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The Clause

A Quarterly Publication of the Boards of Contract Appeals Bar Association, Inc.

The President's Column

Dear BCABA Members:

For my first column as President of BCABA, I want to try to express what being elected as leader of this organization means to me.
I love the mission of the bar association – always have. Educating professionals for the purpose of improving practice before the Boards benefits everyone involved. Attorneys become more effective, both in their Board practice and in a more general way. Judges become better able to write decisions more accurately and precisely, and we become better at what we do. Clients – on both sides – receive more predictable and uniform results when the level of practice on all sides rises. The benefits are great and there is no down-side.

The collegiality of this bar impresses me. The cooperation and partnering among government and private sector attorneys, judges, academics and many others is extraordinary and makes me proud of our profession.

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<u>President's Column (cont'd):</u>

This is a volunteer organization. Everyone interested in contributing are welcomed. Opportunities abound, and I admire BCABA's inviting inclusiveness. We issue a respected publication – *The Clause* – which provides a method to publish legal information and opinions in our field that is as easy and accessible as it comes. I encourage our members to take advantage of the ability to publish that we offer. I think that the government contracts bar may not realize fully what an opportunity *The Clause* offers for publication without bureaucracy. Please help me spread that message to encourage submissions.

I also ask for your help to spread the word generally about BCABA to your colleagues and anyone else that may interested. Word of mouth recommendations are vital to growth. Growth enhances our ability to reach as far and wide as we can to accomplish our mission of improvement of Board practice. Improving Board practice enhances the reputation of the Boards and its practitioners, which benefits us all. Please help us accomplish the mission of the bar.

Personally, it is a tremendous honor and privilege to be asked to be BCABA president, and I am deeply humbled by your confidence. I will do everything I can to try to live up to the distinction of the position. I especially appreciate being allowed to serve a second term as vice-president while I focused on personal matters that required my attention last year, which permitted me this opportunity to serve as your president in 2014. That would not have happened without the remarkable double-duty performed in 2013 by the immediate past-president, Don Yenovkian, and by the creativity and support of my BCABA mentor, Judge Richard Walters. Thank you both. The officer-leader team in 2014 is tremendously talented and energetic. I look forward to a successful year. Thank you all for the opportunity.

Hon. Gary E. Shapiro
President
BCABA, Inc.

The Editor's Column

by
Skye Mathieson

These are large shoes. I would like to start by thanking my predecessor, Pete McDonald, for his seven ~~decades~~ years of able service at the helm of *The Clause*. He consistently delivered timely, useful articles for the broad and diverse BCABA membership. He will be missed. As will his wry, self-deprecating wit. Making cost accounting articles humorous was a rare gift.

I would also like to thank Pete for his ill-fated attempt to use Bitcoins to evade FCPA rules. The ensuing sting is the reason for my meteoric rise from assistant Case Digest contributing editor to Editor-in-Chief. I embrace the opportunity, and I will make every effort to carry on the tradition of fine editing that readers of *The Clause* have come to expect. The enthusiasm among BCABA leaders is infectious, and I am excited to play a larger role in this vibrant community of practitioners, academics, and judges.

Lastly, I want to echo Judge Shapiro in urging our members to submit original articles for publication in *The Clause*. There is no red-tape; the only barrier between you and a published article is a good idea and an email to me. We welcome your suggestions for how to change or improve *The Clause* in order to attract more original content. A great product can always be enhanced. We believe that between your ideas and our will *The Clause* can evolve.

Reminder of Cheap Annual Dues

This is to remind everyone about the BCABA, Inc., dues procedures:

- Dues notices will be emailed on or about **August 1st**.
- Annual dues are **$30** for government employees, and **$45** for all others.
- Dues payments are due NLT **September 30th**.
- There are no second notices.
- Gold Medal firms are those that have all their government contract practitioners as members.
- Members who fail to pay their dues by September 30th do not appear in the Directory and do not receive *The Clause*.
- Members are responsible for the accuracy of their information in the Membership Directory, which is maintained on the website (bcaba.org).

Members are reminded that <u>they</u> are responsible for maintaining the accuracy of their information in the BCABA Directory.

Forget Exercising Your Service Contract Options, The Government Wants to Extend Your Contract at Last Year's Rates for a Shorter Period

by
*Andrew J. Foti**

[Note: Reprinted with permission of the National Contract Management Association, *Contract Management* magazine, December 2013.]

Are you celebrating your recently successful bid for a service contract because you think the agency is likely to exercise the four one-year option periods and keep doing business with you for the next five years? Not so fast!

Sequestration happened, and funding is tight. The government is getting "creative" with its use of federal regulations in conjunction with reduced funding to extend contracts at lower rates.[1] So how will an agency prolong services that it desires without the funds necessary to pay for a full option period? A recent decision by the Armed Services Board of Contract Appeals (ASBCA) provides one option, and it should give government contractors reason for concern.

In light of this decision, contractors must be prepared and must be flexible. Instead of relying on the government to exercise all option periods, a contractor must continually search out and be ready to bid on new work in case funding on its current contract runs out. In addition, and potentially worse, if the agency receives partial funding, a contractor must be ready to continue performing the contract at last year's rate and for a term that is less than the full option period.

The new decision, issued in *Glasgow Investigative Solutions, Inc.*,[2] expands the situations in which a contracting officer can exercise Federal Acquisition Regulation (FAR) 52.217-8, which was previously used by contracting officers to extend services by an outgoing contractor when a successor contract was delayed for reasons outside the contracting office's control. The decision allows contracting officers to invoke FAR 52.217-8 in almost any situation in which the government requires continuing services, even when no follow-on contract is contemplated. As an extra boon for the agency, the clause requires the contractor to perform the extended period at the rate specified in the contract, as opposed to the higher rate that would be paid if a full option period were exercised. FAR 52.217-8[3] appears in almost every service contract. According to FAR 37.111, the reason for including FAR 52.217-8 in service contracts is to allow the government the option to extend current contracts without negotiating short extensions when contracts for continuing services are delayed for reasons beyond the control of the contracting office.[4] FAR 37.111 specifically mentions only two examples of such delays: (1) bid protests and (2) mistakes in bids.

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Forget Exercising Your Service Contract Options (cont'd):

The ASBCA's decision in *Glasgow* confirmed a contracting officer's right to invoke FAR 52.217-8 where the agency was not required to negotiate a short-term extension of an otherwise expiring contract to account for delay of a follow-on contract. Citing limited funding, the contracting officer invoked FAR 52.217-8 to extend the contract instead of exercising a one-year option period.[5] In fact, the contracting officer exercised FAR 52.217-8 five times to extend the contract for a total of six months. Glasgow Investigative Solutions Inc. performed the extensions under protest. It argued that FAR 52.217-8 was inapplicable to its situation because FAR 52.217-8 could only be used to extend the contract term after all options have been exercised, and could not be used to create month-to-month option periods. Glasgow further argued that each exercise of FAR 52.217-8 was a constructive change to the contract, as the government did not exercise the full option period provided in the contract.[6]

The ASBCA did not agree with Glasgow. The ASBCA's decision expanded the use of FAR 52.217-8 to allow an agency to extend an incumbent's contract even when there is no follow-on contract (and thus no delay in the award) and where unexercised options remain on the current contract. The ASBCA reasoned that no prior decision or regulation stated that the clause may only be used when all contract options have expired and the government needs to extend the incumbent contractor's performance until a successor contract is awarded.

Some contractors may rejoice in this decision because the alternative is that their contracts end after the current term. Others, however, might prefer to seek new opportunities instead of having their labor forces tied to contracts at last year's rates without consideration of additional expenses incurred by the contractors for extending beyond the contract completion date. The latter situation occurred in *Arko Executive Services, Inc. v. United States*.[7] In *Arko*, the U.S. Court of Appeals for the Federal Circuit (CAFC) held that, using FAR 52.217-8, an agency may extend a contract beyond the completion date where the award of a successor contract was delayed. It did so by affirming a ruling by the Court of Federal Claims that a contracting officer may extend a contract for one month beyond the completion date at the rate provided to Arko under the last option period.[8]

Arko was the incumbent on an expiring contract.[9] The government had exercised all of the option periods in Arko's contract and solicited bids for the follow-on work. Arko did not submit a bid for the follow-on work and was originally informed that the government would not require phase-in or phase-out services from Arko.[10] Later, the government informed Arko that it required Arko to continue performance for one additional month beyond the term of its contract to account for the delay of the award of a successor contract.[11] Arko performed the additional work under protest and argued that it was entitled to costs plus reimbursement of expenses incurred during the extension, which totaled $184,010.10.[12] In affirming the agency's action, the CAFC referenced the language in FAR 37.111 and opined that this situation was exactly the type of government need contemplated by FAR 52.217-8.[13]

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Forget Exercising Your Service Contract Options (cont'd):

Fortunately, the courts are placing some limits on this clause. In *Overseas Lease Group, Inc. v. United States*,[14] the Court of Federal Claims (COFC) held that the contracting officer may not use FAR 52.217-8 where the contract was still active and the services the contracting officer required could be provided within the confines of the original contract.[15] In this case, the government exercised the third of four 12-month options for the lease of vehicles to the U.S. Army in Afghanistan. Three months into that option period, the government sought to lease 67 vehicles for a term that was less than the contract's 12-month minimum.[16] The government asserted that the short-term leases were permitted extensions of existing leases pursuant to FAR 52.217-8.[17] The government, however, had just exercised an option period and had another unexpired option that it could exercise thereafter.[18] The Court stated that the purpose of FAR 52.217-8 was to protect contracting agencies from being forced to negotiate short-term extensions at potentially higher prices, particularly when performance of the follow-on contract is delayed.[19] Since the leases could occur within the confines of the original contract, the government was not attempting to negotiate a short-term extension on an expiring contract.[20] Accordingly, the COFC ruled that FAR 52.217-8 was not available to the government in this situation.

Glasgow attempted to argue that the decisions in *Arko* and *Overseas* were applicable to its case and wanted a limit on the use of FAR 52.217.8. It argued that FAR 52.217-8 was limited to situations where all options had been exercised and the government needed the incumbent to continue its current contract until the successor contractor was secured. The ASBCA rejected these arguments and concluded that FAR 52.217-8 was not constrained to just those circumstances present in *Arko* and *Overseas*.

One thing is for certain, the decision in *Glasgow* will not be the final word on this issue. Since the plain language of FAR 52.217-8 does not provide any restrictions on its application, boards and the COFC are free to differ on its application until the CAFC rules on the issue. The ASBCA took a very broad reading of FAR 52.217-8, which may allow the government to invoke FAR 52.217-8 and extend current contracts in almost any situation in which the government requires continuing services, so long as the extensions do not exceed a total of six months. While the COFC appeared to take a narrow view of the application of FAR 52.217-8, this view may have been due to the specific factual situation that was presented to it. If given the opportunity to decide a case with a factual setting similar to that in *Glasgow*, where budgetary constraints were driving the dispute, the COFC may expand the arena in which FAR 52.217-8 applies. Alternatively, it may reinforce its prior rulings and state that application of FAR 52.217-8 is limited to situations involving expiring contracts and delays involving follow-on contracts.

In light of the current landscape, there is no clear path for a contracting officer to follow. If an agency lacks funding to exercise an option but desires to continue receiving services, it may look to *Glasgow* for the authority to use FAR 52.217-8, especially in a situation where no follow-on contract is contemplated. In turn, unless the contractor makes a business decision to perform as directed by the contracting officer, the contractor will argue that failing to

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Forget Exercising Your Service Contract Options (cont'd):

exercise the full option period is a constructive change to the contract. Since the issue is budgetary constraints, unless additional funding comes through in the interim, the contracting officer will most likely deny the contractor's claim.

Now the contractor is in a tough position. Either it can refuse to perform the contract as extended by FAR 52.217-8 and risk a termination for default, or it can perform the contract under protest and seek remedy through the courts or boards. Failing to perform the contract is a risky proposition and may not be the best course of action. Unless the contractor can successfully convert the termination into a termination for convenience, the contractor may be held liable for reprocurement costs, actual damages, and liquidated damages. More important, the contractor may be risking its eligibility for awards in the future, and may expose itself to even more severe consequences, such as debarment.

If the contractor wants recourse, it should complete the additional work and reserve its right to file a claim against the agency. While the contractor may not be able to recover the amount owed for the entire option period that was not exercised, it will be able to request additional compensation for the work performed.

A contractor should seriously consider filing a claim objecting to the use of FAR 52.217-8 if it finds itself in a similar situation as the contractor did in *Glasgow*. Otherwise, contracting officers' use of FAR 52.217-8 may continue to grow, and they may see FAR 52.217-8 as a substitute for exercising available option periods. Such a result should cause concern for the contracting community. Planning and budgeting may become more difficult for contractors if an agency can string them along with incremental extensions for up to six months. In addition, since the contractor is not entitled to increased rates, the contractor is losing the opportunity to bid on new work at potentially higher rates.

