


AN A.S. PRATT PUBLICATION

JUNE 2016

VOL. 2 • NO. 6



PRATT'S  
**GOVERNMENT  
CONTRACTING  
LAW**  
REPORT



**EDITOR'S NOTE: GAO PROCEDURE**

Victoria Prussen Spears

**GAO'S FOCUS ON SUBSTANTIVE  
GUIDANCE IN PROTEST DECISIONS  
LEAVES LESS ROOM FOR PROCEDURE**

Stuart W. Turner

**WHAT MUST THE GOVERNMENT PROVE  
TO ESTABLISH THAT A DEFENDANT  
RECKLESSLY INTERPRETED A STATUTE  
OR REGULATION IN VIOLATION OF THE  
FALSE CLAIMS ACT? - PART II**

Robert S. Salcido

**CMS ISSUES FINAL REGULATIONS  
TO GUIDE MEDICARE PROVIDERS  
AND SUPPLIERS IN COMPLYING  
WITH 60-DAY MANDATE  
TO REPORT AND RETURN  
OVERPAYMENTS**

Jared L. Facher and  
Brian T. McGovern

**SCHUMER ALLEGES FALSE "MADE  
IN AMERICA" REPRESENTATIONS  
ON GSA WEBSITE: FALSE CLAIMS  
ACT INQUIRY TO FOLLOW?**

C. Joël Van Over and  
Alexander B. Ginsberg

**COFC FINDS AGENCY WENT TOO  
FAR WITH CORRECTIVE ACTION**

Sandeep N. Nandivada

# PRATT'S GOVERNMENT CONTRACTING LAW REPORT

---

VOLUME 2

NUMBER 6

JUNE 2016

---

**Editor's Note: GAO Procedure**

Victoria Prussen Spears

191

**GAO's Focus on Substantive Guidance in Protest Decisions Leaves Less Room for Procedure**

Stuart W. Turner

193

**What Must the Government Prove to Establish That a Defendant Recklessly Interpreted a Statute or Regulation in Violation of the False Claims Act?—Part II**

Robert S. Salcido

204

**CMS Issues Final Regulations to Guide Medicare Providers and Suppliers in Complying with 60-Day Mandate to Report and Return Overpayments**

Jared L. Facher and Brian T. McGovern

213

**Schumer Alleges False "Made in America" Representations on GSA Website: False Claims Act Inquiry to Follow?**

C. Joël Van Over and Alexander B. Ginsberg

218

**COFC Finds Agency Went Too Far With Corrective Action**

Sandeep N. Nandivada

222

**QUESTIONS ABOUT THIS PUBLICATION?**

---

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Heidi A. Litman at ..... 516-771-2169

Email: ..... heidi.a.litman@lexisnexis.com

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at ..... (800) 833-9844

Outside the United States and Canada, please call ..... (518) 487-3000

Fax Number ..... (518) 487-3584

Customer Service Web site ..... <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or ..... (800) 223-1940

Outside the United States and Canada, please call ..... (518) 487-3000

---

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt);

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. A.S. Pratt is a registered trademark of Reed Elsevier Properties SA, used under license.

Copyright © 2016 Reed Elsevier Properties SA, used under license by Matthew Bender & Company, Inc. All Rights Reserved.

No copyright is claimed by LexisNexis, Matthew Bender & Company, Inc., or Reed Elsevier Properties SA, in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

*An A.S. Pratt® Publication*

Editorial Office  
630 Central Ave., New Providence, NJ 07974 (908) 464-6800  
[www.lexisnexis.com](http://www.lexisnexis.com)

