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THE GOVERNMENT CONTRACTOR®

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Information and Analysis on Legal Aspects of Procurement

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DOD IG Finds Contractor Award Fees Lacked Oversight, Justification

The Department of Defense inspector general April 1 reported that Army Corps of Engineers Transatlantic Programs Center (TAC) contracting officers and award-fee personnel did not properly manage award fees paid to contractors in Iraq and Afghanistan because of a lack of administrative policies and procedures. The IG reviewed 15 task orders worth about $116.4 million and found that award fees of nearly $20.6 million were paid without assurance that the Corps "received the benefit of exceptional performance from contractors."

TAC provides engineering, construction and contracting services to U.S. Central Command, as well as project management, technical and contracting support in Iraq and Afghanistan. In early 2004, TAC awarded indefinite-delivery, indefinite-quantity contracts for a base year and up to four option years with a total potential value of $1.5 billion for construction-related services throughout the Central Command area of responsibility. The contracts allowed TAC COs to issue firm-fixed-price or cost-reimbursement task orders.

The IG found that the Corps did not adequately (a) develop award-fee plans for evaluating contractor performance, (b) conduct oversight, or (c) document and support award-fee ratings. The IG also found that criteria for evaluating contractors' cost-control efforts did not address acquisition outcomes such as cost goals, and TAC personnel did not perform key award-fee functions, including contract oversight and evaluation.

In eight of 15 cases, TAC did not assign CO representatives or others to oversee contract performance. Further, TAC officials did not tailor contractor performance evaluation criteria to individual procure-

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ments, as required by regulations, the IG said. Instead, TAC used vague terms such as effectiveness, timeliness, completeness and reasonableness. The IG also found inadequate documentation to support award-fee determinations for all 38 reviewed evaluation periods.

An award-fee plan, used to evaluate performance and award-fee ratings, "should be unique to contract requirements so that the contractor is focused and motivated to perform well in areas deemed most important to the Government," and should "identify the organizational structure required to administer the award fee provisions," the IG noted. "Award fees can serve as a valuable tool to help control risk and encourage exceptional contractor performance," but TAC officials need to develop an effective award-fee process and establish contracting policies and procedures, the IG said.

According to the IG, the Federal Acquisition Regulation does not "provide a level of detail necessary for executing award fee contracts in practice," and Corps officials did not follow relevant Army guidance because they did not know they should.

The IG recommended that Corps officials adopt best practices from the Army Contracting Agency Award Fee Contracts Handbook or develop their own detailed guidance that complies with the FAR. The policies and procedures should address (1) developing award-fee plans to motivate and oversee contractor performance, (2) key award-fee functions for evaluating contracts, and (3) how to support award-fee ratings.

U.S. Army Corps of Engineers' Use of Award Fees on Contracts in Iraq and Afghanistan (D-2010-049) is available at *www.dodig.mil/Audit/reports/fy10/10-049.pdf*.

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ARWG Issues 2010 Legislative Recommendations

The Acquisition Reform Working Group (ARWG), a coalition of industry associations, March 31 released its 2010 legislative recommendations package for the National Defense Authorization Act for Fiscal Year 2011.

Maintaining the Industrial Base—Significant defense-industry consolidation in the 1990s "puts the country at risk of having a noncompetitive acquisition process or no capability at all in some industrial capability areas," ARWG cautioned. Under 10 USCA §§ 2501, 2505, the Department of Defense must conduct periodic assessments of the national technology and industrial base, and integrate the assessments in the defense budget.

ARWG recommended that Congress amend 10 USCA § 2501 "to clarify the importance of maintaining competitive alternative sources and technological innovation in the national technology and industrial base." Congress should also establish an assistant secretary of defense for industrial base under 10 USCA § 138, and increase resources for assessing the industrial base, ARWG said.

Commercial Products—Legislation in the last 20 years has shifted federal acquisition from Government-unique products with detailed specifications to a preference for commercial items with streamlined commercial practices. But according to ARWG, legislative and regulatory changes have eroded the Government's ability to access the commercial marketplace, especially directly. Use of Government-unique clauses "unnecessarily limits competition at the prime contract level and discourages small and innovative businesses from being prime contractors," ARWG said. For instance, additional costs to gather data to demonstrate fair and reasonable pricing "simply push many suppliers of commercial technologies out of the defense market."

ARWG recommended that Congress stop imposing new Government-unique Federal Acquisition Regulation clauses, require the Congressional Research Service to study the cost of existing Government-unique requirements and subject new Government-unique clauses to Congressional Budget Office scoring.

Fixed-Price Preference—Advanced development is inherently risky. Fixed-price contracts are "generally not suitable for high-risk business, such as the development of major weapon systems with ambitious performance requirements," ARWG said. Contracting officers should maintain the flexibility to select contract type based on requirement complexity, technology maturity and design stability.

ARWG recommended that Congress repeal § 818 of the FY 2007 Defense Authorization Act, which required DOD to modify regulations on determination of contract type for major development programs to address assessment of program risk.

Congress should require DOD to extend the restrictions on fixed-price contracting in Defense FAR Supplement 235.006(b)(ii) to all DOD contracts.

Insourcing—DOD and the Office of Management and Budget are continuing to improve the training and numbers of the acquisition workforce. See 51 GC ¶ 150; 51 GC ¶ 271. ARWG said DOD has in the last year "aggressively and often inappropriately threatened contractor employees with the imminent loss of their private sector jobs to get them to convert to government employment." Directly soliciting contractor employees should be barred if the contracting activity and the contractor have a direct business relationship, ARWG said.

