SPECIAL TOPICS

Competitive Sourcing[1]

Timing Is Everything—GAO's Jurisdiction over Agency Tender Official's Protest Applies Only If Competition Initiated "On or After January 26, 2005"

As discussed in the *2006—Year in Review*,[2] protesters continue to argue unsuccessfully that the Government Accountability Office (GAO) has jurisdiction to hear protests concerning a competition[3] conducted under Office of Management and Budget (OMB) Circular A-76 filed on behalf of the losing federal government employees. A recent amendment to the Competition in Contracting Act (CICA) expanded the GAO's protest jurisdiction concerning OMB Circular A-76 (A-76 competitions).[4] The CICA amendment grants the GAO jurisdiction to hear protests filed by the agency tender official (ATO)[5] in an A-76 competition involving more than sixty-five full-time equivalent (FTE) employees.[6] No protester has yet succeeded in relying on that amendment. This article addresses *James C. Trump*,[7] a case involving another such unsuccessful A-76 protest, filed by the ATO in a U.S. Navy competition. The GAO dismissed the protest reasoning that the agency tender official was not an "interested party" under the CICA.[8]

Mr. Trump's protest arose from the Navy's decision to award a contract for operations and maintenance services for communications satellite systems to Rome Research Corporation (Rome Corp.) following an A-76 competition.[9] The competition affected over sixty-five FTE employees. The Navy formally announced its intent to conduct a standard competition under OMB Circular A-76 on 11 January 2005 on the federal business opportunities (FedBizOpps) internet website.[10] Subsequently, the Navy issued a solicitation. In response, Rome Corp. submitted an offer to the contracting officer; likewise, the ATO submitted the agency tender[11] on behalf of the government's most efficient organization (MEO).[12] On 4 January 2007, after evaluating the submissions from the private sector and from the ATO, the Navy announced its

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[1] Office of Management and Budget (OMB) Circular A-76 is a statement of federal policy concerning the performance of commercial activities in the federal government. FEDERAL OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES pmbl. (May 2003) [hereinafter REVISED CIR. A-76]. "Competitive sourcing" is the term used to describe the policy in REVISED CIR. A-76. Generally, this policy requires private sector performance of commercial activities unless performance by government employees is more cost-effective. *Id.*

[2] *See* Major Andrew S. Kantner et al., *Contract and Fiscal Law Developments of 2006—Year in Review*, ARMY LAW., Jan. 2006, at 112.

[3] REVISED CIR. A-76, *supra* note 1. This policy also prescribes the procedures that federal agencies must follow in conducting what it calls "competitions" of commercial activities; in such competitions, agencies must determine whether private sector performance or government performance would be more cost-effective [hereinafter A-76 competition]. *Id.* at attch. B. If the agency finds that private sector performance is more cost-effective, then at the conclusion of an A-76 competition, the agency awards a contract to a contractor. *Id*. Conversely, if the agency finds that government performance is more cost-effective, then the agency issues a "letter of obligation" to the "official responsible for performance of the MEO" (most-efficient organization). *Id.*

[4] National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 326, 118 Stat. 1811, 1848 (2004) [hereinafter NDAA 2005, CICA Amendment]. The National Defense Authorization Act for FY 2005 amended the definition of "interested party" for protests under the Competition in Contracting Act (Pub. L. No. 98-369, tit. VII, § 2701, 98 Stat. 1175) to include the "official responsible for submitting the Federal agency tender in a public-private competition" completed pursuant to OMB Circular A-76 regarding an activity performed by more than 65 full-time equivalent employees. *Id.* The effective date of the amendment is "on or after the end of the 90-day period beginning on the date of the enactment [October 28, 2004] of this Act." *Id.*; *see also* 31 U.S.C. § 3551 (2000). *Id.*

[5] An "agency tender official" (ATO) is an "inherently governmental agency official with decision-making authority who is responsible for the agency tender and represents the agency tender during source selection." REVISED CIR. A-76, *supra* note 1, at attch. D. The "agency tender" is the "agency management plan submitted in response to a solicitation for a standard competition. *Id.* The agency tender includes a "most efficient organization" (MEO) agency cost estimate, an MEO quality control plan, an MEO phase-in plan, and copies of any MEO subcontracts." *Id.* An "MEO" is "the staffing plan of the agency tender, developed to represent the agency's most efficient and cost-effective organization." *Id.*

[6] A "full-time equivalent" (FTE) is defined as the "staffing of federal civilian employee positions, expressed in terms of annual productive work hours . . . FTE employees may reflect civilian positions that are not necessarily staffed at the time of public announcement. . . . The staffing and threshold FTE requirements stated in this circular reflect the workload performed by these FTE positions, not the workload performed by actual government personnel." REVISED CIR. A-76, *supra* note 1, at attch. D.

[7] Comp. Gen. B-299370, Feb. 20, 2007, 2007 CPD ¶ 40.

[8] *Id*. at 2.

[9] *Id*. 1–2.

[10] *Id.*

[11] *See supra* note 5 (defining "agency tender").

[12] *See supra* note 3 (discussing "most efficient organization").

decision to award a contract to Rome Corp. Thereafter, Mr. Trump, the ATO, filed a GAO protest stating that the "competition contained various flaws."[13]

In determining whether the GAO had jurisdiction to hear the ATO's protest, the GAO focused on the effective date of the CICA amendment.[14] The GAO cited the language of the statute which states, "this section shall apply to protests . . . that relate to studies initiated under Office of Management and Budget Circular A-76 on or after the end of the ninety-day period beginning on the date of the enactment of this Act."[15] The GAO stated that the "date of the enactment" of the CICA amendment was 28 October 2004 and further, that ninety days after that date was 26 January 2005.[16] Therefore, the GAO concluded that the amendment applied to only protests filed by on or after 26 January 2005 by an ATO in a competition involving more than sixty-five FTE employees.[17]

In *Trump*, however, the Navy initiated the competition on 11 January 2005, two weeks before the CICA amendment became effective.[18] While the ATO argued that the Navy initiated the competition on 30 June 2007, six months after the Navy first announced the competition on FedBizOpps, the GAO disagreed.[19] The GAO stated that the Navy's announcement on 30 June 2007 was merely a modification to the earlier announcement it made on 11 January 2005.[20] As such, the GAO found that it did not have jurisdiction to hear the protest and so, the GAO dismissed it.[21] Accordingly, those on the A-76 sidelines will continue to wait until an ATO relies successfully on the CICA amendment in filing a protest on behalf of the losing government employees.

OMB's Latest A-76 Report

In May 2007, the OMB released its annual report on the federal government's competitive sourcing efforts during fiscal year (FY) 2006.[22] In this report, the OMB tracked competitive sourcing data pursuant to the President's Management Agenda.[23] The OMB reported that in FY 2006, federal agencies conducted 183 competitions involving 6,678 employees resulting in over $1.3 billion dollars in expected net savings over the next five to ten years.[24] In contrast, in FY 2005, the total number of competitions was nearly identical (181), however, the total number of affected employees was higher (9,979) and the expected net savings was higher ($3 billion dollars).[25]

In its FY 2006 report, the OMB identified some competitive sourcing trends.[26] In FY 2006, federal agencies determined that performance of commercial activities by in-house personnel was more cost-effective than private sector performance for 87% of the FTE employees competed.[27] The average number of FTE employees per standard competition[28] was 72%, while

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[13] *Trump*, 2007 CPD ¶ 40, at 2–3.

[14] *Id.* at 3.

[15] NDAA 2005, CICA Amendment, *supra* note 4; *see also Trump*, 2007 CPD ¶ 40, at 3.

[16] *Trump*, 2007 CPD ¶ 40, at 3–4.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 4–5.

[20] *Id.* at 5–6.

[21] *Id.* at 7.

[22] U.S. OFFICE OF MANAGEMENT AND BUDGET, REPORT ON COMPETITIVE SOURCING RESULTS FISCAL YEAR 2006 (May 2007) [hereinafter OMB 2006 REPORT], *available at* http://www.whitehouse.gov/omb/procurement/comp_src/cs_report_fy2006.pdf. This report compiles government-wide competitive sourcing data. *Id.*

[23] *Id.* at 2. *See generally* U.S. OFFICE OF MANAGEMENT AND BUDGET, THE PRESIDENT'S MANAGEMENT AGENDA: FISCAL YEAR 2002, 17 (2001), *available at* http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf (explaining that competitive sourcing is one of the key methods by which President Bush seeks to improve government performance).

[24] OMB 2006 REPORT, *supra* note 22, at 5. Of these 183 competitions, 120 were streamlined competitions and 63 were standard competitions. *Id.* at 27.

[25] *Id.* at 5, 27; *see also* U.S. OFFICE OF MANAGEMENT AND BUDGET, REPORT ON COMPETITIVE SOURCING RESULTS FISCAL YEAR 2005, at 1, 14 (Apr. 2006) [hereinafter OMB 2005 REPORT], *available a*t http://www.whitehouse.gov/omb/procurement/comp_src/cs_annual_report_fy2005_results.pdf.

[26] OMB 2006 REPORT, *supra* note 22, at 5.

[27] *Id.* As in prior years, the OMB compiled data regarding the performance decision as a percentage of FTE employees competed rather than as a percentage of the total number of competitions completed. *Id.* Thus, the OMB states that competitions completed in FY 2006 resulted in performance by in-house employees for 87% of all of the FTE employees competed; the OMB does not report the percentage of the time in-house employees won for all competitions completed. *Id.*

the average number of FTE employees per streamlined competition was eighteen.[29] The OMB states that from FY 2004 to FY 2006, 85% of the FTE employees involved in competitions fell into one of six categories: (1) maintenance and property management; (2) information technology; (3) logistics; (4) human resources, personnel management and education; (5) administrative support; and (6) finance and accounting.[30] The average length of standard competitions was thirteen months while the average length of streamlined competitions was three months.[31] Similar to FY 2005,[32] in FY 2006, the clear majority of the competitions were streamlined.[33]

Regarding the level of participation by the private sector, the OMB reported that agencies received at least two private sector offers in the majority of standard competitions conducted.[34] For example, agencies received two or more private sector offers in 53% of the standard competitions conducted in FY 2006.[35] Agencies received only one private sector offer in 30% of the standard competitions.[36] Agencies received no private sector offers in 17% of the standard competitions.[37]

The aforementioned OMB report also provides data specifically on competitive sourcing results in the Department of Defense (DOD) for FY 2006.[38] During this timeframe, DoD completed fourteen competitions involving 454 FTE employees.[39] Of these competitions, only one was a standard competition and thirteen were streamlined; there were no direct conversions.[40] The average number of FTE employees involved in DOD standard competitions was sixty-nine, while the average number of FTE employees in DOD streamlined competitions was thirty.[41] The most frequently competed commercial activity in DOD was "maintenance and property management."[42] In contrast to the other federal agencies as a whole, the performance decisions following DOD competitions favored in-house employees in only 22% of the competitions based on the number of FTE employees competed.[43]

The OMB also tracked DOD's incremental costs[44] resulting from conducting the 2006 competitions and DOD's expected cost savings.[45] Additionally, OMB reported DOD's actual savings resulting from conducting the competitions from FY 2003

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[28] REVISED CIR. A-76, *supra* note 1, at attch. B. An agency must utilize "standard competition" procedures if on the competition's start date, a commercial activity is performed by more than sixty-five FTE employees. *Id.* Conversely, an agency may utilize "streamlined competition" procedures if on the start date, a commercial activity is performed by sixty-five or less FTE employees. *Id.*

[29] OMB 2006 REPORT, *supra* note 22, at 27

[30] *Id.* at 9. OMB did not report separate statistics regarding the commercial activities most frequently competed in only FY 2006; rather, OMB combined these statistics for FYs 2004, 2005, and 2006. *Id.*

[31] *Id.* at 11. *See generally* REVISED CIR. A-76, *supra* note 1, at attach B. REVISED CIR. A-76 requires agencies to complete standard competitions in twelve months and streamlined competitions in ninety days. *Id.*

[32] OMB 2005 REPORT, *supra* note 25, at 28. In FY 2005, federal agencies completed 124 streamlined competitions and 57 standard competitions. *Id.*

[33] OMB 2006 REPORT, *supra* note 22, at 27. In 2006, federal agencies completed 120 streamlined competitions and 63 standard competitions. *Id.*

[34] *Id.* at 15.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* at 27. This total includes all competitions completed in FY 2006 regardless of when initiated.

[40] *Id.* Although not permitted under the current version, the previous version of OMB Circular A-76 permitted a "direct conversion" of a commercial activity from government employee performance to contractor performance if the activity was performed by ten or fewer FTE employees so long as the contracting officer determined that the contractor could perform at a fair and reasonable price. FEDERAL OFFICE OF MANAGENMENT. & BUDGET, CIRCULAR NO. A-76, REVISED SUPPLEMENTAL HANDBOOK, PERFORMANCE OF COMMERCIAL ACTIVITIES 5 (Mar. 1996).

[41] OMB 2006 REPORT, *supra* note 22, at 27.

[42] *Id.* at 31.

