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Government Contractors Can Stay Ahead in the Face of Uncertainty

October 8th, 2008

7:30 – 9:30 a.m.

The Tower Club
8000 Towers Crescent Dr.
Vienna, VA 22182

Moderator:

Doug Brown

Panelists:

Robert Burton

Tony Fuller

Terry Raney



Discussion Topics:

The Multiple Awards Schedule Panel: What will it recommend and how will your business be affected?

Audits and investigations: What's the best way to prepare for them and survive them?

Organizational conflicts of interest: How can you identify them, avoid them and/or mitigate them?

New law requiring mandatory reporting of fraud: Has Congress gone too far?

Biographies

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Robert A. Burton

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PRACTICE FOCUS

Robert A. Burton is a nationally-recognized federal procurement expert, who focuses his practice on assisting government contractors navigate the complex and rule-driven procurement process. He represents companies that conduct business across the entire spectrum of the federal government, from the largest defense manufacturers and systems integrators to small businesses that provide products and services to the government.

A thirty-year veteran of procurement law and policy development, Mr. Burton served in the Executive Office of the President as Deputy Administrator of the Office of Federal Procurement Policy (OFPP), the nation's top career federal procurement official. He also served as Acting Administrator for a total of two years during his seven-year tenure at OFPP. Prior to joining OFPP, Mr. Burton served as a senior acquisition attorney in the Department of Defense (DoD), supporting the acquisition and management of large weapon systems contracts. Throughout his career, he has displayed an ability to effectively work with industry, the military services, the civilian agencies, and Congress.

CLIENT BENEFITS

As a result of his extensive background in procurement law and policy, Mr. Burton is uniquely positioned to assist clients in resolving contract problems and policy issues with the federal agencies and Congress. He is also especially well-suited to assist clients with suspension and debarment proceedings, contract cost disputes, internal corporate investigations, and corporate compliance and ethics programs.

As Deputy Administrator of OFPP, Mr. Burton was responsible for the government's acquisition policy and procurement guidance to all Executive Branch agencies. His office was charged with developing policy affecting more than \$400 billion in annual federal spending – a figure that doubled during Mr. Burton's time in office as a result of

EDUCATION

University of Virginia, J.D.,
1979

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College of William and Mary, B.A.,
magna cum laude,
1976

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Harvard University, John F.
Kennedy School of Government,
Senior Executive Fellows Program,
1994

.....
Office of Personnel Management,
Federal Executive Institute, 1989

BAR ADMISSIONS

District of Columbia

.....
Virginia

AREAS OF PRACTICE

Government Contracts

the Iraq War and other major events.

At OFPP, Mr. Burton was instrumental on a number of fronts, including preparing the Administration's policy positions and testimony on proposed acquisition legislation; working with House and Senate committees on the development of acquisition reform proposals; and serving as a principal spokesperson for government-wide acquisition initiatives. He also served as the Executive Director of the Chief Acquisition Officers (CAO) Council. The CAO Council is comprised of the Chief Acquisition Officers from each federal agency. Mr. Burton also managed the activities of the Federal Acquisition Regulatory (FAR) Council, which has statutory authority to promulgate the government's procurement regulations.

Prior to joining OFPP in 2001, he spent over twenty years as a senior acquisition attorney with the Department of Defense. At the Defense Contract Management Agency, he negotiated the resolution of high-profile contract disputes with major defense contractors and provided advice on cost allowability issues. He served as general counsel for DoD's Defense Energy Support Center as well as associate general counsel for the Defense Logistics Agency (DLA), the DoD component responsible for purchasing most of the general supplies and services used by the military services. At DLA, Mr. Burton served as counsel to the agency's suspension and debarment official and managed the agency's fraud remedies program, working with the Department of Justice and the criminal investigative agencies to coordinate appropriate remedies in major procurement fraud cases.

ARTICLES / SPEECHES

Mr. Burton has delivered more than 100 keynote speeches on procurement topics at leading government and industry gatherings.

Mr. Burton was the co-editor of the American Bar Association (ABA) publication, entitled *Best Practices in Dispute Avoidance for Government Contracting* and a contributing author of an international publication, entitled *Integrity in Public Procurement*. He has also published articles in the *ABA Public Contract Law Journal*, *Government Contract Costs, Pricing & Accounting Report*, *ABA Procurement Lawyer*, and the *Service Contractor*.

HONORS

Secretary of Defense's Exceptional Civilian Service Award, 2008
Lifetime Achievement Award, Coalition for Government Procurement, 2007
Federal Computer Week's Top "Power Player in Procurement," 2007
Fellow, National Contract Management Association (NCMA)
NCMA Contracting Award, 2007
Federal 100 Award, 2006
Council Member, ABA Section of Public Contract Law
Chair, International Working Group on Integrity in Public Procurement
ABA Co-Chair, Accounting, Cost and Pricing Committee
ABA Co-Chair, Contract Dispute Resolution Task Force
Board of Advisors, NCMA

Beers + Cutler

Tony Fuller Partner

Tony has over 15 years experience providing a broad range of business consulting services to government contractors in many industries. He leads the Beers + Cutler's government contracts consulting practice.

Tony has helped government contractors with accounting, financial and contract compliance issues in many areas of their government business operations. He develops standard pricing models and proposal preparation procedures to improve pricing consistency and compliance with federal regulations. In addition, he performs contract compliance reviews, and he often helps contractors implement contract administration and compliance program best practices. Tony has deep expertise in all aspects of GSA Schedule contracting, including pricing analysis, proposal preparation, contract administration, compliance and audit support.

Tony also specializes in project based change management consultation to achieve a variety of compliance outcomes for his government contractor clients. His work is often in connection large, complex projects, and has involved solutions related to a broad range of risk management, systems/control assessments, business process redesign, performance measurement, communications and training. He has successfully managed cross-functional project teams consisting of information technology personnel, accounting/finance professionals, government contract experts, audit personnel and business process consultants during these projects.

