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# Government Contracts Legal Round-Up | 2022 Issue 13

**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.

## Investigations and Enforcement

### Does the DOJ Have the Ability to Dismiss Declined *Qui Tams*?

The Government's ability to dismiss *qui tam* cases is subject to multiple standards, from an "unfettered right" to only after intervention and on terms the court seems proper, and other stops in between. The Supreme Court granted cert in *United States, ex rel. Polansky v. Executive Health Resources, Inc.*, to resolve this circuit split in a case which will be watched carefully by the Government, realtors' counsel, and defense counsel alike.

## Supreme Court Cases

### 1. *Biden v. Texas*, No. 21-954 (June 30, 2022)

- The Supreme Court provided further analysis describing the options available to agencies on remand.
- This is an important and developing issue of administrative law that often arises in bid protests, particularly at the Court of Federal Claims (COFC), where procurement decisions are frequently remanded back to agencies to either provide further explanation for a prior decision or issue a new decision altogether.
- *Biden v. Texas* builds on the Supreme Court's 2020 decision in *Department of Homeland Security v. Regents of University of California*, and confirms that when an agency decides to issue a new decision on remand, as opposed to simply providing further explanation for its initial decision, the agency has discretion to provide new justifications for its actions.

The mechanics and procedural rules that apply to agencies on remand is an increasingly prominent issue in COFC bid protests, particularly those involving corrective action. This is an area where protest practice is often driven by precedents outside the COFC, and even outside the Federal Circuit. Protest counsel should keep an eye on developments in this area of administrative law.

## Claims Cases

### 1. *Raytheon Co. v. United States*, No. 19-883C (June 30, 2022)

- In a much-anticipated decision from a long-running data rights dispute between Raytheon and the Army, COFC Judge Kaplan held that Raytheon's vendor list did not constitute "technical data" covered by the standard DFARS noncommercial Rights in Technical Data clause, 252.227-7013.
- This dispute stemmed from the Army's attempt to require Raytheon to regularly submit its vendor lists relating to Raytheon's contract to provide engineering services in support of the Patriot weapons system.
- When Raytheon provided the list, it included proprietary legends restricting the Army's ability to release the data to third parties—that is, to potential competitors.
- The Army disputed Raytheon's proprietary markings, contending the vendor lists qualified as "technical data." that the Army had broader rights to use and distribute than Raytheon's proprietary markings would allow.
- After analyzing the text and regulatory history of the DFARS data rights clause, the court disagreed with the government's position, granting relief in favor of Raytheon.

This case is an important contribution to the longstanding and ongoing discussion between DoD agencies and defense contractors regarding the need to balance (a) contractors' investments in proprietary business methods and (b) DoD's needs to maintain access to competitively priced maintenance and support services for major weapons systems. This decision is a justified win for contractors, but the discussion is far from over.

### 2. *CiyaSoft Corp.*, ASBCA No. 59913 (June 1, 2022)

- This ASBCA decision follows from a significant 2018 ASBCA opinion finding that the Army was bound by and breached a commercial software license that CiyaSoft incorporated into its contract to sell the Army translation software.
- After finding for CiyaSoft on entitlement, the Board remanded the matter to the parties to negotiate quantum.
- Ciyasoft returned to the Board after negotiations broke down; according to CiyaSoft, the government was continuing to dispute issues that CiyaSoft considered resolved in the entitlement

decision. CiyaSoft and the Army could not agree as to (a) whether the license terms restricted the Army to 20 unique single users or permitted more than 20 individual users as long as no more than 20 copies of the software were deployed at once, and (b) whether CiyaSoft failed to mitigate its damages.

- The Board found a genuine dispute of material fact relating to whether the license permits more than 20 single users, denying CiyaSoft's motion for summary judgment on that issue, and disagreed with the government's theory that CiyaSoft had a duty to mitigate damages before contract performance began.

This is the latest in an important and growing line of decisions from the ASBCA, COFC, and Federal Circuit relating to the resolution of software licensing disputes with the federal government, which can raise incredibly complex issues of sovereign immunity, jurisdiction, entitlement, and quantum. Companies and counsel working in this space should pay careful attention to the CiyaSoft litigation.

