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What Is the Procurement Integrity Act, and How Can Contractors Avoid Unintentionally Violating It?—Part I

*By Sandeep N. Nandivada, Michaela E. Thornton, and Alex Ward**

This article provides practical guidance for government contractors navigating potential Procurement Integrity Act (“PIA”) violations, from understanding the elements of a PIA violation, to investigating potential violations, to defending against bid protests. This first part of the article covers the elements of a PIA violation. The second part of the article, which will appear in an upcoming issue of Pratt’s Government Contracting Law Report, discusses investigating PIA violations and defending awards in bid protest litigation.

The Procurement Integrity Act (“PIA”), codified at 41 U.S.C. § 2101–2107, is intended to prevent unethical and improper competitive practices from influencing federal procurements. To achieve this end, the PIA prohibits knowingly disclosing, or knowingly obtaining, source selection information or contractor bid or proposal information (collectively, “Protected Information”) before the award of a federal agency procurement contract to which such information relates.¹

In a perfect world, the PIA would rarely cause heartache for government or contractor employees. Government employees would never disclose Protected Information prematurely or to unauthorized parties and, as a result, contractor employees would never obtain such information. But we are not so lucky. In the real world, potential PIA violations arise frequently, and usually without any improper intent from either government or contractor personnel. It often starts with the government’s inadvertent transmission of Protected Information to an offeror in a procurement, followed by dissemination of the information by the offeror’s employees, who do not realize they received information they should not have. At the end of this unfortunate chain of events, the government and offeror each find themselves in a difficult position: the government has an

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¹ 41 U.S.C. § 2102. The PIA also contains certain post-government employment restrictions, including restrictions regarding discussions related to potential employment and compensation. 41 U.S.C. § 2103–2104. Those prohibitions are outside the scope of this article.

ongoing competition in which one offeror may have an unfair competitive advantage, and the offeror faces potential disqualification from a competition based on an error by the government.

This article provides practical guidance for government contractors navigating potential PIA violations, from understanding the elements of a PIA violation, to investigating potential violations, to defending against bid protests. Although the risk of a potential PIA violation can never fully be eliminated, government contractors can mitigate it significantly through prompt and reasonable measures.

THE ELEMENTS OF A PIA VIOLATION

Government contractors violate the PIA when they (1) knowingly obtain (2) source selection information or another contractor's bid or proposal information (3) before the award of a federal agency procurement contract to which such information relates.² Each element of a PIA violation is discussed below.

Element 1: Knowledge

The PIA does not define what it means for a contractor to “knowingly obtain” source selection or contractor bid or proposal information.³ The Government Accountability Office (“GAO”), the U.S. Court of Federal Claims (“COFC”), at least one federal district court, and the Armed Services Board of Contract Appeals (“ASBCA”), however, have each opined on the requirement, with the GAO and the COFC in agreement, and the U.S. District Court for the District of Colorado and the ASBCA offering different interpretations.

At both the GAO and the COFC, PIA violations are “founded on improper or unlawful conduct” and require “an affirmative act by the offeror to obtain source selection information [or contractor bid or proposal information]; simply having knowledge is not enough to support a possible PIA violation.”⁴ Thus, where a contractor employee accidentally discovers or opens Protected

² 41 U.S.C. § 2102(b).

³ See 41 U.S.C. § 2102(b).

⁴ In this regard, the GAO has also held that the mere fact that an offeror had the *opportunity* to obtain protected procurement information cannot satisfy the “knowingly obtained” element of a PIA violation; there must be actual evidence that the offeror, in fact, obtained the information at issue. *OBRIS Sibro, Inc.*, B-417406.2, Nov. 19, 2019. See, *Jacobs Tech. Inc. v. United States*, 100 Fed. Cl. 198, 214 (2011); see also *Harkcon, Inc. v. United States*, 133 Fed. Cl. 441, 466 (2017) (finding affirmative act to obtain proprietary information was necessary for PIA violation); *Health Net Fed. Servs., LLC*, B-401652.3, Nov. 4, 2009, 2009 CPD ¶ 220 at 25 (noting PIA violations are based on “prohibited actions”); *S&K Aerospace, LLC*, B-411648, Sep. 19, 2015, 2015 CPD ¶ 336 at 5 (holding contractor employee had not knowingly obtained protected information where agency negligently disclosed proprietary information and employee

Information, but reports the information immediately without utilizing it for an improper purpose, neither the GAO nor the COFC would hold such conduct constitutes “knowingly obtaining” source selection information or contractor bid or proposal information.

