

Preventing Unfairness When Employees Switch Contractors or Enter Industry From Government

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“Our employee who has been working on the big proposal just resigned and is going to our competitor.”

“Our competitor just hired a former government employee who knows everything about the big upcoming procurement.”

With increasing regularity, contractors face issues like these, as personnel “switch sides” or move in and out of government employment. Relatedly, the expansion of the federal government’s use of indefinite-delivery, indefinite-quantity (IDIQ) contract vehicles, along with other factors, such as an uptick in mergers, has led to more situations in which there is, at a minimum, an appearance that work performed on another contract has given an offeror an “inside track” to win a new, separate contract award. What can be done in these situations? Should you protest? If so, when? Is there an organizational conflict of interest? Is there a Procurement Integrity Act violation? Should you sue your former employee and/or competitor?

This article provides an overview of the types of problems that arise and the possible remedies available in various common fact patterns related to employees switching contractors or moving between government and industry. Table 1 on page 23 provides a summary of the four major concerns contractors face in these situations and what, if anything, they can do about them.

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Unequal Access to Information OCI: FAR 9.5

One of the most common issues that arises when contractors or their personnel perform work on multiple contracts is the potential for the contractor to gain unequal access to information that might provide it with an unfair competitive advantage in future procurements. This type of “organization conflict of interest” (OCI), referred to as an “unequal access OCI,” does not arise merely because a contractor served as an incumbent. Instead, the contractor must obtain or have access to competitively useful, nonpublic information, typically source-selection sensitive information or another competitor’s proprietary information.

The FAR requires contracting officers (COs) to identify and evaluate potential OCIs and mitigate or neutralize significant conflicts to prevent a competitor from gaining an unfair advantage.¹ This typically involves the CO conducting an investigation to identify any nonpublic information available to the contractor, determining whether access to this information could create an unfair competitive advantage, and taking steps to avoid, neutralize, or mitigate the advantage.

Typical Unequal Access OCIs

Unequal access OCIs usually occur in the context of technical assistance or systems engineering contracts, when personnel have access to nonpublic information while performing a contract for the government and then participate in the preparation of their employer’s proposal in a later procurement. For example, in *Dell Services Federal Government, Inc.*,² a protester challenged an award based on an offeror’s unequal access to information because an individual who performed work on a similar contract with a previous employer provided advice to the awardee during proposal development. The Government Accountability Office (GAO) found that the individual had access to the protester’s proprietary

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information and other nonpublic, competitively useful information, and also assisted in the awardee’s proposal development. GAO sustained the protest because the agency did not consider whether the individual’s exposure to the nonpublic information could have shaped the advice he provided to the proposal team.

Obstacles to Obtaining Remedies in Bid Protests Alleging Unequal Access OCIs

So, what can a contractor do if it suspects a bidder has access to advantageous nonpublic information? File a protest. A protest alleging an unequal access OCI can result in several remedies, ranging from the agency’s reevaluation and documentation of its OCI investigation, to exclusion of the conflicted company from the procurement at issue.³

Unequal access OCI protests provide recourse to offerors when they suspect that another offeror’s prior exposure to nonpublic information gave it a leg up on the competition. But protesters pursuing this protest ground face many obstacles on their way to bid protest success, including (1) timeliness pitfalls, (2) the requirement to provide hard facts, and (3) deference to agency findings.

Obstacle 1: Establishing the Timeliness of the Protest

As with any protest, a protester must first consider when and in which forum to file its protest. When filing a protest alleging an unequal access OCI, forum selection is

critical, as the timeliness of such an allegation is one area where there are significant differences reflected in GAO and Court of Federal Claims (COFC) precedent. Before deciding the most advantageous possible protest forum, however, it is essential to always select a forum that has jurisdiction. GAO currently has exclusive jurisdiction for protests of DoD task order awards above \$25 million and protests of civilian agency task order awards above \$10 million. GSA FSS orders, however, may be protested at GAO or the COFC regardless of value.

