



# VENABLE

## The Procurement Integrity Act: What Government Contractors Need to Know

Wednesday, January 24, 2018  
12:00 pm-1:00pm ET

**Speakers:**

**Paul A. Debolt**

Partner, Venable LLP

Co-Chair, Government Contracts Practice Group

**Emily A. Unnasch**

Associate, Venable LLP

Government Contracts Practice Group



# Agenda

- Introduction
- Procurement Integrity Act Basics
- Government Fingerprints
- PIA Reporting and Investigation Requirements
- PIA and Suspension and Debarment
- PIA and OCIs
- Gap Analysis: Questions to Ask
- Best Practices for Compliance
- Conclusion



## Background\*

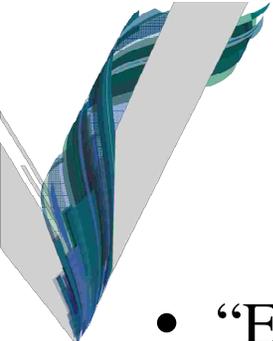
- The Procurement Integrity Act (PIA), 41 U.S.C. §§ 2101-07, implemented at Federal Acquisition Regulation (FAR) Part 3.104
- Passed in 1988 in response to a defense contracting fraud investigation called “Operation III wind.”
- Four basic provisions:
  - Prohibits Disclosing Procurement Information
  - Prohibits Obtaining Procurement Information
  - Reporting Requirement for Agency Official Contacted by Offeror or Offeror Concerning Possible Non-Federal Employment
  - Prohibits Former Official's Acceptance of Compensation from Contractor

\*The Department of Justice also provides a solid outline of the PIA at <https://www.justice.gov/jmd/procurement-integrity>.



## Prohibition on Disclosing Procurement Information

- “Except as provided by law, a person described in paragraph (3) **shall not knowingly disclose** contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.” 41 U.S.C. § 2102(a)(1).
- “Paragraph (1) applies to a **person** that—
  - (A)(i) is a present or former official of the Federal Government; or
  - (ii) is acting or has acted for or on behalf of, or who is advising or has advised the Federal Government with respect to, a Federal agency procurement; and– (B) by virtue of that office, employment, or relationship has or had access to contractor bid or proposal information or source selection information.” 41 U.S.C. § 2102(a)(3).
- *See also* FAR 3.104-3(a)



## Prohibition on Obtaining Procurement Information (cont.)

- “Except as provided by law, a person **shall not 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.” 41 U.S.C. § 2102(b).
- *See also* FAR 3.104-3(b)
- The term “person” is not defined in this section, “with the result that it appears to apply to any contractor, other business entity, or individual who obtains information even if that person is not participating in the procurement.” John Cibinic, Jr., James F. Nagle, Ralph C. Nash, Jr., *Administration of Government Contracts*, 5th ed. (2016).



## Definitions

- **“Contractor bid or proposal information”** means “any of the following information submitted to a Federal agency as part of, or in connection with, a bid or proposal to enter into a Federal agency procurement contract, if that information previously has not been made available to the public or disclosed publicly:
  - (A) Cost or pricing data (as defined in section 2306a(h) of title 10 with respect to procurements subject to that section and section 3501(a) of this title with respect to procurements subject to that section).
  - (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.”

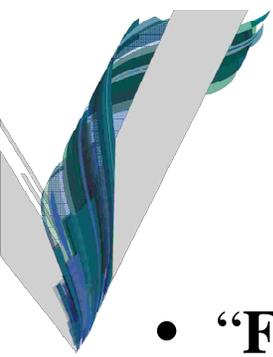
41 U.S.C. § 2101(2).



## Definitions (cont.)

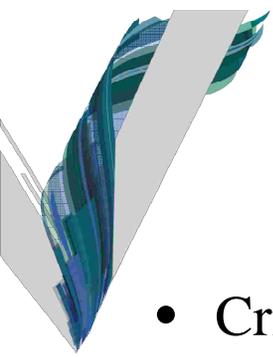
- **“Source selection information”** means “any of the following information prepared for use by a Federal agency to evaluate a bid or proposal to enter into a Federal agency procurement contract, if that information previously has not been made available to the public or disclosed publicly:
  - (A) 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.
  - (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) 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, the head's designee, or the contracting officer that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.”

