

Government Contracts Legal Round-Up | 2021 Issue 11

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. FAR Case 2019-007: Update of Historically Underutilized Business Zone Program, Proposed Rule (June 14, 2021)

- This proposed FAR rule removes obsolete text and updates terminology and processes to correspond with SBA changes made back in November 2019 to reflect current policies on HUBZone program regulations found in 13 CFR 126.200 and in the Dynamic Small Business Search (DSBS).
- HUBZone status protests procedures at FAR 19.306 are revised as follows:
 - To specify who may protest the prospective contractor's HUBZone status for HUBZone sole-source awards;
 - To ensure that the Director of SBA's HUBZone program will determine whether a protested concern has certified HUBZone status;
 - To remove the concern's HUBZone status in DSBS if SBA upholds the protest; and
 - To add references and procedures for filing protests against a HUBZone joint venture.

2. OMB Memorandum M-21-26: Increasing Opportunities for Domestic Sourcing and Reducing the Need for Waivers from Made in America Laws (June 14, 2021)

- This memorandum provides initial guidance to covered agencies regarding how a new "Made in America Office" (MIAO), will provide greater oversight of waivers from "Made in America Laws," to

increase consistency and public transparency of such waivers.

- President Biden mandated the creation of the MIAO in Executive Order 14005, Ensuring the Future is Made in All of America by All of America's Workers, issued January 25, 2021.
- In a phased implementation approach, the MIAO aims to increase reliance on domestic supply chains and reduce the need for waivers through a strategic process aimed at:
 - Achieving consistency across agencies;
 - Gathering data to support decision-making to make US supply chains more resilient;
 - Bringing increased transparency to waivers in order to send clear demand signals to domestic producers; and
 - Concentrating efforts on changes that will have the greatest impact.

3. OMB Memorandum M-21-25: Integrating Planning for a Safe Increased Return of Federal Employees and Contractors to Physical Workplaces with Post-Reentry Personnel Policies and Work Environment (June 10, 2021)

- This memorandum provides agencies with guidance (and a July 19, 2021 deadline) for planning for an effective, orderly, and safe increased return of Federal employees and contractors to the physical workplace.
- Agency leaders have been instructed to use “values-informed” planning, and to leverage telework, remote work, and flexible work schedules as tools for recruitment and retention, and for advancing diversity, equity, inclusion, and accessibility in the Federal workforce.

Protest Cases

1. *Yang Enterprises, Inc.*, B-418922.4, B-418922.6, May 20, 2021 (published June 4, 2021)

- GAO sustained a protest challenging the Air Force's evaluation of the joint venture (JV) awardee's past performance for the award of a contract for mission and base operations services.
- The solicitation expressly provided that the Air Force would evaluate the past performance of the offeror, major subcontractors, teaming partners, and joint venture partners by “focusing on performance that is relevant to the [t]echnical subfactors and [c]ost/[p]rice factor for those requirements that they are proposed to perform.”
- GAO concluded that the Air Force unreasonably evaluated the awardee's past performance because the agency failed to take into account the work each JV member was proposed to perform on the contract. For instance, the agency credited the awardee's large business JV

member with past performance in areas that it was not proposed to perform on the contract, in violation of the solicitation’s evaluation criteria.

- In sustaining the protest, GAO rejected the Air Force’s argument that SBA regulations required the agency to consider the JV’s past performance in the aggregate, highlighting that the updated regulation cited by the Air Force was not effective until after the solicitation was issued and that it was not retroactive.

For solicitations issued after November 20, 2020, SBA regulations require a procuring activity to consider the work done by each partner to a joint venture, and that an agency cannot “require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally.” 13 C.F.R. § 125.8(e). But for solicitations issued prior to that date, the previous version of the regulations permitted a contracting agency to limit the types of past performance that would be attributed to the joint venture, for instance by requiring the experience to involve the same functional areas that the joint venture partner is proposed to perform on a contract, which was the case here.