At GAO, most unequal access OCI protests are filed post-award. Under long-standing GAO precedent, OCI challenges are generally viewed by GAO as premature until after award.⁴ In such cases, GAO has reasoned that a protester is challenging a known harmful action—an improper contract award—rather than the fairness of the ground rules for the competition.⁵ But this does not mean that GAO will always consider post-award unequal access OCI protests to be timely. For example, when an agency expressly advises offerors that it believes a company is eligible for award and not tainted by the existence of an OCI, GAO has concluded that the protest must be filed before the closing time for receipt of proposals.⁶

In stark contrast, the COFC has adopted a much stricter view of the timeliness of unequal access OCI protests. Under COFC precedent, a protester must file its protest when it knew or should have known the facts underpinning

TABLE 1

Type of Concern	Source of Information	Nature of Information	Possible Recourse
Unequal Access to Information (Federal Acquisition Regulation (FAR) 9.5)	Performance by the contractor or its employee(s) on another government contract	Competitively useful, nonpublic information	Bid protest alleging an organizational conflict of interest—agency can waive conflict
Procurement Integrity Act (41 U.S.C. ch. 21)	Any source (generally with a government nexus), as long as information knowingly obtained	Contractor bid or proposal information, or source selection information, before the award of a federal agency procurement contract to which the information relates	Bid protest, provided report made to agency no later than 14 days after discovering the possible violation
Unfair Competitive Advantage (FAR 3.1)	Former government employee hired by contractor or improper release of information by government	Competitively useful, nonpublic information	Bid protest—agency cannot waive conflict
Misappropriation of Trade Secrets (18 U.S.C. §§ 1836, 1905)	Any source, commonly a consultant or previous employee of a competitor	Proprietary information of competitor	Civil lawsuit; bid protest not available (considered a private dispute)

its OCI challenge or risk waiver of its challenge. Thus, if a potential protester is aware of the underlying facts of its OCI claim before the contract award, it must file a protest during the procurement process or risk dismissal of a post-award protest. This requires, in many cases, potential protesters to diligently pursue and investigate potential OCIs and raise concerns before the close of bidding.⁷

Obstacle 2: Demonstrating Hard Facts

Allegations of an unequal access OCI “must be based on ‘hard facts;’ a mere inference or suspicion of an actual or apparent conflict is not enough.”⁸ The “hard facts” standard:

- Requires a protester to show that an offeror had actual, not just potential, access to competitively useful, nonpublic information.
- Requires a protester to identify the specific and detailed facts showing that an OCI or potential OCI exists, and how it affected the agency’s decision making.
- Is a higher standard of proof than the typical bid protest burden of proof.⁹

While proving such an OCI places a higher-than-normal bar on protesters, once a protester overcomes the “hard facts” hurdle, prejudice is presumed and the protester is not required to prove harm suffered or that its competitor actually used the information to gain a competitive advantage.¹⁰

Obstacle 3: Deference to Agency Findings

When reviewing an agency’s decision making with regard to an unfair advantage OCI, both GAO and COFC follow the standard set forth by the U.S. Court of Appeals for the Federal Circuit in *Turner Construction*, which recognizes that FAR Subpart 9.5 provides significant discretion to COs to make business decisions about the “significance” of an actual or potential OCI, and that COs need to take remedial action to avoid, neutralize, or mitigate only “significant” conflicts.¹¹ Overcoming deference to agency findings is another obstacle facing contractors pursuing unequal access OCI protests.

GAO and COFC will generally defer to agency findings when the agency conducts a “meaningful” OCI evaluation and comes to a reasonable conclusion about whether a significant potential OCI exists.¹² Thus, for a protest to succeed, the protester must show that the agency’s OCI analysis was unreasonable—for example, where the agency did not consider relevant facts in its analysis.

Contractors must also face the reality that agencies can, and increasingly are more willing to, waive an OCI if it is determined to be in the government’s best interest.¹³

In sum, an unequal access OCI protest can provide recourse to offerors when they suspect that another

offeror’s prior exposure to nonpublic information gave it a leg up on the competition. But challenging a procurement or award on this basis comes with major hurdles. When faced with a potential unequal access OCI, it is important that contractors:

- Diligently investigate all facts at the first sign of a possible OCI;
- Carefully consider timeliness rules and forum selection; and
- Weigh potential risks related to the standard of review and overcoming agency discretion.

