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Editor: Catherine A. Tomasko, Esq.
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COMMENTARY

Contractors and the FOIA: Proactive Protection Of Proprietary Data Is a Must

By Joanne Zimolzak, Esq., and Mana Elihu, Esq.

For years, many contractors complacently have assumed that certain quintessentially sensitive and proprietary information, such as labor rates and specific pricing data, would be exempt from Freedom of Information Act requirements mandating disclosure of agency records to the public.

However, recent case law and new policy guidelines issued by the Obama administration may render such assumptions obsolete. In May a District of Columbia court took a hardline stance and rejected a contractor's effort to prevent the release of its latest pricing data to the public. The court said the contractor did not meet its burden to show that releasing such data likely would cause it competitive harm.

This case, combined with newly issued guidelines from the executive office and the Justice Department that more actively promote the FOIA's presumption in favor of disclosure, may signify a new era in which contractors must take great care to establish, support, document and preserve the proprietary nature of their records. Otherwise, contractors may run the risk that sensitive commercial and financial information will be released to the public, including competitors.

Pertinent FOIA Standards

What standards govern agencies' release of contractors' pricing and proprietary information to third parties? The FOIA requires federal agencies to make their records available to the public unless the requested records fall within certain exemptions.[1]

Joanne Zimolzak *is a partner at* ***McKenna Long & Aldridge*** *in Washington, where she focuses on assisting companies with obtaining and/or preventing the release of information under federal and state Freedom of Information Act provisions. She also has experience in complex business litigation, procurement fraud matters and conducting related internal investigations.* ***Mana Elihu*** *is an associate at the firm's Los Angeles office. Her practice includes all aspects of government contracts litigation. She has extensive experience conducting internal investigations and defending companies against False Claims Act allegations.*

FOIA exemption 4 provides that the mandatory-disclosure provisions do not apply to agency records that are "trade secrets and commercial or financial information obtained from a person, and privileged or confidential."[2] Exemption 4 thus protects information "which is (a) commercial or financial, and (b) obtained from a person, and (c) confidential or privileged."[3]

A contractor must establish it is likely to suffer substantial competitive injury if such information is released.

Because of the interplay between the FOIA and the Trade Secrets Act, once an agency determines that information falls within exemption 4, the agency is divested of its discretion to disclose such information.[4]

The central inquiry of exemption 4 is the confidentiality requirement. Commercial or financial information is considered confidential "if disclosure of the information is likely to … cause substantial harm to the competitive position of the person from whom the information was obtained."[5] Under this test, "it is not necessary to show actual competitive harm."[6] Rather, "[a]ctual competition and the *likelihood* of substantial competitive injury is all that need be shown."[7] So, to ensure that its sensitive and proprietary information is protected from disclosure, a contractor must establish that it is likely to suffer substantial competitive injury if such information is released.

Although each situation must be decided on a case-by-case basis, courts over the last several decades routinely have held that the release of a contractor's pricing data is likely to cause it substantial competitive harm. Therefore, it should be deemed confidential, commercial and financial data exempt from disclosure under the FOIA.[8]

However, the U.S. District Court for the District of Columbia's May 18 decision in *Boeing Co. v. Department of the Air Force*[9] bucks this trend by suggesting that contractors may face additional hurdles in attempting to prove that release of records likely will result in substantial competitive injury.

In *Boeing* the Air Force contracted with Boeing to build 12 satellites, and put out for competitive bidding 15 other contracts for satellite building.[10] In 2004 the agency received a FOIA request (believed to have come from a major Boeing competitor) seeking, among other things, pricing information pertaining to the company's contract.[11]

Courts may be more willing to place a heavy burden on the contractor to provide a detailed evidentiary analysis in support of any claim that disclosure will cause competitive harm.

