JENNER & BLOCK

Government Contracts Legal Round-Up - January 26, 2021

Publications

January 26, 2021
By: Matthew L. Haws, Noah B. Bleicher, Aime J. Joo, Sati Harutyunyan, Moshe B. Broder, Marc A. Van Allen, David Robbins

Welcome to Jenner & Block's Government Contracts Legal Round-Up, a biweekly update on important government contracts developments. This update will offer brief summaries of key developments for government contracts legal, compliance, contracting, and business executives. Please contact any of the professionals at the bottom of the update for further information on any of these topics.

Executive Actions

1. Thirty Executive Actions in President Biden's First Three Days in Office

- In his first three days of office, President Biden signed 30 executive actions on a variety of subjects, including COVID-19 relief, immigration, environment protections, and defunding the border wall.

- Among other orders, President Biden has mandated masks on federal property, directed a report on a federal minimum wage of $15 per hour, and sought to reinforce and strengthen domestic preferences for products manufactured in the US.

- President Biden has also revoked numerous Trump-era executive orders, including the recent Executive Order 13950 of September 22, 2020, Combating Race and Sex Stereotyping, which had been halted by a preliminary injunction and deemed inoperable pursuant to this revised Class Deviation.

- President Biden issued a "Regulatory Freeze Pending Review" to allow review of any new or pending rules, and asked the Office of Management and Budget to "identify ways to modernize and improve the regulatory review process" in his "Modernizing Regulatory Review" Order. Biden also revoked President Trump's "one in, two out" rule, among others designed to limit Federal regulation.

Contractors should anticipate a number of immediate and long-term regulatory changes under the new Biden administration. Whereas President Trump issued several orders on deregulation, the

Biden administration seeks to modernize the regulatory process to enable "swift and effective Federal action" to address the pandemic, the economy, systemic racial inequality, and climate change. For a more detailed look at the executive orders, see this advisory.

Federal Acquisition Regulation (FAR) Rules

1. FAR Case 2019-106: Maximizing Use of American-Made Goods, Products, and Materials, Final Rule, Issued Jan. 19, 2021, Effective Jan. 21, 2021

- This rule implements Executive Order 13881, which creates a new higher standard for iron and steel products.
- To meet the definition of "domestic construction material" or "domestic end product," the cost of foreign iron and steel for iron and steel products must be less than 5 percent of the cost of all components in the products.
- For all else, the domestic content requirement increases from 50 percent to more than 55 percent of the cost of all components.
    - The domestic content test has been waived for acquisition of commercially available off-the-shelf (COTS) items, except a product that consists wholly or predominantly of iron, steel, or a combination of both (excluding COTS fasteners).
- The Buy American statute imposes a price preference for domestic end products and construction material. This rule increases the price preference from 6 to 20 percent for large businesses and from 12 to 30 percent for small businesses. Price preference for domestic end products for Department of Defense (DoD) procurements remain unchanged, at 50 percent for both large and small businesses.

Contractors should re-evaluate their materials and end products to determine if they meet the new higher standards of 95 percent domestic cost content for iron/steel materials, and more than 55 percent for non-iron/steel materials to qualify for domestic price preferences, which vary for civilian and defense procurements.

2. FAR Case: 2018-016, Lowest Price Technically Acceptable Source Selection Process, Final Rule, Issued Jan. 14, 2021, Effective Feb. 16, 2021

- This rule finalizes similar but not identical restrictions on the use of lowest price technically acceptable (LPTA) source selection for civilian agencies. These rules are already in place for DoD contracts at DFARS 215.101-2.
- The rule amends FAR 15.101-2 to outline when LPTA may be used; e.g., where minimum requirements can be clearly described in terms of performance objectives, measures, and

standards and where the agency would realize no or minimal value from exceeding the minimum requirements.

This rule supplies contractors with a potential protest ground for civilian agency solicitations that improperly use LPTA in situations where the agency would realize value from exceeding minimum requirements.

Defense Federal Acquisition Regulation Supplement (DFARS) Rules

1. DFARS Case 2018-D022: Covered Defense Telecommunications Equipment or Services, Final Rule, Effective Jan. 15, 2021

- Increases the security of systems and critical technology used to carry out the nuclear deterrence and homeland defense missions of DoD by prohibiting the use of telecommunications equipment or services from certain Chinese entities, and from any other entities owned or controlled by China or Russia.

- Converts DFARS 252.204-7018, Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services into a final rule, with two minor changes.

- The changes extend (1) the reporting timeframe for the discovery of covered defense telecommunications equipment or services from one day to three days, and (2) the reporting timeframe to submit information about mitigation actions undertaken from 10 days to 30 days.

