LEGAL ADVISOR

A PilieroMazza Update for Federal Contractors and Commercial Businesses

Government Contracting

LESSONS LEARNED FROM PROTESTS INVOLVING "LATE" PROPOSALS

By Julia Di Vito

Most, if not all, proposals for government contracts are submitted electronically, whether by email or through a third party-website, such as FedConnect. However, electronic submission of proposals can face stumbling blocks due to website crashes, server blockages, and even user error. Bid protests in recent years have shed light on some of the issues with electronic proposal submission that can result in an offeror's proposal being deemed untimely even when submitted on time. These protests provide some lessons of what to do to ensure your proposal is timely, and what not to do.

The bid protests before the GAO and the Court of Federal Claims illustrate various scenarios that have befallen offerors, and how the two adjudicative bodies have treated these scenarios. The GAO and the Court of Federal Claims recognize exceptions to the typical rule that a late proposal is simply late, although they treat these exceptions differently. The Court of Federal Claims has recognized the Government Control exception, where it finds that a proposal is not "late" if the electronic proposal is received by a Government server and is under the agency's "control" prior to the deadline. This exception has been applied even when a proposal was ultimately rejected by an agency's email server, as long as it was, at some point before the deadline, received by a government server.

In general, the GAO imposes a more rigid standard for finding an exception to the "late is late" rule. The GAO has never recognized the Government Control exception in the context of submission by email. It also has resisted concluding that a government agency received a proposal when there is only a record that the offeror submitted the proposal, and no record that the agency actually received the proposal. This rule obviously creates problems for offerors protesting a rejection as untimely, because the offeror normally would not have a record of the government server receiving its submission. However, the GAO has applied the Government Control exception in a protest where the proposal reached the appropriate government personnel through the wrong method, because the agency's receipt was documented by the agency personnel contacting the offeror to notify it of the incorrect submission.

Several lessons can be learned from these protests to help prevent a proposal from being deemed late. First, it is vital that an offeror, including the person actually submitting the proposal, read the instructions for proposal submission very carefully. If submission is by email, make sure to look for specific instructions regarding the time zone for when proposals are due and the maximum file size for attachments to emails. Some government agencies have rejected proposals as over the maximum file size, even when the file size was under the limit when the email was sent. If submission is through a third-party website, make sure to review and understand how to submit proposals through that website. There have been several protests recently regarding issues caused by a failure to understand how to submit proposals through FedConnect, including submitting proposals through the messaging feature of FedConnect and uploading documents but failing to click "submit." When in doubt about the instructions, ask the agency for guidance or consider filing a pre-award protest, if the agency will not clarify ambiguous instructions.

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Next, make sure to leave enough time before proposals are due to account for any issues that arise in the submission of the proposal. For example, if an email fails to send because the file size is too large, that issue is fixable if the files can be broken down and sent in multiple emails. Some solicitations provide that the agency will notify the offeror if the proposal is received. If that is the case, make sure to submit your proposal far enough in advance to address issues in the event the agency does not confirm receipt. If there is any doubt that your proposal was received, it is best to follow up with the agency as soon as possible, as your ability to challenge the proposal being deemed late may suffer if the agency has already awarded the contract.

Lastly, if you end up in a situation where an agency rejects your proposal as untimely, reach out to the agency to find out as much information as you can. Depending on when you learn of the agency's rejection of your proposal, request a preaward or postaward debriefing and ask for a basis of the rejection. For example, did the agency receive your proposal after the deadline for submission, or not receive it at all? Even if a debriefing is not required, the agency may be willing to shed some light on why the proposal was found to be untimely.

Depending on the information received from the agency, consider filing a protest with the GAO or the Court of Federal Claims. In recent years, the Court of Federal Claims has been more receptive to this type of protest, and typically allows a protester to receive more information from the agency than would a protester before GAO. More information would be helpful if the agency's computer server received the proposal but it was rejected as too large or caught in a spam filter. Finally, consider whether you had any role in the agency rejecting your proposal as untimely. If you knew or should have known that your proposal could be untimely or submitted incorrectly, while not necessarily fatal to your protest, the GAO or the Court of Federal Claims might weigh that information in favor of the agency's rejection of your proposal. Overall, keep these lessons in mind to make sure your proposal is timely and correctly submitted, so that the agency can focus on the merits of your proposal. ❐

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Government Contracting

AVENUES FOR AVOIDING FCA LIABILITY

By Ambika Biggs

As the U.S. Department of Justice (DOJ) continues to recover billions of dollars in civil actions under the False Claims Act (FCA) each year, businesses that contract with the government would be wise to take steps to ensure they do not engage in activities that could expose them to liability under the FCA. Under the FCA, anyone who knowingly presents a "false or fraudulent" claim to the government for payment or approval or knowingly makes or uses a false record or statement material to a false or fraudulent claim is civilly liable to the federal government.

