

AN A.S. PRATT PUBLICATION

APRIL 2020

VOL. 6 • NO. 4

PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



**EDITOR'S NOTE: GSA CHANGES,
AND MORE!**

Victoria Prussen Spears

GSA'S BIG CHANGES FOR 2020

Merle M. DeLancey Jr.

**GAO RULES THAT *KINGDOMWARE*
"RULE OF TWO" DOES NOT GOVERN
LEASEHOLD ACQUISITIONS
CONDUCTED BY GSA ON BEHALF OF VA**

Gordon Griffin, Robert C. MacKichan Jr.,
and Amy L. Fuentes

**NEW INTERIM FAR RULE REGARDING
THE PROHIBITION ON CERTAIN
CHINESE TELECOMMUNICATIONS
SERVICES OR EQUIPMENT**

Eric S. Crusius, Christian B. Nagel, and
Kelsey M. Hayes

**SKEPTICAL 9TH CIRCUIT HEARS
INTERLOCUTORY APPEAL OF
UNPRECEDENTED DENIAL OF
GOVERNMENT MOTION TO DISMISS
FCA QUI TAM CASE**

Pablo J. Davis and Tony Busch

**DEPARTMENT OF JUSTICE SETS UP
PROCUREMENT COLLUSION STRIKE FORCE**

James W. Cooper, C. Scott Lent,
Sonia Kuester Pfaffenroth, Craig D. Margolis,
David Hibey, and Mathieu M. Coquelet Ruiz

**BREAKING DOWN DOJ'S FY2019
FALSE CLAIMS ACT RECOVERIES**

Christian D. Sheehan

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 6

NUMBER 4

April 2020

Editor's Note: GSA Changes, and More! Victoria Prussen Spears	117
GSA's Big Changes for 2020 Merle M. DeLancey Jr.	120
GAO Rules That <i>Kingdomware</i> "Rule of Two" Does Not Govern Leasehold Acquisitions Conducted by GSA on Behalf of VA Gordon Griffin, Robert C. MacKichan Jr., and Amy L. Fuentes	130
New Interim FAR Rule Regarding the Prohibition on Certain Chinese Telecommunications Services or Equipment Eric S. Crusius, Christian B. Nagel, and Kelsey M. Hayes	136
Skeptical 9th Circuit Hears Interlocutory Appeal of Unprecedented Denial of Government Motion to Dismiss FCA <i>Qui Tam</i> Case Pablo J. Davis and Tony Busch	139
Department of Justice Sets Up Procurement Collusion Strike Force James W. Cooper, C. Scott Lent, Sonia Kuester Pfaffenroth, Craig D. Margolis, David Hibey, and Mathieu M. Coquelet Ruiz	143
Breaking Down DOJ's FY2019 False Claims Act Recoveries Christian D. Sheehan	147

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Heidi A. Litman at 516-771-2169
Email: heidi.a.litman@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt).

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2020 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. Originally published in: 2015

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

PRATT'S GOVERNMENT CONTRACTING LAW REPORT is published twelve times a year by Matthew Bender & Company, Inc. Copyright 2020 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. All rights reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For permission to photocopy or use material electronically from *Pratt's Government Contracting Law Report*, please access www.copyright.com or contact the Copyright Clearance Center, Inc. (CCC), 222 Rosewood Drive, Danvers, MA 01923, 978-750-8400. CCC is a not-for-profit organization that provides licenses and registration for a variety of users. For subscription information and customer service, call 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 646.539.8300. Material for publication is welcomed—articles, decisions, or other items of interest to government contractors, attorneys and law firms, in-house counsel, government lawyers, and senior business executives. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher. POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 630 Central Avenue, New Providence, NJ 07974.