[43] *Id.* at 32. Note that in prior years, the OMB has reported that DOD competitions have resulted in favor of in-house performance at a far higher frequency. In FY 2005, DOD A-76 competitions resulted in in-house performance for 71% of the FTE employees competed. *See* OMB 2005 REPORT, *supra* note 25, at 56. In FY 2004, DOD A-76 competitions resulted in in-house performance for 90% of the FTE employees competed. FEDERAL OFFICE OF MANAGEMENT AND BUDGET, REPORT ON COMPETITIVE SOURCING RESULTS FISCAL YEAR 2004, at 10, 33 (May 2005), *available at* http://www.whitehouse.gov/omb/procurement/comp_sourcing_results_fy04.pdf.

[44] OMB 2006 REPORT, *supra* note 22, at 24. "Incremental costs" include: (1) the "costs of consultants or contractors" participating in the competition, (2) the "costs of travel, training or other incremental expenses directly attributed" to the competitions, and (3) "incremental in-house staff costs that were incurred" due to the competitions. *Id.*

[45] *Id.* at 33–35.

through FY 2005.[46] During FY 2006, the DOD incurred costs totaling approximately $1.6 million attributable to conducting the competitions.[47] Despite the costs of conducting competitions, the DOD expects that it will realize gross savings of over $23 million and net savings of over $21 million for competitions conducted in FY 2006.[48] Further, from FY 2003–FY 2005, the DOD reported actual saving of over $701 million from competitions completed during that timeframe.[49]

To some extent, FY 2006 competitive sourcing trends in the DOD mirror the trends in other government agencies. For instance, in FY 2006, both the DOD and federal agencies as a whole completed far more streamlined competitions than standard competitions.[50] Likewise, maintenance and property management was the most frequently competed commercial activity for both DOD and also for federal agencies as a whole.[51] In contrast, while for federal agencies as a whole, the A-76 competitions resulted in in-house performance for 87% of the FTE employees competed, in DOD, the competitions resulted in in-house performance for only 22% of the FTE employees competed.[52] Nonetheless, the OMB was not the only federal entity to compile a report on OMB Circular A-76 in 2006.

GAO's Latest Report on the Real Costs of A-76 Competitions

In May 2007, the GAO released a report concerning, in part, the benefits of competitive sourcing in DOD.[53] The GAO prepared the report in response by a tasking by the House Appropriations Committee (HAC) to analyze the "costs and consequences of contracting out" for DOD services from fiscal years 1995–2005.[54] Since DOD normally funds service contracts with operation and maintenance (O&M) appropriations, in examining the costs of contracting for services, the GAO concentrated on O&M expenses.[55] The GAO's report discusses: (1) DOD trends in O&M costs and service contracting, (2) whether the increase in service contracting has led to increased expenditures from operation and maintenance (O&M) appropriations, and (3) advantages and disadvantages of increased service contracting.[56] In conducting its analysis, the GAO reviewed data concerning the costs of DOD A-76 competitions.[57]

Regarding the GAO's analysis of the cost of DOD A-76 competitions, the GAO compared the cost estimates for the performing particular commercial activities with government personnel to the cost of performing these activities with contractors.[58] In most cases, the GAO found that performance of commercial activities with contractors was far less expensive than performance with government employees.[59] In compiling its analysis, the GAO visited three military installations that had recently completed A-76 competitions (Fort Hood, Texas; Naval Air Station, Florida; and Langley Air Force Base, Virginia).[60]

Regarding DOD trends in O&M costs and service contracting, GAO concluded that DOD's O&M expenditures increased dramatically from fiscal years 1995–2005 with the most significant increased from 2001–2005.[61] Additionally, DOD dramatically increased its reliance on service contractors during this same time period.[62] The GAO states that DoD

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[46] *Id.* at 19.

[47] *Id.* at 33–35.

[48] *Id.*

[49] *Id.* at 19.

[50] *Id.* at 27.

[51] *Id.* at 9, 31.

[52] *Id.* at 32.

[53] GOV'T ACCOUNTABILITY OFFICE, GAO-07-631, DEFENSE BUDGET: TRENDS IN OPERATION AND MAINTENANCE COSTS AND SUPPORT SERVICES CONTRACTING (May 2007) [hereinafter GAO REPORT ON O&M COSTS].

[54] *Id.* at 7.

[55] *Id.* at 1.

[56] *Id.* at 1–2.

[57] *Id.* at 2.

[58] *Id.* at 4–5.

[59] *Id.*

[60] *Id.* at 24–27.

[61] *Id.* at 7.

[62] *Id.* at 15. From fiscal years 2000–2005, the costs of DOD service contracts have increased by over $40 billion or 73%. *Id.*

attributes both increases primarily to military operations in support of the Global War on Terrorism (GWOT).[63] In supporting the GWOT, one method that DOD has utilized to conserve its financial resources is by conducting A-76 competitions of DOD commercial activities.[64] The A-76 competition process is designed to result in performance by the most-effective provider.[65] Consequently, some of these A-76 competitions have resulted in the award of additional service contracts.[66]

Regarding the issue of whether the increase in DOD service contracting has led to increased O&M expenditures, the GAO concluded that there was insufficient evidence to make that determination.[67] The GAO reported that DOD does not maintain data on whether the increase in DOD service contracting has, in fact, directly caused the increase in O&M expenditures.[68] The DOD does not generally maintain data comparing the cost of performing services work with contractors to government personnel. While DOD does track the costs of conducting commercial activities with government personnel versus with contractors as part of the A-76 process, contracts following A-76 competitions are only a fraction of DOD's service contracts.[69] Where DOD has decided to award contracts following A-76 competitions, case studies have shown that they are generally cost-effective.[70]

Regarding the advantages and disadvantages of increased service contracting in DOD, GAO reported that both exist.[71] DOD has noted that there are a number of benefits to increased service contracting.[72] First, hiring contractors to perform services formerly performed by civilian employees allows those civilian employees to perform other vital jobs elsewhere in the federal government. Second, contractors can perform services formerly performed by uniformed personnel thus, expanding the pool of service members available for deployments. Third, DOD reports that in most cases, contracts awarded as a result of A-76 competitions are cost-effective.

The DOD also noted some disadvantages to increased service contracting.[73] First, there is concern that more service functions should be performed by government employees. As a result, in the National Defense Authorization Act (NDAA) for FY 2006, Congress required DOD to create a policy giving preference to government employees for performance of commercial activities under certain circumstances.[74] Second, there is concern that service contract costs are spiraling out of control. Consequently, the Army and the Air Force have issued memoranda "calling for review and reduction in services contracts."[75] Third, DOD has complained that increased service contracting has led to less operational flexibility.[76] For example, some commanders state that it is more difficult to respond to changing requirements when a service is performed by contractors vice by government employees.[77]

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[63] *Id.* at 1. The report states that between fiscal years 2000 to 2005, DOD's O&M expenditures increased from $133.4 billion to $209.5 billion amounting to an increase of $76.1 billion or 57%. *Id.* at 2, 10. While the O&M expenditures of each of the Armed Services increased during this period, the Army's increase was the most remarkable at 137%. *Id.*

[64] *Id.* at 16–17.

[65] *Id.*

[66] *Id.* From 1995–2005, DOD A-76 competitions have resulted in 570 decisions to award contracts for work that was formerly performed by over 39,000 government personnel. *Id.*

[67] *Id.* at 18.

[68] *Id.*

[69] *Id.* at 23.

[70] *Id.* at 22.

[71] *Id.* at 29.

[72] *Id.*

[73] *Id.* at 29–30.

[74] *Id.* *See also* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 343, 119 Stat. 3136 [hereinafter NDAA 2006]. For a discussion on this recent preference for government employee performance of commercial activities, *see infra* to this following subsection *Implementing Section 343 of FY 2006 NDAA.*

[75] GAO REPORT ON O&M COSTS, *supra* note 53, at 30.

[76] *Id.*

[77] *Id.*

Hence, the trends in DOD O&M expenditures and in service contracting are closely related to A-76 competitions.[78] Even so, A-76 competitions are only a small part of a much larger DOD effort to increase service contracting.[79] As discussed below, in the NDAA 2006, Congress has taken steps to increase the opportunities for federal civilian employees to perform commercial activities.[80]

Implementing Section 343 of FY 2006 NDAA—Giving More Consideration to Federal Employees

On 27 July 2007, the Under Secretary of Defense issued a policy memorandum[81] to the secretaries of the military departments implementing Section 343 of the National Defense Authorization Act for Fiscal Year 2006 which permanently amended 10 U.S.C. § 2461.[82] Under certain circumstances, Section 343 allows DOD to give preference to government employees in the performance of commercial activities.[83]

The DOD policy memorandum responds to the Section 343 requirement that the Secretary of Defense develop policy ensuring that "consideration is given to using Federal Government employees for work that is currently performed or would otherwise be performed"[84] under DOD contracts. The memorandum states that its overriding purpose is to ensure that DOD affirmatively considers who could best perform a commercial activity—military members, civilian employees, or contract employees.[85] Significantly, the memorandum states that Section 343 "authorizes . . . the use of federal government employees without first conducting a public-private competition under the A-76 Circular, when appropriate."[86]

In implementing Section 343, the memorandum states that federal employees may perform commercial activities "when an economic analysis shows they are the low-cost provider for contracts"[87] specified under the amended statute. Specifically, Section 343 requires that this DOD policy should provide this special consideration for government employees regarding contracts that:

> (A) have been performed by Federal Government employees at any time on or after October 1, 1980;
> (B) are associated with the performance of inherently governmental functions:
> (C) were not awarded on a competitive basis; or
> (D) have been determined by a contracting officer to be poorly performed due to excessive costs or inferior quality.[88]

The memorandum further explains that government employees will also receive special consideration for the performance of commercial activities which are the subject of a new requirement or which are currently being performed by a contractor (unless the contract was awarded following an A-76 competition).[89] This special consideration amounts to permitting DOD to utilize an economic analysis "in lieu of recompeting the contract or of performing a public-private competition under OMB Circular A-76."[90] This guidance also requires DOD components to report to the creation of any new DOD authorizations resulting from converting a commercial activity from contract performance to government performance.[91]

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[78] *Id.* at 24–25.

[79] *Id.* at 23.

[80] NDAA 2006, *supra* note 74.

[81] Memorandum, Deputy Under Secretary of Defense (Acquisitions, Technology, and Logistics), to Secretaries of the Military Departments, subject: Implementation of Section 343 of the 2006 National Defense Authorization Act (27 July 2006) [hereinafter Section 343 Memo], *available at* http://sharea76.fedworx.org/inst/sharea76 (follow the "library" hyperlink and then use the search engine).

[82] NDAA 2006, *supra* note 74; *see also* 10 U.S.C.S. § 2461 (LexisNexis 2008).

[83] Section 343 Memo, *supra* note 81.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] NDAA 2006, *supra* note 74, at 3195.

[89] Section 343 Memo, *supra* note 81.

[90] *Id.*

[91] *Id.*

Section 343 and DOD's implementation of it seems to be a sweeping change to the application of OMB Circular A-76 in DOD competitions. Practitioners in this area should carefully advise their commanders and other clients on this potentially fundamental shift in A-76 policy.

Major Marci A. Lawson

When a Notice to Proceed is Not a Notice to Proceed

The Civilian Board of Contract Appeals (CBCA) determined that the latitude that the Federal Acquisition Regulation (FAR) Subsection 1.102-4(e) grants contracting officers to innovate and use sound business judgment does not allow the government to bifurcate the notice to proceed.[1] The contract included FAR Clause 52.211-10, Commencement, Prosecution and Completion of Work—Alternate I,[2] which provided for a notice to proceed, and coordinated the notice to proceed with several other contractual requirements.[3] The contracting officer issued an "off-site" notice to proceed directing the contractor to begin necessary operations away from the construction site.[4] The government then attempted to require the contractor to meet completion dates tied to the notice to proceed by using the off-site notice to proceed. The problem with the government's strategy was that the government did not issue the full notice to proceed until three months later.[5]

In this case, the Department of Transportation, Federal Highway Administration (FHA) contracted with Tidewater Contractors, Inc. (Tidewater) for road work in California.[6] The contract required the government to issue the notice to proceed by the seventieth day following bid opening, and provided a day-for-day extension of the completion date if the contractor received the notice to proceed later than that seventieth day.[7] The contract also stated that "'a preconstruction conference will be held . . . before beginning any work. . . . [T]he notice to proceed must be issued before the commencement of any work.'"[8] On the sixty-sixth day following bid opening, the contracting officer sent Tidewater a letter directing that off-site construction operations begin two days later.[9] This letter, while directing that the off-site work begin, was not designated as a notice to proceed. The letter also stated that an "on-site" notice to proceed would be issued after the preconstruction conference and after other requirements were met.[10] The parties held the preconstruction conference on the ninety-seventh day following bid opening; the Government issued the "on-site" notice to proceed on the 158th day following bid opening.[11]

Following the government's notice that Tidewater had failed to meet contract deadlines, Tidewater requested that the contract be extended by eighty-nine days to account for the late notice to proceed.[12] The contracting officer denied the requested extension basing the completion date on the off-site notice to proceed,[13] and Tidewater appealed to the CBCA.[14]

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[1] Tidewater Contractors, Inc. v. Dep't of Trans., CBCA No. 50, 07-1 BCA ¶ 33,525, at 166,102. Federal Acquisition Regulation (FAR) Subsection 1.102-4(e) states in pertinent part:

> If a policy or procedure, or a particular strategy or practice, is in the best interest of the Government and is not specifically addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, Government members of the [Acquisition] Team should not assume it is prohibited. Rather, absence of direction should be interpreted as permitting the Team to innovate and use sound business judgment that is otherwise consistent with law and the limits of their authority.

GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 1.102-4(e) (July 2007) [hereinafter FAR].

[2] FAR, *supra* note 2, at 52.211-10.

[3] *Tidewater*, 07-1 CBCA ¶ 33,525, at 166,097. The Clause, as used in the subject contract, stated in pertinent part:

> The Contractor shall be required to (a) commence work under this contract within 10 calendar days after the date the Contractor received the notice to proceed . . . . The completion date is based on the assumption that the successful offeror will receive the notice to proceed by the 70th day following the bid opening. The completion date will be extended by the number of calendar days after the above date that the Contractor receives the notice to proceed, except to the extent that the delay in issuance of the notice to proceed results from the failure of the contractor to execute the contract and give the required performance and payment bonds within the time specified in the offer.

Id. at 166,097.

[4] *Id*. at 166,098.

[5] *Id*. at 166,100.

[6] *Id*. at 166,097.

[7] *Id*.

[8] *Id*. (citing the subject contract).

[9] *Id*. at 166,098.

[10] *Id*.

[11] *Id*. The "on-site" notice to proceed was delayed from the preconstruction conference because Tidewater and the contracting officer could not agree on the quality control plan. *Id*. at 166,104.

[12] *Id*. at 166,100.

[13] *Id.* The "off-site" notice to proceed is the letter directing that the contractor begin off-site work discussed in the immediately preceding textual paragraph. *Id.*

The CBCA dismissed the government's argument that the broad grant of authority to innovate in FAR 1.102-4(e) allowed the two-step notice to proceed used in the subject contract.[15]

The CBCA first noted that FAR 1.102-4(e) applies only when the issue "'is not specifically addressed in the FAR.'"[16] Thus, this grant of broad innovative authority does not permit the alteration of the notice to proceed which is addressed in the FAR at Section 11.404(e) and Clause 52.211-10.[17] The CBCA further found that the government's attempted use of the off-site notice to proceed conflicted with other contract provisions and government correspondence to the contractor.[18] Because the off-site notice to proceed failed to comply with the contract, the CBCA granted Tidewater a portion of its extension request.[19]

When a Person Is a "United States Person"

Last fiscal year, the Department of State (DOS) grappled with the eligibility standards for contractors interested in competing for new embassy construction contracts. Embassy construction projects are subject to the Omnibus Diplomatic Security and Antiterrorism Act of 1986[20] (Security Act) which limits the field of competition to "United States persons and qualified United States joint venture persons" (U.S. Persons.)[21] The exact definition of "U.S. Persons" is further explained in the Security Act and in the DOS implementing regulations, but it was also the subject of two Government Accountability Office (GAO) opinions and a decision from the United States Court of Federal Claims (COFC).[22]

In the first case, Caddell Construction Company, Inc. (Caddell) protested the award of a contract to American International Contractors (Special Projects), Inc. (AICI-SP) for the construction of a new embassy in Djibouti.[23] Caddell

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[14] *Id*.

[15] *Id*. at 166,102.

[16] *Id*. (citing FAR, *supra* note 2, pt. 1.102-4(e)).

[17] *Id*.

[18] *Id*. The contract stated that the notice to proceed would be issued after the preconstruction conference, but the off-site notice to proceed was issued prior to the conference. *Id.* Further, the contracting officer sent Tidewater several letters including language indicating that no work would be allowed until approval of the quality control plan, which had not happened prior to the off-site notice to proceed. *Id*.

[19] *Id*. at 166,104. The CBCA granted only a portion of Tidewater's extension request because the Board found that the delay in approval of the quality control plan was caused at least partially by Tidewater. *Id*.

[20] Omnibus Diplomatic Security and Antiterrorism Act of 1986, 22 U.S.C. § 4852 (2000) [hereinafter Security Act].

[21] *Id*. § 4852(a). The Security Act limits the field of competition, where adequate competition exists, to construction or design contracts exceeding $10,000,000. *Id*. Relevant portions of the definition of United States person are:

> (2) [T]he term "United States person" means a person which—
>
> . . . .
>
> (C) has been incorporated or legally organized in the United States—
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> (i) for more than 5 years before the issuance date of the invitation for bids or request for proposals with respect to a construction project under subsection (a)(1) [of this section]; and
>
> . . . .
>
> (D) has performed within the United States or at a United States diplomatic or consular establishment abroad administrative and technical, professional, or construction services similar in complexity, type of construction, and value to the project being bid;
>
> (E) with respect to a construction project under subsection (a)(1) [of this section], has achieved total business volume equal to or greater than the value of the project being bid in 3 years of the 5-year period before the date specified in subparagraph (C)(i);
>
> . . . .
>
> (3) the term "qualified United States joint venture person" means a joint venture in which a United States person or persons owns at least 51 percent of the assets of the joint venture.

Id. § 4852(c).

[22] Caddell Constr. Co., Inc. (*Caddell I*), Comp. Gen. B-298949, Jan. 10, 2007, 2007 CPD ¶ 24; Caddell Constr. Co., Inc. (*Caddell II*), Comp. Gen. B-298949.2, June 15, 2007, 2007 CPD ¶ 119; Grunley Walsh Int'l, LLC v. United States, 78 Fed. Cl. 35, 37 (2007).

[23] *Caddell I*, 2007 CPD ¶ 24, at 1.

argued that AICI-SP did not qualify as a "U.S. Person," and thus was ineligible for award.[24] Among other requirements, the Security Act defines U.S. Person as an entity which was incorporated or legally organized in the United States for more than five years before the solicitation is issued.[25] In response to the DOS prequalification of sources, AICI-SP stated that it was incorporated in November 2005.[26] AICI-SP thus did not qualify on its own as a U.S. Person. Also in response to the prequalification, AICI-SP indicated that it was not part of a joint venture.[27] The GAO sustained Caddell's protest as the DOS decision that AICI-SP qualified as a U.S. Person lacked a rational basis.[28] The GAO recommended that the DOS reconsider its determination, better document its decision, and if the DOS should determine that additional information is needed, ensure that such information is sought in accordance with procedural requirements.[29]

Following the GAO decision, the DOS requested additional information from AICI-SP to verify its eligibility for the contract award.[30] AICI-SP then indicated that it was a de facto joint venturer with American International Contractors, Inc. (AICI), and the DOS then affirmed its earlier decision to award the contract to AICI-SP.[31] Caddell again protested to the GAO claiming that AICI-SP still did not qualify as a U.S. Person.[32] The GAO dispensed with Caddell's arguments that AICI-SP should not be allowed to use AICI's incorporation status and performance history to meet the Security Act requirements.[33] The GAO then analyzed a final statutory provision in the Security Act—the requirement that to be a U.S. Person a firm must have "achieved total business volume equal to or greater than the value of the project being bid in 3 years of the 5-year period" preceding the solicitation.[34]

The exact meaning of "total business volume . . . in 3 years of the 5-year period" became the key issue in this GAO opinion and the later COFC case.[35] The DOS implemented this language by cumulating the business volume from any 3 years in the prior 5-year period.[36] If this sum equaled or exceeded the value of the project under bid, the statutory requirement was met.[37] Caddell argued that the DOS used an erroneous interpretation, and that each of 3 years in the 5-year period had to equal or exceed the value of the current project.[38] The GAO held that Caddell's interpretation was correct, and thus that AICI-SP was not a "U.S. Person" because it could not meet this requirement.[39] The GAO did not give deference to the DOS interpretation because the DOS position was not the result of formal rulemaking and the plain meaning of the statute contradicted the DOS stance.[40]

About the time that the GAO issued its first *Caddell* opinion, the DOS was conducting the prequalification of offerors for the Fiscal Year (FY) 2007 embassy construction program.[41] Grunley Walsh International, LLC. (GWI) sought prequalification for the FY 2007 program.[42] Later in the Spring of 2007, the DOS notified GWI that it was prequalified for

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[24] *Id*. at 1–2, 4.

[25] *Id*. at note 4.

[26] *Id.* at 2.

[27] *Id*. at 3.

[28] *Id*. at 5.

[29] *Id*. at 6.

[30] *Caddell II*, Comp. Gen. B-298949.2, June 15, 2007, 2007 CPD ¶ 119, at 2.

[31] *Id*. at 4.

[32] *Id*.

[33] *Id*. at 5–8. The Department of State (DOS) found that AICI-SP met the statutory requirements by looking to the parent company, AICI. *Id*. Caddell argued that nothing in the Security Act allowed a bidder to use the qualifications of a parent company to meet the statutory requirements. *Id*. The GAO determined that the DOS regulations reasonably implemented the statute and allowed a joint venturer to use the qualifications of one member of the venture. *Id*.

[34] *Id*. at 8.

[35] Grunley Walsh Int'l, LLC v. United States, 78 Fed. Cl. 35, 37 (2007).

[36] *Id*. at 9.

[37] *Id*.

[38] *Id*. at 10.

[39] *Id*. at 13.

[40] *Id*. at 10–11.

[41] *Id*. at 37.

[42] *Id*. Grunley Walsh International, LLC (Grunley) also presented an offer to the agency concerning the Djibouti contract, the contract that lead to the *Caddell* protest, but Grunley did not protest. *Id*.

all ten projects for the year and should expect to receive the Requests for Proposal (RFP).[43] Nevertheless, following the second GAO opinion in June 2007 interpreting the business volume requirement and finding that the Security Act required a volume equaling or exceeding contract value in each of 3 years in the previous 5-year period, the DOS notified GWI that it was no longer qualified based on the new interpretation.[44] GWI then filed a protest in the COFC.[45]

The COFC reviewed the prior GAO opinions and the statutory language and determined that the Security Act language is not ambiguous.[46] The plain language requires a cumulative total of 3 of the previous 5 years' business volume to equal or exceed the current contract value.[47] This determination contradicted the GAO interpretation in *Caddell* and the revised DOS stance.[48] The proper standard in implementing the Security Act, as determined by the COFC, is the DOS standard it had been using prior to the second GAO opinion.[49] The COFC concluded that:

> [b]ecause the GAO failed to properly read the business volume requirement contained in [the Security Act], its recommendation to the DOS was not in accordance with the law and lacked a rational basis. Therefore, the DOS's reliance on the GAO's decision and withdrawal of plaintiff's and intervenor's pre-qualification for the FY 2007 NEC Program was arbitrary, capricious, and not in accordance with the law.[50]

Major Mark A. Ries

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[43] *Id*.

[44] *Id*. at 38.

[45] *Id*.

[46] *Id*. at 39–44.

[47] *Id*. at 40–41.

[48] *Id*. at 43.

[49] *Id*.

[50] *Id*. at 44.

Foreign Military Sales

Foreign Governments Conducting Foreign Military Sales (FMS) Purchases May Not Sue FMS Contractors in U.S. Federal Courts

In *Secretary of State for Defence v. Trimble Navigation Limited*[1] (*Trimble II*), the Fourth Circuit Court of Appeals held that the United Kingdom Ministry of Defence (UK MOD) was not a third-party beneficiary of Trimble Navigation Limited (Trimble), a U.S. Government contractor. Trimble was awarded a contract to produce global positioning satellite electronic chips for the UK MOD via a FMS purchase.[2] As a result of this holding, UK MOD could not sue Trimble in U.S. federal courts for the alleged damages that Trimble's defective global positioning satellite electronic chips caused.[3] The Court of Appeals reasoned that recognizing a third-party beneficiary right for the United Kingdom to sue Trimble under the FMS program "would be contrary to the AECA [Arms Export Control Act] because it would afford UK MOD a right exclusive to DCS [Direct Commercial Sales] transactions . . . . Accordingly, any recognition of third-party rights in UK MOD would be an end-run around the AECA and is prohibited."[4]

In *U.K. Ministry of Defence v. Trimble Navigation* (*Trimble I*),[5] the Fourth Circuit Court of Appeals previously held that the district court has jurisdictional to hear the merits of a case between a foreign government and an FMS contractor, since foreign nation disputes against FMS contractors do not fall within the scope of the Contracts Dispute Act's (CDA) mandate.[6] The Court of Appeals held that the CDA's jurisdictional mandate was inapplicable in this case because the CDA's jurisdictional reach "is limited to claims by the [U.S.] Government against a contractor, or by a contractor against the [U.S.] Government."[7] The Court of Appeals reasoned that since the claim did not fall within the CDA's jurisdictional mandate, then the district court had jurisdiction to hear this case;[8] the CDA did not displace the district court's jurisdictional mandate in 28 U.S.C.A. § 1332(a), which included hearing "all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between— . . . (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States."[9] As a result, the Court of Appeals remanded the case to the district court to determine whether UK MOD was a third-party beneficiary of the contracts between the U.S. Government and Trimble.[10] In effect, the Court of Appeals in *Trimble I* determined that the district court had jurisdiction to hear the case, and remanded the case to the district court to determine whether UK MOD had standing to sue Trimble under the AECA.