Violating the FCA can have steep consequences for government contractors: penalties ranging from $5,500-$11,000 for each violation of the FCA, and liability to the government of three times the amount of damages that the government sustained as a result of the violator's fraud. In addition, those who violate the FCA may face criminal prosecution.

The FCA enables private citizens to act as private attorneys general who can file lawsuits, known as *qui tam* actions, on behalf of the government and themselves against entities that have submitted false or fraudulent claims to the government. For successful FCA actions, these whistleblowers, who are also known as relators, can receive up to 30 percent of the recovery. Relators received $597 million in awards as a result of qui tam actions in 2015.

Most *qui tam* actions are filed by employees or former employees who allege their employers have defrauded the government. Given the amounts *qui tam* plaintiffs can receive, disgruntled employees are highly incentivized to bring FCA lawsuits. Responding to an FCA investigation or litigation can be expensive and disruptive to the operations of the company, and, if a lawsuit is successful, contractors are subject to treble damages and penalties and could face criminal proceedings. Therefore, a prudent government contractor should proactively take steps to avoid an FCA investigation or lawsuit. We recommend the following:

- Employee handbooks should include policies that prohibit employees from engaging in fraudulent activity or presenting false claims to the government.

- Businesses should provide regular training to employees regarding actions that could expose them to FCA liability. This training should be specifically tailored by job function and include realistic examples that employees can understand.

- To ensure accuracy, companies should audit invoices to the government and any other functions that could expose them to liability.

- Employers should establish internal compliance policies and procedures for employees to report any instances of suspected fraud or false claims. The procedures should allow for employees to bypass direct supervisors and report their concerns to more senior officials, in the event they believe their direct supervisors are engaging in the improper activity.

- Companies should take all employee reports about potential fraud and false claims seriously and investigate them. It often is preferable to use outside counsel that specializes in government contracts to conduct the investigation because they are knowledgeable about the pertinent regulations; conversations between the company and the attorneys are covered by the attorney-client privilege; and reliance on the advise of counsel can support a defense that the company did not knowingly present false claims to or defraud the government.

- If an investigation reveals improper actions, businesses should follow up with the employee who alerted management of the issue to inform her of the actions that were taken to rectify the problem and any changes to company policies or procedures that were made as a result. Oftentimes whistleblowers take their complaints to the DOJ because they do not believe their concerns are being adequately addressed by the company, and following up with the employee can help alleviate this problem.

- When contemplating terminating or demoting an employee, companies should make sure they have a record of all of the employee's actions that support the adverse employment action in order to rebut any assertion by the employee that the action is being taken because he engaged in protected activity under the FCA. The FCA contains a provision that prohibits employers from retaliating by taking adverse employment actions against an employee who investigates possible FCA violations, makes efforts to stop a violation of the FCA or brings an FCA lawsuit. Companies should have written policies regarding what types of activities are prohibited and could lead to disciplinary action. If an employee is disciplined or terminated for violating a company policy, having a written policy could rebut an assertion by the employee that the company retaliated against him because he investigated or reported an FCA violation.

- When violations are discovered, companies should consider reporting them to the government as soon as possible, as the FCA provides for reduced damages for violations that are reported within 30 days of when the company first became aware of them. Any such reporting should be done only after consulting with an attorney.

These tips should help minimize the risk that a company will end up facing an FCA investigation or litigation, but these are only guidelines and companies should consult with counsel for advice regarding any specific matters. In addition, government contractors should keep abreast of FCA developments, particularly in light of the U.S. Supreme Court's anticipated ruling this term in *Universal Health Services, Inc. v. U.S., ex rel. Escobar*. Currently, the circuit courts are split as to whether they recognize the theory of implied certification, under which contractors are considered to have impliedly certified that they complied with statutory, regulatory and contractual provisions to which a transaction is subject by submitting claims for reimbursement. If the Supreme Court rules in favor of the implied certification theory, the scope of the FCA could broaden and contractors would need to be even more diligent in making sure they abide by all provisions applicable to their government contracts.

