

Regulatory/Contractual Update

January 5, 2009

Volume 14, Issue 1

Happy New Year!

- On December 5, 2008, the Federal Register noticed “proposed amendments to 26 CFR part 31 under section 3402(t) (and other sections) of the (Internal Revenue) Code.... Section 3402(t) of the Code was added by section 511 of the Tax Increase Prevention and Reconciliation Act of 2005, Public Law 109-222 (TIPRA), 120 Stat. 345, which was enacted into law on May 17, 2006, ...(and) provides that the Government of the United States, every State, every political subdivision thereof, and every instrumentality of the foregoing (including multi-State agencies) making any payment to any person providing any property or services (including any payment made in connection with a government voucher or certificate program which functions as a payment for property or services) shall deduct and withhold from such payment a tax in an amount equal to 3 percent of such payment. Under the statute, section 3402(t) applies to payments made after December 31, 2010.” Comments are due on/before March 5, 2009.
- On December 8, 2008, DoD issued a revised 80 page DoD Instruction 5000.02 (“Operation of the Defense Acquisition System”), which has been described as “the first major change to acquisition policy in five years.”
- On December 12, 2008, the Air Force issued a memorandum, “Plan for Restricting Government-Unique Contract Clauses on Commercial Contracts.” The Summary of this memo provides,
“It is DoD policy to limit the number of unique clauses in commercial item acquisitions consistent with stated statutory and regulatory requirements. Unique clauses or instructions incorporated into solicitations and contracts for commercial items in addition to those prescribed in the FAR and DFARS shall not be used, unless the contracting activity can demonstrate that inclusion of such instruction or clause is essential. Air Force contracting officers are directed to prepare contracts for commercial items in accordance with FAR 12.301 which requires, to the maximum extent practicable, only those clauses required to implement provisions of law or executive orders applicable to the acquisition of commercial items, or determined to be consistent with customary practice. To ensure appropriate oversight for inclusion of any unique clauses in contracts for commercial items, all MAJCOM/DRUs will establish a management and oversight plan on their efforts to reduce the use of government-unique clauses in commercial contracts.”

Points of Contact

ADROffice@Rumbaugh.net
www.Rumbaugh.net

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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 December 19, 2008, DCAA issued “Audit Guidance/Audit Management Guidance Memorandum No. 08-PAS-043” which
 - “clarifies what constitutes a significant deficiency/material weakness and establishes new guidance on reporting audit opinions on contractors’ internal control systems. Effective immediately, audit reports on contractors’ internal controls that report any significant deficiencies/material weaknesses will include an opinion that the system is inadequate. **DCAA will no longer report inadequate in part opinions.** In addition, the audit report will identify the portions of the system affected by the deficiencies and recommend that the contracting officer disapprove the system (if applicable) and pursue suspension of a percentage of progress payments or reimbursement of costs. (APPS audit report shells have been revised to reflect the appropriate recommendation depending on the system involved and should be used for any in-process assignments.) **Further, suggestions to improve the system will no longer be reported in internal control audit reports....**” (sic)

- On December 2, 2008, the Federal Register noticed two NASA proposals with comments due on/before February 2, 2009:
 - “to revise the NASA FAR Supplement (NFS) to update Agency-level, property-related provisions, clauses, prescriptions and procedures to be consistent with changes made to Part 45 and clauses 52.245 of the FAR in FAC 2005-17” which had significantly rewrote the rules on Government Property.
 - “to revise the NFS to update requirements related to Information Technology Security, consistent with Federal policies for the security of unclassified information and information systems. The rule imposes no new requirements. Its purpose is to more clearly define applicability, update procedural processes, eliminate the requirement for contractor personnel to meet the NASA System Security Certification Program, and provide a Web site link within a contract clause to a library where contractors can find all underlying regulations and referenced documents.”

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

- The recent case of Fireman’s Fund Insurance Company v. Sizzler USA Real Property, Inc. provides a reminder on “subrogation” in contracts in general and in real estate leases in particular. Here the “landlord and tenant entered into a lease agreement that provided subrogation was waived as to all risks covered by ‘any insurance policies carried by the parties.’ Such waiver barred insurer’s claim in subrogation to recover amounts paid to indemnify landlord from tenant.” Fireman’s Fund Insurance Company v. Sizzler USA Real Property, Inc. - filed December 18, 2008, Second District, Div. Fireman’s Fund Insurance Company v. Sizzler USA Real Property, Inc. - filed December 18, 2008. Opinion is at <http://www.metnews.com/sos.cgi?1208%2FB201536>
Consult with counsel on the ramifications of subrogation waivers, or absence thereof, in your contracts.
- Considering the recent economic/banking turmoil, have you reviewed the status/viability of the bank(s) that have issued you or your organization letters of credit?
- Crossroads of Conflict—Israel 2008: Commentary and pictures www.Rumbaugh.net

Future Speaking Topics Include—

- Beach Cities National Contract Management Association (NCMA) Chapter and University of California annual educational conference, “Update on Regulatory/Contractual Changes in Government Contracting,”
- Inland Empire and San Fernando Valley NCMA Chapters, “How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements.”
- “Contract Negotiation: Deal or No Deal!” NCMA Houston Space City Chapter.
- “Baseball Arbitration,” ISM Miami Affiliate.
- “ADR,” NCMA South Florida Chapter.

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

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