ARWG recommended that Congress prohibit DOD from insourcing positions, except those performing inherently governmental functions, until agencies submit congressionally mandated acquisition workforce strategic plans. See 51 GC ¶ 24(a). Except for inherently governmental and critical work, uniform cost comparisons should be required under Directive-Type Memorandum 09-007, "Estimating and Comparing the Full Costs of Civilian and Military Manpower and Contract Support." ARWG also recommended granting contractor employees the same rights as federal employees to protest conversion of positions at the Government Accountability Office under 10 USCA § 2461.

Suspension and Debarment—ARWG said current FAR suspension and debarment notification procedures lack due process. See 23 N&CR ¶ 36. ARWG recommended revising the FAR to give contractors a pre-exclusion opportunity to respond and provide a mediation plan to avoid suspension or debarment. The agency initiating suspension or debarment should convene interested agencies, and a lead agency should coordinate actions. If the lead agency determines that suspension or debarment is necessary, but that an agency would exercise a waiver, the lead agency should offer an administrative agreement with compliance measures and an agreement that the contractor will not compete for new awards unless an agency demonstrates compelling reasons.

Other Issues—ARWG also recommended that Congress (a) repeal the three-percent tax withholding on Government payments to contractors under § 511 of the Tax Increase Prevention and Reconciliation Act, P.L. 109-222, effective Jan. 1, 2012, see 52 GC ¶ 93(e); (b) eliminate the 12-month limit on Prompt Payment Act interest; (c) establish a pilot or proof of concept for automated supply-chain management tools; (d) require DOD to hire up to 500 highly qualified experts, as defined in § 1101 of the FY 2004 Defense Authorization Act, to augment the acquisition workforce; and (e) hold hearings on cybersecurity transparency.

ARWG's recommendations are available at *www.pscouncil.org/AM/Template.cfm?Section=Home1&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=4975*.

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IG Recommends Improvements To DOE Recovery Act Data Quality Assurance

Department of Energy quality assurance officials have made significant efforts to ensure that American Recovery and Reinvestment Act funds are accurately reported by recipients, according to the DOE inspector general. However, DOE officials did not resolve all identified anomalies and sometimes incorrectly evaluated the accuracy of "funds provided" data submitted by grant recipients.

DOE received approximately $37 billion in Recovery Act funds to support science, energy and environmental initiatives. To comply with Office of Management and Budget requirements that recipients distinguish Recovery Act funds in all reporting, DOE funds recipients must report on 18 data elements. OMB guidance also requires DOE to develop a data quality assurance process. The IG audited information reported as of Sept. 30, 2009, the end of the first quarterly reporting cycle.

DOE's quality assurance process analyzes information from all DOE Recovery Act recipients and focuses on four of 18 reporting elements—award amount, invoiced amount, jobs created and retained, and project status. DOE compared these elements to information in its financial systems, and identified potential anomalies for 1,113 of 2,038 recipients reviewed for the first reporting cycle, which included 308 recipients that did not report approximately $323 million of Recovery Act funding to *FederalReporting.gov*.

The IG found that because DOE did not make necessary changes as directed by the OMB guidance, "recipients for 102 projects reported to FederalReporting.gov that 744 jobs had been created or retained even though no funds had been spent on these projects." The quality assurance process discovered that 13 recipients reported some awards twice, potentially overstating the amount of Recovery Act awards by $137 million, but the IG found that the duplicate awards were not removed.

DOE sometimes incorrectly used the amount of funding provided to the recipients to date rather than the total award amount reported by the recipients, the IG reported. For example, a grantee reported that it received approximately $308 million for a project. However, DOE's financial system showed only $50 million had been provided to date. DOE incorrectly compared the amounts and flagged a potential $258 million error. "Errors such as this resulted in site officials identifying and addressing more discrepancies than necessary, reducing the efficiency of the quality assurance process," the IG concluded.

DOE also sometimes did not detect anomalies if recipients reported no award amount. DOE said it would correct the programming error that caused the problem.

The IG also evaluated information systems at seven DOE contractors that received Recovery Act funding. The IG found that the information systems could meet the new reporting requirements and had adequate processing capacity to handle the additional transactions resulting from Recovery Act activities.

DOE focused on award amount, invoiced amount, jobs created and retained, and project status because DOE viewed these as the highest-risk areas that would reveal material omissions and significant reporting errors. The IG agreed that the elements are critical, but recommended preiodic review of other data fields. The IG said that not only would this reduce material errors, but other data "such as recipient name and congressional district could also assist the public in its efforts to determine the economic impact" of the Recovery Act. The IG also recommended that DOE ensure adequate training for officials that oversee Recovery Act recipient reporting.

Accounting and Reporting for the American Recovery and Reinvestment Act by the Department of Energy's Funding Recipients (OAS-RA-10-06) is available at *www.ig.energy.gov/OAS-RA-10-06-508.pdf*.

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Developments In Brief ...

