

Logistics Civil Augmentation Program (LOGCAP) Legal Reviews

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Introduction

You are assigned as a contract/fiscal law attorney in Afghanistan and you are handed a file to review marked “LOGCAP.” You are told that this is merely a project validation, and not a final contract—no prices have yet been finalized. What information is necessary for you to complete a review of this file? This article will help you understand the LOGCAP validation process and the role of the legal advisor in that process.

LOGCAP validation results in U.S. military commanders committing funds for LOGCAP requirements. Commanders are entrusted with funds to pay for LOGCAP projects and have the statutory and regulatory duty to “[l]imit the obligation and expenditure of funds provided to the amount currently available at the time of the obligation or expenditure, enforce those limitations, and ensure that all personnel involved in administrative control and use of available funds are knowledgeable of such limitations.”¹ Commanders must also “[r]igorously enforce compliance with all the provisions of the Antideficiency Act (ADA) and other specific laws that limit the obligation and expenditure of funds.”² Commanders look to their judge advocates for independent legal advice, including on the legality of funding LOGCAP projects.³

LOGCAP uses rapid contracting authorities to undertake projects within fifteen days from the approval of the requirement by the task force commander.⁴ The speed of the process is “underpinned by the assumption that, for critical and dynamic wartime logistics requirements, there is not sufficient time to wait for a full proposal that can be analyzed and negotiated prior to the commencement of work.”⁵ Importantly, “rapid contracting authorities” allow for large LOGCAP projects to be started quickly, but proposals for such projects must still contain significant

information before commanders and their staffs can validate them.

As will be explained in this paper, commanders and their staffs need answers to a series of questions and unredacted, detailed price estimates in order to validate LOGCAP projects. This information is necessary to ensure that LOGCAP projects conform to traditional fiscal law standards of purpose, time, and amount.⁶ Rapid contracting authorities do not allow government officials to bypass congressional fiscal limitations on contracting. According to the Department of Defense (DoD) Office of the General Counsel, “contracts for obtaining logistics and engineering services and supplies under LOGCAP are not subject to special treatment under the law: they must be formed, funded, and executed in accordance with the laws and regulations governing government contracts generally.”⁷

The Afghanistan LOGCAP Process

In 1985, the U.S. Army established LOGCAP as a means to “preplan for the use of civilian contractors to perform selected services in wartime to augment Army forces.”⁸ LOGCAP contracts are intended to augment combat support and combat service support to military forces.⁹ They are not, however, intended to provide permanent support: “LOGCAP is designed for initial force deployment and employment support, it is not intended to be utilized for long-term sustainment support. It is Headquarters, Department of the Army (HQDA) policy that all of the LOGCAP task orders [be] designed to be readily converted to competitive theater support contracts.”¹⁰

Multiple parties are involved in executing LOGCAP. The Army has a deployed team consisting of a LOGCAP deputy program manager, a planning team, and a LOGCAP Support Unit, to assist commanders by providing a single

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¹ U.S. DEP’T OF DEF., REG. 7000.14-R, vol. 14, ch. 1, para. 010205B (Jan. 2009) [hereinafter DODFMR].

² *Id.*

³ See U.S. FORCES–AFGHANISTAN, PUB. 1-06, MONEY AS A WEAPON SYSTEM AFGHANISTAN (MAAWS–A) 123 (Apr. 2011) [hereinafter MAAWS–A] (“A legal review is required for all LOGCAP requirements \$10,000 and greater. At a minimum the legal advisor for the requesting unit will conduct a legal review so that he can identify any issues prior to review by an acquisition review board.”).

⁴ See *id.* at 120, 122, 124, 127 (describing the time goals and approval process).

⁵ *Id.* at 121.

