

From Problem-Solver to Policeman: The Ombudsman's Role in Army Compliance Agreements

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*A country man between two lawyers is like a fish between two cats.*³

Introduction

You are sitting in your office one day, and your boss, Major Delegation, comes in and explains that another attorney in the office just developed a case of the mumps and will be out for a month. Major Delegation gives you the procurement fraud case previously assigned to your ailing colleague. Major Delegation has read the file and suggests that if the contractor can provide appropriate assurances of responsibility,⁴ the suspension and debarment official (SDO)⁵ may consider a compliance agreement.⁶ He asks you to prepare a compliance agreement, including the requirement for an ombudsman,⁷ for the SDO to evaluate.

Puzzled, you ask, "What's an ombudsman?" Major Delegation explains that "[u]sually, an ombudsman is a[n] [objective] third party who intervenes to address concerns that individuals or dependent groups have with larger and more powerful organizations or bureaucracies."⁸ Finally, Major Delegation explains that an ombudsman is the intermediary between the Army and the contractor.⁹ As he leaves your office, you wonder what the role of the ombudsman is in Army compliance agreements and how he can assist you in this case.

There is a dearth of information regarding the use of Ombudsmen in Army Compliance Agreements. The current guidance in the Federal Acquisition Regulation [FAR] regarding the use or implementation of an ombudsman is limited to the use of an independent agency ombudsman to review contractor complaints related to awards of task and delivery order contracts.¹⁰ This note provides an overview of the ombudsman's function in Army procurement fraud compliance agreements. First, this note discusses the suspension and debarment process. Second, this note explains the use of compliance agreements within the Army. Third, the note analyzes the Army's use of the ombudsmen and the many roles that they play in the enforcement of compliance agreements. Last, this note addresses factors to consider when approving an ombudsman and assists the practitioner in utilizing an ombudsman in the compliance process.

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³ USHistory.org, The Quotable Franklin, <http://www.ushistory.org/franklin/quotable/quote35.htm> (last visited Oct. 11, 2005) (providing quotes attributed to Benjamin Franklin).

⁴ The Federal Acquisition Regulation (FAR) provides that contractors are not considered responsible unless the contractor: (1) has adequate financial resources to perform; (2) is able to comply with required or proposed delivery dates and performance schedules; (3) has a satisfactory performance record; (4) has a satisfactory record of integrity and business ethics; (5) has the necessary organization, experience, controls, skills or ability to obtain such; (6) has the necessary production, construction, and technical support; and (7) is qualified and eligible to receive an award under law and regulation. See GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 9.104-1 (July 2005) [hereinafter FAR].

⁵ The current U.S. Army SDO is Mr. Robert N. Kittel. The Army also has SDOs in Europe and Korea. The Europe SDO is the Deputy Staff Judge Advocate for U.S. Army Europe and 7th Army. The SDO for Korea is the Staff Judge Advocate for U.S. Eighth Army. Mr. Kittel also serves as Special Assistant to the Judge Advocate General for Regulatory Law & Intellectual Property and Chief of the Regulatory Law & Intellectual Property Division, US Army Legal Services Agency. Additional information on Mr. Kittel can be found on the Army Fraud Fighters Website, <https://www.jagcnet.army.mil/armyfraud> (last visited Oct. 18, 2005) [hereinafter Army Fraud Fighter's Website]. Launched in March 2005, the Army's Fraud Fighter's Website contains Compliance Agreements between the Army and contractors that may be of interest to practitioners.

⁶ See Major Jennifer S. Zucker & Captain Joseph Fratarcangeli, *Administrative Compliance Agreements: An Effective Tool in the Suspension and Debarment Process*, ARMY LAW., Feb. 2005, at 19.

⁷ "om-buds-man *n.* 1. A government official, esp. in Scandinavian countries, who investigates citizens' complaints against the government or its functionaries. 2. One that investigates complaints, as from consumers, reports findings, and assists in achieving fair settlements." AMER. HERITAGE DICTIONARY (2d College ed. 1982).

⁸ Richard C. Rueben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 580 n.3 (1997).

⁹ See Mary P. Rowe, *The Corporate Ombudsman: An Overview and Analysis*, 3 NEGOTIATION J. 127 (1987).

¹⁰ FAR, *supra* note 4, 16.505(b)(5).

