THE GOVERNMENT CONTRACTOR®

THOMSON WEST

Information and Analysis on Legal Aspects of Procurement

Vol. 50, No. 46 December 17, 2008

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FEATURE COMMENT: The FAR's 'Contractor Business Ethics Compliance Program And Disclosure Requirements' Require Significant Changes For All Government Contractors And Subcontractors

On November 12, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council issued a final rule establishing new "Contractor Business Ethics Compliance Program and Disclosure Requirements." The new rule is broad in scope, burdensome in application and, in some respects, almost immediate in its effect. In many ways, to use the FAR councils' own words, it represents a "sea change" in how the Government regulates federal contractors.

The rule, effective December 12, has four primary elements:

- First, all contractors, including commercial-item contractors and small businesses, must establish and promote awareness of a code of conduct.
- Second, all contractors must disclose in writing to the agency inspector general, with a copy to the contracting officer, any violation of (1) certain fraud-related criminal statutes or (2) the civil False Claims Act if they have "credible evidence" of such a violation.
- Third, it provides for suspension and debarment for any "knowing failure" of a "principal" of a contractor to timely disclose to the Government "credible evidence" of those same events *or* of a "significant overpayment"—even

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THE GOVERNMENT CONTRACTOR is not published the weeks of December 25 and January 1. The next issue will be dated January 7, 2009.

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if the event occurred *before* the effective date of the new rule.

- Fourth, it requires large companies with noncommercial-item contracts to implement a comprehensive "internal control system."

The new rule is not clear on how many of these obligations must be enforced and, indeed, in some instances appears inconsistent in its requirements. Ambiguities and inconsistencies notwithstanding, agencies are busily implementing the rule and educating their workforces about its requirements. A November 14 Office of Management and Budget memorandum may trigger a flurry of agency-specific "guidance, memoranda, or other communications." For contractors, this may foreshadow a need to live with and work under multiple implementation regimes.

Applicability of Clause—The new rule was adopted following passage of the so-called "Close the Contractor Fraud Loophole Act," P.L. 110-252, Title VI, Chapter 1. As of December 12, a modified clause—FAR 52.203-13—is being incorporated in all new federal procurement contracts subject to the FAR that exceed $5 million in value and have a performance period longer than 120 days, including commercial-item contracts, small business contracts and contracts performed overseas. For multiple award and indefinite-delivery, indefinite-quantity contracts, the $5 million threshold is measured by the contract's total estimated value. FAR provisions dealing with mandatory commercial-item clauses and mandatory commercial-item subcontract clauses have been appropriately modified. FAR 52.212-5(e)(1)(i) and 52.244-6.

Because the act and the rule apply directly only to procurement contracts subject to the FAR system, the rule does not control other types of federal contract vehicles such as grants, cooperative agreements or other transaction agreements. But nothing precludes the Government from including the rule in these other contractual vehicles. In fact, before the current new rule was issued, OMB issued guidance on nonprocurement suspension and debarment that agencies, including the Department of Defense, have adopted. See 72 Fed. Reg. 34983 (June 26, 2007). The new rule may be similarly adopted. Thus, parties receiving grant funds, entering into cooperative agreements or negotiating "other transactions" need to monitor the contractual terms included in those agreements.

A prime contractor subject to the clause is required by subsection (d) of the clause to include the provision in all of its "subcontracts" valued over $5 million that have a performance period longer than 120 days. Moreover, the clause requires that subsection (d) be included in the subcontracts. Thus, subcontractors must include the clause and subsection (d) in their subcontracts. As a result of this mandated flow-down, the clause must be included in subcontracts at all tiers.

A "subcontract" is defined in the clause to include any contract entered into by a "subcontractor" to furnish supplies or services for performance of a prime contract. The definition of a "subcontractor" is broad. A "subcontractor" is defined as any "supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or anther subcontractor." This definition seems, therefore, to require inclusion of the clause in agreements between distributors and their sources for supplies and services provided under the General Services Administration's Multiple Award Schedule contracts, again, assuming that a subcontract meets the applicable criteria.

Code of Conduct—As noted, modified clause FAR 52.203-13 is being incorporated into all new federal procurement contracts worth over $5 million that have a performance period longer than 120 days. Among other things, the modified clause requires a contractor, within 30 days after award of a contract that incorporates the new FAR 52.203-13 clause, to develop and implement a "written code of business ethics and conduct," and "make a copy of the code available to each employee engaged in performance of the contract." See FAR 52.203-13(b)(1)(i)–(ii). The new rule does not mandate the content of the code, but it is clear from the context of the rule that it should be *federal contracting-centric*. An adequate code, thus, presumably would cover such issues as gratuities, kickbacks, personal conflicts of interest, procurement integrity, mischarging, overcharging, internal reporting of wrongdoing and the like. Although many companies already have corporate-wide codes of conduct, such codes may not be sufficient to satisfy the new requirement unless they specifically address key federal contracting-specific issues.

Contractors may determine how best to "make the Code available" to employees. Providing a hard copy satisfies this requirement, but posting an elec-

tronic copy of the code on the company's intranet and promoting its existence also is sufficient. Importantly, contractors should choose a mode that does not "hide in plain view" the code by burying it in a bundle of other material, either hard copy or electronic.

In addition to requiring a code of conduct, the new FAR 52.203-13 clause requires all contractors, including commercial-item contractors and small businesses, to

> exercise due diligence to prevent and detect criminal conduct; and otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

52.203-13(b)(2)(i)–(ii). Although the clause does not describe how a contractor is to accomplish these tasks, any approach likely should include a robust training program and periodic internal reviews.

As discussed below, the new rule outlines a number of steps that *noncommercial-item* contractors must take as part of a mandatory internal control system. These steps do *not* govern *commercial-item contractors*, but provide a useful blueprint for meeting the more general "due diligence" and "ethical conduct" requirements that apply to *all* contractors.

Contractual Mandatory Disclosure of Wrongdoing—In an acknowledged "major departure" from prior practice, the new FAR 52.203-13 clause requires a "timely" disclosure in writing to the cognizant agency IG, with a copy to the CO, upon discovery of "credible evidence" that "a principal, employee, agent, or subcontractor of the Contractor has committed"

- a federal criminal violation involving fraud, conflict of interest, bribery or the gratuity laws, or
- an FCA violation.

FAR 52.203-13(b)(3)(i). Companies holding multiple award contracts must disclose *both* to the ordering agency's IG *and* to the IG of the agency responsible for the basic contract. A "principal" is defined to include an "officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity." FAR 52.203-13(a). An "agent" essentially is any person or entity authorized to act on behalf of the company. Id.