⁶ *Id.*

⁷ Memorandum from Douglas P. Larsen & E. Scott Castle, Deputy Gen. Counsel, U.S. Dept. of Def., for Office of the Legal Counsel to the Chairman, Joint Chiefs of Staff, subject: Logistics Civil Augmentation Program (LOGCAP) Funding 1 (Mar. 7, 2006) [hereinafter DoD General Counsel Memorandum], available at [http://ogc.hqda.pentagon.mil/EandF/Fiscal_Documentation/LOGCAP%20Contract%20Funding%20\(Final\).pdf](http://ogc.hqda.pentagon.mil/EandF/Fiscal_Documentation/LOGCAP%20Contract%20Funding%20(Final).pdf).

⁸ U.S. DEP’T OF THE ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP) para. 1-1 (16 Dec. 1985).

⁹ VALERIE BAILEY GRASSO, CONG. RESEARCH SERV., RL33834, DEFENSE LOGISTICAL SUPPORT CONTRACTS IN IRAQ AND AFGHANISTAN: ISSUES FOR CONGRESS 6 (2010), available at <http://www.fas.org/sgp/crs/natsec/RL33834.pdf>.

¹⁰ JOINT CHIEFS OF STAFF, JOINT PUB. 4-10, OPERATIONAL CONTRACT SUPPORT, at B-4 (17 Oct. 2008).

focal point for centrally managing LOGCAP execution.¹¹ The Defense Contract Management Agency (DCMA) provides an Administrative Contracting Officer (ACO) to administer the task orders in accordance with the base contract and guidance from the LOGCAP deputy program manager.¹² The DCMA also provides quality assurance representatives and property administrators as needed. Units are also required to provide Contracting Officer Representatives when LOGCAP support is utilized. Furthermore, the LOGCAP process uses SERCO, a support contractor, to provide document control, cost analysis, and administrative functions.¹³

LOGCAP IV, the current LOGCAP contract in Afghanistan, is a cost-plus-award-fee contract with two competitively awarded task orders that cover geographic sections of the country.¹⁴ Contractors provide supplies, services and construction when the DCMA ACO in theater directs commencement of work using undefinitized change orders.¹⁵ The ACO places each order after receiving a Not-to-Exceed (NTE) ceiling price estimate from the contractor, validation of the requirement, and associated funding.¹⁶

The NTE estimate is also known as a Project Planning Estimate (PPE). The PPE is created by the contractor upon receiving a project planning request (PPR) from a DCMA Logistics Support Officer (LSO).¹⁷ The PPR includes a letter of justification (LOJ) signed by the O-6 task force commander.¹⁸ The PPE is not a formal proposal, but is an estimate containing enough information to allow for a technical evaluation to ensure that the Government and the contractor agree on the scope of the effort.¹⁹ Although

commanders must obligate funds to cover full PPE amounts once undefinitized task orders are approved, PPEs do not represent definitive fair and reasonable prices, nor are the amounts contained therein what the Government will ultimately pay.²⁰ Normally each PPE has three components: (1) the detailed PPE, which is not provided to the supported unit per LOGCAP and DCMA policy; (2) the summary PPE, which is provided to the supported unit; and (3) the Project Schedule, which is also provided to the supported unit in its entirety.²¹ Although some contracting personnel in Afghanistan have said that the PPEs “are not worth the paper they are printed on” or that the PPEs are like “darts thrown at a wall,” contracting personnel at Rock Island indicate that the PPEs regularly reflect a value very close to the final price.²² The PPE also sets a not-to-exceed ceiling price.

Following standard operating procedures, LOGCAP management and DCMA withheld the detailed PPEs from Regional Command (RC) and USFOR-A-level reviewers during the validation process.²³ The problem is that the summary PPEs do not give sufficient details for validation. The validation process requires analysis of the proposed construction and acquisition to determine if projects exceed congressional funding thresholds. According to the MAAWS-A, “[a] legal review is required for all LOGCAP requirements \$10,000 and greater. At a minimum, the legal advisor for the requesting unit will conduct a legal review [to] identify any issues prior to review by an acquisition review board.”²⁴ This legal review is required to ensure compliance with fiscal law requirements: the purpose, time, and amount of funds required to be committed.²⁵

¹¹ *Id.* at B-5.

