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Robert G. Barbour

Court Dismisses FCA Claims Against Miller Act Surety Defendants For Alleged Failure To Detect And Report Procurement Fraud

by Robert G. Barbour, Senior Partner and Matthew D. Baker, Partner

Matthew D. Baker

On July 19, 2022, the U.S. District Court for the District of Columbia granted summary judgment dismissing a series of claims brought under the False Claims Act ("FCA") against a group of Miller Act sureties related to their alleged failure to detect and report alleged set-aside procurement fraud committed by their principals. *See Scollick ex rel. United States v. Narula et al*, No. 1:14-cv-01339-RCL, 2022 WL 3020936 (D.D.C. July 29, 2022) *("Scollick")*. In a case that has been closely watched by the surety industry, the Court found that Miller Act sureties are not participants in federal set-aside programs and have no duty to familiarize themselves with the applicable regulations for those programs. The Court also found that Miller Act sureties have no duty to double-check the government's verification of their principal's set-aside program eligibility. Although the decision leaves a number of issues unresolved, its reasoning provides a road map for sureties attempting to minimize their exposure to liability for FCA violation in connection with their work underwriting contractors competing for set-aside contracts.

Factual Background

The factual and procedural background in *Scollick* is complex and only overviewed by the Court in its opinion. As summarized by the Court, in 2014, plaintiff-relator Andrew Scollick ("Scollick" or the "Plaintiff-Relator") brought suit against over a dozen defendants alleging "an elaborate plot … to defraud the federal government by posing as service-disabled veteran-owned small businesses ("SDVOSB") to obtain set-aside contracts." *Scollick,* 2022 WL 3020936, at *1. Relevant to the Court's opinion, the Plaintiff-Relator alleged that a group of defendants, all non-veterans, (the "Contractor Defendants") colluded with an undisputed, *bona fida* service-disabled veteran (the "SDV Defendant") to form a company known as Centurion Solutions Group ("CSG") (the "Contractor Defendants," the "SDV Defendant," and "CSG," collectively the "Construction Defendants") to bid on and obtain Department of Veterans Affairs ("VA") SDVOSB set-aside contracts. *Id.* at *3, *11. In its decision, the Court noted that to be eligible for the award of VA SDVOSB set aside contracts, a small business "'must be unconditionally owned and controlled by one or more eligible veterans, service-disabled veterans, or surviving spouses.'" *Id.* at *7 (quoting 38 C.F.R. § 74.2(a) (2015)). Notwithstanding the undisputed provisions of CSG's operating agreement, the Plaintiff-Relator alleged that CSG was actually owned and controlled by the Contractor Defendants. *Id.* at *6. Nevertheless, the VA "certified CSG as SDVOSB compliant." *Id.* at *3. Between 2010 and 2015, "CSG was awarded nineteen SDVOSB set aside contracts," "never defaulted on any contracts for the VA," and did not receive "negative performance reviews regarding completed contracts." *Id.* at *4.

As detailed by the Court, CSG was required by the Miller Act to obtain performance and payment bonds on the contracts it was awarded and obtained such bonds from various sureties (the "Surety Defendants"). *Id.* at **4-5. As the Court noted, the Plaintiff-Relator argued that the "Construction Defendants could not have filed the allegedly fraudulent bid proposals without surety bonds and performance bonds …." *Id.* at *12. The Plaintiff-Relator further alleged that the Surety Defendants in connection with underwriting CSG "'obtained facts that [they] knew or should have known violated the government's contracting requirements'" and "'concealed those facts'" from the government. *Id.* at *12 (quoting Pl's Second Am. Compl. ¶ 204) (brackets in original). Consequently, the Plaintiff-Relator asserted claims against the

Surety Defendants under the FCA based on theories of indirect presentment of false claims, reverse false-claim, and conspiracy. *Id.* at *12.

The Surety Defendants' Arguments

The Surety Defendants raised a number of arguments in their briefs supporting the entry of summary judgment, only some of which were directly addressed by the Court in its opinion. An understanding of these arguments is critical to appreciating the implications of the Court's decision. Although this article does not attempt to fully overview the arguments raised by the Surety Defendants in support of summary judgment, it does detail at least three important arguments which merit attention.

First, the Surety Defendants argued that the Plaintiff-Relator failed to proffer sufficient evidence to establish that they possessed the requisite *scienter* under the FCA (*i.e.,* knowingly made or caused to be made an actionable false statement or claim). A defendant acts *knowingly* under the FCA by: (1) having actual knowledge; (2) acting with deliberate ignorance; or (3) acting with reckless disregard of the falsity of the claim or statement. 31 U.S.C. § 3729(b)(1). On summary judgment, the Surety Defendants argued that the Plaintiff-Relator failed to "identify *any* evidence that reflected … actual, subjective knowledge of the falsity of any statement made by CSG or any claim submitted by CSG." *See* ECF 334-1, p. 10. Moreover, the Surety Defendants argued that the Plaintiff-Relator failed to establish that any applicable employee "ever saw or had any familiarity with the regulatory requirements" or had "sufficient knowledge and understanding of those requirements to appreciate whether a violation had occurred." *See Id.,* p. 5. The Surety Defendants further argued that their underwriting was undertaken solely for their own benefit, and as Miller Act sureties, they had no duty to the government to know "the regulatory requirements of the VA's SDVOSB program, let alone to look behind the VA's verification of CSG into its program and to verify whether CSG qualified for SDVOSB status." *See Id.*, p. 14.

Second, the Surety Defendants argued that the Plaintiff-Relator failed to proffer evidence to establish that they caused the submission of any false claim under an indirect present theory based on any previously recognized causation scenario. To prevail on a theory of indirect presentment under the FCA, a plaintiff-relator must establish that a non-submitter defendant "caused" a false statement or claim to be presented. 31 U.S.C. § 3729. As stated by the Court in a prior decision in the case:

> To determine whether a defendant who did not actually submit a claim or make a false statement "has 'caused' the submission of a false claim or false statement, a court must look at the degree to which that party was involved in the scheme that results in the actual submission." *United States ex rel. Tran v. Computer Scis. Corp.*, 53 F. Supp. 3d 104, 127 (D.D.C. 2014).... Courts have credited indirect presentment and false statement claims in the following circumstances: [...] when 'they had agreed to take certain critical actions in furtherance of the fraud;' and when the 'non-submitter continued to do business with an entity upon becoming aware that that entity was submitting false claims.' *Tran*, 53 F. Supp. 3d at 126–27.

