

28th Annual Ounce of Prevention Seminar

# Welcome

## Predicting the Future: Federal Contracting in an Election Year

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# THE CONFLICTING EVOLUTION OF THE PROCUREMENT INTEGRITY ACT

James G. Peyster

# The Procurement Integrity Act: Background

- The Procurement Integrity Act (“PIA”); 41 U.S.C §§ 2101-2017 (Formerly 41 U.S.C. § 423)
- Prohibitions on disclosing and obtaining procurement information (§ 2102)
  - Subsection (a): “Except as provided by law, [a present or former government official] shall not knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.”
  - Subsection (b): “Except as provided by law, a person shall not knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.”

# The Procurement Integrity Act: Background

- Subsection (a): “Except as provided by law, [**a present or former government official**] shall not knowingly disclose . . .”
    - 41 U.S.C. § 2102(a) applies to “any person” who:
      - by virtue of that office, employment, or relationship has or had access to contractor bid or proposal information or source selection information.
- and*
- “is a present or former official of the Federal Government”; or “is acting or has acted for or on behalf of, or who is advising or has advised the Federal Government with respect to, a Federal agency procurement.”

# The Procurement Integrity Act: Background

- Subsection (a) and (b): “. . . shall not knowingly disclose **contractor bid or proposal information** or **source selection information** . . . .”
- The term “**contractor bid or proposal information**” means any of the following information submitted to a Federal agency as part of, or in connection with, a bid or proposal to enter into a Federal agency procurement contract, if that information previously has not been made available to the public or disclosed publicly:
  - (A) Cost or pricing data . . . .
  - (B) Indirect costs and direct labor rates.
  - (C) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor . . . .
  - (D) Information marked by the contractor as “contractor bid or proposal information” . . . .

# The Procurement Integrity Act: Background

- Subsection (a) and (b): “. . . shall not knowingly disclose **contractor bid or proposal information** or **source selection information** . . . ”
- The term “**source selection information**” means . . . information prepared for use by a Federal agency to evaluate a bid or proposal to enter into a Federal agency procurement contract, if that information previously has not been made available to the public or disclosed publicly
  - Includes: Source Selection and Evaluation Plans, Proposed costs or prices submitted in response to a Federal agency solicitation, Cost/Price and Technical Evaluation reports, Independent Government Cost Estimates, Competitive range determinations, and Rankings of bids, proposals, or competitors
  - Also includes anything else marked “Source Selection Information”

# The Procurement Integrity Act: Background

- The Savings Provision (41 U.S.C. § 2107): The PIA does not:
  - (1) restrict the disclosure of information to, or its receipt by, a person or class of persons authorized, in accordance with applicable agency regulations or procedures, to receive that information;
  - **(2) restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information;**
  - 
  - (5) authorize the withholding of information from, nor restrict its receipt by, Congress, a committee or subcommittee of Congress, the Comptroller General, a Federal agency, or an inspector general of a Federal agency;
  - (6) authorize the withholding of information from, nor restrict its receipt by, the Comptroller General in the course of a protest against the award or proposed award of a Federal agency procurement contract;

# The Procurement Integrity Act: Background

- Penalties (41 U.S.C. § 2105)
  - Criminal: “A person that violates [the PIA] for anything of value or to obtain or give a person a competitive advantage in the award of a Federal agency procurement contract shall be fined under title 18, **imprisoned for not more than 5 years**, or both.”
  - Civil: “On proof of [violative] conduct by a preponderance of the evidence, (1) an individual is liable to the Federal Government for a civil penalty of not more than \$50,000 for each violation plus twice the amount of compensation that the individual received or offered for the prohibited conduct; and (2) an organization is liable to the Federal Government for a civil penalty of not more than \$500,000 for each violation plus twice the amount of compensation that the organization received or offered for the prohibited conduct.



# The Procurement Integrity Act: Background

- Penalties (41 U.S.C. § 2105)
  - Administrative: A Federal agency that receives information that a contractor or a person has violated section 2102, 2103, or 2104 of this title shall consider taking one or more of the following actions, as appropriate:
    - Canceling the Federal agency procurement, if a contract has not yet been awarded.
    - Rescinding a contract where . . . the agency that awarded the contract has determined, based on a preponderance of the evidence, that the contractor or a person acting for the contractor has engaged in conduct constituting the offense.
    - Initiating a suspension or debarment proceeding.

# The Procurement Integrity Act: Background

- Requirement for Prompt Reporting of Potential PIA Violations (41 U.S.C. § 2106)
  - A person may not file a protest against the award or proposed award of a Federal agency procurement contract alleging a violation of [the PIA] . . . unless the person, **no later than 14 days after the person first discovered the possible violation**, reported to the Federal agency responsible for the procurement the information that the person believed constitutes evidence of the offense.
    - Protests are only ripe when the agency completes its investigation after the 14-day notice has been made.
    - Must file at GAO within 10 days of notice unfavorable investigation outcome. *See SRS Techs.*, B-277366, July 30, 1997, 97-2 CPD ¶ 42.

# Narrowing Construction of the PIA as a Bid Protest Cause of Action

- Question: Is the PIA a tool to be used in disputes between private entities? Can it protect against the effects of predatory hiring of employees by a competitor?
  - Answer: Probably not.

