

Government Contracts Legal Round-Up | 2021 Issue 5

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.

Regulatory Activity

1. Withdrawal of Several FAR Cases on March 19, 2021

The change in administration has resulted in the review and withdrawal of several rules pending for years. Because of the passage of time, the FAR Council favors further consideration under new FAR cases, if at all. One FAR case (2018-002) was withdrawn as it was tied to a now-revoked executive action. The rules withdrawn include:

- FAR Case 2011-001: Withdrawal of Organizational Conflicts of Interest
- FAR Case 2012-015: Withdrawal of Small Business Set Asides for Research and Development Contracts
- FAR Case 2013-022: Withdrawal of Extension of Limitations on Contractor Employee Personal Conflicts of Interest
- FAR Case 2018-002: Withdrawal of Protecting Life in Global Health Assistance

2. Request for Comments on Semiconductor Manufacturing by US Department of Commerce

- In response to President Biden's Executive order on "America's Supply Chains," the Secretary of Commerce must submit a report within 100 days that: (1) identifies risks in the semiconductor manufacturing and advanced packaging supply chains; and (2) proposes policy recommendations to address these risks.
- The FY 21 NDAA also includes a provision to incentivize the production of semiconductors for the US, and mandates several actions to secure the semiconductor-related supply chain.

- This notice requests comments by April 5, 2021 to assist the Commerce Department in preparing its report to the White House. Publish

3. Department of Labor Plans to Rescind Two Rules Related to Independent Contractors and Joint Employers Finding They “Weaken” Protections to Workers Under the Fair Labor Standards Act

- The first Notice of Proposed Rulemaking proposes the withdrawal of the Independent Contractor Final Rule issued on Jan. 7, 2021. This rule adopted a new “economic reality” test that narrowed or minimized other factors considered by courts traditionally, making it less likely a worker will be found an employee subject to FLSA protections. Independent contractors have no FLSA protections, but employees are eligible for the federal minimum wage and overtime.
- The second Notice of Proposed Rulemaking seeks to rescind a current regulation on joint employer relationships under the Fair Labor Standards Act, effective March 16, 2020. On September 8, 2020, the US District Court for the Southern District of New York vacated portions of the Joint Employer Rule, stating that the rule was contrary to the FLSA and was “arbitrary and capricious” due to its failure to explain a shift from prior guidance or to consider the effect of the rule on workers.
- The Department of Labor invites comments on both proposed rules by April 12, 2021.

Protest Cases

1. *People, Technology and Processes, LLC*, B-419385, B-419835.2 (Feb. 2, 2021) (published Mar. 15)

- GAO found unobjectionable the General Services Administration’s (GSA) rejection of a late-submitted proposal.
- The request for proposals (RFP) required that offers be submitted by October 13, 2020, via the agency’s online proposal submission portal, “GSA ASSIST.” The RFP warned that proposals received after the closing date and time would not be considered.
- The protester had trouble with the online portal—it uploaded materials but was unable to click submit—so it emailed the proposal to the contracting officer instead.
- Even though the protester had uploaded proposal materials prior to the deadline, GAO noted that the protester maintained the ability to revise its proposal by uploading new, modified attachments until the moment it pressed the “submit” button. Thus, GAO found that the uploaded materials were never under the government’s control.
- GAO also found that the use of email to submit the proposal was not authorized by the RFP.

Late is late. It is an offeror's responsibility to deliver its proposal to the government office designated in the solicitation by the time specified, and an agency is not required to consider a proposal where there is no evidence that the proposal was actually received.

2. *HVF West, LLC v. United States*, CAFC No. 2020-1414, 2020-1583 (Feb. 19, 2021)

- The Court of Appeals for the Federal Circuit reversed a Court of Federal Claims decision, finding that the successful protester actually lacked standing to bring its COFC protest.
- HVF protested the Defense Logistics Agency's (DLA) award of a "sales contract" for the purchase and destruction of surplus Government military equipment. Given that DLA technically was selling the property to the contractor, DLA awarded the contract to the highest bidder, Lamb Depollution, Inc. HVF was fourth in line for the contract.
- First at the agency-level, then at GAO, and eventually at COFC, HVF raised numerous "detailed allegations" to challenge the award to Lamb, and HVF also questioned the experience of the two intervening bidders. COFC sustained the protest, finding that HVF showed that DLA erred in finding Lamb satisfied all non-price criteria in the solicitation.
- On appeal, the Federal Circuit found that HVF's challenges to the intervening offerors were "based upon conjecture," which was insufficient for HVF to establish that it had a substantial chance of winning the award such that it qualified as an interested party. More specifically, HVF alleged only that the intervening bidders "failed to meet the standards for a successful pre-award survey," a conclusory statement deemed insufficient to question the eligibility of the intervening bidders.

To have standing to bring a bid protest, a losing bidder must be an interested party; that is, an actual or prospective bidder whose direct economic interest would be affected by the award of the contract or by failure to award the contract. The Federal Circuit clarified that "even when an agency assesses price-ranked bidders together for technical compliance to select the bid most advantageous to the Government, . . . the least favored price-ranked bidder has standing only upon mounting a credible challenge to the technical acceptability of the better price-ranked bidders in line and in front of the protesting party."

