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106TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT 106–581

FOR THE RELIEF OF AKAL SECURITY, INCORPORATED

APRIL 13, 2000.—Referred to the Private Calendar and ordered to be printed

Mr. HYDE, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 3363]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3363) for the relief of Akal Security, Incorporated, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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PURPOSE AND SUMMARY

H.R. 3363 would pay Akal Security $10,208.74 for security guard services rendered in 1991 and relieve the company's liability to repay the U.S. $57,771.29 it was already paid for such services.

BACKGROUND AND NEED FOR THE LEGISLATION

In response to an official warning of possible terrorist activities during Operations Desert Shield and Desert Storm, the Army Reserve Personnel Center in St. Louis, Missouri, contracted with a private security firm to provide guard service at a leased storage facility for approximately 8 months. Payment of $57,771.29 was made for the 7 months covered by written contracts. During consideration of the contractor's claim for payment for guard service provided during a month in which there was no written contract, the Army discovered that contracting for security guard services at the Personnel Center was prohibited by section 2645 of title 10. The Army, therefore, was required to claim a refund of the amounts already paid to Akal Security, and it denied payment of $10,208.74 for the services provided during the 1 month not covered by the written contract. Under the law, the Department could not remedy this problem.

The company appealed to the DOD Claims Appeal Board asking that its claim for retention of the amounts already paid and for payment for the unpaid month be submitted for consideration by the Congress under the Meritorious Claims Act. The Claims Appeal Board agreed that such action should be taken, and the claim was forwarded to the Congress for introduction of a private bill.

The Meritorious Claims Act is the mechanism for the Executive Branch to refer to the Congress claims that they cannot pay under the law, but that they believe should be paid as a matter of equity through private legislative relief.

The Department of Defense wrote when forwarding the claim to Congress that "we recommend Congressional approval of the payment of the claim . . . pursuant to the Meritorious Claims Act (31 U.S.C. 3702(d))." They further stated that "we believe that Akal Security, Inc.'s claim contains such elements of equity as to be deserving of consideration by the Congress as a meritorious claim."

HEARINGS

The committee's Subcommittee on Immigration and Claims held no hearings on H.R. 3363.

COMMITTEE CONSIDERATION

On March 1, 2000, the Subcommittee on Immigration and Claims met in open session and ordered favorably reported the bill H.R. 3363, without amendment, by voice vote, a quorum being present.

On March 30, 2000, the Committee on the Judiciary met in open session and ordered reported favorably the bill H.R. 3363, without amendment, by voice vote, a quorum being present.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(l) of rule XIII of the Rules of the House of Representatives, the committee reports that the findings and recommendations of the committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 3(c)(4) of rule XIII of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House Rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the committee sets forth, with respect to the bill, H.R. 3363, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 7, 2000.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3363, a bill for the relief of Akal Security, Incorporated.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is John R. Righter, who can be reached at 226–2860.

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure

cc: Honorable John Conyers Jr.
Ranking Democratic Member

H.R. 3363—A bill for the relief of Akal Security, Incorporated.

H.R. 3363 would require the Security of the Treasury to pay Akal Security $10,208.74 for security guard services provided to the Department of Defense in 1991. CBO expects the payment would occur in fiscal year 2000. In addition, the bill would extinguish a federal claim against Akal Security of $57,771.29. That claim is for services paid for by the Department of Defense that it did not have the proper authority to pay. It is uncertain, however, when or if Akal Security will return the funds to the government under current law. Because the bill would affect direct spending, pay-as-you-go procedures would apply.

The CBO staff contact is John R. Righter, who can be reached at 226-2860. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

AGENCY VIEWS

The report of the Department of Defense recommending Congressional approval of the payment of this claim pursuant to the Meritorious Claims Act is as follows:

GENERAL COUNSEL OF THE
DEPARTMENT OF DEFENSE,
Washington, DC, March 1998.

