Westlaw Journal
GOVERNMENT CONTRACT

Litigation News and Analysis • Legislation • Regulation • Expert Commentary

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WHAT'S INSIDE

BREACH OF CONTRACT

U.S. owes $964,000 for VA clinic security upgrades, contractor says

A construction company says in a lawsuit that the U.S. Department of Veterans Affairs owes nearly $965,000 to cover increased project costs arising from the design and installation of security features to mitigate the impact of a possible explosion at an Ohio medical clinic.

Premier Office Complex of Parma LLC v. United States et al., No. 14-CV-1223, complaint filed (Fed. Cl. Dec. 22, 2014).

Construction firm and landlord Premier Office Complex of Parma LLC says the United States must pay additional compensation because the VA changed the original security feature plans after entering into the contract to construct and lease the clinic.

In a complaint filed in the U.S. Court of Federal Claims, Premier says it entered into a lease with the VA to construct and then lease a medical clinic in Parma, Ohio, to the federal government. The lease started running in October 2008 when the contract was awarded to Premier, and expires in October 2028.

Premier says it followed the terms of the VA's contract solicitation, including those on physical security, when it compiled its proposal and price.

REUTERS/Larry Downing

The company gave the VA design drawings and documents discussing how it would implement the security measures listed in the solicitation, the suit says.

Premier says the lease incorporated all the building design components from its proposal,

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COMMENTARY

Moving on? The top 5 steps to take when your company loses a contract

R. Scott Oswald and Tom Harrington of The Employment Law Group discuss steps that professionals in the government contracting industry can take to remain employed in the event that their employer loses a federal contract.

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Moving on? The top 5 steps to take when your company loses a contract

By R. Scott Oswald, Esq., and Tom Harrington, Esq.
The Employment Law Group

A government contracting professional's life often exists in a state of perpetual flux. Not only are contractors subject to workforce turnover within their own company, but they must also deal with the turnover of their government employee counterparts. This shifting cast of characters can put a strain on anyone. But individuals working for government contractors are subject to an additional and very specific stressor that is unique to their industry: the contract re-compete. There are few other industries in which an employee can arrive at work for Company A and, within 24 hours, be employed by Company B to perform the same job in the same office.

We have compiled the following "top five" list to help ensure that government contracting professionals remain employed after a contract transition.

1. KNOW YOUR NON-COMPETE

When you began working at your job, you almost certainly signed some kind of employment agreement. In addition to governing the circumstances of your employment, these agreements typically discuss the terms associated with your separation. These separation-related provisions are often labeled as "non-competition," "post-employment covenants" or, in some cases, "proprietary rights agreements." It is of the utmost importance that you review your employment agreement to determine the scope of any non-compete provision that may be included.

> It is of the utmost importance that you review your employment agreement to determine whether you are subject to a non-compete provision.

This is the best-case scenario when an incumbent contractor loses on a re-compete. But this seamless transition does not often come to fruition for many members of the outgoing incumbent's workforce. In our practice, we often work with federal contractors who are left jobless after their company loses a contract re-compete.

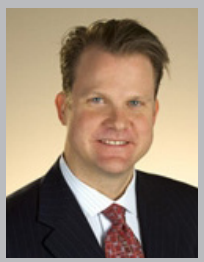
Bowhead Information Technology Services v. Catapult Technology Services, a case from the U.S. District Court for the District of Columbia, illustrates the importance of non-competition agreements in the government-contracting arena.[1]

Bowhead and Catapult each had a contract with the Department of Transportation. The DOT then consolidated the contracts, thus eliminating the need for Catapult's services. When Bowhead sought to hire 14 of Catapult's employees to work on the new contract, Catapult told Bowhead that it would sue if any of its employees were recruited. Catapult also told its own employees that it would sue to enforce the non-compete provisions of their employment agreements if they left to work for Bowhead. Despite the threats, Bowhead hired 12 Catapult employees.

Bowhead then sued Catapult to invalidate the newly hired employees' non-compete provisions. The upshot of the case is best explained by Judge John D. Bates in his July 2005 decision:

> [T]he court has held that Bowhead lacks standing to seek this relief. And at least as Bowhead describes them in its complaint, the non-compete provisions would appear on their face to bar the employees in this case from leaving Catapult and working for Bowhead during the first year of the transition to a consolidated sole-source IT contract for the DOT.[2]

What should employees in a similar position do? First, gather and review your employment documents and determine whether you are subject to a non-compete agreement. If you are, consult an attorney to determine whether the geographic scope, duration and other substantive provisions of the agreement are likely to be enforceable.[3] Finally, try to discreetly ascertain the extent to which your employer has attempted to enforce non-compete agreements against other employees.[4]



R. Scott Oswald (L) is managing principal of **The Employment Law Group** in Washington and past president of the Metropolitan Washington Employment Lawyers Association. He has been recognized as one of the Best Lawyers in America and is listed as a Top 100 Trial Lawyer by the National Trial Lawyers. He can be reached at soswald@employmentlawgroup.com. **Tom Harrington** (R) is a principal at The Employment Law Group, where he represents employees who have suffered workplace discrimination and retaliation. He was recently honored by Super Lawyers as a "Rising Star." He can be reached at tharrington@employmentlawgroup.com.

2. GATHER DOCUMENTATION ON CONTRACT PERFORMANCE

A successor company will often interview an incumbent's employees to determine whom it will keep on the contract. One of the best ways to be retained by the successor is to demonstrate your value to the contract program. If you can access your performance evaluations online, you should do so well in advance of the official transition date. Bringing positive performance evaluations and other accolades to interviews could keep you on the contract.

