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

1. **ETHICS IN GOVERNMENT CONTRACTING.** “A former top Boeing Co. executive was sentenced to four months in prison...for illegally negotiating a \$250,000-a-year job for an Air Force contracting officer while she held sway over a potential multibillion-dollar contract sought by the huge aircraft manufacturer.” And it’s also reported that the Defense Criminal Investigative Service, continues its ethics investigation “Senior Official Project,” commenced over eight months ago, on “former civilian and military managers who negotiated and managed large contracts at the Pentagon after 2001 and then went to work in the defense industry.” And, a “Procurement Fraud Working Group” has also been initiated by the Department of Justice where it has “created a special task force aimed at combating fraud among defense and homeland security contractors.”

COMMENT: Must reading for all is the plea agreement <http://news.findlaw.com/hdocs/docs/boeing/ussearsplea.pdf> and statement of facts <http://news.findlaw.com/hdocs/docs/boeing/ussearssof.pdf> in this case. Do they provide a “road-map” for HR departments in ensuring hiring decisions comport to the Government direction in the area? Review with counsel.

2. **SERVICES ACQUISITION REFORM ACT ADVISORY COMMITTEE CONVENES.** The first meeting of the Services Acquisition Reform Act Advisory Committee was held on February 28, 2005, and discussed priorities with a reported emphasis on the panel adding “ethics” on its agenda. A report on the meeting can be found at <http://38.118.42.202/dailyfed/0205/022805k1.htm>. The next meeting is scheduled for March 30 where members of the private sector will be invited to speak.

COMMENT: Ethics is “not” an issue? See prior Updates.

3. **DOD IS PROPOSING TO “UPDATE” DFARS ON “EXTRAORDINARY CONTRACT ADJUSTMENTS.** On February 7, 2005, DoD noticed in the Federal Register a “proposed rule is a result of the DFARS Transformation Initiative” which will...

- Update requirements for DoD processing of requests for extraordinary contract adjustments; and
- Delete procedures for preparation of records and submittal of requests to a contract adjustment board. Text on this subject will be relocated to the new DFARS companion resource, Procedures, Guidance, and Information (PGI), available at <http://www.acq.osd.mil/dpap/dars/pgi>

Comments are due on/before April 8, 2005.

## Miscellaneous Items:

- On February 25, 2005, the Federal Register noticed that “The Office of Management and Budget (OMB) requests comments on a draft guidance document entitled Improving Government Charge Card Management. The draft guidance, located at [http://www.whitehouse.gov/omb/financial/fia\\_travel.html](http://www.whitehouse.gov/omb/financial/fia_travel.html), consolidates and updates current government charge card program guidance previously issued by OMB, the General Services Administration, the Department of the Treasury, and other Federal agencies. The draft guidance applies to all Executive Branch departments and agencies, establishing standard minimum requirements and suggested best practices in areas of charge card management such as planning, training, risk management, data collection, credit worthiness, and strategic buying. When this guidance is finalized, it will be issued as either a new OMB Circular or as an addendum to an existing OMB Circular.” Interested parties should submit comments in writing on or before March 28, 2005.
- The ABA announced a March 8, 2005, audio/web cast on “Recent Developments in Export Enforcement Cases.” Registration: Phone: 800.285.2221 and use the menu or online at [http://maestro.abanet.org/trk/click?ref=zpqri74vj\\_0-385x1a02x1244&](http://maestro.abanet.org/trk/click?ref=zpqri74vj_0-385x1a02x1244&)
- On February 22, 2005, DoD noticed in the Federal Register that is “has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 816 of the National Defense Authorization Act for Fiscal Year 2005. Section 816 increases, from \$500,000 to \$1,000,000, the threshold at which a DoD contract must include a requirement for the contractor to provide to cooperative agreement holders, upon their request, a list of the contractor's employees who are responsible for entering into subcontracts.” Comments are due on/before April 25, 2005.
- On February 22, 2005, DoD noticed a “final rule (that) adds policy at DFARS 246.402 and 246.404 to eliminate the requirement for Government contract quality assurance at source for contracts or delivery orders valued below \$250,000, unless (1) mandated by DoD regulation, (2) required by a memorandum of agreement between the acquiring department or agency and the contract administration agency, or (3) the contracting officer determines that certain conditions exist.” The notice also provided an extensive analysis of the public comments that were submitted in response to the previously published proposed rule.
- On February 22, 2005 DoD also published rules resulting from its DFARS Transformation initiative including
  - Revisions to “DFARS 229.101 to remove text pertaining to (1) resolution of issues regarding the applicability of taxes under DoD contracts; and (2) tax relief agreements between the United States and European governments” to Procedures, Guidance, and Information on the web.
  - Amendments to “DFARS 228.105 to clarify that fidelity and forgery bonds are authorized for use under certain circumstances; and Amends DFARS 228.106-7(a) to update a cross-reference.”