U.S. ex. rel. Scollick v. Narula, 215 F. Supp. 3d 26, 39 (D.D.C. 2016). In connection with the recognized causation scenarios of "critical actions in furtherance of the fraud" or "continu[ing] to do business … upon becoming aware," the Surety Defendants argued, based on a review of the applicable case law, that the Plaintiff-Relator bore the burden to demonstrate that the non-submitter had "… *actual knowledge* of the falsity of the statement or claim submitted." *See* ECF 334-1, p. 19. According to the Surety Defendants' argument, the requirement for proof of actual knowledge arises not from the FCA's *scienter* requirement, but from the established requirements for demonstrating causation under an indirect presentment theory of liability.

Third, the Surety & Fidelity Association of America ("SFAA") filed an *amicus* brief asserting, among other arguments, that sureties should not be responsible for "policing" contractor's compliance with set-aside eligibility regulations and should be entitled to rely upon the government's verification of the same. *See* ECF No. 324-1, pp. 20-24.

The Court's Decision

The Court ultimately granted summary judgment in favor of the Surety Defendants based on the Plaintiff-Relator's failure to proffer sufficient evidence to establish that the Surety Defendants possessed the requisite scienter (*i.e.,* acted *knowingly* within the meaning of the FCA). *Scollick*, 2022 WL 3020936, at *13.

Based on the evidence produced by the Plaintiff-Relator, the Court readily determined that the Surety Defendants did not possess subjective,

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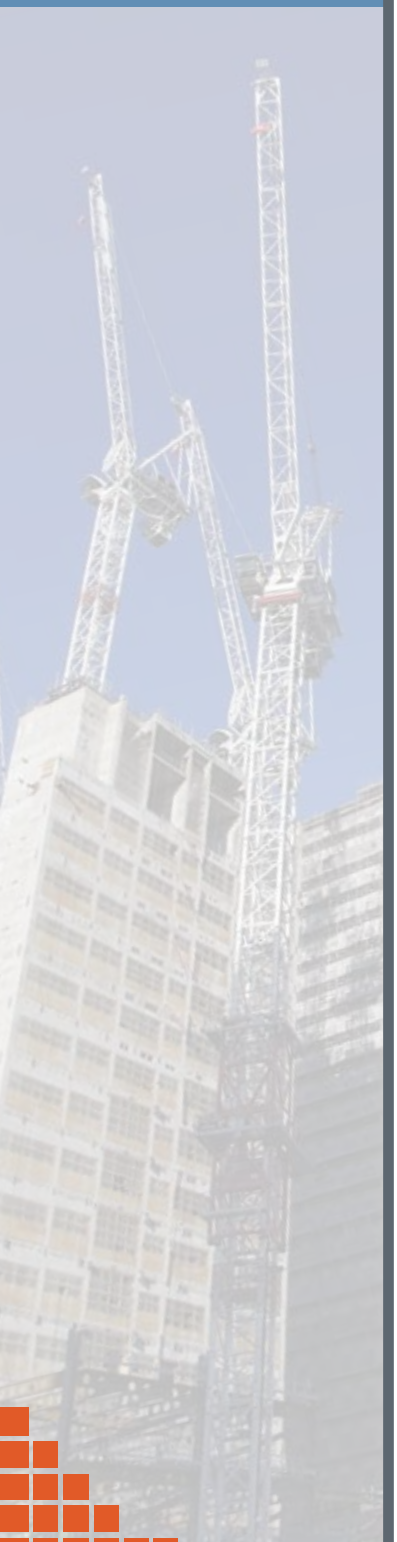

actual knowledge of the alleged fraud. *Id.* at *13. Specifically, the Court found there to be no evidence to suggest that the Surety Defendants "*knew* the bids were fraudulent." *Id.* at *13. Based on its review of the evidence, however, the Court did conclude that it appeared to be "undisputed" that certain employees of the Surety Defendants "seemed to think that CSG was the 'construction arm of [one of the Contractor Defendants]'" and that two of the Contractor Defendants "owned CSG." *Id.* at *5. In addition, the Court noted evidence that one of the Contractor Defendants "was the primary contact" between the Surety Defendants and CSG and appeared to believe there was evidence the Surety Defendants knew at least some of the details of CSG's bid proposals. *Id.* at *5, *13. Nevertheless, the Court concluded that evidence the Surety Defendants "knew the details of the bid proposals and some details of the ownership of CSG" was "insufficient [for the Plaintiff-Relator] to proceed on a theory of actual knowledge." *Id.* at *13.

The Court further declined to find that the Surety Defendants had constructive knowledge (*i.e.,* acted with deliberate ignorance or in reckless disregard) of any alleged fraud. The Plaintiff-Relator argued that the Surety Defendants "recklessly disregarded the truth about the construction defendants' fraud" because "'[a]ll that was required to have full knowledge of the fraud was for the [Surety Defendants] to take the actual knowledge they possessed and apply it to the ownership and control regulations applicable to all VA SDVOSB set-aside contracts.'" *Id.* at *13 (quoting, in part, ECF No. 331-1, p. 29). Importantly, the Court noted that the Plaintiff-Relator "failed to proffer evidence that [the sureties] knew of the SDVOSB requirements" *Id.* at *14. Consequently, the Court disposed of Plaintiff-Relator's argument by noting that it would:

> [I]mpose a significant duty on [sureties] to familiarize themselves with VA regulations before bonding companies. It is a significant leap in terms of lability. Without facts indicating that the insurance defendants *knew* of the specific SDVOSB requirements, this Court will not impose an affirmative duty on insurance and bonding companies to double-check the government's verification.

Id. at *13 (emphasis in original). The Court further rejected the Plaintiff-Relator's argument that the Surety Defendants had a duty to familiarize themselves with the applicable set-aside program requirements because those who "'deal with the Government are expected to know the law.'" *Id.* at *13 (quoting *Heckler v. Community Health Services of Crawford County, Inc.,* 467 U.S. 51, 63 (1984)). Specifically, the Court noted in response that the Construction Defendants, rather than the Surety Defendant, were participants in the federal set-aside programs. *Id.* at *13. Moreover, the Court was unaware of any case imposing an obligation on Surety Defendants to familiarize themselves with set-aside program requirements. *Id.* at **13-14. Finally, the Court parried the Plaintiff-Relator's argument that the Surety Defendants had an "FCA-imposed duty" to make additional inquiries when they encounter "red flags of … possible fraud," by noting that "without affirmative knowledge of SDVOSB regulations or requirements, the facts in question would not raise red flags." *Id.* at *14.

