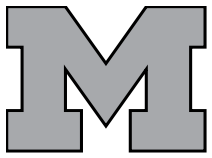

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# Some Legal Reforms to Increase Contractor Accountability

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**Some Legal Reforms to Increase Contractor Accountability**

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## Abstract

The extensive contracting out of government functions, such as the operation of nuclear energy facilities, preparation of government budgets, and even oversight of government contracts themselves, has raised great concern about contractor accountability. This chapter identifies some particular issues of contractor accountability, including accountability, including accountability to private parties for harm done and the need for public access to and participation in "policy-setting" types of activities conducted by contractors. The chapter further discusses the need for any reform to prompt agencies to more clearly specify contract requirements and to closely monitor those contracts, rather than displacing agency supervision with private litigation. Finally, the chapter suggests and discusses several possible adaptations of current law that would increase contractor responsibility, while simultaneously giving contractors an incentive to seek out, rather than to avoid, greater agency supervision.

## I. Introduction

Agency purchases of sophisticated professional services, such as research and information technology, are on the rise.[2] This Chapter primarily focuses on the issues raised by such services contracts, or in Ruth Hoogland DeHoog and Lester Salamon's words, "purchase-of-service contracting." As detailed elsewhere in this Volume, agencies are increasingly relying on the private sector to perform not only commercial services, but also what might be traditionally viewed as "governmental" or even, by some, "inherently governmental" functions.[3] For example, contractors may not only supply aircraft and maintenance services, but may administer airports, libraries, and prisons, operate immigration detention facilities, collect income taxes, and supply security services.[4] As the General Accounting Office recently observed, "[t]he [Department of Defense] is now buying launch services, rather than rockets,"[5] and flight simulator training services for Air Force pilots rather than flight simulators

themselves.[6] As contractor tasks become more related to what we consider critical government functions, the contractor workforce is increasingly blending with the civil service, and contractors are exercising decision making power in new contexts. For an example of this extended contractor authority, in 2006, the Department of Homeland Security signed a $30 billion contract with Boeing to "conceptualiz[e], design[], build[], and operat[e]" a comprehensive border security plan known as SBInet, aimed at securing northern and southern United States land borders, including the Great Lakes. According to an analysis prepared by U.S. Senate staff, private contractors bear responsibility not only for building and operating the border security project, but also for much of the *oversight* of the contract itself.[7] For another example, the Department of Energy spends over 90% of its budget on contracts, including contracts to operate research laboratories, maintain nuclear weapons stockpiles, and clean up radioactive and hazardous wastes resulting from weapons production.[8]

Contractors that supply sophisticated services over long periods of time can end up with significant discretion to set policy. Contractors safety-testing helicopters may have significant control over what tests to perform, for example.[9] In the border security project, Boeing's responsibilities include devising and providing the "*optimum* mix of personnel, technology, infrastructure, and response platforms" to detect and classify border breaches.[10] Such policy decisions have the potential to serve public goals for the particular program – or to undermine them. As the responsibility and discretion of contractors increases, contractor activities can present greater risks for national security, human health and the environment, and public safety. In implementing their contracts, government contractors may attend to–but may also disregard– other legal obligations, such as employee rights or environmental compliance. Reports of agency

contractors violating other applicable laws, including worker safety laws, are widespread.[11] The contractor that operates the Department of Energy Pantex nuclear weapons facility has repeatedly been fined for safety violations, including one instance when the contractor's technicians improperly sealed a crack in the high explosives surrounding the plutonium sphere of the hydrogen bomb, causing an even bigger crack and "'increase[ing] the potential for a violent reaction.'"[12] Government agencies can also be afflicted with problems of poor performance, cost overruns, or legal violations. However, government agencies are constrained by a number of laws that keep their functions open to public view and make the agencies legally accountable for underperforming or causing harm. Contractors, by comparison, can bypass many of these constraints. They function under a patchwork of random laws and doctrines, many of which were designed primarily for other purposes. At best, the current laws governing contractors amount to a makeshift legal framework.

Close agency supervision of a contractor could, in theory, substitute for the lack of public and legal accountability. The contract could guide and constrain the contractor's discretion, and the prospect of supervision (and reductions in contract payments) by an agency motivated to serve the public interest might prompt better performance by the contractor. The government contract, however, may simply be inadequate to guide a contractor or constrain its functions. Especially for service contracts, such as the hiring, administration, planning, and operating contracts described above, agencies can face great challenges in adequately specifying terms, including "defining requirements, establishing expected outcomes, and assessing contractor performance."[13] Lack of competition among qualified private entities and limited contract supervision can increase the chances of poor contract performance. Federal agency supervision

of contract performance is widely recognized as inadequate.[14] As recognized by several authors in this volume, these problems call for greater contractor accountability as well as more transparency and public involvement in the contracting process.[15]

Changes to the legal framework governing contractors should accordingly be aimed at increasing contractor accountability and responsibility. That may mean that a contractor may more often be liable in court for harm the contractor has caused or problems in contract performance. However, litigation should not be the sole means of increasing contractor accountability. Any legal reforms should also help the mechanisms of government function better. Ideally, legal reforms should prompt agencies to draft more carefully contract terms and to monitor more thoroughly government contractors. Agencies likely will have superior access to information about the public's needs, project demands, contractor qualifications, and contractor performance. Compared with a private plaintiff, agencies will also be more publicly accountable for supervising government contracts. It thus makes sense to encourage effective agency supervision of contracting wherever possible. One way to prompt greater agency involvement is to enlist contractors in seeking, rather than avoiding, agency supervision and involvement in key decisions.

Looking at federal law and federal contracting activities, this Chapter offers some conservative suggestions for increasing the accountability of federal contractors, especially those supplying services, and for increasing agency involvement in contractor supervision. I will not advocate abandoning contracting either completely or for some large category of activities (such as battlefield actions or intelligence-gathering).[16] Nor will I advocate the overhaul of the state action doctrine, which defines when private party activities may be attributed to the state, thus

subjecting them to constitutional restraints.[17] Further, the chapter does not focus on special issues presented by contracting abroad. Instead, I propose several amendments to existing statutes and changes in contracting practice that could creatively take advantage of existing law. The purpose here is to identify straightforward reform opportunities – in particular, by ensuring that a contractor does not face significantly fewer incentives than the agency itself to perform its job properly and comply with the law. While any statutory change that increases contractor responsibility could, of course, bring controversy, these changes could make contractors more appropriately responsible within the framework of existing laws.

Section II identifies and compares major laws that constrain government agencies and government contractors; Section III summarizes some possibilities for reform.

## II. Federal Agency Responsibility Compared with Government Contractor Responsibility

This section briefly overviews the existing legal structure governing federal agency activities and federal agency contracting. The analysis focuses on important disparities in treatment of agencies and contractors, as well as areas in which a relatively small legal change might significantly increase contractor accountability.

