Regulatory/Contractual Update

July 7, 2006 Volume 11, Issue 6

- On July 5, 2006, Federal Acquisition Circular (FAC) 2005-11 was issued and included the following:
  - **Earned Value Management System** (EVMS) (FAR Case 2004-019). "This final rule amends the Federal Acquisition Regulation to implement Earned Value Management System (EVMS) policy in accordance with OMB Circular A-11, Part 7 and the supplement to Part 7, the Capital Planning Guide. The FAR will require the use of an EVM System that complies with the guidelines of ANSI/EIA Standard - 748, in major acquisitions for development, and in other acquisitions in accordance with agency procedures. An agency shall conduct an Integrated Baseline Review (IBR) when EVMS is required. Offerors shall not be eliminated from consideration for contract award because they do not have an EVMS that is compliant with the ANSI/EIA standards, provided they submit an EVMS implementation plan with their proposal."
  - **Emergency Acquisitions** (FAR Case 2005-038). "This interim rule revises FAR Part 18 to provide a single reference to acquisition flexibilities that may be used during emergency situations. This change is expected to improve the Government's ability to expedite acquisition of supplies and services during emergency situations. The FAR Part 18 makes no change to existing contracting policy." Comments are due on/before September 5, 2006.

- On June 30, 2006, OMB issued updated guidance ("Policy for a Common Identification Standard for Federal Employees and Contractors") for procuring HSPD-12 (Homeland Security Presidential Directive-12) "certified products and services." Earlier on June 8, 2006, the Department of Homeland Security noticed in the Federal Register the final Regulations Implementing the SAFETY Act.

- OMB announced the next meeting of the Services Acquisition Advisory Panel will be held on July 12, 2006 beginning at 9 a.m. Eastern Time and ending no later than 5 p.m. at the new FDIC Building, 3501 N. Fairfax Drive, Arlington, VA in C3050D (July 24/25 are also tentatively planned for a meeting).

  COMMENT: Should the Panel finalize the recommendation that government-wide quotas for performance-based contracts be dropped?

- The June 2006 issue of NDIA National Defense magazine has an excellent overview by Stuart Nibley, Esq. on the Defense Priorities/Allocation System including rated orders.

Points of Contact
ADROffice@Rumbaugh.net
www.Rumbaugh.net

Regulatory/Contractual Update
Volume 11, Issue 6

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.

- On June 28, 2006, Federal Acquisition Circular (FAC) 2005-10 was issued and included the following:
  - **Central Contractor Registration**--Taxpayer Identification Number (TIN) Validation (FAR Case 2005-007). "The rule adds the process of the government validating a Central Contractor Registration (CCR) registrant's taxpayer identification number (TIN) with the Internal Revenue Service (IRS) to improve the quality of data in the CCR and the federal procurement system. Additionally, the rule removes outdated language requiring modifications of contracts prior to December 31, 2003, regarding CCR."
  - **Procedures Related to Procurement Center Representatives** (FAR Case 2006-003). "This final rule amends the Federal Acquisition Regulation to provide internal procedures to cover situations when the FAR requires interaction with a procurement center representative and one has not been assigned to the procuring activity or contract administration office. It primarily impacts contracting officers and procurement center representatives."
  - **Submission of Cost or Pricing Data on Noncommercial Modifications of Commercial Items** (FAR Case 2004-035).

    "This final rule amends the interim rule issued in FAC 2005-004 and implements an amendment to 10 U.S.C. 2306a. The policy requires that the exception from the requirement to obtain certified cost or pricing data for a commercial item does not apply to noncommercial modifications of a commercial item that are expected to cost, in the aggregate, more than $500,000 or 5 percent of the total price of the contract, whichever is greater. Section 818 of Public Law 108-375, the Ronald W. Reagan National Defense Authorization Act of Fiscal Year 2005 applies to offers submitted, and to modifications of contracts or subcontracts made, on or after June 1, 2005. This new policy results from a statute which changed 10 U.S.C. 2306a. 10 U.S.C. 2306a applies only to contracts or task or delivery orders funded by DoD, NASA, and the Coast Guard. The new policy does, however, also apply to contracts awarded or task or delivery orders placed on behalf of DoD, NASA, or the Coast Guard by an official of the United States outside of those agencies, because the statutory requirement of Section 818 applies to the funds provided by DoD, NASA, or the Coast Guard. The change to the interim rule clarifies the policy to ensure it is applied properly. The threshold in the rule applies to an instant contract action, not to the total value of all contract actions and, as applicable to subcontractors, the threshold applies to the value of the subcontract, not the value of the prime contract."

