

THE GOVERNMENT CONTRACTOR[®]

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FEATURE COMMENT: Space Development Agency: Why Was Using An OT The Second Choice?

With the enactment of § 867 of the National Defense Authorization Act (NDAA) for Fiscal Year 2018, Congress directed that the Department of Defense shall “[i]n the execution of ... prototyping programs ... establish a **preference** for using transactions other than” procurement contracts (emphasis added). The DOD Other Transactions Guide issued in November 2018 contains a chart summarizing the legislative history of Other Transactions (OT) authority. For 2017 (2018 NDAA), the Guide mentions the congressional education mandate (§ 863) but does not reference § 867. This leaves it to the military departments and defense agencies to implement the *preference* as well as the education mandate. Implementation of congressional directions in both these provisions of law by various DOD organizations has varied between inconsistent and non-existent.

The difference between what Congress has required of DOD organizations and how they operate was illustrated by a recent protest against the Space Development Agency (SDA). In August 2021, SDA released a traditional Federal Acquisition Regulation request for proposals for tranche 1 of its Transport Layer supporting the national security space architecture. This had been preceded by a tranche 0, which might have been considered

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THE GOVERNMENT CONTRACTOR is not published the weeks containing December 25 and January 1. The next issue will be dated January 5, 2022.

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a prototype project for subsequent tranches. The earlier tranche was also conducted as a standard procurement.

Early in October on the day proposals were due, Maxar Technologies protested the RFP. According to media reports, Maxar protested on the grounds that SDA's approach put too much financial burden and risk on industry. It alleged that this disadvantaged smaller companies and favored larger companies. It further alleged that this violated Government procurement rules. Subsequently, SDA cancelled the RFP, and the Government Accountability Office dismissed the protest. In cancelling the RFP, the acting director of SDA asserted that SDA was trying something new and that various orbital planes of the program would be conducted with "full and open competition." There would be multiple opportunities for companies to receive an award. He also announced that a new solicitation would be issued using OT authority.

Here it might be noted that not only do Government officials have difficulty in casting off FAR-speak and -think, but media reports of OTs often contain inaccuracies as they did in this case. One news source contained a brief blurb on the protest and re-solicitation mentioning that it would be using a different acquisition authority. This news source apparently thinks the standard procurement system works great and seldom mentions OTs or suggests OTs can play a role in improving defense acquisition. Another news source inaccurately reported that OTs were first authorized by NDAA 1994, and that prototype authority was granted in 2015. Misinformation abounds.

Initially considering the above, if tranche 1 is a prototype project why wasn't an OT preferred as the first approach rather than adopted when the traditional approach failed? More profoundly, what is the prototype project? The program solicitation references 10 USCA § 2371b but does not contain the words "prototype project." The statute is applicable to prototype projects and follow-on production efforts after a successful prototype project. The draft OT agreement issued as part of the solicitation references a "prototype constellation" but does not specify whether the prototype project consists of the first two orbital planes which appear to be the subject of the solici-

tion, six orbital planes, and where the prototype project ends and "production" begins. Five years of operational support for the deployed system is included in the pricing of the agreement. Is this part of the prototype project or a follow-on activity?

The program solicitation and draft OT agreement contain various elements, such as test and evaluation, that could be considered prototyping within the broad definition of the DOD OT Guide. However, the Guide, which generally provides guidance and not mandatory direction, contains this mandatory language: "potential follow-on activities, to include follow-on production *shall* be included in the solicitation and any resulting OT Agreements" (emphasis in the original). Contrary to this, it is unclear what activities described in the program solicitation constitute the "prototype project," what the success criteria are, and what the follow-on "production" activities are.

FAR language that adds to the confusion is sprinkled throughout the program solicitation and draft agreement. For example, the FAR language of firm-fixed price is juxtaposed with "events based Milestone Payments." Why unnecessarily import a FAR concept of fixed price to an OT agreement? This suggests thinking that is mired in the limitations of the FAR, i.e., payments are either fixed price or cost based. This and other examples show a profound lack of OT education and understanding of just how different OTs can and should be from the limitations and concepts of FAR contracting.

Perhaps this discussion provides the answer to why OTs were the second choice. SDA leadership has shortchanged the SDA project and contracting team by not providing the opportunity for education and experiential learning, which Congress requires in § 863. Mired in FAR-think, SDA has missed fundamental issues such as clearly defining what the prototype project is. As a result of lacking key knowledge, they are not in a position to comply with the legal requirement creating a *preference* for using prototype OTs in conducting their mission.

Decades of expert study and review have proffered solutions to substantially improve defense acquisition. These are known, and lessons have been learned. The supporting policies are in place and have been congressionally mandated (the

law). Let's stop making excuses and just get to it! Replacing stagnant old-think with new greater understanding begins with education.



This Feature Comment was written by Richard Dunn. Mr. Dunn was the first general counsel of the Defense Advanced Research Projects Agency. He was instrumental in creating DOD's OT authority. Currently, Mr. Dunn acts as a consultant providing advice and engaging in research and analysis related to the deployment and implementation of technology in the military and civil sectors through partnering and other innovative means. Mr. Dunn conducts research in national security operations, technology and their interactions; and analyzes laws, policies and practices that impact the effective implementation of technology. He is the founder of the Strategic Institute for Innovation in Government Contracting, strategicinstitute.org. Mr. Dunn is also a member of The George Washington University Law School, Government Contracts Program advisory council.

Developments

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NASA IG Flags Space Station Costs, Risks

Operations and maintenance costs for the International Space Station (ISS) remained steady at around \$1.1 billion annually in fiscal years 2016–2020, but “systems maintenance and upgrade costs trended upward 35 percent in the same 5-year period, rising to approximately \$169 million in FY 2020 due primarily to upgrades,” the NASA inspector general recently reported. NASA also faces the challenge of “whether one or more commercial destinations will be available [before the ISS is decommissioned] to avoid a gap in access to low Earth orbit.”

Costs—In the past decade, “NASA has spent between \$2 to \$4 billion a year on the ISS, includ-

ing operations and maintenance, research activities, and transportation costs,” the IG found. “The ISS Program Office expects annual operating costs to remain stable at \$3.2 billion until the Station nears the end of its life and NASA begins to spend less on repairs, spare equipment, and transportation.”

“Operations costs are driven largely by the ... \$19.6 billion, 26-year contract with Boeing for sustaining engineering of the U.S. segment,” which “includes original design, development, test, and evaluation of the Station as well as spares, subsystem management, modifications, repairs, and life extension analysis,” the IG said. NASA also relies on contractors to resupply the ISS, including Space Exploration Technologies Corp., for commercial crew transportation.

Anticipating the eventual retirement of the ISS, “NASA has committed to replacing the ISS with one or more commercially owned and operated space destinations,” the IG explained. Current plans call for the ISS's retirement in 2024, and an extension to 2030 is likely. However, NASA and the Russian space agency Roscosmos “are investigating the cause and long-term impacts of cracks and leaks that were recently discovered” in the module that connects the ISS's service module to its docking ports, which suggests “the possibility of an earlier-than-projected obsolescence for at least one element of the Station.”

The ISS requires costly maintenance and upgrades while the cause remains unknown, the IG added. Additionally, eventually decommissioning and deorbiting the station will be “a technically complex and costly operation requiring international participation and a critical decision on timing.” According to the IG, the overall cost of deorbiting will be an estimated \$1 billion, allocated among international partners “through negotiations and bartering.”