41 U.S.C. § 2101(7).



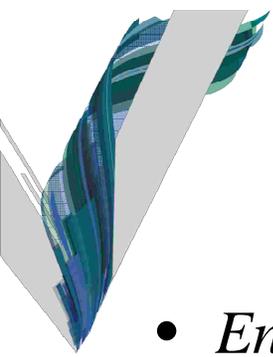
## Definitions (cont.)

- “**Federal agency procurement**” means “the acquisition (by using competitive procedures and awarding a contract) of goods or services (including construction) from non-Federal sources by a Federal agency using appropriated funds.” 41 U.S.C. § 2101(4).
- As a result of this narrow definition, “...officials who have participated in sole source procurements or contract modifications are not covered...” by the prohibitions on disclosing procurement information. *See Cibinic et al.*



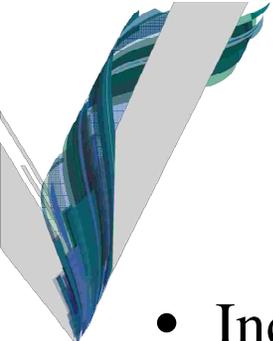
# Consequences of Violations

- **Criminal Penalties**
  - “...fined under title 18, imprisoned for not more than 5 years, or both.” 41 U.S.C. § 2105(a).
- **Civil Penalties**
  - For an individual, “...not more than \$50,000 for each violation plus twice the amount of compensation that the individual received or offered for the prohibited conduct,” and \$500,000 for an organization. 41 U.S.C. § 2105(b).
- **Administrative Actions**
  - Canceling the Federal agency procurement
  - Rescinding a contract and recovering the amount expended
  - Initiating a suspension or debarment proceeding
  - Initiating an adverse personnel action41 U.S.C. § 2105(c).



## Unfair Competitive Advantage

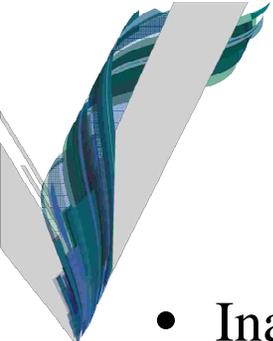
- *Engineering Support Personnel, Inc.*, B-410448, Dec. 24, 2014, 2015 CPD ¶ 89
  - “An unfair competitive advantage is a necessary element of a procurement integrity allegation since it relates to the resulting prejudice. Even where a protester shows an actual or potential PIA violation, our inquiry does not end there. Rather, the question becomes whether the alleged PIA violation created an unfair competitive advantage.”



*S&K Aerospace, LLC*

B-411648, Sept. 18, 2015, 2015 CPD ¶ 336

- Incumbent Contract Information
  - PIA prohibits release of information “before the award of a...contract to which the information relates.” 41 U.S.C. § 2102(a)(1).
  - “As we have previously held, the release of information regarding a prior incumbent contract does not meet this definition.”
  - Thus, the information must be bid or proposal or source selection information relating to the solicitation and contract at issue.



## *S&K Aerospace, LLC*

B-411648, Sept. 18, 2015, 2015 CPD ¶ 336 (cont.)

- Inadvertent Disclosure
  - PIA prohibits “knowingly” disclosing contractor bid or proposal or source selection information. 41 U.S.C. § 2102(a)(1).
  - Protester conceded that it was not alleging that the agency intentionally disclosed its proprietary information; rather, protester asserted that the release of the information was caused by the agency’s negligence.
- Inadvertent Acceptance
  - PIA prohibits “knowingly” obtaining contractor bid or proposal or source selection information. 41 U.S.C. § 2102(b).
  - Awardee’s employee unintentionally discovered pricing information in pricing matrix that agency provided; awardee alerted agency and employee was removed from proposal team.
- GAO denied protest.



# Savings Provisions

The PIA does **NOT**

- “(1) restrict the disclosure of information to, or its receipt by, a person or class of persons authorized, in accordance with applicable agency regulations or procedures, to receive that information;
- (2) *restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information*;
- (3) restrict the disclosure or receipt of information relating to a Federal agency procurement after it has been canceled by the Federal agency before contract award unless the Federal agency plans to resume the procurement;
- (4) prohibit individual meetings between a Federal agency official and an offeror or potential offeror for, or a recipient of, a contract or subcontract under a Federal agency procurement, provided that unauthorized disclosure or receipt of contractor bid or proposal information or source selection information does not occur;
- (5) authorize the withholding of information from, nor restrict its receipt by, Congress, a committee or subcommittee of Congress, the Comptroller General, a Federal agency, or an inspector general of a Federal agency;
- (6) authorize the withholding of information from, nor restrict its receipt by, the Comptroller General in the course of a protest against the award or proposed award of a Federal agency procurement contract; or
- (7) limit the applicability of a requirement, sanction, contract penalty, or remedy established under another law or regulation.” (e.g., government’s use of technical data within its rights)

