THE GOVERNMENT CONTRACTOR®

THOMSON REUTERS

Information and Analysis on Legal Aspects of Procurement

Vol. 60, No. 28 **August 1, 2018**

Focus

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FEATURE COMMENT: Disclosure Dilemma For Government Contractors Learning Before Contract Award That Proposed Key Personnel Are Not Available To Perform The Contract

What is a contractor supposed to do when, through no fault of its own, an event occurs after submission of the final proposal or final proposal revision that causes the contractor's proposed plan for contract performance to no longer meet a material solicitation requirement?

For example, a request for proposals requires offerors to submit a proposal that identifies a key employee with a specific level of experience, and makes it clear that any proposal that does not meet this requirement is nonresponsive and therefore not awardable. The offeror gets a written commitment from an individual to serve as the key employee, and the offeror submits a competitive proposal that meets the solicitation requirements. However, after final proposal revisions, the company learns that the individual has taken a job with a different company and will not be available to perform work on the contract.

When this occurs, the offeror faces a difficult choice. It may either (1) keep quiet and risk the proposal being viewed as a "bait and switch" if a competitor files a protest at the Government Accountability Office after award, or (2) inform the contracting officer and risk the proposal being rejected as nonresponsive. This Feature Comment will discuss some issues that a contractor might consider if it finds itself in this situation.

Traditional "Bait and Switch" Protest Decisions—Misrepresentations about the availability of personnel may be considered a "bait and switch" in an offeror's proposal. Such cases occasionally arise if an offeror knowingly represents in its proposal that it will use specific personnel, with no intention of actually using the personnel to perform the contract. The key elements of a "bait and switch" are the awardee's material misrepresentation, the Government's reliance on the misrepresentation, and a material effect on the evaluation because of the agency's reliance. See *L-3 Global Commc'ns Sols., Inc. v. U.S.*, 82 Fed. Cl. 604, 613 (2008); *Ann Riley & Assocs., Ltd.—Recon.*, Comp. Gen. Dec. B-271741.3, 97-1 CPD ¶ 122; *QMX Support Servs., Inc.*, Comp. Gen. Dec. B-408959, 2014 CPD ¶ 21.

For example, GAO sustained a "bait and switch" protest in *Patricio Enters. Inc.*, Comp. Gen. Dec. B-412738 et al., 2016 CPD ¶ 145, because the awardee materially misrepresented its ability to provide specific personnel identified in its proposal. The awardee told the agency that it had signed contingent offers for those personnel. In reality, the personnel in question had neither signed such offers nor heard of them. This fact came to light during a protest because the personnel identified in the awardee's proposal were employed by the protester. GAO found that the agency relied on the awardee's misrepresentations, which had a material impact on the agency assigning a "strength" to the awardee's proposal. GAO recommended that the awardee be excluded from the competition.

In *Patricio* and other "bait and switch" cases involving changes in key employees, GAO has drawn a clear line: a protest will be sustained if an awardee intentionally deceives the Government customer. GAO reiterated this rule in *XYZ Corp.,* Comp. Gen. Dec. B-413243.2, 2016 CPD ¶ 296; 58 GC ¶ 412. In *XYZ Corp.*, GAO refused to recommend excluding an offeror from the competition when the Government was aware of a misrepresentation. In that case, the agency was aware that a key employee identified in the proposal would be retiring. Accordingly, GAO found no intent to deceive. In a similar case, GAO refused to overturn a selection decision when there was

no evidence that the awardee misled the agency into selecting an offeror it would not otherwise have picked. *Airwork Ltd.-Vinnell Corp. (A Joint Venture)*, Comp. Gen. Dec. B-285247, 2000 CPD ¶ 150. In *Airwork*, GAO upheld an award when the awardee ultimately substituted certain personnel after contract award. GAO found that the substitutions were not part of an improper "bait and switch" because the substituted persons had the same qualifications and skill level as those proposed. Id.

When it comes to a traditional "bait and switch" situation, GAO and the U.S. Court of Federal Claims have established a clear and common-sense rule: when identifying key personnel in a proposal, make no intentional, material misrepresentations.

Changes in Key Personnel after Proposal Submission—Unlike the "bait and switch" precedents, GAO and the COFC have provided conflicting guidance in their approaches regarding personnel changes outside the contractor's control *after proposal submission*. These cases are distinct from a traditional "bait and switch" because they do not involve misrepresentation by an offeror.