Commercial Platforms—NASA plans to have at least one commercial low orbit destination operational by 2028, creating an overlap before the retirement of the ISS.

In 2019, NASA established a commercial and marketing policy and announced opportunities for private astronaut missions to the ISS, and in March it announced a commercial low Earth orbit destination procurement strategy “to fund a portion of initial development costs and ultimately purchase

services on one or more commercial low Earth orbit destinations—potential replacements, essentially, for the ISS.”

“As a separate initiative to develop a commercial destination in low Earth orbit, in 2020 NASA awarded Axiom Space a firm-fixed price contract valued at up to \$140 million over 7 years to provide at least one habitable commercial module to attach to the ISS beginning late 2024,” the IG reported. “In the second phase of NASA’s commercial destination procurement strategy, once the destination concepts mature the Agency intends to acquire services from one or more viable commercial destinations through an openly competitive solicitation.”

NASA also awarded seven companies a total of \$38.8 million in contracts starting in 2017 to stimulate demand for space services. And “NASA continues to refine, quantify, and publicize services that it intends to purchase on future low Earth orbit destinations by issuing white papers and announcements, and the Agency’s specifications have become more detailed over time.”

“However, NASA faces significant challenges with fully executing the plan in time to meet its 2028 goal and avoid a gap in availability of a low Earth orbit destination,” the IG said. “Challenges of commercialization include limited market demand, inadequate funding, unreliable cost estimates, and still-evolving requirements.” For example, NASA requested \$150 million annually in FYs 2019–2021, but Congress authorized \$40 million, \$15 million, and \$17 million. NASA “also has not provided sufficient information about its future requirements for companies to design and develop commercial destinations.”

Moon and Mars Missions—NASA’s plans for human flights to the Moon and Mars are “not feasible without continued human health research and technology demonstrations being conducted on the ISS and its eventual replacement,” the IG said. “In reviewing NASA’s planned research onboard the ISS, we found that research needed for long-duration missions to the Moon and Mars will not be complete by 2030.”

“A substantial gap between the Station’s retirement and the introduction of a new, commercial destination in low Earth orbit would force NASA to accept a higher level of health risk or delay start dates for long-duration, deep space human explora-

tion missions,” the IG warned. And “the nascent low Earth orbit commercial space economy would likely collapse” without a destination, “causing cascading impacts to commercial space transportation capabilities, in-space manufacturing, and microgravity research.”

The IG recommended identifying and mitigating the risks from the observed cracks and leaks before agreeing to an ISS life extension.

The IG recently pointed out the key challenges facing NASA, including improving major project management and returning humans to the Moon. See 63 GC ¶ 356. The IG and the Government Accountability Office have also highlighted the risks facing the Artemis lunar space program. See 63 GC ¶ 123; 63 GC ¶ 172(b); 63 GC ¶ 354. NASA recently admitted that its effort to return humans to the Moon will be pushed back at least to 2025. See 63 GC ¶ 346(d).

NASA’s Management of the International Space Station and Efforts to Commercialize Low Earth Orbit (IG-22-005) is available at oig.nasa.gov/docs/IG-22-005.pdf.

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District Courts Enjoin Contractor Vaccine Mandate

U.S. district courts issued preliminary injunctions, enjoining the Biden administration from mandating that contractor employees be fully vaccinated against covid-19 or undergo regular testing. Separately, other courts enjoined broader vaccine mandates for all large employers and many healthcare providers.

President Biden issued Executive Order 14042 to mandate vaccinations and other pandemic safety protocols for contractor and subcontractor employees. See 63 GC ¶ 276(a); 63 GC ¶ 357(a). Beyond those, the administration has sought to mandate vaccination generally for employers with over 100 employees through an Occupational Safety and Health Administration emergency temporary standard and for healthcare workers at facilities participating in Medicare or Medicaid through a Centers for Medicare and Medicaid Services policy.

Contractor Mandate—The District Court for the Southern District of Georgia granted a prelimi-

nary injunction to seven plaintiff states, enjoining the mandate nationwide, after the District Court for the Eastern District of Kentucky's preliminary injunction for Kentucky, Ohio, and Tennessee. See *Georgia v. Biden*, 2021 WL 5779939 (S.D. Ga. Dec. 7, 2021); *Kentucky v. Biden*, 2021 WL 5587446 (E.D. Ky. Nov. 30, 2021). The Georgia Court quoted the Kentucky Court to state that "[t]his case is not about whether vaccines are effective. They are." But although the Government "has a strong interest in combating the spread of [covid-19]," it cannot "act unlawfully even in pursuit of desirable ends," the Court said, quoting *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021).

The Georgia District Court held that (1) plaintiffs were likely to succeed on their claim that the president exceeded the congressional grant of authority in the Federal Property and Administrative Services Act; (2) co-plaintiff trade associations showed a threat of irreparable injury in the compliance costs of identifying contractor and sub-contractor employees subject to the mandate and implementing software to ensure vaccinations; (3) balancing of harms weighed heavily in favor of an injunction because delaying vaccinations would not cause irreparable injury but would only "maintain the status quo," with contractors "free to encourage their employees to get vaccinated"; and (4) an injunction was firmly in the public interest because "the mere specter of [EO 14042] has contributed to untold economic upheaval in recent months" and "the principles at stake when it comes to [EO 14042] are not reducible to dollars and cents," quoting *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604 (5th Cir. 2021).

The Court permitted Associated Builders and Contractors Inc. to intervene, and the association's members, "all over the country," received 57 percent of federal contracts in fiscal years 2009–2020. Thus, limiting injunctive relief to only the plaintiff states "would prove unwieldy and would only cause more confusion," the Georgia Court said, issuing a nationwide preliminary injunction.

The Kentucky District Court ruled similarly on a narrower scope. It said that "[i]f a vaccination mandate has a close enough nexus to economy and efficiency in federal procurement, then the statute could be used to enact virtually any measure at the president's whim under the guise of economy and efficiency." The Court also cited constitutional

concerns over the nondelegation doctrine and federalism.

OSHA and CMS Mandates—The Court of Appeals for the Fifth Circuit granted a stay pending review, enjoining the OSHA mandate. It said "occupational safety administrations do not make health policy," and in seeking to do so, OSHA "runs afoul of the statute from which it draws its power and, likely, violates the constitutional structure that safeguards our collective liberty." *BST Holdings*, 17 F.4th 604.

The District Court for the Western District of Louisiana issued a nationwide preliminary injunction, enjoining enforcement of the CMS mandate. See *Louisiana v. Becerra*, 2021 WL 5609846 (W.D. La. Nov. 30, 2021). It said "[t]here is no question that mandating a vaccine to 10.3 million health-care workers is something that should be done by Congress, not a government agency," and "[i]t is not clear that even an Act of Congress mandating a vaccine would be constitutional." The District Court for the Eastern District of Missouri issued a preliminary injunction against the CMS mandate for 10 states. See *Missouri v. Biden*, 2021 WL 5564501 (E.D. Mo. Nov. 29, 2021).

