PUBLIC-PRIVATE SECTOR COLLABORATION AND NATIONAL SECURITY: LEGAL PATHWAYS AND PITFALLS IN THE FEDERAL ACQUISITION REGULATIONS REGARDING PROCEEDS FROM SEIZURES, FORFEITURES AND FEES.

ABSTRACT

The national security docket, since time immemorial has always been an exclusively been manned by the government. There has always been little room or none at all for public private engagement in matters national security. The Federal Acquisition Regulations (FAR) regulate among other things the collaboration between private and public sectors. This article will therefore analyse the existing policies and legal framework within the scope of the FAR that enable or hinder public – private collaborations in matters national security and utilisation of proceeds from seizures, forfeitures and fees for Remuneration of private actors. This article will also explore and recommend legislative reforms within the framework of the FAR to facilitate public-private partnership in the national security sector.

KEYWORDS: Federal Acquisition Regulations (FAR), National security, seizures, fees forfeitures, compensation mechanisms

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1.0 INTRODUCTION

The concept of national security has evolved over the years and is no longer limited to only state stakeholders. Currently, new and more sophisticated global threats have emerged, while the available budget is limited and the demands for specialized knowledge and skills are high, which means that governments rely on private actors more and more. In the field of cyber security and intelligence, analysis, logistics, and even certain fields of security, private actors have become remarkably significant for supporting the national security efforts.

With the shifting context and collaboration between state actors and private actors, the question of compensation and remuneration of private actors is an inevitable question. Although traditional contracting practices and models involve agreed-upon fee agreements, cost-plus requirements, or performance-based bonuses, the idea of jointly linking private sector incentives with revenues derived from seizures, forfeitures, or fees is rather novel. It is however important to note that this may encourage private actors to directly participate in activities leading to such revenues, which could lead to better results and less reliance on taxpayer monies for such enterprises.

This novel approach poses legal and regulatory risks and challenges remain relatively high. The FAR, the principles guiding procurement of goods and items by the U.S federal government were not particularly designed to address compensation paradigms linked with the proceeds of either law enforcement operations or regulatory investigations. This paper thus reviews the FAR, other statutes, and case law to determine channels that can be exploited in pursuing such contractual arrangements as well as possible barriers to their creation in the realm of national security.

1.2 The Allure and Potential Benefits of Proceeds-Based Compensation

Compensating private actors for their services from proceeds of seizures, forfeitures or fees has a number of benefits. First it plays a key role in promoting efficiency in that remuneration based of performance fosters extra efficiency of private actors. Secondly private actors may fund initial operations and their remuneration only occurs in the event that there is recovery/ seizure; this means that the financial burden on the government is significantly reduced. Further, private firms tend to have specialized knowledge and advanced tools that can be more easily acquired by outside partners than by government entities. It is possible that a proceeds based compensation model could bring about these capabilities without demanding substantial public sector capital investment. This policy could in also provide the government with a way of sharing risks of 'high stakes,' 'high variance' national security operations where the pay off can be high but the costs are unpredictable, thus compensating its risks.

1.3 Legal Analysis of the Federal Acquisition Regulations (FAR) and the potential enabling provisions.

When analyzing the FAR, it is first important to note that there are some requirements that were not specifically created with the concept of proceeds-based compensation in mind. (Manuel, K. M. 2011) However there are provisions that may be utilized in practice as the basis for such agreements. This however should be approached with caution as one may encounter legal hurdles in institutionalization. In as far as FAR is concerned, the following parts may be applicable.

First, Part 15 of the FAR provides for Contracting by Negotiation and this part of the FAR provides for negotiated and thus such contracts are flexible in providing legal terms and conditions of the contract. While it calls for the adoption of reasonable and justifiable pricing, it


does not preclude complicated compensation structures if they are clearly laid down and are reasonably justifiable for the government to support. The legal challenge however would be to show how the proceeds-based model creates value for the government. (Manuel, K. M. 2011)

The FAR also provides for types of contracts that may be used in acquisition under part 16. These therefore include, Fixed Price Contracts, Cost Reimbursement Contracts, and Incentive Contracts. None of them are completely related to proceeds-based compensation, however, incentive contracts, especially those which use performance-based incentives (FAR Subpart 16.4) may be applicable. Some may want to suggest that what the organization receives in the form of the "proceeds generated" could be used as a positive incentive benchmark. (Grove, D. B. 1989). However, a direct transfer of part of government revenue to a contractor may not be valid based on the principles of appropriation and the Anti-Deficiency Act.

