

# International Aviation, Defense, and Aerospace ALERT

NOVEMBER 4, 2002

## CONTRACTOR RESPONSIBILITY GREATER SCRUTINY

A recent decision in a bid protest case filed in the U.S. Court of Federal Claims may lead contracting officers, as well as the Court of Federal Claims and the General Accounting Office, to more closely examine a contractor's eligibility for award of a federal contract.

In *Impresa Costruzioni Geom. Domenico Garufi v. United States*, No. 99-400C c/w 01-708C, May 3, 2002, the Court of Federal Claims, after remand from the Court of Appeals for the Federal Circuit, sustained a protest challenging a contracting officer's determination that a contractor was "responsible" and eligible to receive a government contract.<sup>1</sup> The Court found that the contracting officer's determination was not reasonable because he failed to make an independent and informed determination.

### I. Court of Federal Claims (Initial Decision)

*Impresa Costruzioni Geom. Domenico Garufi* ("Garufi") filed suit in the Court of Federal Claims, challenging the award of a Navy contract to Joint Venture

Conserv ("JVC") for maintenance services at the U.S. Naval Air Station in Sigonella, Italy. Garufi claimed that the contracting officer made an improper determination of JVC's responsibility by failing to take into account criminal allegations involving one Carmello La Mastra, who had previously controlled two of the three companies comprising JVC, in connection with prior contracts at Sigonella. In making his determination, the contracting officer made no mention of the criminal allegations, but simply noted that JVC was not on the list of "Parties Excluded from Procurement Programs," and that JVC had a satisfactory record of performance, integrity, and business ethics.<sup>2</sup>

Garufi made no allegations of fraud or bad faith on the part of the contracting officer. The Court of Federal Claims, therefore, limited its review to the record before the contracting officer. Finding nothing in the record that conflicted with JVC's representations that it was a responsible contractor, the Court ruled in favor of the government.<sup>3</sup> Garufi appealed.<sup>4</sup>

<sup>1</sup> The Federal Acquisition Regulation (FAR) provides that "No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility." 48 C.F.R. § 9.103(b).

<sup>2</sup> To be responsible, a prospective contractor must, *inter alia*, "Have a satisfactory record of integrity and business ethics." 48 C.F.R. § 9.104-1(d). The contracting officer's signing of a contract constitutes a determination that the prospective contractor is responsible with respect to that contract. 48 C.F.R. § 9.105-2(a)(1).

<sup>3</sup> *Impresa Costruzioni Geom. Domenico Garufi v. United States*, No. 99-400C, 44 Fed. Cl. 540 (1999).

<sup>4</sup> *Impresa Costruzioni Geom. Domenico Garufi v. United States*, No. 99-5137, 238 F.3d 1324 (2001).

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## II. Federal Circuit Court of Appeals

On appeal, the Court of Appeals for the Federal Circuit determined that, under standards established by the Administrative Dispute Resolution Act of 1996, review by the Court of Federal Claims was not limited to fraud or bad faith.<sup>5</sup> Instead, the Federal Circuit said that the Administrative Procedures Act (“APA”) should apply,<sup>6</sup> and that traditional APA standards adopted by the district courts in bid protest cases allowed for review if there had been a violation of a statute or regulation or, alternatively, if the determination lacked a rational basis.

The Federal Circuit said that the record in this case raised serious questions as to the rationality of the contracting officer’s determination. The Court noted that an Italian court had found that La Mastra engaged in bid rigging and was involved in a Mafia organization in connection with prior contracts at Sigonella. The Italian proceeding was also directed at La Mastra’s son, as well as his brother-in-law who controlled the third company comprising JVC. As a result of its findings, the Italian court placed the three JVC companies under a receivership run by a legal administrator. Shortly thereafter, the administrator gave La Mastra’s son authority to negotiate contract changes.

The government claimed that Garufi had not shown that the contracting officer’s determination was invalid. The government argued that past acts of a former principal did not require a finding of nonresponsibility, particularly when the person no longer has control. The government pointed out that the administrator was empowered to represent and run JVC, without any limitations or exceptions. But the Federal Circuit said that it could not tell whether the contracting officer’s determination was valid, since the contracting officer’s reasoning was not apparent in the record. Because La Mastra’s son had been given signature authority over contracts at Sigonella, the Federal Circuit

said that there was some question whether the appointment of an administrator divested control from La Mastra and his relatives. The Federal Circuit remanded the matter to the Court of Federal Claims to allow a limited deposition of the contracting officer so that the Court of Federal Claims could apply the APA standard of review.