Although the clause language does not require disclosure of the "credible evidence" underlying the disclosure, the new rule may require such disclosure as a practical matter. The clause requires that a contractor provide "full cooperation" to the Government in connection with a Government investigation. And although the definition states that such cooperation includes only such information sufficient for law enforcement to identify the nature and extent of an offense and the individuals responsible, it also defines the term to include a "complete response to Government auditors' and investigators' request for documents." Id. One assumes that one of the Government's first requests for documents following a disclosure will be for all documents and information supporting a contractor's conclusion that "credible evidence" of a violation exists. Indeed, some agency IGs are preparing disclosure forms, and the GSA IG form requires not only the evidence on which the disclosure is based, but also an estimated financial impact of the issue and names and contact information of anyone involved. See *oig.gsa.gov/integrityreport.htm*. Moreover, the new rule's concurrent changes to suspension and debarment regulations clearly indicate that credible evidence must be provided.

Industry is most concerned about the requirement to disclose if a contractor concludes that credible evidence *of an FCA violation* exists. To prove an FCA violation, the Government usually must show that a contractor, either directly or indirectly through a higher-tier contractor, "knowingly" submitted to the Government a claim that was false and material to a federal payment decision, or made a false statement in a record for the purpose of obtaining payment. Not surprisingly, the Department of Justice and contractors typically evaluate the facts of such cases, especially the "knowledge" requirement, through different prisms. Indeed, DOJ has asserted that any contractor request for payment while in breach of a material provision of the contract is an FCA violation—a so-called false "implied certification." Needless to say, this is not a universally accepted interpretation.

The FAR councils clarified that "the mere filing of a qui tam action" does not "represent, standing alone, credible evidence of a violation." Beyond that one salutary comment, however, the councils unqualifiedly rejected industry concerns about the vagaries inherent in the rule. The councils specifically rejected the idea that "the requirements of the civil FCA cannot be reasonably ascertained and

understood by contractors." 73 Fed. Reg. 67081. This comment misses the point, however. The concern is not that contractors cannot understand the FCA, but that it is extremely difficult to determine whether "credible evidence" of an FCA violation exists. The credibility of evidence is, of course, one reason why juries are empanelled—the two sides of the litigation equation simply have different views on evidence credibility. The new rule effectively requires contractors to prejudge the credibility of the evidence against them and risk serious consequences if their judgment is later challenged.

The new disclosure requirements obviously pose many problems for contractors. First, any disclosure by a contractor can constitute an admission that "credible evidence" of a violation exists. Such an admission is detrimental to a contractor:

- It can complicate the process of negotiating a settlement with the Government. Government investigators and attorneys can point to the admission of "credible evidence" of a violation and adopt a hard line in negotiations.
- Judges may find it difficult meaningfully to consider contractor motions for summary judgment because the Government can cite the contractor's disclosure as the basis for a genuine issue of material fact.
- Juries likely will be advised that a contractor's statement about the existence of "credible evidence" of a violation may be considered and is a sufficient basis on which to infer liability.

Given these potentialities, (a) the Government's recognition of a contractor's right to defend itself in any subsequent proceeding rings more than somewhat hollow, and (b) contractor disclosures should, as a matter of course, be framed in explicitly "protective" fashion, disclaiming the contractor's subjective belief that any such "credible evidence" exists and framing the disclosure as one made "out of an abundance of caution."

Second, a failure to disclose constitutes a breach of contract or, at a minimum, a failure to comply with the contractor's obligations under the contract. Because the Government often contends that requests for contract payments while in noncompliance with any given contract clause are false because they violate an implied certification of compliance, the new rule creates the potential for "back door" FCA liability. The failure to disclose "credible evidence" of an FCA violation is, through the legal legerdemain of the councils' rulemaking, transformed into an actual, *independent* FCA violation.

Third, contractors need a comprehensive approach to the collection of information from company personnel, processes and repositories to ensure that the information needed to discharge the obligations imposed by the new rule can be located and evaluated. This burden may be staggering for some companies.

Fourth, disclosure under the rule is not a "public disclosure" for the purposes of the FCA qui tam provisions. "The Councils recognize that mandatory disclosure of a violation of the civil FCA presents a risk that a qui tam action will follow." 73 Fed. Reg. 67082. This risk is essentially dismissed as "not unique." Id.

Fifth, failure to make a required disclosure constitutes a distinct cause for suspension or debarment. This issue is addressed in the next section.

To put contractors' dilemma under this new rule in a context that our legislators might understand more clearly, the rule is somewhat akin to requiring senators and representatives continually to investigate and disclose credible evidence of public corruption crimes and fundraising violations, whether by them personally or by their staff, and making it a felony and a cause for expulsion from Congress to not do so in a timely fashion. Such a statute, however commendable in its treatment of elected officials who violate the public trust, obviously is forever a figment of the imagination. For Government contractors, however, this is today's harsh reality.

Suspension and Debarment Disclosures—The suspension and debarment-related provisions of the new rule perhaps are the most insidious of all, both because they are broader than the contractual disclosure requirements and because they effectively require a contractor to disclose credible evidence of violations that relate to contracts that do *not* incorporate the new FAR 52.203-13.

As previously noted, under the rule's contract clause-based disclosure requirements, contractors must report credible evidence of criminal or FCA violations. However, under the suspension and debarment provisions, the disclosure obligation is broader, including credible evidence of not only

crimes and FCA violations, but also "significant overpayments."

As for the obligation to disclose overpayments under the new rule, the regulation is clear in at least one important respect, i.e., it does not apply to "overpayments resulting from contract financing payments as defined in 32.001." Under FAR 32.001, this exemption applies to overpayments related to advance payments, performance-based payments, commercial advance and interim payments, progress payments based on costs, and some, but not all, progress payments based on percentage or stage of completion and interim payments under cost reimbursement contracts. The rule's commentary clarifies that compliance with existing contract requirements to disclose overpayments, see, e.g., FAR 52.212-4, ¶ (i)(5), is sufficient under the new rule. No separate notification is required.

This broader obligation to disclose credible evidence of crimes, FCA violations and overpayments applies *whether or not* the affected contracts include the new FAR clause. Moreover, the suspension and debarment aspect of the disclosure rule *covers wrongdoing that occurred prior to the effective date* of the new rule. Thus, if a company has credible evidence that wrongdoing took place before December 12, on either a current contract or a contract that is within three years of final payment, then

- a failure to disclose that past wrongdoing provides a basis for suspension and debarment, and
- an actual disclosure made to avoid the risk of suspension and debarment provides a basis for criminal prosecution or an FCA complaint.

The FAR councils explicitly recognize these risks in the preface to the final rule. See 73 Fed. Reg. 67082. The one limit on the suspension and debarment disclosure requirements is that the failure to disclose the "credible evidence" must be by a contractor's "principal." This limitation, however, is not as limiting as the language suggests, because the councils have made explicit their intent that "principal" be "interpreted broadly" to "include compliance officers or directors of internal audit, as well as other positions of responsibility."

Before the final rule was issued, several commentators objected to the "retroactive" nature of the disclosure requirement. The FAR councils responded as follows:

> The Councils do not agree with the respondents who think that disclosure under the internal control system or as a potential cause for suspension/debarment should only apply to conduct occurring after the date the rule is effective or the clause is included in the contract, or the internal control system is established. ... If violations relating to an ongoing contract occurred prior to the effective date of the rule, then the contractor must disclose such violations, whether or not the clause is in the contract and whether or not an internal control system is in place, because of the cause for suspension and debarment in Subpart 9.4.