Consider other ways to prepare for a transition as well. If you have a close relationship with employees on the government side, try to gather intelligence from them about how the new company intends to perform the contract. You may learn that certain teams are at risk or that the new company intends to proceed with business as usual. A strong relationship with key individuals on the government side can help when the time arrives for staffing and personnel decisions. The successor company would like to make a positive first impression with its new government customer, and cutting a valuable, well-liked resource is not something it will want to do.

3. DETERMINE THE EFFECT ON YOUR CLEARANCE

A January 2014 report from the Office of the Director of National Intelligence estimates that almost 5 million people hold some form of government security clearance, with about 1.4 million working under the "top secret" variety.[5] Contract re-competes can be especially onerous on those members of the secured community.

Imagine this common scenario. Your company loses a re-compete, and you are not picked up by the successor. Now your company is stuck sponsoring your clearance while you sit idly on the bench. In this situation, your employer has every incentive to remove you from its books, which it may do by scrutinizing your employment history and manufacturing reasons for your termination. All it takes is a single blemish on your incident report to scare away other contracting companies.

Compounding concerns is the fact that these incident reports are held by JPAS, the Defense Department's Joint Personnel Adjudication System, and most contractors are not even aware of what is on them until they apply for a new position.

There are two primary ways to obtain information related to your incident report: the Privacy Act of 1974[6] and the Freedom of Information Act.[7] The rules governing processes under these statutes are riddled with exceptions. Therefore, you should consult an attorney who can help craft requests that are most likely to produce the information you need. It can be difficult to draft effective requests, so it is paramount that you work with an attorney who is experienced in this area and can guide you through the process.

Importantly, Section 828 of the act implemented a new pilot program. In so doing, it expanded protections to contractors and subcontractors relating to *any* federal funds, contracts or grants. This means that the NDAA's anti-retaliation provisions are newly available to a large segment of civilian contractors.[9]

Previously, an employee was protected only when he made disclosures to the relevant inspector general, the Government Accountability Office, the Department of Justice or some official immediately responsible for contract oversight. Under the 2013 NDAA, a person is protected when he makes disclosures to

Consult an attorney to determine if the geographic scope, duration and other substantive provisions of your non-compete agreement are likely to be enforceable.

4. UNDERSTAND YOUR AVAILABLE EMPLOYMENT CLAIMS

Consider the scenario in which an employee worked for a contracting company for several years. At some point during his employment, he blew the whistle on what he believed to be fraud against the government. Soon after, his employer lost a contract re-compete. The successor company declined to transition him to the new contract, and the outgoing incumbent refused to place him on any of its other contracts.

Federal contractors enjoy protections that are not available to workers in other industries. The 2013 National Defense Authorization Act increases the protection available to defense contractors. Section 827 of the 2013 NDAA provides that contractors *and subcontractors* are protected from retaliation for disclosing any of the following:

> [g]ross mismanagement, gross waste, abuse of authority, or violations of law, rule, or regulation relating to DoD/NASA contracts/grants/funds, including competition for/negotiation of a contract; or substantial and specific danger to public health or safety.[8]

Thus, if an employee working on a Defense Department contract can tie the company's refusal to put him on another contract to his whistleblowing, he will likely have a claim of retaliation under the 2013 NDAA.

any management official who has the responsibility to investigate, discover or address misconduct.

The anti-retaliation provision of the False Claims Act is another valuable tool for contractors who believe they have been retaliated against for disclosing fraud at their company. The FCA's anti-retaliation provision provides:

> Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.[10]

To assert a cause of action under this provision, you must show that you engaged in "protected conduct," that you suffered an adverse employment action and that there is an impermissible causal relationship between the two events.[11] A transitioning employee seeking to avail himself of the FCA's protections must demonstrate that he disclosed some sort of fraud against the government and that, as a result, his

company refused to put him on another contract. The fraud may involve practices such as overcharging the government, selling defective products, or improperly participating in the bid and proposal process.

The FCA analysis is similar to the NDAA analysis, with some nuanced but important distinctions. For example, unlike a proceeding under the NDAA, an individual asserting a retaliation claim under the FCA does not have to file administratively with his agency before proceeding to federal court.

There are, however, some drawbacks to proceeding under the FCA. For instance, the causal connection between the protected conduct and the adverse action must be more direct. The growing trend is for courts to require plaintiffs to meet a heightened "but-for" causation standard when bringing FCA claims, while a lower "contributing factor" standard applies to NDAA claims. Put another way, an employee bringing a claim under the FCA must show a tighter link between his protected conduct and termination than the employee bringing a claim under the NDAA.

The FCA[15] imposes civil liability on any person (including a corporation) who knowingly uses a "false record or statement to get a false or fraudulent claim paid or approved by the government" and any person who "conspires to defraud the government by getting a false or fraudulent claim allowed or paid."

Under the FCA, a private person, known as a "relator" or "*qui tam* relator," may bring an action for a violation of the act for himself and the U.S. government. The *qui tam* relator must inform the Justice Department of his intentions and keep the pleadings under seal for at least 60 days while the government decides whether to intervene to litigate the case.

If the claim succeeds, the defendant can be liable to the government for a civil penalty between $5,500 and $11,000 for each violation, treble damages and costs. The relator may receive up to 30 percent of judgment proceeds, with the total depending on whether the government intervened and how much the relator contributed to the prosecution of the claim.

> The anti-retaliation provision of the False Claims Act is another valuable tool for contractors who believe they have been retaliated against for disclosing fraud at their company.

In addition to the FCA and NDAA, there are a number of other statutes that protect employees from retaliation. For example, the Sarbanes-Oxley Act protects employees of publicly traded companies[12] who disclose conduct that they "reasonably believe" violates federal securities laws.[13]

Likewise, contractors who disclose the improper use of American Reinvestment and Recovery Act funds are protected from retaliation.[14] These protections are in addition to those available to employees under core federal anti-discrimination statutes such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act.