For example, in *Pioneering Evolution, LLC*, Comp. Gen. Dec. B-412016 et al., 2015 CPD ¶ 385, GAO upheld the agency's decision to exclude a protester without reopening discussions. In *Pioneering Evolution*, the Navy's RFP required the submission of at least one résumé for each of the three lead mechanical engineer positions. Two offerors, including Pioneering Evolution, submitted proposals. After the closing date for final proposals, one of Pioneering Evolution's key personnel left the company. The agency declined to reopen discussions, which would have allowed Pioneering Evolution to substitute another qualified candidate. Ultimately, the Navy evaluated Pioneering Evolution's proposal as submitted and found the proposal to be technically unacceptable, and thus unacceptable overall. The Navy awarded the contract to the other offeror.

When Pioneering Evolution protested, GAO upheld the agency's decision. GAO held that Pioneering Evolution was obligated to advise the Navy of its post-final submission changes in proposed staffing and resources. GAO also noted that the Navy had discretion not to reopen discussions. Accordingly, the Navy acted reasonably when it considered Pioneering's proposal as submitted and found it technically unacceptable.

Other GAO decisions support *Pioneering Evolution*'s conclusion that offerors must advise agencies of changes in proposed staffing and resources after proposal submission. See, e.g., *Conley & Assocs., Inc*, Comp. Gen. Dec. B-415458.3 et al., 2018 CPD ¶ 161; *URS Fed. Servs., Inc.*, Comp. Gen. Dec. B-413034, 2016 CPD ¶ 209; *Council for Logistics Research, Inc.*, Comp. Gen. Dec. B-410089.2, 2015 CPD ¶ 76; *Paradigm Techs., Inc.*, Comp. Gen. Dec. B-409221.2, 2014 CPD ¶ 257; 56 GC ¶ 335; *Metro Mach. Corp.*, Comp. Gen. Dec. B-402567, 2010 CPD ¶ 132; *Greenleaf Constr. Co., Inc.*, Comp. Gen. Dec. B-293105.18 et al., 2006 CPD ¶ 19; *Gov't of Harford Cnty., Md.*, Comp. Gen. Dec. B-283259, 99-2 CPD ¶ 81; 41 GC ¶ 494.

In *Pioneering Evolution*, GAO found that the Navy had two options after it learned that the key employee would not be available to perform the contract. First, it could evaluate the proposal as submitted, and reject it as technically unacceptable for failing to meet a material requirement. Alternatively, the Navy could reopen discussions to permit the offeror to correct the deficiency. By not mandating reopening discussions, GAO legitimized an agency's decision to exclude an offeror whose key personnel—through no fault of the offeror—departed after the final proposal was submitted.

GAO Decision in *YWCA of Greater Los Angeles*—A recent decision on substituting key personnel addresses a slightly different issue than the one in *Pioneering Evolution*. In *YWCA of Greater Los Angeles*, GAO reiterated its reasoning in *Pioneering Evolution*: "When the agency is notified of the withdrawal of a key person, it has two options: either evaluate the proposal as submitted, where the proposal would be rejected as technically unacceptable for failing to meet a material requirement, or open discussions to permit the offeror to amend its proposal." *YWCA of Greater Los Angeles*, Comp. Gen. Dec. B-414596, 2017 CPD ¶ 245. If an agency opts for the latter—allowing an offeror to make a late substitution of key personnel—it must "conduct discussions with all offerors in the competitive range." Id.

In *YWCA of Greater Los Angeles*, the Department of Labor sought a contractor to operate the Los Angeles Job Corps center. The RFP required offerors to submit a résumé and letter of commitment for the proposed center director. An unsuccessful offeror, the YWCA, protested the award, alleging that the agency engaged in unequal and improper discussions because DOL only allowed the awardee to submit a final proposal modification. GAO found in the YWCA's favor.

Unlike the RFP interpreted in *Pioneering Evolution,* the RFP at issue in *YWCA of Greater Los Angeles* con-

tained an explicit requirement for offerors to notify DOL if any of their proposed key personnel became unavailable "at any point in the procurement process." Id. The dispute between the protester and the agency concerned the interpretation of this notification requirement.