Suspension and Debarment in a Nutshell

Subpart 9.4 of the FAR governs the suspension, debarment, and ineligibility of government contractors.¹¹ Suspension and debarment actions are proven means of ensuring that the government “solicit[s] offers from, award[s] contracts to, and consent[s] to subcontracts with responsible contractors only.”¹² Suspension and debarment actions are not meant as punishment, but rather are “imposed only in the public interest for the Government’s protection.”¹³ Therefore, agencies are only allowed to “impose debarment or suspension to protect the Government’s interest and only for the causes” set forth in the subpart 9.4 of the FAR.¹⁴

The SDO has the responsibility to determine whether debarment is in the government’s interest.¹⁵ Specifically, the FAR provides that the “existence of a cause for debarment, however, does not necessarily require that the contractor be debarred” and suggests that the SDO consider “the seriousness of the contractor’s acts or omissions and any remedial measures or mitigating factors” before making a decision.¹⁶

The FAR lists the following factors that the SDO should consider when making these determinations:

- (1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment;
- (2) Whether the contractor brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner.
- (3) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.
- (4) Whether the contractor cooperated fully with Government agencies during the investigation and any court or administrative action.

¹¹ *Id.* at 9.4.

¹² *Id.* at 9.402(a).

¹³ *Id.* at 9.402(b); *see also* Frequency Elecs. v. United States Dep’t of the Air Force, 1998 U.S. App. LEXIS 14888 (4th Cir. 1998).

It is important to remember that Suspensions and Debarments are not to punish contractors for misconduct or contract failures. Other measures, such as criminal or civil prosecution, accomplish that purpose. Rather, Suspensions and Debarments serve to protect the integrity of the Government procurement process, our taxpayer dollar, and, importantly, ensure that our Soldiers receive safe, reliable goods and services.

Army Fraud Fighter’s Website, *supra* note 5.

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[Suspension and Debarment] Policy.

(a) Agencies shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. Debarment and suspension are discretionary actions that, taken in accordance with this subpart, are appropriate means to effectuate this policy.

(b) The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government’s protection and not for purposes of punishment. Agencies shall impose debarment or suspension to protect the Government’s interest and only for the causes and in accordance with the procedures set forth in this subpart.

(c) When more than one agency has an interest in the debarment or suspension of a contractor, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

(d) Agencies shall establish appropriate procedures to implement the policies and procedures of this subpart.

FAR, *supra* note 4, 9.402.

¹⁵ Interview with Mrs. Christine S. McCommas, Chief of the Procurement Fraud Branch, U.S. Army Contract Appeals Division, in Arlington, VA (Nov. 2, 2005) [hereinafter McCommas Interview]. Mrs. McCommas has responsibility for the Army’s Procurement Fraud Program as well as Army Administrative Compliance Agreements. *Army Regulation 27-40*, para. 8-2(c), established the Procurement Fraud Division, U.S. Army Legal Services Agency, as the single centralized organization within the Army to coordinate and monitor criminal, civil, contractual, and administrative remedies in significant cases of fraud or corruption relating to Army procurement. U.S. DEP’T OF ARMY, REG. 27-40, LITIGATION para. 8-2(c) (19 Oct. 1994) Effective July 2003, the Procurement Fraud Division was redesignated as the Procurement Fraud Branch of the U.S. Army Contract Appeals Division, U.S. Army Legal Services Agency. A change to the regulation is currently being staffed.

¹⁶ FAR, *supra* note 4, 9.406-1(a).

- (5) Whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.
- (6) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.
- (7) Whether the contractor has implemented or agreed to implement remedial measures, including any identified by the Government.
- (8) Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs.
- (9) Whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for debarment.
- (10) Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence.¹⁷

The contractor can also use these factors to convince the SDO that the contractor is responsible. Additionally, the contractor must ensure the government that it conducts business "with the highest degree of integrity and honesty."¹⁸ After reviewing these factors, the SDO may terminate or avoid a suspension or debarment action if a compliance agreement is executed.¹⁹

Administrative Compliance Agreements

Administrative compliance agreements address concerns about "contractor responsibility and enhance the overall corporate ethical conduct of Government contractors."²⁰ These agreements routinely document the existence of the mitigating factors found in FAR 9.406-1,²¹ any other representations made to the SDO, and the contractor's agreement to take corrective and prophylactic measures for a stated period of time in order to satisfy the SDO of the contractor's responsibility.²² Typically, compliance agreements last three years.²³

The precise terms of a compliance agreement are based upon the facts and circumstances of each case.²⁴ Administrative compliance agreements, however, generally include the implementation of an ethics and compliance program, additional internal controls and remedial measures, and requirements for the contractor to periodically submit reports to the agency. Administrative compliance agreements also subject the contractor to monitoring by the agency.²⁵ In each of these areas, an ombudsman can play a critical role.

