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REPORT

Competition

Recent Developments Highlight the Risks Associated With Contractor Access to Nonpublic, Procurement-Related Information

By Michael F. Mason and Andrew C. Ertley

I. INTRODUCTION

Companies that conduct business in the federal government market face an increasingly difficult business environment. In addition to a vast array of newly-imposed compliance and reporting requirements—and significantly amplified Government oversight of contractor activities—the growth in government spending is now expected to decline substantially. Cuts in major procurement programs are anticipated, with several major programs already identified for elimination or extensive reductions in scope. Competition for prized contracts will likely become even more intense, as will the pressure to achieve every available competitive advantage. Such an environment increases a contractor's compliance risks in many areas, not least of which involve certain risks associated with a contractor's access to non-public, competition-sensitive or government-sensitive procurement-related information.

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These risks arise, for example, when a contractor hires a competitor's employee or a former government official; performs certain systems engineering, advisory or technical assistance activities pursuant to a government contract; or gathers data for assessing a competitor. In some instances the access to information may be authorized and appropriate, but nevertheless lead to the contractor's exclusion from a later competition due to an appearance that access to the information provided the contractor with an unfair competitive advantage. Perhaps more so now than ever government contractors will want to implement and maintain strong measures to mitigate the risks associated with a contractor's access to what this article will refer to as non-public procurement-related information (''NPRI'').

The risks posed by NPRI are underscored in a matter that recently made the front pages of major newspapers. On June 3, 2010, the U.S. Air Force's suspension and debarment official concluded that a business unit of a major U.S. defense contractor had ''purposely and intentionally'' conducted e-mail surveillance of its own employees, its competitors' employees, and U.S. government employees while operating a computer network for the U.S. Special Operations Command (''SOCOM'') [1]/ According to the Air Force, the contractor

[1] / *See* Memorandum in Support of the Suspension of L-3 Communications Integrated Systems, L.P., Special Support Programs Divisions f/k/a L-3 Communications Integrated Systems, L.P, Joint Operations Group, *available at* http://

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surreptitiously monitored e-mails on SOCOM's computer system to discover whether its employees shared information with a competitor. The Air Force found that the contractor obtained and saved information relevant to an anticipated follow-on contract, and a bid protest to which the contractor was a party. [2]/

The price for this transgression is steep. The Air Force suspended the contractor from doing business with the Government, which in turn led the Government to award a $5 billion contract to the company's competitor. [3]/ That contract is a follow-on contract to one that had been performed by the contractor and reportedly had represented three percent of its annual revenue. The contractor is also facing a criminal investigation for its conduct. On July 27, 2010, the contractor and the Air Force entered into an administrative agreement that lifted the suspension while imposing upon the contractor several significant requirements, including the requirement that the contractor avoid performing ''IT work on any Government contract'' for the length of the three-year administrative agreement.

The risks posed by NPRI, however, are not limited to cases of intentional misconduct. There are some bid protest decisions where the Government Accountability Office (''GAO'') or Court of Federal Claims has approved a Government decision to eliminate a competitor, or recommended or ordered that a contract award be overturned, based on a mere *appearance* that a contractor may have obtained a competitive advantage from access to NPRI. For example, in *Health Net Federal Services, LLC*, B-401652.3, Nov. 4, 2009, 2009 CPD ¶ 220, GAO held that a major healthcare contractor's hiring of a former high-level government official raised the specter of an unfair competitive advantage even though the former official had received ''clean letters'' from government ethics officials clearing him to work for the contractor. The procuring agency followed GAO's recommendation and terminated the contractor's multi-billion dollar award and excluded it from the re-opened competition. [4]/

Several legal theories may apply to a contractor's access to NPRI. First, the Procurement Integrity Act (''PIA''), 41 U.S.C. § 423, prohibits a person from knowingly obtaining ''contractor bid or proposal information'' or ''source selection information'' prior to an award to which the information relates. 41 U.S.C. § 423(b). Second, GAO and the Court of Federal Claims have applied the Federal Acquisition Regulation's (''FAR's'') organizational conflict of interest (''OCI'') rules to a firm's ''unequal access to information.'' An unequal access to information type of OCI occurs in ''situations in which a firm has access to non-public information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition for a government contract.'' [5]/ Third, these issues may arise in the context of litigation between private parties, which sometimes involve allegations of a misappropriation of trade secrets. This list is by no means exhaustive—there are various other criminal and civil laws, as well as court or GAO-made common law, that could apply in a particular set of circumstances. [6]/

The remainder of the article addresses this legal framework with an emphasis on recent case law and developments. The article also presents a number of possible approaches aimed at minimizing the risks posed by NPRI.

II. PROCUREMENT INTEGRITY ACT

A. Overview The PIA provides, in part, that ''[a] person shall not, other than as provided by law, 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.'' [7]/ The PIA also prohibits federal officials from knowingly disclosing, other than as permitted by law, this same information. [8]/

In terms of covered information, the key terms are ''contractor bid or proposal information'' and ''source selection information.'' ''Contractor bid or proposal information'' includes the following types of non-public information that is submitted to a Federal agency as part of, or in connection with, a bid or proposal: [9]/

(A) Cost or pricing data (as defined by section 2306a(h) of Title 10, with respect to procurements subject to that section, and section 254b(h) of this title, with respect to procurements subject to that section). [10]/

(B) Indirect costs and direct labor rates.

(C) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation.

(D) Information marked by the contractor as ''contractor bid or proposal information,'' in accordance with applicable law or regulation.

The PIA defines ''source selection information'' to include any of the following non-public information prepared for use by a Federal agency for the purpose of evaluating a bid or proposal to enter into a Federal agency procurement:

(A) Bid prices submitted in response to a Federal agency solicitation for sealed bids, or lists of those bid prices before public bid opening.

(B) Proposed costs or prices submitted in response to a Federal agency solicitation, or lists of those proposed costs or prices.

(C) Source selection plans.

(D) Technical evaluation plans.

(E) Technical evaluations of proposals.

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www.airforce-magazine.com/SiteCollectionDocuments/Reports/2010/.

[2] / *Id.*

[3] / Matthew Porter, *Lockheed Gains from L-3 Suspension as it Starts Supporting Air Force SOCOM*, Defense Procurement News, June 22, 2010. Lockheed Martin had won an earlier competition for the contract, but the award was overturned after L-3 filed a bid protest at the Government Accountability Office.

[4] / *Health Net Fed. Servs., LLC*, B-401652.3, Nov. 4, 2009, 2009 CPD ¶ 220 at 31-35.

[5] / *B.L. Harbert-Brasfield & Gorrie, JV*, B-402229, 2010 CPD ¶ 69 at 5.

[6] / *See, e.g.* Economic Espionage Act of 1996, 18 U.S.C. §§ 1831 – 1839.

[7] / 41 U.S.C. § 423(b).

[8] / *Id.* § 423(a).

[9] / *Id.* § 423(f)(1).

[10] / Under both 10 U.S.C. § 2306a(h)(1) and 41 U.S.C. § 254b(h)(1), the term ''cost or pricing data'' includes ''all facts that, as of the date of agreement on the price of a contract . . ., a prudent buyer or seller would reasonably expect to affect price negotiations significantly.''

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(F) Cost or price evaluations of proposals.

(G) Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.

(H) Rankings of bids, proposals, or competitors.

