

Government Contracts Legal Round-Up | 2021 Issue 6

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.

Regulatory Update

1. Class Deviation 2021-00003: DFARS 252.239-7098 Prohibition on Contracting to Maintain or Establish a Computer Network Unless Such Network is Designed to Block Access to Certain Websites – Representation (Apr. 2, 2021)

- This Class Deviation sets out a new representation for contracts to maintain or establish a computer network that are funded under the Consolidated Appropriations Act, 2021 (Pub. L. 116-260) (the Act), or extensions to the Act.
- For covered solicitations, by submission of an offer, the offeror represents “that it is not providing as part of its offer a proposal to maintain or establish a computer network unless such network is designed to block access to pornography websites.”
- Contracting officers will include the provision at 252.239-7098, in all solicitations, including solicitations for the acquisition of commercial items under FAR part 12.
- Funding under the Act may be still used by law enforcement to carry out activities related to criminal investigations, national defense, and intelligence.

Contractors anticipating submitting proposals that include maintaining or establishing a computer network will want to ensure compliance with this new “porn blocking” representation and evaluate any needed changes to supply chain representations.

2. Implementation of the Government Furnished Property Module (Mar. 24, 2021)

- As of January 2021, and in accordance with DFARS subpart 245.102(5), contractors are required to report the loss of Government property in the GFP Module in lieu of the Defense Contract Management Agency (DCMA) Property Loss eTool.

- Training resources on how to use the GFP Module are available at the DoD Procurement Toolbox and live webinars are posted here.

Contractors should note increased oversight of Government property. DoD describes its GFP Module as “an important step” in addressing “DoD’s material weakness in better accounting for Government Property” in contractors’ possession. The tool supports DoD’s strategic plan for defense-wide procurement financial and audit improvements. Documentation and data for completed loss cases in the GFP Module will be saved, allowing greater insight into loss patterns.

3. Securing the Information and Communications Technology and Services Supply Chain: Licensing Procedures (Mar. 29, 2021)

- On January 19, 2021, the Department of Commerce (the Department) published an interim final rulemaking, “Securing the Information and Communications Technology and Services Supply Chain,” which became effective on March 22, 2021.
- This rule allows the Secretary of Commerce, in accordance with Executive Order 13873, to prohibit certain information and communications technology and services transactions (ICTS Transactions) to address national security threats.
- ICTS Transactions include provision of services. The term includes all transactions that occurred on or after January 19, 2021, by any person owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary. Providing services, such as software updates, to US persons may provide a foreign adversary an opportunity to engage in activities that may threaten US national security.
- In its January 19 notice, the Department stated it would implement a licensing process by May 19th for entities seeking pre-approval before engaging in or continuing to engage in ICTS Transactions.
- Because additional public input is needed and the Department no longer expects to meet its May 19 deadline, the Department seeks public input through April 28, 2021, on such a licensing or other preclearance process.

In this Advanced Notice of Proposed Rulemaking, the Department of Commerce seeks public input by April 28, 2021 on all aspects of a future ICTS licensing process, including potential models for creating a process that would provide entities seeking to engage in an ICTS Transaction greater certainty that the transaction will not be prohibited.

Protest Cases

1. TekSynap Corp., B-419464; B-419464.2 (Mar. 19, 2021)

- GAO sustained a protest challenging the National Geospatial-Intelligence Agency’s (NGA) evaluation of proposals and decision not to hold discussions.
- Specifically, GAO found the agency unreasonably assigned only a “slight weakness” to the awardee despite one of its key personnel failing to meet a mandatory qualification. In a cascading effect, this meant the management plan subfactor rating of “outstanding” was unreasonable, and the overall “outstanding” rating for the technical/management factor was unreasonable.
- GAO also held that the assignment of a “moderate strength” rather than a “significant strength” to the protester’s proposal was unreasonable when the evaluators positively described numerous merits of the proposal in detail and used language associated with a significant strength.
- Based upon these errors, GAO concluded that NGA’s decision not to enter into discussions with TekSynap—because the agency had determined the awardee’s proposal was technically superior—was necessarily unreasonable.

2. IAP World Services, Inc., B-418566.2 et al., Aug. 20, 2020 (published Mar. 24, 2021)

- GAO denied a protest alleging that awardee Vectrus-J&J Facilities Support, LLC (VJFS) materially misrepresented its management structure by failing to disclose an imminent sale. One of VJFS’s joint venture members (J&J Maintenance) was subject to a stock purchase several weeks after it was awarded the contract.
- As a general matter, an offeror’s material misrepresentation in its proposal can invalidate an agency’s evaluation, and serve as a basis to cancel any contract award.
- Here, GAO agreed with the contracting agency (the Navy) that even if there had been a misrepresentation, it did not invalidate the agency’s evaluation. While the Navy cited VJFS’s experience and past performance in its best value determination, the stock purchase did not impact VJFS’s stated experience or past performance as J&J’s operations, management team, and resources remained the same.
- Notably, GAO also explained that even assuming that VJFS had a duty to notify the agency about the potential future stock transaction and failed to do so, the protester was not prejudiced by any failure to notify.

Where an offeror’s proposal represents that it will perform a contract in a manner materially different from the offeror’s actual intent, an award based on such proposal cannot stand, since both the offeror’s representations, and the agency’s reliance on such, have an adverse impact on the integrity of the procurement process. But GAO will not sustain a protest alleging a misrepresentation unless the protester can demonstrate competitive prejudice from the awardee’s failure to notify the contracting agency of any changes to its proposal.

Claims Cases

1. *Appeal of L3 Technologies, Inc., ASBCA Nos. 61811, 61813, 61814 (Mar. 1, 2021)*

- L3 appealed multiple contracting officer's final decisions (COFDs) disallowing costs, including for "other direct costs" and overhead expenses.
- The COFDs were based on DCAA incurred cost audits for 2011-2014, which employed cost sampling and then extrapolated the questioned cost amounts across the entirety of the sample pool.
- During discovery, the contracting officer withdrew the COFDs, stating that the government would no longer challenge the costs. The government moved to dismiss the appeals.
- L3 sought to continue the appeals over the government motion to dismiss, desiring a decision on the merits. L3 argued that the government had engaged in a pattern of asserting and then withdrawing such incurred cost disallowance claims.
- The board dismissed the claims, holding that they were moot and not subject to any exception to the mootness doctrine.
- Judge Clarke dissented, noting that "The majority decision subjects L3 (and other contractors) to the unfortunate chain of events discussed below until DCAA and DCMA resolve whatever their differences are."

The painful pattern seen here is familiar to many government contractors: delayed DCAA audits result in rushed COFDs to avoid the statute of limitations. Contractors must then defend against a government claim, often seeking millions of dollars in previously paid amounts. Unfortunately, this decision gives contractor's little hope of relief and highlights the need to pay close attention to all DCAA audits and disallowances.

2. *Appeal of SRA International, Inc., CBCA Nos. 6563, 6564 (Mar. 19, 2021)*

- SRA appealed COFDs disallowing \$29 million in costs on two State Department contracts following DCAA incurred costs audits.
- After a structured negotiation process, SRA secured a complete withdrawal of the COFDs and dismissal of the government claims with prejudice.

Continuing the theme of government cost disallowance claims, this case demonstrates the benefit of engaging experienced outside counsel to assist in dealing with DCAA audits, disallowances, and any resulting COFDs or government claims.

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Related Capabilities

Government Contractor Litigation and Compliance

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