¹⁷ *Id.*

¹⁸ U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 203.7000 (1 July 2002) [hereinafter DFARS].

¹⁹ The U.S. Army's SDO recently explained his philosophy regarding when it is appropriate to use administrative compliance agreements, stating:

During the past year, both I and the Chief Trial Attorney have encouraged the expanded use of administrative "Compliance Agreements" in those circumstances where their use provides appropriate assurances of responsibility coupled with continuing oversight to police the process. We refer to our Agreements with contractors as "Compliance Agreements" rather than "settlement agreements," because emphasis is placed on contractor change in behavior ("compliance") and more accurately describes the probationary period initiated for the contractor. During the past year, I believe the Army has been creative in crafting agreements for large as well as small firms. In the end, a process that cultivates responsible and ethical contractors better achieves the ultimate goal of improving the overall integrity and efficiency of the procurement process.

U.S. DEP'T OF ARMY, ARMY PROCUREMENT FRAUD ADVISORS UPDATE (Christine McCommas ed. 2004), available at [https://www.jagcnet.army.mil/JAGNETInternet/Homepages/AC/ArmyFraud.nsf/\(JAGCNetDocID\)/86DABEE8FC6CC4DA8525703F005519E9/\\$FILE/PFB%20Update%2056-Public.pdf](https://www.jagcnet.army.mil/JAGNETInternet/Homepages/AC/ArmyFraud.nsf/(JAGCNetDocID)/86DABEE8FC6CC4DA8525703F005519E9/$FILE/PFB%20Update%2056-Public.pdf).

²⁰ Army Fraud Fighters Website, *supra* note 5, Compliance Agreements, [http://www.jagcnet.army.mil/JAGCNetInternet/Homepages/AC/ArmyFraud.nsf/\(JAGCNetDocID\)/AGREEMENTS?OpenDocument](http://www.jagcnet.army.mil/JAGCNetInternet/Homepages/AC/ArmyFraud.nsf/(JAGCNetDocID)/AGREEMENTS?OpenDocument) (last visited Oct. 18, 2005).

²¹ FAR, *supra* note 4, 9.406-1(a) (instructing the debarring official to consider several factors before arriving at any debarment decision).

²² AMERICAN BAR ASSOCIATION, COMMITTEE ON DEBARMENT AND SUSPENSIONS 5 (3d ed. 2002).

²³ *Id.* Although a compliance agreement typically lasts three years, the Army may adjust the duration and requirements of the agreement, including the use of an ombudsman, if warranted by the action of the affected contractor.

²⁴ Zucker & Fratarcangeli, *supra* note 6.

²⁵ *Id.* Compliance agreements are patterned, in part, after the factors cited in DFARS 203.70.

The Army's Use of Ombudsmen in Compliance Agreements

In the corporate sense, the term “ombudsman” commonly describes “a neutral or impartial manager within a corporation, who may provide confidential and informal assistance to managers and employees in resolving work-related concerns, who may serve as a counselor, go-between, mediator, fact-finder or upward-feedback mechanism, and whose office is located outside the ordinary line management structures.”²⁶ As used by government agencies, ombudsmen have numerous and diverse uses, including assisting small businesses with regulatory and administrative concerns.²⁷ The federal government is not alone in this endeavor.²⁸ State and international governments also assist small businesses and individuals by employing ombudsmen in varying capacities.²⁹ The Army, however, primarily uses ombudsmen as the “the Army’s eyes and ears.”³⁰

They Wear How Many Hats?

Typically, Army compliance agreements define an ombudsman as “an independent attorney, certified public accountant, or other expert knowledgeable in the area of Federal Government contracting policies and procedures who will audit [the Company’s] compliance with the terms of this Agreement throughout the life of the Agreement.”³¹ Normally, a contractor facing suspension or debarment nominates an individual who is not an employee to serve as an ombudsman at the contractor’s expense.³² The nominee is then vetted by the Army for potential conflicts and qualifications and may be rejected at the Army’s discretion.³³

Serving as the “Army’s eyes and ears,”³⁴ the ombudsman wears many hats.³⁵ In addition to being “an independent”³⁶ check upon the contractor’s compliance, the ombudsman serves as the “honest broker, sheriff, and facilitator”³⁷ to the

²⁶ Rowe, *supra* note 9, at 127.