Department of Justice Sets Up Procurement Collusion Strike Force

*By James W. Cooper, C. Scott Lent, Sonia Kuester Pfaffenroth, Craig D. Margolis, David Hibey, and Mathieu M. Coquelet Ruiz**

The Department of Justice has announced the formation of a Procurement Collusion Strike Force to detect, investigate, prosecute, and deter antitrust crimes such as bid-rigging and related fraudulent schemes in the government procurement, grant, and program funding areas. The authors of this article discuss the new strike force and its implications.

Late last year, the U.S. Department of Justice (“DOJ”) announced the formation of the new Procurement Collusion Strike Force (“PCSF”) to detect, investigate, prosecute, and deter antitrust crimes such as bid-rigging and related fraudulent schemes in the government procurement, grant and program funding areas.¹ Assistant Attorney General Makan Delrahim explained at a press conference in Washington, D.C., that the PCSF will represent an interagency partnership among the DOJ’s Antitrust Division, 13 U.S. Attorneys’ Offices, Federal Bureau of Investigation investigators, and four federal Offices of Inspector General.

In establishing the PCSF, federal authorities are signaling an effort to deter and prosecute procurement collusion.

BACKGROUND

A week before the announcement, the Deputy Assistant Attorney General for Criminal Enforcement at the Antitrust Division, Richard A. Powers, spoke at the American Bar Association Public Contract Law Section’s 2019 Procurement Symposium in San Diego.

In his remarks, the Deputy Assistant Attorney General emphasized the Antitrust Division’s important mandate to protect from anti-competitive conduct not only American consumers, but also the government itself. Powers stated that the Antitrust Division seeks to safeguard taxpayer money by

* James W. Cooper (james.w.cooper@arnoldporter.com), C. Scott Lent (scott.lent@arnoldporter.com), Sonia Kuester Pfaffenroth (sonia.pfaffenroth@arnoldporter.com), and Craig D. Margolis (craig.margolis@arnoldporter.com) are partners at Arnold & Porter Kaye Scholer LLP, where David Hibey (david.hibey@arnoldporter.com) is counsel and Mathieu M. Coquelet Ruiz (mathieu.coquelet.ruiz@arnoldporter.com) is an associate. Hasan Siddiqui, who is a law school graduate employed at the firm, but not admitted to the practice of law, contributed to this article.

¹ Assistant Attorney General Makan Delrahim, Department of Justice, Remarks at the Procurement Collusion Strike Force Press Conference (Nov. 5, 2019).

detering and prosecuting bid-rigging. Powers included in his remarks that over one-third of the Antitrust Division's current open investigations relate to public procurement or other victimization of the government.²

OBJECTIVES AND PLANNED ACTIVITIES

The DOJ announced that the PCSF will represent a multi-office collaboration in which partnered prosecutors and investigators will jointly investigate and prosecute potential criminal antitrust violations in the procurement area. The PCSF will begin its task focus with the announced 13 partner U.S. Attorneys' Office districts. The DOJ Antitrust Division is designating PCSF liaisons to the 13 partner districts, while each of the districts is designating an Assistant U.S. Attorney to serve as a PCSF liaison.

In addition to prosecution, PCSF seeks to train and educate federal, state, and local government procurement officials on how to identify warning signs of collusion. On the "seller side," PCSF will train and educate government contractors, their trade associations, and public contract lawyers about criminal antitrust law. The PCSF will also work to improve data analytics programs to better analyze government procurement data and identify potential red flags of anti-competitive conduct.

The DOJ also launched a PCSF website for government procurement officials, companies and the interested public to access training programs, read about federal antitrust laws, and report suspect criminal activity in the procurement arena.

IMPLICATIONS

The DOJ has recently focused on combating alleged anti-competitive conduct harming the government. At the PCSF announcement, Assistant Attorney General Delrahim mentioned the Antitrust Division's history of prosecuting criminal antitrust conspiracies that victimize government contracts.

In November 2018 and March 2019, five South Korean petroleum companies agreed to plead guilty to their involvement in a decade-long bid-rigging conspiracy targeting fuel supply contracts for U.S. military bases in South Korea.³ The DOJ announced that, in connection with its Korean fuel services

² Deputy Assistant Attorney General Richard A. Powers, Department of Justice, Remarks at the American Bar Association Public Contract Law Section's 2019 Procurement Symposium (Oct. 25, 2019).