Conclusion

In this time of economic uncertainty, contractors must always be ready to find and compete for the next contract. They must also be ready for an agency to extend their current contract for up to six months without an increase in the rate paid to them through the expanded use of FAR 52.217-8. There was a time when contractors could feel confident that option periods on their service contracts were going to be exercised by a government agency. Employment throughout the duration of these options was a given and competing for new contracts was a distant thought. However, with the budgetary constraints associated with sequestration and a directive from the Office of Management and Budget limiting an agency's ability to exercise options, both sides are dealing with uncertainty. Eventually, enough disputes will arise over the use of this clause that a body of law will take shape to guide agencies. Until then, the ASBCA has opened the door to a very broad reading of FAR 52.217-8, which may allow the agency to extend current contracts in almost any situation in which the government requires continuing services, so long as the extensions do not exceed a total of six months.

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Forget Exercising Your Service Contract Options (cont'd):

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Endnotes

1. Office of Management and Budget Memorandum M-13-05 (February 27, 2013), *available at* www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-05.pdf.
2. *Glasgow Investigative Solutions, Inc.*, ASBCA No. 58111, April 9, 2013, 13-1 BCA ¶35,286.
3. The pertinent language in FAR 52.217-8 is as follows: "The government may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the secretary of labor. The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed six months. The contracting officer may exercise the option by written notice to the contractor within _____ [insert the period of time within which the contracting officer may exercise the option]." (48 C.F.R. 52.217-8.)
4. The government would have very little bargaining power in negotiating these short-term extensions because it desires the continuation of service, which it cannot get until the follow-on contract is awarded and the successor contractor is on site. So, FAR 52.217-8 provides a mechanism to allow the government to avoid unfavorable terms, such as higher prices, during this bridge period. (*See Overseas Lease Group, Inc. v. United States*, 106 Fed. Cl. 644, 651 (2012) ("The purpose of the FAR clause [52.217-8] is to protect contracting agencies from being 'forced to negotiate short extensions' to expiring contracts at potentially higher prices, particularly when performance of the follow-on contract is delayed.") (citations omitted).)
5. *See ibid.*
6. *See ibid.*
7. *Arko Executive Services, v. United States*, 553 F.3d 1375 (Fed. Cir. 2009).
8. *Arko*, 553 F.3d at 1380 .
9. *Ibid.*, at 1376.
10. *Ibid.*, at 1376–1377.
11. *Ibid.*
12. *Ibid.*
13. *Ibid.*, at 1380.
14. *Overseas Lease Group., Inc. v. United States*, 106 Fed. Cl. 644 (2012).
15. *Ibid.*, at 651.
16. *Ibid.*
17. *Ibid.*
18. *Ibid.*
19. *Ibid.*
20. *Ibid.*

Trimming the Roses: The Narrowing Availability of the Commercial Items Exemption in Federal Contracting

by

*Nicholas Wolfe**

[Note: Reprinted with permission of the National Contract Management Association, *Contract Management* magazine, January 2014.]

Congress loves a neat lawn. Stroll around Washington, D.C., and you will agree. The grass is immaculate, the shrubbery is trimmed, and the flowers are watered to a fault. In fact, it takes nothing short of a government shutdown to deviate from this priority. Ironically, it was this love affair with landscaping that landed Congress "in the weeds," so to speak, with respect to the definition of "commercial items" as used in the Federal Acquisition Regulation (FAR) and Defense FAR Supplement (DFARS).

For the uninitiated, the "commercial items exemption" is what most large businesses use to exempt themselves from the most cumbersome of government regulations. Qualifying under this exemption means simply that the supplier need not justify its pricing; the idea being that the commercial marketplace has galvanized a fair price out of these services or goods.

During the drafting session of the Federal Acquisition Streamlining Act of 1994 (FASA), Congress was keen on enacting a usable exemption to government contracting regulations. The goal was to encourage commercial supplier participation in federal contracting. More important, the government needed better access to commercial prices. The exemption was initially drafted to include commercial suppliers with catalog prices (like a restaurant menu). However, a regulatory drafter commented that the requirement of a catalog price would restrict the participation of lawn cutting and janitorial services, both of which are task-oriented suppliers.[1] It was this comment that fatefully led to the current definition including "commercial of a type" suppliers; "of a type" signifying that the services/goods need to actually be placed on the commercial market if other factors are present.

Most notably, the "commercial of a type" exemption encourages commercial supplier access to federal work by removing significant regulatory "weeds," such as cost accounting administration and disclosures, providing certified pricing data, and the allowability of indirect cost pass-through (such as overhead).[2] Once the weeds were removed, Congress fertilized the soil by creating the streamlined acquisition procedures authorized for the ordering of commercial items, which makes this exemption perhaps the most impactful in federal contracting (exempting the small business exemption and prioritization).[3] A garden soon bloomed, but quickly became unwieldy.

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Trimming the Roses (cont'd):

Statutory History
1994

The statutory history for the modern definition of "commercial items" begins with the enactment of FASA. FASA encourages government access to the commercial markets by: 1) prioritizing the sourcing of commercial items; and 2) removing the price justification requirement for commercial suppliers.[4] Drafters mentioned, however an inherent tension in adding services to the list of commercial items because most services are priced based on the size of the task (making market prices difficult to come by).[5] Furthermore, the inclusion of services tends to expand the exemption. Drafters commented that a service supplier need only catalog its labor rates to circumvent the technical definition.[6] Presumably to resolve the tension between superficial catalog prices and the need for commercial services, Congress added "of a type" to the definition. The "of a type" language indicates that the services should at least theoretically be appropriate for nongovernmental use, such as lawn cutting.

1996

Of relevance here is the enactment of the Federal Acquisition Reform Act (later renamed the Clinger-Cohen Act of 1996), which prescribed streamlined tiers based on contract value.[7] This act put a ceiling on the exemption of commercial items purchases, now at $6.5 million.[8]

2003

The final piece of the modern definition arrived with the enactment of the Services Acquisition Reform Act of 2003 (SARA).[9] As its title suggests, SARA addresses services in the context of commercial items and attempted to place limits on which services could qualify. SARA made three changes in this regard:

- SARA authorized performance-based contract or task orders for the procurement of services to be "deemed" a "commercial item" under certain circumstances[10];
- SARA authorized the limited use of time-and-materials (T&M) or labor hour contracts in the procurement of commercial services subject to certain restrictions, such as a T&M ceiling (which does not include overtime adjustments)[11]; and
- SARA restricted commercial services to specific, segregable tasks, which would not likely include blanket resource staffing.[12]

Current Definition

The current definition places emphasis on whether the supplier is providing goods or services. Goods included within the current definition include the following:

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Trimming the Roses (cont'd):

- Those customarily used by and have actually been offered for sale[13] to the general public for nongovernmental purposes,[14] and
- Nondevelopmental items, if the procuring agency determines the items were developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple state and local governments.[15]

Services included within the current definition include the following:

- Those customarily used by and have actually been offered for sale[16] to the general public for nongovernmental purposes[17];
- Installation services, maintenance services, repair services, training services, and other services, provided that:
  - ◊ They are used in support of other commercial items, and
  - ◊ They are offered for sale to the general public under similar terms and conditions as the federal solicitation[18]; and
- Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.[19]

Minor Modifications

To complicate things further, the definition includes a penumbral scope that includes a good or service that would qualify as a commercial item but for the fact that it is a minor modification.[20] This is likely intended to cover items such as mobile phones modified to meet Department of Defense (DOD) security parameters, but the implications are much further reaching.

Efforts at Amending—
"Commercial" Military Equipment

Recently, the Pentagon has investigated the abuse of the "commercial of a type" language regarding military equipment sourcing.[21] For example, a federal supplier providing engine parts for the V-22 *Osprey* aircraft pursuant to a $93.2 million contract was determined to be a "commercial of a type" supplier on the basis that aircraft engine parts could theoretically be sold and used commercially.[22] Accordingly, the Pentagon requested a statutory change in the Defense Authorization bill for 2013 to eliminate the phrases "of a type," "offered for sale," and "minor modifications" and to modify "substantial" quantities to "like" quantities.[23] Because of the wide-reaching implications for commercial suppliers working for the federal government, this proposal was not included in the House or Senate versions of the bill for 2013.

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Trimming the Roses (cont'd):

DOD Final Rule

Political hesitation notwithstanding, DOD was able to issue a final rule that, among other things, requires the supplier to provide market and cost data for commercial items acquisitions exceeding $1 million.[24] The new rule applies only to suppliers utilizing the "of a type" category of commercial items, and will require the supplier to provide pricing and cost data, but no justification or explanation of such data.[25]

Evaluation Checklist

With all of these changes and complicated statutory history, federal suppliers have a right to be concerned. The following is an evaluation checklist to assist federal suppliers in evaluating the potential level of increased agency scrutiny in the coming year.

Evaluating Supplier Offerings

Goods or Services—A supplier should use the "primary purpose" test to determine whether they are providing goods or services to the government. Services have had a troubled history under the commercial items exemption and will receive a higher level of scrutiny than goods (in most cases).

"Of a Type" or Actually Sold—Suppliers who sell the same services/goods to the government as they do in the commercial sphere have much less to worry about. The terms will need to be substantially similar (such as length of product or service warranty).

Minor Modifications—Suppliers who make minor modifications to standard commercial items in order to meet government requirements may begin to see requests for clarity in the pricing of such modifications.

Military Suppliers—Suppliers who support DOD have cause for concern in light of the recent final rule issued by DOD. If DOD is dominating the supplier's industry (e.g., purchase of fighter jets) or dominating the supplier's market (e.g., greater than 50 percent of the supplier's revenue), the supplier will likely see increased scrutiny.

Market and Industry Analysis—Suppliers who are selling to a market dominated by the government or who receive more than 50 percent of their revenue from federal sources will likely see an increased scrutiny.

Installation/New Development—No word exists yet as to the fate of exemptions for installation/support of commercial items, or goods that are not available on the commercial market, but will be in time for the award. However, because of the specificity of the exemptions here, no changes are anticipated.

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Trimming the Roses (cont'd):

For example, considering these six items, a supplier providing services not available on the commercial market in support of V-22 *Osprey* engine parts is less likely to avoid price justification scrutiny than a supplier providing goods available on the commercial market in support of a General Services Administration activity.

Evaluating Federal Solicitations

- *Award Value*—If the award exceeds $6.5 million in value, then the commercial items exemption simply does not apply, at least with respect to Cost Accounting Standards disclosures and administration. Moreover, an award exceeding $1 million in value with DOD will require price justification.

- *FAR Flow-down*—If the contracting officer is attempting to flow down clauses that should not apply by virtue of the commercial items exemption, further clarification is mandatory. At the very least, the "Contract Terms and Conditions— Commercial Items" clause should appear in the contract documents.

- *Pricing Type*—A cost-plus pricing type will almost certainly be for noncommercial services. Labor-hour pricing is permitted, but the supplier should include a T&M ceiling as required by SARA. Performance-based pricing also entails certain restrictions and inclusions mandated by SARA.

- *Competition in Contracting*—If the contract was awarded without competition for services, then the supplier has reason to be concerned. DOD has indicated skepticism of sole-sourced, commercial items awards, especially in the area of services and T&M pricing.

- *Prime Contractor Analysis (if applicable)*— If the supplier is on a subcontracting tier, careful attention should be paid to whether the prime contractor is a small business concern. Small business concerns are exempt from stringent FAR requirements, such as cost justifications. Therefore, small business concerns may not properly include certain FAR clauses (although mandatory) because they view them as inapplicable. All subcontracts should include the following language: "Subcontractor's services hereunder shall be limited to the providing of goods and/or services defined a 'commercial items' pursuant to FAR 2.101(b)."

Practical Steps for Long-term Compliance

Federal suppliers who operate under the commercial items exemption should be mindful to maintain a diversity in customers, including commercial market customers, where possible.

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Trimming the Roses (cont'd):

Catalog prices have long been a compliance "safe harbor," such as the General Services Administration Schedules. However, a 2007 Acquisition Advisory Panel report indicated that catalog prices tend to be used as a circumvention technique, and should not be used as dispositive evidence of whether the good/services are commercial items.[26] Therefore, if catalog prices are used, the supplier should endeavor to create task-based catalog pricing, as opposed to labor-hour catalog pricing. Labor-hour pricing should adhere to SARA requirements, instead, to ensure commercial items compliance.

Congress Loves a Neat Lawn

If only the same could be said of its legislation and regulations. The goals behind FASA, FARA, and SARA are simple: to encourage the relationship between commercial suppliers and the government and permit the government to capture the fair prices inherent in a free market. In this regard, some of the new efforts at amending the definition make sense. On the other hand, some of the new efforts are beyond the pale.

The implications of the government participating in the commercial markets make the simple goal of saving money not so simple. It is very clear to any supplier who provides services for the government and nongovernmental clients that the government is an entirely different beast. Cost efficiencies are not as easy to come by, and less so as regulations become more stringent in this area.

Put simply, when it comes to the commercial items exemption, the government wants to have its *laissez faire*, and eat it too.

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Endnotes

1. *See* Pub. L. 103-355, tit. VIII, §8001, 108 Stat. 3385.
2. *See* 48 CFR 9903.201-1(b)(6); and 48 CFR 15.403-1(b).