²⁷ The U.S. Small Business Administration, Office of the National Ombudsman was established to assist small businesses with unfair and excessive federal regulatory enforcement, such as repetitive audits or investigations, excessive fines, penalties, retaliation or other unfair regulatory enforcement action by a federal agency. The Office of the “National Ombudsman receives complaints and comments from small business concerns and acts as a “trouble shooter” between them and federal agencies. Small business comments are forwarded to Federal agencies for a high level review and federal agencies are requested to consider the fairness of their action.” See United States Small Business Administration, National Ombudsmen Fair Enforcement of Federal Regulations, <http://www.sba.gov/ombudsman> (last visited Oct. 11, 2005). The Environmental Protection Agency also offers small businesses an ombudsman to provide documents, guidance, and explanations of environmental regulations. See U.S. Environmental Protection Agency, Small Business Ombudsman, <http://www.epa.gov/sbo> (last visited Oct. 11, 2005). The U.S. Agency for International Development (USAID) also provides an ombudsman to assist small businesses in USAID acquisition and assistance programs. See U.S. Agency for International Development (USAID), Acquisition and Assistance Ombudsman, <http://www.usaid.gov/business/ombudsman.html> (last visited Oct. 11, 2005). In 1996, the Securities and Exchange Commission appointed a Special Ombudsman for Small Business to serve and represent the concerns of smaller companies. See U.S. Securities and Exchange Commission, Q&A: Small Business and the SEC, <http://www.sec.gov/info/smallbus/qasbsec.htm> (last visited Oct. 11, 2005).

²⁸ See FAR, *supra* note 4, 16.505(b)(5).

²⁹ Various state governments employ ombudsmen to assist small business with regulatory issues, including environmental regulations. See, e.g., Pennsylvania Department of Environmental Protection, Office of the Small Business Ombudsman, <http://www.dep.state.pa.us/dep/deputate/pollprev/Ombudsman/ombudsma.htm> (last visited Oct. 11, 2005). The State of Oregon also established an ombudsman office to assist small businesses with worker compensation issues. See Oregon, Small Business Ombudsman, <http://egov.oregon.gov/DCBS/SBO/message.shtml> (last visited Oct. 11, 2005). Internationally, governments use ombudsmen for a variety of purposes including investigating complaints from citizens who claim to have suffered injustice by certain government departments and public agencies. See, e.g., Ombudsman of British Columbia, Office of the Ombudsman, http://www.ombudsman.bc.ca/about_ombudsman/about_ombudsman.htm (last visited Oct. 25, 2005); Parliamentary and Health Service: Ombudsman, <http://www.ombudsman.org.uk/> (last visited Oct. 25, 2005); Ombudsman Manitoba, <http://www.ombudsman.mb.ca/> (last visited Oct. 25, 2005); Ombudsman South Australia, <http://www.ombudsman.sa.gov.au/> (last visited Oct. 25, 2005). Ombudsmen are also used to resolve disputes between consumers and businesses. See, e.g., Financial Ombudsman Service, <http://www.financial-ombudsman.org.uk/> (last visited Oct. 11, 2005) (Great Britain).

³⁰ Interview with Colonel (Retired) (U.S. Army) Karl M. Ellcessor, III, former Chief Trial Attorney, U.S. Army Contract Appeals Division, in Arlington, VA (Mar. 1, 2005) [hereinafter Ellcessor Interview]. Chief Trial Attorneys oversee the Procurement Fraud Branch of the U.S. Army’s Contract Appeals Division.

³¹ See, e.g., Administrative Compliance Agreement, U.S. Army and Cartwright International Van Lines, Inc., et al. Agreement (Sept. 1, 2004), at 3, available at [https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC.ArmyFraud.nsf/JAGCNetDocID/86DABEE8FC6CC4DA8525703F00519E9\\$FILE/Cartwright%20Compliance%20Agreement.pdf](https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC.ArmyFraud.nsf/JAGCNetDocID/86DABEE8FC6CC4DA8525703F00519E9$FILE/Cartwright%20Compliance%20Agreement.pdf) [hereinafter Cartwright Agreement]. See also Administrative Compliance Agreement, U.S. Army and The Pasha Group, et al. (Apr. 16, 2004), at 7-9, available at [https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/ARMYFRAUDNSG/\(JAGCNetID\)/92D403AE65BE737285256FB200637C2C/\\$FILE/Pasha%20Compliance%20Agreement.pdf](https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/ARMYFRAUDNSG/(JAGCNetID)/92D403AE65BE737285256FB200637C2C/$FILE/Pasha%20Compliance%20Agreement.pdf) [hereinafter Pasha Agreement].

