LEGAL ADVISOR

A PilieroMazza Update for Federal Contractors and Commercial Businesses

Intellectual Property

PROTECTING YOUR WEBSITE – THE TOP EIGHT THINGS YOU SHOULD KNOW

By Kimi N. Murakami

Increasingly, for most businesses, your website is the digital store front to all of your customers and the public. Therefore, protecting your website is paramount to protecting your brand. Here are eight issues to keep in mind in order to more fully protect this valuable company asset.

1. Trademark Your Business Name and Logo – Your company's name and logo as used on your website are protected by trademark law. A trademark is a word, phrase, or design that identifies your goods or services. To obtain protection of your trademark under federal law you must file an application with the United States Patent and Trademark Office (USPTO). By registering your trademark with the USPTO, you have the right to sue others for trademark infringement in federal court. After trademark registration has been granted by the USPTO, you can use the ® symbol to protect your mark. If you do not obtain federal registration of your trademark, you can still establish common law rights in your mark and you should use the ™ symbol after the mark. Please note that there is a distinction between trademark law protection of your company name and the act of determining if your company name is available when you form your company. Filing documents with the states to reserve your corporate name and form the business does not give you any trademark protection, rights or ownership in your company's name.

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2. Use a Copyright Notice – Another type of intellectual property – "original literary or artistic works" – found on your website is protected by copyright law. Certain elements of a website clearly fall within copyright protection including blog posts, marketing videos, and certain creative graphical elements. To protect written work on your website use a copyright notice posted at the bottom of the website. A copyright notice consists of three elements: (1) the © symbol or the word "Copyright" or the abbreviation "copr."; (2) the year of first publication; and (3) the name of the owner of copyright in the work. In contrast to copyrighted material, the overall appearance or "look and feel" of a website falls outside of copyright protection and recently has been afforded protection by trade dress law (see # 7 below discussing enforcement of your intellectual property rights).

3. Register Your Domain Name – A domain name is part of your website address, and you register your domain name with an accredited domain name registrar. It is important to note that domain name registration is not the same as trademark registration with the USPTO discussed in #1 above. Domain name registration does not grant trademark law protection, rights or ownership.

4. Do Not Disclose Trade Secrets – Trade secrets are your "secret sauce" such as financial, business, scientific, or technical information and know-how that are unique and developed by your company for its own proprietary use. Trade secrets give you a competitive advantage or economic benefit. You must take reasonable proactive steps to protect your trade secrets and guard their secrecy. You should, therefore, regularly monitor your company's website to ensure that trade secrets are not revealed or accidentally disclosed. Unlike federally protected intellectual property such as patents and trademarks that have a defined term,

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trade secrets last forever and protecting them does not require the expense of filing with the USPTO but you must vigilantly guard their secrecy and not let "the cat out of the bag."

5. Do Not Disclose Patentable Information – If your business has an invention that is or may be entitled to valuable patent protection, do not disclose to the public any information related to the invention through marketing efforts or other disclosures on your website. Don't let your excitement about your novel and unique invention get in the way of your ability to protect such valuable intellectual property because you inadvertently disclosed to the public proprietary information on your website.

6. Enforce Your Own IP Protected Information – If you become aware that someone is using your company's name and infringing on your trademark or has taken text directly from your website in violation of your copyright, you should tell the person to cease and desist their infringing use. The enforcement of your ownership of trademarks and copyrights is critical to maintaining your intellectual property rights in those valuable assets. Another recent trend is to use another form of trademark protection known as a "trade dress" to protect the "look and feel" of a company's website. If an infringer copies the overall image, appearance or essence of your website, trade dress infringement may be another way to protect your website if you can establish distinctiveness, non-functionality, and a likelihood of confusion.

7. Take Down Any Infringing Material – If you receive notice to cease and desist using something on your website because it is allegedly infringing on someone else's intellectual property rights, take it down and remove it from your website. Your continued use, even if you intend to challenge someone's complaint, could increase your liability and the damages you may ultimately have to pay for infringing on someone else's ownership rights.

