

No. 13-817

IN THE
Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC.,
Petitioner,

v.

CHERYL A. HARRIS, Co-Administratrix of the
Estate of Ryan D. Maseth, deceased; and
DOUGLAS MASETH, Co-Administrator of the
Estate of Ryan D. Maseth, deceased,
Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

**BRIEF OF THE PROFESSIONAL SERVICES
COUNCIL AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICUS CURIAE

The Professional Services Council (“PSC”) is the voice of the government professional and technical services industry.¹ KBR is a member of PSC but took no part in PSC’s decision to submit this brief.

¹ Timely notice of intent to file this brief was provided to counsel of record. Counsel for a party did not author this brief in whole or in part and did not make a monetary contribution intended to fund the preparation or submission of the brief. No

PSC's more than 370 member companies represent small, medium, and large businesses that provide federal agencies with a wide range of services, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, and environmental services. Together, the association's members employ hundreds of thousands of Americans in all 50 states.

In addition, many PSC member companies directly support the U.S. military through contracts with the Department of Defense and other federal agencies in deployed war-zone environments.

SUMMARY OF ARGUMENT

Plaintiffs seek to do indirectly what the law forbids them from doing directly—*i.e.*, suing the Government. If plaintiffs succeed in obtaining a money judgment here, KBR would submit that judgment (to the extent not covered by insurance) as a reimbursable cost under the terms of KBR's cost-reimbursement contract. Plaintiffs thus would have successfully avoided the prohibition of sovereign immunity and related doctrines that bar direct suits against the Government under the circumstances present here.²

person, other than the *amicus curiae*, its members, or its counsel, made such a monetary contribution to the preparation or submission of the brief.

² See 28 U.S.C. §§ 2680(a), (j), (k) (exceptions to the Federal Tort Claims Act waiver of sovereign immunity); see also *United States v. Johnson*, 481 U.S. 881 (1987); *Feres v. United States*, 340 U.S. 135 (1950) (holding that the United States is not liable under the Federal Tort Claims Act for injuries to members of armed services sustained on active duty and resulting from negligence of others).

In contractor-on-the-battlefield suits such as the instant action, the cost-reimbursement contractor is in effect a stand-in or surrogate for the Government, answering for the decision of the United States military to engage private companies in war-zone activity.

This brief will provide context by describing how cost-reimbursement contracts shift cost risk to the Government and how the Government assumes responsibility for judgments, settlements, costs, and fees in litigation such as the present suit.

ARGUMENT

I. COST-REIMBURSEMENT CONTRACTING SHIFTS COST RISK TO THE GOVERN- MENT

Government agencies may enter into cost-reimbursement contracts only when (a) it is not appropriate under the circumstances to impose on the contractor the risks of a fixed-price contract, and, conversely, (b) it is proper to shift cost risk to the Government. Specifically, Federal Acquisition Regulation (“FAR”) 16.301-2(a) states the following:

The contracting officer shall use cost-reimbursement contracts only when—(1) Circumstances do not allow the agency to define its requirements sufficiently to allow for a fixed-price type contract . . . or (2) Uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract.

48 C.F.R. § 16.301-2(a) (2013).

Additional circumstances must be present to justify the use of cost-type contracts. The Government must approve the contractor's accounting system. See 48 C.F.R. § 16.301-3(a)(3) (stating a cost-reimbursement contract may only be used when the "contractor's accounting system is adequate for determining costs applicable to the contract"). Also, the contractor must have an approved purchasing system. 48 C.F.R. § 44.3 (2013). Finally, there must be "adequate Government resources . . . to award and manage a contract other than firm-fixed-price." "This includes appropriate Government surveillance during performance . . . to provide reasonable assurance that efficient methods and effective cost controls are used." 48 C.F.R. § 16.301-3(a)(4).

When these conditions are met, the agency's selection of the cost-reimbursement type contract means that cost risk is shifted to the Government. The Comptroller General has stated this type of contract "contemplates that the actual cost of the work and the risk thereof are to be assumed by the Government; that is, that the contractor is to come out whole, regardless of contingencies, in performing the work in accordance with the contract." 20 Comp. Gen. 632 (B-15593) (1941); see John Cibinic, Jr. & Ralph C. Nash, Jr., *Cost-Reimbursement Contracting* 2 (3d ed. 2004).

