- DoD continues to issue memoranda including the following:
  - Class Deviation 2007-O0011—Waiver of Specialty Metals Restriction for Acquisition of COTS Items amends and updates the previous Class Deviation Class Deviation 2006-O0004 issued on December 6, 2006 to implement Section 842 of the National Defense Authorization Act of Fiscal Year 2007 (Pub. L. 109-364). This October 26, 2007, Deviation, among other things, "adds a definition for "commercially available off-the-shelf item" as well as adding the "exception for specialty metals contained in" such items.

    "Commercially available off-the-shelf item"—

    (i) "Means any item of supply, including any component, that is—

    (A) A commercial item (as defined in FAR 2.101);

    (B) Sold in substantial quantities in the commercial marketplace; and

    (C) Offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace and

    (ii) "Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984…."

    COMMENT: Notice the conjunctive definition and the expansion from that in FAR 2.101. Does this assist in the meaning in FAR 2.101?
  - "Management of DoD Contractors and Contractor Personnel Accompanying US Armed Forces in Contingency Operations Outside the United States." In this September 25, 2007, memorandum, an overview of the "tools" available to Combatant Commanders for operations (primarily) in "Iraq and Afghanistan" with direction that provides, "Commanders have UCMJ authority to disarm apprehend, and detain DoD contactors suspected of having committed a felony offense in violation of the Rules on the Use of Force (see DoDI 3020.41) or outside the scope of their authorized mission, and to conduct the basic UCMJ pretrial process and trial procedures currently applicable to the courts–martial of military service members…." Specific action items are also provided.
  - An October 26, 2007, memorandum on block change procedures to implement new FAR Part 45 Property rules into existing contracts. The recent issue of Property Management (volume 18 Issue 6) also has an excellent/expanded article on the final FAR Part 45, Government Property rules. (See previous Updates for background.)

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- A SAF/AQC Policy memo of October 5, 2007, was issued and establishes procedures for processing waiver requests...to the Under Secretary of Defense (Acquisition, Technology, and Logistics) and the Under Secretary of Defense (Comptroller) joint policy memorandum on June 14, 2007 directing that DoD agencies no longer use GovWorks, the Federal Acquisition Center of the DoI's National Business Center, for contracting actions greater than $100,000…."
- USD(AT&L)/DPAP Policy memo of October 17, 2007: Class Deviation 2007-00010—Implementation of the Synchronized Predeployment and Operational Tracker (SPOT) to Account for Contractor Personnel Performing in the United States Central Command Area of Responsibility. And, there is a USD(AT&L) Policy Memo of September 28, 2007, that had provided interim guidance for implementation of the SPOT Program.
- An October 9, 2007, memorandum that "announces the release of the first edition of the Miscellaneous Payment Guidebook developed by the Defense Procurement Acquisition Policy Office and OUSD Comptroller.

- On October 17, 2007, the Federal Register noticed a request for comments from US Industry which has "experience participating in public defense procurements conducted by or on behalf of the Italian Ministry of Defense or Armed Forces."

  > "DoD has had a Reciprocal Defense Procurement (RDP) Memorandum of Understanding (MOU) with Italy since September 11, 1978, (and is) commencing negotiation of an updated RDP MOU with Italy….The current RDP MOU involves reciprocal waivers of buy-national laws by each country; the replacement RDP MOU is expected to continue these waivers. This means that Italy will continue to be listed as one of the 'qualifying countries' in the DFARS at 225.872-1, and that offers of products of Italy would continue to be exempt from the U.S. Buy American Act and Balance of Payments Program policy that would otherwise require DoD to add 50 percent to the price of the foreign products when evaluating offers. This also means that U.S. products should be exempt from any analogous 'Buy Italian' law or policy applicable to procurements by the Italian Ministry of Defense or Armed Forces. DoD is interested in comments relating to the transparency, integrity, and general fairness of Italy's public (defense) procurement processes. DoD is also interested in comments relating to the degree of reciprocity that exists between the United States and Italy when it comes to the openness of defense procurements to offers of products of the other country."

  Comments are due on/before November 16, 2007.

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- NAVAIR has noticed a new clause 5252.204-9505, "Information Assurance and Personnel Security Requirements for Accessing Government Information Technology (IT) Systems," that is required for solicitations/contracts that may require contractor personnel to have access to Government IT systems. The intent of the clause is to have conforming procedures in "place to provide for secure Government information systems." Additional reporting, training, background investigation, etc. is required of contractors.

- On July 31, 2007, DCAA "issued guidance for its auditors on applying the recent regulatory changes regarding labor rates under time-and-materials (T&M) and labor-hour (LH) contracts when they are conducting billing reviews and incurred costs audits covering such contracts. In a July 31 internal memorandum, DCAA summarized key features of the FAR/DFARS in the area and advised auditors to 'selectively verify that the contractor's claimed amounts comply with applicable contract terms.' Audit procedures should include reconciling claimed prime, subcontract, and intercompany labor hours to the respective source documents…." This guidance for "DoD noncommercial T&M and LH contracts and non-DoD contracts awarded without adequate price competition" applies to contracts awarded on/after February 12, 2007.