(I) The reports and evaluations of source selection panels, boards, or advisory councils.

(J) Other information marked as ''source selection information'' based on a case-by-case determination by the head of the agency, his 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. [11]/

Regarding the consequences of noncompliance, the PIA makes it a federal crime when the violation involves either (i) exchanging something of value for the protected information, or (ii) obtaining a competitive advantage in the competition. The PIA also provides the Government with a civil cause of action and several administrative remedies. The remedies include: (1) civil penalties; (2) canceling the procurement (if the contract has not been awarded); (3) rescinding the contract; and/or (4) initiating suspension and debarment proceedings. [12]/

Finally, the PIA places restrictions on bid protests alleging a PIA violation. Specifically, the PIA prohibits the filing of a bid protest alleging a PIA violation unless the protester has first reported the alleged violation ''no later than 14 days after the person first discovered the possible violation, the information that the person believed constitutes evidence of the offense.'' [13]/

B. Case Law and Other Developments Alleged violations of the PIA may become an issue in a bid protest, civil or criminal investigation, and/or administrative action. A common consequence of a PIA violation is the contractor's exclusion from the relevant competition. Serious infractions may result in suspension or debarment, or even criminal prosecution.

The statute received significant attention in 2003 when the Air Force suspended three business units of a major defense contractor for twenty months—the longest suspension to date of a major defense contractor. [14]/ According to a Department of Justice press release, the suspended contractor had hired an engineer from a competitor who brought with him tens of thousands of pages of proprietary documents. [15]/ The documents pertained to a multi-billion dollar Air Force procurement of expendable launch vehicle services used to launch government satellites. [16]/ The Government concluded that the contractor's possession of the documents could have had a high or significant chance of affecting the outcome of the launch competition. [17]/

In addition to the suspension, the Air Force shifted orders covering seven launches of government satellites valued at approximately $1 billion from the contractor to its competitor. [18]/ The contractor later entered into an administrative agreement with the Air Force to resolve the suspension, which included, among other things, a requirement to appoint an independent special compliance officer charged with making periodic reports to the Air Force. In addition, the contractor agreed to pay $565 million to settle the Government's investigations. [19]/

In 2008, the statute gained prominence once again when an alleged violation resulted in the brief suspension of a major information technology company. In that case, the Environmental Protection Agency (''EPA'') alleged that during the course of a competition the contractor had received protected source selection information from an EPA official. [20]/ According to the EPA, the contractor used the information during the negotiations phase of the competition to improve its chance of winning a contract. [21]/ Among other things, the suspension precluded the potential award of a multi-million dollar contract to the contractor. Within a week, the contractor and EPA agreed to terms that lifted the suspension and required the contractor to cooperate with an investigation. [22]/ A government official noted that the suspension did not constitute a punishment, but served to protect the Government's interest. [23]/ This is consistent with the FAR's suspension rules specifically providing that suspension should not be used ''for purposes of punishment.'' [24]/

More recently, as discussed in the Introduction to this article, the Air Force suspended L-3 Communications Integrated Systems, L.P., Joint Operations Group (L-3 JOG), from government contracting. According to the Air Force suspension and debarment official:

Given that the administrative record before me demonstrates that L-3 JOG has used a Government computer network to conduct its own private corporate intelligence-gathering activities in violation of both its contractual requirements and the position of trust it held as a manager of a highly sensitive computer network, and that L-3 JOG continues to bid for additional contracts to manage Government computer systems and networks, I find that protection of the Government interests requires L3 JOG's immediate suspension pending the completion of the investigation and any ensuing criminal proceedings. [25]/

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[11] / 41 U.S.C. § 423(f)(2).

[12] / *Id.* § 423(e)(3)(A).

[13] / *Id.* § 423(g).

[14] / Leslie Wayne, *Air Force Ends Suspension of Boeing Unit*, New York Times, March 5, 2005

[15] / Press Release, DOJ, Two Former Boeing Managers Charged in Plot to Steal Trade Secrets from Lockheed Martin, June 25, 2003, *available at* http://www.justice.gov/criminal/cybercrime/branchCharge.htm.

[16] / *Id.*

[17] / *Id.*

[18] / James Wallace, *Boeing Loses 7 Delta Launches*, Seattle Post-Intelligencer, July 25, 2003; Transcript of Speech by Boeing's Doug Bain, Seattle Times, July 31, 2006.

[19] / Statement of Deputy Attorney General Paul J. McNulty before the Senate Committee on Armed Services, August 1, 2006, *available at* http://www.justice.gov/archive/dag/testimony/2006/080106dagmcnultystatementsenate.htm.

[20] / *Matter of IBM Corp.*, EPA Case No. 08-0113-00, Interim Agreement, Apr.3, 2008, *available at* http://www.epa.gov/ogd/sdd/April%203%202008%20IBM%20Interim%20Agreement.pdf.

[21] / *Id.*

[22] / *Id.*

[23] / Jill R. Aitoro, *GSA Official: IBM 'suspension is not punishment'*, Government Executive, Apr. 2, 2008.

[24] / FAR § 9.402(b).

[25] / Memorandum in Support of the Suspension of L-3 Communications Integrated Systems, L.P., *et al*, Office of the Deputy General Counsel, Department of the Air Force, June 3, 2010, *available at* http://www.airforce-magazine.com/SiteCollectionDocuments/Reports/2010/June%202010/Day14/USAF-L-3_JOG_060310.pdf.

Although the memorandum in support of the suspension does not specifically reference the PIA, [26]/ the suspension and debarment official stated that ''adequate evidence'' in the administrative record established, among other things, that the contractor ''committed criminal offenses in connection with obtaining, attempting to obtain or performing a public contract or subcontract.'' [27]/

In a 2009 case, several major defense contractors were investigated and later precluded from competing for a major defense contract based on findings that their employees and a consultant had violated the PIA. The matter involved several employees and a business consultant that accessed certain source selection information that was inadvertently left unprotected on a government computer system. [28]/ This is another example of the risks posed when employees have access to government computer systems. It also highlights the risks posed by the use of business consultants who have access to NPRI. Historically, consultants who assist contractors with proposals or business development have often been at the center of alleged PIA violations.

As to the PIA's criminal provisions, those provisions have been used recently to prosecute several individuals. For example, in 2008, an Army Corps of Engineers employee pleaded guilty to one count of violating the PIA. [29]/ The government employee admitted that he had provided to a consultant bid evaluation information involving a contract to relocate a U.S. Army base. The consultant was employed by a consortium bidding on the contract and the information was provided in order to give the consortium a competitive advantage. [30]/ The employee was sentenced to 36 months probation and community service. [31]/

In a 2007 PIA case, a Federal Aviation Administration (''FAA'') contracting officer was indicted based on allegations that he steered a $4.3 million airport lighting project to a contractor. [32]/ The contracting officer contacted one of the bidders and invited it to lower its bid by $55,000 to secure a win. The contracting officer did not provide this information to the other offerors, and he did not give the other offerors a similar opportunity to revise their bids. The bidder acknowledged it received the useful inside information and eventually agreed to a civil settlement of more than $1 million.

