

Government Contracts Legal Round-Up | 2021 Issue 25

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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.

Protest Cases

1. *Secri, Inc. v. United States*, No. 21-1936 (Fed. Cir. May 13, 2022)

- This appeal asked the Federal Circuit to decide how traditional timeliness and standing rules apply to bid protests brought by mandatory source suppliers that operate under the Javits-Wagner-O'Day (JWOD) Act, which is intended to prioritize federal procurement from the blind and severely disabled.
- The protester filed suit at the Court of Federal Claims arguing that the Defense Logistics Agency (DLA) had improperly issued a competitive solicitation for certain supplies that should have been purchased directly from SEKRI as a mandatory source pursuant to the JWOD Act.
- The Court of Federal Claims found that it was bound to apply the Federal Circuit's existing framework for assessing bid protest timeliness and standing and dismissed the case because SEKRI did not submit a proposal under the DLA solicitation and did not file a formal protest before the proposal submission deadline.
- The Federal Circuit reversed, treating the case as one of first impression and holding that, based on the unique nature of the JWOD Act and mandatory source procurements, the traditional bid protest timeliness and standing rules do not bar SEKRI's protest in this case.

This case confirms that the Federal Circuit is willing to recognize that certain government contracts cases arise in unique contexts that can warrant a departure from the traditional rules. Contractors should not assume that this holding will be interpreted to relax the otherwise strictly enforced

timeliness and standing rules that apply to protests arising outside the JWOD Act. The opinion, however, is a valuable reminder of the Federal Circuit's unique position to shape procurement law, and the potential power of a persuasive appeal.

2. *BES Federal Solutions JV, LLC, B-420550 et al.* (May 11, 2022) (Published May 18, 2022)

- GAO denied the protest where the Department of the Air Force concluded that the protester's proposal was unacceptable under the technical (staffing plan) evaluation factor.
- Under the mission essential plan (MEP) subfactor, the solicitation provided that offerors were required to explain how they would continue performing during a crisis, including handling employees exposed to COVID-19 and a return-to-work policy.
- The Air Force found BES's approach unacceptable because it did not specifically address a quarantine policy or a procedure for notifying the contracting officer's representative regarding positive COVID-19 test results.
- GAO rejected the protester's argument that the Air Force's evaluation imposed an unstated evaluation criterion. GAO explained, for example, that the Solicitation's requirement to provide a COVID-19 testing policy reasonably encompassed an unstated requirement of where such testing would be performed.

Agencies may properly evaluate a proposal based on considerations not expressly stated in the RFP where those considerations are reasonably and logically encompassed within the stated evaluation criteria, and where there is a clear nexus between the stated and unstated criteria.

3. *DCR Services & Construction, Inc., B-420179.2, B-420179.3* (April 28, 2022) (Published May 6, 2022)

- GAO denied in part and dismissed in part a protest challenging the National Park Service's non-selection of DCR's quotation for the establishment of a blanket purchase agreement (BPA) for contaminated site cleanup services.
- First, GAO denied DCR's protest alleging flaws in its own evaluation.
- Next, GAO dismissed DCR's protest challenging the evaluation of the awardee's proposal and the best-value determination, finding that DCR was not an interested party to raise these challenges.
- GAO explained that even if DCR's protest concerning the agency's evaluation of the awardee's quotation (and its treatment in the best-value determination) was sustained, DCR would not be in line to receive a BPA. The record reflects there were two other vendors that did not receive BPAs, yet the agency found their quotations to be a better value than DCR's.

Where there is an intervening offeror who would be in line for the award if a protester's challenge to the award were sustained, the intervening offeror has a greater interest in the procurement than the protester, and GAO generally considers the protester's interest too remote to qualify as an interested party. Protesters should be mindful of the competitive landscape when filing protests, as they may be required to challenge not only the awardee's evaluation, but the evaluation of other disappointed offerors.

Claims Cases

The Armed Services Board of Contract Appeals (ASBCA) issued a decision that cites an article published by Nathaniel Castellano for the observation that the Contract Disputes Act (CDA) contains traps for the unwary, despite being intended to create a fair and efficient mechanism for resolution of government contract claims. Nathaniel's article argues that, based on a recent line of Supreme Court precedent, the CDA's procedural requirements for claim submission, certification, and timely appeal do not qualify as jurisdictional prerequisites for maintaining CDA litigation.

Freedom of Information Act (FOIA) Exemption 4

1. *Synopsis, Inc. v. Dept. of Labor*, No. 20-16414, 20-16416, 2022 WL 1501094 (9th Cir. May 12, 2022)

- The Department of Labor (DOL) declined to release certain materials in response to a FOIA request; the requester filed suit in district court challenging DOL's decision to withhold; the district court held in favor of the requester, directing DOL to release the disputed materials.
- After the district court issued its order directing DOL to release the materials, Synopsis attempted to intervene in the same case, claiming that the materials qualified as its confidential commercial information that must be withheld under FOIA Exemption 4. The district court denied the motion to intervene as untimely.
- Synopsis separately filed an independent "Reverse-FOIA" action against DOL, asking the district court to enjoin DOL from releasing the same materials, again invoking Exemption 4. The district court rejected the Reverse-FOIA argument on the basis the court had already ordered DOL to release the materials.
- Synopsis appealed. The Ninth Circuit affirmed in an unpublished decision, finding that the district court did not abuse its discretion in denying the motion to intervene, and agreeing with the district court that, under Supreme Court precedent, once the district court ordered DOL to release the materials Synopsis could no longer sue to enjoin the release of those same materials.

This decision emphasizes how important it is for companies to be vigilant when trying to protect confidential information that has been submitted to the US Government. As soon as an agency provides notice that confidential information has been requested under FOIA, the company should

promptly respond with legal and factual support explaining why any proprietary or confidential commercial information must be withheld. In the event a requester files suit to obtain the materials, or the agency indicates it will release sensitive information, the company should act quickly to intervene and support the agency, or file suit to enjoin the agency, as appropriate. For those interested in learning more about FOIA Exemption 4, Nathaniel Castellano recently published a Briefing Paper discussing the latest litigation developments and best practices.

Investigations and Enforcement

The Department of Justice announced an inflation adjustment to civil False Claims Act penalties, increasing the range of penalties to \$12,537 to \$25,076 per claim.

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Government Contractor Litigation and Compliance

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