The U.S. District Court for the District of Colorado recently adopted a different approach to analyzing the PIA’s “knowingly obtained” requirement, at least for criminal actions. Recognizing that the criminal penalty in 41 U.S.C. § 2105(a) only applies when a person violates 41 U.S.C. § 2102 with the intent to exchange the acquired information for something of value or to use that information to obtain or provide a competitive advantage, the court focused on the offeror’s intent rather than on whether the offeror committed an affirmative act to obtain Protected Information.⁵ The district court reasoned that the “knowingly obtained” requirement must be interpreted in accordance with the “‘longstanding presumption . . . that Congress intends to require a defendant to possess a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct.’”⁶ Thus, the court found that a party satisfies the “knowingly obtained” requirement when the party obtained Protected Information “with an intent to profit from it or gain a competitive advantage.”⁷ Active measures to “obtain” the information may not be necessary, but an illicit intent is.

But while the GAO, the COFC, and the District Court for the District of Colorado have interpreted PIA violations to require either an improper act or a culpable intent, the ASBCA recently suggested a PIA violation may result solely from the act of receiving—through no fault of the contractor—source selection or contractor bid or proposal information.

In *CLC Constr. Co.*,⁸ the government terminated a contract for default because the performing contractor allegedly knowingly obtained an internal

“immediately notified her supervisor and closed the file without saving or printing the information”).

⁵ *United States v. Kuciapinski*, 434 F. Supp. 3d 939, 943 (D. Colo. 2020).

⁶ *Id.* at 943–944 (citing *Rehaif v. United States*, 139 S.Ct. 2191, 2195 (2019)).

⁷ *Id.* at 944. Notably, the court also implicitly acknowledged that a PIA violation could occur passively, stating: “the only circumstance in which a jury might need an explicit ‘affirmative act’ instruction . . . [in determining whether 41 U.S.C. § 2102(b) had been violated] is if the Government were planning to prove that (i) [defendant] passively obtained or absorbed procurement information yet somehow did so with the required intent, or (ii) [defendant] obtained the procurement information through no effort of her own (*e.g.*, accidentally) and *later* formed the intent to profit from it or to obtain or give a competitive advantage.” *Id.* at 947.

⁸ ASBCA No. 59110, Apr. 15, 2020, 20-1 B.C.A. (CCH) ¶ 37584.

government cost estimate that helped it secure the contract. The contractor appealed the termination, arguing that the “knowingly obtained” element of a PIA violation was not satisfied because the estimate was not explicitly marked as source selection information and the contractor therefore did not “knowingly” receive it.⁹ The ASBCA disagreed and held the information was “knowingly” obtained because the contractor “understood the information was received” and “the information is of a type that is prohibited by the PIA.”¹⁰ As support for this interpretation of the PIA, the ASBCA cited the Supreme Court’s holding in *Bryan v. United States*,¹¹ that “ ‘knowingly’ when used in the criminal context does not require knowledge of the law alleged to have been violated, only knowledge of the facts constituting the offense.”¹² Thus, according to the ASBCA:

Despite appellant’s contentions that it did not knowingly receive [the government estimate] because it was not marked, or that appellant did not know it was impermissible for it to have the information, or that it was not clear to appellant that the price conveyed was another offeror’s, there is no dispute in the record before us regarding whether appellant knowingly received the information at issue. Appellant’s arguments go to whether it knew, or should have known it was violating the law, not to whether it had received the information. Appellant’s contentions do nothing to dispute the allegation that it had knowledge of the facts constituting the offense.¹³

The ASBCA’s reasoning in *CLC* may constitute a dramatic departure from the decisions of the GAO, the Court of Federal Claims, and the District Court for the District of Colorado. Given the facts of the case, the ASBCA might be attempting to preclude a “head in the sand” defense to a PIA violation. But, taken at face value, the ASBCA’s decision could mean that merely being the innocent recipient of an inadvertent email is a punishable offense. At least until there is wider adoption of the ASBCA’s interpretation, however, the ASBCA’s decision appears to be an outlier with no precedential value.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 524 U.S. 184, 193 (1998).