Federal agencies are subject to an array of requirements aimed at ensuring transparency in decision making, public accountability, and accountability in court. The Administrative Procedure Act requires public participation in informal rulemaking, through the notice-and-comment process. Federal agency actions are subject to judicial review under the Administrative

Procedure Act, as well as other statutes.[18] Federal agencies also are subject to public disclosure requirements under the Freedom of Information Act.[19] Because many of these legal requirements are explicitly aimed at government agencies or instrumentalities, however, a contractor performing services under a government contract may have no parallel responsibility. That may be so even when the contractor exercises discretion closely resembling that of a public agency.[20]

Federal agencies also are subject to political oversight from Congress, the White House, and via elections, the public at large. Sometimes this political oversight is formally structured by statutes that, for example, call for reporting to congressional committees. Federal contractors, like federal agencies, are subject to congressional and presidential oversight. Congressional committees may hold hearings, and members of Congress exercise further oversight of agency contracting by requesting General Accounting Office reports. As with oversight of administrative agencies, however, oversight of contractors is often reactive and ad hoc, rather than systematic.[21] Halliburton's contracting performance in Iraq has received significant attention in congressional oversight hearings, but less attention has been paid to systematic cost overruns by Federal Aviation Administration contractors[22] or to substantial overbilling by a contractor hired by the Transportation Security Administration to set up high speed computer networks linking federal airport employees to security centers.[23]

Unlike federal agencies, contractors have comparatively limited obligations to disclose information to the public, and the Administrative Procedure Act applies only to agencies, thereby excluding contractors.[24] Thus, the primary *judicial* oversight of a contractor's activity is likely to be through the adjudication of a contract claim when the contractor seeks payment, when an agency seeks relief under a contract or for a contract breach, or when the contractor is alleged to

have violated the False Claims Act by presenting a false or fraudulent claim.[25] The contracting agency may also elect to seek exclusion of the contractor from procurement activities in debarment or suspension proceedings.[26] A contractor also may face private tort liability or a private claim under the False Claims Act, though both types of liability are limited. In short, then, it is primarily up to the contracting agency to hold a contractor accountable; government contractors currently have relatively little accountability in court to private parties.[27] The following section examines in greater detail different types of liability that contractors, agencies, or both may face, together with the limitations of that legal responsibility.

(A) Contract Liability to the Agency. An agency may bring a claim against a contractor for failure to perform the contract itself. The claim can address the contractor's overcharging or provision of substandard services, as well as failure to conform to other particular contract requirements. Such a claim (as with a contractor's claim for nonpayment under the contract) is covered by the Contract Disputes Act.[28] Contract liability surely can be used to hold contractors accountable, but its effectiveness depends on the availability of agency resources to monitor contract performance and to pursue claims where necessary. Besides resources, holding contractors accountable in this manner critically depends on having enforceable contract terms that are well specified. Yet contract terms are not always sufficiently specific to support a claim of breach when contractors violate their obligations. For example, contracts may not clearly require compliance with other applicable laws.[29] As the United States Acquisition Advisory Panel found, "the government's difficulties in defining requirements are well documented."[30]

(B) Tort liability. Tort liability applies to some degree to both agencies and contractors whose actions cause harm. Under the Federal Tort Claims Act (FTCA), federal agencies have waived sovereign immunity to state tort claims for a "negligent or wrongful" act or omission or particular intentional torts of "investigative or law enforcement officers." An agency is not, however, liable if the claim is based on the agency's exercise or failure to exercise a "discretionary function or duty" within the meaning of the Act.[31] Such discretionary functions include determinations in "establishing plans, specifications, or schedules of operations. Where there is room for policy judgment and decision there is discretion."[32] Straightforward examples of such discretion might include decisions on whether to launch a space shuttle or what type of security to provide in airports. An agency's exercise of such judgment may be immune from judicial second-guessing, in the form of tort liability. However, as discussed in greater detail below, the agency decision still may be subject to judicial review and invalidation under the Administrative Procedure Act if it is arbitrary, capricious, or illegal.

For government contractors, tort liability also may be limited. Courts recognize a government contractor defense to tort liability, which a contractor may assert when the federal government has approved reasonably precise specifications, the equipment or service provided conformed to those specifications, and the contractor warned the government about known dangers.[33] Consequently, if the US has approved precise specifications, as with, for example, the manufacture of an aircraft part, the contractor will not face tort liability for conforming to those specifications. That seems reasonably consistent with holding the government and not the contractor responsible for key policy decisions. It also is consistent with deferring to government decisions that weigh concerns differently than civilian judges might, consistent with the

"discretionary function" exception to government tort liability.[34] Indeed, courts have expressly noted the link between the government contractor defense and the discretionary function exception to the Federal Tort Claims Act. Where the contractor has acted at variance with the contract specifications, however, tort liability may be available.[35]

However, especially in the context of more complex and longer term purchase-of-service contracts, the government contractor defense could result in excessive limits on tort liability – resulting in injured parties "bear[ing] the costs of contractor negligence."[36] This is especially the case when a contract is incompletely specified. For example, in a long-term contract for prison administration, the contract may not anticipate the range of circumstances that will require a contractor response. Some such responses might cause injury – imagine a contractor's decision not to make medical treatment available to inmates suffering particular illnesses not itemized under the prison administration contract. Similarly, one could imagine the contractor that operates a nuclear weapons facility failing to go beyond the particular safety requirements identified in a contract, even if a reasonable investigation might suggest that more safety measures are required.

A court could conceivably refuse to apply the government contractor defense in such a tort case unless the government had specifically directed or required particular actions (or lack of actions) on the part of the contractor.[37] In that case, the contractor would face tort liability for harm caused by any actions not directed by the government. On the other hand, a number of courts have also stopped their analysis after finding contract terms "reasonably precise," and allowed the government contractor defense as long as the contractor has conformed to existing contract terms, even if the injury arose from contractor activities *not* specifically directed by the

government.[38] In one recent case involving a fatal accident that occurred when an Army helicopter's tail fin broke off, the maintenance contractor argued that it was not liable even though its employees had not inspected the fin. Although the contractor was not barred from conducting a thorough inspection of the fin and was aware of a Federal Aviation Administration advisory regarding it, the contractor was nevertheless held not liable because the Army had not *required* the contractor to perform this particular inspection. The contractor was still allowed to benefit from the government contractor defense to liability.[39]

This sort of overbroad application of the government contractor defense clearly reduces a contractor's incentive to exercise reasonable care – even though the contractor may well be the most knowledgeable party involved and better able than potential victims to bear risk.[40] The chance of overbroad application of the defense is significantly increased in a services contract, especially one that covers a long period of time. Because the contract is not likely to anticipate every situation that may arise, the contractor may end up, as a practical matter, with substantial discretion. At the same time, a court might be more willing to conclude, in view of a long contract term, that contract terms are "reasonably precise" under the circumstances, thus permitting the contractor to claim a defense to tort liability. In this instance, the contractor would have less incentive to use reasonable care. Moreover, because greater detail in a contract could reduce the contractor's discretion and thus potentially reduce the protection of the government contractor defense, the contractor would have little incentive to seek out more detailed contract specifications from the agency or ongoing agency monitoring and approval of its actions.

Further, although the government contractor defense can become unavailable if a contractor fails to disclose "known" dangers to the government, it still generally remains

available if a contractor has declined to reasonably investigate possible risks arising after the execution of the contract or to seek additional agency monitoring of the contract's performance.[41] Over long periods of time, a service contractor will be uniquely positioned to investigate potential risks inherent in the implementation of the contract, but this aspect of the government contractor defense doctrine further reduces the incentive to do so.

In short, although tort liability could serve as a significant incentive for a contractor to exercise reasonable care, the overbroad application of the government contractor defense undermines it, especially in the context of long term service contracts.

(C) Administrative Procedure Act (APA) review. An agency action, including a rulemaking, may be set aside under the Administrative Procedure Act review if it is "arbitrary, capricious, an abuse of discretion, or contrary to law."[42] Courts may also grant other forms of injunctive relief under the APA, although not money damages.[43] APA review provides an avenue for assessing claims not only of statutory violation, but also of constitutional violation. Through the "arbitrary and capricious" review standard, the APA also provides a plaintiff with proper standing an opportunity for judicial review of conduct that under the FTCA would be immune from tort liability under the "discretionary function" exception.[44]

Finally, the Administrative Procedure Act provides for public involvement in agency rulemaking through notice and comment procedures and requires publication of both "substantive rules of general applicability and statements of general policy."[45]

However, these requirements apply neither to agency contracting decisions nor to decisions of contractors. Although courts have occasionally held that agency decisions governing

an entire category of contracts must be made through rulemaking, for the overwhelming majority of individual contracts, notice and comment is not required.[46] Consequently, there may be no public involvement in a particular agency decision to outsource functions or the terms on which the agency will do so.