In granting summary judgment in favor of the Surety Defendants based on their lack of the required *scienter*, the Court failed substantively to address a number of other arguments raised by the Surety Defendants, including, but not limited to, their arguments related to causation.

Conclusion

The Court's grant of summary judgment in favor of the Surety Defendants represents an express rejection of the Plaintiff-Relator's invitation to the Court that it radically expand Miller Act sureties' liability under the FCA. The decision's twin holdings that Miller Act sureties have no duty to "double-check the government's verification" of a participant's set-aside program eligibility and no duty to familiarize themselves with the regulations for such programs represent a monumental decision for the surety industry. The Court's opinion further clarifies the import of a number of prior, preliminary decisions in the case that have been heavily scrutinized. While still leaving a number of questions unanswered, the decision outlines powerful grounds of defense for sureties facing FCA claims in connection with set-aside fraud allegedly committed by their principals and provides important guidance for surety underwriters to inoculate themselves against such claims.

Recovering For Inflation On Federal Contracts: Recent DOD Guidance On Economic Price Adjustment Clauses

by Amanda L. Marutzky, Partner

Since October 2020, inflation in the United States has seen its fastest increase in more than 30 years. In the last year alone, inflation has remained as high at 8.6%. This hike has impacted everything from diesel to steel. In the construction industry, the higher prices of goods and services directly affects how contractors draft their construction contracts.

The Department of Defense (DoD) has taken note of this dramatic price increase and recently issued guidance to its commanding officers and the procurement community. On May 5, 2022, DoD issued a memorandum titled "Guidance on Inflation and Economic Price Adjustments." The stated purpose of the memo is "to assist COs to understand whether it is appropriate to recognize cost increases due to inflation under existing contracts as well as offer considerations for the proper use of EPA when entering into new contracts." DoD's memo responds to contractor and contracting officer concerns related to the sudden and unexpected cost increases in labor and materials.

Economic Price Adjustments

Economic Price Adjustments, or EPAs, are adjustments to a stated contract price upon the occurrence of certain contingencies. FAR 16.203-1. They include three general types: (1) adjustments based on established prices; (2) adjustments based on actual costs of labor or material; or (3) adjustments based on cost indexes of labor or material. Because EPAs allow for adjustments in a contract price, EPA clauses allow a contractor to recover unanticipated increases in its project costs. For example, FAR 52.216-4, Economic Price Adjustment-Labor and Material, authorizes a contractor to recover for increases in the cost of material or labor. Such recovery is available when costs increase more than 3%, with a maximum recovery of 10% of the original contract price. *See also* FAR 52.216-2 through FAR 52.216-4. These EPA clauses provide contractors with relief and protection from issues such as dramatic inflation. EPA clauses, however, are not included in all contracts.

In its memo, DoD encourages the use of EPA clauses where appropriate. DoD first explains that the treatment of inflation depends on the type of contract at issue, i.e. whether cost-reimbursable or fixed price.

- Cost-Reimbursable Contracts

For cost-reimbursable contracts, inflation is an assumed part of the risk borne by the government. Those contracts typically include notice clauses for cost increases and are governed by regulations such as FAR 52.232-20, Limitation of Cost or FAR 52.232-22, Limitation of Funds. Once the contractor provides notice to the government of the increased cost, the contractor can stop working unless and until the government increases the contract funds to cover those costs. These type of contracts provide the most protection for a contractor in the current inflation environment because, as long as the contractor meets the notice requirements, it has contractual protection to recoup its costs if they suddenly spike.

DoD identifies two other types of contracts, including fixed price incentive firm (or FPIF) contracts and fixed-price contracts with economic price adjustment (or FPEPA) contracts.

- FPIF Contracts

FPIF contracts specify a target cost, a target profit, and a target price, which is a combination of the cost and profit. FPIF contracts also set forth a price ceiling. The contractor's actual costs are recognized up to that ceiling, but if they differ from the target cost, the profit is adjusted by applying a profit adjustment formula, also known as a "share ratio" or "sharing arrangement" to any costs

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over or under the target. Because the formula is agreed-upon ahead of time, the government and the contractor have better knowledge of their respective exposures if costs fluctuate.

- FPEPA Contracts

FPEPA contracts include an EPA clause which seeks to mitigate cost risks to both the contractor and the government due to contingencies beyond the contractor's control, such as unanticipated inflation. Typically, the clause will state that the government will bear the cost risk up to a specified amount. Similar to the FPIF, the contracting parties are better prepared for fluctuations in the market because they established cost boundaries ahead of time.

- FFP Contracts

Compared with cost-reimbursement, FPIF, or FPEPA contracts, in a firm-fixed-price (FFP) contract the contractor, rather than the government, generally bears the risk of cost increases due to inflation. This risk exists because FFP contracts are drafted as they sound, with a "firm fixed price" without any sharing arrangement or price adjustment clause. In the absence of a contract clause which allows the contract price to increase due to inflation, the contractor is typically left to incur cost increases, which generally erode the contractor's profit.

DoD Recommendations

To avoid an inequitable cost burden on contractors due to unanticipated inflation, the DoD responded to a proposal for contractors under FFP contracts to submit a request for equitable adjustment (REA). REAs are contractor proposals to a contracting officer requesting an equitable adjustment in the contract via a contracting officer-directed change. DoD, however, explicitly advised against using REAs to address inflation because inflation is not a change caused by the government.

For current and future contracts, and depending on the length of the contract, DoD recommends that contracting officers include EPA clauses to account for "unstable market conditions." The length of the contract is important because the FAR limits the use of EPA clauses to those where the work will be done six months out from the contract start date (DFARS 216.203-4(1)(ii)(based on established prices or actual labor and material costs) or for extended performance contracts where significant costs are incurred one year after the work starts (FAR 16.203-4(d)(1)(i)(based on cost indices of labor and material).

In addition to the timing of the contract, DoD cautions contracting officers who draft EPA clauses to consider the type of cost involved, noting that EPA clauses should be limited to costs that are more likely to be impacted by inflation compared with those that are not. The memo cites labor costs under a union agreement for a FFP subcontract, as well as profit, as examples of such non-impacted costs. The memo further advises that the index used to measure inflation for the EPA clause should be thoughtfully chosen, and "the CO should take care to use an index that is closely related to the cost components judged to be most unstable." DoD then cites several examples of appropriate indices – the Bureau of Labor Statistics Producer Price Index; the Employment Cost Index; and the North American Industry Classification System Product Codes.