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VA Asset Management Framework Continues To Face Challenges

The Department of Veterans Affairs continues to face challenges in its asset management framework, the Government Accountability Office recently reported. VA's staffing resources, communication and performance assessment fall short of GAO's standard for key characteristics in asset management.

VA operates one of the largest health care systems in the country that includes 171 medical centers and over 1100 outpatient sites servicing more than nine million veterans. The Veterans Health Administration owns 5,625 buildings and leases an additional 1,690 buildings. GAO found that VA faces several challenges in managing its real property. The agency has a substantial backlog of maintenance on its capital assets that would cost over \$22.6 billion to clear. Despite the maintenance issues, VA requested \$4.5 billion for construction and non-recurring maintenance in its fiscal year 2022

budget request, which means that the maintenance backlog will remain for the foreseeable future.

GAO also found that VA is not adapting its capital assets to changes in veteran demographics and healthcare needs. There is an influx of younger veterans returning from military operations in Afghanistan and Iraq and an increasing proportion of female veterans. VA's asset management does not address these changing demographics, according to GAO.

GAO concluded that insufficient staffing resources have undermined VA's ability to manage assets and develop capital projects. VA leadership told GAO that it faces difficulties maintaining sufficient qualified staff to support asset management, including contracting officers, engineers and maintenance staff at medical centers. GAO found VA vacancy rates at 20 percent for engineers. VA attributes the vacancies, along with poor retention rates, to an inability to compete with the private sector and other federal agencies for engineers and maintenance workers. To combat the shortage, in 2020 VA sought special salary rates for mechanical and civil engineers, and architects. VA officials reported that the higher salary rates helped VA respond to significant competition from private industry.

VA spreads asset management responsibilities among several headquarters. The dispersed nature means that many offices work on related tasks and must communicate effectively to successfully complete asset management projects. However, VA officials reported that a lack of communication can result in frequent scope increases and contract modifications for capital asset projects. GAO concluded that improved communication during planning, development, and proposal of its capital projects will better position the agency to bring projects online in the most efficient manner and without costly delays. GAO recommended VA better define the Office of Information and Technology's role in developing and executing construction projects so that VA's activation process "will be better positioned to deliver needed services to veterans." GAO also recommended that VA specify how construction and field offices communicate during project development.

VA Real Property: Enhanced Communication and Performance Measurement Could Improve Capital Asset Management (GAO-22-103962) is available at www.gao.gov/assets/gao-22-103962.pdf.

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State, Energy IGs Highlight Management Challenges

Inspectors general for the departments of Energy and State recently reported on key management challenges facing their agencies.

DOE—For DOE, significant challenges include improving cost audits; bolstering the suspension and debarment (S&D) program; enforcing the mandatory disclosure rule, which requires contractors to disclose credible evidence of violations involving fraud, conflicts of interest, bribery, or the False Claims Act; modernizing oversight through data analytics; and combating intellectual property theft.

For example, in April the IG reported "significant findings" that DOE's 1994 cooperative audit strategy allowing management and operating (M&O) contractors to perform their own incurred cost audits "was not functioning as intended." See 63 GC ¶ 117(f). The IG recommended transitioning to an independent audit strategy, with independent incurred cost audits of M&O contractors starting in fiscal year 2022. The IG is also working to improve its ability to make timely S&D referrals, and has worked with DOE's S&D officials and has enhanced its training program.

Additionally, the IG is investigating "how contractors have been managing specific employee concerns that appear to trigger [mandatory disclosure rule] requirements," noting instances in which contractors did not report, or reported later than required by the contract, potential violations. "The contractors' failure to report these issues denied us the opportunity to conduct timely, independent investigations," which "are crucial to procurement integrity," the IG said.

DOE is the second-largest contracting agency and the largest federal sponsor of basic research in physical sciences, awarding \$6.6 billion annually in contracts and grants to fund research, the IG explained. DOE research is "inherently vulnerable to the unauthorized transfer of intellectual property to foreign governments" and it is critical that DOE "takes appropriate actions to mitigate these risks." The IG has initiated a project "to review the most effective legal and practical strategies being used

by other Federal agencies vulnerable to this type of theft.”

State—For State, major challenges include contract and grant management, including monitoring and documenting contractor and grantee performance; information security and management, including improving cybersecurity and selecting and approving information technology investments; operating in contingency environments; protecting people and facilities; financial and property management; and workforce management.

For example, State components “did not consistently and adequately ensure that foreign assistance programs achieve intended objectives and policy goals, monitor and document contractor performance, conduct thorough invoice reviews, and oversee construction contracts,” the IG said. “Oversight personnel must monitor and document performance, confirm that work has been conducted in accordance with the terms of a contract, hold contractors accountable for non-performance, and ensure that costs are effectively contained.”

Additionally, while State “took steps to improve its information security program,” the IG “identified numerous contract weaknesses that affected program effectiveness and increased ... vulnerability to cyberattacks and threats.” The IG also “continued to identify issues related to how the Department selects and approves IT investments.” Specifically, the IG found that State had not implemented policies on reviewing IT portfolio reorganizations, had not performed a benchmark assessment of the entire IT portfolio to identify duplicative systems, and had not routed all IT procurements to the chief information officer for review and approval.

Finally, “[p]rograms and posts operating in contingency and critical environments must adapt to constant change, pervasive security concerns, dramatic swings in personnel and funding, and widespread reliance on contractors and grantees,” the IG said. “Challenges regarding contract oversight also persist in programs and posts operating in contingency and critical environments.” See 63 GC ¶ 125(a); 63 GC ¶ 229(e).

In 2020, the challenges facing State included contract oversight and the pandemic. See 63 GC ¶ 5(b).

The reports, *DOE-OIG-22-11* and *OIG-EX-22-01*, are available, respectively, at www.energy.gov/sites/default/files/2021-11/DOE-OIG-22-11.pdf and www.stateoig.gov/system/files/oig-ex-22-01_508.pdf.

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EO Addresses Emissions, Promotes Clean Energy

President Biden recently issued Executive Order 14057 to promote clean-energy industries and jobs through federal actions, and the Office of Management and Budget published a memorandum to begin implementing the EO. The EO and the memo contain provisions related to federal procurement. See 86 Fed. Reg. 70935 (Dec. 13, 2021).

EO 14057—“As the single largest land owner, energy consumer, and employer in the Nation, the Federal Government can catalyze private sector investment and expand the economy and American industry by transforming how we build, buy, and manage electricity, vehicles, buildings, and other operations to be clean and sustainable,” the EO states. “Through a coordinated whole-of-government approach, the Federal Government shall use its scale and procurement power to achieve” these policy goals.

The policy goals include net-zero emissions from federal procurement, “including a Buy Clean policy to promote use of construction materials with lower embodied emissions,” as well as achieving carbon pollution-free electricity by 2030, acquiring only zero-emissions vehicles by 2035, and having a net-zero-emission building portfolio by 2045. Section 201 of the EO sets agency goals, including establishing targets to meet the EO’s requirements.

Section 501 creates a federal chief sustainability officer position within the Council on Environmental Quality (CEQ), § 502 requires agencies to designate agency chief sustainability officers, and § 508 establishes a Buy Clean task force. Additionally, § 208 addresses sustainable acquisition and procurement goals, § 301 federal supply chain sustainability, § 302 supplier emissions tracking, and § 401 engaging and training the federal workforce.

