

Government Contracts Legal Round-Up | 2022 Issue 8

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. *CACI, Inc.-Fed., B-420441 et al. (April 7, 2022) (Published April 13, 2022)*

- GAO sustained the protest where the Department of Homeland Security, Transportation Security Administration (TSA), reduced the corporate experience evaluation criterion to pass/fail instead of engaging in the solicitation's required qualitative evaluation and tradeoff of corporate experience.
- The solicitation provided that an initial aspect of the corporate experience evaluation would be conducted on a pass/fail basis during the first phase of evaluation, but the solicitation also included corporate experience as a critical element to the agency's best-value tradeoff in the second phase of the evaluation.
- GAO rejected TSA's position that it could reasonably evaluate corporate experience only on a binary pass/fail basis, finding that the plain language of the solicitation required a qualitative evaluation and tradeoff of offerors' experience.
- Accordingly, while the Source Selection Authority summarily compared the satisfactory ratings assigned to both the protester and the awardee, GAO held that this comparison failed to constitute the requisite qualitative comparison of corporate experience.

Challenges to an agency following the terms of the solicitation remain a very common ground of protest. Where, as here, the parties disagree about the interpretation of a solicitation provision or the manner in which the agency was to evaluate proposals, GAO will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions.

Claims Cases

1. *CSI Aviation, Inc. v. DHS*, CAFC No. 2021-1630 (April 14, 2022)

- The United States Court of Appeals for the Federal Circuit reversed a decision issued by the Civilian Board of Contract Appeals (CBCA or Board), which had denied an appeal filed by CSI Aviation, Inc. (CSI), an air charter company.
- CSI sought to recover \$40.2 million under its General Services Administration federal supply schedule (GSA FSS) contract after the US Immigration and Customs Enforcement canceled 45 flights less than two weeks in advance.
- CSI argued that the terms and conditions (T&C) (which included the cancellation policy) were incorporated by reference in the GSA FSS contract, but the CBCA held it was not.
- On appeal, the Federal Circuit reiterated that a document is incorporated when it is cited in “express” and “clear” language. In this case, it found that “[t]he offer’s pricing policy contains a ‘terms and conditions’ provision that expressly states, ‘CSI terms and conditions ... will apply to all operations and are included for reference,’ and , “[t]rue to its word, a copy of the CSI terms and conditions, dated November 2008, is included as part of the offer.”
- Specifically, CAFC rejected the Board’s argument that CSI’s use of different language to incorporate different documents meant this document wasn’t incorporated: “[o]ur circuit ... does not require 'magic words' of reference or of incorporation.”

While often presented to commercial companies as a simple way to sell to the government, GSA schedule contracts actually involve complicated submissions to, and negotiations with, the government. It is important to be careful in these negotiations and clearly address any company-specific terms of sale and their relationship to standard government contract terms. Experienced counsel can help avoid costly litigation down the road as a result of unclear contract language.

Investigations and Enforcement

Jenner & Block lawyers David Robbins and Sati Harutyunyan analyzed the recently issued and long-awaited Interagency Suspension and Debarment Committee Report to Congress for FY2020.

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Government Contractor Litigation and Compliance

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