Part 45 of the FAR also provides for the policies and procedures for providing Government Property to contractors. The said part focuses mainly on how government property is used or knowingly handled by contractors. When it comes to seized or forfeited assets, an appropriation of part of those assets (or, their value) would have to be in a form that does not run afoul of the guidelines governing the disposal of government property. Further Part 47 although this not directly related to the seizure and forfeited goods, it defines the government's ability to contract for the transportation of property, or even property that has been seized or forfeit. It might be reasonable to relate fees to successful transportation and storage and subsequent disposition, albeit not to the proceeds themselves.

Lastly, Part 52 sets out contracting provisions and clauses that apply when forming contracts. There is no common language provision that specifically affords proceeds-based compensation.

(Custos, D., & Reitz, J. 2010) However, the use of "other appropriate clauses" defined in FAR 52.103 can be considered, as long as the clauses do not contradict other laws and regulations. Any clause of this kind has to specify how proceeds will be calculated and distributed to beneficiaries, how competing interests will be handled, and how there will be oversight to prevent fraud.

1.4 Significant Obstacles and Prohibitions within the FAR and Related Statutes

While the FAR contains provisions that can be potentially explored to provide for collaboration with state and private actors, there are legal and regulatory obstacles that may prevent or expressly forbid such agreements and further compensation of private actors from proceeds from seizures, forfeitures, or fees.

First, the Anti-Deficiency Act (31 U.S.C. § 1341 et seq.) a fundamental pillar of federal fiscal law states that federal funds cannot be spent in amounts beyond the established appropriation or authorized in advance of appropriation. It would be legally wrong to directly pay a contractor using the seizure or forfeiture money before the money has been appropriated and earmarked appropriately as per this Act. (Johnson, T. R., Feng, P., Sitzabee, W., & Jernigan, M. 2013). The funds received as proceeds from seizures and forfeitures end up in particular government accounts, say the Department of Justice Assets Forfeiture Fund, and are spent according to the appropriation made by congress. Trying to direct a separate portion for contractor compensation out of this process may not be very feasible. Secondly, The Appropriations Clause (U.S. Constitution, Article I, Section 9, Clause 7) states that no money shall be paid out of the Treasury, except for the expenditure given by the law. It would be unconstitutional if an appropriation act does not state on its face that executive branch money for a private contractor is authorized.

It is also imperative to take note of The Miscellaneous Receipts Act (31 U.S.C. § 3302). This piece of legislation makes it mandatory that all money received by an officer or employee of the federal government is deposited into the treasury as miscellaneous receipts. It is unclear what specific statutes would permit a contractor to receive a portion of a seizure or forfeiture prior to deposit in the Treasury; if such a practice exists, it would most likely violate this Act.

The FAR also imposes a number of regulations that may create a potential obstacle. First part 3 provides for Improper Business Practices and Personal Conflicts of Interest. Paying contractors for their services using percentage recovery of assets is a contentious issue because it violates the rules of conflict of interest in government contracts. It can encourage contractors to focus on items that produce more bounty as income, possibly in ways that are prejudicial to other national security interests or offend the concept of justice. The FAR pays much attention of neutrality and the appearance of bias especially in government contracting. (Johnson, T. R., Feng, P., Sitzabee, W., & Jernigan, M. 2013). Further, part 31 provides for Contract Cost Principles and Procedures which state the cost that can or cannot be charged to a Government contract. Reimbursement of costs by a percentage of the proceeds is not reasonable, allocable or allowable under these principles in that these principles provide guidance on costs that are reasonable, allowable and necessary for the performance of contracts.(Engstrom, D. F. 2012).

Assets forfeiture funds regulations including the Justice Department's Assets Forfeiture Fund or the Treasury Forfeiture Funds and outlines how they can be spent. These may refer to policing, compensation to victims, and associated costs, but they do not refer to direct payments to private entities that would constitute a cut of the recovered assets. Any such operation is likely to occur under statutory prescription. The Posse Comitatus Act further (18 U.S.C. § 1385) although it is intended to prohibit the use of the military in civilian law enforcement, this Act may be seen as a

manifestation of a more general anxiety regarding the meanings of governmental law enforcement and private actors. It may be possible to argue that when LE trusts directly compensates private actors, then these lines become even more blurred and present various policy issues.