41 U.S.C. § 2107 (emphasis added).



## Government Fingerprints

- GAO looks to the savings clause:
  - The PIA does **NOT** “restrict a contractor from disclosing its *own bid or proposal information* or the recipient from receiving that information.” 41 U.S.C. § 2107(2) (emphasis added).
  - GAO is not going to review private disputes. – key – state/federal court action
- COFC looks to 41 U.S.C. § 2102(b):
  - “Except as provided by law, a *person* shall not 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.”



# Government Fingerprints

## *GAO - Savings Clause*

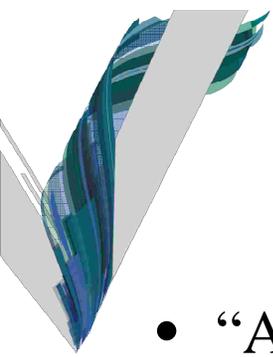
- “At base, DynCorp’s complaint is that M1 failed to abide by the terms of private agreements between the two firms. ***We have repeatedly determined that the PIA’s savings provision applies notwithstanding the fact that voluntarily provided information is subsequently misused or improperly safeguarded.*** Accordingly, DynCorp’s allegation constitutes a ***private dispute*** not for resolution by our Office and provides no basis for sustaining the protest.” *DynCorp Int’l LLC*, B-408516 *et al.*, Oct. 29, 2013, 2013 CPD ¶ 243 at 6.
- “***We have repeatedly determined that the PIA’s savings provisions apply notwithstanding the fact that the voluntarily provided information is subsequently misused or not properly safeguarded.*** Here, GEO voluntarily provided its confidential information to the CFS CEO in the course of his employment with GEO. The CFS CEO’s alleged misuse of that information in transferring it to CFS, breach of his fiduciary duties to GEO, or breach of GEO’s corporate code of ethics, are matters of a ***private dispute*** not for resolution by our Office.” *The GEO Group, Inc.*, B-405012, July 26, 2011, 2011 CPD ¶ 153 at 5



## Government Fingerprints

### *COFC – 41 U.S.C. § 2102(b)*

- The GEO Group lost at the GAO (which decided that it could not review a private dispute) and decided to seek an injunction at the COFC.
- *The GEO Group, Inc. v. United States*, 100 Fed. Cl. 223 (2011)
  - 41 U.S.C. § 2102(b) (then 41 U.S.C. § 423(b)) “*appears to apply only to current or former officials of the United States* or persons who are acting or have acted on such an individual’s behalf...this conclusion is supported by the overall structure of the statute, including the definitions of ‘bid and proposal information’ and ‘source selection information,’ both of which talk in terms of specific information obtained by a Federal agency.”
  - “The conclusion, moreover, that [§ 2102(b)] applies only to government employees and their agents derives support from the legislative history of the statute, which refers to the provision in question as applying to ‘present or former federal employees.’”
- Thus, neither the GAO nor the COFC (for different reasons) is going to consider PIA allegations where the Government did not provide or obtain the information in question.



## Reporting Requirement

- “A person may not file a protest against the award or proposed award of a Federal agency procurement contract alleging a violation of section 2102, 2103, or 2104 of this title, and the Comptroller General may not consider that allegation in deciding a protest, unless the person, *no later than 14 days after the person first discovered the possible violation*, reported to the Federal agency responsible for the procurement the information that the person believed constitutes evidence of the offense.” 41 U.S.C. § 2106 (emphasis added).

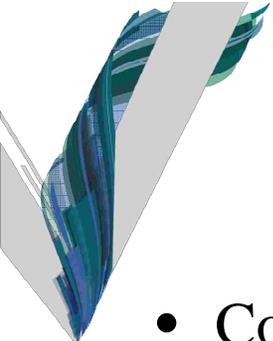


## Consequences of Neglecting Reporting Requirement

- No GAO protest because GAO’s regulations require dismissal:
  - “For any Federal procurement, GAO will not review an alleged violation of [the PIA] where the protester failed to report the information it believed constituted evidence of the offense to the Federal agency responsible for the procurement within 14 days after the protester first discovered the possible violation.”

