Regulatory/Contractual Update

September 8, 2006 Volume 11, Issue 8

- On August 18, 2006, Shay Assad, Director of DoD Defense Procurement and Acquisition Policy, issued a memorandum on "Berry Amendment Pre-Award Compliance for Specialty Metals." The memo "reminds" contracting officers of the obligations under the Berry amendment (10 USC §2533) and DFARS 225.7002-2(b). The Director states, in part, "DoD components should devote resources to create domestic sources only when the industrial capabilities that are impacted are essential to national defense." Reference is then made to DoD Handbook 5000.60, "Assessing Defense Industrial Capabilities" for an analysis of the issue.

  And, the Navy on August 28, 2006, issued an implementing memorandum which highlights, in part, "Reliance on withholdings is not an appropriate strategy for dealing with noncompliance in order to make a new award," i.e. do a market survey on available sources, etc. and resolve "Berry" issues prior to contract awards, including "modifications for new work, undefinitized contract actions, and options."

  COMMENT: And, currently this "Berry" requirement is a flow down "to all tiers for aircraft, missile and space systems, ships, tank-automotive, and ammunition programs." DoD is getting "close" to the solution, i.e. **the government should be providing the material as government furnished**!

- And, on September 6, 2006, the DoD Director of Defense Procurement and Acquisition Policy, issued a memorandum on "Performance Based Acquisition." This memo amplifies upon the OFPP memorandum of July 21, 2006—see August Update on required management plan that is due October 1st.

  Also, on September 6, 2006, the DoD Director issued a memorandum on "Emergency (Contingency) Contracting—Acquisition Flexibilities." The memo implements the FAR interim rule on the same subject which was published on July 5, 2006—see July Update.

- On August 23, 2006, the Air Force issued guidance on "Incremental Funding of Fixed-Price Contracts." The AF continues "to support the use of incremental funding to meet mission requirements when 1) funding constraints make it the only viable option, and 2) proper safeguards are taken to prevent violations of the Anti-Deficiency Act." Use of DFARS clause on Limitation of Government's Obligation (LOGO) at 252.232-7007 is required and incremental funding periods should be no less than ninety days.

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- DoD is reported considering the removal of the authority to make provisional award fee payments, as described in DFARS 216.405-2(b).

  COMMENT: Internal budgets are based upon forecasted past performance/actions—deviations change the calculus! This is a major change. Talk to your industry rep.

- On September 8, 2006, the Federal Register noticed "an interim rule amending the DFARS to implement Section 816 of the National Defense Authorization Act for Fiscal Year 2006. Section 816 requires DoD to prescribe guidance on the use of tiered evaluation of offers for contracts and for task or delivery orders under contracts." Specifically, "the guidance must include a prohibition on the use of tiered evaluation of offers unless the contracting officer (1) has conducted market research in accordance with Part 10 of the FAR; (2) is unable, after conducting market research, to determine whether or not a sufficient number of qualified small businesses are available to justify limiting competition for the contract or order; and (3) includes in the contract file a written explanation of why the contracting officer was unable to make the determination." Comments are due on/before November 7, 2006.

- On September 7, 2006, industry provided a 12-page response to the Federal Register notice of June 16, 2006, on "Contractor Personnel Authorized to Accompany US Armed Forces." Suffice to state that industry is greatly concerned—see two recent Updates. The industry response concludes, in part, as follows:

  > "In our (CODSIA) view, the rule adopts the wrong policy on the issue of Government support for contractors accompanying the force. It includes problematic and confusing provisions relating to contractor participation in hostilities. This interim rule is contrary to long-standing departmental policy and introduces more confusion and risk for contractors supporting deployed forces.… We request that the DAR Council withdraw this interim rule, reinstate the May 2005 rule, and hold a public meeting on the issues raised in the elements of this interim rule." (emphasis added)

  Also, on September 8, 2006 DoD noticed in the Federal Register a final DFARS rule which adopts "with changes, an interim rule (September 1, 2005) amending the DFARS to implement Section 1092 of the National Defense Authorization Act for Fiscal Year 2005. Section 1092 requires that DoD contractor personnel who interact with detainees receive training regarding the applicable international obligations and laws of the United States."

- On September 8, 2006, the Federal Register noticed an "interim DoD rule amending the DFARS to implement Section 1211 of the National Defense Authorization Act for Fiscal Year 2006. Section 1211 prohibits DoD from acquiring United States Munitions List items from Communist Chinese military companies." Comments are due on/before November 7, 2006.

