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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.

GAO RELEASES ANNUAL BID PROTEST REPORT FOR FY 2012

On November 13, the Government Accountability Office (GAO) released its annual bid protest report for FY 2012. According to this report, 2,475 cases were filed at GAO in FY 2012, up 5% from last year and 100% during the past decade. The total of 2,475 includes 2,339 protests, 47 cost claims, and 89 requests for reconsideration. GAO heard 570 cases on the merits, and it reported an "effectiveness rate" of 42%, meaning that 42% of protests this year garnered some form of relief, e.g., voluntary corrective action or a sustained protest.

A closer review of the GAO report, however, results in more questions than answers. For example, the report likely overstates the number of protests filed because GAO separately counted protests and supplemental protests under each docket (*i.e.*, "B") number. Consequently, GAO counted multiple challenges to the same procurement as separate cases. In addition, a written decision in a case with multiple protesters was counted as more than one decision. More importantly, the purported effectiveness rate upon which GAO relies does not capture whether the relief ultimately changed an agency's award decision, nor does the GAO report provide the breakdown between voluntary corrective actions versus sustained protests. These types of statistics would provide more accurate insight into the true effectiveness of the GAO as a protest forum. Ultimately, GAO remains the venue of choice for many protestors because of the opportunity for a stay of performance, well established case law, and the relatively short timeline for decisions. But, the GAO report may overstate the likelihood that a GAO protest will lead to a change in an award—the result most protestors seek. Thus, for certain pre- or post-award protests, agency level protests or protests brought before the Court of Federal Claims should be considered when protestors are deciding where to file.

DISPUTING THE VA'S USE OF FSS PROCEDURES

GAO devoted a significant portion of its FY 2012 bid protest report to the brewing dispute between GAO and the Department of Veterans Affairs (VA) regarding the VA's use of Federal Supply Schedule (FSS) procedures. This year, the VA failed to follow GAO's recommendation in three bid protests. In each protest, GAO had held that the VA violated the Veterans Benefits, Health Care and Information Technology Act of 2006, 28 U.S.C. §§ 8127-28 (2006), by procuring through the FSS without first determining (through market research) whether two or more service-disabled veteran-owned small businesses (SDVOSB) or veteran-owned small businesses (VOSB) could meet the VA's requirements at a reasonable price. In repeatedly rejecting GAO's recommendations, the VA has maintained that it is required to consider SDVOSB set-asides only in connection with attaining its SDVOSB contracting goals. Further, the VA has argued that where FSS procedures are used and an SDVOSB is not an FSS contract holder, the SDVOSB is not entitled to a preference.

Although one of the original protestors has petitioned the Court of Federal Claims to resolve this issue, the appropriate fix may be a legislative solution. In the interim, expect more SDVOSB protests of the VA's use of the FSS.

DOD UPDATES THE BETTER BUYING POWER INITIATIVE

On November 14, the Department of Defense (DoD) announced it would update its Better Buying Power (BBP) Initiative, which DoD launched in June 2010. BBP 2.0 consists of thirty-six initiatives organized into seven focus areas, including incentivizing productivity in industry and government, promoting effective competition, and improving the professionalism of the acquisition workforce. Notable initiatives include:

- Increasing the use of fixed price incentive contracts in low-rate initial production;
- Instituting a superior supplier incentive program;
- Increasing the effective use of performance-based logistics;
- Reducing the backlog of DCAA audits;
- Reducing product cycle times;
- Increasing small business participation in service contracting;
- Establishing higher standards for key contracting leadership positions;
- Establishing stronger professional qualifications for all acquisition specialties; and
- Increasing the cost consciousness of the acquisition workforce.

BBP guidance applies to everything DoD purchases, from major programs to commercial products and services. DoD is seeking industry input on BBP 2.0 prior to the rollout of the final set of initiatives and implementation guidance, which is set for January 2013. More information on BBP 2.0 is available here.

