# Regulatory/Contractual Update

May 18, 2009 Volume 14, Issue 5

- On April 21, 2009, DoD Director, Defense Procurement and Acquisition Policy, Shay Assad issued a memorandum with updated instructions to the March 31, 2009, interim rules (see April 2009 Update) promulgated pursuant to the "American Recovery and Reinvestment Act of 2009 (the Recovery Act)." Again, the government is clear on retroactivity where the Director states, "If Recovery Act funds will be used, contracting officers shall modify existing contracts, on a bilateral basis in accordance with FAR 1.108(d)(3), to include the Recovery Act FAR clauses contained in the interim rules (of March 31, 2009)…and this applies to orders." A contractor's failure to accept any such modification will result in that contractor being deemed ineligible for receipt of Recovery Act funding.

- On May 5, 2009, the Federal Register noticed a proposal to amend the FAR "to revise the withholding-of-payment requirements under FAR clause 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts." This proposal would "permit contracting officers to use their judgment regarding the amount of payment withhold" rather than it being a mandatory/set amount. Comments are due on/before July 6, 2009.

- On April 23, 2009, the Federal Register noticed an OFPP request for "public comments and information on a provision that provides an exemption from CAS for contracts and subcontracts that are executed and performed entirely outside the United States, its territories, and possessions (overseas exemption)." Comments are due on/before May 26, 2009.

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

- The Spring 2009 Vancouver meeting of the Letter of Credit subcommittee of the ABA Business Law Section resulted in the issuance of several enlightening documents/reports on the drafting/enforcement of Letters of Credit given the current economic/banking environment. One of potential interest is entitled, "Possible Criteria in Assessing the Creditworthiness of a LC Issuing Bank." Do your policies on the use/issuance of LCs, qualified banks, etc. need to be reviewed?

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- Recent cases that raise important concepts in negotiating/drafting/managing contracts include the following—

  - Is a settlement of litigation which involves resolution of a dispute concerning "goods," a purchase subject to the Uniform Commercial Code (UCC) Article 2? The court summary provides the following…

    In Ole Mexican Foods, Inc. v. Hanson Staple Co., (Ga., Apr. 28, 2009), "Appellee Hanson Staple Company brought suit for breach of contract, alleging that Appellant Olé Mexican Foods, Inc. failed to purchase over $300,000 worth of packaging which was specially manufactured by Appellee for Appellant. In its answer, Appellant denied all liability and asserted in a counterclaim that Appellee had 'breached its agreement with (Appellant) by shipping defective product.' Thereafter, the parties negotiated a handwritten 'agreement reached in settlement,' outside the presence of counsel, which provided, in relevant part, that Appellant would 'purchase a minimum of $130,000 worth of current inventory from' Appellee and would 'test the remainder of inventory and ... purchase additional inventory if it meets quality expectations.' On a motion to enforce the settlement agreement, the trial court ordered Appellant to 'purchase a minimum of $130,000 worth of (certain of Appellee's) product inventory' and that such purchases would 'be governed by the Georgia Uniform Commercial Code (UCC), and (Appellant) shall retain the right to reject (Appellee's) product pursuant to the Georgia (UCC).'

    "On appeal, the Court of Appeals reversed, ruling that the trial court erred in applying the implied warranties of the UCC to the settlement agreement, because the primary purpose of the settlement, construed as a whole, 'was to resolve a dispute between the parties about (1) whether (Appellant) was obligated to purchase any goods from (Appellee) and (2) whether (Appellee's) goods were merchantable.' … The Court of Appeals also found, 'in the alternative, that the parties excluded implied warranties of the UCC from their settlement agreement based upon their course of conduct.' …. In Division 2 of its opinion, the Court of Appeals further determined, contrary to the trial court, that the second provision of the agreement, which refers to Appellant's subjective quality expectations, is enforceable. ... Having granted certiorari to clarify if and when the implied warranties found in the UCC apply to settlement agreements involving the sale of goods, we hold that those implied warranties are applicable to such an agreement only if its predominant purpose is the sale of goods and not the settlement of litigation."

    The court determined here that the predominant purpose was the settlement. Clarity in the negotiation/mediation and drafting may have saved the day. Discuss with counsel. The full opinion is at http://www.gasupreme.us/pdf/s08g2029.pdf

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- And, a timely case on "appropriate" insurance for a foreign venue, etc. Again, from the court opinion…

  In CACI Int'l., Inc. v. St. Paul Fire & Marine Ins. Co., (No. 08-1885, 4th Circuit Court of Appeals, May 14, 2009), "CACI International (CACI) appeals the district court's decision that its insurer, St. Paul Fire and Marine Insurance Company (St. Paul), had no duty to defend CACI against claims alleging torture and abuse at Abu Ghraib and other prisons in Iraq. CACI acknowledges that the insurance policies at issue in this case generally limit coverage to the United States and Canada. Still, CACI argues that some of the underlying claims implicate events that happened in the United States, and that other claims fall under an exception to the coverage provision for employees who were away from home for a 'short time.'

  "We agree with the district court that the underlying complaints cannot be read to allege events that happened in the coverage territory. Under well-established principles of insurance law, the place of the injury—not the place of some precipitating cause—determines the location of the 'event' for coverage purposes. Further, the underlying complaints do not allege that any injuries resulted from the activities of a CACI employee who was in Iraq for a 'short time.' Requiring St. Paul to defend CACI on the mere possibility that some employee may have been briefly in Iraq would allow the policies' exception to non-coverage to swallow the rule. We thus decline to extend CACI's coverage beyond the plain terms of its policies and affirm the judgment of the district court."

  There was a short dissenting opinion. Who reviews your insurance coverage for compliance with contractual/operational requirements? Discuss with counsel. The full opinion is at http://caselaw.lp.findlaw.com/data2/circs/4th/081885p.pdf

- The November 10, 2008, Update provided a then current report on the on-going litigation in an alleged teaming relationship (and the many ramifications/allegations thereof) in Trianco v. IBM, 466 F.Supp.2d 600 (District Court, ED Pennsylvania and 3rd Circuit Court of Appeals appellate decisions). Now that same District Court in an April 13, 2009, opinion, in an unrelated case, Quandry Solutions Inc. v. Verifone Inc, (No. 07-097), found, among other things, that a teaming arrangement did not arise in Quandry.

  The decision is interesting, in part, given the analysis/facts and the "what is needed" to have such a finding (at least in that District)—good reading for all involved in teaming arrangements coupled with the risks associated in (apparently) not documenting "the" deal! (2009 WL 997041). Discuss with counsel.

- Jack Paul, Esq., through Federal Procurement Conferences, Inc., has noticed his Spring 2-day calendar including **Concentrated** and **Advanced Courses on Government Contract Costs and Pricing**. Additional information is available at 310.234.0200 or Jackpaul@aol.com.

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## Future Speaking Topics Include—

- South Florida NCMA Chapter, "Contract Negotiations," NES. Information available at conchcontracts@aol.com
- China Lake NCMA Chapter, "ADR."
- St. Louis NCMA Chapter, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements."
- Southeast Idaho NCMA Chapter, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements."
- ISM—South Florida, Inc., "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements."
- Nova University, Ft Lauderdale, Fl., "ADR Opportunities."
- California Western School of Law, San Diego, Ca., "ADR Opportunities."

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