

WHAT'S INSIDE

UNDEFINITE CONTRACT ACTION

- 9 Air Force's pricing decisions to result in \$3.5 million loss, contractor says

L-3 Communications Integrated Systems v. U.S.
(Fed. Cl.)

FALSE CLAIMS ACT

- 10 Doctor to settle civil charges for writing unnecessary opioid prescriptions for \$200,000

U.S. v. Midwest Family Practice
(E.D. Mich.)

- 11 D.C. Circuit won't reinstate fraud claims in military cigarette pricing dispute

U.S. v. Philip Morris USA
(D.C. Cir.)

CRIMINAL LAW

- 12 NSA contractor charged with stealing secret data

U.S. v. Martin (D. Md.)

PATENT INFRINGEMENT

- 13 Judge ejects patent suit over Air Force urine bags

American Innotek v. U.S.
(Fed. Cl.)

REGULATORY ACTION

- 14 DOL final rule requires contractors to provide paid sick leave

FAIR PAY AND SAFE WORKPLACES

Contractor trade groups challenge new Obama administration disclosure rule

(Reuters) – Business groups that represent federal contractors have launched a legal challenge to regulations requiring them to disclose violations of more than a dozen U.S. labor and employment laws and their state equivalents.

Associated Builders and Contractors of Southeast Texas et al. v. Rung et al., No. 16-cv-425, complaint filed (E.D. Tex. Oct. 7, 2016).

The Associated Builders and Contractors, that trade group's Texas-based affiliate and the National Association of Security Companies filed a lawsuit Oct. 7, seeking a judgment that the rule is invalid and a preliminary injunction blocking it from taking effect Oct. 25. The groups are represented by Littler Mendelson.

CONTINUED ON PAGE 15



EXPERT ANALYSIS

The Fair Pay and Safe Workplaces executive order: The final rules, implementation and compliance

David Goldstein, Linda Jackson and Meredith Schramm-Strosser of Littler Mendelson discuss the federal government's final rule implementing the Fair Pay and Safe Workplaces executive order and its impact on federal contractors and subcontractors.

SEE PAGE 3

EXPERT ANALYSIS

Cross your heart and hope to die — New DFARS clauses target counterfeit electronic parts

Emily Theriault and David Gallacher of Sheppard Mullin Richter & Hampton discuss the Defense Department's new rule aimed at eliminating counterfeit electronic parts from the supply chain and its impact on federal contractors and subcontractors.

SEE PAGE 7



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TABLE OF CONTENTS

Fair Pay and Safe Workplaces: *Associated Builders and Contractors v. Rung*

Contractor trade groups challenge new Obama administration disclosure rule (E.D. Tex.)..... 1

Expert Analysis: By David Goldstein, Esq., Linda Jackson, Esq., and Meredith Schramm-Strosser, Esq., Littler Mendelson PC

The Fair Pay and Safe Workplaces executive order: The final rules, implementation and compliance 3

Expert Analysis: By Emily Theriault, Esq., and David Gallacher, Esq., Sheppard Mullin Richter & Hampton

Cross your heart and hope to die — New DFARS clauses target counterfeit electronic parts 7

News in Brief 8

Undefined Contract Action: *L-3 Communications Integrated Systems v. U.S.*

Air Force's pricing decisions to result in \$3.5 million loss, contractor says (Fed. Cl.)..... 9

False Claims Act: *U.S. v. Midwest Family Practice*

Doctor to settle civil charges for writing unnecessary opioid prescriptions for \$200,000 (E.D. Mich.) 10

False Claims Act: *U.S. v. Philip Morris USA*

D.C. Circuit won't reinstate fraud claims in military cigarette pricing dispute (D.C. Cir.) 11

Criminal Law: *U.S. v. Martin*

NSA contractor charged with stealing secret data (D. Md.)..... 12

Patent Infringement: *American Innotek v. U.S.*

Judge ejects patent suit over Air Force urine bags (Fed. Cl.) 13

Regulatory Action

DOL final rule requires contractors to provide paid sick leave..... 14

Case and Document Index..... 16

The Fair Pay and Safe Workplaces executive order: The final rules, implementation and compliance

By David Goldstein, Esq., Linda Jackson, Esq., and Meredith Schramm-Strosser, Esq.
Littler Mendelson PC

President Barack Obama, on July 31, 2014, issued a controversial executive order that an accompanying White House fact sheet said was intended to “crack ... down on federal contractors who put workers’ safety and hard-earned pay at risk.”

Among other things, Executive Order 13673, titled Fair Pay and Safe Workplaces, changes the procurement process for contracts worth more than \$500,000 by requiring federal contractors to disclose during the bid process any labor law violations committed within the past three years.

Agency contracting officers must then determine whether, based on the information disclosed, the would-be contractor is a responsible source with a satisfactory record of integrity and business ethics. Depending on the number and nature of the violations, contractors could be prohibited from receiving the contract.

The EO also imposes disclosure obligations on contractors relating to employee paychecks, and it limits the use of pre-dispute arbitration agreements.

The proposed rule to implement the EO was published in May 2015, producing a storm of protests from contractors. The final rule, published Aug. 25, addresses some of the issues that were raised. But it fails to address

contractors’ most serious concerns and leaves many questions unanswered.

LABOR LAW VIOLATION DISCLOSURE REQUIREMENTS

Under the EO, an entity submitting a bid on a covered federal contract must disclose to the contracting agency whether it has had “reportable violations” of any of the following 14 federal¹ labor laws:

- Fair Labor Standards Act.
- Occupational Safety and Health Act of 1970.
- Migrant and Seasonal Agricultural Worker Protection Act.
- National Labor Relations Act.
- Davis-Bacon Act.

- Family and Medical Leave Act.
- Title VII of the Civil Rights Act of 1964.
- Americans with Disabilities Act of 1990.
- Age Discrimination in Employment Act of 1967.
- Executive Order 13658 establishing a minimum wage for contractors

Disclosure of labor law violations is required from “the legal entity whose name and address is entered on the bid/offer and that will be legally responsible for performance of the contract. The legal entity that is the offeror does not include a parent corporation, a subsidiary corporation, or other affiliates.”

If the bidder/award recipient is a joint venture that is not itself a separate entity, then each concern in the joint venture

The Fair Pay and Safe Workplaces executive order changes the procurement process for contracts worth more than \$500,000.