Although Boeing did not object to the release of the total contract price, it objected to the release of its 2000-2004 wrap rates, which included labor rates and profit rates for the most recent four years under the ongoing contract. Boeing objected on the ground that such information could be used to predict its future labor rates.[12] The Air Force turned aside Boeing's objections and issued a final administrative decision letter declining to withhold from disclosure the 2000-2004 rate information.[13]

Boeing brought a "reverse FOIA action," seeking to enjoin disclosure of the 2000-2004 rates under exemption 4. The court, however, found that the company did not meet its burden to show that the Air Force acted arbitrarily and capriciously when it determined that public release of the four years of rates at issue likely would not cause substantial competitive harm.[14]

Boeing argued that a competitor armed with this most recent pricing information could estimate the annual "percent increase factor" to derive future labor rates.[15] The court rejected this argument, reasoning that the data Boeing provided in support of its argument was not sufficiently detailed because it related to only one section of the contract. The court emphasized that it found no other evidence in the administrative record that demonstrated how the release of such data would cause Boeing competitive harm.[16]

In addition, the court found that Boeing's recent rates did not follow a linear progression and instead rose unevenly. Thus, it sanctioned the Air Force's conclusion that future prices could not be extrapolated from this information.[17] Accordingly, the court upheld the Air Force's decision that exemption 4 did not apply and ordered the release of the 2000-2004 rates.

This decision suggests that courts increasingly may be more willing to place a heavy burden on the contractor to provide a detailed evidentiary analysis in support of any claim that disclosure of pricing and other sensitive, proprietary data will cause competitive harm. Consequently, and in reliance on this decision, agencies might be more inclined on a prospective basis to disclose information that previously was considered confidential, proprietary and sensitive data exempt from the FOIA's mandatory disclosure requirements.[18]

Recent Regulatory Developments

Recent policy guidelines coming from the Justice Department and the executive branch also might encourage agencies to make disclosures more liberally under the FOIA. Although the act generally carries a presumption of disclosure, in recent years, executive branch policy concerning how to apply the statute tends to be protective of the records maintained by government agencies.[19] During the Bush administration, for example, the Justice Department assured federal agencies withholding records from disclosure that the agency "will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."[20]

The changing political landscape, however, has brought with it new policies emphasizing more open and transparent government, including a heavier presumption in favor of disclosure of public records under the FOIA. In essence, the Bush administration's stance has been turned on its head by new guidelines from the Obama administration. For example, President Obama issued a memorandum to executive agency heads, stating that "all agencies should adopt a presumption in favor of disclosure in order to renew their commitment to the principles embodied in FOIA and to usher in a new era of open government." He further directed Attorney General Eric Holder to issue new guidelines "reaffirming the commitment to accountability and transparency."[21]

In March Holder issued FOIA guidelines in support of the "new era of open government that the president has proclaimed."[22] The guidelines state that an agency should not withhold records "simply because it may do so legally" or "merely because it can demonstrate, as a technical matter, that the record falls within the scope of a FOIA exemption."[23]

Agencies are required to consider making partial disclosures when they determine that they cannot make a full disclosure of requested records and they must take reasonable steps to segregate and release non-exempt information.[24] The guidelines further state that the Justice Department will defend an agency's denial of a FOIA request *only if* the agency reasonably foresees that disclosure would harm an interest protected by one of the exemptions or that disclosure is otherwise legally prohibited.[25] Ultimately, the new guidelines evidence a trend toward facilitating an agency's ability to make disclosures under the FOIA.

Recommendations for Protecting Proprietary Data

Taken together, the *Boeing* case and the Obama administration's guidelines discussed above increase the likelihood that agencies will decide to publicly release records that traditionally were considered proprietary and exempt from disclosure under the FOIA. These developments are still new, so the full scope and impact of the legal changes are yet to be known. As is often the case in the face of such changes, however, it seems likely that both the number of FOIA requests seeking proprietary contractor data and the number of contractor challenges to agency decisions to release such data will increase.

The full scope and impact of the legal changes are yet to be known.

In light of these circumstances, it is increasingly important for contractors to take a number of steps to prevent unwanted disclosures and to help ensure that an agency facing a FOIA request is required to withhold their proprietary records from disclosure.

Contractors should take reasonable steps to ensure that all confidential, proprietary, or commercially or financially sensitive data is properly marked, handled and maintained. Upon learning that an agency has received a FOIA request seeking disclosure of their sensitive records, contractors should timely submit written objections to the release of any confidential, proprietary information. Requests to agencies to withhold confidential and propriety data need to be narrowly construed. To the extent possible, the contractor should identify and segregate the sensitive data that must be withheld.