5. PARTICIPATE IN GOVERNMENT REWARDS PROGRAMS

In addition to pursuing available employment claims, you may be able to assist the government in recovering funds fraudulently obtained by your former employer. On July 21, 2010, President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act into law. The statute is 2,319 pages long, and it creates robust retaliation protections for whistleblowers. It also implements a reward program to provide whistleblowers with up to 30 percent of any collected monetary sanction. Individuals can earn a reward for disclosing original information to the Securities and Exchange Commission or the Commodity Futures Trading Commission if the information leads to monetary sanctions exceeding $1 million. To carry out Congress' intent, the Dodd-Frank Act mandated the creation of the Office of the Whistleblower at the SEC.[16]

Because of the nature of the relationship between their employer and the federal government, contracting professionals are often in a unique position to be aware of and disclose concerns about fraud and to participate in *qui tam* lawsuits and investigations by the SEC. You should consult an attorney if you believe that you may have information regarding a fraud perpetrated by your current or former employer. The consultation will allow you to learn how to gather evidence that the government can use — and how you can share in any recovery.

> The Dodd-Frank Act creates robust retaliation protections for whistleblowers.

CONCLUDING THOUGHTS

Re-competes are a fact of life for government contractors. Whether your company is a long-term incumbent at an agency or has held a particular contract for just a year or two, there is always the possibility that a new firm will come in and take over the contract. Such takeovers can have a serious impact on your relationship with the agency and, indeed, your long-term career outlook.

In addition to taking the steps outlined in this commentary, diligent government contract employees would do well to remember the old adage of hoping for the best but preparing for the worst. Know your documents and the post-employment restrictions that you may face. Know your rights under the various whistleblower and privacy statutes designed specifically for your protection. Know what programs are available if you are aware of fraudulent conduct. If you take all this information to an experienced employment attorney, you will be well on the way to working through what could potentially be a painful transition process. WJ

NOTES

[1] *Bowhead Info. Tech. Servs. v. Catapult Tech. Ltd.*, 377 F. Supp. 2d 166 (D.D.C. 2005).

[2] *Id.* at 175.

[3] Separate commentaries — if not treatises — could be written about enforcement differences in various jurisdictions. In most jurisdictions, courts examine the duration, geographic scope, and breadth of the restraint to determine whether it is overly broad. The analysis as to what is "reasonable" varies widely from one state to the next. You are best advised to bring any non-compete issue to an attorney who specializes in employment matters.

[4] A company's failure to enforce a non-compete agreement for some employees but not others could provide a means to attack its validity. In addition, it could give rise to discrimination claims if, for example, the company predominantly sought to enforce agreements against a particular demographic group.

[5] John Bacon & William Welch, *Security clearances held by millions of Americans,* USA TODAY, June 10, 2013, http://www.usatoday.com/story/news/2013/06/09/government-security-clearance/2406243/.

[6] 5 U.S.C. § 552a.

[7] 5 U.S.C. § 552.

[8] *See* 10 U.S.C. § 2409(a).

[9] Importantly, the 2013 NDAA exempted members of the intelligence community from its protections. Such individuals must follow the procedures set forth in the Intelligence Community Whistleblower Protection Act of 1998. The ICWPA's coverage is significantly more limited than that of the NDAA and generally protects only communications to the Inspector General or to Congress involving an "urgent concern."

[10] 31 U.S.C. § 3730(h).

[11] *See, e.g., Hutchins v. Wilentz, Goldman & Spitzer,* 253 F.3d 176, 186 (3d Cir. 2001).

[12] *See also Lawson v. FMR LLC,* 134 S. Ct. 1158 (2014) (providing protections to employees of companies that are not publically traded but had a contractual relationship with publicly traded companies).

[13] *See Sylvester v. Paraxel,* ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042, slip at 14 (Dep't of Labor, Admin. Review Bd. May 25, 2011) (citing 18 U.S.C.A. § 1514A(a)(1)).

[14] *See* 1553 of the American Recovery and Reinvestment Act of 2009, P.L. 111-5.

[15] 31 U.S.C. §§ 3729-373.

[16] 15 U.S.C.A. § 78u-6.

NEWS IN BRIEF

NAVY ADDS $14 MILLION TO SHIP REPAIR CONTRACT

The Navy is paying BAE Systems Southeast Shipyards Mayport LLC of Jacksonville, Fla., more than $14.5 million so the company can continue working under a ship repair contract, the Defense Department said in a Jan. 2 statement. The extra funding will allow the company to make structural repairs to the USS Roosevelt, a U.S. Navy destroyer. The agency said BAE will work on the vessel's hull and machinery as well as on the piping, electrical and electronics systems. The company is scheduled to complete the job in May.

CALIFORNIA FIRM WINS F-35 FIGHTER JET TRAINING-SYSTEM JOB

Cubic Corp. said in a Jan. 5 statement that it will be adding updated air combat training systems to F-35 fighter jets now in production. The company said that under contracts from jet manufacturer Lockheed Martin Aeronautics, it will work with subcontractor DRS Technologies on the project at facilities in San Diego and Fort Walton Beach, Fla. The job involves installation of a specialized training system that will allow the jets, also known as Joint Strike fighters, to be used for combat training without having to disable their radar-evading stealth features. Cubic did not disclose the deal's financial aspects.

MARYLAND COMPANY GETS $17.3 MILLION WEAPONS LAB CONTRACT

The Defense Department said in a Jan. 5 statement that Altus Systems & Technologies LLC has won a $17.3 million contract to operate a Navy weapons survivability laboratory, which is used for live fire testing and the evaluation of vulnerabilities in weapons systems. Under the contract, the Maryland-based company will work at the Naval Air Warfare Center Weapons Division facilities in China Lake and Point Mugu, Calif., Wright Patterson Air Force Base in Ohio and the White Sands Missile Range in New Mexico. The agency said the Navy chose Altus over four other contract bidders.

