TAF EDUCATION FUND
TAXPAYERS AGAINST FRAUD

April 28, 2011

Commission on Wartime Contracting
1401 Wilson Blvd., Suite 300
Arlington, VA 22209

Honorable Commissioners:

Taxpayers Against Fraud Education Fund ("TAFEF") submits this letter at the invitation of the Commission on Wartime Contracting in Iraq and Afghanistan (the "Commission"), in order to provide comments and suggestions with respect to the Commission's "Second Interim Report to Congress" ("Report"). TAFEF is a national non-profit, public interest organization dedicated to combating fraud through the promotion and use of federal and state whistleblower laws. TAFEF's membership includes nearly 400 attorneys who represent whistleblowers and assist federal and state governments to recover funds lost through fraudulent and corrupt business practices. Our members have represented numerous whistleblowers in cases involving fraud in Iraq and Afghanistan.

TAFEF believes the Report contains commendable recommendations, implementation of which will help bring integrity to the contracting process in Iraq and Afghanistan. But it omits mention of a vital source of information about fraud and abuse in government contracting – whistleblowers – who, at considerable personal risk, shine light on fraud and abuse through cases brought under the False Claims Act, 31 U.S.C. §§ 3729 *et seq.* (the "FCA").

In the context of this Commission's work, we should recall that the False Claims Act was conceived to fight fraud by contractors in wartime. Dubbed "Lincoln's Law," the original FCA

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was that President's weapon to fight fraud and abuse perpetrated against the Union army during the Civil War in everything from sawdust sold as gunpowder to mules for the cavalry.

Since the Act was modernized by Congress and President Reagan in 1986, private citizens bringing cases under the Act have exposed fraud against the Department of Defense in a myriad of areas. Notable cases have involved serious overbilling by General Electric and Lockheed, safety-of-flight issues involving Boeing's work on Chinook helicopters, and dangerous submarine valves manufactured by General Dynamics.

Indeed, the FCA is the government's "primary litigative tool to combat fraud" in federal contracting. *Avco Corp. v. U.S. Dept. of Justice*, 884 F.2d 621, 622 (D.C. Cir. 1989). And, significantly, the substantial majority of funds recovered under the FCA have been the result of whistleblower cases. In the past 10 years, 80% of the $17.7 billion recovered by the federal government, more than $14 billion, was recovered due to whistleblower cases. Recognizing the overwhelming success of the FCA, 27 states and the District of Columbia have enacted similar laws, and Congress has recently passed whistleblower statutes for the Internal Revenue Service, the Securities Exchange Commission and the Commodities Futures Trading Commission.

Unfortunately, the impressive record of the FCA in addressing fraud in government contracting generally, and in defense procurement cases specifically has not extended to contracts in Iraq and Afghanistan. Many whistleblowers have come forward, but very few cases have resulted in significant recoveries. While constrictive legal rulings have been partly to blame,[1] Department of Defense policies and practices have contributed to the difficulty in bringing successful cases. Based on our experience in this area, TAFEF has a number of

[1] *See e.g.*, *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370 (4th Cir. 2008).

suggestions for agency and legislative changes to create a more favorable environment for the successful prosecution of substantial fraud cases.

SUGGESTED IMPROVEMENTS

1. Require DCMA approval of "internal" company procedures and make such procedures a contractual requirement.

Under LOGCAP III, the base contract was worded very generally, with subsequent "Task Orders" providing marginally greater specificity. Most of the detailed explanations of how work was to be performed, what materials and processes would be used, what quality procedures would be required, and other specific policies and practices, were contained in internal documents prepared by the contractor, often described as "Standard Operating Procedures" or "Desktop Operating Procedures." DCMA reviews and approves these procedures in a somewhat haphazard manner, potentially resulting in a lack of clarity about which particular procedures are contractual requirements. The procedures often cover critical requirements, including the construction safety standards that contractors must meet.

For example, it has been widely reported that at least 16 U.S. service personnel have suffered electrocution due to a failure to adhere to proper electrical procedures in the construction of buildings in Iraq. Contractor procedures contain the most detailed discussion of the specific electrical codes that must be met. Knowing violation of those procedures should be actionable under the FCA.