It is critical to establish with the agency in question a detailed administrative record supporting the claim that if the disclosures are made, the company is likely to suffer competitive harm. Contractors should keep in mind that if the agency turns aside the objections, their ability to later block disclosure of documents through a reverse FOIA action will be strictly limited to the administrative record they compiled in their communications with the agency. As a result, it is critical to provide detailed evidence and analysis documenting the competitive harm that the company likely will suffer with the release of certain data. Competent legal counsel can help streamline and facilitate this process from the early stages.

Ultimately, contractors will be best served by being proactive and not assuming that agencies will automatically deem the proprietary and sensitive data confidential and exempt from disclosure under the FOIA.

Notes

[1] 5 U.S.C. § 552(a), (b).

[2] 5 U.S.C. § 552(b)(4).

[3] *Landfair v. Dep't of the Air Force*, 645 F. Supp. 325, 327 (D.D.C. 1986); *see also McDonnell Douglas Corp. v. NASA*, 180 F.3d 303, 304 (D.C. Cir. 1999); *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286 (D.C. Cir. 1983).

[4] *See* 18 U.S.C. § 1905; *McDonnell Douglas Corp. v. NASA*, 180 F.3d at 305; *Pac. Architects & Eng'rs v. Dep't of State*, 906 F.2d 1345, 1347 (9th Cir. 1990).

[5] *Nat'l Parks Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted).

[6] *Gulf & Western Indus. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979).

[7] *Id*. (emphasis added); *see* also *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987); *Nat'l Cmty. Reinvestment Coal. v. Nat'l Credit Union Admin*., 290 F. Supp. 2d 124, 134 (D.D.C. 2003); *Utah v. U.S. Dep't of Interior*, 256 F.3d 967, 970 (10th Cir. 2001).

[8] *See Canadian Comm. Corp. v. Dep't of the Air Force*, 514 F. 3d 37, 40-41 (D.C. Cir. 2008) (summarizing and reaffirming line of cases wherein contractor pricing data was exempt from disclosure).

[9] 216 F. Supp. 2d 40 (D.D.C. 2009).

[10] *Id*. at *42.

[11] *Id*.

[12] *Id*. at *43.

[13] *Id*.

[14] *Id*. at *49.

[15] *Id*. at *48.

[16] *Id*.

[17] *Id*.

[18] The Air Force historically has favored disclosure of contract pricing information, arguing that FOIA exemption 4 does not apply to such data. *See supra* note 8 and citations therein.

[19] 5 U.S.C. § 552; *Multi AG Media v. Dep't of Agriculture*, 515 F. 3d 1224, 1227 (D.C. Cir. 2008).

[20] Department of Justice, Office of the Attorney General, Memorandum for Heads of All Departments & Agencies, re: Freedom of Information Act, issued by Attorney General John Ashcroft (Oct. 12, 2001) *available at* http://www.doi.gov/foia/foia.pdf.

[21] White House Briefing Room Memorandum for the Heads of Executive Departments & Agencies, re: Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

[22] Department of Justice, Office of the Attorney General, Memorandum for Heads of Executive Departments & Agencies, re: Freedom of Information Act, issued by Attorney General Eric Holder, (Mar. 19, 2009) *available at* http://www.usdoj.gov/ag/foia-memo-march2009.pdf.

[23] *Id*.

[24] *Id*.

[25] *Id*.

BREACH OF CONTRACT

KBR Sues U.S. for Payment of Iraq Food Service Contract

***Kellogg, Brown & Root Services Inc. v. United States,* No. 09-CV-508, *complaint filed* (Fed. Cl. Aug. 4, 2009).**

Kellogg, Brown & Root Services Inc. has sued the U.S. government, claiming it owes the company $3 million to cover costs incurred in connection with dining facility services in Iraq.

KBR says the Army must pay for the costs it incurred hiring a subcontractor to provide the dining facility services at an Iraq military site called D-1.

The complaint, pending in the U.S. Court of Federal Claims, says KBR won a support services contract from the Army in 2001 to supply a variety of services, including laundry, fuel delivery, dining facilities and food.

In August 2003 the Army issued a task order directing KBR to provide dining facility services at several sites, the suit says.

KBR hired a subcontractor, nonparty Renaissance Services, to provide the dining services at the D-1 site. Under the subcontract, Renaissance was to provide kitchen and refrigeration equipment, generators, labor, food and a building.

In December 2004, KBR says, after the Army told it to move the existing dining hall at D-1 to a new location on the premises, and KBR had Renaissance move the dining facility.