PIA issues may also arise in a less obvious manner. GAO's bid protest decision in *Lockheed Martin Maritime Systems & Sensors* [33]/ serves as a good example. The case involved a Navy competition for towed arrays, which would be deployed behind submarines to assist in locating other vessels and underwater features. The Navy initially awarded the contract to Lockheed Martin Maritime Systems & Sensors (''Lockheed Martin''). After award, and a few days prior to its debriefing, the disappointed offeror, Chesapeake Sciences Corporation (''CSC''), received a telephone call stating, ''Sorry you lost, but at least yours worked.'' [34]/ At the debriefing, when the protester asked whether the awardee's array had failed, the Navy personnel merely responded that ''[i]t depends.'' [35]/ CSC filed a bid protest at GAO, and the Navy later took corrective action, which resulted in the Navy rescoring the proposals and awarding the contract to CSC.

While CSC's bid protest was pending, Lockheed Martin was aware of CSC's allegation that its towed array had failed during testing, but had assumed that the information had been disclosed by the Navy through the debriefing process. Lockheed Martin was unaware that the information came through unauthorized channels. It was not until Lockheed Martin's debriefing following the corrective action that it learned of the phone call. [36]/ Within 14 days of this revelation, Lockheed Martin filed a letter with the Navy expressing its concern that the PIA had been violated. The Navy contracting officer (''CO'') agreed, but decided the violation did not prejudice Lockheed Martin or otherwise preclude a fair competition. [37]/ Lockheed Martin also filed a GAO bid protest.

Although GAO sustained Lockheed Martin's bid protest on other grounds, it held that the CO's written determination that the PIA had been violated, but that the violation did not affect the competition, was reasonable. [38]/ The GAO decision relied heavily on the contractor's response to the release of the information. Specifically, GAO pointed out that the contractor had taken no immediate action when it believed that the Navy had informed its competitor of the array failure during CSC's debriefing. [39]/ Only after it learned that the disclosure was not provided by the Navy during CSC's debriefing, but came from a phone call beforehand, did it complain of the PIA violation. According to GAO, the contractor's initial reaction reflected that the contractor itself did not believe that knowledge of the array's failure was competitively harmful. [40]/ This aspect of GAO's decision seems speculative and otherwise does not reflect the deference that contractors typically give contracting officials in terms of what may or may not be properly disclosed.

A number of recent PIA cases have illustrated the statute's limitation in scope. One key limitation pertains to the PIA's requirement that a protest invoking the PIA must be reported to the responsible government agency no later than 14 days after the person first discovered

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[26] / It is not clear from the memorandum whether the incident met all of the elements necessary for a PIA violation. For example, it is unclear whether the incident involved ''contractor bid or proposal information'' or ''source selection information''.

[27] / The suspension has since been lifted via the signing of a July 27, 2010, administrative agreement between the Air Force and the contractor. The preamble to the agreement provides: ''Although investigation is ongoing, evidence in the record to date suggests that Government emails were not intentionally Journaled [sic], and were not reviewed, opened, or used.''

[28] / Information is on file with the authors.

[29] / Press Release, DOJ, Former U.S. Army Corps of Engineers Employee Pleads Guilty to Disclosing Sensitive Procurement Information, July 22, 2008, *available at* http://www.justice.gov/opa/pr/2008/July/08-crm-639.html.

[30] / *Id.*

[31] / Federal Ethics Report, Vol. 16, No. 5, May 2009.

[32] / Press Release, DOJ, FAA Contracting Officer Indicted in Procurement Fraud Conspiracy, March 2, 2007.

[33] / B-299766, B-299766.2, Aug. 10, 2007, *available at http://www.gao.gov/decisions/bidpro/299766.pdf.*

[34] / *Id.* at 6.

[35] / *Id.*

[36] / *Id.* at 7.

[37] / *Id.*

[38] / *Id.* at 10.

[39] / *Id.*

[40] / *Id.*

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the violation. [41]/ In *Omega World Travel, Inc. v. United States*, 82 Fed. Cl. 452 (2008), the protester contended that the Government act of providing to a competitor ''confidential information regarding [the protester's] business operations,'' names of staff, and the accounts they service, violated the PIA. The court ruled against the protester, in part because the protester failed to present what it considered to be evidence of the offense within 14 days of having notice. [42]/ Notably, in *Health Net Federal Services, LLC*, B-401652.3, Nov. 4, 2009, 2009 CPD ¶ 220—a case discussed in more detail below in Section III.B—the protester successfully worked around the PIA's 14-day limitations period by characterizing its allegation as presenting an ''unfair competitive advantage'' challenge.

Relatively few court or GAO decisions have directly addressed the scope of ''confidential bid or proposal information'' or ''source selection information'' under the PIA. In cases where this is addressed, the discussion often focuses on whether the information at issue was in the public domain or lawfully disclosed.

In *Accent Service Co., Inc.*, B-299888, Sept. 14, 2007, 2007 CPD ¶ 169, the incumbent contractor alleged the Government caused it to disclose proprietary information about its staffing plan to competitors. Without detailed analysis, GAO concluded that the information ''did not constitute contractor proposal information, source selection information, or a competition-sensitive trade secret.'' [43]/ The holding helps illustrate that the question of what constitutes confidential bid or proposal information is necessarily a fact-based inquiry. In the context of a competition, an offeror's staffing plans might be considered confidential proposal information. However, GAO has shown reluctance to protect this same type of information post-award. Therefore, both the nature of the information and its context can be important in determining whether the information is protected by the PIA.

Similarly, in *Avtel Services, Inc. v. United States*, 70 Fed. Cl. 173 (2005), the awardee had met with incumbent employees and gained information on a wide range of subjects regarding the incumbent's performance of the contract. [44]/ The court found that the information the awardee obtained from the incumbent employees was either the same or substantially similar to information that could be found in the public domain through contracting documents, statements of work, a thesis, and internet sites. [45]/ The court concluded that once the information entered the public domain, it was no longer proprietary or protected by the PIA. [46]/ In *McKing Consulting Corp. v. United States*, 78 Fed. Cl. 715 (2007), the court held that information publicly available on a website was not protected by the PIA. [47]/

Another recent bid protest decision narrowed the definition of ''confidential bid or proposal information'' by focusing on only the information actually contained in the contractor's proposal. In *Assessment and Training Solutions Consulting Corp. v. United States*, 92 Fed. Cl. 722 (2010), the Government elected to set aside a medical training contract for small businesses. Several of the incumbent employees received recruiting e-mails from potential small business offerors, some of which identified a government official as the source of the employees' names. [48]/ The incumbent contractor informed the contracting officer that it believed the Government had violated the PIA, [49]/ and then filed a bid protest. The Government's PIA investigation found that the government official named in the e-mails as a source of the names had engaged in unauthorized outside employment and had teamed with one of the offerors. [50]/ However, the court found no violation of the PIA for two reasons. First, the names and e-mail addresses of the incumbent employees did not constitute ''contractor bid or proposal information.'' Although the incumbent contractor had submitted resumes as part of the previous procurement process, and the resumes were marked with restrictive legends, the resumes did not contain the names and contact information at issue. Second, the record did not show that the government official named

[41] / 41 U.S.C. § 423(g).

[42] / 82 Fed. Cl. at 468. The case also illustrates an interesting temporal aspect regarding the Government's release of information. The court noted that the PIA only bars the release of confidential information *before* the award of a procurement contract to which the information relates. Because the protester alleged that DOJ violated the PIA after the contract was awarded, the court concluded no PIA violation was properly plead. *Id.*

[43] / *Accent Serv. Co., Inc., B-299888* at 3.

