

Government Contracts

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This edition includes Recent Developments, Recent Decisions, and a Feature Article titled “Official Immunity: Second Circuit Applies Doctrine of Official Immunity to Protect Contractor Carrying Out Governmental Function.”

Recent Developments

Executive Compensation: The Office of Management and Budget (OMB) established \$546,689 as the maximum annual compensation for an executive that will be allowable under Government contracts for Fiscal Year 2006 and subsequent contractor fiscal years, until revised. 71 Federal Register (Fed. Reg.) 26114 (May 3, 2006). This figure represents the median amount of compensation accrued over a recent 12 month period for the top five highest paid executives of publicly traded companies with annual sales exceeding \$50 million. The maximum annual compensation for an executive that is allowable under Government contracts for Fiscal Year 2005 is \$473,318. 70 Fed. Reg. 23888 (May 5, 2005).

Expiration of Small Disadvantaged Business Price Evaluation Adjustment: A final rule was issued to amend the Federal Acquisition Regulation (FAR) to cancel the authority for civilian agencies (other than the National Aeronautics and Space Administration (NASA) and the U.S. Coast Guard) to apply a price evaluation adjustment to benefit certain small disadvantaged business concerns in competitive acquisitions. 71 Fed. Reg. 20304 (Apr. 19, 2006). This rule is necessitated by the expiration of the 1994 statutory authorization for the price evaluation adjustment. As a result, only the Department of Defense (DOD), NASA, and the U.S. Coast Guard are authorized to continue applying the adjustment.

Prime Contractor Confirmation of Subcontractor HUBZone Status: A final rule amending the FAR has been issued to require prime contractors to confirm that a subcontractor representing itself as a Historically Underutilized Business Zone (HUBZone) small business concern is in fact certified by the Small Business Administration (SBA) as such a concern. 71 Fed. Reg. 20303 (Apr. 19, 2006). This FAR amendment is the result of a November 2002 DOD Inspector General report that found prime contractors were overstating their HUBZone accomplishments because subcontractor representations were not being verified. The final rule revises FAR 19.703 and FAR Clause 52.219-9, “Small Business Subcontracting Plan,” to require prime contractors to confirm subcontractor representations either by accessing the Central Contractor Registration database or by contacting the SBA.



GSBCA within 90 days of the contractor's receipt of the Final Decision, the Board dismissed the appeal for lack of jurisdiction.

Feature Article

Official Immunity: Second Circuit Applies Doctrine of Official Immunity to Protect Contractor Carrying Out Governmental Function

As contractors increasingly take on roles previously performed by Government employees, questions are arising as to what extent the legal obligations and protections that apply to the Government should also apply to contractors. For example, should the ethics rules and penalties applicable to Government employees also apply to contractor employees who provide procurement advice to federal agencies? Should the doctrine of official immunity that shields Government employees from liability also shield contractors and their employees when they are sued for damages allegedly caused while performing a Governmental function?

In *Murray v. Northrop Grumman Information Technology, Inc.*, 444 F.3d 169 (2nd Cir. 2006), the U.S. Court of Appeals for the Second Circuit (Second Circuit) recently held that the doctrine of official immunity could in certain circumstances shield a contractor from third party liability. *Murray* involved two Irish citizens (James Murray and Ruth Gould) who came to the United States in 2001 on nonimmigrant visas under the Irish Peace Process Cultural and Training Program (IPPCTP). The IPPCTP was enacted to allow young people from disadvantaged areas of Ireland to enter the United States to develop jobs skills and conflict resolution abilities. The Department of State (DOS) selected Northrop Grumman Information Technology, Inc. (NGIT) to act as the IPPCTP Program Administrator. As the Program Administrator, NGIT was responsible for the day-to-day operation of the program, which included identifying job opportunities for program participants, recommending employers for participation in the program, issuing letters of certification to aliens approved for the program, and monitoring participants' compliance with program requirements. NGIT was also required to promptly inform the DOS and the INS of a participant's termination or withdrawal from the program.

