

Government Contracts Legal Round-Up | 2022 Issue 5

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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. *Choctaw Defense Munitions, LLC, B-420003, B-420003.2 (October 27, 2021) (Published March 1, 2022)*

- GAO dismissed a protest alleging, in part, that the awardee had an unequal access to information OCI, finding the information at issue was not obtained through performance of a government contract.
- A former Choctaw executive, who had been a managing officer for the affiliate performing the incumbent contract, left Choctaw and began working with Cherokee. While working at Choctaw, this individual had direct oversight of the incumbent contract and was responsible for approving proposals related to that program.
- Choctaw thus argued that this change in employment created an unequal access to information OCI, which Cherokee failed to disclose and the agency failed to evaluate and mitigate.
- GAO dismissed the protest ground, explaining that an unequal access to information OCI exists where a firm has access to non-public information as part of its performance of a government contract, and where that information may provide the firm an unfair competitive advantage in a later competition for a government contract. In contrast, where information is potentially disclosed by a former employee of the other firm, this type of disclosure is "essentially a dispute between private parties." Without evidence of government involvement, as was the case here, GAO will not consider the issue.

Allegations of an OCI will be considered a private dispute, and therefore not be considered by GAO, if the information at issue is obtained not through performance of a government contract, but through hiring a competitor's employee.

2. *K&K Industries, Inc.*, B-420422; B-420422.2 (March 7, 2022) (Published March 10, 2022)

- GAO dismissed a protest as untimely where it was filed more than 10 days after the agency unambiguously stated that the protester's enhanced debriefing had concluded.
- Following notice of award, K&K requested and received its Department of Defense enhanced debriefing, which only closes following a question and answer period. After receiving its first set of answers, K&K submitted a second round of questions, and in response the agency stated: "Any additional questions must be submitted by December 1, 2021. This concludes your written debriefing." K&K submitted a third round of questions by that date, and following the receipt of answers, K&K filed its protest.
- Following the submission of the agency report and K&K filing a supplemental protest, GAO on its own requested briefing on timeliness.
- In arguing that its protest was timely, K&K contended that the second agency response was ambiguous regarding the conclusion of the required debriefing, because it stated both "[a]ny additional questions must be submitted by December 1, 2021" and "[t]his concludes your written debriefing."
- GAO disagreed, holding that the agency unambiguously informed K&K that its written debriefing had closed following the second round of questions. The agency's decision to answer additional questions did not toll the protest clock, as only an agency's action can extend a debriefing, and a disappointed offeror cannot extend the debriefing by asking further questions.

GAO's strict timeliness rules can be a trap for the unwary. If there is an opportunity to ask additional questions after the agency has stated that the debriefing is closed, confirm that the debriefing remains open until answers are received. Without such confirmation, disappointed offerors should assume that the 10-day protest clock has commenced and file accordingly.

Claims Cases

1. *Central Company*, ASBCA No. 62624 (February 3, 2022)

- After it was terminated for default, an Air Force design and construction contractor brought an appeal claiming its performance delays were excusable due to the COVID-19 pandemic.
- ASBCA denied the appeal, finding no evidence that the pandemic actually affected performance. To the contrary, the board determined that significant delay occurred *before* the pandemic's onset

in March 2020. Specifically, the contract required that work be completed in May 2020, but as of March 2020, the contractor had submitted only one design document, which was rejected.

The decision indicates that although COVID-19 impacts could excuse delay or non-performance in some scenarios, contractors cannot cite COVID-19 impacts to explain away all delays occurring during the pandemic. Contractors asserting pandemic-related impacts should be prepared to provide documentation and point to contemporaneous demonstration to the agency of when the delays occurred and their real effect on the contractor's work.

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Government Contractor Litigation and Compliance

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