Contracts should contain provisions requiring contractors to submit their internal procedures to DCMA for review, and, once approved, those procedures should become binding obligations. In addition, amendments should be in writing, and also approved by DCMA. Finally, the contracts should make it clear that compliance with these procedures is a

precondition for payment, and that failure to do so will constitute a "false claim" under the FCA.[2]

2. Contractors should be required to certify compliance with contract requirements before receiving payment.

Under the FCA, a contractor is only liable if it submits a "false or fraudulent claim" to the government. Thus, if the contractor deliberately supplies faulty or even dangerous equipment, or provides substandard services, the government must still identify a "false or fraudulent claim." While there are many cases where one or the other of these is apparent—for example, when a contractor delivers food with an altered sell-by date, TAFEF would argue that the claim is both false *and* fraudulent—there can be a great deal of litigation over this seemingly formalistic requirement. That problem can be compounded in Iraq and Afghanistan, because it is sometimes difficult to locate documentation reflecting the contractor's demand for payment, and the documents that are submitted to support requests for payment often fail to identify the specific goods or services provided. Thousands of hours can be expended in a case, in which it is clear that the government was overcharged, tracking down the payment paperwork to demonstrate that the contractor claimed and received payment for the work.

In order to clear away this artificial hurdle, contractors should be required to submit a standard form with any demand for payment. The form should specify the precise nature of the work for which payment is requested, and certify that the work was performed in accordance

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[2] A number of cases have held that absent such an express provision, deliberate circumvention of the requirement may not be deemed an FCA violation. *See e.g.*, *U.S. ex rel. Godfrey v. KBR, Inc.*, No. 08-1423, 2010 WL 55510 , slip op. (4th Cir. Jan. 6, 2010); *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370 (4th Cir. 2008);
U.S. ex rel. Carter v. Halliburton Co., No. 1:08cv1162, 2009 WL 2240331 (E.D. Va. July 23, 2009).

with all applicable contractual, statutory, and regulatory requirements. The claim form should also state that a truthful certification is a precondition for payment, and acknowledge the Contractor's recognition that false certifications are actionable under the FCA.[3]

3. Contract requirements should be flowed down to subcontractors.

It has been difficult to sustain FCA cases against subcontractors of the major U.S. prime contractors in Iraq and Afghanistan. One problem is the difficulty of exercising jurisdiction over foreign companies, which the Commission correctly suggests should be addressed by legislation. TAFEF heartily endorses the Commission's Recommendation 26 to this effect.

Another problem, however, has been that prime contract requirements are not uniformly "flowed down" to subcontracts. TAFEF believes this is a problem that should be addressed through contracting provisions similar to those typically required in domestic Defense contracts. Moreover, it should be the responsibility of the prime contractor to ensure not only that prime contract requirements are included in subcontracts, but also that they are complied with. That assurance can be achieved through routine receiving, inspection, and other subcontracting procedures required by contract, violation of which would make any invoices submitted "false claims."

4. Any modification or waiver of contractual requirements can only be made in accordance with government regulations, and any other purported waivers shall be void and shall not be a basis for any defense under the FCA.

It is common for contractors to take advantage of the "fog of war" to seek informal contracting officer approval for deviations from contract requirements. While there may be

[3] The Defense Department has a form, Standard Form DD 250, which contractors typically submit and that contains some of these representations. But the peculiarity of how the form is used has led some courts to suggest that it does not constitute a representation by the contractor. *See e.g., U.S. ex rel. Carter v. Halliburton Co.*, No. 1:08cv1162, 2009 WL 2240331 (E.D. Va. July 23, 2009).

circumstances where urgency requires that such deviations be agreed to quickly, there is no reason to circumvent the requirement that such matters be approved by the appropriate officials and made part of the contracting file. Contract provisions should clarify this requirement, should state that no government official has the authority to waive it, and should state that the contractor understands that any unauthorized approval shall not be a defense to an action under the FCA.

5. When the Government recovers money paid out in fraud or false claims by a Service Branch, money recovered under the False Claims Act should go back to that Branch.

