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**FINAL EDITION
July 2008**

Legislation & Regulations

**Contributed by Functional Director for Legislation & Regulations, Thomas M. Abbott,
with assistance from Associates at McKenna Long & Aldridge LLP**

Legislation

INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2009 PASSED BY HOUSE

On July 16, 2008, the House of Representatives passed the Intelligence Authorization Act for Fiscal year 2009 (H.R. 5959). Section 306 requires the Director of National Intelligence to report to the Congressional intelligence committees on the use of personal services contractors within the intelligence community. Specifically, the Director must inform the committees of the contractor's impact on the intelligence community, plans for migrating from contractor to government employees, and the measures used to ensure contractor accountability. Section 425 prohibits the Central Intelligence Agency from using contractors to conduct interrogations of detainees or prisoners, though the provision does provide for an exception if no federal employees are able or available to conduct the interrogation. Section 425 also clarifies that when contractors are performing interrogations they are subject to whatever law would govern a federal employee conducting the interrogation. The Senate's companion bill, S. 2996, remains on the Senate calendar.

OVER-CLASSIFICATION REDUCTION ACT INTRODUCED IN HOUSE

On July 23, 2008, Representative Waxman (D-CA) introduced the Over-Classification Reduction Act. (HR 6575). The bill would require the Archivist of the United States to, in consultation with national intelligence officials, promulgate regulations to prevent the over-classification of government materials. The bill would also require that the regulations provide a mechanism for employees to challenge the classification of materials, without retribution, including an incentive for employees to make such challenges. Finally, the bill would also require the promulgation of regulations that provide for penalties for employees or contractors who repeatedly over-classify materials. The bill has been referred to the Committee on Oversight and Government Reform, which is chaired by Rep. Waxman.

REDUCING INFORMATION CONTROL DESIGNATIONS ACT PASSED BY HOUSE

On July 30, 2008, the House of Representative passed the Reducing Information Control Designations Act. (HR 6576). The bill would require the Archivist of the United States to promulgate regulations regarding the use of information control designations. The bill provides

that information control designations cannot be used to conceal violations of law, government inefficiency, administrative error, or to prevent embarrassment to any level of federal or state government. The bill would also require regulations to: permit individuals to challenge information control designations; and to provide penalties for employees or contractors who repeatedly make inappropriate use of information control designations. The bill was sent to the Senate, where it was referred to the Senate Committee on Homeland Security and Governmental Affairs.

Regulations

TREASURY DEPARTMENT ANNOUNCES NEW RATE FOR PROMPT PAYMENT ACT AND CONTRACT DISPUTES ACT INTEREST

The Treasury Department Fiscal Service announced that the interest rate under the Prompt Payment Act and the Contract Disputes Act will be 5.125% for the period July 1, 2008, through December 31, 2008. (73 FR 37529, 7/1/2008).

PRESIDENT ISSUES EXECUTIVE ORDER TO STREAMLINE SUITABILITY AND FITNESS DETERMINATIONS

On June 30, 2008, President Bush issued Executive Order No. 13,467 in an effort to streamline the process for determining federal employee and contractor suitability, fitness, eligibility to hold a sensitive position, eligibility to access federal facilities and information systems, and eligibility to access classified information. The E.O. requires agencies conducting a higher level background investigation to build upon, but not duplicate, previous investigations that have been conducted by other agencies. Additionally, the E.O. requires reciprocity between agencies in recognizing and granting access to classified information. (73 FR 38103 7/2/2008).

DOD, GSA, NASA SEEK COMMENT ON BURDEN CAUSED BY FAR REQUIREMENT THAT CONTRACTORS REPORT TRAVEL COSTS THAT EXCEED FEDERAL PER DIEMS RATES

Federal Acquisition Regulation ("FAR") section 31.205-46 provides that a contractor's travel costs are generally reasonable and allowable only up to the per diem amounts in the Federal Travel Regulations. In certain circumstances, however, a contractor may be entitled to reimbursement for costs in excess of the federal per diem rate if the contractor is able to document and justify an extraordinary circumstance. The agencies are requesting public comment on the utility and effectiveness of requiring this additional information, as well as comments on the administrative burden of preparing and submitting the justification. Comments are due before August 13, 2008. (73 FR 40303, 7/14/2008).