COMMENT: When is it a non-commercial modification to a commercial item contract/subcontract?

Points of Contact
ADROffice@Rumbaugh.net
www.Rumbaugh.net

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.

- **Implementation of Wage Determinations OnLine** (WDOL) (FAR Case 2005-033). "This interim rule implements the Department of Labor (DOL) Wage Determinations OnLine (WDOL) internet website as the source for Federal contracting agencies to obtain wage determinations issued by the DOL for service contracts subject to the McNamara-O'Hara Service Contract Act (SCA) and for construction contracts subject to the Davis-Bacon Act (DBA). The rule amends the FAR to direct Federal contracting agencies to obtain DBA and SCA wage determinations from the WDOL website…."
- **Free Trade Agreements**--El Salvador, Honduras, and Nicaragua (FAR Case 2006-006) (Interim).
- **Buy-Back of Assets** (FAR Case 2004-014). "This final rule amends the FAR contract cost principle for depreciation costs. The final rule adds language which addresses the allowability of depreciation costs of reacquired assets involved in a sale and leaseback arrangement."

  COMMENT: Industry is reported to be very upset with this final Buy-Back rule.

- On June 16, 2006, the Federal Register noticed several DoD regulatory actions including the following:
  - **Contractor Personnel Authorized to Accompany U.S. Armed Forces** (DFARS Case 2005-D013). "DoD has issued an interim rule amending the DFARS to implement DoD policy regarding contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States (and for consistency with DoD Instruction 3020.41). The rule addresses the status of contractor personnel as civilians accompanying the U.S. Armed Forces and the responsibilities of the combatant commander regarding the protection of contractor personnel." Comments are due on/before August 15, 2006.
  - **Berry Amendment Exceptions** - Acquisition of Perishable Food, and Fish, Shellfish, or Seafood (DFARS Case 2006-D005) Interim Rule.
  - **Security-Guard Services Contracts** (DFARS Case 2006-D011).
  - **Protests, Disputes, and Appeals** (DFARS Case 2003-D010) Proposed Rule. "Deletes obsolete and unnecessary text regarding the processing of contractor claims submitted under DoD contracts."
  - **Use of Clause on Training for Contractor Personnel Interacting with Detainees** (PGI Case 0000-P061). "Adds the clause at DFARS 252.237-7019, Training for Contractor Personnel Interacting with Detainees, to the list of clauses that should be considered when using the clause at DFARS 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States."

- Contract close-outs continue to "lag" with revised/new FAR rule on same expected by September.

Points of Contact
ADROffice@Rumbaugh.net
www.Rumbaugh.net

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 National Defense Industrial Association (NDIA) is hosting a meeting on July 11th whereby the British Ministry of Defence representatives will be present to discuss some issues/concerns in contract negotiations raised by U.S. firms with "Internet-Authorised UK Defence Contract Conditions" (DEFCONS). Apparently, the DEFCONS causing the most problems are:
  - DEFCON 501 - Definitions
  - DEFCON 509 - Recovery of Sums Due
  - DEFCON 515 - Bankruptcy & Insolvency
  - DEFCON 611 - Issued Property
  - DEFCON 614 - Default
  - DEFCON 649 - Vesting
  - DEFFORM 24 - Parent Company Indemnity

  COMMENT: Of course there could be flow-down issues and thus this may be of interest to subcontractors. Also, the July 3, 2006, issue of the Wall Street Journal had an interesting article on a new "attempt" by Congress to "normalize" fixed price development contracting while also noting that some DoD contractors have been accepting same in the international arena and several of those programs involve significant "cost-growth."

- On March 27, 2006, the USD Comptroller issued a memorandum on "Proper Use of Interagency Agreements with Non-DoD Entities Under Authorities Other Than the Economy Act," which referred to earlier guidance and stated, in part, "DoD purchases made through non-DoD entities continue to violate these policies and existing regulations." This recent memorandum directed certain corrective action with a harsh warning that the "failure to complete these actions may result in a revocation of your (recipients of memo) authority to transfer funds to non-DoD entities executing interagency agreements." The Memo required DoD purchasing entities to close out all completed agreements by June 30th and deobligate funds that are expired "with a limitation of one year on any future service contracted for and paid by operations and maintenance funds."

  COMMENT: Interesting the GSA was not a recipient of the memorandum nor was it specifically mentioned therein. Reports are surfacing that GSA may be "non-compliant" with the March 27th guidance/direction unless their customer directs them to comply therewith. But GSA is noted separately as "dragging" its feet on the one year requirement and retroactivity. July 15th is the due date on "compliance reports."

