

Government Contracts Legal Round-Up | 2022 Issue 19

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.

Enforcement News

Deputy Attorney General Announces Revisions to DOJ's Corporate Criminal Enforcement Policies and Practices (September 15, 2022)

On September 15, 2022, Deputy Attorney General (DAG) Lisa Monaco issued a memorandum and delivered a speech, announcing several revisions to the Department of Justice's (DOJ)'s corporate criminal enforcement policies and practices. The new revisions reflect input from DOJ's Corporate Crime Advisory Group, which DOJ convened in late 2021 to review and recommend improvements to DOJ's approach to prosecuting corporate crimes, and the imprint of DOJ's compliance-minded leadership. The new revisions, which will apply to current and future corporate defendants, include:

1. Emphasizing that a corporation's cooperation with DOJ must be timely and not strategically delayed if the corporate seeks maximum cooperation credit;
2. Clarifying how prosecutors should evaluate a company's record of prior misconduct when deciding how to resolve a criminal investigation;
3. Requiring the development of additional written guidance to govern the Department's overarching approach to voluntary self-disclosure, the selection of independent compliance monitors, and policies governing mobile devices and ephemeral messaging platforms; and
4. Heightened attention to DOJ's evaluation of the effectiveness of corporate compliance programs, including detailed guidance on how prosecutors should assess employee compensation systems and the impact of compliance programs on corporate culture.

Overall, the new revisions reinforce DOJ's commitment to the principles announced in DAG Monaco's October 28, 2021 memorandum, while clarifying areas of potential confusion and promoting consistency across the Department on corporate crime issues. Taken together, they reflect the consistent DOJ trends of broadcasting aggressiveness against corporate crime; developing more guidance for the exercise of prosecutorial discretion; and centralizing departmental attention, if not control, over corporate prosecutions.

To read more about the memo here.

Leonard Francis Update (September 21, 2022)

For those following the Leonard Francis (a.k.a. "Fat Leonard") saga, he has been apprehended on his way to Russia. U.S. fugitive known as 'Fat Leonard' apprehended in Venezuela after weeks on the run (nbcnews.com)

Supply Chain and Software Developments

NIST Certification for Federal Software Providers (September 14, 2022)

- The Office of Management and Budget issued a memo titled *Enhancing the Security of the Software Supply Chain through Secure Software Development Practices*, M-22-18 (Sept. 14, 2022).
- The key takeaway is OMB's directive that: "Federal agencies must only use software provided by software producers who can attest to complying with the Government-specified secure software development practices, as described in the NIST Guidance."
- The operative term "NIST Guidance" refers to two publications from the National Institute of Standards and Technology (NIST): (1) the Secure Software Development Framework (SSDF), SP 800-213 and (2) the Software Supply Chain Security Guidance.
- Agencies will be required to obtain a self-attestation of NIST-compliance from software producers before using their software. In order to use software from a producer that cannot make the complete attestation, agencies will need to obtain a Plan of Action & Milestones documenting the practices to which the producer cannot attest and those in place to mitigate any risks.

This is the latest in a long series of steps the federal government is taking to harmonize and improve agencies' cybersecurity and software licensing practices. The requirement for affirmative certifications from software providers is sure to create all manner of compliance and implementation challenges over the next several years. Stay tuned.

Protest Cases

STG International, Inc., B-420759.4; B-420759.8 (August 24, 2022) (published September 15, 2022)

- GAO denied a protest alleging that the agency unreasonably excluded the offeror, an incumbent contractor, from the competitive range.
- The protester raised multiple challenges to the evaluation judgments by the Department of Homeland Security, Immigrations and Customs Enforcement (ICE), in connection with a procurement for medical staffing support services for detainees at ICE Health Service Corps clinic sites.
- For example, the protester argued that the agency unreasonably evaluated its response to a hypothetical scenario which would be evaluated on, among other things, the extent to which it demonstrated creative and innovative techniques.
- GAO concluded that the firm did not effectively respond to the scenario promptly, and found unobjectionable ICE's conclusion that the firm did not articulate "new and innovative techniques," instead pointing only to existing processes.

GAO will not disturb an agency's evaluation of proposals where reasonable and consistent with the solicitation's evaluation criteria, and protesters must demonstrate that protest grounds do not constitute mere disagreement with the agency's evaluation. In cases such as this one where an agency evaluates a solution under inherently subjective factors (innovation and creativity), that burden is particularly acute. Here, the protester's proposal had not identified its techniques as "new or innovative," but even if it had, the protester would have had to demonstrate that ICE unreasonably determined that these new techniques were not innovative or creative. Ultimately, offerors are responsible for submitting a well-written proposal with adequately detailed information that allows meaningful review by an agency.

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Government Contractor Litigation and Compliance

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