

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 7

NUMBER 10

October 2021

| | |
|---|-----|
| Editor's Note: Developments Victoria Prussen Spears | 313 |
| Government Contractor Best Practices in Light of Afghanistan Withdrawal Merle M. DeLancey Jr. and Craig Stetson | 315 |
| GSA Mandates Disclosure of Foreign Ownership/Financing of High-Security Leased Spaces Ronald A. Oleynik, Libby Bloxom, and Robert C. MacKichan Jr. | 321 |
| Issues for Government Contractors and the Private Sector Under the Cybersecurity Executive Order Steven G. Stransky, Mona Adabi, Tom Mason, and Thomas F. Zych | 324 |
| Recent Developments Under the Executive Order on Improving the Nation's Cybersecurity Susan B. Cassidy, Robert K. Huffman, and Ryan Burnette | 328 |
| Procurement Collusion Strike Force Secures First International Guilty Plea Agreement John M. Hindley, David Hibey, James W. Cooper, Sonia Kuester Pfaffenroth, and C. Scott Lent | 332 |
| In the Courts Steven A. Meyerowitz | 335 |

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Heidi A. Litman at 516-771-2169
Email: heidi.a.litman@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt).

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. Originally published in: 2015

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

MARY BETH BOSCO

Partner, Holland & Knight LLP

PABLO J. DAVIS

Of Counsel, Dinsmore & Shohl LLP

MERLE M. DELANCEY JR.

Partner, Blank Rome LLP

J. ANDREW HOWARD

Partner, Alston & Bird LLP

KYLE R. JEFCOAT

Counsel, Latham & Watkins LLP

JOHN E. JENSEN

Partner, Pillsbury Winthrop Shaw Pittman LLP

DISMAS LOCARIA

Partner, Venable LLP

MARCIA G. MADSEN

Partner, Mayer Brown LLP

KEVIN P. MULLEN

Partner, Morrison & Foerster LLP

VINCENT J. NAPOLEON

Partner, Nixon Peabody LLP

STUART W. TURNER

Counsel, Arnold & Porter

ERIC WHYTSELL

Partner, Stinson Leonard Street LLP

WALTER A.I. WILSON

Partner Of Counsel, Dinsmore & Shohl LLP

Pratt's Government Contracting Law Report is published 12 times a year by Matthew Bender & Company, Inc. Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

GSA Mandates Disclosure of Foreign Ownership/Financing of High-Security Leased Spaces

*By Ronald A. Oleynik, Libby Bloxom, and Robert C. MacKichan Jr.**

A new General Services Administration rule imposes disclosure requirements regarding the foreign ownership of prospective lessors of “high-security leased space” and mandates access limitations on such foreign-owned lessors. The authors of this article discuss the Rule.

The General Services Administration (“GSA”) has amended the General Services Administration Acquisition Regulations (“GSAR”) via an interim rule¹ (“the Rule”)—effective June 30, 2021—to incorporate disclosure obligations of foreign ownership of high-security spaces leased to the federal government.

Specifically, the Rule adds two new requirements to the GSAR: (1) lessors must make a representation regarding foreign ownership or foreign financing of “high-security leased spaces”—spaces with Facility Security Levels III, IV or V—and, (2) foreign-owned or foreign-financed leases must limit access to foreign lessors. As of June 2021, GSA estimates about 16 percent of the existing leases in its portfolio (or 1,263 out of 7,860 leases) constitute “high-security leased spaces.”

BACKGROUND

The Rule stems from the Secure Federal Leases from Espionage and Suspicious Entanglement Act² (“the Act”), which became law on December 31, 2020, and imposed requirements on federal agencies to obtain ownership information of foreign-owned buildings for high-security leases.

The Act was passed in response to a 2017 Government Accountability Office (“GAO”) report,³ which revealed certain federal agencies were not aware that

* Ronald A. Oleynik, a partner at Holland & Knight LLP, and head of the firm’s International Trade Practice, practices in the area of international trade regulation. Libby Bloxom is an associate at the firm and a member of the firm’s International Trade Group. Robert “Bob” C. MacKichan Jr. is a partner at the firm and is the leader of the firm’s GSA Leasing and Federal Real Estate Team within the Litigation and Dispute Resolution Practice. The authors may be reached at ron.oleynik@hkllaw.com, libby.bloxom@hkllaw.com, and robert.mackichan@hkllaw.com, respectively.

¹ <https://www.federalregister.gov/documents/2021/07/01/2021-14161/general-services-administration-acquisition-regulation-immediate-and-highest-level-owner-for>.

² <https://www.govinfo.gov/content/pkg/PLAW-116publ276/html/PLAW-116publ276.htm>.

³ <https://www.gao.gov/assets/gao-17-195.pdf>.

their high-security spaces were located in foreign-owned buildings. It also revealed that GAO was unable to identify the ownership information of approximately one-third of the government's high-security leases. GAO concluded that the use of such spaces for classified operations and storage of sensitive data created security risks and national security concerns of espionage and unauthorized cyber and physical access.

APPLICABILITY OF THE RULE

The Rule is applicable to new leases by GSA and the head of any federal agency that has independent statutory leasing authority; but will not apply to leases with the U.S. Department of Defense and the Intelligence Community agencies, as such agencies are already subject to similar ownership disclosure requirements pursuant to the 2018 National Defense Authorization Act. New leases include not only lease awards but also options for current leases (e.g., renewal, succeeding and replacing leases and other novations), lease extensions and ownership changes for high-security leased spaces entered into on or after June 30, 2021. Thus, while the Rule is effective immediately, there are no retroactive disclosure obligations.

INFORMATION REQUIRED TO BE DISCLOSED

The Rule mandates that lessors disclose, through a newly imposed representation at 48 C.F.R. § 552.270-33, whether the immediate owner or the highest-level owner of the building, as well as any entity involved in the financing, is a foreign person or entity and the associated country of citizenship or organization. "Immediate owner" is defined as "an entity that has direct control of the . . . lessor," and "highest-level owner" is defined as "the entity that owns or controls [the] immediate owner. . . ." The following factors may indicate control: "ownership or interlocking management, identity of interests among family members, shared facilities and equipment, and the common use of employees."

The representation also requires the lessor to state whether the lease is financed by a foreign entity, and if so, lessors must disclose the legal name, unique entity identifier, physical address and country of foreign financing. "Financing" captures debt and equity fundraising for the lease, including acquisition, maintenance, and construction of and improvements to the property.

In addition to foreign ownership disclosure requirements, applicable leases will be required to include a new GSAR clause at 48 C.F.R. § 552.270-34, which provides access restrictions for the foreign owner and property manager. Specifically, lessors and property managers will be required to obtain approval from the government before accessing the leased space.

IMPACT OF THE RULE AND OTHER CONSIDERATIONS

In the event of foreign ownership or foreign financing, prior to awarding the lease, GSA or the contracting officer will coordinate and consult with the federal tenant on any security concerns and necessary mitigation measures. Once a lease is executed, the lessor will be required to verify its ownership and financing information on an annual basis.

While the Rule does not disqualify foreign-owned or foreign-financed buildings from leasing to federal agencies, it will result in enhanced scrutiny by GSA of new leases or lease novations. Importantly, these new requirements are separate from the jurisdiction of the Committee on Foreign Investment in the United States (“CFIUS”) in connection with reviews of covered real estate transactions. Given the interagency dialogue among federal government agencies, the Rule also may increase CFIUS’s reviews of covered real estate transactions.

Although the Rule was effective immediately, GSA sought public comments and indicated that it would consider such comments when forming the final rule.