Taking these steps will best position you to make an educated decision on whether to protest.

Procurement Integrity Act Violation: 41 U.S.C. §§ 2101–2107

Another serious, but less common, situation involving the release or dissemination of proprietary material is a Procurement Integrity Act (PIA) violation. The PIA is meant to protect the fairness of a procurement by deterring the improper release of information and ensuring that competitors’ proprietary information remains confidential. The PIA protects the information exchanged during a procurement and generally restricts interactions between government contractors and agency officials that could improperly influence procurement decisions.

Relevant Provisions of the PIA

The first two provisions of the PIA, 41 U.S.C. § 2102(a) and (b), apply in the context of a specific procurement or competition and are meant to prevent the release of an offeror’s confidential information. The first provision, 41 U.S.C. § 2102(a), prohibits the knowing *disclosure* of bid or proposal information¹⁴ and source selection information¹⁵ before the award of a federal agency procurement contract to which the information relates. This prohibition applies to “a person” who (i) is a former or current government official, (ii) advises or has advised the government about the procurement, or (iii) has or had access to contractor bid or proposal or source selection information by virtue of his or her position.¹⁶

The second provision, 41 U.S.C. § 2102(b), prohibits knowingly *obtaining* “bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.” Unlike the first provision, section 2102(b) does not define “person,” but COFC and GAO case law have required government involvement to find a PIA violation.¹⁷ Both provisions, however, require that the action be done “knowingly,” which sets a relatively high standard of proof and increases a protester’s pleading requirements.¹⁸

In addition, the PIA includes several “savings

provisions” that explicitly describe what the PIA does not restrict, authorize, or limit.¹⁹ For example, under the savings provisions, the PIA does not restrict disclosure of source selection or contractor bid or proposal information to authorized persons, restrict contractors from disclosing their own bid or proposal information, or restrict the receipt of procurement-related information after the procurement has been canceled, if no award has been made and the agency does not plan to resume the procurement.²⁰ In addition, GAO has “repeatedly found that the PIA’s savings provision applies even where voluntarily provided information is subsequently misused or improperly safeguarded.”²¹

Protesting an Alleged PIA Violation

If an offeror suspects the agency has failed to address a potential PIA violation, the recourse available is to file a protest. However, offerors should be aware of the unique jurisdictional and timeliness requirements applicable to protests alleging PIA violations.²² First, before filing a protest, the protester must notify the agency of the alleged violation within 14 days of discovery.²³ By statute, GAO may not consider the protest unless the protester provided such notice to the agency.²⁴

Once an agency is notified of an alleged violation, the FAR requires that the CO conduct an investigation of the PIA allegations.²⁵ If the agency concludes, after an investigation, that there was a violation and that the violation adversely impacted the procurement, the agency has several statutory options, including (1) canceling the procurement, (2) rescinding the contract, (3) initiating suspension and debarment proceedings, and (4) initiating adverse personnel action.²⁶ An offeror may file a protest only after the agency has concluded its investigation. GAO will sustain a protest if it finds that the agency failed to consider relevant information in its PIA investigation.²⁷ To prevail, the protester must show not only that a PIA violation occurred, but that it created an unfair competitive advantage.²⁸

If a contractor suspects that a government official has released its proprietary information, it should:

- Gather any facts or evidence that supports the possibility of a violation;
- Report the potential violation to the agency within 14 days of discovery and determine what steps, if any, the agency has taken to investigate or remedy the matter; and
- Carefully consider the facts, prejudice, and any interplay of the savings provisions. After considering these factors, the contractor could file a protest if it believes it has been competitively prejudiced.

Acting quickly is critical given that neither GAO nor COFC will entertain PIA allegations if they have not been timely reported to the CO.

