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April 2, 2005 Regulatory/Contractual Update
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Recent Regulatory/Contractual matters that may be of interest since the last Update include---

- The March 29, 2005, Federal Register noticed a proposed rule that would revise and codify in Title 32, Part 18, of the Code of Federal Regulations the "DOD CONTRACTORS' SAFETY MANUAL." This Manual specifies the

  > "explosives safety standards for ammunition and explosives (A&E) work performed under DoD contracts. This proposed rule is necessary to minimize the potential for mishaps that could interrupt DoD operations, delay project completion dates, adversely impact DoD production base or capability, damage or destroy DoD-owned material/equipment, cause injury to DoD personnel, or endanger the general public. The benefits of this proposed rule in terms of the protection of the public and ensuring contract performance are expected to balance its potential cost or administrative impacts. Only provisions related to conventional AE operations have been included in this proposed rule. No attempt was made to encompass general industrial safety, occupational health concerns, chemical warfare agents, radiation, or over-the-road transportation requirements, because these are either the responsibility of other regulatory agencies (for example DOT, DOL/OSHA, or NRC) or may be addressed elsewhere in the contract by the procuring activity." Comments are due on/before May 31, 2005.

  COMMENT: This DoD proposal is over 40 pages and it also provides the following on "budgetary effects" which are stated to be

  > "minimal since existing DoD Federal Acquisition Regulation Supplement coverage already requires compliance with safety requirements in AE solicitations and contracts. Finally, because this proposed rule is needed to minimize the potential for AE mishaps that could adversely impact DoD and the public, timely publication in the Federal Register is important."

  Is the Manual incorporated into your contracts? Any financial impact to your organization and/or your subcontractors—was this flowed down? Any conflicts over the "scope" of specified "responsibilities/oversight" with other regulatory agencies?

- On January 27, 2005, OFPP requested the Civilian and Defense Acquisition Councils to open a FAR case "to consider clarifying the allowability of B&P cost where teaming arrangements are involved."

  COMMENT: See prior Updates on some critical cost allowability issues involved in current teaming arrangements.

- On March 29, 2005, Charlie Williams, AF Deputy Assistant Secretary (Contracting), Assistant Secretary (Acquisition), issued a memorandum "clarifying the requirement for obligating funds when awarding indefinite-quantity contracts. When awarding these type (of) contracts, an obligation must be recorded for the minimum order quantity (and therefore those funds must exist at time of award). The memorandum explains the FAR and DOD Financial Management Requirements that require this obligation (and as a DFAS reporting requirement)."

- On March 30, 2005, the Services Acquisition Reform Act Acquisition Advisory Panel convened and discussed the topics of contract bundling, government ethical standards verses industry ethical standards, and definition of commercial items. The next meeting will be on April 19, 2005.

- GSA noticed in the Federal Registers on March 11 and 17, 2005, two important topics:
  - "Whether the General Services Administration Acquisition Regulation (GSAR) should be revised to include a waiver of consequential damages for contracts awarded for commercial item under the FAR.
  - "Whether 'post award' audit provisions should be included in its Multiple Award Schedules (MAS) contracts and Governmentwide acquisition contracts (GWACs)."

  Comments are currently due on/before May 10, 2005. "A public meeting will be conducted at the General Services Administration, National Capital Region, 301 7th and D street, SW., Washington, DC 20407, Auditorium, starting at 9 a.m. to 4 p.m. EST., on April 14, 2005, to ensure open dialogue between the Government and interested parties on this important topic…. Interested parties may register and submit presentations by April 7, 2005."

  COMMENT: These are crucial topics. One is mindful that the UCC does not include a blanket waiver of consequential damages yet the question being presented here is whether there should be a "blanket" waiver of same for all applicable GSA contracts? Is there a real/perceived reluctance of contractors willing to accept specified government contracts without a waiver—yet are willing to accept non-governmental commercial contracts without any such waiver? And, should the government be the self-insurer on the consequences of the actions of commercial firms? Finally, clearly government audits of commercial contracts are the antithesis of commercial contracting. Talk to your counsel.