Finally, § 303 requires the Buy Clean task force to recommend “policies and procedures to expand consideration of embodied emissions and pollutants of construction materials in Federal procurement and federally funded projects.” This includes “identifying and prioritizing pollutants and materials, such as concrete and steel, to be covered under a Buy Clean policy”; “providing recommendations to increase transparency of embodied emissions, including supplier reporting”; and “recommending pilot programs that incentivize Federal procurement of construction materials with lower embodied emissions.”

OMB Memo—The EO “calls on the Federal Government to lead by example as we achieve a carbon pollution-free electricity sector by 2035 and net-zero emissions economy-wide by no later than 2050, and to use the Federal Government’s scale and procurement power in achieving an ambitious set of goals,” including net-zero emissions from federal procurement and driving sustainability in the federal supply chain, the memo states. The EO “lays out a coordinated, whole-of-government approach that requires bold action to transform Federal procurement and operations and secure a transition to clean energy and sustainable technologies.” Agencies are to take prescribed actions outlined in the memo for each goal, such as leveraging performance contracting and transitioning to a zero-emissions vehicle fleet. CEQ will issue instructions and guidance for agencies within 120 days.

The OMB memo (M-22-06) is available at www.whitehouse.gov/wp-content/uploads/2021/12/M-22-06.pdf.

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Administration Issues Strategies To Combat Human Trafficking, Corruption

The Biden administration recently revised the *National Action Plan to Combat Human Trafficking* and issued a first-ever *U.S. Strategy on Countering Corruption*. The high-level strategy documents contain provisions related to Government contracting.

Human Trafficking—The anti-trafficking action plan includes four pillars—prevention,

protection, prosecution, and crosscutting approaches and institutional effectiveness—each comprising principles with priority actions. Principle 1.3 is to “[s]trengthen efforts to identify, prevent, and address human trafficking in product supply chains and ventures.” The report notes that the U.S. “has a standing policy prohibiting government employees, contractors, subcontractors, grantees, and sub grantees from engaging in trafficking in persons,” which was implemented in the Federal Acquisition Regulation in 2015. See 57 GC ¶ 37(b).

Priority actions under principle 1.3 include requiring select agencies to designate a senior accountable official to coordinate “between the procurement trafficking in persons point of contact and the agency trafficking in persons expert,” and identifying best hiring practices of Department of Defense contractors. “DOD will then share promising practices throughout the federal contracting community that aim to decrease the risk of labor trafficking.” The report also notes that “DOD will update its training for ... acquisition personnel on protocols for reporting incidents of suspected human trafficking.”

Principle 3.3 is to “[e]nhance efforts to bring traffickers to justice by deploying a broader range of federal non-criminal tools,” including a priority action to deploy administrative and regulatory tools. The plan says the Government can deploy enforcement tools such as “civil forfeiture actions, civil injunctions, False Claims Act litigation, federal contracting suspension and debarment, financial tools including sanctions and anti-corruption measures, travel restrictions, export control, and enforcement of reporting requirements” in addition to criminal prosecution to disrupt human trafficking.

Corruption—The anti-corruption strategy includes five pillars, each comprising strategic objectives and lines of effort. The pillar of curbing illicit finance includes strategic objective 2.1 to address deficiencies in the anti-money-laundering regime. This objective includes promoting procurement transparency and notes a recent statutory requirement for contractors and grantees to disclose beneficial ownership. “It is imperative that the U.S. Government, and our partners and allies, are open and transparent regarding the people and entities with which they are contracting.”

The report also highlights the Department of Justice's establishment in 2019 of a Procurement Collusion Strike Force. See 61 GC ¶ 341(a); 63 GC ¶ 112(f). The report says the Strike Force "has expanded international collaboration and is engaging foreign partners in bid rigging, collusion, and market manipulation schemes negatively impacting government spending."

The pillar of holding corrupt actors accountable includes strategic objective 3.1 to enhance enforcement efforts. Agencies will "remove corrupt individuals, companies, and other entities from the Federal marketplace and the Federal supply chain by excluding (suspending or debaring) such actors from U.S. Government contracts, subcontracts, grants and related business opportunities." And the Government will "vigorously pursue the enforcement of foreign bribery cases through the [Foreign Corrupt Practices Act (FCPA)], money laundering charges, and forfeitures."

The report highlights the U.S. Agency for International Development's assistance to Ukraine to establish its electronic procurement system PROZORRO. "Since October 2017, PROZORRO has helped save Ukraine nearly \$6 billion in public funds, including by cancelling illegal tenders."

For discussions of the FAR's anti-trafficking provisions, see Navarre and Mutek, Feature Comment, "Final Trafficking In Persons Rule Creates New Compliance Component For U.S. Government Contractors," 57 GC ¶ 74; Carp, Feature Comment, "The FAR Ban On Human Trafficking—A 20-Year Journey From Mere Rhetoric To Meaningful Enforcement," 62 GC ¶ 213. For a discussion of DOJ's FCPA corporate enforcement, see Low, Prelogar, and Megaw, Feature Comment, "DOJ's FCPA Corporate Enforcement Policy: Dangling Presumptive Declination As An Incentive For Voluntary Disclosure," 60 GC ¶ 58. The Congressional Research Service has surveyed the FCPA's anti-bribery provisions, and the Government Accountability Office has recommended that DOD improve oversight of anti-human-trafficking measures. See 62 GC ¶ 192; 63 GC ¶ 235.

The administration's anti-trafficking plan is available at www.whitehouse.gov/wp-content/uploads/2021/12/National-Action-Plan-to-Combat-Human-Trafficking.pdf, and the anti-corruption plan at www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf.

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CRS Surveys SDVOSB Awards Ahead Of Certification Transfer From VA To SBA

Ahead of a transfer of certification authority for service-disabled veteran-owned small businesses from the Department of Veterans Affairs to the Small Business Administration by 2023, the Congressional Research Service surveyed the SDVOSB contracting preference programs and goals.

The Government-wide SDVOSB program allows agencies to award set-aside or sole-source contracts to SDVOSBs. SBA administers the program, except that VA has similar, but not identical, SDVOSB regulations, CRS noted. An eligible SDVOSB must be small, at least 51 percent unconditionally and directly owned and controlled by service-disabled veterans, and have service-disabled veterans managing day-to-day operations and making long-term decisions.

CRS said "SDVOSBs generally self-certify their eligibility for contracting preferences and are subject to criminal and civil sanctions if they are found to have made false or fraudulent claims." Section 862 of the National Defense Authorization Act for Fiscal Year 2021 will phase out self-certification and "requires VA to transfer, by January 1, 2023, the maintenance of its SDVOSB database to the SBA, provide the SBA compensation for doing so, and abolish VA's Center for Verification and Evaluation and transfer its function to the SBA," CRS said. "VA is to continue to determine whether an individual qualifies as a veteran or service-disabled veteran." And SBA is required to establish a Government-wide SDVOSB certification process with periodic recertification by Jan. 1, 2023.

CRS noted the Government Accountability Office's findings that "SBA's reliance on bid protests to investigate allegations of SDVOSB program fraud 'has allowed ineligible firms to receive millions of dollars in federal contracts.'" See 51 GC ¶ 418.

In FY 2020, about 37 percent of SDVOSB contracts were awarded with an SDVOSB preference, including one percent as sole-source awards and 36 percent as set-asides; 31 percent were awarded with another small business preference; and 32 percent in open competition.