1.5 Exploring Potential Pathways and Legislative Considerations

In exploring legal reforms, the most straightforward approach would be for Congress to pass legislation explicitly permitting the government agencies to engage into contracting where remuneration for several national security services is based on a proportion of seizures, forfeitures, or fees to be collected. (Engstrom, D. F. 2012). To pass such legislation, it may be necessary to make exceptions to the Anti-Deficiency Act or establish rules on how money can be disbursed, as well as how the Appropriations Clause and the Miscellaneous Receipts Act must be followed. It would also require measures to address conflict of interests and put in place necessary measures on independence, transparency and accountability.

Secondly, Additional Experience can be gained by Congress providing funding for pilot programs or demonstration projects in specific national security domains to assess the operational viability of proceeds-based compensation models. These could run with controls on operations and evidence to establish how they afford advantages and disadvantages early before widespread use. It may also be helpful to shore up existing asset forfeiture laws so that a certain percentage of the recovered amount can be used to compensate private contractors who may have played an instrumental role in identifying or recovering such assets. It would be necessary to consider the overall goal of these funds and potential effects on other permissible uses.

Despite various limitations under the current FAR such as encouraging innovative contractual mechanisms to potentially include performance-based incentives that are related to a successful asset recovery but not necessarily a percentage of the profits. Nevertheless, such mechanisms would require legal analysis to observe and/or control fiscality and ethical issues. For example, a contract may be designed to reward a contractor for the amount of assets to be recognized, and such payment will be made from the appropriated amount and not the seized assets. Possible solutions may also include enhancing and separately identifying legal frameworks for PPP projects that provide potentially fair risk allocation with fixed financial structures or other special purpose vehicles or escrow accounts to cover contingent liabilities. Such structures would have to be developed in such a way that they would adhere to the federal fiscal law and at the same time would facilitate transparency in the flow of funds.

1.6 Qui Tam lawsuits; a comparison with public-private sector collaboration in national security matters

Qui Tam lawsuits are civil actions in which an individual initiates a lawsuit against another individual or a business for defrauding the government and the initiating individual gets to share the proceeds in the case. Engstrom, D. F. (2012). The whistleblower stands to benefit from receiving a certain percentage of the recovered amount in case the lawsuit is won. Although this is not a clear link to national security contracting, it is a case where legal rules offered a reward for private actions of recovering a share of the governmental recovery.

The U.S. False Claims Act (FCA) allows individuals to pursue legal action against fraudulent claims made against the government. Through "qui tam" lawsuits, anyone with knowledge of fraud targeting federal or state programs can file a complaint. The FCA has also been amended to increase the financial rewards for filling qui tam suits on behalf of the government. This

indicates that this approach of the use of incentives rather than penalties is a proper strategy to combat crime. Engstrom, D. F. (2012). However, it is arguable that bounty awards can create a counterproductive incentive, leading to the prolongation of fraudulent activities beyond the socially optimal point. The potential competition among whistleblowers does not completely solve this problem, as the risk of stigma and limited job opportunities act as internal deterrents to reporting wrongdoing. These constraints significantly diminish the preventative impact of qui tam litigation and reward-based systems overall.

The private -public cooperation and paying private actors out of the proceeds of seizures, fees and forfeitures should mimic qui tam litigation for reasons that, the False Claims Act (FCA) leverages whistleblowers by offering rewards, effectively recruiting individuals with unparalleled insight into illegal government acquisitions. Employees within a company or organization often possess knowledge of misconduct that surpasses even the most sophisticated government oversight systems. Furthermore, gaining access to clandestine information about fraudulent activities may necessitate some level of involvement. In these situations, incentives such as rewards and promises of immunity become necessary to encourage offenders to cooperate, representing a "price the government must pay to prosecute its prime target." To enhance prosecution and recovery efforts, the FCA empowers private individuals to pursue legal action against fraudulent claims on the government's behalf, targeting "any person who knowingly presents...to an officer or employee of the United States Government...a false or fraudulent claim for payment.(Engstrom, D. F. 2012).

