

Regulatory/Contractual Update

June 3, 2006

Volume 11, Issue 5

- On May 19, 2006, the Federal Register noticed an interim DFARS rule that requires RFID tags at the case and palletized unit load levels. Specifically “it adds requirements for contractors supplying materiel to DoD to affix passive RFID tags at the case and palletized unit load levels when shipping packaged petroleum, lubricants, oils, preservatives, chemicals, additives, construction and barrier materials, and medical materials to the Defense Distribution Depots in Albany, GA; Anniston, AL; Barstow, CA; Cherry Point, NC; Columbus, OH; Corpus Christi, TX; Hill, UT; Jacksonville, FL; Oklahoma City, OK; Norfolk, VA; Puget Sound, WA; Red River, TX; Richmond, VA; San Diego, CA; Tobyhanna, PA; and Warner Robins, GA; and the Air Mobility Command Terminals at Charleston Air Force Base, Charleston, SC; Naval Air Station, Norfolk, VA; and Travis Air Force Base, Fairfield, CA...” Additional commodities and locations are incorporated into a revised DFARS clause—DFARS 252.211-7006, Radio Frequency Identification. Comments are due on/before July 18, 2006.

COMMENT: There is no mention of how this impacts current contracts. Does DoD expect these added commodities/locations to be accomplished at no cost? Talk to counsel.

- On May 30, 2006, the Air Force issued the results of its recent “Contracting Workforce Survey.” The AF specified “good results” include the following:
 - 80% understand Force Development affects their career
 - 88% feel they have the skills to accomplish complex contracting activities
 - 92% feel they have the skills to be successful in their position
 - 96% feel they contribute to the success of their organization’s mission

The AF noted certain “areas to improve in” which include

- “Only” 84% reported that AF Core Values are evident in the workplace
- “Only” 70% reported having formal feedback sessions with their supervisors
- “Only” 66% indicated mentors are available to them
- A “majority” of the written comments indicated having training concerns

COMMENT: Or... 8% felt they do not the skills to be successful in their current position? 4% feel they do not contribute to the success of their organization? Is the first “P” of the four “P’s” associated with Performance Based Acquisitions, “People,” in need of a refocusing? Has it started at the top? Are there 360° reviews? “Is” there “really” a training budget? Perhaps this is a wake-up call for the AF in noted areas of improvement and has started! Kudos to the AF for the leadership in initiating the survey and kudos to those that responded!

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- On May 12, 2006, DoD noticed in the Federal Register final rules in connection with its Transformation Initiative which includes the following:
 - “To update text pertaining to the use of specifications, standards, and data item descriptions in solicitations and contracts.
 - “Clarify text on the use of option clauses for industrial capability production planning; deleting unnecessary text on determinations for interagency acquisitions under the Economy Act; deleting restrictive requirements relating to the use of master agreements for vessel repair; ...
 - Lower the level for approval of profit on undefinitized contract actions for which substantial performance has been completed (under DFARS 217.7103-4 Emergency work and by following the procedures at PGI 217.7103-4);
 - Delete guidance on the use of options; and procedures for preparation of master agreements and job orders, for breakout and acquisition of spare parts, and for acquisition of work over and above contract requirements.
 - Update and clarify requirements for Government contract quality assurance and use of warranties;
 - “Delete unnecessary definitions and unnecessary text on technical requirements matters, responsibilities of contract administration offices, and material inspection and receiving reports; and delete text on preparation of quality assurance instructions, use of quality inspection approval stamps, and information on types of quality evaluation data.
 - “Update text pertaining to termination of contracts.
 - “Update text pertaining to the use of basic agreements in the acquisition of telecommunications services.
 - “To add policy permitting the assignment of an additional identification number to an existing contract for administrative purposes.”
- On May 26, 2006, the Federal Register noticed the “Department of Health and Human Services proposal to amend its acquisition regulations (HHSAR) to make administrative and editorial changes to reflect organizational title changes resulting from Office of the Secretary and Operating Division reorganizations and to update or remove outdated text and references. The intent of the proposal is to bring the HHSAR up to date and to make the HHSAR consistent with the latest amendments to the FAR.” Comments are due on/before July 25, 2006.
- PriceWaterhouseCooper published a comprehensive study on multinational companies using arbitration rather than litigation in resolving international disputes citing “greater flexibility, finality and confidentiality.” Also, when one factors in the New York Convention for enforcement of arbitration awards, it usually prevails over litigation. The report is available at www.pwc.com. The earlier US study by the American Arbitration Association may be of interest—see www.adr.org. Finally, the recent issue of International Lawyer published by the ABA International Law Section has several cases in its 2005 year in review in the area of international disputes.

