THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

STEVEN M. ANDERSON, Plaintiff/Counterclaim Defendant,	)	
v.	)	Civil Action No. 1:19-cv-00289-LO-TCB
FLUOR INTERCONTINENTAL, INC., FLUOR FEDERAL GLOBAL PROJECTS, INC., AND FLUOR FEDERAL SERVICES, LLC Defendants/Counterclaim Plaintiffs	)	

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE COALITION FOR GOVERNMENT PROCUREMENT AS *AMICI CURIAE*

MILLER & CHEVALIER CHARTERED

Jason N. Workmaster (VA Bar. No. 46011)
Timothy O'Toole (VA Bar No. 39739)
Alejandro L. Sarria (*Pro Hac Vice Pending*)
Katherine E. Pappas (*Pro Hac Vice Pending*)
900 16th Street NW
Washington, DC 20006
Telephone: (202) 626-5893
Facsimile: (202) 626-5801
jworkmaster@milchev.com
totoole@milchev.com
asarria@milchev.com
kpappas@milchev.com

Attorneys for *Amici Curiae* The Chamber of Commerce for the United States of America and The Coalition for Government Procurement

November 15, 2019

TABLE OF CONTENTS

FINANCIAL DISCLOSURE iv

INTEREST OF *AMICI CURIAE*……v

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. In Practice, The Federal Government Encourages and Expects Government Contractors To Disclose More Than The Mere Existence Of "Credible Evidence" Under The Mandatory Disclosure Rule. 3

II. In Practice, the Federal Government Encourages and Expects Government Contractors To Provide "Full Cooperation" In Their Initial Disclosures, Not Just In Response To Investigative Requests. 8

POST CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page(s)

Cases

In re Kellogg Brown & Root, Inc.,
756 F.3d 754 (D.C. Cir. 2014) 7

Upjohn Co. v. United States,
449 U.S. 383 (1981) 7

Statutes

False Claims Act, 31 U.S.C. § 3729 (2009) 4, 6

Other Authorities

Dep't of Defense Office of General: DoD Contractor Disclosure Program,
available at
http://www.dodhotline.dodig.mil/programs/CD/pdfs/DoDContractorDisclosureForm.pdf 5

Fed. Acquisition Regulation; FAR Case 2007-006, Contractor Bus. Ethics
Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,064-02
(Nov. 12, 2008) 9

Fed. R. of Evid. 502 6

Federal Acquisition Regulation,48 C.F.R. § 52.203-13 (2015) 3, 4, 7, 8, 9

Federal Acquistiion Regulations, 48 C.F.R. § 3.1004 (2015) 4

Guide to the Mandatory Disclosure Rule: Issues, Guidelines and Best Practices at
131 (Huffman & Levy, et al. eds., 2010) ..... *passim*

FINANCIAL DISCLOSURE STATEMENT

Pursuant to Local Civil Rule 7.1(A), *Amici Curiae* certify that no amicus curiae have parents, trusts, subsidiaries or affiliates that have issued stock or debt securities to the public; that no publicly held entities own any stock in any amicus curiae; that no amicus curiae is a partnership or has any owners or members; and that no amicus curiae has anything else to report in order to comply with the requirements of Local Civil Rule 7.1.

INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber thus regularly files amicus curiae briefs in cases raising issues of concern to the Nation's business community.

The Coalition for Government Procurement (the "Coalition") is a non-profit national trade association of Federal government contractors. Coalition members include small, medium, and large business concerns, and collectively account for a significant percentage of the sales generated through the GSA Multiple Award Schedules program and of the commercial item solutions purchased annually by the United States Government. Contracts held by Coalition members are subject to many of the compliance requirements at issue in this case.