1.7 Comparative jurisprudence

Other jurisdictions may have completely different legal systems that enable organizations to receive compensation in direct forms for service provision in law enforcement and security

issues. Studying these international models could be very informative for comparison; however, as the American system has completely different legal and constitutional foundations, the application of these models in the United States would still be rather limited. The Netherlands for example has successfully implemented public private collaboration in its efforts to combat terrorism.

1.71 The Netherlands and public-private partnership in Combating terrorism and money laundering

The development and rationale behind Dutch Public-Private Partnerships (PPPs) in Anti-Money Laundering and Counter-Terrorist Financing (AML/CFT) are rooted in previous endeavours and significant events. Their genesis lies in earlier efforts to tackle digital crime within the banking sector. Specifically, in 2003, several Dutch banks initiated the Financial Institutions – Information Sharing & Analysis Centre (FI-ISAC), which expanded in 2006 to include government agencies. FI-ISAC's core mission has consistently been to facilitate a secure exchange of cybersecurity-related intelligence, encompassing incident reports, threat analyses, vulnerability assessments, and best practice guidance, ultimately aiming to lessen cybersecurity risks to banking information. Vogel, B., Kosta, E., & Lassalle, M. (2024). Furthermore, in 2011, a formal data-sharing partnership emerged between four Dutch banks, the Public Prosecution Service (Openbaar Ministerie), the National Police, and the Dutch Banking Association (NVB). This alliance, named the Electronic Crime Taskforce (ECTF), was formed to foster collaboration with relevant government entities by sharing real-time, critical information to proactively prevent and combat cybercrime.

The need to combat money laundering was heavily fuelled by the surge in terrorism globally and specifically the 9/11 attacks. The ECTF therefore provided a blueprint for future taskforces dedicated to combating money laundering and terrorist financing (AML/CFT). In light of the

numerous terror attacks the Dutch authorities begun to recognize the limitations of their existing CFT policies in identifying subtle connections between financial transactions and potential terrorist activities. (Vogel, B., Kosta, E., & Lassalle, M. 2024).

The informal beginnings of Public-Private Partnerships (PPPs) in the Netherlands can therefore be traced back to 2014, when the necessity to consolidate government-held information and develop actionable typologies for the financial sector became apparent. The formal push for AML/CFT PPPs gained momentum at the October 2016 "Fraud Film Festival" in Amsterdam, where ABN AMRO hosted a breakout session exploring enhanced cooperation between the financial sector and public officials in combating terrorism. During this session, ABN AMRO and other participating Dutch banks voiced their commitment to social responsibility and expressed a desire to improve the detection of terrorist financing.

On July 6, 2017, ABN AMRO, Rabobank, ING NL, Volksbank, and AEGON Nederland launched the financial sector's first public-private partnership (PPP). This resulted in the Transaction Monitoring Netherlands Taskforce (TFTF) pilot, a collaboration between these banks, the National Police, the Public Prosecution Service (project lead), FIU-NL, and the Fiscal Information and Investigation Service (FIOD), guided by the Financial Expertise Centre (FEC). Initially a one-year pilot, the TFTF was extended and became a permanent taskforce in 2019. Following this success, a related PPP, the Serious Crime Taskforce (SCTF), was established in late 2019. The SCTF included ABN AMRO, Rabobank, ING, and Volksbank (from the TFTF), along with the same law enforcement agencies, working together to fight crime and protect the financial sector's integrity. Aegon Bank (Knab) later joined the SCTF. Like the TFTF, the SCTF started as a year-long pilot under the FEC's oversight.

The SCTF achieved permanent structural taskforce status after successful extensions and a positive evaluation. Concurrently, FIU-NL established the Fintell Alliance to collaborate with banks. Volksbank, initially the only private bank involved, volunteered for a pilot program suggested at a Dutch National Bank roundtable. This successful 2018 pilot led to four more banks (ABN AMRO, Rabobank, ING, and Knab) joining, formalizing the collaboration. The Fin tell Alliance aims to improve knowledge sharing and suspicious transaction reporting, ultimately providing better understanding of criminal networks, their methods, and money laundering techniques.