¹² ASBCA No. 59110.

¹³ *Id.*

Element 2: Source Selection Information or Contractor Bid or Proposal Information

The second element of a PIA violation is whether the information knowingly obtained constitutes source selection information or contractor bid or proposal information. Fortunately, the PIA defines both terms explicitly.

“Contractor bid or proposal information” refers to the following types of information:

- Cost or pricing data;
- Indirect costs and direct labor rates;
- Proprietary information about manufacturing processes, operations, or techniques marked by the contractor; or
- Information marked by the contractor as contractor bid or proposal information.¹⁴

By contrast, “source selection information” refers to:

- Bid prices submitted in response to a federal agency solicitation for sealed bids, or lists of those bid prices before public bid opening;
- Proposed costs or prices submitted in response to a federal agency solicitation, or lists of those proposed costs or prices;
- Source selection plans;
- Technical evaluation plans;
- Technical evaluations of proposals;
- Cost or price evaluations of proposals;
- Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract;
- Rankings of bids, proposals, or competitors;
- Reports and evaluations of source selection panels, boards, or advisory councils; or
- Other information marked as “source selection information” based on a case-by-case determination by the head of the agency, the head’s designee, or the contracting officer that its disclosure would jeopardize the integrity or successful completion of the federal agency procurement to which the information relates.¹⁵

¹⁴ 41 U.S.C. § 2101.

¹⁵ *Id.*

Notably, per FAR 3.104-4(c), where a recipient is unsure of whether or not the information in question is protected by the PIA, the recipient “should consult with agency officials as necessary” to determine whether receipt of particular information might lead to a PIA violation.

Element 3: Timing and Relation

A contractor’s knowing receipt of Protected Information only violates the PIA if the contractor obtains such information prior to award of the procurement contract to which that information relates.¹⁶ Thus, if a contractor obtains Protected Information (1) after the award of the procurement contract to which that information relates, (2) relating to a procurement different from the procurement in which the contractor is currently competing,¹⁷ or (3) relating to the award of a non-procurement contract (such as an Other Transaction Authority agreement), then there is no PIA violation, at least for the present procurement.¹⁸

Penalties

A PIA violation may result in serious criminal, civil, and administrative consequences.

A criminal violation occurs when a contractor 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.”¹⁹ It is punishable by a fine, imprisonment for up to five years, or both.²⁰

For civil violations, penalties are limited to fines.²¹ For the contractor as an organization, civil penalties are capped at “\$500,000 for each violation plus twice the amount of compensation that the organization received or offered for the prohibited conduct.”²² For contractor employees, civil penalties are capped

¹⁶ 41 U.S.C. § 2102(b).

¹⁷ For example, in *United States v. Bowling*, 108 F. Supp. 3d 343, 348–352 (E.D.N.C. 2015), the District Court for the Eastern District of North Carolina found there was no PIA violation because, among other things, the internal government cost estimate at issue was not related to the ongoing solicitation.

¹⁸ *See id.*

¹⁹ 41 U.S.C. § 2105(a).

²⁰ *Id.*

²¹ *Id.* § 2105(b).

²² *Id.* § 2105(b)(2).

at “\$50,000 for each violation plus twice the amount of compensation that the individual received or offered for the prohibited conduct.”²³

Whether a violation is criminal or civil, the contractor may also be subject to administrative penalties, including cancellation of a yet-to-be-awarded contract, rescission of an existing contract for which a PIA violation has occurred, suspension or debarment, or adverse personnel action.²⁴ The government is also afforded the right to recover, in addition to any monetary penalty, the dollar amount already expended on the contract at issue.²⁵ Any PIA violation will also negatively affect the responsibility of the relevant contractor or subcontractor for purposes of future procurements.²⁶

* * *

The second part of this article, which will appear in an upcoming issue of *Pratt's Government Contracting Law Report*, discusses investigating PIA violations and defending awards in bid protest litigation.

²³ *Id.* § 2105(b)(1).

²⁴ *Id.* § 2105(c)(1).

²⁵ *Id.* § 2105(c)(2).

²⁶ *Id.* § 2105(c)(3).