



# 2021 Government Contracts Year in Review

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# Outline

## **I. Laws and Regulations**

- A. Executive Orders**
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- D. Small Business Contracting**
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## **II. Cases**

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- C. Other Cases**

# Laws and Regulations: Executive Orders

# E.O. 14005 Buy American

- January 2021, Executive Order 14005, *Ensuring the Future is Made in America by all of America's Workers*
- April 2021, establishment of Made in America Office
  - Reviews proposed waivers of Made-in-America laws, and
  - Assists agencies use taxpayer dollars to support U.S. manufacturing.
- July 2021, Issuance of Proposed Buy American Rule
  - Increased U.S. content from 55% to 60% with a phased increase to 75%
  - Strengthened supply chains for critical goods with enhanced price preferences
  - Increase transparency and accountability in Buy American Rules
    - New domestic content reporting requirements for “critical” items and components
    - Improve data on the actual U.S. content of good purchased

# E.O. 14005 & Resulting Changes to the FAR

- Raising the Domestic Content Threshold
  - BAA implements procurement preference for “end products” that are “domestic”
  - Domestic content test
    - 55% to 60% initially to 65% in two years and to 75% five years after the second increase
    - Iron and steel products must be composed of 95% domestic steel and iron
  - Enhanced Price Preference for Critical Products and Components
    - Under prior rule, large businesses offering domestic end items will receive a 20% price preference, and small businesses a 30% price preference
    - Under proposed rule, higher preference allowed for domestic end products that are either on the government’s list of “critical items” or contain domestically sourced “critical components”
  - Rule requires offerors to identify in their offer any domestic end products that contain a critical component to permit COs to apply the higher price preferences when appropriate.
  - Rule contemplates requiring contractors to identify, within 15 days after award, the exact percentage of domestic content of:
    - Any critical items they supply; and
    - The exact percentage of domestic content of any end products they supply that include one or more critical components.
    - NOTE: Post-award disclosure requirement does not apply to COTS under the proposed rule

# EO 14026 – Increasing the Minimum Wage for Federal Contractors

- Issued Apr. 27, 2021 to “promote economy and efficiency in procurement by contracting with sources that adequately compensate their workers.”
- Implemented via Dep’t of Labor (DOL) Final Rule dated Nov. 24, 2021
- Applies to contracts and “contract-like instruments”:
  - (1) for construction and covered by the Davis Bacon Act (DBA); (2) for services and covered by the Service Contract Act (SCA); (3) for concessions; or (4) entered into in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public; **AND THAT ARE**
  - (a) dated Jan. 30, 2022 or later; or (b) renewed or extended, including via option exercise, on or after Jan. 30, 2022

# EO 14026 – Increasing the Minimum Wage for Federal Contractors, cont.

- Requires contractors and subcontractors to pay workers performing “on” or “in connection with” a covered contract/contract-like instrument at least: (a) \$15 per hour beginning Jan. 30, 2022; or (b) the amount determined by the Sec’y of Labor beginning Jan. 1, 2023, and annually thereafter
- Makes compliance a “condition of payment” for the prime
- Does not replace or supersede DOL prevailing wage determinations under DBA or SCA
- Defers to future FAR rulemaking (expected 60 days after DOL Final Rule) on the potential for equitable adjustments

# EO 14055 – Nondisplacement of Qualified Workers under Service Contracts

- Issued Nov. 18, 2021, to “make federal procurement more economical and efficient by ensuring a stable, skilled, and experienced workforce for service contracts, even when contracts change hands.”
- Directs DOL to issue implementing regulations within 180 days of EO; and FAR Councils rulemaking within 60 days of DOL regs
- Will apply to all solicitations for SCA-covered contracts and “contract-like instruments” issued after FAR rulemaking
- Agencies “strongly encouraged” to include EO’s sample clause in all active solicitations before FAR rulemaking is complete

# EO 14055 – Nondisplacement of Qualified Workers under Service Contracts, cont.

- Requires a successor service contractor or subcontractor to make *bona fide* offers of employment to “qualified” predecessor contractor employees before hiring new employees for positions remaining on successor contract
- Predecessor contractor must provide list of incumbent employees (with SCA anniversary dates) to CO no fewer than 10 days before end of contract term, to be delivered to successor contractor
- Clause must be flowed down to subcontractors
- DOL enforcement can include hiring orders, payment of lost wages and benefits, and debarment for up to 3 years

# EO 14057 – “Buy Clean”

- Directs the Federal Government to be carbon neutral by 2050, including several specific goals
- For federal procurement, the specific goal is net-zero emissions by 2050, with a “Buy Clean” policy regarding construction materials with lower embodied emissions
  - The Administration is also targeting a 65% reduction in emissions by 2030
- The EO calls for a Task Force to designate the polluting materials that will be targeted
- Starting in 2022, GSA will require contractors to disclose the embodied carbon (*i.e.*, emissions) in materials used for “new building and major modernization contracts.”

