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# The BDO GovCon Week Ahead - May 2023

## May 22, 2023

### DOJ's strong stance against COVID-19 Healthcare Fraud and Malfeasance

COVID-19 acted as a catalyst for government-funded programs to combat the vicissitudes associated with the virus. Programs such as the Economic Injury Disaster Loan (EIDL), Paycheck Protection Program (PPP), Health Resources Services Administration (HRSA), Provider Relief Fund (PRF), and the Coronavirus Aid Relief and Economic Security Act (CARES Act) received injections of capital to aid those businesses suffering deleterious effects caused by COVID-19. Unfortunately, these programs were also taken advantage of in some cases.

Some individuals tried to defraud the system. Those who engaged in the misappropriation of funds, fraud, and malfeasance will be prosecuted to the full extent of the law. This stance is

represented in the Attorney General's (Merrick Garland) recent comments, where he stated that the federal government will deploy "every available resource to combat and prevent COVID-19 related fraud and safeguard the integrity of taxpayer-funded programs". The COVID-19 Fraud Enforcement Task Force, established in May 2021, will be responsible for spearheading the initiative.

The Department of Justice (DOJ) is committed to weeding out all types of pandemic-related malfeasance. Recently, they uncovered the largest act of COVID-19 fraud; On April 20, 2023, they identified eighteen alleged criminals who participated in COVID-19 healthcare fraud schemes. The defendants misappropriated nearly half a trillion dollars in federal pandemic funds. The DOJ also recently discovered the misappropriation of funds in the PRF, occurring in the Eastern District of Louisiana. A healthcare provider was allegedly submitting false loan agreements and unjustly using the acquired funds. The DOJ has made it their prerogative to prosecute those that defrauded pandemic funded programs.

With the prevalence of pandemic-related fraud, government contractors will be subject to more stringent PPP loan investigations. In addition to potential audits by the Small Business Administration (SBA), the Federal Bureau of Investigations (FBI) will be targeting individuals who have submitted false information on their PPP loan application, used PPP loan funds for unlawful purposes, or submitted fraudulent certifications for loan forgiveness. DOJ will be investigating fictitious companies, falsified payroll data, and PPP funds expensed for personal purchases. And the Defense Contract Audit Agency (DCAA) along with the Internal Revenue Service (IRS) will be pursuing intensive audits to ensure that the PPP loans were acquired and used appropriately.

For more information: DOJ Announces Largest-Ever Coordinated Law Enforcement Action Targeting COVID-19 Healthcare Fraud | Enforcement Edge | Blogs | Arnold & Porter (arnoldporter.com)

May 15, 2023

## Fraud Concerns Rise as Small Business Administration Expands Loan Programs Despite Billions in Defaulted Loans

The Small Business Administration (SBA) has recently expanded its 7(a) small business loans

program, raising concerns among lawmakers and the agency's inspector general about oversight and fraud prevention. The concerns stem from the SBA's handling of pandemic relief programs such as the Paycheck Protection Program (PPP) and the Economic Injury Disaster Loan (EIDL), which experienced fraudulent activities. The SBA's decision not to pursue defaulted loans worth less than $100,000 has drawn criticism.

In response to a House Small Business Committee inquiry, the SBA justified its decision by arguing that collection on the defaulted loans was not cost-effective. However, Mike Ware, SBA's Inspector General, disagreed with the analysis, noting that there are simpler avenues for collection, such as Treasury offset which allows for collection of debts through funds due delinquent borrowers from government sources such as tax refunds and payments if the borrower is a government employee or contractor. In September 2022, the SBA Office of Inspector General reported that the SBA had not assessed the costs to recover these debts, nor made any efforts to collect them. The report found that defaulted loans totaled $1.1 billion at the time.

Ware also expressed disagreement with the SBA's decision to apply the same policy to EIDL loans under $100,000 and revealed an ongoing review into the matter. He stressed the importance of attempting to collect the money and highlighted the lack of a time limit on recovering these funds. Budgetary concerns have been raised regarding the SBA OIG's funding levels in that if the Biden administration’s request to increase the SBA OIG’s funding by 33% is not approved, the loss of current supplemental funding in 2024 would impact the OIG’s ability to recover further defaulted loan funds.