Hon. NEWT GINGRICH,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: I am forwarding the appended decision of the Defense Office of Hearings and Appeals Claims Appeals Board in Claims Case No. 96081904, which is hereby adopted as a Department of Defense report in which we recommend Congressional approval of the payment of the claim addressed therein pursuant to the Meritorious Claims Act (31 U.S.C. 3702(d)). Pursuant to section 202(n) of the General Accounting Office Act of 1996 (Public Law 104–316; 110 Stat. 3843–3844) and a delegation of authority from the Director, Office of Management and Budget, the authority of the Comptroller General to submit meritorious claims recommendations under such section § 3702(d) was transferred to the Secretary of Defense for claims arising out of activities of the Department of Defense.

In response to an official warning of possible terrorist activities during Operations Desert Shield and Desert Storm, the Army Reserve Personnel Center, St. Louis, Missouri, contracted with a private security firm to provide guard service at a leased storage facility for approximately eight months, from January 28, 1991, through September 30, 1991. Payment of $57,771.29 was made for the seven months covered by written contracts. During consideration of the contractor's claim for payment for guard service provided in the one month without a written contract, it was discovered that contracting for the security guard services at the Personnel Center was prohibited by section 2465 of title 10. The Army, therefore, was required to claim a refund of the amounts already paid to Akal Security, Inc., and it denied payment of $10,208.74 for the services provided during the one month not covered by the written contract.

For the reasons set forth in the Claims Appeals Board decision, we believe that Akal Security, Inc.'s claim contains such elements of equity as to be deserving of consideration by the Congress as a meritorious claim. Provided the Congress concurs in this recommendation, enactment of the attached draft legislation would relieve Akal Security, Inc. of the liability to repay the aforementioned $57,771.29 and would permit payment of the $10,208.74 to Akal for previously provided but uncompensated services.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of these views for the consideration of the Committee.

Sincerely,

JUDITH A. MILLER

Enclosures:
DOHA Claims Case No. 96081904—In Re Akal Security, Inc.
Draft Bill

In Re: Akal Security, Inc.
Claimant

DATE: March 11, 1997
Claims Case No. 96081904

CLAIMS APPEALS BOARD DECISION

Digest

In response to an official warning of possible terrorist attack during Operations Desert Shield and Desert Storm, the Army Reserve Personnel Center contracted with a private security firm to provide guard service at a leased records storage facility for approximately eight months in 1991. Payment was made for the seven months covered by written contracts. During consideration of contractor's claim for payment for guard service provided in the one month without a written contract, it was discovered that procurement of a contracted security guard service at a military installation is prohibited by 10 U.S.C. § 2465. The Army, therefore, claimed a refund of the amounts already paid to the security company and denied payment for the unpaid month. The company requests that its claim for retention of the amounts already paid, and for payment for the unpaid month, be submitted for consideration by the Congress under the Meritorious Claims Act, 31 U.S.C. § 3702(d). The claim is forwarded to the General Counsel with a recommendation of submission to the Congress.

Decision

This is in response to the request of Akal Security, Inc. ("Akal"), that its claim be submitted to the United States Congress for consideration under the Meritorious Claims Act (MCA), 31 U.S.C. § 3702(d). The claim is for security guard services provided from January 28, 1991, through September 30, 1991, at a records storage site of the Army Reserve Personnel Center (ARPERCEN). Pursuant to the Legislative Branch Appropriations Act, 1996, Pub. L. No. 104–53, § 211, 109 Stat. 514, 535 (1995), the authority of the Comptroller General to submit a claim under 31 U.S.C. § 3702 was transferred to the Director, Office of Management and Budget (OMB). Effective December 18, 1996, the Director of OMB delegated to the Secretary of Defense the authority to settle general claims arising out of the activities of the Department of Defense, not otherwise delegated to the Secretary of Defense under the OMB Director's Determination of June 28, 1996, or directly transferred to the Secretary under Public Law No. 104–316.[1]

BACKGROUND

This claim arose from the activities of ARPERCEN, 9700 Page Boulevard, St. Louis, Missouri. To house its records, ARPERCEN

[1] General Accounting Office Act of 1996, Pub. L. No. 104–316, 110 Stat. 3826 (1996).

leases several facilities in and around St. Louis, most from the General Services Administration (GSA). ARPERCEN stored the only copies of records of World War II Filipino service members in a facility at 9711 Diehlman Rock Island Road in an industrial park in Olivette, Missouri, in suburban St. Louis. Unlike the other storage facilities, this facility was subleased through the Army Corps of Engineers (ACE) from a private owner, who has leased it to ACE since August 22, 1988. This facility was often referred to as the Diehlman Building.