8. Know Who Owns the Content On Your Website – Your website includes elements that may be owned by different entities besides your company. For example, someone else may own the copyright in a photograph that is posted and a different owner may own the rights in the software. If your website was designed by employees employed for that purpose then you, as the employer, would own the copyright as "work made for hire." On the other hand, if you hired an outside vendor to design your website you may not own certain intellectual property rights, and it would be important to have a written agreement transferring the rights of ownership from the website developer to your company. ❐

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Government Contracting

SECURING CORRECTIVE ACTION MAY RAISE FURTHER CHALLENGES

By Alexander O. Levine

According to the latest statistics available from the U.S. Government Accountability Office (GAO), roughly half of all bid protests filed at the GAO are dismissed within 30 days of filing. Of these, the majority of dismissals occur because the procuring agency takes corrective action in response to the protest. Corrective action often involves the agency agreeing to perform a reevalaution or make a new award determination. Corrective action can be an important early victory; it may provide a second bite at the apple for the contractor, and it can result in a contract award. That said, protesters should be prepared for some unique challenges they may face during and after the corrective action.

A corrective action generally permits the agency to go back and correct procedural errors in the evaluation record with an eye towards bolstering its award decision.

A corrective action generally permits the agency to go back and correct procedural errors in the evaluation record with an eye towards bolstering its award decision. If an agency is intent on sticking with the original awardee, the agency can use corrective action to "dot the i's" in its evaluation file, in order to better defend a second protest or to foreclose

a protester's potential grounds altogether. For instance, if a protester challenged the best value decision, the agency could do a more thorough tradeoff analysis and provide more documentation of that analysis. This type of procedural bulwarking can be very effective due to the difficulty involved in challenging the substance of an agency evaluation determination. While the GAO will often reverse an agency that has not followed the correct procedure in reaching a decision, it is generally reluctant to "second guess" the substance of the discretionary decision itself. Additionally, it is difficult for a protester to challenge the corrective action itself, as the GAO generally affords the agency with wide latitude to sculpt the corrective action it will take.

Another risk posed by corrective action is that it can dispense with one of the protester's most effective weapons: the automatic stay of contract award. Under the Competition in Contracting Act, an agency is generally prohibited from proceeding with the performance of an awarded contract while that contract is being protested. This automatic stay is put in place if the protester files a protest within ten days of contract award or within five days of certain types of debriefings. However, in a recent case, *Solutions by Design Alliant Joint Venture LLC v. United States*, the Court of Federal Claims held that the automatic stay ends when the GAO protest is dismissed – regardless of whether that dismissal is due to the agency taking corrective action. While agencies will often keep the automatic stay in place while they take corrective action, they are not obligated to do so. And, if the agency chooses to end the automatic stay, this can mean the agency has little, if any, incentive to expeditiously proceed with the corrective action.

In one recent GAO case, an agency chose to take corrective action in response to a protest and then decided to end the automatic stay. Eight months later, the agency still had not completed its reevaluation and the protester was forced to file a second GAO protest to challenge the agency's delay in completing the corrective action.

An additional risk posed by corrective actions can arise where a protester tries to bring new protest grounds following the agency's corrective action. A corrective action usually does not prevent a protester from bringing another protest should it again lose out on an award. However, this is not always the case. In the case of *DRS ICAS, LLC*, the GAO dismissed as untimely a price analysis argument made in a follow-on protest, when the argument was based on an alleged error made by the agency in the prior evaluation. The GAO held that the agency's corrective action and new source selection decision did not provide any basis for reviving an untimely issue, where it was clear that the challenged price calculation at issue was not affected by the agency's corrective action. Thus, the mere fact that an agency took corrective action will not provide a basis for the protester to bring new protest arguments based on the prior evaluation, unless the corrective action directly affected the portion of the evaluation being challenged.