If the Supreme Court rules in favor of the implied certification theory, the scope of the FCA could broaden and contractors would need to be even more diligent in making sure they abide by all provisions applicable to their government contracts.

For the latest information on this important case before the Supreme Court, follow our blog at www.pilieromazza.com/blog. ❐

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NEGOTIATING THE PROVISIONS OF YOUR OFFICE LEASE

By Josh Humi

One contract that virtually all businesses enter into is an office lease. But despite how common office leases are, the terms of different office leases vary dramatically. Business owners should be sure to fully negotiate this important contract, with a view towards protecting and maximizing the interests of their business over the full term of the lease. This article examines three office lease provisions of particular importance and negotiability: the security deposit provision, the assignment and subletting provision, and the renewal option provision.

Security Deposit

While it is beneficial to a landlord to maximize the size of the security deposit it receives from a tenant, transferring a cash security deposit to a landlord has real-world costs to the tenant. These costs include eliminating the potential use of the security deposit cash for other business purposes and putting the business at risk of unfairly losing its security deposit if the landlord acts in bad faith and does not return the security deposit. Primary points of negotiation regarding the security deposit include:

- The amount of the security deposit. The amount is often equal to a certain number of months of rent that the tenant pays under the lease.

- Whether part of the security deposit will be returned to the tenant at a certain point during the term of the lease. Some landlords will agree to return part of a tenant's security deposit during the term of a lease if the tenant has been a good tenant who has not caused an event of default under the lease. The logic behind this tenant-friendly structure is that if the tenant has been a good tenant, the amount of money that the landlord reasonably needs to protect itself is reduced. Thus, the landlord should return a part of the security deposit to the tenant during the term of the lease.

- Timing of the return of the security deposit. While it would be beneficial to a landlord for the office lease to state that it has a "reasonable" amount of time after the term of the lease to return the security deposit to the tenant, the tenant should consider insisting that the lease state exactly how many days after the end of the term of the lease the landlord has to return the security deposit. Doing so will help ensure that the landlord will not drag out the return of the security deposit.

Assignment and Subletting

As a business evolves and rides the waves of business and economic cycles, its office space needs will surely change as well. For example, while a business might enter into a lease that provides sufficient space for its current employees and some growth for more employees over the next two years, what if the business is hit by a downturn and needs to lay off some employees, thus resulting in the leased space being too large for the business? If such excess space is not sublet or assigned, it could have a harsh financial impact on the business' bottom line.

Most office leases provide that the tenant shall be able to assign or sublet the leased space, or a portion thereof, with the consent of the landlord, which shall not be unreasonably withheld. However, business owners can strategically negotiate for improved rights, including by:

- Detailing criteria under which the landlord's consent would be deemed to be "unreasonably withheld." For example, the lease can provide that the landlord would be unreasonably withholding consent to a sublet or assignment request if the proposed new tenant is financially stable and will use the space for standard office space purposes.

- Minimizing the fees that your company will need to pay the landlord for processing a sublet or assignment request. For example, the lease could provide that such fees will be limited to no more than actual expenses incurred by the landlord for reasonable due diligence and professional services, with a cap on the maximum amount that your company will have to pay.

- Providing that if a tenant who takes over the premises via an assignment or sublet ends up paying more rent to the landlord than your company would have been required to pay under your lease agreement with the landlord, the additional rent will be split between the landlord and your company.

Renewal Option

Under a renewal option of a lease, a tenant has the option to renew the lease for a new term, immediately after the end of the existing term.

When negotiating this provision with the landlord, business owners should consider a number of factors, including:

- How many renewal terms will be available to the tenant and how many years will each term last? Often times, landlords will grant the tenant the right to renew a lease for more than one term and tenants often have a good amount of negotiating room as to how many years each renewal term will last.

- Under what circumstances, if any, will the landlord be able to revoke the tenant's renewal option? In negotiations, landlords often take the position that they should be able to revoke this right of the tenant if the tenant has defaulted on any term or condition of the lease at any point during the course of the lease. However, tenants are often able to successfully push back on this position and reach an agreement with the landlord that the landlord will only be able to revoke this right of the tenant at specific times when the tenant is materially defaulting under the lease (i.e., irrespective of past defaults by the tenant which the tenant has cured).