ARPERCEN's records storage facilities were usually unguarded prior to late 1990. During Operations Desert Shield and Desert Storm, the Federal Bureau of Investigation (FBI) advised ARPERCEN of the possibility of an attack by pro-Iraqi elements and an Iraqi was later arrested in the area. The ARPERCEN Security Officer found that guards were necessary for the protection of ARPERCEN employees working at its facilities away from the headquarters on Page Boulevard. Therefore, arrangements were made for GSA to provide such protection, starting January 19, 1991. However, GSA discovered on January 22, 1991, that the Diehlman Building was leased to ACE, and in turn, to ARPERCEN. Thus, it was not a GSA facility and GSA therefore lacked jurisdiction to provide security there. GSA accordingly ended its guard services at that building.

To provide increased security at the Diehlman Building, ARPERCEN contracted through the U.S. Army Aviation Systems Command (AVSCOM), Granite City, Illinois, with Akal Security, Inc., Santa Cruz, New Mexico, to provide guard services there under the following written contracts:

Contract no.	Date	Period	Amount
DAAJ04–91P–0564*	01–26–91	01–28–91/02–28–91	$12,002.88
DAAJ04–91–P–1141**	04–09–91	04–01–91/06–30–91	15,900.00
DAAJ04–91–P–1886	07–02–91	07–01–91/08–31–91	16,000.00
DAAJ04–91–P–2693	09–06–91	09–01–91/09–30–91	8,000.00
TOTAL			$51,902.88

*Modified by P0001, 03–22–91, to add $1,002.88 to the initial $11,000.00 amount.

**Modified by P0001, 05–31–91, to extend the period covered from 05–31–91 to 06–30–91.

(SOURCE: Dept. of the Army, Office of the JAG, memorandum dated 05–31–94.)

The guard service provided by Akal at the Diehlman Building apparently ended when the last contract expired on September 30, 1991. Actual payments to Akal were as follows:

Contract no.	Voucher no.	Date	Amount
DAAJ04–91–P–0564	265145	05–15–91	$11,870.52
DAAJ04–91–P–1141	265575	06–06–91	7,395.00
" "	266361	07–10–91	7,624.25
" "	267594	08–20–91	7,690.80
DAAJ04–91–P–1886			
268530 09–25–91			
7,749.96			
" "	200752	10–09–91	7,749.96
DAAJ04–91–P–2693	205638	11–25–91	7,694.38
Interest credit			–3.58
TOTAL			$57,771.29

(SOURCE: Letter to Akal dated 06–14–95 from DFAS, St. Louis, Missouri.)

None of these payments was questioned at the time. Akal provided guard services at the Diehlman Building during the period of March 1 through 31, 1991, without a written contract and it later submitted a claim for $10,208.74 for that service. Upon review of that claim on the basis of *quantum meruit/quantum valebant*, it was discovered that the procurement of the guard services from Akal had been in violation of 10 U.S.C. § 2465 and the Anti-Deficiency Act. *See* Memorandum for the Deputy Assistant Secretary of the Army (Financial Operations) from the Army Deputy General Counsel (Fiscal Law & Policy) dated October 22, 1993. Akal's claim was denied and a claim was asserted against Akal on June 14, 1995, by the Government for recovery of the $57,771.29 already paid to the firm. Akal submitted to the U.S. General Accounting Office (GAO) a claim for both that amount and the unpaid $10,208.74, for a total of $67,980.03, to be submitted to the Congress under the MCA. Akal's claim was forwarded from GAO to our Office due to the transfer of the claims settlement and submission functions under Public Law Nos. 104–53 and 104–316.

