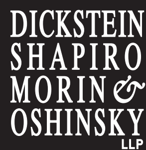
Dickstein Shapiro Morin & Oshinsky LLP

The Advisor

Timely legal and business information for government contractors.

SPRING 2005
Volume 7 ■ Issue 1



Our attorneys guide clients through the maze of regulations to maximize a company's ability to secure government contracts. If you would like more information on this issue or any other government contracts issue, please contact us.

Scott Arnold
ArnoldS@dsmo.com
(202) 775-4736

Richard J. Conway
ConwayR@dsmo.com
(202) 828-2235

Merle M. DeLancey, Jr.
DeLanceyM@dsmo.com
(202) 828-2282

J. Andrew Jackson
JacksonA@dsmo.com
(202) 828-2268

Robert J. Moss
MossR@dsmo.com
(202) 775-4784

David M. Nadler
NadlerD@dsmo.com
(202) 828-2281

Harvey G. Sherzer
SherzerH@dsmo.com
(202) 775-4745

Joseph R. Berger, *Author*
BergerJ@dsmo.com
(202) 955-6673

Andrew Sherman, SECAF Founder and Chairman, Joins Dickstein Shapiro as Partner; Alan Schaefer also Joins as Partner

Andrew J. Sherman, Founder and Chairman of the Small and Emerging Contractors Advisory Forum (SECAF), joined Dickstein Shapiro Morin & Oshinsky LLP as Partner in February 2005. Mr. Sherman joins the Firm's Corporate & Finance Group and will focus his legal practice on issues affecting business growth, particularly mergers and acquisitions, joint ventures, strategic alliances, and other types of growth strategies. Alan J. Schaeffer also joined the Firm as Partner and will focus his practice on counseling clients on corporate, transactional, and regulatory matters related to franchising and licensing, mergers and acquisitions, capital formation, and securities. Mr. Sherman and Mr. Schaeffer joined the Firm from McDermott, Will & Emery.

Through his numerous years as a legal and strategic advisor to hundreds of emerging growth companies, Mr. Sherman recognized the need in the small and emerging government contractor community for assistance in ensuring equal access to successful contracting opportunities. As a result, he formed SECAF in September 2001, which has provided education, resources, and research for small and emerging government contractors since its founding. SECAF also supports small contractors' efforts to acquire and fulfill contracts with military and civilian government agencies. The SECAF leadership brings together top executives from local technology and IT service firms, as well as from commercial real estate companies, investment banks, and employee benefits firms, providing SECAF members with a wealth of expertise necessary to keep abreast of the ever-changing federal marketplace. Today, SECAF serves several hundred members representing all aspects of government contracting.

SECAF holds numerous conferences and events every year for its members, featuring speakers at the forefront of government contracting programs, and specifically geared toward growing its members' contract base. A recent SECAF event, "Small Business GWAC's & Multiple Award Contracts," held on March 23, 2005, specifically highlighted large federal contracts which are primarily available for small businesses. The event, which drew some 100 attendees, included such speakers as Mike Sade, Chief Procurement Officer for the Department of Commerce; Tina Burnette, Deputy Assistant Commissioner of Commercial Acquisition for the GSA's Federal Supply Service; and Tiffany Hixson, Deputy Director of Procurement Operations for the Department of Homeland Security. An upcoming SECAF event, entitled "Growth Financing for Your Small Business," will be held on May 18, 2005, and promises to provide attendees with important tips on government contract lending. For more information about this event, please visit www.secaf.org/events.htm.

The addition of Mr. Sherman, and his strong connections with SECAF and understanding of the needs of the government contractor community, further enhances Dickstein Shapiro's active Government Contracts Practice, which encompasses counseling and dispute resolution in all procurement phases before all relevant administrative and legal forums. Mr. Sherman, together with Mr. Schaeffer, also adds depth to the Firm's Corporate & Finance Group. The Group's practice ranges from small, traditional transactions to large, highly complex transactions, and provides a full range of corporate, finance, and transactional legal services to its clients. Currently, Mr. Sherman is working with several other Partners at Dickstein Shapiro on a wide variety of government contractor M&A, financing, and related transactions as these two practice areas continue to strengthen their working relationship. For more information, please visit www.DicksteinShapiro.com.

For more information on SECAF, please visit its Web site at www.secaf.org, or contact Andrew Sherman at ShermanA@dsmo.com.

Stronger Compliance Programs Needed for the Foreign Corrupt Practices Act

By Joseph R. Berger

On November 1, 2004, new revisions to the U.S. Federal Sentencing Guidelines took effect for corporate offenses; the changes focus on the need for improved corporate compliance programs. According to the U.S. Sentencing Commission, the amendment "strengthens the criteria an organization must follow in order to create an effective compliance and ethics program.... In particular, the amendment requires boards of directors and executives to assume responsibility for the oversight and management of compliance and ethics programs[.]"[1] As a consequence of a January 2005 decision of the Supreme Court, the Sentencing Guidelines are no longer mandatory for judges, but remain in effect as voluntary guidelines.