73 Fed. Reg. 67073–74.

Accordingly, contractors would be wise to spend some time *now* thinking about their prior and ongoing investigations to determine whether the new rule imposes new disclosure obligations. Of course, any potential disclosure must be considered and planned carefully because, as noted above, the new rule does not protect a company against the possibility of Government prosecution, civil complaint or qui tam action based on the disclosure.

Internal Investigations—The new mandatory disclosure rule counsels strongly in favor of a prompt internal investigation if a company suspects wrongdoing. Indeed, the new rule practically requires such a response. For example, the FAR councils explained their choice of words in the final rule as follows:

> The Councils have replaced "reasonable grounds to believe" with "credible evidence." DOJ Criminal Division recommended use of this standard after discussions with industry representatives. This term indicates a higher standard, implying that the contractor will have the opportunity to take some time for preliminary examination of the evidence to determine its credibility before deciding to disclose to the Government.

73 Fed. Reg. 67073. Later in the new rule, the councils returned to the issue of this "preliminary examination" in rejecting a request that the rule identify a time period in which the mandatory disclosure must be made.

> Until the contractor has determined the evidence to be credible, there can be no "knowing failure to timely disclose." This does not impose

> upon the contractor an obligation to carry out a complex investigation, but only to take reasonable steps that the contractor considers sufficient to determine that the evidence is credible.

73 Fed. Reg. 67074. Although the new rule does not suggest what "reasonable" is, one can assume that contractors and DOJ will interpret the phrase differently. Nonetheless, given the potential legal consequences of an admission of "credible evidence" of a violation, contractors should not be coerced by the rule to make improvident and inadequately evaluated disclosures.

It is worth noting that the modified clause and the commentary accompanying the new rule acknowledge that the rule does not intend to eliminate or in any way hinder the protections of attorney client privilege or the attorney work product doctrine in internal investigations. See 52.203-13(a), Definitions, "Full Cooperation"; and 73 Fed. Reg. 67077. As explained above, however, there is a world of difference between those words and the practical impact of the new rule.

Internal Control System—The modified FAR clause imposes significant additional requirements on large businesses performing noncommercial-item contracts. Specifically, the new clause requires that such companies establish

- an ongoing business ethics awareness and compliance program and
- an internal control system.

FAR 52.203-13(c)(1)–(2). The new rule outlines the minimum that a contractor must do to meet these requirements. It is worth noting, however, that although these requirements do not strictly apply to commercial-item contractors and small businesses, all contractors risk suspension and debarment for a failure to disclose wrongdoing. Consequently, as a practical matter, the following requirements are best viewed as applicable to all contractors—whether or not their business is limited to commercial items.

With respect to a contractor's awareness program, the new rule has this to say:

> This program shall include reasonable steps to communicate periodically and in a practical manner the Contractor's standards and procedures and other aspects of the Contractor's business ethics awareness and compliance program and internal control systems, by conducting effective training programs and otherwise disseminating information appropriate to an individual['s] respective roles and responsibilities.

FAR 52.203-13(c)(1)(i). The rule further provides that such training "shall be provided to the Contractor's principals and employees, and as appropriate, the Contractor's agents *and subcontractors*." Id. at (ii) (emphasis added).

Although the FAR councils declined to outline an effective training program, they offered the following brief discussion in the rule's commentary.

> The business ethics training courses may cover appropriate education on the civil FCA, as well as many other areas such as conflict of interest and procurement integrity and other areas determined to be appropriate by the contractor, considering the relevant risks and controls.

73 Fed. Reg. 67067. Obviously, an effective training program, like any compliance program generally, should be tailored to the number, nature and size of the federal contracts and subcontracts that a company has.

The rule details what the Government expects from a company's internal control system as a whole. In general, the rule requires implementation of a system that (1) facilitates timely discovery of improper conduct in connection with Government contracts, and (2) ensures that corrective measures are promptly instituted and carried out. FAR 52.203-13(c)(2)(i). To accomplish this, the new rule requires, at a minimum, that the company:

- Assign responsibility for the internal control system to someone "at a sufficiently high level" and with "adequate resources" to ensure the program's effectiveness.
  - The rule does not dictate who this person should be, but experience teaches us who this person should *not* be. For one, it should not be the director of federal sales or the equivalent. Such a choice too easily conjures up the "fox guarding the henhouse" image. It also typically should not be a member of the law department because that can make it more difficult to invoke the attorney client privilege as counsel becomes more embroiled in routine, day-to-day compliance activities that do not necessarily involve the tendering of legal advice or the receipt of requests for such advice.

- Take reasonable efforts not to hire anyone as a principal "whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business ethics and conduct."
  - The rule acknowledges that "the level of background check required depends on the circumstances. This is a business decision, requiring judgment by the contractor." 73 Fed. Reg. 67068.
  - The rule further states that, although a company would not have to report prior wrongdoing by a prospective hire to the Government, such wrongdoing "should be part of the decision whether to hire the individual." Id. In making such a decision, the commentary suggests that a contractor consider the "relatedness of the individual's illegal activities and other misconduct ... to the specific responsibilities the individual is anticipated to be assigned and other factors such as: (i) the recency of the individual's illegal activities and other misconduct; and (ii) whether the individual has engaged in other such illegal activities and other such misconduct." Id.
- Conduct periodic reviews to detect wrongdoing, including (a) monitoring and auditing to detect criminal conduct, (b) periodic evaluation of the effectiveness of the internal control system, and (c) periodic assessment of the risk of criminal conduct.
  - Although the new rule does not state how or how often these reviews should be conducted, most companies should employ a combination of in-house and outside reviews. As for the "monitoring and auditing" portion of the new "periodic review" requirement, the FAR councils acknowledged that monitoring and auditing that "conforms to generally accepted accounting principles should be sufficient." Id.
- Implement an internal reporting mechanism, such as a hotline.
- Discipline those who engage in improper conduct *and* those who do not take "reasonable steps to prevent or detect improper conduct."
  - Note that this requirement goes beyond simply punishing the offender. Now companies must discipline not only the individual who engaged in improper conduct, *but also the individual who did not take reasonable steps to detect the improper conduct*. As a practical matter, this likely will require companies investigating an individual's conduct also to investigate the supervisor's conduct—and maybe even higher up the chain.
  - Although the councils explicitly declined to suggest what level of discipline is appropriate for what type of transgression, the preface to the new rule notes that "most corporate compliance programs assert that violation of law or company policy is grounds for dismissal." 73 Fed. Reg. 67077.
- Timely disclose to the cognizant IG "credible evidence" of a federal criminal violation involving fraud, conflict of interest, bribery or the gratuity rules, or of an FCA violation.
- Fully cooperate with "any Government agencies responsible for audits, investigations, or corrective actions."
  - Government contractors always have been required to cooperate with federal auditors, but the rule expands the meaning of "full cooperation." In this context, it means (1) disclosing to the Government information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct, (2) providing timely and complete responses to Government auditors' and investigators' requests for documents, and (3) *providing auditors and investigators timely access to employees with information*. 73 Fed. Reg. 67078. Although some security agency contracts already impose such a requirement, the requirement to provide access to employees as a rule of general application under the FAR is new. According to the FAR councils, it is "reasonable for investigators and prosecutors to expect that compliant contractors will encourage employees both to make themselves available and to cooperate with the Government investigation." Id.
  - In response to multiple comments about a perceived inconsistency between the new cooperation requirements and the need to

conduct a privileged internal investigation, the final rule explicitly states that it is not intended to require any company to waive the attorney client privilege, and that a waiver of the privilege is not required to get "credit" for full cooperation. FAR 52.203-13(a).