In *Trimble II*, the Court of Appeals upheld the district court decision that the UK MOD did not have standing to sue Trimble since the AECA's structure barred third-party beneficiary suits by foreign governments against U.S. Government contractors performing FMS contracts.[11] The *Trimble II* holding may have long-term effects on U.S. foreign policy. In the future, developed nations may opt out of the FMS program and choose to finance their own military research and development programs, since they may have no legal recourse to resolve disagreements with FMS contractors.

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[1] Sec'y of State for Defence v. Trimble Navigation Ltd. (*Trimble II*), 484 F.3d 700 (4th Cir. 2007).

[2] *Id*. at 707.

[3] *Id*.

[4] *Id*.

[5] United Kingdom Ministry of Defence v. Trimble Navigation Ltd. (*Trimble I*), 422 F.3d 165 (4th Cir. 2005).

[6] *Id*. at 166.

[7] *Id*.

[8] *Id*. at 168.

[9] 28 U.S.C.A. § 1332(a)–(a)(4) (LexisNexis 2008).

[10] *Trimble I*, 422 F.3d at 173.

[11] *Trimble II*, 484 F.3d 700, 707 (4th Cir. 2007).

Payment and Collection

Third Party Beneficiary Prevents Setoff Against Prime

"[T]he government cannot setoff payments owed to [plaintiff], a subcontractor and third party beneficiary, with debts owed by [the] prime contractor . . . on other, unrelated contracts that do not involve [plaintiff]."[1] In *J.G.B. Enterprises*,[2] the Court of Appeals for the Federal Circuit (CAFC) affirmed the Court of Federal Claims (COFC) holding as stated above, limiting the Government's right of setoff.[3] In its opinion, the CAFC provides an explanation of the difference in standing between a subcontractor that is also a third party beneficiary and one that is not.[4]

The Defense Supply Center Columbus (DSCC) contracted with Capital City Pipes (CCP) to supply hose assemblies under the small and disadvantaged business program.[5] All of CCP's required work was subtracted to J.G.B. Enterprises, Inc. (JGB), and the DSCC understood that JGB would perform the work.[6] During the period of performance, JGB informed the DSCC that CCP had not paid JGB on several contracts, and that JGB would halt future deliveries of the hose assemblies until payment was arranged.[7] An escrow payment arrangement was eventually implemented with the understanding and cooperation of all three parties, the DSCC, CCP, and JGB.[8] When the government made the payment to the escrow agent, the DSCC set off amounts owed by CCP under unrelated contracts.[9]

The CAFC began its analysis by recognizing that the government is entitled to recoup amounts owed it by a contractor through retaining amounts the government owes that contractor under the same or other contracts.[10] This right remains despite the fact that the indebted contractor owes amounts under the various contracts to subcontractors that perform some of the work; ordinarily subcontractors may not pursue claims against the government because they lack privity of contract.[11] Nevertheless, if a subcontractor is also a third party beneficiary of the contract, then the subcontractor has standing to bring its own claim.[12]

In this case, JGB was a third party beneficiary of the contract between the DSCC and CCP.[13] "A subcontractor is a third party beneficiary to the government contract when the [contracting officer] knew or should have known that the government's payment on the contract was intended to directly benefit the subcontractor."[14] The DSCC contracting officers knew of the change of payment instructions requiring payment to an escrow agent to ensure JGB received payment.[15] Thus, the government's payment on the contract would be made to the escrow agent for the sole purpose of benefiting JGB.[16]

When a third party beneficiary sues to enforce the contract against the government, the government retains all defenses as it would against the prime contractor.[17] This rule appears to allow the government to use its setoff claim against JGB's

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[1] J.G.B. Enters., Inc. v. United States, 497 F.3d 1259, 1260 (2007) (citing J.G.B. Enters. v. United States, 63 Fed. Cl. 319 (2004)).

[2] *Id.*

[3] *Id*.

[4] *Id*. at 1261.

[5] *Id*. at 1260.

[6] *Id*.

[7] *Id*.

[8] *Id*.

[9] *Id*. at 1260–61.

[10] *Id*. at 1261.

[11] *Id*.

[12] *Id*.

[13] *Id*.

[14] *Id*. at note 1 (citing D&H Distrib. Co. v. United States, 102 F.3d 542, 546–47 (Fed. Cir. 1996)).

[15] *Id*.

[16] *Id*.

[17] *Id*.

claim for full payment on the contract. The CAFC found that setoff is not a *defense*, but rather a *claim*.[18] Because setoff is a claim, the government must address the setoff to the owing party, CCP in this case.[19] In other words, in order to claim a setoff against a third party beneficiary claim, the government must have a valid claim as against the third party beneficiary, not against the prime contractor.[20]

Prompt Payment Act Interest Claim Cognizable at ASBCA

In *Gosselin World Wide Moving NV*,[21] the Armed Services Board of Contract Appeals (ASBCA) determined that it has jurisdiction over claims for Prompt Payment Act (PPA)[22] interest even if it lacks jurisdiction over the original claim.[23] The Surface Deployment and Distribution Command (SDDC) contracted with Gosselin World Wide Moving NV (Gosselin) to provide movement of service members' household goods in Europe.[24] Gosselin fully performed its contractual obligations and the SDDC paid Gosselin.[25] Gosselin then filed a certified claim with the contracting officer for PPA interest on claims that SDDC paid late.[26] Gosselin appealed the contracting officer's failure to issue a final decision on the PPA interest claim with the ASBCA.[27]

The Government argued that "'when a common carrier is seeking payment from the government for charges owed on a GBL [government bill of lading] contract for transportation, the applicable statute is the ICA [Interstate Commerce Act].'"[28] The ASBCA does not have jurisdiction over such claims under the ICA; rather, the ICA provides its own administrative review process.[29] The Government then argued that as the PPA interest claim relates to the underlying transportation services claim, the ASBCA likewise has no jurisdiction over Gosselin's claim.[30]

The ASBCA found that jurisdiction is determined by analyzing the claim, not the contract.[31] In this case, Gosselin is claiming PPA interest, not payment due under the terms of the transportation contract.[32] Therefore, the starting point for a jurisdictional analysis is the PPA.[33] First, there is no exemption in the PPA for transportation services contracts, so the late SDDC payments are subject to the PPA.[34] Next, "[t]he PPA provides that a claim for an interest penalty not paid may be filed under section 6 of the CDA [Contract Disputes Act] . . . ."[35] Therefore, the CDA provides the mechanism for resolving PPA interest claims.[36] The ASBCA concluded:

> Because Gosselin's appeal does not involve the performance of the underlying contract for transportation service (TDS or GBL) but involves interest penalties under the PPA, and because the PPA applies to DoD, and designates the CDA as the statute for resolving PPA interest penalty disputes, we hold

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[18] *Id*. "'The right of setoff . . . allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding the absurdity of making A pay B when B owes A.'" *Id*. at 1261–62 (quoting Citizen Bank of Md. v. Strumpf, 516 U.S. 16, 18 (1995) (internal quotes omitted)).

[19] *Id*.

[20] *Id*.

[21] Gosselin World Wide Moving NV, ASBCA No. 55365, 06-2 BCA ¶ 33,428.

[22] Prompt Payment Act (PPA), 31 U.S.C. §§ 3901–3907 (2000).

[23] *Gosselin*, 06-2 BCA ¶ 33,428, at 165,733.

[24] *Id*. at 165,728.

[25] *Id*. at 165,729.

[26] *Id*.

[27] *Id*.

[28] *Id*.

[29] *Id*.

[30] *Id*.

[31] *Id*. at 165,730.

[32] *Id*.

[33] *Id*.

[34] *Id*.

[35] *Id*.

[36] *Id*.

that the ASBCA, as the agency board designated for resolution of DoD CDA appeals, has jurisdiction to decide this appeal.[37]

DFARS Final Rule—Electronic Payment Request Submission and Processing

In the *2006—Year in Review*,[38] we discussed a proposed change to the Defense Federal Acquisition Regulation Supplement (DFARS) regarding electronic submission of payment requests.[39] In response to comments received by the DOD regarding the proposed rule, the DOD clarified in the final rule that responsibility for approving non-electronic payment requests lies with the contracting officer administering the contract, and limits the alternative methods available for non-electronic payment request submissions.[40] This final rule, amending the DFARS Subpart 232.70 and the corresponding clause at 252.232-7003, clarifies exceptions to the requirement that all payment requests be submitted electronically.[41]

Major Mark A. Ries

[37] *Id*. at 165,733.

[38] Major Andrew S. Kantner et al., *Contract and Fiscal Law Developments of 2006—Year in Review*, ARMY LAW., Jan. 2007, at 146.

[39] *Id*. (discussing Defense Federal Acquisition Regulation Supplement; Electronic Submission and Processing of Payment Requests, 71 Fed. Reg. 14,149 (Mar. 21, 2006)).

[40] Defense Federal Acquisition Regulation Supplement; Electronic Submission and Processing of Payment Requests, 72 Fed. Reg. 14,240 (Mar. 27, 2007). One comment indicated that the proposed rule use of the term "administrative contracting officer" is overly narrow as many procuring contracting officers administer contracts. *Id*. The final rule uses the language, "the contracting officer administering the contract for payment." *Id*. Another comment recommended limiting the non-electronic alternative payment request options to those for which systems are already in place. *Id*. The final rule adopted this recommendation and limits non-electronic methods to conventional mail or facsimile. *Id*.

[41] *Id*.

Original Source

The Supreme Court took on the issue of the meaning of "original source" under the False Claims Act (FCA) in *Rockwell Int'l Corp. v. United States*[1] and, as a result, greatly narrowed the definition.[2] In *Rockwell*, former employee Mr. James Stone filed a *qui tam* action for FCA violations involving the contractor at the Energy Department's Rocky Flats, Colorado nuclear weapons plant.[3] In determining that the relator was not an "original source" within the meaning of the FCA, the majority of the Court determined that Mr. Stone did not have "direct and independent knowledge" of the information that was the basis for the amended complaint in this case.[4] In fact, Mr. Stone had predicted, while still employed with the contractor, that the technique used for storing pond sludge would fail, but the court found that a prediction was not "knowledge" within the meaning of the statute.[5] Moreover, the court held that the relator's prediction was at odds with the amended complaint which stated a different basis for the failure.[6]

The reality of the decision threw the relator's *qui tam* action out of the legal arena. The decision did not, however, prevent the Government from bringing a civil action.[7] In the end, Mr. Stone's willingness to assist the Government seemed to be his undoing, and as a result, the decision is likely to have a chilling effect on a relator's willingness to come forward, to work with Government investigators, and to allow the Government to amend the complaint for strategic purposes.

Publicly Disclosed Material In Relation to Determining Original Source

In *United States* ex rel. *Atkinson v. PA. Shipbuilding Co.*,[8] the court addressed the issue of whether a relator could be an original source when the action is based on material that is publicly disclosed.[9] In *Atkinson*, the relator claimed the defendants committed multiple FCA violations that were partially based upon public disclosures.[10] The court evaluated the relator's claims by determining whether the relator's knowledge was based in whole or in part on information available in the public domain that was not identified in the FCA because "it is the nature and extent of reliance upon that information that determines whether the relator is an original source."[11] Declining to follow the Ninth Circuit's lead in adopting a "rigid rule" of always requiring disqualification, Judge Jane R. Roth announced that the court must consider the availability of the public information and the amount of work and analysis required to craft the particular FCA claim.[12]

Presentment for the FCA . . . Required or Not Required, That Is (Still) the Question[13]

The court in *United States* ex rel. *Sanders v. Allison Engine Co., Inc.*[14] confronted the difficult task of disagreeing with a previous opinion of a district court judge.[15] Although disagreements between circuits occur regularly, the opinion with which the court disagreed was written by none other than, Chief Justice John Roberts, when he was serving as a district court

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[1] 127 S. Ct. 1397 (2007).

[2] *Id*. at 1403.

[3] *Id*.

[4] *Id*. at 1410.

[5] *Id*. at 1402.

[6] *Id*.

[7] *Id.*

[8] 473 F.3d 506 (3d Cir. 2007).

[9] *Id.*

[10] *Id.* at 509–11.

[11] *Id*. at 522.

[12] *Id.*

[13] *See* Brian A. Hill & Lara A. Covington, *The Preeminence of Presentment: Important Developments Under the False Claims Act*, FED. CONT. REP., Nov. 21, 2006, at 523–27, *available at* http://www.wsgr.com/attorneys/NEWBIOS/PDFs/covington1.pdf (analyzing the presentment issue in pre-*Sanders* appellate case).

[14] 471 F.3d 610, 616 (6th Cir. 2006).

