

Key Takeaways from the Federal Circuit's Recent Discussion of Potential Procurement Integrity Act Violations

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In a recent decision addressing an agency's response to alleged Procurement Integrity Act violations, *DynCorp International, LLC v. United States*, No. 2018-1209 (Fed. Cir. Dec. 10, 2018), the United States Court of Appeals for the Federal Circuit offered an important reminder for contractors on what to do if a competitor gains access to your proprietary information. As the decision explains, the Court of Federal Claims and GAO will afford broad deference to the contracting officer's decision about whether a Procurement Integrity Act (PIA) violation occurred, so it is vital for contractors reach out to the contracting officer early in the process to help guide the contracting officer's investigation.

In the *DynCorp* case, DynCorp alleged that a former employee shared DynCorp's salary information from an incumbent contract with a competitor, AAR Airlift Group, during a competition for the follow-on contract, and that AAR used that information in its proposal. After the Government selected AAR for award, DynCorp filed a protest—first at GAO and later at the Court of Federal Claims (COFC)—arguing, in part, that AAR should have been disqualified from the competition because of PIA violations and to avoid the appearance of impropriety.

The Contracting Officer conducted what the Federal Circuit characterized as an "exceptionally thorough review of the record," which included a review of thirty DynCorp documents determined to be in AAR's possession, of which the Contracting Officer concluded only ten contained proprietary information. For those ten documents, the Contracting Officer determined they did not contain DynCorp bid

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or proposal information that was within the scope of the PIA, and that AAR did not appear to have used the information in its proposal to gain a competitive advantage. The Contracting Officer thus found no reason to exclude AAR from the competition.

Based on this record, the Court of Federal Claims denied the protest, finding that although the "procurement was not a model of efficiency or of appropriate government acquisition policy," because of the "very high, broad standards of review and presumptions that apply to judicial review of contracting officers' decisions," there was not a basis to overturn the Contracting Officer's decision. The Federal Circuit affirmed the decision, reiterating the deference owed to contracting officers. Under the unique circumstances presented by the case, the Federal Circuit agreed that the Contracting Officer reasonably evaluated whether AAR violated the PIA and whether any appearance of impropriety tainted the procurement.

The outcome of this case provides a cautionary tale for contractors when they learn that a competitor may have gained improper access to confidential and proprietary information. As an initial matter, the PIA requires a contractor to notify the agency of a potential PIA violation within fourteen days after the contractor first discovers the violation, to provide the agency an opportunity to investigate the allegation and to preserve the opportunity to preserve the ability to pursue a protest at GAO based on the allegation. See 41 U.S.C. § 2106. Because that notice will be the predicate for the agency's investigation, analysis, and the administrative record it will develop, contractors should use the notice as an opportunity to frame the subsequent investigation. Contractors should provide all known facts, such as what information was disclosed, who has the information, how it was disclosed, and why the information is competitively sensitive. Include specific questions or concerns that the Contracting Officer's investigation should address. Because GAO and the COFC will defer to the contracting officer's ultimate decision, this notice may be the last, best opportunity to shape that investigation.

Contractors should also consider pursuing private remedies against third parties in parallel to the Government's investigation of any PIA allegations, which may include claims for misappropriation of trade secrets, theft, or fraud. For example, DynCorp pursued and settled a suit against AAR alleging theft of trade secrets. A parallel litigation path may help protect the contractor's interests if the Contracting Officer's analysis determines that there is not a sufficient procurement-related violation or remedy, as was the case in *DynCorp*. It is also notable that, although DynCorp's protests were not sustained, in exhausting its protest opportunities it continued to perform as the incumbent contractor for more than two years after filing its initial GAO protest.