¹² *Id.* The Defense Contract Management Agency (DCMA) is the combat support agency responsible for ensuring major Department of Defense (DOD) acquisition programs (systems, supplies, and services) are delivered on time, within projected cost or price, and meet performance requirements. *Id.* at D-1. When authorized, DCMA’s major role and responsibilities in contingency operations is to provide contingency contract administration services to LOGCAP and Air Force Civil Augmentation Program (AFCAP) external support contracts, for selected weapons systems support contracts with place of performance in the operational area, and theater support contracts.

¹³ DEF. CONTRACT MGMT. AGENCY, LOGCAP IV AFGHANISTAN GUIDE, vers. 1.0, at 4 (30 Oct. 2009) [hereinafter LOGCAP IV AFGHANISTAN GUIDE].

¹⁴ The LOGCAP IV Afghanistan task orders are split into northern and southern areas. MAAWS-A, *supra* note 3, at 118.

¹⁵ Undefinitized change orders are, by definition, orders placed so that performance may begin before the final price is agreed upon. *See* U.S. DEP’T OF DEF., DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT para. 217.7401(d) (Oct. 2009). They are also known as undefinitized contract actions, undefinitized task orders, or unpriced change orders. *See* GRASSO, *supra* note 9, at 25 & n.100; MAAWS-A, *supra* note 3, at 118.

¹⁶ MAAWS-A, *supra* note 3, at 118.

¹⁷ LOGCAP IV AFGHANISTAN GUIDE, *supra* note 13, at 14.

¹⁸ MAAWS-A, *supra* note 3, at 124.

¹⁹ LOGCAP IV AFGHANISTAN GUIDE, *supra* note 13, at 27.

²⁰ MAAWS-A, *supra* note 3, at 119.

²¹ LOGCAP IV AFGHANISTAN GUIDE, *supra* note 13, at 27.

²² A Congressional Research Service report described undefinitized change orders, and specifically referred to Kellogg, Brown and Root’s estimates in another LOGCAP contract:

[R]ecent DCAA audits have found that these undefinitized task orders have given KBR a significant cost advantage. Auditors have found that DOD contracting officials were more willing to rely on KBR’s costs estimates, estimates later found to be greatly inflated. According to DCAA auditors, DOD contracting officials rarely challenged these cost estimates. The estimates became the baseline from which KBR established their costs upon which to bill the government, which later increased their overall profit.

GRASSO, *supra* note 9, at 25.

²³ LOGCAP IV AFGHANISTAN GUIDE, *supra* note 13, at 27.

²⁴ MAAWS-A, *supra* note 3, at 123.

²⁵ *Id.* at 120.

Fiscal Law Reviews of Construction

For a construction project, a fiscal law attorney must first determine the scope of the project. A “military construction project” includes all work necessary to produce a complete and usable facility, or a complete and usable improvement to an existing facility.²⁶ In other words, all costs required to complete the facility must be counted toward the legal funding threshold costs—these are referred to as the “funded costs” of a project. Splitting a single project into separate ones to reduce costs below an approved threshold is prohibited, even if each separate project is complete and usable.²⁷ Construction projects may be treated separately so long as they do not result in mutually dependent facilities. On the one hand, facilities with a common support purpose, but which are not mutually dependent, may be funded as separate projects. For example, billeting for soldiers is not mutually dependent on recreation facilities. On the other hand, a new airfield includes runways, taxiways, ramp space, and lighting. These projects, even if built by different companies, are mutually dependent to accomplish the intent of the construction project: a complete and usable airfield. They must be funded as one project.²⁸

Thus, if the command wants to build twelve trailers to house personnel for a test and training range, these must be funded as one project. Providing housing for the range is a single requirement, and the construction of each trailer is mutually dependent on the others to accomplish that requirement.²⁹ For another example, consider the construction of related structures on an installation. The facilities include a water well, a water distribution plant, an electrical power plant, an electrical distribution facility and an office building. The well and water distribution facility are mutually dependent in supporting the function for which they are constructed, i.e., providing water for the installation. They must be funded as part of one project. The power plant and electrical distribution facility are mutually dependent in supporting the function for which they are constructed, i.e., providing electric power for the installation. They, too, must be funded as part of one project. None of these facilities depends on the office building. Water and electricity may be needed in the building, but the function of the building is not to provide water or electricity for the installation. The dependence is not mutual. The office building may be funded as a separate project.

