2004-D017) “to remove text addressing prohibitions on contractor activities involving trafficking in persons. The DFARS text is no longer necessary, since policy on this subject has been added to the FAR.”
 - **Payment Withholding--Deletion of Duplicative Text** (DFARS Case 2007-D010) “to remove text addressing withholding of payments under time-and-materials and labor-hour contracts. The DFARS text is no longer necessary, since similar policy has been added to the FAR.”
- The GAO recently issued a December 2007 report entitled, “Oversight Plan Needed to Help Implement Acquisition Advisory Panel Recommendations,” a 74 page complementary statement on the Services Acquisition Advisory Panel 89 recommendations issued in July 2007. Therein it is stated that OFPP agrees with all of the Advisory Panel recommendations except the two dealing with changing the name of Contracting Officer Technical Representative and allowing protests of task/delivery orders over \$5 million but on the latter item allowing same but with a “higher threshold.”

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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 January 10, 2008, DoD issued several final DFARS rules including the following which are effective on January 10th, except as noted:
 - **Functions Exempt From Private Sector Performance** (DFARS Case 2007-D019) “to address procedures for preparation of the written determination required by the FAR, that none of the functions to be performed by contract are inherently governmental.”
 - **Receiving Reports for Shipments** (DFARS Case 2006-D024) “to address requirements for the distribution of material inspection and receiving reports under DoD contracts. The rule clarifies that two copies of the receiving report must be distributed with each shipment.”
 - **Information Assurance Contractor Training and Certification** (DFARS Case 2006-D023) to address training requirements that apply to contractor personnel who perform information assurance functions for DoD. Contractor personnel accessing information systems must meet applicable training and certification requirements.”
 - **Lead System Integrators** (DFARS Case 2006-D051) “an interim rule to implement Section 807 of the National Defense Authorization Act for Fiscal Year 2007. Section 807 places limitations on contractors acting as lead system integrators in the acquisition of major DoD systems. Such contractors may have no direct financial interest in the development or construction of any individual system or element of any system of systems unless an exception applies.” Comments are due on/before March 10, 2008.
 - **DoD Representations and Certifications in the Online Representations and Certifications Application** (DFARS Case 2006-D032) “to address the DFARS provisions included in the Online Representations and Certifications Application (ORCA). Use of ORCA eliminates the need for offerors to repetitively submit the same information in response to Government solicitations.”
 - **Ship Critical Safety Items** (DFARS Case 2007-D016) “an interim rule to implement Section 130 of the National Defense Authorization Act for Fiscal Year 2007. Section 130 requires DoD to establish a quality control policy for the procurement, modification, repair, and overhaul of ship critical safety items.” Comments are due on/before March 10, 2008.
- The New York Times News Service reported under the heading “CIA staff flocking to insurer for protection,” that “a growing number of CIA employees...had bought professional liability insurance” from a company founded by a former FBI agent. And, it is further reported that the government “pays half the premium for all supervisors and certain other high-risk employees, which include hundreds of CIA officers, among them everyone at the agency involved in counterterrorism.”
- Deidre Lee, the Federal Emergency Management Agency's director of management and chief acquisition officer, announced that she will retire from government March 3rd after 32 years of government service—a long and distinguished career!

- The DoD IG on December 20, 2007, issued a report (No. D-2008-036) entitled, “FY 2006 DoD Purchases Made Through the US Department of Veterans Affairs.” The IG stated that substantial number of purchases “were either hastily planned or improperly administered.” Further, DoD/VA “contracting officials failed to consistently comply with the FAR and Pentagon procurement rules when making purchases through the VA.”
- On January 11, 2008, the Federal Register noticed a final EPA rule that “amends the EPA Acquisition Regulation (EPAAR) to add policy, procedures, and contract clauses for the use of award term incentives. This rule makes two administrative changes to the EPAAR... (including noting that) the Civilian Board of Contract Appeals as EPA's new forum for appeals under the Contract Disputes Act of 1978....”
- On January 10, 2008, the Federal Register noticed a proposed DoD rule on “DoD Law of War Program (DFARS Case 2006-D035) to address requirements for DoD contractors to institute effective programs to prevent violations of law of war by contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States.” The proposal would amend “the clause at DFARS 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States, to address requirements for DoD contractors to institute effective programs to prevent law of war violations by contractor personnel. The proposed rule requires that deploying contractor personnel receive appropriate law of war training, and that contractor personnel report any violations of the law of war to the appropriate authorities. The proposed rule is consistent with the policy in DoD Directive 2311.01E, DoD Law of War Program, dated May 9, 2006.” Comments are due on/before March 10, 2008.
- DoD continues to issue memoranda including the following:
 - **“Improving Communication during Competitive Source Selections”** (dated January 8, 2008) that encourages government participants involved in source selections to fully engage with industry at all stages of the competitive process. Examples include the use of industry days, Requests for Information, and draft Requests for Proposals. It also establishes a DoD “requirement to provide a briefing” to the DoD Director, Defense Procurement and Acquisition Policy, Shay Assad, “on any protest of a competitively awarded Major Defense Acquisition Program or of an acquisition of services valued at \$1B or more within ten days of the filing of the protest....”
 - **“Interagency Acquisition”** (dated January 18, 2008) with an update on DoD policy on interagency acquisition and provide clarification of existing policy.
- Marion Blakey was recently elected President of the Aerospace Industries Association (AIA). She is the former FAA administrator from 2002 through 2007.