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Trimming the Roses (cont'd):

Endnotes (cont'd)

3. *See* 48 CFR 12.603.
4. *See* Pub. L. 104-106 §4202, 110 Stat. 186, 652.
5. *Ibid*.
6. *Ibid*.
7. Pub. L. 104-106, div. D, 110 Stat. 642 (1996).
8. *See* FAR 13.5.
9. Pub. L. 108-136, tit. XIV, 117 Stat. 1663 (2003).
10. *Ibid*., at §1431; codified at 41 U.S.C. §403.
11. *Ibid*., at §1432.
12. *See ibid*., at §1433.
13. *See* note 16.
14. 48 CFR 2.101(b).
15. *Ibid*.
16. Does not apply to items that are not commercially available because of new technological advances, but will be prior to award.
17. 48 CFR 2.101(b).
18. *Ibid*.
19. *Ibid*.
20. *Ibid*.
21. DOD, Office of Inspector General, "Commercial Contracting for the Acquisition of Defense Systems," D-2006-115 (September 29, 2006) (DOD IG Report), *available at* www.dodig.mil/audit/ reports/FY06/06-115.pdf.
22. *Ibid*., at 7.
23. *Ibid*., at 13.
24. DFARS Case 2011-D041, 77 Fed. Reg. 11480, 114881 (March 12, 2012).
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Independent Monitors:
What They Do and How to Avoid the Need for Them

by
*John S. Pachter**

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It can be a daunting experience for a company to come under the regime of a Deferred Prosecution Agreement or an Administrative Compliance Agreement that includes the appointment of an Independent Monitor. Nevertheless, by working collaboratively with the Independent Monitor, the company can achieve a win-win outcome, and emerge with a stronger ethical culture and control mechanisms that guard against potential violations in the future. The following discussion will outline the role of the monitor and provide a framework for successful fulfillment of the company's obligations under the monitor's supervision. In fact, through careful attention and planning, we will see that a company can avoid the need for an Independent Monitor altogether, by having in place adequate controls and being alert to the need for self-reporting.

While compliance is expensive, some companies have found from bitter experience that compliance is much less expensive than non-compliance. There are positive benefits as well. By integrating compliance into operations, as opposed to isolating it as a stand-alone function, companies can foster a more confident and productive workforce. Studies have shown that companies that espouse high ethical standards also deliver greater shareholder value. Thus, a sound set of ethical values should be viewed as the cornerstone for successful business operations.

The Ethisphere Institute each year compiles a list of what it deems the World's Most Ethical Companies. Ethisphere summarizes the attributes of those companies as follows: ''WME honorees not only promote ethical business standards and practices internally, they exceed legal compliance minimums and shape future industry standards by introducing best practices today.''[1]

Periodically, Ethisphere compares its WME Index to standard stock indices, demonstrating that the most ethical companies outperform the indices by a substantial margin. The latest such comparison is available for the year 2011.[2]

1. How and Why Independent Monitors Are Appointed.

Independent Monitors are appointed pursuant to (1) a negotiated Deferred Prosecution Agreement ("DPA") or a Non-Prosecution Agreement entered into by the Department of Justice to resolve a criminal case against a corporation without a formal conviction,[3] or (2) an Administrative Agreement entered into by a federal agency in lieu of debarment. Where criminal charges have been brought, both types of agreements are involved, requiring coordination between the federal agency and the Department of Justice.

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These agreements are appropriate when government officials determine that the company has made a sufficient showing of corporate responsibility and cooperation, and that the government's interests can be adequately safeguarded by allowing the company to continue to do business with the government, subject to certain conditions, including supervision and appropriate reporting. The agreements acknowledge the harmful effects of prosecution and debarment on innocent third parties who were not involved in the alleged misconduct, including employees, customers, shareholders and pensioners.

The criminal prosecution and conviction of the accounting firm Arthur Andersen for obstruction of justice in the destruction of Enron-related records provides a case study. As a byproduct of the conviction, the company went out of business. The Supreme Court unanimously overturned the conviction, holding that the jury instructions were flawed.[4] Only a relative few of Arthur Andersen's 85,000 employees were involved in the wrongdoing. It is fair to ask whether the persons responsible for misconduct could have been disciplined, and the public interest served, by a DPA that would have preserved the vast majority of the 85,000 jobs.

This is among the questions considered by debarring officials and prosecutors. DPAs and Administrative Agreements can serve as sensible alternatives to prosecution and debarment. These measures assure that wrongdoers are treated appropriately, that innocent third parties are not harmed, and that the public interest is served. An Independent Monitor assesses the company's compliance with the terms of the agreement, the effectiveness of the company's internal compliance program, makes recommendations for improvement or remedial measures, and reports to the agency.

The monitor's duties are described in the DPA or the Administrative Agreement. Those duties may be broadly stated or more narrowly tailored to address specific concerns. The agreement may reserve discretion in the monitor to address challenges that are not a specifically enumerated. Subject matter experts can serve the government as special compliance officers to work in conjunction with the Independent Monitor, and address such matters as export controls and technical or environmental compliance.

In short, the company benefits from the expertise of an independent third party; innocent employees keep their jobs; vendor relationships are preserved; and shareholders and the public gain from the expectation of and insistence upon high levels of ethical conduct.

2. Duration of Appointment.

Agency administrative agreements typically last three years, generally the length of a debarment, although the term can be longer. In addition, if there is a DPA in place or in negotiation, the agency Administrative Agreement will usually terminate not earlier than the termination date of the DPA. The Department of Justice ("DOJ") has discretion to shorten the term of the DPA if the individual or company demonstrates satisfactory progress in meeting its objectives. Similarly, the agency may decide that changed circumstances eliminate the continued need for a monitor. On the other hand, some agreements grant the agency authority to extend the period of the agreement beyond three years.

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If a new and independent ground of debarment arises during the term of the agreement, the debarring official may revisit the entire matter and decide whether the controls in place are adequate or whether the agreement should terminate and debarment be imposed.

3. Status of the Independent Monitor.

Agencies typically request the company to propose a monitor subject to agency approval. The company then engages the monitor and compensates the monitor. As an Independent third party, the monitor is not an employee or agent of the company or the government. Rather, agencies rely on monitors to serve as their "eyes and ears" to assess whether the steps undertaken by the company are sufficient. Success of the mission depends on candid dialogue and timely disclosure to the monitor by the company and the agency of any issues of concern that arise during the monitor's tenure. The monitor submits reports directly to the agency on the status of the company's fulfilment of its obligations under the Administrative Compliance Agreement.

Because the monitor does not serve as attorney to the corporation, statements to the monitor are not privileged. Nevertheless, for the monitor to function effectively, the monitor must have unfiltered access to individuals and records at any level of the company.

4. Role of the Independent Monitor.

Except for monitorships that involve specialized scientific or other technical expertise, the monitor's responsibility is to assess and report on the company's compliance with the DPA or Administrative Agreement, including the effectiveness of the company's internal compliance program. The government's overall objective, in these remedial steps, is to reduce or eliminate the risk of recurrence of the conduct in question. The monitor works in collaboration with the government and the company. Just as debarment is not a form of punishment, the monitor's role, as defined in the DPA or Administrative Agreement, is not to punish the company. That is the job of prosecutors, and their work has usually been accomplished, subject to the provisions of the DPA, when the monitor is appointed.

Administrative Compliance Agreements typically require the monitor to provide recommendations for improvements in the company's internal controls, compliance system, ethics programs, and other areas. The company will provide responses to the recommendations, including any reasons why the company believes it should not adopt the recommendations. The agency may express its views on adoption of any recommendations to which the company takes exception. The agreement should provide the means of resolving differences that cannot be disposed of by agreement between the monitor and the company.

In short, the monitor should work cooperatively with the company to build a strong and sustainable ethical culture designed to detect and prevent violations. From this collaborative effort should emerge a renewed company commitment to continuous improvement of its ethical culture.

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5. Importance of an Ethics and Compliance Program.

The websites of major corporations contain examples of well-developed Ethics and Compliance Programs and Codes of Conduct. This, with other information publicly available, means that any company can assemble on paper a credible Code of Conduct and Ethics and Compliance Program. After all, Enron had a credible program on paper, but, to put it gently, failed to implement its program. In most cases, the monitor's job is to assess whether the company has an adequate compliance system along with an ethical culture that honors and respects its written commitments.

The Federal Sentencing Guidelines Manual Section 8B2.1 "Effective Compliance an Ethics Program" and the clause at Federal Acquisition Regulation ("FAR") 52.203-13 "Contractor Code of Business Ethics and Conduct" set forth the elements of an effective compliance and ethics program.[5] The FAR clause is mandatory for solicitations and contracts if the value of the contract is expected to exceed \$5,000,000 and the contract is expected to exceed 120 days.[6] The clause at FAR 52.203-13(c) states that the requirement for a business ethics awareness and compliance program and internal control system does not apply to small business concerns or to commercial item acquisitions.

From this you might conclude that if you do not have a contract expected to exceed \$5 million, or you are a small business concern, or a commercial item contractor, you are exempt from the requirements just mentioned. That would be a mistake. Here is the reason: the FAR debarment mitigation standards state that before imposing debarment, the debarring official should consider certain factors. The first such factor is:

> (1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.

There is *no* exception here for contracts under a certain threshold, for small business concerns or for commercial item contracts. And the contractor must have "effective standards of conduct and internal control systems in place" *before* the agency investigates the activity cited as the cause for debarment. If the contractor waits until the debarring official knocks on the door, it is too late to be given credit in the debarring official's deliberations.

Accordingly, because of the combined effect of the sentencing guidelines and the FAR debarment mitigation standards, every company doing business with the government should have some form of an ethics and compliance program, tailored to the size of the company, the number of employees, and the nature of its work. Above all, the program should address the company's particular risks and challenges. A "check-the-box" approach will be viewed as superficial and ineffective.

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6. Attributes of an Effective Ethics and Compliance Program.

The following summary is adapted from the Sentencing Guidelines, the FAR clause, and the Resource Guide to the U.S. Foreign Corrupt Practices Act issued by the DOJ and the Securities and Exchange Commission ("SEC") on November 14, 2012, augmented with further detail based on personal experience. While this summary contains the elements of a program needed by a large corporation, every government contractor – as mentioned above – is well advised to take heed.

a. Tone from the Top.

Above all, the company should promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law. Senior management and the board of directors must set the tone for the organization, demanding the highest dedication to ethical conduct and compliance with the law from themselves and the entire organization. Words must be combined with deeds. This is an indispensable first step to establish a "culture of compliance," and it must be reinforced at all levels of management down the chain. If the lowest level supervisor – the person the employee encounters daily – is unsupportive, the whole effort is put at risk. Accordingly, the company should take reasonable steps to ensure that it does not appoint or retain persons in leadership positions who engage in conduct inconsistent with an effective ethics and compliance program.

Further, the company's executives and its board of directors should be knowledgeable about the content and operation of the ethics and compliance program and should exercise oversight with respect to its implementation, operation and effectiveness.

b. Code of Conduct; Corporate Values.

A code of conduct is a set of standards describing the behavior that a company expects from its personnel at all levels. An effective code of conduct will provide employees a framework for their own conduct. It is the responsibility of each individual within the company to follow the code. The code should go beyond the minimum requirements in statutes and regulations and define the behaviors and principles to which employees are expected to abide.

An indispensable ingredient of a code of conduct and an ethics and compliance program is a succinct statement of the company's values. It must be clear, concise, and accessible. The monitor's job is to assess whether the corporation's conduct matches its stated values as evidenced by the behavior and attitudes of its employees.

With sound corporate values, employees are apt to be more content and efficient. It makes a huge difference to them to know their contribution is valued. They feel better about coming to work, knowing the company adheres to the sound values they were taught as children. Absenteeism falls off; productivity improves; customer satisfaction increases; and the government customer is more willing to be a committed partner than a skeptical buyer that must constantly be on guard for lack of a trusting relationship.

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A moment's reflection will reveal how far we have come. Fifty years ago, one image embedded in our society was that of the hard-driven boss determined to make the numbers. Various forms of abuse, harassment and discriminatory treatment were accepted in some Organizations as something that had to be tolerated if you wanted to keep your job. The sales opportunity counted more than the notion of ethics and values.

Today, the bottom line is still important; companies do not survive without close attention to it. Quality products and services and customer satisfaction remain at the forefront. The difference, we now know, is that we can get there without sacrificing human values. To the contrary, a company with sound values is an attractive and admired competitor in the marketplace. It is the sort of organization others want to do business with and to emulate. It is not just a matter of complying with government regulations. It is a matter of "doing the right thing" – of setting the right tone for successful business operations.

c. The Relationship Between Values and Compliance.

We have seen that "tone from the top" is essential. The board of directors must be well-informed and engaged. The corporate leaders must exhibit daily in words and deeds that they embrace the company's stated values. What happens, then, if a business unit manager goes in a different direction and shows disrespect to others? If the manager does not fully embrace corporate values, the message to the rank and file is that the company itself does not take its values seriously. This type of manager must be cautioned, counseled, and replaced if necessary. A culture of compliance needs fertile ground to take root.

