

# Government Contracts Legal Round-Up | 2021 Issue 3

## Publications

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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.

## Defense Federal Acquisition Regulation Supplement (DFARS) Rules

1. Class Deviation 2021-00004 - DFARS 252.225-7987 Requirements for Contractor Personnel Performing in the US Southern Command Area of Responsibility (Feb. 22, 2021)

- The new deviation is to be used in lieu of the clause DFARS 252.225-7040, Contractor Personnel Supporting US Armed Forces Deployed Outside the United States, in solicitations and contracts that require performance in US Southern Command (USSOUTHCOM).
- Designed to implement the President's March 13, 2020, "Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak," this new class deviation adds the following requirements for contracts supporting USSOUTHCOM, as follows:
  - Recertification of medical fitness for medical suitability screening;
  - Requirements for Synchronized Predeployment and Operational Tracker data for contractor personnel support and tracking; and
  - Personnel recovery requirements.

Contractors operating in the USSOUTHCOM area of responsibility should note this new class deviation, which rescinds and supersedes class deviation 2014-00016. It includes new medical and tracking requirements in response to COVID-19 outbreak, in addition to continued operational requirements.

## DoD Implements New Contracting Certification Program for DoD Acquisition Professionals

## **1. Restructuring of the Certification Program for the Contracting Functional Area (Feb. 18, 2021)**

- The Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)), has released a plan for a new certification program for its workforce as part of its phased implementation of a Back-to-Basics (BtB) talent management framework.
- A Contracting Certification Taskforce has designed a new Contracting Professional Certification Program for DoD's Contracting Functional Area.
- Effective October 1, 2021, DoD will be adopting a single level of certification with foundational training and an examination designed to verify competency.
- The certification is based on the American National Standards Institute / National Contract Management Association (ANSI / NCMA ASD 1-2019) accredited Contract Management Standard.
- A "significant undertaking," the deployment of the new certification program and credentials is designed to enable "an improved talent development approach for a professional, capable, and mission-focused contracting workforce."

Training DoD's acquisition workforce has long been a key issue. This new Contracting Competency model is designed to comply with section 861 of the Fiscal Year 2020 National Defense Authorization Act (Public Law 116-92). That provision requires DoD contracting professionals to earn a professional certification based on standards developed by a third-party accredited program.

## **DoD Audits**

1. Audit of Contracts for DoD Information Technology Products and Services Procured by DoD Components in Response to the Coronavirus Disease–2019 Pandemic (DODIG-2021-050) (Feb. 12, 2021)

- DoD's Office of Inspector General concluded that DoD has complied with the CARES Act and other Federal and DoD requirements in procuring approximately \$81.5 million in information technology products and services in response to the COVID-19 pandemic at reasonable prices and at a reduced risk of cybersecurity vulnerabilities.
- Contractors should note that DoD will continue to focus on compliance with the CARES Act and cybersecurity to reduce waste, fraud, and abuse, and mitigate cyber vulnerabilities, each of which could potentially jeopardize the DoD's missions, information, and assets.

**2. Audit of Cybersecurity Requirements for Weapon Systems in the Operations and Support Phase of the Department of Defense Acquisition Life Cycle (DODIG-2021-051) (Feb. 10, 2021)**

- The objective of this audit was to determine whether DoD Components took action to update cybersecurity requirements for weapon systems in the Operations and Support (O&S) phase of the acquisition life cycle, based on publicly acknowledged or known cybersecurity threats and intelligence-based cybersecurity threats.
- For the five DoD weapon systems assessed, DoD IG concluded that program officials followed the Risk Management Framework requirements and updated cybersecurity requirements to account for additional countermeasures implemented or needed to protect the weapon systems from the identified threats.
- Contractors should be prepared for cybersecurity requirements to evolve during an O&S phase of a program if threats are identified.