## Protest Cases

### 1. *AGMA Security Service, Inc. v. United States*, No. 20-926C (June 26, 2022)

- Judge Horn issued a decision carefully walking through the elements of a small business bid protester's claim for attorney fees under the Equal Access to Justice Act (EAJA); the decision provides a helpful summary of this unfortunately complex area of law.

- After analyzing legal entitlement and examining the evidence presented as to the attorney hours worked litigating the underlying bid protest and EAJA request, the court granted recovery of nearly $33,000 in fees and expenses.

While EAJA does provide a vehicle for small business protesters to recover some amount of legal fees, this decision, like many before it, confirms that EAJA litigation is remarkably complex, with significant litigation risk for the small business seeking recovery. Accordingly, the best practice is often to reach a negotiated settlement of attorney fees to avoid this additional round (if not rounds) of contentious litigation.

### 2. *Castellano Cobra UTE MACC LEY 18-1982*, B-420429.4 (June 17, 2022)

- This protest arises from a Navy task order award to acquire base improvements in Rota, Spain.

- Typical of procurements requiring performance in foreign countries, the solicitation required offerors to comply with various aspects of local Spanish law.

- When the Navy made award to a US-based company, Castellano filed a protest at GAO arguing that the awardee did not have a mandatory Certificate of Classification from the Spanish government and had not properly organized its joint venture under Spanish law.

- The Navy took corrective action, which Castellano challenged as unreasonably narrow for failure to broadly review whether the initial awardee complied with Spanish law.

- GAO dismissed the protest as premature on the basis that the corrective action is still ongoing; however, GAO also agreed with the agency that the general solicitation requirement to comply with Spanish law is an issue of contract administration that GAO will not consider.

Special Counsel Nathaniel Castellano predicts that *Castellano Cobra* (no relation) will be one of the best-named GAO bid protest decisions of the decade. It also serves as a reminder of the complex issues that arise in procurements that require performance in foreign countries, which are often subject to local labor laws and other unique requirements of the host country.

**3. *American Fuel Cell & Coated Fabrics Company*, B-420551, B-420551.2 (June 2, 2022) (Published June 13, 2022)**

- GAO denied a protest alleging that the awardee failed to comply with the requirements in DFARS 252.204-7019/7020 to perform and post in the Supplier Performance Risk Assessment (SPRS) a current NIST SP 800-171 DoD assessment.

- During discussions, the government assigned a deficiency to an offeror for having no records in SPRS. The offeror ultimately posted a score in SPRS and received an award.

- The protester argued that the awardee's proposal should have been rejected for failing to demonstrate compliance with these cyber requirements. GAO agreed that that the documentation did not show that the awardee was compliant because there was no indication that the company had performed a basic assessment or posted the summary level score into SPRS, as required by the clauses.

- GAO denied the protest, however, because the protester could not demonstrate prejudice in this multiple-award procurement given its significantly higher price and limited confidence past performance rating.

Compliance with new and evolving cybersecurity requirements continues to be an increasingly important compliance and bid protest risk area. While this protest was denied due to lack of competitive prejudice, we expect protesters to continue to raise similar grounds.

**4. *Chicago American Manufacturing LLC*, B-420533, B-420533.2 (May 23, 2022) (Published July 5, 2022)**

- GAO sustained the protest where a firm quoted a product under its Federal Supply Schedule (FSS) contract that did not meet the solicitation's requirement.

- The solicitation sought new furniture in several buildings in South Korea, and included specifications and requirements for all solicited items, including a metal bunkbed that must accommodate a 38”x80” mattress.

- The awardee’s FSS catalog, however, included a bed that was only 78 inches long, or two inches short, of the solicitation’s requirements. While the awardee’s quotation specified the correct dimensions, GAO found that this was inconsistent with the FSS contract whose terms are contractually binding and not subject to alteration.

It is well established that an agency may not use FSS procedures to purchase items not listed on a vendor’s GSA schedule. Thus, as a precondition for receiving an order, all items quoted and ordered must be on a vendor’s FSS contract.

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