²⁶ 10 U.S.C. § 2801(b) (2006).

²⁷ U.S. DEP’T OF ARMY, REG. 420-1, ARMY FACILITIES MANAGEMENT para. 2-15a(2) (Feb. 12, 2008)

²⁸ See U.S. DEP’T OF ARMY, REG. 415-32, ENGINEER TROOP UNIT CONSTRUCTION IN CONNECTION WITH TRAINING ACTIVITIES 12 (Apr. 15 1998) (definitions of “interrelated” and “interdependent” facilities).

²⁹ The Hon. Michael B. Donley, B-234326, 1991 WL 315260 (Comp. Gen. Dec. 24, 1991).

The second part of the fiscal law analysis of construction deals with work classification. Work classification definitions and rules apply to all work projects on real property facilities, also known as “facilities engineering work,” regardless of who performs the work or how it is funded.³⁰ The work will be either construction or repair. “Construction” includes any construction, development, conversion, or extension carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, to include all work necessary to produce a complete and usable facility or a complete and useable improvement to an existing facility (or to produce such portion of a complete and useable facility or improvement as is specifically authorized by law).³¹ “Repair” means to restore a real property facility, system, or component to such a condition that it may effectively be used for its designated purpose.³²

The distinction between construction and repair is important from a fiscal law standpoint because different funding thresholds apply. Construction projects are financed with operation and maintenance (O&M) funds as long as the project’s funded costs do not exceed \$750,000 (\$1.5 million if the project is intended solely to correct a deficiency that threatens life, health, or safety).³³ Operation & maintenance funds may also be used for repair projects costing less than \$5,000,000, but only if the repairs cost less than half as much as replacement would.³⁴ Specified construction projects over the O&M threshold are known as military construction (MILCON) and are authorized by the annual National Defense Authorization Act and funded through the National Defense Appropriations Acts.³⁵ According to the MAAWS–A, LOGCAP should not be used for construction over the O&M threshold.³⁶ The limitation on LOGCAP applies to repair projects exceeding the O&M threshold as well.

³⁰ U.S. DEP’T OF ARMY, PAM. 420-11, PROJECT DEFINITION AND WORK CLASSIFICATION para. 1-4b (18 Mar. 2010) [hereinafter DA PAM. 420-11].

³¹ 10 U.S.C. § 2811(e) (2006); DA PAM. 420-11, *supra* note 30, para. 1-6b.

³² DA PAM. 420-11, *supra* note 30, para. 1-6a.

³³ AR 420-1, *supra* note 27, para. 2-12d. Congress also provides annual funding for Unspecified Minor Military Construction (UMMC) projects. The UMMC funds may be used to carry out military construction projects with funded construction costs of \$2 million or less (up to \$3 million if the project is intended solely to correct an immediate deficiency that threatens life, health, or safety), but such projects must be approved by the service secretary with a congressional notification waiting period. MAAWS–A, *supra* note 3, at 35.

³⁴ MAAWS–A, *supra* note 3, at 32–33. Note that in Afghanistan, Regional Command commanders may only authorize repairs up to \$3 million. *Id.* at 55.

³⁵ *Id.* at 34.

³⁶ *Id.* at 124.

A critical component of work classification is distinguishing funded project costs from unfunded project costs. As described above, the O&M construction threshold is defined by the funded project costs.³⁷ Funded costs include, but are not limited to, materials, supplies, services applicable to the project, installed building equipment, civilian labor costs, as well as demolition and site preparation costs.³⁸ Unfunded costs are those that would have been incurred whether or not the project was executed. They usually have application to many undertakings.³⁹ Examples of unfunded costs include troop labor and personal property. Personal property consists of equipment of a movable nature that has been fixed in place or attached to real property, but may be severed or removed from buildings without destroying the usefulness of the facilities.⁴⁰ The movability of property, however, is not exclusively determinative of its classification because property may also be essential to the usefulness of facilities.