## III. Court of Federal Claims (On Remand)

On remand, the Court of Federal Claims allowed the deposition. Based on the deposition testimony, and applying APA standards, the Court concluded that the contracting officer failed to conduct an independent and informed responsibility determination. The Court found that the contracting officer failed to make any independent inquiries about the responsibility of JVC, even though he was aware of an ongoing investigation at Sigonella, as well as the pending Italian court proceedings and the appointment of the administrator. Further, the contracting officer made assumptions about the receivership arrangement without sufficient familiarity with it or similar arrangements. Because the contracting officer lacked sufficient information to make the assumptions that he did, and because he failed to make any affirmative assessment, the Court found the responsibility determination not to be reasonable and sustained the protest. The Court later ordered the government to re-solicit the procurement.<sup>7</sup>

## IV. General Accounting Office

As a result of the Federal Circuit’s ruling that an affirmative responsibility determination could be reviewed, even in the absence of allegations of fraud or bad faith on the part of the contracting officer, the General Accounting Office (“GAO”) has proposed to expand its review of such determinations.<sup>8</sup> Currently, the GAO will not review an affirmative responsibility determination absent a showing of possible bad faith on the part of government officials.<sup>9</sup>

<sup>5</sup> The Administrative Dispute Resolution Act of 1996 (“ADRA”), Pub. L. No. 104-320, provided that the Court of Federal Claims and the district courts would have concurrent jurisdiction over bid protests and that the courts shall review agency decisions under the standards set forth in the Administrative Procedures Act (“APA”). ADRA at § 12. Under the ADRA, the district court jurisdiction was to terminate on January 1, 2001, unless extended. *Id.* at § 12(d). It was not extended.

<sup>6</sup> The APA provides that the reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706.

<sup>7</sup> *Impresa Costruzioni Geom. Domenico Garufi v. United States*, No. 99-400C c/w 01-708C, July 11, 2002.

<sup>8</sup> General Accounting Office, Proposed Rule. 67 Fed. Reg. 61,542 (Oct. 1, 2002).

<sup>9</sup> 4 C.F.R. § 21.5(c).

Although the GAO does not apply APA standards in its review of bid protests, the GAO proposes to adopt a standard similar to the one enunciated by the Federal Circuit in *Impresa*. The GAO proposes to allow protests when there is “evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer failed to consider available relevant information or otherwise violated statute or regulation.”<sup>10</sup>

**V. Some Observations**

If the GAO does change its rules to allow protests of affirmative responsibility determinations to test the rationality of the contracting officer’s decision, there are likely to be many such challenges before the GAO finally determines when and how such protests will be decided. What statutory or regulatory violations or other conduct will raise

“serious concerns” remain to be seen. As a result, government contractors might consider providing additional information when bidding on contracts to demonstrate their present responsibility, particularly when a former manager or company official is under investigation or has been implicated in wrongdoing.

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For more information regarding contractor responsibility, contact:

**John Janecek\***      John.Janecek@Wilmer.com  
 +1 (202) 663-6750

\* *Admitted in CA only.*

<sup>10</sup> 67 Fed. Reg. at 61,545.

**WCP International Aviation, Defense and Aerospace**

Gregorio B. Cater  
 Sheila C. Cheston  
 J. Edward Cox  
 Stephen P. Doyle  
 Christian Duvernoy  
 Leon B. Greenfield  
 Michael R. Holter  
 John P. Janecek  
 Neil J. King

F. David Lake, Jr.  
 Dieter G. Lange  
 James W. Lowe  
 Natalie Luebben  
 Jeffrey A. Manley  
 Ronald I. Meltzer  
 Thomas Mueller  
 Cathleen P. Peterson  
 Stephen W. Preston

Ulrich Quack  
 Bruce H. Rabinovitz  
 John Ratliff  
 Leonard M. Shambon  
 Charles S. Stark  
 Ali M. Stoepfelwerth  
 Sven B. Voelcker  
 Paul A. von Hehn  
 Matthias Wissmann

2445 M Street, N.W. Washington, D.C. 20037-1420 Telephone: +1 (202) 663-6000	399 Park Avenue New York, NY 10022 Telephone: +1 (212) 230-8800	100 Light Street Baltimore, MD 21202 Telephone: +1 (410) 986-2800	1600 Tysons Boulevard Tysons Corner, VA 22102-4826 Telephone: +1 (703) 251-9700	4 Carlton Gardens London SW1Y5AA Telephone: +44 (20) 7872-1000	Rue de la Loi 15 Wetstraat B-1040 Brussels Telephone: +32 (2) 285-4900	Friedrichstrasse 95 D-10117 Berlin Telephone: +49 (30) 2022-6400
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