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Non-Compete Clauses in Government Contracting: A Case Study in Enforceability

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Government contractors compete in a market that depends on proprietary approaches that frequently involve unique experience, expertise, or key employees. Because the stakes are so high and the competition fierce, government contractors often make significant investments to attract, train, and retain talented employees, and develop unique technical and management processes to gain a competitive advantage. The loss of an employee to a competitor has the potential to harm a contractor's new business prospects and dilute its competitive advantages. For those reasons, non-compete clauses can be an attractive option for a government contractor to protect its business.

Every jurisdiction applies its own test to determine whether a non-compete agreement is enforceable; some will not honor restrictive covenants at all. For the jurisdictions that do, courts generally consider, among other factors, whether the scope of the agreement (i) is narrowly tailored to the employer's legitimate business interest, (ii) is unduly burdensome on the employee's ability to earn a living, or (iii) violates public policy. Non-compete clauses are generally difficult to enforce, but government contracting is the rare business where specific personnel and the knowledge they possess *are* the competitive advantage, often making the difference between winning or losing a contract. Even then, however, the strong interest the government has in securing the best personnel for the job may lead to a restrictive covenant being void as against public policy.

This article discusses several strategies to consider when drafting non-compete clauses for use in government contracting contexts. It encourages specificity through narrowly-tailored terms. It also includes a Case Study that shows how the circumstances of a unique

Authors

Olaoluwaposi O. Oshinowo
Of Counsel
202.719.4275
ooshinowo@wiley.law

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situation might be able to save a government contractor from an otherwise broad and unenforceable non-compete clause.

Enforceability

Most jurisdictions disfavor noncompete agreements because they restrict trade and employees often lack bargaining power when they sign such agreements. This hostility to non-competes is also evident from the fact that several jurisdictions—including Maryland, Virginia, and the District of Columbia—have passed legislation limiting or banning their use. (The District of Columbia's Ban on Non-Compete Agreements Amendment Act of 2019 is currently pending approval by Congress.) That said, there are drafting best practices that can increase the likelihood that a non-compete agreement will be enforceable.

Non-compete agreements should be narrowly tailored to a specific business interest because enforceability can be highly dependent on the specific factual scenario in which it arises. A non-compete that is appropriate for one group of employees may be overly broad and unenforceable, or against public policy, when applied to another group of employees, even within the same company. Courts usually find broad non-compete clauses unenforceable when the geographic, temporal, and topical scope of the restriction extends beyond protecting a specific or clearly defined business interest and threatens the employee's ability to earn a living. Even where a former employee worked in a leadership role and had broad knowledge about the former employer's business, a broad non-compete agreement is unlikely to be enforced if it simply focuses on the similarity of a competitor to the employer, rather than the risk that the former employee will use their knowledge to the employer's detriment.

When a non-compete is so general that it prohibits an employee from working for a competitor in any capacity, it will not be enforced. Similarly, courts are unlikely to enforce an agreement that includes the entire United States government as a part of the prohibition—if, for example, the ex-employee would be prohibited from performing work for another business that provides services to all government agencies. Instead, non-compete agreements should be narrowly tailored to specific and specialized skills an employee may possess, a specific program or agency which the contractor regularly supports, or a specific business interest that can be justifiably protected.

Public interest factors can also limit enforcement of non-compete agreements for government contractors. Government contractors must contend with the fact that FAR 52.237-3, Continuity of Services, can be a strong factor against enforcement of a non-compete agreement. This clause requires that government contract work "continue without interruption" when services under the contract are considered vital. Relatedly, an incumbent government contractor's non-compete agreements may be barred when the successor needs those employees to fulfill its contract, and an interruption in the work threatens national security.

Additionally, some courts have reasoned that because non-competes restrict the government's access to qualified personnel, they are against public interest in the government contracts context. Courts also often view arguments to protect goodwill and customer relationships with more skepticism in government contracting than in other fields because there is one chief customer—the Government—who must follow a

stringent bidding process intended to limit biases. Instead, more justifiably protectable interests in government contracting include proprietary information, such as training programs, manufacturing processes, and trade secrets.

Case Study – Enforceability of a Broad Clause

Notwithstanding the foregoing caution, even a poorly written non-compete may be enforced when specific circumstances place limitations on language that might otherwise be deemed overly broad. This case study highlights a scenario we recently encountered, in which a generic, broad non-compete clause was enforced because there were significant factors demonstrating a government contractor's investment in its employee, followed by direct competitive harm once the employee left to work for a new competitor.

The scenario for the case study involved a non-compete clause similar to the following hypothetical example:

> *During the term of Employee's employment with May Mollusk and for one year from the date of Employee's termination for any reason whatsoever, Employee shall not directly or indirectly operate, join, participate, or engage in the operation or control of, or be an employee of any business, firm, or any other entity which supplies or seeks to supply the same or similar Products and Services to or for Customers of May Mollusk.*

There are several weaknesses in this clause, namely the broad language such as "*directly or indirectly*." Similar language has been found repeatedly to make a clause unenforceable due to overbreadth, especially in a case such as this when the clause covers all customers of the contractor (rather than specific agencies or government clients).

However, despite the broad language, a court actually enforced the clause. The employer (the hypothetical "May Mollusk") provided highly specialized information technology services to the Government. It had hired the employee because his educational and work experience qualified him to work with the company's extremely technical software, software "Z". The company expended substantial time and resources training him. It was highly unlikely that the employee would have been able to learn the skills necessary to program software Z if not for the training he received with the company; the information he received in training is not publicly available and few other companies work with the software.

After two years, the employee left the company for a competitor. Prior to hiring this employee, the competitor did not offer any services associated with software Z. After hiring the employee, the competitor bid to provide the government with software Z services. The original employer (May Mollusk), who had also bid on the contract, filed suit in state court against the competitor and the employee for breach of the non-compete clause. The court found that the competitor hired the employee solely to supply software Z services to the same federal agency as the original employer he had worked for. The court decided that specific circumstances supported enforcement of the non-compete clause. Several factors favored enforcing the clause, including: the timing of the employee's hiring by the competitor; the failure of either the competitor or the employee to investigate the applicability of his non-compete; the common agency customer of both the company and the competitor; and the fact that the employee suffered no financial harm. In making this

determination, the court also considered that few, if any, other companies provided software Z services and that the employee was hired specifically to work with software Z.

In addition to those specific circumstances, the court examined the three standard non-compete factors. First, the Court concluded that because few competitors offer software Z services and software Z work is very specific, the non-compete was no broader than necessary to enable the company to protect the unique and specialized services for software Z it developed. It also found that the non-compete was narrowly tailored to protect the company's legitimate business interest because it only prohibited the employee from using unique and specialized skills related to software Z, to the Government, for one year.

As illustrated by this case study, non-compete agreements are most likely to be enforceable in government contracting when the contractor is seeking to protect unique and specific knowledge, training, or confidential information that cannot be gained by means other than working for the employer at issue. Specific circumstances, such as the uniqueness of the training or reference to only one possible customer, can sometimes save even a poorly drafted non-compete.