

# Government Contracts Legal Round-Up | 2021 Issue 8

## 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 offers brief summaries of key developments for government contracts legal, compliance, contracting, and business executives. Please contact any of the professionals at the bottom of the update for further information on any of these topics.

## Executive Orders

### 1. Executive Order on Increasing the Minimum Wage for Federal Contractors (Apr. 27, 2021)

- President Biden is raising the minimum wage for workers under federal government contracts to \$15.
- Contractors should expect to see a \$15 minimum wage in new contract solicitations and option modifications beginning on January 30, 2022.
- The minimum wage will be adjusted automatically to reflect changes in the cost of living every year after 2022.
- The order phases out the lower "tipped minimum wage" for federal contractors by 2024, meaning tipped employees working on federal contracts must be paid the same minimum wage as other government contract employees.
- The order includes federal contract workers with disabilities and outfitters/guides operating on federal lands.
- The executive order directs the Department of Labor to issue regulations by November 24, 2021 to implement the requirements of the order. Within 60 days of the Labor Secretary issuing such regulations, the FAR Council shall amend the FAR to provide for inclusion in Federal procurement solicitations, contracts, and contract-like instruments entered into on or after January 30, 2022, consistent with the effective date of such agency action.

- Agencies are “strongly encouraged” to implement the \$15 minimum wage in contracts issued before the effective dates in the executive order.

As always, contractors should pay careful attention to the specific wage and hour requirements in their solicitations and contracts.

## Protest Cases

### **1. *AECOM Management Services, Inc.*, B-418828.4; B-418828.5; B-418828.6, Mar. 17, 2021 (published Apr. 30)**

- GAO sustained a protest where the awardee was provided with a significantly greater opportunity to enhance its proposal during FAR part 16 interchanges.
- Specifically, the awardee was provided the opportunity to make significant revisions to its proposal, including to its small business utilization and program execution volumes and to its price volume by adding in missing pricing information, resulting in a price increase of approximately \$20 million. In contrast, the protester was never advised of a “confidence decreaser” in its program execution approach or provided any opportunity to revise its proposal—and this “confidence decreaser” was a key factor in the award decision.
- Even though the solicitation stated that discussions would not be conducted pursuant to FAR part 15, it also stated that offerors would be treated fairly. GAO disagreed with the agency’s conclusion that engaging in interchanges with at least two offerors, but permitting only one offeror to meaningfully revise its proposal, provided a fair exchange.

While FAR part 16 permits more streamlined procurement processes than part 15, agencies cannot disregard fundamental fairness when conducting interchanges/exchanges/discussions with offerors. When an agency conducts interchanges but a debriefing identifies a weakness that was never raised, this is a ripe area for protest.

### **2. *Deloitte Consulting, LLP*, B-419508; B-419508.2, Apr. 15, 2021 (published Apr. 27)**

- GAO sustained a protest challenging the award of a federal supply schedule (FSS) task order where the awardee’s quotation represented that the company would provide services exceeding the scope of the underlying FSS contract.
- The RFQ sought specific knowledge and expertise to address cybersecurity and privacy-related threats to the agency’s IT systems, and required that specific services be performed to address such threats. The awardee’s quotation represented that particular labor categories would provide these skills, yet the identified FSS labor categories gave no indication of any such expertise.
- The agency argued that the FSS labor categories at issue “are intended to cover a large variety of potential requirements” and “broad functional responsibilities,” and therefore the specific

services should be considered within the scope of the awardee's FSS labor categories.

- GAO disagreed, finding such a broad reading of the labor categories neither reasonable nor permissible.

When preparing quotations in an FSS competition, make sure that your proposed services are within the scope of your existing FSS contract labor category descriptions. And, if you lose out in such a procurement, evaluate whether there is an angle to challenge the awardee on this basis.

## Claims Cases

### **1. *Appeal of Northrop Grumman Corporation, ASBCA No. 62189 (Apr. 14, 2021)***

- Northrop settled a shareholder's class action lawsuit related to its acquisition of Orbital ATK. Northrop then sent a letter to its DCMA corporate administrative contracting officer stating that it believed the costs were allowable costs related to legal proceedings and that it planned to include them in its forward pricing rates and incurred costs submissions.
- The CACO responded stating that the costs were unallowable corporate organization costs and should be excluded. The CACO letter did not advise that it was a contracting officer's final decision, nor did it include the FAR's statement of appeal rights.
- Northrop appealed the CACO letter to the Armed Services Board of Contract Appeals, asserting it was a government claim related to these costs. The government moved to dismiss for failure to state a claim.
- The ASBCA dismissed the appeal, finding that the CACO letter was not a COFD, which is required for a government claim. "The government's June 20, 2019 letter was not a "demand" or "assertion" seeking either the payment of money the government alleged it was due, the interpretation of contract terms, or other relief arising under the contract as required by FAR 2.101."

While certainly possible, it can be tricky to get resolution of cost issues or contract interpretation questions in advance of a monetary dispute. This case highlights the need for clear strategy and communications when attempting to do so.

### **2. *Appeal of Sungjee Construction Co., ASBCA Nos. 62002, 62170 (Mar. 24, 2021)***

- Sungjee appealed a termination of its contract for default, asserting that the Army failed to issue base passes necessary to perform building repair work. In discovery, Sungjee sought documents from the Army regarding the base passes, but the Army had destroyed them under its standard record retention policy.

- Sungjee sought sanctions for spoliation of evidence, including an adverse inference related to base access it was provided.
- The ASBCA denied Sungjee’s motion, finding that the Army had neither violated a requirement to retain these records, nor destroyed them after being made aware litigation was reasonably foreseeable.
- The ASBCA also noted that the adverse inference sought by Sungjee would be dispositive and, thus, requires a showing of bad faith and prejudice, which was not demonstrated. “In short, we cannot find that the government’s routine document destruction, as opposed to Sungjee’s apparent failure to create and keep contemporaneous records, is the cause of any difficulty Sungjee may be experiencing in meeting its burden of proof.”

This case demonstrates the importance of engaging early and comprehensively when projects are delayed: documenting the causes of delay, communicating with the government regarding any excusable delay, rebutting any default termination, and notifying the government when litigation is reasonably foreseeable. Doing so will allow a contractor to meet its burden of proof based on its own evidence and ensure government evidence is properly preserved.

## Investigations and Enforcement

In *U.S. ex rel. Rickey Howard v. Caddell Constr. Co., et al.*, the District Court for the Eastern District of California granted summary judgement in favor of the construction company defendants. The relator had argued that the construction company defendants knew their subcontractors were pass-through, or sham entities, and therefore violated the False Claims Act. Among other things, the court held that semi-annual small business subcontracting plan and bi-annual reports were not material to payment, and that defendants had disclosed enough detail about the subcontract relationships to put the government on notice about them. Small business subcontracting is a persistent source of False Claims Act risk. This case is helpful to demonstrate when small business subcontracting is not material and therefore less of a risk.

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**Related Capabilities**

Government Contractor Litigation and Compliance

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