Tony's government contract experience also includes large projects in connection with mergers and acquisitions, contract disputes, claims, fraud investigations, government audits and other business matters. He has formulated complex quantitative analysis related to manufacturing programs, major system integration projects and numerous other contract issues. When he works with counsel, he often quantifies economic damages, drafts and critiques expert reports, prepares and presents voluntary disclosures, facilitates settlement negotiations and otherwise support the contractor and counsel during all phases of litigation.

Tony graduated with honors from the University of California, Los Angeles where he obtained a Bachelor of Arts in Business Economics. Prior to that, Tony graduated with honors from The Defense Language Institute, Presidio of Monterey with a diploma in Arabic Language Studies.

Partner, Government Contract Industry Group

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Areas of Experience

Industry:

Professional services
Defense/Aerospace
Manufacturing
Information technology
Telecommunications
Construction
Security

Functional:

FAR/CAS consultation
Compliance program
Disputes/Claims
GSA Schedule
DCAA/OIG Audit support
Contract administration
Proposal preparation
Cost and pricing analysis
REA/claim preparation
Program/project management
Business process redesign
Enterprise-wide risk management

Education

B.A., Business Economics,
University of California, Los
Angeles

Membership

American Bar Association
(Committee Co-chair)
National Contract Management
Association
Project Management Institute
Professional Services Council

TERRY RANEY, PhD

Dr. Raney is Senior Vice-President and Division Group Manager of the Business Management Division of CACI International, Inc. This Division provides program management, security program management and contracting support services and consulting to over 40 different Federal civilian and Department of Defense agency customers. He has over 35 years of acquisition, contracting and professional academic experience including service as the Acting Associate Deputy Assistant Secretary (Contracting) for the Air Force. He was Chief of Contract Policy for the Air Force for four years and was the Air Force Policy Member of the Defense Acquisition Regulations (DAR) Council. While on the DAR Council he chaired the joint Federal agency committee responsible for drafting and implementing Federal Acquisition Regulation (FAR) Part 12, Commercial Items Acquisition. His contracting experience includes service as a warranted contracting officer at the major weapons system, the defense contractor plant representative and operational contracting levels. He was a professor and department chairman at the Defense Systems Management College and was also the course director for the Advanced Program Management Course (APMC). Dr. Raney also served as the Deputy Department Head of the Department of Economics and Geography at the Air Force Academy where he was an assistant professor of economics and Director of Acquisition Research. He holds a PhD in economics from Georgetown University. He is a member of the National Contract Management Association (NCMA) Board of Advisors and co-chair of the Professional Services Council Acquisition Policy Committee and has spoken regularly at national acquisition and contract management conferences. He is also a guest lecturer at Defense Acquisition University and civilian agency senior contract management courses.



DOUGLAS T. BROWN

SENIOR VICE PRESIDENT AND GROUP MANAGER
GOVERNMENT CONTRACTORS GROUP
PNC BANK, GREATER WASHINGTON

Doug is the Senior Vice President and Group Manager for a specialized group of lenders that focuses on Government Contractors within PNC's Corporate & Institutional Banking Group.

He has over 25 years experience in Corporate lending, the last 15 of which has been specializing in Government Contractors wherever they may be located. This specialized group handles a wide variety of companies that vary in size, geography, technology and agencies of the Federal Government. His banking experience includes middle market, special assets, asset based lending and corporate banking.

Doug earned a B.A. degree from American University and completed graduate studies from The Stonier Graduate School of Banking.

He serves on the Board of Spherix, a local public company in the Biotech business, is the Treasurer of the Montgomery County Chamber of Commerce and has served on the Boards of several Not-For-Profit organizations. Mr. Brown is a local Washingtonian and lives in Kensington, MD.



William L. Walsh, Jr.

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PRACTICE FOCUS

Bill Walsh concentrates his practice in business counseling and litigation with an emphasis on commercial and government contract-related matters. He represents clients locally, nationally, and internationally in issues including litigation and bid protests before federal and state courts, the U.S. General Accounting Office, Federal Boards of Contract Appeals, and executive agencies on contract administration matters, contract claims and disputes, contract terminations, teaming agreements, contractor qualification issues, conflict of interest issues, protection of intellectual property rights, government socio-economic programs, and small business matters.

CLIENT BENEFITS

Mr. Walsh has 30 years of federal and state government contract experience and extensive knowledge and skills in this complex area. Mr. Walsh's legal career began as a lawyer with the DOD on government contract and legislative issues. Mr. Walsh also served as Chief Counsel for NASA's Marshall Space Flight Center.

In the past few years, Mr. Walsh has assisted several clients in pursuing claims before the General Accounting Office and Armed Services Board of Contract Appeals. He has served as lead counsel on numerous significant protest matters involving, collectively, several billion dollars in contract value. He has also participated in several substantial prime-subcontractor disputes in federal district court, as well as a number of qui tam and related civil false claims matters.

ACTIVITIES

An active member of the business community, Mr. Walsh serves on the board of directors for the Fairfax County Chamber of Commerce and served as its general counsel, and is a former chair of the Government Affairs Committee of the Northern Virginia Technology Council. Recent activities include serving as chair of the Small

EDUCATION

Catholic University, J.D., 1968
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Boston College, B.S., 1965

BAR ADMISSIONS

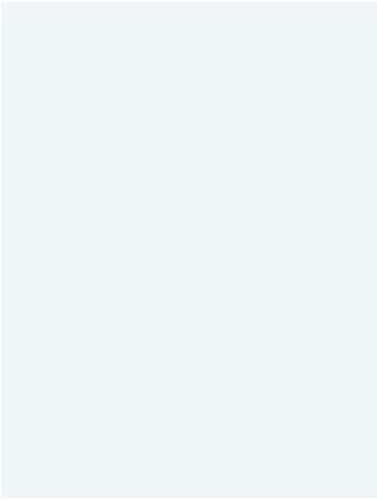
District of Columbia
.....
Virginia

AREAS OF PRACTICE

Government Contracts

INDUSTRIES

Corporate Governance and
Investigations
.....
Government Contractor Services



Business and Federal Regulations Committees of the American Bar Association, Public Contract Law Section, membership in the Professionalism Committee of the Virginia State Bar Association, membership on the Advisory Board of the National Center for Technology and the Law, and membership on the advisory board of George Mason University School of Management. He is also a member of the American, Federal, Virginia, District of Columbia, Fairfax County, and Arlington County bar associations.

