**Case Brief: *Algese 2 s.c.a.r.l. v. United States*, 125 Fed. Cl. 431 (2016) (Algese I)**

**Issue**: Whether the Agency’s responsibility determination was arbitrary and capricious due to the material misrepresentation of an awardee’s certifications of business integrity under FAR § 52.209-5 and FAR § 52.209-7?

**Facts**: Louis Berger Aircraft Services (Louis Berger Aircraft), the awardee of the subject solicitation, was a subsidiary of Berger Group Holdings, Inc. At the time of the subject solicitation (2015), Berger Group Holdings and other subsidiaries were being investigated for fraud and bribery. Prior to the solicitation, on 23 Dec 14, Derish Wolff, a former chairperson of Berger Group (retired in 2010), as well as other executives, plead guilty to defrauding the federal government. A Berger Group subsidiary, Louis Berger International, also entered into a deferred prosecution agreement with the DOJ for corruption occurring between 1998-2010. While this was newly created subsidiary, its creation appeared to keep the Berger Group and other subsidiaries out of the agreement as named defendants. The World Bank debarred Berger Group.

When completing certifications, Louis Berger Aircraft stated that neither it nor any of its principals were indicted, charged, or convicted of any crimes related to government procurement or crimes involving integrity (fraud, bribery, false claims, etc). SAM and FAPIIS reports did not reveal any integrity reports as well.

The Navy was unaware of any of the investigations until Aglese 2, the protestor in this case, filed a protest in another related contract. That contract was awarded during the solicitation of this procurement. Navy attorneys identified the issue and discussed it with DOJ attorneys, who indicated that the deferred prosecution was against Louis Berger International, which Berger Group intentionally carved out of its holdings to avoid having to disclose the prosecution. The Navy sent responsibility questions to Louis Berger Aircraft, which responded that all of its representations and certifications were accurate.

The KO considered all of the above information, but determined that Louis Berger Aircraft was not directly implicated in the public integrity scandals. First, the KO determined that because Mr. Wolff was no longer part of the company, he was not an owner. Second, the KO examined Louis Berger Aircraft’s corporate structure, as well as its sister subsidiaries. The KO determined that Berger Group Holdings did not have any operational control over Louis Berger Aircraft. The KO also found that Berger Group Holdings was not part of the deferred prosecution agreement because the named defendant was Louis Berger International. Therefore, Louis Berger Aircraft that no duty to report the indictments, convictions, and various investigations.

**Holdings**:

* Intentionally concealing criminal proceedings on certifications constitute a material misrepresentations. When a KO discovers a material misrepresentation, the KO should determine the awardee is ineligible for award (holding vacated based on new information)
* A parent company is considered a “principal” for purposes of certifications because it is an owner.
* A former employee who served as a director and part owner of a parent company is considered a “principal” if the departure from the company is within the disclosure period of certifications (3 or 5 years, depending on the disclosure) and still owns shares in the company.

**Court Order:** Set aside award, terminate the contract, and exclude Louis Berger Aircraft Services from further competition when contract is resolicited.

**Analysis**:

* Material, intentional misrepresentations in a proposal generally disqualify an offeror from competition.
	+ A misrepresentation is material if the contracting officer relied on it in forming an opinion.
	+ When contracting officer relies on the misstatement, then the award is arbitrary and capricious
* Certifications under FAR 52.209-5 and 209-7 include “principals.”
	+ “Principal” means any officer, director, **owner**, partner, or person having primary management or supervisory responsibilities
* The focus is whether Derish Wolff and the Berger Group are considered “principals” and whether both were “otherwise criminally charged” under FAR 52.209-5(a)(1)(C)
	+ **Mr. Wolff:** Although Mr. Wolff retired a little over four years prior, he was still a “principal” for purposes of certification. At the time of his guilty plea, he still owned 25% of the parent corporation as well. A contractor cannot circumvent disclosure requirements by firing or otherwise extricating the employee before submitting a proposal. This would create a loophole that would be exploited allowing bad actors to circumvent disclosure requirements in certifications. Therefore, the KO improperly considered Mr. Wolff not to be an owner, Mr. Wolff should be considered an owner, regardless of his departure from the company.
	+ **Berger Group Holdings:**  The Berger Group owned 100 percent of Louis Berger Aircraft Services. Therefore, it is an “owner,” and should be considered a “principal.” Furthermore, the KO’s determination that Berger Group Holdings did not have any operational control was incorrect. Finally, the deferred prosecution expressly included Berger Group Holdings in its definition of “company,” and is therefore a party to the misconduct. Therefore, Berger Group Holdings were “otherwise criminally charged.”
* Based on the above record, the Court found that Louis Berger Aircraft intentionally intended to make false statements in its proposal. The entity is part of a family of corporations which attempted to create a new subsidiary, Louis Berger International, to “dump its criminal liability problems.”

