



2023 Public Contracting Update Symposium: Legal Update Panel

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Agenda

Introduction

Legislative / Regulatory

Case Law Update

- Cost Allowability
- Government Claims
- COVID-19 and the Procurement Act
- Commercial Products and Bid Protests
- False Claims Act (FCA) and Scierter Requirement
- GSA Procurement: GWAC
- Bid Protests

Lapse of Appropriation

AKA: “Government Shutdown”

Lapse of Appropriations - Shutdowns

- Anti-deficiency Act, 31 U.S.C. §1341(a)(1)(A)
- Attorney General Opinions on Operations during a lapse, Appendix VIII, GAO Report to Congress, Funding Gaps Jeopardize Federal Government Operations, B-202135, March 3, 1981, <https://www.gao.gov/assets/pad-81-31.pdf>

FY24 - Continuing Resolution

- Expires 17 November 2023
- OMB Guidance on implementing the CR <https://www.whitehouse.gov/wp-content/uploads/2023/09/FY-2024-OMB-CR-Bulletin-23-02.pdf>
- As of today - differences between the Republicans and the Democrats are very significant, the divide is growing not shrinking.

Shutdown Guidance

- OMB, Agency Shutdown Guidance page, <https://www.whitehouse.gov/omb/information-for-agencies/agency-contingency-plans/>
- OMB – Listing of procedures for a lapse in appropriation – Updated daily - [Agency Contingency Plans | OMB | The White House](#)
- OSD – Memorandum – Potential for Lapse in Funding – Issue date: 29 Sep 23, [Deputy Secretary of Defense Memorandum](#)
- GSA – Memorandum - Operations in the Absence of Appropriations – Issue Date: - 26 Sep 23, [Operations in the Absence of Appropriations | GSA](#)
- NASA – Memorandum – NASA Continuity of Appropriations Plan – Issue date: 1 Aug 23, [NASA Continuity of Appropriations Plan to OMB 2023](#)
- Office of the Federal Register, 88 FR 68157 – Notice – Publication Procedures for Federal Register Documents During a Funding Hiatus – [2023-21143.pdf \(govinfo.gov\)](#)
- Apportionment of the Continuing Resolutions for FY 2024, <https://www.whitehouse.gov/wp-content/uploads/2023/09/FY-2024-OMB-CR-Bulletin-23-02.pdf>

If You're a Contractor

- Don't expect guidance from gov't until the eve of shutdown
- Communicate with your CO and COR
 - Get a good number/email address
 - Ask for guidance on what, if anything to do with your contract
- Submit all invoices for work performed, etc.
- Keep track of additional costs for claims
- Expect delays in payment
- Make all deliverables and communicate with CO on who can accept
- Expect delays in awards of new contracts and decisions on options
- If you were going to file a protest, file it before the shutdown

Contractors (con't.)

- Stop work order
 - contractors historically have not been reimbursed for the costs of keeping their workforce
 - Contractors are not reimbursed for interest on debts incurred
- Many contractors encourage their employees to take annual leave if available.
- Know where your folks are vis-à-vis TDY/travel and whether you have to have them return from travel, etc.

Government

- Check for most recent agency guidance – it may not be issued until the “eve” of the shutdown
- Determine whether you are “essential” or “excepted” and will work
 - Some Feds are paid with non-appropriated funds or revolving funds - will continue to work
- Determine whether your facility will be available to use/access by you and contractors
- Make sure you have contact information of your contractors
- Provide contractors with any additional/new delivery instructions for goods and services.
- Review and approve any properly submitted invoices for payment

