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PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



**EDITOR'S NOTE: LOOKING BACK,
AND AHEAD**

Victoria Prussen Spears

**FALSE CLAIMS ACT:
2016 YEAR-IN-REVIEW**

Jonathan G. Cedarbaum and
Christopher E. Babbitt

**FALSE CLAIMS ACT STATISTICS SIGNAL
THAT DOJ WILL CONTINUE RIGOROUS
ENFORCEMENT WITH A FOCUS ON
THE HEALTH CARE INDUSTRY AND ON
INDIVIDUAL ACCOUNTABILITY**

Suzanne Jaffe Bloom, Benjamin Sokoly,
and Mollie C. Richardson

**RECENT DRUG COMPANY
SETTLEMENT HIGHLIGHTS UNIQUE
THEORY OF FALSE CLAIMS ACT
LIABILITY: FAILURE TO FOLLOW
CURRENT GOOD MANUFACTURING
PRACTICES**

Stephanie Trunk and
Emily M. Leongini

**PROTESTERS' PARADISE AT THE
GAO? UNDERSTANDING THE RAPID
RISE IN THE GAO'S FY 2016 BID
PROTEST SUSTAIN RATE**

Franklin C. Turner

**NINTH CIRCUIT REJECTS
HEIGHTENED STANDARD FOR
DEMONSTRATING LIKELIHOOD OF
COMPETITIVE HARM UNDER
FOIA EXEMPTION 4**

Kevin T. Barnett and
E. Sanderson Hoe

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MAY 2017

Editor's Note: Looking Back, and Ahead

Victoria Prussen Spears

157

False Claims Act: 2016 Year-in-Review

Jonathan G. Cedarbaum and Christopher E. Babbitt

159

False Claims Act Statistics Signal that DOJ Will Continue Rigorous Enforcement with a Focus on the Health Care Industry and on Individual Accountability

Suzanne Jaffe Bloom, Benjamin Sokoly, and Mollie C. Richardson

178

Recent Drug Company Settlement Highlights Unique Theory of False Claims Act Liability: Failure to Follow Current Good Manufacturing Practices

Stephanie Trunk and Emily M. Leongini

184

Protesters' Paradise at the GAO? Understanding the Rapid Rise in the GAO's FY 2016 Bid Protest Sustain Rate

Franklin C. Turner

188

Ninth Circuit Rejects Heightened Standard for Demonstrating Likelihood of Competitive Harm under FOIA Exemption 4

Kevin T. Barnett and E. Sanderson Hoe

191

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Ninth Circuit Rejects Heightened Standard for Demonstrating Likelihood of Competitive Harm under FOIA Exemption 4

*By Kevin T. Barnett and E. Sanderson Hoe**

The authors of this article discuss a recent U.S. Court of Appeals for the Ninth Circuit decision addressing Exemption 4 of the Freedom of Information Act.

The U.S. Court of Appeals for the Ninth Circuit recently confirmed that predicting the future with near certainty is not required when seeking to protect information from disclosure under Exemption 4 of the Freedom of Information Act (“FOIA”). In a recent unpublished decision,¹ the Ninth Circuit concluded that Sikorsky Aircraft’s small business subcontracting plan was “confidential commercial or financial information” exempt from disclosure under Freedom of Information Act, Exemption 4.² Although the non-precedential decision merely reaffirmed the existing standard for determining competitive harm, the decision was significant because it rejected the lower court’s position that Exemption 4 required a party to show that release in effect “would” produce competitive harm rather than simply “could” lead to such harm. In addition, the ruling confirmed that employee contact information and signatures are protected from disclosure by Exemption 6 (Personal Privacy).³

THE FOIA REQUEST

In 2013, the American Small Business League submitted a FOIA request for “[t]he most recent master [C]omprehensive [S]ubcontracting [P]lan submitted by Sikorsky Aircraft Corporation for participating in the Comprehensive Subcontracting Plan Test Program for the Department of Defense.”⁴ Under the

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¹ <https://cdn.ca9.uscourts.gov/datastore/memoranda/2017/01/06/15-15120.pdf>.