In light of the multi-year nature of most office leases and the significant expenses associated with them, business owners should carefully review and negotiate the provisions of their proposed office leases. ❐

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Small Business

UPDATE ON SBA'S NEW ITVAR SIZE RULE

By Jon Williams

On February 15, 2016, my colleague, Cy Alba, wrote an article for our blog, *The PM Legal Minute*, "SBA Closes the Door on Resellers of Major Commercial Software," directed at IT value-added resellers (ITVARs) and discussed the major ramifications of the new rule. The rule requires ITVARs to comply with the nonmanufacturer rule when reselling IT products to the federal government under NAICS code 541519, footnote 18, which has a size standard of 150 employees. This was a 180-degree turnaround from SBA's prior position on ITVARs, which were not previously required to comply with the nonmanufacturer rule. The upshot of the new rule is that ITVARs performing small business set-aside prime contracts will now have to supply products made by small businesses, or obtain a waiver from SBA to supply products made by large businesses. SBA's new ITVAR size rule went into effect on February 26. Over the last few weeks, we have been studying the rule closely and have talked with many ITVARs and others in the industry about the implications and implementation of the new rule. There are still many unanswered questions, but the following thoughts and policy issues have crystalized so far:

- The rule should only apply prospectively, meaning it would cover procurements issued after February 26, 2016 under the ITVAR NAICS code, but would not apply retroactively to ITVAR procurements issued before February 26.

- The nonmanufacturer rule has a 500-employee size standard. By requiring ITVARs to comply with the nonmanufacturer rule under NAICS code 541519, there is confusion about whether the 150-employee size standard found in NAICS code 541519, footnote 18 is trumped by the nonmanufacturer rule's 500-employee size standard. We do not believe this was SBA's intent. Therefore, SBA should clarify that, to qualify as a small business using the nonmanufacturer rule under NAICS code 541519, a firm must have less than 150 employees.

- In a pending SBA rulemaking related to the limitations on subcontracting, SBA indicated its intent to confirm that the nonmanufacturer rule does not apply to small business set-aside procurements between $3,000 and $150,000. SBA should finalize this intention, and should go a step further to make clear that this exception to the nonmanufacturer rule includes multiple-award contract orders between $3,000 and $150,000.

- In the same pending SBA rulemaking, SBA signaled the understanding that it needs to facilitate class waivers for name brand IT products, such as software. As part of this rulemaking, the current class waiver rules should be revamped to make it easier and faster to obtain class waivers for name brand items. That way, when an agency desires only name brand items, or when only name brand items will do, it would not be necessary for the agency to go through the individual waiver process.

- SBA needs to clarify that class waivers tied to a particular manufacturing NAICS code will be applicable whenever that item is supplied under a procurement using NAICS code 541519. Because NAICS code 541519 is a services code, it is unlikely that a class waiver could be issued for this code. That is why it is necessary for existing class waivers under manufacturing codes to apply when the waived products are supplied under NAICS code 541519.

There was a recent GAO protest ruling that heightens our concern over how these policy issues will be resolved. The GAO ruling, *Manus Medical LLC*, B-412331 (Jan. 21,

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2016), found that an agency was not required to set aside a procurement for small businesses because, while there may have been at least two small business distributors of the products sought, there were not at least two small business manufacturers. GAO also found that the agency was not required to pursue an individual waiver for the contract because the decision to seek a waiver is discretionary.

Based on *Manus Medical*, and the new ITVAR size rule, we are concerned that there will be less small business set asides for ITVARs. One way to mitigate this concern would be to implement more class waivers for IT products, the existence of which an agency presumably would have to consider in determining whether to set aside a procurement for IT products.

Because this is such an important issue for the ITVAR community, we plan to continue monitoring this rule closely and will push the key policy issues with SBA and others. We held a webinar on April 12, 2016, to help resellers understand the impact of SBA's new ITVAR size rule and we gained feedback to submit to SBA. We invite you to send us your thoughts, concerns, and suggestions about this new rule to Cy Alba at ialba@pilieromazza.com and me, Jon Williams, at jwilliams@pilieromaza.com. You can watch the webinar in its entirety on our YouTube Channel at www.youtube.com/pilieromazza. ❒

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PilieroMazza News

THANK YOU, SUSAN

Susan Brock, our long-time designer and editor of *The Legal Advisor,* is retiring and this will be her last issue. Over her many years with us, we have benefitted greatly from Susan's keen eye for detail, editorial skills, and amiable spirit in making *The Legal Advisor* into the great newsletter it is today. As we build on the strong foundation Susan laid and evolve *The Legal Advisor* format in the months ahead, we will do so with much appreciation and affection for Susan and all her contributions. Thank you, Susan. We will miss you.