The Government has a statutory goal to award three percent of contract and subcontract dollars to SDVOSBs each fiscal year. CRS noted that “[t]here are no punitive consequences for not meeting these procurement goals,” but SBA’s annual small business scorecards “are distributed widely, receive media attention, and heighten public awareness of small business contracting.” The Government met the three-percent SDVOSB goal “for the first time in FY2012, and it has met the goal each fiscal year since then (4.28% in FY2020).” See 63 GC ¶ 236.

For a discussion of § 862, see Schaengold, Schwartz, Prusock, and Muenzfeld, Feature Comment, “The Significance Of The FY 2021 National Defense Authorization Act To Federal Procurement Law—Part II,” 63 GC ¶ 24.

Service-Disabled Veteran-Owned Small Business Procurement Program (R46906) is available at crsreports.congress.gov/product/pdf/R/R46906.

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Developments In Brief ...

(a) **GAO Updates Congress on NASA Space Telescopes**—For fiscal year 2022, NASA requested about \$767 million for its major space telescope programs—the James Webb Space Telescope (JWST), Nancy Grace Roman Space Telescope (Roman), and Spectro-Photometer for the History of the Universe, Epoch of Reionization and Ices Explorer (SPHEREx)—and the programs “represent a cumulative total life-cycle cost of approximately \$14 billion,” William Russell of the Government Accountability Office recently testified before two House Science, Space, and Technology subcommittees. “As such, while it is important for NASA to continually stretch technological boundaries to further scientific research, it is also important to manage these projects prudently, with clear accountability and oversight for taxpayer dollars.” Russell noted that Roman set cost and schedule baselines in February 2020 and SPHEREx in January 2021, but technical problems pushed back the critical design review for SPHEREx to January 2022 and the covid pandemic led to cost and schedule growth for Roman. Addition-

ally, the JWST “continues to make progress toward its planned launch in December 2021, 90 months later than originally planned.” According to Russell, the lessons learned from GAO’s past work “provide an opportunity to strengthen management of future space telescopes” by managing cost and schedule performance for large programs to limit cascading effects on the rest of the portfolio, minimizing cost and technical risk in program decisions to better position projects for successful execution, and consistently updating cost and schedule estimates to provide decisionmakers with realistic information. NASA has improved acquisition management in recent years and adopted some of these lessons. For example, it requires “major projects to develop and update a joint cost and schedule confidence level—an integrated analysis of a project’s cost, schedule, risk, and uncertainty,” Russell noted. But acquisition management remains a long-standing challenge. See 62 GC ¶ 336; 63 GC ¶ 169. In GAO’s 2021 high-risk list update, it “found that NASA needs to do more to reduce acquisition risk and demonstrate progress, especially with regard to demonstrating sustained improvement in cost and schedule performance for new, large, complex programs entering the portfolio.” See 63 GC ¶ 67.

(b) **DOD Issues JWCC Solicitation to Four Firms for JEDI Replacement**—The Department of Defense has issued Joint Warfighter Cloud Capability (JWCC) solicitations to four cloud-service providers in its competition that replaced the Joint Enterprise Defense Infrastructure (JEDI) solicitation. In July, DOD formally canceled JEDI and issued a JWCC presolicitation notice, indicating its intention to issue a limited solicitation to only Amazon Web Services Inc. and Microsoft Corp. See 63 GC ¶ 203. But DOD issued the solicitation to those two firms, Google LLC, and Oracle Corp. JWCC will be a multiple-award indefinite-delivery, indefinite-quantity contract with a three-year base and two one-year options. According to its initial notice, DOD “anticipates that a multi-billion dollar ceiling will be required.” JEDI’s single-award IDIQ structure was among the protest

grounds in various protests. In October, the U.S. Supreme Court denied certiorari in Oracle America Inc.'s protest of the JEDI contract award to Microsoft. See 63 GC ¶ 305. Oracle had argued that DOD intended to replace JEDI "with another similar cloud-computing contract; to presumptively award the contract to Microsoft and respondent Amazon Web Services as the 'only' eligible competitors; and to exclude other bidders."

(c) VA Faces Supply Chain, Acquisition Management Problems—The Department of Veterans Affairs has struggled to "clearly defin[e] supply chain management in its action plan," and "VA has fundamental acquisition management challenges that, if not addressed, could undermine its supply chain and other efforts to improve," Shelby Oakley, Government Accountability Office director for contracting and national security acquisitions, testified before two House Veterans' Affairs subcommittees. She noted that GAO added VA acquisition management to its high-risk list in 2019 "due to long-standing acquisition management challenges, including purchases of goods and services, particularly medical supplies." See 61 GC ¶ 72. VA recently issued a high-risk action plan identifying root causes, but it "lacks specifics," including failing to "identify the scope of VA's supply chain and how existing programs and initiatives will be included in its overall supply chain modernization effort," she testified. Earlier this year, GAO recommended that VA "develop a comprehensive supply chain management strategy, given existing and continuing supply chain challenges that were highlighted by the COVID-19 pandemic." See 63 GC ¶ 186. VA "plans to complete a supply chain assessment by the end of 2022, which will inform its supply chain strategy," Shelby said. She told the subcommittees that in 2017 GAO flagged VA's initial implementation of its Medical-Surgical Prime Vendor (MSPV) program because it "lacked an overarching strategy, stable leadership, and medical center buy-in," and the program "has yet to fully meet medical centers' needs for medical supplies." See 59 GC ¶ 375. Further, in 2019–2020, the Veterans Health Administration piloted the

Defense Logistics Agency's MSPV program and then expanded it VA-wide. But VHA "did not evaluate whether the pilot was scalable, as GAO recommended in September 2020." See 62 GC ¶ 289. And VA medical centers "continue to face the shortcomings of the current version of the program, including frequent backorders and other issues." GAO recently reported on VA asset management challenges. See 63 GC ¶ 369, in this issue.

(d) OMB Issues Procurement Guidelines to Boost Equity—The Office of Management and Budget recently issued guidelines to implement President Biden's commitment to boost small business contracting and advance equity by increasing federal spending going to small disadvantaged businesses (SDBs) to 15 percent by fiscal year 2025. OMB's memorandum "instructs agencies to take five management actions, which have been developed in partnership with the Small Business Administration (SBA) and Federal buying agencies." Agencies are to (a) work with SBA to help the Government award at least 11 percent of its FY 2022 contract spending to SDBs; (b) adjust category management practices to increase contracting opportunities for SDBs and other small business categories; (c) increase the number of entrants to the federal market place and reverse the recent declines in the small business supplier base, including through new entrant management tools, stronger procurement forecasting capabilities, improved data management, and increased transparency; (d) include small business contracting goals in key senior officials' performance plans; and (e) provide agency small business contracting officials access to senior leadership. The guidance "is intended to inform and complement the actions agencies are considering for the underserved communities in their Equity Plans required by" Executive Order 13985, the memo states. "OMB will consider additional management actions to advance equity in procurement based on these ongoing efforts." Biden issued EO 13985 in January to advance racial equity and support underserved communities. See 63 GC ¶ 30. EO 13985 also repealed an ear-

lier EO that had directed agencies to impose contract restrictions to “combat ... race and sex stereotyping and scapegoating” and limit workplace diversity training. In March, OMB rescinded two prior OMB memos implementing the revoked EO. See 63 GC ¶ 71. In July, an industry group urged OMB to set clear goals and use a data-driven baseline to measure the effectiveness of its efforts to boost equity. In August, OMB directed federal agencies to review procurement practices for opportunities to embed equity. See 63 GC ¶ 246(f). *Advancing Equity in Federal Procurement* (M-22-03) is available at www.whitehouse.gov/wp-content/uploads/2021/12/M-22-03.pdf.

