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Responsibility

COFC: Awardee May Perform Despite Parent's Criminal Conduct



By Daniel Seiden

Aug. 2 — A parent company's criminal conduct does not preclude an affiliate from performing a Navy contract, the U.S. Court of Federal Claims (COFC) ruled (*Algeese 2 s.c.a.r.l. v. United States*, 2016 BL 245618, Fed. Cl., No. 15-1279C, 7/29/16).

Louis Berger Aircraft Services may perform air terminal and ground handling services for the Navy months after the criminal conduct of a parent company led to an injunction halting performance, Judge Thomas C. Wheeler said. Despite reservations, new information the Navy provided allowed the court to defer to the government's assertion that the award satisfied the Navy's anti-corruption program, Wheeler said.

The decision highlights some of the practical challenges a corporation faces when it attempts to mitigate the impact of criminal behavior by principals or employees within the organization or affiliated entities, Jon W. Burd, a partner at Wiley Rein LLP, told Bloomberg BNA.

The decision “documents a series of complex transactions taken within the organization to ‘cash out’ a former principal's equity interest in the company, and then wall him off from future decision-making, after he was implicated in wrongdoing,” Burd said.

“The organization also undertook a corporate reorganization to further insulate affiliated entities from the scandal,” he added. “Yet, years later, the company is still addressing protests challenging its status as a presently responsible contractor.”

Anthony Anikeeff, co-chair of the government contracts practice at Williams Mullen, said large companies that do business with the government for a significant period of time will likely be confronted by an accusation of wrongdoing at some point.

This decision demonstrates that “that a company needs to have an aggressive and thorough approach to investigating and defending itself against such allegations, and in then undertaking what may be significant remedial action,” he said.

W. Brad English, a shareholder with Maynard Cooper & Gale LLP, said the decision illustrates the court's limited rule in reviewing responsibility determinations.

“The contracting officer is held to a very low standard in making responsibility determinations, and that low standard makes it very difficult to prevail on a challenge to an affirmative responsibility determination,” English said. “This case and Judge [Nancy] Firestone's decision in *Remington Arms Co. LLC* make clear the COFC's recognition that a responsibility determination is a meaningful requirement; it is not, and is not intended to be, a ‘check-the-box’ exercise.”

Award Vacated in March

Incumbent and awardee Louis Berger Aircraft Services was one of several firms to submit a proposal to provide air terminal and ground handling services at Naval Station Rota, Spain.

When the awardee submitted its proposal, parent company Berger Group Holdings Inc. and affiliates had faced and were facing government investigations and prosecution for fraud and bribery related to multiple procurements around the world, the court said.

However, Louis Berger Aircraft Services didn't disclose the history of public corruption.

The Navy learned about those integrity issues when protester Algeese 2 s.c.a.r.l. raised a protest in another matter before the Government Accountability Office (GAO) but still awarded Louis Berger Aircraft Services the contract after deciding it wasn't directly implicated in misconduct.

In March, the court vacated the award over Louis Berger Aircraft Services' false certifications (105 FCR 240, 3/22/16).

The government moved for reconsideration. The court remanded the case to allow the Navy to make a new responsibility determination. The Navy decided that Louis Berger Aircraft Services is responsible and should

Snapshot

- COFC defers to Navy's decision to allow awardee to perform Navy contract despite criminal conduct of a parent company
- Navy relied on new information before rationally concluding that awardee didn't make false certifications, court says

perform the contract.

Determination Not Unreasonable

The court concluded here that the Navy's determination wasn't unreasonable because it articulated a rational basis for moving forward with the awardee after considering new information.

Specifically, the Navy determined that the guilty plea of the parent company's former chairperson didn't result in the awardee falsely certifying that neither it nor any of its principals had been subject of a proceeding resulting in a conviction.

The chairperson had no ability to control or influence the Louis Berger family of companies, the Navy found.

The Navy reasonably concluded that Louis Berger Aircraft Services wasn't required to disclose misconduct about a former principal under the Federal Acquisition Regulation, the court added. All of the chairperson's misconduct occurred before Louis Berger Aircraft Services was part of the Louis Berger family of companies.

The government wants to contract with responsible and ethical contractors, Anikeeff said.

"In addressing wrongdoing, however, the government may reach beyond a wrongdoer and consider bad acts of affiliated companies in the ownership chain where they might have had an adverse effect or could affect conduct of a contractor," he said. "That said, the case also demonstrates that contractors which do good work and take an aggressive approach to addressing issues that do arise may find the government will give them a break."

Arnold & Porter LLP represented the plaintiff. Blank Rome LLP represented the defendant-intervenor.

To contact the reporter on this story: Daniel Seiden in Washington at dseiden@bna.com

To contact the editor responsible for this story: Seth Stern at sstern@bna.com

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