

Regulatory/Contractual Update

February 13, 2006

Volume 11, Issue 2

Highlights:

- DAPA Report
- Performance-Based Service Acquisitions
- Section 1423
- The New DoD-BTA
- Contract Closeout
- Certification
- NASA Open Meeting
- UID
- Other...

Contract Negotiation Comments. . .

Speaking Engagements

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

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

- The December 2005 Report by the Assessment Panel of the Defense Acquisition Performance Assessment Project (DAPA) was issued. This review of the defense acquisition process is the latest flowing from several past reports issued over the years on improving that process. As noted in the Foreword by Norman Augustine, this “present review, as was the case with its predecessors, will ultimately be judged not by how well it identified the problems, or even how well it points to the solutions. It will be judged by what it (the DAPA project) actually makes happen.”
COMMENT: Required reading.
- On February 1, 2006, DoD issued a Memorandum on “Performance-Based Service Acquisition (PBSA).” DoD remains “committed to increasing the appropriate use of PBSA.” Attached thereto are copies of the earlier OFPP direction on PBSAs, current list of services exempted from using PBSA contracting methods, and a copy of the prior DoD direction requiring “personnel involved in preparation of performance-based statement of work must complete PBSA training.”
- On January 31, 2006, a multi-association “Response and Comment” to the “Preliminary Recommendations of the Working Groups of the (Section 1423) Acquisition Advisory Panel” was published—“as provided in the Public Hearing on January 31, 2006.” The response/comment encompasses five areas:
 - Performance-Based Working Group
 - Government-Wide & Interagency Contract Vehicles Working Group
 - Comments Regarding New Ethics Regulations
 - Small Business Working Group
 - Commercial Practices Working Group**COMMENT:** Suffice to say the primary area of “critical” concern was in the latter area with over 12 pages of “preliminary” recommendations! This multi-association Memorandum/Presentation was signed by 7 trade associations!
- On February 3, 2006, DoD issued a Memorandum on “Organization of the Defense Business Transformation Agency (BTA).” With funding of this new agency announced by the publication of Program Budget Decision 721 on December 21, 2005, “this new agency’s mission is to transform business operations to achieve improved warfighter support while enabling financial accountability across the DoD.” Operating under the authority of the Under Secretary of Defense for Acquisition, Technology and Logistics, it is “specifically responsible as corporate level service organization for the DoD, accountable for successful definition and execution of DoD-wide business improvement initiatives and system investments.” The Memorandum covers the organizational structure of the seven divisions/offices of BTA. “BTA is dedicated to building upon the momentum established in the effort to modernize DoD-wide business activity.”

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.

- The Air Force issued an updated “Mechanization of Contract Administration Services (MOCAS) Contract Closeout Guide” under a date of December 2005. This Guide for acquisition personnel is intended as providing a “helping hand...through the complex list of things to be done to close MOCAS contracts.” In addition to process/flowchart, forms, etc., chapters have the following headings:
 - “Proactive Closeout” or so-called, “How to Avoid Antagonizing Future Generations of Contracting Officers.”
 - “Common Closeout Problems” or so-called, “What do you mean the contract uses Armed Services Procurement Regulation (ASPR) clauses?”
 - “Other Transaction Authority Agreements.”
 - “Contracts with a Long Term Warranty.”
 - “FY 04/05 Defense Acquisition Act Temporary Contract Closeout Relief.”
- On January 20, 2006, the Office of Management and Budget issued a Memorandum on “The Federal Acquisition Certification in Contracting Program.” With approval of this program in 2005, the civilian agencies will generally mirror the DoD requirements established for its contracting officers under the Defense Acquisition Workforce Improvement Act. This program has as its goal “standardized education, training, and experience requirements for contracting professionals, which will improve workforce competencies and increase career opportunities.” Attached to that Memorandum was a detailed enclosure on the approved program.
- On January 30, 2006, the Federal Register noticed the withdrawal of “proposed rule, FAR case 2003-008, Share-in-Savings Contracting, which was published in the Federal Register on July 2, 2004. The rule proposed amending the FAR as it pertains to types of contracts and acquisition of information technology to address the inclusion of Share-in-Savings (SIS) contracting. However, the SIS concept was not reauthorized by Congress.”
- The Air Force issued an updated, and “complete revision of, AFI 63-301, dated 1 December 2005, on “Competition and Commercial Advocacy Program”—which provides “mandatory...guidance and procedures for personnel implementing the Air Force Competition and Commercial Advocacy Program.” It also “updates the role of the Competition Advocate General and revises the reporting requirements for the annual competition plan.”
- On March 8, 2006, NASA will conduct an “open forum meeting 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 Assistant Administrator for Procurement, industry, and the public.” The meeting will be held at NASA Johnson Space Center's Robert R. Gilruth Center Houston, TX from 1:00-3:00. Point of contact is Barbara Kirkland, NASA Johnson Space Center, Mail Code BD35, Houston, TX 77058, (281) 483-4512 or (281) 483-4511.
- On January 26, 2006, the CAS Board noticed an “invitation for public comments on the staff discussion paper regarding CAS 416, ‘Accounting for Insurance Costs.’ In particular, this staff discussion paper addresses the use of the term ‘catastrophic losses’ in CAS 416-50(b)(1).” Comments are due on/before March 27, 2006.
- DHS Under Secretary for Science and Technology Charles McQueary submitted his letter of resignation to the President. His resignation is effective March 25th.

