

Regulatory/Contractual Update

August 24, 2009

Volume 14, Issue 8

- The Federal Register on July 17, 2009, noticed an interim DFARS rule which “establishes policy, assigns responsibilities and provides procedures for the regulation of the selection, accountability, training, equipping, and conduct of personnel performing private security functions under a covered contract during contingency operations. It also assigns responsibilities and establishes procedures for incident reporting, use of and accountability for equipment, rules for the use of force, and a process for administrative action or the removal, as appropriate, of Private Security Contractors (PSC) and PSC personnel. For the Department of Defense, this interim rule supplements DoD Instruction 3020.41, ‘Contractor Personnel Authorized to Accompany the U.S. Armed Forces,’ which provides guidance for all DoD contractors operating in contingency operations.” Comments are due on/before August 31, 2009.
- The Federal Register on August 20, 2009, noticed a proposed FAR change “to revise procedures for closing out contract files. This case revises procedures for clearing final patent reports and quick-closeout procedure, and sets forth a description of an adequate final indirect cost rate proposal and supporting data.” Comments are due on/before October 19, 2009.
- The Federal Register on August 7, 2009, noticed a proposed FAR change “to revise the list of nonavailable articles at FAR 25.104(a). The Councils also request public comment as to whether some articles on the list of nonavailable articles are now mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality and should therefore be removed from the list.” Comments are due on/before October 6, 2009.
- The Federal Register on July 15, 2009, noticed an interim DFARS rule which “implements Sections 805 and 815 of the National Defense Authorization Act for Fiscal Year 2008. The rule specifies the conditions under which a time-and-materials or labor-hour contract may be used for the acquisition of commercial items.” Comments are due on/before September 14, 2009.
- On July 29, 2009, OFPP issued supplemental guidance to the July 1, 2009, FAR changes on “Use of Contractor Performance Information.” Also, see July Update. And, on July 30, 2009, OMB issued the first of two installments on “Improving Government Acquisition,”—complementing the March 4, 2009, President’s Memorandum on Government Contracting.

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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.

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- On August 11, 2009, Federal Acquisition Circular 2005-35 was issued and includes
 - Federal Technical Data Solution (FedTeDS) (FAR Case 2008-038). “This final rule amends FAR subparts 5.1, 5.2, and 7.1 to remove all references to the Federal Technical Data Solution (FedTeDS) System, and refer to the enhanced capabilities of the Governmentwide Point of Entry (GPE) system....”
 - Fair Labor Standards Act and Service Contract Act Price Adjustment Clauses (FAR Case 2007-021). “This final rule amends the FAR to specifically require the incorporation of FAR clauses 52.222-43, Fair Labor Standards Act and Service Contract Act-Price Adjustment (Multiple Year and Option Contracts) and 52.222-44, Fair Labor Standards Act and Service Contract Act--Price Adjustment, in time-and-materials and labor-hour service contracts that are subject to the Service Contract Act.”
 - New Designated Country—Taiwan (FAR Case 2009-014) (Interim). “This interim rule implements in FAR Parts 22, 25, and 52, as appropriate, the designation of Taiwan under the World Trade Organization Agreement on Government Procurement, which took effect on July 15, 2009.”
 - List of Approved Attorneys, Abstractors, and Title Companies (FAR Case 2006-013). “This final rule amends FAR 28.203-3 and 52.228-11 to update the procedures for the acceptance of a bond with a security interest in real property (and deletes the previous approval ‘list’)...”
 - Cost Accounting Standards (CAS) Administration and Associated Federal Acquisition Regulation Clauses (FAR Case 2007-002). This final rule converts, without change, the interim rule published in the Federal Register at 73 FR 54011 September 17, 2008, (for which no comments were received).”
 - Prohibition on Restricted Business Operations in Sudan and Imports from Burma (FAR Case 2008-004).
- The Federal Register on August 6, 2009, noticed a proposed FAR change “to revise coverage in regard to Government property and its associated clauses. These changes are to add clarity and correction to the previous FAR rule for Part 45, Government Property, published under Federal Acquisition Circular 2005-17, FAR case 2004-025. Comments are due on/before October 5, 2009. See below a referenced DoD memorandum on the topic.
- It is reported that the Air Force has “updated its Service Contract Act (SCA) Price Adjustment Guide. Among other changes, the current Health & Welfare rate and references are updated, and sections are reorganized for clarity.”
- DCAA issued a Memorandum on August 6, 2009, noticing the “temporary change in audit management responsibility” of the DCAA Western Region, Peninsula Branch Office, whereby most functions will report to the Central Region, etc.