3. *Peraton, Inc.*, B-416916.11 (Feb. 8, 2021) (published Mar. 16)

- Following a series of protests and corrective action over two years, GAO dismissed as untimely the protester's new allegation that the RFP no longer reflected the agency's requirements.
- Under GAO's timeliness rules, protests challenging the terms of a solicitation must be filed prior to the proposal due date **unless** no due date has been established, in which case the protester is required to raise any issues within ten days of when it knew or should have known about the defects in the solicitation. An agency's alleged failure to amend a solicitation based on changed requirements is a challenge to the terms of the solicitation.

- Here, on October 30, the agency set a deadline for proposal submission. While Peraton protested prior to the due date, the company knew about the issues it raised between April 27 and October 30, when no closing time had been established for this procurement. GAO thus concluded Peraton’s protest was untimely.
- In a rare admonishment, GAO also noted that this procurement had been subject to six protests by Peraton, the incumbent contractor that had continued performance throughout, and “permitting a protester to, in effect, hold solicitation challenges in reserve until it becomes clear that they are unlikely to prevail in a competition is antithetical to the idea that allegations of solicitation improprieties should be resolved as early as possible in the procurement process.”

When challenging the terms of a solicitation—including an agency’s failure to amend a solicitation based on changed requirements—the key question for timeliness is whether the date for proposal submissions (or resubmissions) has been set. In situations where no due date has been established, the protest must be filed within ten days of when the basis for protest was known. Failure to protest on time will result in a dismissal.

4. *Mission 1st Group, Inc., B-419522 (Mar. 15, 2021)*

- GAO denied a protest challenging the company’s elimination from the competition based on a “go/no-go” evaluation factor for ISO 9001:2015 certification.
- Offerors were required to show that they possessed a current/valid certificate, and also that they had possessed one during the period two years prior to the deadline for submitting proposals (October 5, 2020). The protester provided a current certificate, issued on December 27, 2019, but did not submit its prior certification. Based on missing the RFP requirement, the agency said “no-go.”
- GAO found this result unobjectionable, because there was nothing ambiguous about the terms of the RFP, and had the agency requested the company submit additional documentation, that would have amounted to discussions.

A good reminder that contractors must pay close attention to RFP documentation requirements, particularly on “go/no-go” factors, as failure to provide the necessary information will likely result in elimination from the competition.

Claims Cases

1. *Creative Mgmt. Servs., LLC v. United States*, US Court of Appeals for the Federal Circuit, Case No. 2020-1449 (Feb. 26, 2021)

- Creative held a GSA contract to host the annual GovEnergy conference. Under the contract, it was to maintain a separate bank account with all proceeds from the conference and from which it could receive payment. When GSA cancelled the conference in 2012, GSA requested by letter

that Creative return the entire amount in this account. Creative responded that it was entitled to keep any remaining funds and submitted a termination for convenience settlement. Eventually the government issued a final decision with a settlement amount and sought return of any difference remaining in the account.

- Creative failed to appeal this Contracting Officer's Final Decision (COFD) within 12 months, and the Court of Federal Claims found its appeal time barred by the Contract Disputes Act.
- On appeal, Creative argued that the COFD was not proper as it did not state a sum certain.
- The Federal Circuit upheld COFC's dismissal, holding that a COFD need only be based on a claim stating a sum certain. Even then, the "sum certain" only needs to be "readily ascertainable to the party against whom the claim was made." The court held that the government's prior demand letters for the balance of the account constituted a sum certain despite containing different amounts and the word "approximately." The court held the amount was readily ascertainable to Creative by simply checking the balance in the account.

This case is a reminder to pay close attention when dealing with any government demand for payment or any letter that identifies itself as a Contracting Officer's Final Decision. Time limits under the Contract Disputes Act are a trap for the unwary. Creative gets credit for making creative technical arguments to attempt to avoid them, but it couldn't get around its failure to timely appeal the COFD.

Investigations and Enforcement

O'Fallon Building Co. Settles Fraud Claims, USAO-SDIL, Department of Justice

R&W Builders, Inc., agreed to pay \$400,000 to resolve allegations that it fraudulently obtained construction contracts reserved for 8(a) businesses. R&W had graduated from the 8(a) program, then stood up a new joint venture and, upon award of a new contract, stepped forward and managed the contracts using its own employees to perform nearly all the work in violation of 8(a) rules.

The International Rescue Committee (IRC) Agrees to Pay \$6.9 Million To Settle Allegations That It Performed Procurement Fraud by Engaging in Collusive Behavior and Misconduct on Programs Funded by the United States Agency for International Development, USAO-DC, Department of Justice

International Rescue Committee agreed to pay \$6.9 million to settle False Claims Act allegations related to USAID funds for humanitarian assistance for displaced persons in Syria. The allegations involved collusion and kickbacks for goods purchased by USAID funds.

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Government Contractor Litigation and Compliance

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