



# DEPARTMENT OF THE AIR FORCE

ARLINGTON, VA

Office of the Deputy General Counsel

FEB 12 2010

## MEMORANDUM IN SUPPORT OF THE DEBARMENTS OF:

HUMMINGBIRD AVIATION, LLC  
CHARLES PRIESTLY

On November 25, 2009, the Air Force proposed the debarments of Charles Priestly ("Priestly") and Hummingbird Aviation, LLC ("Hummingbird") from Government contracting and from directly or indirectly receiving the benefits of federal assistance programs. The actions were initiated pursuant to Federal Acquisition Regulation (FAR) Subpart 9.4.

By correspondence dated December 29, 2009, the designated counsel for these parties submitted matters and arguments in support of brokering an administrative agreement. On January 4, 2010, the designated counsel for these parties submitted matters and arguments in opposition to the proposed debarments. By correspondence dated January 13, 2010, the designated counsel for these parties submitted supplemental matters and arguments in opposition to the proposed debarments and an additional request for an administrative agreement.

All matters and arguments in opposition to the proposed debarments ("the Submissions") on behalf of Priestly and Hummingbird (collectively "Respondents"), and all information in the administrative record ("the Record"), have been read and carefully considered.

### INFORMATION IN THE RECORD

Information in the record indicates that at all times relevant here:

1. Hummingbird is a limited liability corporation based in Connecticut, with its principal place of business in Hammond, Louisiana. The company offers a variety of helicopter services, including rentals and sales, and contracted with USTRANSCOM to provide helicopter services in Afghanistan in 2007. Priestly is the CEO of Hummingbird.
2. Helimed Limited ("Helimed") is a foreign corporation based in Ireland and operating primarily in Galway that provides helicopter services, including helicopter storage space. Shiel is the CEO of Helimed.
3. USTRANSCOM contracted with Hummingbird for helicopter services in Afghanistan on October 1, 2007. To provide these services, Hummingbird subcontracted with Helimed to rent a

Sikorsky S-61 N helicopter ("the helicopter"). Hummingbird memorialized the terms of the subcontract in a Helicopter Lease Agreement ("the lease") with Helimed. The lease was initially signed by Priestly and Shiel on November 29, 2007, but was not shown to USTRANSCOM at this time. The lease stated that Hummingbird would pay Helimed \$150,000 per month for the helicopter rent.

4. Helimed performed its obligations under the lease, successfully acquiring and storing the helicopter. However, Hummingbird failed to complete its independent obligation to obtain the required FAA clearance to operate the helicopter in Afghanistan. As such, Hummingbird was unable to perform its contractual obligations for USTRANSCOM. USTRANSCOM terminated the contract for convenience. Formal notification of the termination was sent to Hummingbird on February 14, 2008, and final modification of the contract was effective April 9, 2008.

5. On December 11, 2007, Priestly emailed Shiel to request that they backdate their lease contract from November 29, 2007 to August 31, 2007. Priestly stated in this email that, "[t]his would help me and in a month, or so, might net us both a little extra cash." Priestly also stated that he backdated the contract to encourage the FAA to approve their helicopters, as FAA tended to look favorably upon leases that had been in place longer and that backdating the lease would help Hummingbird "with getting up higher in the cue [sic] with the FAA to get a priority."<sup>1</sup>

6. During the course of contract termination, Hummingbird requested payments from USTRANSCOM to allow the small business to continue operating, in accordance with FAR 49.503. This request included reimbursement for the lease payments Priestly stated had been made to Helimed based on the backdated lease. USTRANSCOM asked that Priestly provide USTRANSCOM with receipts for the lease payments to Helimed. Priestly indicated by email that he did not "get receipts for making lease payments," but that he would produce the August 31, 2007 lease. Unaware that the lease was backdated and relying on the lease as evidence of the duration of Hummingbird's obligation to Helimed, USTRANSCOM overpaid Hummingbird by \$300,000 for rent for October and November 2007.

7. Helimed did not receive payment from Hummingbird for its services from December 2007 through April 2008, when Hummingbird's contract was formally terminated for convenience. In December 2008, Helimed sued Hummingbird in the U.S. District Court for the Eastern District of Louisiana for breach of contract. This suit asks for the enforcement of the November 29, 2007 non-backdated lease agreement and does not include the \$300,000 for rent from October and November 2007 for which USTRANSCOM paid Hummingbird.

8. Two former Hummingbird employees have sued Priestly and Hummingbird in U.S. District Court for the Eastern District of Louisiana for the recovery of unpaid wages owed according to their employment contracts with Hummingbird. A settlement agreement was entered into as of June 8, 2009. However, payments due to the employees according to the terms of the settlement were not made, and the case was ordered reopened on December 10, 2009.

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<sup>1</sup> Priestly made this statement in a deposition taken on March 31, 2009 in connection with the litigation between Hummingbird and Helimed in U.S. District Court for the Eastern District of Louisiana (Civil Action No. 08-5062-AJM-DEK).

