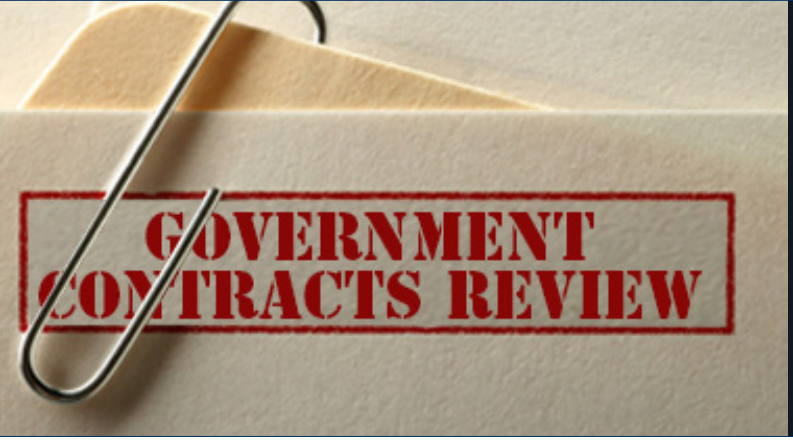

Current Issues Affecting Government Contractors
By Alston & Bird's Government Contracts Group
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The GovCon Files

No Good Deed….: Reconciling the FAR's Mandatory Contractor Disclosure Rules with Protections Afforded Under FOIA Exemption 4

The proverbial "Golden Rule" of public procurement is that all public transactions be conducted with the utmost integrity and without any appearance of impropriety. For many years, in support of this goal, federal government contractors were encouraged—but not required—to disclose instances of known or suspected misconduct or fraud in the award or performance of a government contract. In exchange for making this kind of "voluntary disclosure," a contractor prosecuted for the reported misconduct or fraud would receive a lesser penalty or fine than would have been levied if the misconduct or fraud was brought to light by other means.

In 2008, the FAR Council promulgated a new rule that requires federal government contractors to disclose to the contracting agency's Office of Inspector General and responsible Contracting Officer, in connection with the award, performance or closeout of a federal government contract, all "credible evidence" that a principal, employee, agent or subcontractor of the contractor has committed a violation of criminal law involving fraud, conflict of interest or bribery, or a violation of the civil False Claims Act. This new rule requiring "mandatory" contractor disclosures properly was acknowledged at the time as a "sea change" and "major departure" from the voluntary disclosure scheme it replaced.

There was no shortage of criticisms of the new FAR rule, including, among other things, a concern that disclosures of this nature could be obtained under the Freedom of Information Act. To assuage that concern, the FAR Council included the following language in the final rule:

> The Government, to the extent permitted by law and regulation, will safeguard and treat information obtained pursuant to the Contractor's disclosure as confidential where the information has been marked "confidential" or "proprietary" by the company. To the extent permitted by law and regulation, such information will not be released by the Government to the public pursuant to a Freedom of Information Act request, 5 U.S.C. Section 552, without prior notification to the Contractor.

But would the FAR Council's concession provide the protection contractors were hoping for? As of the date of this article, that question has not yet been answered by a court, but the answer may very well be "no."

The Freedom of Information Act (FOIA) was enacted in 1988 to implement a policy of broad public disclosure of government documents in order to ensure "an informed citizenry, vital to the functioning of a democratic society." At the same time, however, "Congress realized that legitimate [g]overnmental and private interests could be harmed by release of certain types of information." Accordingly, there were included within the FOIA nine statutory exemptions to the FOIA's disclosure requirements.

To contractors, probably the most important exemption is Exemption 4, which protects from disclosure under the FOIA "confidential commercial or financial information" received by governmental authorities from private persons or commercial entities. Information is "commercial" if it pertains or relates to or deals in any way with commerce. Commercial information is "confidential" if it is either (1) likely to impair the government's ability to obtain the information in the future, or (2) likely to cause substantial competitive harm to the person from whom the information was obtained.

Where the person from whom commercial information was obtained is able to demonstrate that he provided that information "voluntarily" to the government and that he does not customarily release that information to the public, it is per se confidential for purposes of Exemption 4 and should not be disclosed by the government in response to a FOIA request. On the other hand, commercial information obtained by the government "involuntarily" from a person is confidential for purposes of Exemption 4 only where disclosure of that information by the government poses substantial harm to the competitive position of the person from whom it was obtained.

As probably seems obvious, whether information is submitted voluntarily or involuntarily is determined by the existence or absence of legal authority requiring the contractor's submission of information to governmental authorities. For example, in *Center for Auto Safety v. National Highway Traffic Safety Administration* (NHTSA), the NHTSA issued "Information Requests" to airbag manufacturers and importers that purported to require the recipients to disclose information relative to the physical and performance characteristics of airbags. The notices included language that indicated "[f]ailure to respond promptly and fully… could subject [the recipient] to civil penalties."