(a) DOD Is Developing New IT Acquisition Process—The Department of Defense is on track to deliver by July a report outlining a new information technology acquisition process under § 804 of the National Defense Authorization Act for Fiscal Year 2010, P.L. 111-84, according to Tim Harp, DOD deputy assistant secretary for command, control, communications, intelligence, surveillance and reconnaissance, and IT acquisition. At an April 6 IT acquisition symposium hosted by TechAmerica, an industry coalition, Harp said DOD will focus IT acquisition on speed in delivering capabilities to warfighters. "An 80-percent solution works with IT," he said. The current system is designed for weapon system acquisition and pressures IT solutions that are 80–90 percent complete to delay deployment. "Having nothing out there is worse than having a partial solution, so we need to start thinking in terms of how we *manage* risk rather than minimize risk." IT production can begin with an 80-percent solution and make improvements later, Harp emphasized. He cited the Joint Tactical Radio System as an example. See 50 GC ¶ 314. Although engineers are concerned about a 10-second latency issue, warfighters would rather have a radio with a delay than older radios that require line-of-sight connections from mountaintops that expose them to enemy fire. Harp said the new system would focus on designing IT acquisition architecture so that "you can break it into pieces and deliver the pieces independently." Technologies should be spun out piecemeal in a continuous dialogue with warfighters. According to Harp, DOD does not need new contract vehicles or incentive structures because it can use existing ones. "If we start building things smaller, we're going to be using more [Government-wide acquisition contracts], more [indefinite-delivery, indefinite-quantity contracts], more of those kind of vehicles and other services to deliver IT."

(b) Obama Tightens Recovery Act Reporting—President Obama April 6 directed Government agencies to "further intensify their efforts to improve reporting compliance by prime recipients of [American Recovery and Reinvestment Act] funds." The Recovery Act requires recipients to submit quarterly reports on how they use the funds. The presidential memorandum requires agencies to identify recipients that must file a report and ensure their compliance by, if appropriate, (a) pursuing termination, suspension or debarment; (b) reclaiming funds; (c) implementing punitive actions; and (d) reporting noncompliance to the Office of Management and Budget. The memo also directs OMB within 30 days to update guidance on agency responsibilities for addressing noncompliance, including any strategies or agency actions to improve compliance or recover funds from noncompliant recipients. The memo will "make sure that every dollar is accounted for and every official is held accountable," Vice President Joe Biden said. Recovery Accountability and Transparency Board Chair Earl Devaney added that the memo will help the board meet its 100-percent compliance goal. The memo was published at 75 Fed. Reg. 18043 (April 8, 2010).

(c) **U.S. Files FCA Suit over KBR's LOGCAP III Billings**—The Government filed a False Claims Act suit in U.S. district court in Washington, D.C. against Kellogg, Brown & Root, alleging that KBR knowingly included impermissible costs for private armed security in billings to the Army under the Logistics Civil Augmentation Program III contract, under which KBR provides an array of services to U.S. troops in Iraq and Afghanistan, including facilities management, airfield operations, detainee camp construction and supply transportation. The Government alleged that KBR and 33 of its subcontractors used unauthorized private armed security between 2003 and 2006. KBR allegedly violated requirements to obtain Army authorization for arming subcontractors and to use private security contractors that were registered with the Iraqi Ministry of the Interior. The Government also alleged that subcontractors using PSCs "violated subcontract terms requiring travel only in military convoys." LOGCAP III is an indefinite-delivery, indefinite-quantity contract, awarded in December 2001 after a best-value competition, with one base year and nine option years. KBR has had other disputes with the Government about the LOGCAP contract. See 45 GC ¶ 468; 46 GC ¶ 74(a); 46 GC ¶ 142(b); 46 GC ¶ 318. In 2007, the Army disputed more than $19 million billed by KBR for a subcontractor's Iraq security services that were banned under the primary contract. See 49 GC ¶ 54.

(d) **Daimler Hit with Criminal Penalties for FCPA Violations**—Daimler AG agreed to pay $93.6 million in penalties to resolve a Department of Justice Foreign Corrupt Practices Act investigation into the company's sales practices. Daimler's Russian and German subsidiaries April 1 pleaded guilty to criminal informations, charging the companies with conspiring to violate and violating the antibribery provisions of the FCPA. As part of the plea agreements, the Russian firm agreed to pay a $27.3 million criminal fine and the German firm agreed to a $29.1 million fine. The Russian subsidiary admitted to improper payments to Russian federal and municipal government officials to secure contracts to sell vehicles by over-invoicing the customer and paying the excess amount back to the government officials. The German firm admitted it made corrupt payments directly to Croatian government officials and to third parties, including two U.S.-based corporate entities, with the understanding that the payments would be passed on to Croatian government officials.

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Regulations In Brief ...

FAR

(a) **Federal Acquisition Regulation—FAR Case 2009-005—Use of Project Labor Agreements for Federal Construction Projects—Final Rule**—The General Services Administration, the Department of Defense and NASA issued a final rule, effective May 13, amending the FAR to implement EO 13502, Use of Project Labor Agreements for Federal Construction Projects. See 51 GC ¶ 53. The order encourages the use of project labor agreements for large-scale federal construction projects to promote economy and efficiency in federal procurement. 75 Fed. Reg. 19168 (April 13, 2010).

DFARS

(b) **Defense FAR Supplement—DFARS Case 2004-D010—Export-Controlled Items—Final Rule**—DOD adopted as final, with changes, an interim rule amending the DFARS to address contracting requirements for complying with export control laws. Effective April 8, the rule recognizes contractor responsibilities to comply with existing departments of Commerce and State regulations and prescribes a contract clause to address those responsibilities. 75 Fed. Reg. 18030 (April 8, 2010).

(c) **DFARS—DFARS Case 2006-D053—Research and Development Contract Type Determination—Final Rule**—DOD adopted as final, without change, an interim rule requiring the milestone decision authority for a major defense acquisition program to select for a development program a contract type that is consistent with the level of program risk according to § 818 of the National Defense Authorization Act for Fiscal Year 2007. The final rule is effective April 8. 75 Fed. Reg. 18034 (April 8, 2010).

