

Government Contracts Legal Round-Up | 2021 Issue 21

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 Developments

1. White House Announces Extension of Contractor COVID-19 Vaccine Mandate to January 4, 2021 (November 4, 2021)

- In a Fact Sheet dated November 4, the Biden Administration extended the deadline for federal contractors to comply with the COVID-19 vaccine mandate to January 4, 2021, matching the deadline of the vaccine mandates published by the Department of Labor's Occupational Safety and Health Administration (for workers at private companies with more than 100 employees), and the Department of Health and Human Services (for health care workers at facilities participating in Medicare and Medicaid).
- The Fact Sheet clarifies that the OSHA mandate, which allows testing in lieu of vaccination, is inapplicable to workplaces that are subject to the federal government contractor mandate.
- The deadline extension comes amid legal challenges (which have temporarily blocked the OSHA mandate) and a variety of guidance, public meetings, and Q&A publications from the White House and the Safer Federal Workforce Task Force.
- The Q&A Guidance clarifies, among other things, that affiliates may become covered contractor workplaces if covered contractor employees are present.

Regulatory Developments

1. Department of Defense Announces "CMMC 2.0" (November 4, 2021)

- DoD announced that it is suspending the original CMMC piloting efforts and will not require CMMC in any contract prior to completion of a newly announced CMMC 2.0 rulemaking process. That process will last between nine and twenty-four months and will involve opportunities for public comment and stakeholder input.
- CMMC 2.0 streamlines the original model from five levels to three: Level 1 with 17 practices; Level 2 with 110 practices that align with NIST SP 800-171; and Level 3 with 110+ practices based on NIST SP 800-172.
- CMMC 2.0 reverts back to a *self-assessment* for Level 1 and some (but not all) Level 2 programs. It also imposes triannual *third-party assessments* for Level 2 programs with critical national security information, and triannual *government-led assessments* for Level 3. Programs requiring the most advanced cybersecurity standards and third-party assessments have yet to be identified.
- Plans of Action and Milestones (POA&Ms) for those unable to meet all criteria will be permitted in some cases.
- During the interim period while the rulemaking is underway, DoD encourages contractors to continue to enhance their cybersecurity posture. Project Spectrum is a new tool to help companies assess their cyber readiness.

2. Federal Acquisition Regulation: Revision of Definition of Commercial Item, Final Rule (November 4, 2021)

- DoD, GSA, and NASA have issued a final rule that redefines “commercial item” by replacing it with definitions of “commercial product” and “commercial service.”
- The amendment to separate “commercial item” into “commercial product” and “commercial service” does not expand or shrink the scope of products or services that the Government may procure using FAR part 12, nor does it change the terms and conditions with which contractors must comply.

Protest Cases

1. Aero Spray, Inc. d/b/a Dauntless Air v. United States, COFC No. 21-1079C (October 28, 2021)

- COFC dismissed a bid protest filed by a contract awardee because the awardee in this procurement lacked standing to protest.
- The Department of the Interior awarded indefinite-delivery, indefinite-quantity (IDIQ) contracts to four companies, including Aero Spray, for aircraft services for wildfire firefighting.

- Aero Spray lodged a protest on the basis that two of the awardees failed to comply with the solicitation's aircraft configuration requirements. Aero Spray contended that it "spent significant funds" to comply with the requirement and that it would suffer economic harm from increased future competition for task orders resulting from the allegedly improper IDIQ contracts.
- In finding that Aero Spray, as an awardee, lacked standing, the Court followed Federal Circuit precedent and turned to the Competition in Contracting Act's definition of an "interested party," *i.e.*, "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract."
- Applying the CICA definition, the Court concluded that Aero Spray, "having received a contract award for all that it proposed, was not, and is not, an actual offeror 'with respect to' the other contract awards to which Aero Spray now objects."

GAO has consistently rejected the notion that a contract awardee qualifies as an interested party to file a bid protest, but the COFC has reached different conclusions under similar facts. Here, however, the Court emphasized "the general rule [] that '[o]nce a party becomes an awardee, they are no longer an 'interested party' with standing to bring a bid protest claim under 28 U.S.C. § 1491(b)." More specifically, this case stands for the proposition that "where an offeror received the very contract it sought," that the company cannot be considered an actual offeror (and thus an interested party) with respect to the other contract awards it did not seek. But an awardee still may establish interested party status (at the Court) where it claims it should have won different or additional contracts.

