



Colorado Aerospace and Defense Follow-Up: What's New for FY 2021

A list of selected updates and new developments on the topics addressed during our September 2020 program:

PAYCHECK PROTECTION PROGRAM (PPP) LOAN ENFORCEMENT

PPP recipients should expect ongoing audits and enforcement actions, and should therefore consider developing internal compliance documentation.

- **Feb. 1, 2021:** In its [Quarterly Report to Congress](#), the Special Inspector General for Pandemic Recovery (SIGPR) noted its "aggressive preparation" and "proactive efforts to prevent, detect, and investigate fraud, waste, and abuse involving CARES Act funds and programs."
- **March 26, 2021:** The U.S. Department of Justice (DOJ) announced that it has charged more than 100 defendants with PPP fraud. DOJ's [press release](#) described "[h]istoric levels of enforcement action" during the national health emergency.

INTELLECTUAL PROPERTY (IP)

New proposed U.S. Department of Defense (DoD) IP rules would force contractors to negotiate special license rights for DoD acquisitions.

- The proposed rules represent a significant change from the standard rules now in place, which assign data rights based on the funding source to develop the IP. For more information, please see [Defense Federal Acquisition Regulation Supplement: Negotiation of Price for Technical Data and Preference for Specially Negotiated Licenses \(DFARS Case 2018-D071\)](#) and [Defense Federal Acquisition Regulation Supplement: Noncommercial Computer Software \(DFARS Case 2018-D018\)](#).
- The proposed rules also would require contractors to assign a dollar value to their IP, making it easier for DoD to acquire contractors' IP and leading to potential disputes regarding the method of valuing IP. Should the IP be valued according to the research and development (R&D) funds spent by the contractor, the contractor's potential future revenue from the IP or some other method? The proposed rules leave these types of questions to the discretion of DoD contracting officers.
- Comments to the proposed rules closed on Jan. 13, 2020, but DoD thus far [has not taken action](#) to update the Defense Federal Acquisition Regulation Supplement (DFARS) to implement the rules.

NEW CYBERSECURITY REQUIREMENTS

DoD now requires all contractors to submit a written assessment of their compliance with National Institute of Standards and Technology Special Publication 800-171 (NIST SP 800-171) and has begun to implement Cybersecurity Maturity Model Certification (CMMC).

- **Nov. 30, 2020:** DoD implemented the NIST SP 800-171 [DoD Assessment Methodology](#), which provides for an assessment of a contractor's implementation of security requirements, using the [Supplier Performance Risk System](#) (SPRS).
- DoD will include [DFARS 252.204-7021, CMMC](#), through Sept. 30, 2025, making CMMC apply if the requirement document or statement of work requires a contractor to have a specific CMMC level. CMMC will apply to all DoD solicitations and contracts starting on or after Oct. 1, 2025.
- These standards are [widely expected to be implemented by other federal agencies](#) in the near future. Katie Arrington, the Pentagon's Chief Information Security Officer, has stated that she believes CMMC "will become a federal standard for the whole government rapidly."



MERGERS AND ACQUISITIONS

New federal rules impose eligibility timeline for proposals submitted during the acquisition of small businesses.

- **Oct. 16, 2020:** The U.S. Small Business Administration (SBA) issued a [final rule](#) substantially overhauling its government contracting regulations. Included in the revisions was a change to [13 C.F.R. § 121.404](#), governing when the size status of a business concern is determined. A concern that represents itself as "small" and qualifies as "small" at the time of its initial offer, including price, is generally considered "small" throughout the life of that contract.
- Under the previous regulations, a small business concern was required to recertify its size status up to the time of award. SBA, recognizing that there is often delay between the submission of an offer and the award of a contract, revised its regulations to provide that if "the merger, sale or acquisition (*including agreements in principle*) occurs **within 180 days of the date of an offer** and the offeror **is unable to recertify as small**, it will not be eligible as a small business to receive the award of the contract." 13 C.F.R. § 121.404(g)(2)(iii) (emphasis added). If the merger, sale or acquisition occurs more than 180 days after the date of an offer, the agency can still award the contract to the offeror, but it cannot count the award as an award to a small business concern (i.e., the agency will not receive small business credit for the award). *Id.*

BID PROTESTS: RULING ON DOD ENHANCED BRIEFINGS

DoD enhanced debriefings do not extend protest deadlines if no questions are submitted.

- **Feb. 4, 2021:** The U.S. Court of Appeals for the Federal Circuit published its decision in [Nika Technologies Inc. v. United States, 987 F.3d 1025 \(Fed. Cir. 2021\)](#), clarifying the filing period for a post-award protest at the U.S. Government Accountability Office (GAO) following a DoD enhanced debriefing. Under DoD's enhanced debriefing rules in [10 U.S.C. § 2305\(b\)\(5\)\(B\)\(vii\)](#), agencies are required to provide unsuccessful offerors with an opportunity to submit, "within two business days after receiving a post-award debriefing, additional questions related to the debriefing." The Competition in Contracting Act (CICA) provides that a DoD agency must suspend contract performance upon receipt of a protest filed at GAO within five days after the government delivers its written responses to additional questions submitted under the enhanced debriefing rules.
- In *Nika Technologies*, the protester received its post-award written debriefing but did not ask questions within the two-day period. The protester filed a protest at GAO six days after the written debriefing, but only four days after the expiration of the two-day period for asking questions. The agency did not honor the CICA stay, and the protester went to the U.S. Court of Federal Claims (COFC) to enforce the stay of performance. The protester argued that it was timely for purposes of the stay: It filed its protest within five days of the conclusion of the debriefing, because the two-day period for submitting questions expired only four days before it filed its GAO protest. COFC agreed with the protester, but the Federal Circuit reversed. In reversing COFC, the Federal Circuit held that if no questions are submitted within the two-day period following receipt of a post-award debriefing, the debriefing concludes for purposes of the CICA stay on the day it is received; the debriefing is not automatically held open for an additional two days.