- Service Contract Act.
- Executive Order 11246 on equal employment opportunity.
- Section 503 of the Rehabilitation Act of 1973.
- Vietnam Era Veterans’ Readjustment Assistance Act of 1974.

must separately comply with the disclosure requirements. Successful bidders must update their disclosures every six months during the pendency of the contract. The final rule provides that this update can be done universally rather than on a contract-by-contract basis.

The three-year look-back period for reporting violations is also being phased in. Covered contractors are required to report violations going back three years or to Oct. 25, 2015, whichever period is shorter.

COVERED CONTRACTS

Disclosures are required under the EO when a contractor submits a bid that, if accepted, is expected to result in a contract with a value that exceeds \$500,000.

Subcontracts are similarly covered, except that subcontracts for commercial over-the-shelf items are not subject to the disclosure requirements. There is no COTS exception, however, for prime contractors.



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Neither the EO nor the final rule clearly defines the term “subcontract.” However, the term is defined in the Federal Acquisition Regulations as any contract entered into by a subcontractor to furnish supplies or services “for performance of” a prime contract or a subcontract.

Also, “contract” is defined as a commitment for which the government is obligated to an expenditure of appropriated funds.²

While there is likely to be some confusion as to whether particular arrangements with higher-tier federal contractors are covered by the EO, it is important to note that the applicability of the EO is determined by the nature of the subcontract and not the definition of a subcontractor.

The requirements arise only in connection with procurement contracts. The receipt of federal financial assistance or grants does not trigger any obligations under the EO.

IMPLEMENTING THE NEW DISCLOSURE REQUIREMENTS

The new requirements will be phased in beginning with solicitations the government issues on or after Oct. 25.

For the first year, only prime contractors are required to comply. In addition, for the first few months the requirements will apply only to prime contractors submitting bids that would result in a contract with an estimated value of \$50 million or more. Beginning in April 2017, the requirements will apply to all bids with an estimated value in excess of \$500,000.

Subcontractors will become subject to the EO when being considered for subcontracts arising under solicitations issued on or after Oct. 26, 2017.

WHAT CONSTITUTES A REPORTABLE VIOLATION?

The final rule defines “violation” as administrative merits determinations, awards or decisions from an arbitration, or civil judgments. The final rule and Department of Labor final guidance broadly interpret the definition of “violation.” The categories are very broad. They include numerous nonfinal decisions, such as an Equal Employment Opportunity Commission reasonable cause determination; Occupational Safety and Health Administration-issued citations, imminent danger notices, notice of failure

to abate or any state equivalent thereof; and appealable civil judgments.

These are just a few of many events that constitute labor law violations, and any contractor seeking to bid on a solicitation that requires compliance with the EO should closely and carefully review these definitions.

Because the definition of “violation” is broad, many nonfinal determinations constitute reportable events. Contractors and subcontractors are relieved from the reporting requirements only if the determination that there was a violation of labor law is reversed or vacated.

suspending and debaring official, as required by their agency’s procedures.

The process for subcontractors is a bit different. Subcontractors must disclose any reportable labor law violations directly to the DOL. The department will then issue an assessment regarding the reported violations, which the subcontractor must share with the contractor when seeking covered work.

If the subcontractor disagrees with the DOL’s assessment, it may inform the contractor and provide a rationale for its disagreement. The contractor is permitted to enter into or

Subcontracts for commercial over-the-shelf items are not subject to the disclosure requirements.

REPORTING REQUIREMENTS

Under the final rule and final guidance, when a contractor submits a bid on a covered contract, it will first report whether any violations have been rendered against it, without more detail.

Only if the bidder reaches the responsibility determination stage of the procurement process will it be required to provide additional information as to each of the disclosed violations.

This additional information includes “the labor law that was violated; the case number, inspection number, charge number, docket number, or other unique identification number; the date that the determination, judgment, award, or decision was rendered; and the name of the court, arbitrator(s), agency, board, or commission that rendered it.”

At that point, if it has not been previously voluntarily disclosed, the contractor can provide information regarding mitigating circumstances and remedial efforts.

The federal agency will then determine whether the bidder “is a responsible source that has a satisfactory record of integrity and business ethics.” This determination will be made by the agency’s contracting officer in concert with the agency labor compliance adviser, or ALCA, and it will be driven by whether the reported violations were “serious,” “repeated,” “willful” or “pervasive.”

COs must report information received through this process to their agency’s

continue subcontracts with a subcontractor that the DOL has negatively assessed, but it must inform the government contracting officer of its action and its basis.

A contractor that acts in good faith will not be liable for misrepresentations made by its subcontractors regarding labor law decisions or labor compliance agreements.

THE PARAMETERS OF VIOLATIONS, ASSESSMENT AND MITIGATION

The final rule and the DOL final guidance attempt to define whether violations are “serious,” “willful,” “repeated” or “pervasive,” as required by the EO. Congress has already defined some of these terms in the labor laws covered by the new rules. But others, such as “pervasive,” do not appear in any of the statutes.

Each contractor’s disclosed violations will be “assessed on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractors, and any mitigating factors.”

In an effort to mitigate contractor concerns regarding the effects of this evaluation process, the DOL explained “that to serve as the basis for a determination that a violation is serious, repeated, willful, and/or pervasive, the relevant criteria must be readily ascertainable from the labor law decision itself. This means the ALCA should not second-guess or re-litigate actions or the decisions of reviewing officials, courts, and arbitrators.” It is yet to be determined what

the effects of this disclosure and evaluation process will be.

Of particular concern to contracting officers are pervasive violations, violations that meet two or more of the categories above, violations reflected in final orders, and violations of “particular gravity.”

A difference between the DOL’s proposed guidance and the final guidance is in how the two treat an award of injunctive or equitable relief against a contractor or subcontractor.

In the proposed guidance, such an award was treated, in and of itself, as a “serious violation.” In the final guidance, the DOL recognized that the grant of injunctive relief as a remedy is rare and said “the ALCA should take this into account as a factor that increases the significance of that violation to the contractor’s overall record of labor law compliance.”

In determining whether a bidder has a satisfactory record of integrity and business ethics, the CO must also consider any remedial steps the company has taken to correct the violations, including steps to prevent their recurrence (e.g., those taken pursuant to agreements entered into with the relevant enforcement agency), as well as information communicated by the respective enforcement agency regarding necessary remedies, compliance assistance or future corrective actions.

