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FEATURE COMMENT: The Fed. Cir. Breathes New Life Into The Government's Contractual Obligation To Observe The Duty Of Good Faith And Fair Dealing

Metcalf Constr. v. U.S., 742 F.3d 984 (Fed. Cir. 2014)

The Issue—If you contract regularly with federal, state or local governments, how many times during performance of your contracts have you asked rhetorically, "What do I have to do to get Government contract administrators to take action that will enable me to perform the contract?! Approve my drawings … issue permits … review specifications?!"

For more than 80 years, courts from the U.S. Supreme Court to the circuit courts of appeals, including the Court of Appeals for the Federal Circuit, have "*felt the contractors' pain*" and applied salve through the concept of the breach of the duty of good faith and fair dealing (the duty), and its corollary duty not to hinder performance.

The basic premise of the duty, which is implied in every bilateral contract, is that a party may not act, or fail to act, in one or more ways that frustrate the other party's ability to enjoy the benefits it reasonably expected to enjoy when it contracted. The principle applies as much to the Government as it does to contractors.

For years, courts, relying on the Restatement (Second) of Contracts (1981), have recognized the duty as an inextricable part of every contract. However, several decisions issued by the Federal Circuit and lower tribunals (the Court of Federal Claims and boards) during the last decade have substantially eroded the applicability of the duty to the Federal Government and its employees.

The erosion seemed to reach a low point with the Federal Circuit's issuance of its decision in *Precision*

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Pine v. U.S., 596 F.3d 817 (Fed. Cir. 2010); 52 GC ¶ 97. The decision's use of imprecise and confusing language with regard to the legal standard by which conduct of Government employees should be judged when a contractor asserts breach of the duty led to a cacophony of lower tribunal decisions on the issue. Fortunately, in *Metcalf Constr. Co. v. U.S.*, 742 F.3d 984 (Fed. Cir. 2014); 56 GC ¶ 52, a panel of the Federal Circuit heeded the call that many of us had issued following *Precision Pine* seeking Federal Circuit clarification of its articulation of the legal principle of the duty. See e.g., Nibley and Totman, "Let the Government Contract: The Sovereign Has the Right, and Good Reason, to Shed Its Sovereignty When It Contracts," 42 Pub. Cont. L.J. 1 (2012). Judge Taranto's opinion in *Metcalf* is a significant step toward restoring the duty. Lower tribunals should now have substantially less difficulty determining when the Government has breached the duty.

The Interplay of Three Fundamental Legal Principles—For more than a decade, decisions issued by the Federal Circuit have dealt with three related but distinct legal principles. The three legal principles flow from a core tenet, which has been stated consistently and powerfully in decisions of the Supreme Court:

> When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.

Lynch v. U.S., 292 U.S. 571 (1934). See also *Winstar v. U.S.,* 518 U.S. 839 (1996); 38 GC ¶ 322.

In 1861, President Lincoln petitioned Congress to increase the Court of Claims' jurisdiction and powers. He stated, "[i]t is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals." See President Abraham Lincoln, first annual message (Dec. 3, 1861), available at *www.presidency.ucsb.edu/ws/index.php?pid=29502*.

Decisions of the courts and boards have examined three legal concepts, what we call "principles," in addressing claims by Government contractors that the Government has violated the core tenet: Principle 1 (the presumption of good faith); Principle 2 (the duty of good faith and fair dealing, and the duty not to hinder); and Principle 3 (the sovereign acts doctrine).

Principle 1 provides that Government employees acting in their *sovereign capacities* are presumed to act in good faith. See *Am-Pro Protective Agency, Inc. v. U.S.*, 281 F.3d 1234 (Fed. Cir. 2002); 44 GC ¶ 94. For this principle, *subjective bad faith* is the touchstone: The presumption of good faith when the Government acts *in its sovereign capacity* can be overcome *only by clear and convincing evidence of subjective bad faith*, which means personal animus. The evidence has worn the colorful mantle of "well nigh irrefragable evidence" for many years. See *Tecom v. U.S.*, 66 Fed. Cl. 736 (2005); 47 GC ¶ 341 (Note); see also Johnson, "Mixed Nuts and Other Humdrum Disputes: Holding the Government Accountable Under the Law of Contracts Between Private Individuals," 32 Pub. Cont. L.J. 677, 703–04 (2003).

The presumption that Government employees act in good faith did not spring from contract law. Instead, it "has its roots in English law" as an *evidentiary presumption* created to shield the Government from liability otherwise caused by *discretionary, sovereign actions*. See e.g., *Gonzales v. W.,* 218 F.3d 1378 (Fed. Cir. 2000) (applying presumption when veteran challenged disability rating assigned by Department of Veterans Affairs); *Gonzales v. Def. Logistics Agency*, 772 F.2d 887 (Fed. Cir. 1985) ("Penalty decisions are judgment calls best left to the discretion of the employing agency. The presumption is that government officials have acted in good faith.") (citing *Boyle v. U.S.*, 515 F.2d 1397 (Ct. Cl. 1975)). With few exceptions, courts had not applied the presumption—and its heavy evidentiary burden—to the resolution of disputes between the Government and its contractors before the Federal Circuit's decision in *Am-Pro*.

Principle 2 (the duty of good faith and fair dealing) is a principle of contract law that is implied in every contract, including every Government contract. See e.g., *Centex Corp. v. U.S.*, 395 F.3d 1283 (Fed. Cir. 2005); Restatement (Second) of Contracts § 205 (1981). Principle 2 provides that each party to a contract owes the other the duty to cooperate, not to hinder the other party's performance, and to take all actions necessary to permit the other party to enjoy the benefit of its bargain. Principle 2 applies only in the *contractual arena*, and not when the Government acts in its *sovereign capacity*.