[44] / *Avtel Servs., Inc. v. United States*, 70 Fed. Cl. 173 (2005).

[45] / *Id.* at 192-209

[46] / *Id.*

[47] / *See also, Synetics, Inc. v. United States*, 45 Fed. Cl. 1 (1999) (information concerning compensation and bonuses revealed by contractor's employees was authorized and/or in public domain). Cf. *Computer Tech. Assocs.*, Comp. Gen. Dec. B-288622, 2001 CPD ¶ 187 at 5 (transcripts of oral presentations, which contained agency questions and bidder responses, constituted ''source selection information'' because they were prepared for the purpose of evaluating proposals and had not been publicly disclosed) . Several GAO and Court of Federal Claims decisions indicate that a reasonably-grounded appearance of a violation may be grounds to sustain a bid protest or for a contracting officer to exclude an offeror. *See Compliance Corp. v. United States*, 22 Cl. Ct. 193, 203 (1990), *aff'd*, 960 F.2d 157 (Fed. Cir. 1992) (''[t]he NIS investigation clearly supports a finding that [the protester's] conduct in attempting to obtain proprietary information from [the awardee] created the appearance of impropriety, which necessitated the disqualification of [the protester] to protect the integrity of the procurement process.''); *Computer Tech. Assocs.*, Comp. Gen. B-288622, 2001 CPD ¶ 187 at 4 (''For example, a contracting officer may protect the integrity of the procurement system by disqualifying an offeror from the competition where the firm may have obtained an unfair competitive advantage, even if no actual impropriety can be shown, so long as the determination is based on facts and not mere innuendo or suspicion. It is our view that, wherever an offeror has improperly obtained proprietary proposal information during the course of a procurement, the integrity of the procurement is at risk, and an agency's decision to disqualify the firm is generally reasonable, absent unusual circumstances.'') *But cf: Avtel Servs. Inc. v. United States*, 70 Fed. Cl. 173 (2006) (Contracting officer's decision in aircraft maintenance procurement not to disqualify offeror under the Procurement Integrity Act for obtaining information from employee of incumbent contractor concerning employee insurance offered by contractor had a reasonable basis in that insurance information was publicly available in contract documents, and contractor did not demonstrate that the information gave offeror a competitive advantage).

[48] / *Assessment and Training Solutions Consulting Corp.,* 92 Fed. Cl. at 727.

[49] / *Id.*

[50] / *Id.* at 734-35.

in the recruiting e-mails had access to the resumes. [51]/ The court viewed the Government's explanation that, ''[a]nyone with access to the training facility'' could have obtained the names, as a reasonable explanation that was inconsistent with a finding of a PIA violation. [52]/

Another aspect of the PIA involves the statute's ''savings provision,'' which provides that the statute does not ''restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information.'' [53]/ In *Pemco Aeroplex, Inc.*, B-310372, December 27, 2007, 2008 CPD ¶ 2, two contractors had previously teamed on an aircraft maintenance contract before competing against each other for follow-on work. Among other things, the protester alleged that the contracting officer failed to investigate its reported concern regarding the awardee's misuse of its proprietary pricing information. Specifically, the protester reported that the awardee had access to its proprietary pricing information under a non-disclosure agreement (''NDA'') connected with the previous contract, but that the awardee failed to safeguard the information in accordance with the NDA's terms. According to the protester, the awardee's personnel who had access to the protester's proprietary pricing information under the NDA had assisted the awardee with its proposal.

GAO denied the protest. Relying largely upon PIA's ''savings provision,'' GAO held:

Accordingly, to the extent [the awardee] obtained [protester's] proprietary information, it appears clear that [the protester] provided it voluntarily, pursuant to its prior relationship with [the awardee], and that the facts here fall squarely within the Act's ''Savings provision'' which states: ''This section does not . . . restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information.'' It is also clear that [the protester's] only complaint is that [the awardee] failed to properly ''safeguard'' [the protester's] information, as required by the terms of the NDA. To the extent [the protester][believes that [the awardee] failed to comply with the terms of the parties' NDA, the matter constitutes a private dispute. [54]/

Among other things, the case highlights at times a reluctance by GAO to adjudicate alleged thefts or misuse of competition sensitive information where there is no suggestion that government misconduct is involved. [55]/

Finally, in 2009, the Director of Defense Procurement and Acquisition Policy directed Department of Defense components to designate an ombudsman to address procurement integrity issues. [56]/ The ombudsmen's responsibilities include acting upon complaints and questions about procurement integrity issues, taking the initiative to address procurement integrity issues within his or her purview, referring allegations of potential criminal conduct discovered during an investigation to the appropriate investigative organization (and taking no further action with regard to the potential misconduct), and ensuring that all affected offices and appropriate officials are consulted as part of any resolution process. The ombudsmen are directed not to interfere with or usurp normal procurement and associated authorities such as source selection, program management, and suspension and disbarment authorities. The ombudsmen also do not have the responsibility of rendering decisions that purport to bind an agency or agency personnel, and would not be authorized to directly compel or attempt to compel an entity or individual to implement an ombudsman's recommendation.

III. UNFAIR COMPETITIVE ADVANTAGE THROUGH ACCESS TO NPRI

A. Overview GAO and the Court of Federal Claims both have held that an offeror may be excluded (and in some cases must be excluded) from a competition based on the offeror's (or team member's) unequal access to NPRI. This may occur, for example, where an offeror (or one of its subcontractors or consultants) had access to NPRI during its performance of a government contract and the information may provide the contractor a competitive advantage in a later competition for a government contract. [57]/ This situation is reflected in FAR subpart 9.5 and is commonly referred to as an ''unequal access to information'' type of OCI. Unequal access to NPRI also could become an issue where a contractor may have gained a competitive advantage from hiring a former government official who had access to NPRI. This type of ''unfair competitive advantage'' bid protest ground is based on FAR 3.101-1 and involves an analysis that is very similar to the analysis performed by regarding unequal access to information OCIs. [58]/

With respect to unequal access to information OCIs, unlike with the two other types of OCIs recognized by GAO and the Court of Federal Claims, [59]/ there is no issue of potential bias—the concern is limited to the risk of the contractor gaining an unfair competitive advantage. [60]/ A contractor may sometimes mitigate prospective unequal access to information through implementation of an effective mitigation plan. [61]/ In some decisions, however, GAO has warned that ''a contractor's unilateral efforts to implement a mitigation plan'' are insufficient—some government involvement is required. [62]/ Importantly, there is some case law indicating that unequal access to information OCIs are ''presumed to arise'' without ''the need for an inquiry as to whether that information was actually utilized by the

[51] / *Id.* at 735-36.
[52] / *Id.* at 736.
[53] / 41 U.S.C. § 423(h).
[54] / *Pemco Aeroplex, Inc.*, B-310372, December 27, 2007, 2008 CPD ¶ 2 at 17.
[55] / *But see Litton Sys.*, B.-234060, 89-1 CPD ¶ 422, *aff'd, The Dept. of the Air Force—Request for Recons.*, B-234060, 89-2 CPD ¶ 228, 68 Comp. Gen. 677 (GAO recommended termination of contract where unsealed FBI affidavit alleged that awardee had obtained a competitor's presentation from a consultant).
[56] / *DoD Components Told to Designate Ombudsman for Procurement Integrity*, 92 FCR 253, Oct. 3, 2009.
[57] / *See Aetna Gov't Health Plans, Inc.*, B-254397 et seq., July 27, 1995, 95-2 CPD ¶ 129.
[58] / *Health Net Fed. Servs., LLC*, B-401652.3; B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 28.
[59] / The two other types of OCIs are ''biased ground rules'' and ''impaired objectivity'' OCIs.
[60] / *Aetna Gov't Health Plans, Inc.*, B-254397 et seq., July 27, 1995, 95-2 CPD ¶ 129.
[61] / *L-3 Servs., Inc.*, B-400134.11; B-400134.12, Sept. 3, 2009, 2009 CPD ¶ 171 at 12.
[62] / *Id.*, citing *Johnson Controls World Servs., Inc.*, B-286714.2, Feb. 13, 2001, 2001 CPD ¶ 20 at 8.

