



Department of Justice

STATEMENT OF

TONY WEST
ASSISTANT ATTORNEY GENERAL

BEFORE THE

SUBCOMMITTEE ON CONTRACT OVERSIGHT
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

AT A HEARING ENTITLED
"ACCOUNTABILITY FOR FOREIGN CONTRACTORS:
THE LIEUTENANT COLONEL DOMINIC 'ROCKY' BARAGONA
JUSTICE FOR AMERICAN HEROES HARMED BY CONTRACTORS ACT"

PRESENTED

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Chairwoman McCaskill, Senator Bennett and distinguished Members of the Subcommittee. I appreciate the opportunity to appear before you today. S.526, the “Lieutenant Colonel Dominic ‘Rocky’ Baragona Justice for American Heroes Harmed by Contractors Act,” was prompted by the difficulties the Baragona family experienced in establishing personal jurisdiction in a United States court for the wrongful death of their son. Lieutenant Colonel Baragona was serving this country in Iraq when he was killed in an accident. His family sued the foreign contractor whose employee was involved in the accident, but the judgment was vacated and the lawsuit was dismissed when the court found it had no personal jurisdiction over the contractor. Let me say at the outset that we greatly appreciate the Subcommittee’s attention to this difficult and tragic situation and support your effort to ensure that our service men and

women and their families have recourse to our Federal courts in these types of terrible circumstances.

For certain covered contracts, S.526 would require contractors to consent to personal jurisdiction over the contractor by U.S. courts to hear civil suits alleging rape, sexual assault or serious bodily injury to members of the United States armed forces, civilian employees of the United States, or United States citizens employed by contractors working under government contracts performed abroad. S.526 also would facilitate establishment of personal jurisdiction in civil procurement fraud matters brought by the United States by requiring contractors to consent to personal jurisdiction alleging wrongdoing in the performance of a government contract performed abroad.

We greatly appreciate the Subcommittee's effort in this regard to ensure that the United States's interests are protected in providing for personal jurisdiction in procurement fraud matters brought by the government. Addressing procurement fraud is among our highest priorities at the Department and for the Civil Division, which I lead. This includes everything from pursuing fraud in connection with the delivery of vital services to our men and women in uniform, to ensuring that the American taxpayers are not overcharged for what we purchase; ensuring that the equipment we deploy is built to specifications, tested, and properly performs, and enforcing the laws against bribery or other corruption that taints our contracts.

In conjunction with the United States Attorney's Offices, the Civil Division pursues civil enforcement of procurement fraud matters that are initiated either through *qui tam* actions under the False Claims Act, or as a result of referrals from agencies or through parallel or joint

investigations with criminal components of the Department. Since 1986, when the False Claims Act was substantially amended, the statute has been the government's primary weapon against all forms of fraud against the United States, including procurement fraud. The Fraud Enforcement Recovery Act (or "FERA"), enacted on May 20, 2009, further strengthened the False Claims Act. The Department pursues False Claims Act cases against contractors, subcontractors and others that engage in all forms of procurement fraud, including false claims under contracts fraudulently induced by bid rigging and kickback schemes; inflated claims for payments; claims for defective or counterfeit products; defective pricing; and other forms of procurement fraud. Indeed, since 1986, the Department has recovered in excess of \$4.4 billion in procurement fraud matters involving solely the Department of Defense.

Where a non-resident defendant has not consented to personal jurisdiction in a United States court, the Due Process Clause of the Fifth Amendment requires that such defendant have "minimum contacts" with the forum, and that the exercise of personal jurisdiction not offend "traditional notions of fair play and substantial justice." Because Section 3732 of the False Claims Act authorizes worldwide service of process, the United States need only demonstrate that the foreign defendant has sufficient minimum contacts with the United States as a whole rather than with the particular judicial district in which the suit is brought. Also, the minimum contacts test can be met based on defendant's specific contacts with the forum in connection to the events alleged in the complaint, or defendant's overall contacts with the forum, which usually must be "continuous and systematic". It is not necessary that the defendant's actions

actually take place in the forum to establish personal jurisdiction. All that is required is that the defendant's actions were "purposefully directed" toward the forum.

Over many years, the Department has brought cases successfully against foreign contractors and subcontractors, and other nonresident defendants, for violations of the False Claims Act. For example, in *U.S. ex rel. Miller v. Holzman*, a case now on appeal, the U.S. District Court for the District of Columbia entered judgment in the amount of \$90 million in favor of the United States after an earlier jury verdict found foreign defendants liable for conspiring to rig bids on contracts financed by the U.S. Agency for International Development to construct waste water treatment facilities in Cairo, Egypt. The *Holzman* case is one where the Department was able to establish personal jurisdiction over two foreign defendants. In the case of one of those foreign defendants, the court found that the United States had established personal jurisdiction for claims under one contract, but not for claims submitted under two other contracts. That defendant has appealed the court's ruling finding personal jurisdiction.

The Department also is litigating two False Claims Act cases against Toyobo Co. Ltd. of Japan and its American subsidiary, Toyobo America Inc., for their role in manufacturing and selling defective bullet-proof vests to the United States for use by federal, state, local and tribal law enforcement agencies. The United States has alleged that Toyobo, which manufactured the Zylon fibers used to make the vest, and others in the vest manufacturing chain, knew that Zylon was unsuitable for ballistic uses because it degraded when exposed to light, heat and humidity.