The principle arises in the context of a Government contract dispute when a contractor alleges that the Government has breached the duty by

failing to cooperate or by hindering the contractor's performance. To prevail, a contractor must prove by a *preponderance of the evidence* that the Government breached the duty of good faith and fair dealing. Principle 1 (the presumption of good faith) is irrelevant to the applicability of Principle 2 because applying Principle 2 does not involve assessment of *subjective intent, bad faith, or animus* on the part of Government employees. Rather, applying Principle 2 requires assessing *objective criteria* by determining whether the Government's alleged acts and omissions deprived the contractor of a benefit it reasonably anticipated it would have received when it executed the contract. For example: Did Government personnel take actions that prevented the contractor from performing as originally envisioned under the contract? Did Government personnel fail to take action to allow the contractor to perform as originally envisioned under the contract? The state of mind of Government personnel is irrelevant. Principle 2 involves actions and inactions of Government personnel in their *contractual*, not *sovereign*, capacities.

Principle 3 (the sovereign acts doctrine) applies when an action the Government takes or fails to take in its *sovereign capacity* has the effect of depriving a Government contractor of a benefit the contractor reasonably expected when it contracted with the Government. See *U.S. v. Winstar Corp*., 518 U.S. at 839. Principle 3 therefore assesses sovereign actions that affect the contractual arena.

Stated generally, case law has provided that when the Government acts in its *sovereign capacity* in a "public and general" manner, it is shielded from liability for damages arising from an alleged breach of its duty of good faith and fair dealing under a Government contract. Conversely, if the Government acts in its sovereign capacity (e.g., enacts legislation, as in *Winstar*) with a primary intent to erase contract obligations already existing, the sovereign acts doctrine will not relieve the Government from liability. Unfortunately, as Justice Souter recognized in *Winstar*, a Governmental act can have "public and general" effects, at least prospectively, and yet still have intentional adverse effects with regards to its retrospective application. See id. at 893–99.

Multiple Fed. Cir. Decisions Issued in the Last Decade Have Tangled the Three Principles—Over the last decade, decisions issued by the Federal Circuit, followed by decisions of lower tribunals attempting to apply the Federal Circuit decisions, have made a tangled mess of the three legal principles. See *Am-Pro*, 281 F.3d 1234; *Centex Corp.*, 395 F.3d 1283; *Precision Pine*, 596 F.3d 817. Expert commentators have lamented this conflation. See generally Nash, "The Government's Duty of Good Faith and Fair Dealing: Proving a Breach," 23 N&CR ¶ 66; Johnson, "Mixed Nuts," supra; see also Nibley and Totman, supra, at 6, 16.

The fundamental problem is the unwillingness of some judges to employ rigorous analysis to ensure recognition that *the rights and effects that define and flow from the Government's sovereign acts are distinct from the rights and effects that define and flow from the Government's contractual acts*. The recent decisions cited moved away from prior decisions of the Federal Circuit, which had articulated Principle 2 quite clearly. See, e.g., *Malone v. U.S.*, 849 F.2d 1441 (Fed. Cir. 1988); 36 GC ¶ 32.

Following the Federal Circuit's decisions in *Am-Pro* and *Precision Pine*, a number of decisions by lower tribunals have merged the burden for the presumption of good faith into the standard that private contractors must meet to prove the Government's breach of the duty of good faith and fair dealing. Some judges have required proof by clear and convincing evidence of bad faith or personal animus—not just the absence of good faith (such as slacking, lack of diligence or failure to cooperate)—to prove breach of the duty of good faith and fair dealing. See, e.g., *Cal. Human Dev. Corp. v. U.S.*, 87 Fed. Cl. 282 (2009); *Keeter Trading Co. v. U.S.*, 85 Fed. Cl. 613 (2009); 51 GC ¶ 105; *N. Star Alaska Hous. Corp. v. U.S.*, 76 Fed. Cl. 158 (2007).

In almost comical fashion, it seems that some of the confusion has arisen out of a fact so small and innocent that it would seem incapable of causing such mischief: the mere fact that both Principle 1 and Principle 2 employ the term "faith"—"bad faith" in Principle 1, and "good faith" in Principle 2. However, careful judicial analysis of the type exercised by Judge Wolski in *Tecom*, and many others in both parallel and higher courts and boards, prevent the easy marriage of the two distinct concepts. "Bad faith" in the context of the presumption of good faith (Principle 1) in the *sovereign* arena is *not* merely the flip side of "good faith" in the

context of the duty of good faith and fair dealing in the *contractual* arena. They are very different concepts.

The tangle became more than inconvenient when the Federal Circuit issued its decision in *Precision Pine*. There the Court used language that implied that tribunals were *required* to import the *subjective intent standard* from Principle 1 (the presumption of good faith) when applying Principle 2 (the duty of good faith and fair dealing) in a context that involved Principle 3 (the sovereign acts doctrine). *Precision Pine* involved a lumber contract under which the U.S. Forest Service was ordered by a federal court to suspend the contractor's logging activities until the Forest Service could pursue and conclude consultation with the Environmental Protection Agency regarding threats to an endangered species. The contractor alleged, among other things, that the Forest Service breached its duty of good faith and fair dealing, not by complying with the court order, but by consuming an unreasonable amount of time to pursue and resolve issues with EPA and to authorize the resumption of work. The COFC found that the Forest Service had breached its duty of good faith and fair dealing it owed the contractor by dragging its feet in resolving the environmental issues.

The Federal Circuit reversed, and articulated two reasons why the contractor was not entitled to recover damages in relation to the Government's alleged breach of the duty not to hinder performance (Principle 2): "[t]he Forest Service's actions during these formal consultations were (1) not '*specifically targeted*' [at the contractor], and (2) did not reappropriate any 'benefit' guaranteed by the contracts, since the contracts contained no guarantee that Precision Pine's performance would proceed uninterrupted." *Precision Pine*, 596 F.3d 817 (emphasis added).

