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BAE pleads guilty to minor accounting offence in Tanzania radar scandal

Sentencing at Crown Court on 20 December 2010

Arms company BAE Systems today pleaded guilty at the City of Westminster magistrates court in London to minor charges of false accounting relating to its controversial sale of military radar equipment to Tanzania in 1999. The sale has been surrounded by allegations of corruption.

BAE and the Serious Fraud Office (SFO), which was investigating the corruption allegations, announced in February 2010 that they had reached a "plea bargain" settlement under which BAE would plead guilty to the accounting misdemeanours.

After BAE entered its guilty plea, District Judge Caroline Tubbs gave permission for the plea bargain settlement to be heard at the higher Southwark Crown Court on Monday 20 December. At this unprecedented December hearing, the judge, Mr Justice Bean, will be asked to confirm the final settlement.

The single criminal offence against BAE, presented by SFO lawyer Louis Mably, was brought under section 221 of the Companies Act 1985 concerning a corporation's "duty to keep accounting records". It states that British Aerospace Defence Systems Limited failed:

"to keep accounting records which were sufficient to show and explain payments made pursuant to (a) a contract between Red Diamond Trading Limited and Envers Trading Corporation, (b) a further contract between British Aerospace (Operations) Limited and Merlin International Limited."

The SFO had been investigating allegations that BAE covertly channelled bribes through the Panama-registered Envers from its company, Red Diamond, to secure a contract in 1999 to supply Tanzania with a military radar system costing £28 million. (British Aerospace Defence Systems was a UK subsidiary of Siemens AG [Siemens Plessey Systems] that BAE acquired in April 1998 and renamed.)

The charge, however, is not being brought against this BAE subsidiary or its company officers, but against the ultimate parent company, BAE Systems Plc, for knowingly procuring the failure of this subsidiary to keep accounting records:

B.A.E Systems Plc, between 1st January 1999 and 31st December 2005, knowingly procured the failure of British Aerospace Defence Systems Limited to comply with the provisions of section 221 of the Companies Act 1985, and thereby aided and abetted, counselled and procured the commission of the offence contrary to section 221(5) of the Companies Act 1985 by the officers of British Aerospace Defence Systems Limited.

When asked how BAE pleaded to this charge, QC David Perry acting for BAE said simply "guilty", and declined to add anything further.

There was no mention by the SFO at the Magistrate's five-minute hearing of a request by The Corner House and Campaign Against Arms Trade (CAAT) to bring to the Court's attention the SFO's apparent undertaking as part of the plea bargain never to prosecute any individual in future if doing so involves alleging BAE Systems was guilty of corruption.

ENDS

NOTES

1. Campaign Against Arms Trade (CAAT) works for the reduction and ultimate abolition of the international arms trade together with progressive demilitarisation within arms producing countries. www.caat.org.uk

The Corner House aims to support democratic and community movements for environmental and social justice through analysis, research and advocacy. www.thecornerhouse.org.uk.

The Serious Fraud Office is a UK government department that investigates and prosecutes complex fraud. It aims to contribute to "the delivery of justice and the rule of law. It has been investigating alleged bribery and corruption in BAE's deals in at least six countries since 2004. www.sfo.gov.uk.

BAE Systems is one of the world's largest arms producers. It makes fighter aircraft, warships, tanks, armoured vehicles, artillery systems, missiles and munitions. Its foremost markets are Saudi Arabia and the United States. It has consistently denied any wrong-doing.

2. In their letter of 19 November to SFO Director Richard Alderman, CAAT and The Corner House state:

We remain deeply concerned about the terms of the plea bargain that the SFO has struck with BAE. ...you disclosed that:

"BAe requested an undertaking form [sic] the SFO that in any future

proceedings (to which BAe was not a party) the prosecution would not allege that the company was guilty of corruption."

Despite repeated requests, the SFO has not released further details of this undertaking.