1.72 The United Kingdom

The scope of public private partnership in the UK extends to sharing intelligence with financial institutions in bid to combat terrorism and money laundering as well. While In 2015 UK Home Office pilot program improved intelligence sharing among law enforcement and financial institutions in bid to combat money laundering. This involved the National Crime Agency (NCA) establishing the Joint Money Laundering Intelligence Taskforce (JMLIT). The NCA, also serving as the UK's Financial Intelligence Unit (UKFIU), now receives over 900,000 annual suspicious activity reports (SARs). The UKFIU securely shares nearly all this data—over two million SARs—with UK law enforcement to fight crime. (Vogel, B., Kosta, E., & Lassalle, M. 2024).

While the Home Office announcement didn't detail the structure of JMLIT, some uncertainty existed regarding the type and granularity of information to be shared by private-sector participants with law enforcement. However, a statement from then Home Secretary Theresa May prior to JMLIT's February 2015 launch indicated that the Taskforce would facilitate intelligence sharing and improved understanding of how illicit funds are moved and stored,

enabling better targeting of criminals. Though initially seeming to suggest a focus on broader criminal trends rather than case-specific information, it became apparent that the UK government intended for a more comprehensive dialogue from the outset.(Vogel, B., Kosta, E., & Lassalle, M. 2024).

Law enforcement would receive specific, not general, information. The Taskforce, as the Home Secretary explained, aimed to enhance existing systems, allowing banks to share data with the National Crime Agency (NCA) on a case-by-case basis. Individually innocuous data could, when aggregated, expose criminal patterns and networks. The Home Secretary stressed the vital role of private sector cooperation in fighting financial crime, a significant threat to national security and prosperity. Acknowledging the limitations of government and law enforcement alone, the Home Secretary championed a strong government-industry partnership as essential for tackling serious and organized crime.

The JMLIT project therefore is based on the concept of public-private partnerships, which are considered an effective way to combat increasingly complex money laundering schemes used by criminals. JMLIT asserts that this collaborative approach has broken down traditional barriers between the financial sector and law enforcement, fostering a new model of shared responsibility and cooperation. According to the NCA, JMLIT aims to serve as a partnership where law enforcement and the financial sector can share and analyze information related to money laundering and broader economic threats.(Vogel, B., Kosta, E., & Lassalle, M. 2024). The FAR should therefore be amended to bring about such reforms and to facilitate public private partnership through direct incentives to private actors.

1.8 Ethical and Policy Considerations

There are also ethical and policy issues that need to be considered in proceeds-based compensation for private national security actors. These factors include;

- Risk of Abuses and Overreach: There are probable situations where developments related to seizures or forfeitures provide incentives for unlawful and peremptory actions by private contractors. Sanctions having an independent judiciary, strong oversight and accountability mechanisms and fidelity to the rules of procedural fairness would be essential.

- The issues that can be raised about the so-called mission creep and privatization of core governmental functions relate to the fact that common and inherently governmental jobs like law enforcement, security, intelligence, and others are increasingly delegated to private companies pursuing profit motives.

- Transparency and Accountability: The financial arrangements within proceeds-based contracts would require a high level of transparency and accountability to reduce or eliminate the possibilities of embezzlement of government revenue.

- Limitations to the grant: These will be to ensure that any proceeds generated from the grant are fairly distributed and that there is no windfall gain that is otherwise socially inefficient for private actors while public interests are neglected.

- Oversight and Regulation: A set of policies would also be required to regulate those private actors who work with proceeds-based incentive structures, including applicable standards for behavior, codes regarding use of force (where applicable), and procedures for handling improper actions.

1.9 Conclusion: Charting a Course Through Complexity

The idea of paying private individuals or companies for the provision of national security services in exchange for percentage of profits made from seizures, forfeitures or fees, is an attractive concept that is however juridically and ethically sensitive. Despite the barriers created by the FAR and other related laws and statutes, including lapsing federal funds, and principles of the separation of powers based in the Constitution, the prospect of increased reward and access to specific expertise suggests future exploration. These issues are likely to be resolved by the courts and legislative changes may be necessary as well to create such specific exemptions or new legal categories that would allow these compensation models while preventing their misuse and ensuring their financial viability. There is also need for incorporation of the practices in the UK and Netherlands as discussed to enable and encourage public-private partnerships.

It is however important to note that any shift toward proceeds-based compensation in national security contracting must be done cautiously with respect to due process, fiscal responsibility, and principles of legal and political relationship between the government and the private entities. Additional studies and more considerations in formulating appropriate laws and regulations will be needed to define how such radical forms of compensation could be incorporated into the national security environment safely and effectively.

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