

# PRATT'S GOVERNMENT CONTRACTING LAW REPORT

---

VOLUME 7

NUMBER 6

June 2021

---

**Editor's Note: Accountability**

Steven A. Meyerowitz 175

**Preparing for the Coming Onslaught of Government  
Investigations and Audits of COVID-19 Relief Funds  
and Contracting—Part I**

Merle M. DeLancey Jr. and Craig Stetson 177

**Are You a New U.S. Government Contractor? Here Are  
Answers to Frequently Asked Questions**

Gail D. Zirkelbach, Peter J. Eyre, William B. O'Reilly, and  
Zachary Schroeder 184

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

Sandeep N. Nandivada, Michaela E. Thornton, and Alex Ward 193

**PPP Fraud: Update on the DOJ's Activity**

Jaimie Nawaday and Malavika Rao 198

**From the Courts: Eleventh Circuit Panel Revives  
FCA Mortgage Fraud Case, Reversing Materiality-Based  
Summary Judgment Dismissal**

Pablo J. Davis 201

**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  
Outside the United States and Canada, please call ..... (973) 820-2000

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) 487-3385  
Fax Number ..... (800) 828-8341  
Customer Service Website ..... <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 ..... (937) 247-0293

---

Library of Congress Card Number:

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

ISSN: 2688-7290

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 designed to provide authoritative information in regard to the subject matter covered. It 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 RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. Originally published in: 2015

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., 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.

Editorial Office  
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862  
[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*

**PABLO J. DAVIS**

*Of Counsel, Dinsmore & Shohl LLP*

**MERLE M. DELANCEY JR.**

*Partner, Blank Rome LLP*

**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, Morrison & Foerster LLP*

**VINCENT J. NAPOLEON**

*Partner, Nixon Peabody LLP*

**STUART W. TURNER**

*Counsel, Arnold & Porter*

**ERIC WHYTSELL**

*Partner, Stinson Leonard Street LLP*

**WALTER A.I. WILSON**

*Partner Of Counsel, Dinsmore & Shohl LLP*

*Pratt's Government Contracting Law Report* is published 12 times a year by Matthew Bender & Company, Inc. Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. 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 customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries 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, 646.539.8300. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. 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, 230 Park Ave. 7th Floor, New York NY 10169.

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

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

*This two-part 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. The first part, which was published in the May 2021 issue of Pratt’s Government Contracting Law Report, covered the elements of a PIA violation. This second part discusses investigating PIA violations and defending awards in bid protest litigation.*

## INVESTIGATING PIA VIOLATIONS

When a contractor first learns of a potential Procurement Integrity Act (“PIA”) violation, there necessarily is a mad dash to understand what happened and take steps to prevent or mitigate any potential competitive impact. Time is of the essence, because the longer the contractor takes to understand the situation, the greater the opportunity for an unfair competitive advantage to develop.

A step-by-step approach to investigating potential PIA violations in a timely and efficient manner is below.

### **Step 1: Understand the Nature of the Information at Issue**

Before any internal investigation of a potential PIA violation can begin, a company should understand—at a high level—the type of information it received and whether the information could reasonably be construed as source selection information or contractor bid or proposal information, such that a PIA violation is even possible. This assessment, however, does not require company personnel to review the information in question.

In fact, companies should train their employees to resist the all too human urge to “double-check” the pertinent emails or documents after they have been alerted to the presence of potential “Protected Information.”<sup>27</sup>

---

\* Sandeep N. Nandivada is a senior Government Contracts associate in Morrison & Foerster LLP’s Washington, D.C. office, specializing in civil litigation and complex internal investigations. Michaela E. Thornton is a law student at the George Washington University Law School. She serves as a Government Contracts law clerk in the firm’s Washington, D.C. office, and is not yet licensed to practice law. Alex Ward is a partner in and co-chair of the firm’s Government Contracts practice. Footnote numbering continues from the first part of this article.