U.S. Army Corps owes $2.4 million for work on Afghan base, contractor says

A Virginia-based construction company says in a lawsuit that it incurred more than $2.4 million in costs on a project for the Afghanistan military because documents from the U.S. Army Corps of Engineers did not accurately represent conditions at the job site.

Technologists Inc. v. United States, No. 14-CV-1239, complaint filed (Fed. Cl. Dec. 29, 2014).

Technologists Inc.'s complaint, filed in the U.S. Court of Federal Claims, says the company had to perform more excavation work than originally planned because the elevation of the land at the construction site in Parwan, Afghanistan, differed from what was depicted in the documents.

The company further alleges that its excavation costs also increased because the United States removed unexploded ordnance, buried Soviet tanks and underground bunkers from the site after the project began.

Technologists says it won an Army Corps contract in August 2007 to perform a variety of construction projects in Afghanistan. The Army Corps issued a task order under the contract in August 2010 directing the plaintiff to build a base for the Afghan military at a cost of more than $19 million, the suit says.

Differing site conditions

In construction and demolition projects, differing site conditions exist when there is a deviation between the actual physical characteristics of a job site and what was expected at the time the contract was awarded. There are two types of differing site conditions:

- The subsurface or latent physical conditions of the project site are materially different from what is indicated in the contract.
- The site conditions are unusual in nature and are materially different from what is ordinarily encountered and generally recognized as inherent in the work required under the contract.

Federal Acquisition Regulation § 52.236-2

After the Army Corps directed Technologists to begin work, the company performed a site survey and learned that the land elevations in the documents were inaccurate, the suit says. The complaint says two of the corners at the site were several meters higher and two were several meters lower than described by the Army Corps, and as a result more excavation and grading work would be needed.

> Technologists Inc. says its excavation costs increased because the United States removed unexploded ordnance, buried Soviet tanks and underground bunkers from the site after the project began.

The company says the task order contained drawings marking the four corners of the site and listing the ground elevation for each corner. Technologists relied on this information when preparing its price for the excavation and grading work that would be needed, according to the complaint.

The company says that before submitting its price it could not determine whether the Army Corps' documents were accurate because the four corners of the base were not marked at the job site.

The company says it notified the Army Corps about the alleged elevation discrepancies but was directed to perform the extra work.

Technologists also alleges the task order documents contained another error because they represented that the work site had previously been "demined," or cleared of unexploded ordnance.

The company says that after it started work it discovered that the land had not been demined and notified the Army Corps about this matter in December 2010. The agency halted work on the project and hired a demining firm, which uncovered ordnance, buried weapons caches, tanks and bunkers, the plaintiff says.

The demining efforts changed the land's elevations and necessitated additional excavation and grading work, Technologists claims.

The company says it incurred more than $2.4 million to perform all the required work. The Army Corps must cover these expenses because the task order documents did not contain correct information about the land elevations or the demining, the suit says.

The plaintiff is also seeking an award of interest, costs and attorney fees.

As of press time the government had not filed a response to the suit. WJ

Attorneys:
Plaintiff: Edward T. DeLisle, Cohen, Seglias, Pallas, Greenhall & Furman, Philadelphia

Related Court Document:
Complaint: 2014 WL 7506885

See Document Section B (P. 27) for the complaint.

Whistleblowers' suit barred by first-to-file rule, appeals court says

A federal appeals court has affirmed the dismissal of a False Claims Act suit by two whistleblowers against a pharmaceutical company because the claims were too similar to ones resolved in an earlier suit by a Florida pharmacy.

United States ex rel. Ven-A-Care of the Florida Keys Inc. v. Baxter Healthcare Corp., Nos. 13-1732 and 13-2083, 2014 WL 6737102 (1st Cir. Dec. 1, 2014).

Allegations by Linnette Sun and Greg Hamilton that Baxter Healthcare Corp. defrauded the federal Medicare and Medicaid programs by inflating its drug prices to obtain higher reimbursements were barred under the first-to-file rule, the 1st U.S. Circuit Court of Appeals said.

Similar allegations were pending in an earlier case by Ven-A-Care of the Florida Keys Inc. when Sun and Hamilton filed their suit, the appeals court said.

The first-to-file rule, codified at 31 U.S.C. § 3730(b)(5), states that when a private party files a *qui tam* action under the False Claims Act, "no person other than the government may intervene or bring a related action based on the facts underlying the pending action."

The *qui tam* provision of the False Claims Act allows private citizens to file suit on behalf of the government in cases involving federal funds fraud and to share in any consequent settlement or court award.

According to the court's opinion, Ven-A-Care filed a *qui tam* action against a number of pharmaceutical companies, including Baxter, in 1995, alleging price inflation. The suit was filed under seal but was unsealed in 2010 after the federal government decided not to intervene.

