

# Regulatory/Contractual Update

May 22, 2008

Volume 13, Issue 6

- On May 16, 2008, the Federal Register noticed a request by the Civilian/Defense Councils whereby they are “seeking (more) comments on changes to the proposed rule, FAR Case 2007-006, Contractor Compliance Program and Integrity Reporting, published in the Federal Register at 72 FR 64019, November 14, 2007, for which the initial comment period had closed, that may be included in the final rule.” Comments are due on/before July 15, 2008.
- On May 13, 2008, the Federal Register noticed a DoD request for comments to a (revised) interim DFARS rule (to that issued April 26, 2007) on “regulations to ensure that pass-through charges on contracts or subcontracts that are entered into for or on behalf of DoD are not excessive in relation to the cost of work performed by the relevant contractor or subcontractor.” DoD has also published an extensive response to the prior public input. Comments are due on/before July 14, 2008.

COMMENTS: See prior Updates on the subject. Where is the incentive for prime contractors and higher tiered contractors to subcontract work to small businesses, etc. if profits on that work are eliminated?
- May 19, 2008, the Federal Register noticed a proposed change to 48 CFR Chapter 54 that will “provide an additional method for documenting customer receipt of DLA supplies and services in support of the contract acceptance and payment process by allowing contractor input of receipt documentation into the Department of Defense Wide Area Workflow system.” Comments are due on/before July 18, 2008.
- On May 12, 2008, the Federal Register noticed the “final revisions to the interim rules of procedure of the Civilian Board of Contract Appeals (Board), which were published in the Federal Register at 72 FR 36794, July 5, 2007. These rules will govern all proceedings before the Board, and will be contained in 48 CFR parts 6101 through 6105. These rules of procedure supersede the current interim rules of the Board.”
- On May 1, 2008, the Federal Register noticed a final DoD rule “revising 32 CFR Part 204 to better align it with Office of Management and Budget (OMB) Circular A-25, ‘User Charges.’ This part provides guidelines to establish appropriate fees for authorized services supplied by Department of Defense organizations when such services provide special benefits to an identifiable recipient beyond those that accrue to the general public.”

## Points of Contact

ADROffice@Rumbaugh.net  
www.Rumbaugh.net

Regulatory/Contractual  
Update  
Volume 13, Issue 6

*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.*

- DoD continues to issue memoranda including the following:
  - **“Brand Name Specifications and Competition.”** On May 13, 2008, Shay Assad, the DoD Director of Defense Procurement, Acquisition Policy, and Strategic Sourcing, issued a memorandum to express the Director’s concern “that DoD components may not be properly following the brand name or equal policy” expressed by OMB in 2005, 2006, and 2007—representative sampling indicates noncompliance. Contracting Officers must “maintain neutral contract specifications and ensure the Department strictly complies with the FAR requirements regarding the use of brand name specifications and providing for full and open competition in soliciting offers and awarding Government contracts.”
  - **“DoD Senior Contracting Leadership Positions.”** On April 25, 2008, DoD issued a notice on the concern over “unfilled senior contracting positions” and the risks associated with same.
  - **“Office of Secretary of Defense Wide Area Workflow Implementation Scorecard.”** On May 12, 2008, DoD issued a notice on the implementation goals and planned briefings this year—June 25<sup>th</sup> and September 17<sup>th</sup>.
  - **“Inventories and Reviews of Contracts for Services.”** On May 16, 2008, DoD issued a schedule for conducting the required Services inventories pursuant to Section 807 of the National Defense Authorization Act for FY 2008.
  - **“Enterprise Business Intelligence in Support of Independent Verification and Validation.”** On May 12, 2008, DoD issued direction on providing DoD direct access to data warehouses.
  - **“Final Certification for FY07 Contract Reporting to the Federal Procurement Data System.”** On May 7, 2008, DoD issued a request for final certification of FY07 data by May 30, 2008.

#### Points of Contact

ADROffice@Rumbaugh.net  
www.Rumbaugh.net

*Regulatory/Contractual  
Update  
Volume 13, Issue 6*

*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.*

---

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

- The April 2007, Update reported the decision of Trianco v. IBM, 466 F.Supp.2d 600 (No. 06-3533, December 21, 2006, US District Court, ED Pennsylvania) as “a ‘must read’ case for those contemplating teaming arrangements and how a winning prime proposal resulted in the team member not being awarded a subcontract notwithstanding the teaming arrangement. The case is important on various aspects including the selection of team members, drafting of the teaming agreement, methods on resolving ‘open issues’ including price, use of UCC ‘good faith’ obligation in negotiation of the final subcontract price, etc.”

On April 2, 2008, the Third Circuit Court of Appeals (No. 07-1095) affirmed that earlier decision in part and remanded the case on one issue, i.e. “whether Trianco’s complaint states a cause of action for unjust enrichment.” The claims associated with breach of contract, fiduciary duty, the implied covenant of good faith and fair dealing, equitable/promissory estoppel were all “properly dismissed.”

There is no discussion of UCC 2-305 dealing with open pricing issues when the parties otherwise intended to form a contract.

Again the impact on primes/subs in drafting teaming arrangements cannot be over emphasized. And, Contracting Officers need to review what teaming “assurances” are being provided in the prime contractor’s proposal!

- The International Association for Contract and Commercial Management has announced “a joint study with internationally-respected consulting firm Vantage Partners (a spin-off of the Harvard Negotiation Project). The purpose of this study is to assess current negotiation practices, enable companies to benchmark their negotiation outcomes and capabilities, and provide insights about the negotiation challenges and opportunities confronting customers and suppliers.”

Take the survey for **Buy-side** executives at

[http://www.surveymonkey.com/s.aspx?sm=7eA01Lr9o29jUI48a5FTog\\_3d\\_3d](http://www.surveymonkey.com/s.aspx?sm=7eA01Lr9o29jUI48a5FTog_3d_3d)

Take the survey for **Sell-side** executives at

[http://www.surveymonkey.com/s.aspx?sm=U5G6QOP5RE\\_2fA3DpDsTy3cQ\\_3d\\_3d](http://www.surveymonkey.com/s.aspx?sm=U5G6QOP5RE_2fA3DpDsTy3cQ_3d_3d)

- NCMA has posted the presentations from its recent Congress in Cincinnati. The material is posted at <http://www.ncmahq.org/Events/WC08Detail.cfm?itemnumber=3100&navItemNumber=3064>
- ISM has posted the Proceedings from its recent International Conference in St. Louis. The material is posted at <http://www.ism.ws/pubs/proceedings/YearProceedingsIndex.cfm?LISTITEMID=834&View=1>

### Points of Contact

ADROffice@Rumbaugh.net  
www.Rumbaugh.net

*Regulatory/Contractual  
Update  
Volume 13, Issue 6*

---

## 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).
- Sacramento/Gold Rush NCMA Chapter, "Contract Negotiations."
- "Solicitations, Bids, Proposals and Source Selection: Building a Winning Contract," NCMA NES, Puget Sound Chapter (registration info: felicia.cannon@gsa.gov) and Central Connecticut Chapter (registration info: tyu@sikorsky.com).

ADR Offices of  
**CHARLES E. RUMBAUGH**  
Arbitrator/Private Judge/Mediator  
310.373.1981 // 310.373.4182 (fax)  
888.ADROffice (toll free)

Los Angeles  
San Francisco

Recent Updates are posted at  
[www.Rumbaugh.net](http://www.Rumbaugh.net)  
©MMVIII Charles E. Rumbaugh