Regulatory/Contractual Update

May 26, 2011 Volume 16, Issue 5

- On May 18, 2011, the Federal Register noticed that DoD is issuing an interim rule "amending the DFARS to improve the effectiveness of DoD oversight of contractor business systems." Specifically, "DoD is defining contractor business systems as accounting systems, estimating systems, purchasing systems, earned value management systems (EVMS), material management and accounting systems (MMAS), and property management systems." And, "DoD is implementing compliance enforcement mechanisms in the form of a business systems clause which includes payment withholding that allows contracting officers to withhold a percentage of payments, under certain conditions, when a contractor's business system contains significant deficiencies. Payments could be withheld on--

  Interim payments under--
  Cost-reimbursement contracts;
  Incentive type contracts;
  Time-and-materials contracts;
  Labor-hour contracts;
  Progress payments; and
  Performance-based payments."

  "The threshold for application of the contractor business systems clause is set forth in section 893 of the Ike Skelton National Defense Authorization Act for Fiscal Year (FY) 2011 (NDAA), which defines a covered contractor as one that is subject to the Cost Accounting Standards." "A 'significant deficiency' is defined, in accordance with section 893 of the NDAA as a shortcoming in the system that materially affects the ability of officials of the Department of Defense to rely upon information produced by the system that is needed for management purposes." A system deficiency may result in application of a payment withholding against all contracts that contain the business systems clause.

  An extensive discussion of the public comments is provided. Comments on this interim rule are due on/before July 18, 2011.

  COMMENT: No phase-in period for implementation of the rule was noted. How will this "system" approach be priced? Are there any ambiguities and, if so, how will they be addressed?

- On May 5, 2011, the Federal Register noticed that "DoD has adopted as final, with changes, the interim rule that amended the DFARS to implement section 831 of the National Defense Authorization Act for Fiscal Year 2009, which required DoD to develop guidance on personal services contracts."

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- DoD continues to issue memoranda including the following:
  - May 6, 2011, Procurement Support of Theater Security Cooperation Efforts. "This memorandum forwards a revised Department of State Cable, 'Procurement Roles and Responsibilities - General Service Officer and Department of Defense Personnel,' along with text of recently published DFARS PGI language that puts forth guidance on planning for and executing such support. This revision was necessary because of an increase in DoD unauthorized commitments and lack of planning for military exercises and training events with host nations."
  - May 6, 2011, Class Deviation 2011-O0010, Removal of Exception to WAWF for Foreign Vendors. "Effective immediately, for awards made to foreign vendors for work performed outside the United States, contracting officers shall not use the exception to WAWF at DFARS 232.7002(a)(2). This class deviation remains in effect until incorporated in the DFARS or is otherwise rescinded. DFARS case 2011-D027 is in process."

    COMMENT: The DFARS is estimated by DoD to be revised by February 6, 2012!
  - May 6, 2011, Class Deviation 2011-O0011 - Extension of Restrictions on the Use of Mandatory Arbitration Agreements. "Effective immediately, contracting officers shall use the clause at DFARS 252.222-7006, Restrictions on the Use of Mandatory Arbitration Agreements, as prescribed at DFARS 222.7405, except that the prescription also applies to the use of funds appropriated or otherwise made available by the Defense Appropriations Act for Fiscal Year 2011. This deviation is required to implement section 8102 of the Defense Appropriations Act for Fiscal Year 2011 (Pub. L. 112-10)."

    COMMENT: The DFARS is estimated by DoD to be revised by February 6, 2012!

- On May 5, 2011, the Federal Register noticed that "DoD is issuing a final rule to amend the DFARS to address electronic business procedures for placing orders. This final rule adds a new DFARS clause to clarify this process."

  COMMENT: One of the public comments had suggested that e-mail be the electronic commerce of choice by DoD. The DoD response thereto was that it "considered the use of e-mail as a primary method of distribution, but rejected its use because of the lack of an audit trail. DoD was also concerned that the delivery and receipt of e-mail is subject to interruption without notice due to firewall and spam filter configurations." Interesting!

