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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

Last week, Senators Warren and Lujan requested that the Department of Justice use the Department's debarment authority to exclude companies under investigation or that had been convicted/found liable. Such an approach would turn suspension and debarment practice on its head and remove buying agencies (e.g., the customer) from the exclusion process and cause exclusions to be collateral consequences of Justice Department actions. This assumes of course that Justice could clear ISDC coordination and receive lead agency in the first place.

Source material can be found here.

FOIA Exemption 4

1. *Siefe v. U.S. FDA*, No. 20-4072 (2d Cir. August 5, 2022)

- The Second Circuit Court of Appeals issued a significant decision discussing the interplay between FOIA Exemption 4, the Supreme Court's 2019 decision in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 915 (2019) and the FOIA Improvement Act of 2016 (FIA).

- The Second Circuit affirmed the district court's decision, which found that federal agencies had appropriately withheld certain information from public release pursuant to FOIA Exemption 4, which protects confidential commercial information.

- After the Supreme Court held in *Argus Leader* that the plain language of FOIA Exemption 4 does not require a showing of competitive harm for information to be deemed "confidential," district courts have been divided over whether the FIA (which did not apply to the FOIA request in *Argus*

Leader) effectively codifies the requirement that agencies must find a likelihood of competitive harm before withholding information under FOIA Exemption 4.

- The Second Circuit held that the FIA does require an agency to determine whether release of information otherwise protected by Exemption 4 would harm the submitter, arguably re-imposing a competitive harm standard similar to what the Supreme Court rejected in *Argus Leader*.

This is the latest of a dense line of decisions interpreting FOIA Exemption 4 in light of *Argus Leader* and the FIA. Special Counsel Nathaniel Castellano recently published a Briefing Paper discussing these issues in detail. In short, the procedural and substantive standards applicable to FOIA Exemption 4 are currently volatile and require careful, case-by-case consideration. As shown by this decision, even though the Supreme Court in *Argus Leader* seemed to reject competitive harm as a relevant consideration under Exemption 4, courts may still require a showing of competitive harm based on the FIA.

Bid Protests

1. *Hydraulics International, Inc. v. United States*, No. 22-364 (Fed. Cl. August 8, 2022)

- Court of Federal Claims (COFC) Judge Holte issued a significant decision confirming that the COFC can and will exercise jurisdiction over post-award OTA protests.

- Consistent with prior decisions from the COFC and district courts, Judge Holte explained that the question of whether an OTA protest falls within COFC jurisdiction turns on whether the Other Transaction is sufficiently "in connection with a procurement or a proposed procurement."

- While individual judges have approached this fact-based analysis differently, in this case the COFC found that the OTA award was in connection with a procurement or proposed procurement because there was evidence that the agency may issue a follow-on procurement contract for production. Notably, this is a common feature in solicitations for Other Transactions involving prototypes.

- Consistent with prior OTA protest disputes, the Department of Justice zealously disputed COFC jurisdiction, arguing that Congress intended to insulate Other Transaction awards from COFC protest review. Judge Holte provided detailed analysis rejecting each of the government's jurisdictional arguments, emphasizing that the statutory OTA provisions are silent with respect to protest jurisdiction.

- Having found jurisdiction, the Court rejected the protest on the merits.

This is the latest in a series of COFC and district court opinions analyzing when and where judicial review of OTA protests may occur. While each decision is unique in its jurisdictional analysis, so far, they share the common theme of accepting the premise that COFC can review certain OTA protests.

However, whether an OTA protest can be heard at COFC or district court will, under current precedent, require a case-specific and fact-intensive inquiry. Any company considering a bid protest relating to an OTA solicitation or award should proceed carefully.