In summary, corrective action can often be an important initial success in the bid protest process. However, such an initial success is not a guarantee of final victory. Given how agencies can use the corrective action process to their advantage, protesters need to stay on guard and be mindful of the challenges that may lie ahead. ❒

About the Author: Alex Levine, an associate with PilieroMazza, focuses his practice in the areas of litigation and government contracts law. Mr. Levine counsels clients in variety of government contract matters advises including regulatory compliance, bid protests, debarment and suspensions, government investigations, and general litigation matters. He can be reached at alevine@pilieromazza.com.

Government Contracting

GET IN THE RING: CONTRACTORS OPPOSED TO THE PROPOSED EXTENSION OF PERSONAL CONFLICTS OF INTEREST SHOULD PUT UP A FIGHT

By Peter B. Ford

All contractors must guard against conflicts of interest, both with their personnel and their organizations. For personal conflicts of interest, the FAR currently requires contractors to take certain measures to avoid and mitigate conflicts of interest involving certain employees. For example, contractors must have procedures in place to screen covered employees for potential conflicts. This entails having employees disclose personal and financial information and to update these disclosures whenever an employee's personal or financial circumstances change such that a new personal conflict of interest might occur.

Earlier this month, a proposed FAR amendment was issued that would significantly expand the coverage of the personal conflicts of interest rules. The rules presently apply to a contractor's "covered employees," which the FAR defines as a contractor employee performing any of the eight acquisition-related functions listed in FAR 3.1101 (e.g., evaluating contract proposals, awarding and terminating government contracts). The proposed rule would expand the definition of a "covered employee" to include employees performing any of the 19 "functions closely associated with inherently governmental functions" listed in FAR 7.503(d).

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Importantly, the list in FAR 7.503(d) is not exhaustive, meaning there are more than 19 functions that would qualify an employee as a "covered employee" under the proposed rule. Moreover, of the 19 listed functions, only a few bear a direct relationship to the procurement process. As such, if the proposed rule is adopted, personal conflicts of interest would no longer be limited to contractor employees performing work closely related to the acquisition of government contracts. And the significant gray area in the rule would allow for further expansion of the definition of covered employee and will make it difficult for contractors to know when the rule applies and when it does not.

As such, if the proposed rule is adopted, personal conflicts of interest would no longer be limited to contractor employees performing work closely related to the acquisition of government contracts.

Contracting trade groups, such as the Professional Service Council, are not happy, arguing that the proposed rule is "overly broad and unnecessarily intrusive" and does not fall in line with Congressional intent. See Dietrich Knauth, *Contractors Blast Proposed Conflict of Interest Rule* (April 4, 2014). Much of their frustration stems from a concern that the benefits of the proposed expansion of personal conflicts of interest would not outweigh the associated burden and costs to contractors and their employees. So, are the complaints of the contractor trade groups justified? We think so.

The proposed rule extending personal conflicts of interest emanates from Section 829 of the National Defense Authorization Act for Fiscal Year 2013 (the 2013 NDAA). Section 829 of the 2013 NDAA directed the Secretary of Defense to "review the guidance on personal conflicts of interest for contractor employees…in order to determine whether it would be in the best interest of the Department of Defense and the taxpayers" to expand the current regulations governing personal conflicts of interest. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632, 829 (2013). We interpret this provision to mean that Congress' intent was to have the Secretary of Defense assess a possible expansion of the personal conflicts of interest rules and that such expansion, if any, would apply only to the Department of Defense, as opposed to the government-wide application contemplated by the proposed rule. That said, by throwing the best interest of the taxpayers into the mix, it could be argued that Congress intended Section 829 to mean that any proposed expansion of the personal conflicts of interest rules would be applicable to all government agencies, not just the Department of Defense. Still, if the Congressional intent was in fact for the Secretary of Defense to assess a possible expansion of the personal conflicts of interest rules with a government-wide application, one would think that the language of Section 829 of the 2013 NDAA would have been drafted in a less ambiguous fashion.