<sup>27</sup> The PIA prohibits knowingly disclosing, or knowingly obtaining, source selection

It is usually best for even the company's in-house counsel—and its outside counsel, for that matter—to avoid reviewing or preserving the information at issue. While there might be circumstances in which it would be appropriate for legal counsel to preserve evidence of a PIA issue (particularly with the government's approval), legal counsel's retention of source selection or contractor bid or proposal information could be construed as the company itself retaining access to competitively useful information, particularly if the same counsel are also involved in the company's competitive decision-making.<sup>28</sup>

### **Step 2: Identify the Universe of Individuals Who Potentially Received the Information**

The next step in a PIA investigation is to identify the universe of individuals who could possibly have received the source selection information or contractor bid or proposal information at issue. Companies should not be overly narrow in making this determination; it is better to be over-inclusive and then rule people out, than to be under-inclusive and find out later that individuals who received the information were omitted from the review.

Once it has established the universe of relevant employees, the company should survey their potential access to Protected Information. In most cases involving the inadvertent receipt of information, this can be done through a simple email requiring employees to respond to a series of questions designed to understand whether, when, and to what extent, a particular individual accessed Protected Information.<sup>29</sup> The survey email should also request confirmation that the employee has permanently deleted the information at issue. Based on the survey responses, the company can focus the remainder of the internal investigation on those employees who actually accessed the Protected Information.

### **Step 3: Conduct Interviews of Anyone Who Accessed the Information**

Using the survey responses as a guide post, the company should schedule interviews with each employee who accessed the protected information to probe

---

information or contractor bid or proposal information (collectively, "Protected Information").

<sup>28</sup> See *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468–69 (Fed. Cir. 1984) (holding retention of information by counsel is more likely improper where counsel, whether in house or retained, have a relationship to competitive decision-making of the organization); *Silversun Indus., Inc. v. PPG Indus., Inc.*, 296 F. Supp. 3d. 936, 940 (N.D. Ill. 2017) (finding viewing, or retention, of competitive trade secret information by in-house counsel improper where counsel are even obliquely involved in "business" decision-making of organization).

<sup>29</sup> Intentional, improper efforts to obtain Protected Information obviously create a more challenging situation, in which merely asking employees to respond to a survey likely will not suffice.

the extent of that access and whether the company may have gained an unfair competitive advantage as a result.

These interviews should focus on understanding what information the employee recalls from the documents he or she reviewed; whether the employee shared the information with others, by email, during telephone calls, or during meetings; whether the information could be viewed as competitively useful; and where the procurement currently stands.

Additional interviews should be scheduled with any new individuals identified as having received the Protected Information, but who were not included in the original employee universe. If possible, all interviews should be conducted by outside counsel, given the possibility that interviewees could share competitor information during the interview.

#### **Step 4: Regroup with the Legal Team**

Following employee interviews, the legal team should regroup to assess whether, and to what extent, the company's receipt of Protected Information has resulted in a violation of the PIA and an unfair competitive advantage in the procurement. During this discussion, the legal team should consider what, if any, mitigation measures may be available to protect the competition's integrity.

For example, one common mitigation measure is firewalling individuals who reviewed Protected Information from further involvement in the capture effort. Other measures include sworn affidavits attesting to the lack of improper conduct and non-disclosure agreements prohibiting discussion of the Protected Information.

#### **Step 5: Ensure the Information Has Been Forensically Deleted from Company Systems**

Once the company has a fuller picture of the extent of its employees' access to the protected information, it should arrange for its information technology ("IT") department to purge its systems of the offending material. By this time, the individual employees should have already permanently deleted the Protected Information, but it is a good practice to have the IT department double-check. In many cases, the government customer will require an affidavit from the company's IT administrator to confirm the Protected Information is no longer accessible by anyone at the company.

#### **Step 6: Communicate with the Government Customer**

The final step in a PIA investigation is to communicate with the government customer about the incident. Frequently, the government customer requests specific information so that it may independently assess whether there has been

a PIA violation or whether the company has obtained an unfair competitive advantage. Companies should, of course, comply with such requests to the extent reasonably practicable.

When responding, however, companies should also be mindful that the information submitted to the government will ultimately form part of the administrative record for the procurement. Thus, the information submitted will not only inform the government's decision about how to proceed with the procurement, but will also be available in any post-award bid protests that may arise.

In other words, companies should think carefully about how best to respond to the government following a potential PIA violation.