DoD next outlines the parameters of an "appropriate" EPA clause with the overarching goal of fairness to both parties. Such a clause will (1) allow for adjustment of the contract price up or down; (2) use the same index to both establish and adjust the negotiated price in the clause; and (3) include the same range or magnitude of adjustment on both the ceiling and floor prices if both are in the contract. The purpose of the EPA clause is to work out the contract price adjustment ahead of time, before the impact of inflation, rather than enable the parties to reopen negotiations on the contract.

DoD notes that best practices for contracting officers include consulting legal counsel, reviewing guidance in the FAR, and consulting local offices and agencies. The memo concludes with a reminder that EPA clauses invoke contingent liabilities which must be administratively reserved as commitments.

Notably, DoD clarified that its guidance can be more broadly applied to any contract provision that alters the price of a contract because of changes in the economy, not just EPA clauses. Therefore, contractors who work outside of the world of government contracts can also use this guidance to craft and include EPAs when negotiating contracts with private owners or other state or local public agencies. Contractors can apply the same parameters identified by the DoD (i.e., up and down price adjustment, similar bases of price measurement, and equal ranges of adjustment on the high and low price points) to balance the goals of equity and fairness with risk mitigation in a currently volatile market.

John F. Finnegan, III

Dominick Weinkam

Look Up And Look Out: Increased Antitrust Enforcement Of Horizontal No-Poach Agreements Signals Heightened Scrutiny Of Vertical Agreements May Be Next

by John F. Finnegan, III, Partner and Dominick Weinkam, Associate

In the current regulatory environment, it is important for contractors to remain vigilant of heightened anti-competitive enforcement in the construction and procurement spheres by the United States Department of Justice (DOJ). Such vigilance should include, among other things, regular review of applicable laws and implementation of related updates to compliance policies, as well as careful evaluation of joint venture (JV), subcontractor, and teaming agreements.

Recent DOJ Activity Opens The Door To Broader Antitrust Exposure For Contractors

Many contractors include exclusivity and non-compete clauses in their vertical agreements, including subcontractor agreements and certain types of JV and teaming agreements. In fact, many widely available "checklists" for drafting these agreements recommend including such provisions; however, under U.S. antitrust law, particularly as enforced by the DOJ in the last 1-2 years, exclusivity and non-compete clauses may be construed as unduly competition-restricting. Although no court has yet held that exclusivity and non-compete clauses in *vertical* agreements violate antitrust laws, recent aggressive enforcement activity by the DOJ with regard to *horizontal* no-poach agreements suggests that the investigatory headwinds may be blowing in that direction.

Horizontal no-poach agreements between market competitors – traditional targets of the DOJ's antitrust enforcement actions – are generally *per se* illegal. However, a recent criminal case, *USA v. DaVita Inc., et al.*, Case No. 1:21-cr-0229 (D. Colo. 2021), which involved horizontal no-poach agreements, underscores the DOJ's increased scrutiny of potentially anti-competitive contractual clauses. In *DaVita*, the DOJ charged DaVita, a dialysis provider, and its former CEO with a violation of Section 1 of the Sherman Act due to alleged anti-competitive conduct arising from no-poach agreements between DaVita and other health care companies that precluded the competitor companies from recruiting and hiring DaVita's employees. Though DaVita and its former CEO were ultimately acquitted by a federal jury of a criminal conspiracy, this case nonetheless illustrates that the DOJ is escalating its efforts to aggressively investigate and prosecute perceived anti-competitive conduct by private companies, such that contractors who are parties to vertical agreements should take heed.

Indeed, the *DaVita* case represents a policy shift within the DOJ to pursue criminal liability related to no-poach agreements, which stems from guidance issued jointly by the DOJ and Federal Trade Commission (FTC) in October 2016, in which the government warned that no-poach agreements as well as wage-fixing among horizontal competitors are *per se* illegal. In this regard, the *DaVita* case serves as a stark warning to contractors whose JV, subcontractor, and/or teaming agreements include provisions which may be construed as anti-competitive – *e.g.*, non-compete and exclusivity clauses – that the DOJ has adopted a more expansive interpretation of the types of clauses that may run afoul of U.S. antitrust law.

In addition to criminal liability, contractors face broad civil exposure for antitrust violations. Potential consequences include suspension and debarment, revocation of business licenses, and the initiation of False Claims Act investigations carrying the threat of treble damages. Further, even if an accused contractor demonstrates its compliance, handling antitrust investigations is often a costly and time-intensive endeavor, and the mere fact of being under investigation may, unfortunately, inflict reputational damage or impair business relationships.

With passage of the Infrastructure Investment and Jobs Act in 2021 and the recent

...continued on page 8

passage of the Inflation Reduction Act in 2022, contractors may reasonably expect a substantial slate of procurement opportunities in the near to intermediate future, including large infrastructure projects that are ripe for JV formations. In light of the government's strident enforcement posture in accordance with its October 2016 DOJ/FTC guidance, however, contractors should ensure that their JVs are formed for the purposes of providing more efficient, cost-effective, and technically superior services than would be possible absent collaboration. More specifically, contractors should consider erring on the side of caution and reasonably limiting the use and scope of exclusivity and non-compete provisions based on legitimate business judgment to fit the particular circumstances presented.

The Rise Of The Procurement Collusion Strike Force

These considerations are particularly salient given the growing influence and emboldened prosecutorial actions of the Procurement Collusion Strike Force (PCSF). Formed in 2019, the PCSF is a department within the DOJ's Antitrust Division charged with deterring, investigating, and prosecuting antitrust crimes and related schemes involving procurement, grants, and program funding at all levels of government, including federal, state, and local. This broad mandate includes the traditional antitrust crimes such as bid rigging, price fixing, and market allocation, as well as previously lower-prioritized issues, such as set-aside fraud.

The PCSF has taken its robust charge seriously. From 2020-21, the PCSF secured bid rigging and fraud guilty pleas from a Connecticut insulation contracting company and one of its owners, a North Carolina engineering firm, and a Minnesota concrete contractor. Thus far in 2022, the PCSF already announced that it has: (i) obtained guilty pleas from additional defendants in the Connecticut insulation bid rigging scheme, a former California Department of Transportation contract manager, South Korean nationals performing repair and maintenance work at U.S. military bases, and a Texas miliary contractor involving false representations of qualifications for procurement set-aside programs; and (ii) indicted certain Florida military contractors for similar offenses.