Regarding the breadth of the proposed rule, some of the functions included in FAR 7.305(d) are related to the government procurement process and, therefore, do seem to be of the type contemplated by the personal conflicts of interest rules added to the FAR in November 2011, which related just to acquisitions. For example, "[s]ervices that involve or relate to the evaluation of another contractor's performance," "[s]ervices in support of acquisition planning," "[c]ontractors providing technical evaluation of contract proposals," and "[c]ontractors providing assistance in the development of statements of work" are all categorized as functions closely associated with inherently governmental functions. See FAR § 7.503(d)(5)-(6), (8)-(9). On the other hand, "[s]ervices that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy" and "[c]ontractors providing support in preparing responses to Freedom of Information Act requests," are functions arguably not related (at least, directly) to the government procurement process and thus beg the question as to whether the government is truly at risk if contractor employees performing these functions are not covered by the personal conflicts of interest rules. Id. at §§ (d)(1), (10).

The proposed extension of personal conflicts of interest would result in increased costs to small business contractors forced to train, screen, and maintain a compliance program for a much broader pool of employees. The proposed rule will also likely lead to pushback from employees who would be forced to divulge personal and financial information. And the gray areas in the proposed rule increase risk of inadvertent noncompliance. For these reasons, we believe the proposed rule goes too far and we encourage contractors who feel the same to voice their concerns by submitting comments. Comments on the proposed rule are due by June 2, 2014. ❐

About the Author: Peter B. Ford, an associate with PilieroMazza, practices in the areas of government contracts and corporate law. He counsels clients in a wide variety of matters, including compliance with the Federal Acquisition Regulation and the unique rules and regulations governing eligibility and participation in the federal government's small business programs. He can be reached at pford@pilieromazza.com.

GUEST COLUMN

The Guest Column features articles written by professionals in the services community. If you would like to contribute an original article for the column, please contact our editor, Jon Williams at jwilliams@pilieromazza.com.

BABIES, BOATS AND GSA SCHEDULES

By Jennifer Schaus

Babies, boats and GSA Schedules, what do they all have in common? They are financial investments, require ample maintenance and the decision to have one should be well thought out. Sometimes having a friend who possesses one may be the better route!

A GSA Schedule is a contract vehicle (or "short list") that allows government buyers to purchase products and services directly from you. It is a 5 year contract with 3 five year renewable periods, thus making it a 20 year contract. The overwhelming majority of getting onto the Schedule is based on price. GSA seeks to obtain equal to or better than your Most Favored Customer – typically your lowest price customer. Additionally, GSA will compare your prices to similar items already on the GSA Schedule and "negotiate" with you to get your prices within a few points of these other items or services. This can be a deal-breaker if you are not willing to play the game with GSA.

Just like your baby needs food to survive, your GSA Schedule requires contracts – actual revenue – to survive, too. GSA requires that you bring in a minimum of $25k for the first 24 months and $25k every year thereafter. This is another deal-breaker. If your firm does not have clients lined up who want to purchase your products or services specifically through the Schedule, you may want to rethink the ROI to your firm. If you do not meet the sales requirement, GSA will cancel your Schedule. Currently, more than 60% of GSA Schedule holders do not meet this requirement. (Visit https://ssq.gsa.gov to view the sales figures for the Schedule holders and notice how many have 0's next to their names.) Having the "build it and they will come" strategy is not the way to win GSA Schedule business. Only about 10% of federal purchases occur through the GSA Schedule.

Boats need continuous maintenance and repairs; an investment beyond your initial purchase. GSA Schedules require quarterly payment and reporting of the Industrial Funding Fee (IFF). The IFF equates to .75% of your GSA Sales and gets paid to GSA electronically. Having an accounting system that can differentiate your GSA Schedule sales versus your non-GSA sales to produce quarterly reports is essential. Adding the task of the quarterly payment and keeping your Schedule compliant with the terms and conditions of the contract should be factored into the responsibilities of your controller, CFO or contract administrator.