PUBLICATIONS

Mr. Walsh has presented and written on a broad range of contracting issues, from teaming arrangements to bid protests and contract disputes, to winning "best value" procurements and avoiding pitfalls in federal supply service contracting.



J. Scott Hommer, III

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PRACTICE FOCUS

Scott Hommer concentrates his practice in business counseling and litigation with an emphasis on technology companies and government contractors. He represents clients locally, nationally, and internationally on issues including negotiating contracts, acquisitions, protecting intellectual property rights, and litigating successfully. Mr. Hommer also has significant experience in counseling clients who do business with the Federal, state and local governments and has represented clients on contract administration matters, contract claims and disputes, bid protests, contract terminations, teaming agreements, conflict of interest issues, intellectual property rights issues, government socio-economic programs, and small business matters.

CLIENT BENEFITS

Mr. Hommer is committed to developing relationships with his clients that go beyond the usual role of legal advisor. He works closely with his clients on a pro-active basis, developing strategic plans and managing legal issues that may arise, and more importantly, identifying potential problems before they develop. This approach is not only smart, but is efficient, cost effective, and significantly enhances opportunities for success.

ACTIVITIES

As testimony to his commitment to community service, Mr. Hommer was nationally recognized when he received the "Distinguished Leadership Award" from the National Association for Community Leadership, and was locally recognized when he was named a "Community Champion" by Volunteer Fairfax. He is a proud recipient of the Outstanding Alumni Award from Penn State's College of Liberal Arts and Department of Political Science, a recipient of Venable's Pro

EDUCATION

Georgetown University Law Center, J.D., 1987

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Pennsylvania State University, B.A. (with high distinction), 1983

BAR ADMISSIONS

Virginia

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Pennsylvania

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District of Columbia

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U.S. Supreme Court

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U.S. Court of Appeals for the District of Columbia Circuit

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U.S. Court of Appeals for the Federal Circuit

.....
U.S. District Court for the District of Columbia

.....
U.S. District Court for the Eastern District of Virginia

.....
U.S. District Court for the Western District of Pennsylvania

.....
U.S. Court of Federal Claims

AREAS OF PRACTICE

Government Contracts

INDUSTRIES

Government Contractor Services

Bono Lawyer of the Year award, a 1991 graduate of the annual "Leadership Fairfax" program, and he devotes time to his community in many ways. For example, he is a member of the Executive Committee and Board of Directors of the Northern Virginia Technology Council (NVTC), and he is serving in his fourth elected term as the General Counsel to NVTC. He is a member and participant in Leadership Fairfax, Inc. and the Metro Washington Chapter of the Penn State Alumni Association. Previously, Mr. Hommer was elected to be General Counsel to the Equal Footing Foundation, and he has served as a member of the NVTC's Senior Advisory Board. He has been the Chairman of Special Olympics of Fairfax County, a member of the board of directors of Ronald McDonald House of Northern Virginia, a member of the Advisory Board of Fairfax Futures, and President of the Volunteer Center of Fairfax County. In 2001, Mr. Hommer was appointed to the Virginia Legislature's Advisory Committee on Virginia's Critical Infrastructure; in 2002, he was appointed to the Virginia Legislature's Advisory Committee on Intellectual Property; and in 2004 he was appointed to the Virginia Legislature's Advisory Committee on Integrated Government. In 2003, Virginia's Governor appointed Mr. Hommer to judge the Governor's Technology Awards. His other activities include the Fairfax County Chamber of Commerce, the Professional Services Council, and the National Contract Management Association. Through his involvement with the Fairfax County Chamber of Commerce, Mr. Hommer was one of the first to work on developing a regional high-tech council, which is now known as the NVTC.

Prior to entering law school, Mr. Hommer served as a Legislative Assistant and Press/Media Aide to United States Congressman Bud Shuster (Pennsylvania, 9th District).

Additional Materials

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Prepared by:

Bill Walsh

Scott Hommer



Organizational Conflicts of Interest

Perspectives

- "Organizational conflicts of interest are a disease that a decade ago were rare and now in Washington are an epidemic," Professor Charles Tiefer, University of Baltimore School of Law. Robert O'Harrow Jr., *Potential for Conflict Grows With Government's Use of Contractors*, Wash. Post, Aug. 18, 2008, at D3.



Organizational Conflicts of Interest

Perspectives

- "The federal government's increased use of a dependence on outside contractors to perform essential government functions often entails providing those contractors with governmental, business proprietary and otherwise private information to perform their duties. ... Establishing the parameters of access to and use of this information will be among the most important decisions that the [courts] will make in the next few years – not only for government contract jurisprudence, but to maintain competition in this growing segment of the economy." *Axiom Resources Management, Inc. v. United States*, 78 Fed. Cl. 576 (2007) (citing Ralph C. Nash, *Organizational Conflicts of Interest: An Increasing Problem*, 20 No. 5 Nash & Cibinic Report Para 24 (May 2006)).



OCI Legal Developments

AT&T Government Solutions, Inc., B-400216, Aug. 28, 2008

- Protest of AT&T's disqualification, due to a perceived OCI, under an RFP issued by the Dept. of the Navy for information operations support services.
- AT&T's contention was sustained by the GAO, citing that the agency improperly failed to consider the OCI mitigation plan included in AT&T's proposal; unreasonably concluded that AT&T would evaluate its own products; and improperly failed to give AT&T notice of and an opportunity to respond to the agency's OCI concerns prior to its disqualification.