2. *ISHPI Information Technologies, Inc.*, B-420718.2, B-420718.3, July 29, 2022 (Publicly issued August 9, 2022)

- GAO sustained a protest alleging that the awardee's proposed Federal Supply Schedule (FSS) labor categories did not meet the solicitation's minimum qualifications.
- The solicitation, which sought to establish a Blanket Purchase Agreement with FSS holders, identified three labor categories and required all contractor personnel to meet the minimum educational and experience requirements identified for those positions. Vendors were required to map quoted FSS labor categories to the solicitation's minimum qualifications for each labor category.
- After filing an initial protest and gaining access to the awardee's proposal, the protester timely filed a supplemental protest, which GAO sustained, arguing that the awardee's quotation failed to identify FSS labor categories that mapped to the solicitation's required minimum qualifications and that several quoted labor categories lacked the required education and experience.
- GAO rejected the Agency's argument that the awardee had implicitly promised to provide personnel meeting the minimum requirements, explaining that when a solicitation requires quoted FSS labor categories to meet minimum requirements, a quotation "must include some kind of affirmative representation or showing that the personnel offered will meet the solicitation's specified experience and education requirements."
- Because the awardee's quoted FSS labor categories fell "far below" the solicitation's required qualifications, its quotation was technically unacceptable and could not properly form the basis of award.

GAO decisions in this area continue to evolve but the stakes are high because of the potential for a quotation being found unacceptable. Where a solicitation requires quoted labor categories to meet certain experience or education qualifications, GAO has clarified that the vendor must affirmatively demonstrate its capability to meet the requirements. GAO previously explained that a solicitation may be unduly restrictive of competition where labor categories must "align precisely" with minimum requirements, but where a solicitation requires 12 years of experience and a proposed FSS labor category provides for a minimum of 10 years, the vendor can expressly or implicitly propose to provide personnel with more than 10 years' experience. Notably, the awardee's quotation here had not affirmatively demonstrated that several labor categories met the minimum requirements, several labor categories fell "far below" the required qualifications, and the awardee's FSS catalog did not describe the qualifications as "minimums."

Claims Cases

1. *Textron Aviation Defense v. United States*, No. 20-1903C (Fed. Cl. August 12, 2022)

- Judge Solomson issued an important decision concerning the statute of limitation (SOL) under the Contract Disputes Act (CDA).

- In 2014, Textron acquired pension assets and liabilities associated with three employee pension plans relating to a bankrupt company, where two of the employee pension plans had been terminated in 2012.

- In 2018, Textron submitted a payment demand seeking to recover the Government's share of the adjustment amount for all three pension plans pursuant to CAS 413. The Contracting Officer rejected the request for payment. Textron submitted a certified claim, which the contracting officer denied in September 2020 on the basis that the pension adjustment claim was barred by the CDA SOL. Textron then appealed to COFC, and Judge Solomson granted the government's motion to dismiss the case, agreeing that the claim was barred by the CDA SOL.

- Judge Solomson held that Textron was not required to submit a pre-claim payment demand before submitting its claim and that Textron's claim (or its predecessor's) accrued no later than February 2013. Because Textron did not file a certified claim until April 2020, its claim was barred by the CDA SOL.

- Judge Solomson rejected the argument that Textron's CAS 413 payment demand was a "routine request" akin to a voucher or invoice that could not form the basis of a claim before the government disputed the demand. After sorting through the complex caselaw governing the distinction between routine and nonroutine requests for payment—which Judge Solomson described as a "sticky wicket of epic proportions"—the Court concluded that the request for payment was not required by any FAR provision or otherwise and emerged from the unusual circumstances of bankruptcy, and could not be routine in nature.

This decision provides important guidance for contractors when navigating the CDA claims process. Contractors must be diligent in ensuring that they meet each of the CDA's prerequisites and seek recovery as soon as is practicable—to steer clear of any statute of limitation concerns. This case underscores the traps awaiting contractors when attempting to recover under the CDA, and why experienced counsel can be invaluable when trying to unpack, as Judge Solomson put it, the CDA's "jurisdictional minefield of the first order."

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