# Narrowing Construction of the PIA as a Bid Protest Cause of Action

- *The GEO Group, Inc*, B-405012, July 26, 2011, 2011 CPD ¶ 153
  - A former employee of the protester absconded with proprietary information belonging to the protester, formed his own company, and submitted a competing bid in a follow-on contract for one of the protesters' major contracts
  - The former employee utilized language that was almost word for word the same as language from the protester's proposal, evidencing usage of the confidential documents
  - The former employee's new company won the contract award
  - Protester alleged that the agency had overlooked a PIA violation

# Narrowing Construction of the PIA as a Bid Protest Cause of Action

- *The GEO Group, Inc*, B-405012, July 26, 2011, 2011 CPD ¶ 153
  - GAO concluded that there was no violation of the PIA
  - GAO found that the PIA was not designed to resolve the “private disputes” between contractors
  - The former employee was given the confidential information voluntarily by the protester, thus implicating the “savings clause” provision at 41 U.S.C. 2107(2)
  - Despite protester’s assertion that the information was provided through fraudulent inducement, GAO ruled that the motives of the recipient are irrelevant to the savings clause

# Narrowing Construction of the PIA as a Bid Protest Cause of Action

- *The GEO Group, Inc*, 100 Fed.Cl. 223 (2011)
  - Same protester files a motion for preliminary injunction at COFC
  - Judge Allegra denies the motion
  - Concedes that 41 U.S.C. § 2102(b) refers to a “person” illegally obtaining confidential contractor bid and proposal and/or source selection information.
  - “Read in context, however, [§ 2102(b)] appears to apply only to current or former officials of the United States or persons who are acting or have acted on such an individual's behalf.”
  - The limitation “derives support from the legislative history of the statute, which refers to the provision in question as applying to ‘present or former federal employees.’”

# Narrowing Construction of the PIA as a Bid Protest Cause of Action

- Question: Can a contractor compel a PIA review by submitting a timely notice of a possible PIA allegation?
  - Answer: Probably not.

# Narrowing Construction of the PIA as a Bid Protest Cause of Action

- *Jacobs Technology Inc. v. United States*, 100 Fed.Cl. 198 (2011)
  - In initial protest, GAO concluded that the awardee must have had access to information about how the pricing estimates would be used in the evaluation
  - Successful protester filed a timely PIA notice and asked that the agency investigate how the awardee got the information
  - The agency refused to investigate
  - Protester filed COFC protest seeking declaratory order to make agency investigate the source of the potential leak before allowing the awardee to participate in the re-compete



# Narrowing Construction of the PIA as a Bid Protest Cause of Action

- *Jacobs Technology Inc. v. United States*, 100 Fed.Cl. 198 (2011)
  - COFC denied the protest, concluding that protester must establish “hard facts” rather than “mere suspicion and innuendo” in order to show that the agency was irrational in deciding not to investigate the potential PIA violation
  - “Hard facts” standard is the same standard a protester needs to satisfy to establish an actual PIA violation
  - Thus, a protester must establish “hard facts” of a violation BEFORE the agency conducts the fact-gathering investigation

# Divergent Interpretation of the PIA by Suspension and Debarment Officials

- Obtaining information vs. receiving information?
- *Jacobs Technology Inc. v. United States*, 100 Fed.Cl. 198 (2011)
  - “[A]possible PIA violation requires the offeror to have knowingly obtained information that the agency intended to use in evaluating proposals on the new procurement. Thus, a PIA violation essentially requires an affirmative act by the offeror to obtain source selection information; simply having knowledge is not enough to support a possible PIA violation. A PIA violation also appears to be founded on improper or unlawful conduct.”
  - Suggests the question is how information is obtained, not whether information is possessed and/or used

# Divergent Interpretation of the PIA by Suspension and Debarment Officials

- MCR Federal LLC Suspension by Air Force

- MCR was a participant in an Air Force Procurement
- Contracting Officer inadvertently sent MCR's point of contact an e-mail with source selection sensitive attachments relating to the evaluation of a competitor and information about that competitor's proposal
- MCR point-of-contact forwarded e-mail to MCR employees without realizing what it was
- Air Force attempted to recall the e-mail 10 minutes later
- MCR took two days before it fully quarantined the e-mail
- Recipients of the e-mail continued to work on MCR's proposal revisions during this two-day period (and after)

# Divergent Interpretation of the PIA by Suspension and Debarment Officials

- MCR Federal LLC Suspension by Air Force

- Air Force Suspension and Debarment Official (SDO) concluded that MCR’s conduct was potentially in violation of the PIA
- SDO concludes that MCR was guilty of “wrongdoing” and “acting improperly” and issued a suspension notice to MCR – presumably based on the PIA
- MCR’s suspension was lifted only after it demonstrated that it was implementing a new ethics program within the firm, as well as new procedures to more quickly respond to information quarantine scenarios
- No allegation that MCR “acted affirmatively” to acquire info; nothing in the PIA penalizes “use” of source selection information

# Divergent Interpretation of the PIA by Suspension and Debarment Officials

- Bid Protest Forums:
  - Reads-in a narrowing provision to find that § 2102(b) only applies to current and former government employees
  - Finds that only “affirmative acts” and “unlawful conduct” can lead to a PIA violation
- Suspension and Debarment Officials:
  - Reads-in expansive, implicit prohibition on “use” of source selection information even when information was not “*knowingly obtained*” by an affirmative unlawful act
  - Applies this implicit prohibition against contractor employees who are not former government officials

# Lessons For Industry

- The trend in the enforcement of the PIA suggests that it will be only minimally useful to firms trying to protect their own information from the actions of a competitor
- As a bid protest cause of action, the PIA will be construed narrowly
- However, when the government elects to invoke the PIA, the statute may be read broadly
- Contractors should consider the fact that they may be charged with a PIA violation for failing to respond properly when agency officials make accidental disclosures
- Best practices call for a plan to handle inadvertent disclosures