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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.

Executive Actions

1. Biden Announces New Safety Protocols for Federal Employees and Contractors Working at Government Facilities (July 29, 2021)

- Under President Biden's mandate, every federal government employee and onsite contractor will be asked to attest to their vaccination status.
- Those who does not attest to being fully vaccinated will be required to wear a mask on the job no matter their geographic location and comply with a weekly or twice weekly screening testing requirement, and be subject to restrictions on official travel.
- Agencies have already begun implementing these requirements through directives.
- Biden is directing his team to take steps to apply similar standards to all federal contractors.

Regulatory Developments

1. Amendments to the FAR Buy American Act Requirements, FAR Proposed Rule (July 30, 2021)

- As required by President Biden's Executive Order 14005, *Ensuring the Future is Made in America by All of America's Workers*, the FAR Council published a proposed rule to amend the FAR's Buy American rules.
- While not fundamentally shifting the landscape, the proposed rule makes it more difficult to qualify as selling American-made goods and foretells of potential future changes in key questions

for comment.

- There are three areas of changes in the proposed rule:
  - ***First***, the proposed rule includes an increase to the domestic content threshold, a schedule for future increases, and a fallback threshold that would allow for products meeting a specific lower domestic content threshold to qualify as domestic products under certain circumstances.
  - ***Second***, the proposed rule creates a new framework for application of an enhanced price preference for a domestic product that is considered a critical product or made up of critical components.
  - ***Third***, the proposed rule establishes a post-award domestic content reporting requirement for contractors.
- For more details, see this Jenner & Block client alert.

2. Four-Day Extension of Comment Period for Proposed Rule on Increasing the Minimum Wage (August 4, 2021)

- On July 22, the Department of Labor (DOL) issued a notice of proposed rulemaking (NPRM) to implement President Biden's Executive Order 14026, which raised the federal minimum wage to $15.00 per hour, and invited public comments.
- The comment period was scheduled to close August 23, 2021, but DOL has extended the deadline to August 27, 2021.

Protest Cases

1. *Mayvin, Inc.*, B-419301.6, B-419301.7 (June 29, 2021) (Published July 28)

- GAO sustained a protest ground where the agency disparately evaluated proposed methodologies for recruiting and retaining qualified personnel.
- The United States Marshal Service (USMS) established a blanket purchase agreement (BPA) with a small business for executive, administrative, and professional support services.
- The solicitation provided that the agency would evaluate recruitment and retention methodologies and encourage vendors to engage qualified incumbent personnel.
- GAO agreed with the protester that the USMS disparately evaluated quotations by crediting only the awardee for proposing to retain 100% of qualified incumbent personnel. The protester had teamed with the incumbent contractor and had likewise proposed a goal of retaining 100% of

qualified incumbents and detailed its approach to recruitment and retention, but Mayvin was not similarly credited with a strength on this basis.

- The protester demonstrated competitive prejudice because the vendors were assigned identical adjectival ratings and the awardee's recruitment and retention benefit justified the agency selecting the awardee based on its marginally lower price.

GAO issued its decision in the second round of litigation; the protester and another disappointed vendor had previously filed protests at GAO and the agency responded by taking corrective action. Agencies often use such corrective action periods to address any concerns in the evaluation record. In this case, a persistent approach to pursuing the protest resulted in a notable win for the incumbent contractor and its team.

2. *Sunglim Engineering & Construction Company, Ltd.*, B-419067.3 (August 6, 2021)

- GAO sustained a protest because the US Army Corps of Engineers (USACE) failed to conduct meaningful discussions.

- USACE originally awarded the contract to Sunglim but took corrective action following an initial protest. During corrective action, the Agency conducted discussions—identifying proposal weaknesses—and solicited revised proposals. Because USACE did not identify any weaknesses in Sunglim's proposal, the company submitted a materially unchanged proposal.

- Following its reevaluation, the Agency awarded the contract to the company that filed the earlier protest. In reaching this conclusion, the USACE evaluation board documented a weakness in Sunglim's proposal.

- GAO sustained the protest because the Agency's final evaluation of Sunglim's materially unchanged proposal identified a weakness that was not raised during discussions.

When an agency seeks revised proposals during corrective action, its reevaluation may identify flaws in a materially unchanged proposal that the agency would have been required to discuss with the offeror had the flaws been identified when the proposal was initially evaluated. In that situation, the agency must reopen discussions in order to disclose its concerns, thereby giving all offerors similar opportunities to revise their proposals.