OMB GUIDANCE

OMB Memos

- OMB – Memorandum M-23-01 – Increasing the Share of Contract Dollars Awarded to Small Disadvantaged Businesses – Effective date: 4 Oct 22, <https://www.whitehouse.gov/wp-content/uploads/2022/10/M-23-01.pdf>
- OMB, 88 FR 57750 – Final – Guidance for Grants and Agreements, revisions are limited in scope to Buy America, Buy America Act provisions of the Infrastructure Investment and Jobs Act and domestic preferences – Effective date: 23 Oct 23, [2023-17724.pdf \(govinfo.gov\)](https://www.whitehouse.gov/wp-content/uploads/2023/10/2023-17724.pdf)
- EOP – National Security Strategy – The White House published the Biden Administration’s National Security Strategy on 12 Oct 22, <https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf> You can find the FACT Sheet at: <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/12/fact-sheet-the-bidenharris-administrations-national-security-strategy/>
- EOP – Memorandum M-23-08 - Strengthening Support for Federal Contract Labor Practices Labor Advisors- 10 Jan 23, <https://www.whitehouse.gov/wp-content/uploads/2023/01/M-23-08-Labor-Advisor.pdf>
- EOP, 88 FR 10825 – EO 14091, Further Advancing Racial Equity and Support for Under-served Communities Through the Federal Government – Effective date: 16 Feb 23, [2023-03779.pdf \(govinfo.gov\)](https://www.whitehouse.gov/wp-content/uploads/2023/02/2023-03779.pdf)
- EOP – National Cybersecurity Strategy March 2023, www.whitehouse.gov/wp-content/uploads/2023/03/National-Cybersecurity-Strategy-2023.pdf
- EOP, 88 FR 18957 – EO 14093 - Prohibition on Use by the United States Government of Commercial Spyware that Poses Risks to National Security, establishes policy that the USG shall not make operational use of commercial spyware that poses significant counterintelligence or security risks to the USG or significant risks of improper use by a foreign government or foreign person. – Effective date: 27 Mar 23, [2023-06730.pdf \(govinfo.gov\)](https://www.whitehouse.gov/wp-content/uploads/2023/03/2023-06730.pdf)
- EOP – Presidential Determination No 2023-06 – Section 303, DPA of 1950 , Printed Circuit Boards Printed Circuit Boards and Advanced Packaging Production Capability, waives the requirements of section 303(a)(1)–(a)(6) of the Act for the purpose of expanding the domestic production capability for these supply chains. – Effective date: 27 Mar 23, [2023-06921.pdf \(govinfo.gov\)](https://www.whitehouse.gov/wp-content/uploads/2023/03/2023-06921.pdf)
- EOP, 88 FR 51203 – EO 14104, Federal Research and Development in Support of Domestic Manufacturing and United States Jobs, when new technologies and products are developed with support from the USG, they will be manufactured in the United States whenever feasible and consistent with applicable law – Effective date: 28 Jul 23, [2023-16636.pdf \(govinfo.gov\)](https://www.whitehouse.gov/wp-content/uploads/2023/07/2023-16636.pdf)
- EOP – EO – Safe Secure, and Trustworthy Artificial Intelligence – Effective date: 30 Oct 23, <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/>
- EOP, 88 FR 75191 – EO 14110 – Safe Secure, and Trustworthy Development and Use of Artificial Intelligence – Effective date: 30 Oct 23, [2023-24283.pdf \(govinfo.gov\)](https://www.whitehouse.gov/wp-content/uploads/2023/10/2023-24283.pdf)

SAFER FEDERAL WORKFORCE

Safer Federal Workforce

- Safer Federal Workforce – Vaccination – EOs 14042 AND 14043 will be rescinded vaccinations of federal employees and federal contractors will no longer be required effective 12:01 am on 12 May 23. In the interim no action should be taken to enforce EO 14043 and 14042, further guidance to follow – Effective date: 1 May 23, Federal Employees [Vaccination | Safer Federal Workforce](#) Federal Contractors [For Federal Contractors | Safer Federal Workforce](#)

SIGNIFICANT FAR CASES

Regulatory Statistics

6 Nov 22 – 7 Nov 23

Type of Regulatory Action	FAR	DFARS	GSA	NASA	SBA	Other Agencies	CY 23 Total
Final	6	20	2	15	7	12	39
Interim	1	4					5
Proposed	5	8	3	1	2	3	22
Advanced Notice of Proposed Rulemaking		1	1				2
Notices*	1	13	11	1	2	57	85
Class Deviations***		10	10	1		5	26
Information Collections	14	34	3	15		9	75
Technical Amendments/Corrections	4	3	4	1	1		13
Withdrawals	1				2	1	3

