

# Regulatory/Contractual Update

February 29, 2008

Volume 13, Issue 3

- On January 31, 2008, the Federal Register noticed a proposed FAR change that would “limit the length of contracts awarded noncompetitively under unusual and compelling urgency circumstances to the minimum contract period necessary to meet the requirements, and no longer than one year, unless approved by the head of the contracting activity.” Comments are due on/before March 31, 2008.
- On February 28, 2008, FAC 2005-24 was issued and is effective on March 31, 2008, except as noted, and includes the following changes:
  - **FAR Part 30--CAS Administration** (FAR Case 2005-027). This final rule amends the FAR “to implement revisions to the regulations related to the administration of the Cost Accounting Standards (CAS). Among other changes, the final rule streamlines the process for submitting, negotiating, and resolving cost impacts resulting from a change in cost accounting practice or noncompliance with stated practices.”
  - **Common Security Configurations** (FAR Case 2007-004). This final rule amends the FAR “to require agencies to include common security configurations in new information technology acquisitions, as appropriate. The revision reduces risks associated with security threats and vulnerabilities and will ensure public confidence in the confidentiality, integrity, and availability of Government information. This final rule requires agency contracting officers to consult with the requiring official to ensure the proper standards are incorporated in their requirements.”
  - **Numbered Notes for Synopses** (FAR Case 2006-016). This final rule amends the FAR “to update and clarify policy for synopses of proposed contract actions and to delete all references to Numbered Notes (Notes) in the FAR and Federal Business Opportunities (FedBizOpps) electronic publication.”
  - **Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission** (FAR Case 2005-011).
  - **Trade Agreements--New Thresholds** (FAR Case 2007-016) (Interim—effective February 28, 2008)
- The GAO issued a January 2008 report entitled, “Defense Contracting, Contract Risk a Key Factor in Assessing Excessive Pass-Through Charges,” which “endorses/expands” upon the earlier DoD rule (which needs to be substantially revised according to GAO) as to the purported need for increased contract risk assessments and contractual documentation of lower tier subcontract work. (See April 30, 2007, Update for background information on the DoD interim rule on the topic)

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*Items summarized in these Updates are for general informational/discussion/educational purposes only and should not be relied upon in the course of representation or in the forming of decisions in legal matters— independent counsel should be obtained.*

- On February 13, 2008, the CAS Board issued two items with a request for comments on/before April 14, 2008 on the CAS 403 proposal:
  - A “staff discussion paper (SDP) addressing potential revisions to Cost Accounting Standard (CAS) 403, ‘Allocation of Home Office Expenses to Segments.’ This SDP addresses whether the current thresholds that require use of the three factor formula for allocating residual home office expenses require revision.”
  - “Public notification of the (CAS Board) decision to discontinue its review of the exemption for contracts that are executed and performed outside the United States, its territories, and possessions.” See September 15, 2005, Federal Register for background material.
- DoD continues to issue memoranda including the following:
  - **“Class Deviation—Implementation of New Specialty Metals Restriction”** (dated January 29, 2008) which supersedes prior deviations (2006-00004 and 2007-00011) and provides expanded guidance and direction, e.g. in the area of commercial items, etc.
  - **“Class Deviation—Extension of Test Program for Certain Commercial Items”** (dated February 8, 2008) which extends the deviation and authorizes contracting officers to “continue processing solicitations and contracts under Subpart 13.5 until implementation of FAR language that updates FAR 13.5(d).”
- Information on the Air Force Installation Acquisition Transformation initiative is available at <http://ww3.safahq.af.mil/factsheets/factsheet.asp?id=11457>
- The Air Force on January 28, 2008, issued AFAC 2008-0128 which “implements revisions to the Air Force source selection procedures and is effective for source selection plans approved on or after 31 March 2008. Acquisitions with source selection plans (SSP) approved before 31 March 2008 may continue to conduct source selection activities in accordance with the procedures established in those approved plans. These new procedures reflect implementation of the recommendations of the Air Force Source Selection Improvement Team.” A briefing of the changes is available- <https://www.safahq.af.mil/contracting/affairs/5315/mandatory/afac.2008.0128.briefing.ppt>
- On February 20, 2008, OFPP issued additional guidance on public-private competitions.

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

Professor Peter Fitzgerald, Stetson University College of Law, has completed a study of the “value and utility” of the Convention on the International Sale of Goods (CISG)\* and the UNIDROIT (International Institute for the Unification of Private Law) Principles of International Commercial Contracts.\*\* The study results/analysis are scheduled to be published as an article in the Fall 2008, volume 27, issue of the Journal of Law and Commerce. A prepublication draft article of his study provides significant insight into international contracting practices, substantial concerns in this area, and corrective changes for the future—all important in drafting/negotiating contracts in the international area. This comment provides an overview of the important aspects from that draft article.

The introduction highlights the “problem,” wherein he states,

“In an era of globalization it is perplexing that so many US practitioners, jurists, and legal academics continue to view contract issues as governed exclusively by state common law and the UCC. In essence, a significant number of lawyers may be defaulting to the wrong law, in the absence of an effective choice of law clause, when trying to determine the rights and responsibilities arising out of international commercial transactions.”