To date, we have not yet faced a personal jurisdiction challenge in connection with a procurement fraud matter arising out of contracts related to the wars and reconstruction efforts in

Iraq and Afghanistan. But as more civil investigations involving the wars and reconstruction in Iraq and Afghanistan mature and move forward into litigation, we likely will see additional False Claims Act cases involving foreign contractors, and challenges to personal jurisdiction.

Just this month, the Department filed two war-related cases. On November 5, 2009, the Department initiated an action under the False Claims Act in the United States District Court, for the Western District of Texas, against individuals and entities involved in the bribery of John Cockerham, Jr., and James Momon, Jr., two former Army officers serving in Kuwait who earlier pleaded guilty to criminal charges. The complaint alleges that Cockerham and Momon were bribed for awarding Blanket Purchase Agreements (BPAs) to Kuwaiti companies owned and controlled by defendant Saud Al Tawash, or in which Al Tawash had an interest, including Green Valley Co., Palm Springs General Trading and Contracting Establishment, and Jireh Springs General Trading and Contracting Establishment. We have sued these entities and expect to establish personal jurisdiction over them. The BPAs were awarded during 2004-2005, and covered supplies such as bottled water and tents, and services such as removing waste water from Army camps.

On November 16, 2009, the Department announced that it had intervened in a *qui tam* action in the Northern District of Georgia against Public Warehousing Company (“PWC”) - and others. At the same time, the Department also announced indictments against PWC.

The *qui tam* complaint alleges that since 2003, PWC has engaged in a scheme to defraud the Defense Supply Center of Philadelphia, a field activity of the Defense Logistics Agency, by presenting or causing others to present false claims for payment under PWC’s multi-billion

dollar contracts to supply food for U.S. service members serving in Kuwait, Iraq, and Jordan. The *qui tam* complaint alleges that the defendants overcharged the United States for local market ready items (*i.e.*, fresh fruits and vegetables) and, that PWC failed to disclose and pass through rebates and discounts it obtained from its U.S.-based suppliers, as required by its contracts.

With respect to the proposed legislation, we believe that requiring contractors to consent to personal jurisdiction in U.S. courts as a condition of their contract with the United States should assist us in establishing personal jurisdiction over foreign contractors in procurement fraud cases. These provisions could be especially helpful in cases involving subcontractors that are not in direct privity of contract with the United States. We note that S.526 defines the term “contractor” to include subcontractors, and expect that in implementing these provisions the FAR Council will require contractors to flowdown the consent provisions to their subcontractors. While requiring subcontractor consent to personal jurisdiction would be helpful in pursuing civil procurement fraud matters, we also note the concerns expressed by the Department of Defense that requiring subcontractor consent to personal jurisdiction might make contracting more difficult, and impede its efforts to obtain on a timely basis the goods and services needed by our troops in combat environments. We would be happy to work with the Subcommittee to explore ways to realize both of these important goals.

As currently written, S.526 arguably does not capture the full range of procurement fraud violations that we can pursue under the False Claims Act, including some of the most prevalent forms of fraud, including bid rigging, kickbacks, bribes and other forms of fraud. These types of fraud typically occur at the time of contract formation, and arguably may not be encompassed by

the current phrase in the bill – “wrongdoing associated with the performance of such a contract.”

The *Holzman* and *Cockerham* matters are examples of False Claims Act matters involving fraud in the formation of a contract. (To be clear, it is the Department’s view that the False Claims Act covers fraud that occurs at the time of contract formation.)

S. 526 would amend the Federal Acquisition Regulation (“FAR”) to require contractors to consent to personal jurisdiction in any civil or criminal lawsuits alleging “wrongdoing associated with the performance of” a contract. However the legal concept of “personal jurisdiction” is only relevant to civil lawsuits, not to criminal proceedings. Federal court jurisdiction over criminal cases exists in jurisdictions where all or some part of a crime occurred. In those cases where the government relies on extra-territorial jurisdiction to reach crimes which occurred outside the United States, jurisdiction is established when the government is a victim. We can prosecute someone acting overseas in committing government contract fraud because typically, the United States is a victim. The concept of civil “personal jurisdiction” does not apply to criminal matters.

The Department supports protecting the rights of individuals and their families to recover appropriate damages for injuries caused by the negligent acts of foreign contractors. We note that it appears that the intent of the bill generally is to extend these new protections on a prospective basis. We note, however, that the provisions would apply to new task orders under currently-existing indefinite delivery, indefinite quantity contracts (IDIQ contracts), or new calls under existing BPAs issued after the Federal Acquisition Regulation is amended in accordance with the statute. The government’s existing contractual obligations may be affected by these

provisions. We would anticipate that the effect of this legislation would be to impose upon most active pre-existing IDIQs and BPAs a requirement that the contractor consent to personal jurisdiction through change orders. Foreign contractors would be entitled, by law, to seek “reasonable compensation” from the United States for performance of this additional contractual term. What would constitute such “reasonable compensation” is not plainly evident, but it would certainly become a source of additional costs to the government and most likely become a cause for litigation from contractors dissatisfied with our proposed compensation. We look forward to working with the Subcommittee to address these concerns in order to ensure that personal claims brought by our service members and their families are appropriately addressed.

The Department is committed to pursuing contractors and subcontractors, including foreign entities, that violate the False Claims Act and drain the treasury of funds so vital to our military and procurement systems. We appreciate the Subcommittee’s efforts to ensure that there is jurisdiction over these foreign entities in the federal courts.

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