Predominantly Additions and Deletions to the “Procurement List”

**Includes DoD procurement related as well as DFARS

***Includes revisions to Class Deviations

****Includes CAAC Letters

FAR Cases – Final Rules

- FAR, 87 FR 73902- Final – FAR Case 2016-005, Effective Communication between Government and Industry – Effective date: 30 Dec 22, [2022-25959.pdf \(govinfo.gov\)](#)
- FAR, 87 FR - Final – FAR Case 2020-014, United States-Mexico-Canada Agreement – Effective date: 30 Dec 2022, [2022-25960.pdf \(govinfo.gov\)](#)
- FAR, 87 FR 73894- Final – FAR Case 2022-005, Update to Title 10 Citations – Effective date: 30 Dec 22, [2022-25958.pdf \(govinfo.gov\)](#)
- FAR, 88 FR 9730 - Final – FAR Case 2020-007, Accelerated Payments Applicable to Contracts with Certain Small Business Concerns, implements §873 of the FY 20 NDAA accelerated payment for small business prime contractors to 15 days after receipt of proper invoice, see rule for application to prime small business contractors – Effective date: 16 Mar 23, [2023-02425.pdf \(govinfo.gov\)](#)
- FAR, 88 FR 9734 - Final – FAR Case 2019-008, Small Business Program Amendments implementing several changes to the SBA's regulations – Effective date: 16 Mar 23, [2023-02426.pdf \(govinfo.gov\)](#)
- FAR, 88 FR 25476 – Final – FAR Case 2022-002, Exemption of Certain Contracts From the Periodic Inflation Adjustments to the Acquisition-Related Thresholds – Effective date: 26 May 23, [2023-08198.pdf \(govinfo.gov\)](#)
- FAR, 88 FR 25474 – Final – FAR Case 2022-007, Removal of FAR Subpart 8.5, Acquisition of Helium – Effective date: 26 May 23, [2023-08197.pdf \(govinfo.gov\)](#)

FAR Cases – Final Rules

- FAR, 88 FR 53754 – Final – FAR Case 2022-008, Update to ASSIST Database – Effective date: 7 Sep 23, [2023-16660.pdf \(govinfo.gov\)](#)
- FAR, 88 FR 53748 – Final – FAR Case 2017-014, Use of Acquisition 360 to Encourage Vendor Feedback, encourages use of voluntary feedback mechanisms, where appropriate, to support continual improvement of the acquisition process – Effective date: 22 Sep 23, [2023-16658.pdf \(govinfo.gov\)](#)
- FAR, 88 FR 69523 - Final – FAR Case 2021-012, 8(a) Program – Effective date: 6 Nov 23, [2023-21322.pdf \(govinfo.gov\)](#)
- FAR, 88 FR 69517 - Final – FAR Case 2017-005, Whistleblower Protection for Contractor Employees – Effective date: 6 Nov 23, [2023-21321.pdf \(govinfo.gov\)](#)

FAR Cases – Interim Rules

- **FAR, 88 FR 36430 - Interim** - FAR Case 2023-010, Prohibition on a ByteDance Covered Application – **Effective date:** 2 Jun 23 - **Comments due:** 1 Aug 23, [2023-11756.pdf \(govinfo.gov\)](#)
- **FAR, 88 FR 69503 - Interim** – FAR Case 2020-011, Implementation of Federal Acquisition Supply Chain Security Act (FASCSA) Orders – **Effective date:** 4 Dec 23, **Comments due:** 4 Dec 23, [2023-21320.pdf \(govinfo.gov\)](#)

FISCAL YEAR 2024 NATIONAL DEFENSE AUTHORIZATION ACT

NDAA Provisions of Interest

- H 804 – Loser Pays
- S 806 - Default Commercial Products and Services
- S 815 – Exempt Software from EVM and raise thresholds
- S 817- Pilot on higher progress payments
- S 844 – Encourage DoD Kongs to provide more timely payments to subs
- H 808 & S 812 – No contracting w/ CCP, Russia, etc.
- S 1080 – Add Australia and UK as domestic sources under DPA

