

# Government Contracts Legal Round-Up | 2021 Issue 22

## 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 Orders

### **1. Executive Order on Nondisplacement of Qualified Workers Under Service Contracts (November 19, 2021)**

- President Biden has re-instituted the rule on non-displacement of qualified workers under service contracts subject to the Service Contract Act. In simple terms, this rule requires contractors to offer covered employed under the predecessor contract and its subcontracts a right of first refusal of employment under a successor contract in positions for which those employees are qualified.
- Contractors should expect the Department of Labor to issue a final rule implementing the change no later than May 2022, with FAR implementation following within 60 days. Despite often bumping up against rulemaking deadlines, DOL could issue this rule in fairly short order due to the framework already provided by the original rule issued by President Obama, but rescinded by Trump. Regardless, contracting officers are likewise "strongly encouraged" to include the relevant clause in any contracts issued between the date of the Order and the final rule.
- DOL may issue sanctions and remedies for noncompliance, including orders requiring employment and payment of wages lost; and, for willful violations, suspension or debarment.

## Regulatory Developments

### **1. Class Deviation 2022-00005: Pilot Program for Streamlining Awards for Innovative Technology Projects (November 18, 2021)**

- With a sunset date of October 22, 2022, this Class Deviation exempts from certified cost or pricing data requirements contracts, subcontracts, or modifications of contracts or subcontracts valued at less than \$7.5 million awarded to a small business concern or nontraditional defense contractor, when awarded pursuant to
  - A technical, merit-based selection procedure, such as a broad agency announcement (see FAR 35.016(b)(2));
  - The Small Business Innovation Research Program; or
  - The Small Business Technology Transfer Program.

## **2. Class Deviation 2022-00004: Requirements for Nonavailability Waiver Determinations Under the Buy American Statute (November 18, 2021)**

- Defense Pricing and Contracting has issued a Class Deviation to implement key Biden initiatives designed to improve transparency of domestic sourcing (Buy America) waivers and increase the public's trust in efforts to expand the US manufacturing base.
- In lieu of the relevant FAR provisions, this Class Deviation requires DoD contracting officers to execute an individual nonavailability waiver determination if no offer for a domestic end product is received in response to competitive acquisitions.
- Contracting officers must post such waiver determinations digitally to MadeinAmerica.gov via System for Award Management (SAM.gov) for "Made in America Office" (MIAO) review unless an exception applies. Such exceptions include an urgent need or a prior class determination of nonavailability for the type of product to be purchased. Portions of this posting will be available to the public while source selection information will remain protected.
- Contracting officers shall not make an award until receiving confirmation that the MIAO: (1) completed its review of the proposed nonavailability waiver determination; or (2) waived its review. The final decision to execute an individual nonavailability waiver determination shall be approved in accordance with DFARS 225.103(b)(ii).
- A similar Class Deviation applies to civilian agencies and is available here: Class Deviation 2022-01.

## **Protest Cases**

### **1. GAO Bid Protest Annual Report to Congress for Fiscal Year 2021 (November 16, 2021)**

- GAO issued its annual report to Congress providing data concerning GAO's overall protest filings for Fiscal Year (FY) 2021.

- 1,897 cases (including protests, cost claims, and requests for reconsideration) were filed, down 12% from the prior year. In comparison, FY 2018 saw a five-year high with 2,607 cases filed.
- GAO's sustain rate of 15% remained consistent with prior years.
- The effectiveness rate (based on a protester obtaining some form of relief from the agency, either as a result of voluntary agency corrective action or GAO sustaining the protest) likewise remained steady at 48%.
- The most prevalent reasons for sustaining protests during the 2021 fiscal year were: (1) unreasonable technical evaluation; (2) flawed discussions; (3) unreasonable cost or price evaluation; and (4) unequal treatment.

## **2. ASHLIN Management Group, B-419472.3; B-419472.4 (November 4, 2021) (Published November 15, 2021)**

- GAO sustained a protest alleging that the agency should have evaluated the awardee's quotation as technically unacceptable because one of the awardee's quoted key personnel became unavailable during corrective action.
- In January 2021, the Department of Labor took corrective action following a protest challenging the award to Booz Allen Hamilton (BAH). When BAH had submitted its quotation in October 2020, one of its then-current employees was slated to fill a key position. In March 2021, the individual submitted a resignation letter notifying BAH of the employee's intent to leave BAH in two weeks' time; the employee left the company in April. During this period, the agency was still implementing its corrective action; BAH did not provide notice that the key personnel had departed. The agency again awarded the task order to BAH.
- The protester argued that BAH's quotation became technically unacceptable during the corrective action period because this individual was no longer available.
- GAO sustained the protest, finding that BAH had *actual knowledge* of the unavailability of one of its quoted key personnel during the corrective action period and failed to notify the agency.
- GAO was unpersuaded by BAH's argument that it did not have actual knowledge of the individual's unavailability because BAH might seek to re-hire the individual if the agency rejected a key personnel substitution, and he might agree to be rehired. GAO also did not accept BAH's argument that no duty to notify arose here because the task order issued to BAH in December 2020 remained in place throughout the corrective action period, making this the replacement of a key person after award that is a matter of contract administration not for consideration by GAO.

The question of whether to notify agencies regarding the departure of key personnel is one that perpetually vexes contractors. GAO's decision here reinforces that the failure to do so will render

the proposal technically unacceptable—even if the departure occurs during corrective action. If faced with this situation, the proposal team should consult with legal counsel for guidance navigating the traps.

## Claims Cases

### 1. *Appeal of Lockheed Martin Aeronautics Co., ASBCA No. 62209 (October 27, 2021)*

- Lockheed submitted a claim for excessive “over & above” work on a contract to upgrade C-5 aircraft.
- The parties engaged in an increasingly contentious discovery process, with multiple motions to compel. The ASBCA appears to have become increasingly frustrated with the parties and pointedly noted that it “is optimistic that this will be the final [motion to compel] and [the decision] will guide the parties in working together to resolve any future discovery disputes.”
- The ASBCA noted that broad discovery is permitted before the Board, subject to limits of relevance and proportionality. It then found that Lockheed’s requests were within the bounds of relevance and permitted discovery. Specifically, Lockheed had identified its intent to use a measured mile approach in demonstrating quantum and was entitled to seek information that might support that approach. The government’s view that Lockheed did not have sufficient facts to prove entitlement did not permit the government to refuse to engage in discovery.
- The ASBCA also rejected the government’s boilerplate objections to interrogatories. The Board found that generalized objections—such as it being “unduly burdensome to attempt to locate” relevant individuals or information—were not sufficient. Such a response failed to demonstrate that the government engaged in a good faith effort to respond to the interrogatories and failed to identify the actual burden the government might face in responding.

Discovery disputes can be costly and time consuming for both parties. They also fail to serve the government’s interest and obligation to treat contractors fairly. Carefully articulated discovery requests and thoughtful trial strategy can help reduce unnecessary costs and painful delay during the discovery process.

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**Related Capabilities**

Government Contractor Litigation and Compliance

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