(d) **DFARS—DFARS Case 2008-D002—Acquisitions in Support of Operations in Iraq or Afghanistan—Final Rule**—DOD adopted as final, with minor changes, an interim rule amending the DFARS to implement §§ 886 and 892 of the FY 2008 National Defense Authorization Act. Section 886 gives DOD authority to limit competition if acquiring products or services for operations in Iraq or Afghanistan. Section 892 addresses competition requirements for the procurement of small arms for assistance to Iraq or Afghanistan. The final rule is effective April 8. 75 Fed. Reg. 18035 (April 8, 2010).

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Organization's EAJA Eligibility Is Not Based On Members' Aggregate Resources, COFC Holds

Dalles Irrigation Dist. v. U.S., 2010 WL 785395 (Fed. Cl. March 2, 2010)

The eligibility of a local irrigation district for a fee award under the Equal Access to Justice Act, 28 USCA § 2412, is determined by the district's net worth and number of employees, not by the aggregated net worth and employees of the farmers that receive irrigation water from the district, the U.S. Court of Federal Claims has held. Because the Government asserted a contract interpretation that was not substantially justified, the COFC awarded fees to the district based on its partial success in the litigation.

The Department of the Interior and the Dalles Irrigation District entered into a contract requiring Interior to supply the district with hydroelectric power for irrigation pumping. The COFC held that Interior breached the contract by including a lost-revenue component in the rates charged to the district. *Dalles Irrigation Dist. v. U.S.*, 82 Fed. Cl. 346 (2008). The COFC awarded the district $172,954 in damages and its costs. *Dalles Irrigation Dist. v. U.S.*, 88 Fed. Cl. 601 (2009). The district then sought $20,536 in costs and $933,909 in attorneys' fees and expenses under EAJA.

There are five prerequisites for an EAJA award: (1) the applicant is a prevailing party in an action against the Government; (2) the Government's position was not "substantially justified"; (3) no special circumstances make an award unjust; (4) the prevailing party must submit its fee application within 30 days of the final judgment and support the application with an itemized statement; and (5) at the time it initiated the underlying action, a corporation or other organization must have had no more than $7 million in net worth and 500 employees. 28 USCA § 2412(d)(1), (2). The Government agreed that the district was a prevailing party and filed a timely EAJA application, but challenged the application on the other criteria.

Substantial Justification—The Government has the burden to show that its position was substantially justified. A court does not examine the Government's stance on every issue in the case. Instead, the question is whether the Government's overall position, both before and during the litigation, was factually and legally reasonable. Even an incorrect position can be substantially justified. Substantial justification "occurs somewhere between winning the case and being 'merely undeserving of sanctions for frivolousness,' " the Court said, quoting *Pierce v. Underwood*, 487 U.S. 552 (1998).

The Court held that the Government was not substantially justified in including a lost-revenue component in the power rate it charged the district. The lost-revenue component included a "true-up mechanism" that effectively adjusted the rate more than once every five years, directly contravening contract terms providing that rate changes occur no more that once every five years, the Court held.

No rule precludes the award of EAJA fees in cases of first impression, and a court should base its determination on the "entire record of the proceedings" and not on per se rules, the Court said. Moreover, the district may receive an EAJA award even though it prevailed on only part of its claims and recovered only $172,594 of the $8 million it sought. The degree of success may, however, "affect the proportional amount of fees awardable under EAJA."

Itemized Statement—The Court dismissed the Government's challenge to the adequacy of the materials the district submitted to prove the amount of its fee award. The initial EAJA application included counsel's affidavit and invoices from counsel and an expert witness. The district's supplemental application included similar invoices and an affidavit documenting fees incurred after Sept. 13, 2009. These submissions "describe the activities performed on the District's behalf, the date on which these services were provided, the hours spent, and the rates charged to the District," the Court said, rejecting the Government's challenge.

Qualifying Party—Next, the Court rejected the Government's assertion that to determine whether the district meets the EAJA net worth requirement, the Court should consider the aggregate assets of all the farmers that receive water through the Dalles Irrigation Project, rather than just the district's assets.

The Court noted a split in the circuits on the aggregation issue. The U.S. Court of Appeals for the Sixth Circuit held that EAJA requires the aggregation of net worth and number of employees of trade association members if an association is primarily representing the interests of its members. *Nat'l. Truck Equip. Ass'n v. Nat'l. Highway Traffic Safety Admin.*, 972 F.2d 669 (6th Cir. 1992). In contrast, the Fifth, Ninth and District of Columbia circuits have held that such aggregation is generally not appropriate. See *Nat'l. Ass'n of Mfrs. v. Dep't of Labor*, 159 F.3d 597 (D.C. Cir. 1998); *Texas Food Indus. Ass'n v. U.S. Dep't of Agriculture*, 81 F.3d 578 (5th Cir. 1996); *Love v. Reilly*, 924 F.2d 1492 (9th Cir. 1991). Relying on the D.C. Circuit's reasoning in *Nat'l. Ass'n of Mfrs.,* the Court concluded that statutory language setting the $7 million in assets and 500-employee limits contains no caveat requiring the aggregation of assets and numbers of employees to determine an association's eligibility. See 28 USCA § 2412(d)(2)(B)(ii).

Addressing the Government's contention that the district was not the real party in interest, the Court noted that although the members may benefit from the contract, the district was the party to the contract with the Government. This, together with the financing of the litigation from the district's general budget, shows that the district is the real party in interest and supports the holding that aggregation is inappropriate, the Court said.