To the agency, the RFP's explicit requirement to notify DOL if any of the offeror's proposed key personnel became unavailable contained an implicit requirement within it—allowing offerors to substitute key personnel when notifying the agency. DOL asserted that the RFP terms permitted offerors to substitute key personnel, including the center director, at any time and, thus, the agency reasoned that it could evaluate a personnel substitution even if it were late in the procurement process. So, in *YWCA*, the agency maintained that it was reasonable, under the terms of the RFP, to accept key personnel substitutions even after final proposal submissions.

GAO disagreed, finding that the notification requirement "did not implicitly grant special permission for offerors to make late modifications regarding key personnel." Id. On the contrary, GAO found that even if the requirement allowed late substitutions, such a substitution would amount to discussions. Thus, DOL was required to "conduct discussions with all offerors in the competitive range." Id.

GAO ultimately found that the agency's acceptance of the late substitution amounted to unequal and improper discussions.

GAO Decision in *Pioneering Evolution* May Rely on a Misunderstanding of Prior Legal Authority—The decision in *Pioneering Evolution* may be based a misunderstanding of prior GAO precedents. At the heart of this problem is GAO's decision in *Dual Inc.*, Comp. Gen. Dec. B-280719, 98-2 CPD ¶ 133; 41 GC ¶ 154, a decision that may have misunderstood prior GAO decisions and incorrectly applied a new framework to issues regarding key personnel unavailability after final proposal submission.

In *Dual*, the awardee of an Air Force contract represented in its proposal that it owned a flight simulation division and employed the staff within that division. In fact, the awardee signed an agreement to sell the flight simulation division and transfer the employees after the Air Force evaluated the proposal, but before the contract was awarded. GAO sustained the protest, reasoning that the awardee had a duty to advise the Air Force of the planned sale.

In *Dual,* GAO misinterpreted and misapplied two of its prior decisions: *Mantech Field Eng'g Corp.*, Comp. Gen. Dec. B-245886.4, 92-1 CPD ¶ 309, and *CBIS Fed. Inc.*, Comp. Gen. Dec. B-245844.2, 92-1 CPD ¶ 308. In both decisions, GAO found that offerors have an obligation to assess the availability of key personnel until the time set for receipt of final proposal revisions. See, e.g., *CBIS*, Comp. Gen. Dec. B-245844.2 ("[W]here an offeror knows prior to submission of its [best and final offer] that proposed key employees are no longer available, the offeror should withdraw the individuals and, in its [best and final offer], propose substitutes who will be available."). Both decisions addressed the reasonableness of the offerors' expectation that proposed personnel would be available before final proposal submission.

In *Mantech*, GAO held that if proposals are to be evaluated on the qualifications of proposed personnel, an offeror has the responsibility to propose individuals who may reasonably be expected to be available for performance. In analyzing the facts of *Mantech*, GAO held that the contract awardee had not met that responsibility because the awardee failed to confirm availability of one proposed key individual whose intention to accept employment with the awardee was questionable, and six other proposed individuals whose résumés were received over six months before inclusion in the awardee's proposal. Similarly, in *CBIS*, GAO sustained a protest because the awardee (1) lacked a letter of commitment, as required by the RFP, for one proposed key employee, and unreasonably assumed she was still available despite contrary information, and (2) failed to confirm continued availability of a second proposed key employee whose letter of intent was signed eight months earlier.

Unlike *Dual* and *Pioneering Evolution*, *Mantech* and *CBIS* involved actions before final proposal submissions were due and addressed scenarios in which offerors had no written commitment from key personnel, and therefore no reasonable expectation that the personnel would be available. So the facts in *Dual* and *Pioneering Evolution* are not analogous to the facts in *Mantech* and *CBIS*. Thus GAO's conclusion in *Dual*, later applied in *Pioneering Evolution*, was based on a misunderstanding of GAO's prior decisions in *Mantech* and *CBIS*.

Moreover, in *Pioneering Evolution*, GAO ignored a factually analogous case, *Prof'l Safety Consultants*, Comp. Gen. Dec. B-247331, 92-1 CPD ¶ 404. *Prof'l Safety Consultants* involved a post-final submission change in key personnel. There, after the final proposal submission, one key individual left the awardee and another key individual became ill. The awardee replaced both individuals after award, and a protest ensued. The

protester alleged that the awardee acted improperly. GAO denied the protest, concluding that there was no evidence that a "bait and switch" had occurred. GAO found it reasonable for the awardee, when it submitted its initial proposal, to expect the proposed employees to be available for performance. GAO found that unlike "the circumstances in *Mantech* and *CBIS*, nothing in this case put the employees' commitments in question; rather, their unavailability was due to subsequent events which [the awardee] could not foresee when it included them in its proposal." Id.