OCI Legal Developments

United States v. Sci. Applications Int'l Corp., 502 F. Supp. 2d 75 (D.D.C. 2007) ("SAIC I")

- Government complaint premised on the nondisclosure of impaired objectivity OCI as required of SAIC under two contracts with Nuclear Regulatory Commission related to SAIC's relationship with a trade association.
- SAIC moved to dismiss and moved for summary judgment, arguing it was required to disclose only contractual or consulting relationships that presented an OCI. The motion to dismiss and the motion for summary judgment were both denied.



OCI Legal Developments

United States v. Sci. Applications Int'l Corp., 555 F. Supp. 2d 40 (D.D.C. 2008) ("SAIC II")

- SAIC held to have violated the False Claims Act ("FCA") by improperly certifying that it had no OCIs under NRC contract.
- Though express certification of no OCIs was only required once during contract performance, under the doctrine of "implied certification," each invoice submitted to the government constituted a FCA violation.
- Subsequent jury verdict entered, finding SAIC liable for nearly \$2 million in false claims submitted to the government. Civil False Claims Act liability includes treble damages, and fines of \$5,000 to \$10,000 for each false claim.



OCI Legal Developments

United States v. Sci. Applications Int'l Corp., 555 F. Supp. 2d 40 (D.D.C. 2008) ("SAIC II") (continued)

- The Department of Justice commented in its pleadings:
 - "If SAIC has an OCI Relationship to disclose it is not enough to simply bury it in the text of a Technical Proposal. If there is an OCI Relationship, it is not [the Nuclear Regulatory Commission's] obligation to find it." Robert O'Harrow Jr., *Potential for Conflict Grows With Government's Use of Contractors*, Wash. Post, Aug. 18, 2008, at D3. Washington Post (Aug. 18, 2008).





OCI Legal Developments

U.S. ex. rel. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908 (4th Cir. 2003)

- Defendant, a Department of Energy contractor, worked with employees from another company - General Physics Corporation ("GPC") - to develop training plan for radioactive waste storage facility. Contractor subsequently awarded subcontract to run the training program to GPC.
- Jury determined this created an OCI; further found that contractor impliedly made false certifications that no OCIs existed each time it submitted an invoice to the Government. The district court then assessed a penalty of \$7,500 as to each of the twenty-six funding requests, for a total penalty of \$195,000.



OCI Legal Developments

U.S. ex. rel. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908 (4th Cir. 2003) (continued)

- United States Court of Appeals for the Fourth Circuit held on appeal that the contractor had acted with the requisite scienter since at least one employee knew of facts that made the no-OCI certification false. This was regardless of whether that employee knew the contractor was submitting the no-OCI certification.
- The court found that FCA liability attached despite the fact that the employee who actually submitted the no-OCI certification lacked any knowledge of the OCI.



OCI Legal Developments

Protest of Ribeiro Construction Co., Inc., ODRA Docket No. 08-TSA-31, Aug. 11, 2008

- FAA's Office of Dispute Resolution for Acquisition denies protest alleging that awardee improperly certified that it had no OCIs in competing for a contract to construct a TSA baggage screening facility
- OCI allegations arose from awardee's past dealings with TSA officials, participation in an industry working group, and earlier work on high-level screening facility concepts.
- Solicitation required disclosure of information:
 - *"which concisely describes all relevant facts concerning any past, present or currently planned interest, (financial, contractual, organizational, or otherwise) relating to the work to be performed and bearing on whether the offeror or contractor has a possible OCI."*



OCI Legal Developments

Protest of Ribeiro Construction Co., Inc., OIRA Docket No. 08-TSA-31, Aug. 11, 2008 (continued)

- OIRA denied protester's OCI allegations:
 - Record lacked substantial evidence that awardee's work with the industry group, prior dealings with TSA officials, or earlier work on screening facility concepts resulted in an unfair competitive advantage
 - Any advantage enjoyed by the awardee was akin to an incumbent's advantage
 - Any OCI-related issues were addressed and mitigated by the contracting officer throughout the course of the procurement



OCI Legal Developments

Axiom Resource Management, Inc., B-298870, Jul. 12, 2007 ("Axiom I")

- Protest of Army's award of task order to Lockheed Martin for program management support services for the TRICARE Management Activity.
- RFQ for task order differentiated between "purchased care" (i.e., services directly to TRICARE beneficiaries) and "non-purchased care" (i.e., services in support of TRICARE mission, provided under 3 different categories); task order for work under non-purchased care under program support category. Army determined Lockheed had no OCIs related to non-purchased care, but had potential unfair competitive advantage for further purchased care work, which could be mitigated.
- Protest denied by GAO, holding that the Army had properly evaluated potential unequal access OCIs.



OCI Legal Developments

Axiom Resource Management, Inc. v. United States, 78 Fed. Cl. 576 ("Axiom II")

- Court of Federal Claims held that the Contracting Officer had initially failed to identify the unfair access OCI, and had failed to properly identify and mitigate an impaired objectivity OCI in violation of FAR 9.5.
- The court held that the contracting officer's reliance on TMA policy and voluntary mitigation efforts by the awardee was insufficient to protect against potential conflicts.
- According to Judge Braden, the CO's violation of FAR 9.5 arose "by awarding the Task Order to Lockheed Martin, without developing a mitigation plan that does not afford Lockheed Martin any significant competitive advantages, is enforceable, i.e., subject to court order, and otherwise does not impose any anticompetitive effects on future competition."



OCI Legal Developments

Axiom Resource Management, Inc. v. United States, 78 Fed. Cl. 576 ("Axiom II") (continued)

- The court also requested an amicus brief from the Federal Trade Commission Bureau of Competition to advise on the following:
 - Whether Lockheed should divest existing non-purchased contracts if the award stands
 - Whether current "TMA policy" and Lockheed's voluntary mitigation efforts were sufficient to mitigate conflicts
 - Whether nondisclosure agreements that Lockheed required former Axiom employees to sign might foreclose future competition for the services at the expiration of the task order
- The FTC declined to file an amicus brief.