Nor do APA requirements apply to contractors; the Administrative Procedure Act, by its terms, applies only to an "agency," which is defined to include only an "authority of the Government of the United States."[47] The APA's definition of "agency" does not include government contractors.[48] Procedural requirements for broad decisions accordingly do not apply. Nor are contractor decisions subject to outside review in court, even those functional and policy decisions that, if made by an agency, would clearly be subject to APA review as "arbitrary, capricious . . . or not in accordance with law."[49] For example, an agency's decision, despite an FAA advisory on easily cracked helicopter tailfins, that inspection of helicopter tailfins is unnecessary, would be subject to APA review. Similarly, an agency's decision to require that nuclear weapons facility security guards work over 70 hours per week despite employee complaints that exhausted employees cannot effectively protect security would be subject to APA review. Although it might have the same effects on employee and public safety and public resources, a similar decision made by a contractor would not be subject to review.

(D) Freedom of Information Act (FOIA) disclosure requirements

Under FOIA, federal agencies must make written information promptly available on request, subject to some limited exceptions, such as for national security, predecisional materials, and trade secrets.[50] As with the Administrative Procedure Act, however, federal agency

contractors are considered private parties that are not covered by the statute.[51] Moreover, FOIA's exemption for confidential "trade secrets and commercial or financial information" could preclude federal agency disclosure of some information about contractors, even if the agency had possession of the information.[52] As Rosenbloom and Piotrowski explain, a contractor that operated much of the space shuttle fleet and was "integrally involved" in the decisions of the National Aeronautics and Space Administration relating to the disastrous Columbia space shuttle mission, had documents that were nonetheless not covered by the federal FOIA.[53] Similarly, this exemption has been applied to protect contractor information about design, test results, and compliance with other laws, such as equal employment laws.[54]

The concern here is that the public does not possess a clear entitlement under these statutes to information concerning even important decisions made by a contractor, such as operational decisions involving the space shuttle or a prison operator's devising of directives to individual guards. That reduces decision making transparency and accountability.

(E) *Bivens*-type actions. So-called *Bivens* claims are special claims for money damages that courts have implied under particular provisions of the Constitution. Although the Constitution itself does not provide a remedy for violating, for example, the Fourth Amendment right not to be subjected to unreasonable search or seizure, the courts have reasoned that money damages are sometimes appropriate to redress the injury to an individual that has suffered such a search. Such damages awards can also deter further constitutional violations. *Bivens* claims can be brought against individual federal officers (though not the employing agency[55]) for damages for violating the Fourth, Fifth, and Eighth Amendments' protections of individual liberties, and

possibly others as well.[56] Congress made clear when it amended the FTCA in 1974 that it viewed the statute, which imposes liability on federal agencies, and the *Bivens* doctrine, which imposes liability on individual agency employees, as "parallel, complementary causes of action."[57]

A government contractor's employee might conceivably face direct liability for violating an individual's constitutional rights under *Bivens* or related cases.[58] However, the Supreme Court has barred *Bivens* claims against the employing corporate entity.[59] The Supreme Court held that such claims were barred against a prison operator despite strenuous arguments from the Legal Aid Society that without *Bivens* liability directly on the contractor, private prison operators were hiring (and would continue to hire) inadequate numbers of guards, increasing the chance of uncontrolled violence and constitutional violations.[60]

Even if individual employees may face *Bivens* liability for violating the constitutional rights of an individual, they could be judgment-proof. This worsens the moral hazard for the contractor. The contractor accordingly may have little incentive to supervise its employees with the goal of preventing constitutional deprivations or other injuries.

The lack of *Bivens* liability, combined with the available defenses to tort liability, means that a contractor will be accountable for poor contract performance primarily to the contracting agency. And if agency oversight is inadequate or contract terms are not well specified, that accountability too will be limited.[61]

(F) False Claims Act liability for "false certification." The False Claims Act ("FCA") allows a private person to bring a *qui tam* suit in the name of the United States to recover

penalties from a person who knowingly presents a false or fraudulent claim to the government.[62] A special feature of the act is that any private individual may bring such a claim; no showing of direct injury need be made.[63] Although previous law barred a plaintiff from bringing such an action if the suit was "based upon evidence or information in possession of the United States . . . at the time such suit was brought,"[64] the Act was amended in 1986 to globally authorize such suits with very limited exceptions, the most important bar to suit being the presence of a previously filed government civil action or public disclosure of allegations or transactions in a public hearing, congressional, administrative or GAO report, or by the news media.[65] Such suits have been brought, for example, to expose the fraudulent obtaining of federal grants and false certification of compliance with contract terms.[66] Claims may be focused on a contractor's overcharging or based on theories of supplying substandard products or services.[67] A contractor will face liability for knowingly and falsely certifying compliance with an applicable contract term, statute or regulation.[68]

The FCA may thus enable a private party to hold a contractor responsible for statutory or regulatory noncompliance even where the government has not discovered the issue or pursued the contractor itself for noncompliance. For example, in *United States ex rel. Holder v. Special Devices, Inc.*,[69] the relator successfully argued that the contractor had falsely certified compliance with environmental and health and safety regulations. The court held that the contractor's failure to comply with the regulations, as warranted in its contract with the government, had caused pollution, resulting in government losses and giving rise to a FCA claim.[70]

However, not every act of regulatory or statutory noncompliance will serve as the basis of a FCA claim against a contractor. Instead, regulatory compliance must have been falsely represented to the government and also relevant to the government's disbursement decision - again, generally meaning that the contract must require or reference it.[71] Further, although the FCA provides a cause of action for "worthless services," that claim is aimed at truly deficient conduct - where "services literally are not provided or the service is so substandard as to be tantamount to no service at all."[72] Such claims are rarely successful.[73]

In addition, the FCA requires a plaintiff to show that a contractor "knowingly" presented such a false or fraudulent claim, which the statute defines to mean that the contractor either possessed actual knowledge of the information or acted in deliberate ignorance or reckless disregard of the truth or falsity of the information.[74] A negligent failure to investigate, for example, a safety risk or an issue of legal compliance may not serve as the basis for liability.

In short, current law provides some avenues toward holding contractors accountable. However, those avenues are limited in some important ways. For example, although an agency may hold a contractor responsible for inadequate contract performance, the effectiveness of that remedy depends on the agency drafting well specified contracts and the investing of agency resources in contract enforcement actions, something an overtaxed agency may not have the will to do, especially in the context of a longer term service contract. Meanwhile, contractor responsibility to third parties is also limited. Contractor "policy decisions" may not be subject to disclosure or outside review, even if equivalent agency actions would be under the Administrative Procedure Act or FOIA. Contractor liability for failure to exercise reasonable care may be limited, especially in the context of service contracts, by an overbroad application of

the government contractor defense. Finally, contractor liability under the False Claims Act for substandard performance may be too limited or too difficult to establish, especially if contract terms are not well specified or because the contractor's presentation of a false claim must be shown to be "knowing."

Importantly, a number of the shortcomings in the current legal regime are exacerbated by inadequate contract terms. Clearer specification by federal agencies of contractor responsibilities would unquestionably increase contractor accountability. Accordingly, any proposed reforms should not only clarify contractor responsibility, but also encourage agencies to define contractor responsibilities more carefully and to monitor contractor activities closely.

## III. Avenues for Increasing Contractor Accountability

This section offers suggestions for amending the governing statutes discussed above. Some suggestions are modest; others may be viewed as controversial or not easily accomplished. At a minimum, however, the hope is to generate a broader discussion about possible legal changes to the existing regime governing contractors. In particular, more information should be made available to the public regarding essential aspects of contracts and contractor supervision. In addition, legal changes should increase the accountability of contractors for their implementation of contracts. A contractor should face more appropriate incentives both to properly perform a particular contract and to use reasonable care in exercising its contractual

discretion. Enhancing opportunities for private enforcement of contract terms could help prompt better contractor performance by supplementing agency oversight and enforcement.