Conversely, a business environment that is indifferent to compliance and tries to cut corners to minimize costs is at great risk. Its employees will be cynical; their energy will be diverted into negative channels. Hence, they will be less attentive to contract requirements, and unable to believe in the value of a reputation for excellence. As a result, the company will be at risk of poor performance ratings, fines and penalties, prosecution and debarment. A monitor will evaluate the company's measurement of the depth of its culture in these areas and will interview personnel regarding these and other areas to make independent findings.

d. Oversight.

An experienced high level person should be assigned overall responsibility for the ethics and compliance program. That person should have direct access to the top corporate executives and the board of directors or a sub-group of the board such as the Audit Committee. The person should have adequate staffing and other resources and should report periodically to the top executives and the board of directors on the operation and effectiveness of the ethics and compliance program. The program must be designed to be effective in detecting and preventing misconduct. Without adequate staffing and resources, this objective may be compromised.

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e. Training.

Training of employees is a vital part of an ethics and compliance program. The company should conduct periodic training of employees in ethics and compliance, including training of new hires and refresher training of all employees. Depending on markets served, it may be necessary to train agents and business partners, or at least insist that they do their own training. The training should stimulate participants to think about how to respond to challenges that could arise in the company's identified risk areas.

To get a training program off the ground, a company may find it desirable to bring in an outside consultant. However, training is too important to outsource entirely. Employees respond best when trained by others in the company who understand the company's products and services, its marketing goals and its customer demands. Monitors will be interested in the content of course material, the quality of instruction, and the attentiveness of those being trained.

f. Communication.

The company should regularly communicate items of interest regarding ethics and compliance through such means as newsletters, intranet postings, and group meetings. These communications may include lessons learned, specific suggestions to employees, and recognition of employees who exemplify the company's values through their accomplishments. To indicate that it means business, the company should consider communicating summaries of disciplinary action without identifying the employee or employees involved.

g. Evaluation and Review of the Ethics and Compliance Program.

The subject of ethics and compliance is not static. Rather, compliance programs must evolve over time to meet changing circumstances.

Thus, compliance officers need to be aware of laws and regulations but also trends that point to development of a higher level of compliance. With this in mind, the company should periodically review its business practices, procedures, policies, training, and internal controls. Areas of vulnerability should be identified and a plan developed for solutions. Procedures should be updated to reflect the latest developments and to institute measures for continuous improvement.

In addition, the company should periodically evaluate the effectiveness of the ethics and compliance program using metrics such as surveys; interviews; examination, analysis and tracking of employee complaints and grievances; human resources statistics; available industry statistics; and other yardsticks. There should also be periodic risk assessment reviews of the company's operations to identify vulnerable areas in need of attention.

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h. Reporting of Infractions.

The company should encourage employees to report suspected instances of improper conduct and seek ethics and compliance guidance. These reports can be made directly through supervisors or compliance officers, or anonymously. To facilitate anonymous reporting, the company should publicize a hotline or dedicated email address through which employees can make anonymous and confidential reports of suspected instances of improper conduct, or seek guidance. In all cases, the company must provide assurances against fear of retaliation and reinforce those assurances through training.

The compliance program should also include a procedure for identifying infractions that must be reported to government officials and for making and following up on such disclosures.

i. Investigations.

After a complaint is reported, the company must ensure that proper procedures are followed for investigating the complaint. These procedures should include due consideration of the individual or individuals who are the subject of the complaint. Complaints should be investigated on a timely basis by a person with an appropriate level of experience and judgment. Nothing is more disheartening to employees than to lodge a complaint, only to have it not acted upon and resolved reasonably promptly and professionally. The investigation should also give the subject of the complaint a fair opportunity to respond before imposing any disciplinary action. The subject of the investigation may provide information that obviates the need for discipline, excuses the behavior or mitigates the circumstances in question.

While employees should have direct access to the monitor, the monitor should not ordinarily conduct investigations. The monitor's job is to evaluate the company's procedures and its ability to conduct its own investigations. If the employee files the complaint directly with the monitor as a last resort after the company has failed to respond, then it is time for the monitor to become directly involved. Otherwise, unless the Administrative Compliance Agreement provides otherwise, the monitor will re-direct the complaint to the proper place within the company for investigation and resolution, then review the result.

j. Disciplinary Measures.

The program should include graduated disciplinary measures for improper conduct, or for failing to take reasonable steps to prevent or detect improper conduct. These graduated measures should range from warnings and letters of reprimand, to dismissal depending on the severity of the infraction.

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k. Rewards and Incentives.

Alongside the negative aspect – sanctioning misconduct – there should be incentives and rewards to acknowledge special contributions to the ethics and compliance program and the ethical culture of the organization. Personnel evaluations, promotions, and consideration for salary increases and bonuses, can include a component for improvements in the ethics and compliance program and for leadership in ethics and compliance. This insures that compliance is woven into the regular everyday conduct of business.

l. Third-Party Due Diligence.

The clause at Department of Defense Federal Acquisition Regulation Supplement ("DFARS") 252.244-7001 Contractor Purchasing System Administration, includes the following requirements:

> (17) Enforce adequate policies on conflict of interest, gifts, and gratuities, including the requirements of 41 U.S.C. chapter 87, Kickbacks;
>
> ***
>
> (21) Establish and maintain selection processes to ensure the most responsive and responsible sources for furnishing required quality parts and materials and to promote competitive sourcing among dependable suppliers so that purchases are reasonably priced and from sources that meet contractor quality requirements.

These requirements come into play in the following discussion of Anti-Kickback Act and counterfeit parts.

i. Anti-Kickback Act.

A common area of vulnerability relates to third party relationships, including business partners, subcontractors and suppliers. This is especially the case with respect to operations in foreign countries, where practices considered illegal in the United States routinely occur. In the recent case of *Kellogg Brown & Root Services, Inc. v. United States*, 728 F.3d 1348 (Fed. Cir. 2013), for example, the Federal Circuit held that contractors can be strictly liable for double damages and penalties for acts of employees, without regard to their position in the corporate hierarchy, that are imputed to the corporation as knowing violations of the Anti-Kickback Act. This decision highlights the need for ongoing monitoring of third-party relationships.[7] A request for annual compliance certifications is also advisable.

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ii. Counterfeit Parts.

Another area that warrants attention is new coverage added to DFARS 252.244-7001, Contractor Purchasing System Administration, specifically the requirements of 252.246-70XX, Contractor Counterfeit Electronic Part Avoidance and Detection System.[8] The Contractor Purchasing System Criteria, mentioned above, which ensure the most responsive and responsible sources for furnishing parts and materials, now includes 252.246-70XX, Contractor Counterfeit Electronic Part Avoidance and Detection System, if applicable.

m. A Cross-Disciplinary Approach.

Ethics and Compliance cannot properly be viewed as a stand-alone operation. To succeed, it must be integrated into the fabric of the company's operations. Above all, ethics and compliance must be accepted as a valued contributor to risk assessment and risk management. In contracting, this means starting in the business development phase, to make sure vulnerabilities in target markets are identified and plans undertaken to cope with compliance challenges. The same principle applies throughout – in the proposal planning and preparation phase; the award phase and the administration of performance; and contract close-out.

To be effective, Ethics and Compliance should work in tandem with Human Resources, Security and Environmental, Safety and Health components. Many complaints filed with Ethics and Compliance turn out to represent HR issues. Conversely, HR actions can reveal incipient compliance or culture issues that reflect the need for broader study and action. The Penn State/ Sandusky episode is a tragic example of systemic failure in this regard. The monitor will review the company's progress in these areas and the effectiveness of its programs.

n. Disclosures to the Government.

Companies are especially sensitive to the need to report violations that arise during the term of DPAs and administrative agreements. The agreements usually address this disclosure in specific terms. In addition to contractual provisions, FAR 3.1003 requires contractors to report violations. Here, however, as in the case of determining what type of ethics and compliance program is appropriate, we find a potential trap. FAR 3.1003 provides that a contractor may be suspended or debarred for failure to disclose "credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code or a violation of the civil False Claims Act." The FAR also states as a cause for suspension or debarment the "knowing failure by a principal to timely disclose credible evidence of a significant overpayment, other than overpayments resulting from contract financing payments as defined in 32.2001."[9]

Companies and attorneys not versed in this area may mistakenly view these FAR requirements as constituting the universe of required disclosures. There are other causes for debarment, however, including the broad catchall "any other cause of so serious and compelling a nature that it affects the present responsibility of the contractor or subcontractor."[10]

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In addition to the FAR disclosure requirement just discussed, there is the much older provision in the FAR debarment mitigation criteria. The second factor is as follows: "Whether the contractor brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner."[11] As in the case of standards of conduct and internal control systems, there is no exception here for contracts under a certain threshold, for small business concerns, or for commercial item contracts. Thus, the company cannot wait for receipt of a notice of proposed debarment to decide whether to disclose. When the prosecutor or debarring official knocks on your door it is too late to say "I was about to disclose." That is not the ''timely'' disclosure that will entitle you to credit.

The monitor will review the company's procedures for identifying and evaluating circumstances requiring disclosure. The monitor will also receive reports from the company on the nature and frequency of disclosures factor is as that are made to the government.

7. How to Avoid the Need for a Monitor.

Recent developments demonstrate how companies can avoid the need for an Independent Monitor. These situations involve Foreign Corrupt Practice Act ("FCPA") violations prosecuted by DOJ and the SEC.

a. The Resource Guide to the U.S. Foreign Corrupt Practices Act.

The Resource Guide to the U.S. Foreign Corrupt Practices Act, issued November 14, 2012 by DOJ and SEC, states:

> In addition to considering whether a company has self-reported, cooperated, and taken appropriate remedial actions, DOJ and SEC also consider the adequacy of a company's compliance program when deciding what, if any, action to take. The program may influence whether or not charges should be resolved through a deferred prosecution agreement (DPA) or non-prosecution agreement (NPA), as well as the appropriate length of any DPA or NPA, or the term of corporate probation. *It will often affect the penalty amount and the need for a monitor or self-reporting*.[12]

In the same connection, Footnote 303 of the Resource Guide notes the FAR debarment mitigation standards:

> Debarment authorities, such as the Department of Defense or the General Services Administration, may also consider a company's compliance program when deciding whether to debar or suspend a contractor. Specifically, the relevant regulations provide that the debarment authority should consider "[w]hether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment," and "[w]hether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs."[13]

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The Resource Guide further states: "In appropriate circumstances, DOJ and SEC *may decline to pursue charges against a company based on the company's effective compliance program*, or may otherwise seek to reward a company for its program, even when that program did not prevent the particular underlying FCPA violation that gave rise to the investigation."[14] So now we know that a company with an effective ethics and compliance program can avoid charges being brought against the company and in any case may avoid or reduce the need for monitoring. Two recent cases demonstrate this possibility.

b. Morgan Stanley.

On April 25, 2012, DOJ and SEC announced that Garth Peterson, a former managing director for Morgan Stanley's real estate business in China, pleaded guilty for conspiring to evade internal accounting controls Morgan Stanley was required to maintain under the FCPA.[15] Peterson sought to enrich himself and a Chinese government official. The controls in question were designed to prevent corruption. Morgan Stanley had trained Peterson seven times and reminded him to comply with the FCPA at least thirty-five times. Nevertheless, through false representations concealing his ownership interest, Peterson conspired to transfer a multi-million dollar ownership interest in a Shanghai building to himself and a Chinese official with whom he had a personal friendship.

Morgan Stanley voluntarily disclosed the matter and cooperated with DOJ's investigation. After considering all available facts and circumstances, including that Morgan Stanley constructed and maintained a system of internal controls that provided reasonable assurance that its employees were not bribing government officials, the authorities declined to bring any enforcement action against Morgan Stanley. This was the first public declination by DOJ and SEC of an FCPA enforcement action, and it noted Morgan Stanley's extensive compliance efforts as a key factor.

c. Ralph Lauren.

On April 22, 2013, the SEC announced a Non-Prosecution Agreement ("NPA") with Ralph Lauren Corporation in which the company will disgorge more than $700,000 in illicit profits and interest in connection with bribes paid by a subsidiary to government officials in Argentina from 2005 to 2009. The company discovered the misconduct in an internal review and promptly reported to the SEC. SEC determined not to charge the company with violations of the FCPA "due to the company's prompt reporting of the violations on its own initiative, the completeness of the information it provided, and its extensive, thorough and real-time cooperation with the SEC's investigation."[16]

SEC stated: "The NPA is the first the SEC has entered involving FCPA misconduct."[17] In parallel proceedings, the DOJ also entered into an NPA with Ralph Lauren in which the company will pay an $882,000 penalty.

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When the bribes occurred, Ralph Lauren lacked meaningful anti-corruption and control mechanisms over its Argentine subsidiary. The company discovered the misconduct after it adopted measures to improve its worldwide controls and compliance, including an FCPA training program in Argentina. Ralph Lauren had undertaken remedial measures, including compliance training, termination of employment and business arrangements with individuals involved in the wrongdoing, and strengthening its internal controls and procedures for third party due diligence. Ralph Lauren also conducted a risk assessment of its major operations worldwide to identify other compliance problems.

