

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Contract and Fiscal Law Note

Post-Award Mistakes under the Buy American Act

A case before the General Services Administration Board of Contract Appeals (GSBCA), *Integrated Systems Group, Inc. v. Social Security Administration*, raised some interesting questions regarding how to apply the Buy American Act requirements after the contract award.¹ Integrated Services Group (ISG) challenged the Social Security Administration's (SSA) decision to terminate its supply contract for cause² after ISG failed to furnish various computer cabling products by the stated delivery date. The Integrated Systems Group contended that the SSA's termination for cause was improper for several reasons. The ISG argued that it made a unilateral mistake by certifying that it would provide domestic end products pursuant to the Buy American Act.³

After award of the contract, the ISG attempted to verify the country of origin of the products it intended to supply to the government. That is, ISG wanted to insure that the computer cabling products were domestic end products. The ISG learned, much to its chagrin, that it had actually proposed foreign end products for a number of the contract line items.⁴ The ISG immediately notified the contracting officer of the problem. According to the ISG, supplying domestic end products would significantly increase its costs under the contract. The ISG asked the contracting officer to reevaluate the items as foreign end products. The contracting officer, however, declined to do so because the award had already been made. The Inte-

grated Systems Group had received the evaluation preference for offering domestic end products; and the contracting officer stated that she *could not* reevaluate the ISG's proposal after award.⁵

The next day the contracting officer called the ISG and reiterated that the ISG must deliver the computer cabling in accordance with the terms and conditions of the contract. The ISG informed the contracting officer that all purchasing activity had stopped once it discovered the mistake.⁶ The contracting officer proceeded to terminate the contract for cause because of the ISG's failure to deliver acceptable products in accordance with the delivery schedule.⁷

The ISG appealed the contracting officer's decision, requesting the GSBCA convert the termination for cause to a termination for convenience.⁸ The ISG argued that its inadvertent Buy American Act miscertification either excused its non-performance or rendered the contract void ab initio.⁹

The GSBCA held that the ISG's contentions were not supported by either the facts or law. In making its decision, the GSBCA relied on a similar case decided by the Armed Services Board of Contract Appeals (ASBCA).¹⁰ In that case, *Sunox Inc.*, the ASBCA found that a contractor's unilateral mistake in providing non-domestic goods after certifying the products were Buy American compliant is not the type of mistake which warrants relief from a termination for default. The ASBCA specifically noted that "A unilateral mistake of this sort is not beyond the control or without the fault or negligence of the contractor and therefore is not the basis for relief from the default on the contract."¹¹

1. *Integrated Systems Group, Inc. v. Social Security Admin.*, GSBCA 14054-SSA, 98-2 BCA ¶ 29,848.

2. *General Servs. Admin. et al.*, Federal Acquisition Reg. 52.212-4(m) provides, in pertinent part, "Termination for cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance."

3. 41 U.S.C.A. §§ 10-d (West 1998). Generally, the Buy American Act establishes a preferences for the acquisition of domestic "articles, materials, and supplies" when they are being purchased for use in the United States. The Buy American Act was a depression-era statute designed to protect American capital and jobs.

4. *Integrated Systems Group, Inc.*, GSBCA 14054-SSA, 98-2 BCA ¶ 29,848.

5. *Id.* at 147,741.

6. *Id.*

7. *Id.* at 147,742.

8. *Id.*

9. *Id.*

10. 98-2 BCA ¶ 147,742 (citing *Sunox, Inc.*, ASBCA No. 30025, 85-2 BCA ¶ 18,077).

Applying these principles to the instant case, the GSBCA concluded that ISG's failure to supply products in accordance with the terms and conditions of the contract justified the termination for cause.¹² Additionally, the GSBCA stated that the agency's termination for cause was justified due to the ISG's miscertification. That is, the ISG's failure to inquire of its subcontractors is not a "mistake." A proper certification requires an inquiry by the contractor in order to provide a basis for the certification.¹³ Major Wallace.

International and Operational Law Note

Principle 7: Distinction Part II

The following note is the seventh in a series of practice notes¹⁴ that discuss concepts of the law of war that might fall under the category of "principle" for purposes of the Department of Defense (DOD) Law of War Program.¹⁵

"Strikes Hit Civilians, Iraq Says."¹⁶ This front page headline in the *Washington Post* highlighted an article describing the civilian casualties resulting from an apparent stray U.S. missile fired at military targets in Southern Iraq. Later in the article, the author cited General Anthony Zinni, the Central Command (CENTCOM) Commander, as laying blame for the incident on Saddam Hussein. According to General Zinni, "the ultimate reason and cause for these casualties"¹⁷ was the Iraqi tactic of locating military targets in civilian areas.¹⁸ While most practitioners recognize the significance of the principle of distinc-

tion,¹⁹ this incident highlights an often-overlooked aspect of that principle—the obligation of a defender to facilitate the distinction process.