- Specialized Service Contracting. “Proposed change relocates to PGI, procedures for defining the geographic area to be covered by mortuary services contracts, and procedures for distribution of those contracts; deletes a contract clause containing facility requirements for mortuary services, as these requirements are adequately addressed in State law; and deletes unnecessarily restrictive text on contracting for laundry and dry cleaning services.”
  - Advisory and Assistance Services. “Proposed change deletes a definition of advisory and assistance services that is used primarily for budgeting and reporting purposes and is adequately addressed in financial management regulations; deletes obsolete text on contracting for engineering and technical services and requesting activity responsibilities; and relocates to PGI, a list of DoD publications that govern the conduct of audits.”
  - Acquisition of Telecommunications Services. “Proposed change revises DFARS text on the acquisition of telecommunications services to update terminology, delete obsolete text, and add text addressing DoD's authority to enter into contracts for telecommunications resources. Adds to PGI, historical documents on delegated authority from the General Services Administration for the procurement of communications services.”
  - Acquisition of Utility Services. “Proposed change deletes DFARS text on the use of competitive procedures and delegated authority to acquire utility services, as these issues are adequately addressed in the FAR; deletes obsolete text on preaward contract reviews; and relocates to PGI, procedures and corresponding definitions related to connection charges and award of separate contracts for utility services.”
  - Utility Rates Established by Regulatory Bodies. “Proposed change clarifies that utility rates established by independent regulatory bodies may be relied upon as fair and reasonable; and clarifies requirements for use of contract clauses addressing changes in rates for regulated and unregulated utility services.”
- **DoD IS PROPOSING TO “UPDATE” DFARS ON “EXTRAORDINARY CONTRACT ADJUSTMENTS.** On February 7, 2005, DoD noticed in the Federal Register a “proposed rule is a result of the DFARS Transformation Initiative” which will...
    - Update requirements for DoD processing of requests for extraordinary contract adjustments; and
    - Delete procedures for preparation of records and submittal of requests to a contract adjustment board. Text on this subject will be relocated to the new DFARS companion resource, Procedures, Guidance, and Information (PGI), available at <http://www.acq.osd.mil/dpap/dars/pgi>
  - The Department of Transportation is reissuing the Transportation Acquisition Regulation (TAR). This interim final rule reflects changes made to implement and/or supplement the Federal Acquisition Regulation (FAR). The TAR has been substantially revised to update references to obsolete policies, procedures and organizations; incorporate electronic links to references such as provisions to the FAR, U.S. Codes, the Code of Federal Regulations; and adopt by reference Office of Federal Procurement Policy Letters and Executive orders. The reissued TAR eliminates coverage that is unnecessary or duplicates the FAR or other directives.

Only coverage that is suitable and necessary will be retained in the regulation. These efforts will create a 2004 edition of the TAR that is consistent with the 2001 edition of the FAR. The 2004 edition of the TAR will replace the 1994 edition. This rule is effective April 8, 2005. Comments should be received by March 9, 2005.