- It also appears, based on the promulgation comments, that "full cooperation" does *not* preclude a contractor from indemnifying employees for legal fees, consistent with state law and "provisions contained in their corporate charters, bylaws or employment agreements." 73 Fed. Reg. 67077.

The new rule requires contractors to implement internal control systems, encompassing the foregoing elements, which, incidentally, are consistent with the U.S. Sentencing Guidelines, within 90 days after contract award, unless a CO authorizes a longer period of time. Contractors should not think that they can wait to report "credible evidence" of wrongdoing until after the implementation of their control systems. The commentary to the rule addresses precisely this concern in the context of discussing the need to disclose wrongdoing promptly.

> To some extent, the effective date of the rule actually trumps the other events, because the failure to timely disclose as a cause for suspension/debarment is independent of the inclusion of the contract clause in the contract or the establishment of an internal control system.

73 Fed. Reg. 67075. As a result, as of December 12, companies whose principals knowingly do not promptly disclose "credible evidence" of covered wrongdoing by the contractor or its subcontractors are at risk of suspension and debarment.

Finally, the modified clause provides that contractors must flow down these requirements to subcontractors holding subcontracts worth over $5 million and with a performance period exceeding 120 days. Although contractors do not need to review or approve subcontractors' codes or internal control systems, the preface to the rule suggests that "verification of the existence of such code and program can be part of the standard oversight that a contractor exercises over its subcontractors." 73 Fed. Reg. 67084.

Conclusion—The new rule is dramatic and far-reaching. Paradoxically, although elements of the rule are a "sea change" in approach, the "Councils do not anticipate that companies are going to flood the [IG] with trivialities, as some respondents fear." 73 Fed. Reg. 67076. The councils seem oblivious to the obvious differences in how contractors and Government enforcement personnel view such matters. Given the draconian consequences of erring on the side of nondisclosure, the councils' prediction seems to be unduly optimistic.

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Developments

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Group Says Treatment Of Contractor Employees Needs Improvement

A recent Center for American Progress Action Fund report suggests that the Government too often contracts with companies that "pay very low wages and treat their workers poorly." The report recommends ways that contractors can improve their treatment of employees.

Relying on figures from New York University professor Paul Light, the report estimates that low-wage earners make up about 80 percent of the 5.4 million service workers employed by Government contractors. Although the size and scope of "low-wage or poor-quality jobs" can only be roughly estimated, the report alleges that the Government is wasting taxpayer funds on companies that treat employees poorly. The report suggests four ways that contractors can improve their treatment of workers.

Increased Transparency—According to the report, inadequate oversight and transparency result in part from the Government's inadequate collection of information about contractors and workers, and from stakeholders' inability to access

information in a useful format. "Improved transparency, especially about working conditions, is necessary to ensure that contractors are complying with the law," the report states. It recommends collecting such additional information as contractor employee numbers, wages and benefits. It also recommends creating a centralized database for the collected information, and making the database available to the general public and to contracting officers evaluating bids.

Better Oversight and Enforcement—To improve oversight, the report recommends "subjecting all contracts to an open and competitive process" to provide rigorous scrutiny. The report also recommends increasing the number of COs; improving CO training; better monitoring existing contracts, including targeted investigations into industries "known for a prevalence of abuses"; and effectively using a centralized database. The report favors recent congressional actions, especially the effort to create a contractor misconduct database.

Judicious Use of Contracting—The report asserts that such inherently governmental functions as policymaking, procurement and budgeting should not be performed by contractors. "An overreliance on contracting" can lead to a transfer of jobs from the public sector "where wage and benefit information, compliance with the law and performance records are easily known and enforced, to the private sector where they are not," the report says.

Promoting Improved Standards—The report says that giving contractors that meet or exceed "certain wage and benefit levels" special consideration could improve job standards. It suggests applying prevailing-wage laws to all contractor employees and reforming prevailing-wage calculations, because prevailing-wage laws have three shortcomings: lack of universal coverage, substandard wage rates and inadequate enforcement. For example, the report found that "court rulings and statutory and administrative exemptions" have reduced worker protections provided by the Service Contract Act and other laws.

The report additionally recommends applying the same protections and oversight to both contractors and subcontractors. It notes that "much of the work—sometimes the majority of labor—is carried out by subcontractors," and the information available for review "becomes decidedly murkier the further one moves down the supply chain."

Stan Soloway, president of the Professional Services Council, an industry trade association, said the report makes some valuable recommendations, many of which PSC has previously suggested. These include investing more in the Government acquisition workforce, improving the Service Contract Act and emphasizing best value over low-bid contracting. See 50 GC ¶ 433. But the report's "incorrect presumption" of the accuracy of much of its underlying data and the "rhetoric woven throughout" paint an inaccurate picture of the current contracting environment, undercutting its recommendations, Soloway said.

Making Contracting Work for the United States is available at *www.americanprogressaction.org/issues/2008/pdf/contracting_reform.pdf*.

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GSA's Security Schedule Is Too Complex, CGP Reports

The General Services Administration's Multiple Award Schedule for security solutions is overly complex and buried under layers of contracting bureaucracy, survey participants recently told the Coalition for Government Procurement, a group of more than 350 Government contractors. GSA asked the CGP security committee to gather information on Government officials' "experiences attempting to attain Security Convergence solutions."

After gathering input from a January 2008 request for information, GSA added four new special item numbers (SINs) to Schedule 84, its security and law enforcement schedule. Agencies currently can purchase security services, products and solutions from 10 schedule holders that have added these SINs to their GSA schedules.

CGP surveyed a "small group of stakeholders" from the Department of Defense and civilian agencies involved in physical and information technology security. CGP found four major areas of concern: (a) definition of "security convergence," (b) ease of use of GSA services and schedules, (c) program managers' familiarity with GSA, and (d) evaluation of GSA value.

Definition of Security Convergence—Security convergence refers to recent efforts to merge management of physical security and logical, or IT,

security. Traditionally, agencies addressed the two fields separately, but security convergence reflects the notion that the two are inseparable. According to GSA's Web site, "in regard to security convergence, agency requirements comprise the entire range of security functions and architecture." GSA offers six types of security convergence solutions: (1) identity management, (2) safeguarding information, (3) compliance support, (4) physical security (5) security systems, and (6) IT services and products.