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OCI Legal Developments

Axiom Resource Management, Inc. v. United States, 80 Fed. Cl. 530 (2008) ("Axiom III")

- Court of Federal Claims enjoined exercise of option of TRICARE task order awarded to Lockheed Martin.
- The Army and Lockheed had proposed modifying the task order to incorporate a mitigation plan; the court recommended independent oversight by the U.S. Army Audit Agency
 - Judge Braden wrote: "the Government and Lockheed Martin's offer to incorporate the proposed mitigation plan as a modification to the contract, without affording the court the ability to insure compliance by an independent auditor, likely will prove illusory. Given the fact that the contracting officer repeatedly failed properly to identify or mitigate the OCIs at issue in this case, the court has little confidence that the CO will identify and properly mitigate potential or actual OCIs in the future."

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OCI Legal Developments

ARINC Eng'g Servs., LLC v. United States, 77 Fed. Cl. 196 (2007)

- Protester was denied injunctive relief where the contracting officer's determination that no OCI existed was not arbitrary, capricious or contrary to law. The protest alleged that the awardee, in performing prior work, obtained information critical to responding to one of the solicitation's three task orders, and the procurement was therefore tainted by an OCI.

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OCI Legal Developments

VRC, Inc., B-310100, Nov. 2, 2007

- Protest denied where the National Guard Bureaus reasonably found that an OCI existed based on the fact that an individual employed by a company with ownership ties to the protester (VRC, Inc.) was assigned to work in the NGB contracting office in connection with the procurement at issue.

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OCI Legal Developments

Alion Science and Technology Corp., B-297342, B-297022.3 Jan. 9, 2006

- Protests sustained where contracts called for ITT-ACS, a manufacturer of spectrum-dependent products, to perform analysis and evaluation and exercise subjective judgment regarding formulation of policies and regulations that may affect the sale or use of spectrum-dependent products manufactured by the awardee or the awardee's competitors and those deployed by the awardee's customers.

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OCI Legal Developments

Greenleaf Construction Company, B-293105.18; B-293105.19, Jan. 17, 2006

- Protest sustained where the Department of Housing and Urban Development failed to reasonably consider or evaluate a potential impaired objectivity OCI due to the fact that the owner of the management and marketing (M&M) services contractor in Ohio will be receiving payments from the owner of the closing agent contractor for Ohio, the activities of which the M&M contractor will oversee.

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OCI Legal Developments

Sys. Plus, Inc. v. United States, 69 Fed. Cl. 757 (2006)

- Court of Federal Claims denied protest, holding that a Department of Labor contractor's previous IT work for the agency did not give rise to an unfair competitive advantage OCI that disqualified it from the award of a blanket purchase agreement for certain IT services.



OCI Legal Developments

PURVIS Systems, Inc., B-293807.3, .4, Aug.16, 2004

- GAO bid protest sustained where the Navy failed to reasonably consider or evaluate potential impaired objectivity conflicts of interest that would be created by awardee's involvement in evaluating the performance of undersea warfare systems that have been manufactured by the awardee or by the awardee's competitors.



OCI Practical Considerations

- Impaired objectivity/bias OCIs may be more difficult to mitigate through traditional firewall protections
 - Subcontracting work in question is often acceptable to Government
 - Subcontractor deals directly with the Government, including submission of deliverables
 - Subcontractor may not disclose protected information to prime contractor and signs NDA
- Declining to seek award of a particular task order that would create a potential OCI may be feasible (particularly in multiple award ID/IQ context).

OCI Practical Considerations

Avoiding OCIs

- It is important to identify an OCI as early along in the process as possible
- Avoid, neutralize, mitigate potential OCIs prior to contract award
- A proper conflict-avoidance or mitigation plan is necessary



OCI Practical Considerations


Avoiding False Claims Act Liability for OCIs

- In light of the *Savannah River* and *SAIC* holdings, and the allegations in *Ribeiro Construction*, contractors certifying no OCIs must be vigilant of actions that may result in an OCI and must implement policies to ensure that employees share any knowledge of a potential OCI.



MANAGING compliance risk: GSA option extension

by tony fuller and bill bressette



Chances are your General Services Administration (GSA) Schedule contract may have been around longer at your company than you have. Given that the schedules are five-year contracts with three five-year options, your schedule may remain in place for up to 20 years.

Many contractors don't understand the disclosures that form the basis for their negotiated prices, but a company's failure to keep those disclosures current may expose it to audit risk and financial liability when the Office of Inspector General (OIG) comes knocking.

GSA Audit Rights

The GSA Schedules are multiple award contracts that essentially allow a company to negotiate a price for goods and services at which all federal agencies can buy. The government's intent was to streamline the procurement process by negotiating "fair and reasonable" prices at a discount from the vendor's commercial price list. Of course, the negotiation is predicated upon a current, accurate, and complete disclosure of the contractor's commercial pricing practices (i.e., full disclosure of your pricing and discounting practices to all customers or customer groups). These disclosures need to be maintained throughout the life of the contract to help the government ensure that its pricing remains fair and reasonable.

The government's audit rights generally flow from two clauses from the *Federal Acquisition Regulation (FAR)* and the *General Services Administration Regulation (GSAR)*, respectively—FAR 52.215-20, Requirements for Cost and Pricing Data or Information Other than Cost and Pricing Data; and GSAR 552.215-71, Examination of Records by GSA. The former "grants the contracting officer (CO) or an authorized representative the right to examine...books, records, documents, papers, and other directly pertinent

records to verify the pricing, sales and other data...in order to determine the reasonableness of price(s)." The latter provides the government with the right to access all records related to the GSA Schedule contract during contract performance and up to three years after final payment on the contract.