Foreign finances and payments are one area where compliance programs can effectively prevent corporate offenses. The 1977 Foreign Corrupt Practices Act (FCPA) establishes tough civil and criminal penalties for corrupt conduct intended to assist a company in obtaining business with, or directing business to, any other person by influencing foreign officials.[2] Violations of the FCPA also may be violations of the 2002 Sarbanes-Oxley Act, which requires internal corporate controls that ensure payments are properly authorized. Violations also may lead to suspension of export licenses and the right to participate in federal procurements.

The U.S. Department of Justice (DOJ) shares responsibility for FCPA enforcement with the U.S. Securities and Exchange Commission (SEC), which initiates civil enforcement against securities issuers. Fines and investigations increased during the 1990s. There have been approximately three dozen FCPA criminal prosecutions, yet there are many more investigations each year. In the past few months, the media has reported on several investigations of high-profile companies, typically as a result of the actions of their foreign subsidiaries.

Violations also may implicate foreign laws. The "Antibribery Convention," modeled on the FCPA, took effect in 1999, sponsored by the Organization for Economic Cooperation and Development (OECD). The Antibribery Convention has been signed and ratified by 35 countries, including the OECD members, each of which has adopted implementing legislation. The Commerce Department's July 2004 Report to Congress on the Antibribery Convention describes the U.S. Government's monitoring program for signatory countries. The Report estimated that between May 1, 2003 and April 30, 2004, competition for 47 contracts worth approximately $18 billion "may have been affected by bribery by foreign firms of foreign officials."[3] If a U.S. company has information about a foreign competitor's practices indicating potential violations of the Antibribery Convention, this information may be reported to the Commerce Department's Trade Compliance Center.

Companies conducting business in foreign countries and companies with foreign subsidiaries must be vigilant about compliance with the FCPA. As part of their oversight of broader corporate compliance and ethics programs, corporate executives should ensure that FCPA requirements are covered.

The list of issues discussed above is wide-ranging. Dickstein Shapiro has broad experience advising on compliance programs including government contract areas such as the FCPA, and is well-prepared to help your company with these obligations. If you have any questions regarding the issues described above, please contact us.

---

1 U.S. Sentencing Commission Press Release, "Commission Tightens Requirements for Corporate Compliance and Ethics Programs," May 3, 2004, available at www.ussc.gov/PRESS/rel0504.htm.

2 A summary of information on the FCPA provided by the DOJ can be found at www.usdoj.gov/criminal/fraud/fcpa.html.

3 The report is available at www.export.gov/tcc, the Commerce Department's Trade Compliance Center Web site.

OGE Recommendation for Contractor Ethics Standards

The Office of Government Ethics has set up an advisory committee to explore "whether contractor employees should be subject to some type of ethics laws, rules, or practices designed to prevent conflicts of interest and the appearance of conflicts of interest, thereby protecting 'the best interests of the Federal Government' and ensuring the 'ethical integrity of acquisitions.'" Among the proposals for consideration are: (1) amending the Federal Acquisition Regulation to address contractor-related ethics concerns; (2) requiring ethics clauses in solicitations and contracts; and (3) requiring government contracts ethics training for all contractor employees.

The Advisor is intended for general informational purposes only. It should not be construed as legal advice or as legal opinion on any specific facts or circumstances. Under court rules of some states, this publication may be considered advertising.

©2005 Dickstein Shapiro Morin & Oshinsky LLP. All Rights Reserved.

The Government Contracts Practice of the Litigation & Dispute Resolution Group of Dickstein Shapiro Morin & Oshinsky LLP assists clients in obtaining and maintaining a competitive edge in government procurements.

If you would like to receive future issues of *The Advisor* via e-mail, please contact MaryBeth Mora at MoraM@dsmo.com.

Dickstein Shapiro Morin & Oshinsky LLP

www.DicksteinShapiro.com

2101 L Street, NW
Washington, DC 20037
Tel: (202) 785-9700 Fax: (202) 887-0689

1177 Avenue of the Americas
New York, NY 10036
Tel: (212) 835-1400 Fax: (212) 997-9880

The SAFETY Act: Who Does It Protect?

By Joseph R. Berger

The SAFETY Act (the "Act"), part of the 2002 Homeland Security Act, is designed to promote the effective use of technologies that can be deployed by governments at the federal, state, and local level (and by private entities) to guard against terror attacks. The Act provides significant product liability protections not only to the recipient of a SAFETY Act designation (the "Seller"), but to its customers and subcontractors as well. In December 2004, the Department of Homeland Security (DHS) announced it had prepared a draft revision of the application kit and sought additional comments on the application process. Following the close of the comment period in February 2005, a new application kit will be released in the coming months.

Formally titled the Support Anti-Terrorism By Fostering Effective Technologies Act, the SAFETY Act authorizes the Homeland Security Secretary to designate "qualified anti-terrorism technologies" (QATT or qualified ATT) to receive certain protections. These QATT, which may be products and/or services, can receive two levels of protection under the Act, provided first by "designation" as QATT and second by "certification" as an Approved Product. DHS has set forth significant interpretation of the Act with its Proposed Rule and an Interim Rule issued October 16, 2003, which established Safety Act regulations.