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awardee in the preparation of its proposal.'' [63]/ In contrast to PIA violations, unequal access to information OCIs may arise from a contractor's legitimate access to NPRI as part of contract performance.

An incumbent contractor's access to information through its performance of a predecessor contract, however, does not necessarily give rise to an unequal access to information OCI because any advantage may have been fairly gained. The Court of Federal Claims decision in *ARINC Engineering Services, LLC v. United States*, 77 Fed. Cl. 196 (2007), provides the following summary of prior case law regarding when an incumbent contractor's access to non-public information may be unfair:

These cases indicate that, for an organizational conflict of interest to exist based upon unequal information, there must be something more than mere incumbency, that is, indication: (i) the awardee was so embedded in the agency as to provide it with insight into the agency's operations beyond that which would be expected of a typical government contractor; (ii) the awardee had obtained materials related to the specifications or statement of work for the instant procurement; or (iii) some other ''preferred treatment or . . . agency action'' has occurred.

Id. at 203, 204 (citations omitted).

As to unfair competitive advantages that could arise from the hiring of former government officials, GAO has considered a variety of factors, ''including whether the individual had access to non-public information that was not otherwise available to the protester, or non-public proprietary information of the protester, and whether the non-public information was competitively useful.'' [64]/ While the disqualification of an offeror need not be based on improper conduct (e.g., proof of actually using the information in proposal efforts), it must be based on ''hard facts'' establishing the former official's access to non-public information, which could provide the contractor with an unfair competitive advantage. [65]/ Mere innuendo and speculation is insufficient to support a claim of unfair competitive advantage.

B. Case Law and Other Developments One of the most prominent recent developments in this area involves GAO's decision in *Health Net Federal Services, LLC,* B-401652.3; B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220. In *Health Net*, which involved the award of a multi-billion dollar Department of Defense TRICARE contract for managed health care support services, the protester argued that the awardee should have been excluded from the competition based on an alleged unfair competitive advantage gained by hiring a former top-level government employee. According to the protester, the awardee had hired the former Chief of Staff to the Director and Deputy Director of TRICARE Management Activity (TMA), who allegedly had access to non-public source selection information, proprietary information with respect to the protester's performance of its incumbent TRICARE contract, and non-public source selection and proprietary information of the two principal subcontractors proposed by the rival firms. The protester further alleged that the former government official had assisted the awardee with the preparation of its proposal.

GAO ruled that the responsibility for determining whether to allow an offeror to continue to compete in the face of an appearance of an unfair competitive advantage resides with the contracting agency, whose decision will not be disturbed unless determined to be unreasonable. In this case, the agency's contracting officer neither investigated nor considered the allegations in the case. Although the former government official had received several ''clean letters'' from agency ethics officials indicating that no ethics rules would be violated by the former official's proposal efforts, at least one of the letters made it clear that the ethics opinion was independent from the contracting officer's authority to safeguard the integrity of the procurement process. The letter further provided that the contracting officer should be consulted regarding the appropriateness of the former official's planned activities. GAO found, however, that ''the matter was never raised with the contracting officer, thereby depriving him of an opportunity to address any such concerns in advance of the competition.'' [66]/ GAO also found that ''there were no specific procedures established by [the awardee], e.g., a firewall, to limit the individual's participation in other aspects of proposal preparation.'' [67]/

GAO held that the ''hard facts'' established a *prima facie* case that an appearance of an unfair competitive advantage was created through the awardee's use of the former government official. Specifically, the facts established that the former official had participated in government meetings concerning the Government's policy and goals for the procurement, received data that included non-public price and cost information of the incumbent contractors, and received information regarding incumbent contractor staffing levels. Moreover, the former official continued to have access to, and did indeed access, his government e-mail account after he began working for the awardee.

GAO sustained the protest and recommended that the contracting officer perform a thorough review regarding the former official's access to NPRI ''and determine what actions, if any, should be taken to address the appearance of impropriety, if any, stemming from the individual's participation in the preparation of the awardee's . . . proposal.'' [68]/ Ultimately, as part of its re-evaluation, the agency excluded the original awardee's proposal from further consideration, culminating in the loss of a contract valued up to $17 billion. [69]/

Notably, during the protest GAO rejected the awardee's and Government's defense that the protester's argument was in essence an untimely PIA argument. As discussed above, the PIA precludes bid protests based on PIA violations except where information pertaining to the violation is brought to the agency's attention within 14 days. GAO ruled that PIA and unfair competitive advantage allegations are not co-extensive, and that ''allegations dealing with apparent unfair competitive advantages do not turn on prohibited behavior, and . . .

[63] / *Health Net*, B-401652.3; B-401652.5 at 28 n.15.

[64] / *Health Net,* B-401652.3; B-401652.5 at 29 (citations omitted).

[65] / *Id.* (citations omitted).

[66] / *Id*. at 32.

[67] / *Id.* at 32 n.18.

[68] / *Id.* at 36.

[69] / Hartford Business Journal Online, *Aetna Loses Billion-Dollar TRICARE Contract*, May 5, 2010 (available at http://www.hartfordbusiness.com/news13059.html).

. arise without regard to the good faith behavior of all parties.'' [70]/

In this regard, GAO's decision in *Health Net* should be compared to its earlier 2009 decision in *Honeywell Technology Solutions, Inc.*, B-400771; B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49. *Honeywell* also involved the hiring of a former government official as a consultant on the procurement that led to the bid protest. [71]/ Honeywell argued that the former official's work for the awardee violated the PIA and gave the awardee an unfair competitive advantage. [72]/ Although Honeywell did not report the alleged procurement integrity violations to the Government within 14 days of learning of them, it argued that the protest was timely to the extent that the awardee gained an unfair competitive advantage. [73]/ GAO rejected that timeliness argument, holding that Honeywell's unfair competitive advantage arguments were premised on the underlying alleged procurement integrity violations. [74]/

The differing results in *Honeywell* and *Health Net* might be explained by the GAO's views regarding the underlying procurement integrity violations. While the government officials in both cases were alleged to have access to non-public source selection sensitive information about the procurements, the protester in *Health Net* did not specifically allege a PIA violation or contend that the official ''knowingly'' disclosed PIA-covered information. [75]/ In an attempt to reconcile the decisions, GAO stated that the *Honeywell* decision only addressed allegations of an ''unfair competitive advantage'' as a necessary element of a procurement integrity allegation ''since it relates to the resulting prejudice.'' [76]/ GAO therefore appears to have made a distinction based on whether the unfair competitive advantage arguments are predicated upon an alleged PIA violation by the former government official.