Counsel for amici curiae conferred with counsel for Plaintiffs and Defendants regarding the filing of this amicus brief. Based on those discussions, Plaintiffs have indicated that they will oppose the filing of this brief. Defendants have consented to the filing of this brief. Amici curiae state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amici curiae, their members, and their counsel, made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

The vast majority of Federal government contractors are subject to regulations that require them to notify the Government in writing whenever they have credible evidence that an employee has violated certain Federal laws. The efficacy of this so-called "Mandatory Disclosure Rule" relies on contractors to provide the Government sufficient information to meaningfully consider and investigate potential violations. In its Memorandum Opinion and Order of November 8, 2019 (the "Opinion"), the Court found that the regulations governing such disclosures only require contractors to provide "mere notice" that they have credible evidence and that a contractor's "full cooperation" is required only when responding to an investigative request from the Government. *See* Mem. Op. and Order at 12 n.1, 13 (Nov. 8, 2019), ECF No. 113 (hereinafter "Mem. Op. and Order"). These findings factored into the Court's decision, which held that Defendant Fluor[1] waived the protections of the attorney-client privilege and work product doctrine over the subject matter of an internal investigation and subsequent disclosure to the Department of Defense ("DoD") by making the following statements in a written submission to DoD:

(i) Plaintiff "appears to have inappropriately assisted . . .";

(ii) "Fluor considers [that] a violation . . .";

(iii) Plaintiff "used his position . . . to pursue [improper opportunities] and . . . to obtain and improperly disclose nonpublic information . . ."; and

(iv) "Fluor estimates there may have been a financial impact . . . [due to] improper conduct."

See Mem. Op. and Order at 9-10.

1 "Defendant Fluor" or "Fluor" refers collectively to Defendants Fluor Intercontinental, Inc., Fluor Federal Global Projects, Inc. and Fluor Federal Services, LLC.

On reconsideration, the Chamber and the Coalition respectfully urge the Court to weigh how the Government and its contractors have implemented the mandatory disclosure system in practice for more than a decade. Several Federal departments and agencies, such as DoD, encourage and expect contractors to furnish detailed information pursuant to the Mandatory Disclosure Rule, including descriptions of the violation the contractor is disclosing, the contours of the contractor's investigation and other details. Apart from satisfying their minimum regulatory and contractual obligations, contractors have an interest in providing their Federal customers with explanatory information that puts into context both the credible evidence and violations they identify in a disclosure.

Proactively including such information in an initial disclosure can avoid misunderstandings about the quality, relevance and ultimate legal significance of the evidence and misconduct being disclosed. It also can help assuage any concerns about a contractor's present fitness to contract with the Federal Government. Regardless if a contractor provides such information in the first instance, the regulations empower the Government to compel the contractor's 'full cooperation' – i.e., to provide Government investigators enough information to determine the nature and extent of the potential offense and the individuals responsible. Thus, when a contractor provides explanatory and contextual information in an initial disclosure, it not only frames the issues for the Government's consideration, it helps the Government conserve limited investigative resources that would otherwise be spent to secure information and evaluate its significance.

The Court's Opinion threatens to upend this settled administrative practice. Though the Mandatory Disclosure Rule does not compel contractors to waive attorney-client privilege or work-product protections, the Rule also should not be interpreted to effect broad subject matter waivers when contractors make statements that explain or characterize the evidence and

misconduct they disclose to the Government. Such an interpretation would have a chilling effect on the frequency and robustness of contractor disclosures, particularly from contractors with operations in Virginia – the very heart of government contractor country. It also would require the Government to rethink how it can encourage contractors to be forthcoming in their initial disclosures. These outcomes are in tension with the public policy underlying the regulations governing contractor disclosures, which seek to promote fulsome disclosure and cooperation with the Government. Accordingly, on reconsideration of its Opinion, the Chamber and the Coalition respectfully submit that the Court should account for how the Mandatory Disclosure Rule has been and continues to be implemented in practice.