CGP reported that most participants believe the issuance of a clearance card compliant with Homeland Security Presidential Directive-12 satisfies the agency's security convergence requirements. Only a few survey respondents from the civilian agencies "clearly understood the importance of a converged solution as a more holistic view of security," CGP said.

Ease of Use—Respondents said that GSA services and schedules are difficult to use. Agencies tend to avoid using GSA schedules if another contract vehicle is available, CGP found. One interviewee said, "The Department has a GSA guru who is really the only person that can navigate GSA." Another said GSA has "layer after layer of contracting bureaucracy."

Familiarity with GSA—Several participants said they are unfamiliar with GSA purchasing procedures and cannot determine whether GSA solutions are best suited to their agencies' procurements. The survey revealed a consensus that "GSA needs to put their services into the customer's context then needs to provide training to the [program managers, chief information security officers] and other groups." CGP found a reluctance to use GSA schedules because contracting personnel involved with security, both physical and logical, typically do not understand the schedules and are not sufficiently trained.

GSA Value—Because program managers are unfamiliar with GSA procedures, they cannot confirm that GSA services offer substantial value to their agencies. Contracting officials making acquisition decisions must be able to qualitatively compare GSA processes with other contract vehicles, CGP stressed. As one respondent said, "Security Convergence SINs don't say anything substantive if you don't know how to buy off [the] schedule."

Recommendations—CGP recommended that GSA quickly identify and communicate its value proposition, and annually brief at least the top 10 GSA customer agencies. GSA should use these briefings to foster relationships with agency groups, specifically the Interagency Physical Security Committee, created by EO 12977, and the Chief Information Officer Council, created under the Federal Information Security Management Act. CGP said GSA's Schedule 84 business unit, rather than a general marketing office, should conduct the briefings, focusing on project officers rather than customer contract staff.

CGP recommended that GSA provide "boot camp" training on GSA schedules. GSA should consider hiring professional trainers, and training should be mandatory for some agency personnel such as experienced contracting officers, CGP said.

CGP also recommended that GSA work with its Schedule 84 contractors to develop a configuration tool to "harmonize all associated schedules and … create a comparative pricing model." The tool would bring uniformity to the process by configuring systems, components, services and maintenance, permitting end-users to compare technical and pricing factors to determine best value. CGP acknowledged the difficulty of implementing this recommendation—especially for services as opposed to products—but said the tool could "mitigate training deficiency and promote uniformity issues."

Security Committee Security Convergence Agency Survey Results is available at *www.thecgp.org/files/CGP%20Security%20Convergence%20Survey%20Report.doc*.

¶ 442

HUD Contract Administration Inconsistent With Management Decisions, IG Says

The Department of Housing and Urban Development administers contracts inconsistently with previously agreed-upon management decisions between HUD and the HUD inspector general, a recent IG review found.

The IG examined whether HUD's request to submit applications for performance-based § 8 housing program contract administrator services and a related annual contributions contract were consis-

tent with the recommendations from a June 7, 2007 audit report. See 49 GC ¶ 254. In the 2007 audit, the IG determined that work required by a similar contract had been eliminated, but that HUD had specifically informed contract administrators that they would continue to receive administrative fees for certain tasks until the contracts were revised.

Further, the 2007 audit found that when HUD entered into or renewed contracts, the eliminated work was still included as part of the new contracts, and HUD continued to make administrative payments. In fiscal year 2006, this resulted in HUD paying $27.2 million, or 19 percent of the total administrative fees, to contract administrators for work they were not required to perform. Accordingly, the IG recommended revising contracts to reflect the work actually required and to include in new contracts a method for adjusting administrative fees if the work required was modified or eliminated.

The acting deputy assistant secretary for multifamily housing agreed with the IG's recommendations, and a final action target date of Oct. 31, 2008, was set for their implementation. When following up with the acting deputy in September, however, the IG found that the Office of Multifamily Housing had not yet formed a working group to examine the audited contract, and was planning to delay implementation until at least the first quarter of FY 2009.

On October 1, HUD issued an invitation to eligible bidders to enter into a contract for administration services for housing assistance payments for the Southern California service area. The IG's review of this invitation and the proposed contract found that its two prior recommendations were not implemented, at a potential loss of $1.9 million, or 19 percent of the contract's basic fee, each year.

Specifically, the IG found that the proposed contract contained tasks for which contract administrators were not required to perform any work, including tenant income matching, budget request and revision work, and creating year-end settlement statements. Although the invitation noted that some of these tasks would not require work, the tasks were included in performance requirements summary tables and accounted for percentages of the contract's basic fee.

Further, the IG found that neither the invitation nor the proposed contract provided flexibility or any provisions for adjusting the contract in the future. Without this flexibility, HUD might not receive best value on contract administrator services, the IG said.

The IG recommended that HUD immediately rescind the invitation until it revises the contract to include an adjustment mechanism for future workloads and fees, and eliminate proposed contract tasks that do not require performance. HUD disagreed with the IG's findings, claiming that it had replaced the tasks no longer requiring work. The IG asked for documentation of these additional tasks, a status report on corrective action taken and copies of any correspondence or directives issued because of its review.

The IG's report is available at *www.hud.gov/offices/oig/reports/files/ig0900801.pdf*.

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Developments In Brief ...

(a) DPAPSS Issues Contingency Contracting Handbook—Shay Assad, director of defense procurement, acquisition policy and strategic sourcing, is seeking final comments on the draft second edition of the joint contingency contracting handbook, developed and produced by the Air Force Logistics Management Agency. The pocket-sized handbook and its accompanying DVD "provide essential information, tools, and training for [Department of Defense] Contingency Contracting Officers … to meet the challenges they may face, regardless of the mission or environment," according to Assad. Final comments are due December 19. Assad's memorandum and the draft handbook are available at *www.acq.osd.mil/dpap/policy/policyvault/2008-0001-DPAP.doc*.

(b) DOD Revises Acquisition Policy—John Young, undersecretary of defense for acquisition, technology and logistics, recently approved a major revision to Department of Defense acquisition policy to reduce delays and cost overruns. As the first major change to its acquisition policy in five years, DOD declared it a reflection of its "determination to improve the effectiveness and efficiency of its enterprise-wise acquisition

business processes." The new directive includes a mandatory acquisition process entry point, competitive prototyping, more frequent program reviews, configuration steering boards, technology readiness assessments, engineering and manufacturing development, and more effective test activity and evaluation. "The directive reflects the conviction that our policies must be more disciplined and effective to ensure the results are more predictable, and that we are better stewards of taxpayer dollars," Young said. The new acquisition policy is available at *akss.dau.mil/dag/DoD5000.asp?view=document&doc=2*.