**For more information:**

- https://federalnewsnetwork.com/agency-oversight/2023/04/lawmakers-ig-question-sba-decision-not-to-pursue-defaulted-covid-relief-loans/
- https://www.sba.gov/article/2023/04/12/us-small-business-administration-implements-rules-address-persistent-capital

May 8, 2023

## Is this the End of Noncompete Agreements? Considerations and Insights

If you've ever worked in an industry where private company information, customer relationships, and technical skills are vital to an organizations' success, then you have probably seen or signed a noncompetition agreement (NCA). Historically, these agreements have been put in place by employers to protect proprietary information, resources (employees), clients, suppliers, etc. from being taken to a competitor by a former employee. However, NCAs have come under increasing threat in recent years as a number of states have moved to limit the enforceability of NCAs in employment and separation agreements.

The federal government is now part of this trend. President Biden signed an Executive Order (EO) on Promoting Competition in the American Economy on July 9, 2021. More recently, on January 5th, 2023, the Federal Trade Commission (FTC) issued a Notice of Proposed Rulemaking to prohibit employers from imposing noncompete clauses on workers. The proposed rule would make it illegal for an employer to:

- Enter into or attempt to enter into a noncompete with a worker;
- Maintain a noncompete with a worker; and
- Represent to a worker, under certain circumstances, that the worker is subject to a noncompete.

The FTC maintains that by preventing workers across the labor force from pursuing better opportunities that offer higher pay or better working conditions, and by preventing employers from hiring qualified workers bound by these contracts, noncompete clauses hurt workers and harm competition (see FTC Fact Sheet below).

- Noncompete clauses significantly reduce workers' wages by restricting free movement of workers.
- Noncompete clauses stifle new businesses and new ideas by preventing entrepreneurs from forming new businesses and inhibiting workers from bringing ideas to new companies. Fewer new entrants and greater concentration in markets result in higher prices.
- Noncompete clauses can exploit workers because workers often have less bargaining power than employers who may coerce workers into staying in jobs workers would prefer to leave.
- Employers have other ways to protect trade secrets and other valuable investments that

are significantly less harmful to workers such as non-disclosure and non-solicitation agreements.

Government contractors often use confidential information such as methodologies, trade secrets, technical specifications of product, etc. Should the proposed rule be adopted, there could be shifts in the ability of contractors to differentiate themselves in the market. There may also be an uptick in legal cases and battles in the court between employers and former employees.

For more information, see link below. The FTC extended the comment period for this proposed rule through April 19, 2023.

What Every Federal Contractor Should Know About the FTC's Proposed Rule to Void Noncompete Agreements Nationwide—and What to Do About It | Government Contracts Law

# May 1, 2023
## Post-Proposal Communication

Communications with offerors after receipt of proposals is defined in FAR 15.306 and takes different forms. A recent case before the Government Accountability Office (GAO) highlights the differences in these types of communications and the issues that can arise.

The first type of communication under FAR 15.306 is clarifications which are limited in nature and are utilized when an award will be made without conducting discussions. The second type is communications before establishment of the competitive range which "are for the purpose of addressing issues that must be explored to determine whether a proposal should be placed in the competitive range" and may address ambiguities in a proposal or information relating to past performance (FAR 15.306(b)(3)). The third type of communication is exchanges after the establishment of a competitive range which are negotiations and in a competitive acquisition are known as discussions. Discussions must be held with each offeror still being considered for award (i.e. in the competitive range) and must at a minimum discuss deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond (FAR 15.306(d)(3)).

In BC Site Services, LLC (File B-420797.4; B-420797.5 dated March 21, 2023) the GAO concluded that "certain offerors were provided [by the US Army Corp of Engineers] with an opportunity to

revise proposals by submitting additional material information for inclusion in their proposals in order to make their proposals acceptable." However, the protesting party was not afforded this same opportunity though still under consideration for award. The Corp argued that the solicitation was issued as a two-phase design-build selection under FAR subpart 36.3 and that only phase two was to be conducted in accordance with FAR 15.306. The Corp asserted that under FAR 36.3 there were no limitations on the Corps' prerogative during phase one "to talk with, and obtain revised submissions from, some portion of the offerors to determine which should be included in the second phase of the competition." The GAO however found that the solicitation clearly referenced FAR 15.306 in its description of phase one of the acquisition. Therefore, the communications the Corps had with selected offerors were discussions and those discussion should have been had with all offerors.

Contractors are well advised to understand the different types of communications described in FAR 15.306 to make sure they are being treated fairly in the selection process. If they feel they are being unfairly they should consider a protest.

For more information, visit:

- GAO U.S. Government Accountability Office pdf
- Sometimes Post-Proposal Communications Are More Than Sweet Nothings ...