

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 98294 / September 6, 2023

ADMINISTRATIVE PROCEEDING
File No. 3-21613

In the Matter of

JAMES F. BRITTAIN,

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission (“Commission” or “SEC”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”) against James F. Brittain (“Brittain” or “Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over the Respondent and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings, Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent’s Offer, the Commission finds¹ that

¹ The findings herein are made pursuant to Respondent’s Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

Summary

1. This matter stems from Brittain's involvement in Fluor Corporation's ("Fluor") percentage of completion ("POC") accounting for a fixed-price construction project on which Fluor carried the risk of cost overruns with respect to work within the contract's scope and not the customer. The project required Fluor to design and build a Floating Production Storage and Offloading ("FPSO") facility for delivery to the Penguins oil and gas field located in the North Sea ("Penguins" or the "Penguins Project"). Immediately following the project's contract award, Fluor experienced cost overruns that worsened over time.

2. For the quarters ending June 30, 2018 and September 30, 2018 (the "Relevant Period"), Brittain, President of the Energy & Chemicals ("E&C") segment of Fluor, was a cause of inaccurate project forecasts being generated that failed to include all anticipated costs, thus preventing the project from being reported at a loss. Brittain thereby was a cause of Fluor's failure to maintain a system of internal accounting controls sufficient to account for the Penguins Project in accordance with Generally Accepted Accounting Principles ("GAAP"). These failings resulted in Fluor maintaining inaccurate books and records and ultimately in Fluor including materially misstated financial statements in periodic reports filed with the SEC for the quarters ending June 30, 2018 and September 30, 2018. Brittain was a cause of Fluor's filing these materially inaccurate financial statements in its periodic reports with the SEC.

3. In August 2019, Fluor announced \$714 million in pre-tax charges stemming from an "operational and strategic review" of sixteen projects, including Penguins. Prompted by the SEC staff's investigation, Fluor undertook an internal investigation in 2020 that identified material weaknesses in its internal control over financial reporting and material errors in its financial statements, and resulted in Fluor restating its annual and quarterly financial statements for its fiscal year 2016 through the third quarter of 2019, as disclosed in its 2019 Form 10-K filed with the SEC on September 25, 2020 (the "Restatement"). The material weaknesses and errors identified in the Restatement were attributable in part to control failures associated with the Penguins Project. Fluor's delayed recognition of the loss on the Penguins Project for two quarters resulted in Fluor overstating its net earnings by \$17 million (22%) in the second quarter of 2018.

4. As a result of conduct detailed herein, Brittain was a cause of Fluor's violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 13a-13 and 12b-20 thereunder.

Respondent

5. **James F. Brittain**, age 64, is a resident of Alberta, Canada. He served as President of the E&C segment at Fluor from 2017 until he retired in May 2019. He has never been registered with the Commission in any capacity.

Relevant Entity

6. **Fluor Corporation** is a Delaware corporation with its principal place of business in Irving, Texas. Since registering its common stock with the SEC under Section 12(b) of the Exchange Act in 2000, Fluor has been required to file periodic reports on Forms 10-K and 10-Q with the SEC pursuant to Section 13(a) of the Exchange Act and related rules thereunder. During the Relevant Period, the stock traded on the New York Stock Exchange under the ticker symbol “FLR.” Fluor performs engineering, procurement, and construction services worldwide and operates through business segments, including E&C.

Background

7. Under GAAP, Fluor accounted for its fixed-price projects using the POC method, whereby it was required to periodically recognize the project’s costs as incurred and the revenue as a percentage of the work completed to date. Under this method, each reporting period, a project team develops dependable estimates of expected total revenues, total costs, and total project gross margin (“PGM”) to arrive at a project’s financial forecast (known as the Estimate at Completion or “EAC”). Upon a loss first being anticipated on a project, the project must immediately recognize the entire amount of the loss.

8. To periodically record a project’s EAC, Fluor required use of the Project Margin Analysis Report (“PMAR”), which should document project management’s most likely current estimate of the project’s revenue, cost, and PGM forecast. Fluor’s internal accounting controls required that Brittain, as President of E&C, along with two other segment officers, provide sub-certifications to corporate-level management, with each signer representing that, “to the best of our knowledge and belief,” the project forecasts represent management’s best estimate, and are in compliance with the applicable GAAP and Fluor’s policies.

Penguins Project

9. In December 2017, the E&C segment of Fluor won a contract for an FPSO project with a large international energy company (the “Customer”). Fluor’s responsibilities under the Penguins contract included engineering, design, procurement, selection of subcontractors, construction management, fabrication, integration, commissioning, delivery, and handover of the FPSO. Brittain approved the final bid for the Penguins Project.

10. The contract totaled \$491.7 million, with an as-sold margin of \$33.9 million. The bid was based on Fluor subcontracting fabrication of the FPSO to an offshore engineering, procurement, and construction company (“Fabrication Subcontractor”). This subcontract was a significant portion of the Penguins Project, constituting at least 25% of the cost of the overall contract. Although Fluor received a binding bid from the Fabrication Subcontractor for a subcontract agreement, it had expired prior to Fluor submitting its final bid to the Customer. Accordingly, Fluor had to finalize the subcontract with the Fabrication Subcontractor after Fluor signed its fixed-price Penguins contract.

The Second Quarter 2018 Forecast Inaccurately Reported Penguins as Profitable

11. In May 2018, Fluor personnel compiled forecasts reflecting the best, most likely, and worst case financial scenarios for the Penguins Project. By the middle of the second quarter of 2018, they concluded that the most likely scenario for the Penguins Project was that it “won’t be a break-even scenario, it will be a loss.”