The determination of what specific costs are allowable is governed by the Cost Principles in Part 31 of the FAR. 48 C.F.R. pt. 31 (2013). In general, a cost is allowable if it complies with the following requirements: (1) reasonableness; (2) allocability; (3) standards promulgated by the Cost Accounting Standards Board, if applicable, and generally accepted accounting principles and practices appropriate to the circumstances; (4) terms of the contract; and (5) any

limitations set forth in Subpart 31.2 of the FAR. 48 C.F.R. § 31.201-2(a).

Each of these “allowability” requirements has its own subset of rules. The requirement most pertinent to the instant case is “terms of the contract.” The inclusion of FAR 52.228-7 in KBR’s contract provides for the allowability of the costs to KBR of a judgment obtained by plaintiffs here. 48 C.F.R. § 31.201-2(a)(4).

II. FAR 52.228-7 “INSURANCE—LIABILITY TO THIRD PERSONS”

A. The Government Reimburses the Cost of Liability Insurance and Assumes Liabilities Arising out of the Performance of the Contract and Not Compensated by Insurance

In cost-reimbursement contracts, the Government (1) requires the contractor to provide and maintain insurance, including comprehensive general liability (bodily injury) insurance, the costs of which are reimbursable, and (2) agrees to reimburse the contractor for liabilities to third persons not compensated by insurance, including death or bodily injury. 48 C.F.R. § 52.228-7 (2013); 48 C.F.R. § 31.206-19. FAR 52.228-7 “Insurance—Liability to Third Persons” (“the -7 Clause”) or its antecedents has been in use at least since 1953. *See, e.g.*, Armed Services Procurement Regulation, Revision No. 25, 1 October 1953, ASPR 7-203.22. This clause has generated no controversy and a paucity of litigation; it has operated efficiently over the decades.

Specifically, the -7 Clause states the contractor “shall be reimbursed . . . that portion (i) of the reasonable cost of insurance allocable to this contract

and (ii) required or approved under this clause” 48 C.F.R. § 52.228-7(c). The clause provides, as an alternative, that “[t]he Contractor may, with the approval of the Contracting Officer, maintain a self-insurance program” 48 C.F.R. § 52.228-7(a)(2).

The -7 Clause further states the contractor shall be reimbursed for judgments or settlements of third-party suits arising out of the performance of the contract and not compensated by insurance, including death or bodily injury, “whether or not caused by the negligence of the Contractor or of the Contractor’s agents, servants, or employees” More specifically, the clause states the following in relevant part:

(2) For certain liabilities (and expenses incidental to such liabilities) to third persons not compensated by insurance or otherwise without regard to and as an exception to the limitation of cost or the limitation of funds clause of this contract. These liabilities must arise out of the performance of this contract, *whether or not caused by the negligence of the Contractor or of the Contractor’s agents, servants, or employees*, and must be represented by *final judgments* or settlements approved in writing by the Government. These liabilities are for—

(i) Loss of or damage to property (other than property owned, occupied, or used by the Contractor, rented to the Contractor, or in the care, custody, or control of the Contractor); or

(ii) *Death or bodily injury*.

48 C.F.R. § 52.228-7(c)(2) (emphasis added).

In summary, for judgments or settlements of third-party suits for liabilities that arise out of the

performance of the contract and are not compensated by insurance, the contractor shall be reimbursed those costs “whether or not caused by the negligence of the Contractor” or its agents, servants or employees. The liability must be represented either by a final judgment, or by a settlement approved in writing by the Government.

Paragraph (d) of the -7 Clause states that the Government’s liability is “subject to the availability of appropriated funds at the time a contingency occurs.”³ However, that limitation would not apply to a judgment obtained by the contractor against the Government for reimbursement, as such a judgment would be paid from a permanent, unlimited appropriation—the Judgment Fund.⁴

B. Reimbursement Under the Clause Extends to Third Party Actions Based on Simple Negligence as Alleged by Plaintiffs

In this case, the alleged act complained of is ordinary negligence. The -7 Clause explicitly covers

³ See *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2189 (2012) (citing *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005)) (noting that the “subject to the availability of funds” clause “is ordinarily satisfied so long as Congress appropriates adequate legally unrestricted funds to pay the contracts at issue”).