After paying Renaissance for its work, KBR billed the Army for the cost. The government then audited the plaintiff's bills and determined that the $3 million cost for Renaissance's services were unreasonable, according to the suit.

The complaint alleges the government breached the contract by failing to pay the $3 million in costs.

KBR is seeking damages plus interest and costs.

The company is represented by Thomas Lemmer of McKenna, Long & Aldridge in Denver.

See Document Section A (P. 15) for the complaint.

CRIMINAL LAW

Ex-Army Official Admits to Taking Bribes On Contracts

***United States v. Clifton,* No. 09-CR-340, *guilty plea entered* (E.D. Va. Aug. 7, 2009).**

A former U.S. Army contracting official has admitted he accepted $87,000 in bribes from two trucking companies in exchange for awarding them contracts for work at a military base in Afghanistan.

Former Army staff sergeant and contracting official James Paul Clifton, 35, pleaded guilty to bribery before Judge Liam O'Grady in the U.S. District Court for the Eastern District of Virginia.

The Justice Department says Clifton admitted he accepted the illegal gratuities and steered contracts to two Afghani trucking firms while at the Army's Bagram Airfield in Afghanistan.

Prosecutors said Clifton took part in the bribery scheme between May and October 2008 while serving as a contracting officer representative at the Bagram base.

Clifton was responsible for overseeing the companies that provided ground transportation to and from the airfield, according to the Justice Department. In a criminal information filed simultaneously with the guilty plea, prosecutors alleged Clifton accepted a cell phone from an unidentified representative of Afghan International Trucking in May 2008.

Prosecutors said the representative offered to pay Clifton $20,000 a month in exchange for more trucking work at the base. Clifton accepted the payments and assigned additional work to the company. Clifton entered into a similar arrangement with Afghan Trade Transportation, another Afghani company, according to the criminal information.

The company paid Clifton $15,000 a month in exchange for trucking work. He accepted a total of $87,000 in bribes from both companies, the charges said.

Clifton will be sentenced Oct. 23. He faces a maximum sentence of 15 years in prison and a significant fine.

See Document Section B (P. 22) for the criminal information and Document Section C (P. 24) for the plea agreement.

DISCRIMINATION

Airline Discriminates Against Military Pilots, Suit Says

***Carder et al. v. Continental Airlines Inc. et al.,* No. 09-1448, *complaint filed* (S.D. Cal. July 2, 2009).**

A class-action lawsuit filed in San Diego federal court alleges that Continental Airlines discriminates against pilots who are members of the armed forces or National Guard through its practices concerning scheduling, hiring and pension funds.

The four plaintiffs say Continental targeted them with a "continuous pattern of harassment" because of their military service. The airline's misconduct involves discriminatory conduct and derogatory comments made about their military service and leave obligations.

The estimated class consists of at least 1,000 Continental pilots who are members in the armed forces or National Guard. The defendant's discriminatory treatment is in violation of the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301, the suit says.

The plaintiffs say airline officials have commented about not hiring pilots who are members of the military because of the inconvenience that results from the airline's inability to create consistent schedules, accused pilots of "taking advantage of the system" by taking military leave, and told an employee to "choose between [Continental] and the Navy."

They also say airline superiors have yelled at them for taking "short notice" military leave, denied notices requesting time off for military leave and pressured them to perform their military duty obligations on their days off from the airline.

Even when the plaintiffs complied with such pressure by performing military duty obligations on their days off from Continental, they received less pay than non-military pilots under the airline's preferential-bidding system.

The plaintiffs say Continental condoned the harassment by refusing to take any action against the perpetrators or even investigate their complaints.

The airline creates the plaintiffs' schedules after receiving their military leave requests by assigning them to "lower quality" trips that include fewer flight hours, with fewer days off and sometimes with days of the week off, when they might otherwise have been able to work, the suit says.

During the months when the plaintiffs are not on military leave, Continental contributed an amount to the plaintiffs' individual pension plans that was "substantially" more than what they received when they were on military leave, according to the complaint.

Finally, airline officials allegedly tell prospective pilot applicants that any affiliation with the military "makes it difficult for Continental to hire because the individual may have future military commitments," the suit says.

