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Litigation Alert

D.C. District Court Ruling Puts Government Contractor's Privileged Internal Investigation Reports in Jeopardy of Disclosure

A D.C. District judge recently decided that a government contractor's internal investigation reports into alleged misconduct of its employees are not privileged because the investigations were undertaken to comply with regulatory obligations rather than for the purpose of seeking legal advice. If upheld, the decision could drastically change the compliance landscape for government contractors and other regulated companies.

In an unusual and controversial move, US District Judge James Gwin ordered a government contractor to produce its internal investigation reports to the relator in an ongoing False Claims Act (FCA) case proceeding. *United States ex rel. Barko v. Halliburton Co.*, No. 1:05-CV-1276 (D.D.C Mar. 6, 2014) *(slip op.)*. The court rejected the contractor's claims of attorney-client privilege or attorney work-product protections on the grounds that the internal investigation and the related reports were prepared pursuant to the company's regulatory obligations under the Federal Acquisition Regulation (FAR) and corporate policy, and not primarily for the purpose of seeking legal advice. Therefore, Judge Gwin determined that the investigation reports were not privileged and granted the relator's motion to compel disclosure.

Regardless of how this case ultimately comes out, it is a wake-up call for government contractors and other companies operating in regulated industries. There is no doubt that government agencies and plaintiffs are aggressively pursuing internal corporate reports. Careful consideration and planning now can go a long way in protecting the company's interests when such requests/demands are inevitably received.

FAR Business Ethics Requirements

In December 2008, the FAR Councils amended the FAR to require all government contractors to implement a business ethics awareness compliance program and an internal control system. FAR 52.203-13. The final rule expanded the requirements imposed previously only on Department of Defense contractors. Under FAR 3.1004, the foregoing FAR clause must be included in all contracts that are expected to exceed $5 million and have a performance period of 120 days or more; certain requirements are not applicable to small businesses and commercial-item contractors.

Among other things, the FAR business ethics rule imposes a mandatory requirement on all government contractors to disclose to the relevant agency's Office of Inspector General (OIG) whenever they have "credible evidence" of: (1) certain criminal violations; and (2) civil False Claims Act violations. Further, the rule requires government contractors to provide "full cooperation with any Government agencies responsible for audits, investigations, or corrective action." FAR 52.203-13(c)(2)(ii). Failure to comply with these obligations constitutes an independent ground for suspension and/or debarment. FAR 9.406-2(b)(1)(vi), 9.407-2(a)(8).

Recent Decision in *United States ex rel. Barko v. Halliburton Co. et al.* to Order Disclosure of Privileged Internal Investigation Materials

In *United States ex rel. Barko v. Halliburton Co.*, the contract at issue was awarded by the government to Kellogg Brown & Root Inc. (KBR) to support Iraq reconstruction that was subject to the Defense Federal Acquisition Regulation Supplement (DFARS) previous requirement. In accordance with the applicable requirements, KBR's compliance program provided for a clear process for reporting and evaluating suspected wrongdoing to KBR's law department:

- Reports of suspected wrongdoing are referred to the director of the Code of Business Conduct (COBC);
- After an initial review, the director determines whether further investigation is warranted; and
- If an investigation is warranted, the investigators gather additional facts and prepare a report for KBR's legal department.

At some point, KBR became aware of alleged improprieties in the award of subcontracts awarded to a Kuwaiti company, and KBR conducted an internal investigation into the allegations. It is unclear whether the COBC director was a lawyer and the extent to which the investigative work was overseen by lawyers; however, the court did note that the individual investigators were not attorneys. Subsequently, one of KBR's former employees filed a whistleblower suit under the FCA's *qui tam* provisions accusing KBR and numerous corporate affiliates of inflating construction costs to the government through its subcontracts with the Kuwaiti company, which allegedly paid kickbacks to KBR employees.

In response to the relator's discovery requests, KBR asserted that its internal investigation reports were protected by both the attorney-client privilege and the attorney work-product privilege. The relator then moved to compel production of the internal reports.

The court reviewed the internal reports—which it referred to as KBR's COBC investigations— *in camera*, and noted "they are eye-openers" as it summarized a number of the bad facts contained in the internal reports. (*slip op*. at 2.) In analyzing KBR's privilege claims, the court rejected KBR's objections, holding that the "the Court finds that the COBC investigations were undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." (*slip op*. at 5.) The court noted that interviews were conducted by non-lawyers and that the witnesses were never informed by the interviewer or through confidentiality agreements that the purpose of the review was to assist KBR in obtaining legal advice. (*slip op*. at 5-7). The court further found that there was nothing in the record to support a claim that the reports included the mental impressions of lawyers in anticipation of litigation; rather, the materials were provided in the ordinary course of business as required by FAR regardless of litigation possibilities. (*slip op*. at 7-8.)

The court distinguished KBR's investigation from the facts in *Upjohn Co. v. United States*, 449 U.S. 383 (1991):

> The COBC investigation was a routine corporate, and apparently ongoing, compliance investigation required by regulatory law and corporate policy. In contrast, the Upjohn internal investigation was conducted only after attorneys from the legal department conferred with outside counsel on whether and how to conduct an internal investigation. As such, the COBC investigative materials do not meet the "but for" test because the investigations would have been conducted regardless of whether legal advice were sought. The COBC investigations resulted from the Defendants need to comply with government regulations.

(*Slip op*. at 6.)

While it remains to be seen whether this case will be upheld or whether other courts will follow suit, it nonetheless provides some important considerations for government contractors and other companies operating in regulated industries.

Important Take-Aways for Companies

Although this case focused on specific government contract regulations, it has broader implications to any company operating in a regulated industry. There are a number of steps that companies should take to establish clear distinctions between conducting internal investigations into alleged violations of law and their internal, ongoing audit programs.

- **Prepare clear guidelines that establish a road map for reviewing claims of misconduct.** Companies should document clearly the roles of their internal compliance review functions and internal investigations into alleged wrongdoing. To the extent that processes are established to address ethics complaints through a compliance review (as opposed to automatically through the legal department), there should be a process for legal referrals in appropriate cases as well as options for compliance investigations to be conducted at the direction of internal lawyers for purposes of seeking legal advice. Certain types of reviews may call for utilizing different personnel or processes. To the extent certain processes will be conducted for reasons other than seeking legal advice, and therefore outside the privileged setting, the company should consider setting guidelines on the type of documentation that will be created to serve that purpose.

- **Make clear the purpose of any internal investigation and establish a clear record to support the assertion of the attorney-client privilege and attorney work-product doctrine from the outset (or as soon as the matter is identified as a potential legal problem).** It is always wise to scope the purpose of any internal investigation carefully to manage resources, costs and goals of the review effectively. To the extent that any review includes the goal of seeking legal advice, such a goal should be clearly documented, along with instructions to the investigative team (including lawyers and nonlawyers) regarding the preparation of privileged materials. Although the court here distinguished KBR's investigation from the *Upjohn* case because "the Upjohn internal investigation was conducted only after attorneys from the legal department conferred with outside counsel on whether and how to conduct an internal investigation," the use of outside counsel is not dispositive. Certainly, not every internal investigation needs to be conducted by outside counsel.

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