In addressing Principle 3 (the sovereign acts doctrine), the *Precision Pine* panel never mentioned "sovereign acts" or addressed the legal underpinnings supporting Principle 3. See id. at 827, 830. Instead, it used language applicable to Principle 1: "misbehavior," "the old bait and switch," and "a governmental bait and switch or double-crossing." These are words of *subjective (bad) intent*, not applicable to Principle 2 (the duty of good faith and fair dealing).

A number of judges in lower tribunals quickly followed suit and applied the *Precision Pine* "*specific targeting*" language even in situations that involved *only* contractual disputes, i.e., situations in which there was no issue of the Government acting in its *sovereign capacity* (Principle 1), and no issue that could invoke the sovereign acts doctrine (Principle 3). See, e.g., *White Buffalo Constr. v. U.S.*, 101 Fed. Cl. 1 (2011); *Metcalf Constr. Co. v. U.S.*, 102 Fed. Cl. 334. These decisions imported the requirement from Principle 1 that a contractor must prove through clear and convincing evidence that Government action was *specifically targeted* at a contractor to prove Government breach of the duty of good faith and fair dealing *even* in a purely *contractual* setting.

Metcalf involved a construction contract. In brief, the contractor ran into differing site conditions, soil expansion and soil contamination problems. Metcalf filed a claim and alleged "that the Navy imposed requirements not found in the written contract and that an uncooperative inspector hindered the project." *Metcalf,* 102 Fed. Cl. 334. Metcalf alleged that the Navy's actions and inactions breached the duty of good faith and fair dealing that the Navy owed Metcalf.

The Government actions and inactions at issue in *Metcalf* took place exclusively in the *contractual* arena. There were no court orders, no endangered species and consultations with EPA, no congressional legislation or agency rulemaking. The situation did not involve any type of sovereign act by the Government. *Metcalf* involved purely a contract dispute. Yet the decision of the COFC applied the tangled standard articulated in the Federal Circuit's decision in *Precision Pine*—the "*specifically targeted*" standard. In so doing, the court acknowledged that the contractor had faced numerous examples of noncooperation on the part of key Government employees: "[t]he record establishes ... a *retaliatory aspect* to some of the noncompliance notices that the Navy issued." Id. at 361, 364 (emphasis added). Further, the court stated that the contracting officer's "lack of knowledge and experience significantly contributed to the *lack of trust and poor communication* that plagued the [project] at the beginning." Id. (emphasis added).

In these respects, the facts in *Metcalf* would seem to support a finding that the Government

had breached its duty of good faith and fair dealing. However, the court reasoned,

> our appellate court requires that a breach of the duty of good faith and fair dealing claim against the Government *can only be established by a showing that it "specifically designed to reappropriate the benefits [that] the other party expected to obtain from the transaction*, thereby abrogating the [G]overnment's obligations under the contract." Short of such interference, it is well established that federal officials are presumed to act in good faith, so that "[a]ny analysis of a question of *governmental bad faith* must begin with the *presumption that public officials act conscientiously in the discharge of their duties*."

Id. (second alteration in original; citations omitted) (emphasis added).

The *Metcalf* Fed. Cir. Panel Helped to Untangle and Restore the Duty of Good Faith and Fair Dealing—Judge Taranto, writing for the *Metcalf* panel, artfully parsed the language that the panel in *Precision Pine* had used; he clarified what the Federal Circuit had meant, and not meant, in *Precision Pine*. Putting aside the artful dancing involved in *Metcalf*'s rehabilitation of *Precision Pine*'s language, the real, unequivocal take-away from the decision is that the concept of s*pecific targeting* has no place in a court's (or board's) application of Principle 2—the duty of good faith and fair dealing.

A contractor alleging breach of the duty need not prove animus on the part of Government employees. In fact, as Federal Circuit precedents clearly articulated prior to *Am-Pro* and *Precision Pine*, Government intent is irrelevant when considering the duty of good faith and fair dealing. Proof of Government breach of the duty involves merely analysis of the contracting parties' actions and inactions during relevant periods of contract formation and performance.

In ruling on this issue of the appeal, the Court first addressed arguments offered by Government counsel that would essentially eliminate the concept of the duty of good faith and fair dealing from Government contracts. The Government argued that Metcalf was not entitled to recover on its claim because its claim did not rest on allegations that Government personnel had breached an express provision of the contract:

> The government suggests a much more constraining view when it argues, for example, that there was no breach of the implied duty because "Metcalf cannot identify a contract provision that the Navy's inspection process violated." Gov't Br. 16. That goes too far: a breach of the *implied* duty of good faith and fair dealing does not require a violation of an *express* provision in the contract.

Metcalf, 742 F.3d at 994.

> We have expressed this principle when we have said that the "implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions." E.g., *Precision Pine*, 596 F.3d at 831. Although in one sense any "implied" duty "expands" the "express" duties, our formulation means simply that an act will not be found to violate the duty (which is implicit in the contract) if such a finding would be at odds with the terms of the original bargain, whether by altering the contract's discernible allocation of risks and benefits or by conflicting with a contract provision. *The implied duty of good faith and fair dealing is limited by the original bargain: it prevents a party's acts or omissions that, though not proscribed by the contract expressly, are inconsistent with the contract's purpose and deprive the other party of the contemplated value.*

Id. at 991 (emphasis added).