### **DEFENDING AWARDS IN BID PROTEST LITIGATION**

After a company has completed its internal investigation of a potential PIA violation and complied with the government customer's requests for information, the next step for the company is to await the government's decision about how to proceed with the procurement. The government's decision whether to eliminate a company from the competition is subject to a pre-award protest, although the agency's decision will receive substantial deference.<sup>30</sup> If the government elects to proceed with the procurement, the company should also be prepared for a potential bid protest if it secures the contract.

To preserve the ability to file a bid protest alleging a PIA violation, the aggrieved party must notify the procuring agency of the issue no later than 14 days after the protester first discovered the possible violation.<sup>31</sup> Once the agency completes its investigation, the protester may then file a protest at the Government Accountability Office ("GAO") or the U.S. Court of Federal Claims ("COFC") if the protester is not satisfied with the outcome.

At the GAO, any such protest would have to be filed within 10 days of when the agency notified the protester of the outcome of its investigation, which means the protester may have to file a pre-award protest to preserve its protest allegation. The protester would have greater flexibility to file a protest at the COFC, which does not have strict timeliness requirements, though the protester should still proceed diligently to avoid waiver.

---

<sup>30</sup> See *DynCorp Int'l, LLC v. United States*, 757 Fed. App'x. 927, 930 (Fed. Cir. 2018) (deferring to contracting officer's findings that no PIA violation occurred); *IDS Int'l Govt. Servs., LLC*, B-419003.2, Nov. 18, 2020, 2020 CPD ¶ 383 at 18–19 (deferring to agency conclusion that PIA-protected information in question was not competitively useful).

<sup>31</sup> 41 U.S.C. § 2106; 4 C.F.R. § 21.5(d).



To succeed on a protest alleging a PIA violation, the protester must show not only that a PIA violation occurred, but also that the violation resulted in an unfair competitive advantage and therefore was prejudicial.<sup>32</sup>

Defending against such a protest therefore necessarily requires evidence in the record undermining the protester's claims of a PIA violation or competitive harm. This is why, as detailed above, it is critical that the company take a forward-looking approach to the information it shares with the government following a PIA investigation.

The information a company submits to the government in response to a potential PIA violation will be a significant component of the administrative record that the GAO or the COFC will review in determining whether a PIA violation has occurred and whether there is an unfair competitive advantage.

Even more critically, it also may inform how the government customer ultimately documents its own PIA investigation, which will hold the most weight with the GAO or the COFC.<sup>33</sup>

## CONCLUSION

Inadvertent disclosures giving rise to potential PIA violations are always going to be a thorn in a contractor's side, but with adequate foresight and planning, contractors can mitigate the risk associated with such incidents. This foresight and planning should begin before a potential PIA incident arises.

Contractors should take the time now to review their policies and procedures for handling a potential PIA violation to make sure they are adequate.

Contractors should also consider whether additional training for employees would be beneficial. Through such preparation, contractors can ensure they are ready, to the maximum extent practicable, for whatever adversity comes their way.

---

<sup>32</sup> See *TRAX Int'l Corp. v. United States*, 144 Fed. Cl. 417, 431 (2019) (denying PIA protest where protester could not show prejudice); *Eco Tour Adventures, Inc. v. United States*, 114 Fed. Cl. 6, 37 (2013) (finding that, although the PIA did not apply to the contested situation, no violation could be found if the PIA did apply due to a lack of competitive prejudice); *Health Net Fed. Servs., LLC*, B-401652.3, Nov. 4, 2009, 2009 CPD ¶ 220 at 31 (noting an unfair competitive advantage is a "necessary element of a procurement integrity allegation since it relates to the resulting prejudice"); *Eng'g Support Pers., Inc.*, B-410448, Dec. 24, 2014, 2014 CPD ¶ 89 at 7; see also FAR 3.104-7 (noting contracting officer who has received information about a violation or possible violation must determine if there is "any impact on the pending award or selection of the contractor"); *Unisys Corp.*, B-403054.2, Feb. 8, 2011, 2011 CPD ¶ 61 at 10 (denying protest that awardee's use of former government employee in preparation of its proposal provided an unfair competitive advantage where the information at issue was not competitively useful).

<sup>33</sup> See *DynCorp Int'l, LLC v. United States*, 757 Fed. App'x. 927, 930 (Fed. Cir. 2018).