ARGUMENT

Contractors do not invariably reveal privileged information when they identify a legal concern or characterize a potential violation of law in a disclosure to the Government. The regulatory context and manner in which contractors are encouraged and expected to make such disclosures supports this conclusion. Indeed, for contractors to receive credit for making a disclosure, and for the Government to receive the information it needs to investigate potential violations, contractors must be able to make disclosures without the risk of waiving privilege and work product protections over the subject matter of their submissions. The Court's Opinion endangers this system for the reasons discussed below.

I. In Practice, The Federal Government Encourages and Expects Government Contractors To Disclose More Than The Mere Existence Of "Credible Evidence" Under The Mandatory Disclosure Rule.

The Mandatory Disclosure Rule is set forth in the clause at Federal Acquisition Regulation ("FAR") 52.203-13, titled "Contractor Code of Business Ethics and Conduct." *See* 48 C.F.R. § 52.203-13(b)(3) (2015). This clause is incorporated in all Federal procurement contracts with a value that is expected to exceed $5.5 million and a period of performance of more than 120 days.

See Id. § 3.1004(a). In relevant part, the clause requires contractors to make a written disclosure to the agency Office Inspector General (OIG), with a copy to the contracting officer, "whenever" the contractor has "credible evidence" that an "employee" has committed certain violations of Federal criminal law or the civil False Claims Act. *Id.* § 52.203-13(b)(3)(i).[2]

The Court found this "regulation does not require disclosure of investigatory findings, the credible evidence which triggers the requirement, a summary, or any details. It instead requires a mere notice disclosing the fact that the contractor has credible evidence." Mem. Op. and Order at 12 n.1. This conclusion is contrary to how the Federal Government has implemented the rule for more than a decade, as explained below. Crucially, even if the regulation does not "require" a detailed disclosure, information provided by a contractor to explain or characterize evidence or misconduct does not necessarily reveal privileged information, and Federal courts should not find broad subject matter waivers based solely upon the mandatory versus voluntary nature of a contractor's disclosure.

Like other Inspectors General, the DoD OIG maintains a form, available online, that government contractors can use to make disclosures of potential wrongdoing. Though the use of the form is not required, the form itself "illustrate[s] the scope and detail that OIGs are seeking in contractor disclosures," as explained by the American Bar Association's Task Force on Implementation of the Contractor Code of Business Ethics and Conduct and Mandatory Disclosure Rule ("the Task Force")" *See* Guide to the Mandatory Disclosure Rule: Issues, Guidelines and Best Practices at 131 (Huffman & Levy, et al. eds., 2010) ("Guide to the Mandatory Disclosure

2 In this case, the "agency OIG" was the DoD OIG.

Rule").[3] These forms request "basic information," such as a "*complete* description of the facts and circumstances surrounding the reported activities," "*evidence* forming the basis of the report," "potential witnesses and their involvement," and "any corrective action taken by the company." *Id.* at 131-32 (emphasis added).

For example, the DoD OIG form specifically asks: for a "full description of the nature of the violation(s) being disclosed," whether "an overpayment occurred" (and the estimated amount of the overpayment), a description of "the scope of the investigation (records reviewed, number and positions of employees interviewed, etc.)," whether the contractor is "willing to provide a copy of its investigative report" and any "[a]dditional information" relevant to the disclosure. *See* DoD Contractor Disclosure Program Form.[4] Importantly, "[w]hether or not [a contractor] use[s] the on-line form to make [an] initial disclosure . . . the OIG will expect that [the contractor] ultimately provide the same or similar information to the Government." *See* Guide to the Mandatory Disclosure Rule at 152. Therefore, in practice, the Government encourages and expects contractors to disclose much more than *the mere existence* of credible evidence, including the very types of information the Court found Fluor had no duty to disclose. *Compare* Mem. Op. and Order at 12 n.1, *with* DoD Contractor Disclosure Program at 4-5.