(c) Obama Drops Pledge to End Contracting Abuse, ASBL Charges—In four recent press releases, the American Small Business League said President-elect Obama has dropped a campaign promise to end the awarding of small business contracts to large corporations. In a February 27 release, ASBL quoted Obama as saying, "It is time to end the diversion of federal small business contracts to corporate giants." ASBL stated that any mention of the pledge "vanished without explanation" from the new administration's transition Web site, *www.change.gov*. ASBL referred to contracting abuses found by numerous investigations, including the Small Business Administration inspector general's 2005 finding that large firms obtained small business contracts through "vendor deception" and "false certifications," and a July report from the Interior Department IG that millions of dollars worth of small business contracts were awarded to Fortune 500 firms. See 50 GC ¶ 254. ASBL predicted that Obama "will enact legislation and policies that will hurt American small businesses and even create more loopholes that will allow some of the nation's wealthiest investors to take federal contracts earmarked for legitimate small businesses."

(d) DARTT Improves Laptop Security, Saves Money, Pentagon Says—Taxpayers saved more than $90 million by the Government's use of a Department of Defense and General Services Administration purchasing initiative to purchase computer security products, DOD recently announced. The agencies participating in the Data At Rest Tiger Team (DARTT) initiative purchased $112 million worth of information security products for interagency users for about $19 million through DOD's Enterprise Software Initiative (ESI) and GSA's SmartBUY programs, DOD added. Data at rest refers to digital information stored on computers and similar electronic devices. Additionally, DOD said the program helped the Government meet an Office of Management and Budget directive that requires the encryption of all data on mobile computers and associated storage devices that carry sensitive information to protect against unauthorized access. According to David Hollis, DOD's DARTT program manager, the program has improved the Government's mobile data security while offering "deep product and service discounts across the government." Hollis said the savings resulted from the program's "business-pricing and competitive-bidding processes." ESI promotes the use of enterprise software agreements with contractors that offer DOD favorable terms and pricing for commercial and related services. See 43 GC ¶ 390; 44 GC ¶ 53; 50 GC ¶ 304. SmartBUY helps the Government leverage its buying power to gain maximum cost savings and best quality in its acquisitions. See 45 GC ¶ 233; 45 GC ¶ 440(b).

(e) Contractors Pay Navy and EPA Environmental Cleanup Costs—The Department of Justice December 9 gave notice of a proposed consent decree with FMC Corp. and BAE Systems Land & Armaments LLP. The consent decree will require FMC and BAE Systems to reimburse $4.6 million worth of environmental response costs, which the Navy and the Environmental Protection Agency are incurring at the Naval Industrial Reserve Ordnance Plant Superfund Site in Fridley, Minn. The Government brought suit against the companies under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 USCA §§ 9607, 9613(g)(2), after the Government's remedial investigations identified "contamination, including buried waste, leaking pipes or equipment, and process area spills and upsets." The disposal of chemical waste and hazardous substances rendered unallowable certain costs under FMC's and BAE Systems' federal contracts. The consent

decree includes no admission of guilt or fault, will expedite cleanup and avoid protracted litigation, and is consistent with the purposes of CERCLA and the public interest. DOJ is accepting comments on the proposed consent decree until December 24. 73 Fed. Reg. 74752 (Dec. 9, 2008).

(f) Blackwater Guards Indicted for 2007 Iraq Shootings—The Department of Justice December 8 unsealed indictments for voluntary manslaughter and other charges against five security guards involved in a shooting in Iraq while working for Blackwater Worldwide under a contract with the Department of State. A sixth security guard pleaded guilty. The Sept. 16, 2007 incident in Baghdad's Nisour Square left 17 Iraqi civilians dead and a comparable number injured. See 49 GC ¶ 372. That incident prompted Secretary of State Condoleezza Rice to send investigators to Iraq and Secretary of Defense Robert Gates to question whether private security contractors (PSCs) should operate within a unified command structure. See 49 GC ¶ 463. The State panel, led by Undersecretary of State for Management Patrick Kennedy, questioned the adequacy of the legal framework for properly overseeing PSCs because there was no basis for holding non-Department of Defense PSCs accountable under U.S. law. See 49 GC ¶ 413. DOJ said the case marks the first time non-DOD PSCs are prosecuted under the Military Extraterritorial Jurisdiction Act (MEJA), as amended in 2004. DOJ says that MEJA applies because at the time of the incident, the five guards worked for Blackwater under a contract with State "to provide personal security services related to supporting [DOD's mission in Iraq], within the meaning of MEJA." Eugene Fidell, who teaches military law at Yale Law School and heads the National Institute of Military Justice, disagrees. Fidell questioned whether, given the definitions in 18 USCA § 3267, there is MEJA jurisdiction over the security guards. "I don't think what they were doing for State 'relates to supporting the mission of' DOD, as MEJA requires," Fidell said. "Based on what we currently know, I think a district judge would have to dismiss this indictment."

Decisions

¶ 444

Takeover Contractor Entitled To Equitable Damages, ASBCA Finds

Atherton Constr. Inc., ASBCA 56040, 2008 WL 4981621 (Nov. 5, 2008)

The Armed Services Board of Contract Appeals had jurisdiction under the Contract Disputes Act of 1978, 41 USCA §§ 601–13 over a claim for equitable adjustment for work beyond a contract's requirements because the equipment at issue was ordered months after a replacement contractor had taken over. A CDA claim accrues when a contractor suffers damage as a result of the Government's conduct, and the ASBCA rejected the Government's assertion that the takeover contractor lacked privity of contract. The Board found that the contractor was entitled to equitable adjustment under Federal Acquisition Regulation 52.245-2 because the contracting officer reduced the amount of property the Government provided to the contractor, constructively changing the contract.

The Army Corps of Engineers in 2003 issued a request for proposals for construction work in Nashville, Tenn., including providing kitchen equipment. The contract was awarded March 31, 2004 to Blacksmith Management Group (BMG), which subcontracted with Atherton Construction for the kitchen equipment. The Government was to provide some kitchen equipment under the original contract, and other kitchen equipment required the Corps' approval. In October 2004, the administrative CO told BMG that it must provide the kitchen equipment the Government was originally going to provide. After BMG objected, the ACO suggested that, if BMG decided to pursue the matter by requesting a decision from the CO, "it should certify its claim and … support its position."

In February 2005, BMG notified Travelers Casualty and Surety Co., its performance and payment bond issuer, that it was unable to meet its contract obligations. On Feb. 25 and March 7, 2005, Atherton executed a purchase order with its supplier for the additional items. On April 26, the Corps rejected the kitchen equipment that

Atherton submitted through BMG and asked for revisions. On April 29, Travelers and the Corps entered into a completion agreement with Atherton to perform the incomplete part of the contract. Atherton purchased the kitchen equipment between Dec. 30, 2005 and Feb. 23, 2006, and began installing it on Jan. 30, 2006.

In January 2007, Atherton submitted a certified claim to the CO seeking an equitable adjustment for $172,206 for supplying kitchen equipment beyond what the contract required. Specifically, Atherton asserted that the Corps constructively changed the contract by revising the equipment schedule and directing Atherton to provide more equipment than the contract required. The CO denied Atherton's claim, and Atherton appealed to the ASBCA.