2. *ICI Services Corp.*, B-418255.5; B-418255.6 (October 13, 2021) (Published October 28)

- GAO denied a protest challenging that the Navy failed to properly evaluate Serco, Inc.'s eligibility for award as a corporate successor-in-interest to Alion Science and Technology Corporation, the entity that originally submitted a proposal.
- The Navy issued the RFP to the Navy's SeaPort Next Generation (SeaPort-NxG) IDIQ contract holders. Prior to its proposal submission, Alion entered into a definitive agreement with Serco, another SeaPort-NxG contract holder, whereby Serco would acquire, among other things, Alion's Naval Systems Business Unit (NSBU).
- In its initial proposal, Alion informed the Navy about the existence of the definitive agreement with Serco, advised that the corporate transaction was expected to close later in the year, and indicated that the "resources identified and included in this proposal will remain the same." Specifically, within the NSBU, the Ship Systems Business Unit (SSBU) was the largest organization and "owned" the employees, facilities, and other resources that comprised Alion's proposal, as well as the cost history and past performance included in Alion's proposal.

- The transaction was finalized after initial proposal submission, but prior to discussions. Because the Alion NSBU was now a part of Serco, the agency’s discussions were held with Serco. The Navy sought and received detailed information regarding the Serco-Alion transaction.
- The contracting officer subsequently determined that: (1) Serco had acquired the entirety of the business entity that had submitted Alion’s proposal and which was proposed to perform; and (2) Serco’s purchase of Alion’s NSBU resulted in all relevant proposal assets—*i.e.*, employees, leases/subleases, “any and all” other SSBU resources needed to perform the task order—being transferred from Alion to Serco. The Navy concluded that Serco could be substituted for Alion as an offeror under the RFP and, ultimately, awarded the task order to Serco.
- The Protester alleged that Serco was not a complete successor-in-interest to Alion, as evidenced by the lack of a novation of Alion’s SeaPort-NxG contract, which rendered improper the selection of, and award to, Serco.
- GAO denied the protest, first finding that there is no requirement that the entirety of Alion’s SeaPort-NxG contract be transferred, or novated, in order for Serco to be a complete successor-in-interest to Alion with respect to the entire portion of the business embraced by the Alion proposal.
- GAO also found that ICI failed to establish that the Alion “corporate distinctions” which allegedly did not transfer to Serco were ones likely to have a significant cost or technical impact on performance of the task order.
- Finally, GAO found it relevant that the Navy’s evaluation and award decision were not based on Alion’s initial proposal, but on Serco’s final proposal after the agency reasonably found Serco to be a proper successor-in-interest to Alion. GAO noted that there is no assertion that Serco’s performance of the task order would be in a manner materially different from that which Serco proposed in its final proposal, which is the ultimate nature of GAO’s concern regarding corporate transactions.

GAO’s case law regarding matters of corporate status and restructuring are highly fact-specific, and turn largely on the individual circumstances of the proposed transactions and timing. If you are the entity involved in a corporate transaction while in the midst of a procurement, take steps to provide the agency with the information necessary to determine you are eligible for award—which also insulates you in the case of a subsequent protest.

Claims Cases

1. *Appeal of Tactical Network Corporation, ASBCA No. 62963 (October 13, 2021)*

- Tactical Network filed a dizzying number of motions as it sought to challenge the government’s interpretation of the contract and its concerns with pending deliverables. Specifically, Tactical

Network sought an order directing the government to receive pending deliverables and filed a motion to compel seeking an order that the government refrain from taking further contract actions.

- After the claim was appealed, the government terminated Tactical Network’s contract for default. Tactical Network then filed a “motion to join” seeking to convert the termination for default to a termination for convenience and consolidate the challenge with its existing appeal.
- The Board denied Tactical Network’s motion to compel and similar requests in its complaint, reiterating that it does not possess jurisdiction to provide injunctive relief or order specific performance. The Board then interpreted Tactical Network’s motion to join as a notice of appeal of the termination and consolidated that appeal with the existing appeal.

