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

1. On December 9, 2005, DoD published in the Federal Register a proposal “to clarify the restriction on the acquisition of foreign carbon, alloy, or armor steel plate. The restriction implements provisions of annual DoD appropriations acts” and are included in DFARS 225. Comments are due on/before February 7, 2006.

And, the Acting Director of Defense Procurement and Acquisition Policy issued a December 9, 2005 memo “that authorizes exemption from the Buy American Act for acquisitions of information technology that are commercial items, in accordance with Section 717 Pub. L. 108-115.” The memo is available on the web at <http://www.acq.osd.mil/dpap/policy/policyvault/2005-1706-DPAP.pdf#zoom=100>

**COMMENT:** The contractual requirements for product content—as several contractors to their dismay (after-the-fact) found out—are very important. Will the new contract clause supersede the current clause in your contract? Finally, the website at <http://www.acq.osd.mil/dpap/paic/berryamendment.htm> provides a DoD overview of “Berry Amendment” restrictions on foreign purchases.

2. The Air Force SAF/AQC released its Air Force Contracting Construction Guide (dated December 2005). “The purpose of the guide is to address key issues to assist the stakeholders and contracting officers in acquiring construction. The guide outlines the processes and strategies to prepare a construction acquisition.” This 127 page Guide contains six chapters covering Independent Government Estimates, Acquisition Planning, Simplified Acquisition Base Engineer Requirements (SABER), Multiple Award Construction Contracts (MACC), Task Order Negotiations, Evaluating Unit Prices - IDCs, and Construction Labor Requirements. The Guide is at <https://www.safaq.hq.af.mil/contracting/affars/5336/informational/affars/mp-ig/IG5336.9201.pdf>
3. On December 5, 2005, the SBA published its new small business size determinations on an interim rule basis and are effective January 5, 2006. The revised standards are available at <http://www.sba.gov/size/indextableofsize.html>

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4. On December 20, 2005, DoD published in the Federal Register two DFARS updates—all as a result of the DoD transformation initiative.

The first proposed change addresses contract pricing matters and cost accounting standards administration (with “Technical” changes) and are in the following subject matters:

- Exceptions to cost or pricing data requirements and waiver of cost accounting standards.
- Cost realism analysis
- Acceptable Cost Estimating Systems
- Authority to grant CAS waivers
- Imputed cost of money
- Relocation of several parts of DFARS 215 to Procedures, Guidance, and Information (PGI).

Comments are due on/before February 21, 2006.

The other update is a final rule dealing with Contract Financing (DFARS 232)—no public comments were received in response to the original proposal that was published on May 5, 2005.

5. On December 12, 2005, the Federal Register noticed proposed FAR changes to adjust acquisition-related thresholds for inflation including micro-purchase threshold (to \$3,000), commercial items test program ceiling (to \$5.5M), cost/pricing data submittal under TINA (to \$600,000), prime contractor subcontracting plan “floor” (to \$550,000), with no change in construction (\$1,000,000), nor was any change proposed in the simplified acquisition threshold (at \$100,000), etc. OFPP similarly proposed inflation adjusted changes in the CAS area. Comments are due on both proposals on/before February 10, 2006.

6. On December 15, 2005, the Federal Register noticed a final NASA rule “to require for NASA Research Announcements: Submission of a small business subcontracting plan with any proposal having subcontracting possibilities that may result in the award of a contract whose value exceeds \$5,000,000; and acknowledgement of NASA sponsorship and disclaimer of agency endorsement of results.... Plans will still be required after selection and before contract award above \$500,000.”

**COMMENT:** The \$5M threshold was increased from that proposed (\$500K) solely as a result of industry (AIA) input.

7. The Professional Services Council, along with CODSIA, “sharply criticized” the FAR “proposed rule addressing the use of Time & Materials/Labor Hour (T&M/LH) contracts for commercial items and services. CODSIA opposed the proposed rule and recommended additional public meetings to identify and address options. CODSIA also submitted comments to the FAR Council on a companion proposed rule dealing with the treatment of T&M/LH contracts for non-commercial items and services. While several of the issues raised are similar to those raised for the commercial rule, CODSIA did not call for a complete rewrite of the rule, but did request additional public meetings.” The December 9, 2005 comments are viewable through the PSC release at <http://www.pscouncil.org/programs/TMRule.pdf>

