THE PRESUMPTION OF GOOD FAITH

UNRAVELING THE MIXED MESSAGE GOVERNMENT PROCUREMENT PERSONNEL RECEIVE: MESSAGE 1: ACT ABSOLUTELY IN THE GOVERNMENT'S "BEST INTERESTS" MESSAGE 2: ACT "ETHICALLY"

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I. THE MIXED MESSAGE: 1) YOU HAVE A DUTY TO DEAL WITH CONTRACTORS FAIRLY AND IN GOOD FAITH; 2) ANY ACT YOU TAKE IN YOUR OFFICIAL CONTRACTING CAPACITY IS ALMOST CONCLUSIVELY PRESUMED TO BE IN GOOD FAITH (I.E., MEETS THIS DUTY).

A. Introduction

A whitepaper and an article recently written by two of the Government contracting bar's most experienced attorneys have sparked a spirited discussion within the bar. In May 2005, Marshall Doke, a member of the Commercial Practices Working Group,[2] sent a proposal to his colleagues calling for the Group to recommend legislation in order to amend the federal procurement laws to provide substantially as follows:

> Except as otherwise expressly required by statutes, the same rules of interpretation and performance of contracts and the liabilities of the parties *shall be applied in the same manner to the Government and to contractors.*[3]

Mr. Doke noted that the "recommendation merely [would] adopt the view consistently expressed by the Supreme Court of the United States."[4]

In October 2005, Stanfield Johnson authored a "Guest Appearance" special column in Thomson/West's Nash & Cibinic Report.[5] The proposals advanced by Messrs. Doke and

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1 The paper was written in early January 2006, presented March 3, 2006.

2 Part of the Acquisition Advisory Panel, formed under the Services Acquisition Reform Act, Pub. L. No. 108-136, § 1423, 117 Stat. 1392, 1669 (2003).

3 *See* Attachment 1, Proposal for Public Comment, *Commercial Practices Legislation*, from Marshall Doke to Commercial Practices Working Group, Acquisition Advisory Panel (May 5, 2005) at 4 (emphasis added).

4 *Id.* at 1.

5 *See* Attachment 2, W. Stanfield Johnson, *NEEDED: A Government Ethics Code And Culture Requiring Its Officials To Turn "Square Corners" When Dealing With Contractors*, 19 No. 10 Nash & Cibinic Rep. ¶ 47, at 150 (reproduced by permission of Thomson/West Publishing).

Johnson were brought before the Council of the ABA's Section of Public Contract Law, and the "issue was joined." The Government contracts bar now considers a number of questions relative to the issue. I set out my characterization of some of the basic issues and questions and my answers to them:

Two Primary Questions Arise --

1. Should the judicially-created principle that Government procurement personnel acting in their contractual capacities are presumed to act in good faith be legislatively or otherwise extinguished?

   Answer: Yes

2. Would the Government contracting community, or the tax-paying community in general, benefit from the implementation of a "code" or set of principles that articulates and explains the duty that Government and contractor personnel both have to deal with one another fairly and in good faith?

   Answer: Yes

These two questions give rise to several other questions, including but not limited to:

3. Is there a true need to address either issue?

   Answer: Yes

4. Are the two issues actually connected?

   Answer: Yes

5. Should the focus be on Government personnel only?

   Answer: No

B. The Conflict Of Legal Principles That Creates The Mixed Message: 1) The Duty (Implied Into Every Contract) That Government Employees Deal Fairly And In Good Faith With Contractors, And 2) The Presumption That Government Employees Act in Good Faith

It is not the purpose of this paper to retrace the ground that Messrs. Doke and Johnson have expertly traveled. Rather, I aim to expand upon their discussion of the current state of the case law and its consequences and how the apparent conflict might best be resolved.

The problem arises from the application of two inconsistent standards by the judicial forums that hear contract disputes between the Government and its contractors.[6] The *first principle* arises from the duty that is imposed upon each party to a contract to deal fairly and in good faith with the other party to the contract. The Restatement 2nd of Contracts provides substantial guidance as to what this duty entails, which we address in connection with our discussion of the case law below.

The *second principle* was created by the Court of Federal Claims ("COFC") (at the time the Claims Court) and adopted and revised at various times by the Court of Appeals for the Federal Circuit ("Federal Circuit"). The *second principle* was ported over from a previously existing principle that applied to the conduct of Government personnel acting in a *sovereign* capacity, rather than a *contractual* capacity. The *second principle* posits that Government employees acting in their official capacities are presumed to act in good faith.[7]

The question therefore arises whether it is appropriate to apply the presumption of good faith (or regularity) to the conduct of Government employees acting in a *contractual* capacity,

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[6] The Court of Federal Claims ("COFC"); the Court of Appeals for the Federal Circuit (I know, I should probably use "CAFC" – but with CAFC and COFC, and FASA and FARA – I prefer "Federal Circuit").