4 C.F.R. §21.5(d) (emphasis supplied)

- But, all hope may not be lost because of PIA investigation requirements.
- *Concurrent Techs. Corp.*, B-412795.2, B-412795.3, Jan. 17, 2017, 2017 ¶ 25



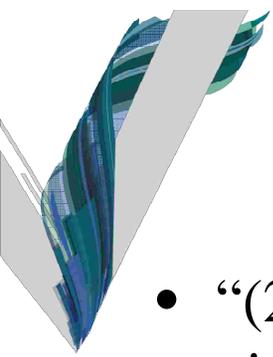
## *Concurrent Techs. Corp., B-412795.2*

- Concurrent Technologies Corporation (“CTC”) alleged that the Navy failed to investigate whether the awardee’s access to CTC’s proprietary information violated the PIA.
- Navy requested dismissal of the PIA allegation as untimely.
- GAO dismissed CTC’s PIA argument.
- Although it sought dismissal of the PIA allegation, the Navy nonetheless conducted an investigation of the allegations.
- CTC thus filed a supplemental protest *challenging the Navy’s PIA investigation*, specifically the procedural sufficiency of the investigation.



## Agency Investigation of Alleged PIA Violation

- “A **contracting officer** who receives or obtains information of a violation or possible violation of [the PIA] must determine if the reported violation or possible violation has any impact on the pending award or selection of the contractor.” FAR 3.104-7(a).
- “(1) If the contracting officer concludes that there is no impact on the procurement, the contracting officer must forward the information concerning the violation or possible violation and documentation supporting a determination that there is no impact on the procurement to **an individual designated in accordance with agency procedures.**”
  - “(i) If that individual concurs, the contracting officer may proceed with the procurement.
  - (ii) If that individual does not concur, the individual must promptly forward the information and documentation to the [**head of the contracting activity (“HCA”)**] and advise the contracting officer to withhold award.”



## Agency Investigation of Alleged PIA Violation (cont.)

- “(2) If the contracting officer concludes that the violation or possible violation impacts the procurement, the contracting officer must promptly forward the information to the HCA.”
- “(b) The HCA must review all information available and, in accordance with agency procedures, take appropriate actions, such as—(1) Advise the contracting officer to continue with the procurement; (2) Begin an investigation; (3) Refer the information disclosed to appropriate criminal investigative agencies; (4) Conclude that a violation occurred; or (5) Recommend that the agency head determine that the contractor . . . has engaged in conduct constituting an offense punishable under 41 U.S.C. 2105, for the purpose of voiding or rescinding the contract.”



## Agency Investigation of Alleged PIA Violation (cont.)

- “(d) If the HCA concludes that 41 U.S.C. chapter 21 has been violated, the HCA may direct the contracting officer to—(1) If a contract has not been awarded—(i) Cancel the procurement; (ii) Disqualify an offeror; or (iii) Take any other appropriate actions in the interests of the Government.”
- “(2) If a contract has been awarded—(i) Effect appropriate contractual remedies, including profit recapture . . . or, if the contract has been rescinded . . . recovery of the amount expended under the contract; (ii) Void or rescind the contract . . .; or (iii) Take any other appropriate actions in the best interests of the Government.”
- “(3) Refer the matter to the agency suspending or debarring official.”



## *Concurrent Techs. Corp., B-412795.2*

- CTC filed a supplemental protest challenging the Navy's PIA investigation, specifically the procedural sufficiency of the investigation.
- The GAO ultimately found that the Navy's PIA investigation complied with the FAR's procedural requirements.
- Although CTC challenged the procedural sufficiency of the investigation, it failed to challenge the reasonableness of the Navy's conclusions in its PIA investigation until six weeks later.
- Thus, the GAO dismissed the challenge to the reasonableness of the investigation as untimely because CTC did not raise the issue until more than 10 days after it received the Navy's PIA investigation report.



## *Concurrent Techs. Corp., B-412795.2 (cont.)*

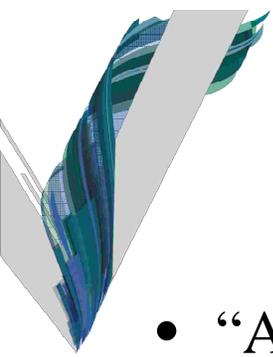
- Major Takeaways:
  - PIA violations must be raised with the agency responsible for the procurement within 14 days after first learning of a possible violation; if not, the GAO will dismiss the protest of the alleged PIA violation.
  - Even if you cannot protest a PIA violation due to failing to meet the 14-day requirement, you can still protest the sufficiency of any PIA investigation performed by the agency.
  - When protesting an agency's PIA investigation, it is critical to protest both the procedural sufficiency of the agency's investigation and the reasonableness of the agency's investigation within 10 days of receiving the investigation report, if warranted.