³ Press Release, Department of Justice, More Charges Announced in Ongoing Investigation into Bid Rigging and Fraud Targeting Defense Department Fuel Supply Contracts for U.S. Military Bases in South Korea (Mar. 20, 2019), *available at* <https://www.justice.gov/opa/pr/more-charges-announced-ongoing-investigation-bid-rigging-and-fraud-targeting-defense>; Press Re-

investigation, those companies have agreed to pay \$156 million in criminal fines and more than \$205 million in civil settlements.

In March 2019, the DOJ also indicted seven individual defendants, including associates, managers, and executives of the companies, for conspiring to rig bids and defraud the government; one executive was also charged with obstruction of justice.

In another investigation, the DOJ partnered with the General Services Administration (“GSA”) Office of Inspector General to indict, in April and September 2019 respectively, two individuals for rigging bids submitted to the GSA.⁴ Both individuals have agreed to plead guilty and are cooperating in the government’s ongoing investigation.

These recent investigative forays into government procurement matters, and the announcement of this new task force may portend more criminal antitrust investigations in this space.

For government contractors, these developments require reviewing and examining their internal policies and procedures with respect to several aspects of government procurement.

For example, contractors who sell directly, or use resellers and distributors to sell goods and services, on GSA Schedule contracts need to be diligent about not only their own pricing, but also any possible collusive behavior being conducted by its suppliers, resellers, or distributors.

Government contractors who engage in teaming agreements and joint ventures may also receive added scrutiny regarding the robustness of anticompetitive protections established in those relationships. Although competitive bidding is highly regulated and formalized in the government procurement sphere, market allocation also remains a possible avenue for collusive activity among contractors.

And any time the government chooses to investigate a government contractor, the False Claims Act and Section 4A of the Clayton Act, which empower the United States to obtain treble damages for anticompetitive conduct when

lease, Department of Justice, Three South Korean Companies Agree to Plead Guilty and to Enter into Civil Settlements for Rigging Bids on United States Department of Defense Fuel Supply Contracts (Nov. 14, 2018), *available at* <https://www.justice.gov/opa/pr/three-south-korean-companies-agree-plead-guilty-and-enter-civil-settlements-rigging-bids>.

⁴ Press Release, Department of Justice, Online Bidder Pleads Guilty to Antitrust Charge for Rigging Bids at Government Auctions (Sept. 24, 2019), *available at* <https://www.justice.gov/opa/pr/online-bidder-pleads-guilty-antitrust-charge-rigging-bids-government-auctions>.

the government is itself the victim,⁵ emerge as a significant risk to the contractor.

PARTNERS AND PARTICIPATING AGENCIES

The DOJ announced that the PCSF's investigative partners will include:

- 13 U.S. Attorney partners;⁶
- The Federal Bureau of Investigation;
- The Department of Defense Office of Inspector General;
- The General Services Administration Office of Inspector General;
- The DOJ Office of the Inspector General; and
- The U.S. Postal Service Office of Inspector General.

⁵ False Claims Act, 31 U.S.C. § 3729 (2017); Clayton Act, 15 U.S.C. § 15(a) (2018).

⁶ Nicole T. Hanna, Central District of California; McGregor Scott, Eastern District of California; Jason R. Dunn, District of Colorado; Jessie K. Liu, District of Columbia; Ariana Fajardo Orshan, Southern District of Florida; Byung J. Pak, Northern District of Georgia; John R. Lausch Jr., Northern District of Illinois; Matthew Schneider, Eastern District of Michigan; Geoffrey S. Berman, Southern District of New York; David M. DeVillers, Southern District of Ohio; William M. McSwain, Eastern District of Pennsylvania; Erin Nealy Cox, Northern District of Texas; G. Zachary Terwilliger, Eastern District of Virginia.