[7] The judicial derivation and evolution of this principle is discussed in riveting detail in Judge Wolski's decision in the case of *Tecom v. United States*, 66 Fed. Cl. 736 (2005). *See infra* Section II.C.

and if so what standard contractors must meet to overcome the presumption. Mr. Doke voiced his opinion on the presumption as follows:

> c. Presumption of Good Faith. There is a strong presumption that government officials act in good faith. *Torncello v. United States*, 681 F.2d 756, 770 (Ct. Cl. 1982). The presumption is so strong that, until recently, it took "well-nigh irrefragable proof" to overcome the presumption. *Kalvar Corp. v. United States*, 543 F.2d 1298, 1301-02 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 830 (1977). Recently, the Federal Circuit said it takes "clear and convincing" evidence (not just a preponderance of evidence) to overcome the presumption. The presumption may be appropriate for actions of officials in the Government's *sovereign* capacity, but it should not be used to give the Government an advantage in contractual disputes if the Government is to be treated as other private parties. Why should it be presumed that government employees act in good faith but contractor employees do not?

II. THE CURRENT STATE OF THE LAW GOVERNING THE CONDUCT OF GOVERNMENT PROCUREMENT PERSONNEL IS MUDDLED

A. Two Recent Decisions At The Court of Federal Claims, *LP Consulting Group* and *Systems Fuels Inc.*, Apply Both Legal Standards To The Conduct of Government Contracting Personnel

To understand the confusion that persists in this area of the law, it is helpful to examine two of the most recent COFC cases.[8] In *LP Consulting*, issued on July 7, 2005, the Court articulated the *first principle* -- the Government's duty of good faith and fair dealing – without commentary or analysis; and then promptly negated it by applying the *second principle*. The Court applied the *first principle* in short-hand:

> To be sure, the government has an implied obligation to carry out its duties under a contract in good faith. *See e.g. Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988); *Commerce Int'l Co. v. United States,* 167 Ct.Cl. 529, 338 F.2d 81, 85 (1964).[9]

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8 *See L.P. Consulting Group v. United States*, 66 Fed. Cl. 238 (2005); *System Fuels, Inc. v. United States*, 66 Fed. Cl. 722 (2005).

9 *L.P Consulting*, 66 Fed. Cl. at 243.

In mentioning the *first principle*, the Court cited to decisions issued by the Federal Circuit almost two decades ago (*Malone*) and four decades ago (*Commerce Int'l Co.*).[10] After mere mention of the principle that requires the Government to deal fairly and in good faith with its contractors, the Court effectively negated this principle by applying the presumption of good faith to the Government's contractual action in the case. The Court further provided that the presumption could be successfully rebutted only by a presentation of clear and convincing evidence of "specific intent to injure" the contractor—*i.e.*, *animus*:

> In order to demonstrate a breach of such duty, plaintiff must demonstrate that the government acted in bad faith. *See Torncello v. United States*, 231 Ct.Cl. 20, 681 F.2d 756, 770-71 (1982); *Asco-Falcon II Shipping Co. v. United States*, 32 Fed. Cl. 595, 604 (1994). It is well-settled, however that government officials are presumed to act conscientiously and in good faith in the discharge of their duties. *See, e.g., Spezzaferro v. Fed. Aviation Admin.*, 807 F.2d 169, 173 (Fed. Cir. 1986); *Asco-Falcon II Shipping Co.*, 32 Fed. Cl,. At 604; *Kalvar Corp. v. United States*, 211 C.Cl. 192, 543 F.2d 1298, 1301-02 (1976), cert. denied, 434 U.S. 830, 98 S.Ct. 112, 54 L.Ed.2d 89 (1977). In order to overcome this presumption, plaintiff "must **allege and prove**, by clear and strong evidence, specific acts of bad faith on the part of the government." *Asco-Falcon*, 32 Fed. Cl. At 604 (emphasis in original); *Galen Medical Assocs., Inc. v. United States*, 369 F.2d 1324, 1330 (Fed. Cir. 2004). The level of proof to overcome this presumption is high, often described as requiring "well nigh irrefragable proof." *Kalvar*, 543 F.2d at 3102-02; see also *Torncello*, 681 F.2d at 770 ("it requires 'well-nigh irrefragable proof' to induce the court to abandon the presumption of good faith dealing") (quoting *Knotts v. United States*, 128 Ct.Cl. 489, 121 F.Supp. 630, 631 (1954)). While this standard is not intended to "insulate government action from **any** review by courts," *Libertatia Assocs., Inc. v. United States*, 46 Fed. Cl. 702, 707 (2000) (emphasis in original), in this circuit, it has "been equated with evidence of some **specific intent to injure the plaintiff**." *Kalvar*, 543 F.2d at 1302 (emphasis in original): *see also Galen*, 369 F.3d at 1330; Librach v. United

[10] Curiously, the Court did not cite the Federal Circuit's recent decision in *Centex Corporation and CTX Holding Company v. United States*, 395 F.2d 1283 (2005). *See infra* Section II.D.