[15] *Id.*

judge.[16] In that opinion, Judge Roberts determined that a presentment requirement applied to subsections (a)(2) and (a)(3) of the FCA even though the language of those subsections do not facially contain a presentment requirement.[17] Judge Roberts reasoned that because subsection (a)(2) was once part of the same clause as subsection (a)(1), it must be read as incorporating that subsection's presentment text.[18]

After issuing the opinion, Judge Roberts became the Chief Justice of the Supreme Court. With confidence in hand, however, the *Sanders* court determined that presentment is not always required for FCA liability.[19] The *Sanders* court determined that although 31 U.S.C. 3729(a)(1) refers to a "knowing presentment of a false or fraudulent claim to an officer or employee of the U.S. government," subsections 3729(a)(2) and (a)(3) contain no such requirement.[20] The *Sanders* court looked to the language of the statute itself as well as the legislative history in determining that Judge Roberts got it wrong.[21]

In another case on presentment, the court in *United States* ex rel. *Howard v. Lockheed Martin Corp*.[22] held that for purposes of pleading fraud with particularity, as required by Federal Rule of Civil Procedure 9(b), there is no requirement to plead presentment by a subcontractor to the prime contractor.[23] In that case, the FCA whistleblowers alleged that Lockheed and eight subcontractors improperly charged the United States for nonconforming tooling made by the companies and used by Lockheed to manufacture the F-22 fighter plane and the C-130J cargo plane.[24] While the whistleblowers provided what the court described as "specific and detailed information about the alleged fraud," the whistleblowers also identified particular difficulties that have hindered their ability to identify specific false claims submitted.[25]

Accordingly, the court determined that to the extent the relators' fraud claims are based on subsections (a)(2) and (3), the fraud claims are pleaded with sufficient particularity and will not be dismissed.[26] To the extent the relators' claims are based solely on subsection (a)(1), however, which imposes liability for knowing presentation of a false claim to the Government, the court dismissed the relators' claims because the whistleblowers did not plead presentment to the United States with particularity.[27] With regard to these claims, the court also said it would entertain a motion to amend the complaint if warranted after discovery.[28] In basing its decision on what it called the "recent seminal decision" in *Sanders*, the court also stated, "[T]he concern that Lockheed raises—that there must have been the presentment of a claim to *someone* if not directly to the government—is merely a matter of practical proof and not an element of the cause of action."[29]

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[16] *See* United States *ex rel*. Totten v. Bombardier Corp. (*Totten II*), 380 F.3d 488 (D.C. Cir. 2004).

[17] *Id.*

[18] *See id*. at 507.

[19] *Sanders*, 471 F.3d at 615–16.

[20] *Id*. at 615–17.

[21] *Id*. at 618.

[22] 499 F. Supp. 2d 972 (S.D. Ohio 2007).

[23] *Id.*

[24] *Id.* at 975.

[25] *Id.* at 979.

[26] *Id.* at 980.

[27] *Id.*

[28] *Id.*

[29] *Id*. at 978.

Custer's Revenge?

In last year's *Year in Review*, we discussed the ongoing developments of one of the first *qui tam* actions to arise out of Operation Iraqi Freedom.[30] The opinion in *United States* ex rel. *DRC Inc. v. Custer Battles, LLC*,[31] struck the latest blow to relators suing the firm, Custer Battles LLC, in *qui tam* actions.[32]

In this FCA whistleblowers case, the relators lost their sole remaining claim against Custer Battles. In finding for Custer Battles, the federal district court found no support for allegations that the contractor fraudulently induced the Coalition Provisional Authority (CPA) to award it a $16.8 million fixed-price contract to provide security services at Baghdad International Airport (BIAP).[33] Specifically, the court stated:

> [T]he undisputed facts manifestly demonstrate that Relators cannot establish a fraudulent inducement claim under the FCA because they have failed to show (i) that Custer Battles made a false statement regarding fixed security personnel staffing levels; (ii) that Custer Battles knowingly made the allegedly false statement; and (iii) that this allegedly false statement was material to the CPA's decision to award the BIAP contract to Custer Battles.[34]

This case is notable because of the notoriety the company received as one of the first contractors to be identified as allegedly defrauding the United States in the Iraq war.[35] Although one could argue that there was ample evidence of fraud, in passing laws which criminalize fraud, Congress did not seem to contemplate the contracting problems that arose with the creation of the CPA. In response to some of these problems, the House of Representatives, on 9 October 2007, passed the War Profiteering Prevention Act of 2007.[36] This law aims to add to the criminal statute provisions that would apply:

> [I]n any matter involving a contract with, or the provision of goods or services to, the United States or a provisional authority, in connection with a mission of the United States Government overseas . . . .[37]

Curiously, the latest Custer Battles' case was decided after *Sanders* and took the opportunity to address the *Sanders* opinion when reciting the history of the Custer Battles litigation. In doing so, the court dismissed *Sanders* as "unpersuasive" in its of the construction of the statute.[38] The court instead chose to follow Judge Roberts' opinion in *Totten II*.[39]

Be Careful What You Ask For . . .

When Daewoo Engineering and Construction (Daewoo) submitted a claim to the U.S. Army Corps of Engineers (ACE) for an equitable adjustment for building a road, it may not have been prepared for would happen next. Daewoo was the low bidder on a road construction contract on the island of Palau.[40] Daewoo had difficulty completing the project on time and attempted to shift the blame to the contract's specifications, particularly those concerning the embankment construction and soil compaction; Daewoo claimed it was impossible to meet the requirements of these specifications.[41] Daewoo then

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[30] Major Andrew S. Kantner et al., *Contract and Fiscal Law Developments of 2006—The Year in Review*, ARMY LAW., Jan. 2007, at 153–54; *see also* Major Andrew S. Kantner et al., *Contract and Fiscal Law Developments of 2005—The Year in Review*, ARMY LAW., Jan. 2006, at 133–34.

[31] 472 F. Supp. 2d 787 (E.D. Va. 2007).

[32] *Id.*

[33] *Id.* at 800.

[34] *Id.*

[35] *See BBC News 24: Security Worker Killed in Iraq* (BBC television broadcast Apr. 9, 2004); T. Christian Miller, *Contractor Accused of Fraud in Iraq*, SEATTLE TIMES, Oct. 9, 2004; Eric Eckholm, *Memos Warned of Billing Fraud by Firm in Iraq*, N.Y. TIMES, Oct. 23, 2004; *Nightly News: U.S. Contractors in Iraq Allege Abuses: Four Men Say They Witnessed Brutality* (MSNBC television broadcast Feb. 17, 2005); *60 Minutes: Billions Wasted in Iraq?* (CBS television broadcast Feb. 12, 2006).

[36] *See* War Profiteering Prevention Act of 2007, H.R. 400, 110th Cong. § 1040 (2007).

[37] *Id.*

[38] *See DRC, Inc.*, 472 F. Supp. 2d at 790 n.4.

[39] *See Totten II*, 380 F.3d 488 (D.C. Cir. 2004).

[40] *See* Daewoo Eng'g & Constr. Co., Ltd. v. United States, 73 Fed. Cl. 547, 554 (2006).

[41] *Id.* at 560.

submitted a claim to the ACE for additional costs it incurred for its attempt to comply with the specifications.[42] When the ACE denied the claim, after offering a no-cost time extension, Daewoo appealed the contracting officer's final decision at the Court of Federal Claims (COFC), ultimately requesting $13 million in excess of current costs and $50.6 million in alleged future costs.[43]

In deciding for the Government, the court found that the contract specifications for embankment construction and soil compaction were not defective, but were rather performance specifications that required pre-bid investigation and judgment on the part of the contractor.[44] The court concluded that "[w]hether Daewoo wanted the money or wanted the Government's attention, $64 million was not an amount the Government owed . . . and [Daewoo] knew it."[45] The court, however, only entered judgment for the Government in its counterclaims against Daewoo in the amount of $50.6 million for the Contract Disputes Acts (CDA) violation and $10,000 for the FCA violation.[46]

Of note and possibly of warning to future litigants wishing to use the court as part of a bargaining game, the court stated that:

> Plaintiff did not present a clear legal theory to support its large claim against the government. It appeared that Daewoo did not expect to find itself in court trying to justify its case; perhaps it thought the defendant would pay a negotiated amount. The purpose of the Contract Disputes Act is to prevent this sort of gamesmanship.[47]

Underbidding Alone Is Not Fraud

In a Fifth Circuit case, the court addressed the issue of whether underbidding alone is fraud.[48] In deciding that these concepts were indeed not one in the same, the court affirmed a district court's ruling in favor of the defendant in an FCA whistleblower action alleging that it deliberately underbid a cost-plus-award-fee (CPAF) National Aeronautics and Space Administration (NASA) research contract and then knowingly failed to report anticipated cost overruns in order to obtain award fees under the contract. Although the defendant was alleged to have committed fraud in three instances, the court addressed the issue of whether there was a nexus between the alleged underbidding and the request for payment.[49] The court found that the defendant's projected labor costs were derived from NASA's model and that there was no FCA liability.[50] Further, the court determined that from the beginning, the research contract was "doomed to run over-budget" and that cost overruns due to changes in the "skill mixes" of workers were "government directed."[51] The court wrote, "Without more, a contract underbid is not a false claim. For FCA liability, there must be a nexus between the underbidding and a request for payment that the contractor would not have been entitled to absent the contract. That nexus is absent here."[52]

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[42] *Id.*

[43] *Id.*

[44] *Id.* at 593–94.

[45] *Id.* at 596.

[46] *Id.* at 595–96. In discounting the award to the government by $13 million, the court harshly-worded its analysis by stating:

> We suspect that Daewoo's entire claim is fraudulent. However, plaintiff's apparent incompetence in putting together its claim, along with the unwillingness of its witnesses to explain the process, provides it an ironic benefit. That is, we found it difficult to locate the line between fraud and mere failure of proof in this case.

Id.

[47] *Id.* at 568–69.

[48] United States *ex rel.* Laird v. Lockheed Martin Eng'g & Sci. Servs. Co., 491 F.3d 254 (5th Cir. 2007).

[49] *Id.* at 260.

[50] *Id.*

[51] *Id.*

[52] *Id.*

Let's Continue to Do the Numbers

Fiscal Year (FY) 2006 set records for settlements and judgments in cases involving allegations of fraud against the government.[53] The Department of Justice (DOJ) announced 21 November 2006 that the amount in recoveries reflected a record of more than $3.1 billion. This was significantly more than the last record of $2.2 billion in recoveries set in FY 2003.[54] The FY 2006 recoveries more than doubled the amounts recovered in FY 2005 for DOJ.[55] According to the DOJ, government-initiated claims accounted for $1.8 billion in recoveries, while whistleblower suits under the *qui tam* provisions of the FCA accounted for $1.3 billion.[56] Unfortunately, FY 2007 is doomed to disappoint as almost half the total recoveries resulted from the DOJ's settlements with Tenet Healthcare and the Boeing Co., the nation's second-largest hospital chain and second-largest defense contractor, respectively.[57]

But That's Why They Play the Game

One does not want to pin the success of fighting fraud on purely numbers, but the metric is hard to pass up as a litmus test for success. Notwithstanding, 2007 had seeds sown of possible recoveries as evidenced by the United States intervening in three FCA whistleblower lawsuits alleging that Hewlett-Packard Co., Accenture LLP, and Sun Microsystems Inc. "submitted false claims to the United States for information technology (IT) hardware and services on numerous government contracts from the late 1990s to the present."[58] The lawsuits were originally filed in U.S. District Court in Little Rock, Arkansas, by Norman Rille and Neal Roberts.[59] The core of the allegations is that the three companies have "systematically solicited and/or made payments of money or other things of value, known as 'alliance benefits,' to a number companies with whom they had global 'alliance relationships' or an agreement to work together."[60] The Government's complaints assert that "these 'alliance relationships' and the resulting alliance benefits amount to kickbacks and undisclosed conflict of interest relationships."[61]

National Procurement Fraud Task Force (NPFTF)

The NPFTF continues to make its mark in the criminal prosecution of fraud. One of its biggest improvements is the NPFTF's website which centralizes the coordinated efforts in the fight against procurement fraud.[62] The website has dramatically increased the dissemination of information regarding events such as arrests, indictments, verdicts, and settlements.[63] As evidenced by the NPFTF's July 2007 Progress Report, the strides made by the coordination between DOJ, the Federal Bureau of Investigations (FBI), and other federal agency Inspector Generals have been impressive.[64] The task force has held 3 full meetings with more than 125 representatives attended by more than 30 agencies.[65] The task force has taken a coordinated and unified approach to combating procurement fraud related to the wars and reconstruction efforts in Iraq and Afghanistan.[66] Two entities that are supported or integral to the mission and goals of the NPFTF are the Office of

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[53] *See* Press Release, Dep't of Justice, Justice Department Recovers Record $3.1 Billion in Fraud and False Claims in Fiscal Year 2006 (Nov. 21, 2006) [hereinafter DOJ FY06 Recovery], *available at* http://www.usdoj.gov/opa/pr/2006/November/06_civ_783.html.

[54] *Id.*

[55] *See* Press Release, Dep't of Justice, Justice Department Recovers $1.4 Billion in Fraud & False Claims in FY 2005; More Than $15 Billion Since 1986 (Nov. 5, 2005), *available at* http://www.usdoj.gov/opa/pr/2005/November/05_civ_595.html.

[56] DOJ FY06 Recovery, *supra* note 53.