*Dell Services Federal Government, Inc.*

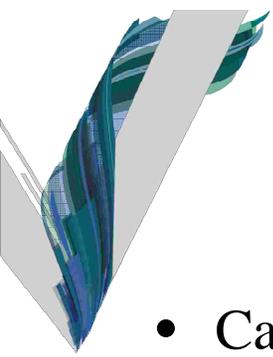
B-414461, B-414461.2, June 21, 2017, 2017 CPD ¶ 192

- Dell Services learned that a competitor gained access to its old proposals, including information relating to Dell Services' historical prices, labor rates, and staffing strategies.
- Agency concluded that possible PIA violation would have no impact in connection with ongoing acquisition.
- Dell Services protested agency's conclusion at GAO, arguing that agency failed to adequately investigate and evaluate, and failed to adequately investigate and evaluated related organizational conflicts of interest (OCI).
- GAO sustained the protest.



## PIA – Suspension & Debarment

- “A Federal agency that receives information that a contractor or a person has violated section 2102, 2103, or 2104...shall consider taking one or more of the following actions, as appropriate...Initiating a suspension or debarment proceeding...” 41 U.S.C. § 2105(c)(1)(C).



## PIA – Suspension & Debarment (cont.)

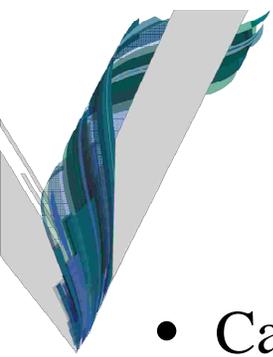
- **Case Study – MCR Federal, LLC\***
  - Air Force inadvertently disclosed source selection information to MCR during final proposal revisions, including its competitor’s bid price and technical evaluation.
  - MCR recipient immediately forwarded the attachment, without opening it, to MCR’s technical team working on MCR’s proposal.
  - Air Force called within ten minutes, but MCR did not complete containment until two days later. MCR exposed the information to more individuals during containment process. MCR also continued to allow such individuals to participate personally and substantially in developing its technical proposal.

\*Information regarding this case study obtained from 2013 Administrative Agreement between MCR and Air Force. See “Administrative Agreement,” available at <https://www.fapiis.gov/fapiis/showreportsummary.action?rctrName=MCR%20FEDERAL,%20LLC&rctrID=028509656&rctrCage=0GYV7>.



## PIA – Suspension & Debarment (cont.)

- Case Study – **MCR Federal, LLC** (*cont'd*)
  - Following investigation, Air Force suspended MCR from federal contracting and subcontracting on August 23, 2011.
  - MCR agreed that its “policies and procedures in place at the time of the alleged conduct were insufficient...” and “agreed to keep in place its voluntarily adopted Business Ethics and Compliance program (‘Program’) and to take other actions to improve this Program, and other processes...”
  - Air Force and MCR entered into Interim Administrative Agreement on September 26, 2011, and Air Force lifts suspension.
  - MCR was suspended again on October 28, 2011, following Air Force’s receipt of new information. MCR made “several significant management changes” (including replacing its President and CEO) and other process changes, and then entered Second Interim Administrative agreement on November 16, 2011.



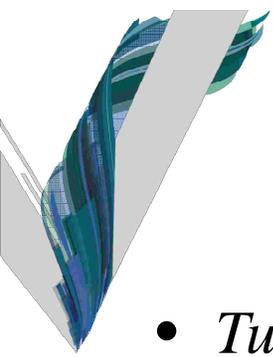
## PIA – Suspension & Debarment (cont.)

- Case Study – **MCR Federal, LLC** (*cont'd*)
  - MCR adhered to terms of Second Interim Administrative Agreement and the agreement became final on February 25, 2013.
  - Takeaways?
    - MCR was suspended, *twice*, even though “all government investigations” were ultimately “concluded without administrative, judicial, or executive action taken against MCR relating to” this issue. There need not be a criminal conviction or civil penalty under the PIA for a contractor to be suspended or debarred. Suspension & Debarment Officials apply the PIA more expansively than the GAO.
    - MCR’s suspensions resulted from its response to *the government’s* initial mistake. Contractors need to develop and be prepared to immediately implement a plan for inadvertent disclosures from the government.



