Regulatory/Contractual Update

November 29, 2006 Volume 11, Issue 11

- On November 22, 2006, Federal Acquisition Circular (FAC) 2005-14 was issued and included the following:
  - **Common Identification Standard for Contractors (FAR Case 2005-015).** "This rule converts the interim rule published on January 3, 2006, to a final rule with changes. The rule amends the FAR by addressing the contractor personal identification requirements in Homeland Security Presidential Directive (HSPD) 12, 'Policy for a Common Identification Standard for Federal Employees and Contractors,' and Federal Information Processing Standards Publication (FIPS PUB) Number 201, 'Personal Identity Verification (PIV) of Federal Employees and Contractors.'"
  - **Removal of Sanctions Against Certain EU Countries (FAR Case 2005-045).** "This rule converts the interim rule published at on April 19, 2006, to a final rule without change. The interim rule removed the sanctions in FAR Part 25 against Austria, Belgium, Denmark, Finland, France, Ireland, Italy, Luxembourg, the Netherlands, Sweden, and the United Kingdom on acquisitions not covered by the World Trade Organization Government Procurement Agreement."
  - **Free Trade Agreements--Bahrain and Guatemala (FAR Case 2006-017) (Interim).**
  - **Free Trade Agreements--Morocco (FAR Case 2006-001).**

- On November 15, 2006, Shay Assad, Director of DoD Defense Procurement and Acquisition Policy, issued a memorandum on "Contract Closeout…." This memorandum, in part, reminds Contracting Officers of the process of confirming that contracts are administratively completed within 75 days from notification of same by DFAS for MOCAS contracts and point of contacts designated by the Services for non-MOCAS contracts. Attached to this memorandum were several earlier memos on the topic.

- On November 13, 2006, the Federal Register noticed an interim NASA rule in furtherance of FAC 2005-11 which "established the requirement for Earned Value Management (EVM) to be implemented on major acquisitions as defined in OMB Circular A-11…. Accordingly, NASA has developed its own provision and clause, and supplemental guidance for EVM implementation. In addition to requiring the application of EVM to major acquisitions as described in OMB Circular A-11, NASA's coverage provides contract value dollar thresholds for EVM implementation." Comments are due on/before January 12, 2007.

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- On November 9, 2006, the Federal Register noticed a proposed DFARS rule "to address requirements for the distribution of material inspection and receiving reports under DoD contracts. The proposed rule clarifies that copies of the Wide Area WorkFlow-Receipt and Acceptance (WAWF-RA) report must be distributed with a shipment, when WAWF-RA is used to satisfy material inspection and receiving report requirements." Comments are due on/before January 8, 2007.

- On November 9, 2006, the Federal Register noticed a proposed DFARS rule "to add an exception to the requirement for a written determination before using a fixed-price type contract for a development program effort. The exception would apply to contracts for systems integration of commercial off-the-shelf information technology products under the DoD Enterprise Software Initiative (DFARS 208.74)." Comments are due on/before January 8, 2007.

- On November 9, 2006, the Federal Register noticed a DFARS rule to adopt "as final, with changes, an interim rule amending the DFARS to update policy relating to trade agreements. The rule incorporates increased dollar thresholds for application of the World Trade Organization Government Procurement Agreement and the Free Trade Agreements, implements a new Free Trade Agreement with Morocco, and amends the list of end products subject to trade agreements."

- On November 9, 2006, Shay Assad, Director of DoD Defense Procurement and Acquisition Policy, issued a memorandum to implement a yet to be published, i.e. currently "draft," PGI on the topic of "Implementation for Procedures, Guidance and Information (PGI) No. 225-74, entitled 'Solicitation and Award of Contracts for Performance in a Foreign Country or Delivery to any Unified Combatant Command Theater of Operation' (copy of draft 225-74 attached to the memorandum)." Specifically, his office has established a webpage http://www.acq.osd.mil/dpap/contingency/ calling for links from this website to the Contracting Office(s) of the respective Combat Commands and Commanders of those Commands that "will ensure that their respective COCOM Contracting Office(s) establish *and maintain* a website listing all prevailing regulations, policies, requirements, host nation laws, Orders/FRAGOS, COCOM Commander's directives, unique clauses and other considerations necessary for soliciting and awarding a contract for performance in or delivery to that COCOM's AOR." (emphasis in original) Weblinks are due to DPAP Office within 30 days.