Shortly after the terrorist attacks of September 11, 2001, Murray and Gould requested NGIT's approval to transfer from an IPPCTP-qualified employer in North Carolina to a hang-gliding school in Las Vegas. NGIT verified that the Las Vegas hang-gliding school qualified for the IPPCTP and recommended it for approval to the DOS, which approved the school as a program employer. Murray and Gould then moved to Las Vegas and began working for the hang-gliding school. Over the course of the next four months, however, their relationship with the school's owner (Steve Smith) deteriorated to the point where Smith refused to provide Murray and Gould with work or respond to their attempts to reach him. Murray and Gould then contacted NGIT and requested a transfer to a third employer. On the same day, however, Smith contacted NGIT and claimed that neither Murray nor Gould had ever worked for him; that they were working for other employers in the Las Vegas area; and that Murray was getting a pilot's license. Smith further alleged that Murray and Gould had made anti-United States and pro-terrorist statements, and he urged NGIT to forward this information to the Government. NGIT reported Smith's accusations to the DOS and the INS, which subsequently took Murray and Gould into custody. When Murray and Gould informed the INS that they no longer worked for Smith, the INS determined that they were out of status with the IPPCTP and, because more than 30 days had passed since the

end of their approved employment, the INS initiated deportation proceedings. Murray and Gould eventually were deported.

Murray and Gould subsequently sued NGIT in the U.S. District Court for the Eastern District of New York, alleging negligent misrepresentation, defamation, negligence, and breach of contract. The lawsuit was principally based upon NGIT's communication to the Government of Smith's allegations that Murray and Gould posed a possible terrorist threat. The district court granted summary judgment for NGIT and dismissed the suit, which Murray and Gould appealed to Second Circuit.

In affirming the district court's dismissal of the case, the Second Circuit first addressed NGIT's defense that its transmittal of Smith's allegations to the Government was protected by the doctrine of official immunity. This doctrine is designed to promote the effective administration of Government affairs by ensuring that Government officials are free to exercise their duties "unembarrassed by the fear of damage suits." The court stated that the same policy considerations that justify immunity for Government employees can apply with equal force to private actors when they are charged with implementing Government policies. The Second Circuit concluded that, as the administrator of a program under the federal immigration laws, NGIT – which was acting within the scope of its employment when it conveyed Smith's allegations to the DOS and the INS – was entitled to official immunity for tort actions arising out of NGIT's transmittal of this information to the Government: "We think that when a private contractor, hired to perform a quintessential governmental function, in the course of its official duties conveys information with possible national security implications to the agency charged with its oversight, that contractor is absolutely immune from state tort liability for claims resulting from that information-sharing." Noting that the threat of damage suits arising from the transmittal of such information would deter a company in NGIT's position from promptly sharing the information with the Government, the court stated that NGIT's action in forwarding Smith's allegations to the Government was precisely the type of discretionary action that sound public policy requires to be protected by official immunity. The court further observed that the claim of negligence would be far more compelling if NGIT had not transmitted information and harm from terrorist acts had resulted. The Second Circuit also affirmed the district court's dismissal of the remaining negligence claims and the breach of contract claim because of the absence of any duty of care owed by NGIT to Murray and Gould and because of the absence of an enforceable contract. (It should be noted that the court's decision did not address the so-called "Government contractor defense," another immunity defense frequently relied upon by Government contractors pursuant to *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). Not long ago, the U.S. Court of Appeals for the Eleventh Circuit confirmed that service contractors may invoke the Government contractor defense in response to lawsuits seeking tort damages under state law. *Hudgens v. Bell Helicopter/Textron*, 328 F.3d 1329 (11th Cir. 2003).)

Murray v. Northrop Grumman Information Technology demonstrates that there are circumstances where the legal protections normally only applicable to Government employees may be extended to contractors performing Governmental functions. However, where the policies supporting such protections for Government employees do not apply with similar force to contractors, the justification for such an extension may be lacking. In such cases, contractors performing Government functions may be exposed to certain third party liabilities that federal agencies are shielded from when Government employees are on the job.

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