In *Prof'l Safety Consultants*, GAO established reasonable, common-sense guidelines for agencies and offerors in these situations. First, GAO found that an offeror must propose key personnel it reasonably expects will be available for contract performance. Second, GAO concluded that "where the offeror provides firm letters of commitment and the names are submitted in good faith with the consent of the respective individuals … the fact that the offeror, after award, provides substitute personnel does not make the award improper." Id. *Dual* diverged from *Prof'l Safety Consultants*' sensible framework for analyzing issues with key personnel unavailability.

In *Pioneering Evolution*, GAO should have relied on the factually analogous and soundly reasoned decision in *Prof'l Safety Consultants*. Instead, it relied on *Dual*'s misunderstanding of *Mantech* and *CBIS*, leading to an unsound result and further entrenching *Dual*'s error.

GAO Has No Jurisdiction to Make Recommendations to Contractors—Another flaw in the *Pioneering Evolution* decision concerns GAO's jurisdiction to decide bid protests. GAO's bid protest jurisdiction is limited to making recommendations to agencies if they fail to comply with statutes or regulations. 31 USCA § 3554(b)(1). By the same token, GAO has no jurisdiction to make recommendations to offerors—including a recommendation that an offeror disclose the unavailability of key personnel when the offeror first learns of this after proposal submission. Its jurisdiction is limited to recommendations to the awarding agency.

GAO's recommendation in *Pioneering Evolution* and *Dual* that offerors advise agencies of changes in proposed staffing and resources arguably oversteps GAO's bid protest authority. GAO cited no statute or regulation that is violated if an offeror does not advise an agency of a staffing or resource change that it learns about after submitting a final proposal revision.

The GAO decision in *Metro Mach. Corp*. is instructive. There, GAO asserted, "under certain circumstances an offeror is required to advise the agency of material changes to its proposal, even after submission, in order to ensure that the agency's evaluation is based on consideration of the proposal as it actually exists at the time it is being evaluated." *Metro Mach. Corp.*, supra, at 9. This is effectively a recommendation to offerors who find themselves in this situation that they disclose changes in key personnel when they first become aware of the need for the change after submission of the final proposal revision. GAO did not disclose the source of this requirement or the source of its authority for recommending that offerors disclose this information.

***Pioneering Evolution* and FAR 52.215-1**—In fact, GAO in *Pioneering Evolution* overlooked the regulation—the solicitation provision at Federal Acquisition Regulation 52.215-1—that is contained in virtually every solicitation and explicitly advises offerors what to do in this situation. See FAR 15.209(a). This provision defines a "[p]roposal modification" as "a change made to a proposal before the solicitation's closing date and time, or made in response to an amendment, or made to correct a mistake at any time before award." If an offeror were to advise an agency of "changes in proposed staffing and resources … after submission of proposals," it would be submitting a "proposal modification" as that term is defined in FAR 52.215-1.

Not only did GAO in *Pioneering Evolution* omit a discussion of FAR 52.215-1, it drew a conclusion that is contrary to the terms of this solicitation provision. Nothing in FAR 52.215-1 (or anywhere else in the FAR) requires an offeror to submit a proposal modification after receipt of the final proposal revision. In fact, FAR 52.215-1(c)(3)(ii)(A) provides that "[*a*]*ny* proposal, [*proposal*] *modification*, or [proposal] revision *received* at the Government office designated in the solicitation *after the exact time specified for receipt of offers is 'late' and will not be considered*" (emphasis added). FAR 52.215-1 thus makes it clear that agencies may not even consider this information if it were submitted, which is contrary to GAO's conclusion that "offerors are obligated to advise agencies of changes in proposed staffing and resources, even after submission of proposals." *Pioneering Evolution, LLC*, supra at 9.