Further, while a disclosure to the Government should not be treated as a "legal brief," it is a written submission with potentially significant legal implications and, therefore, "a disclosing

---

3 The ABA Task Force was comprised of more than forty (40) private practitioners, government contractor representatives and Government officials. *See id.* at xi-xii. While each of these persons participated in the Task Force in their individual capacity, and did not speak for their respective employer, the Task Force's 234-page Guide to the Mandatory Disclosure Rule contains numerous practical "insights into the Government's expectations regarding how the [Mandatory Disclosure] Rule should be interpreted and implemented by contractors and agencies." *Id.* at 6-8.

4 Dep't of Defense Office of General: DoD Contractor Disclosure Program, available at http://www.dodhotline.dodig.mil/programs/CD/pdfs/DoDContractorDisclosureForm.pdf.

contractor should not be constrained from identifying relevant legal issues as part of its disclosure provided it also is meeting the expectations of the receiving agency with respect to the relevant facts." *See* Guide to the Mandatory Disclosure Rule at 133. For example, in identifying relevant credible evidence, a government contractor should be able to observe – without the fear of effecting a broad subject matter waiver − that an employee's misconduct occurred outside the applicable statute of limitations or that the quality of evidence supporting scienter or materiality appears insufficient to state a claim under the civil False Claims Act (31 U.S.C. § 3729). *See id.* Such explanatory statements not only put evidence and potential violations in proper context, they help the Government evaluate the viability of successfully investigating or prosecuting the disclosed conduct, as well as the relative costs and benefits of dedicating resources to such efforts. On the other hand, a rule that punishes contractors for even identifying such legal issues would expose contractors *and* the Government to costly, drawn-out and ultimately fruitless investigations where a contractor's silence on such matters could be wrongly construed as an implicit admission of fault or as warranting further examination.

The Court found it was significant that Fluor has previously referred to its disclosure as voluntary, rather than mandatory. *See* Mem. Op. and Order at 10-11, 13. But when considering the drastic consequence of a blanket waiver, the voluntary versus mandatory nature of a contractor's disclosure is not dispositive of whether *the underlying statements in the disclosure* reveal otherwise privileged communications. *See* Fed. R. of Evid. 502 (listing factors for determining whether such a waiver has occurred). Rather, regardless if a disclosure is appropriately characterized as mandatory or voluntary, Federal courts should be reluctant to find subject matter waiver based on the kinds of explanatory statements the Court highlighted in its

Opinion – all of which appear calculated to put credible evidence of misconduct in context for the Government. Mem. Op. and Order at 9-10.

In this regard, the clause at FAR 52.203-13 recognizes the practical reality that contractor disclosures often are preceded by internal investigations conducted at the direction of counsel. *See* 48 C.F.R. § 52.203-13(a)(3)(i). Like other corporate entities, contractors have long performed such investigations with the understanding that privileged information will enjoy robust protections under the common law − even if a contractor makes affirmative statements to third parties, such as the Government, based on the facts it learns during a privileged investigation. *See In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 762 (D.C. Cir. 2014) (cautioning against the adoption of a waiver rule that "would potentially upend certain settled understandings and practices" in contractor internal investigations). Narrowing the protections of the privilege in this context creates significant uncertainty for contractors and decreases the chances they will undertake such investigations in the first place. *See Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) (recognizing that a diminished privilege "not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."). "That uncertainty matters in the privilege context, for the Supreme Court has told us that an 'uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'" *In re Kellogg Brown & Root, Inc.*, 756 F.3d at 763 (quoting *Upjohn*, 449 U.S. at 393)).

II. In Practice, the Federal Government Encourages and Expects Government Contractors To Provide "Full Cooperation" In Their Initial Disclosures, Not Just In Response To Investigative Requests.

The Mandatory Disclosure Rule requires contractors to provide their "full cooperation" when engaging with Government agencies that are responsible for investigations, audits, or

corrective actions. *See* 48 C.F.R. § 52.203-13(a)(1). "Full cooperation . . . [m]eans *disclosure to the* Government of the information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct." *Id.* (emphasis added). "It *includes* providing timely and complete *response* to Government auditors' and investigators' request for documents and access to employees with information." *Id.* (emphasis added).