Second, the Court pointed out that in *Precision Pine*, unlike *Metcalf*, the court found that the benefit that the contractor complained it lost through Government non-cooperation and hindrance was not a benefit that the contractor reasonably could have expected when it originally contracted (in *Precision Pine*—freedom from suspension of performance to address environmental concerns). In contrast, the benefit that Metcalf complained it had lost through the Government's actions and inactions was solely related to Metcalf's ability to complete the contract on time and at the anticipated profit. The Government actions at issue were actions that Metcalf reasonably believed the Government would take when it contracted with the Government—the benefits of the bargain.

Third, and most important—the Court found that the COFC applied the wrong legal standard

given the facts in the *Metcalf* case. The dispute in *Metcalf* was solely *contractual* in nature, not *sovereign*. Unlike *Precision Pine*, the dispute in *Metcalf* involved actions and inactions *solely* within the four corners of Metcalf's construction contract:

> The trial court's decision in this case rests on an unduly narrow view of the duty of good faith and fair dealing. Relying almost entirely on *Precision Pine*, it held that "a breach of the duty of good faith and fair dealing claim against the Government can *only* be established by a showing that it '*specifically designed* to reappropriate the benefits [that] the other party expected to obtain from the transaction, thereby abrogating the government's obligations under the contract.' " *Metcalf*, 102 Fed. Cl. at 346 (emphasis added; bracketed word added by trial court). Underscoring its narrow view, the court added that "incompetence and/or the failure to cooperate or accommodate a contractor's request do not trigger the duty of good faith and fair dealing, unless the Government '*specifically targeted*' action to obtain the 'benefit of the contract' or where Government actions were 'undertaken for the purpose of delaying or hampering performance of the contract.' " Id. (alterations omitted). The court invoked those principles when deciding Metcalf's specific claims for breach. E.g., id. at 363–64.
>
> *The trial court misread* Precision Pine*, which does not impose a specific-targeting requirement applicable across the board or in this case. The cited portion of* Precision Pine *does not purport to define the scope of good-faith and-fair-dealing claims for all cases, let alone alter earlier standards*…. As that statement indicates, *the court in* Precision Pine *did not hold* that the absence of specific targeting, by itself, would defeat a claim of breach of the implied duty— i.e., *that proof of specific targeting was a requirement for a showing of breach*…. The answer to that question is that, as already explained, neither *Precision Pine* nor other authority supports the trial court's holding that specific targeting is required generally or in the present context, which does not involve the kind of dual-authority circumstances that gave rise to the "*specifically targeted*" formulation as part of the inquiry in *Precision Pine*. *The general standards for the duty apply here. The trial court erred in relying on* Precision Pine *for a different, narrow standard.*

Id. at 992–993 (emphasis added).

***Metcalf* Is a Step in the Right Direction to Give Credence to the Supreme Court's Statement that the Government Stands as All Others Do when It Contracts, No Better, No Worse**—The Federal Circuit's decision in *Metcalf* makes clear—as in "read my lips"—that *proof of specific targeting is not relevant* to a determination regarding whether or not the Government breached its contractual duty of good faith and fair dealing. One might muse: "Is this merely a tempest in a teapot? Courts stray off course all the time. Is this Principle 1, 2 and 3 gibberish no more than an academic exercise?" Not at all. The Supreme Court justices have long recognized the importance of holding the Government to its bargains under its contracts—the core tenet. As Justice Souter stated in *Winstar*, quoting Justice Brandeis,

> Injecting the opportunity for unmistakability litigation into every common contract action would, however, produce the untoward result of *compromising the Government's practical capacity to make contracts, which we have held to be "of the essence of sovereignty*" itself.... From a practical standpoint, it would make an inroad on this power, by expanding the Government's opportunities for contractual abrogation, with the certain result of *undermining the Government's credibility at the bargaining table and increasing the cost of its engagements. As Justice Brandeis recognized,* "[*p*]*unctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors*."

Winstar, 518 U.S. at 884 (emphasis added; alteration in original) (quoting *Lynch*, 292 U.S. at 580) (citing *U.S. v. Bekins*, 304 U.S. 27 (1938)).

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Developments

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Subcommittee Airs Allegations Of Whistleblower Retaliation At Hanford Nuclear Clean-Up Site

Whistleblowers who have raised concerns about waste treatment plant safety at the Department of Energy's Hanford nuclear facility have faced "severe retaliation," according to Sen. Claire McCaskill (D-Mo.), chair of the Senate Homeland Security and Governmental Affairs Subcommittee on Financial and Contracting Oversight. Further, whistleblower firings have "created the appearance of a chilled atmosphere to safety and the belief of employees that management suppresses technical dissent," she added.

Bechtel National Inc. oversees the construction of DOE's $12.2 billion radioactive waste treatment and immobilization plant at the site in Hanford, Wash. URS Corp. is a Bechtel subcontractor. When operational, the plant will process and stabilize 56 million gallons of radioactive and chemical waste currently stored at the Hanford site. The subcommittee held a hearing March 11 on retaliation against whistleblowers at the waste treatment plant.

Michael Graham, a vice president at Bechtel, testified that Bechtel has multiple avenues for employees to raise issues and concerns, and noted that all employees "receive extensive training and information" on those avenues. "Raising and resolving technical issues is an integral part of our work process," Graham added. James Taylor of URS said his firm "has zero tolerance for retaliation against whistleblowers. This is firmly embedded in our company's culture."

Taylor also asserted that "URS encourages its employees to raise safety concerns, and [it is] methodical in addressing" those concerns. "Critical feedback and dissent are vital parts of [URS'] process," and the company encourages employees "to raise concerns and challenge the status quo," he added. "We address all identified concerns and value these important contributions to our safety culture."

