

Government Contracts Legal Round-Up | 2021 Issue 13

Publications

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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.

Regulatory Developments

1. DFARS Case 2018-D063: Data Collection and Inventory for Services Contracts, Final Rule (Effective July 9, 2021)

- This final rule requires all contractors that are awarded a contract or order in excess of \$3 million for services in four service acquisition portfolio groups to report contract data in the System for Award Management (SAM). The four service acquisition portfolio groups include:
 - Logistics management services;
 - Equipment-related services;
 - Knowledge-based services; or
 - Electronics and communications services.
- The contractor is required to report the total amount invoiced for services performed during the preceding fiscal year and the number of direct labor hours, including first-tier subcontractor hours, expended on services performed during the preceding fiscal year.
- The proposed rule instead required contractors to enter data into a DoD-unique system, Enterprise Contractor Manpower Reporting Application (ECMRA), but in response to comments received, DoD has adopted the service contract reporting process in SAM used by other Federal Agencies and no longer requires use of ECMRA.

2. Department of State Acquisition Regulation (DOSAR), Access to Contractor Records, Proposed Rule (Issued July 2, 2021)

- Agencies may evaluate the accuracy, completeness, and currency of certified cost or pricing data required to be submitted with respect to a contract or subcontract, and examine contractor or subcontractor records related to proposals, proposal discussions, and pricing or performance of the contract or subcontract.
- The Department has determined, after a review of existing regulations, that further clarity is required as it relates to contracts other than contracts by negotiation, which are already covered by FAR section 15.209(b).
- Accordingly, the Department has proposed to add section 615.209-70 to the DOSAR, requiring contracting officers to insert a new clause, Examination of Records, in all solicitations and contracts, other than contracts by negotiation.
- Comments on the proposed rule will be accepted until August 31, 2021.

3. GSAR Case 2021-G527: Immediate and Highest Level Owner for High-Security Leased Space, Interim Rule (Effective June 30, 2021)

- GSA has amended the General Services Administration Acquisition Regulation (GSAR) to implement requirements that address the risks of foreign ownership of Government-leased real estate and requires the disclosure of ownership information for high-security space leased by a Federal agency.
- This interim rule applies to new lease awards, the exercise of options for current leases, lease extensions, and ownership changes for high-security leased space on or after June 30, 2021.
- Comments on the interim rule will be accepted until August 30, 2021.

Protest Cases

1. Qwest Government Services, Inc. d/b/a CenturyLink QGS, B-419045.4; B-419045.5; B-419045.6 (June 2, 2021) (Published July 1)

- GAO denied a protest challenging the Department of Education's conduct of discussions, finding that a second round of discussions was not required merely because new issues came to light upon final proposal submission.
- Following corrective action from a prior protest, the agency opened discussions and advised CenturyLink of issues identified with its pricing, including that the price proposal failed to provide a summary of total proposed costs by CLINs, left several items unpriced, and did not include labor rates or volumes for proposed labor. The firm submitted a revised proposal, and upon review the

agency concluded that CenturyLink's proposed price did not reflect a proper understanding of the agency's requirements and was unrealistic.

- CenturyLink alleged that the agency engaged in inaccurate and misleading discussions by advising the protester to revise only its price proposal, but failed to advise the protester of the agency's concerns with CenturyLink's proposed staffing in its technical proposal.
- GAO disagreed, finding that only after reopening discussions and receiving the protester's final proposal did the agency have sufficient information to identify discrepancies between the protester's price and technical proposals—and finding concerns with the protester's revised proposal did not obligate the agency to engage in additional rounds of discussions to address the newly discovered discrepancies. Because the agency reasonably led CenturyLink into the area of its proposal requiring amplification, the agency was not required to conduct additional discussions once it determined that the price proposal, as revised, remained unrealistic.

Agencies are not obligated to hold additional discussions to inform offerors of new issues that emerge based upon final proposal submissions. While companies are often reluctant to revise any areas of their proposal not identified as a weakness or deficiency, it nonetheless is good practice to ensure that final proposal submission as a whole reflects the agency's needs.

Claims Cases

1. Appeal of Lockheed Martin Aeronautics Co., ASBCA No. 62505, 62506 (June 24, 2021)

- Lockheed performed aircraft upgrade work in Singapore and South Korea under the Foreign Military Sales program. The work was performed through undefinitized contract actions (UCAs).
- The parties failed to agree on a price and to definitize the contracts. The Air Force contracting officer then unilaterally established a price.
- Lockheed appealed this unilateral price determination to the Armed Services Board of Contract Appeals, asserting that it constituted an appealable final decision.
- The ASBCA disagreed, holding that UCA price determinations are not claims because they merely set pricing rather than demand amounts from the contractor. The ASBCA rejected the argument that a prior decision on this issue, *Bell Helicopter Textron*, had been superseded by subsequent case law expanding what constitutes a claim. A unilateral price determination must still be filed as a claim to the contracting officer for a final decision.

Undefinitized contract actions are frequently used by the government to attempt to obtain performance quickly. But the failure to agree on a price at the outset often leads to problems later on, including with the government seeking to lower profit based on the fact that actual costs have become known. Pay careful attention to UCAs to avoid long-term disagreements.

2. Appeal of Lockheed Martin Aeronautics Co., ASBCA No. 62209 (June 22, 2021)

- Lockheed submitted a claim for excessive “over & above” work on a contract to upgrade C-5 aircraft.
- The claim was submitted within the six-year statute of limitations provided by the Contract Disputes Act, but the government raised an affirmative defense of laches, arguing that Lockheed had unreasonably delayed bringing the claim and that the government was prejudiced as a result, including because of the voluminous records likely to be relevant to the claim.
- The ASBCA granted Lockheed’s motion for partial summary judgment on laches, holding that the CDA’s six-year statute of limitations precludes the assertion of a laches argument. Citing Supreme Court precedent, the Board summarized, “Where ‘Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive.’”

It is essential to comply with the six-year statute of limitations in submitting a government contract claim, but this decision ensures contractors will not also have to fight a laches argument for claims properly submitted within that time.

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

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