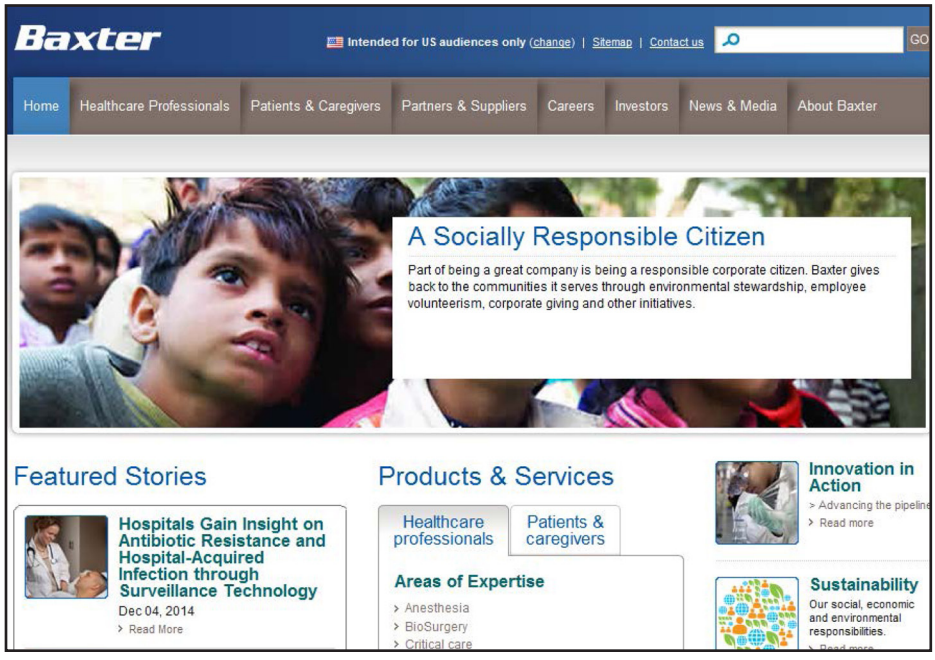
In 2011, Baxter and Ven-A-Care reached a settlement under which Baxter agreed to pay millions of dollars, which was shared between the government and Ven-A-Care.

The settlement released Baxter from all further claims for the covered conduct, defined as Baxter's "submission of inflated price and cost figures" and "receipt of higher-than-deserved reimbursements" for drugs, according to the 1st Circuit's opinion.

Once the federal government consented to the agreement, the suit against Baxter was dismissed.

Sun, a former Baxter employee, and Hamilton, employed by one of Baxter's customers, sued Baxter in the U.S. District Court for the District of Massachusetts before its settlement with Ven-A-Care, according to the appellate opinion.

> In order to avoid the first-to-file bar, the whistleblowers had to show that they provided more detail and that the earlier-filed suit did not provide enough, the 1st Circuit said.



Courtesy www.baxterhealthcare.com

The 1st Circuit said the whistleblowers cannot proceed because their complaint states the same essential fraud elements as those described in an earlier suit against Baxter Healthcare Corp. A screenshot of the company's website is shown here.

Once the government approved its settlement with Ven-A-Care, Baxter moved for summary judgment in the Sun/Hamilton suit, arguing that the settlement agreement released those claims as well.

The District Court granted Baxter's motion, rejecting Sun's and Hamilton's argument that they were not parties to the Ven-A-Care action and should not be bound by the release.

Sun and Hamilton then moved to reopen the Baxter judgment, which led to the ruling that their complaint was barred by the first-to-file rule.

Baxter responded to the motion to reopen by arguing that Ven-A-Care's action, which was pending when Sun and Hamilton filed their complaint, stated all the essential facts of the fraud that Sun and Hamilton alleged.

Sun and Hamilton appealed to the 1st Circuit, challenging the first-to-file ruling and the earlier decision that they were bound by the settlement between Ven-A-Care and Baxter.

The 1st Circuit affirmed the first-to-file ruling and chose not to address the appeal of the settlement decision.

The appeals court analyzed the relationship between the fraud alleged in the two *qui tam* actions to determine whether the first suit apprised the government of essential facts of a fraudulent scheme. The second suit may not proceed if it states the same essential facts or elements of the fraud described in the earlier suit, the panel explained.

Sun and Hamilton argued that they provided more details about Baxter's alleged fraud because of their inside knowledge.

To avoid the first-to-file bar, the 1st Circuit said, Sun and Hamilton had to show not only that they provided more detail, but that Ven-A-Care did not provide enough.

Ven-A-Care's complaint was neither too brief nor overly broad and speculative, and it put the government on notice of the essential facts of Baxter's alleged fraud so it could initiate an investigation, the appeals court said. WJ

Attorneys:
Appellants: David J. Chizewer and Courtney R. Baron, Goldberg Kohn Ltd., Chicago; Lauren J. Udden, Frederick M. Morgan Jr. and Jennifer M. Verkamp, Morgan Verkamp LLC, Cincinnati; Mark Allen Kleinman, Venice, Calif.

Appellee (Baxter Healthcare): Steven J. Roman and Merle M. DeLancey Jr., Dickstein Shapiro LLP, Washington; Peter E. Gelhaar, Donnelly, Conroy & Gelhaar, Boston

Appellee (Ven-A-Care): James J. Breen, Alpharetta, Ga.; Rand J. Riklin and John E. Clark, Goode Casseb Jones Riklin Choate & Watson, San Antonio

Related Court Document:
Opinion: 2014 WL 6737102

See Document Section C (P. 33) for the opinion.

FEDERAL TORT CLAIMS ACT

Daughter claims VA's early discharge of dad led to homicide, suicide

The daughter of a U.S. Army veteran who shot and killed his wife and himself has filed a $40 million lawsuit against the federal government, alleging employees at a North Carolina VA hospital failed to provide him with adequate psychiatric treatment.

Adams et al. v. United States, No. 7:14-cv-292, complaint filed (E.D.N.C., S. Div. Dec. 18, 2014).

Jessica N. Fairfax claims the Veterans Administration hospital in Fayetteville, N.C., negligently discharged her father after a few days of treatment and failed to warn the family that he had expressed homicidal and suicidal thoughts.

The complaint, filed in the U.S. District Court for the Eastern District of North Carolina, says the federal government is liable for VA employees' negligence under the Federal Tort Claims Act, 28 U.S.C. § 1346.

The FTCA provides a limited waiver of sovereign immunity for tort claims related to negligent acts and omissions by federal employees in the scope of their employment.

According to the suit, Fairfax's father Paul W. Adams Sr. told a VA primary care physician June 15, 2012, that he was having suicidal thoughts and had access to firearms.