In light of the firings of two high-profile whistleblowers at the plant, McCaskill and Sen. Ron Johnson (R-Wis.), subcommittee ranking member, questioned the ability of a contractor to fire key project personnel without DOE approval, the lack of a clear path for a whistleblower to follow to raise safety concerns, and the potential ability of a contractor to get Government reimbursement for litigation costs incurred defending whistleblowers' lawsuits. McCaskill pointed out that "hypothetically a contractor could draw out a case as long as possible, weaken the plaintiff significantly, financially and over time, and then get a settlement and never have to pay a dime [for its] legal defense, whereas the other side who wanted an adjudication is denied that opportunity just by being worn down." Johnson also lamented that DOE only recently recognized the need to improve its overall safety culture.

In a statement provided to the subcommittee, Sen. Ed Markey (D-Mass.) noted that Walter Tamosaitis, the plant's former manager for research and technology—and one of the fired whistleblowers—"had raised concerns … including the possibility that if the safety concerns were not addressed, a potential criticality or hydrogen explosion could occur." Markey pointed out that he was "almost immediately removed from his managerial position, and assigned to sit in a basement office with essentially no responsibilities." Markey quoted from a Bechtel manager's e-mail sent "to one of Tamosaitis' bosses," and the response that "[h]e will be gone tomorrow." Tamosaitis' employment was terminated in October 2013, Markey added.

Markey also referred to the firing of the second whistleblower, URS employee Donna Busche, the former manager of environmental health and safety at the plant. "After she testified as a witness at a public hearing that the release of radioactive contaminants would spread further outside the plant's boundaries in the event of an incident than DOE and Bechtel officials maintained they would," she asserted being "pressured to alter her testimony," Markey noted. "Later, the DOE and Bechtel calculations were acknowledged to be inaccurate. Ms. Busche was fired last month." During the hearing, Taylor maintained that she was fired for cause.

Tom Carpenter, executive director of Hanford Challenge, a regional public interest group, said the "pattern of reprisal at Hanford is historical, well-documented, and has gotten progressively

worse." Carpenter said the concern goes beyond individuals, to "a broken nuclear safety culture that, if unaddressed, risks silencing employees who might otherwise reveal a nuclear safety defect that could lead to loss of life, contamination of the environment, or lead to a nuclear catastrophe." According to Carpenter, "DOE's failure to listen to, to address the problems raised by, and to protect the highest echelon of nuclear safety experts at the [plant] has put this multi-billion dollar, much-needed project at risk."

According to William Eckroade of DOE's health, safety and security office, a 2012 safety culture assessment found a significant number of plant personnel reluctant to raise safety or quality concerns, in part due to a fear of retaliation. "We found that while managers espoused support for [a] healthy nuclear safety culture, they did not have a full appreciation of the current culture, or the nature and level of effort needed to foster a healthy safety culture," Eckroade said. "Employee willingness to raise safety concerns without fear of retaliation is an essential element of a healthy safety culture. Our conclusion was that significant management attention was needed" to improve the plant's safety culture.

According to Matt Moury, from DOE's environmental management office, DOE's recent measures to improve safety at the plant include new leadership, clarifying management roles and responsibilities, revising the plant's contract performance evaluation to better balance priorities, and implementing a safety culture oversight process. The latter involves regular meetings between senior management and contractor management "to formally review the contractor's progress in executing its safety culture improvement action plan."

Moury also pointed to DOE's three areas of focus in managing the safety culture: (a) holding managers accountable for fostering a strong safety culture, (b) ensuring that line managers "encourage a vigorous questioning attitude toward safety," and (c) establishing a high level of trust that allows personnel to "feel safe from reprisal when raising safety concerns."

In a September 2013 memorandum, Secretary of Energy Ernest Moniz, said DOE "will foster a safety conscious environment" in which federal "and contractor workers have the right to identify and raise issues that affect their safety and health or that of their co-workers openly, and without fear of reprisal." DOE workers would "receive a prompt, professional, and transparent evaluation and resolution of their concerns," Moniz asserted.

If DOE does not take action "to halt these retaliatory actions," hold responsible individuals accountable, and limit the reimbursement of contractor legal fees, "its efforts to improve safety culture" at the waste treatment plant and throughout the department "will, quite simply, lack all credibility," Markey asserted.

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ISDC Submits Suspension And Debarment Report To Congress

The Interagency Suspension and Debarment Committee (ISDC) recently presented to Congress its fiscal years 2012 and 2013 report on the status of the federal suspension and debarment system. Required by § 873(a)(7) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, the report discusses agencies' suspension and debarment activity and steps that ISDC is supporting to ensure fair and effective use of the tools Government-wide.

According to ISDC's report, activity levels for FYs 2012 and 2013 show a continued upward trend from the previous reporting period and "a significant increase when compared to FY 2009," when ISDC formally began to collect data. ISDC attributes the upward trend to its efforts to help agencies make the necessary program improvements so that appropriate attention is given to suspension and debarment according to "requirements for administrative due process laid out in regulations governing procurement and non-procurement activities." ISDC has placed special emphasis on helping agencies with developing programs to leverage the experience of agencies with well-established programs.

ISDC reported that agencies have taken management actions to address program weaknesses and reinforce best practices. Every agency reviewed reports that it has (1) an accountable official in place who is responsible for suspension and debarment activities, including the adequacy of available training and resources; (2) taken steps to address

resources, policies, or both—in some cases by dedicating greater staff resources to handle referrals and manage cases and in others by entering into agreements to be mentored by the managers of successful programs; and (3) procedures to forward recommendations to their suspending and debarring official for action.

To improve transparency, ISDC launched a web portal, *isdc.sites.usa.gov*, to allow easier contractor and public access to agency debarment programs and resources. The initial version of the site includes contact information on agency suspending and debarring officials and ISDC members. Future plans include more information to allow easier access to agency debarment programs and resources.