This obligation is manifested in Article 58 of Protocol I Additional to the Four Geneva Conventions of 1949.²⁰ Article 58, entitled "Precautions against the effects of attacks,"²¹ requires *all* parties to a conflict (not just the attacking force) to:

- (1) Endeavor to remove civilians and civilian objects *under their control* from the vicinity of military objectives;
- (2) Avoid locating military objectives within or near densely populated areas;
- (3) Take other precautions to protect civilians *under their control* from the dangers of military operations.²²

In essence, these provisions represent a mandate directed toward a force anticipating enemy attack to separate itself from the civilian population. As the Official Commentary to Geneva Protocol (GP) I indicates, "Belligerents may expect their adversaries to conduct themselves fully in accordance with their treaty obligations and to respect the civilian population, *but they themselves must also cooperate by taking all possible precautions for the benefit of their own population . . .*"²³

The measures required under Article 58 of GP I have the stated purpose of enhancing the protections afforded the civilian populations. Undeniably, however, the consequence of

11. *Id.* (citing *Sunox*, 85-2 BCA at 90,752).

12. *Integrated Systems Group, Inc.*, GSBCA at 147,743.

13. *Id.* (citing H&R Machinists Co., ASBCA No. 38440, 91-1 BCA ¶ 23,373).

14. See International and Operational Law Note, *When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War*, ARMY LAW., June 1998, at 17; International and Operational Law Note, *Principle 1: Military Necessity*, ARMY LAW., July 1998, at 72; International and Operational Law Note, *Principle 2: Distinction*, ARMY LAW., Aug. 1998, at 35 [hereinafter *Principle 2*]; International and Operational Law Note, *Principle 3: Endeavor to Prevent or Minimize Harm to Civilians*, ARMY LAW., Oct. 1998, at 54; International and Operational Law Note, *Principle 4: Preventing Unnecessary Suffering*, ARMY LAW., Nov. 1998, at 22; International and Operational Law Note, *Principle 6: Protection of Cultural Property During Expeditionary Operations Other Than War*, ARMY LAW., Mar. 1998, at 25.

15. See U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (10 July 1979). See also CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (12 Aug. 1996).

16. Bradley Graham, *Strikes Hit Civilian Targets, Iraq Says*, WASH. POST, Jan. 26, 1999, at A1.

17. *Id.* at A16.

18. *Id.*

19. See *Principle 2*, *supra* note 14, at 35.

20. 1977 Protocol I Additional to the Geneva Conventions, Dec. 12, 1977, 16 I.L.M. 1391 [hereinafter GP I].

21. *Id.*

22. *Id.*

23. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 692 (1987) (emphasis added).

such measures will be to facilitate an opponent's ability to lawfully target military objectives. While this might seem illogical to some, it is an aspect of the principle of distinction that the United States considers fundamental and essential.

This aspect of the principle of distinction is best illustrated by considering the issue of entitlement to prisoner of war (PW) status. While this may at first seem an unlikely paradigm for this proposition, it is the classic example of the requirement that armed forces distinguish themselves from non-combatants at all times, even if it results in facilitating an opponent's ability to identify targets.

The standard for determining who qualifies for PW status is established in the Geneva Convention Relative to the Treatment of Prisoners of War (GPW).²⁴ Article 4 of the GPW identifies several categories of individuals who satisfy the "status" test. The common thread that runs through all these categories is the requirement that before capture, the individuals are identifiable as combatants.²⁵

The "identifiable as combatants" requirement is best illustrated by the Article 4 requirement that militia members are entitled to PW status *only* if they, among other things, wear a "fixed and distinctive sign recognizable from a distance," and carry arms openly.²⁶ Even the concept of giving PW status to captured civilian members of a *levee en masse*²⁷ (spontaneous resistance) is consistent with this thread. Their status is contingent on their carrying arms openly, thus facilitating the ability of the opponent to distinguish them from civilians not participating in the spontaneous resistance.

Thus, Article 4, which is considered a reflection of the customary international law of war, establishes an implied *quid pro quo*—obtaining the benefit of PW status once in the hands of an opponent is contingent on ensuring your opponent could distinguish you from non-combatants before capture. The undeniable consequence of facilitating your opponent's ability to identify you as a lawful target is the price paid for gaining the benefit of the law of war upon capture.