Fiscal Law Reviews of Major End-items

Tactical and support vehicles, major communication and electronic equipment, centrally managed items, or equipment/systems costing \$250K or more must be paid for with “Other Procurement, Army” (OPA) funds.⁴¹ The OPA threshold is applied to the cost of a complete system rather than to individual items that, when aggregated, become a system. “A system is comprised of a number of components that are part of and function within the context of a whole to satisfy a documented requirement. In this case, system unit cost applies to the aggregate cost of all components being acquired as a new system.”⁴² A fiscal law review needs to examine the costs of items and systems of items to ensure that OPA funds are not required for purchases that would otherwise be made with O&M.

³⁷ See DA PAM. 420-11, *supra* note 30, para. 1-4b.

³⁸ DoDFMR, *supra* note 1, vol. 3, ch. 17, para. 170203; AR 415-32, *supra* note 28, para. 2-5a; AR 420-1, *supra* note 30, para. 2-17c. Installed building equipment includes items of real property affixed to or built into a facility that are an integral part of the facility. *Id.* para. 4-58.

³⁹ DA PAM. 420-11, *supra* note 30, para. 2-9b.

⁴⁰ Examples include laundry and photographic equipment. *Id.* para. 4-59. Equipment that is movable and not affixed as an integral part of the facility (such as office machines and wall clocks) is generally accounted for as personal property rather than real property. *Id.* para. 4-60.

⁴¹ MAAWS–A, *supra* note 3, at 31. The primary source for the OPA threshold is the annual appropriations act. For example, the Department of Defense and Full-Year Continuing Appropriations Act, 2011, Public Law 112-10 § 8031 states, “During the current fiscal year, appropriations which are available to the Department of Defense for operation and maintenance may be used to purchase items having an investment item unit cost of not more than \$250,000.” The Secretary of Defense may raise the “Other Procurement, Army” (OPA) threshold to \$500,000 in overseas contingency operations. Department of Defense and Full-Year Continuing Operations Act, 2011, Pub. L. No. 112-10, § 9010, 125 Stat. 38, 101 (2011).

⁴² DoDFMR, *supra* note 1, vol. 2A, ch. 1, para. 010201D.1.f.

If the contractor purchases equipment or constructs a facility *for itself* to fulfill a proper LOGCAP services order, the cost of that purchase will not be subject to the government’s monetary limits.⁴³ For example, if LOGCAP is used to provide electrical power, reimbursed based on kilowatts provided rather than equipment purchased, and the government does not take title to the power generation or distribution equipment—OPA and construction thresholds do not apply. When reimbursement is based on the cost of equipment purchased or constructed, or title to the property vests in the government, the monetary thresholds apply. According to the MAAWS–A, LOGCAP should not be used to procure investment items over the OPA threshold.⁴⁴

The Challenge of LOGCAP Fiscal Law Reviews Without the Complete Detailed PPE

Detailed PPE are not critical for service contracts as long as title to property does not vest in the government.

Whether a particular LOGCAP [change] order in fact constitutes an order for services will depend upon the intent of the government, as evidenced primarily by the [change] order’s terms in the context of the contract under which it is issued, including the manner in which the contract allocates business risks between the government and the contractor.⁴⁵

A primary consideration for whether funding thresholds apply to service contracts involves the ultimate title to end-items constructed or purchased under the contract. Title to all property purchased by a contractor, which will be reimbursed as a direct item of cost, vests in the government upon delivery.⁴⁶ “Other factors include the government’s intent, the type of performance required under the task order, and the manner in which business risks are allocated between the government and the contractor.”⁴⁷ In other words, the funding thresholds apply when “the task order requires the contractor to deliver investment end items that must be funded from procurement appropriations, or construct facilities that exceed statutory ceilings on O&M-funded construction, or the contractor is entitled to be reimbursed for the costs of such items or construction as direct items of cost.”⁴⁸

⁴³ DoD General Counsel Memorandum, *supra* note 7, at 2.