> States, 147 Ct.Cl. 605, 614 (1959); cf. *Tecom, Inc. v. United States*, 66 Fed.Cl. 736, 757-72, 2005 WL 1515902 at *22-37 (2005).[11]

In *Systems Fuels*, issued July 29, 2005, the COFC dealt in even more cursory fashion with the *first principle*, merely mentioning it in a heading, and by way of brief introduction to its extensive legal discussion and application of the *second principle*, which again had the effect of negating the *first principle*. The Court stated:

> 2. On Count II-Breach of the Implied Covenant of Good Faith and Fair Dealing.
>
> The Complaint also alleged that the Government breached the implied duty of good faith and fair dealing under the Standard Contract by:
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> * * *
>
> SFI, however, has failed to proffer sufficient evidence to overcome the presumption that the relevant government officials have acted in good faith. *See Am-Pro Protective Agency v. United States*, 281 F.3d 1234, 1239 (Fed.Cir.2002) ("[T]he clear and convincing standard most closely approximates the language traditionally used to describe the burden for negating the good faith presumption [afforded to Government officials.]"); *see also Sanders v. United States Postal Service*, 801 F.2d 1328, 1331 (Fed.Cir.1986)) ("There is a strong presumption in the law that administrative actions are correct and taken in good faith."); Where there is an allegation of bad faith by the Government, the court usually requires evidence of "some specific intent to injure the plaintiff." *Id.* at 1240 (quoting *Kalvar Corp., Inc. v. United States*, 211 Ct.Cl. 192, 543 F.2d 1298, 1302 (1976)); *see also Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578, 1581 (Fed.Cir.1995) ("A contractor can overcome [the presumption that the Government acts in good faith] only if it shows through 'well nigh irrefragable proof' that the government had a specific intent to injure it.").
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> * * *
>
> *See Am-Pro Protective Agency*, 281 F.3d at 1240 ("[T]he requirement of 'well-nigh irrefragable' proof ... sets a high hurdle

[11] *L.P Consulting*, 66 Fed. Cl. at 243 (emphasis in original).

> for a challenger seeking to prove that a government official acted in bad faith."). Therefore, SFI has failed to overcome the presumption that the Government acted in good faith.[12]

B. Voices of Reason in the Fray: *Centex* and *Tecom*

What is curious about the *LP Consulting* and *Systems Fuels* decisions is that neither discusses the two decisions that were most recent and relevant to the legal principles involved – *Centex*, issued by the Federal Circuit in January 2005, and *Tecom*, issued by the COFC on June 27, 2005.[13] The *Centex* case was not a procurement case and therefore did not fall under or discuss the line of cases that apply what I have been calling the *second principle* – the presumption that Government employees act in good faith even in the contractual arena. Rather, it dealt with the fundamental issues that were addressed in the landmark Supreme Court case *United States v. Winstar Corporation, et al.*, 518 U.S. 839, 116 S.Ct. 2432 (1996), regarding the definition and interplay between the Government's role as a *sovereign* and its role as a *contracting* party.

In *Centex*, Congress had enacted legislation that the plaintiffs contended had both the intention and effect of depriving them of the benefit of the (non-procurement) contracts they had executed with the Government. In affirming the COFC's decision rejecting the Government's arguments that its legislative actions as a *sovereign* overrode its *contractual* obligations, the Federal Circuit confirmed what the Supreme Court made clear in *Winstar* (and for more than one

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12 *Systems Fuels*, 66 Fed. Cl. at 735.

13 *LP Consulting* cites to the *Centex* decision but does not discuss it.

hundred years prior to its issuance of *Winstar*)[14] – the duty of good faith and fair dealing that is implied into every contract "applies to the government just as it does to private parties":

> The covenant of good faith and fair dealing is an implied duty that each party to a contract owes to its contracting partner. The covenant imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract. *Restatement (Second) of Contracts,* § 205 (1981); 13 Richard A. Lord, *Williston on Contracts* § 38:15, at 437-38:15, at 437-38 (2000); M/A-COM *Sec. Corp. v. Galesi*, 904 F.2d 134, 136 (2d Cir.1990); *Polito v. Continental Cas. Co.*, 689 F.2d 457, 463 (3d Cir.1982); *Concrete Specialities v. H.C. Smith Constr. Co.*, 423 F.2d 670 (10th Cir. 1970). The duty applies to the government just as it does to private parties. *Rumsfed v. Freedom NY, Inc.*, 329 F.3d 1320, 1330 (Fed. Cir.2003); *Essex Electro Eng'rs, Inc. v. Danzie*, 224 F.3d 1283, 1291 (Fed.Cir.2000); *Malone v. United States*, 849 F.2d 1441, 1445, *modified*, 857 F.2d 787 (Fed.Cir.1988).[15]

In addressing the difficult issue of the interplay between Government actions in its *sovereign* capacity and Government actions in its *contractual* capacity, the Supreme Court in *Winstar* articulated the critical need to subject the Government to the same duties and obligations to which private parties are subjected when they contract, including the duty of good faith and fair dealing implied into every contract:

> An even more serious objection is that allowing the Government to avoid contractual liability merely by passing any "regulatory statute" would flout the general principle that, *"[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."* *Lynch v. United States*, 292 U.S., at 579, 54 S.Ct., at 843. Careful attention to the cases shows that the

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[14] *See e.g., Cooke v. United States*, 91 U.S. 237, 242 (1875); *United States v. Boswick*, 94 U.S. 65, 66 (1877); *Lynch v. United States*, 292 U.S. 571, 579 (1934).

