

Government Contracts Legal Round-Up | 2021 Issue 9

Publications

May 18, 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 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 Improving the Nation's Cybersecurity (May 12, 2021)

- Described as “the first of many ambitious steps the Administration is taking to modernize national cyber defenses,” this significant order emphasizes that federal action alone is not enough and the private sector (especially critical infrastructure) should augment and align cybersecurity investments to minimize future incidents.
- The scope of order includes systems that process data (information technology) and those that run machinery (operational technology).
- Contractors should expect a number of proposed regulatory changes by the fall of 2021 that will:
 - Remove barriers to threat information sharing between the government and the private sector;
 - Modernize and strengthen cybersecurity standards in the federal government, including by adopting security best practices and advancing toward a zero trust architecture;
 - Establish a Cybersecurity Safety Review Board and create a standard playbook for responding to cyber incidents;
 - Improve detection of cyber incidents on federal government networks by establishing endpoint detection and response deployment; and
 - Improve investigation and remediation capabilities.

Regulatory Developments

1. Withdrawal of Independent Contract Status Under the Fair Labor Standards Act (FLSA), Final Rule, Wage and Hour Division, Department of Labor (May 6, 2021)

- The Department of Labor has withdrawn the Independent Contractor Rule finalized under the prior administration on January 7, 2021, which would have provided a new interpretation of employee or independent contractor status under the Fair Labor Standards Act.
- After delaying the effective date of the final rule and seeking additional comments, the Department of Labor has concluded that the Independent Contractor Rule is not fully aligned with the FLSA's text or purpose, or with prior case law applying the multifactor economic realities test.

2. Placing Rated Orders Under the Defense Priorities and Allocations System for Novel Coronavirus Disease 2019 (COVID-19), General Services Administration (May 7, 2021)

- This policy provides guidance for placing DPAS rated orders to purchase cleaning supplies, IT equipment for telework, and IT equipment for healthcare.
- The delegation of authority to place DO rated orders in support of GSA's COVID-19 response and recovery activities extends through March 31, 2022, or until the Presidential Emergency Declaration is rescinded.

Protest Cases

1. *M R Pittman Group, LLC, B-419569 (May 5, 2021)*

- GAO dismissed a protest as untimely where the protester waited until after its bid was rejected to challenge a patent ambiguity in the solicitation.
- The Army Corps of Engineers issued an invitation for bids (IFB) that included standard FAR clauses indicating the procurement was being set aside for small businesses, but the IFB did not include other regulatory requirements for set asides, such as the NAICS code or size standard.
- The Army rejected the protester's low bid because the company was other than small, and the company protested.

The protest decision is a stark reminder that a company that competes under an ambiguous solicitation cannot wait until after the company is not selected for award to challenge the ambiguous solicitation terms. As GAO has explained, a patent solicitation ambiguity exists where the solicitation contains an obvious, gross, or glaring error, and an offeror has an affirmative obligation to seek clarification of a patent ambiguity prior to the due date for bids. When a patent ambiguity exists but is not challenged prior to the bid submission deadline, GAO will not consider subsequent untimely arguments asserting the protester's own interpretation of the ambiguous provision.

2. Tridentis, LLC, B-418690.4 (Jan. 5, 2021) (publicly released May 11)

- GAO found unobjectionable the Department of the Navy’s decision to reject a proposal as technically unacceptable where the protester failed to establish that it possessed a facility security clearance on the due date for receipt of proposals, as required by the solicitation.
- The Navy initially evaluated the facility identified in the protester’s proposal as meeting the solicitation requirements, but following corrective action related to other allegations, the agency re-reviewed these aspects and found that the facility identified was not cleared to safeguard secret information after all.
- GAO agreed with the Navy that an offeror’s showing that it met the facility clearance requirement at the time of proposal submission was a material term of the solicitation, and one of technical acceptability, not responsibility.
- GAO then found that the agency’s conclusion that Tridentis failed to clearly demonstrate that it met the facility clearance requirement at the time of proposal submission was reasonable. While its proposal contained the address of its teaming partner’s Virginia Beach facility—which did possess the required facility clearance—the proposal did not explain that the facility belonged to another firm, or that Tridentis would be relying on that firm’s facility to meet the clearance requirement.