One risk of increasing contractor liability to private parties, however, might be that the prospect of lawsuits brought by a few highly motivated groups or individuals, rather than government agency decisions, could drive contract performance priorities. Compared with private parties, government agencies are better able to weigh competing social priorities, more publicly accountable for those decisions, and may well possess better information about how a contractor can best serve the needs of the public. Accordingly, if opportunities for private enforcement are increased, they should be structured as a supplement to, rather than a substitute for, agency enforcement. One way of doing so would be to supply contractors with defenses to some private claims if the contractor can show that the agency adequately specified the contractor's responsibilities and monitored the contractor's performance. Such a defense might lead contractors to seek out better specified contracts and more agency supervision. This in turn might prompt agencies to monitor contractors more closely or to specify contractual terms more clearly.

A few suggested changes follow:

(A) Subject Contractors to Document Disclosure Requirements. Requiring contractors to publicly disclose, at a minimum, documents relating to the performance of their contracts would increase transparency in contract performance. For example, unless it is specified in a contract, a contractor operating a private prison is under no particular obligation to release to the public a

directive to individual prison guards, even though that directive may significantly influence the way inmates are treated. Similarly, a contractor operating a government laboratory or other facility is under no general obligation to publicly release safety directives issued to employees. Greater transparency in turn could evoke greater agency supervision of contractor performance and other forms of oversight, including political oversight. Of course, a contractor is likely to resist the disclosure of trade secrets or sensitive financial information, and appropriate exceptions could be drafted for this type of information.

One possible way to increase transparency is to require, as a matter of statute, regulation, or agency practice, that government contracts provide that critical documents, such as operating procedures related to contract execution, be supplied to the agency. From there, the documents would be under agency control and hence subject to public disclosure under FOIA.[75] Alternatively, FOIA could be amended to make such contractor documents directly subject to disclosure without requiring transmittal to the agency.

(B) Clarify the Government Contractor Defense to Tort Claims. As discussed above, the contractor defense, as interpreted by some courts, appears to insulate a contractor from tort liability as long as there are reasonably precise contract specifications with which the contractor has complied (and the contractor has notified the government of particular dangers known to the contractor). The difficulty is that a contractor may escape tort liability for a particular harmful decision even if the agency neither required nor approved that decision.

One possible solution is to enact a statute limiting the availability of the government contractor defense unless the contractor shows not simply a lack of contract violation, but also

that the events giving rise to the tort claim either amounted to the contractor's *required* compliance with particular contract terms or that the agency knew of and approved (or, less stringently, had an opportunity to disapprove) the particular decision or action that gave rise to the tort claim.

Relatedly, Congress has recently enacted statutory provisions in the Homeland Security Act (HSA) that modify the government contractor defense. In some respects, the modification is problematic in its reduction of government contractor accountability. Apparently aimed at design defect claims,[76] the modification provides a "rebuttable presumption" that the government contractor defense applies to tort claims arising out of the sale of qualified anti-terrorism technologies.[77] Moreover, that defense is available even when the contractor is selling its products directly to private parties.[78]

Despite its apparent expansion of protections for contractors, the modification nevertheless appears to increase contractor accountability relative to the current form of the government contractor defense in two relevant respects: First, the defense is only available if the Secretary of Homeland Security has specifically *approved* the technologies after a comprehensive review of the design of the technology to assure that it is "safe for use as intended."[79] Second, the seller has an independent obligation to conduct "safety and hazard analyses" and to supply that information to the Secretary. In short, the agency has a specific obligation to review the design, while the seller has an independent obligation to investigate safety and supply that information to the Secretary.[80]

This aspect of the HSA language might serve as a model for modifying the government contractor defense to tort claims. For example, legislation might clearly specify that for a

contractor to invoke the defense, the contractor would need to show that an agency actually did approve (or at least had an opportunity to disapprove) the action that is the basis for the tort claim. Moreover, to provide the greatest incentive to a contractor to disclose available safety information to the agency, an amendment should clarify that a contractor's negligent failure to disclose relevant information to an agency would also bar assertion of the defense.

Such a modification would make clear that a contractor would face tort liability for its own implementation decisions not specified or required by an agency. That would give a contractor more appropriate incentives to exercise reasonable care in performing a contract, while prompting the contractor to seek greater agency supervision of its critical decisions.

(C) Broaden False Claims Act Coverage. Broadening the range of claims available under the FCA might increase a contractor's incentive to comply with widely applicable laws, such as environmental or safety laws. As mentioned above, from the perspective of empowering "private attorneys general," the FCA has a great advantage over the other laws imposing legal responsibility on contractors: a broad plaintiff class. Under the FCA *qui tam* provisions, any plaintiff can have standing under Article III of the Constitution, based only on the assignment of the United States' interest in the contract.[81]

As currently written and interpreted by the courts, the FCA's primary limitation is that it is predicated on contract specifications. Inadequate specification of a contract will pose an obstacle to an FCA claim. Meanwhile, a contract probably must require a warranty of compliance with particular laws to serve as the basis for a FCA challenge to a contractor's failure to comply with those laws. Finally, for a plaintiff to prevail, the plaintiff must show that the

contractor's certification is knowingly false or in reckless disregard of truth or falsity. Again, these limitations present particular problems in the context of purchase-of-services contracts, which are likely to be complex and incompletely specified compared with supply contracts.

One possible solution is to amend the FCA to provide liability for noncompliance with applicable laws in the course of contract performance, even when a services contract includes no explicit warranty that the contractor has complied with the law in question. Alternatively, Congress could require that a services contract include a warranty that the contractor is complying with applicable laws. As with citizen suits under environmental laws,[82] individuals could function as private attorneys general to hold a contractor responsible for performing the contract or for complying with applicable legal regimes, particularly when there is no government enforcement action.

Authorizing additional False Claims Act suits could increase the cost of contracting, perhaps significantly. Moreover, government contractors could be exposed to a greater risk of third-party enforcement actions than their counterparts that contract only with private parties. This disparity in responsibility seems justified, however, by the more public nature of many functions a government contractor will undertake, together with the contractor's receipt of public funds.

Such an amendment could clarify that such private enforcement is meant to supplement, rather than substitute for, agency supervision and enforcement. Accordingly, an FCA amendment could provide a defense to a claim if the contractor can show that contract terms have been adequately specified and that the agency has adequately supervised the contract's performance, including the contractor's compliance with applicable laws.

An FCA regime modified along these lines would increase a contractor's accountability for contract implementation and encourage it to investigate the possibility that its activities are not in compliance with applicable laws or are otherwise creating dangers to the public. Meanwhile, the availability of the defense would ensure that private FCA suits serve primarily as an adjunct to active contract supervision by publicly accountable federal agencies.

(D) Authorize Claims for Violating Constitutional Rights. Congress might also specifically authorize *Bivens*-type claims against federal contracting entities, thereby reversing the Supreme Court holding in *Correctional Services Corp. v. Malesko*, would put federal contractors on the same footing as their state government counterparts, who may bear responsibility for constitutional violations undertaken "under color of" state law.[83] More to the point, it would give private contracting entities market-based incentives to honor – and to ensure their employees honor – the constitutional rights of individuals.