In addition to class certification, the plaintiffs are seeking an order requiring the airline to comply with USERRA by providing them with all the benefits they allegedly have been denied because of discrimination and harassment.

Such benefits include pension fund contributions, lost earned vacation time, lost earned sick leave, pay lost because of the inability to bid on flights commensurate with their seniority levels, and pay lost due to lost seniority and the company's refusal to hire pilots who are members of the military, the suit says.

The plaintiffs also seek liquidated damages, special damages and general damages.

They are represented by Brian Lawler, Alexandra Taylor, Charles Billy and Gene Stonebarger of Lindsay & Stonebarger in San Diego.

To retrieve the complaint (2009 WL 2115344), visit westlaw.com.

FALSE CLAIMS ACT

Cops' Bulletproof Vests Are Defective, Feds Say

***United States v. First Choice Armor & Equipment Inc. et al.,* No. 09-CV-1458, *complaint filed* (D.D.C. Aug. 3, 2009).**

The government has sued a body armor manufacturer and its founder for allegedly selling defective bulletproofs vests to federal agencies and local police forces.

First Choice Armor & Equipment Inc. marketed its Zylon vests to law enforcement agencies as a thinner and more lightweight alternative to other bulletproof vests, according to the U.S. Department of Justice.

But prosecutors claim that the company and its founder, Edward Dovner, knew at the time of sale that the products contained "significant manufacturing and degradation problems" in the Zylon fiber that rendered the material unsafe for ballistic use.

"By providing defective bulletproof vests to the nation's law enforcement officers, First Choice put the lives of those officers at risk," Assistant Attorney General Tony West told the media.

The government says in the lawsuit that the defendants violated the False Claims Act, 31 U.S.C. § 3729, by supplying federal agencies with the defective products. The act is the government's primary tool for fighting procurement fraud.

The lawsuit, filed in the U.S. District Court for the District of Columbia, also accuses Dovner and his wife, Karen Herman, of a making a fraudulent conveyance for transferring more than $5 million from the company to themselves after learning of the government's investigation into the defective vests.

They transferred the assets in order to render First Choice insolvent and unable to repay the United States for the defective products, according to the lawsuit.

In a written statement, First Choice President Dan Walsh said that the charges are without merit.

"Not a single First Choice vest has ever failed to protect the individual wearing it," Walsh said. "We stand behind the safety of every body armor product we manufacture and intend to further demonstrate this and defend ourselves in court."

See Document Section D (P. 30) for the complaint.

FALSE CLAIMS ACT

Convicted Doctor Must Pay $2.7 Million In Civil Lawsuit Too

***United States ex rel. Lamberts v. Stokes,* No. 1:05-CV-596, 2009 WL 2147017 (W.D. Mich. July 15, 2009).**

A dermatologist's criminal conviction for health care fraud bars him from denying liability in a separate civil fraud case that will now cost him an additional $2.7 million in penalties, a Michigan federal judge has ruled.

Robert W. Stokes was convicted on 31 counts of health care fraud in 2007 in the U.S. District Court for the Western District of Michigan.

U.S. District Judge Gordon J. Quist sentenced Stokes to 10-and-a-half years in prison and ordered him to pay more than $600,000 in restitution. Stokes' appeal to the 6th U.S. Circuit Court of Appeals is pending.

Stokes was a board-certified dermatologist who cheated Medicare and insurers by "upcoding," or billing for more expensive treatments than provided to patients, from 2001 to 2004.

At nearly the same time the criminal case was filed, Dr. Robert J. Lamberts filed a whistle-blower suit under the False Claims Act, 31 U.S.C. § 3729, asserting civil Medicare fraud against Stokes for the upcoding.

The government intervened in Lamberts' suit and moved for partial summary judgment, arguing that Stokes' criminal conviction estopped him from denying liability under the FCA and for common-law fraud and unjust enrichment.

In a July 15 ruling Judge Quist agreed and granted the government's motion. Some claims brought by Lamberts were not covered in the motion and are pending.

Based on the same 17 acts for which Stokes was criminally convicted, the government was granted treble damages and statutory penalties in the civil case totaling nearly $2.7 million.

Judge Quist explained that expert testimony presented at the restitution phase of the criminal trial established that Stokes had committed 8,481 instances of fraudulent billing from 2001 to 2004.