The government's audit rights are generally exercised in the form of a pre-award or post-award audit. The primary objective of a pre-award audit is to ensure that the option pricing disclosures are current, accurate, and complete so the GSA CO can effectively negotiate fair and reasonable pricing for the option extension period. A post-award audit focuses on historical contract performance, including Price Reductions Clause (PRC) compliance, Industrial Funding Fee (IFF) payment, over-billings, and compliance with other contract terms and conditions. Unfortunately, the lines of demarcation between pre-award and post-award audits can be blurred. Contractors should be aware that compliance risk associated with past performance often surfaces during pre-award audits, even though the stated purpose of the pre-award audit is to review disclosures for the future contract period.

Two key GSAR clauses carry the greatest financial risk. The first clause is GSAR 552.238-75, Price Reductions, which establishes a relationship between the GSA price and the pricing offered to the identified customer—often referred to as the basis of award (BOA) customer. The government will often begin negotiations by attempting to identify your best or most favored

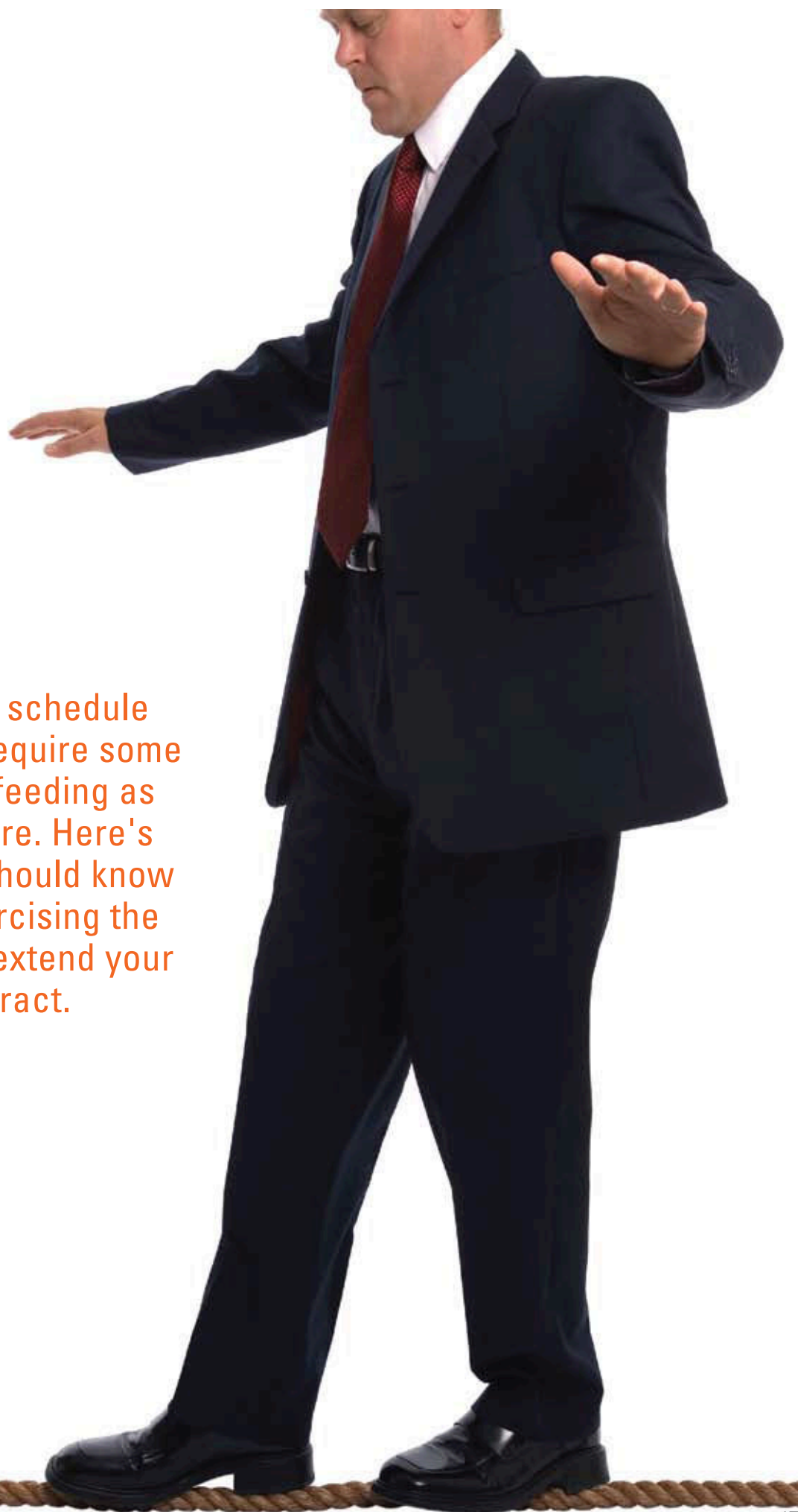
customer (i.e., the customer to which you offered the deepest discount from your list price). The contracting officer's goal is to negotiate the same or better price for the federal government. Obviously, since it is a negotiation, companies will often identify a customer or customer group that is most similar to the GSA ordering agencies. There are a number of strategies that one can use here, but some of the more common arguments center around dollar volume of sales for similar products and services. Once identified, this customer or customer group becomes the basis of award for your GSA Schedule contract.

In essence, the government defines its negotiated discount (or price) relative to what is being offered to the BOA customer. If a contractor offers a better price, discount, or concession to the BOA customer(s) that disturbs the defined discount relationship, the same deal must be offered to GSA with the same terms and conditions, and for the same period of time. If price reductions are identified by GSA during an audit, they may be applied retroactively to all GSA transactions from the time of the initial incident. In short, the dollars can add up quickly for high-volume contractors.