- OFPP on October 17, 2007, issued a memorandum on the subject of "2007 Federal Contracting Workforce Competencies Survey." This OFPP survey "identified gaps in such areas as project management, requirements definition, performance-based acquisition (PBA), and negotiation." Each Chief Acquisition Officer was directed to review the results and prepare a "Gap analysis Report and Improvement Plans for closing contracting workforce skills gaps, which are due to the Office of Personnel Management by December 15, 2007." A summary of the survey is available at www.fai.gov. GovExec.com has an October 24, 2007, article which focuses on a new report from INPUT/Output which has published a survey on PBAs (summary available at www.input.com) and states PBAs have been risky.

- And, Acquisition Solutions, Inc. has announced its Performance-Based Acquisition Master's Certificate Program—"one-of-a-kind Master's Certificate Program in performance based acquisition facilitates…command of the knowledge, tools, and techniques needed to plan, negotiate, and manage contracts and programs using the performance-based approach." Scheduling/enrollment information is at www.acquisitionsolutions.com.

- On October 30, 2007, the Federal Register noticed that DoD is "waiving the limitation of 10 U.S.C. 2534 for certain (identified) defense items produced in the United Kingdom (UK). 10 U.S.C. 2534 limits DoD procurement of certain items to sources in the national technology and industrial base. The waiver will permit procurement of enumerated items from sources in the UK, unless otherwise restricted by statute." This waiver is effective for one year commencing November 14, 2007.

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

- The June Update provided highlights of an important US Supreme Court decision in the Leegin Case on the subject of antitrust law, i.e. "price fixing." Subsequently, Jim Mulcahy, a California attorney, provided an overview in an Executive Forum on the ramifications of that decision within the context of franchising/distribution. Below are his comments which may have broader implications beyond those noted.

  "On June 28, 2007 the Supreme Court issued a watershed opinion on the lawfulness of minimum resale price maintenance under the federal Sherman Antitrust Act. The Court overruled a nearly century-old ruling, holding that agreements to set minimum resale prices are now to be judged by applying the 'rule of reason,' as opposed to being considered per se unlawful. The decision left it to local district courts throughout the country to determine the reasonableness of such agreements on a case-by-case basis. On August 9, 2007, sixteen high-level legal and franchise executives met in Atlanta to discuss the implications of this case to franchisors and distributors. The following are the major take-aways from this compelling discussion:

  1. If a company is selling a premium product brand which requires a great deal of consumer service and attention (think customized golf clubs as an example), the company can now consider implementing a program which would effectively eliminate discounters who 'free ride' on the services provided by other retailers.

  2. Companies will need to review their distribution and franchisee agreements with care. It may be desirable to change some agreements to give corporations the power to engage in minimum resale price maintenance without violating their contracts.

  3. While Leegin is a watershed case, its potential limitations must be recognized, as state antitrust laws may be either (a) interpreted as continuing to ban minimum resale price maintenance, or (b) changed to make minimum resale price maintenance illegal. Companies taking a conservative approach may wish to wait to see how others fare in litigation involving state laws.

  4. It will take some time to establish what agreements will be deemed lawful under the 'rule of reason,' as the Supreme Court has left it to lower courts to establish when resale price maintenance agreements are impermissibly anticompetitive and when they are not.

  As always, consult with counsel."

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- And, the ASBCA case of Conner Bros. Construction Company, Inc., ASBCA No. 54109, October 11, 2007 provides a reminder (in a Corps of Engineers case) that claims for increased costs due to contractor denial of access to the work site may not be compensable when the cause purportedly involved sovereign acts in a post9-11 environment.

- The Fulbright & Jaworski law firm in its 2007 Litigation Trends survey confirms its prior survey findings that the cost and time of international litigation and arbitration are about the same. Survey available at www.fulbright.com/litigationtrends

Future Speaking Topics Include—

- National Contract Management Association (NCMA), "Understanding the (Un)Intended Consequences of Boilerplate Provisions in Commercial Contracts and Government Subcontracts," Audio Seminar.

- NCMA Orange County, Finger Lakes (NY) and Vandenberg Chapters, "Contract Negotiations."

- NCMA Leatherstocking Chapter, Rome, New York, "Negotiation Skills: What Contracting Professionals Can Learn from Baseball Arbitration."

- Institute of Electrical and Electronic Engineers workshop, Long Beach State University, "Dispute Resolution for Entrepreneurs and Engineers."

- NCMA 2008 Congress NES, April 17, 2008, Cincinnati, Ohio, "Contract Negotiation." Registration info at www.ncmahq.org

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