- Also noticed in the February 7, 2005, Federal Register:
  - Small Business Competitiveness Demonstration Program (DFARS Case 2003-D063). “Supplements FAR policy that requires a statement on the face page of contracts to identify awards under the Small Business Competitiveness Demonstration Program. Facilitates the use of automated systems by permitting alternative means of identifying a contract as an award under the Program.”
  - Tax Procedures for Overseas Contracts (DFARS Case 2003-D031). “Relocates text to the new DFARS companion resource, Procedures, Guidance, and Information (PGI), available at <http://www.acq.osd.mil/dpap/dars/pgi>. The relocated text contains procedures for use by contracting officers in obtaining tax relief and duty-free import privileges for acquisitions conducted in Spain and the United Kingdom.”
  - Polyacrylonitrile (PAN) Carbon Fiber - Restriction to Domestic Sources (DFARS Case 2004-D002). Extends, from May 31, 2005, to May 31, 2006, the ending date for inclusion of PAN carbon fiber domestic source requirements in solicitations and contracts. Applies to acquisitions for major systems that are not yet in development and demonstration (milestone B as defined in DoD Instruction 5000.2). Revises the prescription for use of the clause at DFARS 252.225-7022, Restriction on Acquisition of PAN Carbon Fiber, to reflect the extension.
- Air Force issued AF Acquisition Circular (AFAC) 2005-0209. See <http://farsite.hill.af.mil/reghtml/changes/afac/afac2005-0209.htm>
- On December 29, 2004, the Under Secretary of Defense, Personnel and Readiness, issued a “reminder” memorandum, “Limitations on the Use of Contracts and Other Agreements with DoD Nonappropriated Fund Instrumentalities (NaFIs) Pursuant to 10 USC §2942” on the scope of same, i.e. limited “exchanges and morale, welfare and recreation programs.”
- Decisions/Items of potential interest in contract drafting/management and negotiation:
  - A recent case involving the purported “oral agreement” for the purchase/sale of privately held stock/securities may be of interest as an example of the need for the requisite level authority in negotiations to find a binding contract of sale and, in particular, whether the attorney representing a party in those negotiations had the actual or apparent authority to bind his principal to a sale. In the case of *SARKES TARZIAN, INC. V. US TRUST CO.* 7th Cir. (Feb. 14, 2005), Case No. 03-2994, 03-3098, the mere retention of an attorney for negotiations does not establish that attorney—something more may be needed. Also, the concept, and different levels, of “good faith” negotiations under New York law may be of additional interest to the reader. The scope of the person’s authority with whom you are negotiating cannot be underestimated—as this case indicated. <http://caselaw.lp.findlaw.com/data2/circs/7th/032994p.pdf>

## **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.

## **Future Speaking Topics Include—**

- ISM—Phoenix, Arizona, Affiliate, "How 'Baseball Arbitration' will help in Negotiating Sole Source Procurements--or how to get through Impasse."
- NDIA, Las Vegas Annual Educational Seminar, “Dispute Resolution Today: Or is it a reprise of yesterday’s ADR theme? ‘Play It Again, Sam?’”
- Halifax, Nova Scotia, Atlantic Public Purchasing Association Chapter, NIGP, "How 'Baseball Arbitration' will help in Negotiating Sole Source Procurements."
- NAPM/ISM of New Hampshire, "How 'Baseball Arbitration' will help in Negotiating Sole Source Procurements--or how to get through Impasse."
- ISM—Los Angeles Affiliate and San Fernando Valley Affiliate, "Big Changes to UCC Rules on Contract Formation and Terms of the Deal are Around the Corner--Are you Ready?"
- Finger Lakes Chapter (Rochester, New York), "Preparing for the Big Changes to UCC Rules on Contract Formation and Terms of the Deal."
- ISM 2005 Annual International Conference, San Antonio, Texas, “May the New (UCC) Force Be With You!”
- 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 21<sup>st</sup> Century Rules on Buying/Selling ‘Goods’ Under the New and Improved UCC Article 2?”
- NCMA National Education Seminars, Inland Empire Chapter and China Lake Chapters, “Contract Negotiations.”

*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](mailto:ADROffice@Rumbaugh.net)*