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## Miscellaneous Items—

- On December 22, 2005, the Federal Register noticed a DoD proposed change to implement policies and procedures, and assigns responsibilities (in 32 CFR part 153) under “The Military Extraterritorial Jurisdiction Act of 2000” (MEJA), i.e. “Criminal Jurisdiction Over Civilians Employed by or Accompanying the Armed Forces Outside the United States, Service Members, and Former Service Members.” Comments are due on/before February 21, 2006.
- The next SARA Acquisition Advisory Panel committee meeting is scheduled for January 19, 2006, at the FDIC building on 17<sup>th</sup> St. in Washington DC from 9:00 am to 5:00 pm (originally scheduled meeting for January 5<sup>th</sup> was cancelled). The working group reports are “generally” posted at [http://www.acqnet.gov/aap/wg\\_list.html](http://www.acqnet.gov/aap/wg_list.html) but it is interesting that the recent release of the “draft” report of the Commercial Practices Working Group was not posted. See prior Updates.
- On December 14, 2005, the President issued an Executive Order on “Improving Agency Disclosure of Information” by the US Government (through, in part, FOIA requests). How transparent is the Government?
- On December 9, 2005, DoD published Change Notice 20051209 with Final Rules on the following topics:
  - Ordering Period for Task and Delivery Order Contracts (DFARS Case 2003-D097/2004-D023)
  - Socioeconomic Programs (DFARS Case 2003-D029)
  - Environment, Occupational Safety, and Drug-Free Workplace (DFARS Case 2003-D039)
  - Foreign Acquisition (DFARS Case 2003-D008)
  - Free Trade Agreements - Australia and Morocco (DFARS Case 2004-D013)
  - Contracting for Security-Guard Functions (PGI Case 0000-P051)
- As of October 28, 2005 the Electronic Subcontract Reporting System (eSRS) “is available for use by all civilian agencies and their contractors at [www.esrs.gov](http://www.esrs.gov). The eSRS is now functioning at the Initial Operating Capability (IOC) level, which will allow the civilian contractors to enter their Subcontracting Reports for Individual Contracts (formerly the SF-294) and Summary Subcontract Reports (formerly the SF-295). The eSRS is the latest system under the umbrella of the Integrated Acquisition Environment (IAE). . . .”
- The Air Force announced in a memorandum dated November 17, 2005, that the AF Advisory and Assistance Services Policy Memo of July 23, 2001 (setting forth “requirements” for a Determination/Decision Document (DDD)), will be optional in the future.
- The 2006 DoD Procurement Conference is planned for May 23-26, 2006 Orlando, Florida

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- Updates on DCMA activities...

It is reported that “DCMA is going through a transformation to become more responsive to customers (primarily the Military Services). The goals are listed at <http://www.dcma.mil>. One of them is:

“GOAL 1: Transform the Agency into a customer-focused organization

“Our objective is to help our customers be successful. We do this by utilizing our extensive knowledge and insight into contractor operations to assess and forecast contractor cost, schedule, and performance information. We then can take timely action, communicate with our customers, make recommendations for remedial actions, and profoundly influence contractor behavior. By contributing to the customers’ success, DCMA becomes indispensable to our customer.

“Strategic Actions:

- a. Develop and implement an Agency Customer Engagement Strategy
- b. Identify customer outcomes
- c. Build a robust Customer Relationship Management System

“The contract management offices (CMO) are going through a realignment to group CMOs that have a commonality of supplies/services being administered. The major groupings are Aeronautical (which includes DCMA Santa Ana), Navy Ship & Electronics, Space & Missiles (includes LA AFB in El Segundo) and Ground Vehicles & Munitions (primarily Army). There has been a large effort to collect information on Products/Services being administered and the majority of the items being administered define a particular CMO’s grouping. The whole project may take 1-2 years until complete.”

Another topic: “DCMA is still encouraging/marketing Wide Area Workflow (WAWF) to contractors” with over 80% of the DD250s requiring Source Inspection/Acceptance being done by WAWF with electronic invoicing at the same level. Quite a bit of the effort is being done at the grass roots level by Quality Assurance Reps and the contracts folks. DCMA is realizing participation in the mid 80%, i.e., over 80% of the DD250s requiring Source Inspection/Acceptance are being done by WAWF and electronic invoicing approximately at the same level, but measures Source and Destination types of acceptances along with Cost Vouchers, Performance Based Payment, Progress Payments, Contracting Officer approved invoices, etc.”

Finally, the “latest information indicates that WAWF version 3.0.9 will not be deployed until January 2006.” See prior Updates.

- The Navy CIO issued an extensive 7-page memorandum on September 30, 2005, on the subject, “INFORMATION TECHNOLOGY (IT) POLICY GUIDANCE FOR FISCAL YEAR 2006 EXPENDITURES.” Therein, it is stated, that “in Fiscal Year 2006, as in recent years, our (Navy) information management/ information technology (IM/IT) efforts will focus on creation of a joint, net-centric environment that delivers knowledge dominance to Naval warfighters. To that end, we must invest only in projects that are aligned with the Department's strategic vision and aimed at our goals of a secure, interoperable architecture, providing web-enabled services and full dimensional protection...” The policy provides detailed direction on how to proceed relative to the spectrum of IT efforts.

