

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA

v.

BAE SYSTEMS plc,

Defendant.

Criminal No. 1:10-cr-00035-JDB

ORAL ARGUMENT REQUESTED

**MOTION OF BAE SYSTEMS PLC FOR AN EXTENSION OF THE
DEADLINE FOR THE APPROVAL BY THE DEPARTMENT AND
ENGAGEMENT OF A CORPORATE MONITOR**

1. BAE Systems plc (“BAES” or the “Company”) respectfully submits this motion (the “Motion”) for a 90-day extension of the deadline for BAES to engage, and the Department (as defined below) to approve, a corporate monitor (the “Monitor”). Efforts to reach an agreement with the United States Department of Justice, Criminal Division Fraud Section and National Security Division Counterespionage Section (collectively the “Department”) on a brief extension have reached an impasse, and therefore the Department has not granted its consent to the Motion.

2. As a condition of BAES’ Plea Agreement, the Company agreed to engage the Monitor within 90 days from the March 1, 2010 acceptance of the Plea Agreement by this Court. *See* Plea Agreement, Dkt. 8, para. 12. According to the Plea Agreement, the Monitor’s period of engagement is to last no longer than three years from the acceptance of the plea agreement – March 1, 2013. During the Monitor’s engagement, he is to “assess and monitor the Company’s compliance with the terms of this agreement so as to specifically address and reduce the risk of any recurrence of the Company’s misconduct, including evaluating the Company’s

corporate compliance program with respect to the Foreign Corrupt Practices Act of 1977 ('FCPA'), as amended, 15 U.S.C. §§ 78dd-1, *et seq.*, other relevant anti-corruption laws, the Arms Export Control Act ('AECA') and International Traffic in Arms Regulations ('ITAR'), and other relevant export control laws, and making recommendations for improvement." Plea Agreement, Dkt. 8, App. C, para. 1. The Monitor is required to prepare three reports in this regard. The first report is due within 120 days of the approval of the Monitor by the Department. The second is due one year thereafter and the third is due one year following the second report (if the Monitor is still engaged at that point). *See* Plea Agreement, Dkt. 8, App. C, para. 8(i).

3. Additionally, this Court incorporated the engagement of the Monitor into the terms of BAES' probation, providing, as Additional Probation Term 2, that, "[t]he defendant shall engage and maintain an independent corporate monitor for a period not to exceed THREE (3) YEARS from the date of sentencing as set out in Appendix C to the Plea Agreement, filed in this case." Judgment, Dkt. 9, p. 3.

4. BAES is constrained, however, in its ability to engage the Monitor. Under the terms of the Plea Agreement, BAES cannot engage the Monitor until the Department accepts the Monitor proposed by BAES. *See* Plea Agreement, Dkt. 8, para. 12. Pursuant to this requirement, the Department has informed BAES that the Department and BAES must first agree on an individual to serve as the Monitor, and that his engagement must then be approved through an internal Department process, including by a Standing Committee established within the Department to review the selection and independence of compliance monitors.

5. Since the approval of the Plea Agreement, BAES has proposed six highly qualified citizens of the United Kingdom to serve as the Monitor, three more than required by the

terms of the Plea Agreement.¹ The Department, however, rejected as “unqualified” the first three candidates, all of whom had served as members of the English judiciary, without even agreeing to conduct interviews or seeking additional information about them. The Department has also, thus far, declined to accept any one of the second group of candidates, who are highly accomplished and respected lawyers in the U.K., including a former Senior Partner of a leading British law firm. At present, the two current Monitor candidates have had initial meetings with the Department and a follow-up meeting between one of the Monitor candidates and the Department is scheduled for June 3, 2010.²

6. BAES stands ready to engage immediately any one of the five remaining candidates it has proposed. The Department, however, has refused to recommend to the Standing Committee that they approve any of the proffered candidates. Because the Department has refused to recommend approval of any of the candidates, it will not be possible for BAES to engage the Monitor prior to the original May 30, 2010 deadline (which as a practical matter is June 1 due to the Memorial Day national holiday). At a minimum, the Department has informed BAES that the Standing Committee’s review will take approximately 30 days after the Department and BAES agree on a Monitor candidate to recommend to the panel.