Special Circumstances—EAJA provides that a prevailing party may recover fees and expenses from the U.S. "unless the court finds that the position of the [U.S.] was substantially justified or that special circumstances make an award unjust." 28 USCA § 2412(d)(1)(A). Repeating the theme of its argument on real party in interest, the Government argued that the Court should not award EAJA fees to the district because its members would benefit from the award, and they would likely not qualify for an EAJA award if their net worth and number of employees were aggregated.

The Court summarily rejected this argument. The district is the real party in interest, the benefit to the district's members is attenuated and the membership's eligibility for an award is irrelevant, the Court said.

Award Amount—The Court reduced the district's $773,536 attorneys' fees request on several grounds. The prevailing party's degree of success is the most important factor in setting a fee award. A party need not prevail on every issue to recover a full fee, and a court's rejection of or failure to reach some theories is not a sufficient ground for reducing a fee, the Court said. But if a party only partially succeeds, "the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount," the Court said, quoting *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The ratio of damages sought to damages awarded, however, is not a good measure for calculating an EAJA award, the Court said. Instead, a court should focus on the significance of the relief obtained in relation to the hours reasonably expended on the litigation.

EAJA does not require a court to assign every billed hour to an issue. The district's claims arise from a common core of facts related to the correct contractual power rate. Therefore, the proper standard is whether the degree of success makes an award of the total hours unreasonable.

The district obtained a $172,954 judgment and prevailed on three issues: justiciability, statute of limitations and the impropriety of including the lost-revenue component in the rate charged to the district. The district did not prevail on the other disputed components of the power rate: fish and wildlife costs, operation and maintenance costs, and replacement or depreciation costs.

In light of the outcome on the cost items, the district was only partially successful. The Court therefore awarded fees based on three-sevenths of the hours reasonably expended, reflecting the proportion of the issues on which the district prevailed compared to the number of major issues in the case. The Court applied the same ratio to award part of the district's other costs.

The Court rejected the district's argument for a fee award based on rates above the statutory $125 per-hour cap on fees. Novel and difficult issues and counsel's ability do not entitle a party to an enhanced fee award. Congress intended the enhanced-fee exception to the cap to apply to attorneys having distinctive knowledge or specialized skill, such as patent law or foreign language expertise, the Court said. This case did not involve an identifiable practice specialty that would justify an enhanced fee award.

The Court granted the district's request for a cost-of-living adjustment. Such an adjustment is within the Court's discretion and appropriate in this case in light of its "long and complicated history."

The Court deducted some amounts for attorneys' fees that are not chargeable under EAJA. These include fees for nonlitigation work such as communicating with the press. In addition, the Court excluded fees for work performed before the documented start of work on the complaint. EAJA does not permit recovery of fees incurred prior to litigation in a court in the absence of a "civil action" or "adversary adjudication" within the meaning of 28 USCA § 2412(d)(3). Finally, the Court deducted attorneys' fees related to preparing an affidavit in support of an enhanced fee.

The district also received an award of paralegal fees. The Court used the three-sevenths ratio and a cost-of-living adjustment to calculate the fees. Although an affidavit from the district's counsel was admissible on the prevailing paralegal rate in the community, the affidavit received less weight because counsel did not provide the details of his calculation of the median and mean rates, the Court said. The Court excluded fees for filing pleadings electronically because that work is clerical.

An EAJA award can include expert witness fees, although the hourly rate may not exceed the rate for the Government's highest-paid expert. The Court excluded the expert's travel expenses that were unrelated to attending depositions or trial.

The Court also awarded attorney travel expenses and witness and mileage fees for private witnesses. Finally, the Court awarded costs under 28 USCA § 1920, including transcript costs and filing fees.

✦ **Practitioner's Comment**—Potential EAJA applicants should note the *Dalles* decision for several reasons.

First, it further resolves the question of where courts will draw the line in determining what persons or entities should be considered part of the "prevailing party" in assessing its size. A prevailing party may not recover fees and expenses if it had more than $7 million in net worth or 500 employees when it initiated its action. This inquiry is usually straightforward, but can be complicated in cases like *Dalles*, in which a small group or association has litigated in the interest of a larger constituency. Although the Sixth Circuit has held that the constituents with an interest in the litigation should be included in tabulating the size of the prevailing group litigating on its behalf, *Dalles* takes the opposite view, siding with the Fifth, Ninth and D.C. circuits in a somewhat lopsided circuit split. See *Nat'l Truck Equip. Ass'n v. Nat'l Highway Traffic Safety Admin.*; *Texas Food Indus. Ass'n v. U.S. Dep't of Agriculture*; *Love v. Reilly*; *Nat'l Ass'n of Mfrs. v. Dep't of Labor*. The majority view endorsed by *Dalles* was well explained in the last circuit decision on the matter, *Nat'l Ass'n of Mfrs.*, in which the D.C. Circuit concluded that there was "no indication that Congress intended to exclude small associations representing large members from the benefits conferred by the EAJA." Id. at 602. The *Dalles* decision is more evidence that courts are likely to follow this logic and allow recovery by size-eligible associations with large constituencies, at least if association members themselves are not liable for attorneys' fees.

Second, the decision serves notice that the Government's position is not necessarily "substantially justified" simply because the dispute involves an issue of first impression. Although it is generally true that the Government is substantially justified in pursuing an appeal if a court or board has never considered the legal question in dispute, see, e.g., *Ace Servs. Inc.*, GSBCA 12067(c) 11331, 93-2 BCA ¶ 25727 at 128,012, there is no per se rule to this effect. In *Dalles*, the Government asserted that its position should be deemed substantially justified on this ground, but the Court found this justification "unavailing" because the "novelty of a legal issue does not by itself satisfy the government's burden of proof under EAJA."