# Laws and Regulations: FY2022 NDAA

# FY 2022 NDAA

- E-Commerce Platforms: requires GSA to test and report on different E-Commerce platform models with regard to price, quality, anti-counterfeiting measures, reliability, etc.
- Repeal of Preference for Fixed-Price Contracts: also provides more flexibility for use of certain cost-type contracts
- Other Transactions: several provisions require studying and reporting regarding the use of OTs. This includes a requirement for DoD to develop a system for publicizing OT awards - and for GSA to update the Federal Procurement Data System to capture that information – within 180 days

# FY 2022 NDAA (cont'd.)

- Domestic Preference Violations: starting in 2023, DoD must annually report violations of the Buy American Act, Berry Amendment, and specialty metals laws
- China/Russia/Iran/North Korea: contains several provisions aimed at these countries and the regions they control –
  - Requires DoD to implement a plan to reduce reliance on products and materials from regions controlled by those countries;
  - Starting July 1, 2022, requires contractors to disclose employees who will be performing work in the PRC on contracts >\$5M;
  - Requires DoD to develop of list of companies that have engaged in or facilitated cyber attacks that should be excluded from contracting

# FY 2022 NDAA (cont'd.)

- Cybersecurity: several provisions relating to cybersecurity, including:
  - Reporting on how controlled unclassified information is defined, identified, and marked;
  - Requirement for DoD to assess its current capabilities to respond to ransomware attacks and provide recommendations to Congress;
  - Provides for P3 and other voluntary partnerships between government and industry in the areas of the “internet ecosystem” and critical infrastructure;
  - DoD reporting on CMMC impacts on small and non-traditional contractors

# Laws and Regulations: Infrastructure Legislation

# Infrastructure Investment and Jobs Act

- Nov. 2021 Congress passed the IIJA or the Bipartisan Infrastructure Package (BIP)
- \$1.2 Trillion with \$550 billion in new spending on infrastructure over the next five years. Key Provisions:
  - \$66B Amtrak maintenance, modernize NE Corridor and extension of rail services outside of northeast and mid-Atlantic
  - \$110B Roads, bridges and major projects
  - \$65B Power infrastructure, R&D for transmission
  - \$100B Water Infrastructure
  - \$65B High-Speed Internet
  - \$21B Environmental Remediation
- Specific provisions funding to agency OIGs for oversight (e.g. one-half of one percent of the amounts made available; 137.5M for Amtrak)

# Laws and Regulations: Small Business Contracting

# Small Business Subcontracting

- SBA Aug. 2021 final rule defining “good faith” efforts to comply with small business subcontracting plans. 86 FR 44249; FAR 19.705-7
  - Some examples of “good faith”
    - Breaking out work to be subcontracted into economically feasible units
    - Conducting market research to identify potential small business subcontractors (e.g. searching SAM notices, solicitations on SBA’s SUBNet, participating in matchmaking events, etc.
    - Although failing to meet the subcontracting goal in one socioeconomic category, exceeding the goal by an equal or greater amount in one or more of the other categories
    - Participating in mentor-protégé programs that results in development assistance to the protégé
  - Some examples of failure to make a “good faith” effort
    - Failing to conduct market research.
    - Failing to pay small business subcontractors in accordance with subcontract terms.
    - Failing to designate a company official to administer and monitor compliance.
    - Failure to submit an acceptable ISR, or the SSR, using the eSRS, or as required
  - **Risk of liquidated damages is much more present now that contracting officers have a clear basis to find when a large prime has failed to make good faith efforts**

# Small Business Subcontracting

- SBA Aug. 2021 final rule revising limitations on subcontracting 86 FR 44233; FAR 19.505 and FAR 52.219-14
  - Final rule allows small business prime contractors to count first tier “similarly situated entities” toward their required 50 percent workshare
  - FAR Council is revising the definition of "similarly situated entity" to specify that the entity 1) must have the same small business program status as that which qualified the prime for award and 2) must be small under the North American Industry Classification System (NAICS) code assigned to the subcontract

# Small Business Subcontracting

- Oct. 7, 2021 Proposed FAR rule requiring SBA or third-party certification of WOSB/EDWOSB (86 FR 55769)
  - To amend FAR 2.101 definition of WOSB and EDWOSB to add requirement that the concern be certified by SBA or an approved third-party certifier in accordance with 13 CFR 127.300 prior to be considered eligible under the WOSB program
  - Set-aside procedures will be amended to allow an offeror to submit an offer while awaiting SBA or third-party certification under the WOSB program
  - contracting officers will be required to affirmatively check SAM or DSBS to determine if an EDWOSB or WOSB concern is certified or has a pending application for certification in DSBS instead of checking that all required documentation has been submitted to the now defunct WOSB Repository