⁴ See *Ramah*, 132 S. Ct. at 2189 (holding that the unavailability of funds is not a defense where contractor receives a judgment for breach of contract, as such judgments are payable from the Judgment Fund); *Cherokee Nation*, 543 U.S. at 643 (finding that the Government must fulfill its contractual obligations even where contract is “subject to the availability of appropriations” or where agency’s total lump-sum appropriation is insufficient to pay all individual contracts made).

liability for such alleged acts. The Clause contains an exception for “willful misconduct or lack of good faith” on the part of high level officers or directors of the contractor. 48 C.F.R. § 52.228-7(e). That exception has no application here.

C. The Contractor Is Entitled to Reimbursement of Expenses Incidental to the Defense of Third Party Claims

As stated above, the -7 Clause states the contractor is entitled to be reimbursed for liabilities to third parties not compensated by insurance and for “expenses incidental to such liabilities.” 48 C.F.R. § 52.228-7(c)(2). This would include legal fees and costs of defending third-party litigation. These costs may also be reimbursed pursuant to the Cost Principle in FAR 31.205-47 “Costs related to legal and other proceedings.” *See also* 48 C.F.R. § 31.205-33 (addressing the reimbursement of professional costs); 31.206-19 (covering the reimbursement of self-insurance costs).

III. THE GOVERNMENT COULD INCUR COSTS FROM WHICH IT IS OTHERWISE IMMUNE IF CONTRACTOR-ON-THE-BATTLEFIELD SUITS ARE ALLOWED TO PROCEED

Although the Government is immune from personal injury and wrongful death suits filed by active duty service personnel or their representatives, it could still be liable as a payor of such costs under a cost-reimbursement support services contract, thus usurping the Government’s sovereign immunity.

A recent Congressional Research Service report stated, on the use of contractors generally: “Over the

last decade in Iraq and Afghanistan, and before that, in the Balkans, contractors accounted for 50% or more of the total military force.”⁵ The once popular image of the “GI” peeling potatoes on “KP” duty has faded into history. By providing a wide range of services, contractors free up uniformed personnel to conduct combat operations.

Given the heavy reliance that the United States military places upon the support services provided by war-zone contractors in inherently risky and unpredictable circumstances, the use of cost-reimbursement contracts that provide for reimbursement of litigation expenses and indemnification of third-party liability is a recurring phenomenon. This is a result of our Government’s broader national policy to rely upon an all-volunteer military force. Contractors provide flexibility to augment military capability, bringing specialized expertise tailored to specific needs, but allowing the military to scale back when services are no longer needed.⁶ In short, contractors have become an integral part of military force structure.

The substantial use of cost-reimbursement contracts and third-party indemnification clauses in civilian contracts for traditional military support roles makes the Government the real party in interest in cases such as this. A suit is considered to be “against the sovereign” if “the judgment sought would expend itself on the public treasury.” *Dugan v. Rank*, 372 U.S. 609, 620 (1963); *Land v. Dollar*, 330 U.S. 731, 738

⁵ Department of Defense’s Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress, May 17, 2013, Congressional Research Service, Summary.

⁶ *Id.*

(1947). Under the present circumstances, permitting suits against a cost-reimbursement contractor would undermine the principle of sovereign immunity.

CONCLUSION

Sovereign immunity bars personal injury or wrongful death suits directly against the Government by service personnel on active duty or their representatives. In the present suit, because the Government is the ultimate party responsible for paying the costs of any judgment, including legal fees and expenses (to the extent not covered by insurance), KBR is and should be treated as a stand-in or surrogate for the Government. The Court should grant the Petition for Writ of Certiorari and decide whether the Government must pay indirectly the costs of judgments it is immune from paying directly.

Respectfully submitted,

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