ISDC reported that agencies subject to the Chief Financial Officers and Federal Reform Act of 1990 issued 836 suspensions in FY 2012 and 883 suspensions in FY 2013. Agencies proposed 2,081 individuals and entities for debarment in FY 2012 and 2,244 in FY 2013. Those agencies ultimately debarred 1,722 in FY 2012 and 1,715 in FY 2013. In FY 2012 agencies reported more than 3,700 referrals and just over 200 declinations to pursue action. In FY 2013 there were 3,942 referrals and 154 declinations.

Seventeen agencies reported issuing 122 "show cause notices/pre-notice investigative letters" in FY 2012 and 131 in FY 2013. The letters advise an entity that it is being considered for suspension or proposed debarment. They typically identify the assertion of misconduct that has been brought to the attention of the agency and give the entity an opportunity to respond within a specific period of time before action is taken.

In addition, agencies entered into 54 administrative agreements in FY 2012 and 61 in FY 2013. These agreements are considered after the recipient has responded to a notice of suspension or proposed debarment. The election to enter into an administrative agreement is solely within the discretion of the suspension or debarment official, and "will only be used if the administrative agreement furthers the Government's interest." If properly structured, an administrative agreement creates an incentive for a company to improve its ethical culture and business process to avoid debarment. The mechanism allows respondents to demonstrate their present responsibility to remain eligible for awards. The use of administrative agreements, according to ISDC, increases the Government's access to responsible sources and, thereby, promotes competition in the federal marketplace.

ISDC does not consider the overall number of suspensions and debarments as a metric of success, "as the appropriate level of discretionary suspension and debarment activity in any given year is purely a function of circumstance and need." Instead, ISDC encourages its individual member agencies to review their own individual trends to "determine if the level of activity is reflective of what is necessary to protect their agency and the Government from harm."

ISDC's report to Congress is available at *isdc.sites.usa.gov/files/2014/03/ISDC-Report-FY-12-and-13.pdf*.

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House Subcommittee Surveys SBA Outreach To Underserved Communities

In fiscal year 2014, the Small Business Administration set a strategic objective to strengthen outreach to underserved communities, but "there are concerns as to whether underserved communities are receiving adequate access to [SBA] programs," the House Small Business Subcommittee on Contracting and Workforce noted in its hearing memorandum for a March 11 field hearing at Queens College, N.Y.

The term "underserved communities" is not defined, but Daniel Krupnick, SBA deputy assistant administrator for congressional and legislative affairs, described them generally as "communities and populations that traditionally have faced barriers in accessing credit, capital and the other tools they need to start and grow businesses." From 2007–2012, the percentage of minority small business owners rose from 11.5 to 14.6 percent, the subcommittee memo noted.

The memo reported that in FY 2012, the SBA 8(a) business development program included about 7,815 firms, with almost 4,000 applications received and 500 new companies entering the program. In FY 2012, SBA's Historically Underutilized Business Zone program included an average of 5,600 firms, and SBA conducted 80 "HUBZone boot camps" for prospective applicants.

"SBA works to level the playing field for small businesses to access federal contracting opportunities," Michele Chang, SBA acting chief of staff, testified. The Government obligates hundreds of billions of contract dollars each year, and "it is SBA's job to ensure that 23 percent of those dollars go to small businesses." In FY 2012, the Government awarded 22.25 percent of contract dollars, or $89.9 billion, to small businesses, narrowly missing the statutory goal. See 55 GC ¶ 216. In the Obama administration's first term, the Government awarded $376 billion to small businesses, Chang said. "That is $48 billion more than the previous four years, even as overall contract spending decreased during those years."

Chang told the subcommittee that SBA has "launched a Pre-8(a) Business Development Training Series to help potential 8(a) firms prepare for success in the program and established an online tool, the Government Contracting Classroom, which is geared toward underserved communities." Accessible at *www.sba.gov/gcclassroom*, the Classroom offers free online courses on preparing proposals, strategies for winning federal contracts and SBA small business programs.

Joyce Moy, executive director of the Asian American/Asian Research Institute, testified that cultural and linguistic barriers can prevent immigrant-owned small businesses from benefitting from SBA technical assistance. Quality control in outreach programs is crucial, and "cultural and linguistic competence alone is not sufficient without the business knowledge," she said, noting that immigrant businesses make up 17 percent of U.S. small businesses.

Bill Imada, co-founder of the Asian/Pacific Islander American Chamber of Commerce and Entrepreneurship, said that although SBA provides websites and web-based seminars, most Asian-American and Pacific-Islander chamber and business association leaders "said they were unaware of these tools that were available to them, which meant that many of their members lacked the knowledge and understanding of federal contracting opportunities." Executive order 11625 requires agency reporting on minority business development activities, but Imada insisted that "a more comprehensive data collection process must be employed to ensure that more [Asian-American and Pacific-Islander] small businesses have opportunities to participate in federal contracting opportunities."

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Developments In Brief ...

