

Regulatory/Contractual Update

March 9, 2009

Volume 14, Issue 3

- On March 4, 2009, the White House issued a press release coupled with a “Government Contracting” fact sheet and a memorandum which has as a focus OMB taking the lead in reforming government contracting. There is a calendarization of action items including the issuance of guidance on reviewing processes/contracts under the premise of identifying those that “are wasteful, inefficient, or not otherwise likely to meet the agency’s needs.” Further, government-wide guidance is required on governing oversight/use of all contracts including sole-source non-competitive contracts and the outsourcing of services.

On a related topic, the February 3, 2009, Federal Register noticed a January 30, 2009, Presidential Memorandum on Regulatory Reviews which highlights the role/function of the OMB Office of Information and Regulatory Affairs (OIRA).

And, Congress has indicated an initiative on acquisition reform. See http://armedservices.house.gov/apps/list/press/armedsvc_dem/skeltonpr030609.shtml

- DoD continues to issue memoranda including the following:
 - February 19, 2009, on “DoD Panel on Contracting Integrity,” the panel that was required in the recent National Defense Authorization Act. The panel has at least 28 action items and is charged with “preventing contracting vulnerabilities that result in fraud, waste and abuse.”
 - February 18, 2009, on “Review Criteria for the Acquisition of Services,” wherein it is noted that DoD reviewed all service acquisitions over \$1B and over the past 2 years it had reviewed over 15 service acquisitions. Further, certain basic/enumerated “tenets” that are expected to be used in flowed-down reviews by/for military department that are under the \$1B threshold are also specified.
 - February 13, 2009, on “Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts,” wherein additional direction is set forth on the J&A documents to the interim rule issued on January 15, 2009, that implemented Section 844 of the NDAA for 2008.
 - February 11, 2009, direction whereby DoD “contracting activities shall continue to suspend the use of the price evaluation adjustment for small disadvantaged businesses (SDBs) in DoD procurement, as prescribed in the FAR subpart 19.11 and DFARS subpart 219.11. The suspension is in effect for a one-year period beginning 30 days after the date of this deviation and specifically applies to solicitations issued from March 13, 2009, through March 12, 2010. The current deviation authority is effective through March 9, 2009.”

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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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- February 18, 2009, on an extension to the prior “deviation from the requirements of FAR 31.203(c) when costs disallowed under FAR 31.205-52 are required to be included in the indirect cost base. This deviation expired September 30, 2008. This memorandum extends the deviation until September 30, 2011.”
 - February 12, 2009, a class deviation that “will allow DoD entities to deviate from the FAR by substituting clause 52.219-9 Small Business Subcontracting Plan (DEVIATION), for FAR clause 52.219-9 Small Business Subcontracting Plan. The clause allows DoD entities to use the Standard Form 294 - Subcontracting Report for Individual Contracts to submit reports for individual contracts, in lieu of using eSRS.”
 - February 12, 2009, a class deviation that “revises paragraph (b)(1) for use in FAR clause 52.222-8, Payrolls and Basic Records. It implements recent changes published by the Department of Labor on December 19, 2008, (73 FR 77504) by no longer requiring the reporting of full social security numbers and home addresses of employees as previously required in the weekly payroll submissions to the Contracting Officer.”
 - February 12, 2009, a “class deviation to the Commander of the Joint Contracting Command-Iraq/Afghanistan (JCC-I/A), without power of redelegation, the authority and responsibility, when acquiring products and services other than small arms, to make determinations that apply to an individual acquisition with a value of \$78.5 million or more or to a class of acquisitions under section 866 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181. This authority is in addition to the authority already provided in DFARS 225.7703-2(b)(2)(i), to make determinations that apply to an individual acquisition with a value of less than \$78.5 million.”
- The new Administration has issued memoranda/Executive Orders including the following:
 - EO 13502: Use of Project Labor Agreements for Federal Construction Projects. (February 11, 2009)
 - Executive Order 13494: Economy in Government Contracting. (February 4, 2009)
 - Executive Order 13495: Nondisplacement of Qualified Workers Under Service Contracts. (February 4, 2009)
 - Executive Order 13496: Notification of Employee Rights Under Federal Labor Laws. (February 4, 2009)
 - The January-February 2009 issue of Defense AT&L (DAU) has an interesting and timely article entitled, “Reducing Costs with Value Engineering Change Proposals,” by Danny Reed and Jay Mandelbaum.
 - The magazine from the Salans international law firm entitled, "Focus on Asia," may be of interest for those contemplating business opportunities in the Far East with an emphasis on relevant Chinese laws/practices—it is available at <http://www.salans.com/pub/SalansFocusOnAsia.PDF>

