

CCS NEWS

CERTIFIED CONTRACTING SOLUTIONS, LLC •

January, 2007

Supreme Court Heard Arguments on Whistleblowers

On December 5 the Supreme Court heard arguments in the case of Rockwell International Corp. vs. U.S.(Docket #05-1272) on appeal from the United States Court of Appeals for the Tenth Circuit (March 4, 2004).

This case is a *qui tam* suit initially filed by an employee of Rockwell as a whistleblower alleging that his employer had submitted false claims to the government concerning environmental health and safety issues at the Rocky Flats plant in Colorado.

The federal False Claims Act allows private citizens and company employees, known as relators, to bring suit in the name of the United States (known as a *qui tam* suit) against a corporation that has committed fraud against the government, and to share in any judgment thereon. Rockwell claimed that the employee was ineligible to bring suit because the knowledge he had was not sufficiently “direct and independent” to qualify him as an “original source” under the statute.

The Supreme Court accepted the case for argument this term. It is hoped that the Court’s decision will resolve a split among the circuit courts regarding precisely what level of “direct and independent knowledge” a potential *qui tam* plaintiff must have to qualify as an original source. This is important to CCS clients because the decision will most likely affect any business that contracts with the federal government or participates in government programs, and could make it either substantially easier or more difficult for whistleblowers to bring such suits, and conversely for companies to defend them. More information on false claims and *qui tam* suits can be referred to CCS.

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Inflation Adjusts Thresholds

Threshold for micro-purchases (FAR Part 13.2 – the simplest type of acquisition), increased from \$2,500 to \$3,000 on September 28, 2006. This is an inflation adjustment required by 41 U.S.C. sec. 431a. These rounded inflation adjustments take place once every five years. This adjustment covers the period from October 2000 to October 2005, during which inflation totaled 14.5 percent. In addition to increasing the micro-purchase threshold, there were other inflation adjustments as well:

- The threshold for obtaining cost or pricing data was increased from \$550,000 to \$650,000

- The commercial items test program threshold increased from \$5 million to \$5.5 million

- The Prime contractor subcontracting plan floor increased from \$500,000 to \$550,000

The statute does not permit escalation of acquisition-related thresholds established by the Davis Bacon Act, the Service Contract Act, or by trade agreements.

HAPPY ANNIVERSARY

February 22 marks the five year anniversary of Certified Contracting Solutions, LLC. Formed that day in 2002, CCS has worked hard to build a positive reputation in the industry by serving its clients with outstanding professional service and information concerning government contracting matters. Tom Reid, Chief Problem Solver for CCS expressed his thanks to all clients for their business and for providing an opportunity for CCS to serve their needs. “There are a lot of people and companies in the marketplace who claim to be able to do what we do,” said Reid. “The loyalty of our clients tells us that we do what we do better than anyone else. For that we thank all of our business associates.”

Client Question

In each issue of our newsletter we select a question from one of our clients and provide the answer to everyone. We always protect the identity of our client, but our experience has shown that if one of you has a question, many of you have the same question.

The current question is: **In order to provide the government a total solution, I often hire subcontractors with directly pertinent experience. Does the government evaluate past performance on my subs?**

CCS offers the following from our Staff Problem Solvers:

FAR 15.305(a)(2)(iii) states that a past performance evaluation “should take into account past performance information [on] subcontractors that will perform major or critical aspects of the requirement.” So the short answer is yes – the past performance of your subcontractors should be considered and should count in your proposal overall rating. This requirement, however, is stated in the “should” format, not the “shall” format. Thus whether to do so is a matter of contracting officer discretion.

In a recent case, Singleton Enter., B-298576, Oct. 30, 2006, GAO held that where the solicitation is silent on the issue, neither prohibiting it or stating affirmatively that subcontractor past performance will be used, such an evaluation is appropriate. The agency asserted that the solicitation did not state that subcontractor past performance would be considered, and that this section of the FAR does not mandate the use of subcontractor past performance. Thus the use of subcontractor past performance is optional with the agency.

The lesson here is two fold. First, government solicitation drafters should be explicit in stating whether or not subcontractor past performance will be evaluated. Second, contractors who plan to rely on subcontractor past performance should read the RFP carefully to determine whether such information will be evaluated, and if the solicitation is silent, should ask the question during the Q&A period.

This is one of the very rare cases where GAO found that an RFP contained a “latent” or hidden ambiguity (as compared to “patent” or obvious ambiguity) because the existence of the ambiguity was not apparent until the agency conducted its past performance evaluation. The protest was sustained.