At our request, an administrative report was furnished to us by the Defense Finance & Accounting Service (DFAS), Defense Accounting Office-Indianapolis Center, St. Louis, Missouri (whose functions have since been transferred to Indianapolis). That report recommended submission of Akal's claim to the Congress.

DISCUSSION

As amended[2], 10 U.S.C. § 2465 provides that:

> "(a) Except as provided in subsection (b), funds appropriated to the Department of Defense may not be obligated or expended for the purpose of entering into a contract for the performance of firefighting *or security-guard* functions at any military installation or facility." [Emphasis added]
>
> "(b) The prohibition in subsection (a) does not apply—(1) to a contract to be carried out at a location outside the United States (including its commonwealths, territories,

[2] The 1996 amendment is irrelevant to the issue, and a 1988 amendment renumbered this statute to the current section from 10 U.S.C. § 2693.

> and possessions) at which members of the armed forces would have to be used for the performance of a function described in subsection (a) at the expense of unit readiness; (2) to a contract to be carried out on a Government-owned but privately operated installation; or (3) to a contract (or the renewal of a contract) for the performance of a function under contract on September 24, 1983."

The emphasized language, which applies to the instant case, was added by Public Law No. 100–180[3] three years before the period at issue. Its relatively recent addition could explain why ARPERCEN, AVSCOM, and ACE personnel were unaware of the statute's prohibition on contracted security services. Also, there is some indication that these personnel may have believed that the Diehlman Building was not a military installation or facility. In any case, after some discussion, the Army's General Counsel decided that the Diehlman Building was a "military installation or facility" subject to 10 U.S.C. § 2465. None of the exceptions in 10 U.S.C. § 2465(b) apply: the Diehlman Building is in the United States; the site is not owned by the Government; and Akal's first contract regarding the site was issued on January 26, 1991.

Thus, Akal's claim cannot be considered on the basis of *quantum meruit/quantum valebant* because it does not meet the first requirement, that the procurement would have been valid had the proper procedures been followed. *Graphic Creations. Inc.*, 72 Comp. Gen. 291 (1993). Therefore, Akal has asked that its claim be forwarded to the Congress for consideration under the MCA.

The MCA[4], now codified at 31 U.S.C. § 3702(d), states:

> "The official responsible under subsection (a) for settling the claim shall report to Congress on a claim against the government that is timely presented under this section that may not be adjusted by using an existing appropriation, and that the official believes Congress should consider for legal or equitable reasons. The report shall include recommendations of the official."

DOHA has not yet rendered any determinations or decisions concerning the MCA. However, there are a number of decisions issued by GAO that provide guidance. When the MCA was under the jurisdiction of GAO, only a few of the many claims presented for submission to the Congress under that statute were actually submitted. GAO had no "ground rules" for considering such claims; rather, each claim was to be considered on its own merits. B–137604, Feb. 13, 1959. Besides the statutory requirement of "legal and equitable reasons," a claim had to be "unusual or extraordinary" to warrant submission. *Marvin K. Eilts*, 63 Comp.Gen. 93 (1983). In 53 Comp.Gen. 157 (1973), the Comptroller General stated:

> "The remedy afforded by the Act [MCA] is limited to extraordinary circumstances, and the cases reported by the GAO to the Congress generally have involved equitable circumstances of an unusual nature and which are unlikely to constitute a recurring problem, since to report to the Congress a particular case when similar equities exist or

[3] Public Law 100–180, Div. A, Title XI, § 1112(a), December 4, 1987, 101 Stat. 1147.
[4] Act of April 10, 1928, Ch. 334, 45 Stat. 413; formerly codified at 31 U.S.C. § 236.

are likely to arise with respect to other claimants would constitute preferential treatment over others in similar circumstances."

Over the years, GAO repeatedly emphasized that preferential treatment of one claimant from many similarly situated claimants (actual or potential) should not be afforded under the MCA. *Control Data Corporation*, B–201284, Apr. 21, 1981.

