

CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance and Litigation

A Lawyer's View of Y2K

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Are You Ready for the Year 2000?

By Catherine Shea

As the Year 2000 approaches, the government and its contractors are working hard in the remediation process to ensure information technology and equipment with embedded technology is available when the clock strikes midnight on December 31, 1999. Even before then, many information technology systems will begin to process data that is sensitive to the January 1, 2000 date. This article addresses recent legislation and procurement and contract administration issues that arise during the remediation process to achieve Year 2000 compliance.

Recent Legislation

In October, 1998, the President signed the Information Readiness Disclosure Act (IRDA), Public Law 105-271, to address some of the growing concerns in preparing information technology for the Year 2000. IRDA provides a framework for the exchange of information in this remediation process and provides some protection for the parties as they address these issues.

The essential purpose of IRDA is to encourage the exchange of information and assistance to facilitate remediation of noncompliant systems. One of the purposes of the Act is "to promote the free disclosure and exchange of information related to year 2000 readiness," among others. IRDA § 2(b)(1). To achieve this purpose, IRDA takes several steps to protect those good faith efforts to address the Year 2000 issue before December 31, 1999. To encourage disclosure, the Act provides certain protections for Year 2000 statements. "Year 2000 statement" means any communication concerning the year 2000 assessments, compliance plans, operational problems or solutions and reviews or comments for any entity, product or service. IRDA § 3(11). The Act limits how others can use the year 2000 readiness disclosure against the maker. The term "maker" means a person or entity, including the United States that—

- (A) issues or publishes any year 2000 statement;
- (B) develops or prepares any year 2000 statement; or
- (C) assists in, contributes to, or reviews, reports or comments on during, or approves or otherwise takes part in the preparing, developing, issuing, approving, or publishing of any year 2000 statement.

In any covered action, these year 2000 readiness statements have limited evidentiary value. For example, a year 2000 readiness disclosure (IRDA § 3(9)) cannot be used as a basis of a claim against the maker. Further, a year 2000 statement cannot serve as the sole basis for any claim of fraud against the maker. A statement of readiness disclosure that provides an assessment of

one's own products, services, and status cannot be a basis of liability. In the context of government contracts, it is important to note that "any covered action" means a civil action of any kind. IRDA § 3(4). For example, claims filed before the Board of Contract Appeals are not civil actions although claims before the Court of Federal Claims are considered civil actions. *See* Fed.R.Civ.P. 3 The importance of this distinction is discussed below.

Legislative Protections for Y2K Disclosures

On their own, the Act further provides, year 2000 statements cannot be construed as an amendment to a contract or warranty, unless (1) the contract is amended in writing, (2) the year 2000 statement is made during contract formation, or (3) the contract specifically provides for its amendment through the making of a year 2000 statement. IRDA § 4(e)(2). An advertisement by a government contractor, for example, that the contractor is year 2000 compliant does not create a contractual obligation on the government contract. Whether year 2000 statements made in company information submitted as part of a proposal can be considered a warranty item, however, is a potential issue.

The Act creates a temporary antitrust exemption for activities taking place before July 14, 2001, the effective date of the Act's sunset provision. IRDA § 5. The exemption is intended to allow industry associations to aggregate and exchange data to correct or avoid a failure of year 2000 processing or exchange information to help correct or avoid the effects of year 2000 processing failure without the risk that such efforts would be consider price-fixing.

The Act also encourages federal agencies to request voluntary provision of year 2000 processing information. Should the agency collect such information? If collected, this information shall be exempt from disclosure under the Freedom of Information Act, shall not be disclosed outside the federal government, and may not be used in any civil action, unless the maker of the year 2000 statement gives express consent to use the statement. This provision requires a special note for the agency: contractors may encourage the government to solicit year 2000 statements pursuant to the Act's special data gathering provision Section 4(f). These statements may have unforeseen implications for contract specifications and warranties. If a contractor encourages a program official to request such statements, the

From the Editor: Catherine Shea is an attorney in the Contract Law Division who advises NOAA and other clients.

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program official should contact the contracting officer before soliciting such information. The contracting officer can determine the appropriate means to solicit such information.

With all these protections, however, IRDA has only a limited effect on Government contract rights for year 2000. Specifically, IRDA § 6 provides that the Act does not affect the authority of a Federal agency to enforce a requirement to provide or disclose information under a Federal statute or regulation. The Act, by its terms, also does not alter the terms of any existing contracts. See § 7. Nevertheless, there is some meaningful interplay between IRDA and government contracts.