The FAR Council could certainly revise FAR 52.215-1 to require contractors to continually update their proposals until contract award occurs. GAO could even explicitly recommend that the FAR

Council revise the FAR to correct a perceived defect in the regulation. GAO has in the past made such recommendations. See, e.g., *Belleville Shoe Mfg. Co.; Altama Delta Corp.; Wellco Enters., Inc.*, Comp. Gen. Dec. B-287237, 2001 CPD ¶ 87 n.6 ("By letter of today, we are recommending to the FAR Council that it reconcile the language in FAR §§ 19.502-31(2)(i) and 52-219-7."); see also *Disc. Mach. & Equip., Inc.*, Comp. Gen. Dec. B-240525, 90-2 CPD ¶ 420. But in the absence of a FAR Council decision to revise the regulation, GAO should interpret Government contract solicitations as they are written, not as GAO believes they should be written.

Different Approaches of GAO and the COFC—A final nuance is the difference in approach to this issue by GAO and the COFC. Unlike the GAO decisions in *Dual* and *Pioneering Evolution*, the COFC found no duty to "update the availability of key personnel between final offer and award" if the solicitation is silent. *OAO Corp. v. U.S.*, 49 Fed. Cl. 478, 482 (2001) ("Plaintiff's claim of a legal violation by [the awardee] depends on [the awardee] having breached a duty to update its offer between the date of its final formal proposal submission and the date of award. It is not clear to the court that this duty exists."); 43 GC ¶ 250. In *OAO Corp.*, the COFC denied a challenge to an award when the awardee did not notify the agency that one of four proposed key personnel would be unavailable. While the agency evaluated final proposals, the contractor did not immediately inform the agency about the unavailability. Instead, the awardee notified the agency and proposed a substitute only after contract award.

Judge Tidwell explained that the plaintiff's success on the merits depended on whether the awardee breached a legal duty to update its proposal between final proposal submission and contract award. The court recognized that an offeror has a duty to ascertain the availability of key personnel when final proposals are submitted, citing *CBIS Fed. Inc.*, supra. But the COFC held that it is "not clear" that there is any duty to update final proposals before award, and denied the plaintiff's request for a preliminary injunction because the plaintiff would not prevail in its "bait and switch." *OAO Corp.*, 49 Fed. Cl. 478. Furthermore, although the court found that "there is no language in the Solicitation which creates a duty to update the availability of key personnel between final offer and award …. It would have been a simple enough matter for the agency to have added such a provision to the Solicitation in this case." Id.

GAO Should Revise its Approach for Deciding These Cases—The current framework is arbitrary, unduly burdensome to contractors and based on shaky precedent. It also raises the question of blurred lines insofar as GAO's authority is concerned: it adds to the FAR where the FAR is silent, and appears to make recommendations to offerors even though GAO lacks any statutory authority to do so.

GAO should instead apply the fair and commonsense "bait and switch" rules and reassert the common-sense framework established by *Prof'l Safety Consultants*, supra. Key rules for such a framework might include:

- An offeror must propose persons it reasonably expects will be available for contract performance.
- If an offeror knows prior to submission of its final offer that proposed key employees are no longer available, the offeror should withdraw the individuals and propose substitutes who are available.
- Whether an offeror's expectation of personnel availability is reasonable requires a close examination of the facts of each case.
- An award is not necessarily improper if an offeror proposes key employees in good faith, but later, after award, provides substitute personnel.
- An offeror may promptly notify an agency of the unavailability of personnel that occurs after the final proposal is submitted to the Government, after the contract is awarded.
- If the Government would like to be notified of updates to a proposal and receive a substitution of key employees, the solicitation should expressly say so.

The current legal landscape leaves offerors with few desirable options. The absence of clear legal guidance puts contractors at risk of having their proposal rejected if they notify the Government of personnel changes. Contractors also risk a bid protest if they learn before award about unavailability of a key employee and do nothing about it until after award.

The FAR Council, Not GAO, Should Determine the Need for Continuous Proposal Updates—For this reason, the FAR Council should examine this issue. If, as a matter of contracting policy, it agrees with GAO's decision in *Pioneering Evolution*, it should revise FAR 52.215-1 to establish a regulatory basis for the decision. If the FAR Council does not

agree with this GAO decision, it should retain FAR 52.215-1 without change.

For example, the FAR Council might reasonably conclude that if it established a requirement that offerors update their proposals for changes in key personnel that occur after final proposal revisions, the requirement should be that offerors update their proposals after final proposal revisions for all changes to the offeror's proposal that might change the contract award decision. Again, the FAR Council might reasonably conclude that the benefit to the Government from a requirement for continuous proposal updates is more than offset by the delays that it will necessarily impose on the procurement process.