The second important clause is GSAR 552.215-72, Price Adjustment, Failure to Provide Accurate Information. This clause allows the government to reduce prices if it finds that a contractor failed to provide current, accurate, and complete information that the government relied upon to negotiate prices before contract award. Adverse audit findings may result in false claims allegations and a variety of undesirable outcomes, not the least of which are large financial settlements or a referral to the Department of Justice.

Critical Compliance Considerations

Given the financial risk associated with non-compliance, government contractors should look at the option extension as an opportunity to conduct a thorough compliance review and update their pricing disclosures. Such a review is often beyond the capabili-



-----> Your GSA schedule contracts require some care and feeding as they mature. Here's what you should know about exercising the options to extend your contract.

ties of in-house resources, and retaining outside experts helps ensure that a thorough and objective review is performed that will minimize future compliance risk.

Perform a Broad GSA Schedule Compliance Assessment

This is an ideal time for contractors to revisit all key areas of GSA Schedule compliance, particularly in the areas of PRC and quarterly sales/IFF administration. Contractors should take the time to test the preventive and detective controls established within their systems to ensure that they are working as planned. Preventive controls are typically system controls designed to ensure a company follows an established policy or procedure.

One such control might consist of a required field in the order entry system that ensures sales personnel include GSA Schedule contract information at the time of order placement. This helps to identify a GSA sale up front, and gives the contractor some level of confidence in the GSA sales numbers (and consequently, the IFF remittance) that

are reported on a quarterly basis. Detective controls may, for example, include a periodic review of sales data to identify PRC triggering deals that may not have been reported. Detective controls are designed to ensure that the preventive controls—including policies, procedures, and training—are functioning as intended.

Policies and processes also should be reviewed to make certain that they adequately address the compliance concerns within the context of a contractor's current organizational structure and previous contract disclosures. Changes in business unit structure/operations, sales, or marketing practices—and certainly changes driven by mergers and acquisition—can often render an existing policy or process ineffective. For example, a contractor may have an adequate process in place for tracking all GSA contract sales in its current system. However, through acquisition, the company acquires a business unit with different systems that will not be integrated or migrated for some period of time. If this unit will make use of your GSA Schedule, it's likely that

your current process for identifying sales in your system may not be capturing GSA sales made through the newly acquired unit.

Finally, contractors should review the efficacy of their training programs and periodic internal reviews. An annual compliance review is a good way to test your policies, procedures, and training. Personnel subject to periodic training on document retention, for example, should be expected to have maintained the appropriate sales files required by your GSA Schedule contract. During an annual compliance review, validating that the policies surrounding document retention are actually achieving the desired results will do two things: (1) It will identify the gaps between policy and practice; and (2) In so doing, it will identify any weaknesses in your training program.

Conduct a Historical Pricing Review and Update GSA Pricing Disclosures

A detailed review of a company's pricing practices during the preceding 12 months will frequently reveal that discounting policies and



practices have changed, particularly if they have not been closely monitored during the contract term. It is therefore recommended that contractors not only update their commercial sales practice format (CSP-1), but that they also draft a detailed narrative carefully describing all of their standard practices as defined in written policies/procedures, and the nonstandard practices as revealed by the historical pricing analysis.

The CSP-1 format is a standard form in every GSA solicitation. While it requires you to explain all deviations from your “standard” practices, contractors often provide just enough text to answer the question. We often recommend that a comprehensive narrative be developed and attached to the CSP-1 as a material part of the pricing disclosures. This is the place to eliminate all ambiguity surrounding what you do and don’t do when it comes to your commercial customers.

The pricing narrative can also be used to eliminate any potential misinterpretation surrounding what the contractor understands the price/discount relationship to be and how the PRC compliance will be handled. This allows the contractor to disclose all pertinent information to the GSA CO and removes ambiguities that might otherwise be interpreted in a disadvantageous way in the future.

Although the compliance review and historical pricing analysis can be time-consuming, the effort pales in comparison to management’s distraction and the potential financial impact of an adverse audit report from the GSA OIG. For large contractors who are more likely to be subjected to pre-award audits, the data and analysis produced during such an internal review will help expedite the performance of the on-site portion of the audit.

Current Trends in Pre-Award Audits

Although no two audits are alike, we have observed several key trends which GSA Schedule contractors should be aware of if chosen for a pre-award audit. The following are just a few of the challenges we have observed during recent GSA OIG pre-award audits.

The lead time for OIG’s pre-award audit notification can vary significantly based on many factors, which is why it is important—especially for large, high-volume contractors—to start preparing well in advance of the expiration of the current contract term (e.g., performing the compliance and historical pricing review). In the past 12 months, we have seen notification lead times that generally range from three to four months prior to option exercise. In these cases, the OIG has expected the contractor to respond very quickly to the initial information request, and the field work has begun within a month of the letter notification.

The OIG has become increasingly inflexible with regard to the format and content of the system data it requests before beginning field work. While most companies keep the various data elements required by the OIG, they are typically not maintained in a format that is GSA “OIG-friendly.” Many contractors find themselves creating custom queries and developing reports in a format which they do not routinely maintain in order to satisfy the initial information request. OIG rarely understands the difficulties associated with these types of demands, and related delays may translate into qualifications in the audit report.

We suggest contractors spend the time up front to review the data closely before providing it to the auditors. Many elements of the initial data request letter are common to each and contractors may consider obtaining a copy of an example letter to help them prepare ahead of time.

For services contractors, OIG is particularly focused on issues related to the proper assignment of personnel to GSA Schedule labor categories. Unfortunately, many contractors overlook the importance of mapping personnel from their standard internal labor categories into the GSA Schedule labor categories. OIG looks at both the qualifications of personnel assigned as well as the pricing of those personnel to other customers.

For example, OIG might not be pleased to find that the consultant you regularly sold to the government at the GSA price of \$120

per hour was frequently sold to your commercial clients (for services similar in scope) at a discounted rate of \$100. This is an extremely challenging compliance issue that we see causing services contractors more problems than any other audit area. A best practice is to perform the labor category mapping analysis internally before the audit field work begins.