Adams allegedly received a referral for a mental health consultation and a prescription for the antidepressant medication Zoloft.

Fairfax brought Adams to the emergency room at the Fayetteville VA hospital July 6, 2012, after he tried to commit suicide by shooting himself, the complaint says.

VA physicians allegedly admitted Adams to the hospital's psychiatric unit and switched him to a different antidepressant medication, Wellbutrin.

According to the suit, hospital records indicate that doctors did not expect Adams to receive the full benefit of the medication for three to four weeks, but they discharged him July 10, 2012, without speaking to his family.

If VA employees had contacted the family, they would have learned that Adams had sole possession of guns located in a safe behind his house and had made two prior attempts to shoot himself, the complaint says.

Adams shot and killed his wife, Cathy J. Adams, before fatally shooting himself July 18, 2012, according to the suit.

Fairfax, acting as personal representative for each of her parents' estates, alleges VA healthcare providers breached the standard of care by failing to treat Adams as an inpatient until he no longer posed a danger to himself and others.

According to the suit, VA employees learned during Adams' hospitalization that he was addicted to alcohol and substances, but neglected to treat those conditions.

Adams should not have been prescribed Wellbutrin at all because the drug is known to cause an increased risk of depression and suicide among people who also use alcohol, the suit says.

Fairfax claims the VA was grossly negligent in discharging Adams, and recklessly disregarded the safety of Adams and those around him, including Cathy.

Because the suit involves allegations of gross negligence, Fairfax claims North Carolina's $500,000 noneconomic damages cap for medical malpractice cases does not apply.

She seeks $20 million in compensatory damages for each of her parents' estates. WJ

Attorneys:
Plaintiff: Sanford W. Thompson IV, Raleigh, N.C.; Joseph L. Tart, Tart Law Group, Dunn, N.C.; Todd Conormon, Fayetteville, N.C.

Related Court Document:
Complaint: 2014 WL 7205628

See Document Section D (P. 42) for the complaint.

Bio-Rad pays $55 million to settle bribery, corruption charges

California medical company Bio-Rad Laboratories Inc. has agreed to pay more than $55 million to the Justice Department and Securities and Exchange Commission to settle claims it violated the Foreign Corrupt Practices Act by bribing public officials overseas to obtain business.

The payment ends companion proceedings brought by each agency, according to a Nov. 3 Justice Department statement.

The Justice Department entered into a nonprosecution agreement with the company, and the SEC resolved its allegations through a cease-and-desist order.

"Public companies that cook their books and hide improper payments foster corruption," Assistant U.S. Attorney General Leslie R. Caldwell of the Justice Department's Criminal Division said in a statement announcing the settlement. The agency also gives credit to companies, like Bio-Rad, who self-disclose, cooperate and remediate their violations of the FCPA."

According to the cease-and-desist order, Bio-Rad subsidiaries made unlawful payments to officials in Thailand and Vietnam between 2005 and 2010 to obtain or retain business.

Meanwhile, a France subsidiary, Bio-Rad SNC, paid commissions of 15 percent to 30 percent to Russian intermediary companies to obtain Russian government contracts for the company's medical diagnostics and life sciences equipment, according to the charges.

The SEC said the subsidiary ignored red flags that these intermediaries were not actually performing the work for which they were hired, indicating a conscious disregard that at least some of these commission payments were being used as bribes to secure contracts with the Russian government.

Certain high-level managers nonetheless approved the payments and recorded them on the books as "commissions, advertising and training fees," according to the agreement. The Justice Department said the payments ultimately were included in the parent company's books as well.

The $55 million payment includes a $14.3 million penalty to the Justice Department and $40.7 million under the SEC agreement, including interest.

The scheme came to light in 2010 following an internal investigation, which Bio-Rad voluntarily disclosed to government officials. The Justice Department said it entered into a non-prosecution agreement with the company largely because of the self-reporting.

> Bio-Rad Laboratories subsidiaries allegedly made unlawful payments to officials in Thailand and Vietnam to obtain or retain business.

Bio-Rad provided the results of its internal investigation, made employees available for interview, produced overseas documents and agreed to cooperate fully with the Justice Department's investigation, according to the statement.

The company has already implemented stricter internal controls and compliance protocols, developed new due-diligence and contracting procedures, and conducted anti-corruption training, the Justice Department said. In addition it agreed to submit periodic reports for two years to the agency concerning its anti-corruption efforts.

"The actions that we discovered were completely contrary to Bio-Rad's culture and values and ethical standards for conducting business," Bio-Rad President and CEO Norman Schwartz said in a statement. "Bio-Rad prides itself on operating with the highest levels of integrity, and I am pleased that this settlement fully resolves the government's FCPA investigation and puts this matter behind us." WJ

Defense Department purchase cards used improperly, report says

Defense Department employees at U.S. Southern Command headquarters misused government-issued purchase cards 40 percent of the time between April 2012 and March 2013, according to a report by the agency's inspector general.

Federal Acquisition Regulation Subpart 13.2 mandates that government purchase cards be used by military personnel only to make purchases of supplies or services worth $3,000 or less.

The Army Government Purchase Card Operating Procedures provides policies and procedures for Defense Department programs.

The inspector general is responsible for periodically auditing government purchase card programs to determine whether they are being used improperly or abused and if they are being used when better alternatives are available.

According to the results of the audit, U.S. Southern Command personnel made about 14,800 purchases worth about $19.5 million between April 2012 and March 2013.

About 5,900, or 40 percent, of the purchases made with an estimated value of about $5.1 million were improper. Southern Command is responsible for U.S. military operations in Central and South America.

Specifically, the inspector general found that cardholders did not provide sufficient documentation for purchases. Invoices, receipts and files were missing for several purchases, the report says.

All purchases must be documented and approvals must be obtained before a purchase is made in order to comply with the army's guidelines, the report says.

