

Let's Sue DCAA? Well, KBR Just Did!

Written by Nick Sanders

Wednesday, 24 September 2014 00:00

Remember that old article we wrote? The one in which we said, “Sooner or later, a contractor is going to get fed up with the situation and sue DCAA for malpractice under the FTCA. We suspect it will be sooner, rather than later.”

So that happened.

We don't have the details, because Law360 has a paywall and the subscription is too dear for this little consultancy. But what we do know is that Law360 reported the following:

Kellogg Brown & Root Services Inc. sued the U.S. government in Delaware federal court on Tuesday, seeking to recover \$12.5 million in legal fees from litigation that arose out of an allegedly defective Defense Contract Audit Agency report on its use of private security contractors during...

The *lawsuit*, which seeks damages under the Federal Tort Claims Act, accuses the DCAA of wide-ranging professional malpractice ...

Readers of this blog know about that dispute. Here's [a link](#) to the article in which we reported—

... 35 pages of Findings of Fact that summed up a colossal Charlie Foxtrot, wherein the U.S. Military tried to perform its primary mission under difficult circumstances, a mission that (based on testimony and evidence and Findings of Fact) did not necessarily include protecting the civilian contractors, who were thus forced to protect themselves by hiring PSCs, which led to questioned, suspended, and disallowed costs. We have an opinion on the equity of the situation, but that opinion is not relevant to this article.

See that there? That was us being discreet! That part about “we have an opinion ... but that opinion is not relevant to this article.” That was good, right? Seriously, how often do we do that on this blog?

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Anyway our opinion is still not relevant, but we will venture one here anyway, just for the record. For the record, then, our opinion is that if you take civilian contractors into a war zone, you owe them the obligation of providing them safety and security at least equal to that provided to military service members and civilian employees of the DOD. At least that amount, if not more. And if it turns out that the military cannot provide civilian contractors with at least that level of security, those contractors will have to go look elsewhere. Or they have to abandon their posts and put the overall mission in jeopardy and probably get sued by the DOD for nonperformance. So pretty much they have to go look elsewhere for their security and safety. They have to go find their own security suppliers if they want to stay at their posts.

And if you then say, *thanks for staying at your post, but we are going to make the cost of you providing your own security unallowable, because reasons*, then that is manifestly unfair. If the military can't do the job, then somebody else has to. Or else don't bring civilian contractors into a war zone.

Don't bring civilian contractors into a war zone, and tell them the U.S. military is going to protect them, and then have them find out later that, in fact, the U.S. military has a mission to perform—and that mission does NOT include protecting the civilian contractors. *Surprise!*

And don't have them shrug their shoulders in resignation, and then go provide their own security, security that is obviously allocable to the contract at hand as a direct cost, a direct cost that is allowable since it was not made unallowable by any contract terms or conditions, and then have the auditors say "unallowable." That situation strikes us as being more than simply unfair. It strikes us as being a bit cowardly and more than a little duplicitous. "Good faith and fair dealing" is the standard and, in this case, that standard seems to have been missed by a mile.

So there's our opinion on that. For the record.

KBR, which was forced to spent \$12.5 million in legal fees to recover its questioned, suspended, and disallowed PSC costs, and which lost the use of a roughly a hundred million dollars in cash (but still had to keep performing its contracts and pay its employees) on the basis of an allegedly flawed DCAA audit report, is now suing the audit agency.

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Good for them.

Meanwhile, as readers know, the DOD IG recently found errors in 81 percent of recent DCAA audit reports it reviewed. Which leads us to wonder how many other contractors may be out there, looking to sue DCAA for similar flawed audit findings.