Before the ASBCA, Atherton alternatively asserted that it was entitled to an equitable adjustment of the contract price because (1) it had to furnish additional kitchen equipment after the Corps constructively changed the contract; (2) the Corps reduced the amount of Government-furnished property under the contract to zero by refusing to supply it, instead directing Atherton to supply it; or (3) the Corps knowingly accepted a mistake in the bid regarding the kitchen equipment.

The Corps moved to dismiss for lack of jurisdiction because the CDA allows only contractors to bring claims and Atherton was not a contractor when its claims arose. Specifically, the Government argued—and the Board rejected—that the claims arose in October 2004, before the takeover agreement, and that Atherton accrued damages as BMG's subcontractor. In the alternative, the Government asserted that Atherton never submitted its Government property claim to the CO for a final decision because it did not specifically request an adjustment under the Government property clause.

The Board dismissed the mistake-in-bid claim for lack of jurisdiction because it was not submitted to the CO for a final decision. However, the Board rejected the Government's alternative assertion because the CDA does not require using "any particular wording," and Atherton expressly referred to the Government property clause and changes clause in its claim.

For the ASBCA to have jurisdiction under the CDA, a claim must be brought by a contractor and relate to a contract. Thus, the Board wrote, the operative facts underlying a takeover contractor's claim must have occurred after execution of the takeover contract for it to have jurisdiction. A CDA claim accrues when a contractor suffers damage as a result of the Government's conduct, and Atherton argued that it was "undisputed" that it incurred "all the costs of supplying every item of kitchen equipment after [becoming] the contractor." The Board agreed, adding that Atherton "did not actually order and purchase that equipment until … months after it became the 'takeover contractor.' "

The facts in Atherton's certified claim to the CO "give rise to claims for an equitable adjustment under either the Changes or Government Property clauses," the ASBCA wrote. The CO has contractual authority to unilaterally alter the contractor's duties under the agreement, the ASBCA wrote, but "a contractor is entitled to receive an equitable adjustment in contract price for any increase in its costs required to perform."

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Comp. Gen. Finds Agency Decision Not In Compliance With RFP

ASRC Research & Tech. Solutions, LLC, Comp. Gen. Dec. B-400217, 2008 CPD ¶ 202

The Government's cost and technical evaluations were unreasonable and not supported by the record, the U.S. Comptroller General found, sustaining a protest against a NASA contract award.

NASA issued a request for proposals for a cost-plus-award-fee, indefinite-delivery, indefinite-quantity contract, seeking support services at the Goddard Space Flight Center in Maryland. The RFP provided for a best value determination. The contract would have a one year base period with four one-year options.

The RFP used three evaluation factors, with past performance and cost weighted approximately equally and considered less important than mission suitability. Past performance was to be evaluated on relevance, determined by the degree of similarity in size, content and complexity to the solicitation requirements; and on performance, rated on a scale from excellent to poor. The RFP stated that

NASA would evaluate cost realism in determining the cost factor, and that mission suitability scores could be adjusted "to account for a lack of cost realism." NASA provided offerors unweighted average rates, called library rates, to use as a guide for the 18 labor categories. The RFP permitted offerors to change the labor categories, including creating sublevels.

NASA received four proposals, including from ASRC Research & Technology Solutions (ARTS), the protester, and SP Systems, which won the award. Both offerors' past performance was rated excellent. ARTS had a lower cost offer, but SP Systems received a higher rating—excellent compared to ARTS' very good—for mission suitability. NASA determined that ARTS' senior-level labor rates posed a "significant risk" because they were below the library rates. This was ARTS' only "significant weakness" for mission suitability.

ARTS challenged the award to SP Systems, protesting NASA's evaluation of its labor cost proposal as a significant weakness, and alleging that NASA did not accurately evaluate the degree of similarity of SP Systems' past performance to the work called for in the RFP. The Comp. Gen. sustained the protest on both counts.

Cost Analysis—The Comp. Gen. rejected the Government's argument that ARTS' challenges to the library rates were essentially untimely "solicitation challenges" that should have been raised before the RFP's closing time. ARTS challenged not the use of the library rates, but the reasonableness of NASA's evaluation and conclusion stemming from NASA's reliance on the library rates as an evaluation tool, the Comp. Gen. pointed out. The Comp. Gen. sustained the protest to the extent that NASA relied on "the difference between the library rates and the labor rates proposed by ARTS to conclude that ARTS' proposed plan for capturing incumbent personnel presented significant technical risk," because the library rates may not reflect the actual cost of the incumbent workforce. Further, when ARTS' costs were calculated using the same unweighted averaging NASA used to determine the library rates, its rates were identical to the library rates.

The Comp. Gen. did not question NASA's method of evaluating proposal costs and found it "adequate, as a legal matter, that the offerors were treated equally." However, the Comp. Gen. did not "find support in the record for the determination that ARTS' proposed rates were inadequate to retain the incumbent workforce" because there was "no way to tell, from the unweighted library rates, how much the incumbent workforce is being paid." The Comp. Gen. said that recognizing NASA's right to choose the set of numbers it used for "plug in" labor rates did not prevent the Comp. Gen. from rejecting NASA's conclusion that ARTS' rates were so low compared to the library rates as to present a significant management plan weakness. The Comp. Gen. explained that NASA could "only assign ARTS' proposal a significant weakness … based on a determination that ARTS is unlikely" to retain the incumbent workforce, but there was "simply no basis in the record for that."

Past Performance Analysis—The Comp. Gen. also sustained the challenge to NASA's evaluation of SP Systems' past performance. ARTS asserted that NASA did not evaluate whether SP Systems' contracts were similar in size to the RFP requirements. The Comp. Gen. noted that both offerors' proposals were rated excellent, which required their past performance references to be rated highly relevant. However, the Comp. Gen. pointed out, five of SP Systems' six reference contracts were worth between $2 million and $3.5 million, and used no more than a dozen employees. The sixth had a dollar value of about $30 million and 67 employees. By contrast, ARTS' references included contracts with values of $600 million, $250 million, at least $100 million and $43.6 million, most involving more than 200 employees. The NASA RFP was valued at nearly $200 million and expected to involve more than 270 personnel.

Evaluation of an offeror's past performance is a matter within the contracting agency's discretion, and the Comp. Gen. will not substitute its judgment for the agency's reasonable decision. The critical question is whether the evaluation was reasonable, fair and consistent with the solicitation's evaluation scheme. See *Clean Harbors Envtl. Servs. Inc.*, Comp. Gen. Dec. B-296176.2, 2005 CPD ¶ 222; 48 GC ¶ 10. NASA's past performance evaluation did not meet this standard, the Comp. Gen. found, because NASA essentially used a pass/fail criterion for the relative size of offerors' past performance references. NASA deemed each reference as relevant if it met the $2 million threshold the RFP established.