Unfair Competitive Advantage: FAR Subpart 3.1

Under FAR Subpart 3.1, an unfair competitive advantage may arise when a contractor or its subcontractor obtains actual or apparent access to competitively useful information through the hiring of, or a relationship with, a former government employee.²⁹ For example, an unfair advantage may exist when a contractor hires of a former government employee who:

- Provided input on solicitation provisions;
- Served as a source selection official; or
- Was involved in discussions or decisions about the scope of the procurement or related procurement.³⁰

For example, GAO sustained a protest alleging an unfair competitive advantage where the awardee employed a high-ranking former government official of the procuring agency to assist in proposal preparation.³¹ During the official’s tenure with the procuring agency, he had participated in the planning of the protested procurement and had access to competitively sensitive information. Despite receiving “clean letters” from the agency’s ethics advisor about post-employment restrictions, GAO found that the CO still was required to be cognizant of potential unfair advantages resulting from the former government official’s change in employer.³²

The Standard of Review for Unfair Competitive Advantage Protests and Obstacles to Meeting the Standard

To determine whether an unfair competitive advantage exists, GAO will consider:

- How the employee obtained access to potentially useful information;
- Whether the sophistication, scope, and timeliness of the information could provide a competitive advantage; and
- Whether the employee’s activities at the new firm were likely to have resulted in disclosure of such information.³³

However, GAO has cautioned that “a person’s familiarity with the type of work required resulting from the person’s prior position in the government is not, by itself, evidence of an unfair competitive advantage.”³⁴

Like unequal access OCI challenges under FAR Subpart 9.5, an unfair competitive advantage protest requires the protester to plead “hard facts.”³⁵ As discussed previously, the “hard facts” standard is higher than the typical protest burden of proof, and overcoming this initial obstacle will depend heavily on the circumstances of each case. Once over the initial hurdle of showing hard facts that support the actual or potential access to nonpublic information by a former government employee, a protester need not show that the information was actually used in bid preparation or in an advantageous way. Rather, an

unfair advantage is presumed to arise, even without proof of whether the information was actually used by an offeror.³⁶ But unlike with unequal access OCIs, GAO has potentially limited agencies' authority to waive this type of unfair competitive advantage regardless of the type of information to which the former government employee had access.³⁷

Challenging and Avoiding Unfair Competitive Advantages

So, what can a contractor do if it suspects a competitor has access to competitively useful information through a connection with a former government employee? File a protest. A protest under an unfair competitive advantage theory can be filed during the bidding process or after an award.³⁸ Potential remedies range from agency reevaluation and investigation of the possible unfair competitive advantage to disqualification of the bidder.

In addition, what should a contractor do when contemplating hiring former government personnel? Contractors can, and should:

- Confirm that their future employee has received an ethics debriefing from the government and an ethics letter from the Designated Agency Ethics Official; and
- Confirm that they fully understand the scope of the work in which the former government personnel engaged during her/his time in government service.

Then, as a proactive and effective option to mitigate protest risks, contractors should aggressively firewall employees and subcontractors from involvement in proposal preparation and reviews whenever there could be any appearance of an unfair competitive advantage. GAO has long recognized that screening a former government employee from competitive decision making is useful to preserve the sanctity of competitions where the employee's access to competitively sensitive information could create an advantage.³⁹ Depending upon the timing, such an approach can effectively avoid an unfair competitive advantage from arising.⁴⁰

Misappropriation of Trade Secrets

Many of the situations described above result in the release of a contractor's trade secrets to a competitor, which can have implications beyond the particular procurement. So, aside from remedies to protect and restore the integrity and fairness of a particular federal procurement, there are other causes of action a contractor may employ to protect its proprietary information. As discussed below, the causes of action available depend on the level of government involvement.

When the Government Is to Blame for the Misappropriation

When the government is to blame for the misappropriation of a contractor's trade secrets, the contractor can bring a cause of action against the government under the

Administrative Procedure Act (APA),⁴¹ or, potentially, the Defend Trade Secrets Act of 2016 (DTSA).⁴²