[15] *Centex*, 395 F.2d at 1304.

> sovereign acts doctrine was meant to serve this principle, not undermine it.[16]

The principle that emerges unquestionably from *Winstar* and *Centex* is that the Government must honor its contractual obligations; *it cannot take action that would effectively deprive its contractors of the anticipated fruits of their contracts.*[17]

In *Tecom*, Judge Wolski follows with remarkable precision the winding path that has led to the current state of confusion regarding the standard that is applied to the conduct of Government employees acting in a non-discretionary *contractual* context and the standard contractors must meet to demonstrate that the Government has breached its obligation of good faith and fair dealing under a Government contract. Any attempt to articulate the Judge's detailed analysis here would be folly. Suffice it to say that the Judge traces how the deference that was accorded to the *sovereign* acting in a discretionary capacity inappropriately leaked its way into the non-discretionary *contractual* context, stating:

> The Court concludes that claims of a breach of the implied covenant of good faith and fair dealing -- including claims that the duties to cooperate and not hinder performance of a contract have been breached -- are to be treated like any other claim for breach of contract. *The presumption of good faith conduct of government officials has no relevance. Were it otherwise, and were the presumption considered particular to government officials, it would no longer be the case that "[t]he duty applies to the government just as it does to private parties," Centex Corp.*, 395 F.3d at 1304. This would be a rejection of the long-held notion that "the principles which govern requires as to the conduct of individuals, in respect to their contracts, are equally applicable where the United States are a party." *United States v. Smith*, 94 U.S. 214, 217, 12 Ct.Cl. 119, 24 L.Ed. 115 (1877).[18]

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16 *Winstar*, 518 U.S. 839 at 895, 116 S.Ct. at 2465 (emphasis added) (footnote omitted).

17 *See also Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 605, 120 S.Ct. 2423, 2428 (2000); *Franconia Associates, et al. v. United States*, 536 U.S. 129, 130, 141, 122 S.Ct. 1993, 1995, 2001 (2002).

18 *Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 771 (2005) (emphasis added).

The *Tecom* decision quotes from Section 205 of the Restatement 2nd of Contracts, which addresses in substantial detail the duty of good faith and fair dealing that is implied into every contract. In so doing, the Court recognizes that a breach of the duty can occur with even a failure to act, or an action that falls far short of intent to injure the other party (*animus*):

> The Restatement (Second) of Contracts has found that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts § 205 (1981). Although this duty is stated in terms of "good faith," proof of bad intent does not appear to be required in order for a breach to be found. As the Restatement explains:
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> > Subterfuges and evasions violate the obligation of good faith in performance even though the actor *believes his conduct to be justified.* But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may *require more than honesty.* A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: ... lack of diligence and slacking off ... and interference with or failure to cooperate in the other party's performance.
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> *Id.* comment d (emphasis added).[19]

C. The Confusion And Mixed Message Persist: Two Decisions Issued By The Court of Federal Claims Almost Contemporaneously with the *LP Consulting* And *Systems Fuels* Decisions Applied the *Centex* and *Tecom* Reasoning Rather than the *LP Consulting* and *Systems Fuels* Reasoning: *H&S Manufacturing* and *Helix Electric*

In beginning his analysis of the conflicting legal principles the COFC and Federal Circuit have often applied, Judge Wolski noted, "This area of jurisprudence has persisted in its

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[19] *Tecom*, 66 Fed. Cl. at 770 (emphasis in *Tecom* decision).

elusiveness."[20] So it continues today, notwithstanding the decisions in *Centex* and *Tecom*. To be sure, progress is evident. On July 18, 2005, five weeks after the COFC issued the *LP Consulting* decision and less than two weeks before it issued the *System Fuels* decision, Judge Christine Miller of the COFC announced:

> FN19. The Government's long touted desideratum that "irrefragable proof' is needed to demonstrate the absence of good faith in the administration of government contracts has been given its last rites. *See Tecom*, 66 Fed.Cl. at 766 n. 36, 2005 WL 1515902, at *30 n. 36.[21]

Judge Miller attempted to hammer her own nail into the *Kavlar*[22] coffin in which the presumption of good faith and clear and convincing proof of *animus* purportedly now lie:

> Determinations of whether the duty of good faith and the duty not to hinder performance have been breached are based on similar considerations.[FN19] Generally, a failure to cooperate with the other party in the performance of a contract serves as a breach of that contract because a failure to cooperate violates the duty of good faith. *See Malone v. United States*, 849 F.2d 1441, 1445 (Fed.Cir.1988). Notably, however, a showing of "bad faith" or "bad intent" is not required to demonstrate a breach of this implied duty. *Abcon Assocs. V. United States*, 49 Fed.Cl. 678, 688 (2001). Instead, the Restatement (Second) of Contracts is instructive: "Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified." Restatement (Second) of Contracts § 205 (1981). Comparatively, the duty not to hinder is breached when the Government commits "actions that unreasonably cause delay or hindrance to contract performance." *C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1542 (Fed.Cir.1993). As such, a government official cannot "willfully or negligently interfere with the contractor in the performance of his contract[.]: *Peter Kiewit Sons' Co. v. United States*, 138 Ct.Cl. 668, 151 F.Supp. 726, 731 (1957).[23]

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20 *Id.* at 768.

21 *H&S Mfg., Inc. v. United* States, 66 Fed. Cl. 301, 312 n. 19 (2005).

22 *See* n. 6, *supra.*

23 *H&S Mfg.*, 66 Fed. Cl. at 311, 312 (footnote omitted).

Similarly, Judge Williams, in *Helix Electric Inc. v. United States*, refused to inject the presumption of good faith into her analysis of the Government's contractual conduct, but instead judged the Government's conduct using standard breach of contract principles.[24]

So, with the decisions in *Centex, Tecom, H&S Mfg.*, and *Helix*, perhaps Judge Miller is correct in fueling the *Kavlar* pyre. But given the decisions in *LP Consulting* and *Systems Fuels*, the wake seems premature. Although Judge Wolski read the Federal Circuit's decision in *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234 (Fed.Cir.2002) in the most favorable light possible to facilitate his analysis,[25] the *Am-Pro* decision still leaves cause for concern.

So, we ask the question again, "Are we 'there' yet?"

Answer: No, not yet.

But so what? What is the significance?

When the COFC, Federal Circuit or Boards of Contract Appeals cloak the formal, non-discretionary contractual actions of Government employees with a *sovereign* presumption of good faith and regularity, they render meaningless the *contractual* duty of good faith and fair dealing that is otherwise imposed upon these employees—the very principle that the Supreme Court and the Restatement 2nd state are inherent in every contract. To hold otherwise presents the very oxymoron Judge Wolski tries to avoid, *i.e.*, Government procurement personnel have a duty to deal fairly and in good faith with contractors; but, Government procurement personnel

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24 -- Fed. Cl. --, 2005 WL 3046514, at *16 (2005) (citing *Centex*, *Tecom* and *H&S Mfg.*).

25 *See Tecom*, 66 Fed. Cl. at 768, 769.

are *presumed* to act in good faith and to prove otherwise requires introduction of "well nigh irrefragable" evidence.

Please indulge me in a non-legal analogy: Consider the analogy of parents raising teenage children. As a high school teacher and coach from 2002 through 2004, I saw parents tell their children to be "good"; be "nice"; act with "honor," "integrity," "character". Some of the children, however, proceeded to act as spoiled, petulant brats, and sometimes worse. The parents often smiled and said variously, "kids will be kids"; or "yes, that was not a good act; but you know, they're good kids." On such occasions I might respond, "Yes, I hope and believe that is true. But they are not *acting* like good kids. They have to *act* like good kids before we can say they *are* good kids." For, as Aristotle, one of the pillars of secular ethics stated, "We *are* what we continuously do – excellence then is a habit." We can be ethical only by *acting* ethically.[26]

The parents were applying an essentially irrefutable "presumption of regularity" to the children's actions. They sent the first message: "Act like a 'good' kid—honorably and with integrity; treat people with respect and civility"; but the parents immediately negated this message by sending an overriding message: "*Anything* you do, honey, is all right. We will *always* defend your conduct of any nature, which is by definition 'good', because, after all, you are a 'good' kid."

ALL of the kids' acts by definition became "good" (or at least, not "bad," not cause for disciplinary or even educational action). Not surprisingly in such instances, which were many, the kids quickly and thoroughly adjusted their behavior accordingly—*they did whatever the heck*

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[26] See generally, Aristotle's *Nicomachean Ethics*.

they wanted to do, knowing that they had the absolute benefit of an almost irrefutable presumption of regularity ("yes, that was an unfortunate act, but he's a *'good'* kid").

The *second parental message* – "no one can ever question your actions unless you act heinously (and get caught)" (equated in the business world to the presumption of good faith and regularity judicially accorded to Government employees, which can be refuted only by "well nigh irrefragable" evidence of *animus*)—completely negated the *first parental message*—"you and your actions will be judged according to a specific standard of conduct, a standard of honor, integrity and civility" (equated in the business world to the duty of good faith and fair dealing).