The fundamental premise of this evaluation method was flawed, the Comp. Gen. said. By the RFP's terms, the size evaluation "was not merely a 'pass' or 'fail' determination." Rather, the solicitation "specified that NASA would consider the 'degree' to which the size[s] of an offeror's past performance references" are similar to the contract requirements. Thus, NASA had to consider the size differences in rating past performance. "Since there is nothing in the record to indicate that NASA engaged in the type of analysis required by the solicitation," the highly relevant rating was unreasonable, the Comp. Gen. found, "particularly given that SP Systems' references were, in most respects, small fractions of the size" contemplated by the contract.

Recommendations—The Comp. Gen. recommended that NASA reevaluate the proposals after removing the significant weakness assigned to ARTS for mission suitability, readjusting ARTS' scores and reevaluating the relevance of SP Systems' past performance. If, after reevaluation, NASA finds that a different offeror provides the best value, it should cancel the SP Systems' contract and make a new award.

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The FTCA And CDA Did Not Provide Jurisdiction Over Counterclaims, District Court Holds

U.S. ex rel. Rille v. Sun Microsys., Inc., 2008 WL 4756170 (E.D. Ark. Oct. 28, 2008)

The Federal Tort Claims Act and the Contract Disputes Act did not give a U.S. district court jurisdiction over a contractor's counterclaims, the U.S. District Court for the Eastern District of Arkansas recently held.

The General Services Administration inspector general audited the defendant's business. The qui tam relator claimed that the defendant "defectively disclosed information to the Government" when negotiating certain contracts. In response, the defendant counterclaimed, alleging negligent performance of the audits and breach of contract by the Government. The relator argued that the negligence counterclaim should be dismissed for lack of subject matter jurisdiction, and that the contract counterclaim should be dismissed for not following statutory claim procedures.

Negligence Counterclaim—The Government is immune to suit except when it waives this privilege and gives the terms of its consent. This requirement also applies to counterclaims against the Government. See *U.S. v. Timmons*, 672 F.2d 1373 (11th Cir. 1982). The defendant, as the party invoking jurisdiction, bears the burden of establishing it, the Court found. The Government waived immunity for certain claims under the FTCA, which does not apply to discretionary functions, libel, slander or interference with a contract. Although a portion of the defendant's counterclaim was brought under a barred theory of contract interference, claims asserting damages from IG audit requests and from defending this case were unrelated to contract rights, the Court found.

FTCA: The FTCA contains a procedural rule that claims must be presented to the appropriate federal agency and denied before courts may act on them. Counterclaims are typically exempt from this requirement, but some courts have held that only compulsory counterclaims receive this exemption. See *Spawr v. U.S.*, 796 F.2d 279 (9th Cir. 1986). A compulsory counterclaim normally must arise from the same transaction or occurrence as the opposing party's claim, the Court wrote. Here, the Court found, the complaint and counterclaim were based on the same audits and reports and, therefore, met the jurisdictional requirement.

Discretionary Function Exception: The Government is immune from suit for its discretionary actions. The Government's decisions to investigate and prosecute are discretionary, the Court found. See *Sloan v. U.S. Dep't of Hous. & Urban Dev.*, 236 F.3d 756 (D.C. Cir. 2001). In *Sloan*, the U.S. Court of Appeals for the D.C. Circuit found audits and investigations were "legally indistinguishable" from prosecutorial discretion. Following this logic, the Court found that both claims rested on discretionary Government decisions. The defendant argued that previous negligent audit cases did not separate arguments for damages resulting from audits from arguments challenging the prosecution itself. Even if an audit and a subsequent prosecution are distinguishable, however, the audit still is a discretionary function, the Court found.

For audits to be discretionary functions, they must pass a two-part test as laid out in *Powers v. U.S.*, 996 F.2d 1121 (11th Cir. 1993). First, the conduct in question must contain "an element of judgment or choice." If so, then a court must determine whether the conduct itself meets an exception meant to be shielded by the discretionary function exception. If both criteria are met, the conduct cannot be a basis for liability. Here, the Court found the audits involved an element of choice because of the Government's decision to investigate. The Court also found that the audits were the type of action that the discretionary function shields because they were an "essential part of the Government's investigation into Defendant's suspected unlawful behavior." Thus, the Court found, even if the audits were performed negligently, the Government was still immune from suit under the discretionary function exception.

The defendant claimed the discretion the Government used to perform the audits did not include discretion to perform the audits negligently. Citing *Appley Bros. v. U.S.*, 164 F.3d 1164 (8th Cir. 1999), the defendant claimed that if a duty, like an audit, were mandatory, it failed the discretionary function test because no discretion was involved. The Court found that *Appley Bros.* was distinguishable from the present case because "it focused on whether a government employee had discretion not to perform any investigation at all," as opposed to whether the investigatory procedure was discretionary. The defendant argued, however, that certain auditing procedures were mandatory because they had to comply with generally accepted government auditing standards (GAGAS), which mandate that auditors be professional, objective, fact-based, nonpartisan and non-ideological. Even assuming that these standards are explicitly required, the Court found, their application requires "substantial judgment or choice," because GAGAS prescribe not specific procedures, but only the ethical standards by which procedures used should be judged. Thus, the audits fell under the discretionary function exception to the FTCA, and the Government did not waive its immunity from suit.

Breach of Contract Counterclaim—Under the CDA, a claim must be submitted to and decided by the contracting officer before it may be reviewed by an agency board of contract appeals or the U.S. Court of Federal Claims. Federal district courts lack jurisdiction over contract-based claims under the CDA, but claims "involving fraud" fall under an express exception. Here, the defendant argued that the fraud exception applied to its claim. The Court found, however, that the exception applies only to fraudulently submitted claims against the Government, not to a contractor's claims that the Government committed fraud on a contract. The Court held that the defendant did not comply with the CDA, and therefore, the Court lacked subject matter jurisdiction over the case. The Court further held that transfer of the defendant's case to the COFC would be inappropriate because the defendant had not taken the first step of obtaining a final decision from the CO.

Notables

Miscellany ...

• The Army December 15 awarded **Sikorsky Aircraft Corp.**, Stratford, Conn., a $619.9 million firm-fixed-price contract for funding of a second program year of a multi-year contract for 24 MH-60R Sea Hawk Helicopters, and a third program year for 18 MH-60S Sea Hawks Helicopter. The contract also includes tooling, program systems management and technical publications. Work will be performed in Stratford, Conn., with an estimated completion date of Dec. 31, 2012. One bid was solicited, and one bid was received.

• The Army December 12 awarded **Hensel Phelps Construction Co.**, Chantilly, Va., a $178.8 million firm-fixed-price contract modification to incorporate in-scope changes to the Pentagon renovation. Work will be performed in Chantilly, Va., with an estimated completion date of March 9, 2011. One bid was solicited, and one bid was received.

• The Defense Logistics Agency awarded **Special T. Hosiery Mills Inc.**, Burlington, N.C., a maximum $7.09 million firm-fixed-price, total set-aside contract for antimicrobial socks and boots. There are no other locations of performance. Using services are the Army and the Navy. There were originally 25 proposals solicited, and 16 responses. The date of performance completion is Dec. 11, 2009.

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