  COMMENT: Long overdue! The intent is to ensure that contractor personnel are aware of such information and not be "wrongly subjected to host country laws." It is also reported that OFPP "is working on a 'book' on emergency contracting." Talk to counsel regarding contractual implementation of PGI related items.

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- On November 15, 2006, Shay Assad, Director of DoD Defense Procurement and Acquisition Policy, also issued a memorandum to implement "Payment on Cost Reimbursable Service Contracts- Use of Alternate I of the Clause at FAR 52.232-25." Therein the Director reminds Contracting Officers that "when the intent is to pay cost reimbursable service contracts in 14 days, DFARS 232.906, Making Payments, requires that the contract include alternate I…and the insertion of a standard due date of 14 days."

  COMMENT: Good contract management practices should have the payments conform to the contract provision. If contractors desire payments within 14 days, rather than the normal 30 days, then the clause should reflect that timing.

- There was recently posted on the web an article earlier published in the ABA International Lawyer on significant 2005 international procurements developments. This 2005 "update" covers "the proceedings at the United Nations Commission on International Trade Law, recent developments involving the Trade Agreements Act in U.S. domestic procurement, and the Organization for Economic Cooperation and Development's (OECD) work on untying foreign assistance." Update is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=903423

- The US Department of Commerce on October 5, 2006, issued Procurement Memorandum 2007-01 on "Contact Performance During Pandemic Influenza Outbreak, or Other Biomedical Emergency or Catastrophe" in order to provide guidance on same, a new contract clause on the subject, etc.

- The US Government Office of Ethics issued an extensive Q/A (29 pages) on ethics, statutes, regulations, etc. related to working with contractors, etc.— http://www.usoge.gov/pages/daeograms/dgr_files/2006/do06023a.pdf. On October 27, 2006, OFPP issued a memorandum also on the topic of "Ethics and Working with Contractors."

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

- The Wall Street Journal on November 25, 2006, has an article entitled, "Litigation Nation," where an overview is provided of the latest "Litigation Trends Survey" undertaken by a major international law firm. This survey involved over 300 in-house counsel for public companies with revenues over $1 billion. The top reported corporate lawyer litigation category "of concern" was "employment" disputes. The category of "contract disputes" was a close second.

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The section in this Survey on the topic of "International Disputes" was noted with particular interest where "considering the ongoing process of globalization, it can be assured that these numbers (frequency of international litigation) are likely to grow in the years ahead." Interesting findings in the international area of this Survey include the following: International litigation/arbitration costs are generally perceived as about the same, time to resolve disputes through litigation and arbitration is about the same, and the "ease of enforcing an arbitration award is about the same as a court judgment." The American Arbitration Association/International Centre for Dispute Resolution was the preferred arbitral provider. Finally it was noted that "formal multi-step (ADR) resolution processes" increased from prior findings with significant savings noted by using same.

The full report of this Survey, "Litigation Trends Survey Findings," is located at http://www.fulbright.com/mediaroom/files/2006/FulbrightsThirdAnnualLitigationTrendsSurveyFindings.pdf.

The June 3, 2006, Update, provided an overview of a PriceWaterhouseCooper sponsored study by a highly recognized international University "on multinational companies using arbitration rather than litigation in resolving international disputes citing 'greater flexibility, finality and confidentiality'." Key messages from this study include the following…

- Majority (73%) of corporations prefer arbitration for international contract disputes.
- Advantages of international arbitration (flexibility, NY Convention, etc.) "clearly" outweigh the disadvantages (e.g. expenses).
- Having a corporate dispute resolution policy provides several strategic advantages.
- Well-drafted contractual arbitration clauses provide tactical advantages (escalating clauses, venue, selection of arbitrators, etc.).
- Institutional arbitration (e.g. ICC, London Court, and AAA) verses ad hoc verses regional arbitration institutions analyzed.
- Why arbitration venue is a crucial factor (procedural law, etc.) and which venues are the most popular (England, Switzerland/US, and then France).
- Corporations overwhelmingly favor the finality of arbitration awards (limited grounds to appeal, etc.).
- Cost of international arbitrations may be "more" expensive.
- Why the outlook for international arbitration is positive (95% of corporations currently using arbitration will continue to use).

