

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 9

NUMBER 6

June 2023

Editor's Note: To Your Success(or)! Victoria Prussen Spears	195
Are You the Successor-in-Interest? When a Company Inherits a Government Contract Through a Corporate Transaction C. Bradford Jorgensen, Christie Alvarez and Thomas Pilkerton	198
PPP Loan Appeals, SBA Clawbacks and More: What You Need to Know Sam Crockett Neel and Llewelyn M. Engel	203
Proposed Rule from U.S. Commerce Department on National Security Guardrails for CHIPS Act Funding: Restrictions on China and Other Countries of Concern Maria Alejandra (Jana) del-Cerro, Byron R. Brown, Jeremy Iloulian and Kelsey Clinton	206
Spy Games: Biden Administration Issues Executive Order Restricting Federal Use of Commercial Spyware Michael G. Gruden, Evan D. Wolff, Adelia R. Cliffe and Jacob Harrison	212
Federal False Claims Act Dangers Lurk Beyond Medicare Advantage Risk Adjustment Steven D. Hamilton	215
<u>The Cost Corner</u> Government Contracts Cost and Pricing: A Brief Overview of the Regulatory Landscape Keith Szeliga	219
In the Courts Steven A. Meyerowitz	225

QUESTIONS ABOUT THIS PUBLICATION?

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

Heidi A. Litman at 516-771-2169
Email: heidi.a.litman@lexisnexis.com

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 © 2023 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. Originally published in: 2017

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

KEITH SZELIGA

Partner, Sheppard Mullin

STUART W. TURNER

Counsel, Arnold & Porter

ERIC WHYTSELL

Partner, Stinson Leonard Street LLP

Pratt's Government Contracting Law Report is published 12 times a year by Matthew Bender & Company, Inc. Copyright © 2023 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.

PPP Loan Appeals, SBA Clawbacks and More: What You Need to Know

*By Sam Crockett Neel and Llewelyn M. Engel**

In this article, the authors share insights into the Paycheck Protection Program and the appeals process. In this article, the authors share insights into the Paycheck Protection Program and the appeals process.

Here are six principles to keep in mind when dealing with a decision by the Small Business Administration (SBA) to deny Paycheck Protection Program (PPP) forgiveness applications.

1. DO NOT ASSUME THAT THE SBA HAS CAREFULLY REVIEWED DOCUMENTATION YOU PROVIDED OR THAT THE SBA CORRECTLY APPLIED ITS RULES AND GUIDANCE

Given that there were more than 11 million PPP loans issued in 2020 and 2021, it was inevitable that a substantial number of forgiveness applications would be denied based on borrower errors. It was also inevitable that the SBA would make errors when reviewing such an influx of loans and forgiveness applications. This plays out every day, as many of denial decisions by the SBA are contrary to law, the SBA's own rules and guidance, and even facts and documentation submitted to the SBA.

For example, many borrowers have received denial decisions based on the SBA's misapplication of the "single corporate group" rule that imposed an aggregate group limit of \$20 million for first draw loans issued after April 30, 2020, and a limit of \$4 million for second draw loans.

In many other instances, the SBA has taken an aggressive position – in apparent contradiction of its own regulations – with its application of the ineligible businesses list in 13 CFR 120.110, including certain types of financial businesses.

Additionally, the SBA will at times hang its hat on facts or documents from decades prior to the PPP to deem that businesses were affiliated, without considering the businesses' changed circumstances and actual realities.

Finally, the SBA has issued many denial decisions that seem to come out of nowhere for borrowers because of communication issues between the SBA and lenders. Borrowers in these situations are forced to go through the appeals

* The authors, attorneys with McDermott Will & Emery, may be contacted at sneel@mwe.com and lengel@mwe.com, respectively.

process and effectively resubmit documents that the SBA should have already received or respond to old requests that borrowers never received from their lenders.

In light of the above, borrowers should not simply accept the SBA's denial decision if there is a chance it was made in error.