- On March 23, 2005, Federal Acquisition Circular 2005-02 was published in the Federal Register with rules on Procurement Program for Service-Disabled Veteran-Owned Small Business Concerns (FAR Case 2004-002).

- GSA noticed on March 29, 2005, in the Federal Register "increased oversight" of deviations to the FAR and GSAR that will "now" involve the GSA Office of the Chief Acquisition Officer. "Therefore, this final rule modifies GSAR 501.403 and 501.404 to include revised procedures for obtaining deviations and clarify the term 'class deviation,' and adds GSAR 501.404-70 to clarify the term 'contract action'."

  COMMENT: Why no notice to the public of a proposed rule? Also, is this an "admission" that the oversight has been wanting in trying to "get it right?" Were the prior deviations "properly" issued, i.e. are/were they "valid"? Discuss with counsel.

- On March 25, 2005, the Army noticed in the Federal Register that its
  "NAF (Nonappropriated fund) Contracting Regulation, AR 215-4… has been updated and revised to include best value acquisition practices, acquisition streamlining, participation in the government/nonappropriated fund purchase card program, implementation of a NAF automated procurement system, and reassignment of signature authority in keeping with the Army's recent restructuring that resulted in the establishment of the new Installation Management Agency (IMA). The public was not and will not be invited to comment on AR 215-4, NAF Contracting Regulation. Although the policy contained in this regulation affects the public as defined in Title 44, this regulation will not be codified. This notice is being published for the purpose of notifying the public as to how Nonappropriated Fund Contracting activities will conduct its business." (emphasis added)

  COMMENT: Let's see… this impacts the public but comments from the public are not solicited! AR 215-4, is available at http://www.apd.army.mil/pdffiles/r215_4.pdf.

- On March 23, 2005, DoD noticed in the Federal Register several proposed, except as noted, rules as part of its DFARS Transformation Initiative with several inclusions into its Procedures, Guidance, and Information (PGI). Changes include those in the following areas:
  - Text pertaining to Contract Modifications.
  - Acquisition of supplies and services from foreign sources.
  - Updating text pertaining to major systems acquisition, earned value management systems, and cost/schedule status reporting (final rule).
  - Procedures for breaking out components of end items for future acquisitions.
  - Updating text pertaining to contracting by negotiation.

- On March 23, 2005, DoD noticed in the Federal Register several rule changes including the following.
  - Implementation of Section 804 of the National Defense Authorization Act for Fiscal Year 2005 requirements including "limitations on the award of contracts for the performance of acquisition functions closely associated with inherently governmental functions (interim rule)."
  - Implementation of Section 843 of the National Defense Authorization Act for Fiscal Year 2005 (Pub. L. 108-375) by amending DFARS 219.702 "to extend the termination date of the DoD test program for negotiation of comprehensive small business subcontracting plans, from September 30, 2005, to September 30, 2010. The test program permits participating DoD contractors to negotiate comprehensive small business subcontracting plans on a plant, division, or company-wide basis."
  - Implementation of Section 324 of the National Defense Authorization Act for Fiscal Year 2005 by amending DFARS Part 237. "Section 324 conditionally extends the expiration date of DoD's authority to enter into contracts for the performance of security-guard functions at military installations or facilities to meet the increased need for such functions since September 11, 2001."

- On March 9, 2005, the Federal Register noticed an interim rule that
  - "revises FAR 44.201-2, Advance notification requirements, and amends Alternate I of FAR clause 52.244-2, Subcontracts. This change is required in order to implement Section 842 of the National Defense Authorization Act for Fiscal Year 2004, Public Law 108-136. Section 842 removes the requirement for contractors under cost-reimbursement contracts with the Department of Defense (DoD), Coast Guard, and National Aeronautics and Space Administration (NASA) to notify the agency before the award of any cost-plus-fixed-fee subcontract or any fixed-price subcontract that exceeds the greater of the simplified acquisition threshold or 5 percent of the total estimated cost of the contract if the contractor maintains a purchasing system approved by the contracting officer for the contract.
  - "In addition, the rule makes a technical amendment to Alternate II of FAR clause 52.244-2, Subcontracts. The rule deletes the reference to paragraph (c) from paragraph (f)(2) of Alternate II because paragraph (c) applies to fixed price type contracts, whereas Alternate II applies to cost-reimbursement contracts."