## PIA vs. OCI

- “An allegation of a possible PIA violation is a serious accusation and carries a different connotation than a potential OCI. *For an OCI, a government contractor, by virtue of its contracts with an agency, may be accused of having access to or knowledge of information that gives it a competitive advantage on a new procurement.* In comparison, a possible PIA violation requires the offeror to have knowingly obtained information that the agency intended to use in evaluating proposals on the new procurement. Thus, *a PIA violation essentially requires an affirmative act by the offeror to obtain source selection information; simply having knowledge is not enough to support a possible PIA violation.* A PIA violation also appears to be founded on improper or unlawful conduct. Indeed, an offeror who knowingly obtains information for purposes of achieving a competitive advantage in violation of the PIA may be subject to criminal penalties . . . in addition to civil penalties and administrative actions.” *Jacobs Tech. Inc. v. United States*, 100 Fed. Cl. 198, 214 (2011) (emphasis added).



## Hard Facts Standard for OCIs

- *Turner Constr. Co., Inc. v. United States*, 94 Fed. Cl. 561 (2010), *aff'd* *Turner Constr. Co., Inc. v. United States*, 645 F.3d 1377 (Fed. Cir. 2011).
- “An OCI must be established by ‘*hard facts*’ that indicate the existence or potential existence of a conflict. These ‘hard facts’ do not need to show either an actual conflict or a negative impact from a conflict....The ‘hard facts’ that indicate the existence or potential existence of impropriety stand opposed to inferences based upon ‘suspicion and innuendo’” (citations omitted).



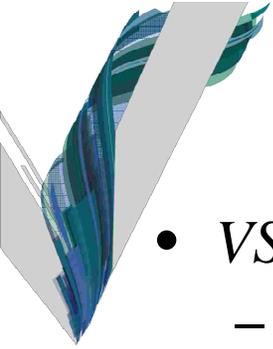
## Hard Facts Standard for OCIs (cont.)

- *AT&T Gov't Solutions, Inc.*, B-413012, B-413012.2, July 28, 2016, 2016 CPD ¶ 237.
- “A protester must identify hard facts that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. Our office has held that once hard facts establish that an actual or potential OCI exists, the protester is not required to demonstrate prejudice; rather, harm from the conflict is presumed to occur. In the context of an unequal access to information OCI, for example, the protester need not demonstrate prejudice by establishing that the awardee’s access to competitively useful nonpublic information provided an actual advantage” (citations omitted).



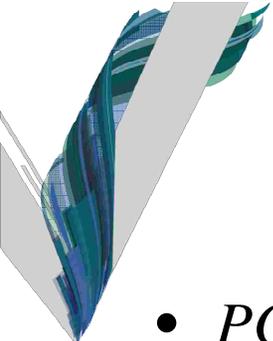
## PIA vs. Unequal Access to Information OCI

- “Except as provided by law, a [present or former official of the Federal Government] shall not knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.” 41 U.S.C. § 2102(a)(1).
- “[A]n unfair competitive advantage exists where a contractor competing for award for any Federal contract possesses—(1) Proprietary information that was obtained from a Government official without proper authorization; or (2) Source selection information...that is relevant to the contract but is not available to competitors....” FAR 9.505(b).
- “When a contractor requires proprietary information from others to perform a Government contract and can use the leverage of the contract to obtain it, the contractor may gain an unfair competitive advantage unless restrictions are imposed.” FAR 9.505-4(a).



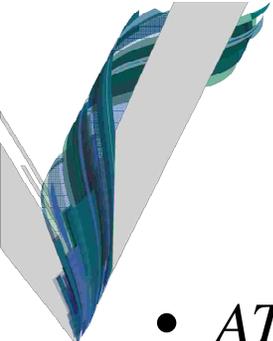
## Unequal Access to Information OCI Since *Turner*

- *VSE Corp.*, B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268
  - “As a general matter, in determining whether an offeror obtained an unfair competitive advantage in hiring a former government official based on the individual’s knowledge of non-public information, our Office 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.”
  - GAO sustained protest challenging agency’s termination of contract because record did not support CO’s determination that appearance of impropriety was created by protester’s hiring of former government employee as consultant; CO’s determination was not based on hard facts, only assumptions.