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- BusGov.com reported the following...

“More than 110,000 employees under the Defense Department's new personnel system will receive performance-based payouts in their checks on Thursday, (January 31st) with the average increase amounting to 7.6 percent.

“Ninety-eight percent of employees working under the National Security Personnel System's Spiral 1 conversion received performance-based payouts this year, meaning their job performance was rated by their supervisors as a three or above on a five-point scale. The bulk of those employees—57 percent—received a rating of three, defining them as ‘valued performers.’

“The average pay increase under NSPS was larger than the hike that federal employees under the General Schedule received for 2008. Congress approved a 2.5 percent across-the-board pay increase for General Schedule employees, with an additional 1 percent allocated to locality pay. Washington, D.C.-area employees received the highest overall increase in the country, coming in at 4.49 percent....”

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

- The case of Production Specialties Group, Inc. (PSG) v. Minsor Systems, Inc. (US Court of Appeals 7th Circuit, January 17, 2008, No. 06-3297) involved a dispute with PSG being tasked to manufacture a machine which was needed by Minsor in its manufacture of automotive parts. The case is interesting, in part, since the VP of Quality allegedly misled PSG as to material aspects of the PSG contractual efforts. Claims by PSG included breach of contract, fraud, punitive damages (in a contract action), etc. The strategy by counsel was also an important factor in the result. The jury had found in favor of PSG and that appeal was sustained by the 7th Circuit. The case is available at <http://caselaw.lp.findlaw.com/data2/circs/7th/063297p.pdf>

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- The international dispute reflected in Prostyakov v. Masco (US Court of Appeals 7th Circuit, January 22, 2008, No. 06-3928) highlights the impact of foreign employment law, drafting/interpretation of arbitration provisions in a settlement agreements, delays in commencement of an arbitration, the interplay of a choice-of-law provision and failure to address conflict of law rules, etc.

A Michigan corporation (“Corporation”) and its Russian managing director (“Director”) of operations had collaborated for several years after the Soviet empire collapsed on expanding that corporation’s business presence in the “new” Russia. For many years that business relationship was very positive but times changed and as the court noted, “things quickly went south.” Subsequently an agreement was negotiated that dissolved that relationship which was described therein as “amicable,” release of all claims, arbitration of all disputes, etc.

Russian law required employees to have a “Labor Book,” which is in essence reflected an individual’s employment career, retained by their current employer, specified reason for termination, etc. and subsequently provided to the employee for specific employment so that it could be tendered to future employers. The former Director’s Labor Book was not provided to him on a timely basis and ultimately was tendered to the former Director wherein it reflected that he was “fired.” The former Director was then terminated from a subsequent supervisory Russian position when that new employer, upon reading the Labor Book, noted that he had been “fired” from the previous position. The Director attempted to have the Book “corrected” for the reasons for termination, requested arbitration by the Corporation, etc.—all to no avail.

The former Director then filed suit in Russia to have the Book “corrected” and a default judgment was entered when the Corporation did not appear. Subsequently, the Director demanded arbitration in the United States to have that judgment enforced, the Labor Book revised, damages, etc.

The arbitrator found for the former Director and issued a so-called “creative” award, damages, etc. to address the claims. The US District Court affirmed that arbitration award with the Court of Appeal affirming that lower court decision.

The appellate court’s analysis focuses, in part, on the proper review of an arbitrator’s award; scope of an arbitrator’s jurisdiction, shaping/designing of an equitable/legal award by an arbitrator; the proper application of a choice-of-law provision in the agreement (calling for Indiana law) which triggered Indiana conflict of laws rules that required application of Russian labor law; and sanctions for delays by the Corporation.

The case is at <http://caselaw.lp.findlaw.com/data2/circs/7th/063928p.pdf>

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Future Speaking Topics Include—

- National Contract Management Association (NCMA), “Drafting the Ultimate Arbitration Clause,” Audio Seminar. Registration information is available at <http://www.ncmahq.org/education/audio.asp>
- “Contract Negotiation” seminar as part of the Acquisition Solutions, Inc. Performance-Based Acquisition Master’s Certificate Program—“one-of-a-kind Master’s Certificate Program in performance based acquisition facilitates...command of the knowledge, tools, and techniques needed to plan, negotiate, and manage contracts and programs using the performance-based approach.” Seminars are offered nation-wide. Scheduling/registration information is at www.acquisitionsolutions.com.
- NCMA 2008 Congress NES, April 17, 2008, Cincinnati, Ohio, “Contract Negotiation.” Registration information is at <http://www.ncmahq.org/meetings/wc08/seminars.asp>
- NCMA San Fernando Valley Chapter, "Contract Negotiation."

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