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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.

FOIA Exemption 4

1. *Notice of Request Under the Freedom of Information Act for Federal Contractors' Type 2 Consolidated EEO-1 Report Data* (August 19, 2022)

- Department of Labor (DOL) Office of Federal Contract Compliance Programs (OFCCP) issued a notice warning about potential public release of federal contractors' Equal Employment Opportunity (EEO) compliance reports. Specifically, the OFCCP is preparing to respond to a Freedom of Information Act (FOIA) request that broadly seeks federal contractor (and subcontractor) EEO-1 Type 2 Reports from 2016-2020.

- OFCCP set a deadline of September 19, 2022 for contractors to object to release of their reports pursuant to FOIA Exemption 4, which protects confidential commercial information. Absent timely objection, it appears OFCCP will release the reports.

Contractors interested in protecting information in their EEO-1 Type 2 reports should proceed promptly, carefully, and strategically. The legal landscape around FOIA Exemption 4 is volatile, and the extent to which FOIA Exemption 4 may be used to withhold EEO-1 Type 2 reports has already been the subject of contentious litigation. Our Government Contracts team has been closely following this area of law; Special Counsel Nathan Castellano recently published a Briefing Paper summarizing best practices and recent developments for contractors using FOIA Exemption 4 to protect confidential commercial information from public release.

Protest Cases

1. *G4S Secure Integration LLC, et al., v. United States*, No. 22-256C (Fed. CL. August 16, 2022)

- This is the latest in a series of COFC bid protest decisions addressing the State Department's interpretation of the SAM registration requirements of FAR 52.204-7(b)(1). Initially, State interpreted the rule to not require a JV entity to separately register in SAM where the individual JV members were already registered.

- In a prior round of protest litigation, COFC Judge Hertling rejected State's interpretation and found that the awardee JV was not properly registered in SAM. Judge Hertling ultimately denied the protest, however, because the protester suffered from the same SAM registration error, and therefore there was no possibility of prejudice. That decision is currently pending appeal before the Federal Circuit.

- Meanwhile, in a separate but similar procurement, State decided to apply Judge Hertling's interpretation of the SAM registration requirement and in doing so deemed several competitor's ineligible without providing notice or amending the solicitation.

- COFC Judge Somers held that State was required to amend the solicitation when it changed its interpretation of what was required with respect to JV SAM registration. Judge Somers held that the protesters were not raising an untimely challenge to the solicitation terms under *Blue & Gold* because any ambiguity in the registration requirement was latent and not revealed until the separate litigation before Judge Hertling.

This line of protest litigation addresses a host of interesting issues, including (a) the prejudice standard that applies when a protester's proposal suffers the same defect as the awardee's, (b) SAM registration requirements for JVs, and (c) identification of latent ambiguities under the *Blue & Gold* rule. The bid protest bar should keep an eye on these cases, including the potential for *at least* one Federal Circuit decision. In the meantime, at a minimum, contractors and agencies should pay careful attention to SAM registration requirements, particularly when a JV is involved.

Claims Cases

1. *The Tolliver Group, Inc. v. United States*, Fed. Cl. No. 17-1763 (August 17, 2022)

- In an interesting turn to a long-running claim dispute that has already generated one Federal Circuit decision and significant commentary, COFC Judge Lettow held that a contractor with a firm-fixed-price, level-of-effort development contract is entitled to recover litigation costs associated with successfully defending against a *qui tam* action.

- The opinion reasons that the FAR Part 31 cost principles applied to the contract, specifically FAR 31.205-47, which covers certain costs of defending against FCA allegations. Judge Lettow found that the FAR required the agency to conduct a cost analysis before awarding the relevant task

order, recognizing that a firm-fixed-price, level-of-effort development contract is, in practice, more akin to a cost-type contract than a fixed-price arrangement.

- Having concluded that FAR 31.205-47 is a mandatory and important clause, and thus incorporated into the contract by the *Christian* doctrine, the Court concluded that the contractor's legal fees were reasonable and properly allocated.

This decision—which is best paired with the previous COFC and Federal Circuit opinions and oral arguments generated through this litigation—are good reminders of the need to think critically, creatively, and strategically when seeking to recover litigation costs under a government contract. Not all theories of recovery will be apparent from the face of the contract, the FAR, or even the case law.

2. *Caring Hands Health Equipment & Supplies, LLC v. Department of Veterans Affairs*, CBCA No. 6814 (August 23, 2022)

- In this decision, the CBCA distinguished between a requirements contract and an indefinite delivery, indefinite quantity (ID/IQ) contract, and held that the contract at issue was an IDIQ contract because it lacked indicia of exclusivity.

- The contractor held a series of contracts with the Department of Veterans Affairs (VA) to deliver Government-owned home medical equipment to beneficiaries. Upon discovering that the VA had placed orders from other entities, the contractor complained to the VA that its contracts were considered requirements contracts and thus the VA was obligated to place all orders with it.

- The CBCA disagreed, finding that the contracts at issue were not requirements contracts. As the Board explained, a requirements contract is defined by an obligation to purchase exclusively from a single source, and the contracts here do not contain the FAR 52.216-21 Requirements clause "or any other provision or language containing words of exclusivity.'"

Contractors should be pay close attention to the terms of the contract in determining the parties' rights and obligations. And the parties' views regarding interpretation of the contract may not be controlling where the contract is unambiguous on its face.

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