Third, the decision is a useful study in how courts may reduce a recovery under EAJA if a party only partially succeeds. Courts have often awarded only part of an EAJA applicant's fees and costs if the party is deemed to have achieved only partial success. In *Dalles*, the Court concluded that the irrigation district was successful on only three of its seven claims, and thus should only recover three-sevenths of its fees and costs. Although the U.S. Court of Appeals for the Federal Circuit recently frowned on using a "mechanical mathematical analysis" to award fees in exact proportion to a party's partial success under EAJA, subsequent decisions in the COFC have continued to do just that. See *Hubbard v. U.S.*, 480 F.3d 1327, 1334 (Fed. Cir. 2007); *Precision Pine & Timber, Inc. v. U.S.*, 83 Fed. Cl. 544 (2008) (awarding a contractor 58 percent of recoverable fees because it obtained a 58-percent reduction of a Government counterclaim). In *Dalles*, the Court took the mathematical approach quite far, applying the three-sevenths recovery standard not only to attorneys' fees, but across the board, allowing the district to recover only that fraction of its legal research expenses, paralegal fees and expert witness fees.

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State Or Local Government Administrative Reports Can Bar Qui Tam Action, Supreme Court Holds

Graham Co. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson, 2010 WL 1189557 (U.S. March 30, 2010)

Unless the U.S. or an "original source" brings the action, the False Claims Act public disclosure bar precludes an FCA action based on information contained in a publicly disclosed state or local government administrative report, the U.S. Supreme Court has held.

In 1995, the Department of Agriculture entered into contracts with two North Carolina counties authorizing them to clean up flood-damaged areas. The Government agreed to pay for 75 percent of the work. Karen Wilson was an employee of the Graham County Soil and Conservation District, which was responsible for part of the cleanup work. She suspected fraud and notified county, state and federal officials.

As part of its investigation, Graham County hired an accounting firm that performed an audit and issued a report identifying potential irregularities in the county's administration of the contracts. The North Carolina Department of Environment, Health, and Natural Resources (DEHNR) issued a report identifying similar issues, and the USDA inspector general issued a report containing additional findings.

In 2001, Wilson filed an action alleging that two county soil and water districts and local and federal officials violated the FCA by submitting false claims for payment under the 1995 contracts. The district court dismissed the action because Wilson failed to show that her action was not based on allegations publicly disclosed in the county audit report and the DEHNR report. It held that those reports are administrative reports, audits or investigations within the meaning of the FCA public disclosure bar, 31 USCA § 3730(e)(4)(A).The court of appeals reversed, holding that only federal administrative reports, audits or investigations qualify as public disclosures.

Analysis of the Text—The FCA public disclosure bar deprives courts of jurisdiction over qui tam suits if the relevant information has already entered the public domain through certain channels. That provision states,

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions [1] in a criminal, civil, or administrative hearing, [2] in a congressional, administrative, or Government Accounting Office [sic] report, hearing, audit, or investigation, or [3] from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

28 USCA § 3730(e)(4)(A) (bracketed numbers added by Court). Resolution of the appeal turned on whether "administrative" in the second category includes only federal sources, or also includes disclosures in state and local sources, such as the county audit report and the DEHNR report.

The term "administrative" may include private and governmental bodies. In the context of the FCA disclosure bar, the term "most naturally" describes governmental bodies. The word "federal" does not modify "administrative" and, thus, the express statutory language does not limit the public disclosure bar to federal administrative reports or investigations, the Court said.

The Court rejected the court of appeals' holding that "administrative" includes only a federal administrative report, hearing, audit or investigation. The Court said that the doctrine of noscitur a sociis—a word may be known by the company it keeps—did not apply in this case.

A list of three things, each quite different from the others, is "too short to be particularly illuminating," the Court said. The substantive connection between the terms "congressional," "administrative" and "Government Accounting Office" is not "so tight or self-evident as to demand that [the Court] rob any one of them of 'its independent and ordinary significance.' " *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). Moreover, the adjectives in category 2 are "too few and too disparate" to qualify as a "string of statutory terms" or as "items in a list" as those phrases have been used in cases applying the doctrine, the Court said.

The term "administrative" should be interpreted in the context of the entire public disclosure bar provision, not just in the context of category 2. Considering the entire provision, the case for limiting "administrative" in category 2 to federal sources "becomes significantly weaker." There is no textual basis for interpreting "news media" in category 3 or "criminal, civil, or administrative hearing" in category 1 as limited to federal sources, the Court said.

The Court noted that the court of appeals' acknowledgement that "administrative" in category 1 encompasses state and local sources makes it hard to interpret the same term differently in category 2. One cannot distinguish the two categories based on the adjudicative functions of the category 1 items versus the legislative functions of the category 2 items because the two functions are equally likely to notify the Government of a potential fraud, the Court said. The Court quickly rejected the relator's and the Government's argument that the federal focus of the FCA requires that "administrative" in category 2 be interpreted as "federal administrative."

Finally, the Court rejected the argument that it would be anomalous for state and local administrative reports to count as public disclosures if state legislative reports do not. The Court said that when Congress enacted the public disclosure bar, the Government rarely gave state legislatures a meaningful role in overseeing federally funded programs.

Legislative History—The public disclosure bar provision at issue was enacted in 1986 to encourage qui tam actions by eliminating a provision known as the Government knowledge bar, which barred a qui tam action based on information in the Government's possession when the action was filed. Rather than simply repealing the Government knowledge bar, Congress "replaced it with the public disclosure bar in an effort to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits," the Court said.