  And, "faulty contracting practices and violations of a law on federal (interagency) spending will be the subject of five reports to be released in August by the Defense Department inspector general's office."

- Paul Dennett nominated to be OFPP Administrator, is expected to receive Committee approval next week with final Senate approval following in the week. A federal jury on June 20th convicted former OFPP Administrator David H. Safavian on four counts of obstructing a GSA proceeding and making false statements. Safavian could face up to 20 years in jail.

Points of Contact
ADROffice@Rumbaugh.net
www.Rumbaugh.net

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.

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

- The 1st Circuit Court of Appeal decision in Teragram Corp. v. Marketwatch.com, Inc. highlights the crucial nature in drafting/managing software licensing/royalty/servicing agreements. This dispute involved claims and counterclaims in connection with alleged failure to make payments, material defect in the software, opportunities to cure, repair/replace warranty, etc. Case is available at http://laws.lp.findlaw.com/1st/051635.html

- The recent decision in Turtle Ridge Media Group, Inc. v. Pacific Bell Directory (California Court of Appeal) is a poignant reminder to be cautious when incorporating the terms (here the arbitration clause) of higher-tier contracts into lower-tier subcontracts whereby a non-signatory could compel arbitration of non-privity subcontractor's claims. Case is available at http://www.metnews.com/sos.cgi?0606%2FB180324

- And, the recent case of Dynegy Midstream Services (DMS) v. Trammochem, Division of Transammonia, Inc., No. 05-3544 (2nd Circuit, June 13, 2006) touches on some issues important on arbitration venue, non-party discovery issues in connection with arbitrations, etc. as well as the extent of the Federal Arbitration Act (FAA) on some of these questions.

  This appeal involves a non-party, DMS (located in Houston), in an arbitration that ignored a subpoena to produce certain documents and electronic data and subsequently a district court in New York which granted an order to compel compliance by DMS.

  One significant issue before the court of appeals was the asserted lack of personal jurisdiction by the district court over DMS. The court reviewed the language in Section 7 to the FAA including..."that the district court in the district in which the arbitrators are sitting may enforce such a summons by compelling attendance or punishing a non-attendee for contempt 'in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States'." The court then "turned" to the Federal Rules of Civil Procedure 45 which has geographical limitations on service of process and enforcement, e.g. "service at any place within the district or at any place without the district that is within 100 miles of the place of the deposition, hearing,...production...specified in the subpoena...." The court concluded that "the Federal Rules governing subpoenas to which Section 7 refers do **not** contemplate nationwide service of process or enforcement; instead, both service and enforcement proceedings have clear territorial limitations."

Points of Contact
ADROffice@Rumbaugh.net
www.Rumbaugh.net

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.

Since the arbitrators were sitting in New York, FAA Section 7 "required that any enforcement action be brought there." The court further found that the language in Section 7 "stands in marked contrast to ...(other) statutes" and **held** "that FAA Section 7 does **not** authorize nationwide service of process, and the district court therefore erred in asserting personal jurisdiction over DMS."

The court further refused to "craft" a solution advocated by the appellee of a "compromise decision" in other cases by summarily stating that the FAA confers upon the arbitrators the authority to subpoena documents or witnesses and **not** the parties and that this "gap" as to who is so authorized **"may reflect an intentional choice on the part of Congress, which could well have desired to limit the issuance and enforcement of arbitration subpoenas in order to protect non-parties from having to participate in an arbitration to a greater extent than they would if the dispute had been filed in a court of law. The parties to the arbitration here chose to arbitrate in New York even though the underlying contract and all of the activities giving rise to the arbitration had nothing to do with New York; they could easily have chosen to arbitrate in Texas, where DMS would have been subject to an arbitration subpoena and a Texas district court's enforcement of it."**

OBSERVATIONS: Where the FAA is applicable...the filing of the demand and venue become more and more important, e.g. who has the authority to decide venue OR change venue? And, we are reminded that venue has a bearing on the unauthorized practice of law issue for out-of-state attorneys. Further, the execution of subpoenas may seemingly become of greater importance. Finally, should there be "multiple" venues or shifting venues for arbitrations?

Case is at http://caselaw.lp.findlaw.com/data2/circs/2nd/053544p.pdf

Future Speaking Topics Include—

- West Sound, Washington, NCMA Chapter, "Baseball Arbitration."
- 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!"
- California State Bar Annual Meeting, Monterey, California, "Thinking Again For The First Time About Advocacy In Arbitrations."
- Naval Postgraduate School, "International Contracting."

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

Recent Updates are posted at
www.Rumbaugh.net
©MMVI Charles E. Rumbaugh