The Court found that the requirement for "full cooperation [applies] when contractors act in response to a government request," but not when making an initial disclosure. Mem. Op. and Order at 12 n.1. That interpretation is not supported by the plain text of the regulation, which indicates that "full cooperation" applies generally to a contractor's "disclosure" of information to the Government and "includes," but is not necessarily limited to, responding to Government "requests" for information. *See* 48 C.F.R. § 52.203-13(a)(1). Perhaps more importantly, the Court's interpretation of the "full cooperation" requirement is at odds with how that requirement is implemented by the Government and contractors in practice.

Though a contractor technically could disclose the mere existence of credible evidence in an initial disclosure, that approach is fraught with risk because "some OIGs and DOJ attorneys may expect additional detail in [the] disclosure, and likely will view a threadbare offering as insufficient to even qualify as a 'disclosure' within the meaning of the Rule." Guide to the Mandatory Disclosure Rule at 152 (responding to the question "Does the concept of 'full cooperation' require that I include all the details of the event in my initial disclosure?"). Therefore, if the Government finds that a contractor's disclosure does not meet the full cooperation standard, the contractor may not be credited with having made a disclosure to the Government at all. Further, regardless if full cooperation technically is required in an initial disclosure, the Government can seek to compel a contractor to fully cooperate *after* it has made its initial submission. *See id.* at

153. This includes the ability to compel disclosure of "*all* pertinent information known by the organization." Fed. Acquisition Regulation; FAR Case 2007-006, Contractor Bus. Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,064-02, 67,078 (Nov. 12, 2008) (emphasis added). Thus, as a practical matter, contractors must carefully consider whether their initial disclosures to the Government will provide information "sufficient for the auditors or investigators to determine (a) the nature and extent of the offense, and (b) the individual(s) responsible for the conduct." *See* Guide to the Mandatory Disclosure Rule at 153.

At bottom, when a government contractor discloses credible evidence of potential misconduct to the Government pursuant to the Mandatory Disclosure Rule, it must aim to make a complete and fulsome disclosure. In doing so, contractors should not have to choose between meeting their regulatory obligations under FAR 52.203-13 or risking a broad waiver of the protections afforded by the attorney client privilege and work-product doctrines. Indeed, the regulation itself explicitly confirms that full cooperation does not waive a contractor's privilege. Nor should contractors be forced to avoid making statements that identify pertinent legal considerations or provide context regarding the evidence and violations they report in a disclosure. A contrary rule, like the one fashioned in the Court's Opinion, threatens to disturb the settled understanding and practices that the Government and its contractors have implemented for more than a decade and, therefore, should be avoided to the greatest extent possible.

November 15, 2019

Respectfully submitted,

MILLER & CHEVALIER CHARTERED

By: /s/ Jason N. Workmaster
Jason N. Workmaster (VA Bar. No. 46011)
Timothy O'Toole (VA Bar No. 39739)
Alejandro L. Sarria (*Pro Hac Vice Pending*)
Katherine E. Pappas (*Pro Hac Vice Pending*)
900 16th Street NW
Washington, DC 20006
Telephone: (202) 626-5893
Facsimile: (202) 626-5801
jworkmaster@milchev.com
totoole@milchev.com
asarria@milchev.com
kpappas@milchev.com

Attorneys for *Amici Curiae* The Chamber of Commerce for the United States of America and The Coalition for Government Procurement

CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of November, 2019, a true and genuine copy of the foregoing Brief of The Chamber of Commerce of the United States of America and The Coalition for Government Procurement as *Amici Curiae* was sent via electronic mail by the Court's CM/ECF system to the following:

Counsel for the Plaintiff/Counterclaim Defendant

Counsel for the Defendant/Counterclaim Plaintiffs

/s/ Jason N. Workmaster
Jason N. Workmaster