Where Do We Go From Here?

From a cost mitigation standpoint, contractors are well-advised to implement comprehensive antitrust compliance policies. Such policies should address the underlying criminal acts set forth in the PCSF's published indictments and guilty pleas. To avoid the innumerable risks, costs, and business disruptions that flow from governmental investigations, contractors should also exercise oversight into less obvious potential violations, such as the informal sharing of bid information with competitors. Indeed, one common misconception is that antitrust violations arise primarily from formalized, written agreements. This is not necessarily the case; rather, antitrust violations may be established through circumstantial evidence as well as through oral or implied understandings.

Accordingly, contractors should educate their employees on the potential risks of communications – formal or informal – with competitors. Discussion of topics such as present or future prices, pricing policies, bids, costs, capacity, and identity of customers, between a contractor's employees and competitors may invite enhanced antitrust scrutiny. While not all conversations involving such topics give rise to antitrust violations, they do present opportunities – or, put differently, provide an articulable pretext – for enforcement arms, such as the PCSF, to open wide-ranging investigations.

While governmental review of antitrust compliance is nothing new to the construction and procurement industry landscape, the rise of the PCSF and its recent slew of indictments and plea announcements cannot be ignored. As the DOJ's anticompetitive focus begins to envelope not only horizontal but also, potentially, vertical agreements, contractors can get out ahead of this enforcement trend by updating their compliance policies to avoid scrutiny of what is increasingly becoming a wider swath of anti-competitive conduct.

Pre-Award Protests Remain A Valuable Tool For Actual Or Prospective Offerors

by Andrew L. Balland, Associate

Bid protests are an important aspect of the federal procurement process. Government contractors rely on bid protests to ensure that award decisions are rendered lawfully and impartially. Offerors are entitled to challenge government decision-making to ensure it complies with the terms of the solicitation, as well as the Federal Acquisition Regulation (FAR).

Although post-award protests account for most bid protests filed at the Government Accountability Office (GAO), offerors can also challenge the terms of the solicitation itself in a pre-award protest. Typically, the government is afforded discretion to define and explain its needs in a solicitation. However, protesting a solicitation's requirements can enhance an offeror's chances of being awarded a contract, particularly where the terms unduly limit the number of prospective bidders without adequate justification.

Recently, in *Insight Technology Solutions, Inc.*, B-420543, B- 420543.2, May 27, 2022, CPD ¶134, an offeror successfully protested the terms of a Request for Proposals (RFP), where the procuring agency unreasonably asked offerors to obtain certifications before the contract's award. The decision is a reminder to offerors that pre-award protests can be a valuable tool in the right context. This article briefly reviews the basics of pre-award protests and explains why *Insight Technology Solutions, Inc.* is a good example of when offerors should mount a pre-award protest.

Pre-Award Protest Basics

Pre-award protests challenge various aspects of the procurement process that take place before a contract's award. Pre-award protests can increase an offeror's competitiveness. They are often launched to clarify solicitation ambiguities, challenge unreasonably restrictive terms, or to dispute the exclusion of an offeror from further consideration. Common grounds for pre-award protests include an alleged impropriety in the solicitation's terms, an offeror's improper exclusion from the competitive range, an agency's failure to use competitive procedures, and an agency's intention to award a contract on a sole source basis. A pre-award protest can be filed with the agency, the GAO, or the Court of Federal Claims (COFC). *See* 48 C.F.R. § 33.103 (agency protests); 4 C.F.R. § 21.1(a) (GAO protests); 28 U.S.C. § 1491(b) (COFC protests).

If a pre-award protest is filed with an agency, the agency must try to render a decision within thirty-five (35) days. *See* 48 C.F.R. § 33.103(g). If the protester receives an adverse decision from the agency, it can file a subsequent protest to the GAO within ten (10) days of receiving the initial adverse agency action. *See* 48 C.F.R. § 33.103(d)(4); 4 CFR 21.2(a)(3). Regardless of the forum in which a pre-award protest is filed, pre-award protests challenging the terms of the solicitation must be filed before the proposal submission deadline or else they are waived. *See* 48 C.F.R. § 33.103(e); 4 C.F.R. § 21.2(a)(1).

***Insight Technology Solutions, Inc.* – Summary And Key Takeaways**

Insight Technology Solutions, Inc. is a good example of when an offeror may launch a successful challenge to the terms of the solicitation. In that case, the Department of Homeland Security, U.S. Immigration and Customs Enforcement (ICE) issued an RFP for level 1 call center support services for the agency's student and exchange visitor program (SEVP). *See Insight Tech. Sol. Inc., supra*, at 1. ICE issued the RFP on December 12, 2021, and – after fielding questions from offerors – it amended the deadline for proposals, setting it on January 19, 2022 (five weeks later).

The RFP established several phases to the procurement process. *See id.* at 1-2. Phase I established an opt-in period during which offerors had to affirmatively state they wished to participate in Phase II of the procurement. In Phase II, the Agency would conduct an initial evaluation of proposals based on two factors - certifications and experience. After narrowing the field, ICE would evaluate the remaining proposals based on technical capability and price in Phase III.

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At the time proposals were due, the RFP required offerors to demonstrate a level three (3) or greater certification for its capability maturity model integration (CMMI). *See id.* at 2. During Phase II, ICE would evaluate proposals under the certifications factor to determine whether they met the RFP's requirements on an acceptable or unacceptable basis. An offeror would only be assigned an acceptable rating if the proposal showed the offeror had the required certifications at time of submission. Offerors whose proposals failed to show current and valid certification at the time of submission would be rated unacceptable, disqualifying them from further consideration.

Insight filed an agency-level protest challenging the CMMI certification requirement as unduly restrictive of competition on January 18, 2022. *See id.* Insight argued that offerors were not given a reasonable opportunity to respond to the amended solicitation. On February 17, the agency denied Insight's agency-level protest. On February 18, Insight timely filed its subsequent protest with the GAO.

At the GAO, Insight mounted two arguments: (1) that there was no reasonable basis for ICE to require a CMMI level 3 or greater certification for the services sought, and (2) that the RFP requirement for each offeror to demonstrate its CMMI certification at the time of proposal submission exceeded the agency's needs. *See id.* at 2-4.