STUFF TO WATCH

Stuff to Watch

- OMB, 88 FR 75625 – Request for Comments – Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum – Comments due: 5 Dec 23, [Proposed Memorandum for the Heads of Executive Departments and Agencies \(ai.gov\)](#)
- OMB, 88 FR 73878 - Proposed - Updated Guidance for Modernizing the Federal Risk Authorization Management Program (FedRAMP), [Policies & Priorities | CIO.GOV](#) – Comments due: 27 Nov 23, [2023-23839.pdf \(govinfo.gov\)](#)
- FAR, 88 FR 68402 – Proposed – FAR Case 2021-019, Standardizing Cybersecurity Requirements for Unclassified Federal Information Systems – Comments due: 4 Dec 23, [2023-21327.pdf \(govinfo.gov\)](#)
- FAR, 88 FR 68055 – Proposed – FAR Case 2021-017, Cyber Threat and incident Reporting and Information Sharing – Comments due: 4 Dec 23, [2023-21328.pdf \(govinfo.gov\)](#)

Legislative / Regulatory

Drabkin and Associates, LLC



Case Law Update



Cost Allowability

Sec'y of Def. v. Raytheon Co., 56 F.4th 1337 (Fed. Cir. 2023)

- **Brief Summary:** In 2007 and 2008, Raytheon included government relations group costs as indirect costs in its incurred cost submissions, but withdrew a portion of those costs as unallowable lobbying costs in accordance with FAR 31.205-22, which requires that contractors maintain adequate records to demonstrate that the certification of costs as being allowable or unallowable
- Raytheon also included a portion of corporate development group costs as indirect costs in its incurred cost submission in 2007 and 2008, but withdrew a portion of the costs as unallowable organizational costs under FAR 31.205-27
- Also relevant was Raytheon's policy of allowing business class travel for trans-oceanic flights in excess of 10 hours. Government objected to Raytheon's costs and practice, and Raytheon appealed the Government's claim to the ASBCA
- **Holding:** Board held that the Government did not meet its burden of proving that any of the government relations costs were unallowable, and that Raytheon's method of removing unallowable lobbying costs was proper based on its disclosed accounting practice
- Board found that Raytheon's corporate development employees kept support for their time in accordance with internal rules and that DCMA did not meet its burden of proving that the corporate development costs were unallowable organization costs under FAR 31.205-27
- Federal Circuit reversed the ASBCA's lower decision, determining that the lower decision was inconsistent with FAR and improperly interpreted Raytheon's corporate practices and policies

Government Claims - Price Definitization

Lockheed Martin Aeronautics Co. v. Sec'y of Air Force, No. 2022-1035, 2023 WL 3064417 (Fed. Cir. Apr. 25, 2023)

- **Brief Summary:** *Lockheed* involved two UCAs with the Air Force for upgrades to the F-16 fighter jet. The contracts contained price definitization clauses, FAR 52.216-25 and DFARS 252.217-7027, which required Lockheed Martin to begin performance while the parties worked to definitize a price by a target date. If the parties were unable to reach an agreement on price, the clauses allowed the contracting officer to determine and set a reasonable price. The parties were unable to reach an agreement after several years of negotiation, and the contracting officer unilaterally determined a price for each of the contracts. Lockheed Martin immediately appealed for relief from the price determination to the Armed Services Board of Contract Appeals (“ASBCA”). The appeal was dismissed for lack of jurisdiction and Lockheed Martin appealed this decision to the CAFC.
- **Holding:** The CAFC held that unilateral price definitizations do not constitute government claims under the Contract Disputes Act (“CDA”). Accordingly, the relevant boards and Court are not authorized under the CDA to resolve such disputes absent: (1) a separate submission by the contractor of a claim objecting to the unilateral prices; and (2) a contracting officer’s final decision denying such a contractor claim.

