

Government Contracts Legal Round-Up | 2021 Issue 7

Publications

April 20, 2021

By: Matthew L. Haws, Noah B. Bleicher, Aime J. Joo, Sati Harutyunyan, Moshe B. Broder, Marc A. Van Allen, David Robbins

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. Notice of Request for Comments on Executive Order "America's Supply Chains," (April 13, 2021)

- On February 24, 2021, President Biden issued Executive Order 14017, "America's Supply Chains," which directs several federal agency actions to secure and strengthen America's supply chains.
- Under that Order, within 100 days, the Secretary of Defense must identify risks in the supply chain for strategic and critical materials and develop policy recommendations to address these risks.
- DoD is seeking input by April 28, 2021 from both consumers and producers of strategic and critical materials on fifteen separate topics, including transparency, diversification, reclamation, global fair trade, environmental sustainability, workforce issues, and the full spectrum of risk to supply disruption.

Protest Cases

1. *APR Staffing, B-419667* (March 30, 2021) (publicly released April 6)

- GAO dismissed as a matter of contract administration a protest alleging errors in the agency's evaluation of the protester's prior performance under a blanket purchase agreement (BPA), on which the agency relied in deciding not to exercise options under the BPA.
- GAO rejected the protester's view that the agency's evaluation of vendors' performance constituted a "procurement process" that rendered those actions subject to GAO's bid protest

jurisdiction.

As a general rule, option provisions in a contract are exercisable at the discretion of the government. GAO will not question an agency's exercise of an option under an existing contract unless the protester shows that the agency failed to follow applicable regulations or that the determination to exercise the option, rather than conduct a new procurement, was unreasonable.

2. *SAGAM Securite Senegal*, B-418583.2 (March 22, 2021) (publicly released April 7)

- GAO dismissed as untimely a protest objecting to the agency's cancellation of a solicitation where the protest was filed more than 10 calendar days after receipt of the agency's email notice of cancellation.
- The protester maintained that its director first received the contracting officer's email within 10 days of filing its protest, because the individual was on leave when the email notifying the company of the cancellation was sent, and the director was unable to access emails without physically going into the company's office.
- GAO disagree that the company did not have constructive or actual knowledge of the notice of cancellation until the director accessed his email account 10 days prior to filing its protest. The fact that the director did not access his email because he was on leave did not toll the filing deadline imposed by GAO's regulations.

For the purposes of GAO's timeliness rules, the mechanical receipt of the email during a firm's regular business hours constitutes notice to a party. The filing deadline imposed by GAO's regulations is not tolled where the recipient's email system generated an automatic response indicating that the recipient was on leave, and the agency was not required to respond or otherwise take action in response to receiving the out-of-office email notice.

3. *Zolon Tech, Inc.*, B-419280.4 (March 18, 2021) (publicly released April 7)

- GAO denied a protest alleging that a Library of Congress (LOC) procurement for agile development and system integration services was tainted by an unmitigated unequal access to information organizational conflict of interest (OCI).
- The protester asserted that the awardee had an OCI by virtue of the company's access to sensitive procurement-related information, including non-public information, based on the awardee's level of access to two LOC systems and its president's placement in the Office of the Chief Information Officer.
- LOC explained that it conducted a thorough investigation of the allegations and found that no OCI existed. The agency pointed out that information in these two project management systems was available to both the protester and the awardee as incumbent contractors, and that the allegations

did not show how information in these two systems gave the awardee any specific or unfair advantage regarding this procurement. LOC also confirmed that the two project management systems referenced by the protester do not contain proprietary or source-selection information, and the awardee's president did not have access to sensitive procurement-related information either.

An unequal access to information OCI exists where a firm has access to non-public information as part of its performance of a government contract, and where that information may provide the firm with an unfair competitive advantage in a later competition for a government contract. GAO reviews the reasonableness of a contracting officer's OCI investigation and, where an agency has given meaningful consideration to whether an OCI exists, GAO will not substitute its judgment for the agency's, absent clear evidence that the agency's conclusion was unreasonable.