The GAO denied Insight's first protest ground, finding that ICE's justification for its certification requirement was sufficiently rationale to withstand logical scrutiny under GAO precedent. *See id.* at 3-4 (citing *AAR Airlift Grp., Inc.*, B–409770, July 29, 2014, 2014 CPD ¶231 at 3) (noting ICE explained that CMMI level 3 certification would provide higher quality identification and resolution of process issues when compared to those certified at CMMI level 2 or level 1).

Nonetheless, the GAO sustained Insight's protest with respect to the RFP's requirement that offerors demonstrate CMMI level 3 certification at the time of proposal submission. The GAO made clear that "[a]n agency's otherwise legitimate requirements regarding an offeror's demonstrated ability to meet contract requirements **may not generally be applied at a point in time prior to when such qualifications become relevant**." *Id.* at 4 (citing *Active Aero Group, Inc.*, B–404666, Apr. 1, 2011, 2011 CPD ¶91 at 5) (emphasis added).

The GAO noted it will sustain a protest where the justifications provided by an agency do not support requiring that mandatory industry certifications be held at the time of proposal submission. *See id.* at 4-5. The GAO rejected ICE's contention that it could not risk having to verify certification requirements at the time of award. Instead, the GAO found that nothing in the proffered advantages of certification requirements would make the possession of CMMI level 3 relevant before the award or the start of performance. *See id.* at 5 (noting that just because a diligent offeror could face a lengthy certification process does not mean the requirement must be met when proposals are due) (internal citations omitted).

The key takeaway from the Insight protest is that an agency cannot unreasonably restrict competition by establishing a certification requirement be met before said requirement becomes relevant to the work sought by the government. Accordingly, contractors should diligently review solicitations with counsel to determine whether any grounds for a pre-award challenge to the solicitation exist. Otherwise, contractors run the risk of being excluded from competition or waiving the only available legal mechanism to challenge an unduly restrictive solicitation.

Swearing Witnesses: Tips For Surviving Your Deposition

by Jonathan C. Burwood, Partner

We spend a great deal of time working with construction professionals to avoid disputes, and to resolve disagreements that do arise as efficiently as possible. When litigation is ultimately necessary, clients are required to invest considerable money *and time* in proceedings that can often be protracted. The commitment of time is particularly challenging given valuable client personnel are required to simultaneously support the litigation process and keep up with their demanding day-to-day responsibilities. While, as outside counsel, we do everything we can to minimize that type of disruption, successful claims and defenses rely primarily on rock solid facts provided by rock star witnesses. And long before any hearing or trial, those witnesses are usually required to sit for a deposition.

Informing a client that an adversary has requested his or her deposition usually elicits one of three responses: (1) "do I have to?" (2) "what the heck is a deposition?" or (3) "yes! I cannot wait to give those bozos a piece of my mind!" The last reaction is the rarest, yet most concerning – and if it resonates with you, *please read the rest of this article*. Most witnesses express a healthy sense of resignation and have misgivings about the process. And rightfully so because the terminology surrounding depositions is not objectively encouraging. Attorneys talk about "taking" someone's deposition, or having a witness "sit" for a deposition, and depositions are "defended." In the first two minutes of a deposition everyone gets to see that old photo on your driver's license, you are "administered" an "oath," and "objections" rain down as unexpected interruptions almost every time you try to answer a question. And a few weeks later, when the experience is finally starting to fade, you are required to read an entire transcript of every word you uttered over the course of a very long day and correct any mistakes through an "errata," which translates to "a list of errors." The deposition brand has a long way to go.

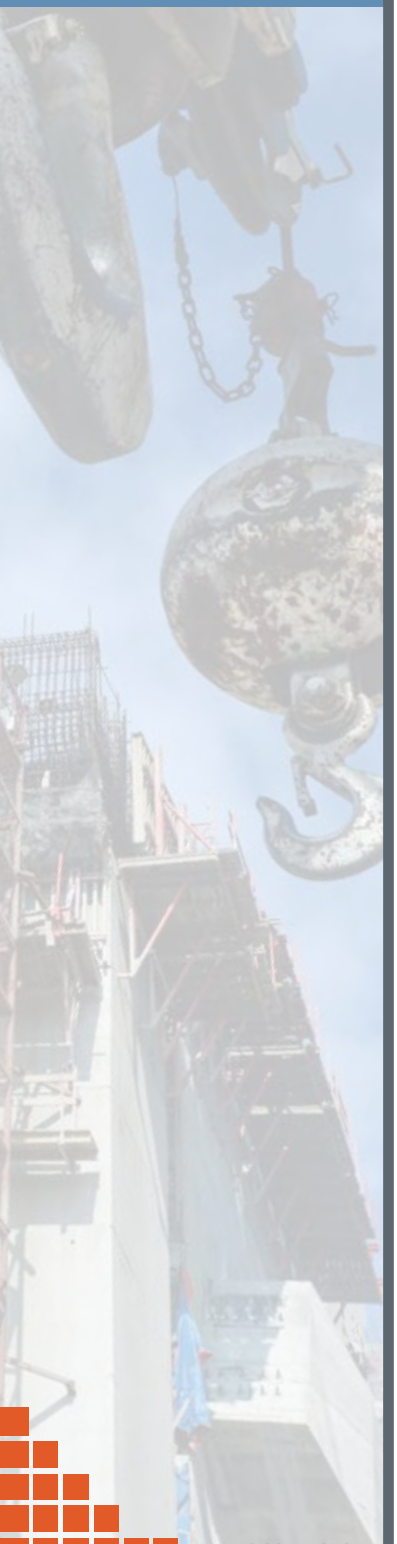
The trick is to ignore the intimidation often associated with a deposition, to focus on the opportunity that a deposition affords you to set the record straight in your own words, and to take control of your own testimony because no-one in that room knows more about the issues than you. Though to reach that place, you and your attorneys must put in the following work.

Be Prepared

This sounds obvious, but the daylight between a witness afforded little to no preparation and a witness who is truly prepared is significant, evident immediately, and has the potential to swing the momentum if not the outcome of a lawsuit. No deposition is the same, so there is no formula for preparation, but deponents are routinely asked at the outset what they did to prepare and how long they spent preparing. This is a smart question as the answer usually speaks volumes about how the deposition is about to unfold. Witnesses that have not been prepared simply do not have the tools to assert any control over the course of the deposition. They are no longer familiar with documents that are often years old, they have not considered the likely questions and potential responses, and they are not warned about the subtle techniques employed by examining attorneys to gain an advantage.