- On May 25, 2011, the Federal Register noticed that NASA is proposing a reversal of its current rules so that it "may enter into multi-year anchor tenancy contracts for commercial space goods or services. Anchor Tenancy means 'an arrangement in which the US agrees to procure sufficient quantities of a commercial space product or service needed to meet Government mission requirements so that a commercial venture is made viable.'" Comments are due on/before July 25, 2011.

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

- The U.S. Department of State Advisory Committee on Private International Law noticed in the May 6, 2011, Federal Register a public meeting of its Study Group on the Hague Convention on Choice of Court Agreements. The meeting will take place on June 15, 2011 from 9:00 a.m. to 2:00 p.m. EDT at the Department of State, Washington, DC. "The Study Group will meet to discuss the draft federal legislation that has been developed to implement the Convention. It is proposed that the federal legislation would work in tandem with uniform state law, developed by the Uniform Law Commission, as may be enacted by individual states Where a state did not enact the uniform state law, or in the event of any inconsistency between the federal law and the uniform state law as enacted, the federal law would apply…. This Study Group meeting is open to the public, subject to the capacity of the meeting room. Access to the meeting building is controlled; persons wishing to attend should contact Tricia Smeltzer or Niesha Toms of the Department of State Legal Adviser's Office at SmeltzerTK@state.gov or TomsNN@state.gov.... Persons who cannot participate in the meeting but who wish to comment on the draft federal implementing legislation are welcome to do so by email to Keith Loken at lokenk@state.gov."

- The forum selection clause may have a major impact to your litigators. Is the contract clear on the appropriate forum and does your litigation attorney review the drafting of your transaction documents? "In a dispute involving the appropriate interpretation of a forum selection clause, judgment of the district court is affirmed where forum selection clause providing that exclusive jurisdiction shall lie in the appropriate courts of the "State of New Jersey" constitutes a waiver of the right to remove an action to the federal district courts of New Jersey." United States Third Circuit, 05/18/2011 State of New Jersey Treasury Dept. Div. of Investment v. Merrill Lynch & Co, No.09-4676. Case is available at http://caselaw.findlaw.com/us-3rd-circuit/1567722.html?DCMP=NWL-pro_contracts

- The A-12 default litigation ends or does it? "In a dispute arising from the termination (for falling behind the government's schedule) of a government contract for manufacture of a stealth aircraft, judgment of the appeals court is reversed where petitioner claimed an affirmative defense of 'superior knowledge' because, when a court dismisses a government contractor's prima facie valid affirmative defense to allegations of contractual breach to protect state secrets, the proper remedy is to leave the parties where they were on the day they filed suit." This unanimous decision was remanded by the US Supreme Court. General Dynamics Corp. v. US, No. 09–1298. Next…T4C, Court of Claims, PL85-804…? Case is available at http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=09-1298

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Future Speaking Topics Include—

- Twin Cities NCMA Chapter, "Is the FAR (System) Out of Control?"
- Wisconsin NCMA Chapter and Wisconsin Procurement Institute, "Is the FAR (System) Out of Control?"
- Georgia/Carolina NCMA, NAPM/ISM, & APICS Chapters, "How to Negotiate Fair Prices in Sole Source Procurements (Baseball Arbitration)."
- Research Triangle Park (Raleigh, NC) NCMA Chapter, "Drafting the Ultimate ADR Clause for Subcontracts" and "How to Negotiate Fair Prices in Sole Source Procurements (Baseball Arbitration)."
- South Florida NCMA Chapter, "Contract Negotiation" National Educational Seminar.

Articles Include—

"Twelve-Step Guide to Cost-Effective Customer-Focused Arbitration"

ABSTRACT: The on-going dynamics in the evolution of the rules-of-the-road for complex arbitrations implores contracts and transactional attorneys, as well as litigators, to be cognizant of the intertwined ingredients involved in this dispute resolution process. This article provides a 12-step approach of key components in the deliberative analysis that is required toward an effective ADR clause with a "pitfall avoidance" mindset leading to a successful arbitration process that is cost-effective and expeditious for the contracting parties. Scheduled for publication in the August 2011 issue of NCMA Contract Management.

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