

# Government Contracts Legal Round-Up | 2021 Issue 2

## Publications

February 10, 2021

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Welcome to Jenner & Block's Government Contracts and Grants 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.

## Executive Actions

### **1. Executive Order on Ensuring the Future Is Made in All of America by All of America's Workers (Jan. 25, 2021)**

- Establishes a policy to maximize the use of goods, products, and materials produced in, and services offered in, the United States under federal financial assistance awards and federal procurements.
- Encourages replacement of the FAR's "component test" to identify domestic products with a test under which domestic content is measured by the value added through US-based production or US job-supporting economic activity.
- Encourages the FAR Council to increase the domestic content requirements and price preferences for domestic end products and domestic construction materials.
- Requires the FAR Council to hold off on any final determination of domestically nonavailable articles until it has reviewed an Office of Federal Procurement Policy (OFPP) recommendation on whether goods and materials mined, produced, or manufactured in the United States are sufficiently and reasonably available.
- Limits, centralizes, and publicizes waivers of domestic preference laws, by clearing them through a "Made in America Director" appointed by the Director of OMB, who would require agency's assessments of whether the cost advantage of the foreign-sourced product arises from dumped or injuriously subsidized steel, iron, or manufactured goods.
- Encourages supplier scouting to increase federal procurement from small- and medium-sized American businesses.

As we reported in our last update, President Biden has used his executive authority to seek swift and effective federal action to address the pandemic, the economy, systemic racial inequality, and climate change. President Biden also furthered one of his key “Build Back Better” campaign pledges by signing an executive order (EO) directing federal agencies to redouble efforts to proactively prefer the purchase of goods made in the United States.

## **Defense Federal Acquisition Regulation Supplement (DFARS) Rules**

### **1. Rescission of Class Deviation 2021-00001, Combating Race and Sex Stereotyping (Jan. 28, 2021)**

- This memorandum rescinds Class Deviation 2021-00001, Combating Race and Sex Stereotyping, and its Revision 1.
- Effective January 28, 2021, contracting officers shall:
  - Remove the clause 252.222-7999 (DEVIATION 2021-00001) (JAN 2021), and the clause 252.222-7999 (DEVIATION 2021-00001) (NOV 2020), from existing contracts, so that neither clause remains in contracts.
  - Ensure that existing and/or new solicitations do not contain either clause mentioned above.

President Biden revoked Executive Order 13950, Combating Race and Sex Stereotyping, on January 20, 2021. As a result of this rescission, the Class Deviation put in place by Executive Order 13950 has likewise been rescinded.

## **Protest Cases**

### **1. GOV National Healthcare Drive, LLC, B-419258 et al. (Jan. 13, 2021)**

- GAO sustained a protest where the Department of Veterans Affairs (VA) failed to engage in meaningful discussions.
- The VA argued that it merely engaged in “due diligence clarifications” with some offerors, but GAO highlighted that each offeror was asked to provide essential information necessary for the agency to determine the acceptability of their respective proposals, which constituted discussions and triggered an obligation for the VA to raise proposal deficiencies or significant weaknesses.

Where an agency engages in communications with an offeror for the purpose of obtaining information essential to determining the acceptability of a proposal, or otherwise provides the offeror with an opportunity to revise or modify its proposal in some material respect, discussions have occurred. Where discussions have occurred, they must be meaningful; that is, they must lead the offeror into those areas of its proposal that require modification, amplification, or explanation.

## **2. *Accenture Federal Services, LLC, B-418321.4 (Jan. 29, 2021)***

- GAO denied a protest challenging a solicitation’s definition of similar prior experience under a corporate experience evaluation factor.
- Accenture—the incumbent contractor providing the health insurance exchange support services being procured—argued it was unreasonable for the Department of Health and Human Services to consider experience with a state-based health exchange to be similar in size to the services being solicited (and performed by Accenture).
- GAO rejected the protest because its role in reviewing bid protests is to ensure that the statutory requirements for full and open competition are met—not to protect a protester’s interest in restricting competition.

A procuring agency is responsible for defining its needs and determining the best methods for meeting its requirements; this extends to matters involving the relevance of offerors’ performance history. An agency may reasonably provide for an evaluation that fosters competition by increasing the feasibility of proposals submitted by non-incumbent offerors.

## **3. *NIKA Technologies, Inc. v. United States, CAFC No. 20-1924 (Feb. 4, 2021)***

- The Court of Appeals for the Federal Circuit clarified that a disappointed offeror must ask follow-up questions in response to an enhanced debriefing to extend the GAO bid protest filing deadline necessary to invoke an automatic stay of performance under the Competition in Contracting Act (CICA).
- The Department of Defense had provided NIKa an enhanced debriefing, but NIKa did not ask any follow-up questions to extend the debriefing. Because NIKa filed a subsequent bid protest six days after the debriefing, GAO concluded that that a CICA stay was not required; COFC then reached the opposite conclusion, holding that the two-day period to ask follow-up questions automatically extended the debriefing and the five-day clock for a stay, regardless of whether a question was asked. The appellate court reversed COFC.

The Department of Defense’s enhanced debriefing provisions permit an offeror to ask follow-up questions in response to a post-award debriefing within two business days of the debriefing. But the five-day GAO protest clock to invoke an automatic stay of performance is only extended if the offeror actually asks follow-up questions.

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**Related Capabilities**

Government Contractor Litigation and Compliance

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