

Los Angeles
San Francisco

ADR Offices of
CHARLES E. RUMBAUGH
Arbitrator/Private Judge/Mediator
310.373.1981 // 310.373.4182 (fax)
888.ADROffice (toll free)
ADROffice@Rumbaugh.net (e-mail)
www.Rumbaugh.net

P.O. Box 2636
Rolling Hills, California
90274

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

1. **DoD PUBLISHES FIRST PHASE OF PROPOSED TRANSFORMATION CHANGES.** On February 23, 2004, the Federal Register noticed 14 proposed rules as “a result of DFARS Transformation, which is a major DoD initiative to dramatically change the purpose and content of the DFARS. The transformed DFARS will contain only requirements of law, DoD-wide policies, delegations of FAR authorities, deviations from FAR requirements, and policies/procedures that have a significant effect on the public. The objective is to improve the efficiency and effectiveness of the acquisition process, while allowing the acquisition workforce the flexibility to innovate”— while removing 40% of the DFARS. Proposed changes include the following:
 - Procedures, Guidance, and Information (PGI)—Maintenance and availability of same, i.e. those current provisions of the DFARS not impacting the public will be included in a PGI document, e.g. guides, and available on a website.
 - Sealed Bidding— Implements DFARS Transformation noncomplex proposals relating to DFARS Part 214—includes deletion of unnecessary text and “list of officials authorized to permit correction of mistakes in bid.”
 - Research and Development Contracting—Deletion of “obsolete formats, movement to PGI, updating of clauses, etc.
 - Part 251, Use of Government Sources by Contractors—Clarifies contractor requirements for payment of invoices from Government supply sources and moves certain items to PGI.
 - Protection of Privacy and Freedom of Information—Deletion of items covered in other DoD publications.
 - Insurance—“Relocates procedural text on risk-pooling insurance arrangements and requests for waiver of overseas workers’ compensation requirements to PGI.”
 - Cost Principles and Procedures—“Deletes obsolete and duplicative text...and removes procedural text...to PGI.”
 - Major System Acquisitions—clarifications, updates, etc. and removal of internal review procedures to PGI.

- Competition Requirements—Deletes obsolete/duplicative text in FAR “and relocates procedures for documenting reasons for use of other than full and open competition to PGI.”
- DFARS Part 203, Improper Business Practices and Organizational Conflicts of Interest, and Applicable Sections of Part 209 that Relate to Debarment.
- Applicable Sections of Part 209, Contractor Qualifications, that Relate to Contract Placement.

COMMENT: The March 8, 2004, issue of Federal Computer Week discussed this DoD initiative under an article, “Defense Procurement Regs Meet Atkins.” On March 11, 2004, OFPP issued a memorandum announcing a “streamlining” of the number of FAR drafting committees, greater participation in the future by OFPP, etc. in order to increase process efficiency.

2. **TRANSFORMATION AT NASA.** On March 12, 2004, the Federal Register noticed some NASA proposed “transformation” related changes, i.e. the removal of prior regulatory direction in the NASA FAR Supplement to NASA “internal” documents since, purportedly, that prior regulatory direction does not (now) affect the public.

COMMENT: Similar to the DoD transformation initiative, should NASA’s past-regulatory direction “now” constitute a policy that does not impact your operation? Review with counsel and stay on top of these changes and assess how they may impact you and your operations. Comments are due on/before May 11, 2004.

3. **ETHICS AND INTEGRITY.** Last month’s Update referenced the “Do’s and Don’ts” checklist on procurement integrity in an article “Safe Harbors of Ethical Conduct Needed in Defense Procurement” (<http://nationaldefense.ndia.org/article.cfm?Id=1347>) published in the February 2004 issue of NDIA’s National Defense. The March issue of National Defense also had another excellent article on the topic, “Small Companies Need Ethics Programs Too” (<http://nationaldefense.ndia.org/article.cfm?Id=1370>).

And, for an approach by one company and recommended actions by its law firm, visit http://www.boeing.com/news/releases/2004/q1/rudman_030904.pdf (“A Report to the Chairman and Board of Directors of the Boeing Company Concerning the Company’s Policies and Practices for the Hiring of Government and Former Government Employees”) and an earlier report at <http://www.boeing.com/news/releases/2003/q4/rudman.pdf>. (“A Report to the Chairman and Board of Directors of the Boeing Company Concerning the Company’s Ethics Program and its Rules and Procedures for the Treatment of Competitors’ Proprietary Information”).

COMMENT: Must reading! A “self-audit/compliance” template that could establish an ethical/integrity metric. Also, the Washington Post on February 19, 2004, had an interesting article on hiring of former government officials/employees under the heading, “Recruiting Uncle Sam.”