Claims Cases

1. *Appeal of Carothers Construction, ASBCA No. 62204 (February 11, 2021)*

- Carothers won a contract to build an elementary school at Maxwell Air Force Base in Alabama.
- Carothers identified that the 2 ½ inch roofing system in the contract was available from only one manufacturer. Carothers identified an alternative 2-inch system that it believed was equivalent.
- Carothers made five different submissions regarding the equivalence of the 2-inch system, but the government failed to engage in a substantive consideration and repeatedly denied Carother's requests to use the alternative.
- Carothers ultimately installed the 2 ½ inch system and submitted a claim for the difference in cost. Carothers asserted that FAR 52.236-5, Material and Workmanship entitled it to use the 2 inch system because it was equal in all important performance requirements.
- The board sustained the appeal, finding that an item with only one source is, by definition, proprietary and that Carothers had proven the elements for a clam under FAR 52.236-5. The court held that the "general rule of strict compliance with the contract specifications does not apply simultaneously with the Material and Workmanship clause—it is one or the other."

The government is required to meaningfully engage with contractors on contract interpretation issues like those found in FAR 52.236-5. Contractors can take heart in this decision: understanding and diligently pursuing your rights under the contract pays off.

2. *Appeal of SRM Group, CBCA Nos. 5194, 5938 (March 11, 2021)*

- SRM held a Department of Homeland Security contract for housing maintenance services at the Federal Law Enforcement Training Center in Georgia.

- The government deleted two buildings from the contract scope and later sought to add them back. The parties couldn't agree on the price for that addition, and SRM brought a claim for its asserted amount.
- In support of its claim, SRM engaged multiple lawyers and cost consultants, ultimately submitting five different expert reports from two different experts, each finding a different amount of claimed costs. At trial, SRM did not provide any explanation regarding the different amounts.
- The board denied SRM's appeal, finding that it had failed to adequately support its quantum.

This case demonstrates the benefit of engaging experienced, detailed-oriented outside counsel to assist in developing and litigating claims. While damages need not be proven exactly, self-contradiction, imprecision, and errors can sink a claim.

Investigations and Enforcement

In *U.S. ex rel. Felten v. William Beaumont Hospital*, the Sixth Circuit construed Section 3730(h) anti-retaliation provisions of the False Claims Act to apply after a purported whistleblower's employment ends. While not all circuits have the same standard, False Claims Act defendants should be aware of this ruling and consider providing instruction not only to avoid retaliating against a whistleblower employee, but to avoid retaliating (including, but not limited to, impacting reputation so as to preclude future employment) against a whistleblower *former* employee as well.

Related Attorneys

Matthew L. Haws

Partner
mhaws@jenner.com
+1 202 639 6065

Noah B. Bleicher

Partner
nbleicher@jenner.com
+1 202 639 6063

Aime J. Joo

Associate
ajoo@jenner.com
+1 202 639 6010

Sati Harutyunyan

Partner
sharutyunyan@jenner.com
+1 213 239 2229

Moshe B. Broder

Partner
mbroder@jenner.com
+1 202 637 6334

Marc A. Van Allen

Partner
mvanallen@jenner.com
+1 202 639 6005

David Robbins

Partner
drobbins@jenner.com
+1 202 639 6040

Related Capabilities

Government Contractor Litigation and Compliance

© 2026 Jenner & Block LLP. Attorney Advertising. Jenner & Block LLP is an Illinois Limited Liability Partnership including professional corporations. This publication, presentation, or event is not intended to provide legal advice but to provide information on legal matters and/or firm news of interest to our clients and colleagues. Readers or attendees should seek specific legal advice before taking any action with respect to matters mentioned in this publication or at this event. The attorney responsible for this communication is Brent E. Kidwell, Jenner & Block LLP, 353 N. Clark Street, Chicago, IL 60654-3456. Prior results do not guarantee a similar outcome. Jenner & Block London LLP, an affiliate of Jenner & Block LLP, is a limited liability partnership established under the laws of the State of Delaware, USA and is authorised and regulated by the Solicitors Regulation Authority with SRA number 615729. Information regarding the data we collect and the rights you have over your data can be found in our Privacy Notice. For further inquiries, please contact dataprotection@jenner.com.

Stay Informed

