

# Regulatory/Contractual Update

November 10, 2008

Volume 13, Issue 11

- DoD continues to issue memoranda including the following:
  - On October 31, 2008, the DoD Director of Defense Procurement, Acquisition Policy, and Strategic Sourcing, issued a memorandum, “Meeting Department of Defense Requirements Through Interagency Acquisition,” which implements the earlier OFPP memo of June 6, 2008, on “Improving...Interagency Acquisition” by the issuance of the guide on same and “mandating its use for Interagency Acquisitions in excess of \$500,000” for new agreements on/after November 3, 2008. Attached to the OFPP memo are elements that must be included in specified new agreements, a model interagency agreement, etc. See June 27, 2008, Update.
  - On October 3, 2008, the DoD Director, also issued a memorandum, “Competition Report for FY 2008” with DoD planning to submit to OFPP by January 30, 2009, a consolidated competition report. DoD “Components’ reports should be submitted through the Component Acquisition Executive, (to the DoD point of contact) by January 9, 2009.”
  - On September 29, 2008, the DoD Director, similarly issued a policy memorandum, “Peer Reviews of Contracts for Supplies and Services.” The memo set forth the policy on Peer Reviews with the three-fold stated objective
    - to ensure the Contracting Officers across the Department are implementing policy and regulations in a consistent and appropriate manner;
    - to continue to improve the quality of contracting processes across the Department; and
    - to facilitate cross-sharing of best practices and lessons learned across the Department.

COMMENT: On a “somewhat” related topic is the October 20, 2008, Wall Street Journal article/critique, “Get Rid of the Performance Review!” The subtitle to which is “It destroys morale, kills teamwork and hurts the bottom line. And that’s just for starters.” The author is Dr. Samuel A. Culbert, consultant, author and professor of management at the UCLA Anderson School of Management in Los Angeles.

- On October 24, 2008, the Federal Register noticed a revised Department of Energy (DOE) “Statement of Policy on Alternative Dispute Resolution (ADR) to reaffirm its commitment to the use of ADR, including the use of Environmental Conflict Resolution (ECR) and other collaborative processes that may be utilized to prevent or avoid potential conflicts.” Limited authorization to use arbitration as an ADR process is provided.

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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 October 20, 2008, the Federal Register noticed a final DFARS rule “to implement Section 819 of the National Defense Authorization Act for Fiscal Year 2006. Section 819 authorizes DoD to use an evaluation factor that considers whether an offeror intends to perform a contract using employees or individual subcontractors who are members of the Selected Reserve.”
- The Summer 2008 issue of NCMA’s Journal of Contract Management has an exhaustive article on the background, then current status, etc. of the DoD Specialty Metals Restrictions (and exceptions) as well as the Berry Amendment.
- The Air Force has issued its September 2008 ADR Newsletter which includes an article on the “revised” ADR agreement/pledge between the AF and contractors—see prior Updates. The Newsletter is located at <http://www.adr.af.mil./shared/media/document/AFD-081001-069.pdf>
- Jack Paul, Esq. has published his Government Contract course offerings at [www.jackpaul.com](http://www.jackpaul.com)
- Timothy Malishenko, CPCM, Fellow, corporate vice president, contracts and pricing, The Boeing Company, announced his retirement effective December 31, 2008.

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

- On that Election Day, November 4, 2008, the United States Court of Appeals for the Federal Circuit issued an opinion in Rothe Development Corporation v. DoD, et al (2008-1017), which is summarized below (quoted from the court opinion):

This case concerns the constitutionality of 10 U.S.C. § 2323 (“Section 1207”), which, in relevant part, (1) sets a “goal” that five percent of federal defense contracting dollars for each fiscal year be awarded to certain entities including small business concerns owned and controlled by “socially and economically disadvantaged individuals”; (2) incorporates the Small Business Act’s presumption that Black Americans, Asian Americans, Hispanic Americans, and Native Americans are socially

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disadvantaged individuals; and (3) provides that the Department of Defense shall give specified forms of assistance to the listed entities and may, when practicable and necessary to achieve the five percent goal, make advance payments to those entities and award contracts to them at prices up to ten percent above fair market cost.

Plaintiff-Appellant Rothe Development Corporation (“Rothe”) filed its first complaint in this case in November, 1998, bringing an equal protection challenge to Section 1207 both on its face and as applied by Defendants-Appellants the Department of Defense and Department of the Air Force (together, “DOD”) earlier that year, when DOD awarded a contract to an Asian-American-owned business despite the fact that Rothe—owned by a Caucasian woman—was the lowest bidder. Since this case began in 1998, Congress has reenacted Section 1207 a number of times, the district court has rendered judgment in this case three times, and we have remanded the case twice without reaching the ultimate question of constitutional muster. Most recently, the district court granted summary judgment to DOD on Rothe’s facial challenge, Rothe Dev. Corp. v. U.S. Dep’t of Def., 499 F. Supp. 2d 775 (W.D. Tex. 2007) (“Rothe VI”), and, after Rothe’s claim for monetary relief became moot, entered a final judgment in favor of DOD on September 25, 2007. Rothe appealed, and we heard oral argument on September 2, 2008.

Now, in our third opinion in this case, we must decide whether Section 1207, on its face, as reenacted in 2006, violates the right to equal protection (as incorporated against the federal government by the Due Process Clause of the Fifth Amendment). Because we will hold that Congress did **not** have a “strong basis in evidence” before it in 2006, upon which to conclude that DOD was a passive participant in racial discrimination in relevant markets across the country and that therefore race-conscious remedial measures were necessary, we will reverse the district court’s judgment in part, and will hold that Section 1207 (i.e., 10 U.S.C. § 2323) is unconstitutional on its face.

The opinion is available at  
<http://caselaw.lp.findlaw.com/data2/circs/fed/081017p.pdf>

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- The May 22, 2008, Update reported on the original decision in Trianco v. IBM, 466 F.Supp.2d 600 (No. 06-3533, December 21, 2006, US District Court, ED Pennsylvania), stating that that case was a “must read”
  - “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 compliant states a cause of action for unjust enrichment.”
  - On October 15, 2008, in the remand to the District Court, that court found against Trianco and dismissed its unjust enrichment argument. It is reported the case is (now) on appeal (back) to the Court of Appeals.

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### **Future Speaking Topics Include—**

- Rio Grande (Albuquerque, New Mexico) National Contract Management Association (NCMA) Chapter, “Update on Regulatory/Contractual Changes in Government Contracting,”
- Institute for Supply Management (ISM) Seattle Affiliate, “Big Changes to UCC Rules on Contract Formation and Terms of the Deal are Around the Corner— Are You Ready?”
- "Solicitations, Bids, Proposals and Source Selection: Building a Winning Contract," NCMA NES, Puget Sound Chapter.
- Inland Empire NCMA Chapter, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements."
- “Contract Negotiation” workshop, NCMA Houston Chapter.
- “Baseball Arbitration,” ISM Miami Affiliate.
- “ADR,” NCMA South Florida Chapter.

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