Other mitigating factors include recent legal or regulatory changes, good faith and a significant period of compliance following violations. The guidance explains that a “labor compliance agreement” may be warranted where the ALCA has concluded that a contractor has an unsatisfactory record of labor law compliance.

PAYCHECK TRANSPARENCY PROVISIONS

In addition to the new disclosure requirements, the final rule also requires contractors holding federal contracts for goods and services (including construction), and qualifying subcontracts worth more than \$500,000 to provide specified information to employees with each paycheck.

Specifically, for employees working on contracts covered by the EO, contractors must include with each of their employees’ paychecks the following information:

- The number of hours worked during the period for which overtime is calculated and paid (in other words, reporting must be by workweek).
- The number of overtime hours worked during this same period.
- Rate of pay.
- Gross pay.
- Any additions to or subtractions from pay (like bonuses, awards and shift differentials).

Where a significant portion of the workforce is not fluent in English, the contractor must provide the statement in English and the language(s) in which the significant portion(s) of the workforce is fluent. Information regarding hours worked and overtime does not have to be provided to exempt employees as long as such employees have been informed in writing that they have been classified as exempt.

Subcontractors must disclose any reportable labor law violations directly to the DOL.

Contractors that are required to maintain wage records under the Fair Labor Standards Act, the Davis-Bacon Act, the Service Contract Act or any equivalent state law must provide a written notice to any independent contractor informing the individual of his independent contractor status. This document must be provided before the individual performs any work under the contract, and it must be separate from any contract entered into between the contractor/subcontractor and the independent contractor.

The first notice must be provided as of the effective date of the notice requirement, and thereafter each time the independent contractor is engaged to perform work under each covered contract.

LIMITATIONS ON THE USE OF PRE-DISPUTE ARBITRATION AGREEMENTS

Finally, on contracts and subcontracts with a value exceeding \$1 million the final rule prohibits contractors from agreeing with employees and independent contractors in advance to arbitrate Title VII claims, as well as tort claims related to sexual assault

or harassment. Contractors will be able to arbitrate such claims only if the employee filing the claim voluntarily agrees to arbitration after the dispute arises.

This prohibition of pre-claim arbitration agreements does not apply when:

- A contractor’s employees are covered by a collective bargaining agreement that the contractor negotiated with a labor organization.
- Employees or independent contractors entered into a valid contract to arbitrate before the contractor or subcontractor bid on a covered contract, unless the contractor or subcontractor has the ability to change the terms of the contract (in which case the exception expires when the contract is renegotiated or replaced).
- Contractors are providing commercial items or commercially available off-the-shelf items.

Until now, only defense contractors were prevented from requiring such arbitration agreements. This broader restriction on government contractors’ use of the arbitration process appears to conflict with the U.S. Supreme Court’s decision in *CompuCredit v. Greenwood*, 132 S. Ct. 665 (2012), and similar rulings upholding the enforceability of arbitration agreements under the Federal Arbitration Act.

CONCLUSION

The EO, the final rule, and the DOL final guidance represent a significant change in federal contracting practices. While the effects of these new requirements will undoubtedly unfold over time, and legal challenges are likely, the EO is likely to increase contracting costs and may delay necessary federal procurement decisions.

The “blacklisting” provision would enable federal agencies to reject a bid or cancel an existing contract — as well as initiate suspension and debarment proceedings — based on violations that a contractor may have already resolved or that have not been fully adjudicated. This pre-award review may result in uncertainty for both contractors and the government.

The threat of cancellation, suspension and debarment of contracts may also significantly impact contractors’ approaches to charges, demands and matters pending

before enforcement agencies. These threats may force companies to settle matters rather than seek an adjudication of their position and risk a reportable “violation” that could affect their contract rights.

The cost of compliance will be high and may skew particularly against small contractors, which have more limited resources. The cost of compliance may also deter new contractors from choosing to compete for government contracts.

Furthermore, the final rule explains that while inadvertent mistakes in the disclosure process will likely not result in False Claims Act exposure, any intentional or knowing failure to disclose could result in FCA liability.

Litigation will be filed challenging various components of the EO. Meanwhile, government contractors should prepare for compliance by taking the following steps:

- Identify a point person responsible for maintaining required information and compliance.
- Identify all of the company’s labor law decisions going back to Oct. 25, 2015.
- Conduct self-audits on areas of risk, and begin mitigation efforts.
- Review the corporation’s overall ethics and compliance programs.
- Consider the impact when defending and resolving disputes.

Let us know if you are interested in participating in or supporting the litigation effort, or otherwise would like our assistance with your self-audits or compliance efforts.

WJ

NOTES

¹ In addition to the federal labor laws, the EO also mandates that contractors must disclose violations of “equivalent state laws, as defined in guidance issued by the [DOL].” With the exception of OSHA-approved state plans included in the final rule and the DOL guidance, the DOL has yet to identify or define “equivalent state laws.” These disclosure requirements will be phased in following an additional notice-and-comment period. Exec. Order No. 13,673, 79 Fed. Reg. 45,309 (Aug. 5, 2014).

² See FAR Sections 2.101 and 44.101.

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Cross your heart and hope to die – New DFARS clauses target counterfeit electronic parts

By Emily Theriault, Esq., and David Gallacher, Esq.
Sheppard Mullin Richter & Hampton

On August 2, 2016, the Department of Defense (“DOD”) rolled out new requirements for defense contractors that provide electronic parts and assemblies containing electronic parts. The new rules impose significant risks on DOD contractors.

One clause mandates a specific purchasing hierarchy, with requirements to purchase from the original manufacturer or authorized suppliers thereof when available. When an original source is not available, contractors are now required essentially to “vouch” for their suppliers, assuming all the risks if a vendor delivers a counterfeit or defective part.

Simultaneously, DOD issued a second clause, which requires certain covered contractors in the DOD supply chain to establish and maintain an acceptable electronic part detection and avoidance system. Failure to implement an effective plan may disqualify a vendor from providing products to the DOD.

These new rules come very close to imposing a near “strict liability” standard on DOD contractors, asking them to essentially guarantee the supply chain. Cross your heart and hope to die.