² See *Am. Small Business League v. Department of Defense*, No. 15-15120, 2017 WL 65399 (9th Cir. Jan. 6, 2017) (“ASBL I”), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption4_0.pdf.

³ https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption6_0.pdf.

⁴ *Am. Small Business League v. Dep’t of Defense*, No. C14-02166 (N.D. Cal. Nov. 23, 2014) (http://www.asbl.com/documents/FOIA/2014Nov23_Order_Denying_MSJ.pdf) (“ASBL I”), http://www.asbl.com/documents/FOIA/2014Nov23_Order_Denying_MSJ.pdf.

Department of Defense (“DOD”) Test Program,⁵ the Comprehensive Subcontracting Plan must identify “all subcontract amounts awarded to small businesses on all government contracts the prime contractor fulfills.”⁶ Most businesses treat this information about their supply chains as proprietary. After DOD failed to meet the FOIA response deadlines, ASBL filed suit demanding release of the plan.⁷

DISTRICT COURT DECISION

In response to the lawsuit, DOD filed a motion for summary judgment, arguing that the plan was protected by FOIA Exemption 4.⁸ Exemption 4 prohibits the release of “trade secrets and commercial or financial information [that is] privileged or confidential.”⁹ In support, DOD submitted an affidavit from a Sikorsky employee detailing the competitive harm that Sikorsky *could* face if the information were disclosed.¹⁰ (“[I]t is my professional opinion that a competitor with similar expertise could readily use the information to determine Sikorsky’s approach to key manufacturing and sourcing decision[s] that are competitively evaluated as part of [the agency’s] contract proposal review.”).

The district court was not persuaded by Sikorsky’s argument. The court found that “[n]either the lodged document nor [Sikorsky]’s declaration adequately shows how the redacted information is “likely to cause substantial competitive injury” if disclosed.¹¹ Instead, DOD showed “at best” that a competitor “could” use such information to assess the strengths and weaknesses of Sikorsky’s proposals to the agency.¹² In addition, the court said that DOD failed to justify why employee contact information or official signatures were an invasion of privacy.¹³ As a result, the court ordered DOD to release an unredacted copy of Sikorsky’s small business subcontracting plan. DOD appealed.

⁵ <http://www.acq.osd.mil/osbp/sb/initiatives/subcontracting/>.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ 5 U.S.C. § 552(b)(4).

¹⁰ *ASBL I, supra.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

NINTH CIRCUIT DECISION

On appeal, the Ninth Circuit rejected the district court’s position that the use of the word “could” was somehow insufficient to establish competitive prejudice.¹⁴ In doing so, it confirmed that “[n]othing more is required to gain protection from disclosure under Exemption 4” than “(1) identifying the entities with which Sikorsky competes for government defense contracts and (2) averring that those entities could use the redacted information to gain a significant competitive advantage over Sikorsky.”¹⁵

The Ninth Circuit also rejected the district court’s determination that Exemption 6 did not prohibit the release of employee contact information and signatures. Exemption 6 protects information that, if released, would result in an unwarranted invasion of personal privacy.¹⁶ To determine if Exemption 6 is applicable, courts balance the personal privacy interest against the potential public benefit. Here, the court determined that the information presented risks of harassment and forgery while providing little, if any, public benefit.¹⁷ Thus, DOD appropriately withheld this information as subject to Exemption 6.¹⁸

SIGNIFICANCE

This decision is significant for two reasons. First, contractors can breathe a sigh of relief that their small business contracting plans are protected from disclosure (assuming the contractor makes the requisite showing). Second, and more importantly, the Ninth Circuit provided a clear statement of the type of information required to trigger the protections of Exemption 4: the identity of competitors and a forward-looking statement about how the information could be used to their competitive advantage. At the same time, the protection is not automatic and this lower threshold must be taken seriously. DOD prevailed here because it submitted a detailed affidavit from a knowledgeable company official that outlined with some particularity the necessary information. Going forward, companies should follow a similar blueprint when opposing disclosure pursuant to Exemption 4.

¹⁴ *ASBL II, supra*.

¹⁵ *Id.*

¹⁶ *See* 5 U.S.C. § 552(b)(6).

¹⁷ *ASBL II, supra*.

¹⁸ *Id.*