2. *Qwest Government Services, Inc. d/b/a CenturyLink QGS, B-419597, B-419597.2, May 24, 2021 (published June 3, 2021)*

- GAO denied a protest alleging that the Department of Homeland Security waived a material requirement for the awardee.
- CenturyLink argued that the agency unreasonably found the awardee’s proposal eligible for award even though the company did not propose to meet the solicitation requirement for full operational capability (FOC) within 18 months of task order issuance.
- DHS’s interpretation of the solicitation was that FOC was met by hitting a certain user capacity, while CenturyLink claimed that FOC was only reached when an offeror will have met all of the RFP’s objective capabilities.
- GAO concluded the record supported that at the time of proposal submission, CenturyLink interpreted the RFP’s requirement for FOC to mean providing the requisite user capacity—the interpretation offered by DHS. Because the solicitation interpretation advanced in CenturyLink’s protest was inconsistent with the interpretation that informed the protester’s proposal, GAO determined that this interpretation was unreasonable.

When challenging a solicitation provision as containing a latent ambiguity, it is critical that the company’s proposal supports the solicitation interpretation being advanced. If not, GAO will use this as evidence that the provision is unambiguous.

Claims Cases

1. *Pernix Serka Joint Venture v. Sec’y of State, Fed. Cir., No. 2020-2153 (June 9, 2021)*

- The US Court of Appeals for the Federal Circuit denied Pernix Serka's effort to revive its claim for more than \$1 million in costs stemming from an Ebola outbreak that caused the company to stop work in Sierra Leone.
- According to the Civilian Board of Contract Appeals' decision, upon the Ebola outbreak, Pernix Serka became concerned about continued performance and sought agency guidance. The State Department refused to direct Pernix Serka to shut down (or otherwise protect employees). Ultimately, the company unilaterally stopped work, evacuated employees, and later filed a claim for safety and health costs arising from differing site conditions and disruption of work.
- The Federal Circuit affirmed the Board's grant of summary judgment to the State Department in April 2020, finding that Pernix Serka bore the risk under the fixed price contract for any costs arising from an unforeseen epidemic.

Contractors operating under a fixed price contract will find it difficult to seek pandemic-related costs that were not ordered or authorized by the government. The excusable delays clause, which grants time but not money for epidemic-related delays, among others, controls in the absence of agency direction that would change the scope of the underlying contract. Although the Federal Circuit expressed some empathy during oral argument for Pernix Serka's position and the lack of State Department direction, the court found insufficient evidence for Pernix Serka's constructive suspension of work argument.

2. Appeal of Ology Bioservices, Inc., ASBCA No. 62633 (May 20, 2021)

- Ology held four cost reimbursement contracts with the government. As part of these contracts it included \$2,730,686 attributable to executive compensation in its final indirect cost rate proposal submitted for 2013.
- Because this amount exceeded the 2013 cap on allowable executive compensation costs, the government denied the unallowable costs and asserted a penalty equal to the amount of unallowable costs, asserting that these were expressly unallowable.
- Before the Armed Services Board of Contract Appeals, the government changed its argument slightly—asserting that the costs were expressly unallowable because they exceeded the 2012 executive compensation cap, which it asserted was still applicable to Ology's 2013 indirect cost rate proposal.
- The ASBCA held that the government could not assess a penalty for expressly unallowable costs by applying the 2012 cap to Ology's 2013 proposal. Congress intended for the government to adjust the cap on an annual basis and the government had unreasonably delayed doing so until after the deadline for contractors to submit their indirect cost rate proposals: "[W]e do not believe that Congress intended OFPP to have unlimited time to update the cap or for the government to apply an outdated cap for years on end."

- The Board concluded that Ology 2013 executive compensation costs “were not expressly unallowable at the time it certified its final indirect cost rate proposal because the FY 2012 cap was no longer applicable.”

The government often fails to meet its statutory deadlines for rulemaking, and this decision holds it accountable for that failure. While contractors must carefully analyze cost allowability rules and limitations, they should also assert their rights in areas of greyneess.

Anti-corruption National Security Memorandum

Source: Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest | The White House

Making anti-corruption a priority, President Biden has ordered more than a dozen federal agencies to collaborate and issue recommendations to elevate federal anti-corruption efforts within 200 days.

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Government Contractor Litigation and Compliance

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