# Laws and Regulations: Other Developments

# OFCCP “Contractor Portal”

- Announced Dec. 2, 2021, and formally known as the Affirmative Action Program Verification Interface, or AAP-VI
- Implements recommendation from 2016 GAO report to “[ensure] that all covered contractors are meeting their obligation to develop and maintain written AAPs.”
- Applies to any supply or service contractor or subcontractor that has 50 or more employees and:
  - Holds a contract valued at \$50K or more (subject to EO 11246 and Rehabilitation Act of 1973); or
  - Holds a contract valued at \$150K or more (subject to Vietnam Era Veterans’ Readjustment Assistance Act of 1974)
- Does not apply to construction-only contractors/subs

# OFCCP “Contractor Portal,” cont.

- Subject contractors and subs can register for Portal access beginning Feb. 1, 2022
- Certification of compliance with requirement to develop and maintain an AAP for each establishment and/or functional unit (as applicable) begins Mar. 31, 2022 and is due:
  - By Jun. 30, 2022 for contractors and subs already subject to AAP reqs;
  - Within 210 days after becoming subject to AAP reqs (120 days to develop an AAP + 90 days to register and certify)
- OFCCP will use Portal to receive contractor/sub AAPs during compliance evaluations and audits; certification will not result in exemption from future eval or audit

# Cybersecurity Maturity Model Certification (CMMC): Redo? Redux?

- Refresher: In Sept. 2020, DoD issued Interim Rule adding a new DFARS clause to implement CMMC, and a requirement that covered contractors/subcontractors undergo a pre-award self-assessment or post-award DoD assessment of compliance with NIST SP 800-171 controls
- In Mar. 2021, DoD began comprehensive review of CMMC “informed by more than 850 public comments” on the Interim Rule
- End Result: CMMC 2.0, which “updates the program structure and . . . requirements to streamline and improve implementation.”
- Announced via Nov. 2021 ANPR; formal rulemaking to follow

# CMMC: “Back to Basics” ...but with teeth?

- Major changes in CMMC 2.0:
  - Reduction in maturity levels from 5 to 3 (old Levels 2 and 4 eliminated)
    - New Level 2 compliance expected for most contractors to process CUI
  - Elimination of “the delta 20” and other additional process maturity reqs
    - New Level 2 compliance matches NIST 800-171 standard
  - Substitution of annual self-assessment for Level 1 contractors (replaces CMMC Third Party Assessment Organization (C3PAO) certification)
  - Potential substitution of annual self-assessment for some new Level 2 contractors; others to receive triennial C3PAO cert
    - BUT new Level 3 certs to be performed by government-led teams, not C3PAOs
  - Plans of Actions and Milestones (PoAMs) permitted for some controls; certain open items with implementation timelines not a barrier to cert

# CMMC: Way Forward/Looking Ahead

- All CMMC Piloting efforts suspended
- GAO Recommendations: better comms with industry; plan to evaluate effectiveness of CMMC 2.0 pilot; plan to measure CMMC 2.0 effectiveness
- No new contractual requirements before CMMC 2.0 rulemaking is complete
  - Continue to comply with FAR 52.204-21 and/or DFARS 252.204-7012, 252.204-7019, 252.204-7020
- Complacency is not an option
  - DOJ Civil Cyber-Fraud Initiative

# DoD Initiatives on Ethical Use of AI

- Refresher: In Feb. 2020, Joint Artificial Intelligence Center (JAIC) released five principles for ethical use of AI that extended beyond the battlefield context (AI should be: Responsible – Equitable – Traceable – Reliable – Governable)
- Building from JAIC principles, in Nov. 2021 Defense Innovation Unit (DIU) issued “Responsible AI Guidelines in Practice,” described as “a useful starting point for defining a process by which the DoD’s Ethical Principles for AI can be operationalized on acquisition programs.”
- Final guidance expected from JAIC in Dec. 2021; instead, JAIC combined with 2 other offices into Chief Data and AI Officer

# DoD Initiatives on Ethical Use of AI, cont.

- Responsible AI Guidelines in a nutshell:
  - Specific questions be addressed at each phase in the AI lifecycle: planning, development, and deployment
  - Meant to function as step-by-step guidance for AI companies, DoD stakeholders, and program managers to ensure AI programs reflect the Ethical Principles, and that fairness, accountability, and transparency are considered at each step in the development cycle
  - Predictive health case study shows how including inputs from all stakeholders (government team, vendor, end users, academic literature) resulted in more robust modeling to avoid misprioritization of cases or false diagnoses

# DOJ's Procurement Collusion Strike Force (PCSF)

- Formation announced – November 2019
- Interagency partnership dedicated to deterring, detecting, investigating and prosecuting antitrust crimes and related schemes that target government procurement, grants and program funding at all levels of government.
- Key partners include
  - DOJ Antitrust
  - U.S. Attorney's Offices' Prosecutors and
  - Government investigators
    - FBI
    - Agency OIGs (USAF, DHS, GSA, DOJ, USPS and other agencies)