Under the APA, a contractor may file an action to prevent an agency from disclosing confidential information.⁴³ In such actions, a contractor may seek injunctive relief only, not money damages. The "hook" for this type of claim is that the plaintiff must show the release of the confidential information violates the Trade Secrets Act (TSA),⁴⁴ a criminal statute that prohibits an officer or employee of the United States from disclosing "in any manner or to any extent not authorized by law any information coming to him in the course of his employment . . . which . . . concerns or relates to the trade secrets . . . of any . . . firm."⁴⁵ Because the TSA is a criminal statute, it does not create a private right of action, but the Supreme Court held in *Chrysler* that a party may file an action under the APA to enjoin an agency from violating the TSA. In this type of suit, a district court would review the agency's decision to disclose confidential information under the arbitrary and capricious standard.⁴⁶

Another avenue for relief is filing an action under the DTSA, which is the federal mechanism for protecting trade secrets, and provides a civil remedy for the misappropriation of trade secrets. Available remedies under the DTSA are injunctions, monetary damages, exemplary damages, and *ex parte* seizures to prevent dissemination of the trade secret.⁴⁷

The DTSA, however, does not provide a private cause of action related to "otherwise lawful activity" of a governmental entity.⁴⁸ In *Pollack*, a plaintiff brought suit under the DTSA seeking to prevent state officials from disclosing trade secrets that were in plaintiff's bid documents submitted in response to a state-issued request for proposals, which could be lawfully disclosed publicly under Massachusetts law. Reasoning that Congress included the "otherwise lawful" language in the statute to prevent the DTSA from interfering with state governments' policy choices about their operations, the court found that, because release of the plaintiff's trade secrets would "otherwise be lawful" under state law in the absence of the DTSA, plaintiff had no cause of action.

Notably, the DTSA is silent as to which parties can be sued in federal court. The few cases that have addressed this issue suggest that the DTSA does not apply to state action. Although the court in *Pollack* reasoned that the "otherwise lawful activity" exemption "applies only to the actions of Federal, state, and local government entities," it added that it thus "is entirely reasonable to read the statute as demonstrating that Congress did not intend for [] DTSA to abrogate state sovereign immunity."⁴⁹ In addition, a more recent federal case has found explicitly that Congress did not intend to abrogate the states' Eleventh Amendment immunity in the DTSA.⁵⁰ Thus, it is likely that the DTSA may not be used against state action, but it is possible that this may continue to be litigated.

When a Nongovernmental Party Is to Blame for the Misappropriation

The issues and remedies discussed thus far in this article all relate to a contractor's remedy against the government. Occasionally, however, employees of a competitor, or consultants that help companies prepare proposals, may inappropriately obtain and use a contractor's proprietary information without a nexus to any government involvement. What recourse is available to contractors in those situations?

As an initial matter, a protest against the federal government is not available as a remedy. It is well established that an aggrieved offeror may not protest a private party's wrongdoing; the protest process may only remedy wrongful government action.⁵¹

There are, however, both state and federal remedies available to contractors in actions against private party actors. For example, contractors can pursue civil lawsuits for misappropriation of trade secrets under state law. Many states have adopted some form of the Uniform Trade Secrets Act (UTSA).⁵² Contractors can also seek remedies in federal court under the DTSA. The DTSA does not preempt state law, so aggrieved parties have a choice of forum and law, or possibly they can seek remedies under both state and federal laws.

Thus, when contemplating a private civil action, it is important for a potential plaintiff to carefully consider the forum and law for its claims. For example, bringing suit under the DTSA:


- Allows a potential plaintiff to bring a suit notwithstanding the amount-in-controversy limits or diversity requirements that usually exist for federal jurisdiction.⁵³ In other words, the DTSA provides federal question jurisdiction, and an aggrieved party therefore can bring directly in federal court what has historically been a state law claim.
- Acts as a “hook” for a contractor to bring state law claims it may want to bring along with its DTSA action in federal court. Such claims might include state statutory and common law claims for breach of contract (e.g., nondisclosure, non-compete, and nonsolicitation agreements) and similar acts generally characterized as “unfair competition” (e.g., tortious interference, conversion, unjust enrichment, and unfair and deceptive trade practices).
- Provides more robust remedies than many state laws, such as *ex parte* seizure orders, which permit a plaintiff to obtain an order for seizure of evidence without notice to the defendant.⁵⁴ However, this remedy is only available in “extraordinary circumstances,” where the plaintiff is able to meet several specific requirements.⁵⁵

State forums have advantages, too. State courts typically have lower pleading standards than federal courts

(which usually require plaintiffs to plead more specific factual allegations to support their claims).⁵⁶ Also, because states have enacted their own unique trade secrets laws, some state laws may provide more expansive trade secrets protections.