Even the government believed that basing the civil damages on such a large number of events would have been "excessive," the judge said, agreeing to base the civil assessment on the same 17 transactions for which Stokes was convicted in the criminal trial.

"The resulting number based upon the maximum penalty for the 17 executions is appropriate and reasonable in light of the large number of false claims," Judge Quist said.

The government is in the process of seizing Stokes' property and retirement accounts to satisfy the restitution judgment, according to the criminal case docket.

To retrieve the opinion (2009 WL 2147017), visit westlaw.com.

FALSE CLAIMS ACT

New York Ripped Off Medicaid, Must Pay $540 Million

***United States ex rel. Cirrincione v. Hamel et al.,* No. 99-CV-2082, *settlement announced* (N.D.N.Y., Syracuse July 21, 2009).**

The state and city of New York cheated the Medicaid program on billings for speech therapy services and will pay the federal government $540 million to settle a lawsuit filed by the whistle-blower who reported the fraud.

Whistle-blower speech therapist Hedy M. Cirrincione will receive $10 million as her share of the settlement under the False Claims Act, 31 U.S.C. § 3227.

The FCA's *qui tam* provision allows private citizens to file suit on behalf of the U.S. government in fraud cases involving federal funds and share in any consequent settlement or court award.

Cirrincione brought her action in the U.S. District Court for the Northern District of New York.

Her suit triggered a federal investigation, which revealed that New York state officials "knowingly" defrauded the Medicaid program from 1990 to 2001, according to the U.S. Department of Justice.

The Justice Department said the fraud was aimed at making the United States pay more than its share of Medicaid costs in New York state.

The agency said New York authorities used federal dollars to pay for speech therapy services that were not covered by Medicaid or were improperly documented, and New York City billed the United States for "false" speech therapy services.

The Justice Department further reported that state Medicaid authorities turned a blind eye to billing procedures they knew were causing false claims to be sent to the federal government.

Under the terms of the settlement agreement, the state will pay the federal government $331.8 million over five years.

It will also give the United States the right to $107.8 million in Medicaid funds that the federal Centers for Medicare and Medicaid Services withheld pending the outcome of the whistle-blower action.

As its part of the settlement, New York City will pay the United States $100 million over the same five-year period

Cirrincione was represented by David A. Koenigsberg of Menz Bonner & Komar in New York.

To retrieve the amended complaint (2006 WL 6333523), visit westlaw.com.

PERFORMANCE BONDS

Insurers' Handling Of Highway Contract Default Is Not Bad Faith

***Fidelity & Deposit Co. et al. v. Douglas Asphalt Co. et al.,* No. 09-10919, 2009 WL 2225817 (11th Cir. July 28, 2009).**

The insurers of a government contractor that failed to complete a project are not liable for bad-faith handling of the matter, the 11th Circuit has ruled.

The panel said the insurers were fulfilling their own responsibilities when they paid more than $15 million to fix the default, refused to allow its insureds to continue in a consulting role and failed to contest the contract termination.

According to the opinion, the Georgia Department of Transportation contracted with Douglas Asphalt Co. to perform work on an interstate highway. GDOT terminated the contract after Douglas Asphalt allegedly failed to pay its suppliers and subcontractors or to complete the work.

Fidelity & Deposit Co. and Zurich American Insurance Co. had executed payment and performance bonds in connection with Douglas Asphalt's work on the interstate. After GDOT terminated the contract, the insurers were forced to make good on it, the opinion says.

Thereafter, the insurers sued Douglas Asphalt and its principals, Joel and Ronnie Spivey, in the U.S. District Court for the Southern District of Georgia. The plaintiffs sought to recover their losses.

The District Court ruled in the insurers' favor.

The defendants appealed to the 11th U.S. Circuit Court of Appeals, arguing that Fidelity and Zurich had acted in bad faith.

First, they argued, the insurers claimed excessive costs to remedy the default caused by Douglas Asphalt's poor performance. They asserted that the interstate project was 98 percent complete, requiring only $3.6 million to finish the contracted work.

Second, they contended, the insurers acted in bad faith by failing to contest the default.

Finally, the insurers' refusal to permit the defendants to remain involved with the interstate project, either in contracting or consulting, was evidence of bad faith, the defendants argued.

The 11th Circuit affirmed judgment in favor of the insurers, noting that the District Court had found that the project was only 90 percent to 92 percent complete and that millions of dollars were needed to correct Douglas Asphalt's defective work.

