

# Government Contracts Legal Round-Up | 2021 Issue 17

## 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 Activity

### **1. DFARS Case 2020-D030: Improved Energy Security for Main Operating Bases in Europe, Final Rule, Effective August 30, 2021**

- This final rule amends the DFARS to prohibit contracts for the acquisition of furnished energy for a covered military installation in Europe from inside the Russian Federation. The rule is intended to promote energy security and reduce reliance on Russia, though waivers may be sought. It applies only to contracts for furnished energy, but includes those at or below the simplified acquisition threshold and for the acquisition of commercial items, including COTS.

### **2. DFARS Case 2021-D019: Use of Firm-Fixed-Price Contracts for Foreign Military Sales, Final Rule, Effective August 30, 2021**

- This final rule rescinds the requirement for the use of firm-fixed-price contract types for foreign military sales unless an exception or waiver applies; DFARS 225.7301-1 is being removed and reserved.

### **3. DFARS Case 2021-D012: Contract Closeout Authority for DoD Services Contracts, Proposed Rule, Issued August 30, 2021; Comments due October 29, 2021**

- This proposed rule would amend the DFARS to enhance the ability to expedite contract close outs when certain conditions are met. At present, if a contract was entered into at least 17 years prior to the current fiscal year, is physically complete, and has been determined not reconcilable, the contracting officer may close the contract through a negotiated settlement.

- This rule would reduce the number of years from 17 to 10 for military construction and shipbuilding, and to 7 years for all other contract actions. The rule would also require contracts to be physically complete at least four years prior to the current fiscal year.

#### **4. DFARS Case 2019-D045: Maximizing the Use of American-Made Goods, Proposed Rule, Issued August 30, 2021; Comments due October 29, 2021**

- To align with previous changes to the FAR under President Trump’s Executive Order, this proposed rule would conform the definition of “domestic end product” and “domestic construction material” to differentiate between end products and material that consist wholly or predominantly of iron or steel or a combination of both, and those that do not.
- In simple terms, end products and construction materials of iron/steel are domestic if manufactured in the US, and the cost of iron/steel not produced in the US or a qualifying country is less than 5 percent of the cost of all materials. Exceptions apply for construction fasteners.
- If not of iron/steel, the domestic end products/construction materials must be manufactured in the US and the cost of qualifying country components and/or those mined, produced, or manufactured in the US must exceed 55 percent (an increase from 50 percent).
- The price preference for domestic products remains at 50 percent for Department of Defense (DoD) contracts.
- This proposed rule does not yet propose any changes stemming from President Biden’s more recent Executive Order enhancing Buy American Act requirements. Those changes have prompted a proposed FAR rule. Additional changes to the DFARS will likely follow finalization of that FAR proposed rule.

#### **5. DFARS Case 2020-D008: Requiring Data Other Than Certified Cost or Pricing Data, Proposed Rule, Issued August 30, 2021; Comments due October 29, 2021**

- This proposed rule would prohibit contracting officers from basing the determination that the price of a contract or subcontract is fair and reasonable solely by reference to historic prices paid by the government.
- Offerors who fail to comply with a reasonable request to submit data needed to determine price reasonableness are ineligible for award, unless the head of the contracting activity determines that it is in the best interest of the government to make the award. Despite being implemented in the FAR, this requirement must be separately adopted in the DFARS as the criteria for DoD contracts differ from those for civilian agencies.
- This proposed rule adds the requirement that, unless exempted, a notation will be added in the Contractor Performance Assessment Reporting System (CPARS) that a contractor has denied

multiple requests for submission of data other than certified cost or pricing data over the preceding three years.

## **6. Federal Acquisition Security Council Rule, Final Rule, Effective September 27, 2021**

- The Federal Acquisition Security Council (FASC) has issued a final rule to implement FASC operations, the sharing of supply chain risk information, and the exercise of the FASC's authorities to recommend issuance of removal and exclusion order to address supply chain security risks.
- Congress created the FASC in 2018 to improve executive branch coordination regarding the evaluation and sharing of threats and vulnerabilities in the acquisition of information and communications technology and services in the supply chain.
- Although some changes were made as a result of public comments filed, the FASC rejected many suggested safeguards for companies who share information about potential security risks, and for companies accused of presenting a supply chain risk.

## **Protest Cases**

### **1. *Deloitte Consulting, LLP*, B-418321.5; B-418321.6 (August 19, 2021) (Published September 2, 2021)**

- GAO sustained a protest ground where the awardee's proposal failed to comply with the solicitation's transition requirements and the agency failed to reasonably evaluate the awardee's proposal against those requirements.
- The Department of Health & Human Services issued a task order request for proposals for IT services.
- The solicitation, through incorporated questions and answers, required that all offerors, including the incumbent contractor, price the six-month transition period for full performance of all PWS tasks.
- The agency initially awarded the task order to Deloitte, but following two rounds of corrective action in response to earlier protests, the agency awarded the task order to Accenture Federal Services, the incumbent contractor.
- Deloitte argued that the awardee failed to propose transition costs that included full performance of the PWS requirements, and GAO agreed, rejecting arguments that the solicitation requirement was ambiguous or unreasonable, or that the protest ground was untimely.
- The protester demonstrated competitive prejudice because the awardee had only a slight technical advantage and had proposed a price that was less than one percent higher than the protester's.