- “The Office of the Under Secretary of Defense for Acquisition, Technology & Logistics, Unique Identification (UID) Program Office, has announced that they will sponsor three UID Forums in 2006 to provide practical guidance to military program managers and DoD contractors to help with successful UID implementation as required by DoD policy (DFARS 211.274). ...The OSD UID PMO will sponsor the registration for the first 200 DoD employees that attend the first UID Forum in Seattle, February 21-22, 2006. ... For complete information on the UID Forums and registration ... visit <http://www.UIDforum.com>. For registration questions, please contact Karyn Calaway, 1-800-560-1980.”
- A SPAWAR Contracts Policy document was issued whereby COs are directed “not (to) issue a final RFP in support of SPAWAR programs without having an approved Source Selection Plan.”

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

- The recent 10th Circuit Court of Appeals decision in *MidAmerica Construction Management, Inc. v. Mastec North America, Inc.* (02/09/06 - No. 04-6231) brings to the forefront (at least perhaps in Texas and New Mexico) the import of “pay-if-paid” clauses in subcontracts.

The defendants were general contractors on a private-sector construction project and plaintiff subcontractor’s contract “requires the general contractors to pay the subcontractor for the work the subcontractor performed only if the general contractors are first paid on their own contract with the project owner.” The court addressed the type of language that constitutes a “pay-if-paid” clause under applicable law and affirmed the “district court’s grant of summary judgment to Defendants ... on the claim of Plaintiff MidAmerica Construction Management, Inc. that Defendants breached their contract with Plaintiff by refusing to pay Plaintiff for the work Plaintiff performed under the contract. We do so because we determine that (1) the contract contains a “pay-if-paid” clause; (2) this clause is enforceable under both Texas and New Mexico law; and (3) as a result, Defendants need not at the present time pay Plaintiff for the work that Plaintiff performed under the contract, because Defendants have not been paid by project owner ... for that work.” Case is located at <http://laws.lp.findlaw.com/10th/046231.html>

Read your contracts, know state law, and review your lien rights! Talk to counsel.

- The 3rd Circuit Court of Appeals decision in *Malaysia Int’l Shipping Corp. v. Sinochem Int’l Co. Ltd.* (02/07/06 - No. 04-1816) highlights, in part, the necessity of “care” in selecting/drafting a clear and applicable “Dispute Resolution” clause or “leaving it to the courts” to determine even if the courts have jurisdiction, etc. Briefly, the “dismissal of plaintiff’s fraudulent misrepresentation action involving a purchase and shipment of steel coils on forum non conveniens grounds is vacated where the district court should have ascertained personal jurisdiction before engaging in a forum non conveniens analysis.” The case also presents an interesting account on international trade (e.g. intrigue) including admiralty transactions, letters of credit, bill of lading, etc. Case is located at <http://caselaw.lp.findlaw.com/data2/circs/3rd/041816p.pdf>

- And, in a decision which could suggest a “Who’s on First...” saga the U.S. Court of Appeals for the Federal Circuit in *Info. Sys. & Networks Corp. v. US* (02/06/06 - No. 04-5151, 04-5154) held that a “summary judgment for plaintiff in a dispute over the allowable costs in a cost-reimbursement contract between the government and plaintiff is reversed where the Court of Federal Claims improperly interpreted a regulation in holding that certain state income tax payments made by plaintiff’s sole shareholder were allowable costs in the contract.”

If a Subchapter S corporation is involved, be careful on whether the FAR presents an “exhaustive list of all unallowable costs that take the form of taxes.” Case is located at <http://caselaw.lp.findlaw.com/data2/circs/fed/045151p.pdf>

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?"
- University of California, “Impasse Negotiations.”
- ISM Arizona Affiliate, "Big Changes to UCC Rules on Contract Formation and Terms of the Deal are Around the Corner—Are You Ready?"
- US Naval Postgraduate School, Monterey, School of International Graduate Studies, “Request for Tender Offers.”
- Antelope Valley NCMA Chapter Annual Education Conference and Sierra Vista NCMA Chapter, “Go Ahead, Make my (Contract) Day!”
- NCMA Atlanta, Georgia, National Educational Seminar, "Contract Negotiations."
- Tampa Bay Suncoast and West Sound, Washington, NCMA Chapters, “Baseball Arbitration.”
- NCMA World Congress, Atlanta, Georgia, "Drafting the Ultimate ADR Clause for Government Subcontracts.”
- Central Connecticut NCMA Chapter, National Educational Seminar, “Best Contracting Practices for Businesses.”
- California State Bar Annual Meeting, “Thinking Again For The First Time About Advocacy In Arbitrations.”
- Puget Sound NCMA Chapter workshop on “New UCC Rules on Contract Formation and Terms of the Deal are Around the Corner! Are You Ready?” and “Go Ahead, Make my (Contract) Day!”
- Los Angeles Gateway and Southern Nevada NCMA Chapters, National Educational Seminar, “Performance-Based Acquisitions.”

Recent Updates are posted at www.Rumbaugh.net

©MMVI Charles E. Rumbaugh

ADR Offices of
CHARLES E. RUMBAUGH
Arbitrator/Private Judge/Mediator
310.373.1981 // 310.373.4182 (fax)
888.ADROffice (toll free)

Los Angeles
San Francisco