"Douglas Asphalt and the Spiveys have not shown that the District Court's finding was clearly erroneous, and accordingly, their argument that Fidelity and Zurich showed bad faith in claiming that the project was only90 percent complete and therefore required over $15 million to remedy the default fails," the 11th Circuit said.

Further, the panel said, the performance bonds and indemnity policy required Douglas Asphalt and the Spiveys, not their insurers, to contest the default. They also were required to post collateral security to pay any resulting judgment.

Because they did neither, they now cannot claim that their insurers acted in bad faith for not contesting the default, the appeals court said.

Finally, the panel rejected Douglas Asphalt's and the Spiveys' argument that not allowing them to remain involved with the project is evidence of bad faith.

"Fidelity and Zurich had a contractual right to take possession of all the work under the contract and arrange for its completion," the 11th Circuit said. "Exercising that contractual right is not evidence of bad faith."

The defendants were represented by Philip Keith Lichtman and Eules A. Mills of Mills Paskert Divers in Tampa, Fla.

The insurers were represented by C. Dorian Britt of Savage & Turner in Savannah, Ga.

To retrieve the opinion (2009 WL 2225817), visit westlaw.com.

PERSONAL INJURY

Marine's Wife Sues U.S. Over 'Tainted' Water at Camp Lejeune

***Jones v. United States,* No. 09-00106, *complaint filed* (E.D.N.C. July 4, 2009).**

A wife of a U.S. Marine is suing the federal government, alleging she was injured from being exposed to toxic chemicals in the drinking water at Camp Lejeune, N.C.

The complaint, filed in the U.S. District Court for the Eastern District of North Carolina, alleges the federal government knowingly exposed Laura Jones and other Marine families to highly contaminated drinking water on the base.

Jones says she developed non-Hodgkin's lymphoma as a result of her exposure to the contaminated drinking water at Camp Lejeune from 1980 to 1983. She was diagnosed with cancer in November 2003.

The suit says the government should have provided a water supply that was free from contamination and safe for drinking and bathing.

According to the Agency for Toxic Substances and Disease Registry, in 1982 the Marine Corps discovered volatile organic compounds in the drinking water provided by two of the eight water treatment plants at Camp Lejeune.

The lawsuit says the Navy, which also had facilities at the base, had regulations in place as early as 1963 to prevent water contamination. The regulations mandated that the water supply be adequate in capacity to meet maximum demands without creating health hazards.

In addition the water supply was required to be located, designed and constructed to eliminate or prevent pollution, the complaint says.

In 1974 Camp Lejeune's commanding general instituted additional regulations concerning the disposal of chemicals, the suit says.

The federal government allowed large quantities of chlorinated solvents and other contaminants to be dumped and disposed of on Camp Lejeune's property, according to the complaint.

The government should have known that providing contaminated water likely would cause health problems, the suit says.

"At no time did the defendant warn the individuals at the base or those coming on to the base … that the water supply could and/or would potentially harm them and their families," the complaint says.

Jones is seeking unspecified damages.

She is represented by Joseph Anderson of Anderson Pangia & Associates in Washington.

To retrieve the complaint (2009 WL 1971436), visit westlaw.com.

REGULATORY ACTION

Feds Give Military Spouses Job Preference

The federal Office of Personnel Management has released final regulations that allow the spouses of military service members to obtain civil service jobs without facing competition for them.

The Aug. 12 regulations permit federal agencies to give preferences to the spouses of certain military service members when hiring for temporary or permanent positions.

The OPM says the regulations are part of the government's efforts to recruit and retain skilled members of the armed forces and to honor those service members who have been injured, disabled or killed.

The regulations implement a Sept. 25 Executive Order signed by President George W. Bush that authorized noncompetitive civil service appointments for eligible spouses.

The OPM says the regulations allow the spouses of service members to obtain civil service positions without competition when a service member is permanently transferred to a new location.

The agency says the spousal preference also will be in effect when a service member becomes disabled or is killed while on active duty.

Under the regulations, the spouse of an armed forces member killed while on active duty must not have remarried at the time of the noncompetitive civil service hiring.

The regulations become effective Sept. 11.

The regulations are available at http://edocket.access.gpo.gov/2009/E9-19340.htm.

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