- (e) **Congress Passes CR to Avert Shutdown**—Congress December 2 passed a continuing resolution (CR), P.L. 117-70, to avoid a Government shutdown and fund agency operations through Feb. 18, 2022. The House of Representatives approved the CR by a 221–212 vote, and the Senate by 69–28. Professional Services Council president David Berteau lamented that agencies “need full appropriations to be enacted as soon as possible. Passing a CR every few months is harmful, inefficient, and wasteful.” And American Federation of Government Employees president Everett Kelley urged Congress to pass full-year appropriations, so “federal employees can focus exclusively on doing their jobs for the American people.” In September, after Congress passed a previous CR, lawmakers introduced legislation to end the risk of shutdowns, and Berteau and the Aerospace Industries Association criticized Congress’s reliance on CRs. See 63 GC ¶ 294.
- (f) **DIU Issues AI Ethics Guidelines**—The Department of Defense’s Defense Innovation Unit has issued *Responsible AI Guidelines in Practice* to integrate DOD’s ethical principles for artificial intelligence (AI) into DIU’s commercial prototyping and acquisition programs. In February 2020, DOD adopted AI ethical principles in five areas: AI should be responsible, equitable, traceable, reliable, and governable. DIU’s guidelines pose “specific questions that should be addressed at each phase in the AI lifecycle: planning, development, and deployment.” For example, in the AI development phase, DIU’s principles ask if a plan has been created to prevent manipulation of data, if roles and persons have been designated to certify necessary changes to the capability, and if roles and positions have been defined for Government or third-party system audits. DIU noted that it is applying the principles to various AI projects, “including predictive health, underwater autonomy, predictive maintenance, and supply chain analysis.” In March, the National Security Commission on AI recommended expanding acquisition pathways to include AI. See 63 GC ¶ 94(a). DIU’s AI guidelines are available at www.diu.mil/responsible-ai-guidelines.
- (g) **CRS Surveys Presidential Helicopter Program**—The total acquisition cost for the fleet of VH-92 presidential helicopters came in below initial estimates, and in November the Department of Defense found the VH-92 operationally suitable for routine flights, the Congressional Research Service recently reported. However, the VH-92 “did not receive the same rating for contingency operation missions, or emergency flights, in part due to continuing issues with the mission communications system.” The first six of 23 helicopters were acquired before 2019 through research and development funding, and Congress appropriated \$649 million in fiscal year 2019 and \$641 million in FY 2020 to procure 12 more helicopters. In FY 2021, Congress appropriated \$578 million to procure the final five helicopters, bringing the “total program acquisition cost, including development and procurement, [to a] projected \$4.9 billion, 5.6% less than initially estimated in 2014,” CRS said. Concerns about the mission communications system were first observed during operational assessment testing in early 2019, which delayed program development. See 62 GC ¶ 208(d). “VH-92s are currently in flight test at Naval Air Station Patuxent River, MD, and in the Washington, DC, area,” CRS explained. “Tests were scheduled to be complete in September 2020, with initial operational capability by July 2021,” before the DOD director of operational testing and

evaluation found concerns about contingency or emergency flights. “The responsibility to declare initial operational capability lies with the Marine Corps in concert with the White House Military Office,” CRS added. The Government Accountability Office periodically surveys the presidential helicopter program. See 57 GC ¶ 119; 58 GC ¶ 138; 60 GC ¶ 149. Sikorsky Aircraft, a subsidiary of Lockheed Martin, is the prime contractor, and the VH-92’s engines are built by General Electric. In 2015, Ashton Carter, then the defense secretary, warned against additional consolidation in the defense industry days after the Department of Justice approved Lockheed’s acquisition of Sikorsky. See 57 GC ¶ 314. *VH-92 Presidential Helicopter* (IF11598) is available at [crsreports.congress.gov/product/pdf/IF/IF11598](https://www.crsreports.congress.gov/product/pdf/IF/IF11598).

(h) **CRS Flags Concerns About Air Force Armed Overwatch Program**—In October 2019, following “a series of ... ‘experiments’ to determine the utility of such an aircraft,” the Air Force issued a request for proposals for the OA-X turboprop off-the-shelf light attack aircraft, a new type of aircraft that is “designed for operation in relatively permissive environments,” the Congressional Research Service has reported. After experimenting with three aircraft types, the Air Force acquired two Textron/Beechcraft AT-6 aircraft and three Sierra Nevada/Embraer A-29 aircraft. “The Air Force has not yet discussed why the buy was split between the two aircraft,” CRS noted. The “armed overwatch” program was then transferred to the Special Operations Command, which issued its own RFP in November. After considering five aircraft types, the RFP sought three. The administration requested \$101 million for the program in its fiscal year 2021 budget, but § 163 of the National Defense Authorization Act for FY 2021 denied the request and prohibited the Air Force from spending funds to “procure armed overwatch aircraft” through FY 2023. The administration sought \$170 million for six aircraft in its FY 2022 budget request. Issues for Congress include determining the value of adding such a capability to the Air Force; whether the mission can be better accomplished through other means, such

as drones; whether a procurement restricted to a few specified competitors is fair and appropriate; if it is efficient to operate more than one type of light attack aircraft; and whether the creation of a light attack fleet would exacerbate the Air Force’s reported shortage of pilots. Additionally, “[i]s the use of ‘experiments’ rather than a formal selection process a useful innovation in streamlining acquisition, a circumvention of rules, or might it be described some other way?,” CRS asked. “Does that judgment change when (as in this case) the procurement is intended for an off-the-shelf, rather than developmental, acquisition?” *Air Force OA-X Light Attack Aircraft/SOCOM Armed Overwatch Program* (IF10954) is available at [crsreports.congress.gov/product/pdf/IF/IF10954](https://www.crsreports.congress.gov/product/pdf/IF/IF10954).