DFARS 252.246-7008, SOURCES OF ELECTRONIC PARTS

The first new clause requires contractors to purchase from specified sources when available, creating a three-tier hierarchy for purchasing:

1. If the electronic part is in production or in stock from an original, authorized, or approved source, then the part must be sourced from the original manufacturer, their authorized suppliers, or suppliers that obtain parts exclusively from the original manufacturer or authorized supplier.

When an original source is not available, contractors are now required essentially to “vouch” for their suppliers, assuming all the risks if a vendor delivers a counterfeit or defective part.

2. If the electronic part is not in production and not in stock from an original, authorized, or approved source, then the part must be sourced from a “contractor-approved supplier” — essentially, a source that the contractor verifies meets industry standards and for which the contractor bears responsibility for the risk of any counterfeit parts.

3. If the electronic part is not in production and not available from any of the previously mentioned sources, or if the part is sourced from a subcontractor that refused flowdown of this clause, or if the contractor or subcontractor cannot otherwise confirm the part is new, that is has not been comingled in supplier new production or stock with used, refurbished, reclaimed or returned parts, then the contractor must “promptly” notify the Contracting Officer, in writing, of its sourcing. The contractor is responsible for inspecting,

testing, and authenticating the parts. And, presumably, the Contracting Officer may refuse to accept the unverified parts.

The age-old principle of caveat emptor (“let the buyer beware”) is officially turned on its head. It is now the *supplier* that needs to be aware — aware of where it is buying from, aware of whether the product meets the quality requirements, and aware of the risks inherent in supplying products to the DOD.

DFARS 252.246-7007, CONTRACTOR COUNTERFEIT ELECTRONIC PART DETECTION AND AVOIDANCE SYSTEM

Prime contractors subject to the federal cost accounting standards, as well as their subcontractors and suppliers of electronic parts or assemblies containing electronic parts, must have an electronic part detection and avoidance system.

The system must include risk-based policies and procedures addressing twelve key areas:

1. Training personnel.
2. Inspection and testing of electronic parts.



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3. Processes to abolish counterfeit parts proliferation.
 4. Risk-based processes that enable tracking of electronic parts from the original manufacturer to product acceptance by the Government, whether supplied as discrete electronic parts or contained in assemblies.
 5. Use of suppliers in accordance with 252.246-7008, Sources of Electronic Parts (described above).
 6. Reporting and quarantining of counterfeit electronic parts and suspect counterfeit electronic parts.
 7. Methodologies to identify and rapidly determine if a suspect counterfeit part is, in fact, counterfeit.
 8. Design, operation, and maintenance of systems to detect and avoid counterfeit electronic parts and suspect counterfeit electronic parts.
 9. Flow down of these requirements to all subcontractors that supply electronic parts or assemblies containing electronic parts, or perform authentication testing.
 10. Process for staying abreast of current counterfeiting information and trends.
 11. Process for screening Government-Industry Data Exchange Program (GIDEP) reports and other credible sources of counterfeiting information to avoid the purchase or use of counterfeit electronic parts.
 12. Control of obsolete electronic parts.
- Per new regulations issued on August 30, 2016, failure to have an appropriate detection and avoidance system may affect the allowability of costs relating to counterfeit or suspect counterfeit electronic parts as well as the cost of rework or corrective action. Further, the Contracting Officer may disapprove of the purchasing system or withhold payments.
- These clauses stem from the 2012 National Defense Authorization Act's mandate to purchase electronic parts from trusted suppliers. Notably, the requirements only apply to DOD contracts, as they seek to ensure weapon system integrity and protect troops' lives.
- Defense contractors that supply electronic parts should examine their supply chains to determine if their current sourcing meets DOD's new mandates. Failure to do so imposes significant risks on all government contractors, including those who simply in the "routine" supply chain. **WJ**

NEWS IN BRIEF

GENERAL DYNAMICS UNIT WINS \$508 MILLION ARMY CONTRACT

The U.S. Army has awarded Sterling Heights, Michigan-based General Dynamics Land Systems Inc. a \$508 million contract to make modifications to 215 Stryker combat vehicles, the Defense Department said in an Oct. 7 statement. The military uses the Stryker, an eight-wheeled vehicle, in rugged and dangerous areas overseas. Under the contract, which runs until April 30, 2019, General Dynamics will change the bottoms of the vehicles so troops will be better protected from explosive blasts. General Dynamics, which manufactures the Stryker vehicles, was the only bidder for the contract, according to the statement.

NAVY ADDS \$29 MILLION TO VESSEL CHARTER JOB

The Navy is paying American Petroleum Tankers LLC more than \$29 million so the Pennsylvania-based company can continue working under an existing vessel charter contract. The Defense Department said in an Oct. 6 statement that the funding will allow the company, which uses the U.S.-flagged vessel M/T Empire State, to transport petroleum products for the Defense Logistics Agency – Energy until Sept. 18, 2017. The contract gives the Navy the opportunity to extend the contract for two additional one-year terms and an 11-month final term, the department said. American Petroleum beat out one other bidder to win the contract in June 2015.

RAYTHEON TO UPGRADE THE NETHERLANDS' MISSILE SYSTEM

Massachusetts-based Raytheon Co. said in an Oct. 6 statement that it has won a contract from the Royal Netherlands Defence Materiel Organisation to upgrade that nation's Patriot missile system. Under the contract Raytheon, which makes the systems, will add the "Modern Man Station" user interface to command and control shelters, the statement says. The interface, which has full color graphics and touch screens, is used to identify, track and engage airborne threats such as aircraft, drones and missiles, according to the statement. It will "significantly boost" the Netherlands' missile defense capability, Raytheon said. The company did not disclose the contract's financial terms or the number of new interfaces it will add.

Air Force's pricing decisions to result in \$3.5 million loss, contractor says

A military contractor says in a federal lawsuit that the U.S. Air Force's unilateral pricing of two components of an aircraft training services contract will cause the company to lose over \$3.5 million by the time the job is finished.

L-3 Communications Integrated Systems LP v. United States, No. 16-cv-1265, complaint filed (Fed. Cl. Oct. 4, 2016).

L-3 Communications Integrated Systems LP wants the U.S. Court of Federal Claims to order the Air Force to hold additional pricing negotiations for two types of flight training services the company is providing the Australian government under the Foreign Military Sales program.

Under the FMS program the United States buys goods and services from domestic contractors and sells them to friendly foreign nations.