Cardholders also did not make purchases from mandatory supply sources. For example, one cardholder mentioned in the report bought eight 27-inch computer monitors and 19 printer cartridges for about $3,000 but used a commercial vendor instead of using the so-called CHESS contract — for computer hardware, enterprise software and solutions — as required for such purchases, the inspector general found.

Moreover, many employees did not receive proper written authority to use a card before making purchases, according to the report.

Improper and abusive purchases were made because the agency's program coordinator did not effectively oversee use of the cards, provide proper training to cardholders or conduct required reviews of cardholder accounts, the report adds.

Additionally, employees wasted about $160,000 on 3,500 unnecessary gift items using funds not meant to purchase gifts. Further, some government officials initiated, reviewed and forwarded requests for funds without validating the expense with command.

The inspector general recommends that the Southern Command ensure purchases are approved and cardholder accounts are properly reviewed.

It further recommends that the Southern Command develop a plan for determining levels of gift inventory and reviewing the staff performance to ensure purchases are made with appropriate funds.

The report is available at http://www.dodig.mil/pubs/documents/DODIG-2015-060.pdf. WJ

These photos from the inspector general's report show two unnecessary items purchased by the U.S. Southern Command's Protocol Office: an iPod Touch device (L) and a Peggy Karr bowl (R).

U.S. watchdog questions if Air Force overpaying for F117 engine work

(Reuters) – The Pentagon's internal watchdog Dec. 22 questioned whether the U.S. government is paying United Technologies Corp. too much to maintain the F117 engines that power Boeing Co.'s C-17 cargo plane, and it urged greater oversight.

The Pentagon's inspector general faulted the Air Force for buying $1.54 billion worth of maintenance and repair services on a sole-source, commercial basis, without first assessing if a commercial market existed for the services.

It recommended that the Pentagon's director of pricing block further Air Force contracts for F117 maintenance with Pratt & Whitney, a unit of United Technologies, until Pratt provided the information needed to evaluate whether the Air Force was getting a "fair and reasonable price" for the work.

Tensions are growing between weapons makers and the Pentagon over the treatment of commercial items and services. When the U.S. military buys items considered commercial, it generally pays less but also receives less detailed cost or pricing information than in cases involving non-commercial items developed solely for the government.

REUTERS/Shamil Zhumatov

Pratt & Whitney funded the development of the F117 engine for the C-17 cargo plane, shown here, and has sold it commercially to the Air Force since the early 1990s.

Tensions are growing between weapons makers and the Pentagon over the treatment of commercial items and services.

Pratt said it believed it had provided the Air Force sufficient data to declare "commerciality," and that its investment in the F117 engine had saved the government significant operations and maintenance costs.

Pratt & Whitney spokesman Matthew Bates said the company's performance-based logistics system for servicing the F117 engine had tripled the time it could be used, eliminating 1,000 shop visits and saving $3 billion in costs.

The F117 is a common derivative of the successful PW2000 engine, which powers the Boeing 757. Pratt funded its development and has sold this engine commercially to the Air Force since the early 1990s. The company and a large number of commercial airlines and repair facilities have been providing commercial overhaul and repair services for the engine for over 25 years.

The watchdog report urged the Air Force to review how well its officials complied with rules for determining commerciality, and to consider corrective actions as appropriate.

It also recommended:

- The Air Force contracting officer be required to obtain necessary documents to support the commercial nature of the F117 sustainment contract, or deem the work non-commercial.
- The Air Force prepare a written plan to develop a competitive market for F117 engine sustainment.
- The Pentagon's director of pricing establish policy for oversight of future Air Force contracts with Pratt and Whitney. WJ

(Reporting by Andrea Shalal; editing by Ken Wills)

F-35 PROGRAM

Lockheed meets 2014 target for 36 F-35 deliveries, Pentagon says

(Reuters) – Lockheed Martin Corp. met its target of delivering 36 F-35 fighter jets to the U.S. government in 2014, paving the way for the firm to collect most of the associated performance fees, a spokesman for the Pentagon's F-35 program office said Dec. 22.

The U.S. government Dec. 22 accepted the last of the 36 jets due to be delivered by Lockheed in 2014, said Joe DellaVedova, spokesman for the F-35 program office.

The company accelerated deliveries in the final months of the year to meet the target despite weeks of delays after flight groundings were imposed following engine failure on an Air Force jet in June.

DellaVedova said Lockheed and the other companies involved in the program had delivered 109 operational aircraft to the United States and partner nations since the program's inception in 2001.

Air Force Lt. Gen. Chris Bogdan said building and delivering the jets to the U.S. government was a global undertaking that involved thousands of workers and 300,000 individual parts from 45 U.S. states and 10 other countries.

The jet delivered to the U.S. government Dec. 22 was the first F-35 carrier-variant jet built for the U.S. Marine Corps, which plans to buy a total of 80 such jets in coming years.

The 2015 F-35 deliveries included 23 conventional takeoff and landing jets for the U.S. Air Force, the first two jets for the Royal Australian Air Force, four Marine Corps short takeoff and landing jets, and seven carrier-variant jets, including the Marine Corps' first F-35 C-model jet.

Lorraine Martin, Lockheed's F-35 program manager, said 2014 marked the most F-35 deliveries in a single year and showed the program's "growing stability and ability to ramp up production."

Lockheed is building three variants of the jet for the U.S. military. Eight other countries that helped fund its development are Canada, Britain, Australia, Italy, Turkey, Norway, the Netherlands and Denmark. Israel, South Korea and Japan have also placed orders for the new radar-evading jets. WJ

(Reporting by Andrea Shalal; editing by Meredith Mazzilli and Diane Craft)

REUTERS/Lockheed Martin/Darin Russell/Handout

Three F-35 Joint Strike Fighters fly over Edwards Air Force Base in California in 2011. The U.S. government Dec. 22 accepted the last of the 36 F-35s due to be delivered by Lockheed Martin Corp. last year.