The well-established rule is that the Government is not bound or made liable by the erroneous advice or actions of its officers, employees, and agents, even if given or made in the course of their official duties. DOHA Claims Case No. 97012101 (February 6, 1997). The record is mixed as to how that rule was applied to requested MCA submissions. In B–168300, December 4, 1969, the Comptroller General denied a request in the case of supplies and services advanced by a cooperative to an unsuccessful farmer based on assurances made by a Farmers Home Administration employee without authority to make such assurances. But in B–136117, June 6, 1958, GAO acted favorably in the case of a timber company for losses it sustained due to an erroneous Bureau of Land Management computation of merchantable timber in its contracted area. The Comptroller General noted that the error was the largest such mistake in the history of the agency, that the contractor diligently performed the work, and that the Government received a benefit from that work. In *Campanella Construction Co., Inc.*, B–194135(1), Nov. 19, 1979, GAO submitted a claim for a contracted upgrade of a wastewater treatment plant that, unknown to the Army and the contractor, had already been deeded over to the local school board from the Federal Government.

The record is also mixed as to submitting claims based on work done under contract for the Government in violation of a statutory provision. In B–147086, Sept. 20, 1961, the request was denied in the case of a construction contract for an amount in excess of the statutory limit. However, submission was approved in the cases of newspaper advertisements procured without proper authorization in *The Florida Times-Union and The Jacksonville Journal*, B–208306, Aug. 18, 1982, and in *The Virginian-Pilot and The Ledger-Star*, B–205094(1), Nov. 24, 1981. In both cases, the Comptroller General noted that the Government received a benefit, that the newspapers acted in good faith, and that the amounts were reasonable.

The instant case may be considered extraordinary in that it involved the expeditious procurement of additional security services at a possible terrorist target during a national emergency. Both ARPERCEN and DFAS agree that the Government received a benefit from Akal's work, enhanced security during a national emergency in which there were official warnings of possible terrorist attacks on Federal buildings, including a specific warning from the FBI; that Akal acted in good faith; and that the amounts claimed by Akal are reasonable. Similar circumstances existed in B–136117, B–205094(1), and B–208306, *supra*. The work at issue was instigated by Government employees or officials who were unaware of the statutory prohibition against it, as in B–194135(1), B–205094(1), and B–208306, *supra*. Thus, a strong case based on equity can be made. The persons and offices responsible for this pro-

curement have since been made aware of the prohibitions effected by 10 U.S.C. § 2465; no similar cases seem to have been received by our Office; and nine years have now elapsed since the prohibition against contracted security guard services was enacted. Thus, a recurrence of this type of claim does not seem likely, frequent, or numerous.

CONCLUSION

We recommend to the General Counsel that the claim of Akal Security, Inc., for payment for security guard services provided to the Army Reserve Personnel Center, be submitted to the United States Congress for consideration under the Meritorious Claims Act, 31 U.S.C. § 3702(d), with a favorable recommendation.

MICHAEL D. HIPPLE, *Chairman, Claims Appeals Board*
CHRISTINE M. KOPOCIS, *Member, Claims Appeals Board*
JEAN E. SMALLIN, *Member, Claims Appeals Board.*

A BILL

To relieve, under the Meritorious Claims Act, Akal Security, Inc. of New Mexico of responsibility to repay the Army for security guard services provided the Army Personnel Center in St. Louis, Missouri.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. RELIEF OF LIABILITY FOR REPAYMENT.

Notwithstanding the provisions of section 2465 of title 10, United States Code, or any other provision of law, Akal Security, Inc. of Santa Cruz, New Mexico, is relieved of all liability to repay $57,771.29 to the United States for security guard services performed but not authorized in 1991 at the Army Reserve Personnel Center in St. Louis, Missouri.

SEC. 2. PAYMENT FOR SERVICES PERFORMED BUT NOT PAID.

The Secretary of the Treasury is authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, $10,208.74 to Akal Security, Inc. of Santa Cruz, New Mexico, provided such Akal Security, Inc. agrees that the relief of liability in section 1 and such payment are in full satisfaction of its claim against the United States for security guard services provided by Akal Security, Inc. to the Army Reserve Personnel Center in 1991.

○