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- On August 23, 2006, Shay Assad, Director of DoD Defense Procurement and Acquisition Policy, issued a memorandum on "Update on DoD Implementation Plan for Electronic Subcontract Reporting System (eSRS)" which provides "an update" regarding the DoD implementation of eSRS. As background, OFPP issued an eSRS memo in 2005 which "targeted DoD implementation for FY2006… (in order) to create higher visibility and introduce more transparency into the process of gathering information on Federal subcontracting accomplishments." DoD had issued direction on April 1, 2005, and November 21, 2005, on the implementation of same. Background information, guides, powerpoint slides, training (contractor and government), etc. on eSRS is available at http://www.esrs.gov/index?cck=1.

  This memo acknowledges "several issues that must be resolved before DoD implementation is complete including "associated training…for DoD personnel, prime contractors and subcontractors." Accordingly, there will be a formal notification of at least 60 days prior to future eSRS availability by DoD and contractors/subcontractors. In the interim contractors shall continue to submit, where applicable, SF 294/295 forms.

- There is a 3% withholding requirement from federal, state, and local government's payments for goods and services that is scheduled to begin in 2011—all as a result of federal legislation signed into law by the President earlier this year. And, at the recent industry/OFPP meeting it is reported that the OFPP represented stated, "any five-year agreement with the government (contract, grant, or other instrument) would be subject to this provision."

  COMMENT: How are you forward pricing this "tax"?

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

- A case involving international shipments, parol evidence rule, bill of ladings, shipping terms and the risk of loss (no insurable interest in the goods) and passage of title to goods under the UCC is P & O Nedlloyd, Ltd. v. Sanderson Farms, Inc. (08/30/06 - No. 05-3766). Over a strong dissent, the importance in using the correct shipping terms in the contract cannot be overemphasized—as was the transaction here. Case is available at http://caselaw.lp.findlaw.com/data2/circs/8th/053766p.pdf.

- The ABA International Law Section—International Procurement Committee—has posted links to the governing international procurement rules/statutes for over 169 countries, multilateral development banks, international (procurement) "arrangements," etc. at http://www.abanet.org/intlaw/committees/corporate/procurement/Proclinks.pdf.

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- An interesting alternative to the use of arbitration for international commercial disputes—primarily used due to the recognized enforcement of arbitration awards by treaty, the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (the so-called, "New York Convention"—available at www.adr.org), is the approach proposed in a new treaty, "Hague Convention on Choice of Court Agreements." This latter convention was recommended for US approval at ABA meetings last month. An ABA reported stated that "The US, not a party to any bilateral or multilateral convention on the enforcement of foreign judgments, sought to find a means for private parties to enforce foreign judgment outside of the US without relitigation …." The Convention, which only applies for B2B transactions, has three basic rules:
    1) "The court chosen by the parties in an exclusive choice of court agreement has jurisdiction;
    2) if an exclusive choice of court agreement exists, a court not chosen by the parties does not have jurisdiction, and shall decline to hear the case; and
    3) a judgment resulting from jurisdiction exercised in accordance with an exclusive choice of court agreement shall be recognized and enforced in the courts of other Contracting States."

  It is reported that over 30 countries have approved this treaty. The full text of the Convention is available at http://www.hcch.net Talk to counsel about using arbitration for resolving international disputes or possibly having a "choice of court" agreement for resolution of those disputes.

  COMMENT: Who has the "leverage" in your international negotiations? Is this in your best interests?

- And, an employment arbitration decision involving a relatively detailed arbitration clause on what the arbitrator can, and cannot, do in the California Court of Appeal case of Baize v. Eastridge Companies. The arbitrator was required to follow California law, allegedly incorrectly applied the law, etc. and the court found, among other things, that the parties failed stipulate grounds for review under those circumstances and affirmed the holding, in part, since errors in law are not grounds for appeal, citing several California decisions. Need one need to be reminded—arbitrations are intended to be final! Case is available at http://www.metnews.com/sos.cgi?0806%2FB185823

Future Speaking Topics Include—

- 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!" **Information/registration info available at www.ncmaps.org** –September 22, 2006.
- California State Bar Annual Meeting, Monterey, California, "Thinking Again For The First Time About Advocacy In Arbitrations." **Presentation material posted under "Teaching" at www.Rumbaugh.net**
- Silicon Valley NCMA Chapter, "How Baseball is a Big Player in (Most) Negotiations Or How 'Baseball Arbitration' is a Valuable Tool for Contract Professionals."
- Naval Postgraduate School, "International Contracting."
- "Contract Negotiation," NCMA World Congress NES, Dallas, Texas.
- Inland Empire ISM Affiliate, "Big Changes to UCC Rules on Contract Formation and Terms of the Deal are Around the Corner— Are You Ready?"
- West Sound, Washington, NCMA Chapter, "Baseball Arbitration."
- 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."
- Phoenix and Tucson NCMA Chapters, "International Contracting Trends— Benchmarking to CISG."

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