    Comments are due or/before May 9, 2005.

    COMMENT: Maintaining an approved purchasing system becomes an area of increasing importance. Should this change be made applicable to current contracts? Discuss with counsel.

Decisions/Items of potential interest in contract negotiation, drafting, and contract management—

- An interesting decision involving international law, distribution agreement, applicability/recognition of foreign arbitral awards (9 USC §201 et seq.), Federal Arbitration Act (FAA) (9 USC §1 et seq.), and, most importantly, the drafting of "choice of law" provisions in agreements (which also have an arbitration provision) are raised in Jacada Technology v. International Marketing Strategies, Inc. March 18, 2005, 6th Cir. No. 03-2521 at http://caselaw.lp.findlaw.com/data2/circs/6th/032521p.pdf. An issue decided by the court was whether a generic State choice of law for the "entire" agreement was intended to be specifically applicable to the arbitration aspects rather than the arbitral standards under the FAA. Any ambiguity in drafting could have been easily remedied but not here—the generic aspects of that agreement did not trump application of the FAA standard on vacating of arbitration awards.

- The case of Power Standards v. Federal Express Corp., California 1st App Dist., 03/25/05, Case No. A103021, emphasizes the need to carefully review any shipper's limitation on liability provided in the contract of shipment. Thus, when a shipper has paid the contractual limit of its liability for damaged goods, State common law and statutory remedies cannot augment that recovery—which are deemed to have been preempted by the Airline DeRegulation Act of 1978 and federal common law. http://caselaw.lp.findlaw.com/data2/californiastatecases/a103021.doc

Recent Publications Include—

- "The New (and Improved) Article 2 to the UCC," NCMA Contract Management magazine, December 2004, republished in the National Association of Credit Management Business Credit magazine, March 2005—available at www.Rumbaugh.net

Future Speaking Topics Include—

- ISM—Los Angeles, San Fernando Valley, and Orange County Affiliates, "Big Changes to UCC Rules on Contract Formation and Terms of the Deal are Around the Corner—Are you Ready?"

- NCMA National Education Seminar, China Lake Chapter, "Contract Negotiations."

- NCMA International Congress 2005, Phoenix, Arizona, "Creating an Effective Dispute Resolution Clause—Rules-of-the-Road in Drafting an Arbitration Clause" and "Are You Prepared for the 21st Century Rules on Buying/Selling 'Goods' Under the *New and Improved* UCC Article 2?"

- "Thinking Again For The First Time About Advocacy In Arbitrations," Bar meeting, San Diego, California.

- ISM 2005 Annual International Conference, San Antonio, Texas, "May the New (UCC) Force Be With You!"

- Finger Lakes NCMA Chapter (Rochester, New York), "Preparing for the Big Changes to UCC Rules on Contract Formation and Terms of the Deal."

- Norfolk, Virginia, NCMA Chapter and NAPM/ISM of New Hampshire, "How 'Baseball Arbitration' will help in Negotiating Sole Source Procurements—or how to get through Impasse."

- Maple Leaf, Toronto, Canada, NCMA Chapter, "What Hockey and Baseball Have in Common—A Discussion on Alternative Dispute Resolution."

- Halifax, Nova Scotia, Canada, Atlantic Public Purchasing Association Chapter, NIGP, "How 'Baseball Arbitration' will help in Negotiating Sole Source Procurements."

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.

Information on arranging speaking/teaching engagements in connection with various aspects of Alternative Dispute Resolution (ADR) and basic/advanced negotiation techniques— seminars/workshops—may be arranged by sending a message to ADROffice@Rumbaugh.net