

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

**RICHARD F. MILLER,**

**Plaintiff,**

**v.**

**CA No. 95-01231 (RCL/JMF)**

**PHILLIP HOLZMANN, et al.,**

**Defendants.**

**REPORT AND RECOMMENDATION**

Before me is Defendant Harbert Corporation's Motion for Judgment on the Pleadings [#407]. I recommend that it be granted without prejudice to relator's filing a motion for leave to file a Fifth Amended Complaint, with the understanding that Harbert Corporation may file any opposition to that motion that it sees fit.

I previously recommended that the court grant Defendant Harbert Corporation's Motion to Dismiss the United States' Second Amended Complaint [#277] because it failed to specify with the necessary particularity the role Harbert Corporation played in the alleged conspiracy to rig bids and the consequential submission of allegedly false claims. Relator's Fourth Amended Complaint suffers from the same defect for it only pleads that Harbert Corporation is a Delaware corporation with its principal place of business in Birmingham and the owner of another defendant, Harbert International Inc. Relator, writing as of November 27, 2006, explains that he has discovered facts during discovery that will permit him to file a Fifth Amended Complaint. Thus, he asks that, if

Harbert Corporation's motion is not denied, it be granted without prejudice to his filing a Fifth Amended Complaint.

Under Federal Rule of Civil Procedure 15( a), leave to amend "shall be freely given when justice so requires" and there is a general consensus that, when a complaint is found to be deficient under Rule 9(b), leave to file an amended complaint that seeks to correct the deficiency should be granted. 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §1300 (2004). I therefore recommend that the Court grant Defendant Harbert Corporation's Motion for Judgment on the Pleadings [#407] without prejudice to relator's moving promptly for leave to file a Fifth Amended Complaint, with the understanding that Harbert Corporation may oppose that motion for any reason its sees fit. Id. (explaining that leave to replead is not automatic and specifying circumstances where court may deny leave to replead).

**Failure to file timely objections to the findings and recommendations set forth in this report may waive your right of appeal from an order of the District Court adopting such findings and recommendations. See Thomas v. Arn, 474 U.S. 140 (1985).**

Dated:

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JOHN M. FACCIOLA  
UNITED STATES MAGISTRATE JUDGE