

Government Contracts Legal Round-Up | 2021 Issue 24

Publications

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By: Matthew L. Haws, Noah B. Bleicher, Aime J. Joo, Sati Harutyunyan, Moshe B. Broder, Marc A. Van Allen, David Robbins

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.

Vaccine Update

1. Legal Developments Continue Regarding Federal Contractor Vaccine Mandate (December 21, 2021)

- After a busy few weeks in the courts, there are now multiple stays issued against the federal contractor COVID-19 vaccine mandate, including a nationwide stay issued by a Federal District Court in Georgia.
 - On December 17, 2021, the Eleventh Circuit denied the Biden Administration's request for a stay of that nationwide injunction pending appeal.
 - The Biden Administration may appeal that denial to the Supreme Court or could determine it is better to wait and allow other COVID-19 litigation to proceed.
- Given this nationwide stay, litigation challenging the OSHA ETS has become more relevant for government contractors.
 - On December 17, 2021, a three-judge panel of the Sixth Circuit dissolved the Fifth Circuit's stay of the OSHA ETS.
 - The challengers immediately filed in the Supreme Court a request for emergency stay and cert before judgment (per Sup. Ct. Rule 11).
 - The Supreme Court has given the government until December 30, 2021 to respond to the request.

- OSHA posted a notice on its website extending compliance dates under the ETS to January 10 and February 9, 2022.

We are closely tracking legal challenges to the federal contractor mandate and OSHA ETS, and stand ready to advise you on the impact of these challenges nationwide.

Protest Cases

1. *Harmonia Holdings Group, LLC v. United States*, Case 2020-1538 (December 7, 2021)

- The Court of Appeals for the Federal Circuit confirmed that the *Blue & Gold* waiver rule is still applicable law but not as applied by the Court of Federal Claims in Harmonia’s protest.
- In January 2020, the Court of Federal Claims (COFC) ruled that Harmonia had waived its right to protest—post-award—amendments to a Customs and Border Protection (CBP) solicitation for services in support of cargo systems applications.
- Harmonia had raised its solicitation objections prior to the applicable submission deadline but only in an agency-level protest. Five months after CBP denied the agency-level protest and only after CBP awarded the contract to another vendor, Harmonia filed its complaint at COFC. In rejecting the protest, the court explained that “while Harmonia facially met the requirements under *Blue & Gold*, Harmonia nevertheless waived its right to bring those claims before this Court by failing to timely and diligently pursue its objections”
- The *Blue & Gold* waiver rule—established in the Federal Circuit’s 2007 *Blue & Gold Fleet, L.P. v. United States* decision—generally requires that an offeror who seeks to challenge the terms of a solicitation at the Court of Federal Claims bring such a protest prior to the deadline for proposal submission. In *Blue & Gold Fleet*, the Circuit held that “[r]ecognition of a waiver rule, which requires that a party object to solicitation terms during the bidding process,” furthered the Tucker Act mandate that courts expeditiously resolve protests.
- Here, the three-judge Federal Circuit panel disagreed with COFC that *Blue & Gold* applied in this instance.
- The Federal Circuit explained that “the *Blue & Gold* waiver rule is predicated not only on the notion of avoiding delay that could benefit the delaying party, but also on the notion of preserving challenges and providing notice to interested parties . . . Harmonia’s undisputedly timely, formal challenge of the solicitation before CBP removes this case from the ambit of *Blue & Gold* and its progeny.” That is, by filing an agency-level protest, Harmonia had preserved its right to re-raise its solicitation objections in a post-award protest.
- This appeal gained attention because Judge Reyna, who sat on this panel, had previously questioned the viability of the *Blue & Gold* waiver rule in his much talked about dissent in *Insero*

For now, the Federal Circuit's *Blue & Gold* waiver rule remains the law. This means that an offeror who wishes to protest the terms of a solicitation must do so prior to the deadline for proposal submission—in any of the protest forums. Here, the Circuit established that if a timely agency-level protest is filed, the offeror has preserved its right to re-raise its objections in the Court of Federal Claim—even after award—notwithstanding the Circuit's *Blue & Gold* waiver rule.

2. *Science Applications International Corporation, B-420005 et al.* (October 27, 2021)

- GAO sustained a protest alleging that the agency failed to provide adequate discussions and did not advise the protester that its prices were unreasonably high.
- GAO also sustained the protest because the agency solicited but then ignored information from the offerors regarding proposed prices.
- After receipt of initial proposals, the agency engaged in two rounds of discussions and obtained final proposal revisions before awarding the contract to Noble Supply and Logistics. Although SAIC received overall higher non-price ratings, Noble's proposed price of approximately \$1 billion was significantly lower than SAIC's proposed price of approximately \$1.5 billion.
- GAO agreed with the protester that the agency provided inadequate discussions. The record showed that throughout the acquisition, the agency found SAIC's price unreasonably high, yet the agency only advised SAIC that certain of its prices were "high" without ever informing SAIC that any of its prices, either individually or overall, were "unreasonably high."
- GAO also found unreasonable the agency's decision to overlook inadequate substantiating price information submitted by the awardee and requested by the agency given the significant pricing disparity between offerors.

Although the solicitation in this procurement contemplated a consideration of reasonableness (whether prices were too high) but not a realism evaluation (whether prices are too low), GAO held that the agency erred because once it requested from the offerors pricing data that could provide confidence that the offered prices were fair and reasonable, the agency was not free to ignore the requested information (or lack thereof). Here, SAIC substantiated its price with a detailed submission as requested by the agency, while Noble failed to provide adequate information.

- David Robbins, Co-Chair, Government Contracts Practice

Related Attorneys

Matthew L. Haws

Partner
mhaws@jenner.com
+1 202 639 6065

Noah B. Bleicher

Partner
nbleicher@jenner.com
+1 202 639 6063

Aime J. Joo

Associate
ajoo@jenner.com
+1 202 639 6010

Sati Harutyunyan

Partner
sharutyunyan@jenner.com
+1 213 239 2229

Moshe B. Broder

Partner
mbroder@jenner.com
+1 202 637 6334

Marc A. Van Allen

Partner
mvanallen@jenner.com
+1 202 639 6005

David Robbins

Partner
drobbins@jenner.com
+1 202 639 6040

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Government Contractor Litigation and Compliance

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