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- On May 12, 2006, the Federal Register noticed a proposed DFARS rule as part of the DoD Transformation Initiative in order to “clarify the authority of a contracting officer's representative and remove internal DoD procedures relating to the designation of a contracting officer's representative.” Comments are due on/before July 11, 2006.
- On May 8, 2006, the Federal Register published a notice of proposed rule-making by the Department of Energy (DOE) wherein it is “proposing to amend the Department of Energy Acquisition Regulation (DEAR) to revise and expand policy and requirements for contractor internal audits, through the use of DOE's Cooperative Audit Strategy. The amendments would ensure that internal contractor audits are conducted in a manner that ensures reliability.” Proposed DEAR changes include the following:

“Upon contract award, exercise of any contract option, or the extension of the contract, the contractor shall submit to the contracting officer an internal audit implementation design. The audit implementation design would describe (i) the internal audit activity's placement within the contractor's organization and reporting requirements; (ii) the size, experience, and educational standards of the internal audit staff; (iii) the relationship of the internal audit activity to corporate entities; if any; (iv) the standards to be used for conducting the audits; (v) the overall internal audit strategy for the performance period of the contract, considering particularly the method of auditing costs incurred; (vi) the intended use of external audit resources; (vii) the plan for internal audits of subcontracts, both pre- and post-award; and (viii) the schedule for peer reviews.”

Comments are due on/before July 7, 2006.

- The Navy reports that it “is in danger of not meeting its small business contracting goal of 18.4%.” On May 15, 2006, a memorandum was issued regarding renewed efforts to achieve the Navy's Small Business goal for FY 2006.
- The Air Force on May 10, 2006, issued a “clarifying” memorandum in response to the US Court of Federal Claims decision in LB&B Associates Inc. v. US , (No. 05-1066L, 12/08/05) “regarding contracting officers’ requiring small business recertification on delivery orders.” The AF directed that “this ruling should not be interpreted as precedence requiring recertification prior to awarding a delivery order, task order or the exercise of an option.” The case stands for the proposition of the CO exercising discretion to request same. “A firm that self-certified as a small business at the time of contract award may be considered a small business throughout the life of the contract.”

COMMENT: Perhaps the Air Force, like the Navy, has a little problem in meeting its small business goals! Unfortunately for the contractor in this case who was on the “then” wrong-side of the “discretion” equation!

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- DoD has posted those deviations from the FAR/DFARS that have been “officially” issued. These may be of interest in preparing/responding to RFPS—see <http://www.acq.osd.mil/dpap/dars/classdev/index.htm>. Do your solicitations have the requisite deviations?
- It is reported that the final rule for the two FAR cases on T&M contracting (for commercial items and non-commercial items) is due in early June.
- “The first live patent auction was conducted on April 5-6, 2006 in San Francisco, CA at the Rita Carlton Hotel. The event was sponsored “by the Chicago headquartered firm of Ocean Tomo, an intellectual property broker, whose stated goal is to assist clients in maximizing value from their Intellectual Capital Equity, as well as aid in making the patent transaction marketplace more efficient. ... Ocean Tomo has indicated a desire for this auction process to become a semi-annual tradition.... The Ocean Tomo auction could be attended in one of three ways—with associated fees. First, one could simply attend as a viewer: ... Second, one could attend as a bidder—with a discount for early registration. (To be issued a paddle, a bidder must also provide a Bank Letter of Guarantee/Credit and an agent authorization form) Finally, one could attend as a seller.” There were reportedly about 400 people who attended the auction with less than 100 of them being Buyers with many patents sold and some withdrawn from the auction gavel, i.e. with and without reserve. The next auction by Ocean Tomo is scheduled for October 25-26, 2006 in New York, NY.