Summarized report is available at
http://www.pwc.com/extweb/pwcpublications.nsf/docid/0B3FD76A8551573E85257168005122C8

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- The recent 8th Circuit Court of opinion in Suburban Leisure Center, Inc., v. AMF Bowling Products, Inc. et al (No. 06-1865, November 17, 2006) provides an important lesson in contract drafting/notices—in this case, notice impacting the termination of contract(s). Here the parties had a prior oral franchise agreement when they subsequently signed an e-commerce agreement covering aspects of the related products, etc. and it had a merger clause. However, the court stated that there were two distinct agreements and "the parties did not intend that it (e-commerce agreement) be the sole agreement such that its merger clause does not subsume the prior oral franchise agreement."

  Better drafting of the subsequent e-commerce agreement as well as the notice of termination may have mitigated this adverse holding. The case is at http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=8th&navby=case&no=061865P&exact=1

- The US Court of Federal Claims recently decided the case of California Oregon Broadcasting, Inc. (COBi) v. The United States (COFC No. 06-116C, November 06, 2006). This case involved the situation where COBi "leased property that was subsequently acquired by the National Park Service (NPS). The lease contained a provision that stated, in part,

  > Option. At the expiration of the term hereof, Lessee shall have the first right, privilege and option to renew this Lease for a period of fifty (50) years at a rental to be fixed by agreement between said parties and/or their successors in interest. Within ninety (90) days prior to the expiration of said Lease, Lessee shall notify Lessor, in writing, of its election to exercise its option to extend said Lease for the additional term, and shall notify Lessor of the rental which it is willing to pay for said extended term. If said rental is not acceptable to Lessor or her successors or assigns, then within thirty-days after the receipt of such written notice, the amount of rental shall be submitted to arbitration….

  "Plaintiff (COBi) notified NPS that it intended to renew the lease for an additional 50 years (as well as the proposed rental). NPS responded that the terms 'first right' meant that plaintiff only had a right of first refusal and that NPS would lease the property to plaintiff or others. Plaintiff sues for NPS's breach of the lease and $1 million dollars in damages." After a lengthy analysis, the court found that COBi was given an option to renew the lease for 50 years. The court also "rejects the government's arguments that the damages were not speculative or unforeseeable."

  This is a good case on contract interpretation, claims of lost profit, and how well/fast the court can rule in a matter—complaint was filed February 17, 2006. There is no discussion to indicate that the Government reserved its rights on the rent issue, i.e. the rent "was not acceptable!" Opinion available at http://www.uscfc.uscourts.gov/Opinions/Firestone/06/FIRESTONE.COBI.110606.pdf

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Future Speaking Topics Include—

- Beach Cities NCMA Chapter, "International Contracting Trends—Benchmarking to CISG."
- Inland Empire ISM Affiliate, "Big Changes to UCC Rules on Contract Formation and Terms of the Deal are Around the Corner— Are You Ready?"
- Leadership Forum, NCMA Leadership Conference, Las Vegas, Nevada.
- New Orleans and Huntsville NCMA Chapters, National Educational Seminar, "Performance-Based Acquisition."
- Phoenix and Tucson NCMA Chapters, "International Contracting Trends—Benchmarking to CISG."
- "Contract Negotiations," NCMA World Congress NES, Dallas, Texas. Information/registration available at www.ncmahq.org
- ISM International Conference, Las Vegas, "Update on Recent Developments in International Purchasing/Contracting" and "Factors in Drafting/Negotiating a Dispute Resolution Clause with Customers/Suppliers."

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