

Regulatory/Contractual Update

February 28, 2007

Volume 12, Issue 2

- On February 7, 2007, Kenneth J. Krieg, DoD Under Secretary of Defense for AT&L, issued a memorandum on “Class Determination of Domestic Non-Availability (DNAD) for Populated Circuit Card Assemblies for Contracts Entered into Prior to November 16, 2006.” This recent action applied and expanded the rationale from his January 4, 2007, DNAD under 10 USC §2533b, “to existing contracts that are subject to the old specialty metal restriction under 10 USC §2533a (the Berry Amendment).”

Separately, industry representatives in a recent meeting with an OFPP representative are reported to have “expressed their strong interest in learning of any progress made toward exempting commercial-off-the-shelf items (COTS) from the new specialty metals statute, pursuant to OFPP’s authority in Section 35 of the OFPP Act.” OFPP was reported to have stated that “DoD has briefed OFPP on their specialty metals approach and (OFPP) believes that any move to exempt COTS will be addressed within the implementing DFARS rule.”

On January 17, 2007, Shay Assad, Director of DoD Defense Procurement and Acquisition Policy, issued a memorandum on “Factors to be Considered in Making Domestic Non-availability Determinations Under 10 USC §2533b.”

- On February 21, 2007, the Air Force issued a memorandum on “Assessing Contract Scope When Modifying Contracts.” This memorandum is to “remind contracting officers to assess the impact on competition when considering contract modifications... (and done in consultation) with program managers and legal counsel.” In addition, previous modifications to contracts will be assessed “to ensure that the cumulative impact of the modifications does not result in an action that is outside the scope and terms of the original contract.” An Air Force Acquisition Circular is contemplated on the topic.
- The Cost Accounting Standards Board met—on February 6, 2007—for the first time in a year and a half. It is expected to meet every two months. Members include April Stephenson, Deputy Director, DCAA; Bruce Timman, Director, Government Accounting Policy & Compliance, Alliant Techsystems; Kathleen Turco, Chief Financial Officer, GSA; and Richard Wall, former Partner & National Director, Ernst & Young. Paul Denett, OFPP Administrator, Chairs the CAS Board and Laura Auletta, formerly of GSA and now at OFPP, is the CASB Manager.

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- On February 16, 2007, the Federal Register noticed a proposed rule that would amend the FAR “to address Contractor Code of Ethics and Business Conduct and the display of Federal agency Office of the Inspector General (OIG) Fraud Hotline Poster.” This endeavor seems to be directed at an agency-wide rule based, in part, upon existing rules at DoD and other agencies. Comments are due on/before April 17, 2007.

And, on February 16, 2007, Kenneth J. Krieg, DoD Under Secretary of Defense for AT&L, issued a memorandum on the establishment of a “Panel on Contracting Integrity.” This panel will be chaired by the Deputy Under Secretary of Defense and will assume the statutory calling prescribed in Section 813 of PL 109-364 which relates “to eliminating areas of vulnerability in the defense contracting system that allow fraud, waste and abuse to occur.” It will also look at five “key” areas including sustained senior leadership, capable acquisition workforce, adequate pricing, appropriate contracting approaches and techniques, and sufficient contract surveillance.” The initial panel report is due December 31, 2007.

- On February 7, 2007, the Navy issued a new/updated Instruction 2221.5C on the subject of “Release of Communication Security (COMSEC) Material to US Industrial Firms Under Contract to the US Navy.” This Instruction “revises (the) policy and expands the procedures for authorizing release of COMSEC material” to contractors.
- On January 26, 2007, the US Agency for International Development (AID) noticed in the Federal Register a request for comments on a contemplated proposal which would add “additional authority to monitor prime contractor compliance with subcontracting plans. The intent of this amendment is to provide the contracting officer a means for monitoring and assuring that subcontractors who were named in the offeror’s proposal and whose contributions were evaluated as part of the proposal evaluation are in fact used in the contract.” AID is interested in receiving input prior to any definitive regulatory draft being published on “the practicality of administering such a requirement and recommendations to assist the Agency in developing authority, guidelines, and standards to improve mission performance. AID will issue a notice of proposed rulemaking following a review of comments (which are due on/before March 27, 2007) and review of pilot contracts.” On February 16, 2007, AID also noticed a proposal “to consolidate its regulations on USAID Direct Contracts for all types of Personal Services into one Appendix.” Comments on this latter item are due on/before April 16, 2007.

COMMENT: If the contract specifies certain actions are required of the prime contractor, good contract management/administration practices require that a plan be in place (now) by AID to ensure compliant performance!