GSA ISSUES BULLETIN THAT FEES FOR AIRPORT SECURITY FAST PASSES ARE NOT REIMBURSABLE EXPENSES

The General Services Administration has issued a bulletin providing that the cost for individual memberships in trusted or registered traveler programs are not reimbursable costs for federal employees under the Federal Travel Regulation. The GSA's action may lead to increased scrutiny of government contractor's expenses related to airport fast passes. (73 FR 41081, 7/17/2008).

DOD ISSUES INTERIM RULE AMENDING DFAR REGARDING EXPORT CONTROLLED ITEMS

The Department of Defense ("DoD") has adopted an interim rule revising the Defense Federal Acquisition Regulation Supplement ("DFARS") to provide additional guidance regarding export controlled items. The rule adds two contract clauses to the DFARS, one for contracts where the use or development of export controlled items is anticipated and one for contracts where export controlled items are not expected to be used or developed. The additional clauses are intended to alert contractors that export controlled items will or will not be required in order to ensure compliance with applicable export controls. The interim rule implements requirements of the National Defense Authorization Act for Fiscal year 2008. Comments on the interim rule must be submitted by September 19, 2008. (73 FR 42274, 7/21/2008).

DOD PROPOSES RULE TO REVISE DFARS IN ORDER TO IMPLEMENT LIMITATIONS ON THE ACQUISITION OF FOREIGN SPECIALTY METALS

The Department of Defense ("DoD") has proposed a revision to the Defense Federal Acquisition Regulation Supplement ("DFARS") to implement statutory limits on the acquisition of foreign specialty metals. The proposed rule mirrors the current Class Deviation 2008-00002, published January 2008. The rule provides that a contractor shall not acquire aircraft, missile or space systems, ships, tank or automotive items, weapons systems, ammunition, or raw metals as an end item unless the specialty metals contained within each item were melted or produced in the United States. The rule provides for a number of exemptions, including: acquisitions below the simplified threshold, acquisitions outside the United States in support of combat operations, acquisitions for contingency operations, and acquisitions of items to be resold in commissaries. The rule also exempts electronic components and commercial off the shelf ("COTS") items. The proposed rule also includes an exemption for commercial fasteners, as long as the contractor agrees to purchase at least half of its specialty metals, during the relevant calendar year, from domestic sources. The rule also provides a waiver for items that are needed in the interest of national security and for domestic non-availability. Finally, the rule eliminates the non-statutory requirement that the Congressional defense committees be notified before a contract is awarded which permits the foreign acquisition of titanium products, based upon a determination of domestic non-availability. Comments must be received by September 19, 2008. (73 FR 42300, 7/21/2008).

GSA ISSUES PROPOSED RULE REVISING PART 525 OF THE GSAR

The General Services Administration (“GSA”) is currently in the process of rewriting the General Services Administration Acquisition Manual (“GSAM”) in an effort to update the GSAM and ensure consistency between the GSAM and the Federal Acquisition Regulation (“FAR”). The GSAM incorporates the GSA Acquisition Regulation (“GSAR”). The proposed rule modifies GSAR part 525, Foreign Acquisitions, by removing subparts: 525.3, Balance of Payments; 525.5, Evaluating Foreign Offerors - Supply Contracts as well as a related clause at 525.225-70; and 525.6, Trade Sanctions. The proposed deletions are made to reflect revisions to the FAR and GSA acquisition policy. Comments on the proposed rule must be received by September 29, 2008. (73 FR 44209, 7/30/2008).

TRANSPORTATION SECURITY ADMINISTRATION ISSUES INTERIM RULE REGARDING FALSE STATEMENTS ABOUT SECURITY BACKGROUND CHECKS

The Transportation Security Administration (“TSA”) has issued an interim rule prohibiting a public transportation agency, railroad carriers, and their respective contractors and subcontractors from knowingly misrepresenting federal guidance or regulations concerning security background checks. The interim rule implements provisions of the Implementing Recommendations of the 9/11 Commission Act, Pub. L. 100-53. Both the rule and Act expressly provide that knowing misrepresentations made to arbiters during labor arbitration are included within the prohibition. Comments on the interim rule must be received by September 2, 2008. (73 FR 44665, 7/31/2008).