Government Claims – USG Demand

PAE Applied Technologies LLC, ASBCA No. 63233, 2023 WL 5827257

Brief Summary: PAE Technologies received a demand letter from a U.S. Navy contracting officer requesting immediate payment of unallowable COVID-19 costs. PAE Technologies appealed the demand letter to the Board. The Navy responded and moved to dismiss for lack of subject matter jurisdiction. The Navy asserted that the letter was not a contracting officer’s final decision (“COFD”). The Navy contended the letter was an invitation to PAE to comment on its refusal of certain costs.

ASBCA Holding: The ASBCA held that the demand letter was a COFD and constituted a final decision under the CDA. The ASBCA noted that a contracting officer’s subjective intent is not controlling as to whether a communication is a decision and instead, “the totality of previous communications,” determines whether a CDA claim exists.

COVID-19: Procurement Act

Mayes v. Biden, 67 F.4th 921 (9th Cir. Apr. 19, 2023)

Brief Summary: The Arizona state attorney general, a federal contractor, and a federal employee brought an action challenging an Executive Order requiring Federal Contractors' and Subcontractors' employees to be vaccinated against COVID-19. The District Court for the District of Arizona granted a motion for permanent injunction which the Government appealed. The Ninth Circuit focused on the first prong of the permanent injunction inquiry, actual success on the merits.

Holding: The Ninth Circuit reversed the injunction and found that Arizona failed to satisfy the first prong of the permanent injunction inquiry. The court held the Procurement Act broadly granted the President "the necessary flexibility and broad-ranging authority to ensure economy and efficiency in federal procurement and contracting." This holding has created a circuit split with the 5th, 6th, and 11th Circuit upholding identical injunctions.

COVID-19: Sovereign Act by the Government

Appeal of Structure Projects, Inc., ASBCA No. 62927, 2023 WL 5606951

Brief Summary: The U.S. Army Corp. of Engineers awarded StructSure Projects a task order to perform design and alteration services. After work began, and due to the COVID-19 pandemic, the agency deemed the task order non-mission essential and precluded the contractor from on-site activities for forty-four days. StructSure filed an appeal alleging it was owed money for the Government's use of its temporary facilities and other services, during the forty-four days the task order was non-mission essential.

ASBCA Holding: The ASBCA rejected the sovereign act defense raised by the Government and held StructSure was entitled to compensation from the Government

Commercial Products and Bid Protests

Percipient.ai Inc. v. U.S., 165 Fed.Cl. 331 (2023)

Brief Summary: Percipient.ai alleged the National Geospatial-Intelligence Agency violated 10 U.S. Code Section 3453, which requires the government to acquire commercial products and services “to the maximum extent practicable,” when it awarded a contract to CACI International Inc. The Government argued that Percipient.ai lacked standing, given they did not bid on the contract. While the case was ultimately dismissed, the language from the ruling may have an impact on commercial contractors in the future who seek to enforce federal preference for commercial products.

Holding: Protestor has standing under the Tucker Act to bring post-award bid protest and bid protest was not barred due to protestor’s failure to object to the terms of the solicitation. Further, Percipient.ai, as an offeror of a commercial product, had standing under § 3453 because it had a direct economic interest in that opportunity.

FCA: Scierter Requirement

U.S. et al. Ex Rel. Schutte et al. v. SuperValu Inc. et al., and U.S. et. al.,ex rel. Proctor v. Safeway, Inc., 598 U.S. 739 (2023)

Brief Summary: Relators brought a qui tam action under the False Claims Act against pharmacies alleging the operators knowingly filed false reports when they sought reimbursements under Medicare and Medicaid. The district court granted summary judgment to the drug stores based on a lack of scierter. On appeal by the Relator, the Seventh Circuit affirmed, after which certiorari was granted. The court focused on whether the operators had the required scierter if they understood the standard and still submitted claims that were inaccurate.

Holding: The Court vacated the Seventh Circuits decision and remanded the case. The Court held that the FCA's scierter element refers to the defendant's knowledge and subjective beliefs, not what an objectively reasonable person might have known or believed.