Later, the Center for Auto Safety (CAS) submitted a FOIA request seeking access to the information NHTSA obtained. NHTSA disclosed some but not all of the requested information, alleging that the withheld information was protected under Exemption 4. CAS sued to compel NHTSA's disclosure of the withheld documents.

On summary judgment, the district court concluded that NHTSA had failed "to obtain prior approval from the Office of Management and Budget" for issuance of the information requests and, as a result, the requests could have been ignored without penalty by the recipients. Because NHTSA could not have compelled the recipients' compliance with the requests, any disclosures made in response to them were voluntary — and per se confidential — and not mandatory within the meaning of the FOIA. CAS appealed and the Court of Appeals for the D.C. Circuit affirmed, concluding that "actual legal authority, rather than the parties' beliefs or intentions, governs judicial assessments of the character of submissions [as voluntary or involuntary]."

Against this backdrop, a court presented with the question of whether a mandatory contractor disclosure is protected under Exemption 4 could reasonably conclude that the disclosure is "mandatory" within the meaning of the FOIA, and protected from disclosure only if the contractor can demonstrate release of the disclosure would cause substantial harm to his competitive position. For that reason, contractors are well-advised to consult with knowledgeable counsel in determining whether and how to make a disclosure under the FAR. For example, where the contractor is uncertain whether his information meets the (amorphous) "credible evidence" standard in the FAR, he could make a non-FAR, voluntary disclosure that may be easier to protect under the FOIA's Exemption 4.

Decisions Affecting the Marketplace

PROTEST DECISIONS: GAO Sustains Untimely Protest Based on the "Significant Issue Exception" in 4 C.F.R. § 21.2(c)

In a decision rendered August 8, 2012, the Government Accountability Office (GAO) considered an untimely protest regarding a solicitation impropriety. The protest concerned a General Services Administration (GSA) request for quotations (RFQ), issued under FAR subpart 8.4, seeking to establish up to six blanket purchase agreements under the Federal Supply Schedule. The RFQ provided that the blanket purchase agreement would be issued on a best value basis considering price and four technical evaluation factors. The RFQ further provided that a technical evaluation board would review and "downsize" quotations to no more than 12 of the most favorably evaluated quotations. The GSA subsequently clarified that the board would not consider price when it downsized the quotations, despite the fact that FAR § 8.405-3(a)(2) requires that price always be considered when determining best value.

Although the RFQ was blatantly flawed, not one of the 35 contractors who submitted quotations in response to the RFQ filed a timely protest. Instead, protester Cyberdata Technologies filed an untimely protest concerning the flawed downsizing methodology after learning that its quotation was one of the 23 quotations excluded from the competition during the downsizing phase.

Citing the "significant issue" exception in its timeliness rules, 4 C.F.R. § 21.2(c), the GAO decided to consider Cyberdata's protest. The significant issue exception provides that "GAO, for good cause shown, or where it determines that a protest raises issues significant to the procurement system, may consider this an untimely protest." Although determination of whether a protest raises a "significant" issue under is decided on a case-by-case basis, the GAO explained that it "generally regard[s] a significant issue as one of widespread interest to the procurement community…that has not been previously decided." The GAO reasoned that the "significant issue" exception was applicable in this case because (1) the GAO had not previously considered the requirement that price be considered before excluding a technically acceptable proposal in the context of establishing a blanket purchase agreement under the Federal Supply Schedule; (2) the requirement to consider price in this situation is expressly required under FAR § 8.405; and (3) federal procurement relies extensively on blanket purchase agreements.

Accordingly, the GAO recommended that the solicitation provide for an evaluation consistent with its obligations under the FAR, request revised quotations and make a new source selection decision. However, because Cyberdata's protest was untimely, the GAO did not recommend that Cyberdata be reimbursed for its costs of filing and pursuing the protest.

Cyberdata Technologies, Inc., B-406692 (Comp. Gen. Aug. 8, 2012).

CHANGES TO THE MARKETPLACE: New DCAA Audit Policy for Contractor Internal Audit Reports

A recent Defense Contract Audit Agency (DCAA) Policy Memorandum, issued on August 14, 2012, signals a change in policy for the DCAA's use of internal audits for major contractors. The change in policy comes as a response to a recent Government Accountability Office (GAO) report highlighting areas in need of improvement. The GAO report recommended that the DCAA make efforts to facilitate access to internal audits and periodically evaluate whether additional actions are warranted.

In response to the GAO report, the DCAA Policy Memorandum requires the DCAA Contract Audit Coordinator offices and Field Audit offices at major contractor locations to establish a process and central point of contact to obtain and monitor DCAA's access to and use of internal audits. As part of establishing the process, the offices must establish a way to track requests for internal audit reports and working papers, as well as the disposition of these requests. The duties and processes have been revised for both the central point of contact and the auditors and supervisors to ensure that access to internal audits are obtained as part of ongoing audits. With regard to non-major contractors, a formal tracking process or central point of contact are not mandatory requirements, but the policy memorandum provides that contractor audit reports "can still be useful in the performance of the audits."

