

Government Contracts Legal Round-Up | 2021 Issue 19

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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 Developments

1. Class Deviation 2021-00009: Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (October 1, 2021)

- DOD issued Class Deviation 2021-00009 mandating the use of a DFARS provision, DFARS 252.223-7999
- The DFARS clause contains substantively identical language to the FAR clause issued on September 30, 2021. In other words, the clause directs contractors to “comply with” the September 24 Task Force guidance, which we discuss here.
- The clause includes a flowdown requirement: contractors must include the clause in services subcontracts that are above the SAT and are performed in the United States.
- The DOD deviation memorandum calls on COs to use a *bilateral* modification when modifying existing contracts, task orders, or delivery orders in accordance with the deviation.

2. Class Deviation 2021-03: From the Federal Acquisition Regulation Regarding Implementation of Executive Order 14042, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors. (September 30, 2021)

- The CAAC memorandum attaches a FAR deviation clause that mirrors the clause issued by the FAR Council on September 30, 2021. Accordingly, the clause directs contractors to “comply with” the September 24 Task Force guidance and to flow down the clause.

- The memorandum states that civilian agencies can adopt the FAR clause issued on September 30, 2021 without making any changes.
- If an agency intends to use clause text different from that of the FAR clause, the agency must consult with the CAAC Chair.
- The memorandum further adopts the encouragement of the FAR Council memorandum that agencies include the clause in: contracts that have been or will be awarded before November 14, 2021 (or solicitations issued before October 15, 2021); contracts below the SAT; and products manufacturing contracts and subcontracts.

3. FAR Case 2020-007: Accelerated Payments Applicable to Contracts with Certain Small Business Concerns, Proposed Rule (September 29, 2021)

- The policy at FAR 32.009-1 has been expanded to address accelerated payments to small business contractors.
- A goal of payment within 15 days after receipt of a proper invoice is added, and prime contractors are prohibited from requesting any further consideration from the subcontractor in exchange for the accelerated payments.
- These requirements will be incorporated into FAR clause 52.232-40, Providing Accelerated Payments to Small Business Subcontractors, which will be added to the list of clauses applicable to commercial items under FAR clause 52.215-5.

Protest Cases

1. Qwest Government Services, Inc. d/b/a CenturyLink QGS, B-420095 (October 6, 2021)

- GAO dismissed a protest where the procuring entity was not a federal agency and therefore the procurement was outside of GAO's jurisdiction.
- Qwest protested the issuance of a task order by AgFirst-Farm Credit Bank off of a General Services Administration multiple-award contract.
- Even though the solicitation contained language that cited the FAR's bid protest provisions, GAO explained that AgFirst is borrower-owned financial institution—not a wholly owned government corporation as the protester contended—and therefore outside of GAO's protest jurisdiction.

GAO's bid protest jurisdiction is limited to procurements conducted by federal agencies. The Federal Property and Administrative Services Act of 1949 defines a federal agency as "an executive agency or an establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol, and any activities under the

direction of the Architect of the Capitol.” 40 U.S.C. § 102(5). GAO will dismiss a protest of a procurement conducted by an entity that does not fall under this definition.

2. *Coast to Coast Computer Products, Inc., B-419833.2 (September 28, 2021)*

- GAO denied a protest challenging the Air Force’s use of a lowest-price, technically acceptable (LPTA) award methodology.
- The DFARS lists eight criteria that must be satisfied before an entity of the Department of Defense can procure goods or services on an LPTA basis. DFARS 2.15.101-2-70. The DFARS also requires that DOD contracting officers “avoid, to the maximum extent practicable,” using LPTA procedures for procurements that are predominantly for the acquisition of certain items or services including, “[i]nformation technology services.”
- Here, the contracting officer had prepared a determinations and findings memorandum (D&F) detailing how all of the DFARS criteria were satisfied.
- Although the protester objected to numerous findings in the D&F, GAO found the protester’s objections constituted mere disagreement with the contracting officer’s findings, but did not establish that the D&F was unreasonable. GAO walked through several findings as illustrative examples.
- GAO also held that the DFARS does not prohibit the use of LPTA award criteria for information technology products (as compared to services), which the Air Force was procuring under the solicitation.

A contracting agency has discretion to determine its needs and the best method to accommodate them, but the determination must still be reasonable. GAO will deny a protest challenging a DOD entity’s use of an LPTA award methodology if the agency’s explanations and determinations that the award criteria were authorized under DFARS are reasonable and can withstand logical scrutiny.

False Claims Act

The Department of Justice (DOJ) announced last week a new Civil Cyber-Fraud initiative which will use the False Claims Act (FCA) to enforce government contract cybersecurity requirements. The initiative will be led by the Fraud Section of the DOJ Civil Division’s Commercial Litigation Branch. DOJ believes it can bring its experience and resources from its civil fraud enforcement, procurement, and cybersecurity focused attorneys to make this a successful initiative.

In remarks coinciding with the launch of this initiative, Deputy Attorney General Lisa Monaco emphasized that DOJ will seek to impose “very hefty fines” on contractors or grant recipients who fail to comply with their obligations under cybersecurity standards. For example, while contractors are required to “rapidly report” (defined as reporting within 72 hours) “cyber incidents” to the

Department of Defense under Defense Federal Acquisition Regulation Supplement 252.204-7012, Monaco suggested that contractors are falling short in meeting those reporting requirements. In particular, she stated that “[f]or too long, companies have chosen silence under the mistaken belief that it is less risky to hide a breach than to bring it forward and to report it. Well that changes today.”

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Government Contractor Litigation and Compliance

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