Special Regulatory/Contractual Update

February 19, 2010 Volume 15, Issue 2

- **DoD Implementation of Franken Amendment on Restricting the Use of Arbitration.** On February 17, 2010, the DoD Director of Defense Procurement and Acquisition Policy issued a Memorandum under the subject of "Class Deviation to Implement Additional Contractor Requirements and Responsibilities Restricting the Use of Mandatory Arbitration Agreements."

  This direction to the DoD acquisition community mandates that the use of FY 2010 DoD funding is restricted by §8116 of the FY 2010 DoD Appropriations Act whereby such funds in excess of $1 million cannot be used for specified contract actions after February 17, 2010, unless the contractor agrees to not to enter into any agreement, or enforce any existing agreement, with any employee or independent contractor to resolve disputes through arbitration arising under title VII of the Civil Rights Act of 1964 as well as torts arising/relating to "sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention." A contract clause is also provided such that after June 17, 2010, no funds may be expended absent a "contractor certification that it requires each covered subcontractor" not to take similar actions prohibited by the prime.

  While applicable contract actions are stated in the "Deviation," they generally include all contractual actions that exceed $1 million of FY 2010 funding except "contract modifications adding more than $1 million …to a contract awarded prior to February 17, 2010," unless work is added to such contracts. Commercial contracts are exempt. And, the clause and the legislation provide that "the prohibitions…do not apply with respect to a Contractor's or subcontractor's agreements with employees or independent contractors that may not be enforced in a court of the United States."

  Comments are solicited by DoD for receipt within two weeks of the memo. They will be considered in the formulation of an "interim rule" with later receipts considered in the formulation of a final rule.

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.

Last month's Update had a comment on this expected implementation including its short timeframes, etc. Additional comments include the following:

- While no direct guidance is provided, arguably, the enforcement of employee/independent contractor agreements in the US, e.g. perhaps there is US Federal District Court jurisdiction, would seemingly limit these prohibitions to the international arena—the area noted of significant concern in earlier Congressional hearings. However, as a practical matter, will contractors/subcontractors eliminate any/all arbitration agreements for uniformity under the guise of these prohibitions? Is this of special import given the broad range of possible claims including those that arise solely beyond those enumerated and/or in conjunction with claims that include an allegation in the identified areas?
- Will this set a new trend in use or non-use of arbitration for commercial contracts/subcontracts with all firms that do any government business or…?
- Is the litigation budget going to be significantly impacted? If so, how is this change in a company's dispute management process going to be priced into contracts/subcontractors—as a direct charge or as part of the overhead with different rates depending upon year of "funding"?
- DoD has known at least since December 2009 that this legislation would be forthcoming yet has not published any required notice in the Federal Register and was specifically requested by industry for feedback to specific areas of inquiry. Is it appropriate to use a "purported" deviation process for an action that clearly impacts the public?
- Discuss with counsel.

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

Recent Updates are posted at
www.Rumbaugh.net
©MMX Charles E. Rumbaugh

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.