Conclusion.

By having a strong ethics and compliance program in place, by self-reporting suspected violations, by cooperating with investigative authorities, and by taking appropriate remedial measures, the company may be able to avoid prosecution. The company may also be able to resolve the charges through a DPA, Administrative Agreement, or both, in tandem. The strength of the company's ethics and compliance program and its implementation may also determine whether an Independent Monitor is needed, and, if needed, the scope of the Independent Monitor's duties.

If a monitor is appointed, the company should view this development as an opportunity to work collaboratively with the monitor to strengthen and improve the company's ethical culture, its control mechanisms and its adoption of best practices in the industry.

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Endnotes

1. *World's Most Ethical Companies-Honorees*, ETHISPHERE.COM, http://ethisphere.com/worlds-most-ethical/wmehonorees/#sthash.Ji736GSY.dpuf (last visited December 16, 2013).
2. *See WME Honorees,* ETHISPHERE.COM, http://m1.ethisphere.com/wme2013/index.html (last visited December 16, 2013).
3. *See* Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., to Heads of Dep't Components United States Attorneys, ''Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations'' (Mar. 7, 2008) (commonly referred to as the "Morford Memorandum"), *available at* http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf. Additional guidance was issued May 25, 2010, in a memorandum from Gary G. Grindler, stating that agreements should address resolution of any disputes between the monitor and the corporation regarding monitor recommendations the company considers ''unduly burdensome, impractical, unduly expensive, or otherwise inadvisable.'' *See* Memorandum from Gary G. Grindler, Acting Deputy Attorney Gen., to Heads of Dep't Components United States Attorneys, ''Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations'' (May 25, 2010) *available at* http://www.justice.gov/dag/dag-memoguidance-monitors.html.

Independent Monitors (cont'd):

Endnotes (cont'd)

4. *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).
5. The Sarbanes-Oxley Act of 2002 contains code of ethics requirements for publicly traded companies. *See* 15 U.S.C. § 7264 (2002).
6. 48 C.F.R. § 3.1004.
7. The Fifth Circuit held that corporations can be held vicariously under § 55 (a)(1) and (a) (2) of the Anti-Kickback Act, depending on whether the Government alleges a knowing violation under (a)(1) or seeks a penalty equal to the amount of the kickback under (a)(2) without the need to prove knowing misconduct. *United States ex rel., Vavra v. Kellogg Brown & Root, Inc.*, 727 F.3d 343 (5th Cir. 2013). Judge Jolly, in a concurring opinion, stated that § 55 (a)(1), properly construed, "holds corporations liable for the knowing violations of those employees whose authority, responsibility, or managerial role within the corporation is such that their knowledge is imputable to the corporation." *Id.* at 354 (Jolly, E. Grady, concurring). *See also* John Pachter, *2 KBR Cases Illuminate Kickback Risks For Contractors*, LAW360.COM, http://www.law360.com/governmentcontracts/articles/491501/2-kbrcases-illuminate-kickback-risks-for-contractors (last visited December 16, 2013).
8. Detection and Avoidance of Counterfeit Electronic Parts, 78 Fed. Reg. 28,780, 28,783 (May 16, 2013) (to be codified at 48 C.F.R. pts. 202, 231, 244, 246, and 252).
9. 48 C.F.R. § 9.406-2 (b)(1)(vi)(C); 48 C.F.R. § 9.407-2(8)(iii).
10. 48 C.F.R. § 9.406-2(c).
11. 48 C.F.R. § 9.406-1(a)(2).
12. CRIMINAL DIVISION OF THE U.S. DEPARTMENT OF JUSTICE ET. AL., A RESOURCE GUIDE TO THE U.S. CORRUPT PRACTICES ACT 56 (1st ed. 2012) (emphasis added), available at http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.
13. 48 C.F.R. § 9.406-1(a).
14. CRIMINAL DIVISION OF THE U.S. DEPARTMENT OF JUSTICE ET. AL., A RESOURCE GUIDE TO THE U.S. CORRUPT PRACTICES ACT, *supra* note 11 (emphasis added).
15. *See* Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA, JUSTICE.GOV, http://www.justice.gov/opa/pr/2012/April/12-crm-534.html (last visited December 16, 2013); SEC Charges Former Morgan Stanley Executive With FCPA Violations and Investment Adviser Fraud, SEC.GOV, http://www.sec.gov/litigation/litreleases/2012/lr22346.htm (last visited December 16, 2013).
16. *SEC Announces Non-Prosecution Agreeement With-Ralph Lauren Corporation Involving FCPA Misconduct*, SEC.GOV, https://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514780 (last visited December 16, 2013).
17. *Id.*

Richard v. United States: Government Contracts, Indian Treaties, and the Federal Circuit's Evolving Interpretation of "Bad Men" Provisions

by
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Introduction

In April 2012, the United States Court of Appeals for the Federal Circuit issued a decision promulgating an innovative interpretation of the "bad men" provision found in the Treaty of Fort Laramie of 1868.[1] In addressing a seemingly minor claim arising out of a drunk-driving accident in South Dakota, the Federal Circuit broke from its previous interpretation and application of one of the key provisions found in all nine 1868 Indian Treaties, applying it in a novel and unexpectedly broad manner. In *Richard v. United States*,[2] the Federal Circuit held that claims under the Treaty of Fort Laramie's "bad men" provision brought by any member of the Indian tribes protected by the 1868 treaties are not limited to those arising from wrongs committed by governmental actors or representatives.[3] In effect, the law in the Federal Circuit now holds that members of protected tribes under the 1868 treaties may state a claim against the federal government pursuant to these treaties for indemnification arising from the actions of any American, including other Indians, who are not members of that particular protected tribe.[4] In opposition to the Federal Circuit's previous, more limited application of this provision to claims arising from injuries caused by government actors, the court has now more broadly interpreted this provision to apply to all people that are subject the jurisdiction and laws of the United States.[5]

This Article argues that the Federal Circuit's holding and interpretation of the "bad men" provision of the Treaty of Fort Laramie of 1868 in *Richard* represents a drastic change in the Federal Circuit's approach to Indian law and Indian treaty interpretation, especially with regard to the basic principles of government contract law that govern Indian treaty interpretation. Mr. Timothy Hotz, the non-Indian drunk-driver involved in the *Richard* case, had no authority to unilaterally bind the federal government under the "bad men" provision because blanket indemnifications are illegal under both the Appropriations Clause and Anti-Deficiency Act and because the doctrine of Actual Authority provides that only those with "actual authority" have the power to bind the government in contract. The Federal Circuit's understanding of how the "bad men" provision is to be applied is not in accord with these fundamental rules of government contract law, and it is inconsistent with the Circuit's previous understanding of the very same principles and provisions in the context of Indian treaties.

The first section of this Article will address the historic background of the Treaty of Fort Laramie of 1868 as well as the facts and subsequent history of the *Richard* case. The second section discusses the principles of government contract law that are relevant to Indian treaty interpretation and applies these principles to the facts of *Richard*. In analyzing the proper application of the Appropriations Clause, the Anti-Deficiency Act, and the doctrine of Actual Authority to the "bad men" provision found in the Treaty of Fort Laramie, this Article purports to demonstrate that the Federal Circuit's reasoning and holding in *Richard* is inconsistent with the Circuit's previous application of government contract principles to Indian treaties. The court's holding represents a departure from related precedent within the Federal Circuit.

Richard v. United States **(cont'd):**

I. Background

The claims in *Richard* arise under the Treaty of Fort Laramie of 1868, one of the nine treaties signed in the late nineteenth century between Indian tribal leaders and the United States government.[6] Conflict between frontiersmen and Indians was commonplace during the nineteenth century in the American midwest, particularly as the numbers of frontiersmen arriving in the name of westward expansion continually increased until well into the 1860s.[7] This constant tension between the two groups, manifested through continuous conflict in the form of both informal and formal wars, ultimately culminated in the drafting and signing of a series of nine peace treaties in the year 1868 between Commissioners representing the United States, including William T. Sherman,[8] and prominent, previously hostile Indian tribal leaders. All nine of the treaties signed were agreed upon, ratified, and published[9]; all claimed "peace [a]s their object."[10] In fact, much of modern Indian law arises out of these treaties made in the 1860s,[11] and it is under the unique "bad men" provisions of these treaties that the plaintiffs in *Richard* claim that the government owes a duty of indemnification for their losses at the hands of non-Indian American "bad men."[12]

A. The Treaty of Fort Laramie of 1868 and Its "Bad Men" Provision

The signing of the Treaty of Fort Laramie, at issue here and exemplary of all nine similarly drafted treaties, signified the end of a large-scale military engagement in which famed Sioux leader Red Cloud had fought to protect tribal lands, granted to the Sioux under an 1851 treaty, from the incursion and trespass of white settlers.[13] Though Congress passed legislation in 1871 that ended treaty making with Indian tribes as separate, sovereign nations, all nine of the 1868 Indian treaties still stand today as good law.[14]

The 1868 Indian treaties, at least one of which is considered a foundational document for today's modern tribal nations,[15] facially served a variety of significant purposes such as creating large reservations[16] and establishing tribal rights to education, land, and subsistence-level rations of household necessities.[17] Additionally, each of the nine treaties includes an explicit indemnification clause known as the "bad men" clause.[18] These "bad men" provisions address the consequences of "wrongs" committed by and against members of a signatory tribe, but historically, these clauses rarely have been invoked by protected tribal members in response to injuries, both legal and physical, suffered at the hands of other people.[19]

The "bad men" provisions of the nine Indian treaties have become increasingly controversial in recent years, and the "bad men" clause found in the Treaty of Fort Laramie is the foundational provision of the claims made by the plaintiffs in *Richard*.[20] "Bad men" provisions were included in each of the Indian treaties for the primary purpose of ensuring that the peace to be established by the signing and enactment of the treaties would be upheld in the wake of greedy frontiersmen who were steadily moving west.[21] The clause states:

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.[22]

***Richard v. United States* (cont'd):**

Because white frontiersmen believed they had a right to develop the land as they expanded westward regardless of any previous settlement by others and often paid little attention to Indians whose communities they trampled upon along the way, government negotiators incorporated these "bad men" clauses in order to "ward off outliers and punish those who violated the peace treat[ies] by committing a crime on the reservation."[23] It is this purpose behind the inclusion of the "bad men" clause in the Treaty of Fort Laramie that has colored and driven the court's interpretation of the provision's application over the past 145 years.

A. *Richard v. United States*

Though members of signatory tribes have been filing suits under the nine Indian treaties since the late nineteenth century, the early cases focused primarily on property rights and did not invoke the "bad men" provisions.[24] The Federal Circuit, however, recently addressed the "bad men" provision as found in the Treaty of Fort Laramie in its 2012 *Richard* decision, when it reversed a decision made by the trial court dismissing the suit for lack of jurisdiction. The trial court, unlike the appellate court, based its dismissal upon a narrow interpretation of the phrase "subject to the authority of the United States" found within the treaty's "bad men" provision.[25] *Richard* arose out of a drunk-driving incident on the Sioux reservation in South Dakota.[26] Ms. Calonnie D. Randall and Mr. Robert J. Whirlwhind Horse, both members of the Oglala Sioux Tribe, were struck and killed by a non-Indian intoxicated driver, Mr. Timothy Hotz, while walking along a highway on the Pine Ridge Indian Reservation.[27] Mr. Hotz pled guilty to involuntary manslaughter in a criminal case in the District Court for the District of South Dakota and was given a fifty-one month prison sentence.[28] He additionally was required to pay $1700 in restitution to the Department of Social Services Victims Compensation Services as well as other amounts directly to the families of the two victims.[29] While the Treaty of Fort Laramie does support criminal action against those who violate the "bad men" provision, the criminal charges against Mr. Hotz were neither brought under this provision nor under the treaty more generally.[30] Even without a claim being sustained under the Treaty of Fort Laramie awarding compensation to the victims' families under the "bad men" provision, the families of Ms. Randall and Mr. Whirlwhind Horse will still receive some measure of compensation and restitution for their losses as a result of the previous criminal proceeding against Mr. Hotz.[31]

1. Court of Federal Claims

Mr. James Richard, Sr. and Mr. Jon Whirlwhind Horse, the personal representatives of the estates of Ms. Randall and Mr. Whirlwhind Horse, respectively, filed the original complaint in this action in the Court of Federal Claims in August 2010. In the complaint, the plaintiffs alleged that the decedents were beneficiaries under the Fort Laramie Treaty due to their membership within the Oglala Sioux Tribe and were covered by the indemnification clause found in the Treaty's "bad men" provision.[32] The key jurisdictional question, however, turned on the applicability of the Tucker Act to the plaintiffs' claims under the Treaty of Fort Laramie.

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Richard v. United States **(cont'd):**

The Tucker Act, the statute under which the plaintiffs claim jurisdiction in the Court of Federal Claims, creates a method by which the court may entertain suits against the United States despite the government's general retention of sovereign immunity.[33] The United States may only be sued when it consents to be so, and such consent is described in detail in the Tucker Act.[34] Because the Tucker Act waives sovereign immunity "upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States,"[35] recovery was only available to the plaintiffs under these circumstances upon a showing that the Treaty of Fort Laramie was an individual money-mandating source providing a claim for damages against the United States such that sovereign immunity is waived.[36] In fact, the validity of the plaintiffs' claims under the Treaty of Fort Laramie ultimately rested upon the determination by the court, based upon its assertion of the proper understanding of the provision's applicability, as to whether the "bad men" provision provides an opportunity for monetary relief in this particular circumstance.

