

Government Contracts Legal Round-Up | 2021 Issue 18

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.

Executive Actions

1. The Safer Federal Workforce Task Force Vaccination Guidance (September 24, 2021)

- This guidance implements President Biden's Executive Order (EO) 14042: Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (full advisory on that EO [here](#)).
- This highly anticipated guidance imposes broad requirements for covered contractor employees (and subcontractor employees) to be vaccinated by December 8, 2021, regardless of whether they work full-time or part-time, whether they work at a contractor workplace, federal workplace, or from their homes, and whether they work directly on a covered government contract, indirectly, or only at the same workplace as those who do.
- See Jenner & Block's advisory for details regarding applicability and operation.
- The Department of Defense has announced an early engagement opportunity for industry to comment, due no later than October 17, 2021.

Regulatory Developments

1. GSAR Case 2016-G511, Contract Requirements for GSA Information Systems, Proposed Rule Issued September 10, 2021, Comments Due by November 9, 2021

- The GSA is proposing to amend the General Services Administration Acquisition Regulation (GSAR) to streamline and update requirements for contracts involving GSA information systems.

- The proposed rule will replace outdated text with existing policies issued by GSA's Chief Information Officer and provide centralized guidance to ensure consistent application across the organization.
- The updated GSA policy will align cybersecurity requirements based on items being procured by ensuring contract requirements are coordinated with GSA's Chief Information Security Officer.
- After finalization, this rule will require contracting officers to incorporate applicable cybersecurity requirements in statements of work to ensure compliance with federal guidelines and to prevent cyber incidents.

2. Notice of Rate Change for Minimum Wage Federal Contracts Covered by Executive Order 13658 (September 16, 2021)

- The Wage and Hour Division of the Department of Labor issued this notice to announce the applicable minimum wage rate for workers performing work on or in connection with federal contracts covered by President Obama's EO 13658. Beginning January 1, 2022, the rate paid workers on covered contracts will increase to \$11.25 per hour, while the required minimum cash wage to tipped employees will increase to \$7.90 per hour.
- Covered contracts that are entered into on or after January 30, 2020, or that are renewed or extended on or after that date, will be generally subject to the higher \$15.00 minimum wage rate established by President Biden's EO 14026.

3. Extension of Time for Comments on FAR Buy American Act Requirements (September 23, 2021)

- The FAR Council issued a proposed rule on July 30, 2021, to amend the FAR to implement President Biden's EO 14005, Ensuring the Future is Made in All of America by All of America's Workers.
- The deadline for submitting public comments has been extended from September 28, 2021 to October 28, 2021.

4. Request for Public Comments on Risks in the Semiconductor Supply Chain (September 24, 2021)

- The Department of Commerce is seeking comments from those impacted by ongoing shortages in the semiconductor supply chain.
- The goal is to accelerate information flow and reduce data gaps across the various supply chain participants, including domestic and foreign semiconductor design firms, semiconductor manufacturers, materials and equipment suppliers, as well as semiconductor intermediate and end-users.

- Comments are due November 8, 2021.

Protest Cases

1. *Marquis Solutions, LLC, B-419891; B-419891.2 (September 14, 2021) (Published September 21, 2021)*

- GAO sustained a protest where the agency had unreasonably and disparately evaluated the protester's quotation, resulting in its quotation not receiving further consideration in the competition.
- The Department of Veterans Affairs (VA) issued a solicitation for medical courier services in the New York metropolitan area under FAR Part 13 simplified acquisition procedures.
- GAO observed that not only did the solicitation lack detailed instructions for preparation of technical quotations, the agency's evaluation of the protester's technical quotation was equally vague and took issue with the protester's compliance with solicitation instructions.
- GAO held that the agency had not adequately documented the basis for its evaluation and source selection decision. In particular, the evaluators failed to explain (or provide examples of) the details lacking in the protester's quotation, instead levelling "vague and conclusory" critiques against the protester's quotation.
- GAO also found that the VA engaged in disparate treatment, including because the Agency found the protester's quotation unacceptable for copying from the statement of work but overlooked the same concerns in the awardee's proposal.

Even in competitions conducted under the simplified acquisition procedures under FAR Part 13 (meaning that the agency was not required to perform the in-depth evaluation required under FAR Part 15), agencies are still required to treat competitors fairly and equally and to sufficiently document the basis of its decisions.

Claims Cases

1. *MLB Transportation Inc. v. VA, CBCA 7019 (September 3, 2021)*

- MLB Transportation, Inc. had a contract with the Department of Veterans Affairs to transport patients from a VA hospital to their homes.
- Although the parties treated the contract as if it was an IDIQ contract, the contract did not include any language indicating that it was an IDIQ contract. The parties both acknowledged that the contract was intended to be an IDIQ contract but that it lacked a guaranteed minimum clause (previous contracts between the parties did contain the clause).

- As a result of the COVID-19 pandemic, the contractor could not recover its costs. MLB submitted a claim seeking reimbursement of the indirect additional costs.
- On appeal, the board determined that the contract did not contain a minimum guarantee of the services to be ordered. The board noted that an IDIQ contract that lacks a guaranteed minimum is illusory and unenforceable, since the government had not made a binding promise regarding the minimum amount it will purchase.
- The board opined that although the contract was not enforceable at its inception, the VA's obligations were limited to compensation for services provided, but nothing more.

Contractors should take care to not only read all contract provisions but also to note any provisions that are absent. Ask for clarification where the contract type is unclear or where something seems to be missing. Don't assume that provisions from prior contracts will carry over. Remember that IDIQ contracts will not be enforced unless they contain a guaranteed minimum clause.

2. *Anglin Consulting Group, Inc. v. Department of Homeland Security*, CBCA 6926 (September 7, 2021)

- The government entered into a contract with Anglin Consulting Group, Inc., for accounting and general clerk services. The firm fixed price contract had one base year and four one-year options. The government exercised two of the option years.
- Through bilateral modifications to the contract, the parties agreed to remove the position of finance clerk, and remove two of the remaining three other positions from the contract.
- Anglin submitted a request for equitable adjustment (REA), asserting that the descoping and deletion of work by these modifications caused it to absorb losses for costs incurred and caused loss profits. When the contracting officer denied the REA, stating that the underlying contract was a firm fixed price contract and the contractor had released all claims without reservation through the bilateral modification.
- The contractor submitted a certified claim on the same grounds as the REA, but added that none of the modifications released its claims. The contracting officer denied the claim. Anglin appealed.
- For the first time on appeal, Anglin argued that it only signed the modifications due to economic duress and that the government had breached its duty of good faith and fair dealing.
- In response to the government's predictable motion for dismissal for lack of jurisdiction on the grounds that those claims had not been presented to the contracting officer, Anglin filed an amended complaint, adding yet another new claim.
- The Board dismissed the additional claims, finding that it did not have jurisdiction to hear claims that had not been presented to the contracting officer.

Ensuring that claims are presented at the right time and in the right way is essential and can be complicated. Legal advice from experienced government contracting attorneys can help contractors navigate this process.

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Government Contractor Litigation and Compliance

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