The suit says the Air Force's chosen prices do not allow L-3 Communications to cover the costs of work on the two training components, earn a profit or obtain a reasonable rate of return on a \$38 million flight simulator it is using to conduct the training.

AN URGENT NEED

In its complaint, L-3 Communications says it won an FMS contract Sept. 5, 2014, to provide the Royal Australian Air Force with training services for C-27J transport planes. The contract runs from September 2014 through December 2017, according to the complaint.

Italian aerospace and defense company Leonardo-Finmeccanica makes the planes, which are desirable for military operations in areas with rugged terrain because they need less space to take off and land, according to the suit.

Under the contract, L-3 Communications is using its \$38 million C-27J flight simulator to provide the RAAF with operational flight trainer and fuselage trainer instruction.

The U.S. Air Force did not settle all contract terms in advance because the RAAF urgently needed the training. L-3 Communications

started working while it negotiated the contract terms with an Air Force contracting officer, the complaint says.

DISAGREEMENT ON PRICING

L-3 Communications and the Air Force reached an agreement on all parts of the contract except on hourly pricing for the operational flight trainer and fuselage trainer instruction, according to the suit.

When L-3 Communications bought the C-27J flight simulator, it expected the C-27J aircraft would be widely used by militaries around the world. However, demand for the C-27J has been low — only 31 aircraft have been ordered worldwide — and consequently, demand for L-3's flight simulator is not as high as the company thought it would be, according to the complaint.

L-3 Communications initially sought \$15.2 million for both training components and based that price on its limited customer base, the complaint says. The Air Force refused that price and the two sides traded price quotes back and forth, but arrived at an impasse, according to the lawsuit.

By early October 2015, L-3 Communications had decreased its price to \$13.8 million for both training components, but the Air Force wanted to pay \$8.6 million, according to the suit.

Around that time, an Air Force contracting officer told L-3 Communications the government would set the prices by Oct. 30, 2015, either through negotiation or a unilateral action, the complaint says.

UNILATERAL DEFINITIZATION

The Air Force unilaterally modified the contract Oct. 29, 2015, and added prices for both training components, according to the lawsuit. The modification set the total price of the operational flight trainer work at

\$1.9 million and the total price of the fuselage trainer work at \$216,834, the suit says.

By unilaterally setting the prices, the Air Force did not consider L-3 Communications' need to amortize, over a finite customer base, its \$38 million simulator cost, the complaint alleges.

In addition, L-3 Communications says the Air Force is thinking about ending the RAAF training job, which is L-3's only C-27J training contract, in July 2017 instead of letting the contract run until the December 2017 completion date.

L-3 Communications says the Air Force's chosen rates prevent the company from covering some of the simulator's cost and are causing L-3 to lose money on the contract, since the company is incurring more costs to perform both training jobs than the Air Force is paying it, according to the complaint. The company says it has lost more than \$1 million as of July 31, 2016, and expects to lose more than \$3.5 million by the end of the contract in December 2017.

L-3 Communications alleges the Air Force's unilaterally determined prices are unreasonable, arbitrary and capricious and violate federal regulations that permit contractors to earn a reasonable profit.

The company seeks an order directing the Air Force to hold additional negotiations on the prices and cover the losses with interest. The suit also requests attorney fees and costs.

As of press time, the government had not responded to the suit. [WJ](#)

Attorney:
Plaintiff: Richard L. Moorhouse, Greenberg Traurig LLP, McLean, VA

Related Court Document:
Complaint: 2016 WL 5897506

See Document Section B (P. 29) for the complaint.

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FALSE CLAIMS ACT

Doctor to settle civil charges for writing unnecessary opioid prescriptions for \$200,000

By Phyllis L. Skupien, Esq.

A Warren, Michigan, family doctor has agreed to pay \$200,000 to settle civil charges that he violated the False Claims Act by writing unnecessary prescriptions for oxycodone and other opioid medications.

United States ex rel. Henson v. Midwest Family Practice PLC et al., No. 13-cv-14579, stipulation of dismissal filed (E.D. Mich. Sept. 21, 2016).

"Prescription pain pills like oxycodone are controlled substances because their abuse can lead to addiction, illness and death," Barbara L. McQuade, U.S. attorney for the Eastern District of Michigan, said in a statement. "This settlement demonstrates that doctors pay a substantial price when they seek to profit by prescribing medically unnecessary prescription drugs and services that may harm their patients."

Hussein Awada, 46, pleaded guilty last year to conspiring with patient "recruiters" to write tens of thousands of prescriptions for oxycodone, the U.S. Department of Justice said. *United States v. Awada*, No. 12-cr-20595, *plea entered* (E.D. Mich. Feb. 11, 2015).

Awada began serving his 84-month sentence in May 2015. The payment announced Sept. 21, 2016, settles his civil liability under the FCA.

According to the DOJ, from 2010 to early 2012, Awada used the data on his patients to submit false invoices to Medicare for services that were never performed or were medically unjustified. The defendant was also accused of prescribing unnecessary monthly X-rays and other tests to hide his health care fraud.

The FCA suit was originally filed in 2013 by Heather Henson, who worked as a receptionist at Awada's medical practice, Midwest Family Practice PLC.

Under the *qui tam* provisions of the FCA, 31 U.S.C.A. § 3729, a relator can sue on behalf of the government and share in any recovery. The government intervened in the



civil suit in March and took up the charges against Awada and his medical practice.

In the criminal action, Award admitted prescribing 80,000 dosages of oxycodone and Roxicodone as well as defrauding federal health care programs of about \$2.3 million through his false billing, the DOJ said.

As part of his sentencing, Awada was also ordered to pay \$2.3 million in restitution and forfeit assets such as real property and two vehicles, including a 2009 Range Rover. Awada was also ordered to divest any interest he has in the medical practice.

Relator Henson will receive \$36,000 from the \$200,000 settlement as well as 18 percent of the assets Awada forfeits to resolve both the criminal and civil proceedings, according to a stipulation of dismissal filed Sept. 21. [WJ](#)

Related Court Document:

Stipulation of dismissal: 2016 WL 5219533

See Document Section C (P. 34) for the stipulation of dismissal.

D.C. Circuit won't reinstate fraud claims in military cigarette pricing dispute

By Rae Theodore

A federal appeals court has refused to reinstate fraud claims asserted by a whistleblower who claims tobacco giant Philip Morris USA Inc. defrauded the U.S. government by failing to sell cigarettes to military vendors at the lowest prices.