## **Protest Cases**

### **1. Coventry Healthcare Workers' Compensation, Inc., B-417237.5 (Jan. 29, 2021)**

- GAO denied a protest asserting that a price-technical tradeoff was flawed because the agency failed to assign a monetary value to savings that purportedly would be realized from the protester's technical solution.
- GAO rejected the argument because nothing in the solicitation's evaluation scheme contemplated that the agency would "monetize" any aspect of an offeror's technical approach.

An agency is not required to take into account monetary savings that could be realized during performance unless the solicitation contemplates an analysis or consideration of the potential cost savings associated with an offeror's technical approach.

### **2. FreeAlliance.com, LLC; Radus Software LLC/Radus CTA; Mobomo, LLC, B-419201.3 et al. (Jan. 19, 2021)**

- GAO sustained a protest where the evaluation record did not explain why the strengths and weaknesses assigned to each quotation merited a particular adjectival rating. Apart from a recitation of the definition for the adjectival ratings, the record did not explain the agency's basis for assigning the ratings.
- GAO was unable to conclude that the agency's evaluation was administered on an even-handed basis because quotations with the same strengths were assigned different ratings without any explanation.

GAO will sustain a protest where the evaluation record is insufficient to conclude that differences in evaluation ratings assigned to quotations stemmed from differences between the quotations.

### **3. DynCorp International, LLC v. United States, No. 20-cv-1293 C (Feb. 16, 2021)**

- COFC dismissed a protest on the basis that it was “connected to the issuance of the task order” and did not fit into the jurisdictional exception for task orders that exceed the scope of the IDIQ contract.
- The protest alleged that an Army task order was improperly awarded to CACI, Inc. because, following CACI’s conversion from Inc. to LLC, CACI, Inc. no longer held a GISS IDIQ contract.
- Because DynCorp could not show that the statement of work described in the task order Performance Work Statement (PWS) was beyond the PWS for CACI’s GISS IDIQ contract, the scope exception did not apply.
- In addition, the Court explained that the protest would have been denied on the merits, because the conversion from CACI, Inc. to CACI, LLC was completed in accordance with the FAR, with full government awareness, and did not affect the Army’s award to CACI in any way.

This decision highlights two important issues for contractors. First, protesting a task order at COFC is only available in the narrowest of circumstances, and GAO is generally a contractor’s only recourse. Second, when a contractor takes any action that affects the company’s corporate identity, it is vital to engage the federal customer and follow appropriate practices to ensure that any awards made are to the correct entity.

## **Claims Cases**

### 1. Appeals of Harry Pepper and Associates, ASBCA Nos. 62038-42

- Harry Pepper and Associates encountered numerous changes while performing a \$36.5 million contract to restore and reinforce a rocket booster support tower at NASA’s Stennis Space Center.
- Pepper submitted 12 claims asserting a variety of changes, including to the contract performance method and welding procedures, and alleging defective design by the government.
- In addition, Pepper argued in the alternative that the contract had been constructively changed by pervasive out-of-scope work, increased performance time, different equipment requirements, and increased labor demands.
- The Armed Services Board of Contract Appeals (ASBCA) held there was no cardinal change because, despite a great number of alterations made in the work, the changes were not out of character with the work contemplated in the contract and were foreseeable by the contractor.

As contract changes begin to balloon on a contract, it is tempting to assume the cumulative effect will equal a cardinal change. But this case is a reminder that cardinal change is very difficult to demonstrate through voluminous changes to the work or significant increase in performance time. Courts and Boards are loath to find the government in breach and will seek to redress changes—no matter how voluminous—under the contract’s changes clause. Thus, as changes mount and

performance time increases, it is especially important to engage in developing comprehensive requests for equitable adjustment to ensure you can fully capture cost and schedule impact.

