

Wiley Rein Files *Amicus* Brief for Trade Groups Regarding the Proper Standard for Determining Cost Reasonableness in Government Contracts, as Well as the Causation Necessary to Support Government Counterclaims for Fraud

January 4, 2013

Wiley Rein filed an *amicus curiae* brief January 2 on behalf of the Professional Services Council (PSC) and the National Defense Industrial Association (NDIA), in *Kellogg Brown & Root Services Inc. v. United States*, No. 09-CV-351.

The two trade associations support Kellogg Brown & Root Services' (KBR) appeal of a U.S. Court of Federal Claims (COFC) ruling that rejected as unreasonable approximately \$29 million of costs that KBR incurred to provide food services to the U.S. Army during the Iraq war under a cost-reimbursement contract. The associations also oppose the Government's cross-appeal of the COFC's rejection of the Government's fraud counterclaims against KBR.

"These appeals raise two issues of first impression for the Federal Circuit and are likely to generate binding precedent that will significantly impact many contractors, particularly those performing cost reimbursable contracts in contingency environments," according to Daniel P. Graham, the principal attorney representing PSC and NDIA on the brief. Mr. Graham was joined on the brief by Nicole J. Owren-Wiest and Brian G. Walsh, attorneys in Wiley Rein's Government Contracts Practice.

Related Professionals

Brian Walsh
Partner
202.719.7469
bwalsh@wiley.law

Practice Areas

Government Contracts
State and Local Procurement Law

With respect to KBR's appeal, the attorneys believe that, "Given the Government's—particularly the U.S. Defense Contract Audit Agency's—increased willingness to second-guess cost reasonableness, it is critical that the Federal Circuit articulate a rule that appropriately reflects the allocation of cost risk to the Government in cost-reimbursable contracts and the substantial discretion afforded to contractor's business judgement under the Federal Acquisition Regulation." With respect to the Government's cross-appeal, the attorneys argued that the COFC correctly rejected the Government's broad and unprecedented theory of common law fraud and liability under the False Claims Act, 31 U.S.C. § 3729, under which the Government seeks to recover hundreds of millions of dollars in payments to KBR, based on kickbacks totaling \$38,000, without proving any causal link between the payment of the kickbacks and the award of any contract or any claim or invoice submitted by KBR.

The trade groups' brief urged the appeals court to vacate the COFC's judgment and remand the case "with instructions to apply the appropriate standard for determining the reasonableness of the costs incurred and claimed by KBR." The *amicus* brief also said the court should uphold the COFC's rejection of the Government's counterclaims.

The *amicus* brief can be read [here](#).