United States ex rel. Oliver v. Philip Morris USA Inc., No. 15-7049, petitions for reh'g denied (D.C. Cir. Sept. 19, 2016).

Without comment, the District of Columbia U.S. Circuit Court of Appeals rejected Anthony Oliver's petitions for rehearing by the original panel and petition for rehearing by the full court Sept. 19.

INSIDE INFORMATION ALLEGED

Oliver, president and chief operating officer of tobacco company Medallion Brands International Co., sued Philip Morris on behalf of the U.S. government in 2008. Oliver alleged Philip Morris violated the False Claims Act, 31 U.S.C.A. § 3729, by failing to provide the government with "most favored customer pricing."

Oliver said Philip Morris sold the same products to others for less in the same markets as federal purchasers while misrepresenting that its price to the government was the lowest. He alleged the military bought millions of dollars' worth of cigarettes at inflated prices each year since at least 2002, according to a 2015 opinion by the U.S. District Court for the District of Columbia.

Individual citizens can bring claims under the FCA in the government's name and are entitled to receive a percentage of any damages recovered. The whistleblower's actions are deemed invalid if they are based on information already made public.

PHILIP MORRIS MOVED TO DISMISS, DISPUTING THAT OLIVER HAD INSIDE INFORMATION ABOUT HIS CLAIMS

Background In 2013 U.S. District Judge Colleen Kollar-Kotelly ruled the court lacked subject matter jurisdiction because of the "public disclosure bar." She said the lawsuit was based on an interoffice memo that Philip Morris had uploaded to a public online database in 2002 — five years before Oliver filed suit. *United States ex rel. Oliver v. Philip*

Morris USA, 949 F. Supp. 2d 238 (D.D.C. 2013).

The database had been created as part of the 1998 global settlement between the major tobacco companies and 46 state attorneys general, the judge said.

According to that ruling, the interoffice memo, known as the "Iceland memo," discussed how the company should respond to an inquiry from the federal government as to why it could not purchase duty-free cigarettes for a base in Iceland at a lower price than the "most favored customer" price that Philip Morris was required to offer the government.

In August 2014 the District of Columbia U.S. Circuit Court of Appeals overturned the lower court ruling on the ground that neither the contract terms requiring Philip Morris to provide the government with most favored customer pricing nor the company's representations regarding compliance had been publicly disclosed. *United States ex rel. Oliver v. Philip Morris USA*, 763 F.3d 36 (D.C. Cir. 2014).

The appeals court vacated the District Court judgment and remanded the case for further proceedings.

On remand, Judge Kollar-Kotelly said the documents at issue "are sufficient to trigger the public disclosure bar." She also noted that the facts alleged in Oliver's complaint and the facts publicly disclosed prior to its filing are "substantially similar."

Judge Kollar-Kotelly again dismissed the case for lack of subject matter jurisdiction. *United States ex rel. Oliver v. Philip Morris USA Inc.*, No. 08-0034, 2015 WL 1941578 (D.D.C. Apr. 30, 2015).

A panel of the D.C. Circuit court affirmed June 21, 2016.

REHEARING PETITIONS CITE CONFLICTS

In his petition for rehearing by the panel or rehearing en banc, Oliver said the case should



REUTERS/Petr Josek

be reheard because two different panels of the federal appeals court have issued conflicting decisions — in 2014 and this year — as to whether the lawsuit is precluded by the FCA's public disclosure bar.

Oliver also argued that the appellate court's June 21 decision affirming the District Court's dismissal of the case on remand conflicts with the court's precedent with regard to public disclosure because it allows unfiled discovery materials posted on the internet outside the court system to be considered disclosed in a "civil hearing."

He said the decision conflicts with a recent decision by the 7th U.S. Circuit Court of Appeals defining "original source" as it applies under the FCA.

That opinion said a 2010 amendment to the FCA requires only that a relator have knowledge that is independent of and materially adds to publicly disclosed information, and the court ruled the 2010 amendment is retroactive. *United States ex rel. Bogina v. Medline Indus.*, 809 F.3d 365 (7th Cir. 2016). [WJ](#)

NSA contractor charged with stealing secret data

(Reuters) – The FBI has arrested a National Security Agency contractor on charges of stealing highly classified information and is investigating possible links to a recent leak of secret hacking tools used to break into the computers of adversaries such as Russia and China, U.S. officials said Oct. 5.

United States v. Martin, No. 16-mj-2254, criminal complaint unsealed (D. Md. Oct. 5, 2016).

Harold Thomas Martin, 51, was taken into custody in Maryland in August, according to a criminal complaint. A U.S. official, speaking on condition of anonymity, said Martin worked for Booz Allen Hamilton, the consulting firm that employed Edward Snowden when he revealed the vast collection of metadata by the NSA in 2013.

Allegations about a second insider leaking top-secret NSA information could further set back the Obama administration's efforts to recover from Snowden's damaging disclosures about the U.S. government's surveillance and cyber spying activities.

Booz Allen said in a statement that when the company "learned of the arrest of one of its employees by the FBI," they immediately fired him and offered full cooperation to the FBI.

The same month Martin was arrested, some of the NSA's most sophisticated hacking tools were dumped onto public websites by a group calling itself Shadow Brokers.

The U.S. Justice Department charged Martin, who had top secret national security clearance, with theft of classified government material, according to the complaint, which was unsealed Oct. 5. The complaint did not specify Martin's alleged motive, and U.S. officials declined to say.

NSA General Counsel Glenn Gerstell told Reuters that the agency was still assessing damage from the data theft, but said "I don't think this is a Snowden-type situation." Snowden, who has been granted asylum in Russia, has said he deliberately exposed the scope of U.S. government surveillance to force changes.

The New York Times reported that the Federal Bureau of Investigation was looking at whether Martin stole and disclosed highly classified computer "source code" developed to hack into the networks of Russia, China, Iran, North Korea and other countries.

One U.S. government source told Reuters that investigators were not fully convinced that Martin was involved with the Shadow Brokers but another official said the question was still being probed.

'SENSITIVE' DOCUMENTS

It was the latest disclosure of details of cyberspying by the U.S. government since Snowden stole and released a massive trove of documents that exposed the reach of the NSA's surveillance programs at home and abroad.