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

- **The SBA is NOT Favorably Inclined Toward ADR and the Courts...?**

“In this consolidated case, the Small Business Administration (SBA) (as a court appointed receiver for Acorn Technology Fund, LP (Acorn)) sued an individual and others for failure to fulfill their investment obligations to make capital contributions to Acorn.” The individuals “filed a motion to dismiss for lack of personal jurisdiction or, in the alternative, to stay the case pending mandatory arbitration.” The motions were denied. The issue before the court of appeals was “whether SBA’s attempts to enforce the subscription agreements are subject to mandatory arbitration.” “The court found that the arbitration agreement that bound the general and limited partners did not apply to the subscription agreements. The two agreements were not sufficiently related for the clause to bind the subscribers. Accordingly, it was proper to stay arbitration “despite the liberal policy in favor of enforcing arbitration agreements under the Federal Arbitration Act.”

A national policy favoring ADR when the agreements are so intertwined? Why is the SBA forcing these individuals to go to court when it could have been resolved by arbitration? Why is the SBA adverse to ADR? Finally, are these judges from the 3rd Circuit Court of Appeal also anti-ADR? Read the opinion and you decide! See <http://caselaw.lp.findlaw.com/data2/circs/3rd/044083p.pdf>

- **“Creative” Installation of Software on Computers in Excess of That Licensed!** Or, “when in doubt read the agreement!” The Los Angeles County Sheriff’s department purchased 3,633 software licenses for Wall Data software yet installed it on 6,007 computers. But, the County configured the computers so that no more than 3,633 users could log-on and use the software at any one time. “Wall Data sued the County for copyright infringement, and a jury found that the County had violated Wall Data’s copyright and awarded Wall Data damages and attorneys fees.” Upon appeal by the County the Ninth Circuit court of appeal “held that the district court properly excluded the County’s use of a ‘Fair Use’ defense, or an ‘essential step’ defense” Each license agreement provided that it was for a “single designated computer.” See <http://caselaw.lp.findlaw.com/data2/circs/9th/0356559p.pdf>

- Would the recent attention/debate to “border security” be better served by outsourcing some/all of the activities to the private sector with a Performance Based Contract? The metrics seem to some to be straight forward.
- Last month we commented here on the reliability of emails, etc. It is suggested that that topic may need to be revisited. Are confidential/privileged e-communications and telephone communications *really* confidential/privileged? Talk to counsel.

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- **Court OKs Arbitration of Job Disputes With Military Members.** Plaintiff had worked for Circuit City for several years when “Circuit City fired him during the mobilization for the Iraqi invasion in March 2003.” An arbitration agreement covered employment related disputes between employer/employee. However, the Plaintiff filed suit under the Uniformed Services Employment and Reemployment Rights Act (Act) “alleging wrongful termination because of his status as a Marine Reserve Officer.” The district court agreed with Plaintiff’s argument, that binding arbitration was precluded by the Act. “The district court found it superseded any state law, including contracts or agreements, that limit any right provided by the Act. ... The Fifth Circuit Court of Appeals reversed [by] finding no evidence of express preemption of the Federal Arbitration Act by Congress in the Act. The Fifth Circuit noted that the Supreme Court has held that arbitration of a statutory claim does not deprive the party of substantive statutory rights; arbitration only submits the claim’s resolution to an arbitral rather than a judicial forum.” Case is at <http://caselaw.lp.findlaw.com/data2/circs/5th/0411360cv0p.pdf>

News accounts on this case state that this court “became the first to rule that employment disputes between private-sector companies and members of the military are subject to arbitration under the Federal Arbitration Act.”

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.”

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