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E-ALERT | Government Contracts

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THE GOVERNMENT CONTRACTS UPDATE

Covington & Burling LLP's Government Contracts practice regularly delivers an update on major news, notes, and trends relevant to government contractors.

CASE DIGEST

GAO Narrows "Too Close at Hand" Doctrine (*FN Manufacturing LLC*, B-407936 (Comp. Gen. Apr. 19, 2013))

The U.S. Government Accountability Office ("GAO") recently considered an unusual application of the "too close at hand" doctrine. Protestors typically rely on this doctrine—which holds that agencies must consider relevant information that is "too close at hand" to ignore—when arguing that an agency ignored negative information concerning the awardee, or failed to evaluate past performance references that the protestor included in its proposal. Here, however, FN Manufacturing LLC ("FNM") argued that the Army had ignored evidence from a previous FNM contract that FNM omitted from its proposal. The GAO determined that the "too close at hand" doctrine was not intended to remedy an offeror's failure to include information in its own proposal; rather, when an offeror is in control of its past performance information and not reliant on third parties to submit that information, "it exercises its own judgment as to the information that the agency should consider." The GAO thus refused to "shift responsibility" to the agency for what FNM "could have identified in its proposal, but did not."

This decision emphasizes the importance of carefully selecting the most relevant contract references during the proposal process. Further, contractors should resolve any concerns regarding what contracts to include in a proposal, or an agency's arbitrarily low allowance for past performance references, before proposal submission. As we discussed during our March 2013 Webinar, "Bid Protests: Creative Thinking for Better Capture Efforts," post-award bid protests based solely on these grounds often are unsuccessful.

Court of Federal Claims Re-Affirms the Importance of "Clear Proof" of CDA Jurisdiction (*Diversified Maintenance Systems, Inc. v. United States*, No. 12-539 C, 2013 WL 1831697 (Fed. Cl. Apr. 26, 2013))

A plaintiff bears the burden of establishing a court's jurisdiction by a preponderance of the evidence, and a recent U.S. Court of Federal Claims decision reminds contractors of the importance of providing clear proof of the court's jurisdiction under the Contract Disputes Act ("CDA"). Here, in its complaint, a plaintiff stated, without support, that it had submitted a valid claim to the contracting officer ("CO"); the plaintiff further claimed that this representation should be "presumed true" by the Court. But considering extrinsic evidence, the Court disagreed, noting: "Other than plaintiff's conclusory statement in its Complaint that its claim letter was 'submitted' (with no 'to whom' it was submitted) and that no final CO decision was received, no other evidence was offered on this jurisdictional requirement."

Court of Federal Claims Asserts Jurisdiction over Third Parties in IP Cases (*UUSI, LLC, and OLDNAR CORP. v. United States*, No. 12-216C, 2013 WL 1768711 (Fed. Cl. Apr. 25, 2013))

In a memorandum opinion denying a motion to dismiss, the U.S. Court of Federal Claims ("CFC") has affirmed its subject matter jurisdiction over third-party government contractor defendants in patent infringement actions brought against the United States. Here, two companies, UUSI and Oldnar, brought claims against the U.S. government related to a patent for an engine system sold by a third company, GHSP, and incorporated into Humvees for the U.S. government by a fourth, AM General. Last year, shortly after UUSI and Oldnar filed suit, the Court allowed the government to notify GHSP and AM General—who could face contractual indemnification obligations—that their interests may be at stake. UUSI and Oldnar moved to dismiss GHSP and AM General for lack of subject-matter jurisdiction, arguing that the 2010 repeal of a federal statute used to administer World War II-era contract claims had "eviscerated" CFC Rule 14—which allows a CFC judge to exercise subject matter jurisdiction over third-party defendants with an interest in certain cases. Nevertheless, the Court held that "[c]ontrary to plaintiffs' argument … Rule 14 is alive and well at the Court of Federal Claims" and affirmed that the "interest[s] of the third-party indemnitor" are "well established" in the Court.

NEWS FROM THE HILL

2013 Cybersecurity Bill Dies in Senate

Though it had the approval of the U.S. House of Representatives in April, the U.S. Senate is unlikely to even consider the Cyber Intelligence Sharing and Protection Act ("CISPA"). Originally introduced in November 2011, CISPA was designed to allow contractors and the government to share Internet traffic data to better detect and protect critical infrastructure against cyber threats and attacks. Although dozens of prominent technology companies, including Apple, Google, and IBM, initially supported the bill, the ACLU and other organizations have challenged CISPA's privacy protections, noting in particular the bill's broad language and lack of limits on how and when the government can monitor Internet browsing information. Likewise, President Obama has stated he would veto CISPA because of its inadequate privacy protections. Thus, the bill will likely require significant revisions to stand any chance of being passed into law during future sessions.

OTHER NOTEWORTHY ITEMS

Update to Cybersecurity Guidelines Applicable to Federal Agencies

On April 30, the National Institute of Standards and Technology ("NIST") published its first major update to the data security and privacy guidelines. NIST describes these guidelines as the "most comprehensive update to the security controls catalog since its inception in 2005." The revised guidelines catalog security and privacy controls for federal information systems and organizations and outline a process for selecting controls to protect organizational operations (including mission, functions, image, and reputation), organizational assets, individuals, and other organizations, from diverse threats ranging from cyber-attacks to natural disasters, structural failures, and human errors. Agencies are not required to follow all the specifications in the guidelines, but may choose among the protections that suit their operational environments.

Pursuant to the Federal Information Security Management Act, the Office of Management and Budget and NIST are responsible for setting minimum security requirements used across the federal government. The new guidelines include recommendations on handling insider threats, privacy controls, risks in supply contracts, and mobile and cloud computing technologies. For example, to

address supply chain risks, the guidelines recommend that the government consider using "blind or filtered buys" to withhold the ultimate purpose of electronic parts from the contractors who supply them. The new guidelines also encourage agencies to offer incentives, such as those contemplated by the U.S. Department of Defense, to contractors that establish transparent procedures for vetting the security of their electronic parts and subcontract suppliers.

Although some of the recommendations in the guidelines could prove costly to implement, the update should at least provide contractors with a single source for guidance on cybersecurity standards—an improvement over the ad hoc rules that individual agencies previously have pursued.

The Department of Energy Issues New Rule on Contractor Legal Management

The Department of Energy ("DoE") has issued new regulations, effective July 2, 2013, relating to how it monitors and determines the allowability of contractors' legal costs. Conforming amendments also were made to the Department of Energy Acquisition Regulation. The regulations supplement FAR 31.205-47, which addresses costs related to legal and other proceedings, and provide rules for handling legal matters and associated costs by contractors whose contracts exceed $100,000,000 and legal counsel retained directly by DoE for matters in which costs exceed $100,000. The final rule also revises requirements for submitting contractors' legal management plans, staffing and resource plans, and annual legal budgets. Among other things, the rule requires DoE approval of legal settlements involving contractor payments of $25,000 or more—down from the previous threshold of $50,000 or more. Of course, compliance with the rule's terms does not guarantee that costs will be allowable, as all costs still are subject to the allowability rules in FAR 31.201-2.

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