

WHERE DO ACTION OFFICERS DREAM UP THESE SCHEMES?

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In the Army, much of the staff work on the Army staff is performed by Action Officers (“AO”) whose job it is to “make things happen.” Unfortunately, some AO’s are so dedicated to making something happen that they skirt the procurement laws or regulations. That is what appeared to happen in *Augustawestland North America, Inc. v. United States and Airbus Helicopters, Inc.*, No. 14-877C (Aug. 24, 2016). In the case, the court stopped a clever attempt to undermine the Competition in Contracting Act (“CICA”) and part 6.3 of the Federal Acquisition Regulation (“FAR”).

The case is procedurally complex, but easy to understand.

- In August 2013, the Army Chief of Staff issued an Aviation Restructure Initiative (“ARI”) that required the entire Army institutional training fleet to consist of only UH-72s and eliminated other helicopters.
- On April 3, 2014, the U.S. Army issued Executive Order 109-14 that “standardized” on Airbus Helicopter, Inc.’s UH-72A Lakota helicopter as the “only one responsible source” for future training helicopter purchases.
- On December 10, 2015, more than a year later and pursuant to Army Executive Order 109-14, the Army issued a Justification and Approval (“J&A”) to purchase 16 additional UH-72 helicopters and associated helicopters without “full and open competition” as required by CICA and FAR part 6.3.

Augustawestland (“Augusta”) won a bid protest against this procurement on two crucial grounds in the Court of Federal Claims:

- 1) **The ARI and Executive Order was a “procurement decision” that violated CICA and FAR 6.303.** The Army argued that Exec. Order 109-14 was a mere policy decision, *not* a procurement or proposed procurement under CICA, and therefore not subject to the law and regulations regarding full and open competition. The Court held that the Order was a “quintessential procurement decision that determined a need for property or services.” The Court noted that the Executive Order did not identify any statutory authority permitting other than full and open competition, and failed to include any determination that the cost of the ARI and executive order would be “fair and reasonable” as required by FAR 6.303-2(b)(7).
- 2) **Augusta argued that the Army’s decision to purchase the 16 helicopters did not comply with FAR 6.3 and CICA, and failed to provide a proper justification for a sole source procurement.** The December J&A cited as the principal reason for the Army’s not using competition to be that Airbus was the sole owner of the exclusive technical data to manufacture the UH-72, and Airbus refused to license or sell its technical data package to the Army. The Court noted that FAR 6.302-1(b)(2)

provides that the mere existence of property rights does not in and of itself justify a sole source competition. The court also rejected as flawed the Army's independent cost estimate (which wasn't really independent), and the Army's assertion that it would take 3 years to conduct a competition (when it only took one year to conduct the original UH-72 competition).

The court concluded that the Army's J&A and decision to purchase 16 UH-72s without full and open competition violated 10 U.S.C. §2304(a) (CICA) and FAR 6.3.

As a result, the court ordered a preliminary injunction against the U.S. Army from proceeding with or awarding a contract to Airbus for 16 UH-72 Lakota helicopters, pursuant to the Executive Order 109-14 and/or the December 10, 2015 J&A for Other than Full and Open Competition. Army was required to issue a new J&A to correct the deficiencies, or not proceed with the procurement.

Somewhere in the Army bureaucracy, an Action Officer who thought that the UH-72 Lakota should be the only helicopter for Army training had pushed the envelope of CICA and the FAR in order to accomplish this. Or perhaps a more senior person directed that AO to do that. And no one in the Army bureaucracy had asked the simple question "how can we do this in light of the procurement laws and regulations?"

(Note to readers: the AO theme is a bit of speculation on the author's part. But after working for 20 years in the Pentagon and on the Hill, I have certainly seen this type of scenario play out. RDL).