Like the students in our school example, many Government employees acting in their non-discretionary contractual capacities have learned well the mixed message that the COFC and Federal Circuit (and their agencies) have often sent to them. Their conduct is almost certainly related to the message that is sent. We cannot expect it to change until the message is changed. As a first step, the Courts and Boards need to apply the law that the Supreme Court has articulated, and the Restatement 2nd of Contracts sets out, with respect to the Government's obligation to observe the duty of good faith and fair dealing that it assumes when it contracts. If the confusion in the judiciary with regard to this issue persists, a legislative or other fix is warranted.

III. CURRENT CODES OF CONDUCT AND OTHER GUIDANCE GOVERNING THE CONDUCT OF GOVERNMENT PROCUREMENT PERSONNEL ARE ESSENTIALLY SILENT WITH REGARD TO THIS IMPORTANT TOPIC.

Several questions are warranted at this point of the analysis:

1) Is it enough merely to right the judicial ship with regard to the confusion?

Answer: No.

2) Do current codes or guiding principles for procurement professionals adequately address this problem? Answer: No.

3) Does the issue relate only to Government employees? Answer: No.

It is an axiom of human psychology that humans will act in accordance with the mores of their society, as I attempted to demonstrate in my brief discussion of the analogy regarding high school students. The history of man bears this out, as do current events. One solution to the problem that is the topic of this paper is merely—education. By virtue of the judicially–created presumption of good faith and regularity, Government procurement employees have been told for some time that their conduct is all but unchallengeable in many instances. The biggest problem is not that Government employees act arbitrarily or without purpose. The bigger problem is that they act *only* in pursuit of what they perceive are the Government's "best interests." These employees are not to be chastised or vilified for this – for nearly every piece of training they are given orients them in this fashion. They are reminded at every turn that their paramount job is to guard and advance the Government's interests, the public trust, at all costs. For some employees, this translates into – "Always obtain the best result you can possibly obtain for the Government, without regard to what has passed to date, contractually or otherwise." Since their actions effectively cannot be challenged once they are cloaked in the judicial presumption of good faith and regularity, these employees become emboldened, blind, in their pursuit of the Government's "best interests." There are few if any bad consequences, and often good consequences, if they attempt to reform the terms of a contract the Government now prefers reformed.

Two things are required to remedy this—1) education/training, and 2) consequences for breach of the duty of good faith and fair dealing. The Supreme Court stated this most effectively in *Winstar*. The Court noted that while some in the Government might think it is in the Government's best interests to breach contractual duties, and the duty of good faith and fair dealing when it is expedient to do so, in the long run, such action works to the detriment of not only the contractors involved, but also the Government and the public at large:

> The Government's position would not only thus represent a conceptual expansion of the unmistakability doctrine beyond its historical and practical warrant, *but would place the doctrine at odds with the Government's own long-run interest as a realiable contracting partner in the myriad workaday transaction of its agencies.*
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> * * *
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> Injecting the opportunity for unmistakability litigation into every common contract action would, however, *produce the untoward result of compromising the Government's practical capacity to make contracts, which we have held to be "of the essence of sovereignty" itself. United States v. Bekins*, 304 U.S. 27, 51-52, 58 S.Ct. 811, 815, 82 L.Ed. 1137 (1938).[FN28] From a practical standpoint, it would make an inroad on this power, by expanding the Government's opportunities for contractual abrogation, with the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements. As Justice Brandeis recognized, '[p]unctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors.' *Lynch v. United States*, 292 U.S., at 580, 54 S.Ct. at 844[FN29].
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> FN28. *See also Bowen v Public Agencies Opposed to Social Security Entrapment*, 477 U.S. at 52, 106 S.Ct. at 2396-2397 ("[T]he Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights..."); *Perry v. Unietd States,* 294 U.S. 330, 353, 55 S.Ct. 432, 436, 79 L.Ed. 912 (1935) ("[T]he right to make binding obligations is a competence attaching to sovereignty"); *cf.* Hart, The Concept of Law at 145-146 (noting that the ability to limit

> a body's future authority is itself one aspect of sovereignty).
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> FN29. *See also* Logue, Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment, 94 Mich. L.Rev. 1129, 114 (1996) ("If we allowed the government to break its contractual promises without having to pay compensation, such a policy would come at a high cost in terms of increased default premiums in future government contracts and increased disenchantment with the government generally").[27]

It should be strongly noted that the confusion regarding precisely what is and is not in a contracting party's "best interests" is not merely a Government problem. The problem is endemic to the current business climate, and I fear, to society as a whole. Arguably many of today's business scandals, and certainly many of today's business failures, are the result of a misconception regarding precisely what it is that constitutes a company's best interests at any point in time. Recent events have shown that for many in the business world, short-term gains outweigh long-term objectives and the overall health of their organizations. For them, leverage in business dealings should always be maximized, even when dealing with one's regular business partners.[28]

In his paper, Stan Johnson recounts a series of litigation stories that chill counsel for contractors to the bone. He recounts cases in which Government personnel and counsel have bullied contractors, stretched the truth, ignored the facts as well as their contracts, and flat out

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27 *Winstar*, 518 U.S. at 883-884.

