

# Government Contracts Legal Round-Up | 2021 Issue 12

## 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. Department of State Acquisition Regulation; Safety Requirements, Final Rule, Effective June 28, 2021**

- The Department of State has adopted as final an interim rule amending the Department of State Acquisition Regulation (DOSAR) to provide new guidance prescribing more stringent safety requirements for certain overseas construction and services projects.

### **2. DoD Class Deviation 2021-00006: Department of State Rescission of Determination Regarding Sudan, Effective June 24, 2021**

- This class deviation implements the Department of State Public Notice: 11281, Rescission of Determination Regarding Sudan, announcing removal of Sudan from the US list of state sponsors of terrorism, effective December 14, 2020.
- This class deviation is to be used in lieu of the provision at DFARS 252.225-7050, Disclosure of Ownership or Control by the Government of a Country that is a State Sponsor of Terrorism; and the clause at DFARS 252.225-7051, Prohibition on Acquisition of Certain Foreign Commercial Satellite Services.

### **3. DoD Class Deviation 2020-00012, Revision 1, Undefined Contract Actions During the National Emergency for the Coronavirus Disease 2019**

- This class deviation revises and supersedes the class deviation issued on April 3, 2020 regarding the same subject.

- Contracting officers shall follow the policies and procedures in this class deviation in lieu of those at DFARS 217.7404(a) and (a)(1)(i), 217.7404-3(a), and 217.7404-4(a) for undefinitized contract actions (UCAs) related to the national emergency for COVID-19, as determined by the head of the contracting activity (HCA).
- This class deviation eliminates the requirement to limit obligations, after receipt of a qualifying proposal, to 75 percent of the not-to-exceed price before definitization, for ***UCAs related to the national emergency for COVID-19***.
- The HCA may also waive certain limitations for a COVID-19-related UCA, including a conditional waiver of the 80 percent progress-payment limit (10 U.S.C. 2307(e)(2)) for a UCA, if the HCA determines that the waiver is necessary due to the national emergency for COVID-19. The HCA may issue the 80 percent progress-payment limit waiver if:
  - The contractor has not already received increased progress payments from DoD on contractual actions other than UCAs; or
  - The contractor has received increased progress payments from DoD on other than UCA contractual actions, and can demonstrate that it is flowing the amount of the increase to its subcontractors at any tier, its suppliers, or small business concerns (evidence of which the HCA must then provide to the congressional defense committees and DPC).
  - Special certification and a 60-day extended timeline for definitization (post waiver) would apply to UCAs subject to the waiver that have not been definitized for 180 days beginning on the date the UCA was entered into.

## Protest Cases

### **1. *Journey Aviation LLC, B-419368.2; B-419368.3, June 2, 2021 (published June 16)***

- GAO denied a protest alleging that the Federal Bureau of Investigation unreasonably assigned the protester's proposal a deficiency, which resulted in the company being deemed technically unacceptable.
- The statement of work (SOW) required the aircraft delivered under the contract to meet or exceed approximately 35 specifications and technical requirements, one of which was to include a bipolar ionization system to ensure better air quality in the cabin. The protester's proposed aircraft did not contain such a system; moreover, the proposal did not specify that the aircraft would be modified to add one, but rather only included a general reference to meeting the solicitation requirements. The Agency concluded this was a material failure and assigned a red/fail rating.
- Journey argued that the assigned deficiency was unreasonable because its proposal clearly stated that the proposed aircraft would meet all of the requirements specified in the SOW.

- GAO concluded that Journey’s blanket statement of compliance was insufficient to demonstrate the protester’s ability to meet a specific material requirement, and it was therefore reasonable for the Agency to find the protester’s proposal technically unacceptable for failing to meet minimum performance standards.

This decision is an important reminder that clear proposal drafting is critical. GAO consistently finds that blanket statements of intent to meet minimum performance standards are insufficient, and agencies can reasonably conclude that such proposals are technically unacceptable.

## Claims Cases

### **1. *ECC International Constructors, LLC, ASBCA No. 59586 (May 21, 2021)***

- ECC International contracted with the US Army Corps of Engineers to design and construct a military compound in Afghanistan. ECCI submitted a “demand for \$13,519,913.91 for 329 days of alleged government delay in three categories.....” ECCI broke the demand amount into cost elements, such as labor and equipment, but didn’t break it down by individual delay categories or events alleged to have caused the damages.
- USACE moved to dismiss for lack of jurisdiction, arguing that ECCI failed to comply with the CDA requirement to assert a sum certain as part of a claim.
- The Armed Services Board of Contract Appeals agreed with USACE, holding that the requirement to state a sum certain applies to each separate claim, which is not the same as the entire case between the contractor and government. The ASBCA stated that claims are separate if they request different remedies or assert materially different grounds, either factually or legally.

This case highlights the importance of a thorough and granular quantum presentation of claims against the government. Demonstrating the connection between specific government actions and resulting damages is important both in developing a sum certain and, ultimately, proving the case at trial.

### **2. *Appeal of Corinthian-WBCM, ASBCA No. 62379 (May 20, 2021)***

- Corinthian contracted to widen a road at Marine Corps Base Quantico. During performance, it submitted several requests for equitable adjustment based on the Changes and Differing Site Conditions clauses.
- During discovery, the Navy sought Corinthian’s underlying bid data. Corinthian refused to produce it, and the Navy moved to compel production.
- The ASBCA held that the information Corinthian relied on in preparing its proposal was relevant to two of its claims and must be produced. For example, the Board held that Corinthian asserted a differing site condition claim alleging that an existing water line was discovered in a different

location than identified in the Navy's drawings and that Corinthian had relied on those drawings in preparing its bid.

In developing a contract claim quantum, it is important to identify the basis for the calculation and provide sufficient information regarding that basis during litigation.

## **Investigations and Enforcement**

### **1. CH2M Hill Plateau Remediation Company Agrees to Pay More than \$3 Million to Settle Hanford Subcontract Small Business Fraud Allegations, USAO-EDWA, Department of Justice**

DoJ announced a \$3 million settlement with CH2M Hill Plateau Remediation Company following allegations that the company submitted false small business subcontract reports. The key allegation is that the prime contractor knew that two HUBZone subcontractors did not have that status at the time of award.

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**Related Capabilities**

Government Contractor Litigation and Compliance

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