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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. Legal Wrangling Continues Regarding Federal Contractor Vaccine Mandate (December 3, 2021)

- In an emergency motion, the US Department of Justice requested a stay of the three-state bar (KY, OH, and TN) to the federal contractor vaccine mandate in order to have time to appeal that injunction.
- The government argues that blocking Biden's vaccine mandate risks irreparable harm by disrupting the government's selection of federal contractors who must safely work while carrying out national security missions and manufacturing equipment for national defense.
- The underlying vaccine mandate in Biden's September executive order has thus far been implemented through clauses in new contracts and modifications to existing contracts.
- The key question for the court is whether the President's delegated power to manage federal procurement allows imposition of vaccines on the employees of federal contractors and subcontractors.
- We are closely tracking legal challenges to the federal contractor mandate and stand ready to advise you on the impact of these challenges nationwide.

2. Changes to Guidance on Agency Enforcement of the Vaccine Mandate by Federal Employees, (November 29, 2021)

- The Safer Federal Workforce Task Force updated its guidance to clarify agency enforcement of the vaccine mandate by federal employees.

- For those not yet vaccinated, the guidance now advises an "appropriate" period of education and counseling, rather than a "brief," or "five day" period.

- Following education and counseling, agencies may issue a letter of reprimand, followed by a short suspension, now described as 14 days or less. Continued noncompliance during the suspension can be followed by the agency proposing removal. However, depending on operational needs and individual circumstances, agencies may expedite or extend the enforcement process, such as by moving to a second suspension of 15 days or more prior to removal.

- Agencies are cautioned that "consistency across Government in enforcement of this Government-wide vaccine policy is desired, and the Executive Order does not permit exceptions from the vaccination requirement except as required by law."

- Guidance for agency handling of unvaccinated employees provides a framework for federal contractors to use in fashioning their own policies. We continue to track the changes to guidance regarding vaccine-related workforce policies and stand ready to advise regarding your implementation of the federal contractor vaccine mandate.

Protest Cases

1. *Enterprise Resource Planned Systems International, LLC*, B-419763.2; B-419763.3 (November 15, 2021) (Published December 3, 2021)

- GAO denied a protest alleging in part that the agency improperly performed a price realism evaluation.

- A price realism analysis considers whether an offeror's low price reflects a lack of technical understanding or risk. Agencies are only permitted to assess price realism if offerors are on notice such an evaluation will be performed.

- Here, the solicitation did not include a price realism as an evaluation factor. ERPSI alleged that the agency nonetheless performed one, claiming the evaluators raised concerns about ERPSI's proposed price being too low to fulfill the representations made in its technical proposal.

- GAO denied this protest ground, finding that statements made by the evaluators did not demonstrate that the agency evaluated ERPSI's price for realism. Instead, the record reflected the agency's concern that the protester's proposal carried *technical* risk in multiple respects, which in turn carried *price* risks. For instance, ERPSI's proposal included ambiguities as to what, specifically, the firm was proposing as its technical solution; GAO found reasonable the agency's

conclusion that it might have to incur additional costs to satisfy the requirements of the contract due to these ambiguities.

Evaluation references to price risk do not necessarily constitute price realism. GAO maintains a distinction between cases where it is the protester's price that raised concerns about the risk or feasibility of their technical approach, versus those where the agency had concerns about the firm's technical approach that increased the possibility of additional costs during performance of the contract to meet the requirements.

2. *Computer World Services Corporation; CWS FMTI JV LLC*, B-419956.18 *et al.* (November 23, 2021)

- GAO sustained a protest challenging the terms of the National Institutes of Health's (NIH) Chief Information Officer-Solutions and Partners 4 (CIO-SP4) solicitation.

- Relevant here, the solicitation included a self-scoring component in phase 1 of the competition under which an offeror could claim points for multiple criteria based on various experience (*e.g.*, under the corporate experience criterion, performing in the RFP's ten task areas). The RFP permitted an offeror to submit experience examples by mentor-protégé joint venture members, or members of a contractor team arrangement (CTA).

- CWS and CWS's mentor-protégé joint venture protested because, for a mentor-protégé joint venture, the solicitation limited the experience examples that a large business mentor could submit for credit. The protester argued that these limitations unreasonably restricted the ability of a protégé to take advantage of the experience of its large business mentor.

- GAO first rejected CWS FMTI's argument that the RFP violated 13 C.F.R. § 125.8, which provides that "[a] procuring activity may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally." GAO concluded that the RFP did not violate any specific statutory or regulatory provisions because the RFP's limitations on the experience that could be submitted by the large business mentor did not impose on the protégé a requirement that was different than "other offerors generally," because the protégé was not required to submit any experience itself.

- Nonetheless, GAO sustained the protest because the restriction was unduly restrictive of competition.

- NIH maintained that limiting the amount of experience that may be credited to a large business mentor would ensure that the agency would be able to meaningfully consider the experience of the protégé member of the joint venture, but GAO emphasized that the CIO-SP4 RFP did not actually require the protégé to submit any experience, and therefore did not ensure that the agency would be able to meaningfully consider that joint venture member's experience after all.

(This also distinguished the situation here from a comparable restriction GAO found unobjectionable in *Ekagra Partners, LLC* in early 2019.)

The purpose of the Small Business Administration's mentor-protégé joint venture program is to allow small business protégés to benefit from the capabilities of mentor firms—which may be large or small businesses. GAO sustained one of the dozens of protests filed challenging the CIO-SP4 solicitation because NIH had no reasonable support for its decision to limit the submission of experience from a large business mentor, which essentially favored joint ventures with small business mentors.

Claims Cases

1. *JKB Solutions and Services, LLC v. United States*, Fed. Cir. 2021-1257 (November 17, 2021)

- JKB received an IDIQ contract to provide training services to the US Army. The Army ordered 14 training sessions per year, but then failed to use or pay JKB for that many sessions. JKB brought an action for breach of contact.

- After a series of motions, the government moved for summary judgment based on the contract's inclusion of FAR 52.212-4 and the doctrine of constructive termination for convenience.

- The Court of Federal Claims granted the government's motion for summary judgment, holding that FAR 52.212-4 incorporated a termination for convenience clause and nothing limited the applicability of that clause to commercial items.

- The Court of Appeals for the Federal Circuit disagreed, finding that FAR 52.212-4 does not apply to a services contract and, thus, the termination for convenience clause within it was not applicable. The court remanded to the lower court to consider whether the Christian Doctrine would read into the contract a different termination for convenience clause and whether the government's actions would then permit constructive termination for convenience.

Courts have gone to great lengths to avoid holding that the government has breached its contract and is liable for breach damages. This decision recognizes basic limits on invoking termination for convenience and finding constructive termination for convenience. It also highlights the complexity of—and the need for experienced counsel in—any situation where the government refuses to live up to its end of the bargain and threatens termination.

Investigations and Enforcement

Yesterday, the President announced the United States' Strategy on Countering Corruption. We link to the fact sheet from the White House, which further links to the strategy itself. Additional analysis to follow in future alerts.

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