The Court of Federal Claims, in interpreting the phrase "subject to the authority of the United States," found in favor of the government and dismissed the plaintiffs' suit for lack of jurisdiction.[37] The court determined that a non-Indian individual "who is not an agent, employee, representative, or otherwise acting in any other capacity for or on behalf of the United States"[38] is not a "bad man" such that the Treaty of Fort Laramie provides a basis for indemnification by the federal government. Accordingly, the court stated that it only possesses jurisdiction over "bad men" clause claims "where there exists a nexus between the individual committing the alleged 'wrong' and the United States."[39] The court found that Mr. Hotz had no connection to the federal government other than citizenship at the time of the automobile accident and that that he was not "subject to the authority of the United States" under the provisions of the treaty. As a result, the Court of Federal Claims stated that any injuries resulting from Mr. Hotz's conduct could not give rise to an independent cause of action under the Tucker Act that could be entertained in the Court of Federal Claims; the case was accordingly dismissed.[40]

2. Court of Appeals for the Federal Circuit

The personal representatives of the decedents' estates then appealed the trial court's dismissal to the Court of Appeals for the Federal Circuit.[41] In contrast to the holding at the trial court level, the Federal Circuit found in favor of plaintiffs and reversed the lower court's decision under an extremely broad reading of the "bad men" clause.[42] Contrary to the trial court, the Federal Circuit interpreted the phrase "subject to the jurisdiction of the United States" *not* to limit coverage of the "bad men" provision to government actors or persons acting on behalf of the United States.[43] Despite the urging of the government that laws such as the Federal Tort Claims Act preempt the application of "bad men" provisions as indemnification clauses, the Federal Circuit found its previous holding in *Tsosie v. United States*,[44] which addressed this issue, to be controlling in *Richard*.[45] According to the Federal Circuit, any white man, or in fact any person not a member of the signatory tribe, can be a "bad man" within the meaning of the Fort Laramie Treaty, especially since the language of the Treaty unambiguously distinguishes between "bad men among the whites" and "government actors."[46] Under this expansive understanding of the "bad men" clause, the Federal Circuit reversed the ruling of the Court of Federal Claims and held that the lower court had improperly dismissed the action.[47]

Richard v. United States **(cont'd):**

Judge Lourie wrote a dissenting opinion following the logic of and agreeing with the holding of the Court of Federal Claims.[48] In finding that the case should have been dismissed because of Mr. Hotz's lack of connection to the federal government, Judge Lourie cited the fact that the majority in *Richard* has not been able to identify a case brought under the "bad men" provision of the Treaty of Fort Laramie by an individual against a non-Indian who was not somehow affiliated with the federal government at the time the individual caused the injury.[49] Judge Lourie held that the drafters of the Treaty of Fort Laramie could not have intended the provision to cover situations such as Mr. Hotz's, in which the wrongdoer is not connected with the government in any way, because there have undoubtedly been "wrongs" committed by white men against Indians of signatory tribes in the years since the Fort Laramie Treaty's enactment, and actions addressing these injuries have neither been entertained nor sustained in judicial forums.[50] He further found that any discussions in *Tsosie*—the case the majority relied upon and believed to be controlling—of the broadness of the intended application of the "bad men" provision were merely dicta; thus, these previous interpretations of the provision are not binding on the Federal Circuit under these circumstances.[51] Judge Lourie believed the majority to be completely misinterpreting the treaty, writing:

> [T]he historical context of the treaty and the practical construction adopted by the parties in the intervening 140 years of its enforcement all suggest that it is unlikely that the federal government would broadly have waived sovereign immunity, opened its coffers, and, as the Claims Court stated, agreed to the impossible task of guaranteeing the safety and tranquility of all Native Americans on reservations from any and all of their interactions with anyone.[52]

Judge Lourie's contextual approach to the "bad men" provision led him to the conclusion that the Federal Circuit's holding was illogical. However, the majority opinion in *Richard* is currently the highest authority on the issue of the scope of the "bad men" provision, and, as such, an analysis of the implications of the court's holding is important in understanding the Circuit's changing approach to Indian treaty interpretation.

II. Analysis

While initially it may seem that the Treaty of Fort Laramie is more akin to a treaty between sovereign nations than a traditional government procurement contract, it becomes clear when the agreement's provisions are examined in closer detail that the Treaty of Fort Laramie should be construed and understood as a unique type of government contract.[53] The Treaty, and specifically its "bad men" provision, is, at its core, a contract with the government to expend money from the United States Treasury—exactly the type of contract covered by federal government procurement statutes and regulations.[54] As a result, the proper interpretation of the Treaty of Fort Laramie, and indeed of the other eight similarly drafted Indian treaties, relies upon a thorough understanding of core principles of government contract law. Though the doctrines controlling government contract interpretation were introduced primarily to govern the interpretation of government procurement contracts specifically and exclusively,[55] they are nevertheless applicable and essential to the proper understanding of the nine Indian treaties made in 1868.

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Richard v. United States **(cont'd):**

When these core principles of government contract law are considered, the Federal Circuit's holding in *Richard* appears to depart from the Circuit's previous holdings with regard to these doctrines. For the U.S. government to be bound in contract, the person purporting to bind the government must have had both the ability and authority to do so.[56] The United States can neither be bound nor estopped by acts of its officers or agents to do, or cause to do, something that is not permitted by law.[57] Thus, because no person can have the authority to enter into a contract to bind the federal government into unlimited liability and because only those conferred with actual authority from the government may enter into binding contracts on behalf of the government, under the facts of *Richard* Mr. Hotz could not have had the ability to bind the government into contractual indemnification—particularly not the unlimited indemnification—as the plaintiffs so claim. The Federal Circuit's ruling to the contrary requires reexamination in order to maintain precedential and doctrinal consistency with the Circuit's previous understandings of both Indian Treaty law and government contract jurisprudence.

A. Considering Indian Treaties as Contracts

In general, courts have continuously held that treaties made with federal Indian tribes are, at their core, basic contracts rather than treaties with sovereign nations.[58] Treaties made with Indian tribes were, and still are considered to be, "legally binding agreements between real parties."[59] Because Native Americans fought hard and made numerous large concessions in order to create peace with the federal government, treaties between these tribal groups and the United States can "properly be regarded as negotiated contracts of a high order."[60] Particularly in the present day, in which Indians who attempt to enforce the treaties are the purported beneficiaries of such treaties and not the original signatory parties to the deal, all Indian treaties must be read through the lens of government contracts and must be subject to the traditional, core principles governing general contract interpretation.

Despite the initial treatment of Indian tribal groups as sovereign nations for purposes of treaty-making, the inequalities in bargaining power between the tribes and the U.S. government have led to the development of special considerations governing the interpretation of Indian treaties.[61] As early as 1899, courts recognized the significance of such inequalities and attempted to construe Indian treaties with this in mind.[62] While the U.S. representatives that acted as parties to the treaty were "skilled in diplomacy," well versed in the technicalities of American law and "masters of a written language"[63]—specifically referring to English, the language in which the treaties were drawn up—Indian tribal representatives possessed none of these crucial, potentially equalizing qualities. In contrast, many Indian tribes did not have a written language and were wholly unfamiliar with the United States legal system under which the treaties were created and to be applied.[64] While an interpreter was usually present to help negotiate these types of agreements between U.S. representatives and Indian tribes, the interpreter was certainly not a neutral party; these men were hired by, and in the exclusive service of, the U.S. government.[65] Overall, the Indian tribes that were party to these treaties were at a significant disadvantage in comparison to their American counterparts, and the specialized canons of Indian treaty interpretation have developed in order to compensate for this clear inequality.[66]

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Richard v. United States **(cont'd):**

As a result of the historic and patently unequal relationship between the U.S. government and Indian tribal groups, Indian treaties such as the Treaty of Fort Laramie must be construed under the principles governing simple adhesion contracts.[68] Because adhesion contracts are interpreted to the benefit of the weaker party and "their terms are given the meaning attached to them by laymen unversed in the law,"[69] reading Indian treaties as adhesion contracts has been the most appropriate way of balancing the unfortunate realities of Indian relations with the sanctity of basic contract law. Thus, because Indian tribes were vulnerable to exploitation throughout the negotiation process, the primary canon guiding Indian treaty interpretation is that ambiguities are always to be resolved in favor of the Indian tribal party.[70] Additionally, treaty provisions are to be construed as the Indians of the signatory tribe would have understood them. In practical terms, this means that the treaty provisions are not always to be construed according to their technical meaning; instead, they must be read "'in the sense in which they would naturally be understood by the Indians.'"[71]

Because the nine 1868 Indian treaties must be read as adhesion contracts made with the U.S. government, the doctrines and statutes that govern the interpretation of all other government contracts are equally applicable to the interpretation of the Treaty of Fort Laramie. So long as it meets the requirements for such a contract, any agreement, including the Treaty of Fort Laramie as the plaintiffs in *Richard* suggest, can fall within the meaning of a contract with the government under the Tucker Act.[72] The requirements for Tucker Act coverage are minimal. As in all other contract disputes, the party alleging that there is a binding contract must show that there was a mutual intent to contract through offer, acceptance and consideration.[73] More importantly, however, it must be shown that there was "a Government representative who had actual authority to bind the Government."[74] For Indian treaties to be enforceable as government contracts falling within the purview of the Tucker Act, the treaties must also comply with the requirements of the Appropriations Clause of the United States Constitution and the Anti-Deficiency Act as well as the doctrine of Actual Authority.[75]

B. The Appropriations Clause and the Anti-Deficiency Act

All government contracts must be drafted such that they are in compliance with the Appropriations Clause of the U.S Constitution. The Appropriations Clause, found in Article I, Section 9, states: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."[76] As interpreted by the Supreme Court, the Appropriations Clause provides that money may only be paid out of the federal treasury when Congress has appropriated such funds by statute.[77] The "command of the clause" extends to any exercise of a power granted by the Constitution to any of the branches of government that requires it to reach into the Treasury, including providing relief in judicial proceedings for payment of public funds.[78] Because Indian treaties are a form of government contract, and the "bad men" provisions within the 1868 Indian treaties provide for indemnification to be paid to injured members of the protected tribes under certain circumstances, any monetary payments to be made pursuant to these treaties may only be legally made if Congress has, by statute, previously appropriated the requested amount.

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***Richard v. United States* (cont'd):**

The Appropriations Clause is only enforceable when read in conjunction with the Anti-Deficiency Act.[79] It states:

> An officer or employee of the United States Government or of the District of Columbia government may not—(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.[80]

While this statute is essentially a codification of the practical implications of the Appropriations Clause of the Constitution, this statute is important in ensuring that money is only paid out of the Treasury when constitutionally authorized. Thus, unless Congress has appropriated enough money for the specific purpose for which such funding required, a contract to pay any money out of the federal treasury cannot be entered into by the U.S. government or its authorized representatives.[81] While agencies often need to spend money for unforeseen needs, the government is expected to avoid such situations when possible through asking Congress to appropriate sufficiently unrestricted yet limited funding in advance.[82] The primary effect of the Anti-Deficiency Act is to impose either administrative disciplinary action[83] or criminal sanctions[84] upon those who enter into a contract for which there is no congressional appropriation. In order to be in compliance with the Anti-Deficiency Act and to save the U.S. government from violation of the law, any requested indemnification under the "bad men" provisions of the 1868 Indian treaties may only be legally authorized and paid if there has been a congressional appropriation in the required amount and for the purpose discussed in the treaty.

The interpretation of the "bad men" provision of the Treaty of Fort Laramie advanced by the plaintiffs and upheld by the Federal Circuit must fail because the Appropriations Clause and the Anti-Deficiency Act do not permit the government to enter into contracts for unlimited indemnification.[85] Any indemnity provision that subjects the government to "indefinite, indeterminate, or potentially unlimited liability"[86] will violate the Anti-Deficiency Act because it can never be known with certainty that there will be sufficient funds appropriate to cover the activity. The Supreme Court has consistently articulated this position on the constitutionality of open-ended indemnity provisions, doing so most notably in the series of consolidated cases addressing the tort liability of the government in indemnifying the contractors that had supplied it with Agent Orange.[87] Unlimited indemnity agreements, whether explicit or implied, cannot be entered into either by contracting officers or by other authorized representatives of the federal government.[88] While there are a few established exceptions to this general prohibition of binding contracts for unlimited indemnification, such exceptions are narrowly drawn and based heavily on the specific factual circumstances of particular cases.[89] And, though the government cannot back out of a promise to pay due to "insufficient funds" when Congress has already appropriated legally unrestricted funds to a particular cause,[90] the government cannot be bound when there is no appropriation contemplated at all.[91] When construed how the original parties to the Treaty of Fort Laramie likely understood the term as dictated by the rules of Indian treaty interpretation, the word "reimburse" signifies more than just restoring an amount previously paid, also signifying to "indemnify or make whole."[92] Because the "bad men" provision must be read as an indemnification, it must be appropriately limited so as to comply with both the Appropriations Clause and the Anti-Deficiency Act.