12. As the quarter progressed, the forecast did not improve. In fact, toward the end of the second quarter of 2018, Fluor signed a subcontract with the Fabrication Subcontractor after months of negotiations. The final subcontract terms were more expensive to Fluor than anticipated the quarter before and as had been budgeted for in Fluor’s contract bid with the Customer. Likewise, the cost of supplies, including steel, suggested the forecast could worsen from the project team’s then-current estimate that Penguins would be a loss. Brittain was aware of these increased costs.

13. Nevertheless, after quarter close, Fluor recorded the Penguin Project’s PGM in the second quarter of 2018 as \$23.5 million. This PGM was essentially unchanged from the prior quarter’s PGM despite changes in circumstances for the Penguins Project, most notably the subcontract price with the Fabrication Subcontractor. That PGM was inaccurate. Fluor later corrected the PGM for the second quarter of 2018 to *negative* \$19.4 million in the Restatement.

14. The exclusion of costs that were known or should have been known from the forecast for the Penguins Project led to misstated books and records, and ultimately resulted in materially misstated financial statements reported in Fluor’s Form 10-Q for the second quarter ended June 30, 2018. Penguins was in a loss position in the second quarter of 2018, and, therefore, to be in accordance with GAAP, Fluor needed to recognize the full amount of the forecasted loss in its net earnings that quarter in addition to reversing previously recognized profits. Since it did not, in the second quarter of 2018, Fluor overstated net earnings by \$17 million (\$20.6 million pre-tax) or 22% and overstated the E&C segment profit by 28%.

15. In connection with Fluor’s filing of its financial statements for the second quarter of 2018 in a Form 10-Q, Brittain, in his capacity as President of the E&C segment, along with two other segment officers, signed a sub-certification to Fluor’s Chief Executive Officer (“CEO”) and the Chief Financial Officer (“CFO”) certifying that the “[t]he June 30, 2018 forecasts and related PMARs for all projects were prepared by project management and each project forecast represents management’s best estimate (i.e., most probable outcome) of Fluor’s financial results.” That certification was not accurate. Brittain was aware of costs and potential costs in the second quarter of 2018 that he knew or should have known reduced the Penguins Project’s reported PGM from the prior quarter.

The Third Quarter 2018 Forecast Inaccurately Reported Penguins at a Breakeven PGM When It was a Loss

16. In the third quarter of 2018, Fluor personnel again compiled forecasts reflecting the best, most likely, and worst case scenarios for the Penguins Project. In August 2018, the project team presented a most likely forecast scenario for the Penguins Project of over a \$20 million loss.

17. Nevertheless, Fluor recorded the Penguin Project's PGM in the third quarter of 2018 as \$0.8 million, a reduction of nearly \$22 million, but still roughly a breakeven PGM. Fluor continued to delay reporting the project's loss this quarter, and the exclusion of costs that were known or should have been known from the forecasts for the Penguins Project led to misstated books and records in the third quarter of 2018. The most likely forecast at the time showed a loss of \$19.8 million, as Fluor subsequently amended its financial statements to reflect in the Restatement. As in the second quarter of 2018, the failure to recognize the loss on the project in the third quarter was in violation of GAAP.

18. Brittain, in his capacity as President of the E&C segment, along with two other segment officers, again signed the E&C segment sub-certification letter to Fluor's CEO and CFO for the third quarter of 2018 containing the same certifications and representations as in the second quarter of 2018. Those representations were not accurate. Brittain knew or should have known that the reported Penguins PGM did not "represent[] management's best estimate (i.e., most probable outcome) of Fluor's financial results."

Violations

19. As a result of the conduct described above, Brittain was a cause of Fluor's violations of Section 13(a) of the Exchange Act and Rules 13a-13 and 12b-20 thereunder. Section 13(a) of the Exchange Act requires issuers with a class of securities registered pursuant to Section 12 of the Exchange Act to file such periodic and other reports as the Commission may prescribe and in conformity with such rules as the Commission may promulgate. Exchange Act Rule 13a-13 requires the filing of quarterly reports. The obligation to file such reports embodies the requirement that they be true and correct. *See, e.g., SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1165 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 913 (1979). In addition to the information expressly required to be included in such reports, Rule 12b-20 of the Exchange Act requires issuers to add such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading. .

20. As a result of the conduct described above, Brittain was a cause of Fluor's violations of Section 13(b)(2)(A) of the Exchange Act, which requires an issuer of a security registered pursuant to Section 12 of the Exchange Act to make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the issuer's transactions and disposition of assets.

21. As a result of the conduct described above, Brittain was a cause of Fluor's violations of Section 13(b)(2)(B) of the Exchange Act, which requires an issuer of a security

registered pursuant to Section 12 of the Exchange Act to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that: transactions are executed in accordance with management's general and specific authorization; transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP or any other criteria applicable to such statements, and to maintain accountability for assets; access to assets is permitted only in accordance with management's general or specific authorization; and the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent cease and desist from committing or causing any violations and any future violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 13a-13 and 12b-20 thereunder.

B. Respondent shall, within 10 business days of the entry of this Order, pay a civil money penalty in the amount of \$25,000 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717.

Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying James F. Brittain as a Respondent in these proceedings, and the file number of these proceedings; a

copy of the cover letter and check or money order must be sent to Carolyn M. Welshhans, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549.

C. Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, a Fair Fund is created for the penalties referenced in paragraph B above. This Fair Fund may be combined with the Fair Fund created in *In the Matter of Fluor Corporation*, AP File No. 3-21610. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, he shall not argue that he is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that he shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondent, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Vanessa A. Countryman
Secretary