Thus, in addition to actions to protect the integrity of a federal procurement, contractors have a wide range of private remedies to help protect confidential information should they suspect their confidential information has been misappropriated.

Conclusion

The chart and discussion above are intended to assist contractors in assessing if, how, and where they can bring an action to challenge what they perceive as an unfair competitive edge gained by a competitor through improper means. In some situations, more than one line of attack may be warranted. Whether to pursue such recourse involves not only consideration of the legal costs and benefits, but also the associated business risks. 

Endnotes

1. See FAR 9.504(a), 9.505; see also FAR 9.505-4.
2. B-414461.3, 2018 CPD ¶ 213 (Comp. Gen. June 19, 2018).
3. See generally C2C Innovative Sols., B-416289.2, 2018 CPD ¶ 269 (Comp. Gen. July 30, 2018) (recommending agency reinvestigate a potential OCI); Netstar-1 Gov't Consulting, Inc. v. United States, 101 Fed. Cl. 511 (2011) (enjoining awardee's performance).
4. See, e.g., Guident Techs., Inc., B-405112.3, 2012 CPD ¶ 166 (Comp. Gen. June 4, 2012).
5. *Id.*
6. See, e.g., Raydar & Assocs., Inc., B-401447, 2009 CPD ¶ 180 (Comp. Gen. Sept. 1, 2009); Liquidity Servs., Inc., B-409718 et al., 2014 CPD ¶ 221 (Comp. Gen. July 23, 2014).
7. See, e.g., Concourse Grp., LLC v. United States, 131 Fed. Cl. 26, 29–30 (2017); CRAssociates, Inc. v. United States, 102 Fed. Cl. 698, 712 (2011), *aff'd*, 475 F. App'x 341 (Fed. Cir. 2012); accord ATSC Aviation, LLC v. United States, 141 Fed. Cl. 670, 695 (2019) (stating that OCI protest grounds are akin to challenges extrinsic to offerors' proposals and thus may be waived if not raised prior to the close of the bidding process).
8. Turner Constr. Co. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011) (citing PAI Corp. v. United States, 614 F.3d 1347, 1352 (Fed. Cir. 2010)).
9. See Loch Harbour Grp., Inc. v. United States, 128 Fed. Cl. 294, 302 (2016); Archimedes Global, Inc., B-415886.2, 2018 CPD ¶ 179 (Comp. Gen. June 1, 2018); see also Netstar-1 Gov't Consulting, Inc., B-404025.2, 2011 CPD ¶ 262 (Comp. Gen. May 4, 2011) (finding that “hard facts” to support a finding of an OCI did not exist where individuals who possessed nonpublic information were firewalled from proposal preparation activities).
10. See Netstar-1 Consulting, Inc. v. United States, 101 Fed. Cl. 511, 529 (2011).
11. See *Turner Constr. Co.*, 645 F.3d at 1382.
12. See, e.g., Accenture Fed. Servs., LLC, B-414268.3 et al., 2017 CPD ¶ 175 (Comp. Gen. May 30, 2017) (“We review the reasonableness of a contracting officer's OCI investigation and, where an agency has given meaningful consideration to whether a significant conflict of interest exists, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable.”); McVey Co., Inc. v. United States,

111 Fed. Cl. 387, 404 (2013) (finding that agency properly assessed conflicts of interest in bid, and documentation requirements were not triggered because the agency determined in its discretion that no conflict existed).

13. See FAR 9.503 (“The agency head or a designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government’s interest.”); see, e.g., *Enter. Servs., LLC*, B-417329, 2019 CPD ¶ 205 (Comp. Gen. May 30, 2019) (denying protest challenging an OCI waiver and noting that “[w]hile our Office will review an agency’s execution of an OCI waiver, our review is limited to consideration of whether the waiver complies with the requirements of the FAR, that is, whether it is in writing, sets forth the extent of the conflict, and is approved by the appropriate individual within the agency”).