MATTHEW  BENDER

# *Editor-in-Chief, Editor & Board of Editors*

---

**EDITOR-IN-CHIEF**

**STEVEN A. MEYEROWITZ**

*President, Meyerowitz Communications Inc.*

**EDITOR**

**VICTORIA PRUSSEN SPEARS**

*Senior Vice President, Meyerowitz Communications Inc.*

**BOARD OF EDITORS**

**MARY BETH BOSCO**

*Partner, Holland & Knight LLP*

**DARWIN A. HINDMAN III**

*Shareholder, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC*

**J. ANDREW HOWARD**

*Partner, Alston & Bird LLP*

**KYLE R. JEFCOAT**

*Counsel, Latham & Watkins LLP*

**JOHN E. JENSEN**

*Partner, Pillsbury Winthrop Shaw Pittman LLP*

**DISMAS LOCARIA**

*Partner, Venable LLP*

**MARCIA G. MADSEN**

*Partner, Mayer Brown LLP*

**KEVIN P. MULLEN**

*Partner, Jenner & Block*

**VINCENT J. NAPOLEON**

*Partner, Nixon Peabody LLP*

**STUART W. TURNER**

*Counsel, Arnold & Porter LLP*

**WALTER A.I. WILSON**

*Senior Partner, Polsinelli PC*

PRATT'S GOVERNMENT CONTRACTING LAW REPORT is published twelve times a year by Matthew Bender & Company, Inc. Copyright 2016 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. All rights reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For permission to photocopy or use material electronically from *Pratt's Government Contracting Law Report*, please access [www.copyright.com](http://www.copyright.com) or contact the Copyright Clearance Center, Inc. (CCC), 222 Rosewood Drive, Danvers, MA 01923, 978-750-8400. CCC is a not-for-profit organization that provides licenses and registration for a variety of users. For subscription information and customer service, call 1-800-833-9844. Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, [smeyerowitz@meyerowitzcommunications.com](mailto:smeyerowitz@meyerowitzcommunications.com), 718.224.2258. Material for publication is welcomed—articles, decisions, or other items of interest to government contractors, attorneys and law firms, in-house counsel, government lawyers, and senior business executives. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher. POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 630 Central Avenue, New Providence, NJ 07974.

# COFC Finds Agency Went Too Far With Corrective Action

*By Sandeep N. Nandivada\**

*The author of this article explains a recent U.S. Court of Federal Claims decision that reflects an important check on agency discretion in deciding the appropriate corrective action in response to a protest.*

The U.S. Court of Federal Claims (“COFC”) recently reiterated an important check on agencies’ ability to direct corrective action, holding that despite the discretion afforded contracting officers (“CO”), agency corrective action must be supported by the administrative record to be found reasonable.<sup>1</sup> The court’s decision is a reminder to government contractors that agency discretion is not without its limits and that contractors should not take for granted that proposed corrective action is appropriate under the circumstances.

## FACTS

The United States Special Operations Command (“SOCOM” or “Agency”) issued a solicitation for the award of multiple indefinite delivery, indefinite quantity (“IDIQ”) contracts for global support services totaling approximately \$900 million dollars. Because of concerns over potential organizational conflicts of interest (“OCIs”), SOCOM conducted the acquisition in three groups, with task orders presenting significant risks of OCIs being set aside for service-disabled, veteran-owned small businesses.

On July 28, 2015, SOCOM awarded IDIQ contracts to four offerors. The awards were predicated in large part on SOCOM’s evaluation of proposals for three task orders (Task Orders 1, 2, and 3) that were to be initially awarded. Following the IDIQ and task order awards, several contractors filed protests at the Government Accountability Office (“GAO”), alleging, among other things, that SOCOM failed to consider potential OCIs concerning one awardee with respect to Task Order 1 that would have rendered it ineligible for the IDIQ contract award. According to one of the protesters at GAO, the awardee had an unequal access to information OCI and an impaired objectivity OCI, neither of which could be mitigated.

---

\* Sandeep N. Nandivada is an associate in the Litigation Department of Morrison & Foerster LLP, focusing on government contracts counseling and dispute resolution for clients in the information technology, health care, and aerospace and defense industries. He may be contacted at snandivada@mofo.com.