FCA: Relator Requirements

U.S., ex rel. Polansky v. Executive Health Resources Inc. et al., 599 U.S. 419 (2023)

Brief Summary: Relator, a doctor who worked for a company that helped hospitals bill the United States for CMS claims, filed a qui tam action under the FCA alleging that the company was enabling clients to fraudulently charge inpatient rates. While the court affirmed dismissal of the claim by the lower courts, the dissent suggested that the FCA and the qui tam provisions of the FCA were potentially in conflict with Article II of the Constitution, opening the door for potential challenges to the FCA for defendants in the future.

Holding: The Court rejected a whistleblower argument that the government forfeits its statutory right to dismiss a whistleblower FCA case if it declines to intervene at the outset of the case.

Dissent: The dissent asserted that the FCA does not give the Government the power to unilaterally dismiss a pending qui tam action after it has declined to take over the action from the relator at its outset.

GSA Procurement: GWAC

SH Synergy, LLC and VCH Partners, LLC v. U.S., 165 Fed. Cl. 745 (2023)

Brief Summary: Bidders, an IT provider and mentor-protégé JV formed under SBA mentor-protégé program, filed a pre-award bid protest challenging a GSA set-aside government-wide acquisition contract (GWAC) for IT services and challenged the legality of small business, and other group pool solicitations. The bidders claimed the set-asides unfairly favored mentor-protégé joint ventures with large business mentors.

Holding: The court held that corrective action from GSA treated joint ventures unfairly by placing too much weight upon the protégé's experience. Additionally, the court held that the GSA misapplied Section 876, a clause from the 2019 NDAA, which grants a limited exception to the usual statutory requirement to consider price when evaluating contract proposals, instead allowing prices to be assessed at the tasker order level for certain services. The court held GSA's solicitations violated federal procurement law by excluding price as an evaluation factor at the IDIQ level.

Bid Protest

System Dynamics Int'l, Inc. v. United States, 2023 WL 6532692 (2023)

Brief Summary: SDI filed a post-award bid protest challenging the Army's award of small business set-aside contract and sought permanent injunctive relief preventing performance of the contract award. SDI also sought an order that the Army conduct a proper evaluation and issue a new award decision. The Army contended that they had appropriately evaluated the proposal because several key personnel exceeded the minimum requirements and the agency had discretion to assign a significant weakness as opposed to a deficiency.

Holding: The court rejected the Army's argument, finding that the proposal did not meet the solicitation's requirements in numerous labor categories. The court granted SDI's request for a permanent injunction and ordered the agency to conduct a proper evaluation consistent with the definition of a deficiency as defined by FAR 15.001.

Bid Protest: Pricing Information

Zolon PCS II, LLC, B-420745.2 et al. (September 20, 2023)

Brief Summary: GAO denied a protest alleging that the awardee's technical proposal was not compliant with the solicitation. Protestors contended that the two awardees ran afoul of the solicitation's prohibition on "specific labor rates" where the awardees offered premium pay to employees holding security clearances, including by specifying within the technical proposal volume the percentage of premium pay offered to cleared employees.

Holding: The GAO rejected the protestors assertion holding that the terms of the solicitation did not prohibit the offerors from including in their technical proposals information on a specified percentage of premium pay to be added to the labor rate where the technical proposal did not include the actual labor rate. Additionally, the GAO rejected that suggestion that the solicitation was latently ambiguous, noting that noting in the solicitation barred offerors from including information about percentages for clearance premium pay.

Bid Protest: Conflicts of Interest

Guidehouse, Inc., B-421740, B-421740.2 (September 18, 2023)

Brief Summary: The chair of the agency's technical evaluation board (TEB) was previously a senior consultant at Deloitte and was aware that Deloitte might submit a quotation under the solicitation. The agency conducted a limited investigation and concluded that there was no conflict. Guidehouse, Inc. protested this decision which the GAO sustained.

Holding: The GAO found that where a government official has an apparent potential conflict of interest, a protest regarding that interest is sustained where the record does not show that the agency adequately considered the apparent conflict and failed to investigate other aspects of the matter or consider any mitigation measures.

Where a particular agency action is under protest, GAO needs a sufficient record to assess the reasonableness of the action and an agency's efforts to limit document production may limit the GAO's mandate to fairly resolve bid protests and evaluate whether an agency's actions were reasonable.

Questions?

Thank you



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