(a) DOD IG Finds Accountability Gaps in Processing Used Military Equipment in Afghanistan—The Army's Redistribution Property Assistance Teams (RPATs) in Afghanistan did not have effective procedures to process and safeguard retail and wholesale equipment at the Kandahar and Bagram RPAT yards, the Department of Defense inspector general recently reported. RPATs—which include military, civilian and contractor employees—take equipment from units returning home and relieve them of accountability. They either process and return the equipment to the U.S., or hold it at the RPAT yards for incoming troops. RPATs did not accurately record 37 percent of the equipment—worth about $157 million, the IG said. The IG found a lack of proper contractor oversight "to ensure adequate establishing and transferring of property accountability" at the yards. Additionally, the Army Sustainment Command did not provide the RPATs with sufficient resources, the Army Contracting Command-Rock Island did not hold the contractor accountable for poor performance, and the 401st Army Field Support Brigade did not have effective controls over the equipment at the RPAT yards, the IG concluded. As a result, the Army sustained losses of $587 million—including weapons, weapon systems and other sensitive equipment—from May 2012 to May 2013 at the nine RPAT yards in Afghanistan, the IG observed. "Until the Army implements effective procedures for processing and safeguarding equipment at the RPAT yards, the RPAT environment will remain conducive to property loss," the IG concluded. The IG recommends that officials (a) update the quality assurance surveillance plan and determine whether the contractor is meeting applicable requirements, (b) reform poor contractor performance, (c) ensure adequate resources, (d) employ automatic identification technology and implement monthly reviews of the work performed by RPAT personnel, and (e) establish inventory requirements for wholesale equipment at the RPAT yards. *The Army Needs To*

Improve Property Accountability and Contractor Oversight at Redistribution Property Assistance Team Yards in Afghanistan (DODIG-2014-043) is available at *www.dodig.mil/pubs/documents/DODIG-2014-043.pdf*.

(b) Air Force Business System Acquisition Schedule Is Not Credible—The Air Force's acquisition schedule for the Defense Enterprise Accounting and Management System (DEAMS) did not meet best practices, the Government Accountability Office reported March 10. The schedule supported the February 2012 Milestone B approval, allowing the program to enter the engineering development phase, which is considered a program's official start. The Air Force intends DEAMS to provide all of its financial management capabilities, including collections, obligations, cost accounting, disbursements, billing and financial reporting. DEAMS will be released in two increments, and the Department of Defense has approved $1.6 billion in funding for the first increment in fiscal year 2016. DOD considers DEAMS critical to its goal of becoming fully auditable by FY 2017. The DEAMS schedule only minimally met the best practice of being credible, and partially met the best practices of being comprehensive, well-constructed and controlled. For example, the schedule did not include all Government and contractor activities, some resources were not assigned to specific activities, and the Air Force did not analyze schedule risk to establish a level of confidence, GAO noted. In May 2013, DEAMS program officials updated and improved the schedule, but they acknowledged that problems persisted. GAO found that the DEAMS cost estimate itself fully or substantially met best practices prescribing that a cost estimate be comprehensive, well-documented, accurate and credible. However, "because the cost estimate is based on the schedule, the unreliability of the schedule could affect the cost estimate," GAO cautioned. GAO recommended that the Air Force adjust the DEAMS cost estimate, as necessary, after addressing a previous GAO recommendation to adopt scheduling best practices. In 2013, GAO found that DEAMS "demonstrated mixed results in effectively defining and managing risks of various levels." See 55 GC ¶ 110. *DOD Business Systems Modernization: Air Force Business System Schedule and Cost Estimates* (GAO-14-152) is available at *www.gao.gov/assets/670/660746.pdf*.

(c) Border Surveillance Technology Plan Needs Stronger Management, GAO Says—Nearly half of all annual apprehensions of illegal entrants along the southwest border of the U.S. occur in Arizona. Under the Secure Border Initiative Network (SBInet), the Customs and Border Protection deployed surveillance systems along 53 of the 387 miles of the Arizona border with Mexico. After the Department of Homeland Security canceled further SBInet procurements, see 53 GC ¶ 26, CBP developed the Arizona Border Surveillance Technology Plan (the plan), which includes a mix of radars, sensors and cameras to help provide security for the rest of Arizona's border. The Government Accountability Office assessed schedules for three programs that represent 97 percent of the plan's estimated cost. GAO found that two programs' schedules partially met the criteria for being credible and the third minimally met the criteria. GAO also found that CBP has not developed an integrated master schedule for the plan but instead has used separate schedules for each program to manage plan implementation. CBP said this is necessary because the plan contains individual acquisition programs rather than integrated programs. GAO responded that collectively the programs are intended to provide CBP with a combination of surveillance capabilities to be used along the border, and resources are shared among the programs. The report added that an integrated master schedule is a critical management tool for complex systems that involve a number of different projects to allow managers to monitor all work activities and how they relate to each other. GAO also found that the plan's cost estimates—while partially meeting the characteristics of well-documented, comprehensive and accurate—had not been verified with independent cost estimates. GAO recommended that CBP apply scheduling best practices, develop an integrated schedule, verify life-cycle cost estimates and require tracking of asset assist data. *Arizona Border Surveillance Technology Plan: Additional Actions Needed to*

Strengthen Management and Assess Effectiveness (GAO-14-368) is available at *www.gao.gov/assets/670/661297.pdf*.

(d) Afghan Army Camp Built Outside 'Oversight Bubble'—The Department of Defense cannot confirm the completion of construction of an Afghan army camp or whether it is currently occupied because the camp lies outside the "oversight bubble," the special inspector general for Afghanistan reconstruction reported March 12. Beginning in 2010, DOD awarded five contracts, worth $3.9 million, for construction of Camp Monitor in Jawzjan province, near the Turkmenistan border. In March 2013, the SIGAR found no major construction flaws. However, "[a]ll facilities—the barracks, administration building, latrines, and firing ranges—were empty and unused." Generators were not working, so inspectors could not test lighting, heating, water and other mechanical systems. And the dining facility was not complete, with only cracked concrete footings in place. Officials reported that the contractor abandoned the project when it ran out of funds, and the contract was terminated. Nearby coalition bases were to be closed soon thereafter, leaving the area inaccessible to U.S. contracting officers and CO's representatives. Camp Monitor now lies outside the "oversight bubbles" because the U.S. military "will provide civilian access only to areas within a 1-hour round trip, using air assets, of an advanced medical facility," the SIGAR reported. In November 2013, U.S. Forces-Afghanistan provided design and cost estimates and $1.2 million to the Afghan government for completion of the camp. In January, Afghan officials said the dining facility was 60 percent complete and 700 army personnel had occupied the camp for six months, using a temporary kitchen. The SIGAR believes that DOD or NATO oversight "is needed to ensure funds are being spent properly, construction of the dining facility is completed in accordance with requirements, and the camp is being used as intended." *Camp Monitor: Most Construction Appears to Have Met Contract Requirements, but It Is Unclear if Facility Is Being Used as Intended* (SIGAR 14-41-IP) is available at *www.sigar.mil/pdf/inspections/SIGAR-14-41-IP.pdf*.