It also comes at a time of growing concern over the cyberhacking of federal agencies and American political parties.

According to the complaint, documents found in Martin's possession contained sensitive intelligence.

"These six documents were produced through sensitive government sources, methods, and capabilities, which are critical to a wide variety



REUTERS/Kevin Lamarque

An employee of consulting firm Booz Allen Hamilton, the firm that employed whistleblower Edward Snowden, is accused of leaking classified NSA information. The firm's office in McLean, Virginia, is shown here.

of national security issues," the complaint said. But it did not elaborate. Martin's lawyer could not immediately be reached for comment.

The Justice Department's chief national security prosecutor, John Carlin, declined to comment on the specifics of the case.

He said, however, that insider threats have long posed a challenge to the government.

"I'm sure the trusted professionals I work with across the community will take a hard look at anything they can learn from this case, whether it's about contractors or other issues to see whether they can better defend our systems from others who might try to steal from them," Carlin said in an interview on CSPAN.

Martin faces up to 10 years in prison if convicted on the most serious charges.

Martin's arrest occurred about two weeks after a leak of classified NSA computer data by the Shadow Brokers.

People with direct knowledge told Reuters in September that a U.S. investigation had focused on a theory that one of its operatives carelessly left them available on a remote computer and Russian hackers found them. Officials in Washington had also floated the possibility that it was the deliberate work of an insider.

The leak of the NSA hacking tools coincided with U.S. officials saying they had concluded that Russia or its proxies were responsible for hacking political party organizations in the run-up to the Nov. 8 presidential election. The Russian government has denied involvement.

WJ

(Reporting by Julia Edwards, Dustin Volz, Jim Finkle and Susan Heavey; writing by Matt Spetalnick; editing by Andrea Ricci and Lisa Shumaker)

Judge ejects patent suit over Air Force urine bags

By Patrick H.J. Hughes

The U.S. government has fended off a patent suit claiming the Air Force used infringing urine containment bags in aircraft for about five years.

American Innotech Inc. v. United States, No. 11-223C, 2016 WL 5266660 (Fed. Cl. Sept. 22, 2016).

Judge Mary Ellen Coster Williams of the U.S. Court of Federal Claims said American Innotech Inc.'s "fluid containment bag" patent was invalid as obvious, so it could not be asserted against the government.

GOVERNMENT SWITCHES SUPPLIERS

San Marcos, California-based American Innotech filed its patent infringement suit against the U.S. government April 8, 2011.

The complaint accused the government of buying and using a product that infringed U.S. Patent No. 5,116,139.

American Innotech is the exclusive assignee of the '139 patent, which discloses a container with material that rapidly gels when combined with "human bodily fluids."

According to the complaint, American Innotech has marketed its urine disposal bag for aircraft use, the year the '139 patent application was filed.

The Air Force and other military units purchased American Innotech-made "Flight Extender" bags for about 10 years before switching to a product called "Piddle Pak with Powder" in 2002, the complaint said.

PREFERRED SUPPLIER NEVER OBTAINS LICENSE

The Piddle Pak products are made by the New York City Industries for the Blind, a nonprofit that supplies the government with goods on a noncompetitive basis.

Under the Javitz Wagner O'Day Act — also known as the AbilityOne program — the U.S. government gives preference to nonprofit organizations such as NYCIB that provide work for the blind and seriously disabled.



In 2001 the NYCIB provided the government with testing samples, according to the complaint.

The U.S. Defense Department's Defense Logistics Agency found the Piddle Pak products were substantially similar to American Innotech's Flight Extender, the complaint said.

As a result, the agency asked American Innotech to "work things out" with NYCIB, but the nonprofit never agreed to obtain a license for the patented product, the complaint said.

By permanently awarding all future contracts for urine disposal bags to NYCIB beginning in 2002, the U.S. government knowingly infringed the '139 patent, American Innotech said.

American Innotech sought to recoup damages from lost Flight Extender bag sales from Apr. 8, 2005, to May 26, 2009, the day the '139 patent expired.

CONTAINER COMBINATION WAS OBVIOUS, JUDGE SAYS

In its defense, the government said the '139 patent was invalid as obvious under Section 103 of the Patent Act, 35 U.S.C.A. § 103.

The government said urine containers were produced before the '139 patent.

Since 1968, the government has issued military specifications for urine containment bags, the earliest of which called for sponges to absorb the bodily fluids.

The government has procured "Piddle Pak with Sponge" products from the NYCIB or one of its predecessors since 1980, the opinion said.

Prior to the date the '139 patent was filed, materials that gel when mixed with fluid were also known and commercially available, the government said.

A person of ordinary skill in the art would have known to create a urine container with gellable absorbents such as American Innotech's Flight Extender products, the government argued.

In her opinion, Judge Coster Williams acknowledged that the Patent and Trademark Office did not find that any parts of the disposal bags were obvious to one of ordinary skill in the art during the patent's prosecution.

However, she agreed with the government that in 1991 gellable polymers were "well-known in the art and also increasingly popular in the field of disposable urine containment products prior to the filing of the '136 patent."

Given that by 1991 gellable polymers were not only effective but also cheaper than sponges, the judge said, the price difference would have motivated ordinary skilled artisans to create a urine containment bag with hydrophilic material.

"An invalid patent cannot be infringed," the judge said, denying American Innotech's patent infringement claims. **WJ**

Attorneys:

Plaintiff: Daniel W. Ernsberger, Behrend & Ernsberger, Pittsburgh, PA

Defendant: Benjamin C. Mizer, John Fargo and Corey R. Anthony, U.S. Department of Justice, Washington, DC

Related Court Document:

Opinion: 2016 WL 5266660

DOL final rule requires contractors to provide paid sick leave

The Department of Labor Sept. 30 issued a final rule to implement an executive order requiring contractors and subcontractors to provide employees with a week of annual paid sick leave.

DOL said the rule will provide paid sick leave to 1.15 million people, including 594,000 who currently do not have any paid sick leave. It is effective Nov. 29. *See* 81 Fed. Reg. 67598 (Sept. 30, 2016).

President Obama issued EO 13706, “Establishing Paid Sick Leave for Federal Contractors,” in September 2015. *See* 57 GC ¶ 276. DOL issued a proposed rule in February and received over 35,000 comments, although most were identical form-letters.