The drafting history "raises more questions than it answers," the Court said. Significant changes, including the introduction of the term "administrative," were made without floor debate as technical amendments, the Court said. The House and Senate reports do not explain why a federal limitation would be appropriate. And the later addition of "administrative" sources to category 2 might reflect the full Congress' rejection of such a limitation, the Court said.

The other parts of the legislative record that the relator offered to support a federal limitation on "administrative" are also unpersuasive. A floor statement from Sen. Charles Grassley (R-Iowa), a lead sponsor of the Senate bill, states that "the term 'Government' in the definition of original source is meant to include any Government source of disclosures cited in [the public disclosure bar]; that is[,] Government includes Congress, the General Accounting Office, any executive or independent agency as well as all other governmental bodies that may have publicly disclosed the allegations." Even if a single sentence by a single legislator were entitled to any weight, the remark "merely begs the question" of whether "other governmental bodies" may be state or local bodies.

The Court noted that a 1999 letter to the attorney general from the primary sponsors of the 1986 amendments supported the relator's interpretation. That letter states, "We did intend, and any fair reading of the statute will confirm, that the disclosure must be in a federal criminal, civil or administrative hearing. Disclosure in a state proceeding of any kind should not be a bar to a subsequent qui tam suit." The letter, however, was written 13 years after the amendments. It therefore does not constitute legislative history and is entitled to "scant or no value for our purposes," the Court said.

The Court acknowledged that Congress passed the 1986 amendments to strengthen the Government's ability to fight false claims and to encourage qui tam suits. But Congress also "passed the public disclosure bar to *bar* a subset of those suits that it deemed unmeritorious or downright harmful." The record on the precise scope of the public disclosure bar "is all but opaque," and the Court concluded that there is no "evident legislative purpose" to guide the Court in resolving the issue before it.

The Court also rejected the relator's argument that interpreting the public disclosure bar without a federal-source limitation would preclude a remedy for many fraudulent claims because the Department of Justice would not learn of the state or local administrative report. Characterizing the assertion as "sheer conjecture," the Court said that DOJ "may learn about quite a few state and local inquiries," especially if they are conducted under a joint federal-state program, such as the one in this case.

Moreover, the "statutory touchstone … is whether the allegations of fraud have been 'public[ly] disclos[ed],' § 3730(e)(4)(A), not whether they have landed on the desk of a DOJ lawyer," the Court said. The relator's argument also did not account for Congress' decision to bar qui tam actions based on disclosures from the news media. Finally, contrary to the relator's assertion, a state or local government could not immunize itself from qui tam liability through low-key disclosures of potential fraud. Such a disclosure would not preclude an FCA action by the U.S. or a qui tam action by an original source, the Court said.

Accordingly, the Court held that under the version of § 3730(e)(4)(A) before the Court, the term "administrative" in category 2 is not limited to federal sources.

✦ **Note**—1. Justice Scalia concurred, explaining that if the statutory text "includes state and local administrative reports and audits, as the Court correctly concludes it does, then it is utterly irrelevant whether the Members of Congress intended otherwise."

2. Justice Sotomayor, joined by Justice Breyer, dissented, stating that the Court misinterpreted the statute and gave "insufficient weight to contextual and historical evidence of Congress' purpose in enacting § 3730." The dissent stated that under a fundamental canon of statutory construction, statutory provisions "must be read in their context and with a view to their place in the overall statutory scheme." All agree that "congressional" and "Government Accounting Office" refer to federal sources. Congress' choice of two clearly federal terms to bookend the word "administrative" give a strong contextual cue about its meaning, the dissent said. If Congress intended to include state or local administrative materials, it could have referred generically to "governmental" sources.

The dissent said that the statutory context and legislative history also support a federal limitation on the sources in category 2. First, before the 1986 amendments, the "Government knowledge" bar referred only to information in the Federal Government's possession, yet that limit on qui tam actions was criticized as overly restrictive. Second, a Senate report characterized the reform effort as intending to enhance the Government's ability to fight fraud and encourage private whistleblowers, and the final amendments contain many provisions encouraging qui tam actions. Third, the legislative record does not suggest an intent to bar suits based on disclosures from state or local government sources.

The dissent said that the Court's decision risks disturbing the balance Congress intended from the 1986 amendments. The Court imposes a jurisdictional bar more restrictive of qui tam suits than the pre-1986 regime. Construing § 3730(e)(4)(A) to include "the thousands of state and local government administrative reports produced each year" effectively imputes knowledge to the Federal Government, regardless of whether the Government knows of the reports or is in a position to act on them. As the Government warned in its brief, its authorities never learn of many state and local reports and investigations, the dissent said.

3. The Court noted that the Patient Protection and Affordable Care Act, P.L. 111-148, signed into law March 23, amended the FCA to exclude state and local administrative reports from the sources that can trigger the public disclosure bar. The public disclosure bar as amended provides:

> (A) The court shall dismiss an action or claim under this section unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—
>
> (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
>
> (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
>
> (iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

The Court noted that the legislation does not mention retroactivity and therefore does not apply to pending cases. For a discussion of recent changes to the FCA, see Nadler, Chiarodo and Yang, Feature Comment, "The Patient Protection And Affordable Care Act—Congress' Overhaul Of The FCA Public Disclosure Bar," 52 GC ¶ 123.