- The Federal Register on July 29, 2009, noticed several final (except where noted) DFARS rules that included the following:
 - “To address requirements for ensuring the accuracy of contractor information in the Central Contractor Registration (CCR) database and in contract documents.”
 - “To address DoD requirements for reporting of contract actions in the Federal Procurement Data System. ”
 - “To update text addressing management of Government property in the possession of contractors.”
 - “To address requirements for Peer Reviews of DoD solicitations and contracts.”
 - “To address requirements for DoD management and oversight of undefinitized contract actions, consistent with the provisions of Section 809 of the National Defense Authorization Act for Fiscal Year 2008.”
 - “To address statutory restrictions on the acquisition of specialty metals not melted or produced in the United States. The rule implements Section 842 of the National Defense Authorization Act for Fiscal Year 2007 and Sections 804 and 884 of the National Defense Authorization Act for Fiscal Year 2008.”
 - “To address requirements for DoD management and oversight of unpriced change orders in a manner consistent with the management and oversight requirements that apply to other undefinitized contract actions.” Comments are due on/before September 28, 2009.

- The Federal Register on July 15, 2009, also noticed an interim DFARS rule which “implements Section 802 of the National Defense Authorization Act for Fiscal Year 2008. Section 802 places limitations on the award of new contracts for lead system integrator functions in the acquisition of major DoD systems.” Comments are due on/before September 14, 2009.

- The Federal Register on July 15, 2009, also noticed a final DFARS rule which “implements Section 803 of the National Defense Authorization Act for Fiscal Year 2009. Section 803 requires DoD to identify and evaluate, at all stages of the acquisition process, opportunities for the use of commercial computer software and other non-developmental software.”

- The Acquisition Councils have extended the comment period to the proposed amendment to the FAR “to implement Executive Order (E.O.) 13502, Use of Project Labor Agreements for Federal Construction Projects” to September 23, 2009. And, on July 14, 2009, the Federal Register notice the deletion of “prohibited executive departments and agencies from requiring or prohibiting Federal Government contractors and subcontractors' entrance into project labor agreements.”

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- DoD continues to issue memoranda including the following:
 - July 8, 2009, on “Block Change to Eliminate Obsolete Government Property Clauses.”
COMMENT: Are contractors maintaining dual property systems for different contractual/property clause requirements? This provides a (purported) opportunity to modify contracts through DCMA—discuss with counsel.
 - August 21, 2009, on “Annual Review of the Acquisition of Services Policy and Oversight.” A review as required by DoDI 5000.02, Enclosure 9, Paragraph 3.f. is being initiated.
 - August 19, 2009, on “Revised Posting and Reporting Requirements for the American Recovery and Reinvestment Act of 2009.” “This memorandum is to update the DPAP instructions for required use of federal Integrated Acquisition Environment (IAE) capabilities to ensure all recovery funds are documented appropriately for the new requirements.” DoD had also issued on July 10, 2009, a memo on the same topic with a deviation to FAR 52.204-11.
 - August 19, 2009, on “Class Deviation – FAR 32.9 Prompt Payment for Emergencies and Contingency Operations.” “This Class Deviation, effective immediately, allows all Department of Defense contracting activities supporting payments covered by 5 CFR 1315.1(b)(2), related to emergencies as defined in the Disaster Relief Act of 1974, Public Law 93-288, as amended (42 U.S.C. 5121 et seq.); military contingency operations (as defined in 10 U.S.C. 101 (a)(13)); and the release or threatened release of hazardous substances (as defined in 4 U.S.C. 9606, Section 106) to deviate from the requirements of FAR 32.9, Prompt Payment.”
 - August 10, 2009, on “FY 10 Procurement Management Review (PMR) Program” “This memorandum establishes the schedule of PMR planned for FY10, requests that the Other Defense Agencies provide volunteers to staff the review teams, and invites the Military Departments to offer review team members.”
 - August 3, 2009, on “Preservation and Storage of Tooling for Major System Acquisition Programs.” “This memorandum provides the DoD policy for the implementation of the requirements of Section 815 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 P. L. 110-417, Title VIII, Subtitle B, Section 815).”
 - July 29, 2009, on “Recent GAO Decisions Concerning Small Business Programs.” “This memorandum directs DoD buying components to follow the OMB guidance issued on July 10, 2009 to the Federal agencies regarding recent GAO decisions on small business programs.”
- On August 11, 2009, the Federal Register noticed an “August 13, 2009, (sic) public meeting to continue a dialogue with industry and Government agencies about ways to develop greater assurance around information technology (IT) products acquired by the Government.”