(E) Subject Agency Contracts to the Administrative Procedure Act rulemaking procedures. Alfred Aman has already sensibly proposed an APA amendment to clarify that agency contracting should be open to the public through an "unadorned form of informal notice and comment proceedings. The contracts should be published for comment on the policy-making aspects inherent in the duties to be undertaken."[84]

Judicial review of contracts in which contractors receive significant discretion would render the contracting process more transparent and participatory, although it would clearly increase the upfront cost of contracting and potentially slow it down if judicial review were

sought of every such contract.. It likely would create an incentive for agencies to develop more completely specified contracts and to supervise contract performance more thoroughly. Concerns regarding delays and litigation could potentially be addressed with fee-shifting provisions for meritless challenges or with deadlines for the conclusion of a notice-and-comment process.

(F) Subject Federal Contractor Policymaking to the Administrative Procedure Act. The APA could be amended to encompass contractors to a limited extent by, say, amending the statute's definition of "agency action" to include a policy making action by a contractor engaged in the performance of a federal contract. This would enable private entities to challenge contractor actions as "arbitrary, capricious, an abuse of discretion, or contrary to law."[85]

Subjecting every action taken by a contractor – including even hiring and purchasing decisions – to judicial review would be costly and excessive. However, contractors often possess discretion to make a range of broader decisions implicating significant policy concerns. With each such area of broad discretion comes an increased potential for abuse. These broader decisions should be subject to review.

For example, Guttmann has described an internal "health and safety plan" adopted by a contractor managing the cleanup of an Energy Department site that instructed nuclear weapons workers not to tell government health and safety inspectors of "'possible/probable problem areas,' [or] 'any alleged violations' or to 'volunteer any information or make admissions.'"[86] This type of "policy-making" has obvious implications for how well public goals will be served by the contractor's performance. If such a policy were issued by an agency, it generally would be subject to judicial review as "arbitrary and capricious" or not "in accordance with law."[87]

Subjecting contractors to similar review under the APA would appropriately increase a contractor's accountability for its exercise of broad discretion.

Admittedly, such an amendment could raise the prospect that a contractor might be held responsible for an action that should truly be imputed to the contracting agency, such as carrying out an instruction not to conduct a particular safety inspection. Accordingly, as with some of the earlier proposed reforms, such an amendment should be coupled with a new defense that the contractor's decision was directed by the agency or was reached subject to direct agency supervision. The presence of such a defense would encourage contractors to seek out active agency supervision, rather than to avoid it, and ideally, would also result in agencies identifying inappropriate contractor actions before they are implemented.

Such a proposal might face two difficulties, however. First, a court reviewing an agency action under the APA to ensure it is not arbitrary, capricious, or contrary to law, generally understands that standard to mean the agency must comply with and be guided by the purposes of the statute authorizing the action at hand (though of course the agency must also comply with other applicable laws). This review framework may not translate neatly to the contractor context both because a contractor must comply with the contract itself and because of broader concerns about contractor compliance with a wide range of relevant laws.[88] In the contractor context, amendments to the APA might clarify that the contractor should be guided both by the concerns of the contracting agency's authorizing statute, as well as by the contract's purposes. The contractor's obligations might also be defined with reference to the purposes of other centrally relevant statutes. For example, for the contractor's "health and safety plan" described above, judicial review should focus on whether the contractor adequately considered the contract's

purposes, presumably including achieving a protective cleanup and safe work environment. A court could also consider the goals of the environmental laws the cleanup contractor was being asked to carry out.

Second, and more practically, new APA claims against contractors, like APA claims against agencies, would be subject to constitutional restrictions on standing. Thus, only a comparatively narrow class of plaintiffs, such as a plaintiff with a concrete injury reasonably traceable to the challenged action and redressable by a remedy sought in the lawsuit,[89] could challenge contractor actions. For example, it is unclear who might possess standing to seek judicial review of inadequate provision of security services at American embassies or poor cleanup by an Energy Department contractor. A group of taxpayers or an organization ideologically interested in the issues clearly would lack such standing.[90] On the other hand, embassy employees not yet endangered by negligent security service provision – or employees working on an Energy Department cleanup site – might have standing to seek judicial review without yet having suffered the injury that would give rise to a tort claim.

Despite these shortcomings, creating an avenue under the Administrative Procedure Act to review policy decisions made by contractors would represent an important step in the direction of greater accountability.

## Conclusion

As agencies have increasingly chosen to rely upon contractors to perform complex services, holding contractors accountable for their performance has also become increasingly

difficult. Much of the relevant legal regime assumes that critical policy decisions will be in the control of federal agencies, rather than recognizing the extent to which these tasks are now being contracted out to private entities. Meanwhile, however, contractors are being enlisted in numerous activities that call for policy judgment, including decisions about program design, preparation of critical risk analyses, intelligence gathering, and the operation of government facilities or programs. Contractors have not been held fully accountable for this increase in functions, either through the legal regime or in oversight by the contracting agency. That has led to poor contracting decisions, cost overruns, and decisions in some settings that harm the rights of individuals. The preceding proposals are suggestive of steps we might take – without radically changing the framework of existing law – to render contractors significantly more accountable for their performance of important government contracts. The suggested reforms are neither foolproof nor uncontroversial. Nonetheless, they represent concrete suggestions for possible legal choices that would result in greater transparency and accountability in government contracting and contractor performance.

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[1] Professor of Law, University of Michigan Law School. Thanks to Andrea Delgadillo Ostrovsky for top-notch research assistance.

[2] The federal government is now spending close to $30 billion per year on professional services contracts alone and nearly $400 billion overall on procurement from private contractors, more than 60% of which is spending on services rather than goods. See David Rosenbloom and Suzanne Piotrowski, "Outsourcing the Constitution and Administrative Law Norms," 35 *American Review of Public Administration* 103, 117 (June 2005) ("Today, the federal

government is spending almost $28 billion annually on professional services contracts–a 57% jump from 5 years earlier."); Stanley Soloway and Alan Chvotkin (*in this volume*), (citing services contracts statistics and noting that current contracts demand "increasingly sophisticated management skills"); Draft Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress 1 (Dec. 2006) ("[e]ach year Federal agencies spend nearly $400 billion a year for a range of goods and services"), available at www.acquisition.gov/comp/aap/index.html (last visited Feb. 22, 2007); ibid. p.2 ("spending on services accounts for more than 60% of total procurement dollars"). See also U.S. General Accounting Office, GAO-03-443, Federal Procurement: Spending and Workforce Trends, Report to the House Committee on Government Reform and Senate Committee on Governmental Affairs, Rept. GAO-03-443, (2003), pp.3, 5-6, 32 (noting that federal agencies procured more than $300 billion in goods and services during fiscal year 2001), available at www.gao.gov/new.items/d03443.pdf (last visited Aug. 31, 2006).

[3] In its Circular No. A-76, the Office of Management and Budget instructs agencies to contract out only "commercial" activities, rather than "inherently governmental" ones. It defines the latter to include "an activity that is so intimately related to the public interest as to mandate performance by government personnel." Among such activities, the Circular lists activities binding the United States to take (or not take) some action by order, regulation, or contract; activities determining, protecting, and advancing economic or political interests through military or diplomatic action, judicial proceedings, or contract management; or activities "significantly affecting the life, liberty, or property of private persons." See Office of Mgmt. & Budget, Executive Office of the President, OMB Circular A-76, Performance of Commercial Activities

1-3 (2003), available at www.whitehouse.gov/omb/circulars/a076/a76_rev2003.pdf. E.g., Ruth Hoogland DeHoog and Lester M. Salamon, *The Tools of Governance: A Guide to the New Governance"* p. 328, ed. Lester M. Salamon (Oxford: Oxford University Press, 2002) (noting appeal of contracting to provide human services to sidestep "long-standing conservative opposition to government involvement in social welfare" and to avoid "enlarging government bureaucracies").

[4] See David A. Sklansky, "The Private Police," 46 *UCLA Law Review* 1165 (1999).

[5] Statement of David M. Walker, Comptroller General of the United States, Testimony before the Subcommittee on Defense, House of Representatives Committee on Appropriations, "Contracting for Better Outcomes," GAO-06-800T (Sep. 7, 2006).