IRDA and Government Contracts

Information Technology

Since January 1997, the Federal Acquisition Regulations (FAR) has required agencies, when acquiring information technology, to ensure all solicitations and contracts require information technology be Year 2000 compliant or that non-compliant information technology be upgraded to be Year 2000 compliant. In FAR §39.002, Year 2000 compliant means:

[W]ith respect to information technology, that the information technology accurately processes date/time data (including but not limited to, calculating, comparing, and sequencing) from, into, and between the twentieth and twenty-first centuries, and the years 1999 and 2000 and leap year calculations, to the extent that other information technology, used in combination with the information technology being acquired, properly exchanges date/time data with it.

The FAR defines "information technology" as meaning:

[A]ny equipment, or interconnected system(s) or subsystem(s) of equipment, that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the agency.

(a) For purposes of this definition, equipment is used by an agency if the equipment is used by the agency directly or is used by a contractor under a contract with the agency which—

- (1) Requires the use of such equipment; or
- (2) Requires the use, to a significant extent, of such equipment in the performance of a service or the furnishing of a product.

(b) The term "information technology" includes computers, ancillary equipment, software, firmware and similar procedures, services (including support services), and related resources.

(c) The term "information technology" does not include—
(1) Any equipment that is acquired by a contractor incidental to a contract; or
(2) Any equipment that contains imbedded information technology that is used as an integral part of the product, but the principal

function of which is not the acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. For example, HVAC (heating, ventilation, and air conditioning) equipment such as thermostats or temperature control devices, and medical equipment where information technology is integral to its operation, are not information technology.

It should be noted that the FAR definition of information technology does not include the embedded information technology. IRDA covers both.

Solicitations should include specifications for Year 2000 compliance and sufficient warranty provisions to protect the Government's interest. The General Services Administration issued warranty clauses appropriate for commercial and noncommercial acquisitions of information technology and embedded technology. These provisions appear at GSA's IT Policy website: www.itpolicy.gsa.gov/mks/yr2000/contlang.htm.

Existing contracts

If a contract does not contain specifications or warranties for Year 2000 compliance, what contractual steps can the government take to ensure that the information technology will be year 2000 compliant? What does law require?

FAR §39.106 provides that agencies shall ensure that "solicitations and contracts" (1) require information technology be year 2000 compliant or (2) require that noncompliant information technology be upgraded. The agency must take these steps before the technology may be required to process dates after December 31, 1999 or by December 31, 1999, whichever date is earlier. Therefore, to ensure contracts are in compliance, it may be incumbent upon the government to modify existing contracts.

For example, if the agency has a delivery order contract for information technology, the contract should include a requirement for year 2000 compliance. The year 2000 compliance requirement can take the form of a warranty or specification. If the specifications do not include a provision for year 2000 compliance, the contracting officer should consider alternatives to modify the contract before the agency takes delivery of additional equipment. The contracting officer can amend the contract either through bilateral modification or by relying on the authority of the changes clause in the contract to impose a unilateral modification on the contract with equitable adjustment or compensation determined on a case-by-case basis. Here, the government should give due consideration to the policy behind IRDA. IRDA encourages information disclosure and the exchange of information to avoid year 2000 failures. Negotiated bilateral modifications to contract year 2000 requirements will result in greater chances for meeting the government's goal for year 2000 compliance.



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If the parties cannot negotiate, however, the parties should consider alternative means of dispute resolution looking to a neutral third party to mediate a difficult negotiation. If a negotiated modification is not available, the contracting officer may determine that a unilateral modification is necessary. The goal is to ensure the successful operation of information technology and the continued operations of the agency program. The parties should seek to address the technological issues as quickly as possible. Claims for equitable adjustment can be handled over time, but the substance of the remediation must be done now.

If Disaster Strikes.

If on January 1, 2000 at 12:01 a.m., the information technology is unable to process data, it may become necessary for the government to pursue remedies available under the contract. Even if the contract does not include the GSA warranty or is not modified to require year 2000 compliance, the Government still may rely on other terms of the contract and have some options for recovery such as breach of warranty and latent defect, among others. Available recovery will be significantly different depending on whether the Government provided design or performance specifications.

Although IRDA was enacted to protect the "makers" from future litigation, the Act does not prohibit the government from protecting its interests. As explained above, IRDA provides an evidentiary exclusion for such statements. *See* IRDA § 4. Specifically, IRDA prohibits the use of year 2000 statements against the maker in "any covered action." *See e.g.*, IRDA § 4(e). Covered action is defined in § 3 of the Act to mean civil actions and civil actions by definition do not include contract disputes heard before the Board of Contract Appeals. Although government decisions to file claims for recovery will be made on a case-by-case basis, the Act does not prohibit the government from using year 2000 statements as evidence in contract disputes filed before the board of contract appeals.

Conclusion

Both the government and contractors have a vested interest in protecting information technology and embedded technology from year 2000 processing failures. While the agency reviews its mission critical systems and program operations, the agency should also review the relevant contracts to ensure appropriate legal protections are in place.