<sup>1</sup> *MacAulay-Brown, Inc. v. United States*, No. 15-1041C (Fed. Cl. Feb. 18, 2016).

In response to the protests, the CO notified GAO that SOCOM would be taking corrective action. The CO conceded that the Agency did not properly consider whether the awardee had potential or actual OCIs because the Agency only evaluated whether offerors' OCI plans would avoid or mitigate OCIs for future task order competitions, and not the three task orders to be initially awarded. The CO further asserted that the requirements for Task Order 1 no longer reflected the agency's needs, and that requirements in Task Orders 2 and 3 also required changes. Accordingly, the CO proposed to amend the solicitation to:

- (1) remove Task Order 1 and add a new task order in its place;
- (2) update the requirements for Task Orders 2 and 3;
- (3) establish a new date for the submission of proposals; and
- (4) make new award decisions.

In light of SOCOM's proposed corrective action, GAO dismissed the protests of the IDIQ and task order awards.

On September 11, 2015, the IDIQ contract awardees challenged the Agency's proposed corrective action by seeking injunctive relief at the Court of Federal Claims. SOCOM voluntarily stayed its corrective action pending the result of the protest at the Court. The parties subsequently filed cross-motions for judgment on the administrative record.

## **HOLDING**

The Court of Federal Claims granted the plaintiffs' motion for judgment on the administrative record, finding that the CO's proposed correction action was not supported by the record.<sup>2</sup> The court's decision was predicated on three findings:

- The court found that the administrative record did not evidence a failure by the Agency to consider OCIs when awarding Task Order 1. On the contrary, the record indicated that each offeror submitted an OCI plan and that the Agency considered each plan and rated each as acceptable.
- The court found that the CO's belief that any OCI could not be

---

<sup>2</sup> The court also rejected the Agency's contention that the proposed corrective action was necessary to make needed changes to the requirements for the three awarded task orders. The court noted that the Agency had identified potential changes to Task Order 1 before it awarded that task order, and that, in any event, the Agency could make each of the desired changes to the task orders through in-scope modifications.

mitigated lacked support in the record. Given that the Agency had not yet conducted any OCI analysis, the court found that the CO could not have reasonably concluded that any potential or actual OCI was beyond mitigation.

- The court found that the Agency partitioned the procurement specifically to address task orders at risk for OCIs, and rejected suggestions from contractors to move potentially risky tasks from non-risk groups to the at-risk group. Accordingly, the court held that “[h]aving gone through this process to create three groups and consider appropriate tasks for each, the government, without more facts and analysis, is not free to change course and terminate the awards.”

Thus, the court held that because the Agency could not point to evidence in the record to support its determination that resolicitation was required to address the alleged issues with the procurement, the Agency’s proposed corrective action was unreasonable under the circumstances. Finding that the protesters’ claims were meritorious, the Court, after considering the remaining three factors for injunctive relief,<sup>3</sup> granted the plaintiffs’ motion for judgment on the administrative record and vacated the Agency’s corrective action determination. The court remanded the matter to the Agency to determine by May 10, 2016 whether OCI concerns actually required corrective action.

## SIGNIFICANCE

The court’s decision is significant for government contractors because it reflects an important check on agency discretion in deciding the appropriate corrective action in response to a protest. That is, although a CO has considerable discretion in deciding whether, and in what manner, to take corrective action, that determination must be supported and justified by the administrative record. Here, the court found that SOCOM’s proposed resolicitation was a drastic remedy given the entirely speculative nature of the OCI concerns at hand. Contractors will want to carefully review proposed corrective actions to similarly determine whether the proposed remedy is justifiable.

---

<sup>3</sup> In determining whether injunctive relief is warranted, courts consider: (1) whether the plaintiff has succeeded on the merits; (2) whether the plaintiff will suffer irreparable harm if the court denies injunctive relief; (3) whether the balance of hardships favors injunctive relief; and (4) whether the public interest favors injunctive relief.