RECENT CASES

JUDGE REJECTS CONSTITUTIONAL CHALLENGE TO CONTRACTOR CONTRIBUTION BAN (*Wagner v. Federal Election Commission*, No. 11-1841 (JEB) (D.D.C. Nov. 2, 2012))

On November 2, the U.S. District Court for the District of Columbia held that the federal ban on campaign contributions from government contractors was not unconstitutional. In *Wagner*, plaintiffs challenged the constitutionality of section 441c of Title 2 of the U.S. Code, which bars federal contractors from contributing to candidates, parties, and/or their committees. The plaintiffs asked the Court to declare the law unconstitutional as applied to individuals who have personal services contracts with federal agencies. Because federal workers who are not contractors may make federal political contributions, while contractors performing the same work may not, the plaintiffs argued that section 441c violated both the Equal Protection Clause and the First Amendment of the Constitution.

The Court found that the ban does not violate the First Amendment because it is "closely drawn" to the government's interest in "avoiding *quid pro quo* corruption or the appearance thereof, which is a sufficiently important interest." The Court observed that, although it could not cite to any recent issues with federal contributions by its contractors, a number of states have had recent experiences that substantiated such corruption concerns. The Court also rejected the Equal Protection challenge because it found that federal contractors are not similarly situated to corporate contractors (which

are separate legal entities from the people who run them) or federal employees (who are subject to different, and potentially more severe restrictions), and as such may be subject to a separate regulatory regime.

The Court did not address whether federal contractors may give campaign money to groups making independent expenditures (so-called "Super PACs"). The plaintiffs did not directly challenge the ban on contributing to such groups.

GAO CONSIDERS "THE CRUX" OF PRICE REALISM (*Science Applications International Corp.*, B-407105 (Comp. Gen. Nov. 1, 2012))

SAIC challenged the Defense Intelligence Agency's (DIA) award of a task order for intelligence analysis support to Computer Sciences Corporation (CSC), arguing that (1) CSC's proposal deserved a weakness because CSC proposed a large number of uncleared personnel, and (2) DIA failed to conduct a price realism analysis. GAO granted the protest on both grounds. First, GAO concluded that DIA failed to meaningfully consider the impact of CSC's use of a large number of uncleared personnel on the task order. Second, GAO found that, although the solicitation did not explicitly state that DIA would conduct a price realism analysis, the language in the solicitation was sufficient to put offerors on notice that such an analysis was required. Specifically, the solicitation stated that DIA would evaluate whether price proposals were "compatible with the scope of effort, are not unbalanced, and are neither excessive nor insufficient for the effort to be accomplished . . ." With tightening budgets and agencies increasing their focus on price, GAO's position on price realism is likely to be re-litigated soon.

SIXTH CIRCUIT RULES ON APPLICABILITY OF AMENDED FCA (*Sanders v. Allison Engine Co.*, Nos. 10-3818/10-3821 (6th Cir. Nov. 2, 2012))

On November 2, the Sixth Circuit considered whether the term "claims" in section 4(f)(1) of the Fraud Enforcement and Recovery Act of 2009 (FERA)—an amended liability standard in the False Claims Act (FCA) applicable to "all claims under the False Claims Act . . . pending on or after [June 7, 2008]"—refers to "cases" filed in court or, instead, to "demands or requests for payment" to the government. The Court considered the statute's inconsistent use of "case" and "claim"—a fact attributed to Congress' drafting of the legislation in different chambers, at different times—and concluded that the "natural and ordinary meaning of claim should be used," with the "natural and ordinary" meaning of a "claim" indeed referring to a "case" or "civil action." As the Sixth Circuit noted, a split exists between the Second, Sixth, and Seventh Circuits on one side, and the Ninth and Eleventh Circuits on the other, regarding the interpretation of the term "claim." Thus, this chapter in the *Allison Engine* story seems destined for the U.S. Supreme Court.

The Court also ruled that the retroactive application of the amended liability standard does not violate the *Ex Post Facto* Clause of the U.S. Constitution because, according to the Court, the FCA was designed to combat and deter fraud and, therefore, was not punitive in nature. According to the Court, the evidence "fail[ed] to demonstrate a sufficiently punitive purpose or effect to transform what has been denominated a civil penalty into a criminal penalty." Again, this finding appears ripe for Supreme Court review because it conflicts with the Supreme Court's statement in *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000), that the FCA's treble damages provision is "essentially punitive in nature."