The Professional Services Council said the proposed rule “turned a straightforward mandate to provide one hour of sick leave for every 30 hours worked on covered contracts into a detailed and intrusive compliance and enforcement regime.” *See* 58 GC ¶ 147. The American Bar Association’s Section of Public Contract Law said it “is unnecessarily burdensome on contractors and will raise the cost of contracts for the federal government.” *See* 58 GC ¶ 158.

The final rule requires contractors to provide employees up to 56 hours of paid sick leave annually, including at least one hour of leave for every 30 hours worked. Employees may also use sick leave to care for a sick family member, for a doctor’s appointment, or for reasons related to domestic violence, sexual assault, or stalking.

The rule applies only to new contracts awarded on or after Jan. 1, 2017. DOL noted that “[f]or procurement contracts subject to the Federal Acquisition Regulation and Executive Order 13706, this Final Rule is applicable only after the effective date of regulations to be issued by the Federal Acquisition Regulatory Council.”

Covered contracts include (a) construction contracts covered by the Davis-Bacon Act; (b) service contracts covered by the Service Contract Act; (c) concessions contracts; and (d) “contracts in connection with Federal property or lands and related to offering services for federal employees, their dependents, or the general public.” The rule does not apply to contracts performed outside the United States.

The rule defines covered employees broadly, requiring sick leave for “any person engaged in performing work on or in connection with a” covered contract. However, it does not cover employees who spend less than 20 percent of their time working on covered contracts.

Another exception excludes employees covered by collective bargaining agreements that provide employees with at least 56 hours of paid sick leave. Such employees are not covered by the rule until the earlier of the date the agreement terminates or Jan. 1, 2020.

Contractors are required to maintain records “during the course of the covered contract, and preserve [them] for no less than 3 years thereafter.” The rule lists 15 recordkeeping elements to be maintained, including wage rates and benefits, hours worked, notices of accrued paid sick leave, employee requests to use sick leave, dates and amounts of sick leave used, any responses to requests to use sick leave, and explanations of any denied requests.

The final rule creates a new 29 CFR pt. 13. Subpart A covers general issues, including definitions, types of contracts and employees covered, and the purpose of the regulation. It also lays out rules on accrual and use of sick leave, prohibits interference with accrual or use, and prohibits discrimination for use of rights under EO 13706.

Subparts B and C, respectively, establish the obligations of contracting agencies and contractors. Subparts D and E lay out procedures for enforcement, investigations of violations and administrative proceedings. Appendix A contains a contract clause. **WJ**

(This article was originally published in the Government Contractor, 58 GC ¶ 354.)

Disclosure rule

CONTINUED FROM PAGE 1

According to the trade groups, the Obama administration exceeded its authority by creating a burdensome regulatory regime that violates contractors' rights and will disrupt the federal procurement process.

"The rule creates additional costs and regulatory burdens that will discourage qualified firms, particularly small businesses, from pursuing federal contracts, and will drive up costs to taxpayers," Associated Builders and Contractors official Ben Brubeck said.

The regulations, which Republicans and industry critics have dubbed the "blacklisting rule," implement President Barack Obama's 2014 Fair Pay and Safe Workplaces Executive Order.

The requirements are contained in a rule issued in May by the Federal Acquisition Regulatory Council, which is composed of the General Services Administration, the Defense Department and the National Aeronautics and Space Administration. The Labor Department also released guidance to help federal contracting officers assess prospective contractors' compliance with labor and employment laws.

"The executive order, FAR rule and DOL guidance are unprecedented in their exercise of executive authority over matters previously controlled by Congress," the trade groups

said in their lawsuit filed in the U.S. District Court for the Eastern District of Texas.

The requirements are also arbitrary and capricious in violation of the Administrative Procedures Act, the groups said.

The groups object to the requirement that prospective contractors report violations of 14 labor and employment laws and their state equivalents, including those that

govern collective bargaining, discrimination, wage and hour and safety and health. That requirement will initially apply to applicants for contracts worth \$50 million or more.

The contract value threshold will drop to \$500,000 in April.

Those labor and employment laws already have their own remedial schemes that preempt the contractor regulations, the trade groups argued.

The groups also claimed that the regulations violate contractors' free speech and due process rights by compelling them to report non-final court judgments, arbitrations and administrative determinations, even if they are contesting the allegations or reached a settlement without admitting wrongdoing.

For example, a decision from the National Labor Relations Board to investigate a worker complaint would trigger a duty to disclose a violation, Brubeck said.

The groups also challenged a prohibition on arbitration agreements that contractors have with their employees. The regulations bar companies with contracts worth more than \$1 million from including provisions in

The petitioners say the Obama administration created a burdensome regulatory regime that violates contractors' rights and will disrupt the federal procurement process.

employment pacts mandating arbitration for common-law sexual harassment claims or any claims brought under Title VII of the Civil Rights Act of 1964.

That restriction violates the Federal Arbitration Act's presumption in favor of arbitration, the groups said.

Representatives for the Labor Department and White House did not respond to requests seeking comment. **WJ**

(Reporting by Robert Iafolla)

Attorney:

Plaintiff: G. Mark Jodon, Littler Mendelson, Houston, TX

Related Court Document:

Complaint: 2016 WL 5938682

See Document Section A (P. 17) for the complaint.

CASE AND DOCUMENT INDEX

<i>American Innotek Inc. v. United States</i> , No. 11-223C, 2016 WL 5266660 (Fed. Cl. Sept. 22, 2016).....	13
<i>Associated Builders and Contractors of Southeast Texas et al. v. Rung et al.</i> , No. 16-cv-425, complaint filed (E.D. Tex. Oct. 7, 2016)	1
Document Section A	17
<i>L-3 Communications Integrated Systems LP v. United States</i> , No. 16-cv-1265, complaint filed (Fed. Cl. Oct. 4, 2016).....	9
Document Section B	29
<i>United States ex rel. Henson v. Midwest Family Practice PLC et al.</i> , No. 13-cv-14579, stipulation of dismissal filed (E.D. Mich. Sept. 21, 2016)	10
Document Section C	34
<i>United States ex rel. Oliver v. Philip Morris USA Inc.</i> , No. 15-7049, petitions for reh'g denied (D.C. Cir. Sept. 19, 2016)	11
<i>United States v. Martin</i> , No. 16-mj-2254, criminal complaint unsealed (D. Md. Oct. 5, 2016).....	12