Legislation

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House Committee Passes Small Business Contracting Bills

The House Small Business Committee recently passed six small business contracting bills, and deferred action on a seventh. "Small firms are innovative, and increased competition often leads to savings for the taxpayers," committee chair Rep. Sam Graves (R-Mo.) said.

The committee approved by voice vote the Contracting Data and Bundling Accountability Act, H.R. 4094, and the Greater Opportunities for Small Business Act, H.R. 4093. Graves introduced the bills in February. See 56 GC ¶ 67. H.R. 4094 seeks to increase transparency and accountability in agency reporting on contract bundling and consolidation. H.R. 4093 would raise the Government-wide small business prime contracting goal from 23 to 25 percent and the subcontracting goal from 35.9 to 40 percent.

Stan Soloway, president of an industry group, the Professional Services Council, said it is "premature and counter-productive" to raise contracting goals before the Government fully understands small business participation. "[C]lear and accurate data is needed of not just prime contracting dollars flowing to small businesses, but also federal dollars flowing to small businesses via subcontracts." Subcontracting data are not collected "in any meaningful or accurate form," Soloway said.

The committee also passed two bills sponsored by ranking member Rep. Nydia Velázquez (D-N.Y.). The Women's Procurement Program Equalization Act, H.R. 2452, would standardize sole-source authorities to promote parity among Small Business Administration procurement programs. SBA launched a women-owned small business contracting program in 2011, and has issued regulations to implement it and grant it parity with other small business programs. See 53 GC ¶ 100; 54 GC ¶ 21; 55 GC ¶ 157. "Unfortunately, too often [WOSBs] are locked out of the federal marketplace as the 'old boys' network' games the procurement system to win lucrative federal contracts," Velázquez said. The Small Business Development Centers Improve-

ment Act, H.R. 4121, would streamline SBA's development centers to improve entrepreneurial and educational services.

The Improving Opportunities for Service-Disabled Veteran-Owned Small Businesses Act, H.R. 2882, was passed by voice vote. Introduced in July 2013 by Rep. Mike Coffman (R-Colo.), the bill would transfer verification responsibilities for SDVOSBs from the Department of Veterans Affairs to SBA. See 55 GC ¶ 246. Coffman chairs the House Veterans' Affairs Subcommittee on Oversight and Investigations, which in March 2013 heard testimony on improving the two SDVOSB contracting programs. See 55 GC ¶ 93. VA verifies SDVOSB status before awarding contracts, and SBA administers the Government-wide SDVOSB self-certification program, in which status challenges are protest-based after award.

The committee passed the Commonsense Construction Contracting Act, H.R. 2751, which Rep. Richard Hanna (R-N.Y.) introduced in July 2013. See 55 GC ¶ 237. It would prohibit reverse auctions for design or construction contracts that are "suitable for award" to small businesses or are set-asides. "Reverse auctions simply do not make sense for these kind of services, because they fail to guarantee the lowest price, lead to imprudent bidding, and inadequately ensure that the winning bidder is responsive and responsible," Hanna said.

The committee deferred action on the Security in Bonding Act, H.R. 776. The bill seeks to increase small construction companies' access to surety bonds and the federal marketplace.

Regulations

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GSA Seeks Input On Improving Acquisition Cybersecurity

The General Services Administration has requested comments on a draft plan to implement the six recommendations made by a GSA and Department of Defense joint working group on improving cybersecurity and resilience in acquisitions. See 79 Fed. Reg. 14042 (March 12, 2014). Public input was highly valuable to the joint working group and helped shape the recommendations, according to the GSA notice. "Similarly, public input is critically important during the implementation of the recommendations."

In January, the GSA and DOD joint working group submitted to the president a joint report on improving cybersecurity in federal acquisitions and contracting, as required by § 8(e) of EO 13636, "Improving Critical Infrastructure Cybersecurity," 78 Fed. Reg. 11739 (Feb. 19, 2013). The report recommended (a) instituting baseline cybersecurity requirements as a condition of contract award, (b) including cybersecurity in acquisition training, (c) developing common cybersecurity definitions for federal acquisitions, (d) implementing a federal acquisition cyber risk management strategy, (e) creating a requirement to purchase from original equipment manufacturers and other trusted sources, and (f) increasing Government accountability for cyber risk management and modifying acquisition practices that contribute to cyber risks. See 56 GC ¶ 34.

According to the draft plan, the first recommendation to be implemented is the creation of a federal acquisition cyber risk management strategy because the strategy and the "processes to institute it provide the foundation that is necessary for the other recommendations." The draft plan acknowledges the scarcity of resources to address acquisition cyber risks and recognizes that not all acquisitions "present the same level of cyber risk or warrant the same level of cybersecurity."

Thus, the Government "requires a risk-based, phased approach to managing these risks," the plan notes. "The goal of this recommendation is to develop a repeatable, scalable process for addressing cyber risk in federal acquisitions based on the risk inherent to the product or service being purchased, that is flexible enough to be adapted to the various risk tolerances of end users or risk owners."

Comments are due April 28. The draft implementation plan is available at *r.reuters.com/qaz67v*.

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