- (i) **OFCCP to Launch Online AAP Portal**—The Office of Federal Contract Compliance Programs will launch a contractor portal in February 2022 for contractors to certify affirmative action programs (AAPs) and submit AAPs during compliance evaluations. Contractors may begin registering for the portal on Feb. 1, 2022, and the certification feature will be active on March 31, 2022 and mandatory by June 30, 2022. OFCCP noted the Government Accountability Office’s 2016 findings that OFCCP does not focus on compliance of contractors posing the greatest risk. See 58 GC ¶ 344. OFCCP will require portal certification initially only for supply and service contractors, but not construction contractors. Information on OFCCP’s AAP contractor portal is available at www.dol.gov/agencies/ofccp/contractorportal.
- (j) **FTC Should Improve COR Guidance**—The Federal Trade Commission should update its contracting officer’s representative guidance, the FTC inspector general recommended December 2. Otherwise, the IG found that FTC’s COR program generally complies with federal requirements. But FTC’s administrative manual includes inaccurate guidance and outdated acquisition practices, and most FTC bureaus have not established internal policies on contract management. The IG also cautioned that FTC’s acquisition division “has not

developed the oversight structure to support the transition to a hybrid work environment” for the covid-19 pandemic, and the division should “migrat[e] to a digital records environment suited to largely remote work” to promote “system consistency and staff flexibility.” The IG recommended that FTC (1) update the FTC administrative manual and (2) issue guidance on COR activities and documentation. The IG noted that, along with pandemic challenges, “federal contracting requirements and the increasing need for expert witness services maintain pressure on the acquisitions program.” In 2019, the IG urged FTC to expand in-house expert witness capacity and control expert witness and contract management costs. See 61 GC ¶ 297; 61 GC ¶ 348. *Audit of the Federal Trade Commission’s Contracting Officer’s Representative Program (A-22-03)* is available at www.ftc.gov/about-ftc/office-inspector-general/oig-reading-room/reports-correspondence.

Regulations

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ABA Section Urges Clarification Of FAR WOSB Certification Rule

A Federal Acquisition Regulation proposed rule on certification of women-owned small businesses should be clarified as to the date of size representation and the effect of a Small Business Administration ineligibility determination, the American Bar Association’s Section of Public Contract Law recommended December 6.

In October, the FAR Council issued a proposed rule to require contracting officers to verify WOSB and economically disadvantaged WOSB status in SBA’s Dynamic Small Business Search (DSBS) database before award and to limit sole-source WOSB awards to certified firms. See 63 GC ¶ 304(a). The rule would implement SBA’s long-delayed creation of a WOSB certification process, as mandated by § 825 of the National Defense Authorization Act for Fiscal Year 2015. See 62 GC ¶ 145.

The ABA Section called for clarification of the date of size representation. The rule would allow contractors to bid while awaiting WOSB certification but “leaves this issue of timing unsettled in the FAR.” The Section noted that SBA regulations require WOSB certification or a *completed* application as a condition for *submitting* an offer, whereas the proposed FAR language could allow a contractor to apply for WOSB certification “some days or weeks after initial proposals” so long as its application was “pending” when the CO checked DSBS. The Section thus recommended clarifying that a WOSB certification application must have been submitted as of the date of proposal submission by adding cross-references to SBA regulations at 13 CFR pt. 121 and § 127.504.

The Section noted that SBA regulations prohibit COs from awarding WOSB contracts, or require COs to terminate them, if SBA has determined that a firm is ineligible. SBA regulations use the terms “shall not award” and “shall terminate,” but the FAR proposed rule states that COs “may terminate the contract.” The Section again recommended revising the proposed rule to align with SBA regulations and adding a cross-reference to 13 CFR § 127.604(f).

The Congressional Research Service has reported that WOSB set-aside and sole-source awards make up a relatively small portion of contracts awarded to WOSBs, and many agencies have little experience with WOSB awards. See 62 GC ¶ 123; 63 GC ¶ 52.

The ABA Section’s comments are available at regulations.gov using the code FAR-2021-0009-0007.

Decisions

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Delay In Filing COFC Protest After Agency-Level Protest Did Not Result In Blue & Gold Waiver, Fed. Cir. Holds

Harmonia Holdings Grp., LLC, v. U.S., 2021 WL 5816288 (Fed. Cir. Dec. 7, 2021)

A protester’s pre-award agency-level protest challenging the terms of a solicitation amendment

preserved the protester's right to file a protest at the U.S. Court of Federal Claims after the award despite a five-and-one-half month delay in filing the COFC protest, the Court of Appeals for the Federal Circuit has held in reversing the COFC's decision, which dismissed the protest on *Blue & Gold* waiver grounds.

U.S. Customs and Border Protection (CBP) issued a solicitation for application development and support services for CBP's effort to monitor and control cargo at the U.S. border. The solicitation listed five evaluation factors: factor 1 technical; factor 2 management, including subfactors for staffing plan/key personnel, program management and subcontractor/teaming; factor 3 quality assurance; factor 4 past performance; and factor 5 price.

The solicitation provided a sample price format and required offerors to submit pricing for the contract line items (CLINs) listed in the spreadsheet. The sample price format explained how the tasks tied to time and materials CLINs, and it showed four CLINs listing job titles and over 90 labor categories.

Offerors submitted proposals in September 2018. On Oct. 26, 2018, CBP issued amendment 9, which changed the period of performance, clarified procedures for surge CLIN purchasing, revised factor 2 by requiring offerors to provide a detailed staffing plan for the on-demand/surge CLINs, altered the price factor by requiring offerors to conform their staffing plans to their price quotations, provided a new sample price format spreadsheet requiring offerors to resubmit pricing to comply with new CLIN pricing rules, and reduced the number of labor categories from 90 to 10.

Six days later, CBP issued amendment 10, which, among other things, established estimated ceilings for CLINs 001, 002 and 004; designated CLINs 001 and 003 as work needed at time of award; and added Federal Acquisition Regulation 52.219-14, Limitations on Subcontracting.

The amendments allowed offerors to revise their proposals on price and on the factor 2 subfactor for staffing plan/key personnel. Proposal revisions were due Nov. 13, 2018.

On Nov. 12, 2018, Harmonia Holdings Group LLC submitted a pre-award agency-level protest to CBP. Harmonia challenged CBP's limitation of revisions to price and to factor 2 on staffing plan/

key personnel. Harmonia argued that offerors should be allowed to update their entire proposals in response to amendments 9 and 10. Harmonia also challenged the addition of FAR 52.219-14, Limitations on Subcontracting, which prohibited offerors from subcontracting more than 50 percent of the work. Harmonia said this was a material change warranting "major revisions" to offerors' proposals.

The next day, Harmonia submitted a proposal with revisions for price and for factor 2 on staffing plan/key personnel.

On Dec. 6, 2018, CBP informed Harmonia that its proposal was unsuccessful, that a proposal revision would not be considered and that another offeror had received the award.

Harmonia filed a bid protest at the COFC on May 7, 2019. The COFC first addressed the part of Harmonia's protest asserting the grounds raised in its pre-award protest at CBP, i.e., CBP's limitation on proposal revisions following amendments 9 and 10. The COFC held that these protest grounds were untimely. In support, the COFC quoted *COMINT Sys. Corp. v. U.S.*, 700 F.3d 1377 (Fed. Cir. 2012); 55 GC ¶ 39:

To be sure, where bringing the challenge prior to the award is not practicable, it may be brought thereafter. But, ***assuming that there is adequate time in which to do so***, a disappointed bidder must bring a challenge to a solicitation containing a patent error or ambiguity ***prior to the award of the contract***.

(COFC's emphasis).

The COFC said that Harmonia did not explain the five-month delay in filing its pre-award protest with the COFC. The COFC concluded that, "while Harmonia facially met the requirements under [*Blue & Gold Fleet, L.P. v. U.S.*, 492 F.3d 1308 (Fed. Cir. 2007); 49 GC ¶ 320], Harmonia waived its right to bring those claims at the COFC by "failing to timely and diligently pursue its objections to Amendments 9 and 10."

The COFC then rejected Harmonia's post-award challenges to CBP's evaluation of Harmonia's proposal and the decision to award the contract to another offeror.

