

Government Contracts Legal Round-Up | 2021 Issue 4

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 summarizes key developments for government contracts legal, compliance, contracting, and business executives.

Executive Actions

Executive Order on America's Supply Chains (Feb. 24, 2021)

- This order sets out a policy to ensure resilience in US supply chains through robust US manufacturing capacity and the availability and integrity of critical products and services.
- Within 100 days, members of the National Security Council (NSC) and heads of agencies will identify supply chain risks in key areas, including:
 - Semiconductor manufacturing and advanced packaging supply chains;
 - Critical minerals and other identified strategic materials, including rare earth elements; and
 - Pharmaceuticals and active pharmaceutical ingredients.
- Within one year, DoD, among other agencies, must report on respective industrial bases, including identifying:
 - Critical materials and gaps in any US manufacturing capabilities; and
 - Any contingencies that may disrupt, strain, compromise, or eliminate the supply chain.

This order addresses concerns regarding exclusive or dominant supply of needed goods and materials through nations that are, or are likely to become, unfriendly or unstable. Within one year, agencies must supply recommendations regarding sustainably reshoring and building redundancy into US supply chains, enlarging stockpiles, developing workforce capabilities, and expanding research and development. Contractors should expect future regulatory changes that may be

“necessary to attract and retain investments in critical goods and materials and other essential goods and materials.”

Audits

Weapon Systems Cybersecurity: Guidance Would Help DoD Programs Better Communicate Requirements to Contractors (Mar. 4, 2021)

- GAO concluded that DoD has struggled to ensure its weapons systems can withstand cyberattacks, although some improvements have been made since 2018.
- DoD programs are not always incorporating cybersecurity requirements into contract language. Some contracts had no cybersecurity requirements when they were awarded, with vague requirements added later.

As a result of GAO’s recommendation that DoD components do better at incorporating cybersecurity requirements into contracts, contractors should expect to see new guidance from the Army, Navy, and Marine Corps on “tailored weapons systems cybersecurity requirements, acceptance criteria, and verification processes.”

Protest Cases

1. *Spartan Medical, Inc.*, B-419503 (Feb. 26, 2021)

- GAO dismissed a protester’s challenge to an Air Force other transaction agreement (OTA) procurement for COVID-19 testing supplies.
- The protester waited until after its response was rejected to challenge both the agency’s use of its OTA authority and the agency’s basis for eliminating the firm from further consideration.

OTAs are not procurement contracts covered by the Competition in Contracting Act, and GAO generally does not review protests of the award or solicitations for the award of an OTA. The only exception is where an agency is exercising its OTA authority and the protester files a timely, pre-closing date protest alleging that the agency is improperly exercising that authority. Here, GAO dismissed Spartan’s protest because its objection to the use of OTA authority was filed too late and because its challenge to the rejection of its submission was outside of GAO’s jurisdiction.

2. *Anduril Industries, Inc.*, B-419420 (Feb. 22, 2021)

- GAO denied a protest arguing that an Air Force task order competition for “tactical edge node support” was outside the scope of the underlying indefinite-delivery, indefinite-quantity (IDIQ) contract, or otherwise unduly restrictive of competition.
- The Air Force’s advanced battle management systems (ABMS) IDIQ contract covered several categories and pools of contractors, and while the protester held an ABMS IDIQ contract for

certain categories, its ABMS contract did not cover the category in which the “tactical edge node support” was being procured—“secure processing.” Anduril argued the competition should be conducted in the “transmission of data” category or that it should be permitted to compete.

- GAO concluded that the tactical edge node support requirement was logically connected with the broad scope of work described in the ABMS program’s “secure processing” category.
- Jurisdictional note: Even though the task order was valued below GAO’s \$25 million jurisdictional threshold for DoD task order competitions, GAO had jurisdiction over the assertion that it was outside the scope of the IDIQ category. GAO did not have jurisdiction to consider the protester’s second argument that the solicitation was unduly restrictive of competition.

In determining whether a proposed task order is outside the scope of the underlying contract, GAO examines whether it is materially different from the original contract, as reasonably interpreted. Where there is a logical connection between a broad scope of work in an IDIQ contract and the services to be procured under a subsequent task order, the task order is within the scope of the IDIQ contract.