[57] *Id.*

[58] *See* Press Release, Dep't of Justice, U.S. Joins Cases Against Hewlett-Packard, Sun Microsystems & Accenture Alleging False Claims on Hardware, Software & Technology Services Sales (Apr. 19, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/April/07_civ_265.html.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *See* Dep't of Justice, Nat'l Procurement Fraud Task Force, Press Room website, *available at* http://www.usdoj.gov/criminal/npftf/pr/press_releases/.

[63] *Id.*

[64] *See* U.S. DEP'T OF JUSTICE, NAT'L PROCUREMENT FRAUD TASK FORCE: PROGRESS REPORT (July 2007) [hereinafter NPFTF Progress Report], *available at* http://www.usdoj.gov/criminal/npftf/update/pr/2007/jul/07-01-07progress-rpt.pdf. I need to be able to find this to verify format.

[65] *Id.*

[66] *Id.*

the Special Inspector General for Iraq Reconstruction (SIGIR) and the Logistics Civil Augmentation Program (LOGCAP) Working Group.[67]

Special Inspector General for Iraq Reconstruction (SIGIR)

The Office of the SIGIR is the successor to the Coalition Provisional Authority Office of Inspector General (CPA-IG). The Office of the SIGIR was created in October 2004 by a Congressional amendment to Public Law 108-106.[68] The amendment allows the Office of the SIGIR to continue the oversight that the CPA-IG had established for Iraq reconstruction programs and operations. Specifically, Office of the SIGIR is responsible for overseeing the use and misuse of the Iraq Relief and Reconstruction Fund (IRRF) and all obligations, expenditures, and revenues associated with reconstruction and rehabilitation activities in Iraq. Stuart W. Bowen, Jr., Special Inspector General for Iraq Reconstruction, who served as the CPA-IG since 20 January 2004, continues as the SIGIR and reports administratively to the Secretaries of State and Defense. In addition, the Office of the SIGIR provides quarterly and semi-annual reports directly to the U.S. Congress.[69]

The Office of the SIGIR's duties and responsibilities are extensive.[70] First, it must provide for the independent and objective execution and supervision of audits and investigations. Second, it must provide objective leadership and coordination of, and recommendations on, policies designed to promote economy, efficiency, and effectiveness in the management of Iraq reconstruction programs and operations. Third, it must attempt to prevent and detect fraud, waste, and abuse. Fourth, it must review existing and proposed legislation and regulations and make appropriate recommendations. Fifth, it must maintain effective working relationships with other governmental agencies and non-governmental organizations regarding oversight in Iraq. Sixth, it must inform the Secretaries of State and Defense, and the Congress of significant problems, abuses, and deficiencies in operations, and track the progress of corrective actions. Seventh, it must report violations of law to the U.S. Attorney General and report to Congress on the prosecutions and convictions that have resulted from referrals. Eighth, it must submit regular reports (Quarterly and Semiannual) to Congress.[71]

The Office of the SIGIR has been quite active in the last year with investigations resulting in many indictments and convictions. One of the most important indictments to date is an example of the work by the Office of the SIGIR. On 22 August 2007, a U.S. Army major, John Cockerham, his wife, Melissa, and his sister, Carolyn Blake, were indicted on charges of bribery, money laundering, and conspiracy in connection with his service as an Army contracting officer in Kuwait in 2004 and 2005 (*United States v. Cockerham*, W.D. Tex., No. SA-07-492M, 7/23/07).[72] The alleged bribery began in 2005 when Major Cockerham began accepting millions of dollars in bribes in connection with Defense Department contracts in Iraq and Kuwait that were either awarded or managed by Cockerham. Melissa Cockerham, following instructions from her husband, allegedly received millions of dollars in U.S. and foreign currency from the contractors and deposited the money into bank accounts and safe deposit boxes in Kuwait and Dubai. The three charged may have received up to $9.6 million in bribe payments from at least eight contractors, and Cockerham allegedly anticipated receiving as much as $5.4 million more.

LOGCAP Task Force

Another new entity that has added to the arsenal of fraud fighting tools is the Logistics Civil Augmentation Program (LOGCAP) Working Group.[73] The LOGCAP Working Group operates in the Central District of Illinois and is responsible for investigating allegations of fraud, waste, and abuse on the LOGCAP III, ten-year competitive contract awarded to Kellog, Brown, and Root (KBR) which incorporates task orders issued by the U.S. Army in support of Operation Iraqi Freedom. As of July 2007, the Working Group was responsible for at least five cases involving bribery in the issuance of task orders.[74]

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[67] *Id.*

[68] *See* SIGIR, http://www.sigir.mil/ (last visited Feb. 24, 2008).

[69] *Id.*

[70] *See id.*

[71] *See id.*

[72] *See* Press Release, Dep't of Justice, Three Defendents Indicated in Case Involving Bribery, Conspiracy, Money Laundering, and Obstruction Offenses Related to Contracts in Iraq and Kuwait (Aug. 27, 2007), *available at* http://www.usdoj.gov/criminal/npftf/pr/press_releases/2007/aug/08-22-07three-indict.pdf.

[73] *See* NPFTF Progress Report, *supra* note 64, at 10–11.

[74] *Id.*

Safavian Sentenced

The continued aftermath of Jack Abramoff's web of bad acts culminated for the former head of the Office of Management and Budget's Office of Federal Procurement Policy David Safavian.[75] After a court found him guilty on four counts of making false statements about and concealing his relationship with lobbyist Jack Abramoff, Mr. Safavian was sentenced in federal court on 27 October 2007 to eighteen months in prison.[76]

Care with the Administrative Record

The U.S. District Court for the District of Columbia set aside the Treasury Department's three-year debarment of a former federal official from eligibility for government contracts.[77] In this case, Maria Canales was employed by the Department of the Treasury and served in various capacities in the agency.[78] Before Canales resigned from the Treasury, she received gifts from a contractor whom she had also approved as a sole-source award for a Treasury contract. The IG for the Treasury did an investigation and interviewed Canales. During the interviews, Canales made false statements and was later prosecuted by the Department of Justice for these false statements. Canales pled guilty to making false statements but the plea agreement stated that no connection had been established between the gifts Canales received and the contract awarded to the contractor in question.[79] The Treasury's suspension and debarment official (SDO) initiated debarment proceedings in November 2005 against Canales and gave Canales an opportunity to provide legal arguments and present factual documentation in opposition. During that process Canales raised mitigating factors that made the debarment inappropriate.[80] The SDO informed Canales on 27 June 2006 of his decision to debar Canales.

After review, the court found that "[the SDO]'s failure to address in any detail the mitigating factors Canales raised, or to explain why he gave them so little weight, makes it impossible to evaluate where there was a 'rational connection' between the facts of her case and his decision to impose debarment."[81] Specifically the court found that because the SDO did not "explain his decision to impose debarment rather than a lesser sanction, given the strength of the mitigating factors, the court cannot conclude that that decision was rational or that [the SDO] satisfied the procedures" outlined in the FAR.[82]

This case highlights the care necessary in creating an administrative record that sufficiently explains the SDO's reasoning behind a debarment decision. It is not sufficient for an SDO to rely on, as in the foregoing case, a conviction and a cursory mention of the existence of mitigating factors. This case seems to illustrate the requirement of the SDO to ensure the administrative record properly reflects the analysis of an agency's decision in balancing the best interest of the government with the mitigating factors a contractor raises.

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[75] *See* Press Release, Dep't of Justice, Former GSA Chief of Staff David Safavian Sentenced to 18 Months in Prison on Charges of Obstruction, Making False Statements (Oct. 27, 2006), *available at* http://www.usdoj.gov/criminal/pr/press_releases/2006/10/2006_4825_CRM_06-733_Safavian_102706.pdf.

[76] *Id.*

[77] *See* Canales v. Paulson, 2007 U.S. Dist. LEXIS 50924 (D.D.C. 2007).

[78] *See id*. at 2.

[79] *Id.*

[80] Canales offered mitigating factors to include her "spotless record before" her criminal offense, the fact that five years had passed without incident since the offense, and her "extensive business" with several other federal agencies in the interim, all of which were aware of her misdemeanor conviction when they chose to contract with her. *Id.* at 13.

[81] *Id*. at 17.

[82] *Id*. at 19.

Contractor Must Exhaust Administrative Remedies

In another case decided in 2007, plaintiffs sued the U.S. Army Suspension and Debarment Official, Mr. Robert W. Kittel, after Mr. Kittel proposed that they be suspended.[83] Plaintiffs are defense contractors who allegedly bribed Army officials in exchange for assistance in contract awards. During the Army's investigation, Criminal Investigation Division (CID) Special Agent (SA) Larry Moreland interviewed a contracting official, Major Gloria Davis, who admitted that Plaintiff George Lee gave her at least $225,000 for assistance in obtaining government contracts. Soon after giving the interview, Major Davis committed suicide. Special Agent Moreland reduced his interview into a sworn declaration and the SDO used that declaration as the basis for the proposed suspension. After the Plaintiffs received the notice of proposed suspension, but before final action, they filed suit to enjoin the SDO from implementing an agency decision.

In finding for the Government, the court found that Plaintiffs did not exhaust all their administrative remedies; therefore, the court could not enjoin the agency from taking action. The court stated that the Plaintiffs were offered a chance for a hearing, but decided instead to file an action attempting to enjoin the Army from initiating the suspension action. In citing *Curry v. Contract Fabricators, Inc.*,[84] the court found that when the government refuses access to administrative remedies, a plaintiff would not have to exhaust remedies.[85] That, however, was not the situation here. The court found that the Plaintiffs were offered administrative remedy access, but failed to avail themselves of the process and, therefore, denied Plaintiffs' request to enjoin the government's action.[86]

Major Brett Egusa

[83] *See* Lee v. Kittel, Civil Action No. 5:07-cv-1455-UWC (N.D. Ala. 2007) (unpublished).

[84] 891 F.2d 842 (11th Cir. 1990).

[85] *Lee*, Civil Action Number 5:07-cv-1455-UWC, at 5.

[86] *Id.* at 8.

Taxation

Update on 3% Withholding Tax on Government Contractors

Last year[1] we reported that Section 511 of the "Tax Increase Prevention and Reconciliation Act of 2005"[2] amended the Internal Revenue Code to generally impose a three percent withholding tax on payments for property and services made to contractors by Federal, state, and local government agencies, effective January 2011. Currently, there are three bills pending in Congress which would either repeal this provision in its entirety, or limit its application.[3] So, this is something to continue watching, keeping in mind that implementation in both Internal Revenue Service (IRS) regulations and the Federal Acquisition Regulation (FAR) will be required, should Section 511 not be repealed.

Failing to Include Mississippi Use Tax Equals Tough Luck X 2

Where a contractor's two sole-source fixed price contracts for renovation work included FAR 52.229-4, Federal, State, and Local Taxes (Noncompetitive Contract),[4] the Armed Services Board of Contract Appeals (ASBCA) denied the contractor's appeal for an equitable adjustment for payment of Mississippi use tax, which the contractor had neglected to include in its price.[5] The contractor's sole argument to the ASBCA was that it was not bound by FAR 52.229-4 because of its own unilateral mistake in omitting Mississippi's 3.5% use tax from its total contract price.[6] The Board said this was not a clerical or mathematical error that would entitle the contractor to reformation of the contract, but rather a judgmental error, since the contract and case law placed the burden of ascertaining applicable taxes squarely on the contractor.[7]

Law Firm Has No Standing for Tax Recovery

In an interesting case raising issues of standing relating to tax recovery matters,[8] the Court of Appeals for the 9th Circuit decided whether a law firm had standing to bring an action against the United States to recover attorney's fees from monies that its client was awarded as a result of a contract settlement.[9] Previously, the firm's client had agreed with the Federal Highway Administration to a contract settlement, but the contractor never received any compensation from that settlement because the IRS requested that payment be withheld to offset the contractor's unpaid taxes.[10] The circuit court vacated the district court's summary judgment for the Government and ordered the case to be dismissed, as the trial court lacked jurisdiction to hear the law firm's case.[11]

The law firm attempted to invoke 28 U.S.C. § 1346(a)(1), which waives the sovereign immunity of the United States to permit suit in the U.S. District Courts for the recovery of taxes which have been erroneously collected.[12] In response, the Circuit Court pointed out that a condition of that waiver of sovereign immunity is compliance with 26 U.S.C. § 7422(a), which first requires the filing of an administrative claim.[13] The Circuit Court rejected the law firm's "curious" argument that

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[1] Major Andrew S. Kantner et al, *Contract and Fiscal Law Developments of 2006—Year in Review*, ARMY LAW., Jan. 2007, at 160.

[2] Pub. L. No. 109-222, 120 Stat. 345 (2006) (codified as amended in scattered sections of 26 U.S.C.).

[3] H. R. 1023, 110th Cong. (2007) ("To repeal the imposition of withholding on certain payments made to vendors by government entities.): Withholding Tax Relief Act of 2007, S. 777, 110th Cong. (2007) repealing § 511 of the Tax Increase Prevention and Reconciliation Act of 2005); Small Business Tax Fairness and Simplification Act of 2007, H. R. 46, 110th Cong. (2007) (exempting specified small businesses).

[4] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 52.229-4 [hereinafter FAR]. This clause states, in para (b): "Unless otherwise provided in this contract, the contract price includes all applicable Federal, State, and local taxes and duties." *Id.*

[5] Ellis Envtl. Group, LC, ASBCA Nos. 54066, 54067, 07-1 BCA ¶ 33,551.