⁴⁴ MAAWS–A, *supra* note 3, at 124.

⁴⁵ DoD General Counsel Memorandum, *supra* note 7, at 2.

⁴⁶ FAR § 52.245-1(e)(3)(i) (this contract provision is required for cost reimbursement contracts by FAR § 45.107).

⁴⁷ DoD General Counsel Memorandum, *supra* note 7, at 2.

⁴⁸ *Id.*

Fiscal law reviews of LOGCAP contracts involving construction or the procurement of supplies cannot be meaningfully completed without detailed PPE information.⁴⁹ The summary PPE is too basic: it simply contains the total change order cost with subtotals for total labor, equipment, materials, and broadly defined “other direct costs” and “other indirect costs.” The document cannot be used to determine property classification or even what particular property is being used. This means that a legal reviewer cannot determine whether a given cost is funded or unfunded, and thus whether it counts toward the thresholds. The reviewer also cannot determine if items belong to a “system” in order to see whether the cost exceeds the OPA threshold.

A price-redacted detailed PPE regularly accompanies the summary PPE for construction projects. Without prices, this document has little value other than alerting reviewers to miscategorized line item expenses. The redacted, detailed PPE includes a breakdown of all materials purchased and has line items for labor and freight. It also contains a column titled “property type” in which the word “personal” appears, presumably designating items as personal property and thereby not funded costs of the project. Detailed PPE seldom categorize funded and unfunded costs correctly.⁵⁰ Inevitably, items of installed building equipment are marked as personal property, while general use items such as “hammers” are marked as funded construction costs. Particularly when projects are close to funding thresholds, reviewers need the line item prices for their fiscal law analyses. Furthermore, without the itemized cost details, no one can see if items or systems of items exceed the OPA threshold.

Concern over Delays

Some have expressed concerns that providing unredacted, detailed PPE will delay projects. The goal of the LOGCAP is to begin performance on LOGCAP projects fifteen days from the LOJ.⁵¹ In the first half of 2011, however, the average lead time to start LOGCAP performance under a new change order was 127 days from the LOJ. The RC-East Contract and Fiscal Law attorneys regularly reviewed LOJs which were four to twelve months old in validation packages. Delays were occurring at the brigade level where engineers must balance workload priorities. Brigade packages typically lacked detailed PPE

⁴⁹ Unless the LOGCAP purchase is so small that no funding threshold would be exceeded.

⁵⁰ See, e.g., Memorandum by Lieutenant Colonel Thomas E. Austin, Subject: Report of Antideficiency Act Violation, United States Forces–Afghanistan (USFOR–A), ADA Case Control Nos. 11-01 and 11-02, para. 8.2.4 to 8.2.5 (Jan. 3, 2011) (on file with author). Afghanistan Regional Command-East attorneys and engineers also have frequent, first-hand experience with disputes over work classification.

⁵¹ MAAWS–A, *supra* note 3, at 120.

with pricing information. In other words, experience illustrates that delays are already significant and are not linked to the disclosure of detailed PPE prices. Of course, the detailed pricing may result in questions from commanders. Thus, disclosing detailed PPE might further impact the implementation timeline of LOGCAP projects. Any such delays, however, could be mitigated based on mission priorities and command emphasis.

Commanders have the inherent right to see the LOGCAP estimates before funding projects. The MAAWS–A, however, states, “Under the LOGCAP contract, no one in theater has the responsibility or the authority to determine what will be considered a fair and reasonable price for new work that was not pre-negotiated in the contract.” Although theater commanders do not have the authority to determine LOGCAP’s “fair and reasonable price,” they do have the right to see the estimates for projects that they are funding. Commanders also have the authority use such information as the basis for rejecting a proposed LOGCAP project. Commanders at the brigade, division, and major command level are experienced decision makers. Redacting pricing data to protect commanders from themselves is not an appropriate mechanism to facilitate mission accomplishment. Commanders, as both the LOGCAP customer and budgetary authority, must exercise sound business judgment to ensure that each acquisition results in the best value product or service to meet the mission needs.⁵² Asking commanders to ignore the price of the product or services they acquire is asking them to neglect their duty to exercise judgment and balance priorities.