NOTE: CCS is not authorized to practice law or accounting. This information should not be relied on in any particular facts you may have without checking with a properly licensed professional.

Calendar of Events

Chief Problem Solver Tom Reid will be speaking in the following locations in coming months:

February 13 – National Education Seminar on Leadership – NCMA Twin Cities Chapter – Minneapolis

February 26 – March 2 – Building Effective Contract Management Teams – Oak Ridge TN (private client)

March 5 – 9 – Negotiations – Chicago, IL (private client)

March 22 - National Education Seminar on Leadership – NCMA Fort Worth Chapter – Dallas

April 9 – 13 - Commercial Subcontract Administration – Chicago, IL (private client)



April 22–25

Hyatt Regency Dallas at Reunion,
Dallas, TX

<http://www.ncmahq.org/meetings/WC07/>

Chief Problem Solver Tom Reid will be presenting three sessions at the Congress this year.

- Six Things Contract Managers Need to Know about Six Sigma
- Advanced Negotiations Workshop – The Ethics in Negotiations
- Sarbanes Oxley Internal Controls – Strong Contract Management Disciplines Required for 404 Certification

Did You Know?

- ◆ There are, as of 2005, 1.9 million civil servants, supplemented by 7.6 million contractors. When you add the military, postal workers, and grant recipients, the federal government employs 14.6 million people. (*August 2006, Research Brief No. 2, Graduate School of Public Service, NYU Wagner School*)
- ◆ On January 6, 2007, all of the cases and personnel at eight separate boards of contract appeal (General Services Administration, Agriculture, Energy, Housing and Urban Development, Interior, Labor, Transportation and Veterans Affairs) transferred to a new Civilian Board of Contract Appeals (“CBCA”). Public Law No. 109-163 dated January 6, 2006, established the CBCA to hear and decide all disputes, except those at the Department of Defense, Tennessee Valley Authority and the Postal Service, which will remain under the jurisdiction of their respective boards of contract appeals.
- ◆ According to GAO (GAO-07-359T, dated January 17, 2007) DOD’s obligations on service contracts have jumped from \$82.3 billion in fiscal year 1996 to \$141.2 billion in fiscal year 2005, while DOD’s acquisition workforce has been downsized during this time frame without sufficient attention to requisite skills and competencies. *Ed: Duh! You think? And don’t even ask how many auditors Congress authorized in the same time period! Contact CCS today to schedule training for your organization.*
- ◆ GAO resolved 249 protests in FY06, down from 306 in FY05. There was a slight drop in protests filed in FY06 (1,327) from FY05 (1,356). The sustain rate was similar, with 72 protests sustained, but with a smaller number of decisions the rate increased from 23% in FY05 to 29% in FY06. The ADR success rate was markedly more promising to contractors, with a 96% success rate in FY06.

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<http://groups.myspace.com/governmentcontractingprofessionals>

Are you doing business with the Library of Congress? Why not?

<http://www.loc.gov/about/business/sections/1.html>

Bio-based Products Proposed to Gain a Preference

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to implement a new law, entitled Federal Procurement of Biobased Products, which requires that a procurement preference be afforded biobased products within items designated by the Secretary of Agriculture. Interested parties have until February 26, 2007 to submit comments to the FAR Secretariat for consideration in the formulation of the final rule. For more information visit:

<http://www.regulations.gov/fdmspublic/comment/main/>

PUBLICATION DATE ANNOUNCED!

Watch for the new book authored by CCS’ Chief Problem solver Tom Reid, Government Contract Law Basics published by Management Concepts. Current publication release date is early April. This text is part of a new series published by Management Concepts called “Action Packs” which are designed as training aids for a variety of contract management topics.

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Lagniappe

In each newsletter, CCS offers clients and friends something free, a little something extra, or for our N'awlins friends, lagniappe.

This month – you have a choice. At year end we took an assessment of some of the training materials we have left in our archives and as a result can offer any one of the following presentation disks as a free offer this month:

- 1) The Power of Questions – Advanced Negotiation workshop.
- 2) UN Convention for the International Sale of Goods; NCMA Commercial Contracting Conference.
- 3) Negotiation Workshop; NCMA Space City Chapter – Based on “Getting to Yes” by Fisher & Ury.

For a free copy simply e-mail your request to Freeoffer@certifiedksolutions.com.

We will send a copy of the requested presentation to you right away. Limited to supply on hand.

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