Performance problems and threats of termination for default demand a serious and comprehensive response from the contractor. But it is important to understand and work within the limits of board jurisdiction in order to effectively resolve these significant issues.

Investigations and Enforcement

1. Deputy Attorney General Lisa Monaco announced several important changes to the Department of Justice’s corporate criminal enforcement policies and practices

On October 28, 2021, Deputy Attorney General (DAG) Lisa Monaco delivered a speech and issued a memorandum announcing several important changes to the Department of Justice (DOJ)’s corporate criminal enforcement policies and practices. These changes, which will apply to current and future corporate defendants, include:

- Restoring prior DOJ guidance that in order to receive any cooperation credit in resolutions, companies must provide all non-privileged information regarding *all* individuals involved in the wrongdoing—not just individuals who were *substantially* involved;
- Signaling an increased willingness to impose corporate compliance monitors on companies when resolving criminal investigations;
- Considering a company’s *entire* history of misconduct—rather than only similar past misconduct—in deciding how to resolve a criminal investigation; and
- Applying heightened scrutiny to companies’ adherence to deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs), as well as demonstrating increased willingness to declare companies in breach of those agreements when warranted.

Taken together, these revisions signal DOJ’s intent to pursue broader investigations and implement stricter enforcement measures than were the norm during the previous administration. DOJ plans to implement several structural changes to support these initiatives.

2. Senator Grassley Seeks False Claims Act Amendments

- The Iowa Republican Senator, long a champion of the civil False Claims Act, continues his attempts to amend the FCA.
- The current amendment would add “[i]n determining materiality, the decision of the Government to forego a refund or pay a claim despite actual knowledge of fraud or falsity shall not be considered dispositive if other reasons exist for the decision of the Government with respect to such refund or payment.”
- This is the latest effort to blunt the impact of continued government payment on a FCA case’s materiality analysis. We will continue to watch these proposed amendments and issue further updates as needed.

Ask the Judge - by the Honorable Jeri Somers

After 18 years on the bench, I have some insight into how judges think about a vast variety of things. I will attempt to answer some of the questions that litigants frequently ask when trying to navigate the government contracts world.

Question: “How do judges react to discovery disputes? Do they enjoy them?”

Answer:

- I personally considered discovery disputes a necessary evil, particularly when the discovery involves gnarly issues of privilege assertions. However, I found that if parties approach discovery disputes by providing the judge with clearly identified issues, with appropriate legal support for claims of privilege, the judge will be more willing to engage with the parties and rule on disputed issues. If you claim privileges in response to discovery disputes, you have an obligation to produce any information that is not considered privileged, and to provide a privilege log.
- No one enjoys creating privilege logs. In fact, most lawyers spend little time thinking about how or why privilege logs should be created. While litigants frequently attempt to produce what they consider nonprivileged and to withhold from production whatever the party has identified as privileged, the rational assumption for the requesting party is that the other side is simply withholding discovery because it will either help the requesting party or harm its own case.
- Nonetheless, FRCP 26(b)(5) requires a party to provide a list (the privilege log) of the information being withheld from a discovery production as privileged. Normally a privilege log will identify the basic information needed to describe the documents or electronically stored information withheld; and a clear statement of which privileges the responding party believes cover those documents. But, for whatever reason, the majority of parties neglect this obligation when claiming privilege. This leads the requesting party to file a motion to compel discovery, inevitably combined with a motion for sanctions. It is at those times that the judge may look unfavorably on the entire

discovery dispute. How can a judge deal with these claims of privilege without the privilege log? It can be very frustrating.

Best Practice:

- Anticipate the need to create the log by identifying those records that are responsive to discovery and then prepare for production, with the privileged records still in place. The privileged materials should then be removed, segregated, and logged. This approach will enable the judge to make an informed ruling in this type of discovery dispute.

If you have any questions for me to address in future columns, please email me at jsomers@jenner.com. I look forward to hearing from you!

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Government Contractor Litigation and Compliance

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