# DOJ's PCSF 2020

- 2020 Developments
  - Grew to more than 360 agent, analyst, and other law enforcement and OIG working members from 46 unique agencies and offices at the federal, state and local levels
  - Trained more than 8,000 individuals educating new audiences on identifying and reporting the “red flags” of collusion
  - Boosted strength of data analytics to proactively identify suspicious bid patterns.
  - Delivered interactive training sessions and pandemic-focused training
  - Referred substantive COVID-19 related tips to the DOJ COVID-19 Hoarding and Price-Gouging Task Force and the DOJ's National Center for Disaster Fraud
  - Strengthened relationships to agencies with oversight of CARES Act funding
  - Included focus on U.S. funds spent OCONUS and coordinating with international counterparts
  - Permanent director named to the PCSF

# DOJ's PCSF 2021

- 2021 Accomplishments
  - Scope of Investigations
    - Local, single district conduct pertaining to a single bid to multi-district, nationwide or international conduct that targets a dozen or more agencies
    - Contracts worth millions of dollars
  - Publicly disclosed successes
    - Chicago commercial flooring company pleads guilty to conspiracy to rig bids
    - Belgian security services company agrees to plead guilty for bid rigging on DoD contracts
    - Engineering firm pleads guilty to decade-long bid rigging and fraud scheme
    - Former construction company owner indicted for defrauding federal program intending for service-disabled veteran-owned businesses
    - Concrete contractor pleads guilty to rigging bids for public contracts in Minnesota<sup>31</sup>

# DOJ's PCSF's Red Flags

- **Market**
  - Few vendors that offer products and services
  - Small group of major vendors control a large share of the market
  - Goods or services are standardized, so that the determining factor in the award is price (as opposed to design, quality or service)
- **Applications/Proposals**
  - Two or proposals
    - contain similar handwriting, typos, or mathematical errors
    - are sent from the same mailing address, e-mail address, fax number, etc.
    - reflect last minute changes
  - Document properties of two or more proposals show creation or edits by the same vendor
- **Patterns**
  - Over a series of awards, competing vendors
    - rotate as the award winner
    - win the same or similar amounts of work
  - Over a series of awards, one vendor always wins, regardless of competition
  - Vendor that wins the award subcontracts work to losing vendors or vendors that withdrew their proposals
  - As compared with prior procurements, a smaller number of vendors submit proposals for the current award

# DOJ's PCSF's Red Flags (cont.)

- Suspicious Behavior
  - A vendor submits a proposal for a procurement or grant award and the vendor lacks the ability to provide the goods or services requested
  - A vendor brings multiple proposals to an in-person grant process or procurement or submits multiple proposals
  - A vendor makes statements on the phone or by e-mail indicating advance knowledge of a competitor's price or likelihood of winning the award

# FAR Replaces “Commercial Item” with Commercial Products/Services

- Nov. 2021 final rule from FAR Council effectively splitting the prior definition of “commercial item” into separate definitions for “commercial product” and “commercial services.”
- Rule is not intended to expand the universe of products and services to which the definition applies or expand the way they are procured
- Intent is to aid acquisition professional faced with determining whether an offered product or service is commercial
- Contractors should consider updating terminology in internal contracting procedures, PO terms and conditions, and supplier reps/certs, as necessary

# DOJ Civil Cyber-Fraud Initiative

- October 6, 2021 DOJ announced that
  - “[t]he Civil Cyber-Fraud Initiative will utilize the [FCA] to pursue cybersecurity related fraud by government contractors and grant recipients.”
  - DoJ announced that its Initiative will focus on entities or individuals that put U.S. information or systems at risk by “knowingly providing deficient cybersecurity products or services, knowingly misrepresenting their cybersecurity practices or protocols, or knowingly violating obligations to monitor and report cybersecurity incidents and breaches.”
- On October 12, 2021 at a CISA cybersecurity summit emphasized areas of enforcement
  - Knowing failures to comply with cybersecurity standards and contract terms such as such as protection of government data, restriction on non-U.S. citizens accessing systems, or avoiding use of components manufactured by certain foreign companies
  - knowing misrepresentation of security controls, such as misrepresentations regarding systems security plans or monitoring practices;
  - knowing failure to timely report suspected breaches; and
  - Emphasized the importance of its reliance on whistleblowers

# Status of Vaccine Mandates

- **Federal Contractor Mandate**
  - Requires vaccination of covered contractor employees (employees who work on or in connection with a covered contract and all employees working at a contractor workplace where a covered employee is likely to be present)
    - No testing option; does allow for medical/religious exemptions.
  - December 7, 2021, Georgia federal court issued a nationwide preliminary injunction
    - Follows KY injunction limited to Kentucky, Ohio, and Tennessee. Sixth Circuit voted 2-1 to uphold the KY injunction
- **OSHA Mandate**
  - January 13, 2022, Supreme Court blocked the OSHA Emergency Temporary Standard (ETS) which applied to all employers with 100 or more employees
- **CMS Mandate**
  - January 13, 2022, Supreme Court lifted the injunctions allowing the CMS vaccine mandate to go into nationwide effect
    - No weekly testing option; does allow for medical/religious exemptions
    - Applies to all staff in covered healthcare facilities that offer Medicare or Medicaid services
    - Several states have passed laws/order conflicting with the CMS Rule