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

- The recent case of APS Capital Corp. v. Mesa Air Group Inc., No. 08-50770, 5th Circuit Court of Appeals, may be of interest in showing the risks associated with telephonic/email negotiations/exchanges which were not memorized in a definitive signed document. “In a breach of contract action regarding the resale of trade claims and bank debt, summary judgment for defendant is vacated where: 1) the agreement was ambiguous and required extrinsic evidence to be interpreted; and 2) defendant did not produce sufficient evidence of industry standards to show that the agreement could not be definite enough to be enforceable.” Should a letter of intent, etc. been advised from the get-go? What if the transaction involved an international sale of goods with the CISG being applicable—which does not have a Statute of Frauds? Discuss with counsel. Case is available at <http://caselaw.lp.findlaw.com/data2/circs/5th/0850770cv0p.pdf>
- And, the August 11, 2009, 11th Circuit Court of Appeals decision of Mac East, LLC v. Shoney's, No. 07-11534, which held in part that a commercial lease which provided one-party with the sole discretion to withhold consent to a proposed sublease is not subject to any commercial reasonableness standard. Do your contracts assume that a decision by one party “must” be reasonable or specifically states the criteria for same? Discuss with Counsel. Case is available at <http://caselaw.lp.findlaw.com/data2/circs/11th/0711534pv1.pdf>
- Finally, the July 7, 2009, 8th Circuit Court of Appeals decision of Al-Khalidiya Electronics and Electrical Equipment Co. v. The Boeing Co., No. 08-2686, involved purported commissions on foreign sales. “In a breach of contract action related to the sale of military aircraft to Kuwait, district court grant of summary judgment for defendant is affirmed where: 1) the court did not err in holding the parties' contract barred plaintiff's claim for a commission on the sale of certain Apache helicopters; 2) plaintiff's claims concerning commissions for the sale of A-4 fighters was time barred; 3) defendant did not breach the implied covenant of good faith and fair dealing by not renewing the parties' earlier agreement as it allowed for non-renewal; and 4) claims for quantum meruit and unjust enrichment are precluded by the unambiguous express terms of the parties' agreements.” Case is available at <http://caselaw.lp.findlaw.com/data2/circs/8th/082686p.pdf>
- There is a recent ruling in an IRS case involving government access to certain case-created documents in connection (so-called “work product doctrine”) with a purported tax liability where the applicability/ramifications of same may need to be discussed with counsel. This USA v. Textron, 1st Circuit case, No. 07-2631, was decided August 13, 2009, and is available at Findlaw.com.

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Future Speaking Topics Include—

- Sacramento and China Lakes NCMA Chapters, “How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements.”
- University of California, Irvine, lecture, “Recent Developments in International Purchasing/Contracting.”

Current Articles Include—

“Conflict Resolution Techniques... The Answer to Legislative Impasses?”

ABSTRACT: Given the greater reliance by local governments for budget support from their respective State governments, the need for prompt legislative budget action and approval is a necessity so that procurement dollars can be contractually committed at the local government level. This article offers a methodology which ensures prompt legislative action through a creative approach of resolving deadlocks in certain legislative processes—especially those mandating super-majority legislator approvals. Published in NCMA Contract Management magazine, July 2009—available at www.Rumbaugh.net

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