14. See also FAR 3.104-1.

15. See also FAR 2.101.

16. 41 U.S.C. § 2102(a)(3).

17. *IBM Corp.*, B-415798.2, 2019 CPD ¶ 82 (Comp. Gen. Feb. 14, 2019) (requiring PIA violations to have a “government nexus”); *Geo Grp., Inc. v. United States*, 100 Fed. Cl. 223, 227 (2011) (stating that PIA provisions apply to current or former government personnel).

18. See, e.g., *S&K Aerospace, LLC*, B-411648, 2015 CPD ¶ 336 (Comp. Gen. Sept. 18, 2015) (denying protest where alleged violation based on mere negligence).

19. 41 U.S.C. § 2107.

20. See *id.*

21. *IBM Corp.*, B-415798.2; *accord DynCorp Int’l LLC*, B-408516 et al., 2013 CPD ¶ 243 (Comp. Gen. Oct. 29, 2013) (finding savings provision precluded PIA allegation where the awardee allegedly used the protester’s proprietary information obtained under previous teaming arrangements between the awardee and the protester).

22. Unlike protests alleging OCIs, protests alleging PIA violations do not have a heightened pleading standard, and protesters need only plead to the standards of GAO’s Bid Protest Regulations. See *AlliantCorps, LLC*, B-415744.2, 2018 CPD ¶ 136 (Comp. Gen. Apr. 4, 2018) (dismissing under 4 C.F.R. §§ 21.1(c) (4), 21.1(f), and 21.5(f) a protest alleging PIA violations).

23. 41 U.S.C. § 2106.

24. *Id.*; see also *Matson Navigation Co.*, B-416976.2, 2019 CPD ¶ 69 (Comp. Gen. Jan. 24, 2019).

25. FAR 3.104-7(a). GAO and COFC agree that a CO may reasonably decide not to pursue a possible PIA violation if, after review of the allegations presented by a contractor, the CO concludes no illegal conduct occurred. *Accent Serv. Co.*, B-299888, 2007 CPD ¶ 169 (Comp. Gen. Sept. 14, 2007); *Jacobs Tech. Inc. v. United States*, 100 Fed. Cl. 198, 216 (2011).

26. 41 U.S.C. § 2105. In addition to these administrative actions, PIA violations may also result in criminal and civil penalties. *Id.* § 2105(a).

27. *Dell Servs. Fed. Gov’t, Inc.*, B-414461, 2017 CPD ¶ 192 (Comp. Gen. June 21, 2017).

28. See *TRAX Int’l Corp.*, B-416927.3, 2019 CPD ¶ 192 (Comp. Gen. May 2, 2019); see also *Avtel Servs., Inc. v. United States*, 70 Fed. Cl. 173, 193 (2006).

29. The key distinction between a FAR Subpart 3.1 unfair competitive advantage and an unequal access OCI under FAR Subpart 9.5 is the source of the information. See FAR 3.101-1 (directing the government to “avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships”).

30. See *Int’l Res. Grp.*, B-409346.2, 2014 CPD ¶ 369 (Comp. Gen. Dec. 11, 2014).

31. *Health Net Fed. Servs., LLC*, B-401652.3, 2009 CPD ¶ 220 (Comp. Gen. Nov. 4, 2009).

32. *Id.* In this decision, GAO distinguished between PIA

allegations and allegations of unfair competitive advantages. A protester must allege statutory procurement violations for the protest to be considered a PIA protest. Thus, even if a person or entity has not violated the PIA, that does not eliminate the potential unfair advantages that may arise because of prior involvement with, or knowledge of, a particular procurement.

33. See *Interactive Info. Sols., Inc.*, B-415126.2 et al., 2018 CPD ¶ 115 (Comp. Gen. Mar. 22, 2018); *Physician Corp. of Am.*, B-270698 et al., 96-1 CPD ¶ 198 (Comp. Gen. Apr. 10, 1996).