Because pricing is such a large component of the Schedule both pre and post award, it is important to understand what you have agreed to. Your GSA Schedule will affect your daily business transactions. To break it down, GSA wants to be the customer that obtains your best price – always. Therefore, (post-award) should the price of your solution dip below your negotiated GSA price, a few things will need to happen. First, either a system or person should be in place to monitor this pricing relationship. Second, this drop in price will need to be reported to GSA and your GSA price will need to also be reduced by the same discounts.

Just as a baby will require regularly scheduled doctor visits, your company will receive regular visits from GSA to ensure compliance. These are called Customer Assisted Visits, (CAVs) and are often viewed as audits due to the nature of the information exchanged during these on-site meetings. CAV's are confidential visits and usually occur 2 times within each 5 year period. GSA's objective is to review your quarterly IFF payments, sample other contracts and invoices as well as GSA contracts. Your Report Card results are then sent to your Contracting Officer usually with some follow-up items required by your firm, sometimes an adjustment in your IFF payment.

While having a GSA Schedule may be a status symbol of "hard-core serious" government contractors and it may be the preferred method of some Contracting Officers within the government, it is best to conduct due diligence prior to diving in. Understand who your customers are and how they purchase. Know how much revenue has passed through GSA Schedules for your particular solution and what the price points are for your competitors on Schedule. Evaluate the ROI and make a blended business/strategic decision based on the opportunities as well as the risks and rewards at hand. Don't end up under water by investing in a fancy boat that no one wants to ride in and requires expensive gas that you cannot afford. ❒

About the Author: Jennifer Schaus is principal of Schaus & Associates, a Washington, D.C. based government contracts consulting firm specializing in GSA Schedules and federal sales. Ms. Schaus also hosts events for government contractors. For more information, please visit: www.jenniferSchaus.com.

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Attorney in the Spotlight

PAUL W. MENGEL III

Paul Mengel, counsel with PilieroMazza and head of the Litigation Group, is the man you want in your corner when things don't go quite as expected. A litigator with 25 years experience, Paul helps clients in a wide range of civil litigation impacting all aspects of business, from breach of contract to unfair competition.

When Paul was quite young, his grandmother recognized his well-reasoned arguments, competitive nature and ease before an audience as attributes that might serve him well as a lawyer. And indeed they do. In addition, Paul enjoys the problem-solving aspect, helping his clients resolve issues impacting their businesses. Naturally, his biggest satisfaction is prevailing for his clients, but sometime that's not possible; then success is measured by placing his clients in a stronger position than the one held when litigation began. Paul's biggest annoyance is with opposing lawyers who confuse belligerence with advocacy and lose sight of the client's best interest in the heat of battle. He believes one can be strong and effective without being rude.

Born and raised in Danville, Virginia, Paul now calls Alexandria, Virginia home. But friendships formed in his youth remain a part of his life today. In high school, Paul and his friends formed a band playing rock 'n roll and rhythm and blues. Today all professionals in various fields and living in the Washington, D.C. area, they come together as "CityFarm," a bluegrass band with a modern twist playing clubs, private parties and events at their children's schools. Paul's attraction to bluegrass lies in the acoustic sound, the required skill set, the precision of the arrangements and the vocal harmonies. Paul's singing and mandolin/guitar playing offer a creative outlet for his demanding law practice. To learn more about Paul and the boys, visit www.cityfarmband.com.

When he is not arguing cases or playing music, Paul enjoys Washington Nationals baseball, his son's lacrosse games, his daughter's theatrical productions and University of Virginia athletics. He is especially happy with UVA's winning the Atlantic Coast Conference basketball championship and earning a berth in the NCAA tournament.

Paul likes the way PilieroMazza attorneys genuinely care about their clients and work together as a team, putting out high-caliber work, always in the best interest of their clients; he is proud to be part of the culture. To learn more about Paul, visit his Attorney page at www.pilieromazza.com or contact him at pmengel@pilieromazza.com.