The *Honeywell* case also illustrates that GAO's strict timeliness rules can pose a risk to OCI claims. In addition to the PIA violation discussed above, Honeywell alleged that two awardee employees gained access to non-public Honeywell information through the performance of another government contract. [77]/ Honeywell further alleged these employees participated in the procurement leading to the protest. [78]/ GAO noted that as a general rule, protesters are not required to assert that a firm has an impermissible OCI until that firm has won the contract. However, when a solicitation is issued on an unrestricted basis and the protester is aware of the facts giving rise to the potential OCI, ''and the protester has been advised by the agency that it considers the potential offeror eligible for award,'' the protester must file before closing time for receipt of proposals. [79]/ Because Honeywell knew of the potential OCI before award and the procuring agency had addressed the OCI through questions and answers, Honeywell's OCI protest was untimely. [80]/

A recent 2010 GAO decision illustrates that access to NPRI issues can arise in situations not typically thought of as presenting a risk. In *McCarthy/Hunt*, a design contractor for a hospital project for the Army entered into negotiations for the possible acquisition of another firm. [81]/ The two companies executed a confidentiality agreement and conducted due diligence. [82]/ During the same time period, the Army awarded a contract for the hospital construction to a firm utilizing the acquisition target firm as a subcontractor. The contracting officer was aware of a potential OCI regarding a subcontractor, but considered recusal from the Technical Review Board by the design contractor's employee that had knowledge of the potential merger sufficient to avoid any conflict. [83]/ It was not until after the protest that the CO conducted a comprehensive review of the unequal access to information issue.

GAO, however, gave little weight to the CO's post-protest analysis. [84]/ GAO found that the firms contemplating a merger had a common interest [85]/ and that the awardee may have had access to competitively useful non-public information. [86]/ In reaching the conclusion that the firms shared a common interest, GAO ruled that ''the negotiations occurred during the active phases of this procurement.'' [87]/ Further, GAO noted that the design contractor was in a position to know the Government's ''priorities, preferences, and dislikes'' and that no Government-vetted mitigation plan existed to protect such information. [88]/ Consequently, GAO held that the awardee had an unequal access to information OCI. [89]/ Based on this finding, as well as a finding that the awardee had a biased ground rules OCI, GAO recommended that the awardee be eliminated from the competition and that the Government make a new award determination. [90]/

Despite winning at GAO, the protester eventually lost the case at the Court of Federal Claims. In *Turner Construction v. United States*, —— Fed.Cl. ——, 2010 WL 2795079 (Jul. 16, 2010), the original awardee (now the protester) alleged that the Government was arbitrary and capricious in implementing GAO's recommendation. The Court of Federal Claims ruled for the protester, holding that GAO's decision lacked a rational basis. The court ruled that GAO improperly conducted a *de novo* review of the OCI issue and failed to cite, analyze, or defer to the CO's findings that no OCI existed. [91]/ Further, the court held that in two significant areas the GAO decision relied on vague allegations of potential conflict, rather than the required ''hard facts.''

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[70] / *Health Net*, B-401652.3; B-401652.5 at 30-33.
[71] / *Honeywell*, B-400771 at 7.
[72] / *Id.*
[73] / *Id.* at 8.
[74] / *Id.* at 8-9.
[75] / *Health Net*, B-401652.3; B-401652.5 at 30.
[76] / *Id.* at 31.
[77] / *Honeywell*, B-400771; B-400771.2 at 5.
[78] / *Id.*
[79] / *Id.* at 6.
[80] / *Id.*
[81] / *McCarthy/Hunt*, B-402229.2, Feb. 16, 2010, 2010 CPD ¶ 68 at 2.
[82] / *Id.*
[83] / *Id.* at 4.
[84] / *Id.* at 9 (''The contemporaneous record contains no indication that the contracting officer relied on this information from AECOM or even was aware of AECOM's arrangements.'')
[85] / *Id.* at 6.
[86] / *Id.* at 9.
[87] / *Id.* at 6.
[88] / *Id.* at 9.
[89] / *Id.* at 12.
[90] / *Id.* at 12-13.
[91] / *Turner Construction v. United States*, —— Fed.Cl. ——, 2010 WL 2795079 (Jul. 16, 2010). at *19.

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The court also disagreed with both of GAO's two main findings. First, the court held that GAO lacked a rational basis for rejecting the CO's conclusion that there was no aligned interest between the two firms. [92]/ The court criticized GAO's reversal of the CO's determination ''without highlighting any hard facts that indicate a sufficient alignment of interests.'' [93]/ Second, the court ruled that GAO failed to identify ''hard facts'' to support its conclusion that the awardee had access to ''anything of competitive worth.'' [94]/ The court held that the Government acted arbitrarily and capriciously in implementing GAO's recommendation because GAO's underlying decision lacked a rational basis. [95]/

Like *McCarthy/Hunt, L-3 Services, Inc.*, B-400134.11, B-400134.12, Sept. 3, 2009, 2009 CPD ¶ 171, involved an acquisition planning contract and follow-on work. The procuring agency initially concluded that any contractor performing the acquisition planning work could not compete for the follow-on work due to OCIs that could not be mitigated. [96]/ A year later the CO reversed his initial decision as to a subcontractor performing the planning work. The CO concluded that there existed a ''lack of a definite [OCI] being created through'' the subcontract and that the subcontractor's mitigation plan was reasonable. [97]/ That subcontractor teamed with another contractor that was awarded the follow-on work. [98]/

The protester alleged that performance of the original contract gave the subcontractor unequal access to information and created an OCI for the awardee. The Government responded that the information was not competitively useful, the information was fully disclosed to other offerors, and the mitigation plan effectively prevented the information's release. [99]/ GAO rejected each of these arguments. First, GAO concluded that the CO was unaware of the scope of the subcontractor's knowledge and could ''not reasonably conclude, with any certainty, the kinds of information that the [subcontractor] employee accessed.'' [100]/ Second, GAO concluded that if the CO did not know what information the subcontractor had accessed, there was no support for the Government's belief that all information was made public. [101]/ Finally, GAO rejected the mitigation plan as ''self-executing'' because it was not accepted by the CO until after the subcontractor's performance in the original plan had ended. [102]/

CapRock Government Solutions, Inc., B-402490, et seq., May 11, 2010, 2010 CPD ¶ 124, reflects that while unequal access to information gained through a government contract is covered by the OCI laws, a contractor may need to look to other legal authority when the subject information was obtained in connection with a *non-government* contract. The competition at issue involved performance of the Navy's Commercial Broadband Satellite Program. [103]/ One disappointed offeror protested, alleging that the awardee controlled satellites that were necessary for performance of the contract requirements. [104]/ The protester argued this gave the awardee knowledge of the other offerors' costs and created an unequal access to information OCI. [105]/ GAO rejected this argument because the protester ''did not allege that [the awardee] obtained any non-public information through the performance of a government contract.'' [106]/ GAO concluded that ''these types of negotiations between competitors do not give rise to an OCI, within the meaning of FAR subpart 9.5.'' [107]/

