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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. Increasing the Minimum Wage for Federal Contractors, Department of Labor, Notice of Proposed Rulemaking (July 22, 2021)

- The Department of Labor has issued a proposed rule to implement President Biden's Executive Order 14026, which raised the federal minimum wage to $15.00 per hour.
- The proposed rule would apply only to "new contracts" with the Federal Government, which means contracts entered into on or after January 30, 2022, or contracts that are renewed or extended (pursuant to an exercised option or otherwise) on or after January 30, 2022.
- The 82-page rulemaking contains extensive detail as to implementation, and builds on minimum wage regulations issued under former President Obama's 2014 minimum wage order, but extends coverage and phases out a lower tipped wage.
- If history is any guide, the FAR Council and DOL may work together to publish a class deviation to ensure the minimum wage deadline of January 30, 2022 is met, as they did under the Obama era minimum wage order.
- Contractors will want to understand when and how it will apply to them, and some may even determine that across-the-board wage adjustments may simplify compliance.

Protest Cases

1. *The Bionetics Corp.*, B-419727 (July 13, 2021) (Published July 22)

- GAO sustained a protest where the Air Force failed to evaluate the awardee's proposed compensation plan as required by FAR 52.222-46, *Evaluation of Compensation for Professional Employees*, and the solicitation.

- FAR 52.222-46 requires offerors to submit a total compensation plan setting forth salaries and fringe benefits proposed for the professional employees who will work under the contract, which is to be evaluated to assure that it reflects a sound management approach and understanding of the contract requirements. Moreover, the agency is to consider the effects of compensation levels lower than those of predecessor contractors for the same work, and to evaluate each offeror's ability to provide uninterrupted, high-quality work, considering "its impact upon recruiting, and retention, its realism, and its consistency with a total plan for compensation."

- Here, the solicitation expressly stated that the agency would not be evaluating for realism, and GAO dismissed the protester's challenge that the agency did not consider professional compensation plans for realism as untimely.

- Nonetheless, GAO concluded that the Air Force failed to undertake the other non-realism analyses mandated by FAR 52.222-46, and improperly ignored the unburdened labor rates and fringe benefits information provided in these proposals. As a result, the agency never compared the awardee's proposed salaries to incumbent salaries to determine whether the proposed salaries were lower.

- GAO found that the protester was prejudiced, because had the proposed salaries been lower, the agency may have found sufficient risk in the awardee's proposal to change the award decision.

This decision provides two takeaways for contractors regarding solicitations that include FAR 52.222-46, *Evaluation of Compensation for Professional Employees*. First, if the solicitation includes this provision but also states that proposals will not be evaluated for realism, this creates a patent ambiguity that must be challenged pre-award. Second, if you are the incumbent and the awardee's price is substantially lower than your proposed price, the adequacy of the evaluation of professional compensation plans can be a fruitful area of protest.

Claims Cases

1. *Appeal of Intellicheck, Inc.*, ASBCA No. 61709 (June 24, 2021)

- Intellicheck was a subcontractor under a Navy task order for demonstration of a floating sensorized buoy network. The task order was completed six months ahead of schedule and the parties spent a year discussing disposition of the government property.

- In August 2013, the prime contractor submitted an invoice for Intellicheck's storage costs at that point in time. The Navy paid the invoice. Shortly thereafter, the prime contractor asserted a claim

for additional labor costs. The Navy settled the claim and obtained a broad release from the prime contractor.

- Intellicheck continued to store government property for two more years and then submitted a certified claim for the additional storage costs. Intellicheck asserted that it had an implied-in-fact contract with the Navy to store the government property.

- The Armed Services Board of Contract Appeals held that the Navy's inaction in providing disposition instructions did not create an implied-in-fact contract for storage of the government property. Thus, Intellicheck could not independently assert a claim against the Navy.

This case demonstrates the confluence of two frequent challenges for contractors: government failure to promptly provide guidance on disposition of government property and the limited rights of subcontractors to assert claims against the government. Subcontractors should ensure they understand their rights to seek sponsored claims through the prime contractor under the terms of their subcontract and be sure they quickly identify claims during the performance and close out period. Otherwise, they risk being left out in the cold when the prime contractor closes out the contract.

2. *Appeal of Northrop Grumman Mission Systems*, ASBCA No. 62596 (June 22, 2021)

- Northrop disclosed to the government, investigated, and ultimately reached a $30 million settlement related to time mischarging on a contract in Abu Dhabi. The government asserted that, during the course of the investigation, Northrop included investigation-related costs in its indirect cost rate proposals. The government asserted a claim for penalties for inclusion of expressly unallowable costs containing four courts, including one asserting that the costs were unallowable under FAR 31.205-15 (related to mischarging costs) and another asserting they were unallowable under FAR 31.205-47 (related to legal costs).

- Northrop moved to dismiss for failure to state a claim, asserting that the government failed to apportion the costs between the two cost principles, failed to include the word "expressly" before "unallowable" in count two, and argued based on a settlement agreement that was not a CDA contract. The ASBCA effectively denied Northrop's motion, rejecting its arguments of technical nonconformities.

- The ASBCA held that it would be nonsensical to require a CO to apportion the unallowable costs between two cost principles that each result in the costs being unallowable and that the government's inclusion of separate counts, that were not stand-alone legal theories but did relate to prior counts, did not result in failure to state a claim.

The government pays close attention to unallowable costs related to investigations and litigation. Inclusion of expressly unallowable costs can result in steep penalties. The creative arguments in this motion were not enough to thwart the government's march toward collecting those penalties.

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Government Contractor Litigation and Compliance

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