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Richard v. United States **(cont'd):**

The holding of the Federal Circuit with regard to the open-endedness of the "bad men" provision represents a departure from previous precedent and a drastic change in Indian treaty interpretation. The plaintiffs essentially argue, and the Federal Circuit has accordingly held, that the "bad men" provision in the Treaty of Fort Laramie is analogous to an unlimited, blanket indemnification to be paid to certain qualifying members of protected Indian tribes. By employing such an expansive definition of "wrongs" and "subject to the jurisdiction of the United States," the court has eliminated all limits on the ability of injured members of protected tribes to bring indemnification actions against the government. While the Federal Circuit implied from dicta in its precedent that the application of the "bad men" provision applies to a broader class of people than government employees, the court has still not articulated an outer limit to the provision's application.[93] As Judge Lourie discusses in his dissent, the interpretation advanced by the Federal Circuit's majority charges the government with protecting the safety of all Indians living on protected reservations in their interactions with absolutely anyone.[94] Such unlimited contractual indemnification provisions seem to violate the Appropriations Clause and the Anti-Deficiency Act.[95]

While certain blanket indemnification statutes exist in the current day, namely the Judgment Fund, statutes ensuring sufficient appropriations to cover monetary claims against the federal government did not exist at the time of drafting of the Treaty of Fort Laramie.[96] While a similar argument might be made about the Anti-Deficiency Act given its relatively recent passage in 1956, this argument can be easily distinguished. The Anti-Deficiency Act exists to ensure and enforce compliance with the Appropriations Clause.[97] Thus, the Anti-Deficiency Act merely codifies a principle in existence in 1868 and of which the drafters of the Treaty of Fort Laramie should have been aware. The drafters of the Treaty could not have intended the "bad men" provision to open the government to unlimited liability, because the drafters meant for the provision to take into account any limitations recognized by the parties at the time they negotiated the treaty.[98] The representatives of the government drafting the Treaty would not have included a clause that would violate the Constitution. The drafters, as official representatives of the federal government trained and authorized to enter into contracts on behalf of the United States, would likely have been aware of the constitutional prohibitions—or at least the basic limits of any imposed constitutional restraints—under the Appropriations Clause, later made explicit through the Anti-Deficiency Act.[99] Because the drafters, in exercising their official representative duties, must have taken into account the limitations imposed by the Appropriations Clause and could not have been reliant upon the existence of an open-ended appropriation such as the Judgment Fund,[100] the interpretation of the "bad men" provision enforced by the Federal Circuit holding that the provision should be understood as an unlimited indemnification is confusing when considered in the context of previous Federal Circuit precedent. Additionally, because the Anti-Deficiency Act is in effect in the present day, the Federal Circuit should not enforce an interpretation of the "bad men" provision that would be in violation of the act, especially because the government cannot be bound by a contract to do something that the law does not permit.[101]

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C. Doctrine of Actual Authority

Because the Federal Circuit's holding ultimately turns on the meaning of the phrase "subject to the jurisdiction of the United States," it is essential to consider whether Mr. Hotz falls into this particular category of Americans recognized under the Treaty through the application of the court-made doctrine of Actual Authority. Under this doctrine, a person must have actual authority in order to bind the government into liability for breach of contract.[102] Anyone entering into an agreement with the government takes the risk that he who purports to act on behalf of the government has the proper authority to do so.[103] Any limitations set by Congress upon an actor's authority to bind the government are always in effect, even if the actor himself is unaware of such limitations.[104] Under the Federal Acquisition Regulations, authority to enter into binding contracts on behalf of the government vests only in the agency head or a contracting officer.[105] For Mr. Hotz to have the ability to bind the government into liability through his unilateral actions, he must have possessed actual authority to do so.

As the Supreme Court has articulated, the purpose of the Appropriations Clause is to ensure that public funds are spent for the furtherance of the common good as determined by Congress as a representative body and not according to the pleas and actions of individuals.[106] The Supreme Court has made clear that the class of people who have the ability to bind the government to pay money out of the Treasury is extremely limited, including only those people who have been duly authorized by statute.[107] Even most government officials have no authority to obligate the Treasury to pay funds.[108] It follows, therefore, that average Americans have no authority to bind the government into contractual indemnification and cannot be considered to be "subject to the jurisdiction of the United States" in the context of the "bad men" provision in the Fort Laramie treaty. If most government officials, who have a clear relationship with the federal government, cannot bind the United States to pay money out of the Treasury, then average Americans like Mr. Hotz, who have no connection whatsoever to the federal government outside of citizenship, cannot logically obligate the payment of Treasury funds.[109]

With this in mind, it becomes apparent that the United States cannot be bound under the "bad men" provision of the Treaty of Fort Laramie under the circumstances of *Richard* or, in fact, by anyone without actual authority and without the appropriate nexus to the federal government. Because the Treaty of Fort Laramie is considered to be a contract for purposes of treaty interpretation, it must be interpreted in accordance with the rule that action for breach of contract cannot be maintained against the United States in the absence of the proper authority of an agent to bind the government.[110] In order for the court to have jurisdiction over "bad men" clause claims pursuant to the Tucker Act, there must exist a nexus between the individual committing the wrongful act and the United States.[111] Thus, for the Federal Circuit's interpretation of the Treaty of Fort Laramie to be both tenable and enforceable, Mr. Hotz must have had a strong connection and have been conferred with the requisite authority to bind the federal government into liability in the form of contractual indemnification.

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***Richard v. United States* (cont'd):**

In this case, it is clear that Mr. Hotz did not have the actual authority to bind the federal government, making the Federal Circuit's interpretation of the "bad men" provision requiring the government to indemnify the estates of the decedents inconsistent with the court's previous application of this provision. Mr. Hotz is not, nor do the decedents' estates allege that he is, a government agent, employee, or representative.[112] Mr. Hotz was not acting in any capacity for or on behalf of the United States when he got into the drunk-driving accident on the South Dakota reservation.[113] The only connection to the federal government maintained by Mr. Hotz at the time of the accident was citizenship.[114] Even though the Federal Circuit held that "subject to the authority of the United States" cannot logically be limited to government officials based on parallel language found in the second part of Article I,[115] all of the previous cases involving the "bad men" provision have involved actions by government officials.[116] As Judge Lourie points out through mention of *Hernandez v. United States*,[117] the earliest case brought under this provision involving a person unaffiliated with the federal government, an officer employed by Western Intelligence Narcotics Group ("WING")—a federally funded agency—was dismissed for lack of subject matter jurisdiction because the WING officer, the alleged "bad man," was not an agent of the United States.[118] Just like the WING officer in *Hernandez*, Mr. Hotz does not qualify as a "bad man" under the Treaty of Fort Laramie unless he has both committed a "wrong" and was "subject to the authority of the United States."[119] Mr. Hotz has certainly committed a wrong, acknowledged in the form of his criminal conviction for involuntary manslaughter, but, as he is not an agent of the federal government and has no nexus to the United States other than citizenship, he cannot be considered a "bad man" under the Treaty of Fort Laramie.[120] His actions, therefore, cannot require the government to reimburse the decedents' families pursuant to the Treaty because he had no authority to bind the government in this way.

The interpretation advanced by the Federal Circuit cuts severely against public policy in the area of government contracts. By understanding the treaty's "bad men" provision to cover all Americans, the federal government has been opened up to the possibility of unlimited financial responsibility as a result of the actions of anyone acting under the laws of the United States. As stated by counsel for the United States, the plaintiffs here argue that the federal government has "agreed to guarantee financially the safety and tranquility of Indians on reservations by paying for any injury sustained at the hands of any white person."[121] It is against common sense to believe that the federal government would intentionally allow itself to be contractually bound in such an expansive, completely unrestricted way. It is illogical that the United States would choose to be subject to a binding duty of indemnification as a result of the actions of any random person within the United States borders, especially given the physical size of the reservations laid out in treaties like that signed at Fort Laramie.[122] The Indian Peace Commission as well as the Doolittle Commission recognized that it would be impossible to restrain all white men from engaging Indians in armed conflict.[123] Such an interpretation could not have been intended by the Treaty's drafters, especially considering the fact that drafters included respected government officials such as Lieutenant-General William T. Sherman, and the plain language of the "bad men" provision and its legislative history do not support it.[124]

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***Richard v. United States* (cont'd):**

Additionally, the Federal Circuit's interpretation of the Treaty of Fort Laramie allows claimants under the "bad men" provision to recover multiple times for the same injuries. In the case of *Richard*, it is clear and well recognized by the courts that the estates of the two decedents are being awarded monetary damages in other ways. Under the order of judgment in the criminal case against Mr. Hotz, he must pay restitution to the Department of Social Services Victims Compensation Services and is required to pay a yet to be determined monetary amount directly to the families of Ms. Randall and Mr. Whirlwhind Horse.[125] Judge Lourie highlights that the plaintiffs are pursuing individual damages against Mr. Hotz, inferring the existence of yet another avenue to receive damages beyond that already offered by the government through the order in Mr. Hotz's criminal trial.[126] Yet, in this case, the estates are still seeking an additional award of $3,000,000 for each estate plus costs and attorney's fees.[127] While the families of the decedents have suffered a horrible and unfortunate loss at the hands of Mr. Hotz, they have already recovered in numerous ways. They have received monetary awards, are in pursuit of another, and can take some solace in the fact that Mr. Hotz was sentenced to serve fifty-one months in prison.[128] The federal courts should be engaged in weighing the pursuit of justice and the efficient allocation of the government's limited resources. The court should neither favor nor advocate an interpretation of the Treaty of Fort Laramie that would allow claimants like those in *Richard* to recover more money than normally allowed or intended for comparable claims.[129]

It may be argued that it was not the actions of Mr. Hotz that bound the government under the Treaty of Fort Laramie but instead those of the officials, undoubtedly conferred with the appropriate authority, who signed the treaty in the first place, yet this argument becomes insignificant when considered in the larger context of the treaty's intended application. The nine Indian treaties were established for the purpose of addressing "the myriad problems documented by the Doolittle Commission,"[130] most notably the safety of Indians living on the frontier and in constant contact with white frontiersmen, usually acting on behalf of the federal government in some way. The Treaty of Fort Laramie partially served to end armed conflict among whites and Indians, but it also was intended to serve as a prospective protection to be applied for an indeterminate number of years in the future. It would not make sense for those who signed the treaty to be the only ones able to bind the government pursuant to it because the treaty was intended to apply forever, not just during the lifetimes of the signatory government representatives. For the treaty to have any effect, it must have provided for a method by which those in the future can seek relief under its provisions. Thus, the Federal Circuit properly understood the crucial question to be one of standing under the treaty—whether Mr. Hotz had the ability to obligate the government to indemnify the decedents' estates. The Court made a surprising transformation of its previous understanding of the "bad men" provision, however, in concluding that anyone, regardless of their connection to the government or authority to do so, has the ability to bind the government under the treaty's provisions. While the drafters cannot have intended that only they themselves had the ability to bind the government under the "bad men" clause, they similarly could not have intended to subject the government to liability as a result of the actions of any American, especially when the specific purpose for which the treaty was drafted and ratified is considered. Overall, the Federal Circuit's holding in *Richard* presents a departure from the court's previous understanding of, and logical conclusions with respect to, the government's intent regarding how the "bad men" provisions should be applied.

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Richard v. United States **(cont'd):**

Conclusion

While a broad reading of the "bad men" provision is laudable, especially in consideration of the discriminatory treatment to which Indian tribes in the United States have been subjected throughout the country's history,[131] such an expansive, all-encompassing interpretation of the "bad men" provision is inconsistent with, and represents a departure from, previous interpretations of the Treaty of Fort Laramie. As the Court of Federal Claims stated in its opinion, such an interpretation "yields an absurd result and imposes upon the federal government an impossible task: to guarantee the safety and tranquility of all Native Americans on reservations during any and all of their interactions with anyone."[131] The interpretation of the "bad men" provision advanced by the Federal Circuit in *Richard* is divergent when examined in the context of previous holdings on this topic, regardless of how well intentioned the court might have been in attempting to ensure members of protected Indian tribes that they are afforded the justice the treaties were intended to preserve.