# Civilian Agency Limits on Using LPTA

- FAR Council Final Rule issued Jan 14, 2021, implementing Section 880 of the FY2019 NDAA (86 FR 3679)
- LPTA source selection criteria shall only be used when:
  1. There are clear minimum performance objectives, measures, and standards used to determine the acceptability of offers;
  2. Agency would realize no, or minimal, value from a proposal that exceeds the minimum requirements;
  3. Technical proposals will require no, or minimal, subjective judgment as to the desirability of competing proposals;
  4. High degree of confidence that reviewing technical proposals of all offerors would not result in identification of characteristics that could provide value or benefit to the agency;
  5. The lowest price reflects the total cost, including operation and support, of products/services being acquired; and
  6. Contracting officer documents the contract file justifying the use of LPTA

# Civilian Agency Limits on Using LPTA

- Requires avoiding, to the maximum extent practicable, the use of LPTA source selection criteria for:
  1. IT services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, audit or audit readiness services, health care services and records, telecommunications devices and services, or other knowledge-based professional services;
  2. Personal protective equipment; or
  3. Knowledge-based training or logistics services in contingency operations or other operations outside the United States
- Comparable rule already in effect in the DFARS for DoD

# The Fair Chance to Compete for Jobs Act of 2019 (aka “Ban the Box”)

- Section 1123 of the FY2020 NDAA, effective Dec. 20, 2021
- Prohibits contractors, as a condition of award and payment, from
  - requesting disclosure of criminal history
  - by applicants for positions performing work related to a federal contract
  - prior to extending a conditional offer of employment
- Exception for positions
  - requiring access to classified information
  - performing sensitive law enforcement or national security duties
  - for which consideration of criminal history is required by law
  - additionally to be identified by regulation (rules pending)

# Protests

# Enhanced Debriefing Timelines

*Nika Technologies, Inc. v. U.S.*, 987 F. 3d 1025 (Fed. Cir. 2021)

- Nika filed at GAO six days after debriefing. It received a written debriefing but did not ask any additional questions. The Army Corp of Engineers declined to provide an automatic stay
- Nika relied on DoD enhanced debriefing timelines, which give the disappointed offeror an additional two days to ask follow-up questions. The COFC agreed.
- The protest resolved in the meantime, and the protester did not participate in the appeal. However, the Federal Circuit found that the case was “capable of repetition but evading review.”
- The Federal Circuit reversed, finding that the automatic stay deadline is only extended by the enhanced debriefing period when the offeror actually submits additional questions within two days

# Waivers in Corrective Action Challenge

*VS2, LLC v. U.S.*, 155 Fed.Cl. 738 (Sept. 1, 2021)

- GAO sustained a protest by Vectrus, finding that the Army improperly adjusted Vectrus' price upwards and should have only considered performance risk as part of responsibility. On that basis, GAO recommended that the award be moved from VS2 to Vectrus.
- VS2 protested the Army's decision to award to Vectrus. In addition to challenging the agency's corrective action, VS2 alleged that the Army improperly evaluated Vectrus' past performance
- GAO ruled that all of VS2's grounds of protest were untimely, finding that: (1) VS2's challenge to GAO's recommendation should have been made as a request for reconsideration within 10 days, not after the Army's decision to award to Vectrus; and (2) VS2 should have raised the Army's evaluation of Vectrus' past performance in its role as an intervenor in the original protest, as such information bore on Vectrus' status as an interested party to protest

# Waivers in Corrective Action Challenge

*VS2, LLC v. U.S.*, (cont'd.)

- VS2 took its protest to the COFC, which reached a different result on timeliness
- The Court declined to extend the *Blue & Gold Fleet* waiver rule to corrective action protests, finding that VS2 had not sat on its rights in pursuing the protest
- On the merits, COFC agreed with VS2 on the issue of evaluation of performance risk, but rejected its protest regarding adjustment of Vectrus' price
- The GAO decision raises important considerations for intervenors on future protests

# Waivers for Failure to “Diligently Pursue”

*Harmonia Holdings Group, LLC v. U.S.*, 20 F.4th 759 (Fed. Cir. 2021)

- Harmonia filed a protest of amendments to a Customs and Border Protection solicitation at the COFC, five months after the agency made the award to another offeror
- Harmonia had filed a timely pre-award protest with CBP. Nonetheless, the COFC applied *Blue & Gold Fleet* to hold that Harmonia had failed to “diligently pursue” its protest at the Court
- The Federal Circuit reversed, finding that Harmonia’s agency-level protest took the company outside the scope of *Blue & Gold Fleet*