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- On February 12, 2007, the Federal Register noticed a proposed rule that would amend the DFARS “to address DoD-unique requirements relating to the Online Representations and Certifications Application (ORCA). ORCA presently includes only representations and certifications required by the Federal Acquisition Regulation, but is being revised to also include those required by the DFARS.” Comments are due on/before April 13, 2007.
- On February 12, 2007, the Federal Register noticed a final DoD rule that would adopt, with changes, an earlier “interim rule amending the DFARS to include additional commodities and locations that require package marking with passive radio frequency identification (RFID) tags. The rule requires contractors 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 specified DoD locations.”
- The January/February 2007 issue of "Defense AT&L" has an updated article on how Systems Engineering (SE) standards and Earned Value Management (EVM) "provide a framework for linking award fees to desired program outcomes." This article entitled, "SE and EVM Support for Performance-Based Awards," provides some excellent advice on coupling of technical/program outcomes and contract award/performance requirements, i.e. performance based awards. Additional info on these topics is available at www.PB-EV.com.

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

- The ABA International Law Section’s “International Commercial Practitioners’ Newsletter” for December 2006, had a series of articles/notes on the law from several countries on a “thorny clause commonly found in international commercial agreements: the right of one party to terminate a contract based on the other party’s insolvency, debtors’ relief petition and/or bankruptcy.”
- The ABA Section of Antitrust Law continues to recommend that the ABA “adopt a policy supporting the position that, under the Sherman Act **and** analogous State and territorial antitrust law, agreements between a buyer and seller setting the price at which the buyer may resell a product or service purchased from the seller should not be illegal per se.” The Section notes that “a case pending before the US Supreme Court, Leegin Creative Leather Products v. PSKS, Inc., No. 04-41243, involves a decision of the Court of Appeals for the Fifth Circuit that applied a rule of per se illegality to agreements between a buyer and seller setting the price at which the buyer may resell a product or service purchased from the seller.” The International Law Section recently supported this endeavor. How will this impact your organization/purchases/sales? The proposal is posted at <http://www.abanet.org/leadership/2007/midyear/docs/SUMMARYOFRECOMMENDATIONS/hundredone.DOC>
- The Delaware Court of Chancery issued a decision in 2006, on an interesting issue—can a limitation on liability provision preclude/limit recovery for a contract misrepresentation? Specifically, “broad and freely negotiated liability limitations won’t protect a party that knowingly makes misrepresentations in a commercial contract.” Have you seen contractual representations and warranties coupled with a cap on liability? If so, you may want to review this case with counsel—ABRY Partners V LP et al v. F&W Acquisition, LLC et al, CANo. 1756-N (2006)—[http://courts.delaware.gov/opinions/\(cq00furwapakpm45xs50j3bc\)/download.aspx?ID=72140](http://courts.delaware.gov/opinions/(cq00furwapakpm45xs50j3bc)/download.aspx?ID=72140)
- Finally, the Sixth Circuit Court of Appeals decision in Detroit Radiant Products Company v. BSH Home Appliances Corporation, (1/8/2007—No. 06-1469) involved a supply chain commercial contract dispute concerning “custom-made stove burners ... where (it was determined by the court that) the contract between the parties contemplated a minimum fixed number of units binding upon the purchaser, as opposed to merely a non-binding estimate.” When is it merely an estimate—only if the price quotes are not contingent on an order quantity and the contract “clearly” so provides? The case is at <http://caselaw.lp.findlaw.com/data2/circs/6th/061469p.pdf>

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- And, the ABA Public Contract Law Section is advocating adoption of "a series of six basic principles of professionalism in public procurement which are derived from the Restatement (Second) of Contracts §205 and case law describing the implied obligation of good faith and fair dealing." The proposal is posted at <http://www.abanet.org/leadership/2007/midyear/docs/SUMMARYOFRECOMMENDATIONS/hundredeleven.DOC>

Future Speaking Topics Include—

- “Contract Negotiations,” NCMA World Congress NES, Dallas, Texas. Information/registration available at www.ncmahq.org
- Alamo NCMA Chapter, “Introduction to Performance-Based Acquisitions.”
- 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.”
- Sierra Vista NCMA Chapter, “Contract Negotiations.”
- Phoenix and Tucson NCMA Chapters, “Drafting the Ultimate ADR Clause for Government Subcontracts.”
- Rio Grande NCMA Chapter, “Baseball Arbitration.”
- Los Angeles Gateway NCMA Chapter, “How to Negotiate Fair and Reasonable Prices in Sole Source Government/Commercial Procurements.”

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