In terms of regulatory developments, the Defense Acquisition Regulation Council recently proposed a revision to the Defense Federal Acquisition Regulation Supplement (''DFARS'') OCI regulations that could alter the outcome of some of the cases discussed above. [108]/ Although the proposed rule purports to reflect GAO case law, it raises some concerns relevant to the topics discussed here. First, the proposed rule adopts a broad definition of contractor that includes ''all subsidiaries and affiliates.'' [109]/ As illustrated by the *McCarthy/Hunt* decisions at GAO and the Court of Federal Claims, contractor affiliation is a nuanced issue where reasonable minds can disagree. The proposed rule might curtail contracting officers' ability to conduct fact-based analyses into whether OCIs exists. Second, the proposed rule would move DoD's OCI regulations from DFARS Part 209 to DFARS Part 203. This would group OCI issues with improper conduct such as PIA violations and kickbacks. OCI issues are most appropriately considered a matter of contractor qualification, *i.e.* whether a contractor can be awarded a particular contract. Most OCI issues arise without any allegation of wrongdoing on the part of the conflicted contractor. Third, the proposed rule cautions against the ''mere appearance'' of OCIs. [110]/ This policy statement, untempered by the ''hard facts'' requirement discussed above, could encourage COs to identify OCIs where there is no risk that an offeror will benefit from non-public information.

The proposed rule also includes a contract clause that would require contractors (defined to include affiliates) to disclose conflicts of interest, including unequal access to information OCIs, if discovered after award. [111]/ The clause would only be included in contracts where the contracting officer determines the performance of the work ''may give rise to organizational conflicts of interest.'' [112]/ Contractors may have difficulty complying with this clause because disclosures would only be required if the contractor ''[h]ad access to non-public information that may provide an unfair advantage in competing for some or all of the proposed effort. . . .'' [113]/ As the OCI cases above illustrate, determining whether the non-public information gives a contractor an ''unfair advantage'' can be difficult. The penalty for

[92] / *Id.* at *18.
[93] / *Id.*
[94] / *Id.* at *21.
[95] / *Id.* at *26.
[96] / *L-3 Services, Inc.*, B-400134.11, B-400134.12, Sept. 3, 2009, 2009 CPD ¶ 171at 3.
[97] / *Id.*
[98] / *Id.* at 4.
[99] / *Id.* at 9.
[100] / *Id.* at 10.
[101] / *Id.* at 11.
[102] / *Id.* at 12.
[103] / *CapRock Government Solutions, Inc.*, B-402490, et seq., May 11, 2010, 2010 CPD ¶ 124. at 2.
[104] / *Id.* at 24.
[105] / *Id.*
[106] / *Id.* at 25.
[107] / *Id.*
[108] / 75 Fed. Reg. 20,954, April 22, 2010.
[109] / *Id.* at 20,958.
[110] / *Id.* at 20,959.
[111] / *Id.* at 20,964.
[112] / *Id.* at 20,962.
[113] / *Id.* at 20,964.

failing to disclose can be steep—the proposed rule considers non-disclosure a breach of the contract and allows for termination of the contract for default. [114]/

The DFARS rulemaking also raised concerns regarding the distinction between natural incumbent advantage and unfair access to non-public information. The proposed rule states that a ''contractor that properly had access to non-public information while performing under a Government contract, grant, cooperative agreement, or other transaction may be able unfairly to use the non-public information to its advantage to win award of a future contract.'' As addressed above, however, incumbent contractors often have access to non-public information that can give them permissible competitive advantages—a point that is not made clear in the proposed rule.

IV. MISAPPROPRIATION OF TRADE SECRETS

A. Overview Improper access to NPRI encompassing a competitor's trade secrets could give rise to additional sources of liability. One of the most common legal theories when private parties litigate NPRI–related issues is misappropriation of trade secrets. Most states have adopted laws based on the Uniform Trade Secrets Act (''UTSA''), which is a model law drafted by the National Conference of Commissioners on Uniform State Law.

The UTSA defines the term ''trade secret'' to include a formula, pattern, compilation, program device, method, technique, or process that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. [115]/

This definition is similar to the one included in the Economic Espionage Act of 1996, 18 U.S.C. §§ 1831 – 1839, which makes certain thefts of trade secrets a federal crime. [116]/

Misappropriation generally is defined to include the acquisition or disclosure of a trade secret by a person who knows or has reason to know that the trade secret was acquired through ''improper means.'' ''Improper means'' includes ''theft, bribery misrepresentation, breach or inducement of a breach of duty to maintain secrecy, or espionage through electronic or other means.'' Remedies may include injunctive relief; damages, including exemplary damages in the amount of twice the damages award and upon a finding of willful and malicious misappropriation; and attorney's fees if willful and malicious misappropriation is found.

B. Case Law Developments Improper access to NPRI may result in significant civil liability stemming from litigation. For example, in *Lockheed Martin Corp. v. L-3 Communications Corp.*, 2008 WL 4791804 (N.D. Ga. Sept. 30, 2008), the plaintiff produced and sold P-3 anti-submarine aircraft to the Republic of Korea. In 2004, the plaintiff lost a $427 million contract to refurbish eight P-3s to a rival firm. The plaintiff brought suit in U.S. district court alleging that the rival firm misappropriated its trade secretes and breached a license agreement and non-disclosure agreement.

The disputed data involved approximately 7,000 drawings that the defendant intended to use to complete the refurbishment contract. [117]/ The defendant contended that it properly obtained the drawings through its performance of other government contracts involving the P-3 aircraft. It further argued that the Government had obtained unlimited rights in the data and could provide the data without restriction. [118]/ The court, denying the defendant's motion for summary judgment, disagreed, noting that at least some of the drawings were marked with proprietary legends. The case proceeded to trial where the plaintiff won a $37 million jury verdict. Although the verdict has since been overturned based on later discovered evidence, [119]/ it demonstrates the risks inherent in using competition data—especially data marked with proprietary legends.

Innovative Technologies Corp. v. Silcott, 2008 WL 464960 (Ct. Common Pleas Oh., Feb. 01, 2008) highlights some of the risks associated when a contractor fails to determine whether disclosure of information by a competitor's former employees is authorized or involves public data. In this case, the plaintiff also received a large jury verdict against a competitor. [120]/ The plaintiff's former employees allegedly took confidential information and trade secrets, including the identity of customers and suppliers, bidding strategies, technical data, and pricing structures in violation of their confidentiality agreements. [121]/ The employees used the misappropriated data to set up their own company and help a competitor steal the plaintiff's customers. [122]/ Using the plaintiff's trade secrets, the competitor was able to win a major service contract at Wright Patterson Air Force Base that had represented a significant percentage of the plaintiff's revenue. The jury found that the salaries of the plaintiff's employees and its mapping strategies were trade secrets. [123]/ The jury awarded the plaintiff $6.5 million in compensatory damages and $17 million in punitive damages.

The trade secret cases also highlight the importance of employing reasonable efforts to maintain the secrecy of any claimed trade secrets. In *L-3 Communications Westwood Corp. v. Robichaux*, 2008 WL 577560 (E.D. La. Feb. 29, 2008), L-3 Communications Westwood Corporation (L-3) alleged that former L-3 employees violated the Louisiana Uniform Trade Secrets Act (LUTSA) by copying files from their L-3 laptops and using these files in computer software that their new company used to compete with L-3. [124]/ Although L-3 found some files on the defendants' laptops that matched L-3's source code files, the defendants explained that they had purchased some of the source code from third parties, and

[114] / *Id.* at 20,965.