## Unequal Access to Information OCI Since *Turner* (cont.)

- *PCCP Constructors, JV; Bechtel Infrastructure Corp.*, B-405036 et al., Aug. 4, 2011, 2011 CPD ¶ 156
  - GAO sustained protest challenging CO's determination, after conducting unequal access OCI and PIA investigations, that the awardee's hiring of a former government official from the office responsible for the project that was the subject of the procurement did not create a potential conflict.
  - GAO found that the agency failed to consider the government employee's access to non-public source selection information and only focused on the responsibility and role that the employee had in the procurement.



## Unequal Access to Information OCI Since *Turner* (cont.)

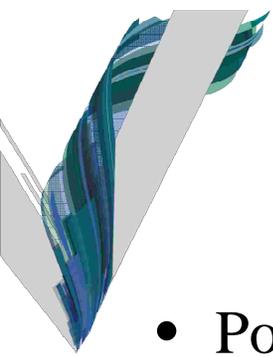
- *AT&T Gov't Solutions, Inc.*, B-413012, B-413012.2, July 28, 2016, 2016 CPD ¶ 237
  - GAO sustained protest that agency failed to adequately evaluate potential unequal access to information OCI arising from awardee's subcontractor.
  - The subcontractor was an incumbent which had provided acquisition support to the agency for the program under which the prime had now received award. The subcontractor had had access to the names of the competitive pool of vendors, including proposal team member information.
  - It was not enough that the CO determined that the prime awardee's proposal showed no evidence that it used such information from the subcontractor.



*Dell Services Federal Government, Inc.*

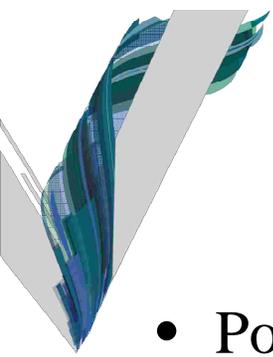
B-414461, B-414461.2, June 21, 2017, 2017 CPD ¶ 192

- Dell Services learned that a competitor gained access to its old proposals through a teaming partner, who likely obtained copies of Dell Services' proposals from the agency while working for a different government contractor on another contract.
- Dell Services argued that by gaining access to Dell Services' proprietary information, its competitor suffered from both an "unequal access to information" OCI as well as a "biased ground rules" OCI.
- GAO concluded that competitor "may have an unequal access to information OCI by virtue of having had copies of the [Dell Services] proposals and, more generally, by virtue of its teaming arrangement with [the subcontractor] that originally obtained Dell Services' proposals."



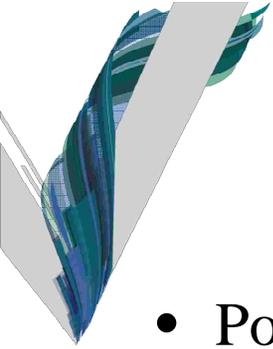
## Gap Analysis: Questions to Ask

- Policy Manuals:
  - Where can the company’s policies be found?
    - Easy to find?
    - In one volume or section of one volume?
    - If not, are there ample references in the company handbook to other policies separate from the handbook?



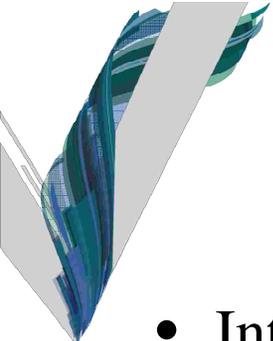
## Gap Analysis: Questions to Ask (cont.)

- Policy Manuals:
  - Are they clear?
    - Are they as jargon-free as possible?
    - Are they grounded in fundamental values?
    - Do they provide concrete examples?
  - Are they thorough and current?
    - When was the last time they were updated?
    - Who is responsible for maintaining the accuracy?



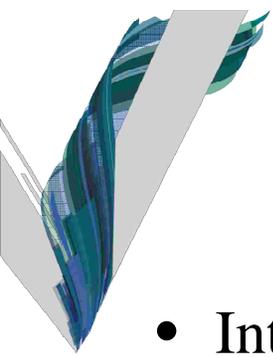
## Gap Analysis: Questions to Ask (cont.)

- Policy Manuals:
  - Do all employees have them?
    - Is a system in place to ensure that new hires receive the manuals immediately?
  - Are they available on the Web?
    - Are they available on both the company's intranet and external home page?



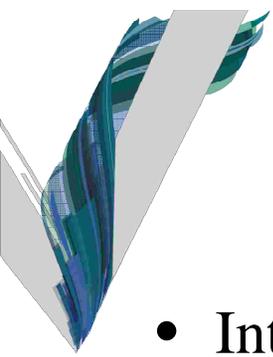
## Gap Analysis: Questions to Ask (cont.)

