

Government Contracts Legal Round-Up | 2022 Issue 4

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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. **KPMG LLP, B-420388, B-420388.2 (February 16, 2022)**

- GAO denied a protest challenging the Defense Logistics Agency's (DLA) decision to set aside a Federal Supply Schedule (FSS) procurement for service-disabled veteran-owned small businesses (SDVOSB).
- The small business programs and the well-known "Rule of Two" generally are not applicable to FSS procurements. Instead, a contracting agency retains broad discretion to set aside FSS orders.
- Among other arguments, KPMG challenged the adequacy of DLA's market research, identifying differences between the description of the work provided in the agency's sources sought notice and the precise requirements of the RFQ.
- Nevertheless, GAO found unobjectionable the set-aside decision. GAO explained that in making set-aside decisions, agencies need only make an informed business judgment that there are small businesses that are capable of performing and can reasonably be expected to submit offers. DLA met that threshold here.

Agencies enjoy broad discretion to set aside an FSS procurement. A contracting officer need only make an informed business judgment that there is a reasonable expectation of receiving acceptably priced offers from small business concerns that are capable of performing the contract. In fact, a contracting officer may set aside a solicitation even where a skeptical competitor can identify

contrasting information that could arguably justify rejecting the set-aside and holding a full and open competition.

2. Softrams, LLC; Chags Health Info. Tech., LLC, B-419927.4 et al. (February 7, 2022)

- GAO sustained a protest where an agency made award to one company based, in part, on an oral presentation given by a different entity.
- The protest involved a Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), procurement for operations and management of the agency's identity management system. CMS conducted the competition among GSA federal supply schedule contract holders.
- During the multi-phase competition, the awardee had undergone a "vendor configuration change"; the vendor changed from a traditional prime-subcontractor arrangement to a GSA contractor teaming arrangement (CTA) (with the subcontractor as the team lead). The CTA participated in the oral presentation part of the competition.
- Softrams and Chags protested; the agency took corrective action and eliminated the CTA from the competition; the CTA filed an agency-level protest; and CMS permitted the original prime-subcontractor bidding entity back in the competition. The agency's corrective action then involved a reevaluation of quotations, but CMS did not permit any vendor to make revisions to or provide a new oral presentation. Ultimately, CMS issued the FSS order to the prime-subcontractor entity.

GAO sustained the protest because CMS improperly relied upon the oral presentation made by the CTA in selecting the prime-subcontractor's revised quotation for award. That is, the quotation that formed the basis of the selection decision technically was submitted by two different vendors—a prime-subcontractor team and a CTA.

Agencies generally have broad discretion to take corrective action when the agency has determined that such action is necessary to ensure fair and impartial competition, and GAO generally will not object to specific corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. Here, GAO sustained the protest because the corrective action did not fully address the original error that CMS was attempting to correct. In the end, because CMS did not revisit the vendors' oral presentations, the agency had unreasonably based its selection decision on a quotation that was composed of submissions from two different vendors.

3. Science Applications International Corporation, B-419961.3; B-419961.4 (February 10, 2022) (Published February 23, 2022)

- GAO denied a protest alleging (in part) that the awardee, Leidos, Inc., gained access to non-public, competitively useful information through a consulting agreement with a former NASA official who provided proposal preparation assistance.

- The protester claimed that the former government official (referred to as X) had access to SAIC's proprietary information from the incumbent contract, as well as access to internal agency source selection information. SAIC also argued that NASA's investigation concluding otherwise was unreasonable.
- Specifically, following an investigation, the contracting officer concluded that while X had access to non-public proprietary information and source selection information due to the high-ranking position the individual held at NASA before retiring, this information was not competitively useful because the information had either become public or was outdated by the time initial proposals were due. The contracting officer also found that there was no evidence that any of the agency's non-public, competitively useful information made its way into Leidos's proposal.
- Ultimately, GAO found NASA's investigation meaningful and its conclusions reasonable. GAO identified that the protester's disagreement with the agency's findings about the competitive usefulness of information, without more, could not displace the agency's reasonable judgment that the awardee did not have an unfair competitive advantage. Notably, GAO concluded that SAIC did not allege hard facts pertaining to X's involvement in the procurement, instead only providing speculation, and thus the protester was not entitled to a presumption of prejudice from an unfair competitive advantage.

For companies relying on a former government official, either as an employee or as a consultant, proceed carefully to avoid an unfair competitive advantage. For protesters alleging that the awardee has such an advantage, it is crucial to allege with specificity how the awardee benefitted from the former government official's knowledge and insights to meet the prejudice hurdle.

Claims Cases

1. *Marine Construction, LLC v. United States*, COFC No. 15-1189 (February 17, 2022)

- COFC granted in-part and denied in-part the contractor's motion for summary judgment alleging that its termination for default of a hydraulic dredging contract at the Quillayute River Waterway in La Push, Washington should be converted to a termination for convenience.
- The contractor claimed that this was warranted for a number of reasons including, because: the government withheld superior knowledge of certain dredging specifications, the contractors properly gave notice of an excusable delay, the government breached the contract, and of differing site conditions.
- While the court ultimately rejected some of these claims, reserved others for further consideration at trial, or was persuaded by the government's defenses, COFC did grant summary judgment on the contractor's superior knowledge claim.

- Specifically, the court found that the contractor successfully established the government breached the contract under the superior knowledge doctrine for two of its four claims.
- First, COFC agreed with the contractor that because the government “failed to disclose its superior knowledge of the 12” minimum sufficient discharge pipe size in the 2014 solicitation,” and the contractor began performance based on that original solicitation, the government breached the contract.
- Second, the court found that because the contractor “bid on the solicitation without knowledge of the substantial quantities of man-made debris and sunken vessels in the boat basin,” the government’s failure to disclose that information before the contractor began performance constituted a breach of contract under the superior knowledge doctrine.
- Notably, in agreeing with the contractor on those two grounds, COFC rejected various attempts by the government to defend itself by claiming that it had informed the contractor at some later point. Instead, the court emphasized that the operative question was whether the solicitation was clear and whether the contractor had performed (to its detriment) on the basis of those representations.

When issues arise during performance—especially those resulting from surprise or other potential misrepresentations by the government—contractors should consider the superior knowledge doctrine as an effective mechanism to have the courts/boards ensure that the government strictly adhered to the terms of the contract pursuant to which the contractor performed. And, where there is a mismatch between what the government represented and the reality of performance, the superior knowledge doctrine remains a vital tool contractors may employ to ensure they are compensated for any misalignment of expectations under the contract. Our team at Jenner & Block has substantial experience litigating superior knowledge claims, please contact us with any questions.

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