[6] See U.S. General Accounting Office, Contract Management: Service Contract Approach to Aircraft Simulator Training Has Room for Improvement, Rept. GAO-06-830, Sep. 2006, p. 1.

[7] See Memorandum of Majority Staff, House Committee on Oversight and Government Reform, to Members of the Committee, Feb. 8, 2007, at 1, available at oversight.house.gov/Documents/20070208121519-64647.pdf (last visited Feb. 22, 2007). The memorandum alleges that at least one contractor hired for oversight, Booz Allen Hamilton, may have a conflict of interest due to its longstanding relationship with Boeing. Ibid. at 3.

[8] See U.S. General Accounting Office, DOE Contracting: Better Performance Measures and Management needed to Address Delays in Awarding Contracts, Rept. GAO-06-722 (June 2006), p. 1 (noting that DOE spent approximately $22.9 billion in fiscal year 2005, 90 % of its annual budget, on contracts for variety of "mission-related activities," and that 90% of those contracting dollars were directed to "facility management contractors").

[9] E.g., Hudgens v. Bell Helicopters/Textron, 328 F.3d 1329, 1334 (11th Cir. 2003) (resolving dispute arising out of maintenance contractor's decision not to closely monitor helicopter tail fin).

[10] See U.S. Customs and Border Protection, Fact Sheet: SBInet: Securing U.S. Borders, Sep. 2006 (emphasis added), available at http://www.dhs.gov/xlibrary/assets/sbinetfactsheet.pdf (Last visited June 13, 2007).

[11] E.g., OMB Watch, Anti-Scofflaw Rule Proposed (1999) (describing repeated workplace safety violations among successful government contractors), available at www.ombwatch.org/article/articleview/569/1/221?TopicID=1 (last visited Oct. 3, 2006). The General Accounting Office has also recently documented extensive labor law and workplace safety violations among contractors. See U.S. General Accounting Office, Federal Contractors: Historical Perspective on Noncompliance with Labor and Worker Safety Laws, Rept. T-HEHS-98-212, July 14, 1998, p. 4.

[12] See Ralph Vartabedian, "Experts fear nuclear facility is lax on safety; conditions at the Pantex weapons plant draw federal scrutiny," *Los Angeles Times*, Feb. 21, 2007, p. A1 (quoting "federal safety inspectors"). In 2005, a contractor responsible for screening and hiring security guards for U.S. Army bases hired many guards with criminal records that included felony and domestic violence convictions; one guard had an active warrant and was arrested while on duty. See U.S. General Accounting Office, Contract Security Guards: Army's Guard Program Requires Greater Oversight and Reassessment of Acquisition Approach, Rept. GAO-06-284, April 2006.

[13] U.S. General Accounting Office, Contracting for Better Outcomes, Sep. 7, 2006, p. 15 .

[14] The U.S. General Accounting Office has published countless reports documenting inadequate contract supervision by agencies. See, e.g., U.S. General Accounting Office, Homeland Security: Contract Management and Oversight for Visitor and Immigrant Status Program Need to be Strengthened, Rept. GAO-06-404, June 2006; Testimony of Comptroller General David M. Walker, Defense Acquisitions: DOD Wastes Billions of Dollars Through Poorly Structured Incentives, Rept. GAO-06-409T, Apr. 5, 2006; U.S. General Accounting Office, Federal Bureau of Investigation: Weak Controls Over Trilogy Project Led to Payment of Questionable Contractor Costs and Missing Assets, Rept. GAO-06-306, Feb. 2006; U.S. General Accounting Office, Defense Inventory: Army Needs to Strengthen Internal Controls for Items Shipped to Repair Contractors, Rept. GAO-06-209, Dec. 2005; see also DeHoog and Salamon, p. 326 (noting costs associated with agency monitoring of contracts); Dan Guttman, "Nuclear Weapon," *Environmental Forum*, Nov./Dec. 2000, p. 19 (noting Secretary O'Leary's 1993 admission that the Department of Energy "was unable to hold its contractors to account").

[15] This issue has received extended attention by Lester M. Salamon in "Tools of Government" (2002); "The New Governance and the Tools of Public Action: An Introduction," 28 *Fordham Urban Law Journal* 1611 (2001).

[16] E.g., Steven L. Schooner, "Contractor Atrocities," at 564-65 (critiquing "indefinite-delivery/ indefinite-quantity" (ID/IQ) contracts).

[17] E.g., American Manufacturers Mutual Insurance Company v. Sullivan, 526 U.S. 40, 50-55 (1999) (applying "state action" doctrine to find that insurers' withholding of payment for medical benefits pending "utilization review" was not fairly attributable to State of Pennsylvania).

[18] See 5 U.S.C. § 702 (person "aggrieved by agency action" can seek judicial review). Agencies can, of course, also be subject to standards imposed under particular authorizing statutes.

[19] 5 U.S.C. § 552.

[20] For example, "agency" under the Administrative Procedure Act and under the Freedom of Information Act refers to an "authority of the Government of the United States." 5 U.S.C. § 551(1). See generally Jody Freeman, "Extending Public Law Norms through Privatization," 1285 *Harvard Law Review* 1285, 1306 (2003) (identifying other laws that apply only to agencies, not contractors).

[21] See, e.g., Mary M. Cheh, "Legislative Oversight of Police: Lessons Learned from an Investigation of Police Handling of Demonstrations in Washington, D.C.," 32 *Journal of Legislation* 1, 21 n.100 (2005) ("committees may not be fully motivated unless they can uncover a politically favorable scandal"), Bernard Rosen, *Holding Government Bureaucracies Accountable*, 21 (New York: Praeger,1989).

[22] A Transportation Department Inspector General's report, requested by Senator Charles Grassley, concluded that FAA contracting approaches cost the government "millions of dollars in [cost] overruns." See Del Quentin Wilber, "Probe of FAA Contracting Finds Waste; Mismanagement Blamed for Losses in Millions," *Washington Post*, Sep. 23, 2006, p. D1.

[23] See Robert O'Harrow, Jr., and Scott Higham, "Contractor Accused of Overbilling U.S.; Technology Company Hired After 9/11 Charged Too Much for Labor, Audit Says," *Washington Post*, Oct. 23, 2005, p. A1.

[24] See 5 U.S.C. § 551(1) (defining "agency" as "each authority of the United States").

[25] The government may also bring criminal charges under the Major Fraud Act for fraud in connection with large contracts (those exceeding a value of $1 million). See 18 U.S.C. § 1031.

[26] See generally 48 C.F.R. part 9 (describing suspension and debarment proceedings).

[27] Besides the legal requirements summarized here, a host of other requirements that would apply to agencies also do not apply to private contractors. These include civil service hiring rules, including requirements of antinepotism in hiring, for example, (5 U.S.C. § 2302(b)(6)-(7)), and adherence to ethics rules (5 C.F.R. 2635.101).

[28] 41 U.S.C. § 601 et seq. A contractor's claim for nonpayment would be brought under the Tucker Act, 28 U.S.C. § 1491.

[29] Government contracts covered by the Rehabilitation Act of 1973 represent a notable exception; they must require a contractor to employ or promote qualified handicapped individuals without discrimination based upon disability. E.g., American Airlines v. Herman, 176 F.3d 283, 284-85 (5th Cir. 1999) (discussing Act's requirements).

[30] See Draft Final Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress, Dec. 2006, at 6 (also noting findings of the General Accounting Office and agency Inspector Generals that "orders under interagency contracts frequently contain ill-defined requirements"), available at www.acquisition.gov/comp/aap/documents/DraftFinalReport.pdf (last visited June 13, 2007).

[31] 28 U.S.C. § 2680(a).

[32] Dalehite v. United States, 346 U.S. 15, 34 (1953).