- Internal Control System:
  - Does the company have a clear, thorough, written procedure for responding to alleged violations?
    - When was it last reviewed and updated?
  - Is the company's ethics compliance officer independent and authorized to make decisions in response to alleged violations without management interference?
    - What is the process for investigating alleged violations of senior management?



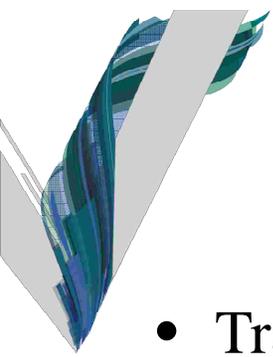
## Gap Analysis: Questions to Ask (cont.)

- Internal Control System:
  - Do employees understand the process?
    - What evidence is there that they understand it/Do they certify their understanding?
  - Are employees encouraged to use it?
    - Does the tone at the top encourage or discourage its use?



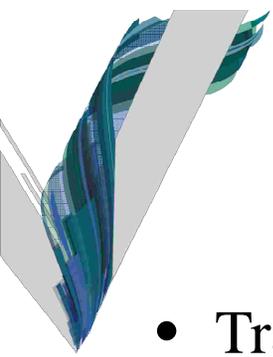
## Gap Analysis: Questions to Ask (cont.)

- Internal Control System:
  - Is the reporting of alleged violations anonymous?
    - Are employees aware that it is anonymous?
    - Have means been employed to assure employees of its anonymity?
  - Is there follow-through in investigating alleged violations and disciplining employees?
    - Is the follow-through consistent and fair?



## Gap Analysis: Questions to Ask (cont.)

- Training:
  - How often does the company have it?
    - Should it be given more often?
  - When was it last offered?
    - Was it last offered before the award of a major contract (and the inclusion of a significant number of new personnel)?
  - Have all employees, including senior management, taken it and had a chance to ask questions?



## Gap Analysis: Questions to Ask (cont.)

- Training:
  - Are handouts available?
    - Are extra copies available?
    - Are copies accessible online?
  - Have all employees certified in writing that they took it and will abide by the policies?
    - Does the company have all certifications on file?



## Best Practices for a Solid Ethics Compliance Program

- Provide the option of online training:
  - Online training is often most convenient.
- Set aside a specific time and place for training:
  - Setting aside a particular time ensures that all employees can fit the training in during working hours.



## Best Practices for a Solid Ethics Compliance Program (cont.)

- Send out periodic ethics e-mail updates or advisories:
  - Even if most employees delete them, they are reminded of the importance of ethics in the organization.
- Bring in outside counsel to review handbooks and training handouts:
  - A set of fresh eyes should ensure that company policy is in line with government expectations and industry practice.



## Best Practices for a Solid Ethics Compliance Program (cont.)

- Include real-life examples of ethics violations and how to avoid them:
  - Case studies from the news are effective in reminding employees of the consequences of even unintentional violations.
- Where appropriate, acknowledge ethics missteps:
  - Being honest about mistakes lends credence to the goals of transparency within the company.



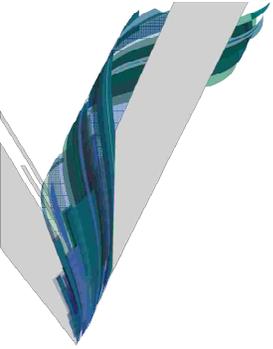
## Best Practices for a Solid Ethics Compliance Program (cont.)

- Give employees repeated opportunities to ask questions:
  - Make sure that employees are regularly able to ask questions and to do so in a variety of ways (in person, by e-mail, over the phone, submission to an anonymous drop box, etc.).
- Award prizes and otherwise acknowledge ethical behavior:
  - Acting ethically can and should be rewarded just as employees are awarded for business development, productivity, and other actions that benefit the company.



## Best Practices for a Solid Ethics Compliance Program (cont.)

- Make sure new employees are promptly given handbooks, training, and other resources:
  - New employees often fall through the cracks and must wait until the next training cycle, which may occur well after they have worked on procurements in which their knowledge of the rules is essential for full compliance.



Comments?

Questions?

**Paul A. Debolt**

Partner, Venable LLP

Co-Chair, Government Contracts Practice Group

[padebolt@Venable.com](mailto:padebolt@Venable.com)

Tel: 202.344.8384