[6] *Id.* at 166,161.

[7] *Id*. at 166,163.

[8] Dunn & Black, P.S. v. United States, 492 F.3d 1084 (9th Cir. 2007).

[9] *Id.* at 1086. After terminating the contractor for default and being sued for wrongful termination, the Federal Highway Administration stipulated to an entry of judgment, without admission of liability, in favor of the contractor. *Id.*

[10] *Id.*

[11] *Id.* at 1093–94.

[12] *Id.* at 1088.

[13] *Id.* Section 7422(a) states, in pertinent part:

section 7422(a) did not apply to them (inasmuch as it was not the taxpayer), while at the same time the law firm asserted standing under section 1346(a)(1).[14] If the court accepted the law firm's argument, it said, "we would find ourselves pointed in diametrically opposite directions with respect to nearly identical statutory language."[15]

Representations & Certifications—Tax Delinquency

In March of this year, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council published a proposed rule, which would amend FAR Parts 9 and 52 provisions covering contractor certification regarding debarment, suspension, proposed debarment, and other responsibility matters, by adding language regarding nonpayment of taxes.[16] As of the date of the writing of this article, the period for public comment had closed, and the final rule was awaiting publication.

Margaret K. Patterson

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

26 U.S.C. § 7422(a) (2000).

[14] *Dunn & Black*, 492 F.3d at 1088. Section 1346(a)(1) states:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of . . . [a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

28 U.S.C. § 1346(a)(1).

[15] *Dunn & Black*, 492 F.3d at 1090.

[16] *See* 72 Fed. Reg. 15,093 (proposed 30 Mar. 2007).

Contingency Contractor Personnel

What to Do with Security Contractors?

While government use of security contractors in support of operations in Iraq and Afghanistan has been the source of simmering controversy for several years,[1] the issue has now come to a rapid boil. Over the past year, numerous allegations have surfaced regarding excessive use of force by security contractor personnel.[2] These allegations have led to new efforts to permit the exercise of criminal jurisdiction[3] and to new proposals to increase and unify oversight over such personnel.[4] As often seems to be the case, reactionary changes during times of high profile allegations and media attention appear to lack thorough analysis and planning, and none will completely solve the issues caused by contracting for security services.

Contractor personnel misconduct has been a difficult issue for several years.[5] However, recent allegations of security contractor misconduct are leading to much greater scrutiny and support for change.[6] One case causing this issue to boil occurred on Christmas Eve, 2006.[7] Andrew Moonen, an employee of Blackwater USA and a former member of the 82nd

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[1] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-06-865T, REBUILDING IRAQ: ACTIONS STILL NEEDED TO IMPROVE THE USE OF PRIVATE SECURITY PROVIDERS (June 13, 2006) (Testimony Before the Subcommittee on National Security, Emerging Threats, and International Relations, Committee on Government Reform (statement of Mr. William Solis, Director, Defense Capabilities and Management)); Major Andrew S. Kantner et al., *Contract and Fiscal Law Developments of 2006—Year in Review*, ARMY LAW., Jan. 2007, at 161–68.

[2] *See, e.g.*, C.J. Chivers, *Contractor's Boss in Iraq Shot at Civilians, Workers' Suit Says*, N.Y. TIMES, Nov. 17, 2006, *available at* http://query.nytimes.com/gst/fullpage.html?res=9B0CE4D9143EF934A25752C1A9609C8B63&scp=1&sq=Contractor%92s+Boss+in+Iraq+Shot+at+Civilians%2C+Workers%92+Suit+Says%2C&st=nyt (stating that two former Triple Canopy, a private security firm, employees alleging that "their shift leader fired deliberately and unnecessarily at Iraqi vehicles and civilians in two incidents"); Steve Fainaru, *A Chaotic Day on Baghdad's Airport Road*, WASH. POST, Apr. 15, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/04/14/AR200704101490 (providing more information about the Triple Canopy team leader and three incidents of alleged excessive force used on July 8, 2006); John M. Broder, *Ex-Paratrooper is Suspect in Blackwater Killing*, N.Y. TIMES, Oct. 4, 2007, *available at* http://www.nytimes.com/2007/10/04/world/middleeast/04contractor.html?_r=1&hp&oref=slogin (discussing 24 December 2006 killing of the Iraqi vice president's body guard allegedly by a former Blackwater USA, another private security firm); Sudarsan Raghavan et al., *Blackwater Faulted in Military Reports from Shooting Scene*, WASH. POST, Oct. 5, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/10/04/AR2007100402654.html (describing military reports about an alleged excessive use of force by Blackwater USA personnel on 16 September 2007 in Baghdad); Janessa Gans, *I Survived Blackwater*, L.A. TIMES, Oct. 6, 2007, *available at* http://www.latimes.com/news/opinion/la-oe-gans6oct06,0,1155563.story (providing a first-person account from a former government employee protected by Blackwater USA in Iraq, now condemning Blackwater USA for excessive use of force); Steven R. Hurst, *Probe Launched in Women's Deaths*, BOSTON GLOBE, Oct. 11, 2007, *available at* http://www.boston.com/news/world/middleast/articles/2007/10/11/probe_launched_in_womens_deaths/ (stating that Unity Resources Group, another private security firm "guards gunned down two Iraqi Christian women in their car . . .").

[3] The Uniform Code of Military Justice (UCMJ), the criminal code for the U.S. Armed Forces, was amended by the John Warner National Defense Authorization Act for Fiscal Year 2007 (NDAA 2007) to provide UCMJ jurisdiction over civilians accompanying the armed forces in time of declared war or contingency operation. John Warner National Defense Authorization Act, 2007, Pub. L. No. 109-364, 120 Stat. 2083, §552 (2007) [hereinafter 2007 NDAA]. This change may allow for prosecution of contractor employees in Iraq and Afghanistan. *See* Kantner et al., *supra* note 1, at 161; *see also* William Matthews, *New Law Subjects Contractors to Military Justice*, FED. TIMES, Jan. 5, 2007, at 10, *available at* http://www.federaltimes.com/index.php?S=2464127 (discussing the UCMJ change). The Military Extraterritorial Jurisdiction Act (MEJA), providing criminal jurisdiction over contractor personnel supporting the Department of Defense (DOD) for certain crimes, may also soon be amended to include contractor personnel under other federal agency contracts. David M. Herszenhorn, *House's Iraq Bill Applies U.S. Laws to Contractors*, N.Y. TIMES, Oct. 5, 2007, *available at* http://www.nytimes.com/2007/10/05/washington/05cong.html. The House of Representatives has passed a bill amending the MEJA and the Senate is considering a similar bill. *Id*. *See* H.R. 2740, 110th Cong. (2007) (passed by the House and on the calendar in the Senate).

[4] "A Pentagon review team has recommended the U.S. military have more control over contractors hired in Iraq and private security guards fall under the [UCMJ] in some cases, Defense Secretary Robert Gates said . . . ." Lolita C. Baldor, *DoD Recommends More Control Over Contractors*, ARMY TIMES, Oct. 4, 2007, *available at* http://www.armytimes.com/news/2007/10/ap_contractors_071003/. The Department of State (DOS) instituted new oversight measures following the 16 September 2007 Blackwater USA shooting incident in Baghdad. John M. Broder, *State Dept. Plans Tighter Control of Security Firm*, N.Y. TIMES, Oct. 6, 2007, *available at* http://www.nytimes.com/2007/10/06/washington/06blackwater.html. The DOS began sending DOS employees along with Blackwater USA escorted convoys and also installed video cameras in Blackwater USA vehicles. *Id*.

> Defense Secretary Robert M. Gates is pressing for the nearly 10,000 armed security contractors now working for the United States government in Iraq to fall under a single authority, most likely the American military, in an effort to bring Blackwater USA under tighter control, senior administration officials and Pentagon advisers say.

Eric Schmitt & Thom Shanker, *Pentagon Sees One Authority Over Contractors*, N.Y. TIMES, Oct. 17, 2007, *available at* http://www.nytimes.com/2007/10/17/washington/17blackwater.html.

[5] *See, e.g.*, articles cited *supra* note 2; *see also* Kathy Benz, *Lawsuit Targets Abu Ghraib Contractors*, CNN.COM, July 27, 2004, http://www.cnn.com/2004LAW/07/27/abu.ghraib.lawsuit/ (discussing a law suit filed against private contractors alleged to have committed abuses at the Abu Ghraib prison); Oliver Poole, *Iraq to Bring Private Armies Under Control*, DAILY TELEGRAPH (London), Sept. 9, 2005, *available at* http://www.telegraph.co.uk/news/main.jhtm1?xml=/news/2005/09/09/wirq09.xml (explaining how in 2005 private security contractors were seen as causing problems); Major Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1 (2003) (discussing the history of private military companies and the benefits and drawbacks of their use).

[6] *See supra* notes 2 and 3 and accompanying text.

[7] *See, e.g.*, Yochi J. Dreazen, *New Scrutiny for Iraq Contractors*, WALL ST. J., May 14, 2007, *available at* http://online.wsj.com/public/article/SB117910638122101554-TMh1_CHvlvg_IlgHL0V7fFcXJd4_20070613.html?mod=fpa_editors_picks ("A Blackwater USA contractor's killing of an Iraqi security guard is putting new pressure on the Bush administration to prosecute private-company employees accused of crimes in Iraq . . . ."); Broder, *supra* note 2 (stating

Airborne Division serving in Iraq in 2003 and 2004,[8] allegedly shot and killed Iraqi Vice President Adil Abd-al-Mahdi's body guard inside Baghdad's International Zone.[9] Prior to the shooting, Moonen had apparently been drinking alcoholic beverages and had engaged in a verbal altercation with the same body guard.[10] Blackwater USA fired Moonen and arranged his return to the United States.[11] No jurisdiction has yet filed criminal charges against Moonen, and he was in Kuwait working for a Department of Defense (DOD) contractor a few weeks after this incident.[12]

Tempers settled temporarily following the Christmas Eve shooting of the body guard. In September 2007, while providing personal security transportation under its Department of State contract,[13] members of a Blackwater USA team (Team) allegedly shot and killed between eleven and seventeen Iraqis.[14] The Team was traveling in Western Baghdad's Nisoor Square; multiple investigations indicate that the Team opened fire without provocation, resulting in the deaths, multiple injuries, and property damage.[15] In response to the allegations, the Team maintains that hostile individuals opened fire on the Team first, and then the Team returned gunfire appropriately.[16] This incident led to the Iraqi government's request that the United States deliver custody of the Team members to the Iraqi government, that the United States sever all contracts with Blackwater USA, and that the United States pay $136 million dollars to the victims and families.[17] Both governments then investigated the incident.[18] The Department of State also reviewed all of its security contracts.[19] Significantly, this incident accelerated Congressional and Executive proposals concerning jurisdiction over security contractors.

Uniform Code of Military Justice

Months before the above incidents, Senators Lindsay Graham and John Kerry sponsored an amendment to the Uniform Code of Military Justice (UCMJ),[20] through the John Warner National Defense Authorization Act for Fiscal Year 2007 (2007 NDAA),[21] extending UCMJ jurisdiction to civilians accompanying the armed forces in the field during contingency operations.[22] This new jurisdiction is limited to contractors accompanying the armed forces,[23] calling into question its

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that the Christmas Eve incident "has had wide reverberations from Baghdad to Washington . . . . [T]he episode has become one of the central exhibits in numerous investigations by Congress, the Justice Department and Iraqi authorities into the operations of Blackwater and [] other private security contractors working in Iraq.").

[8] Robert Brodsky, *Lawmaker Demands Records on Fired Blackwater Employee*, GOVEXEC.COM, Oct. 9, 2007, http://www.govexec.com/dailyfed/1007/100907rb1.htm; Broder, *supra* note 2.

[9] STAFF OF H. COMM. ON OVERSIGHT AND GOV. REFORM, 110TH CONG., MEMORANDUM RE: ADDITIONAL INFORMATION ABOUT BLACKWATER USA 9 (Oct. 1, 2007) [hereinafter HOUSE COMMITTEE MEMO].

[10] *Id.*

[11] *Id.*

[12] Joanne Kimberlin, *CNN Says Blackwater Slaying Suspect Hired Again*, VIRGINIAN-PILOT, Oct. 6, 2007, *available at* http://hamptonroads.com/node/340731. Details regarding the DOD contract work in Kuwait remain unclear. *Id.* The incident is still under investigation by the Federal Bureau of Investigation more than ten months later. HOUSE COMMITTEE MEMO, *supra* note 9, at 12.

[13] The Department of State (DOS) contract is called the Worldwide Personal Protective Services (WPPS) II contract. *See* HOUSE COMMITTEE MEMO, *supra* note 9, at 4. The WPPS II contract is a multiple award Indefinite Delivery/Indefinite Quantity (ID/IQ) contract awarded to DynCorps, Triple Canopy, and Blackwater USA. *Id.* The DOS paid the three private security firms for "'protection of U.S. and/or certain foreign government high-level officials whenever the need arises.'" *Id.* (quoting the WPPS I contract).