In the finalization of this existing interim rule, contractors should note the extension of separate reporting timeframes of discovery and mitigation actions of covered defense telecommunications equipment.

Protest Cases

1. Raytheon Company, B-419393.5, B-419393.6, Dec. 22, 2020

- The US Government Accountability Office (GAO) dismissed as premature a protest challenging the scope of the Space Development Agency's corrective action because the agency had not yet taken any concrete actions that supported the protester's allegations.

- Raytheon had asserted in its prior protest that the agency's technical requirements had changed during the competition and that the agency's public statements suggested that budget constraints were an unstated evaluation criterion. Raytheon protested when the agency failed to amend the solicitation and solicit revised proposals as part of its corrective action.

- GAO explained that the agency's public statements were not probative evidence that the solicitation failed to accurately reflect the agency's requirements such that a solicitation requirement was required.

Until an agency takes some official, concrete action during its reevaluation effort—such as actually evaluating proposals using unstated evaluation factors—a protester's challenge to the agency's proposed corrective action is at risk of being deemed premature.

2. World Wide Technology, Inc., B-417909.2, B-417909.3, Dec. 14, 2020 (publicly released Jan. 4)

- GAO found unobjectionable an agency's decision not to raise pricing issues during discussions where the protester's price was not evaluated as unreasonably high.
- The protester's proposed price was 180 percent higher than the awardee's, but the Defense Information Systems Agency deemed the protester's price to be reasonable (based on a comparison of all proposed prices and the government estimate), and so the agency did not raise the protester's pricing during discussions.

An agency is not required to inform an offeror during discussions that its proposed price is high in comparison to a competitor's proposed price, even where price is the determinative factor for award, unless an offeror's proposed price is so high as to be unreasonable or unacceptable.

3. Innovative Management & Technology Approaches, Inc., B-418823.3, B-418823.4, Jan. 8, 2021

- GAO sustained a protest because the Patent and Trademark Office permitted an awardee to remove a proposal assumption that took exception to the solicitation terms, but it did not provide the protester an opportunity to revise or improve its proposal.
- The awardee's proposal included an assumption that it would be entitled to a price adjustment if the volume of service desk requests supported under the contract exceeded the solicitation's historical estimates by 10% or greater. The awardee removed the assumption at the selection authority's request.

A proposal that takes exception to a solicitation's material terms and conditions should be considered unacceptable and may not form the basis for an award. If an agency permits the offeror to remedy its deficient proposal, it must provide all offerors an opportunity to revise their proposals as well.

4. Perspecta Enterprise Solutions LLC v. United States, COFC No. 20-814, Dec. 17, 2020 (publicly released Jan. 15, 2021)

- The US Court of Federal Claims (COFC) held that a protester had waived its conflict of interest allegations by not raising the claims prior to submitting a proposal.
- Perspecta argued awardee Leidos received an unfair competitive advantage in the Navy's Next Generation Enterprise Network (NGEN) competition through the hiring of a former Navy official,

but the COFC rejected this argument as untimely since the former official's involvement as a member of the Leidos capture team was "clearly a matter of public record."

- The decision follows the Federal Circuit's 2020 decision in Inserso Corp. in which the Circuit Court confirmed that the Blue and Gold waiver doctrine applies to conflicts of interest. Note that Judge Reyna penned a strong dissent in Inserso objecting to the validity of the Blue and Gold doctrine altogether.

The decision reflects the Court's extension of the Blue and Gold waiver rule to conflict of interest allegations that are based on public information. The Blue and Gold waiver rule requires contractors to protest patent solicitation errors prior to submitting a proposal.

Claims Cases

1. Appeal of Granite Construction Company, ASBCA No. 62281 (Dec. 8, 2020)

- When Hurricane Harvey hit Texas, the US Army Corps of Engineers (USACE) suspended work for 49 days on Granite Construction Company's dam repair contract.

- After the suspension expired, Granite sought costs for the 49 days of delay. The USACE agreed to pay costs for only 30 days of delay, arguing that 19 days of adverse weather delay were specified in the contract's adverse weather clause and included in Granite's schedule.

- The Armed Services Board of Contract Appeals (ASBCA) held that the contract's adverse weather clause was unrelated to its suspension of work clause and USACE was not permitted to exclude anticipated weather delays from the suspension period.

The government often fails to properly acknowledge delay events, including those caused by severe weather. The government may also argue that schedule float is for the benefit of the government instead of the contractor. This case is a reminder to pay close attention to contract and schedule treatment of weather-related delays, and to engage promptly and fully whenever severe weather impacts contract performance.

