

E-ALERT | Government Contracts

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THE GOVERNMENT CONTRACTS UPDATE

On a semi-monthly basis, Covington & Burling LLP's Government Contracts practice delivers its update of major news, notes, and trends relevant to government contractors.

SEQUESTRATION & THE STOP-GAP BILL

As questions and debate persists about sequestration, a six-month, stop-gap spending bill has been sent to the White House for President Obama's signature. It will keep agencies funded past September 30 and through November's elections into next spring. The spending translates into a roughly \$8 billion increase for federal programs. Priorities for the increased funding include new cybersecurity software to protect government computers and improved processing of veterans benefits.

The ultimate issue of sequestration has not been resolved. Automatic sequester cuts would occur in January 2013 unless Congress acts – most likely after elections in November – to pass a comprehensive and balanced deficit reduction package. If sequestration is not avoided, it can be expected to have many negative consequences for government contractors, in large part because major federal programs would stand to be downsized or eliminated.

GAO REPORT ON SUSPENSION AND DEBARMENT

The Government Accountability Office reviewed 75 case files on suspension and debarment by DOD. It found that DOD generally maintained adequate records, informed the contractor of the cause and rationale for its decisions, and provided notice of the action to the contractor as required by the FAR. But GAO also found that DOD has not been complying with a requirement to provide written notice to GSA when it decides there is a compelling reason to award a contract to a suspended or debarred entity.

The following statistics from the report are also of interest, as they indicate that "hotline" contacts are the principal source used to identify contractor misconduct:

Table 2: Selected Sources of Information Used to Identify Contractor Misconduct, Fiscal Years 2009 through 2011

Source of information	2009	2010	2011
Department of Justice qui tam lawsuits	52	56	46
Contractor self reporting	81	203	240
Hotline contacts ^a	13,750	16,981	20,402

Source: GAO analysis and presentation of DODIG statistics.

^aHotline numbers include all reported actions, not only those actions involving contractors. In addition to contractor misconduct, the Defense Hotline provides a vehicle for military service members, DOD civilians, contractor employees, and the public to report fraud, waste, mismanagement, abuse of authority, threats to homeland security and leaks of classified information.

RECENT CASES

- ***Tip Top Construction, Inc. v. Donahue*, Fed. Cir. No. 2011-1509 (Sept. 19, 2012) – Federal Circuit clarifies allowability of attorney’s fees as contract administration costs.**

The Postal Service Board of Contract Appeals (PSBCA) denied recovery by the contractor of costs paid to consultants and attorneys arising out of the contractor’s attempt to negotiate the price of certain changed work. The Federal Circuit reversed the PSBCA’s decision. Following *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541 (Fed. Cir. 1995), the opinion by Judge Rader concludes that “the PSBCA erred in holding that the consultant costs and attorney fees which are at issue were not ‘genuine contract administration costs’ because they were ‘solely directed at . . . maximizing [the contractor’s] monetary recovery.’” The decision adds that “[s]imply because the negotiations related to the price of the change does not serve to remove the associated costs from the realm of negotiation and genuine contract administration costs.”

This case is helpful precedent for government contractors, and it makes clear that contractors should be careful in their retention and tracking of work by counsel in connection with a request for equitable adjustment. If the costs of counsel are related to prosecution of a claim against the government, they may not be recovered. By contrast, if the costs are aligned with furthering contract administration, then they are allowable and thus, in principle, recoverable. Contractors bear the burden of demonstrating allowability, so it is important to properly record the costs arising from such services.

- ***Systems Application & Technologies Inc. v. United States*, Fed. Cir., No. 2012-5004 (Aug. 24, 2012) – Federal Circuit expands jurisdiction over bid protest of unwarranted agency corrective action.**

In this case, an unsuccessful offeror protested at the GAO, and a GAO attorney made an outcome prediction that he would sustain the protest. The Army took corrective action in light of that prediction, but the original awardee believed that the protest had no legal merit and filed a protest with the Court of Federal Claims (COFC). The awardee argued that the corrective action was arbitrary and capricious, and the COFC agreed and issued an injunction prohibiting the Army from proceeding with the corrective action. The Army appealed that decision, asserting that the COFC did not have jurisdiction to hear the protest.

The Federal Circuit held that the COFC had jurisdiction to hear the challenge because the protestor at the COFC objected to a solicitation and alleged violations of procurement statutes and regulations. The court explained that bid protest jurisdiction arises when an agency decides to take corrective action even if such action is not fully implemented. Notably, the reasoning in the decision highlighted the disadvantages caused by price disclosures: “The risk of re-competing for a contract after revelation of one’s price calculations to competitors . . . does not extend to a contract fairly competed and won on the first solicitation. In this case, with price a pivotal term of the process, [the original awardee] would unduly bear the burden of re-competing with its prices alone on the table.”

This decision shows that the Federal Circuit is open to a type of protest that would likely be dismissed at GAO. It bears monitoring whether the decision and its reasoning give rise to any changes in the practices of the GAO. Going forward, awardees will have clearer recourse to the COFC over protests of agency decisions to take corrective action.

TRENDS

- **Government Contracts for Cloud Computing.** The federal government continues devoting resources to developing the cloud computing capacity of multiple agencies. One of the most recent examples is the Environmental Protection Agency, which announced that it awarded

Lockheed Martin a four-year, \$9.8 million contract to bring Microsoft's Office 365 Collaboration Suite to the agency. Contractors can expect additional opportunities for cloud computing projects as the Obama Administration encourages federal agencies to move to cloud services as part of its plan for reforming how IT projects are procured and managed.

- **Draft Executive Order on Cyber Security.** The White House has drafted a preliminary executive order aimed at strengthening the nation's computer systems against attack, an effort to begin to accomplish through fiat what could not be achieved through Congress. The draft order would create voluntary standards to guide companies in guarding themselves against cyber-attacks. It would also establish a special council made up of key government agencies to identify threats that could compromise critical sectors. Additional measures that further cyber security remain likely, as the government continues strengthening its capacity in this area in light of growing threats of cyber-attacks.
- **House Bills with New Protections to Whistleblowers Working for Contractors.** Two bills, [H.R. 6406](#) and [H.R. 6409](#), would improve protections for contractor and subcontractor employees who report alleged misconduct associated with work performed for the federal government. They would create a new Whistleblower Protection Office within the Department of Labor (DOL) and put a new administrative review board in place of the existing one at DOL to consider appeals and issue final agency decisions on behalf of the labor secretary. Both bills would extend protections to employees of subcontractors as well as prime contractors, and the FAR would be revised to require contractors to notify employees of their rights and remedies under the new law. The bills reportedly have bipartisan support.

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