# OTA Protest Jurisdiction

*Spartan Medical, Inc.*, B-419503, Feb. 26, 2021

- Spartan protested the Air Force's exercise of its OT authority after it submitted a response to the solicitation and was told that it would not be further considered;
- Spartan argued that the Air Force had improperly exercised its OT authority and that the evaluation of its response was flawed;
- GAO dismissed the protest, clarifying that, while it does have jurisdiction to review protests of an agency's exercise of OT authority, such protests must be submitted prior to the closing date for submissions

# COFC Jurisdiction Under a CSO

*Kinematics, Inc. v. U.S.*, 155 Fed.Cl. 777 (Sept. 10, 2021)

- Kinematics challenged a solicitation amendment under a Commercial Solutions Opening, a specialized kind of OTA that allows DoD to “acquire innovative commercial items, technologies, or services.”
- The COFC found that it had jurisdiction, based on its determination that the CSO process would likely result in the award of procurement contracts
- This is consistent with the COFC’s OTA jurisdictional decisions, which have held that the court may exercise jurisdiction when the OTA solicitation has a connection to future procurement contracts

# IDIQ Protest Standing

*Aero Spray, Inc. v. U.S.*, No. 32-2079C, \_\_\_ Fed. Cl. \_\_\_, 2021 WL 5023371 (Fed. Cl. Oct. 28, 2021)

- Aero Spray was an awardee on a Department of the Interior IDIQ contract and protested the awards made to two of the other offerors;
- Judge Solomson found that Aero Spray lacked standing because it is not an “interested party” with respect to other offerors’ IDIQ contracts;
- Specifically, Judge Solomson rejected a prior ruling from Judge Lettow in *National Air Cargo* that competition for future task orders gives an IDIQ awardee interested party standing with respect to other IDIQ awards;
- The holding of *Aero Spray* is that, where the protest concerns the other IDIQ awards, an IDIQ awardee cannot be an actual or prospective offeror for those other awards

# Challenge to Duration of Sole Source Contract Award

*Sierra Nevada Corp. v. U.S.*, 154 Fed. Cl. 424 (July 1, 2021)

- Sierra Nevada challenged the U.S. Air Force's issuance of a sole source contract to Sikorsky Aircraft Corp. for upgrades to the Combat Rescue Helicopter
- \$980M IDIQ contract with a 5-year ordering, 7-year delivery period
- USAF justified the award because Sikorsky developed the CRH but had not yet delivered the Technical Data Package
- Judge Solomson ruled that while the sole source award was justified while the TDP remained unavailable, the "scope of the contemplated contract exceed[ed] the government's demonstrated need."
- USAF enjoined from proceeding with any delivery orders without competition, once the TDP is available

# Failure to Timely Intervene

*SAGAM Securite Senegal v. U.S.*, No. 21-1138C, 2021 WL 4621966  
(Fed. Cl. Oct. 7, 2021).

- SAGAM filed a COFC protest of the Dept. of State's award to Torres-SAS Security LLC JV in March 2021
- Torres expressly declined to intervene
- SAGAM filed a redacted complaint in April 2021 requesting that Torres be disqualified from the award, and Torres again did not request to intervene
- The COFC issued a judgement on the public docket in June 2021, ordering State to disqualify Torres and make award to the remaining offeror, if found responsible
- The government appealed to the Federal Circuit in August 2021
- In September 2021, Torres moved to intervene in the COFC case to participate in the appeal

# Failure to Timely Intervene

*SAGAM Securite Senegal v. U.S.*, No. 21-1138C, 2021 WL 4621966  
(Fed. Cl. Oct. 7, 2021).

- Court considers three factors when determining whether a motion to intervene is timely:
  - Length of time the intervenor actually knew or reasonably should have known of their right to intervene;
  - Whether prejudice to the existing parties of allowing the intervention outweighs the prejudice to the intervenor of denial
  - Existence of unusual circumstances weighing for or against
- Torres did not dispute that it had notice of the protest from the outset of the litigation; focused its argument on the prejudice factor
- Judge Sweeney denied the motion to intervene as untimely
  - “Torres waited for this protest to be decided, and then, again, for a notice of appeal to be filed, before applying to become a party to this litigation.”
  - “Over five months elapsed between the filing of the complaint and the filing of Torres’ motion to intervene, which, in a bid protest, is an eternity.”

# COFC Jurisdiction Over Implied-in-Fact Contract

*Safeguard Base Operations, LLC v. U.S.*, 989 F.3d 1326  
(Fed. Cir. 2021)

- Safeguard filed a COFC protest alleging (among other things) that the Government breached an implied-in-fact contract to fairly and honestly consider Safeguard's competitive proposal
- COFC adjudicated per the APA standards pursuant to 28 U.S.C. § 1491(b) and denied the protest
- On appeal, the Federal Circuit addressed the jurisdiction question as an issue of first impression
  - “Since the [1996] enactment of the ADRA, this court has not addressed whether the Claims Court still has implied-in-fact contract jurisdiction in the procurement context, and if so, whether that jurisdiction falls under § 1491(a) or (b).
- “We conclude that the Claims Court has jurisdiction over implied-in-fact contract claims in the procurement context under § 1491(b)(1), and only § 1491(b)(1).”
- (Safeguard's appeal was otherwise denied on the merits)