Concern over Protecting Proprietary Information

A primary argument against releasing the unredacted, detailed PPE to military units is that these documents contain “contractor labor rates and specific and parts that are proprietary.”⁵³ Protecting a government contractor’s sensitive information is an important goal. Unauthorized disclosures can erode the integrity of government operations and lead to situations in which that information is misused for private gain.⁵⁴ The LOGCAP contractors can gain an unfair competitive advantage over each other if they know a competitor’s sensitive information.⁵⁵ Detailed pricing information is undisputedly sensitive information.⁵⁶ Experience with awarding the LOGCAP IV contract

⁵² See FAR § 1.102(d) (stating as a general principle that all members of a federal Acquisition Team are to use such judgment).

⁵³ LOGCAP IV AFGHANISTAN GUIDE, *supra* note 13, at 27.

⁵⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-693, CONTRACTOR INTEGRITY: STRONGER SAFEGUARDS NEEDED FOR CONTRACTOR ACCESS TO SENSITIVE INFORMATION 1 (2010).

⁵⁵ FAR § 9.505-4(a).

⁵⁶ See *id.* § 15.404-2(a)(5) (noting that field pricing information “may include proprietary . . . information”).

demonstrates the importance of protecting proprietary information: Kellogg, Brown & Root, Inc. (KBR) was disqualified from competing for the Afghanistan task orders because the KBR program manager improperly accessed a rival's sensitive information.⁵⁷ Indeed, the unauthorized disclosure of confidential or proprietary information by a federal government employee is a crime.⁵⁸

However, protecting a contractor's proprietary information does not prohibit the government from distributing documents to authorized parties. First, the government may transfer a contractor's sensitive information to "any department or agency within the Executive Branch if the information relates to matters within the organization's jurisdiction."⁵⁹ In other words, DoD employees may transfer a contractor's proprietary information to DoD organizations that require it. As previously explained, commanders and their staffs need the detailed LOGCAP estimates to validate the requirement. Second, government employees may provide one contractor's confidential information to another contractor after imposing restrictions, such as requiring non-disclosure agreements.⁶⁰ The fact that detailed prices need to be treated as sensitive information within the military does not prohibit commanders and their staffs from accessing the information they need to carry out their assigned responsibilities.⁶¹

Concern over Cost Analysis

Some argue that theater commanders should not receive PPEs because these are only needed for "cost analysis," which should not be performed by anyone in theater.⁶² However, a fiscal law analysis of the "purpose, time, and amount" of a LOGCAP change order is not a cost analysis. In government contracting, cost analysis is a technical term:

⁵⁷ Kellogg, Brown, & Root Serv., Inc., B-400787.2, 2009 CPD ¶ 692647 (Comp. Gen. Feb. 23, 2009).

⁵⁸ 18 U.S.C. § 1905 (2006).

⁵⁹ FAR, 52.203-13(b)(3)(ii). This contract clause is required for solicitations and contracts "if the value of the contract is expected to exceed \$5,000,000 and the performance period is 120 days or more." *Id.* 3.1004(a).

⁶⁰ *Id.* § 9.505-4(b) (requiring a contractor whose duties require access to other contractors' proprietary information to agree not to disclose it). The contractor SERCO has access to LOGCAP contractors' detailed prices. LOGCAP IV AFGHANISTAN GUIDE, *supra* note 13, at 28.

⁶¹ Task force commanders in Afghanistan all have top secret security clearances. Military personnel on each commander's staff have secret clearances at a minimum. Judge advocates, as lawyers, deal with privileged information on a daily basis. These personnel understand the importance of not disclosing sensitive information.