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

- Some recent Navy pronouncements have “suggested” additional approaches/training relative to “fair/reasonable” pricing—the pricing standard required by FAR—with recommended/action items including different procedures depending upon whether the Contracting Officer has cost/pricing data or “other than cost/pricing” data, listing of websites to visit in conducting market research, a litany of available guides, etc. including management “questions to ask” in approving final pricing actions. All very informative and for sure helpful in the process: however this, and others, seem to operate from the premise that so long as sufficient information is available, rarely, if ever, is a finding made that a price is unfair/unreasonable notwithstanding some GAO audit reports, etc. in the past.

What is also noticeable and wanting in this endeavor is a process of ensuring proper approvals when/if those pricing actions are the result of the price being deemed neither fair nor reasonable as “required” under the FAR—even for commercial items—**and when there is “sufficient” data!** Those situations do occur! And, the “default” mode is not, as some seem to suggest, “a report to Congress with increased visibility on the contractor who has the so-called ‘high or escalated price’ from prior/recent transactions.” Reports to Congress do not assist the Contracting Officer in fulfilling his/her professional obligations and does not assist in the contract management process.

And, given the requests from time to time by Contracting Officers to contractors for, in effect, price redeterminations, i.e. “can the Government have a price adjustment (reduction) due to the (recently negotiated) price ‘not being fair/reasonable’,” etc. indicates that Contracting Officers AND Contractors may need to ensure compliance with the FAR from the get-go. For example, are deviations being obtained and documented when actions are taken that are “inconsistent” with the FAR? If the price is **not** fair/reasonable, would a deviation be required? And if a deviation is not obtained, where does that risk get allocated—it shouldn’t be on the (so-called “offending”) Contractor with that report to Congress!

Contracting Officers/Contractors need additional “negotiating” tools when the answer to a fairness/reasonableness finding/determination “is a close question,” e.g. sole source, impasse, “bilateral” change orders to commercial item contracts, etc.

Talk to counsel and also see the negotiation/final offer articles at [www.Rumbaugh.net](http://www.Rumbaugh.net).

- Some recent case summaries involving indemnification agreements—which may be described for the purposes of this Update as an allocation of risk (usually expressly by contract) between parties whereby one party assumes the legal liabilities of another—may suggest review of this subject with counsel. Indemnification surfaces under various scenarios in subcontract/teaming arrangement(s). Those case summaries raise some interesting aspects on this subject.

One case, Walsh Construction Co. v. Mutual of Enumclaw, 338 Or. 1, 104 P.3d 1146 (2005), held that “additional insured” endorsements to insurance policies violated the relevant Oregon anti-indemnification statutes and therefore are unenforceable. Another case was the California decision in American Casualty Company of Reading, Pa. v. General Star Indemnity Co., 125 Ca. App.4<sup>th</sup> 1510, 24 Cal.Rptr.3d 34 (2005), in the context of a lease/license which found that adding insureds under North Carolina law was permitted notwithstanding that indemnification in the absence of insurance may have been prohibited. In this latter situation the court held that insurance coverage is different and distinct from other applicable contractual prohibitions on the subject.

The scope of indemnification is complex and must be understood—especially in the context of insurance and other/applicable state laws. Talk to counsel.

- A (consumer) case that may also be of interest (including cases cited therein).... “Where parent corporation imported and sold products manufactured by subsidiary, which sold its own products in California, foreign corporation was subject to general jurisdiction of California courts under ‘representative services’ doctrine, which holds that where subsidiary performs services in state that parent would otherwise perform here itself, parent is subject to state’s jurisdiction to same extent as subsidiary. Evidence that subsidiary manufactured products for parent that parent had previously manufactured itself for sale to non-California customers and that subsidiary performed a function that was compatible with and assisted parent in the pursuit of parent’s own business was sufficient to establish applicability of representative services doctrine, even if parent never sold its products in California before acquiring subsidiary.” Dorel Industries, Inc. v. Superior Court (Jackson) - filed December 15, 2005, Calif. Sixth District, Case no. H028516. **But**, see the contrary decision involving that “doctrine,” In re Automobile Antitrust Cases I and II - filed December 22, 2005, Calif. First District, Case no. Case no. A109805. Talk to counsel.

### **Future Speaking Topics Include—**

- Southern Nevada NCMA Chapter and Las Vegas ISM Affiliate, "Big Changes to UCC Rules on Contract Formation and Terms of the Deal are Around the Corner—Are You Ready?"
- ISM Arizona Affiliate, "Big Changes to UCC Rules on Contract Formation and Terms of the Deal are Around the Corner—Are You Ready?"
- NCMA Atlanta, Georgia, National Educational Seminar, "Contract Negotiations."
- Tampa Bay Suncoast NCMA Chapter, “Baseball Arbitration.”
- NCMA World Congress, Atlanta, Georgia, "Drafting the Ultimate ADR Clause for Government Subcontracts.”
- California State Bar Annual Meeting, “Thinking Again For The First Time About Advocacy In Arbitrations.”

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