The Act establishes a "litigation management" framework for "claims arising out of… an act of terrorism when [QATT] have been deployed in defense against or response or recovery from such act and such claims result or may result in loss to the Seller." Under this framework, federal jurisdiction is exclusive, no punitive damages are allowed, non-economic damages are limited (joint liability is prohibited and physical injury is required for such), and awards are reduced by collateral sources such as insurance. The federal cause of action applies to injuries related to technologies sold to both the federal government and other customers, including state and local governments and commercial entities. The Act thus provides a limited legal recourse to parties who believe they were injured by failure of designated technologies.

The Act grants jurisdiction to the appropriate federal district court "over all actions for any claim for loss of property, personal injury, or death arising out of, relating to, or resulting from an act of terrorism when [QATT] have been deployed. . . ." The federal cause of action "shall be brought only for claims for injuries that are proximately caused by sellers that provide [QATT]." DHS has set forth its view in the Federal Register that under these provisions, "only one Federal cause of action exists for loss of property, personal injury, or death when a claim relates to performance or non-performance of the Seller's qualified and deployed [ATT], and . . . such cause of action may be brought only against the Seller." Under Supreme Court caselaw, federal courts give deference to an agency's reasonable interpretation of a statute or its own regulations. The Act and DHS interpretation thus protect both the Seller's customers and its subcontractors against the filing of lawsuits relating to the performance of designated technologies.

The Act next provides a "risk management" framework that requires sellers of QATT to obtain liability insurance against third-party claims in an amount certified by the Secretary, "which will not unreasonably distort the sales price" of the technology. Liability for all claims against a seller (including contribution and indemnity) "shall not be in an amount greater than the limits of liability insurance coverage required to be maintained by the Seller[.]" DHS has discretion to determine the amount of liability insurance required. The Act thus requires liability insurance and proportionate liability limits to protect the Seller and provide recovery to plaintiffs. In addition, the Act states that the required insurance:

> "shall, in addition to the Seller, protect the following, to the extent of their potential liability for involvement in the manufacture, qualification, sale, use or operation of [QATT]: (A) Contractors, subcontractors, suppliers, vendors and customers of the Seller; and (B) Contractors, subcontractors, suppliers, and vendors of the customer. Such liability insurance under this section shall provide coverage against third party claims arising out of, relating to, or resulting from the sale or use of anti-terrorism technologies."

The Seller is required to enter into reciprocal waivers of claims with these parties. The insurance provision would further protect the Seller's customers and subcontractors in the event any actions are allowed against them related to the QATT. However, in its letters of designation, DHS has stated that the Seller's insurance is not required to specifically cover these other entities, because, under the DHS interpretation, no entities other than the Seller can be sued in relation to the QATT.

The litigation management section of the Act also provides for an additional benefit – a statutory Government Contractor Defense (GCD), for technologies that are "certified" by DHS after a higher level of examination. The GCD is the common law defense to tort liability established by the Supreme Court in a 1988 case, *Boyle v. United Technologies Corp*. The common law protects manufacturers from design defect lawsuits when their designs were approved by the federal government. The primary distinction involving the GCD codified by the Act is that once a product is certified, the GCD applies whether the product is sold to the federal government, a state or local government, or even a private entity. In addition, sellers need not design their technologies to pre-existing government specifications in order for the GCD to apply under the Act. Under the Act there "shall be a rebuttable presumption that the [GCD] applies" where a QATT is subject to a product liability or other lawsuit, the presumption overcome only with evidence that the Seller acted fraudulently in submitting information to the DHS Secretary. According to DHS, "it is clear that any Seller of an 'approved' technology cannot be held liable under the Act for design defects or failure to warn claims, unless the presumption of the defense is rebutted."

The Safety Act is codified at 6 U.S.C. §§ 441-444, further implemented at 6 C.F.R. §§ 25.1-25.9, and administered by the Department of Homeland Security. For the most current information about implementation, see www.safetyact.gov. Dickstein Shapiro lawyers have advised their clients on the many benefits, impacts, and potential consequences of various provisions of the Safety Act and their implementation by DHS. If you have any questions about these issues, please contact us.

Innovative Thinking.

Creative Solutions.

Successful Clients.

Are you maximizing the value of your legal dollars? More than 100 *Fortune* 500 companies and other sophisticated businesses including financial institutions, start-up ventures, government entities, and charitable organizations rely on **Dickstein Shapiro Morin & Oshinsky** to solve their highly complex legal issues. Dickstein Shapiro represents clients in virtually every major form of counseling, litigation, and advocacy, to help them achieve their business objectives.

Corporate & Finance • Energy • Legislative & Regulatory Affairs • Litigation & Dispute Resolution • Intellectual Property

To learn more about Dickstein Shapiro's legal services, attorneys, and representative clients, please visit:

www.DicksteinShapiro.com

Washington, DC
(202) 785-9700

New York, NY
(212) 835-1400

© 2005 Dickstein Shapiro Morin & Oshinsky LLP. All Rights Reserved.