By contrast, a prepared witness has been provided a meaningful opportunity to review the universe of documents likely to be introduced during the deposition – including relevant pleadings, discovery responses, project documents, and transcripts of prior deposition witnesses. A prepared witness will have met with counsel (preferably in person or via Zoom/Teams if the deposition will be taken remotely) to review general deposition logistics, basic ground rules, and witness best practices – what we refer to as good "deposition hygiene." Most of those details are completely unfamiliar to an inexperienced witness (and most deponents are first time witnesses) and therefore simply orienting and empowering witnesses can be the most valuable component of deposition preparation. Finally, a prepared witness and counsel will have focused on the key project documents (both favorable and unfavorable), and practiced responding to likely topics of

...continued on page 12



examination. For a deposition that is likely to last a full day, expect two to three days for preparation in the preceding weeks – exclusive of the day before if at all possible. And while that sheer investment of time is considerable and can be disruptive to business-as-usual responsibilities, it is critical to a witness's ability to exercise control during a deposition and ensure that his or her testimony is accurate, clear, and ultimately impactful.

Be Responsive, But Be Careful

The most important element of good deposition hygiene is for a witness to be "responsive" to the question asked. Again, that may seem simple enough, but responding to a deposition question is considerably different than normal conversation. In fact, it is fundamental to remember that *a deposition is not a conversation*. Our brains are wired to anticipate questions, start forming answers before a question is even fully formed, and in so quickly responding demonstrate how helpful, smart, and clever we can be. And since birth you have spent every waking hour communicating with others in that way. Attorneys taking depositions are aware of that bias, have been trained and practiced for years to exploit it, and fully expect you to fall into that trap. Their questions will start with such phrasing as "wouldn't you agree that …" or "isn't it fair to say that …" or they will shove you into the world of hypotheticals without so much as a warning. The more professional and pleasant they are, the more precarious things are for you as a witness. Many people think that the most accomplished litigators reside in New York City or Washington, D.C., but I prepare my witnesses twice as hard when the examining attorney is from the Midwest or the South.

Being responsive to deposition questions is primarily about being careful, being honest, and being able to stop answering. Being careful requires actively listening to each and every question, making sure that you understand the question, taking the time to think about your answer before speaking, responding to only the question asked, and then waiting silently for the next question while the process repeats. It should feel slow, a bit robotic, and there should be generous periods of time when you are not testifying because you are either listening to the question or thinking carefully about your answer. Being careful is hard work, it requires you to review documents at length in silence, to speak slowly so that the stenographer can record the testimony accurately, to often withstand the same question over and over without getting frustrated or wavering from your initial response (counsel keeps asking because the initial response was bad for his or her client), and to have the discipline to take breaks throughout the day to hydrate, eat, and periodically recommit to the process of being careful.

Being honest requires a willingness to ask the examining attorney to repeat the question if there is a chance you did not hear it properly, or to rephrase the question if you did not understand it. I can assure you that it is not easy to ask seven hours of high-quality questions to a seasoned construction professional, so it is highly likely you (and your attorney through objections) will need to weed out the truly bad questions by asking counsel to repeat or rephrase. Good attorneys will rephrase or adjust poor questions immediately, while stubborn ones will stick to their guns. Your obligation as a witness is to answer only clear and direct questions, and part of being responsive is to insist on that right consistently, politely, and professionally. Being honest also requires a willingness to testify "I don't know" or "I don't recall" in response to a question when that is truly the case.

The most important element of responsiveness is being able to stop answering. Listen for "yes or no" questions (for example, "did you respond to the owner's notice?"), answer them with one or the other if possible, and wait for the next question. If a question requires a substantive response (for example, "what did you do after receipt of the owner's notice?"), the answer should be as condensed as possible. The examining attorney is required to ask you short and focused questions – compound or run-on questions are objectionable – therefore you are entitled to give short and focused answers. The examining attorney will ultimately pursue a particular line of questioning incrementally as necessary, and long narrative answers simply give counsel the opportunity to regroup and think of follow-up questions. Part of being in control as a deponent is forcing the examining attorney to do the work, and not easing that burden by answering five questions for the price of one.

Be Yourself

Now that we have jammed all of the project documents and correspondence back into your head, warned you off polite lawyers, and trained you to act like a cagy robot, this is admittedly an awkward turn to encouraging you to "be yourself." However, this is the true super power of a deposition witness, though in my experience is most often overlooked. First, you and your team lived this project, you are

the subject matter experts, you are familiar with the claims and defenses, you believe in those positions, and you will not be swayed. Though the seemingly foreign parameters of litigation – and particularly a deposition – may suggest you are on unfamiliar ground, the opposite is actually true. All of the questions, and all of the responses, are 100% about your project. You have every right and reason to be confident in your testimony, while simultaneously being reasonable, professional, and above all your personable self. The deposition is in part a dry run of your trial testimony, and exercising that measure of control and candor during your deposition will achieve two important objectives: (1) your testimony will substantively improve the factual record supporting your claims or defenses; and (2) your competency and credibility as a witness will impact your adversary's confidence in moving towards trial. Most construction disputes involve close calls on complicated facts, and strong witnesses most often provide the winning edge. Though sometimes miserable in process, a deposition is ultimately a critical opportunity to thrive – not simply survive – by being truly prepared, responsive, and authentic.

FIRM NEWS

Recent And Upcoming Events

Maryland Bankruptcy Bar Association's 24th Annual Spring Break CLE Weekend, May 5-6, 2022; Annapolis, Maryland. **Jennifer L. Kneeland** was a panelist for "Hot Topics In Business Bankruptcy Cases" and **Marguerite Lee DeVoll** was a panelist for a panel entitled "Small Business Reorganization Act."

Western States Surety Conference, "When the Bill Comes Due: Consideration of Damages in Surety Litigation," May 19-20, 2022; Seattle, Washington. **Watt Tieder** co-sponsored and **Amanda L. Marutzky** served as Conference Chair; **Jennifer L. Kneeland** and **Marguerite Lee DeVoll** co-presented on the topic "The Surety's Desk-Guide to Recovering and Advancing Claims for Damages in Bankruptcy or When the 'Zone of Insolvency' is Reached."

AACE National Conference, June 26-29, 2022; San Antonio, Texas. **Christopher J. Brasco** and **Matthew D. Baker** presented the topic "Progress is Best Measured One 'Half-Step' At A Time."

ABA FSLC's Midwinter Meeting, August 18 – 19, 2022; Nashville, Tennessee. **CharCretia DiBartolo** co-chaired the fidelity program "Litigating The Fidelity Claim."