28 It was Chairman Mao, I believe, who said "International ethics comes out of the end of a gun." In marked contrast, Socrates said, "No one does wrong wittingly." *See e.g., The Republic and Meno.* He believed so powerfully in the rule of reason that he argued that every person will do what is right and just if he or she truly understands what is right and just. As we know, Socrates' pronouncements were the trunk from which most Western philosophy has sprung, including many branches that have denounced his pronouncements. In any case, the point is—one cannot *know* until one has been exposed to that which is *to be known*: in this case, the duty of good faith and fair dealing. Training and education of the procurement community is unquestionably needed.

lied on the witness stand. These are reprehensible and grotesque stories. But I have confidence that for many of the stories that involve adoption of an overly aggressive position by Government personnel or counsel, we can find similar stories that involve contractor personnel or counsel. Some people stretch the truth in litigation,[29] and others abuse the business leverage they enjoy over others.

The major difference in the Government contracting arena lies in the area of consequences. The False Claims Act[30] is truly an awesome deterrent. And so are suspension and debarment; claim forfeiture, loss of all contract payments, loss of one's job, and so on. Contractor employees and their counsel live in constant fear of these potential consequences. Government employees, at least at lower and some mid-management levels, are generally not subject to these potential consequences.[31] It is simply a fact that potential consequences drive human (and even non-human) action.

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29 I had occasion to attend traffic court this week (not in connection with my own driving, thankfully, but to provide moral support to a witness who had never appeared in court). We were forced to sit through several trials before our trial was called. Now THAT was an education in fabrication.

30 31 U.S.C. § 3729 (1986); 18 U.S.C. § 287 (1986).

31 The seemingly fundamental unfairness of this fact often drove one of my more animated former partners to distraction. He observed that those making critical contracting decisions within the Government often bore no accountability for decisions they made, and thus often took advantage of the opportunity to be completely arbitrary in their decision-making. One day, a group of us stood in the hallway outside his office, listening to him become increasingly agitated with a Government contracting officer. Finally, he burst out of his office, fuming and red-faced. He announced his solution to what he characterized as an epidemic of arbitrariness and lack of accountability in Government contracting: "I can't believe that these people can be so arbitrary. They have no risk in their jobs. None! If you and I were to make such unreasoned and cavalier decisions in our work, we would bear grave consequences. You know what we are going to do? We are going to initiate a program called 'The Bureaucrat of the Month.' And we are going to get all of the contracting bureaucrats lined up on the mall area in Washington between the Capitol and the Lincoln Memorial. And we are going to have a big bin on the stairs of the Capitol that contains slips with all of their names. And we are going to have Vanna White reach in and select a name, which she will announce. We'll all clap politely as the bureaucrat selected makes his or her way up the steps. And then....we'll shoot the bureaucrat of the month! At least that will put a little risk in their lives commensurate with that the rest of the working world encounters. It won't be connected to their jobs, but at least it will involve SOME risk!" And then he marched back into his office and slammed the door.

The point appears valid even if we are less dramatic in its presentation. When a contractor employee takes a position that subjects the contractor to substantial exposure, and that position is found by a judicial body to be clearly unjustified under the terms of the applicable contract, that employee's career often takes a decidedly downward turn thereafter. The same does not always happen with Government employees. One of the reasons for this is that both the employees and their superiors sometimes operate under the illusion that they act in the Government's "best interests" when they push the envelope regarding the best result they can achieve for the Government without regard to what has transpired prior to that point in time. As Mr. Johnson notes, in such instance, the overly aggressive position is not seen as cause for demotion but rather for congratulations on a "good try" foiled.[32] This is not the product of malicious intent, I believe; rather, it is the product (and here I do mean in the mathematical sense) of a lack of understanding as to what is truly in the Government's best interests ***times*** the application of a presumption of good faith ***times*** lack of consequences.[33]

In addition to the extinction of the judicial presumption of good faith and regularity, we need a code or set of principles to guide the contracting community in this area. Personally, I think it best not to invoke the word "ethics" in this regard, which has both charged and limited connotations. Similarly, the word "code" may carry an unproductive tone. We might then consider promulgation of a set of principles that explain the concept of the duty of good faith and fair dealing that is implied into every Government contract, and which applies to all members of

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32 *See* Attachment 2, at 2.

33 In formula form: (A) lack of understanding x (B) nearly irrefutable presumption of regularity of actions x (C) lack of consequences = (DD) license to ignore contract provisions when expedient to do so; arguably, pretty much the Darleen Druyun formula.

the Government contracting community, Government employees and contractor employees alike.