All contractors should expect more scrutiny from the auditors regarding their BOA customers. Just because a contractor was successful in negotiating a specific set of BOA customers with the CO does not mean it will pass the OIG’s review. The auditors will look closely at the BOA to assess whether it provides the foundation for ensuring that prices remain fair and reasonable during the contract term. Contractors should consider alternative, and potentially broader, BOA customer groups as a fallback position in case adverse findings surface in the auditor’s report.

In general, you can expect OIG to be looking for a very broad BOA with which you do at least the same volume of sales as you push through your GSA Schedule on an annual basis. If the BOA is limited to a few customers, or if it is limited to a small category or class of customers, you can expect OIG to be looking for a suitable replacement from the sales data you provide.

PRC compliance has always been the biggest challenge for GSA Schedule contractors. Some contractors, particularly larger contractors, have often attempted to tailor the PRC by disclosing certain exceptions that would be excluded from triggering the clause or by proposing a specific approach that may be different than the literal interpretation of the clause.

Our recent experiences indicate that the OIG auditors are looking more closely at contractors’ PRC disclosures, particularly the frequency of transactions representing “nonstandard” discounts. We recommend contractors take advantage of the option extension to beef up their disclosures so that exclusions, if any, are clearly articulated.



Finally, OIG has the tendency to communicate potential adverse findings to the GSA CO before the pre-award review is complete and the draft audit report has been generated. In some instances, OIG has gone so far as to recommend contract actions prior to the completion of its review and receipt of all requested information from the contractor. The risks here speak for themselves, and ultimately, it is incumbent upon the contractor to press for an exit conference, the opportunity to provide a management response to any findings, and to maintain good communications with their GSA CO at all times.

Conclusion

As seen in several recent high profile matters brought on by the GSA OIG and Department of Justice, the cost of noncompliance with GSA Schedule contract terms and conditions can be severe. Among the more highly publicized of these is the one in which Oracle Corporation settled False Claims Act allegations by agreeing to a \$98.5 million settlement.

All contractors, regardless of size, should be prepared for the eventuality of an audit. When the time comes to exercise the option to extend a contractor's GSA Schedule contract, they should take the opportunity to confirm that their practices are properly disclosed and that they have an effective compliance program in place. Although the additional disclosures that result may raise questions and complicate things in the near term, it will go a long way in ensuring long-term GSA Schedule contracting success. **CM**

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BEERS + CUTLER provides a wide range of government contract consulting services, including GSA Schedule proposal preparation, contract administration, compliance, and audit support.

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overview of Venable LLP

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Practice Areas	Service Offerings
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The PNC Financial Services Group (NYSE:PNC) is one of the nation's largest financial services companies with assets of \$143 billion. PNC has a diversified business mix, which includes a regional banking franchise operating primarily in eight-states and the District of Columbia, specialized financial businesses serving companies and government entities, and leading asset management and fund processing businesses.

News of the quarter: The PFPC business unit was renamed PNC Global Investment Servicing.

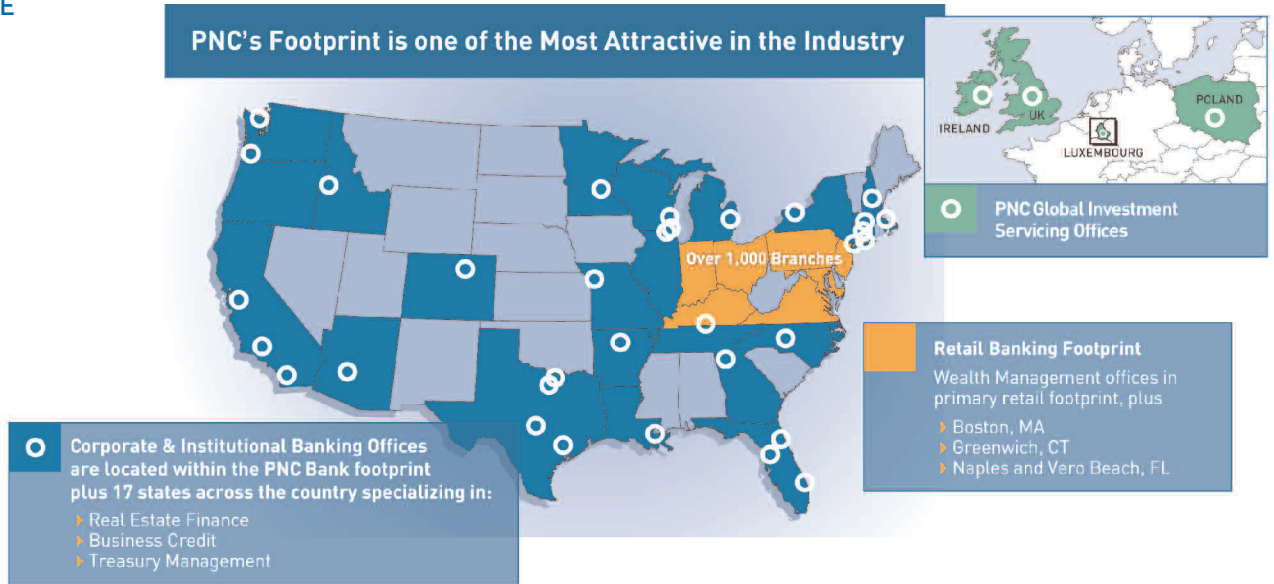
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ASSETS \$143 billion

DEPOSITS \$84.7 billion

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FINANCIAL SUMMARY

	2Q 2008	2Q 2007
Net Income	\$505 million	\$423 million
Earnings Per Share	\$1.45	\$1.22
Total Loans Outstanding	\$73.0 billion	\$64.7 billion
Total Deposits	\$84.7 billion	\$77.2 billion
Total Assets	\$143 billion	\$126 billion