JURY CONVICTS CONTRACTOR SAFETY MANAGER OF MAJOR FRAUD (*United States v. Walter Cardin*, No. 1:11-CR-93 (E.D. Tenn. Nov. 7, 2012))

On November 7, a jury found Walter Cardin, a Medical Case Manager for Stone & Webster Construction Inc., a Shaw Group Inc. company, guilty of eight counts of "major fraud" under 18 U.S.C. §1031. Cardin had falsified safety records at Tennessee Valley Authority (TVA) nuclear power plants, allowing Stone & Webster to collect $1.2 million in safety performance bonuses between 2003 and 2006. The criminal indictment alleged that Cardin fraudulently misclassified injuries as non-work-related, knowing such injuries were recordable and work-related, and that Cardin consulted a doctor who participated in the fraud by concurring in the injuries' misclassification. Cardin submitted these documents to Stone & Webster, knowing the false documents would be transmitted to the TVA to support the award of bonus payments. Notably, the Shaw Group already had paid back twice the amount of the safety bonuses in a 2008 civil settlement with the United States.

SUFI NETWORKS AWARD INCREASED FROM $7.4 TO $114 MILLION (*Sufi Network Services, Inc. v. United States*, No. 11-804C (COFC Nov. 08, 2012))

The Court of Federal Claims awarded $114 million in damages to Sufi Network Services, Inc., finding the ASBCA's original award of $7.4 million too low given the Air Force's extensive breaches of contract. In 1996, Sufi contracted with the Air Force to provide telephone service at Sufi's expense in guest lodging rooms on U.S. Air Force bases in Germany. In return, Sufi was entitled to a share of the telephone service revenues generated by guests' outgoing long-distance calls. Sufi alleged that, during the contract, the Air Force installed cheaper, non-Sufi phones, and it allowed guests to use other systems for long distance calls, breaching its contract with Sufi. The ASBCA found for Sufi on a majority of its claims, but it had awarded only $7.4 million in damages. Calling the $7.4 million too low, the Court of Federal Claims held that (a) Sufi need only have proved its damages with "reasonable certainty"; and (b) the ASBCA improperly rejected many of Sufi's reasonable calculations in favor of the ASBCA's own approach, which the Court characterized as "mere speculation."

OTHER NOTEWORTHY ITEMS

USDA DESIGNATES PRODUCT CATEGORIES FOR BIOBASED PRODUCTS PROCUREMENT PREFERENCE

On November 19, the USDA issued a final rule (77 Fed. Reg. 69381) designating twelve product categories within which biobased products will be given a Federal Procurement preference under section 9002 of the Farm Security and Rural Investment Act of 2002, as amended by the Food, Conservation, and Energy Act of 2008. These designations are intended to improve demand for biobased products, spur development of the industrial base, and enhance energy security by substituting biobased products for products derived from imported oil and natural gas. The twelve product categories are agricultural spray adjuvants; animal cleaning products; deodorants; dethatcher products; fuel conditioners; leather, vinyl, and rubber care products; lotions and moisturizers; shaving products; specialty precision cleaners and solvents; sun care products; wastewater systems coatings; and water clarifying agents. Manufacturers can qualify for the procurement preference provided their product meets the regulatory requirements, such as minimum biobased content requirements. Interestingly, the final rule repeatedly notes two exceptions for when federal agencies are *not* required to purchase biobased products—when the available products are not capable of meeting reasonable performance expectations and/or when the products are not competitively priced. But, the rule does not provide guidance or explain the standards for determining when a biobased product meets either of these exceptions.

DFARS UPDATED TO IMPLEMENT PANAMA FREE TRADE AGREEMENT

DoD issued an interim rule amending the Defense Federal Acquisition Regulation Supplement to implement the United States-Panama Trade Promotion Agreement. *See* 77 Fed. Reg. 68699 (Nov. 16, 2012). This agreement provides for mutually non-discriminatory treatment of eligible products and services from Panama. In particular, the agreement provides for:

- waiver of the applicability of the Buy American statute for some supplies and construction materials from Panama; and
- applicability of specified procurement procedures designed to ensure fairness in the acquisition of supplies and services to supplies and services from Panama.

The interim rule is effective as of November 16, 2012. Comments are due January 15, 2013.

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