[14] HOUSE COMMITTEE MEMO, *supra* note 9, at 6 (putting the reported number of Iraqis killed at eleven). *See also* Raghavan et al., *supra* note 2 (reporting the number of Iraqis killed as fourteen); and Steven R. Hurst & Qassim Abdul-Zahra, *Iraqi Probe Implicates Blackwater*, USA TODAY, Oct. 5, 2007, *available at* http://www.usatoday.com/news/world/2007-10-04-2366534641_x.htm (reporting the number of Iraqis killed as thirteen or seventeen depending on which investigation is used). In addition to this September incident, two Iraqi Christian women were allegedly killed by employees of an Australian security contractor, Unity Resources Group, less than a month later on Oct. 10, 2007. Hurst, *supra* note 2.

[15] Steven R. Hurst & Qassim Abdul-Zahra, *Iraq: Blackwater Should Pay; $136 Million is Demanded for the Shootings*, CHI. SUN-TIMES, Oct. 9, 2007; *see also* Raghavan et al., *supra* note 2.

[16] *See* Hurst & Abdul-Zahra, *supra* note 15; Raghavan et al., *supra* note 2.

[17] Hurst & Abdul-Zahra, *supra* note 15.

[18] *Id.*

[19] Broder, *supra* note 4.

[20] UCMJ (2008); *see* Matthews, *supra* note 3 (including quotes from Senator Graham).

[21] NDAA2007, *supra* note 3, § 552; *see* Kantner et al., *supra* note 1, at 161.

[22] *See* Kantner et al., *supra* note 1, at 161; *see also* Matthews, *supra* note 3.

coverage over those contractor employees working under contracts with the Department of State, the United States Agency for International Development, and any other agency outside the DOD.[24] Moreover, jurisdiction over civilians under the UCMJ is also of questionable Constitutional validity.[25] Apart from these limitations, the DOD has not yet implemented this new jurisdiction.[26]

Although this jurisdictional change to the UCMJ became effective on 17 October 2006 when the President signed the NDAA 2007,[27] the DOD has not yet promulgated regulations implementing it. Nevertheless, Deputy Secretary of Defense (DEPSECDEF) Gordon England issued a memorandum to the Department titled: "Management of DoD Contractors and Contractor Personnel Accompanying U.S. Armed Forces in Contingency Operations Outside the United States."[28] Among reminders of regulatory guidance and responsibilities, this memorandum states:

> Commanders *have UCMJ* authority to disarm, apprehend, and detain DoD contractors suspected of having committed a felony offense in violation of the [Rules for the Use of Force] RUF, or outside the scope of their authorized mission, and to conduct the basic UCMJ pretrial process and trial procedures currently applicable to the courts-martial of military service members.[29]

Although this sentence is not highlighted in any way,[30] several portions seem particularly important. The sentence states that commanders have UCMJ authority.[31] No DOD regulation has implemented the UCMJ jurisdiction change, yet the memorandum directs commanders to begin processing cases as though a system currently existed for doing so.[32] The sentence also purports to limit this authority to DOD contractors suspected of committing felony offenses.[33] Neither the terms of the new UCMJ provision nor the Military Extraterritorial Jurisdiction Act (MEJA) limit jurisdiction to DOD contractors; rather, each apply by their specific terms to contractor employees supporting a DOD mission.[34] Further, the MEJA applies only to felony-level offenses,[35] but the UCMJ jurisdiction applies to misdemeanors as well. The memorandum thus appears to limit the authority commanders possess; however, the memorandum otherwise appears to state simply the applicable authorities and responsibilities rather than providing new authority or limiting existing authority.[36]

Finally, the sentence states that commanders have authority to conduct pretrial and trial processes against contractor employees under the UCMJ.[37] As discussed above, no procedures exist relative to civilian prosecutions by court-martial.

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[23] UCMJ art. 2(a)(10) (2008). "(a) The following persons are subject to this chapter: . . . (10) In time of *declared* war *or contingency operation*, persons serving with or accompanying an armed force in the field." *Id*. (emphasis added, indicating the words added by the NDAA 2007).

[24] *See, e.g*., Alissa J. Rubin & Paul Von Zielbauer, *Blackwater Case Highlights Legal Uncertainties*, N.Y. TIMES, Oct. 11, 2007, *available at* http://www.nytimes.com/2007/10/11/world/middleeast/11legal.html.

[25] Military and civilian courts, including the U.S. Supreme Court, have rejected military jurisdiction over civilians in several circumstances. *See, e.g*., United States *ex rel*. Toth v. Quarles, 350 U.S. 11 (1955) (holding that a former service member cannot be court-martialed for a crime committed while on active duty); Reid v. Covert, 354 U.S. 1 (1957) (holding that a civilian dependent of a service member cannot be court-martialed in time of peace for a capital offense committed abroad); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960) (extending the *Kinsella* holding to non-capital offenses); United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970) (holding that a contractor employee in could not be court-martialed in Vietnam because jurisdiction required a declared war). It is unclear whether this new attempt at statutorily extending UCMJ jurisdiction over civilians will be upheld.

[26] *See, e.g*., Rubin & Von Zielbauer, *supra* note 24.

[27] NDAA 2007, *supra* note 3, § 552.

[28] Memorandum, The Deputy Secretary of Defense, to Secretaries of the Military Departments et al., subject: Management of DOD Contractors and Contractor Personnel Accompanying U.S. Armed Forces in Contingency Operations Outside the United States (Sept. 25, 2007) [hereinafter DEPSECDEF Memo].

[29] *Id*. (emphasis added).

[30] *Id*.

[31] *Id*. (emphasis added).

[32] *Id*.

[33] *Id*.

[34] The UCMJ provides jurisdiction over contractor personnel who are "serving with or accompanying an armed force in the field." UCMJ art. 2(a)(10) (2008). The MEJA provides jurisdiction over contractor personnel employed by DOD contractors or contractors of any federal agency "to the extent such employment relates to supporting the mission of the Department of Defense overseas." 18 U.S.C. § 3267 (1)(A) 2000).

[35] 18 U.S.C. § 3261(a).

[36] For example, the memorandum begins by recognizing that defense contractors are important and directs addressees to ensure that "relevant DoD policies and processes are being followed." DEPSECDEF Memo, *supra* note 28. Perhaps this memorandum simply follows the standard set by the NDAA 2007 change to the UCMJ which provided UCMJ jurisdiction over contractor personnel for the first time since World War II yet was titled, "Clarification of application of Uniform Code of Military Justice during time of war." NDAA 2007, *supra* note 3, § 552; *see also* Kantner et al., *supra* note 1, at 161.

[37] DEPSECDEF Memo, *supra* note 28.

Proper procedures should be directed through changes to the Manual for Courts-Martial prior to any implementation of UCMJ jurisdiction in an *ad hoc* manner as is directed.[38] Without implementing regulations, substantial risk exists that U.S. civilians will be incarcerated by the military in Iraq with no meaningful opportunity for review.

Military Extraterritorial Jurisdiction Act

The U.S. House of Representatives (House) passed a bill on October 4, 2007 amending the MEJA (House Bill).[39] Currently, MEJA jurisdiction is limited to civilians supporting a DOD mission.[40] This limitation most likely excludes jurisdiction over the Blackwater USA employees discussed above because they were working under contracts supporting a traditional DOS mission, and not under contracts supporting a DOD mission.[41] The House Bill attempts to provide jurisdiction over all contractor employees in a contingency operation location by adding a new category of persons covered by the MEJA:

> [W]hile employed under a contract (or subcontract at any tier) *awarded by any department or agency* of the United States, where the work under such contract is carried out in an area, or in close proximity to an area (as designated by the Department of Defense), where the Armed Forces is conducting a contingency operation.[42]

While this language should be broad enough to cover the Blackwater USA personnel discussed above,[43] it is unclear why Congress physically limits this jurisdiction to areas where the Armed Forces are conducting contingency operations.[44] The criteria for determining "in close proximity to an area" of a contingency operation remains unclear and is left to the discretion of the Department of Defense.[45]

Jurisdiction over contractor personnel has not been the only problem with the MEJA. The MEJA has provided jurisdiction over contractor personnel supporting DOD missions overseas for more than five years,[46] but since that time there has been only one indictment of a contractor employee.[47] The first problem is that while the MEJA requires the DOD to

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[38] These procedures can be implemented through interim changes prior to a new edition of the Manual for Courts-Martial, but the procedures should be published officially and applies uniformly.

[39] H.R. 2740, 110th Cong. (2007). Representative David E. Price, Democrat of North Carolina, first introduced the bill in January 2007. David M. Herszenhorn, *House's Iraq Bill Applies U.S. Laws to Contractors*, N.Y. TIMES, Oct. 5, 2007, *available at* http://www.nytimes.com/2007/10/05/washington/05/washington/05cong.html. The bill passed the House by a vote of 389-30. *Id*. A similar bill sponsored by Senator Barrack Obama is pending in the Senate. *Id*.

[40] 18 U.S.C. § 3267 (1)(A).

[41] Marcia Croyle, *Problems with Iraq Contractors Present Legal Puzzle*, NAT'L L.J., Oct. 26, 2007, *available at* http://www.law.com/jsp/article.jsp?id=1193303020578.

[42] H.R. 2740, § 2(a)(1) (emphasis added).

[43] The Blackwater personnel worked under a contract with the DOS, an agency of the United States. HOUSE COMMITTEE MEMO, *supra* note 9, at 4. The Blackwater personnel performed the work in Iraq, which meets the definition of a contingency operation area. *See* Memorandum, Under Secretary of Defense, to the Secretary of the Army et al., subject: Authorization to Utilize Contingency Operations Contracting Procedures (Oct. 9, 2001); Memorandum, Assistant Secretary of the Air Force, to All Major Command Commanders et al., subject: Emergency Acquisitions in Direct Support of U.S. or Allied Forces Deployed in Military Contingency Operations during Operation Iraqi Freedom (21 Mar. 2003).

[44] H.R. 2740 (adding MEJA jurisdiction over contractor employees "where the work under such contract is carried out in an area, or in close proximity to an area (as designated by the Department of Defense), where the Armed Forces is conducting a contingency operation.").

[45] *Id*.

[46] 18 U.S.C. §§ 3261–3267. The MEJA was enacted in 2000, but the DOD did not promulgate its implementing regulation until 2005. U.S. DEP'T OF DEFENSE, INSTR. 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS (Mar. 3, 2005) [hereinafter DODI 5525.11].

[47] Dreazen, *supra* note 7. Aaron Langston is the only contractor employee indicted under MEJA for criminal conduct in Iraq or Afghanistan. *Id*. Langston was a Kellogg, Brown and Root (KBR) employee working in Al Asad, Iraq under the Logistics and Civil Augmentation Program (LOGCAP) contract supporting military operations in Iraq. Memorandum, Staff Judge Advocate, 2d Marine Aircraft Wing (Forward), to Staff Judge Advocate, Marine Central Command, subject: Temporary Detention of U.S. Citizen Under the Military Extraterritorial Jurisdiction Act (n.d.) [hereinafter Langston Memo]. A grand jury in the United States District Court, District of Arizona, indicted Langston on February 27, 2007 for assault with a deadly weapon and assault resulting in serious bodily injury. United States v. Langston, D. Ariz. CR07-210PHX (Indictment). Langston allegedly stabbed an acquaintance in the throat following an argument. Langston Memo, *supra*.

prescribe regulations,[48] the DOD did not prescribe implementing regulations until 2005, thus greatly limiting any ability to use the MEJA.[49] Another problem is that the MEJA provides jurisdiction in the federal district courts, and vests prosecutorial authority in the Department of Justice (DOJ) and responsible U.S. Attorneys.[50] Procedurally, the DOJ reviews each case and determines whether to forward it to the U.S. Attorney in the district where jurisdiction would otherwise exist over the suspect.[51] This U.S. Attorney then reviews the case and determines whether to prosecute.[52] This burdensome and intricate system frustrates efforts to prosecute.

The House Bill attempts to resolve some of the procedural shortcomings of the MEJA. The House Bill requires the DOJ Inspector General (IG) to report to Congress case referrals, investigations, and cases pursued.[53] The House Bill also requires the Federal Bureau of Investigations (FBI) to open a Theater Investigative Unit in a theater in which jurisdiction would lie and report to Congress.[54] These provisions appear intended to entice the DOJ to prosecute without overt interference in prosecutorial discretion. The TIU extends the working relationship between the FBI and the U.S. attorneys, increasing the likelihood of prosecution. By requiring the FBI and the DOJ to report allegations and resultant actions to Congress, transparency increases the likelihood that meritorious allegations are investigated and prosecuted. Whether these measures, if enacted, will succeed in providing accountability for criminal action is an issue for future editions of the *Year in Review*.[55]

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[48] 18 U.S.C. § 3266(a). The MEJA requires that the Secretary of Defense consult with the Secretary of State and the Attorney General before prescribing the regulations. *Id*.

[49] DODI 5525.11, *supra* note 46.

[50] *Id*.

[51] *Id*.

[52] *Id*.

[53] H.R. 2740, 110th Cong. (2007).

[54] *Id*.

[55] Congress should take care to resource these new offices and requirements if there is to be any hope of using them effectively.