# The Cloud Wars – DoD JEDI Concludes...?

- Oct. 2019: Microsoft awarded JEDI contract – 10 year, \$10B single award IDIQ
- Nov. 2019: Amazon Web Services filed its initial protest at the COFC
- Allegations along the way included
  - Conflicts of interest/ revolving door issues
  - Prejudicial agency errors that systematically favored Microsoft
  - Overt influence from former President Trump against AWS
- Apr. 2021: COFC denies Government and Microsoft motions to dismiss AWS' protest
- July 2021: DoD cancels JEDI solicitation, terminates Microsoft's contract
  - “With the shifting technology environment, it has become clear that the JEDI Cloud contract, which has long been delayed, no longer meets the requirements to fill the DoD's capability gaps.”
- Nov. 2021: Solicitations issued to AWS, Google, Microsoft, and Oracle for the replacement Joint Warfighter Cloud Capability (JWCC), a 5-year multiple award IDIQ

# The Cloud Wars – NSA WildandStormy Picks Up

- Aug. 2021: NSA awarded AWS a \$10B contract for cloud services in support of classified and unclassified computing requirements, code named WildandStormy
  - NSA seeking single cloud vendor to provide IaaS, PaaS, and SaaS
  - Up to 10-year contract (5-year base + 5-year option)
- Aug. 2021: Microsoft protests at GAO
- Oct./ Dec. 2021: GAO sustains Microsoft's protest in a classified decision
  - GAO found aspects of NSA's technical evaluation "unreasonable" and recommended a reevaluation of proposals
- Re-evaluation currently in process

# Appeals

# The Impact of Civil Fraud Allegations on CDA Claims/Appeals

*TIYA Support Services, ASBCA Nos. 62648 et al.*

- Government motion to stay appeal granted pending fraud investigation against contractor
- TIYA contract - Army contract to provide base operation support services
  - Contract had an award fee provision which allowed contractor to collect quarterly award based on performance
  - TIYA filed three REAs seeking award fees
  - DCAA Audit - DCAA questioned, among other things, subcontractor invoicing for TIYA's award fees
  - CO denied TIYA's REAs
  - TIYA then submitted certified claim for the award fees which the CO denied
  - TIYA appealed the denials to the ASBCA
  - After TIYA's appeal, CO issued final decision seeking \$5.5M in questions costs identified in DCAA audit – TIYA appeals this final decision

# The Impact of Civil Fraud Allegations on CDA Claims/Appeals (cont'd)

*TIYA Support Services, ASBCA Nos. 62648 et al.*

- Government files motion seeking stay of TIYA's appeals with information that TIYA was under investigation for violation of the FCA and asks the ASBCA to suspend TIYA's appeals for 6 months
- ASBCA analyzed four factors in weighing its decision to stay the proceeding pending the investigation:
  - whether the facts, issues and witnesses in the appeal and investigation were substantially similar;
  - whether the investigation would be compromised by the appeal;
  - whether the proposed stay could harm the non-moving party (TIYA) and
  - whether the duration of the requested stay was reasonable

# The Impact of Civil Fraud Allegations on CDA Claims/Appeals (cont'd)

*TIYA Support Services, ASBCA Nos. 62648 et al.*

- ASBCA found:
  - Award fee appeal and the improper costs involved in the investigation were intertwined;
  - Government had persuasively argued that discovery against the government in the appeals could compromise the government's fraud investigation;
  - As the appeals were in the early discovery process, the proceeding would not be overly affected by a suspension; and
  - The requested stay of six months was reasonable and consistent with stays the board had granted in the past for investigations

# The Impact of Civil Fraud Allegations on CDA Claims/Appeals

*Widescope Consulting and Contracting Services, CBCA 6895*

- Government motion to dismiss appeal denied because the government only suspected the contractor's claim involved fraud
- Widescope Contract: HHS contract to provide project management services
  - After the base year, HHS advised Widescope that HHS would not be exercising option years
  - Widescope submitted two invoices totalling \$539,000
- Widescope submitted a claim for payment of the two invoices one year later (or June 5, 2020)
- HHS sought more information from Widescope and stated that it would issue a decision no later than September 18, 2020
- Widescope appealed HHS's deemed denial in August 2020
- HHS concluded that Widescope's claim were based on misrepresentation and fraud
  - HHS notified Widescope that a COFC would not be issued
  - HHS filed a motion to dismiss Widescope's appeal
    - Widescope's appeal was premature
    - HHS never issued a COFC because HHS suspected fraud – citing to *Savannah River Nuclear Solutions, LLC v. Department of Energy*, CBCA 5287
- CBCA found *Savannah River* distinguishable
  - In *Savannah River*, at the time the motion to dismiss was presented, the DOJ had already filed a fraud action in district court
  - In Widescope, the CO only had a suspicion of fraud where mere suspicion is insufficient to defeat the CBCA's jurisdiction