2. AFTER APPEALS ARE FILED WITH THE OFFICE OF HEARINGS & APPEALS (OHA), SBA COUNSEL IS USUALLY OPEN TO REMEDYING SBA ERRORS PRIOR TO A FINAL DECISION FROM AN OHA ADMINISTRATIVE LAW JUDGE

SBA's lawyers want to cooperate with borrowers during the appeals process. This usually means that the SBA's counsel is receptive to requests from borrowers to have the SBA program office re-review the challenged denial in light of the arguments and information provided in the appeal. This re-review frequently (but not always) results in the SBA reversing the challenged denial decision prior to any finding from the OHA administrative law judge.

3. IF THE SBA FORGAVE YOUR LOAN IN 2020 OR 2021, DO NOT GET TOO COMFORTABLE

Many PPP borrowers likely think that their PPP saga ended when the SBA forgave the loan. However, the SBA is showing no indication that it intends to move on from its reviews of PPP loans, including previously forgiven loans. With a six-year audit window from the time of forgiveness for loans over \$150,000, the SBA has an extended period to review the loans. If the SBA issues your business a request for information, make sure to respond in a timely and thorough manner. Given the above, do not be surprised to see requests for completely irrelevant information or even information you already provided to the SBA.

4. GOVERNMENT CONTRACTORS SHOULD KEEP IN MIND THE GUIDANCE FROM THE DEFENSE CONTRACT AUDIT AGENCY (DCAA) ON PPP LOANS

Along those same lines, borrowers that hold government contracts may see their PPP headaches continue for some time. Businesses that hold government contracts were eligible to receive PPP loans. However, in September 2021, the DCAA released a series of frequently asked questions (FAQs) that included a discussion of how the government will treat PPP loans awarded to government contractors. The FAQs provide that to "the extent that PPP credits are allocable to costs allowed under a contract, the Government should receive a credit or a

reduction in billing for any PPP loans or loan payments that are forgiven.” Government contractors that believed they had finally finished navigating the PPP process when the SBA forgave their loans might face a later DCAA audit to determine whether they must credit the government with any of the forgiven amount.

5. FORGIVEN PPP LOANS STILL CARRY POTENTIAL M&A RISKS AND CONSIDERATIONS

SBA loan reviews of previously forgiven loans – even if the re-review does not ultimately result in a denial of loan forgiveness – will cause headaches and confusion for businesses (and the new owners of those businesses) that had their loans forgiven and subsequently underwent a change of ownership. The personnel who handled a company’s loan application, forgiveness application and correspondence with the lender may be long gone from the company. But the company must retain PPP records and comply with any future SBA reviews of the loan. If the SBA does end up determining that a previously forgiven loan should have been denied, there will be a scramble to figure out who must pay it back – and who should pay it back.

6. THE 30-DAY CLOCK TO FILE AN APPEAL BEGINS ON THE DATE THE BORROWER ACTUALLY RECEIVES THE FINAL LOAN REVIEW DECISION DOCUMENT, NOT THE DATE LISTED ON THE FINAL LOAN REVIEW DECISION

If the SBA elects to deny – in full or in part – a borrower’s forgiveness application, the SBA will send the borrower’s lender a final loan review decision. Lenders must then pass this decision along to the borrower within five business days. The SBA’s Final Rule on Borrower Appeals of Final SBA Loan Review Decisions Under the Paycheck Protection Program¹ stipulates that a borrower has 30 calendar days after “receipt of the final SBA loan review decision” to appeal the SBA’s decision to the OHA.² Accordingly, the 30-day clock begins to run from the date a borrower receives the decision from its lender, rather than from the date listed on the final loan review decision.

¹ <https://www.federalregister.gov/documents/2021/09/16/2021-19985/borrower-appeals-of-final-sba-loan-review-decisions-under-the-paycheck-protection-program>.

² See 13 CFR § 134.1202(a).