34. *Interactive Info. Sols., Inc.*, B-415126.2 et al.; see also *Unisys Corp.*, B-403054.2, 2011 CPD ¶ 61 (Comp. Gen. Feb. 8, 2011) (denying protest that awardee’s use of former government employee in preparation of its proposal provided the firm with unfair competitive advantage due to employee’s access to protester’s proprietary information where the record reflected that the information at issue was not competitively useful).

35. See *Interactive Info. Sols., Inc.*, B-415126.2 et al.

36. See, e.g., *Health Net Fed. Servs., LLC*, B-401652.3.

37. See *Northrop Grumman Sys. Corp.*, B-412278.7, 2017 CPD ¶ 312 (Comp. Gen. Oct. 4, 2017). In making this determination, GAO reasoned that “unfair competitive advantage” challenges under FAR Subpart 3.1 are not properly considered OCIs under FAR Subpart 9.5 and “because FAR subpart 3.1 does not permit the agency to waive concerns arising under that subpart, [the agency’s execution of] a waiver executed pursuant to FAR § 9.503” cannot waive the unfair competitive advantage concerns. *Id.*; compare *supra* at 4–5 (discussing OCI waivers).

38. Like protests alleging unequal access OCIs, a protest alleging an unfair competitive advantage is typically timely in the post-award context because, in negotiated procurements, offerors have no way of knowing what proposals agencies are considering until after award. See *Textron Marine Sys.*, B-255580, 94-2 CPD ¶ 63 (Comp. Gen. Aug. 2, 1994). *But see Honeywell Tech. Sols., Inc.*, B-400771, 2009 CPD ¶ 49 (Comp. Gen. Jan. 27, 2009) (dismissing a protest where protester did not follow PIA timeliness rules and the unfair competitive advantage alleged was premised on a PIA violation); *A Squared Joint Venture*, B-413139, 2016 CPD ¶ 243 (Comp. Gen. Aug. 23, 2016) (protester must challenge OCI before receipt of proposals where it had knowledge of potential conflict and agency informed protester of its determination regarding conflict before receipt of proposals).

39. See, e.g., *Health Net Fed. Servs., LLC*, B-401652.5.

40. It is also worth noting that a protest can be used to challenge situations when an agency improperly discloses or posts an offeror’s proprietary information. GAO has categorized such situations as creating an unfair competitive advantage. See *Kemron Env’t Servs., Inc.*, B-299880, 2007 CPD ¶ 176 (Comp. Gen. Sept. 7, 2007) (noting that “[t]he disclosure of proprietary or source selection information to an unauthorized person during the course of a procurement is improper”).

41. 5 U.S.C. §§ 551–559.

42. 18 U.S.C. §§ 1831–1839.

43. *Chrysler Corp. v. Brown*, 441 U.S. 281, 317–18 (1979).

44. 18 U.S.C. § 1905.

45. *Id.*

46. See *Dowty Decoto, Inc. v. Dep’t of the Navy*, 883 F.2d 774, 778 (9th Cir. 1989).

47. 18 U.S.C. § 1836(b)(2)–(3).

48. 18 U.S.C. § 1833(a)(1); *Fast Enters., LLC v. Pollack*, No. 16-cv-12149, 2018 WL 4539685 (D. Mass. Sept. 21, 2018).

49. *Pollack*, 2018 WL 4539685.

50. *MedSense, LLC v. Univ. Sys. of Md.*, No. CV GLS-18-3262, 2019 WL 4735430, at *6 (D. Md. Sept. 27, 2019) (recognizing that there do not appear to be any Fourth Circuit or any reported federal cases dispositive on the issue of whether the DTSA abrogates states’ rights under the Eleventh Amendment).

51. See, e.g., *Univ. of Md.*, B-416682, 2018 CPD ¶ 366 (Comp. Gen. Oct. 24, 2018).

52. UNIFORM TRADE SECRETS ACT (UNIF. LAW COMM'N 1979, amended 1985).

53. 18 U.S.C. § 1836(b)(1), (c).

54. *See id.* § 1836(b)(2).

55. *Id.*

56. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 n.3 (2007) (The Federal Rules of Civil Procedure “require[] a ‘showing’, rather than a blanket assertion, of entitlement to relief.”).