



KOHN, KOHN & COLAPINTO, LLP

February 19, 2014

URGENT MATTER

Hon. Eric H. Holder
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Hon. Mary Jo White
Chairman
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

**Re: Report and Request for Investigation of Potential
Violations of the False Claims Act, the Securities
and Exchange Act and the Obstruction of Justice
Act**

Dear Attorney General and Chairman:

We are writing to report significant regulatory violations by two major U.S. government contractors: Halliburton and Kellogg Brown & Root (KBR).

Three laws prohibit corporations, such as Halliburton and KBR, from gagging their employees and preventing employees from freely disclosing potential fraud and violations of law to the appropriate authorities. In violation of these requirements Halliburton/KBR has engaged in a systemic tactic of instructing employees to keep information they possess regarding fraud "confidential" and to withhold disclosure of this information to *anyone* without the prior consent of KBR General Counsel.

This policy and practice undermines fundamental rules designed to protect the U.S. taxpayer and shareholders from fraud. Based on the sworn deposition testimony of Christopher Heinrich, Halliburton's Vice President of Legal for Infrastructure, Government and Power,¹ who was responsible for implementing Halliburton's secrecy policy, Halliburton and KBR violated federal laws designed to protect the flow of information from corporate insiders to appropriate regulatory authorities. In his testimony Mr. Heinrich acknowledged that a key tenant of the policy was to keep factual information known by Halliburton/KBR employees from being released to anyone outside of Halliburton's legal department. This policy and practice was willfully designed to keep information secret that would be material in False Claims Act cases and inhibit persons with factual information from coming forward and otherwise assisting in the prosecution of fraud claims raised against Halliburton/KBR.

First, Halliburton/KBR established internal reporting requirements, pursuant to Section B.7 of the Halliburton Code of Business Conduct, that "obligate" every employee to disclose information regarding fraud to be investigated as part of an internal compliance program. Exhibit 1, Section B.7. Second, a team of Halliburton/KBR investigators would be dispatched to obtain signed confidentiality agreements from anyone participating in the investigation. A copy of the confidentiality agreement appears as Exhibit 14 to the Heinrich Deposition. A copy of this agreement is also attached to this letter as Exhibit 2. This agreement was presented to the employees prior to their being interviewed about fraud in government contracting and other violations of law. Once they sign the Agreement they were prohibited not only from disclosing the content of their interview, but all of the underlying factual information they know concerning the subject matter of the interview with *anyone*.

¹ Mr. Heinrich was the designated corporate representative for Halliburton and KBR at a deposition taken in a False Claims Act case currently pending in the United States District Court for the District of Columbia, *U.S. ex rel Barko v. Halliburton, et al.*, Case No. 1:05-CV-1276 (JSG). A full copy of Mr. Heinrich's February 5, 2014 deposition transcript appears at Exhibit 3.

Specifically, the Confidentiality Agreement provides in relevant part:

I further understand that the information that I provide will be protected and remain within the confines of this review and only authorized personnel will have access to the information contained in this report. I understand that. . . *I am prohibited from discussing any particulars regarding this interview **and the subject matter** discussed during the interview, without the advance specific authorization of KBR General Counsel.*

I acknowledge and agree that I understand the unauthorized disclosure of this information could cause irreparable harm to the review and reflect adversely on KBR as a company and/or KBR performance in the Middle East Region and therefore, *I understand that **the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.***

Ex. 2 (emphasis added).

Halliburton/KBR created and utilized this form as a means and method of intimidating those with direct knowledge of facts pertaining to fraud to remain silent or risk termination. In addition to the direct threat to the employee's career and livelihood, the employee is required to acknowledge that the unauthorized release of information can result in "irreparable harm" to Halliburton's/KBR's corporate interests. This represents a clear message to every employee who signs the confidentiality agreement that they are susceptible to a lawsuit and/or an injunction against them if they blow the whistle on the company.

The purpose and intent of gagging Halliburton/KBR employees is evident from Mr. Heinrich's deposition testimony. He confirmed that, for years, employees have been required to sign similar confidentiality agreements, Tr. 177, and that it was the intent of the company to gag employees from discussing the "subject matter" of the fraud allegations with "anyone." Tr. 178-79.

Mr. Heinrich acknowledged that on the LOGCAP III contract alone, there were over 1,000 investigations conducted. Tr. 134, 181. It stands to reason that thousands of Halliburton/KBR employees were silenced from coming forward with information they knew about fraudulent conduct occurring in the execution of the LOGCAP III contract. The employees were not allowed to even confer with fellow employees about what they knew. The apparent purpose and intent of the Confidentiality Agreements was to vacuum up any potentially adverse factual information, conceal it in locked file cabinets and gag those with first hand knowledge from going outside of the company.

Based on Mr. Heinrich's testimony, Halliburton and KBR's use of the Confidentiality Agreement to gag employees was willful, routine and longstanding. The gag requirement is particularly troubling, given the number of fraud and False Claims Act cases filed against Halliburton and KBR, and the importance of ensuring that witnesses with material evidence in these cases were not intimidated into freely giving information to the government or Relators.

Request for Investigation, Sanctions and Employee Notification

The conduct of KBR in requiring employees to sign the Confidentiality Statement violated the False Claims Act, rules governing government contracting, and the regulations of the Securities and Exchange Commission. See 31 U.S.C. § 3730(h) and 17 C.F.R. § 240.21F-17. The Confidentiality Statement also constituted a potential violation of the federal Obstruction of Justice statute and could constitute a violation of federal RICO laws. See 18 U.S.C. § 1513(e); *DeGuelle v. Camilli*, 664 F.3d 192 (7th Cir. 2011).