**Case Brief: *Algese 2 s.c.a.r.l v United States,* 127 Fed Cl. 497 (2016) (Algese II)**

**Issue**: Whether an updated responsibility determination that considers an offeror’s material misrepresentations, as well as new facts, is arbitrary and capricious?

**Facts**: After *Algese I*, the Navy moved to reconsider the Court’s opinion and order enjoining Louis Berger Aircraft Services from performance and competition in the solicitation. The Navy based its request on new information not originally included in the record. The Court vacated its judgement and remanded the case back to the Navy, allowing 45 days to update its responsibility determination and issue a new business clearance memorandum in light of the court’s findings in *Algese I.*

The Navy produced 2500 new pages of legal and factual determinations supporting Louis Berger Aircraft Services as a responsible offeror and should be awarded the contract. Louis Berger Aircraft also updated its certifications.

* + **Mr. Wolff –** The Navy disagreed with the Court’s findings. Mr. Wolff separated from Berger Group Holdings in 2010, which was four years before his conviction and the solicitation. Mr. Wolff’s separation agreement required him to sell half his shares to Berger Group Holdings and exchange the other half for non-voting trust certificates. The sale of the shares was executed via a promissory note, and Mr. Wolff executed the exchange of voting shares into non-voting stock. Navy determined that the sale of the shares via promissory note and the exchange of shares into non-voting trust certificates did not give Mr. Wolff ownership interest in Berger Group Holdings, the parent company. While it gives an indicia of ownership, the trust certificates are a debt or financial instruments. A trustee controls the rights of the trust certificate. Therefore, Mr. Wolff asserts no control over Berger Group Holdings.
		- The Navy also challenged the Court’s holding that former employees are still subject to disclosures regarding current indictments and charges.
	+ **Berger Group** – The KO obtained declarations from one of the AUSA’s who drafted the criminal complaint. The AUSA stated that the definition of “company” in the deferred prosecution agreement did not include Berger Group Holdings and that Berger Group Holdings did not create Louis Berger International to dump its criminal liabilities. Instead, the Louis Berger International was created during a corporate restructuring, which inherited the criminal liabilities as a second order effect to the restructuring. Therefore, it was the named defendant. The DOJ’s Criminal Division concurred with the prosecution team’s assessment, stating it did not intend to implicate Berger Group Holdings in its description of Louis Berger International’s misconduct. The Navy also requested Louis Berger Aircraft to address the issue, which it did (not included in the opinion). The Navy determined that Louis Berger Aircraft’s statements were accurate.
* The Navy also re-reviewed past performance. The past performance board reviewed the protestors concerns for business integrity and the Louis Berger’s response. It also determined that any concerns with affiliated corporations bad acts are irrelevant to the awardee’s performance capabilities under this particular contract. The board gave a substantial confidence rating.

**Holdings**: The court will only review the process by which an agency reaches a determination to ensure compliance with the RFP and regulations. It will not substitute its judgment for the KO. As long as the agency has a rationale basis and followed regulations, then it will uphold its determination.

**Court Order:** Lift permanent injuction.

**Analysis**:

* While the court may disagree with an agency determination, it will be upheld as long as the decision has a rationale basis and does not violate a law or regulation.
* The Court gives the KO’s responsibility determination considerable discretion because it is largely a matter of judgement, and will be upheld as long as the record supports the determination.
* In the Navy’s new responsibility determination, it properly considered whether Derish Wolff was a principal and whether his conviction was connected to an award or contract performance by Louis Berger Aircraft Services.
	+ **Derish Wolff** – A trust is intended to dissociate ownership of economic interest from the parent company. Title of the shares, which is the actual ownership interest, remained with the trustee. The trust certificates were a financial instrument. Further, the separation agreement ensured that Mr. Wolff would never own stocks. Therefore, it is reasonable to conclude Mr. Wolff was not an owner at the time of the solicitation, as well as when he was indicted and convicted.
	+ **Berger Holdings** – Even though the court questions Louis Berger Aircraft’s truthfulness, it will not disturb the agency’s findings as long as its path to its determination can be reasonably discerned. The determination is rationale because the Navy was fully aware of the facts, considered them, and made a judgment supported by the record.
* The Court also acknowledged that FAR 52.209-7 does not expressly require offerors to disclose information about former principals. When a FAR clause is ambiguous, the Court defers to the KO’s interpretation. The KO’s interpretation that FAR 52.209-7 does not require offerors to disclose information about former principals is reasonable.
* The past performance consideration followed the RFP criteria. The Court will not disturb the past performance determination as long as it is reasonable and consistent with the evaluation criteria.