Longstanding procurement law provides that once a contract is closed, any fraud recovery goes to the Treasury, instead of to the Department of Defense. It has long been the experience of our members that this serves as a major disincentive for the Service Branches to commit resources to chasing a "shot fired down-range." TAFEF urges the Commission to suggest that Congress take the seemingly-small and sensible step of ensuring that when, for example, the Army has been cheated out of a dollar by a contractor, that dollar goes back to the Army when it is recovered through litigation.

6. Strengthen Compliance Requirements to Include FCA-specific Training, and Ensure that Compliance Requirements Are Being Met

In 2008, the FAR was amended to require contractors to establish "an ongoing business ethics awareness and compliance program," and to train principals and employees, and "as appropriate," agents and subcontractors, on the Company's program.[4] *See* FAR 52.203-13. Although the regulation specifies some requirements for the content of such programs, there is no specific training required on the FCA or its procedures, and, indeed, the regulation would

[4] Compliance with even this extremely weak regulation is uncertain, and TAFEF also encourages the Commission to examine whether government agencies are auditing contractors' compliance with these requirements, whether the compliance programs being implemented are "meaningful," and if not, whether there should be additional guidance on what needs to be included in a compliance program.

seem to permit programs that limit such training to the Company's own internal reporting procedures.

In contrast, Section 6032 of the Deficit Reduction Act of 2005, 42 U.S.C. § 1396a(a)(68), mandates that any entity that makes or receives payments of $5 million or more under Medicaid, "as a condition of receiving payment":

> (A) establish written policies for all employees of the entity (including management), and of any contractor or agent of the entity, that provide detailed information about the False Claims Act established under sections 3729 through 3733 of title 31, administrative remedies for false claims and statements established under chapter 38 of title 31, any State laws pertaining to civil or criminal penalties for false claims and statements, and whistleblower protections under such laws, with respect to the role of such laws in preventing and detecting fraud, waste, and abuse in Federal health care programs (as defined in section 1320a–7b (f) of this title);
>
> (B)include as part of such written policies, detailed provisions regarding the entity's policies and procedures for detecting and preventing fraud, waste, and abuse; and
>
> (C) include in any employee handbook for the entity, a specific discussion of the laws described in subparagraph (A), the rights of employees to be protected as whistleblowers, and the entity's policies and procedures for detecting and preventing fraud, waste, and abuse.

TAFEF strongly recommends that the Commission require a similar provision for contractors in contingency operations, and, for US-based personnel, that the required training be made part of pre-deployment orientation and training. Personnel in theater who observe fraud cannot easily consult an attorney or otherwise seek independent advice. Moreover, TAFEF's experience, even in domestic cases, is that, although most whistleblowers do report fraud to supervisors, many do not report to compliance channels, particularly where management is believed to be involved in the fraud. In theater, potential whistleblowers would be even more reluctant to report misconduct involving colleagues or superiors with whom they likely live and work in close quarters, and for whom chain-of-command may be paramount. For these reasons,

we believe that it is imperative that employees be given the tools to evaluate their options in the event that they observe fraud. Pre-deployment training, and the inclusion of FCA information in employee handbooks, would significantly increase the ability of potential whistleblowers in theater to assess their situation, find independent assistance if needed, and act to stop fraud.

In conclusion, Taxpayers Against Fraud Education Fund very much appreciates the opportunity to comment on the Commission's profoundly important work. We salute the Commission's recommendations with respect to reducing wasteful and inefficient contracting *ab initio*. Once contracts are awarded, however, we believe that the False Claims Act, by effectively incentivizing integrity, is uniquely suited to deter fraud against the taxpayer and to recoup the federal dollar when such deterrence fails. But the FCA works only when contract requirements are clear and not biased toward the contractor, when proper documentation of payments is obtained and maintained, and when potential knowledgeable whistleblowers know their options and are able to do the right thing, even in a uniquely difficult environment.

Best regards,

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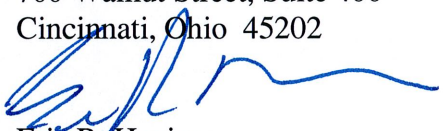

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