

Government Contracts Legal Round-Up | 2022 Issue 3

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.

Protest Cases

1. *AttainX, Inc.*, B-420313 (January 31, 2022) (Published February 1, 2022)

- GAO denied a protest where a protester timely submitted a quotation that was not considered by the agency because of email delivery issues.
- In this procurement, the protester submitted its quotation by email to the contract specialist shortly before the deadline for quotation submission but received an error delivery message. The protester made several attempts to contact the contract specialist, each time receiving an error message.
- After the agency had awarded the task order to another vendor, a subsequently appointed contract specialist informed the protester that its proposal had been quarantined and was never viewed. The protester alleged that the agency improperly failed to consider its quotation.
- GAO denied the protest. Although the protester timely submitted its quotation to the designated email address, the email was quarantined in the agency's email server in a manner that made it inaccessible and thus the contracting personnel were unaware of the quotation.
- GAO analogized to an agency misplacing a timely submitted quotation; in such cases, relief is available only where there is evidence of a deliberate intent to prevent selection of the firm or a systemic agency failure to receive and safeguard quotations. Here, the record lacked evidence of other vendors experiencing similar problems or broader systemic agency issues.

- Notably, the agency had removed FAR 52.212-1(f) from the solicitation, which provides for the “government control exception” to consideration of late proposals.

While GAO described the situation as “unfortunate” and did not fault either party, the result was disappointing for the vendor who had complied with the solicitation’s instructions. While an unusual case, this decision serves as a cautionary tale for leaving ample time to submit proposals prior to the announced deadline, and where appropriate, confirming receipt.

2. *CGS-SPP Security Joint Venture v. United States*, No. 21-2049C (January 19, 2022) (Published February 3, 2022)

- In this second-bite protest, the Court of Federal Claims (CoFC) disagreed with GAO’s prior holding and sustained a protest on the basis that the solicitation contained a latent defect regarding the email address to which proposals were required to be submitted.
- Here, the solicitation required proposal submission by email and identified a specific office within the Department of State for proposal submission, but it did not designate any specific contracting personnel to receive proposals. The solicitation identified two contracting officers, as well as a contract specialist to respond to questions and comments and provided email addresses for a contracting officer and the contract specialist.
- The plaintiff emailed its proposal to the two contracting officers identified in the solicitation, as well as an additional agency contracting officer. However, while the plaintiff addressed its proposal to the contract specialist, it did not include the contract specialist in the email submission. The contracting officers who received the proposal did not open the protester’s email or forward it to the contract specialist. Consequently, plaintiff’s proposal was never considered for award.
- After awarding the contract to the incumbent contractor, plaintiff initially filed a protest at GAO, which dismissed the protest as untimely on the basis that the solicitation contained a patent ambiguity regarding the appropriate addressee for submission of proposals.
- The CoFC disagreed, finding that the solicitation was ambiguous and susceptible to two reasonable interpretations. Further, the court held that the ambiguity was latent, not apparent on the face of the proposal, and created by State not informing potential offerors that proposals would only be considered if sent to one particular individual—the contract specialist—despite any direct textual support in the solicitation for this requirement. The court also held that the plaintiff complied with the most reasonable interpretation of the solicitation by sending its proposal to the two contracting officers identified in the RFP.

Contractors should remain vigilant about potential ambiguities in solicitations, generally, and specifically with respect to threshold matters like proposal submission instructions. Here, the CoFC reached a different conclusion than GAO regarding a latent ambiguity in what it described as a “close call.” As a general matter, however, in situations where a solicitation ambiguity is evident on its face,

it will be considered patent and the potential offeror must seek clarification prior to award or risk waiving its objection.

Claims Cases

1. *Aspen Consulting, LLC v. Secretary of the Army*, CAFC 2021-1381 (February 9, 2022)

- Contractor appealed final decision of the Armed Services Board of Contract Appeals (ASBCA) denying an appeal based on the government's failure to deposit payment in the correct bank account.
- FAR 52.232-33 provides that “[t]he Government shall make payment to the Contractor using the [Electronic Funds Transfer] EFT information contained in the Central Contractor Registration (CCR) database. In the event that the EFT information changes, the Contractor shall be responsible for providing the updated information to the CCR database.”
- The ASBCA held that the government had not breached the contract because the fault rested with the contractor for failing to properly update its information in the Central Contractor Registration (CCR) database; the United States Court of Appeals for the Federal Circuit (CAFC) disagreed.
- Specifically, CAFC “conclude[d] that the government’s breach was material because the FAR clause serves an important purpose for both parties: it protects the government and the contractors who do business with it.”
- CAFC remanded the case for further proceedings on the potential affirmative defense of payment, which may be available where the funds actually benefited the party claiming breach.

This case serves as a reminder that the Boards and Courts will hold parties to a government contract to strict adherence with the terms. When a dispute arises with the government, contractors should examine closely whether the government has satisfied its requirements under the contract. Here, the contractor benefited from application of that concept.

False Claims Act

This was a busy period for False Claims Act updates:

- The Department of Justice announced \$5.6 billion in fraud and False Claims Act recoveries in 2021, with a notable increase in recoveries from defense/government contracting suits to just shy of \$100 million. Press release available here: <https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year>
- The First Circuit announced its standard for False Claims Act dismissals, a broadly deferential standard to the Government’s dismissal authority. Decision available here: <http://media.ca1.uscourts.gov/pdf/opinions/20-1066P-01A.pdf>

- To recap, the current circuit split on FCA dismissals is:
 - First and DC Circuits: government has broad dismissal authority
 - Third and Seventh Circuits: Voluntary dismissal authority in the Federal Rule of Civil Procedure 41(a)
 - Ninth and Tenth Circuits: Dismissal must serve a valid government purpose and there must be a rational relationship between dismissal and that purpose
- The Eleventh Circuit held that non-intervened *qui tam* cases may be subject to the Excessive Fines Clause, while finding the case before the Eleventh Circuit did not violate the clause. Decision available here:

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Related Capabilities

Government Contractor Litigation and Compliance

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