See:

<http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/19NovLetterToSFO.pdf>

- 3. Tanzania:** In 2001, BAE sold a £28 million military Watchman air traffic control system to Tanzania, one of the world's poorest countries. The sale was funded through a loan from Barclays Bank. The deal was backed by then UK Prime Minister Tony Blair, but opposed by the Secretary of State for International Development, Clare Short, who, though she had no evidence, said she did not think the contract "could have been made cleanly". In 2002 the International Civil Aviation Organisation said the system used dated technology and was not adequate for civil aviation. Tanzania does not have a military air force. Norman Lamb MP, who compiled a dossier on the deal, said a modern system could have been provided for 10 per cent of the cost.

The Serious Fraud Office was investigating allegations that over £6 million was paid by a BAE company, Red Diamond, into a Swiss bank account under the control of BAE's Tanzanian agent Sailesh Vithlani, who has a British passport. In August 2007 an international arrest warrant was issued for Sailesh Vithlani and a criminal case has been filed in Tanzania charging him with perjury and lying under oath in connection with the radar deal. He is now listed as wanted by Interpol.

Paying an inflated commission to an adviser (who then pays a government official to clinch a deal) is a common channel for bribes in international contracts and is considered to be a "red flag" when conducting any due diligence involving a contract.

In April 2008, Andrew Chenge, Tanzania's Infrastructure Minister, who had been Attorney General at the time of the radar purchase, resigned following claims regarding £500,000 in a Jersey bank account. He does not dispute the money's existence, but denies it came from BAE.

The Serious Fraud Office requested mutual legal assistance from Tanzania in March 2008 to investigate the allegations, which it outlined in detail.

In February this year, when the SFO announced its plea bargain with BAE, Clare Short said:

"Every way you looked at it, it [the deal] was outrageous and disgraceful . . . It was an obviously corrupt project. Tanzania didn't need a new military air traffic control, it was out-of-date technology, they didn't have any military aircraft – they needed a civilian air traffic control system and there was a modern, much cheaper one. Everyone talks about good governance in Africa as though it is an African problem, and often the roots of the 'badness' is companies in Europe."

(Rob Evans and Paul Lewis, "BAE deal with Tanzania: Military air traffic control – for country with no airforce", The Guardian, 6 February 2010, <http://www.guardian.co.uk/world/2010/feb/06/bae-tanzania-arms-deal>)

4. More information on the SFO's plea bargain settlement with BAE and the legal challenge brought by CAAT and The Corner House can found at <http://www.caat.org.uk/issues/bae/jr/>

We argued that the plea agreement reached between the SFO and BAE failed to reflect the seriousness and extent of BAE's alleged offending (which includes corruption and bribery), as required in the Attorney General's 2009 *Guidance on Plea Discussions in Cases of Serious or Complex Fraud*. http://www.sfo.gov.uk/media/111905/ag_s_guidelines_on_plea_discussions_in_cases_of_serious_or_complex_fraud.pdf

In the past two years, the SFO has been trying to reach US-style plea bargain settlements in which it encourages companies to self-report their bribery and corruption in return for reduced penalties. BAE did not self-report, however; the SFO had been investigating bribery allegations since 2004 from information supplied by others.

5. Under the plea bargain, BAE agreed with the SFO to pay a £30 million penalty. Some of this would pay whatever fine is imposed by the Crown Court in December; the remainder has been earmarked as an "an ex-gratia payment for the benefit of the people of Tanzania". It is not clear, however, to whom this payment would be made. Some Tanzanian civil society groups are concerned that giving it to the Tanzanian Government would continue the alleged corruption. *Bloomberg News* reported a US Department of Justice official as saying: "There is a grave danger that you're returning money to the very people that took bribes in the first place. The last thing one wants to do is fuel corruption in the name of fighting it."

The Tanzanian government may not wish to receive the money as doing so could be seen as acknowledging that government officials took bribes. "Accepting the money may be seen as an admission of guilt, and there may be concern that it puts further pressure on the country to investigate and prosecute their own officials" said the US official.