2. Boeing Co. v. Secretary of the Air Force, No. 2019-2147 (Fed. Cir. Dec. 21, 2020)

- Boeing marked unlimited rights technical data with a "Non-U.S. Government Notice" proprietary legend, which stated that "non-U.S. Government entities may use and disclose only as permitted in writing by Boeing or by the U.S. Government."

- The contracting officer rejected technical data marked with that legend, finding it nonconforming because it is not one of the legends specifically authorized by DFARS 252.227-7013.

- Boeing argued its legend was not nonconforming because it did not restrict the Government's rights, but rather the rights of third parties.

- The Federal Circuit overturned the ASBCA, holding that such a legend is consistent with the standard DFARS data rights clause so long as the legend does not restrict the rights of the government.

The government has traditionally objected to inclusion of any legend outside of those specified in the DFARS. In this case, the Federal Circuit rejected that approach. Thus, when delivering unlimited rights data, consider including a proprietary legend asserting rights against third parties not acting under the government's authority.

Investigations and Enforcement

Procurement fraud investigations, False Claims Act (FCA) cases, prosecutions, and government recoveries are all on the rise. The government's procurement fraud remedies organization is also coordinating heavily to respond to economic stimulus fraud. This will further increase risks for contractors. These developments are designed to make contractors aware of ongoing and emerging risks so ethics and compliance programs may be updated, and to better manage any investigations that may be necessary.

1. Procurement Fraud Recoveries on the Rise for the US Department of Justice (DoJ)
On January 14, DoJ announced its FCA recoveries for FY2020. While the lion's share of recoveries continued to flow from healthcare contracts, the recoveries reflect continuation of a multi-year emphasis on procurement fraud cases.

2. First Civil Settlement for CARES Act Fraud Announced
On January 12, DoJ announced the nation's first civil settlement for the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) fraud. SlideBelts, Inc., and its CEO agreed to pay a combined $100,000 in damages and penalties to resolve fraud allegations. The settlement resolved multiple allegations, including civil FCA allegations.

3. United States v. Strock, No. 19-4331, US Court of Appeals for the Second Circuit (Dec. 3, 2020)
Materiality is a required element under the FCA to show that, among other things, had the government known the facts, the government would not have paid. Here, the Second Circuit discussed materiality in a fraudulent inducement case in depth, and emphasized the impact of continued government payment after knowledge of contract violations on a materiality defense.

4. Materially False Cost and Pricing Data Drives FCA Liability
On January 12, DoJ announced a $25 million FCA settlement ending an inquiry into alleged knowing overcharges on Unmanned Aerial Vehicle contracts. The qui tam case alleged that drone prices were based on inflated cost or pricing data for new parts, when the defendant intended to use recycled or refurbished parts available at substantially lower prices.

5. Bribery and Kickbacks Still Draw Criminal Enforcement

On January 15, DoJ announced a 70-month sentence to an individual for paying bribes to Army contracting officials in order to steer contracts worth at least $19 million to his employer. The individual also accepted more than $700,000 in kickbacks from a company in exchange for subcontract work.

Legislative Developments

1. Summary of Fiscal Year 2021 National Defense Authorization Act (NDAA)

- The William M. (Mac) Thornberry NDAA for Fiscal Year 2021—filled with thousands of provisions—provides a roadmap of acquisition policies that will drive future regulatory changes for government contractors of all types, sizes, and customer bases.

- Perennial topics, including cybersecurity, foreign influence, domestic sourcing, data rights, Other Transaction Authority, commercial item contracting, ethics, and small business participation continue to dominate. Joining these subjects are newer topics, including expediting US Space Force acquisition.

We highlight some of the key developments and offer guidance on what contractors should anticipate in the coming months and years in this client advisory. We will be closely tracking the reports to Congress and anticipated regulatory changes.

Related Attorneys

Matthew L. Haws
Partner
mhaws@jenner.com
+1 202 639 6065

Noah B. Bleicher
Partner
nbleicher@jenner.com
+1 202 639 6063

Aime J. Joo
Associate
ajoo@jenner.com
+1 202 639 6010

Sati Harutyunyan
Partner
sharutyunyan@jenner.com
+1 213 239 2229

Moshe B. Broder
Partner
mbroder@jenner.com
+1 202 637 6334

Marc A. Van Allen
Partner
mvanallen@jenner.com
+1 202 639 6005

David Robbins
Partner
drobbins@jenner.com
+1 202 639 6040

Related Capabilities

Government Contractor Litigation and Compliance

Stay Informed →