³² Pasha Agreement, *supra* note 31, at 7.

³³ *Id.* In fact, pursuant the terms of most Compliance Agreements, the Army may terminate the relationship of the ombudsman under the Agreement at any time for cause.

³⁴ Ellcessor Interview, *supra* note 30.

compliance agreement. In fact, an ombudsman may not be successful in the sometimes “shuttle diplomacy” required under an agreement if he cannot also serve as “a coach, cheerleader, consultant, and facilitator.”³⁸ An ombudsman is critical to the successful enforcement of a compliance agreement³⁹, and “serves an Inspector General function as both an investigator and barometer.”⁴⁰

The need for these varied roles is often the result of diverging interests at the beginning of any compliance agreement. The underlying circumstances necessitating a compliance agreement are almost always viewed differently by the Army and the contractor. Although all contractors that enter compliance agreements must expressly accept responsibility for their wrong doing,⁴¹ in reality, some do so reluctantly.⁴² The looming threat of suspension or debarment on a contractor can have devastating consequences. In contrast, the Army’s primary interest is to protect the integrity of the procurement process; contract with responsible government contractors; and receive quality goods and services on time.⁴³ As a result, an ombudsman needs to balance the government’s interests with the underlying circumstances and the contractor’s mindset. By simply monitoring the scripted requirements and deadlines underlying most Army compliance agreements,⁴⁴ it is somewhat more difficult to effect change on the corporate ethos or mindset.⁴⁵ Being an ombudsman is “more an art than a science.”⁴⁶ An ombudsman must earn the respect and trust of the contractor’s management and employees, while reprimanding and reporting any violations.⁴⁷ Further, an ombudsman must know when to ask the Army to advise a contractor that corrective action may be warranted.⁴⁸ This situation makes for a complicated and sometimes hostile environment for an ombudsman to operate.

Ombudsmen, however, must be careful not to cross some contractual and perceived constraints. For instance, the mandate to be “independent” under most agreements precludes an ombudsman from acting as an advocate and creating the appearance of advocating on behalf of the contractor or management. In fact, this pitfall can cause the Army to question an ombudsman’s independence and objectivity.

Ombudsmen must also ensure that they do not become agents of a contractor. To this end, “ombudsmen must avoid situations that: (1) assume a direct role or managerial duty for the company; (2) make [ombudsmen] advocates; (3) go beyond a consultant type role.”⁴⁹ This can be even more difficult for ombudsman working with smaller companies where

³⁵ McCommas Interview, *supra* note 15.

³⁶ Ellcessor Interview, *supra* note 30.

³⁷ Telephone Interview with Brigadier General (Retired) (U.S. Army) Michael Kelleher, Ombudsman to the Administrative Compliance Agreement, U.S. Army and Gosselin Worldwide Moving, in Atlanta, Georgia (Mar. 17, 2005) [hereinafter Kelleher Interview].

³⁸ *Id.*

³⁹ McCommas Interview, *supra* note 15.

⁴⁰ Ellcessor Interview, *supra* note 30. Colonel Ellcessor also suggested that an ombudsman, investigate and assess the corporate and ethical climate of contractors, secure the trust of the Army, corporate management, and contractor employees.

⁴¹ *Id.*

⁴² Based on the authors’ experience, contractors, unlike the government, must consider the collateral consequences of entering into compliance agreements. A contractor’s reluctance to expressly admit wrongdoing is a result of fear that such admissions may be used in civil and criminal proceedings in federal or international courts.

⁴³ Ellcessor Interview, *supra* note 30.

⁴⁴ Zucker & Fratarcangeli, *supra* note 6, at 20-21.

⁴⁵ Kelleher Interview, *supra* note 37.

⁴⁶ *Id.*

⁴⁷ Interview with Colonel (Retired) (U.S. Army) Fred K. Green, Ombudsman for the Cartwright Agreement, in Kansas City, Missouri (Mar. 10, 2005) [hereinafter Green Interview]. Mr. Green is a retired U.S. Army Judge Advocate and licensed attorney in the State of Kansas. Mr. Green serves as the ombudsman for the Cartwright Agreement. Following thirty-one years of federal service, Mr. Green recently retired as the Director of International Summer Programs, University of Missouri-Kansas City, School of Law.