[33] Boyle v. United Technologies Corp., 487 U.S. 504, 512 (1988). Some courts have required that the agency's approval be discretionary in the sense of the Federal Tort Claims Act, involving

the "permissible exercise of policy judgment." See Lamb v. Martin Marietta Energy Systems, Inc., 835 F. Supp. 959, 966 (W.D. Ky. 1993).

While caselaw applying the defense to service contracts is not extensive, research has not uncovered a case where a court has refused to apply the defense in tort cases on the ground that a service, rather than a product, has been provided to the government. E.g. Yearsley v. W.A. Ross Construction Company, 309 U.S. 18 (1940) (applying defense and rejecting attempt by landowner to hold government contractor liable for erosion of property caused by contractor's work constructing dikes); Askir v. Brown & Root Services Corp., 1997 U.S. Dist. LEXIS 14494 (S.D.N.Y. Sep. 23, 1997) (applying defense to private contractor providing logistical support to United Nations' peacekeeping operation in Somalia); Lamb v. Martin Marietta Energy Systems Inc., 835 F. Supp. 959, 963 (W.D. Ky. 1993) (finding defense available to government contractor operating uranium production plant for Energy Department); Richland-Lexington Airport Dist. v. Atlas Properties, Inc., 854 F. Supp. 400 (D.S.C. 1994).

[34] E.g., In re Aircraft Crash Litigation, Frederick, MD, 752 F. Supp. 1326, 1334 (S.D. Ohio 1990) (recognizing that without government contractor defense, contractors held liable for design features might pass costs on to government, "imposing costs on the government which the FTCA['s discretionary function exception] was enacted to prevent").

[35] E.g., Lamb v. Martin Marietta, 835 F. Supp. at 967 (refusing to let defendant assert government contractor defense in part because of conduct neither "approved" nor "condoned" by agency and because contractor "did not always follow DOE orders"). See generally Boyle at 504-07, 512 (noting that state law is preempted by federal contractor defense in recognition of "uniquely federal interests" in "getting the government's work done" and the exercise of

significant discretion by governmental entities such that the application of state law would create "significant conflict" with federal policy).

[36] Steven L. Schooner & Erin Siuda-Pfeffer, "Post-Katrina Reconstruction Liability: Exposing the Inferior Risk-Bearer," 43 *Harvard Journal on Legislation* 287, 326 (2006).

[37] E.g., Correctional Services Corp. v. Malesko, 534 U.S. 61, 74 n.6 (2001) (commenting in dicta that defense applies "where the government has directed a contractor to do the very thing that is the subject of the claim"); Densberger v. United Technologies Corp., 283 F.3d 110, 120 (2d Cir. 2002) (stating in dicta, "[i]n failure to warn cases, this means that the ultimate product users cannot sue the contractor for failure to warn if the government controlled which warnings the contractor was allowed to provide to those users, and thereby precluded the warnings at issue from being given"); N.J. Department of Environmental Protection v. Exxon Mobil, 381 F. Supp. 2d 398, 404 (D.N.J. 2005) (despite significant government control over operations, contractor could not assert defense with respect to improper hazardous waste disposal without evidence that government exercised control over disposal); Jama v. INS, 334 F.Supp. 2d 662, 688 (D.N.J. 2004) (refusing to apply government contractor defense unless challenged contractor activity actually directed by government).

[38] E.g., Lambert v. B.P. Products North America, Inc., 2006 U.S. Dist. LEXIS 16756 (S.D. Ill. Apr. 6, 2006) (in design defect case, reasoning that defense in design defect case does not depend on government having exercised judgment with respect to "specific feature alleged to be defective;" reasonably precise specifications will suffice for contractor to assert defense).

[39] E.g., Hudgens v. Bell Helicopters/Textron, 328 F.3d 1329, 1334 (11th Cir. 2003) (government contractor defense was available to maintenance contractor that failed to identify fatal cracks in

helicopter tail fin because government had precisely specified items for maintenance inspection and contractor because contractor had "no duty" to go further than Army directed, despite FAA advisory on tail fin problems).

[40] Schooner and Siuda-Pfeffer at 310 (based on least cost avoider/superior risk bearer arguments, arguing that "either the government or its contractors [should] bear the risk of their negligent decisions or actions").

[41] See generally Ronald A. Cass and Clayton P. Gillette, "The Government Contractor Defense: Contractual Allocation of Public Risk," 77 Virginia Law Review 257 (1991).

[42] See 5 U.S.C. § 706.

[43] Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco, 589 F. Supp. 885, 895 (N.D. Cal. 1983) (stating "[t]he law on this issue is unambiguous: the APA does not confer upon federal courts the authority to assess and levy monetary relief").

[44] See Franklin Savings Corp. v. United States, 180 F.3d 1124, 1140 n. 21 (10th Cir. 1999) (noting "[b]ecause review of bad faith may be available under the APA . . . a refusal to permit such inquiry in FTCA suits will not leave all plaintiffs without remedy").

[45] See 5 U.S.C. § 551(4) (defining "rule"); 5 U.S.C. § 552(a) (imposing publication requirements); 5 U.S.C. § 553 (setting forth rulemaking procedures).

[46] See 5 U.S.C. § 553(a) (rulemaking requirements do not apply to "a matter relating to . . . contracts"). Compare Brown v. Housing Authority of City of Milwaukee, 471 F.2d 63 (7th Cir. 1972) (finding agency exempt from § 553 requirements in requiring local housing authorities to set up grievance procedures) with National Association of Psychiatric Treatment Centers for Children v. Weinberger, 658 F.Supp. 48 (D. Colo.), appeal dismissed and remanded, 909 F.2d

1378 (10th Cir. 1987) (refusing to apply exemption where agency proposed prescriptive changes in overall contents of all participation agreements with mental health treatment centers in manner that would affect calculation of congressionally established benefits).

[47] See 5 U.S.C. § 551(1) (defining "agency"); 5 U.S.C. § 552 (FOIA; "each *agency* shall make available to the public information as follows"); 5 U.S.C. § 702 (providing right of review under APA of "agency action").

[48] To date, no court has yet interpreted "agency" in the APA to include any nonfederal entity, even one with significant contractual obligations to the United States. See, e.g., International Brominated Solvents v. American Conference of Governmental Industrial Hygienists, Inc., 393 F. Supp. 2d 1362, 1379-80 (M.D. Ga. 2005) (refusing to find private occupational safety organization to be "agency" under APA despite allegations that entity was created by officials of federal government); The Organic Cow, LLC, v. Northeast Dairy Compact Commission, 164 F. Supp. 2d 412 (D.Vt. 2001) (holding that although compact that created commission had status of federal law, Commission was not "agency" under APA, since it was an authority of six states, rather than the U.S.); Singleton Sheet Metal Works v. City of Pueblo, 727 F. Supp. 579 (D. Colo. 1989) (finding that city was not APA "agency" despite cooperation agreement with Army Corps of Engineers). See also Gilmore v. Department of Energy, 4 Supp. 2d 912, 918-19 (N.D. Cal. 1998) (refusing to find that contractor was "government controlled corporation" under FOIA absent "substantial degree of federal control or supervision").

[49] 5 U.S.C. § 706(2)(A).

[50] See generally 5 U.S.C. § 552 (Freedom of Information Act).

