Regulatory/Contractual Update

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- On June 8, 2007, Shay Assad, Director of DoD Defense Procurement and Acquisition Policy, issued a memorandum announcing/highlighting the May 31, 2007, in the changes to DoD Procedures, Guidance and Instruction (PGI) on "Determining Fair and Reasonable Contract Prices—Revised PGI." This PGI change was in response to DoD IG Report D2005-D000CH-0183.000, Commercial Contract for Noncompetitive Spare Parts with Hamilton Sundstrand Corporation." These changes include
  - Contracting Officers must obtain "whatever information or data is necessary to determine a fair and reasonable price when TINA does not apply.
  - Procedures/guidance regarding TINA waivers.
  - Procedures/guidance "for determining when to perform price analysis, cost analysis, and technical analysis."

  COMMENT: Merely having "more" information does not ensure a price is fair and reasonable. Additional contract management and negotiation tools that empower Contracting Officers on "getting-to-closure" on fair/reasonable pricing should have been "the order of the day"!

- On May 31, 2007, OFPP Administrator Paul Denett issued two memoranda. The first one "introduces" the topic and the attached guide entitled, "Emergency Acquisitions" and covers "strategies for effective response planning and provides a list of acquisition reminders when contracting during emergencies" and is intended to supplement FAR Part 18 as well as agency-specific guidance on the subject. The second memorandum covers "Enhancing Competition in Federal Acquisition" with the stated intent of "reinforcing the use of competition and related practices for achieving a competitive environment. His primary area of concern in the latter memo is "in the placement of task and delivery orders under indefinite-delivery vehicles."

  And, on May 25, 2007, Administrator Denett issued a memo on "Use of Performance-Based Management Systems for Major Acquisition Programs." Therein, he is requesting agency input to be incorporated into Congressional reports required from OFPP on "progress in implementing performance-based management systems for major acquisition programs" with reporting metrics, spreadsheets, etc.

- For the period beginning July 1, 2007, and ending on December 31, 2007, the prompt payment interest rate and the contract disputes interest rate is 5 ¾ % per annum.

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- On June 4, 2007, Shay Assad, Director of DoD Defense Procurement and Acquisition Policy, issued two memoranda on upcoming reviews of DoD profit policies and contract finance issues while attaching a copy of the Federal Register notices on same dated May 22, 2007 (see last month's Update). Potential areas for consideration are set forth in the profit policy memo. The Military Departments and Other Defense Agencies are requested to provide their input no later than July 23, 2007.

  COMMENT: What is your company/trade association doing in response to these notices? And, see the note below on a recent US Supreme court decision.

- "DCMA deployed a new automated tool that is being used by ACOs to issue contract modifications and delivery orders. This application called 'MDO', resides in DCMA 'eTools' which is a compilation of all systems tools used within the Agency. Beginning in Jan 07, ACOs started using MDO to issue modifications, as well as delivery orders and task orders under BOAs and IDIQs. The output of this application results in an order and modification format that is not the familiar DD Form 1155 or SF30 configuration. It is in what is referred to as a 'plain paper format' although it contains all the required information in the standard forms. The format is not what (some PCOs) are use to seeing and will require some adjustment…."

- On May 31, 2007, DoD expressed to Department of Interior its "continued" disappointment of funding and contacting practices found by the DoDIG. "No interagency agreement in excess of $100,000 (shall) be accepted by GovWorks Federal Acquisition Center of the Department of Interior's National Business Center from DoD unless a determination has been made in writing by the Under Secretary of Defense (AT&L) that it is 'necessary' in the interest of the Department to procure the particular property or service…."

- On June 26, 2007, the Federal Register noticed that DoD "is revising the DoD Grant and Agreement Regulations (DoDGARs) to adopt and implement Office of Management and Budget (OMB) guidance on nonprocurement suspension and debarment and to make needed technical corrections. DoD is adopting and implementing the OMB guidance in a new part in title 2 of the CFR, the Governmentwide title recently established for OMB guidance and agencies' implementing regulations on grants and agreements. The Department also is removing the common rule on nonprocurement suspension and debarment that is in 32 CFR, Chapter I, Subchapter C, since the common rule is superseded by the new part implementing the OMB guidance. Adopting and implementing the OMB guidance and removing the common rule completes the DoD actions that the OMB guidance specifies. This regulatory action also is the first step toward relocating all of the DoDGARs to 2 CFR." Comments are due on/before July 26, 2007.

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- On June 29, 2007, the Federal Register noticed a "final" rule whereby NASA purports to make only "administrative changes to the NASA FAR Supplement (NFS) to clarify the requirements for award fee evaluation factors and to add a requirement for a documented cost/benefit analysis when an award fee contract is used." No public input is solicited.