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

- Recent cases that raise important concepts in negotiating/drafting/managing contracts include the following—
 - The decision in Wisconsin Elec. Power Co. v. Union Pac. R.R. Co., No. 08-2693 (US 7th Circuit, March 2, 2009) provides a timely discussion of a legal concept that may be of importance in the current economic situation but here may have been used for a different context—what do you think? “WEPCO, an electric utility that is the plaintiff in this diversity suit for breach of contract (governed by Wisconsin law), appeals from the grant of summary judgment to the defendant, the Union Pacific railroad. The contract was for the transportation of coal to WEPCO from coal mines in Colorado between the beginning of 1999 and the end of 2005. The appeal presents two issues: whether a force majeure clause in the contract authorized the railroad to increase its rate for shipping the coal, and whether the railroad breached its duty of good-faith performance of its contractual obligations by failing to ship the tonnage requested by WEPCO on railcars supplied by the railroad.” The case has an excellent discussion on the concept/background of a force majeure, impact of a non-waiver provision, failure to provide prompt notice of the intervening event, good faith in the performance of a contract, as well as drafting of a price escalation clause in the perspective of “force majeure.” Case is available at <http://caselaw.lp.findlaw.com/data2/circs/7th/082693p.pdf>
 - And, the court opinion in Wolff v. Westwood Mgmt., LLC, No. 07-7136 (US DC Court of Appeals, March 6, 2009) provides insight where an “old” contract clause may have more life than some of the parties anticipated after the original contract was terminated—what needs to be stated in a subsequent contract as it relates to a prior contract? As the court stated, “this case concerns the shelf-life of an arbitration provision in a superseded contract. Appellant Elliot Wolff sued Westwood Management LLC and various related individuals and entities for breach of fiduciary duties and derivative claims. The district court dismissed the complaint, concluding—over Wolff’s vehement objections—that all of his claims were covered by a mandatory arbitration clause.” Of course, negotiation and drafting of the subsequent contract could have indicated whether or not certain provisions survive. Case is available at <http://caselaw.lp.findlaw.com/data2/circs/dc/077136p.pdf>

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- The decision in Agere Systems Inc. v. Samsung Elec. Co. Ltd., No. 07-40984 (US 5th Court of Appeals, February 19, 2009) provides a current view on a hot topic on the authority/demarcation line, i.e. arbitrators or the court, on who decides critical arbitration related issues, e.g. the scope of an arbitration clause. “Agere Systems, Inc. sued Samsung Electronics Company LTD, alleging a breach of a patent licensing agreement. Samsung moved to compel arbitration and stay the proceedings based on an arbitration clause contained in a subsequent payment scheduling agreement. The district court denied the request, and Samsung appealed.” The court concluded that the “arbitrator should determine the arbitrability (jurisdiction) of this action.” Would better drafting ensure who had the requisite authority? The Case is available at <http://caselaw.lp.findlaw.com/data2/circs/5th/0740984cv0p.pdf>
- Finally, A.T.N., Inc. v. McAirmaid’s Vliesstoffe GmbH & Co. KG, No. 08-2727 (US 7th Circuit Court of Appeals, February 25, 2009) provides an overview of some of the pitfalls in drafting international letters of intent where, in this case, involved the importation of goods for resale, “exclusive” distributorship arrangements, methodology on termination of same, etc. “In a breach of contract action, district court's grant of defendant's motion for summary judgment is affirmed where the contract is unenforceable as the agreement between plaintiff and defendant was of indefinite duration and not bound by a specific event, and thus terminable at will. Accordingly the defendants could cease supplying ATN without running afoul of the agreement.” Case is available at <http://caselaw.lp.findlaw.com/data2/circs/7th/082727p.pdf>
- Jack Paul, Esq., through Federal Procurement Conferences, Inc., has noticed his Spring 2-day calendar including two courses:
 - **Advanced Course on Government Contract Costs and Pricing.**
 - **Essentials of Federal Contracts and Subcontracts.**Additional information is available at 310.277.1300 or Jackpaul@aol.com.
- National Defense Industrial Association (NDIA) will have its spring educational conference in San Diego on March 16 with committee meetings on March 17. Additional information/registration is available from Ruth Franklin at 703.243.8539 or rfranklin@ndia.org.
- Crossroads of Conflict—Israel 2008: Commentary and pictures www.Rumbaugh.net

Future Speaking Topics Include—

- Ft. Worth NCMA Chapter, “Contract Negotiations,” NES.
- San Fernando Valley NCMA Chapter, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements."
- ISM Miami Affiliate, “Baseball Arbitration.”
- South Florida NCMA Chapter, “Contract Negotiations,” NES.

Information on arranging speaking/teaching engagements on the above and/or various aspects of Alternative Dispute Resolution (ADR), basic/advanced negotiation techniques seminars/workshops, or on substantive topics (see www.Rumbaugh.net) may be arranged by sending a message to ADROffice@Rumbaugh.net

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