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Endnotes

1. *See generally* Richard v. United States, 677 F.3d 1141 (Fed. Cir. 2012).
2. *Id.*
3. *See id.* at 1153.
4. *See id.* at 1155-56 (Lourie, J., dissenting).
5. *Id.* at 1157.
6. Tsosie v. United States, 825 F.2d 393, 395 (Fed. Cir. 1987).
7. Richard v. United States, 98 Fed. Cl. 278, 282 (2011).
8. *See id.* at 282; Tsosie, 825 F.2d at 395; John L. Kessell, *General Sherman and the Navajo Treaty of 1868: A Basic and Expedient Misunderstanding*, 12 W. HIST. Q. 251, 251 (1981) (noting that, in 1868, William T. Sherman was the sole U.S. official holding the rank of Lieutenant General, and was thus outranked only by Ulysses S. Grant and the President).
9. Tsosie, 825 F.2d at 395. All of the nine published treaties can be found in Volume 15 of the Statutes at Large. *Id.*
10. *Id.* at 395.
11. Phillip M. Kannan, *Reinstating Treaty-Making with Native American Tribes*, 16 WM. & MARY BILL RTS. J. 809, 816–17 (2008).
12. *See* Richard v. United States, 677 F.3d 1141, 1143–44 (Fed. Cir. 2012).
13. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 374 (1980).
14. Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: As Long As Water Flows, or Grass Grows Upon the Earth--How Long a Time Is That?,* 63 CAL. L. REV. 601, 612 (1975).
15. *See* Richard v. United States, 98 Fed. Cl. 278, 282 (2011), *vacated*, 677 F.3d 1141 (Fed. Cir. 2012).
16. *See* Richard, 677 F.3d at 1142 n.2. The Fort Laramie Treaty, in particular, established the Great Sioux Reservation in South Dakota. *Id.*
17. *See* Treaty of Fort Laramie, U.S.-Sioux Indians, arts. VI, VII, X, Apr. 29, 1868. *See generally Sioux Nation of Indians*, 448 U.S. at 374–75 (discussing the several agreements included within the Fort Laramie Treaty).

Richard v. United States **(cont'd):**

Endnotes (cont'd)

18. *See* Tsosie v. United States, 825 F.2d 393, 395 (Fed Cir. 1987). The language of each "bad men" provision is almost identical, and therefore case law discussing such a clause in any of the nine treaties is instructive for this study. *Id.*
19. Lillian Marquez, *Making "Bad Men" Pay: Recovering Pain and Suffering Damages for Torts on Indian Reservations Under the Bad Men Clause*, 20 Fed. Cir. B.J. 609, 609 (2011).
20. *Id.* at 609; *see also* Richard, 677 F.3d at 1143–44.
21. Marquez, *supra* note 19, at 611–12.
22. Treaty of Fort Laramie, *supra* note 17, art. I.
23. Marquez, *supra* note 19, at 612.
24. *See* Richard v. United States, 98 Fed. Cl. 278, 288 (2011).
25. *See* Richard, 677 F.3d at 1144.
26. *See* Richard, 98 Fed. Cl. at 280.
27. *See id.*
28. *See id.*
29. *See id.* at 280 n.1.
30. *See* 15 Stat. 635, art. 1 ("[T]he United States will . . . proceed at once to cause the offender to be arrested and punished according to the laws of the United States . . . .").
31. *See* Richard, 98 Fed. Cl. at 280 n.1
32. *Id.* at 280.
33. *See id.*
34. *See id.* at 280–81.
35. 28 U.S.C. § 1491(a)(1) (1948).
36. *See* Richard, 98 Fed. Cl. at 281.
37. *See id.* at 284.
38. *See id.*
39. *See id.* at 289.
40. *See id.* at 284.
41. *See* Richard v. United States, 677 F.3d 1141, 1142 (Fed. Cir. 2012) (stating the Federal Circuit must review this dismissal under a de novo standard because the underlying question is one of law).
42. *See* Richard, 98 Fed. Cl. at 284; *Richard*, 677 F.3d at 1142.
43. *See* Richard, 677 F.3d at 1142.
44. 825 F.2d 393 (Fed. Cir. 1987). In *Tsosie*, the Federal Circuit interpreted the "bad men" provision of the Navajo Treaty. Richard, 677 F.3d at 1550 n.16. In holding that the Federal Tort Claims Act has not been preempted, the court stated that the coverage of the "bad men" provision is not limited to government actors and that any "white" can be considered a "bad man" under the treaty. *Id.* at 1150.
45. *See* Richard, 677 F.3d at 1150.
46. *See id.* at 1147.
47. *See id.* at 1152–53.
48. *See id.* at 1155–57 (Lourie, J., dissenting).
49. *Id.* at 1155.
50. *See id.*
51. *See id.* at 1156.
52. *See id.* at 1157.
53. *See* 25 U.S.C. § 71 (2013) (recognizing Indian nations within the United States are not sovereign nations with which the federal government can enter into contracts); *see also* Tsosie v. United States, 825 F.2d 393, 397 (Fed. Cir. 1987) (recognizing explicitly that Indian treaties are contracts).
54. *See* 16 Stat. 635, art 1; *see also* 48 C.F.R. § 2.101 (2013) (applying the Federal Acquisition Regulations to acquisitions made "by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated.").
55. *See* 48 C.F.R. § 1.101 (2012) (stating that the Federal Acquisition Regulations are intended to create uniform policies and procedures for acquisition by federal executive agencies).
56. *See* Anderson v. United States, 344 F.3d 1343, 1353 (Fed. Cir. 2003).
57. *See* Office of Personnel Mgmt. v. Richmond, 496 U.S. 414, 426, 428 (1990).

Richard v. United States **(cont'd):**

Endnotes (cont'd)

58. *See Richard v. United States*, 677 F.3d 1141, 1154 (Fed. Cir. 2012) (Lourie, J., dissenting) (stating "a treaty with an Indian tribe is a contract"); *Tsosie*, 825 F.3d at 397; *see also* Corrected Brief for Defendant-Appellee at 9, Richard v. United States, 677 F.3d 1141 (Fed. Cir. 2011) (No. 2011-5083).
59. *See* Wilkinson, *supra* note 14, at 612.
60. *See id.* at 603.
61. *See id.* at 617.
62. *See* Jones v. Meehan, 175 U.S. 1, 10–11 (1899).
63. *See id.* at 11.
64. *See id.* at 11; *see also* Marquez, *supra* note 19, at 614.
65. *See Jones*, 175 U.S. at 11. Even though generals like Sherman attempted to explain the treaties to the affected tribes in terms they would understand, these well-meaning endeavors still led to incorrect descriptions of the treaties' terms. *See* Kessell, *supra* note 8, at 263. For example, General Sherman used maps to convey the boundaries of the Navajo Reservation and, in doing so, unintentionally exaggerated the territorial area allotted and used vague, nonspecific terms such as "bend in the San Juan" to refer to key landmarks. *Id.* Taking this "bend" to mean one location over another could have altered the size of the Navajo reservation by at least 6.7 million acres. *Id.* at 264.
66. *See* Marquez, *supra* note 19, at 614.
67. *See* Wilkinson, *supra* note 14, at 617–18.
68. *See id.* at 617.
69. *See* Winters v. United States, 207 U.S. 564, 576 (1908) ("By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians."); *see also* Marquez, *supra* note 19, at 614.
70. *See* Marquez, *supra* note 19, at 615.
71. *See* Carpenter v. Shaw, 280 U.S. 363, 367 (1930) (quoting Jones v. Meehan, 175 U.S. 1, 11 (1899)); *accord Winters*, 207 U.S. at 577 (finding that, as a result of their precarious relationship with the U.S. government, the Indians could not have been expected to explicitly exclude every inference that could be drawn against them from the treaty language).
72. *See* Trauma Serv. Grp. v. United States, 104 F.3d 1321, 1326 (Fed. Cir. 1997).
73. *See id.* at 1325; *see also* Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947).
74. *See Trauma Serv. Grp.*, 104 F.3d at 1326.
75. *See* U.S. CONST. art. I, § 9, cl. 7; 31 U.S.C. § 1341 (2006).
76. U.S. CONST. art. I, § 9, cl. 7.
77. *See* Office of Personnel Mgmt. v. Richmond, 496 U.S. 414, 424 (1990).
78. *See id.* at 425.
79. *See* 31 U.S.C. § 1341 (2006).
80. *See id.* § 1341(a)(1).
81. *See id.*
82. *See* Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631, 642 (2005).
83. *See* 31 U.S.C. § 1349(a).
84. *See id.* § 1350.
85. *See* Johns-Manville Corp. v. United States, 12 Cl. Ct. 1, 22 (1987).
86. *See Indemnification Agreements & The Anti-Deficiency Act*, 8 U.S. Op. Off. Legal Counsel 94, 96 (1984).
87. *See generally* Hercules, Inc. v. United States, 516 U.S. 417 (1996).
88. *See id.* at 426–27.
89. *See Johns-Manville Corp.*, 12 Cl. Ct. at 22–23 (discussing cases in which the Comptroller General found applicable exceptions to the Anti-Deficiency Act).
90. *See Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2190 (2012).
91. *See Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 643 (2005).
92. *See Elk v. United States*, 87 Fed. Cl. 70, 79 (2009) (internal quotation marks omitted).
93. *See Richard v. United States*, 677 F.3d 1141, 1156 (Lourie J., dissenting).
94. *See id.* at 1157.
95. *See Johns-Manville Corp. v. United States*, 12 Cl. Ct. 1, 22 (1987).
96. *See* 31 C.F.R. § 256.1 (2013).
97. *See* 31 U.S.C. § 1341(a) (2013).
98. *See Richard v. United States*, 98 Fed. Cl. 278, 290 (2011).
99. *See Hercules, Inc. v. United States*, 516 U.S. 417, 427–28 (1996).

Richard v. United States **(cont'd):**

Endnotes (cont'd)

100. The Judgment Fund, codified at 31 U.S.C. § 1304, is a permanent and indefinite appropriation available to pay final monetary judgments against the United States as well as compromise settlements entered into by the United States. The Judgment Fund may not be used to pay a damages award if another source of funding is available. The Judgment Fund is administered by the Financial Management Service within the Department of the Treasury. *See The Judgment Fund: Common Questions*, FIN. MGMT. SERVICE (Feb. 21, 2013, http://www.fms.treas.gov/judgefund/questions.html#q1.
101. *See* Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917).
102. *See* Trauma Serv. Grp. v. United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997); *Richard*, 98 Fed. Cl. at 290.
103. *See* Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947).
104. *See* Trauma Serv. Grp., 104 F.3d at 1325; *Fed. Crop Ins. Corp.*, 332 U.S. at 384.
105. *See* 48 C.F.R. § 1.601 (2013).
106. *See* Office of Personnel Mgmt. v. Richmond, 496 U.S. 414, 427 (1990).
107. *See id.* at 427–28; *see also* 48 C.F.R. § 1.601(a) (2013).
108. *See* Richmond, 496 U.S. at 428 (holding that allowing members of the executive to obligate the payment of Treasury funds based on their unauthorized statements to citizens would render the Appropriations clause a nullity).
109. *See* Richard v. United States, 98 Fed. Cl. 278, 289–90 (2011).
110. *See id.* at 290.
111. *See*, *e.g., id.* at 289 (citing to a series of Federal Circuit decisions in which this proposition is a common thread).
112. *See id.* at 290.
113. *See id.*
114. *See id.* at 284.
115. *See* Richard v. United States, 677 F.3d 1141, 1152 (Fed. Cir. 2012).
116. *See id.* at 1156 (Lourie, J., dissenting).
117. 93 Fed. Cl. 193 (2010).
118. *See* Richard, 677 F.3d at 1155 (Lourie, J., dissenting); *Hernandez v. United States*, 93 Fed. Cl. 193, 200 (2010).
119. *See* Hernandez, 93 Fed. Cl. at 200.
120. *See* Richard v. United States, 98 Fed. Cl. 278, 284 (2011).
121. Corrected Brief for Defendant-Appellee at 44, Richard v. United States, 677 F.3d 1141 (Fed. Cir. 2011) (No. 2011-5083).
122. *See* 15 Stat. 635, art 2 (describing the boundaries of the Sioux reservation in South Dakota to be created).
123. Corrected Brief for Defendant-Appellee at 44, Richard v. United States, 677 F.3d 1141 (Fed. Cir. 2011) (No. 2011-5083).
124. *See generally* 15 Stat. 635; *see also* Corrected Brief for Defendant-Appellee at 46, Richard v. United States, 677 F.3d 1141 (Fed. Cir. 2011) (No. 2011-5083).
125. *See* Richard v. United States, 677 F.3d 1141, 1144 n.4 (Fed. Cir. 2012); *Richard*, 98 Fed. Cl. 278, 280 n.1 (2011).
126. *See* Richard, 677 F.3d at 1157 (Lourie, J., dissenting).
127. *See* Richard, 677 F.3d at 1144 n.5 (majority opinion); *Richard*, 98 Fed. Cl. at 280.
128. *See* Richard, 98 Fed. Cl. at 280.
129. Additionally, the interpretation advanced by the Federal Circuit in *Richard* would seem to violate the "one satis faction" rule applied in state tort actions. Under this rule, plaintiffs are only entitled to a single satisfaction of a claim for damages. *See, e.g.*, Thibodeaux v. Fibreboard Corp., 706 F.2d 728, 729 (E.D. Tex. 1983) (discussing the "one satisfaction" rule under Texas law); *cf.* Leiken v. Wilson, 445 A.2d 993, 999 (D.C. 1982) (stating general principles of tort law only allow a plaintiff to obtain a single recovery even in circumstances with joint tortfeasors).
130. *See* Richard, 98 Fed. Cl. at 285.
131. *See id.* at 282–85.
132. *Id.* at 290.