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FEATURE COMMENT: Government Contractors Should Consider A Lanham Act Lawsuit As A Weapon To Stop Competitors From Making False Or Misleading Promotional Statements

Competition is often fierce between Government contractors bidding for work. When a competitor makes a false or misleading promotional statement—in a bid proposal, airport billboard or even an e-mail—the disadvantaged party should consider bringing a Lanham Act lawsuit to stop the misleading statements and seek damages.

Lanham Act Basics—The Lanham Act provides companies with a private right of action against competitors who make false or misleading promotional statements. Section 43(a) of the Lanham Act extends to any "false or misleading description of fact, or false and misleading representation of fact" about "the nature, characteristics, qualities, or geographic origin of [the company's] or another person's goods, services or commercial activities." 15 USCA § 1125(a)(1)(B). Potential remedies for violations include temporary restraining orders and preliminary injunctions to stop the unlawful conduct, as well as money damages and, in exceptional cases, recovery of attorneys' fees.

Although most attorneys believe that the Lanham Act applies only to "traditional advertising" about consumer goods, it is not so limited. The Lanham Act extends to any promotional statement about products or services, including those that are not seen by the general public. Statements about commercial services for sophisticated business and Government purchasers also come within its scope. The number of cases involving nontraditional advertising to businesses and Government purchasers are increasing, and now form a unique genre of Lanham Act cases. See generally Miller, "Not Just For 'Consumers': Lanham Act Liability for Promotional Statements to Distributors and Other Business Customers," The Antitrust Source, *www.antitrustsource.com*, October 2011, at n.7.

Bid Proposals and Other Statements to Government Agencies—Statements made to Government agencies in the procurement process—even a statement in a bid proposal—are actionable under the Lanham Act. For example, *Tao of Sys. Integration, Inc. v. Analytical Servs. & Materials, Inc.*, 299 F. Supp. 2d 565 (E.D. Va. 2004), involved statements made in a bid proposal to NASA. The plaintiff alleged that the defendant claimed experience that it did not have, and misrepresented the plaintiff "as a venture or subsidiary of [the defendant]." Id. at 569. The defendant moved to dismiss, arguing that statements in a bid proposal could not constitute commercial advertising. The court denied the motion, holding that "[w]hile ... the submission of a proposal in response to a NASA request is not advertising in the traditional sense of the term ... it is reasonable to infer that in the aeronautical engineering industry, services are promoted through proposals to the relevant government agency." Id. at 574. In *Cboss, Inc. v. Zerbonia*, 2010 WL 3835092 (N.D. Ohio 2010), the court found that a Government contractor violated the Lanham Act by stating in its bid proposal that a key person on the project previously served as "System Architect" and "Project Manager" when he worked for plaintiff on a prior computer system. The evidence demonstrated that the person never held those titles, and therefore the court found that the promotional statement violated the Lanham Act.

The Lanham Act is not limited to bid proposals but extends to other communications such as e-mails, slide presentations and letters, as long as they are intended to induce a commercial transaction. For example, in *Derby Indus., Inc. v. Chestnut Ridge Foam, Inc.,*202 F. Supp. 2d 818, 819

(N.D. Ind. 2002), the parties were "competitors in the highly specialized business of prison mattress production and sales." Id. at 819. The promotional statement at issue was a videotape that contained "promotional material intended for the purpose of generating sales." Id. at 823. Similarly, in *Int'l Techs. Consultants, Inc. v. Stewart*, 554 F. Supp. 2d 750 (E.D. Mich. 2008), the court found that a single letter about construction of a "float glass plant" was actionable under the Lanham Act. Id. at 758.

Finding these types of nonpublic statements is a separate challenge, and one that savvy companies overcome through Freedom of Information Act requests and by carefully monitoring the competition. In *Tao*, the plaintiff received the defendant's bid through a third party that filed a FOIA request. In *U.S. Demil v. ARA,* Civil Action No. 1:11cv802-LMB-JFA (E.D. Va. 2011), the plaintiff obtained the defendant's statements (made to the U.S. Army) by reviewing an environmental assessment report after it was published for notice and comment.

"Traditional" Promotional Statements (Billboards, Radio, Television)—Government contractors increasingly use traditional advertising (such as billboards in airports and train stations) to gain a competitive advantage in the procurement process. McCarthy, "Contractors Take Message To Their People; Firms Blanket Airwaves To Target Those Who Decide On Bid Awards," Washington Post (Nov. 28, 2005). "Advertisements from government contractors have supplanted auto industry ads as the top revenue category for WTOP," a popular news radio station in the Washington, D.C. area. Id. As one large Government contractor explained: "the goal is obviously to win business. Just like Coke or Pepsi does marketing, it's important for us to create awareness about our business." Id. These statements can be easily discovered and furnish the basis for a Lanham Act suit.

Defense Strategies—Given the rise of the Lanham Act, Government contractors would do well to prepare for defense in the event of a lawsuit. Truth is a classic defense (i.e., if a Government contractor can substantiate its claim, it can avoid liability). Another classic defense is that the statements are not promotional (i.e., not intended to induce a commercial transaction). For example, the statement may be made in the context of contract performance rather than procurement. The Lanham Act is limited to "commercial advertising or promotion" which is a broad, but not unlimited, category. In *Suntree Techs., Inc. v. EcoSense Int'l, Inc.*, 2011 WL 2893623 (M.D. Fla. 2011), the court held that statements provided to a Government agency for "training" purposes did not meet the threshold for liability under the Lanham Act. Id. at *11.

Counterclaims are another important strategy (whether as a stand-alone claim or as an unclean hands defense) which underscores the need for routine competitive monitoring.

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