For example, the False Claims Act mandates that all federal contractors ensure that their employees are free to report fraud in federal contracts, *both* to the United States *and* to other whistleblowers who file False Claims Act cases on behalf of the United States. The language of the False Claims Act is very clear. 31 U.S.C. § 3730(h).

Moreover, the U.S. Senate Judiciary Committee, in its 1986 report on the FCA, explicitly made sure that the right of employees to provide information to Relators and the government could not be interfered with. The Senate Judiciary Committee explained that all employees for companies like KBR had the right to "assist" litigants, Relators (i.e. the whistleblowers who filed FCA cases) and the United States. See Committee on the Judiciary, "The False Claims Act of 1985," Senate Report No. 99-345, p. 34 (July 28, 1986) ("the Committee believes protection should extend not only to actual *qui tam* litigants, but those who *assist or testify for the litigant, as well as those who assist the Government* in bringing a false claims action.")(emphasis added).

Moreover, under the False Claims Act, federal contractors, such as Halliburton and KBR, are explicitly prohibited from taking action that could "threaten" employees for engaging in a "lawful" act on behalf of "other" employees who have filed FCA claims and/or other employees who are seeking to "stop" fraud in government contracting. See, 31 U.S.C. § 3730(h). The Confidentiality Statement unquestionably "threatens" employees with severe adverse action if they assist other employees who have filed FCA claims. It also "threatens" employees who may want to work jointly with other employees in "stopping" violations of federal law. On its face, the gag order violates the legal requirements established under 31 U.S.C. § 3730(h).

Government contractors, such as KBR, are obligated to comply with the False Claims Act as a condition of obtaining any government contracts. KBR's failure to comply with the FCA, and its willful violation of its disclosure requirements, also constitutes serious breaches of its contractual obligations to the United States.

In regard to the Securities and Exchange Act, the Commission approved a formal rule that also prohibits companies like Halliburton and KBR from requiring employees to execute secrecy agreements such as KBR's "Confidentiality Statement." SEC rule § 240.21F-17(a) prohibited KBR from "impeding" any "person" from "communicating" with the SEC regarding a "possible securities law violation." The rule explicitly applied to "confidentiality agreements" that "threaten" employees who communicate information to the SEC. See 17 C.F.R. § 240.21F-17.

The Confidentiality Statement unquestionably "impedes" such communications. It has a chilling effect on any employee disclosure, and contains explicit threats targeting any employee who may step outside of the corporate secrecy shield reflected in the Confidentiality Statement.

This type of contract/agreement undermines the ability of the SEC to obtain information related to potential securities fraud, including violations of the Foreign Corrupt Practices Act. Given the extensive international business transactions conducted by Halliburton and KBR, the potential use of the Confidentiality Statement to cover-up illegal foreign bribery is very troubling. As you know, KBR and other companies it worked with, were implicated in major FCPA violations, one of which resulted in fines of over \$1 billion dollars.

Administrative and judicial rulings that have adjudicated similar gag orders have uniformly held that such agreements violate public policy and the law. See, *Connecticut Light & Power v. Secretary of Labor*, 85 F.3d 89 (2nd Cir. 1996) (upholding right of employee to sue company over proposed secrecy agreement); *Macktal v. Brown & Root*, "Order Disapproving Settlement Agreement," 86-ERA-23 (Secretary of Labor, October 13, 1993). Significantly, KBR's use of secrecy agreements to restrict employees from disclosing violations of law were highly criticized in hearings conducted by the U.S. Senate Subcommittee on Nuclear Regulation as far back as 1989. See Senate Hearing No. 101-90 (May 4, 1989).

Based on the statutes, regulations, legislative history and case law cited above, Halliburton and KBR's action in having employees execute the Confidentiality Statement constitutes an egregious violation of federal law and public policy.

We hereby request that you initiate a full investigation into Halliburton's/KBR's use of these Confidentiality Agreements. We further request that the following corrective action be taken:

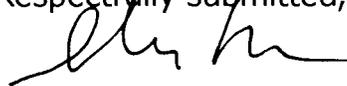
1. Every employee who was required to sign the Confidentiality Statement should be informed, in writing, by Halliburton and KBR, that the Statement does not prohibit their communications with the DOJ, SEC, or any other state or federal regulatory or law enforcement agency. Each employee should also be given the name and contact

information for counsel in all False Claims Act cases filed against KBR and Halliburton since 1986, and informed that they have the right to contact these counsel about any information they may have regarding fraud in federal contracting and/or information that they may have relevant to the FCA case for which these counsel represented Relators.

2. All of the witness statements collected by KBR for which an employee, agent or other person signed a Confidentiality Statement should be provided to the Department of Justice and the SEC for a review as to whether or not the information subject to the Statement was material to any past or current investigation and/or enforcement action.
3. KBR should be required to change the wording of the Confidentiality Statement to ensure that every employee is made aware of his or her right to disclosure information pursuant to the FCA and the Securities and Exchange Act.
4. The investigation should also include a review as to whether or not Halliburton or KBR should pay the fines, penalties and sanctions for their violations of the FCA and Securities and Exchange Act.

Thank you in advance for your prompt attention to this matter. We look forward to hearing from you within ten days.

Respectfully submitted,



Stephen M. Kohn

Attorney for the National Whistleblower
Center and former KBR employee Harry
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