

Government Contracts Legal Round-Up | 2021 Issue 10

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.

Regulatory Update

1. Class Deviation 2021-00005: Revision to Requirement to Use Firm-Fixed-Price Contracts for Foreign Military Sales (May 26, 2021)

- Effective May 26, contracting officers are not required to use firm-fixed-price contracts for foreign military sales as directed at Defense Federal Acquisition Regulation Supplement (DFARS) 225.7301-1(a). The waiver at DFARS 225.7301-1(b) is no longer required.

2. DFARS Case 2018-D055: Past Performance of Subcontractors and Joint Venture Partners, Proposed Rule (May 20, 2021)

- This proposed rule adds one new solicitation provision and two new contract clauses, DFAR 252.242-70YY, past Performance of Joint Venture Partners – Construction and Architect Engineer Services; and 252.242-70ZZ, Past Performance of Subcontractors – Construction and Architect-Engineer Services to implement section 823 of the FY 2019 National Defense Authorization Act (NDAA).
- Section 823 requires performance evaluations in accordance with specified conditions for individual partners of joint ventures awarded construction or architect-engineer (A&E) services contracts exceeding the threshold set forth in FAR 42.1502(e) (currently \$750,000), and for first-tier subcontractors performing a portion of a construction or A&E services contract with an estimated value as set forth in FAR 42.1502(e) or 20 percent of the value of the prime contract, whichever is higher.

- An exception may be granted when submission of annual past performance evaluations would not provide the best representation of the contractor’s performance, including subcontractors and joint venture partners.

3. DFARS Case 2018-D009: Postaward Debriefings, Proposed Rule (May 20, 2021)

- DoD is proposing to amend the DFARS to implement a section of the FY 2018 NDAA that provides enhanced postaward debriefing rights under negotiated contracts, task orders, and delivery orders that exceed \$10 million.
- The new procedures will provide offerors the opportunity, upon receiving a postaward debrief, to submit follow-up questions related to the debriefing and to receive agency responses, and sets out new timeframes for the suspension of performance or termination of a contract, task order, or delivery order awarded, upon notification from the GAO of a protest filed.
- For a more detailed description of the proposed rule, see our client alert.

Protest Cases

1. *DigiFlight, Inc.*, B-419590, B-419590.2 (May 24, 2021)

- GAO sustained a protest where the Department of the Army disparately evaluated quotations for programmatic support of the agency’s Program Executive Office Aviation Headquarters.
- The Army assigned the awardee’s quotation a strength based on the company’s approach to employee retention, but a similar strength was not assigned to the protester’s quotation.
- GAO found no merit to the Army’s position that the two offerors proposed materially different approaches to employee retention. Indeed, GAO’s review of the record confirmed the two approaches were substantially the same.
- For example, GAO rejected the Army’s argument that the approaches were different because the protester did not use the phrase “tuition reimbursement”—which was used by the awardee—but instead referred to reimbursement for “academic degrees.” The record also was devoid of any explanation of why the evaluators considered noteworthy the awardee’s retention rate of 95 percent, but did not similarly consider significant the protester’s higher retention rate of 96 percent.

It is a fundamental principle of federal procurement law that a contracting agency must treat all vendors equally and evaluate their quotations evenhandedly against the solicitation’s requirements and evaluation criteria. GAO will sustain a protest where a protester shows that the agency unreasonably failed to assess strengths for aspects of its quotation that were substantively indistinguishable from, or nearly identical to, those contained in other quotations.

2. PAE National Security Solutions, LLC, B-419207.2, B-419207.3, B-419207.4 (May 19, 2021)

- GAO sustained a protest where the Federal Bureau of Investigation improperly applied unstated evaluation considerations in evaluating quotations for administrative and analysis support services for the agency's National Name Check Program.
- First, GAO found that the agency improperly gave evaluation credit to the awardee for having previously performed a contract implementing a "continuous vetting" (CV) program, as opposed to the discrete work item investigations contemplated under the RFQ. The relevant evaluation subfactor made no mention of experience performing CV-related services, nor was this term mentioned anywhere in the RFQ. As such, GAO found it unreasonable to use CV-related attributes of the awardee's quotation as a discriminator in the competition.
- Next, GAO found it unreasonable that the agency gave the awardee evaluation credit for having key personnel who previously transitioned FBI contracts where the key personnel subfactor made no explicit mention of such experience. GAO concluded that applying strengths on this basis was the application of an unstated evaluation criterion.

Agencies are required to evaluate proposals based solely on the factors identified in the solicitation unless there is a clear nexus between the stated criteria and unstated considerations. If a debriefing identifies that the awardee's strengths, or your weaknesses, were based upon considerations not expressly identified in the solicitation without such a clear nexus, this is a fruitful area for protest.

Claims Cases

1. Appeal of Sauer Incorporated, ASBCA No. 62395 (Apr. 16, 2021)

- Sauer received a contract to design and build the headquarters for the 82nd Airborne at Fort Bragg. The contract broke the project into three phases. Sauer completed phases 1 and 2 on time, but was a month late delivering phase 3. The government assessed \$144,000 in liquidated damages. Sauer appealed the liquidated damages, arguing the project was substantially complete.
- The Armed Services Board of Contract Appeals (ASBCA) focused on the fact that the single liquidated damage amount had not been adjusted when the RFP was revised to break the project into phases. Because the LDs were not assigned to specific phases, it distinguished prior cases holding that each phase must be complete for a project to be substantially complete.
- The Board held that phases 1 and 2 were substantially complete and that the LDs must be apportioned for phase 3. The proper measure for such an apportionment was actual loss by the government.

Liquidated damage assessments often fail to account for the complexities of contract performance. It is important to carefully consider your factual and legal defenses in the face of delay and

liquidated damages.

2. Appeal of Force 3, LLC, CBCA No. 6654 (Apr. 14, 2021)

- Force 3 received a contract to provide support for FireEye cybersecurity appliances that were purchased by HHS. In order to provide the support services, Force 3 purchased and delivered to HHS a three-year support contract with FireEye. The Force3/HHS contract stated that, after non-renewal, HHS would certify that it had deleted or disabled the software and was no longer using it.
- After the base year of performance, HHS declined to exercise the option years. HHS failed to provide the certification of deletion and non-use. And because the license delivered by Force3 had a three year term, HHS continued to download updates and contact FireEye for support.
- The Civilian Board of Contract Appeals concluded that, even though HHS did not exercise the option, its continued use of the software (with the contracting officer's knowledge) ratified its commitment to use Force3's support services and made it liable for the license costs.

The government often fails to properly track and manage software use in accordance with its license agreement. While costs incurred in expectation of option exercise are typically not recoverable, this case demonstrates an exception where the government knowingly fails to uninstall and continues to use software contrary to the license terms.

New COVID-19 Fraud Task Force Launched by DoJ

Attorney General Garland announced the formation of a COVID-19 Fraud Enforcement Task Force led by the Deputy Attorney General, and drawing upon resources from across the government. The organizations participating in the Task Force include DoJ, the FBI, Department of Labor, Treasury, DHS, SBA, and the oversight organizations created by the CARES Act (SIGPR and PRAC).

Source press release: Attorney General Announces Task Force to Combat COVID-19 Fraud | OPA | Department of Justice

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Related Capabilities

Government Contractor Litigation and Compliance

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