- This protest demonstrates an instance where, in a close procurement, slight evaluation errors can tip the scales of prejudice in favor of a protester.

## **2. InfoPoint LLC, B-419856 (August 27, 2021)**

- GAO sustained a protest challenging an Air Force solicitation requirement that a joint venture, as opposed to the partners comprising the joint venture, possess a top-secret facility clearance.
- The Air Force maintained that the requirement for the joint venture itself to have a facility clearance was based on guidance found in the Air Force National Industrial Security Program manual. The Air Force further argued that regulations issued by the DoD concerning security clearances should take precedence over any related regulations issued by the Small Business Administration (SBA) on this issue.
- After seeking input from the SBA, GAO ultimately agreed with the SBA and the protester that the solicitation requirement was inconsistent with applicable law and regulation.
- Specifically, the National Defense Authorization Act (NDAA) for Fiscal Year 2020 included a provision that a facility clearance “may not be required for a joint venture if that joint venture is composed entirely of entities that are currently cleared for access to such installation or facility.” Also, SBA regulations that implemented the NDAA provision and a related provision the Small Business Act require that only the “lead small business partner to the joint venture” possess the required facility security clearance.
- In sustaining the protest, GAO rejected the Air Force’s various arguments, including the Air Force position that the NDAA provision was not yet effective pending regulatory implementation by DoD. GAO concluded that the provision was “an unambiguous command by Congress through a statute that DoD not require joint ventures to hold a facility clearance where the members of the joint venture hold the required facility clearances.”

Whether an unpopulated joint venture is required to meet certain security clearance requirements in a specific procurement has been an area of consternation and confusion. In this decision, GAO confirmed that DoD may not require a joint venture to hold a facility clearance where the joint venture members hold the required facility clearances.

## **3. Northrop Grumman Systems Corporation—Mission Systems, B-419560.3 et al. (August 18, 2021) (Published Sept. 3)**

- GAO sustained a protest because the Navy failed to reasonably consider the impact of an apparent conflict of interest stemming from the actions of a government employee who developed specifications for the solicitation at issue while at the same time engaging in employment negotiations with firm that ultimately received award.

- The record showed that for several months in 2019, the Navy employee (referred to as X) was negotiating for employment with L3Harris while actively participating in the development of the Next Generation Jammer-Low Band Capability Block-1 specifications, and working closely with Northrop and L3Harris on the performance of their predecessor contracts.
- GAO highlighted that applicable government ethics rules (identified under FAR 3.104-2) provide that a person should be disqualified from participating substantially in an acquisition while negotiating for employment with an offeror such as L3Harris.
- The Navy maintained that X's actions had no impact on the competition, but GAO rejected all of the agency's defenses. GAO walked through the myriad ways X was involved with performance of the predecessor contracts and developing the specifications for the procurement at issue.
- GAO noted in particular that prejudice is presumed where hard facts demonstrate a conflict of interest exists. In these instances, a protester is not required to establish bias in the solicitation or point to technical findings to establish a conflict of interest. Rather, "the hard facts that are required are those which establish the existence of the organizational conflict of interest, not the specific impact of that conflict," according to GAO.
- GAO ultimately concluded that X's actions created the appearance of an unfair competitive advantage in favor of L3Harris and that the Navy's consideration of the conflict was unreasonable. GAO recommended that the Navy conduct an independent review of the specifications and seek revised proposals from the two competitors.

Contracting agencies are to avoid even the appearance of impropriety in government procurements. Where an agency knowingly fails to investigate and resolve a question concerning whether an agency employee who actively and extensively engaged in procurement-related activities should have been recused from those activities, the existence of an actual or apparent a conflict of interest is sufficient to taint the procurement, and GAO will sustain a protest on this basis.

## Claims Cases

### **1. *Active Construction, Inc. v. Department of Transportation*, CBCA 6597 (August 9, 2021)**

- Active Construction, Inc. (ACI) filed a motion to compel the Federal Highway Administration (FHWA) to produce documents to show that FHWA "surreptitiously blamed ACI for delays and changes to cover up the real cause: a lack of sufficient funding to support ACI's contract." FHWA refused, stating that the arguments in support of the motion to compel, *i.e.*, that contract funding and bad faith issues, were not properly before the CBCA.
- The CBCA held that it did not possess jurisdiction to entertain ACI's implied duty breach claim arising from FHWA's alleged lack of funding. The Board granted the motion to preclude ACI from raising the issue, finding the documents irrelevant to any issue properly before the CBCA.

This case provides guidance as to how the CBCA will construe and limit motions to compel. Contractors are only entitled to seek documents that relate to claims properly before the Board. The Board will not compel the government to provide documents that are unrelated to those claims.

## **FCA Amendments**

Senator Grassley’s proposed “Anti-Fraud Amendments Act”, originally poised to pass with the upcoming infrastructure legislation, is no longer a part of the current version of the bill. The suggested changes would have required defendants to prove a lack of materiality by clear and convincing evidence, but for now at least, the burden of proof established by the Supreme Court’s 2016 decision in *Universal Health Servs. v. U.S. ex rel. Escobar* remains the law. That case declared the materiality standard as “demanding” and “rigorous” for the government to demonstrate.

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**Related Capabilities**

## Government Contractor Litigation and Compliance

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