This decision serves as a warning that offerors must clearly explain how they intend to meet mandatory solicitation requirements, as the failure to do so may result in disqualification from competition. It is also important to remember that agencies are free to newly disqualify an offeror when reevaluating proposals following corrective action reevaluation, and GAO will not disturb the revised result if otherwise reasonable.

3. Verizon Business Network Services, Inc., B-419271.5, B-419271.6, B-419271.8 (Apr. 26, 2021) (publicly released May 11)

- GAO dismissed a protest ground where the protester knew, or should have known, the basis of protest back when filed its pre-corrective action protest.
- The Department of Homeland Security awarded AT&T a task order off the Enterprise Infrastructure Solutions (EIS) GWAC. In its first protest, Verizon argued that AT&T was ineligible for award because of the company’s alleged failure to have all required services on its EIS contract. The agency took corrective action.
- After the order was re-awarded to AT&T, Verizon protested again, this time arguing that AT&T was ineligible because of alleged lack of SD-WAN service on its EITS contract, which had not been mentioned in the initial protest. Verizon used the same information database (the EIS Public Pricer tool) as evidence.

- GAO concluded that this argument was untimely because the information underpinning the current protest ground was available to the protester as part of its earlier protest. Likewise, the fact that the information regarding AT&T’s alleged lack of SD-WAN services came from a different webpage (within the same EIS Public Pricer tool) did not negate the fact that the information was just as available to Verizon before as it was when it filed the instant protest.

When filing a protest, it is imperative to raise all arguments known at the time—including those based upon publicly available information. GAO will readily dismiss protest grounds that were known before the filing of either a supplemental protest or a protest following corrective action.

Claims Cases

1. *Pacific Coast Community Services, Inc. v. U.S.*, No. 1:19-cv-01187 (April 30, 2021)

- Pacific Coast received a firm-fixed-price contract for administrative services with the Federal Protective Services. The contract included a provision stating that invoices must reflect the services provided each month and identified a monthly contractual hour amount of 1,888.
- FPS began making unilateral deductions from invoices because it did not believe Pacific Coast personnel had worked the stated number of hours. Pacific Coast sued for underpayment, alleging breach of contract.
- Pacific Coast alleged that the firm-fixed-price nature of the contract did not require adjustment for actual hours worked. Specifically, it alleged that such an interpretation would convert the contract to a firm-fixed-price, level-of-effort contract under FAR 16.207-1.
- The Federal Circuit agreed with the lower court that “because productive hours were a specific deliverable,” the government was entitled to deduct payment for hours not actually provided.

Fixed-price contracts with a labor hour component frequently give rise to disputes: the contractor may be able to fully perform the support function with fewer hours and the fixed-price nature of the contract might lead it to believe it is entitled to benefit from its efficiency. But, even where the government has no complaints about the services provided, it may attempt to claw back money based on failure to fully provide the stated hours. This decision extends that problem from FFP-LOE contracts to other labor-hour based fixed-price contracts.

2. ***Appeal of Glen/Mar Construction, Inc.*, CBCA No. 6904 (Apr. 2, 2021)**

- Glen/Mar received a contract with the Department of Veterans Affairs to remedy seismic deficiencies in buildings at a VA clinic in Oregon. During performance, a dispute arose regarding who was responsible for relocating an internet fiber service line.
- Eventually the VA accepted responsibility and entered into negotiations regarding contract adjustment for this work. During the negotiations, the parties discussed both increased costs and

schedule adjustment, but the VA asked Glen/Mar to remove the schedule portion from its request for equitable adjustment.

- The parties executed a contract modification that include zero days of schedule adjustment and contained a broad release.
- Glen/Mar asserted that the parties agreed to resolve the schedule adjustment issues separately and it submitted a claim for costs related to the delay. The VA asserted that the broad release in the contract modification prevented any further recovery.
- The Civilian Board of Contract Appeals concluded that the release language was clear in resolving all issues related to the dispute and denied Glen/Mar's attempt to introduce extrinsic evidence regarding agreement to resolve schedule issues separately.

This case is a reminder of the importance of reserving rights to additional adjustment in any release that the contractor believes does not fully resolve the contractor's claim. There are a variety of reasons the government may seek to have the contractor remove a portion of its claim during negotiations, but unless those removed elements are reserved in the resulting modification, they could be waived.

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