7. BAES, therefore, respectfully requests a 90-day extension of the deadline to engage the Monitor, to August 30, 2010.³ That extension of the deadline to 180 days after the acceptance of the Plea Agreement will not prevent the Monitor from fulfilling the terms of his

¹ The Monitor must be a United Kingdom citizen, be approved by Her Majesty’s Government, and receive the required security clearances from the United Kingdom Ministry of Defence. *See* Plea Agreement, Dkt. 8, para. 12 & App. C, para. 2. These requirements narrow considerably the list of potential Monitor candidates.

² The second group of candidates, which initially included three individuals, has been reduced to two following the withdrawal of one candidate.

³ Because August 28, 2010 is a Saturday, we ask that BAES be permitted to engage the Monitor by August 30, 2010, the following Monday.

engagement, as set out in Appendix C to the Plea Agreement, within the three year term of BAES's corporate probation. *See* Judgment, Dkt. 9, p. 2. Specifically, the Monitor will, within that time, be able to issue the initial report (within 120 days of his approval) and, thereafter, the additional reports (one year and two years after the date he issues his initial report) required by the terms of Appendix C. *See* Plea Agreement, Dkt. 8, App. C, para. 8(i). Moreover, despite the 90 day extension, the Monitor will still fulfill the required period of engagement under the Plea Agreement and the Judgment, which is "not to exceed three (3) years from the date of acceptance of" the Plea Agreement by this Court.⁴

⁴ It is of no moment that the Monitor will be engaged for less than three years. The Plea Agreement, by providing that the Monitor would be engaged "for a period not to exceed three (3) years from the date of acceptance of" the Plea Agreement, rather than from the date of his engagement, specifically contemplated an engagement of less than three years. *See* Plea Agreement, Dkt. 8, para 12.

Moreover, the DOJ's policy on the use of monitors specifically provides "in most cases, an agreement should provide for early termination if the corporation can demonstrate to the Government that there exists a change in circumstances sufficient to eliminate the need for a monitor." *See* Criminal Resource Manual § 163, "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations," available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm. The Department and BAES incorporated that concept into the Plea Agreement by agreeing that the Monitor's engagement was to be for a period not to exceed three years. *See* Plea Agreement, Dkt. 8, para 12.

Finally, to the extent that the Department has withheld its consent to this Motion because it advocates extending the probationary term, it is unclear whether the Court has such authority in the case of a Rule 11(c)(1)(C) plea agreement without the consent of both parties, which was the original basis for the plea and the entry of the sentence. *See United States v. Heard*, 359 F.3d 544, 548 (D.C. Cir. 2004) (citing Fed. R. Crim. P. 11(e)(1)(C), now renumbered Fed. R. Crim. P. 11(c)(1)(C)); *see also United States v. Lockwood*, 416 F.3d 604, 607 (7th Cir. 2005); *United States v. Ritsema*, 89 F.3d 392, 401 (7th Cir. 1996) ("Were courts free to re-examine the wisdom of plea bargains with the benefit of hindsight, the agreements themselves would lack finality and the benefits that encourage the government and defendants to enter into pleas might prove illusory, just as they did here."). In this case, the Plea Agreement does not provide for the extension of the three year period, and therefore the Department lacks a basis to seek such an extension, absent the parties' agreement to amend the plea agreement and present that amendment to the Court for approval. The same is true for extending the Monitor's term beyond March 1, 2013.

WHEREFORE, BAES requests that this Court extend the current 90-day deadline for the appointment of the Monitor by 90 days, to August 30, 2010.

Dated: May 27, 2010
New York, New York

Respectfully submitted,

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