Miscellaneous Items:

- The Federal Acquisition Council has updated its “Manager’s Guide to Competitive Sourcing” (Second Edition, February 20, 2004). This “best practices” guide issued under the auspices of OFPP is posted at <http://www.fac.gov/documents/EileenFACManagerGuide.doc>
- “NASA will conduct an open forum meeting (on May 6, 2004) to solicit questions, views and opinions of interested persons or firms concerning NASA's procurement policies, practices, and initiatives. The purpose of the meeting is to have an open discussion between NASA's Associate Administrator for Procurement, industry, and the public.... The meeting will be held at NASA Johnson Space Center, Robert R. Gilruth Center, Lone Star Room (second floor), Houston, TX.”
- On March 3, 2004, the Federal Register noticed a proposed FAR rule that “revises the policies and procedures for the submission of material safety data sheets (MSDS) by government contractors who provide hazardous materials to the government.” This is the second notice of proposed rule-making on the subject. It has as a primary focus Federal Standard No. 313. Comments are due on/before May 3, 2004.
- On March 8, 2004, the Air Force issued mandatory/interim guidance on “Capabilities Based Test and Evaluation.” This guidance is planned to be issued as AF Instruction 99-103 within 90 days and
“describes the planning, conduct, and reporting of cost effective test and evaluation (T&E) programs as an efficient continuum of integrated testing known as seamless verification. It implements the policies in Department of Defense Directive (DoDD) 5000.1, The Defense Acquisition System, and DoD Instruction (DoDI) 5000.2, Operation of the Defense Acquisition System (collectively called the DoD 5000-series); National Security Space (NSS) Acquisition Policy 03-01; Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3170.01C, Joint Capabilities Integration and Development System, and CJCS Manual (CJCSM) 3170.01, Operation of the Joint Capabilities Integration and Development System. ... This Interim Guidance must be used in conjunction with Interim Guidance that will become AFI 10-601, Capabilities Based Operational Requirements, and Interim Guidance that will become AFI 63-101, Operation of the Capabilities Based Acquisition System. This Interim Guidance applies to all Air Force organizations conducting T&E activities, including the Air National Guard and Air Force Reserve Command. It applies to all acquisition projects and programs regardless of acquisition category (ACAT).”

- On February 23, 2004, the Federal Register noticed an interim FAR rule “to implement the special emergency procurement authorities of section 1443 of the Services Acquisition Reform Act of 2003...(which) increases the amount of the micro-purchase threshold and the simplified acquisition threshold for procurements of supplies or services by or for an executive agency that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or the recovery from nuclear, biological, chemical, or radiological attack. Section 1443 also authorizes the expanded use of Simplified Acquisition and Commercial Items procedures.”
Comments are due on/before April 23, 2004.
- The Air Force issued Acquisition Circular (AFAC) 2004-0205 on February 5, 2004, which “incorporates language from existing Air Force guides as Mandatory Procedures (MP) or Informational Guidance (IG) via addition of heading and pointer language into the text of the AFFARS. Also, an updated direction on bankruptcy procedures is available at <http://www.safaq.hq.af.mil/contracting/affars/5342/mandatory/MP5342.902-bankruptcy.doc>.
- On March 10, 2004, the Air Force issued a “reminder” on the necessity of compliance in “the acquisition of services,” i.e. performance-based service acquisition requirements.
- The US Department of Commerce, Bureau of Industry and Security, Export Enforcement has published a booklet entitled, “Don’t Let This Happen To You!!! Recent Export Enforcement and Antiboycott Cases.” Forty-Three pages replete with situations where criminal, civil, etc. penalties were imposed.
- Finally, the March 5, 2004, NCMA/University of California Annual Educational Symposium, had an excellent presentation by a DCMA representative on Wide Area Work Flow (WAWF), “a Paperless Contracting DoD-wide application designed to eliminate paper from the receipts and acceptance process of the DoD contracting lifecycle. The goal is to enable authorized Defense contractors and DoD personnel the ability to create invoices and receiving reports and access contract related documents. In the traditional DoD business method, three documents are required to make a payment - the contract, the Receiving report and the invoice. Each of these may arrive at the payment office separately - if they are paper. They are processed individually as they arrive. Information is then manually keyed in to the payment system. Using WAWF-RA, electronic documents are shared, eliminating paper and redundant data entry. Data accuracy is increased and the risk of losing a document is greatly reduced.” Copies of the powerpoint slides (1977 KBs) are available.

Future Speaking Topics Include—

- NCMA World Congress, Orlando, Florida, “Designing the Ultimate Dispute Resolution Clause for Enhanced Subcontractor Relationships.”
- NCMA Dayton Chapter, “Hot Topics in ADR.”
- NCMA Puget Sound Chapter, “Baseball and Negotiations are Always In Season!”
- ISM 89th Annual International Purchasing Conference, Philadelphia, Pennsylvania, “An Effective Dispute Resolution Process for Subcontractors” and “Update on DoD Transformation Initiative.”
- ISM Phoenix Affiliate, "How 'Baseball Arbitration' will help in Negotiating Sole Source Procurements--or how to get through Impasse."
- California State Bar Business Law Conference, “Utilization of ADR in Franchise and Securities Industries.”
- National Purchasing Institute, “How to get through Impasse—Can Baseball Arbitration be the Answer?”

Items summarized in all Regulatory 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 on the above and/or various aspects of Alternative Dispute Resolution (ADR), basic/advanced negotiation techniques seminars/workshops, or on substantive topics may be arranged by sending a message to ADROffice@rumbaugh.net