3. *Microgenics Corp.*, B-419470 (Feb. 2, 2021)

- GAO dismissed a protest challenging an award made by the Administrative Office of the United States Courts (AOUSC) that was filed more than 10 days after the protester learned of its basis of protest.
- AOUSC is a judicial branch agency not bound by the statutory requirement for a post-award debriefing that applies to executive branch agencies, and a debriefing mandated by internal agency policy guidance was not a “required debriefing” for purposes of GAO’s timeliness rules.
- Thus, the debriefing exception did not apply, and the debriefing did not toll the protest filing deadline.

GAO’s strict rules for the timely submission of protests can be a trap for the unwary. In preparation for award notifications, offerors should ensure they understand the relevant deadlines in the event they are disappointed by the outcome and elect to protest.

Claims Cases

1. *Appeal of BAE Systems Ordnance Systems, Inc.*, ASBCA Nos. 62416 (Feb. 10, 2021)

- BAE Systems submitted three letters to the US Army related to environmental fines assessed on ammunition production facilities in Virginia. Each letter identified itself as a request for equitable adjustment (REA), referenced the DFARS REA clause, and contained the DFARS REA certification. None of the letters requested a Contracting Officer’s Final Decision (COFD) or contained the FAR claim certification language.

- After failed negotiations, BAE Systems converted the REAs to certified claims through a document requesting a COFD and containing the FAR claim certification. The Army failed to issue a COFD by the date it identified, and BAE Systems appealed the deemed denial to the Armed Services Board of Contract Appeals (ASBCA).
- The Army moved to dismiss the appeal for lack of jurisdiction, arguing that BAE Systems' earlier letters were "claims" under the Federal Circuit's 2019 decision in *Hejran Hejrat* and, thus, the contractor's appeal was untimely.
- The ASBCA acknowledged that the holding in *Hejran Hejrat* made this case a "closer call" than it would have been, but concluded the REAs did not cross the "Rubicon" into CDA claims. The Board focused on BAE's lack of explicit or implicit request for a COFD and the lack of substantive change in the "posture between the parties" during the REA information exchanges.

The government frequently attempts to argue jurisdictional and procedural bars to claims. In *BAE Systems*, the Army attempted to use case law that traditionally helped contractors as a weapon against them: arguing that a document intended by the contractor to be a REA should be treated as a claim and trigger the 90 day clock for appeal to the ASBCA. The Board rejected the argument, but the warning is clear: the government may insert ambiguous language in its contractual correspondence (*e.g.*, "Contracting Officer's Final Determination") and then attempt to use it in a jurisdictional argument. Remember to develop a clear strategy for pursuing REAs and converting them to claims, be careful in drafting each, and pay close attention to government correspondence in response.

2. Appeal of Central Diversified Contracting, LLC, ASBCA No. 62585 (Jan. 6, 2021)

- Central Diversified Contracting, LLC received an Army Corps of Engineers contract to remove a floating fish collector from a reservoir in Oregon. The government had informed bidders the fish collector weighed 15,000 pounds, but it actually weighed 81,000 pounds. As a result, Central Diversified had to use a different crane and method of performance.
- The Army Corps and Central Diversified entered into a bilateral modification increasing the contract amount by \$29,530, but Central Diversified later sought additional damages through contract claims.
- The Army Corps argued that the modification's release covered all additional effort resulting from the larger fish collector.
- The ASBCA held that the modification's description of its purpose as "mobilize a 400-ton crane to the site" was not all-inclusive, and Central Diversified was entitled to additional cost related to the larger fish collector.

This case is a reminder to pay close attention to the release language in any contract modification. Much like any good fish story, the government will often attempt to claim the release was bigger later on.

FCA Priorities

The annual Federal Bar Association's Qui Tam Conference, held last month (and featuring Jenner & Block Partner David Robbins in the "Defense Strategies" panel), saw an important keynote session from Sen. Chuck Grassley (a career-long champion of the False Claims Act) and Brian Boynton, acting Assistant Attorney General for the Civil Division. They outlined FCA enforcement priorities for 2021 and signaled future amendments to the FCA to counter efforts to, in Sen. Grassley's words, "undermine the law as written." Enforcement priorities include combatting COVID-19/stimulus-related fraud, cybersecurity-related fraud, and fraud related to opioids.

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Government Contractor Litigation and Compliance

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