The significance for the United States of ensuring an opponent's ability to distinguish between lawful and unlawful targets is also reflected in an issue related to PW status. The GP I

Article 44(3) dilution of the requirement that those entitled to PW status distinguish themselves before capture was a major factor in President Reagan's decision not to submit GP I to the Senate for advice and consent. According to Judge Abraham D. Sofaer, who was serving as the Legal Advisor to the Department of State:

Our extensive interagency review of Protocol I has, however, led us to conclude that the Protocol suffers from fundamental shortcomings that cannot be remedied through reservations or understanding

Equally troubling [after discussing the politicization of applicability of the law of war] is the easily inferred political and philosophical intent of Protocol I, which aims to encourage and give legal sanction not only to "national liberation" movements in general, but in particular the inhumane tactics of many of them. Article 44(3) grants combatant status to armed irregulars, *even in cases where they do not distinguish themselves from noncombatants, with the result that there will be increased risk to the civilian population within which such irregulars often attempt to hide*

A fundamental premise of the Geneva Conventions has been that to earn the right to protection as military fighters, soldiers must distinguish themselves from civilians by wearing uniforms and carrying weapons openly The law thus attempts to encourage fighters to avoid placing civilians in unconscionable jeopardy

These changes [the modification of who qualifies for PW status contained in Article 44(3)] undermine the notion that the Protocol has secured an advantage for humanitarian law by granting terrorist groups protection as combatants.²⁸

24. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2-3, T.I.A.S. No. 3364 [hereinafter GPW], reprinted in U.S. DEP'T OF ARMY, PAM. 27-1, TREATIES GOVERNING LAND WARFARE (Dec. 1956).

25. There are some minor exceptions to this rule. For example, Article 4(A)(4) grants PW status to civilians accompanying the force. However, this seems to be a recognition that should such individuals fall into the hands of an enemy, the detaining power is authorized to refuse to allow them to go back to the force they were supporting. It does not seem relevant to the distinction issue, because they ostensibly would not be taking actions that would be tantamount to "direct part in hostilities," and therefore an opponent would not incur a risk by assuming they were ordinary civilians until the time they were captured.

26. GPW, *supra* note 24, art. 4.

27. The act of a local population of a non-occupied territory spontaneously taking up arms to resist an armed invasion without having time or opportunity to organize into regular units. *See id.* art. 4 (A)(6).

28. Symposium, *Humanitarian Law Conference*, 2 AM. U.J. INT'L. L. & POL'Y 415, 463-66 (1987) (The Position of the United States on Current Law of War Agreements: Remarks of Judge Abraham D. Sofaer, Legal Advisor, United States Department of State, January 22, 1987) (emphasis added).

This quote is clear evidence of the premium the United States places on both sides of a conflict, enhancing the prospects of distinction between lawful and unlawful targets.

At the operational level, this “opponent distinction” obligation is often the most troubling aspect of enemy law of war compliance or lack thereof. The expanded “battle-space” of contemporary military operations, and the ever improving capability of projecting lethality deep into enemy territory only serve to exacerbate this problem. This is particularly true when U.S. forces confront an enemy who perceives that the United States is determined to adhere to the law of war and minimize incidental civilian injury as a means of negating our technical and tactical superiority, resulting in intentional co-mingling of military assets with civilian population centers.²⁹

Although it is likely that enemy forces will, as they often have in the past, continue to disregard this obligation, from the judge advocate’s perspective, it remains a critical aspect of distinction. The most obvious reason for this assertion is that U.S. forces do not operate in “sterile” environments. Recent history demonstrates that during both military operations other than war and combat operations, U.S. forces often find themselves in the midst of large host nation population concentrations. In such situations, commanders must remain cognizant of the obligation derived from Article 58. This requires that they avoid, whenever possible, establishing positions near civilian popula-

tions. It also requires that commanders consider methods for evacuating civilians from areas of likely conflict,³⁰ and methods of reducing risk to surrounding populations (such as warnings, assistance to civil defense efforts, and possibly even coordinating with ICRC representatives for the establishment of “neutralized zones”³¹).

The second critical, albeit less obvious, reason why judge advocates must be familiar with this aspect of the principle of distinction is to assist commanders in articulating which party is culpable for incidental injury caused by U.S. military operations. General Zinni’s comment validates this imperative.

United States forces must expect to be the object of intense media and non-governmental organization scrutiny during current and future combat operations.³² This scrutiny will be most intense in response to inflicting incidental injuries to civilians and their property during the course of operations. When the culpability for such injuries properly belongs with the enemy for failure to take adequate measures to distinguish his own forces and facilities from local civilian populations, judge advocates must assist commanders in expressing the nature of the enemy violation. This obviously requires a thorough knowledge of the principle of distinction, and in particular those aspects of the principle binding on a defending force. Major Corn.

29. See Michael Shmitt, *Bellum Americanum: The U.S. View of Twenty-First-Century War and Its Possible Implications for the Law of Armed Conflict*, in 70 INT’L LAW STUDIES: U.S. NAVAL WAR COLLEGE 389 (1998) (discussing the probability of enemy resort to “human shield” tactics in future wars as a method of compensating for overwhelming U.S. military superiority).

30. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 17, T.I.A.S. No. 3364, reprinted in U.S. DEP’T OF ARMY, PAM. 27-1, TREATIES GOVERNING LAND WARFARE (Dec. 1956) (providing procedures for the evacuation of civilians from the vicinity of combat operations).

31. *Id.* art. 15 (providing procedures for establishing neutralized zones for the protection of civilian populations in the vicinity of combat operations).

32. See Shmitt, *supra* note 29, at 389.