## **2. Appeal of SkyQuest Aviation, LLC, ASBCA No. 62586**

- SkyQuest received an Air Force contract to provide test pilots and flight engineers. During performance, the Air Force asserted that the pilots must have specific Air Force certification paperwork. SkyQuest responded to a cure notice disputing that the certification paperwork was required by the contract. The Air Force terminated SkyQuest for default.
- SkyQuest filed a pro se complaint at the ASBCA seeking \$429,000 in payment, revocation of the default termination, and adjustment of its CPAR rating.
- SkyQuest did not obtain a contracting officer's final decision on any of these items prior to its appeal, and the Air Force asserted the Board lacked jurisdiction to hear SkyQuest's appeal.
- The ASBCA held that, although it did not have CDA jurisdiction over the monetary claim or the CPAR adjustment, the termination for default was a government claim for which a contracting officer's final decision was not necessary. In addition, because SkyQuest disputed the termination only based on compliance with the contract terms, it was not required to obtain a COFD to proceed.

Challenging government claims, including termination for default or claims for liquidated damages, implicates nuanced procedural questions. The Maropakis case required that affirmative defenses must be the subject of a COFD. SkyQuest Aviation reflects evolution of the Maropakis line of cases in recent years to clarify that submission to the contracting officer is not required where the defense is merely that the government has not met its burden of proof for an element of its claim.

## **3. Appeals of San Point Services, LLC, ASBCA Nos. 61819, 61820**

In another example of government contracting and surety industries colliding, the ASBCA quashed a government subpoena seeking information relating to a payment bond claim filed by a subcontractor. In a rather odd case, NASA sought to defend against an ASBCA claim by arguing that a separate payment bond case, filed by a subcontractor, contained admissions concerning fraud. NASA served a subpoena duces tecum on the surety, which successfully moved to quash based on undue burden. The Navy's arguments that the contractor had been less than forthcoming were not compelling—in the eyes of the ASBCA—to justify placing the burden of a subpoena on the surety.

There are a number of ongoing lawsuits and/or investigations alleging that sureties owe the government certain duties to prevent fraud (see, e.g., *U.S. ex rel. Scollick v. Narula*), but here the ASBCA limited the government's reach into the surety business while upholding the ASBCA's periodically announced practice of not letting the government's blanket assertion of fraud divest the Board of jurisdiction over an appeal.

# Investigations and Enforcement

There have been a number of cases dealing with recovery of attorney's fees in False Claims Act cases lately:

- Beware the parallel proceeding. Where civil settlement funds were seized by the government investigating a separate criminal matter, the court denied motions by the plaintiff's lawyers to release a third of those funds to satisfy the contingent fee earned by those attorneys on the civil case. *U.S. ex rel. Glasser v. Boykin Contracting, Inc.* (Civil Action No.: 3:14-cv-00224-JMC, D.S.C. Columbia Division)
- And a court refused to permit double dipping by qui tam plaintiffs, shaming a relator for not removing from its fee requests amounts for unsuccessful claims and failing to account for prior recoveries. *U.S. and State of New York ex re. Nichols v. Computer Sciences Corp. and City of New York* (S.D.N.Y)

And the District Court for the Northern District of Illinois reminding qui tam plaintiffs that fraud must be pled with particularity, dismissing the complaint in *U.S. ex rel. Noreen Lanahan v. County of Cook* for failure to plead relevant details about alleged false statements and certifications, such as who made them, when they were made, and how much money was involved.

The Eleventh Circuit affirmed a district court's rejection of a False Claims Act retaliation claim in *Hickman v. Spirit of Athens*, holding to the standard that an objectively reasonable belief that the individual was attempting to prevent a violation of the False Claims Act was necessary to support a retaliation claim. A sincere belief is not enough—that belief must be objectively reasonable.

## Suspension / Debarment Summary

The World Bank released its debarment/sanctions results. The Bank debarred 267 companies and individuals, which was a substantial increase over prior years. The Bank also announced, that beginning in 2021, it would state the reason for debarments / sanctions in the future. By comparison, the US suspension / debarment system is less transparent, and does not release the causes for suspensions and debarments in the annual Interagency Suspension and Debarment Committee Report to Congress (which is a trailing publication, the most current edition published in early 2021 only covered Fiscal Year 2019 activities).

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**Related Capabilities**

Government Contractor Litigation and Compliance

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