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Corporate Acquisition Talks Created Potential OCI, Comp. Gen. Says

McCarthy/Hunt, JV, Comp. Gen. Dec. B-402229.2, 2010 CPD ¶ 68

An agency unreasonably determined that an awardee did not have an organizational conflict of interest, which arose because the awardee's design subcontractor had access to competitively useful information through the firm that was negotiating to acquire the subcontractor, and the acquiring firm provided procurement-development services to the agency, the U.S. Comptroller General recently determined.

The Army Corps of Engineers issued a request for proposals for the design and construction of a hospital at Fort Benning, Ga. The procurement had two phases. Under Phase I, the Corps evaluated past performance and technical capabilities, and selected the three top offerors to receive the technical requirements package and provide technical and price proposals for Phase II. The Corps selected McCarthy/Hunt, JV (MHJV), B.L. Harbert-Brasfield & Gorrie, a Joint Venture, and Turner Construction Co. with its design partner Ellerbe Becket (EB) (Turner/EB) for Phase II.

The Corps awarded HSMM/HOK Martin Hospital Joint Venture (HSMM/HOK JV) a contract to assist with design concept preparation and technical proposal review. In May 2008, HSMM/HOK JV's parent, AECOM Technology Corp., executed a confidentiality agreement with EB to support negotiations for its potential purchase of EB. The Corps issued the Phase I solicitation in June 2008 for the design/build contract.

At an industry forum the next month, an AECOM senior vice president in charge of HSMM/HOK JV noted that EB expressed an interest in the project. He asked his supervisor about any OCI potential if AECOM acquired EB, but the supervisor said that negotiations had not been productive. AECOM did not tell the Corps of its concern.

In February 2009, the Corps senior project manager asked the AECOM senior vice president about any potential OCIs for the offerors. According to the project manager, the vice president said that he "inquired with several offices involved in the HSMM/HOK JV and reported only teaming relationships."

The contracting officer said that she first learned of the potential OCI in July 2009, when the AECOM senior vice president told her that AECOM was "in negotiations with one of the offerors' subcontractors." The subcontractor was not identified because of a nondisclosure agreement. The vice president said that he was the only technical evaluation team member aware of the negotiations. The CO determined that the vice president's recusal from the technical review board would avoid any OCI.

In September 2009, the Corps awarded the contract to Turner/EB. EB announced the AECOM/EB merger the next month, and MHJV protested to the Government Accountability Office. MHJV asserted that Turner/EB had each of the three types of OCIs—unequal access to information, biased ground rules and impaired objectivity—none of which were properly mitigated. See Federal Acquisition Regulation subpt. 9.5; *Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs., Inc.,* Comp. Gen. Dec. B-254397, 95-2 CPD ¶ 129.

Turner/EB intervened, arguing that the relationship between AECOM and EB was too attenuated to give rise to an OCI. The Comp. Gen. disagreed, noting that as early as August 2008, "AECOM's and EB's interests effectively were aligned as a result of the merger/acquisition discussions sufficient to present at least a potential organizational conflict of interest."

Unequal Access to Information—An unequal access to information OCI exists if a firm, in performing a Government contract, has access to nonpublic information that might provide a competitive advantage in a later competition. See FAR 9.505-4.

AECOM asserted that the confidentiality agreement limited disclosure to individuals with a need to know. But there was no indication of how many employees fit the need-to-know category or how this qualification was determined, the Comp. Gen. said. The Comp. Gen. also noted the lack of evidence of a disclosure-prevention plan for AECOM employees performing work on the design contract.

The Corps argued that the "open-ended nature of the procurement" prevented AECOM from supplying EB with competitively useful information. The Comp. Gen. found that it was "precisely the breadth of discretion" that would have made any competitively useful information known to AECOM useful to Turner/EB. "AECOM was in a position to obtain information regarding the agency's priorities, preferences, and dislikes relating to this broadly defined project," the Comp. Gen. said. Accordingly, the Comp. Gen. sustained the protest because of a potential unequal access to information OCI.

Biased Ground Rules—A biased ground rules OCI exists if a contractor sets the ground rules for a Government contract, potentially skewing the competition in its favor. See FAR 9.505-1, 9.505-2.

The Corps argued that it supervised AECOM's drafting of the solicitation and allowed offerors to comment on the draft requirements. The Comp. Gen. found this argument unpersuasive because "it is unreasonable to assume that the agency's mere supervision then prevented AECOM from using its special knowledge" to give Turner/EB an unfair advantage. The Comp. Gen. sustained the protest based on a potential biased ground rules OCI.

Impaired Objectivity—An impaired objectivity OCI exists if a firm's work under a contract could entail the firm evaluating itself under another contract. See FAR 9.505-3.

The Comp. Gen. found that MHJV was not prejudiced by any potential impaired objectivity OCI. The AECOM employees who participated in the Phase II evaluations gave favorable remarks to MHJV's proposal and relatively critical comments to Turner/EB's proposal. The Comp. Gen. denied MHJV's impaired objectivity protest for lack of prejudice.

✦ **Note**—The other unsuccessful Phase II offeror also protested to GAO. In a separate opinion, the Comp. Gen. sustained the protest for the same OCI reasons, but did not discuss a potential impaired objectivity OCI. See *B.L. Harbert-Brasfield & Gorrie, JV*, Comp. Gen. Dec. B-402229, 2010 CPD ¶ 69. For further analysis, see Kahn, Feature Comment, "Creation Of OCIs In Government Contractor Acquisition Negotiations—Can A Sufficient Mitigation Plan For OCIs Be Implemented During Confidential Deal Discussions?," 52 GC ¶ 89.

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