Contractor Responsibility Requirement—Federal agencies may contract only with responsible contractors. FAR 9.103(a). Regardless of whether a solicitation requires a company to disclose information about the unavailability of key personnel before contract award, a company might reasonably conclude that an agency might want this information disclosed before contract award, and, therefore, as a responsible contractor, the company might reasonably decide to disclose the information. However, neither the COFC nor GAO has analyzed this issue as a matter of contractor responsibility. Moreover, generally, GAO will not review an affirmative determination of responsibility. 4 CFR § 21.5(c).

Companies selling to the Government face difficult decisions about what they must and what they should disclose to their customer. On one solicitation, a contractor might conclude that an agency would want to know this information before contract award. On another solicitation, the offeror might conclude that the agency might prefer to resolve the issue after contract award.

Furthermore, an agency has meaningful remedies if it concludes that an offeror has acted improperly by not disclosing information until after contract award. See, e.g., FAR 3.700(c) (recognizing that agencies have a common law right to avoid, rescind or cancel contracts that may have been improperly awarded).

Key Takeaways for Contractors—Inconsistent messages from GAO and the COFC, a lack of regulatory clarity, and potentially harsh consequences leave contractors facing a difficult decision when they are forced to change key personnel through no fault of their own. In making this decision, contractors should consider timing and agency discretion.

The first scenario—when key personnel become unavailable *before* submission of the final proposal or final proposal revision—is clear. An offeror must either inform the agency or submit a revised proposal if it knows a key person can no longer work on the project.

The second scenario—when an offeror learns *after* the proposal deadline, but before award, that key personnel will be unavailable to perform the contract—is entirely unclear. In this situation, the offeror is faced with only unpleasant options. First, the offeror could say nothing and face a possible bid protest. If not successfully protested, the postaward substitution of key personnel could become a matter of contract administration. See 4 CFR § 21.5(a); see also *Alamo City Eng'g Servs., Inc.*, Comp. Gen. Dec. B-409072 et al., 2014 CPD ¶ 32 (noting that if an agency allows a contractor-awardee to replace key personnel after contract award, this is not a matter GAO will review, but is a matter of contract administration).

Alternatively, the offeror could inform the agency of the change and hope for the best. The greatest risk with this approach is that the agency might reject the proposal as noncompliant. From an agency perspective, this may be the lowest-risk way to resolve the issue. There is also the risk that exchanges between a contractor and the Government where the contractor provides post-final submission information about revising its proposal, and the agency actually considers that information, could constitute an improper discussion and disqualify the contractor. *Beckman Coulter*, Comp. Gen. Dec. B-218030.1 et al., 99-1 CPD ¶ 9; see also *YWCA of Greater Los Angeles*, supra.

Another possibility, however, is that after being informed of the change, the agency decides to open—or reopen—discussions. This is purely at the agency's discretion, however, so contractors cannot expect the agency to do so. If the agency decides to consider a post-final submission revision from the offeror, the agency must allow other offerors to do the same.

Conclusion—These decisions by GAO and the COFC show the importance of timing when it comes to disclosing unavoidable personnel changes to an agency. If an offeror decides not to disclose this information until after contract award, and an unsuccessful offeror successfully challenges that decision at GAO, the awardee should carefully consider whether to protest to the COFC an agency action adopting an adverse GAO protest decision.

However, navigating the issue of key personnel becoming unavailable during the procurement process

should not be left to GAO, agencies or contractors. The FAR Council should provide clarity and consistency by either publicly affirming FAR 52.215-1 as it exists or revising it to establish a regulatory basis for GAO's decision in *Pioneering Evolution*. Unless and until that happens, contractors should proceed with caution.

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This Feature Comment was written for THE GOVERNMENT CONTRACTOR by* Greg Petkoff*, a Partner at Jenner & Block,* Mark Nackman*, the General Counsel at General Dynamics-NASSCO and a former Partner at Jenner & Block, and* Carla Weiss*,* Joshua Violanti *and* Sati Harutyunyan*, associates at the firm. Disclaimer: This article is published for general information and is not intended to be and should not be taken as legal advice for any particular matter. The opinions expressed and any legal positions asserted in the article are those of the authors and do not necessarily represent the views of other lawyers at Jenner & Block or of General Dynamics Corporation or General Dynamics-NASSCO.