Pearlman Association's Pearlman 2022, September 7-9, 2022; Woodinville, Washington. **Jennifer L. Kneeland** and **Marguerite Lee DeVoll** co-presented "The Bankruptcy Dating Game: What Happens When a Principal Files for Chapter 11 Bankruptcy Protection."

Surety School, September 7, 2022; Woodinville, Washington. **Amanda L. Marutzky** co-presented on "The Importance of Notice."

National Association of Surety Bond Producers (NASBP) East Fall Meeting, September 22, 2022; Boston, Massachusetts. **C. William Groscup** and **Bradford R. Carver** will present in a session titled "Scollick Order Provides Surety Industry with Important Insights for Avoiding FCA Liability."

ABA Construction Forum Meeting, September 28-29, 2022; Memphis, Tennessee. **Shelly L. Ewald** will present in a session titled "First Chair Wanted: How do we get there?"

National Association of Surety Bond Producers (NASBP) West Fall Meeting, October 13, 2022; San Antonio, Texas. **Robert G. Barbour** and **Timothy E. Heffernan** will present in a session entitled "Scollick Order Provides Surety Industry with Important Insights for Avoiding FCA Liability."

National Bond Claims Association Annual Meeting, October 14, 2022; Bowling Green, Florida. **Brian C. Padove** will co-present on "Defending the Surety's Election Rights: An Obligee's Failure to Satisfy Conditions Precedent."

...continued on page 14

Construction SuperConference, December 6, 2022; Las Vegas, Nevada. **Robert C. Shaia** and **Lauren E. Rankins** will present in a session titled "Wrongful or Right: What Makes a Proper Termination?"

Construction SuperConference, December 7, 2022; Las Vegas, Nevada. **Brian C. Padove** will co-present on "Damages and Delays in the context of Supply Chain/ Covid Impact."

Watt Tieder Announces New Partners

Matthew D. Baker is a partner in **Watt Tieder's** McLean, Virginia office concentrating his practice in the areas of construction, government contracts, surety, and commercial litigation. Matt has assisted clients with disputes arising from a wide range of vertical and horizontal construction projects including transit and light rail, highway and utility projects, marine construction, airports, buildings, embassies, and schools. Matt has further represented clients in connection with a variety of matters including payment disputes, changes clause claims, design defects, delay claims, False Claims Act ("FCA") litigation, and indemnity claims. Matt is also a frequent speaker, panelist, and author on topics involving the intersection of the law and the construction and surety industries.

Brian Padove is a Partner in Watt Tieder's Chicago office. Brian focuses his practice in the areas of commercial litigation, construction law, and suretyship representing a wide variety of construction industry clients including contractors, subcontractors, suppliers, and owners. He has experience in contract drafting and negotiations, breach of contract claims, mechanic's liens, and claims involving delays. Brian also represents sureties in matters involving payment and performance bond claims on private and public projects, drafting and negotiating takeover agreements, and collateral and indemnity disputes.

In addition to his practice, Brian regularly authors articles and presents on trending and practical construction industry issues. He also co-founded and co-hosts the "Building Up" podcast which provides general tips and insights for construction industry professionals. His education and experience allow him to provide a full range of transactional and litigation services to his clients.

Watt Tieder newsletters are posted on our website, www.watttieder.com, under the Resources Tab. If you would like to receive an electronic copy of our newsletter, please contact Peggy Groscup at: **pgroscup@watttieder.com**

Watt Tieder Welcomes New Associates

Adrienne M. Arlan joined **Watt Tieder** as an associate in the Chicago office. She focuses her practice primarily in the areas of suretyship, construction and commercial litigation. Prior to joining Watt Tieder, Adrienne practiced at a national insurance defense law firm garnering experience in complex commercial litigation, construction litigation and counseling, general and premises liability, insurance and reinsurance litigation and counseling, labor and employment, product liability, professional liability, toxic tort & hazardous substances, and transportation. Adrienne received her Juris Doctor from Indiana University Maurer School of Law in 2019 and received an undergraduate degree in philosophy and marketing from Northeastern Illinois University in 2016, graduating *summa cum laude*.

Kyle Case is an associate in **Watt Tieder's** Irvine office. Kyle concentrates his practice in the areas of surety and construction. Prior to joining the firm, Kyle was an associate in a reputable boutique construction litigation firm in Orange County and represented subcontractors on construction projects throughout the state of California. Kyle handles all aspects of litigation and has experience representing clients on a variety of construction disputes, including breach of contract, mechanics' liens, payment and performance bond claims, Miller Act claims, and indemnity claims. Kyle earned his Juris Doctor from Western State College of Law where he graduated *summa cum laude* in 2018 and he earned a Bachelor of Science degree from the University of Oregon in 2014.

Evan Kappatos is an associate in **Watt Tieder's** McLean office. He concentrates his practice in construction litigation, government contracts, and suretyship law. He joined Watt Tieder in 2022 after spending a year working as an associate at a general litigation firm in northern New Jersey.

Evan received his J.D. from William & Mary Law School in 2021. In law school, Evan was a member of the William & Mary Environmental Law and Policy Review, competed in mock trial tournaments as a member of the school's National Trial Team, and competed in arbitrations as a member of the school's Alternative Dispute Resolution Team. He also interned for the Nassau County District Attorney's office. Prior to law school Evan worked in sales at a fortune 250 company providing payroll and human resource solutions to local businesses in Chicago Illinois.

Brandon Regan joined **Watt Tieder's** McLean, Virginia office in May of 2022. His practice is focused on complex government contracts litigation, bid protests, and commercial litigation. Brandon previously served as an Assistant United States Attorney (AUSA) for four years at the District of Columbia U.S. Attorney's Office. During his time as an AUSA Brandon prosecuted hundreds of cases, with a focus on federal violent crime, firearm and narcotics trafficking, and gang-related conspiracies. Towards the end of his tenure Brandon served on the Capitol Riots taskforce, and was awarded the U.S. Attorney's Award for Creativity and Innovation for his efforts. Before joining the U.S. Attorney's office Brandon served in the U.S. Marine Corps as a Judge Advocate, where he served as a federal prosecutor and operational law advisor. Brandon is married with two kids, and enjoys coaching youth sports and chasing his kids around the yard.

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Special Thanks to Editors, **Timothy E. Heffernan, William Groscup, Christopher M. Harris** and **Marguerite Lee DeVoll**.

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