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

- The long-awaited US Supreme Court decision on manufacturers, etc. setting minimum resale prices was issued on June 28, 2007, in the case of LEEGIN CREATIVE LEATHER PRODUCTS, INC. v. PSKS, INC., DBA KAYS KLOSET… KAY'S SHOES, No 06-480.

  > "Given its policy of refusing to sell to retailers that discount its goods below suggested prices. petitioner (Leegin) stopped selling to respondents (PSKS) store. PSKS filed suit, alleging, *inter alia*, that Leegin violated the antitrust laws by entering into vertical agreements with its retailers to set minimum resale prices. The District Court excluded expert testimony about Leegin's pricing policy's procompetitive effects on the ground that Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373, makes it *per* se illegal under §1 of the Sherman Act for a manufacturer and its distributor to agree on the minimum price the distributor can charge for the manufacturer's goods. At trial, PSKS alleged that Leegin and its retailers had agreed to fix prices, but Leegin argued that its pricing policy was lawful under §1. The jury found for PSKS. On appeal, the Fifth Circuit declined to apply the rule of reason to Leegin's vertical price-fixing agreements and affirmed, finding that Dr. Miles' *per se* rule rendered irrelevant any procompetitive justifications for Leegin's policy."

  The US Supreme court in overruling Dr. Miles, a 1911 decision, determined that vertical price restraints are to be judged by the Rule of Reason and not by the almost century old "*per se*" rule.

  Thus, when coupled with Court's 1997 decision in State Oil Co. v. Khan, which subjected future "maximum" price setting under the Rule of Reason analysis, this "minimum" price setting provides the "standard" upper/lower rules for the marketplace. When are resale price maintenance agreements anticompetitive, what "procompetitive" justifications trump anticompetitive economic effect, what is the relevant market, what is the role of having a proprietary position in the "goods," bearing on franchising/distributorship relationships (new/current), impact upon government contracting (e.g. teaming alliances, "restrictions on pass-throughs" of subcontract charges, etc.), commercial and international contracting, "unilateral" changes in current long-term supply chain agreements, and the influence on discounting/branding, etc. Clearly contract negotiations and its calculus will change as will the role of economic analysis "**by** the sellers," i.e. the entity "setting the minimum price!" Talk to legal counsel.

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- The International Association for Contact and Commercial Management is undertaking a survey on the use of "mandatory" arbitration clauses in commercial transactions. See https://www.etouches.com/survey/index.php?surveyid=64&PHPSESSID=87765ec8b3dadc1448d759a0e901607a

- When is a Termination for Convenience not a TforC—especially if the SBA is involved? "The Air Force terminated for convenience its Desktop V contract with International Data Products Corporation (IDP) because IDP lost its status as a small entity favored under section 8(a) of the Small Business Act. … The Air Force, however, required IDP to continue to perform warranty and upgrade services under the contract. IDP sued for the costs of performing those services. The Court of Federal Claims determined that the termination for convenience also terminated IDP's obligation to continue to provide warranty and upgrade services. … Because 15 U.S.C. Sect. 637(a)(21)(A) does not terminate IDP's warranty and upgrade services obligations, …the (Court of Appeals for the Federal Circuit reverses the COFC) holding that the termination for convenience terminated IDP's warranty and upgrade obligations." INTERNATIONAL DATA PRODUCTS CORP. v, THE UNITED STATES, CAFC Nos. 2006-5083, -5094, June 27, 2007.

- The recent case of Termorio SA ESP v. Electranta SP, No. 06-7058 (DC Circuit Court of Appeals, May 25, 2007) provides a "wake-up" call on vigilance in drafting/selection of venue for international arbitrations. "In a dispute over power purchase agreement originally submitted to arbitration in Colombia, an award in favor of appellant was nullified by Colombia's highest administrative court (local law does not permit the use of ICC rules). Dismissal of suit filed in (US Federal) district court seeking to enforce the Colombian arbitration award is affirmed where, since the arbitration award was lawfully nullified by the country in which the award was made, appellants have no U.S. cause of action to seek enforcement under the Federal Arbitration Act or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards." See http://caselaw.lp.findlaw.com/data2/circs/dc/067058a.pdf

- The 191 page April 2007 Report for the President on the Use and Results of Alternative Dispute Resolution in the Executive Branch of the Federal Government, "details and evaluates the federal government's use of ADR techniques. Based on surveys from about 100 cabinet and independent federal agencies (while providing specific details on ADR use at 15 cabinet and 31 independent agencies). It then summarizes the advantages of federal ADR use in four areas: civil enforcement and regulation, claims against the government, contracts and procurement, and workplace" and makes certain recommendations. See http://www.adr.gov/pdf/iadrsc_press_report_final.pdf