

Government Contracts Legal Round-Up | 2022 Issue 7

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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.

Regulatory Updates

1. OFCCP Update

The Office of Federal Contract Compliance Programs has announced a new Contractor Portal where contractors and subcontractors must register and certify their compliance with Affirmative Action Program requirements. June 30, 2022 is the deadline to submit initial certifications. After that, annual certifications will be required. Contractor Portal Link: <https://contractorportal.dol.gov>

2. GSA Contracting Price Increases Update

GSA published an Acquisition Letter, link AL MV-22-02: Temporary Moratorium on EPA Clauses ([gsa.gov](https://www.gsa.gov)), which announces a temporary moratorium on GSA enforcement of certain limitations on contractors' ability to seek Economic Price Adjustment (EPA). GSA cited inflation and supply chain concerns as the reasons for the moratorium. Noting that contractors are removing items from the Federal Supply Schedules to avoid selling them at a loss, GSA will permit more frequent requests for price adjustment. GSA will also make it easier for government acquisition professionals to approve such requests.

3. Goodbye DUNS, Hello Unique Entity Identifier

After years of study, the government has stopped using Dun & Bradstreet's Data Universal Numbering System (DUNS) to identify government contractors. In its place, the government has transitioned to Unique Entity Identifiers (UEIs). Link to announcement: Unique Entity Identifier Update | GSA Contractors with existing SAM registrations have been assigned a UEI and will need to begin using the number. New registrants will request a UEI through SAM rather than register for a DUNS number as part of their SAM registration process.

Protest Cases

1. *Spatial Front, Inc.*, B-420377 (March 7, 2022) (Published April 5, 2022)

- GAO denied a protest challenging as unduly restrictive the terms of a solicitation issued by the Department of Commerce for enterprise-wide IT services. Specifically, the protester alleged that the requirement to possess a top-secret facility clearance (TS-FCL) was unduly restrictive and had an unreasonable impact on small businesses.
- The protestor, a small business, argued that because only a “limited number of task orders” were likely to require the TS-FCL, the requirement was unnecessary and “unreasonably restricted competition.”
- GAO found that the agency reasonably justified this restrictive provision. The agency documented the performance and cost issues caused by the current decentralized IT environment and the benefits that would flow from a single-award contract to implement a multi-domain environment. And the agency refuted the contention that only a subset of the work was classified, explaining that it expected classified requirements in each performance area. Moreover, the agency conducted ample market research demonstrating that a significant number of small businesses could meet the solicitation’s TS-FCL requirement.
- GAO thus found that that the TS-FCL requirement was justified and within the agency’s discretion.

Agencies are generally afforded discretion to determine their needs and the best means to accommodate them. Where a requirement touches on matters of national security, such as in the present solicitation, an agency “has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest possible reliability and/or effectiveness.”

2. *Veterans Choice Medical Equipment, LLC*, B-419991, B-419991.2 (October 20, 2021) (Published April 1, 2022)

- GAO denied a protest challenging the Department of Veterans Affairs’ award of a contract for in-home oxygen and ventilator services.
- The protester alleged that the agency unreasonably evaluated the awardee’s corporate experience because the awardee’s proposal lacked a reference contract containing all the required explanatory information. Further, the Source Selection Authority and another evaluator relied on their personal knowledge of the awardee’s experience that was not included in the proposal.
- GAO found no basis to sustain the protest. The Solicitation’s proposal submission instructions afforded the agency discretion to consider experiences that did not conform to the submission requirements, and GAO found nothing improper with the evaluators considering corporate experience not found in the awardee’s proposal of which they had personal knowledge.

In certain circumstances, GAO has held that an agency may consider “close at hand” past performance or corporate experience information known to the agency and not found in an offeror’s proposal. But GAO has also made clear that the “close at hand” doctrine is not intended to remedy a failure to include required information in a proposal, and the burden rests on the offeror to submit a well-written proposal with adequately detailed information that allows for a meaningful review by the procuring agency.

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Related Capabilities

Government Contractor Litigation and Compliance

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