# Laches Not An Affirmative Defense

*Lockheed Martine Aeronautics, ASBCA No. 62209*

- Contractor's motion for summary judgment on government's laches defense granted as the government cannot assert laches as a defense to a legal claim that already has a statute of limitations
- LM Contract: Air Force contract to upgrade C-5 aircraft
- October 18, 2018, LM submitted claim to Air Force seeking \$143M in alleged excessive work and constructive changes
- Air Force denied the claim and LM appealed

# Laches Not An Affirmative Defense (cont'd)

*Lockheed Martine Aeronautics, ASBCA No. 62209*

- Government asserted affirmative defense of laches, arguing that LM's delay in asserting the claim prejudices the government
- LM moved for summary judgment on the government laches defense:
  - The Supreme Court, in *SCA Hygiene Products Atkiebolag v. First Quality Baby Products, LLC*, 135 S. Ct. 954 (2017) held that the equitable defense of laches could not be asserted against a legal claim when Congress had already prescribed a statute of limitations for that claim
  - The CDA provided for a 6-year statute of limitations
  - Laches unavailable

# Timing for Agency to Reject Nonconforming Goods

*Standby Distributors, Inc.*, ASBCA No. 62721 (July 12, 2021)

- Defense Logistics Agency (DLA) waited too long to reject non-conforming supplies, even though it had told contractor before shipment that the supplies were non-conforming
- SDI Contract: DLA ordered laser range fighters from SDI citing Part No. 202720
- SDI provided documents to DLA, one month later (on November 5, 2018), indicating that it would provide laser range finders under Part No. 202421
  - DLA comes to understand that SDI is requesting a modification to the order to deliver the allow delivery of the different laser range finder
  - DLA cancels order
  - DLA reinstates order and tells SDI that DLA is willing to take another look at whether Part No. 202421 would meet DLA's requirements
  - Reinstated order still identified Part No. 202720
- SDI ships Part No. 202421 on December 18, 2018
  - DLA receives the shipment on December 21, 2018
  - DLA pays for the shipment on December 21, 2018
- DLA advises SDI on October 23, 2019 that the supplies were not acceptable and formally revokes acceptance on January 24, 2020

# Timing for Agency to Reject Nonconforming Goods (cont'd)

*Standby Distributors, Inc.*, ASBCA No. 62721 (July 12, 2021)

- ASBCA reverses DLA CO's decision concluding that DLA could not revoke acceptance
  - Revocation of acceptance must be done within a reasonable time after the reason for the revocation is discovered
  - DLA waited too long as DLA had reason to know by November 5, 2018 that SDI intended to ship non-conforming supply
  - DLA had received the goods on December 18, 2018, but waited until January 24, 2020 to issue notice of rejection

# Other Cases

# Subcontract Reporting Under the FCA

*U.S. ex rel. Howard v. Caddell Construction Company, Inc., 2021 WL 1206584  
(E.D.N.C. Mar. 30, 2021)*

- Under a 2008 contract with the Navy, Caddell had an obligation to submit bi-annual small business subcontract reports;
- The relator alleged that Caddell falsified those reports in several ways;
- The Eastern District of North Carolina granted summary judgment to Caddell, finding that the subcontracting reports were not material to the government's payment decisions under *Escobar*;
- The court also found a lack of scienter based on its determinations that the errors in Caddell's subcontract reporting were made in good faith

# Government Motion to Intervene Denied

*U.S. ex rel. Odom v. Southeast Eye Specialists, PLLC, No. 3:17-cv-00689, 2021 U.S. Dist. LEXIS 40961 (M.D. Tenn. Feb. 24, 2021)*

- DOJ declined to intervene in healthcare kickback case following six extensions;
- During briefing on the defendant's motion to dismiss, DOJ attempted to intervene for "good cause," indicating that it had conducted further investigation and that the relator did not object;
- The Middle District of Tennessee denied the motion, finding that the government had not shown good cause based on any new investigatory findings, etc., and had not explained why circumstances were different from when it declined intervention in the first place

# Copyright Infringement by the Government

*Bitmanagement Software GmbH v. U.S.*, 989 F.3d 938 (Fed. Cir. 2021)

- Between 2006 and 2012, the Navy purchased licenses for 119 copies of Bitmanagement's software
- Due to Navy server limitations, Bitmanagement authorized the Navy to install copies on multiple computers so long as specified tracking software was also used to limit the number of concurrent users per the license cap
- The Navy made over 400,000 copies of the software but failed to use the tracking software
- The COFC held that the Navy was not liable for copyright infringement because it had an implied-in-fact license from Bitmanagement to copy the software across its network
- On appeal, the Federal Circuit did not disturb the COFC's findings regarding the implied-in-fact license but held that the Court prematurely cut short its analysis
  - Held that the agreement to use the tracking software was a condition precedent to the license to copy, and the Navy's failure to abide by the condition rendered its copying an infringement

# 2021 Government Contracts Year in Review

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