The full impact of this new policy is a few months away, as the formal training process for accessing contractors' internal audit reports is expected to be presented in the first quarter of 2013. Setting aside the issue, of cost, this interim period can be useful for many companies to re-evaluate their internal record keeping procedures, as the companies "working papers" are now subject to disclosure under this policy. In addition, companies need to be sure to have procedures in place to ensure that privileged documents do not lose their respective protections due to inadvertent disclosures.

GOVERNMENT CONTRACTOR LITIGATION: Fifth Circuit Holds Federal Employees Have Standing to Bring Qui Tam Actions Under Civil False Claims Act

In July 2012, the Fifth Circuit, in a matter of first impression, held that a federal employee, even one whose job it is to investigate fraud, is a "person" within the meaning of the False Claims Act (FCA), such that he or she may serve as the relator and bring a qui tam action in the name of the United States.

In *Little v Shell Exploration & Production Company*, the Relators — two auditors for the Department of Interior, Minerals Management Service (MMS) — brought a qui tam action against a government contractor alleging the contractor violated the FCA by failing to pay certain royalties to the United States. It is undisputed that the Relators learned of the information supporting their allegations during the course of their duties and that they were required to furnish their findings to their supervisor. The contractor moved for summary judgment because (1) the federal employees who brought the suit were not "private persons" within the meaning of the FCA; and (2) because the court lacked jurisdiction under the public disclosure bar of the FCA. The trial court granted summary judgment in favor of the contractor, and the Relators appealed.

On appeal, the Fifth Circuit first needed to resolve whether, under these circumstances, the Relators were "private persons" within the meaning of the FCA, such that they had standing to bring a qui tam action. Finding that federal employees are "persons" within the meaning of the FCA, the Fifth Circuit rejected the contractor's argument that the reference to "private persons" in the statutory heading was intended to exclude federal employees from the scope of the qui tam provisions. The court of appeals was equally unconvinced that federal employees are acting in the interests of the United States and therefore cannot constitute "persons" for purposes of the qui tam provisions, or that permitting federal employees to serve as qui tam relators violates conflicts of interest principles. To the contrary, the Fifth Circuit held that allowing governmental relators is not an absurd result, but may prompt more agency responsiveness and provide additional incentives to ferret out fraud.

The other issue on appeal was whether the court lacked jurisdiction based on the public disclosure bar to the FCA. On this issue, the Fifth Circuit remanded the case, finding that the trial court had previously applied an overly broad definition of public disclosure, and instructed the trial court to re-examine the evidence. Significantly, the Fifth Circuit further held that if a public disclosure has occurred, the suit must be dismissed under the public disclosure bar because the Relators could not be original sources of the allegations underlying their complaint. To be an original source, a relator must voluntarily provide the information to the government. Here, the relators were employed specifically to disclose fraud. Therefore, their disclosures were involuntary.

Little v. Shell Exploration & Production Co.,---F.3d---, 2012 WL 308077 (5th Cir. 2012).

Pros in the Press

- In October, Jeff Belkin and two colleagues, including regulatory counsel for UPS and an assistant United States attorney, are speaking at the Society for Corporate Compliance and Ethics' (SCCE) 11th Annual Compliance & Ethics Institute in Las Vegas on the anatomy of a government investigation, from inside counsel, outside counsel and government attorneys. Compliance professionals and lawyers are encouraged to attend this premier compliance organization's convention. Registration is available at http://dev.complianceethicsinstitute.org/.

- Andy Howard is speaking on the topic of conducting business across state lines at the ABA Forum on the Construction Industry's fall meeting, scheduled for October 18 and 19 in Boston.

- Jeff Belkin authors a blog on government contracts for *The Huffington Post*. Read his most recent entry here: http://www.huffingtonpost.com/jeff-belkin/the-cop-act-arming-small-_b_1382183.html.

- On August 27, 2012, Chris Roux's article "Case Study: *Hooper v. Lockheed Martin*," analyzing whether lowering a bid might result in liability under the False Claims Act, was published by *Law360* and may be found at http://www.law360.com/articles/371825/case-study-hooper-v-lockheed-martin.

- Jeff Belkin was quoted in an August 2010 *Law360* article discussing an "uptick" in retaliation claims brought against defense contractors under the False Claim Act, because of the Fraud Enforcement and Recovery Act (FERA), which made fraud claims easier to sustain and expanded the FCA's retaliation provision. The article may be found at http://www.law360.com/articles/363827/defense-contractors-face-rising-wave-of-retaliation-claims.

- On July 11, 2012, Jessica Sharron's article "The Changing Conflict-Of-Interest Regs for Contractors," analyzing revisions to both the FAR and DFARS to address conflicts of interest, was published by *Law360* and may be found at http://www.law360.com/articles/359101/the-changing-conflict-of-interest-regs-for-contractors.

- Andy Howard was interviewed by *Government Product News* in another installment of their series of articles that discuss ways to control and monitor government spending at GSA and other government agencies.

Note: All *Law360* articles can only be viewed by those who have subscriptions to *Law360.*

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