BID PROTESTS: COURT IMPOSES ENFORCEABLE OBLIGATION

The Federal Circuit imposed an enforceable obligation that the government has an implied obligation to fairly and honestly consider proposals.

- **March 4, 2021:** In a matter of first impression, the Federal Circuit in [Safeguard Base Operations LLC v. United States, 989 F.3d 1326 \(Fed. Cir. 2021\)](#) ruled that COFC has implied-in-fact contract jurisdiction in the procurement context under [28 U.S.C. § 1491](#). The case involved a disappointed offeror whose proposal was eliminated because it omitted pricing information under various contract line items. Before the COFC, the protester argued that the government arbitrarily and capriciously disqualified its proposal and violated an implied-in-fact contract to fairly and honestly consider the proposal. The COFC entered judgment for the government, and the protester appealed.
- In affirming the COFC on appeal, the Federal Circuit first had to consider whether COFC had jurisdiction "over a claim that the Government breached an implied-in-fact contract to fairly and honestly consider an offeror's proposal in the procurement context." Looking to COFC's jurisdictional statute, 28 U.S.C. § 1491, the Federal Circuit noted that COFC could have had jurisdiction under § 1491(a)(1), which governs implied contracts



generally, or § 1491(b)(1), which concerns procurement bid protests. The statutory basis for jurisdiction mattered because it dictates the applicable standard of review. The Federal Circuit previously found that COFC possesses jurisdiction over implied contracts under § 1491(a)(1) **outside** the procurement context in *Resource Conservation Group*, involving the sale of government property, but since the enactment of the Administrative Dispute Resolution Act (ADRA), the Federal Circuit has not considered whether COFC still has implied-in-fact jurisdiction in the procurement context. Different COFC judges have reached different conclusions.

- Looking to the legislative history of ADRA, the Federal Circuit determined that COFC had jurisdiction over the protester's implied-in-fact contract claim under § 1491(b)(1), "and only § 1491(b)(1)." According to the decision, § 1491(b)(1) provides COFC with jurisdiction over implied-in-fact contract claims in the procurement context, and § 1491(a) provides COFC with jurisdiction over all other implied-in-fact contract claims.
- Why is this opinion important? Disappointed offerors may now assert implied-in-fact contract claims (and obtain monetary relief, "limited to bid preparation and proposal costs" per § 1491(b)(2)!) as an alternative to standard bid protest allegations and even after losing before GAO. Under *Safeguard Base Operations*, COFC now has jurisdiction to consider claims such as an agency breached an implied-in-fact contract to fairly and honestly consider an offerors' proposal, an agency breached an implied-in-fact contract by favoring a competitor's proposal, etc.

SIZE PROTESTS

Court found small business ineligible for contract where it subcontracted most of its work to a larger business.

- **April 19, 2021:** COFC issued a new decision finding that SBA's Office of Hearings and Appeals (OHA) properly determined that an apparently successful offeror was not a small business concern for purposes of performing a U.S. Air Force contract. The SBA area office found the offeror was not a small business concern under the "identity of interest" affiliation rule (13 C.F.R. § 121.103(f)) because more than 70 percent of the offeror's revenue during the prior three years was derived from its work as a subcontractor to a large business. Under the rule, companies that have "identical or substantially identical business or economic interests" may be treated as one party with such interests aggregated.
- The regulation presumes an identity of interest based upon economic dependence if the small business "derived 70% or more of its receipts from another concern over the previous three fiscal years." 13 C.F.R. § 121.103(f)(2). This presumption may be rebutted by "showing that despite contractual relations with another concern, the concern at issue is not solely dependent on that other concern, such as where the concern has been in business for a short amount of time and has only been able to secure a limited number of contracts or where the contractual relations do not restrict the concern in question from selling the same type of products or services to another purchaser."
- In [Darton Innovative Technologies Inc. v. United States, Case No. 21-856, 2021 WL 1526507](#), COFC found that OHA properly affirmed the SBA area office's finding that the offeror was affiliated with a large business contractor under the identity of interest rule and the offeror could not overcome the presumption of affiliation.

LOCAL DEVELOPMENTS ON USSPACECOM

DoD has selected Huntsville, Alabama, as the U.S. Space Command (USSPACECOM) headquarters, but several reviews of the decision remain pending.

- **Jan. 13, 2021:** The Secretary of the Air Force (SecAF) [selected Redstone Arsenal](#) in Huntsville, Alabama, as the preferred location for the USSPACECOM headquarters.
- **Feb. 19, 2021:** At the request of Colorado's congressional delegation, [DoD Inspector General announced](#) that it would review the Air Force's basis for selecting Huntsville. Specifically, the DoD Inspector General will evaluate the extent to which the Air Force 1) complied with DoD and Air Force policies during the selection process, 2) used objective and relevant scoring factors to rank the six candidates and locations, and 3) calculated the cost and other scoring factors accurately and consistently among the six candidate locations.
- **March 19, 2021:** The GAO announced that [it will review](#) the Air Force's decision to move the USSPACECOM headquarters from Colorado to Alabama. Specifically, GAO will review "matters relating to the methodology and scoring" of the Air Force's decision-making process.



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