Consequently, what are international companies, business/contracts professionals, transaction attorneys, etc. “defaulting” to as the “contract law” for their international transactions? Professor Fitzgerald, clearly provides a road map into *properly* answering that inquiry.

First, some background may be apropos. Generally, the CISG, like the UCC, provides the default terms when that treaty is applicable—relating to the sale of “goods,” as defined, and involving contracting entities located in different countries which have ratified the treaty. The UNIDROIT Principles, while not a treaty, “are intended to reflect generally accepted aspects of commercial contract law drawn from a variety of different legal systems....” The number of reported court decisions brings into sharper focus the topic where the Professor indicates that the CISG appears in approximately 47 reported cases in the US and the Principles appear in only one case!

His survey methodology is provided as well as the number of individuals completing the survey—236 responded to his survey with US and international participation among the targeted groups—practitioners, jurists, and legal academics. The specific survey questions and responses are included in an exhaustive Appendix (over 80 pages!).

Familiarity with the CISG and Principles was significantly low, i.e. 30% and 17%, respectively.

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Mistaken views of survey respondents as to the CISG are noted. He makes it clear the relationship of the CISG to local law where he states, “the CISG is part of the domestic law of contracts in every state in the United States, fully applicable by its own terms, and therefore provides the default legal rules applicable to international transactions between businesses located in countries that are party to the Convention.” While noting that contracting parties can exclude the CISG or parts thereof from their deal, “the CISG is a self-executing treaty and therefore part of the domestic law of the United States. Simply choosing the law of a particular state in a choice of law clause should not act as an implied exclusion of the CISG. Moreover, as a treaty, the CISG prevails over any inconsistent state law, such as the UCC, as a matter of federal preemption under the supremacy clause of the Constitution.” Consequently, due diligence must be exercised!

The Principles are usually applicable to international transactions by explicit provisions that state, in effect, “this contract will be governed by the UNIDROIT Principles.” He also explores the full meaning of such a clause in litigation and arbitration proceedings.

“When drafting international commercial contracts, 55% of US practitioners who said they were familiar with the CISG specifically choose to opt out of its coverage while 24% specifically opt in to the CISG in whole or in part. However, 21% do not address the Convention at all in their (international) agreements.” What are some of the stated reasons for opting out of the CISG? The UCC or other national law was stated rather than “particularized concerns over the CISG.” Specific issues raised in deciding to opt out included “timing of the ‘meeting of the minds’ and the negotiating processes, warranty exclusions, limitation periods, and the role of gap fillers, and the relative lack of caselaw addressing the interpretation to be given to the CISG’s various provisions.”

Survey questions and observations were also aimed at the judiciary and the law school curriculum over CISG or the Principles.

Professor Fitzgerald concluding observations comprise, in part, the following:

- “The CISG was incorporated into US domestic law nearly twenty years ago, and the UNIDROIT Principles are now more than a decade old, and they are both still largely unknown and seldom seen in practice today.”
- “While the CISG is certainly part of the body of international or ‘foreign’ law, as a ratified treaty it is also an integral part of contract law in the US....”
- “The primary motivation for (opting out)...appears to be a lack of familiarity with the CISG rather than a reasoned analysis of whether opting out serves particular client interests....” And, one clear example highlights, as he calls it, “unthinking exclusion of the CISG,” and it relates to the “CISG’s absence of a perfect tender rule. If a US seller in an international transaction relies upon UCC Article 2, instead of the CISG, the buyer may reject the delivery if it ‘fails in any

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respect,' however minor, to conform to the contract (See UCC 2-601)." And, Professor Fitzgerald notes the corollary issues associated with UCC cure and problems with duties, letters of credit, etc. in such event but "the CISG, in contrast, requires the buyer to accept and pay for the goods in such circumstances ... subject to the buyer's claim for appropriate compensation, unless the seller's breach is fundamental (as defined under CISG) to the transaction."

- The UNIDROIT Principles "are separate and distinct from domestic law...and function best as a non-binding normative instrument that attempts to construct a single unified body of contract rules from a number of legal systems, they can be voluntarily invoked by the parties to any international transaction as is done with INCOTERMS...."

\* CISG was promulgated in 1980 and is embodied into a treaty that has been approved by over 60 countries including the US—it is available at <http://www.cisg.law.pace.edu/>

\*\*The UNIDROIT Principles (not a treaty, but "principles") were originally issued in 1994 and updated in 2004—it is available at <http://www.unidroit.org/english/principles/contracts/main.htm>

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## Future Speaking Topics Include—

- "Contract Negotiation" seminar as part of the Acquisition Solutions, Inc. 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." Seminars are offered nation-wide. Scheduling/registration information is at [http://www.acqsolinc.com/asi\\_training-institute.cfm](http://www.acqsolinc.com/asi_training-institute.cfm).
- NCMA Educational Conference, Antelope Valley Chapter and Sacramento/Gold Rush NCMA Chapter, "Contract Negotiations."
- "Opportunities for Mediators in Business," lecture, University of California, Irvine Extension
- NCMA 2008 Congress NES, April 17, 2008, Cincinnati, Ohio, "Contract Negotiation." Registration information is at <http://www.ncmahq.org/meetings/wc08/seminars.asp>.
- "Solicitations, Bids, Proposals and Source Selection: Building a Winning Contract," NCMA NES, Puget Sound and Central Connecticut Chapters.

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