(See Lindsay Fortado, "U.K. Plan to Return Cash to Bribery Victims May Fuel Corruption", *Washington Post/Bloomberg News*, 14 July 2010. <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/14/AR2010071405471.html>)

6. Since the SFO and BAE struck their plea bargain in February 2010, doubt has been raised in UK legal circles as to whether the agency has the power to make such deals.

In March 2010, when the SFO brought its settlement with chemical firm Innospec to court, Lord Justice Thomas said that the SFO acted beyond its remit in securing the trans-Atlantic plea bargain and that the fine was "inadequate". He concluded "that the director of the SFO had no power to enter into the arrangements made and no such arrangements should be made again."

Innospec pleaded guilty to paying bribes to Indonesian government officials between 2002 and 2006 to win contracts to supply the fuel additive, tetraethyl

lead. BAE, however, has denied all the bribery allegations that the SFO was investigating and has pleaded guilty only to one minor accounting offence for which, under current 2006 legislation, the maximum statutory fine is £5,000. (BAE is being charged under 1985 legislation.)

In April 2010, the SFO brought to court the plea bargain deal it had reached with pharmaceutical company director Robert John Dougall. Under this deal, Dougall pleaded guilty to conspiring to make £4.5 million worth of bribes to Greek health officials to buy corporate products and assisted the SFO's investigation in return for a suspended prison sentence. But Mr Justice Bean jailed Dougall for 12 months, saying that a suspended sentence was not suitable because "the public would simply not accept if someone involved in long term criminality on this scale was not given an immediate sentence of imprisonment."

Mr Justice Bean is to hear the SFO's plea bargain settlement with BAE in December.

7. The SFO's plea bargain settlement with BAE is often described as a co-ordinated transatlantic deal to tackle corporate corruption because it was announced on the same day (5 February 2010) as a settlement between BAE and the US authorities.

But according to a legal statement by SFO Director Richard Alderman, the SFO was in fact aiming to finalise its case on Eastern Europe by the end of January 2010 and to submit papers in mid-February to the Attorney General requesting consent to prosecute, when, on 29 January, the US Department of Justice:

"contacted the SFO and indicated that a plea agreement with BAe was imminent. The agreement involved BAe entering pleas of guilty in respect of offences connectmed to the investigations concerning Eastern Europe and Saudi Arabia, and a payment of \$400 million."

(Director of the Serious Fraud Office, Summary Grounds for Contesting the Claim, para. 12, http://www.caat.org.uk/issues/bae/jr/SFO_Grounds_2010-3-10.pdf)

The SFO contends that the Eastern Europe aspect of the US agreement would be "highly likely" to prevent prosecution in England for the offences involving Eastern Europe that the SFO was investigating because of "the principle of double jeopardy" – a defendant cannot be prosecuted twice for the same crime on the same set of facts. This is despite the charges against BAE in the US not being of a similar character to those that would have been brought in the UK: in the US, BAE pleaded guilty to conspiring to make false, inaccurate and incomplete statements to the US authorities and to file false export licences, whereas in the UK, the SFO was investigating corruption offences.

If the double jeopardy principle is accepted, however, no explanation has ever been given as to why the US plea bargain settlement on BAE's deals in Eastern and Central European countries took priority over the SFO's intended prosecution in the UK, given that BAE Systems is headquartered in the UK, the allegations relate to activities emanating from the UK, and the US was relying on evidence supplied to it by the SFO.

8. As BAE has not pleaded guilty to corruption in either the US or the UK, it can continue to bid for public procurement contracts to supply military equipment and services in both the US and Europe.

The SFO Director has acknowledged that “a conviction for an offence of corruption would have had the effect of debarring BAe for tendering for public contracts in the EU”. The SFO’s own *Guidance on Corporate Prosecutions* states that “a decision not to prosecute because the Directive is engaged will tend to undermine its deterrent effect”, which “is intended to be draconian”. Yet the SFO Director has stated that this consequence would have been “a disproportionate outcome.”

(Director of the Serious Fraud Office Summary Grounds for Contesting the Claim, para 14.5. http://www.caat.org.uk/issues/bae/jr/SFO_Grounds_2010-3-10.pdf)