⁴⁸ Telephone Interview with Mr. James Balassone, Ombudsman for the Pasha Agreement, in Santa Clara, California (Apr. 20, 2005) [hereinafter Balassone Interview]. Mr. Balassone currently serves as an Executive in Residence at the Santa Clara University, Markkula Center for Applied Ethics, in Santa Clara, CA. The Markkula Center is focused on contributing to the development of government, business, and bio-medical ethics. The Markkula Center for Applied Ethics also consults with member organizations on the role and training of Ethics Officers, the development of values-based Codes of Conduct, and ‘campaign’ training and implementation of their ethics initiatives. Further information regarding the Markkula Center is available at <http://www.scu.edu/ethics/> (last visited Oct. 11, 2005).

⁴⁹ Green Interview, *supra* note 47.

close relationships are more easily created.⁵⁰ Additionally, most compliance agreements prohibit privileged communications between the ombudsman and the contractor.⁵¹ The bottom line is that the “employment” relationship between an ombudsman and contractor must not create or appear to be an employer-employee arrangement, but that of a professional services type of agreement.⁵²

Recipe for an Ombudsman

Generally, it is an ombudsman's duty to assist contractor management to implement the terms and conditions of a compliance agreement.⁵³ The ombudsman must also be able to field all of the contractor's questions regarding the terms and conditions of the agreement, investigate complaints concerning compliance, audit the contractor, and report to the Army and contractor management concerning the contractor's compliance with this agreement.⁵⁴ As a result, the required qualifications for an ombudsman are dictated by the underlying facts in each case. For example, an attorney with a background in antitrust is appropriate if the misconduct involves antitrust issues. Whereas, a person with an engineering background may be appropriate if the misconduct involved defective manufacturing. The “employment” of an attorney, however, is not essential and could “be an impediment” where business experience is more valuable than “legal know-how.”⁵⁵ The ombudsman should have a “sufficient range and depth of executive experience” and be able to “to understand the complexity and moving parts of an organization.”⁵⁶ Even a generalist with broad business skills may serve as an appropriate ombudsman under the right circumstances. Any potential ombudsman must be a detail oriented, responsive, communicative and approachable individual,⁵⁷ with impeccable character that is able to “operate at a high level where there is no place for an ego.”⁵⁸

An ombudsman must also have the wherewithal to ask for help before the contractor unnecessarily expends additional funds. Most Army compliance agreements give ombudsmen the authority to consult with an attorney or expert, or pursue training, at the contractor's expense, in performing any of his or her responsibilities under the agreement.⁵⁹ Ombudsmen, however, must avoid creating additional work or expense that is unnecessary and not relevant to the role of the ombudsman.⁶⁰ Although the financial arrangement between the ombudsman and the contractor is reduced to writing before beginning work, an ombudsman could virtually go unchecked and bill the contractor for excessive work under the auspices of “government requirements.”⁶¹ As a result, ombudsmen need to be financially frugal and monitor their costs. Such financial frugality protects the integrity of the Army's compliance agreement process and allows contractors to trust the use of ombudsmen.

Summary

To an outsider, the scheme under which the Army utilizes ombudsmen seems complex. An ombudsman must serve as the parties' honest broker and yet be willing to discipline contractors that violate agreements. An ombudsman must remain independent, yet serve as the Army's eyes and ears. An ombudsman must simultaneously win the trust of the contractor and its employees and report misconduct and non-compliance to the Army and law enforcement officials. An ombudsman does a majority of the Army's “leg work” in the enforcement and implementation of a compliance agreement, yet is compensated by the contractor that committed the original misconduct. The Army's use of ombudsmen not only serves an oversight purpose

⁵⁰ *Id.*

⁵¹ Cartwright Agreement, *supra* note 31, at 8.

⁵² Kelleher Interview, *supra* note 37.

⁵³ Cartwright Agreement, *supra* note 31, at 9.

⁵⁴ *Id.*

⁵⁵ Kelleher Interview, *supra* note 37.

⁵⁶ *Id.*

⁵⁷ Green Interview, *supra* note 44.

⁵⁸ Kelleher Interview, *supra* note 35.

⁵⁹ Cartwright Agreement, *supra* note 31, at 8.

⁶⁰ Green Interview, *supra* note 47.

⁶¹ *Id.*

but saves taxpayers thousands of dollars by putting the financial cost of compliance where it belongs—on the offending contractor. Using the principles in this article, government officials can successfully utilize an ombudsman in the compliance process and cultivate a better government contractor. The use of an ombudsman as problem solver and policeman is an investment in a government contractor's future that will pay dividends that extend beyond the limitations of a compliance agreement and will ensure that the government procures only with responsible contractors.