[115] / Unif. Trade Secrets Act § 1(4) (1985).

[116] / In addition, the federal Trade Secrets Act, codified at 18 U.S.C. § 1905, makes it a federal crime for a government employee to disclose a person's trade secrets.

[117] / *Id.* at *3.

[118] / *Id.*

[119] / *Lockheed Martin Corp. v. L-3 Commc'ns Integrated Sys.*, 2010 WL 181779 (N.D. Ga. March 31, 2010) .

[120] / *Government Contractor Awarded $23M For Ex-Employees' Collusion With Competitor*, 89 FCR 49, Jan. 15, 2008.

[121] / *Innovative Tech. Corp. v. Silcott*, 2008 WL 464960 (Ct. Common Pleas Oh., Feb. 01, 2008).

[122] / *Id.*

[123] / *Id.*

[124] / *L-3 Communications Westwood Corp.*, 2008 WL 577560. at *1-2.

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that other portions were given to them by the. Government. [125]/ The court noted that in order to recover damages under the LUTSA, a complainant must prove: (1) the existence of a trade secret; (2) the misappropriation of the trade secret by another; and (3) actual loss caused by the misappropriation. [126]/ The court found that the defendants did not misappropriate L-3's trade secrets because L-3 did not use reasonable efforts to maintain the secrecy of its alleged trade secrets. [127]/ In reaching this conclusion, the court noted that L-3 had delivered the source code to the Government with no restrictive markings. [128]/ The court found, as a matter of law, that granting the Government unlimited rights data constitutes a failure to maintain secrecy. [129]/

V. COMPLIANCE Government contractors should ensure that they have adequate internal control and compliance systems in place to mitigate the risks posed by access to NPRI. This includes addressing access to NPRI by their own employees, consultants, and subcontractors, as well as safeguards applicable to the contractor's own competitionsensitive information. This section lists some of the controls and mechanisms that a contractor may want to consider implementing. The items listed below are not intended to represent an exhaustive list and there is no suggestion that any specific item is mandatory or constitutes an industry standard. Each contractor will want to tailor its systems based on the size and type of its government business.

Initially, a contractor's internal control and compliance systems should be tailored to the types of risks most relevant to the contractor. Some activities pose more risk than others in terms of access to NPRI. These may include, for example:

- Hiring a competitor's employee to work on proposal-related efforts, especially prior to a competition that involves a government program that the employee had worked on with his or her previous employer immediately prior to switching firms.
- Performing systems engineering and technical assistance, advisory, or other services providing input on a solicitation, definition of requirements, or oversight of competitors involving a government program that may later involve the contractor or one of its affiliates. These activities might result in an ''unequal access to information'' OCI (as well as ''biased ground rules'' or ''impaired objectivity'' OCIs).
- Teaming with a subcontractor where the subcontractor may have had access to NPRI while having input on the solicitation, government requirements, or oversight of competitors.
- Hiring former government officials to work on proposal-related efforts where the government official may have had access to NPRI pertaining to the competition. [130]/
- Accumulating competitive intelligence as part of competitive assessment activities.
- Using proposal and business development consultants who may have had access to a competitor's competition sensitive information relevant to the proposal effort.
- Teaming arrangements with another contractor where the contractor is a competitor on other programs and competition sensitive information relevant to such other programs might be exchanged under the teaming arrangement.
- Handling NPRI that has been inadvertently disclosed by government employees during a competition.

A contractor may want to address some or all of these areas depending on the level and type of activity performed by the contractor.

It is often said that a contractor's leadership must set the proper tone in terms of compliance. A ''win at any cost'' mentality must not be tolerated and ethics and compliance should be frequent topics of conversation from the top on down within an organization. Regular employee training should include real-world examples and not simply a recitation of the applicable rules. Training, as well as policies and procedures, should address issues pertaining to NPRI. Obviously, a contractor's policies should prohibit employees from requesting or receiving NPRI without proper authorization from government or third-party employees. Other aspects of an NPRI policy might include the following points:

- Information may be accepted or retained from government or third party sources only when clearly authorized.
- Disclosure and use of any third-party proprietary information should be consistent with any applicable non-disclosure agreement.
- Doubts concerning whether possession of information is authorized should be reported to an appropriate authority within the contractor, such as the contractor's legal or compliance department.
- Representations might be obtained from potential new hires that he or she does not possess any proprietary documents (either electronic or hard copy) belonging to his/her former employer or other third party and understands and agrees to abide by the PIA.
- Similar ''PIA representations'' might be obtained from consultants and subcontractor teammates that have proposal input.
- Fees paid to business development consultants should be consistent with fees paid for similar work within the industry.
- Additional ethics/PIA training should be considered for all proposal, capture, and competitive assessment team members prior to the commencement of activity on a major proposal effort. Additional measures for these team members could include ''cooling off'' periods for employees who recently worked for competitors and restrictions on competitive intelligence gathering activities.
- Newly-hired former government officials should have received an appropriate ethics advisory letter from the government. Additional measures to consider include obtaining the former government official's written statement regarding the scope of any access to NPRI relevant to his or her new duties with the contractor, firewalls, and other mitigation mechanisms. Especially in light of GAO's decision in *Health Net*, a contractor may place itself in a better position by disclosing any questions regarding NPRI issues to the appropriate contracting officer as early in the proposal process as possible.

[125] / *Id.* at *2.
[126] / *Id.* at *5.
[127] / *Id.*
[128] / *Id.* at *8.
[129] / *Id.*
[130] / In addition, the contractor will want to ensure compliance with the government's ''revolving door'' statutory and regulatory requirements.

■ OCI internal reporting and monitoring systems should address government work beyond ''biased ground rules'' and ''impaired objectivity'' types of OCIs to include work involving access to NPRI. Contractors should consider firewalls and other mitigation mechanisms where appropriate to address the contractor's access to NPRI. Also, if brought to the attention of the contracting officer early enough in the process, other mitigation measures, such as public disclosure of the information to all potential bidders, might be implemented.

Contractors should also seek to protect their own competition sensitive information. Among other things, a contractor's policies might address the content and placement of restrictive markings/legends on records (whether in hard copy or electronic form), and both physical and computer security controls over data. Policies should also address the sharing of competition sensitive information with third parties, including the use, content, and enforcement of non-disclosure agreements. Employee agreements should include appropriate terms, including appropriate confidentiality provisions. Also, employees may be reminded of their confidentiality obligations in writing as part of the exit interview process. Finally, any indications or reports that a former employee possesses or disclosed the contractor's competition-sensitive information should be pursued immediately—the PIA's provision addressing bid protests requires that reports be made within 14 days of when the contractor obtained the information supporting a possible violation.

VI. CONCLUSION The risks posed by access to NPRI are significant. As indicated by the discussion above, recent cases of improper access to NPRI have resulted in contractors being stripped of multi-billion dollar contracts and precluded from competing for major contracts, either as as a result of bid protest activity and related OCI determinations, or through the suspension and debarment process. Contractors have had large jury verdicts leveled against them, and individuals have been prosecuted under applicable federal criminal statutes. Consequently, employee access to NPRI should constitute a key compliance issue for contractors. These recent developments serve to underscore the importance for contractors to have adequate internal control and compliance systems in place that address NPRI issues.

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