As U.S. troops return to Iraq, more private contractors follow

(Reuters) – The U.S. government is preparing to boost the number of private contractors in Iraq as part of President Barack Obama's growing effort to beat back Islamic State militants threatening the Baghdad government, a senior U.S. official said.

How many contractors will deploy to Iraq — beyond the roughly 1,800 now working there for the U.S. State Department — will depend in part, the official said, on how widely dispersed U.S. troops advising Iraqi security forces are, and how far they are from U.S. diplomatic facilities.

Still, the preparations to increase the number of contractors — who can be responsible for everything from security to vehicle repair and food service — underscores Obama's growing commitment in Iraq. When U.S. troops and diplomats venture into war zones, contractors tend to follow, doing jobs once handled by the military itself.

"It is certain that there will have to be some number of contractors brought in for additional support," said the senior U.S. official, speaking on condition of anonymity.

After declining since late 2011, State Department contractor numbers in Iraq have risen slightly, by less than 5 percent, since June, a State Department spokesman said.

After Islamic State seized large swaths of Iraqi territory and the major city of Mosul in June, Obama ordered U.S. troops back to Iraq. In November, he authorized roughly doubling the number of troops, who will be in non-combat roles, to 3,100, but is keen not to let the troop commitment grow too much.

There are now about 1,750 U.S. troops in Iraq, and U.S. Defense Secretary Chuck Hagel the week of Dec. 15 ordered deployment of an additional 1,300.

The U.S. military's reliance on civilians was on display during Hagel's trip to Baghdad in December, when he and his delegation were flown over the Iraqi capital in helicopters operated by State Department contractors.

The problem, the senior U.S. official said, is that as U.S. troops continue flowing into Iraq, the State Department's contractor ranks will no longer be able to support the needs of both diplomats and troops.

After declining since late 2011, State Department contractor numbers in Iraq have risen slightly, by less than 5 percent, since June, a State Department spokesman said.

CONTROVERSIAL PRESENCE

For example, in July, the State Department boosted from 39 to 57 the number of personnel protecting the U.S. consulate in Erbil that came under threat from Islamic State forces during its June offensive.

That team is provided by Triple Canopy, part of the Constellis Group conglomerate, which is the State Department's largest security contractor. Constellis did not respond to a phone call seeking comment.

The presence of contractors in Iraq, particularly private security firms, has been controversial since a series of violent incidents during the U.S. occupation, culminating in the September 2007 killing of 14 unarmed Iraqis by guards from Blackwater security firm.

Three former guards were convicted in October of voluntary manslaughter charges and a fourth of murder in the case, which prompted reforms in U.S. government oversight of contractors.

U.S. troops in Iraq are not using private contractors to provide them additional security, a second U.S. official said.

Virtually all the U.S. government contractors now in Iraq work for the State Department. The withdrawal of U.S. combat troops from Iraq in 2011 left it little choice but to hire a small army of contractors to help protect diplomatic facilities, and provide other services like food and logistics.

The number of Pentagon contractors, which in late 2008 reached over 163,000 — rivaling

REUTERS/Stringer

Iraqi Shiite militia fighters stand atop destroyed vehicles belonging to Islamic State militants near Tikrit last October. As the U.S. sends more troops to fight IS in Iraq, the need for contractors will increase.

the number of U.S. troops on the ground at the time — has fallen sharply with reduced U.S. military presence.

Pentagon spokesman Mark Wright said there is only a handful left now and they report to the State Department. In late 2013, the Pentagon still had 6,000 contractors in Iraq, mostly supporting U.S. weapon sales to the Baghdad government, Wright said.

But there are signs that trend will be reversed. The Pentagon in August issued a public notice that it was seeking help from private firms to advise Iraq's Ministry of Defense and its Counter Terrorism Service.

The notice appeared intended as preparation, in case military commanders need to surge contractors into Iraq. The announcement did not specify the size or cost of the proposed effort.

The Pentagon also said in a quarterly census in October that it would resume reporting on contractors supporting its operations in Iraq in its next update due in January. WJ

(Reporting by Warren Strobel and Phil Stewart; editing by Tomasz Janowski)

Security upgrades

CONTINUED FROM PAGE 1

which the VA accepted. However, the plaintiff says, it learned during January 2010 discussions with VA officials after the lease had been signed that security features listed in two government documents had to be added to the building to preserve the structure in the event of an explosion.

The documents, called the Interagency Security Committee Security Standards for Leased Space (ISC Standard), and the Veterans Affairs Life-Safety Protected Physical Security Design Manual for VA Facilities (VA Design Guide), contained security design features that were not included in the lease contract or the plaintiff's proposal, according to the suit.

The complaint says the VA told Premier to use the ISC standard in the building designs, but the company says it told the VA that the document was not publically available and could only be provided by a federal contracting officer. The government then directed Premier to use the VA Design Guide but later decided to use the ISC Standard again.

Premier says it then designed the facility using the ISC Standard even though doing so added additional costs not covered in the negotiated lease. Because of the VA's mandatory changes, the plaintiff incurred extra costs for additional work, the company says.

In addition to an order directing the government to cover the additional costs, the plaintiff is seeking interest, costs and attorney fees.

> The complaint says the lease incorporated all the design components from the plaintiff's proposal but the VA then forced changes that added nearly $1 million in construction costs.

As of press time, the United States has not filed a response to the suit. WJ

Attorneys:
Plaintiff: Peter W. Hahn, Dinsmore & Shohl, Columbus, Ohio

Related Court Document:
Complaint: 2014 WL 7495967

See Document Section A (P. 19) for the complaint.

CASE AND DOCUMENT INDEX