

# Government Contracts Legal Round-Up | 2021 Issue 20

## 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 Developments

### 1. Implementation of Executive Order 14042, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, in Other Transaction Agreements (October 8, 2021)

- On October 8, 2021, the Department of Defense issued a memo confirming that President Biden's vaccine mandate extends to Other Transaction Agreements (OTAs).
- For services agreements anticipated to exceed \$250,000, agreements officers ***must*** insert a clause that requires contractors to comply with all guidance published by the Safer Federal Workforce Task Force in solicitations issued on or after October 15, 2021, as well as agreements issued on or after November 14, 2021 from solicitations issued before October 15, 2021.
- Likewise, contractors should expect to see the clause in all options, extensions, or renewals exceeding \$250,000 issued on or after October 15, 2021, and award of new work executed on or after November 14, 2021 within the existing ceiling and period of performance of an agreement irrespective of when the agreement was awarded.
- Agreements officers ***have discretion*** to insert the clause in agreements awarded before November 14, 2021 resulting from solicitations issued before October 15, 2021; extensions of new work within the existing ceiling and period of performance valued at or below \$250,000; and agreements for the manufacturing of products.
- Bilateral modifications are required when modifying existing agreements.

## **2. Guidance for Reporting the Use of Clause 252.223-7999, “Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors” (Class Deviation 2021-00009) and Other Transactions Clause “Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors” to the Federal Procurement Data System (October 20, 2021)**

- Defense Pricing and Contracting (DPC) has directed contracting officers to track implementation of the vaccine mandate by entering the code “EO14042” when submitting contract action reports (CARs) in the Federal Procurement Data System (FPDS).
- This new code will track implementation of the vaccine mandate in new and existing contracts and orders, for both FAR-based contracts and OTAs.
- This tracking mechanism will allow the administration to assess whether agencies are acting on the administration’s strong encouragement to apply the vaccine mandate broadly.

## **3. Class Deviation 2022-00001, Revision 1: Threshold for Obtaining Certified Cost or Pricing Data for Subcontracts and Price Adjustments (October 8, 2021)**

- Contracting officers have been directed to use \$2 million, in lieu of \$750,000 at FAR 15.403-4(a) (1), as the threshold for obtaining certified cost or pricing data for the award of a subcontract, at any tier, or a change or modification made to a prime contract or subcontract, at any tier.

## **Protest Cases**

### **1. Academy Leadership, LLC, B-419705.2 (September 30, 2021) (published October 14, 2021)**

- GAO sustained a protest challenging the conduct of discussions in a United States Immigration and Customs Enforcement (ICE) FAR Part 13 simplified acquisition.
- After receiving proposals, ICE sent Lincoln (the eventual awardee) an email stating “While evaluating your proposal, your pricing was significantly higher than the other proposals. Is this the best offer that you can provide?” In contrast, Academy received an email from ICE asking “Is the pricing that you submitted for the Gettysburg program the best offer that you can provide?” No other information was provided to Academy.
- ICE selected Lincoln for award, finding that the benefits offered by Lincoln’s higher-rated proposal warranted the 53% price premium over Academy’s proposal.
- The protester challenged that ICE’s discussions were unequal and not meaningful because Lincoln was notified of the area of its proposal that needed improvement (price), while Academy was not notified that ICE had concerns with its non-price proposal (nor given the opportunity to revise anything but price).
- In response, the agency claimed these were requests for a price reduction, not discussions, and in any event were equal because both offerors were asked if their offer was “the best offer you

can provide.”

- GAO sustained the protest, first finding that the email to Lincoln included what would be considered as “ordinary indicia” of discussions by conveying information that was tailored to Lincoln’s proposal, bargaining, and providing the firm with an opportunity to revise its proposal.
- Next, GAO concluded that the discussions were improper. While Academy’s initial proposed price was significantly lower than Lincoln’s price and the agency’s price estimate, the firm’s proposal had received a number of comments that lowered expectations of success under the non-price factors. GAO determined that these were effectively significant weaknesses and deficiencies, and therefore ICE was required to inform Academy of these issues during discussions. Simply asking for a price reduction did not suggest the agency’s true concerns, reflected in the technical flaws identified in Academy’s proposal, and so discussions were not meaningful.

In contrast to the deference afforded to agencies regarding evaluation findings, GAO will scrutinize the conduct of discussions to ensure they were equal, meaningful, and not misleading. In considering whether to protest on this basis, companies should carefully review any pre-award communications against information provided in the debriefing.

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**Related Capabilities**

Government Contractor Litigation and Compliance

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