With minor exception, current codes and principles of conduct aimed at Government employees address only the employees' obligations to act in the Government's "best interests" at all times. With little exception, this translates into rules and principles that focus exclusively on controlling perceived abuses by contractors, such as acts constituting fraud, waste and abuse, or simply actions by contractors or situations that yield windfalls for contractors.[34] Consider, for example, the fourteen principles that President Bush issued in 2001 to the Heads of all Executive Departments and Agencies as his Standards of Official Conduct.[35] None of the principles addresses the duty of Government employees to deal with their contractors fairly and in good faith.

The Darleen Druyun scandal and the responses it provoked within the Government have stimulated the beginnings of a recognition of the need to train Government employees regarding the duty of good faith and fair dealing. However, at the moment, these are small sparks yet to produce fire. For example, in the wake of the Druyun scandal the Defense Science Board (DSB) conducted a comprehensive study with its stated purpose being to "[a]ssess oversight to ensure the integrity of acquisition decisions in DoD."[36] In its February 22, 2005 Summary of

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[34] Some in the bar cite the provisions of the Procurement Integrity Act and implementing regulations as noteworthy exceptions. However, even these provisions are largely aimed at benefiting the Government – although fairness to contractors is certainly one underlying objective. Further, the effect of these provisions is limited essentially to pre-award situations and does not apply to the arena in which ninety percent of Government-contractor interface occurs—contract performance and administration.

[35] *See* Attachment 3, Memorandum For The Heads Of Executive Departments and Agencies, Standards of Official Conduct, President George W. Bush (Jan. 20, 2001).

[36] *See* Attachment 4, *Summary of the Report of the Defense Science Board Task Force on Management Oversight in Acquisition Organizations*, at 5 (Mar. 2005).

Recommendations, in listing the factors that led to the Druyun scandal, the DSB specifically noted "abuse of subordinates and contractors which was not apparent to supervisors."

In announcing the DSB Task Force findings to acquisition community leaders, Acting Under Secretary of Defense Wynne stated:

> While expediency and results are important, the manner in which we conduct ourselves is even more important. If we make unethical decisions to expedite our acquisitions, we are doing a disservice to the American people. I ask that you and your senior leadership discuss these issues at every opportunity, in meetings and forums, within your community and with your industry partners. Please make acquisition integrity and ethics the center of your everyday decision-making culture.[37]

Similarly, in his September 7, 2005 memorandum addressing the same topic, Secretary of Defense Rumsfield stated, "[t]he task force emphasized that our focus must not only be on 'doing things right' but also on 'doing the right things'." Unfortunately, meaningful guidance and training to implement these brief references appears lacking at this time.[38]

A Government contracting code or set of principles of good faith and fair dealing should be developed. As Mr. Johnson suggests,[39] there is no better place to begin in this process than Section 205 of the Restatement 2nd of Contracts itself, which provides:

> a. *Meanings of "good faith."* Good faith...means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." The phrase "good faith" is used in a variety

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37 *See* Memorandum For Leaders Of The Acquisition Workforce, Acquisition Integrity and Ethics, Acting Undersecretary of Defense for Acquisition, Technology and Logistics Michael W. Wynne (Mar. 22, 2005) (available at http://www.acq.osd.mil/).

38 *See* Federal Acquisition Regulation, 48 C.F.R. § 1.102-2(c) (2003) (requiring Government acquisition personnel to "[c]onduct business with integrity, fairness and openness."). However, as with adverse consequences for violating these performance standards, practical guidance on their implementation currently appears insufficient.

39 *See* Attachment 2, at 5.

of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness....

* * *

d. *Good faith performance.* Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

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e. *Good faith in enforcement.* The obligation of good faith and fair dealing extends to the assertion, settlement and litigation of contract claims and defenses....The obligation is violated by dishonest conduct such as conjuring up a pretended dispute, asserting an interpretation contrary to one's own understanding, or falsification of facts. It also extends to dealing which is candid but unfair, such as taking advantage of the necessitous circumstances of the other party to extort a modification of a contract for the sale of goods without legitimate commercial reason....Other types of violation have been recognized in judicial decisions; harassing demands for assurances of performance, rejection of performance for unstated reasons, willful failure to mitigate damages, and abuse of a power to determine compliance or to terminate the contract....

IV. CONCLUSION: WHAT SHOULD BE DONE?

A. The Courts and Boards need to apply the law that the Supreme Court has articulated, and which the Restatement 2nd of Contracts sets out, with respect to the Government's obligation to observe the duty of good faith and fair dealing that it assumes when it contracts. The presumption of good faith and regularity as it relates to the contractual context should be extinguished. If the confusion in the judiciary with regard to this issue persists, a legislative or other fix is warranted.

B. Implement and teach a Code—or set of Principles—of good faith and fair dealing that applies to all in the government contracting community, with its backbone being Section 205 of the Restatement 2nd of Contracts.

C. Apply Consequences to violations of the Code (Principles) of good faith and fair dealing.