Harmonia appealed to the Federal Circuit, arguing that the COFC erred in determining that Harmonia waived its right to file an action in the COFC

asserting the same challenges that it asserted in its pre-award protest to the CBP.

The Federal Circuit first noted that a party may file an action at the COFC within a six-year period following claim accrual. 28 USCA § 2501. *Blue & Gold*, however, restricted the time for bringing a protest at the COFC to a shorter period. *Blue & Gold* held that a party who has the opportunity to object to the terms of a Government solicitation containing a patent error and fails to do so before the close of the bidding process waives its ability to raise the same objection in a later bid protest at the COFC.

This waiver rule prevents a bidder who is aware of a solicitation defect from waiting to bring its challenge until after the award in an attempt to restart the bidding process, perhaps with increased knowledge of its competitors. The waiver rule thus prevents contractors from taking advantage of the Government and other bidders, and avoids costly after-the-fact litigation.

Later, *COMINT* expanded *Blue & Gold* waiver to include waiver based on delay occurring after the close of bidding. The amendment challenged in *COMINT* was adopted after that time. In *COMINT*, the protester did not claim to have been unaware of the alleged defect in the amendment before the award of the contract, and it had two and a half months before the award to file a protest. Because there was ample opportunity to object, it was improper for the protester to seek to restart the bidding process by objecting to the amendment for the first time after the award.

Blue & Gold waiver generally involves failure to timely object to a known, patent defect in the solicitation. The Federal Circuit said that its precedent does not support applying *Blue & Gold* waiver to Harmonia's protest. The Federal Circuit previously explained that "a formal, agency-level protest before the award would likely preserve a protestor's post-award challenge to a solicitation ... as might a pre-award protest filed with the [Government Accountability Office]." *Bannum, Inc. v. U.S.*, 779 F.3d 1376 (Fed. Cir. 2015); 57 GC ¶ 87. *Blue & Gold* waiver is based not only on the notion of avoiding delay that could benefit the delaying party, but also on the notion of preserving challenges and providing notice to interested parties. Harmonia's undisputedly timely, formal challenge of the solicitation before CBP "removes this case from the ambit of *Blue & Gold* and its progeny."

The Federal Circuit therefore reversed the COFC's decision that Harmonia waived its ability to file an action asserting the same objections it asserted in its earlier CBP protest. The Federal Circuit remanded the case for consideration of Harmonia's pre-award protest objections.

The Federal Circuit emphasized that its opinion should not be read as condoning delay in filing actions at the COFC. Delaying protesters may face adverse consequences, but the Federal Circuit was not persuaded that *Blue & Gold* waiver should be one of those consequences in this case. The COFC has relatively broad authority under 28 USCA § 1491(b)(2) to fashion a remedy. On remand, the COFC "might decide under the circumstances of this case that injunctive relief is appropriate," the Federal Circuit said.

Because the COFC could determine that it is appropriate to reopen bidding and allow offerors to submit wholly new proposals, which would require a new technical evaluation, the Federal Circuit also vacated the COFC's decision on CBP's technical evaluation of Harmonia's Nov. 13, 2018 proposal on mootness grounds.

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Awardee Did Not Notify Agency That Quoted Key Personnel Was No Longer Available, Comp. Gen. Says

Ashlin Mgmt. Grp., Comp. Gen. Dec. B-419472.3, et al., 2021 CPD ¶ 357

An awardee improperly failed to notify the procuring agency that a quoted key person became unavailable during a corrective action period, where the awardee had actual knowledge that the key person was no longer available, the U.S. Comptroller General recently determined in sustaining a protest.

The Department of Labor issued a request for quotations to Federal Supply Schedule contract holders seeking a vendor to assist the National Office of Job Corps in identifying, developing and implementing career pathway programming. The RFQ contemplated a time and materials order awarded on a best-value basis considering price, technical approach, key personnel, management plan and past performance.

Seven firms, including Ashlin Management Group Inc. and Booz Allen Hamilton Inc. (BAH) submitted quotations. After evaluations, DOL made award to BAH. Ashlin protested at the Government Accountability Office, and DOL notified the Comp. Gen. that it would take corrective action. Accordingly, the Comp. Gen. dismissed the protest as academic.

After reconsideration, DOL rated both Ashlin and BAH equally for the key personnel and past performance factors, but rated BAH's \$9,227,435 quotation higher in the technical approach and management plan factors than Ashlin's \$11,557,605 quotation. A third vendor quoted a lower price, but DOL found the quotation to be "technically inferior." Finding BAH's quotation provided the better value, DOL selected BAH for award.

Ashlin again protested at GAO. Ashlin argued that BAH's quotation became technically unacceptable during the corrective action period because of the unavailability of one of BAH's quoted key personnel.

The RFQ established three key personnel positions—project director, project manager and senior project specialist. When BAH submitted its October 2020 quotation, it identified individuals for each key personnel role. On March 23, 2021, the quoted senior project specialist submitted a resignation letter notifying BAH of the individual's intent to leave BAH in two weeks. The employee left BAH in April.

Vendors are obligated to advise agencies of material changes in proposed staffing, even after proposal submission. *MindPoint Grp., LLC*, Comp. Gen. Dec. B-418875.2, B-418875.4, 2020 CPD ¶ 309. This premise is grounded in the notion that a firm may not properly receive a contract award based on a knowing material misrepresentation in its offer. *M.C. Dean, Inc.*, Comp. Gen. Dec. B-418553, et al., 2020 CPD ¶ 206; 62 GC ¶ 204.

While the vendor is generally required to advise an agency when it knows that one or more key personnel are no longer available, such a duty does not arise where a vendor does not have actual knowledge of the employee's unavailability. *DZSP 21, LLC*, Comp. Gen. Dec. B-410486.10, 2018 CPD ¶ 155.

When an offeror notifies an agency of the withdrawal of key personnel, the agency may either evaluate the quotation as submitted without considering the unavailable employee's resume, in which case the quotation would likely be rejected as technically unacceptable, or the agency may open discussions to permit the vendor to amend its quotation. See *M.C. Dean, Inc.*

BAH, as intervenor, acknowledged that the individual resigned from BAH, and after DOL notified BAH of its award, BAH contacted the agency to request substitution of the key person. Nevertheless, in response to the protest, BAH asserted that it did not "have actual knowledge" that its senior project specialist was unavailable to perform.

BAH argued that DOL had not yet approved its request for substitution and BAH could very well re-hire the identified key person. Similarly, DOL asserted that just because the quoted senior project specialist "is not presently employed by [BAH] it does not necessarily follow that [the employee] would not agree to return to work" under the contract.

The Comp. Gen. found that the agency and BAH's arguments "ring hollow" and found them to be "unpersuasive."

The Comp. Gen. concluded that BAH's quoted senior project specialist resigned from BAH during the corrective action period, and that BAH had actual knowledge that the key person would be unavailable and therefore was obligated to notify DOL, which it did not do. Accordingly, the Comp. Gen. sustained the protest.

Reminder ...

The GOVERNMENT CONTRACTS YEAR IN REVIEW conference covering 2021 will be offered as a virtual online educational program in February 2022.

Plans for the event are currently in progress and details for subscriber program access will be provided by early December. Please visit our webpage to view session topics and event updates; <https://legal.thomsonreuters.com/en/events/government-contracts>.

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