## ANALYSIS

The Submissions do not demonstrate the present responsibility of Priestly and Hummingbird to be Government contractors or subcontractors. The January 4<sup>th</sup> submission neither acknowledges nor refutes the fact that Priestly fraudulently backdated the lease sent to USTRANSCOM to obtain excess funds.<sup>2</sup> While the Respondents acknowledge that USTRANSCOM paid Hummingbird \$750,000 for the Helimed lease and offer to pay the Air Force a small sum for anticipated expenses related to reviewing this matter, the respondents do not indicate that USTRANSCOM has been or will be reimbursed the \$300,000 obtained through the backdated lease.

The Respondents' Submission also appears to confirm that Hummingbird did not pay Helimed for the three months that Helimed made its helicopter available under the lease, despite having received funds from USTRANSCOM for that purpose. Priestly and the contract officer signed the modification that terminated the contract for convenience which stated that the contractor shall, "...within 10 days after receipt of the payment specified in this agreement, pay to each of its immediate subcontractors (or their respective assignees) the amount to which they are entitled, for costs which were used in arriving at the amount of this settlement proposal..." David B. Danel, an independent CPA whose letter is attached to the January 4<sup>th</sup> submission, stated that while Hummingbird received payment from USTRANSCOM, he was unable to verify payment to Helimed.

Although the January 4<sup>th</sup> submission asserts that neither Hummingbird nor Priestly retained any of the funds paid by USTRANSCOM, Mr. Danel relates that he reviewed both checks written by Mr. Priestly and Hummingbird's wire transfers. As for the latter, Mr. Danel stated he was unable to determine who authorized the transfer and who received it.

Respondent's submissions indicate that Hummingbird was not a responsible government contractor at the time it was bidding on the USTRANSCOM contract. Mr. Danel, in the January 4<sup>th</sup> submission, states that Hummingbird did not have the financial resources to perform when it bid on the contract and that he assisted Hummingbird with its unsuccessful quest for financing after contract award. Mr. Danel also states that, at the time of the contract award, the company did not have in place a financial reporting process, receivable reporting procedure, or an evaluation mechanism to review financial statements. Furthermore, according to Mr. Danel, throughout the contract period, "the company was not able to put in place a properly functioning system of internal controls, and financial reporting system..." A presently responsible contractor does not bid on contracts it has neither the financial resources nor compliance infrastructure to perform.

The January 4<sup>th</sup> submission states that Hummingbird and Priestly "acknowledge the seriousness of the charges set forth in the proposed debarment notices" and, in addition, this

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<sup>2</sup> The backdated lease was produced as an exhibit in the litigation between Hummingbird and Helimed in U.S. District Court for the Eastern District of Louisiana.

office was provided a copy of Hummingbird's Ethics Policy.<sup>3</sup> However, the Respondents fail to acknowledge or address the backdated lease, their use of that lease to defraud USTRANSCOM, their failure to pay vendors or employees, and their failure to reimburse USTRANSCOM. The Respondents have not demonstrated their present responsibility.

According to FAR 9.406-4, the debarment period will "generally" not exceed three years. In this case, the Respondents' failure to acknowledge their wrongdoing, their failure to express any intent to make either the government or their suppliers whole, the new evidence that they were not competent to perform the contract at the outset, and the attempt to blame others for the situation, coupled with no serious evidence of mitigating factors, supports a longer debarment period than that which is generally imposed.

### FINDINGS

1. The improper conduct of Hummingbird and Priestly is of so serious or compelling a nature that it affects their present responsibility to be Government contractors or subcontractors and provides a basis for their debarments pursuant to FAR 9.406-2(c).
2. The seriously improper conduct of Priestly may be imputed to Hummingbird, pursuant to FAR 9.406-5(a), because the seriously improper conduct occurred in connection with the performance of duties for or on behalf of Hummingbird or with the knowledge, approval, or acquiescence of Hummingbird. The imputation of Priestly's seriously improper conduct to Hummingbird provides a separate and independent cause for its debarment.
3. The seriously improper conduct of Hummingbird may be imputed to Priestly pursuant to FAR 9.406-5(b), because as an officer, director, shareholder, partner, employee, or other individual associated with Hummingbird he participated in, knew of, or had reason to know of Hummingbird's seriously improper conduct. The imputation of Hummingbird's seriously improper conduct to Priestly provides a separate and independent cause for his debarment.
4. Hummingbird and Priestly are affiliates as defined by FAR 9.403, since Priestly either owns and/or controls Hummingbird. That affiliation provides a separate basis for the debarment of Priestly and Hummingbird, pursuant to FAR 9.406-1(b).

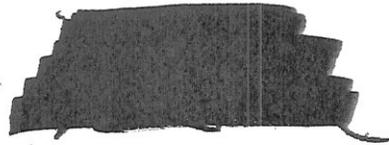
### DECISION

Pursuant to the authority granted by FAR Subpart 9.4, Defense FAR Supplement, subpart 209.4, and 32 C.F.R., Section 25, and based on the evidence contained in the administrative record and findings herein, Priestly and Hummingbird are debarred for a period of six years from November

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<sup>3</sup> The Ethics Policy is of some value and has been considered, but it carries very little mitigating weight. The misconduct here was intentional and was committed by the CEO. That conduct would not have been deterred by a revised Ethics Policy.

25, 2009, the date Priestly and Hummingbird were proposed for debarment. The debarments shall terminate on November 24, 2015.



STEVEN A. SHAW  
Deputy General Counsel  
(Contractor Responsibility)