⁶² MAAWS-A, *supra* note 3, at 119 ("Under the LOGCAP contract, no one in theater has the responsibility or the authority to determine what will be considered a fair and reasonable price for new work that was not pre-negotiated in the contract.").

Cost analysis.

(1) Cost analysis is the review and evaluation of any separate cost elements and profit or fee in an offeror's or contractor's proposal, as needed to determine a fair and reasonable price or to determine cost realism, and the application of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency.

(2) The Government may use various cost analysis techniques and procedures to ensure a fair and reasonable price, given the circumstances of the acquisition. . . .⁶³

The LOGCAP validation process does not require detailed PPEs to determine a fair and reasonable price or to determine cost realism. Instead, the validation process needs the detailed PPEs to examine how construction and supply costs have been classified and whether or not those costs exceed statutory fiscal thresholds.

Contract and Change Order Clauses Do Not Prevent Liability

The MAAWS-A attempts to prevent violations of O&M acquisition thresholds through clauses limiting liability. For example, each undefinitized task order must contain language notifying the LOGCAP contractor that the U.S. will not reimburse it for costs exceeding O&M funding thresholds without the express written authority of the ACO or procuring contracting officer.⁶⁴ However, these clauses cannot succeed in their intended purpose. The threshold limitation clauses will not prevent the government from paying for the construction or products purchased under the contract. The government cannot enter into a contract, bypass its fiscal law review, then hold the contractor liable for the fiscal law violation. The government is getting a product and must compensate the contractor for the value of the product received, even if the contract was invalid.⁶⁵ Moreover, the government cannot return conforming goods which are later found to exceed thresholds as remedy for the violation. If the government refuses to pay based on the limitations clause, the contractor can still file a claim and

⁶³ FAR § 46, 15.404-1(c).

⁶⁴ MAAWS-A, *supra* note 3, at 123.

⁶⁵ See *United States v. Amdahl*, 786 F.2d 387, 393 (Fed.Cir. 1986); see also *AT&T v. United States*, 177 F.3d 1368, 1376 (Fed. Cir. 1999) ("When a contract or a provision thereof is in violation of law but has been fully performed, the courts have variously sustained the contract, reformed it to correct the illegal term, or allowed recovery under an implied contract theory; the courts have not, however, simply declared the contract void ab initio.").

collect on a *quantum valebant* or *quantum meruit* basis.⁶⁶ If the full value exceeds statutory thresholds, the government has violated the ADA, and a funding limitation clause cannot change that fact. The government cannot argue that construction or products delivered in excess of the threshold were gifts since the government is prohibited from accepting voluntary services except as expressly authorized by law.⁶⁷

In sum, the limitation clauses required by the MAAWS–A do not and cannot limit the government’s liability. The LOGCAP change order obligates the government. If the LOGCAP construction or product exceeds the applicable threshold, then the ADA may have been violated,⁶⁸ but the government will still have to pay for the delivered LOGCAP product.

Conclusion

Without a proper fiscal law analysis of LOGCAP projects at the validation stage, commanders are unprotected from violating fiscal law thresholds. Withholding information from commanders and their staffs will result in fiscal law violations. The violations are easily preventable by providing information to the military personnel tasked with validating the projects. Contract and fiscal law attorney must thoroughly review and analyze the LOGCAP projects at the validation stage to protect their commanders.

⁶⁶ *Amdahl*, 786 F.2d at 393 & n.6. Such compensation is under an implied-in-fact contract rather than the invalid written contract. It awards the contractor only the value of the goods and services actually provided before the contract was rescinded for invalidity, without regard to lost profits or other damages. (Traditionally, the term *quantum valebant* describes such payments when the implied contract is for the sale of goods alone, whereas *quantum meruit* describes payments in contracts for goods, services, or both.). *See id.*

⁶⁷ 31 U.S.C. § 1342 (2006); DoDFMR, *supra* note 1, vol. 14, ch. 2, para. 020202I.

⁶⁸ *See* DoDFMR, *supra* note 1, vol. 14, ch. 2, para. 020202B.