[51] See 5 U.S.C. § 552(f) (defining "agency" for FOIA purposes); e.g., Forsham v. Harris, 445 U.S. 169 (1980) (federal grantees were not subject to FOIA disclosure requirements); Irwin Mem'l Blood Bank of San Francisco Medical Society v. American National Red Cross, 640 F.2d 1051, 1053 (9th Cir. 1981) (American Red Cross was not considered agency for purposes of FOIA despite Red Cross's receipt of money from government contracts and specific purpose grants and government's power to appoint eight of Red Cross's Board of Governors). On rare occasions, courts have concluded that private party documents can be subject to FOIA if an agency exercises extensive control over the documents and the documents were created on behalf of the agency. Burka v. United States Department of Health and Human Services, 87 F.3d 508 (D.C. Cir. 1996), rehearing denied (1997). Further, the Office of Management and Budget has now required that as a condition of receiving a federal grant that hospitals, universities and other nonprofits must agree that data produced under the award will normally be subject to FOIA access. See Office of Management and Budget, Final Revision: Circular A-110, 64 Fed. Reg. 54,926 (Oct. 8, 1999).

[52] See 5 U.S.C. § 552(b)(4). See generally Laura Dickinson (noting that military contractors in Iraq have "exercised what is essentially a veto" under 5 U.S.C. § 552(b)(4) to prevent public disclosure of contracts themselves); see also Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1982) (holding that exemption applied to voluntarily disclosed private information to agency because, among other things, disclosure would "jeopardize [agency's] continuing ability to secure such data" and if information would not customarily be released from private party), *cert. denied*, 507 U.S. 984 (1993).

[53] See Rosenbloom & Piotrowski, at 106 (noting that fuller disclosure of contractor's activities was only possible through extraordinary inquiry by Columbia Accident Investigation Board).

[54] E.g., "Federal Procurement in the Federal Courts 1987-88: A Selective Review," 19 *Public Contract Law Journal* 14, 115 n.116 (1989) (listing cases).

[55] See FDIC v. Meyer, 510 U.S. 471, 485 (1994).

[56] Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) (4th Amendment protection against unreasonable search or seizure); Davis v. Passman, 442 U.S. 228 (1979) (5th Amendment due process clause); Carlson v. Green, 446 U.S. 14 (1980) (8th Amendment). These claims, however, are subject to qualified "good faith" immunity, see Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[57] Carlson v. Green, 446 U.S. at 19-20.

[58] See Sarro v. Cornell Corrections, Inc., 248 F. Supp. 2d 52, 58-59 (D.R.I. 2003) (citing cases).

[59] Correctional Services Corp. v. Malesko, 534 U.S. 61 (2000).

[60] See Amicus Brief of Legal Aid Society in Correctional Services Corp. v. Malesko, 2001 WL 826705 (U.S., July 20, 2001).

[61] See generally Clayton P. Gillette & Paul B. Stephan, "Richardson v. McKnight and the Scope of Immunity after Privatization," 8 *Supreme Court Economic Review* 103, 108 (2000) (discussing issues). Gillette and Stephan suggest that corporate *Bivens* liability may be consistent with *Bivens* liability for government employees but not government agencies on the following theory: government agencies can be presumed to act in the public interest, but simply may not supervise employees very well. Imposing liability on individual employees will make them properly consider constitutional rights, while imposing liability on agencies may overdeter them

and make them overly timid in pursuing the public interest. Whether this is plausible or not, *Bivens* liability surely seems appropriate for the private contracting entity to ensure that employees are supervised in a way that minimizes constitutional violations.

[62] See False Claims Act, 31 U.S.C. §§ 3729-31.

[63] The Supreme Court confirmed that False Claims Act plaintiffs bringing *qui tam* claims would meet constitutional standing requirements in Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000).

[64] See 31 U.S.C. § 232(c) (1976).

[65] See 31 U.S.C. § 3730(e). In addition, an FCA plaintiff must file a complaint *in camera*, and the complaint is held under seal for 60 days to permit a government decision to intervene in the suit and proceed with the action. 31 U.S.C. § 3730(b). However, if the government does not act, the plaintiff may pursue the claim.

[66] E.g., Cook County, Ill. v. U.S. ex rel. Chandler, 538 U.S. 119 (2003) (regarding fraudulent obtaining of grant); U.S. ex rel. Hendow v. University of Phoenix, 461 F.3d 1166 (9th Cir. 2006) (holding that *qui tam* relator's complaint alleging university falsely certified that it did not pay recruiters on per-student basis stated False Claims Act claim), cert. denied, 127 S. Ct. 2099 (2007).

[67] E.g., United States ex rel. Lee v. SmithKline Beecham, Inc., 245 F.3d 1048, 1053 (9th Cir. 2001) (discussing "worthless services" theory).

[68] See United States ex rel. Quinn v. Omnicare Inc., 382 F.3d 432, 441 (3d Cir. 2004)

[69] 296 F. Supp. 2d 1167 (C.D. Cal. 2003). See also El Dorado Irrigation District v. Traylor Brothers, 2005 WL 3453913 (E.D.Cal. 2005) (discussing "implied certification" theories of FCA liability).

[70] Ibid. at 1178.

[71] Mikes v. Straus, 274 F.3d 687, 696 (2d Cir. 2001); see also United States ex rel. Fallon v. Accudyne Corp., 880 F. Supp. 636, 638 (W.D. Wis. 1995) ("it is not the violation of environmental laws that gives rise to an FCA claim but the false representations to the government that there has been compliance"); Shaw v. AAA Engineering and Drafting, Inc., 213 F.3d 519, 530 (10th Cir. 2000).

[72] See In re Genesis Health Ventures, Inc. 112 Fed. Appx. 140 (3d Cir. 2004).

[73] See, e.g., Mikes v. Straus, 274 F.3d 687, 703 (2d Cir. 2001); United States ex rel. Swan v. Covenant Care, Inc., 279 F. Supp. 2d 1212, 1221 (E.D. Cal. 2002); In re Genesis Health Ventures, Inc., at 143.

[74] See 31 U.S.C. §§ 3729(a)(1), (2); 3729(b).

[75] See, e.g., Nicole Casarez, "Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records," 28 *University of Michigan Journal of Law Reform* 249, 293 (1995) (advocating that model prison contracts require contractors to provide documents to agency).

[76] See 107 Cong. Rec. S 11405 (Nov. 19, 2002) (comments of Sen. Chafee).

[77] See 6 U.S.C. § 442(d).

[78] In addition, even when the defense does not apply, the Act does away with punitive damages completely and with joint and several liability for noneconomic damages in tort claims arising out of the sale of anti-terrorism technologies. See 6 U.S.C. §§ 442(b)(1), (2).

[79] See 6 U.S.C. § 442 (emphasis added). This mirrors some of the most stringent applications of the government contractor defense. E.g., Kerstetter v. Pacific Scientific Company, 210 F.3d 431, 435 (5th Cir. 2000) (discussing when agency has conducted adequate "substantive review" to make defense available), cert. denied, 531 U.S. 919 (2000).

[80] On the other hand, once eligibility is established, the seller may lose the defense only for failure to submit information to the Secretary that amounts to "fraudulent[]" behavior or "willful misconduct." 6 U.S.C. § 442(d). That implies, perhaps, that a negligent failure to submit the prepared safety and hazard information to the Secretary will not deprive a seller of the defense. A better approach would clearly bar a seller from asserting the defense if the failure to submit information were negligent.

[81] Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000).

[82] E.g., 33 U.S.C. § 1365 (authorizing Clean Water Act citizen enforcement actions).

[83] See 42 U.S.C. § 1983.

[84] See Alfred C. Aman, Jr., "Privatization and the Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law," 28 *Fordham Urban Law Journal* 1477, 1501-02 (2001). Aman also argues that citizens should have the opportunity to petition an agency to amend a contract, even before the contract expires.

[85] See 5 U.S.C. § 706.

[86] See Guttman, "Nuclear Weapon," at 23.

[87] See 5 U.S.C. § 706.

[88] A possible argument is that Congress meant for a contractor's violation of relevant laws to be remedied through the mechanisms provided in the laws themselves.

[89] See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

[90] E.g., Sierra Club v. Morton, 405 U.S. 727 (1972) (refusing to recognize "ideological" standing).