Claims Cases

1. *Paktin Construction Company v. United States*, COFC No. 19-1817

- Paktin, an Afghan company domiciled in Afghanistan, was a subcontractor on a USACE project in Afghanistan. USACE issued a stop-work to the prime contractor, who in turn directed Paktin to vacate the project site without removing any materials pending a purported inventory by USACE.

- Paktin attempted to obtain its materials, which culminated in USACE responding that it had given Paktin's equipment to the Afghan National Army. Paktin sued seeking just compensation under the Fifth Amendment.

- The Government moved to dismiss for lack of jurisdiction, arguing that: 1) as a foreigner with no direct relationship with the US Government, Paktin lacked standing to sue; and 2) the six-year statute of limitations on Paktin's claim had run.

- The court held Paktin had standing under the Fifth Amendment by virtue of close interaction with USACE and history of supporting more than a dozen US Government contracts, including as a prime contractor.

- The court also held that the statute of limitations was suspended until the taking of Paktin's property was knowable.

This decision demonstrates that contractors and subcontractors can pursue remedies beyond the Contracts Dispute Act. In some cases, even foreign entities may properly bring a constitutional claim against the US Government.

2. *RocJoi Medical Imaging, LLC v. Department of Veteran Affairs*, CBCA 6885, 7051 (July 23, 2021)

- RocJoi Medical Imaging, LLC was awarded an indefinite quantity contract to review a minimum of 7,000 radiological examination results at a Veterans Affairs facility.

- After the VA failed to exercise an option, RocJoi appealed to the Civilian Board of Contract Appeals (CBCA), alleging that the VA provided defective estimates as to the quantity it would order. The CBCA dismissed in part, holding that RocJoi failed to state claim for defective estimates.

- Just three months after that decision, RocJoi filed another appeal alleging that "documents filed in [the first] CBCA [appeal] had revealed . . . that VA executed a delivery order dated September 27, 2017, for the estimated quantities in the Contract for the base year[,]" yet the VA failed to provide the funding for the studies.

- The CBCA denied the second appeal, emphasizing that task orders placed under IQ contracts "represent the government's exercising of existing contract rights and are not separate individual, individual contracts."

- The CBCA found that the September 2017 task order simply allocated funds that RocJoi could invoice against *after* providing the services requested.

- Notably, the CBCA admonished the VA for "using the word 'order' in inconsistent ways[,]" and stated that it "do[es] not encourage that practice, which can foster issues of interpretation.

This CBCA decision provides useful takeaways for contractors and the government alike. For contractors, this decision is a reminder that task orders under an IDIQ are not separate contracts, and that contractors should carefully strategize when bringing two separate appeals relating to the same task order. For the government, although the CBCA found in the VA's favor, the Board made sure to highlight its disapproval of the confusing language the Agency had used. . The big picture takeaway is that clearer and more precise drafting and communication can help avoid timely, costly, and unnecessary litigation.

3. *Tetra Tech EC, Inc.*, ASBCA Nos. 62449, 62450

- Tetra Tech and the Navy entered into a task order for surveying and radiological remediation.
- In 2012, Tetra Tech addressed a soil sampling issue and implemented corrective actions and remedial measures. Tetra Tech also submitted an investigation report to the Government.
- In 2017, two former Tetra Tech employees pled guilty for their misconduct in connection with the soil sample issue, which was also the subject of a False Claims Act case.
- In 2019, Tetra Tech submitted two claims to the contracting officer requesting final decisions. In response, the contracting officer advised Tetra Tech that she lacked authority to issue the requested decisions due to the related fraud and False Claims Act allegations.
- ASBCA ruled that the allegations of fraud "do not necessarily deprive the board of jurisdiction" because the Board can "consider claims when there are allegations of fraud in the contract" as long as there are no allegations of fraud in the claim itself and where the Board does not need to make "factual findings of fraud."

Contracting Officers have increasingly sought to sidestep their obligations to issue final decisions based on a statement that fraud allegations exist related to the contract. This decision highlights that Board jurisdiction cannot be avoided merely because some allegation of fraud exists.

Proposed False Claims Act Legislation on Cusp of Passage

Senators Leahy and Grassley's proposed "Anti-Fraud Amendments Act," poised to pass with upcoming infrastructure legislation, would dramatically increase the burden on False Claims Act defendants. Among the changes, defendants would have to prove a lack of materiality by clear and convincing evidence. By shifting the materiality burden so dramatically to defendants, the "clear and convincing" standard is likely to reverse the trend in FCA case law following the Supreme Court's 2016 decision in *Universal Health Servs. v. U.S. ex rel. Escobar*, which declared that the materiality standard is "demanding" and "rigorous" for the government to demonstrate.

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