

Suspension and Debarment of Soldiers: Can We Do It? Yes, We Can

Captain Scott N. Flesch¹
Trial Attorney
Contract Appeals Division

Chief Warrant Officer Two (CW2) Sticky Fingers, an aviation maintenance officer, is the approving official for all government purchase card (IMPAC)² transactions by his department at Fort Irvine, California.³ Essentially, anything sought to be purchased or procured using the IMPAC goes through CW2 Fingers for review and approval. Due in part to the operational tempo at Fort Irvine, compliance and oversight of the IMPAC program are lacking. Sensing an opportunity for supplemental income, CW2 Fingers met individually with three cardholders whom he trusted. Chief Warrant Officer Two Fingers contrived a scheme for each cardholder to purchase electronic items for personal use from stores that accepted the IMPAC. Chief Warrant Officer Two Fingers collects the items (e.g., cell phones, PDAs, digital cameras) and auctions them over the Internet. In exchange for their assistance, CW2 Fingers kicks back fifty percent of the proceeds from the sale of the goods. Before submitting a certified consolidated bill for the purchases to the Defense Finance and Accounting Service, CW2 Fingers alters and/or creates receipts to reflect otherwise legitimate purchases and prevent detection. In the two years of this ongoing conspiracy, CW2 Fingers makes \$356,000 for himself and his co-conspirators.

After an investigation by Fort Irvine's Criminal Investigation Command (CID), the government prefers charges against CW2 Fingers to include: conspiracy, failure to obey an order, larceny, and bribery. Chief Warrant Officer Two Fingers has eighteen years of active duty service and plans to work for one of several commercial vendors he established a relationship with as an approval official when he retires.⁴

Introduction

Unfortunately, abuse of government purchase cards is not uncommon in the military.⁵ In fact, starting in 2001, the level of suspected fraud detected in the Military Purchase Card Program drew congressional interest and resulted in General Accounting Office⁶ (GAO)⁷ as well as Department of Defense (DOD) Inspector General scrutiny.⁸

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² The acronym, IMPAC, refers to the International Merchant Purchase Authorization Card.

³ In 1989, the General Services Administration awarded the first government-wide purchase card contract and the Department of Defense (DOD) entered the program. See U.S. DEP'T OF DEFENSE, REPORT NO. D-2002-075, CONTROLS OVER THE DOD PURCHASE CARD PROGRAM (Mar. 29, 2002), available at <http://www.dodig.osd.mil/audit/reports/fy02/02075sum.htm> [hereinafter DOD AUDIT REPORT]. On 13 October 1994, the President of the United States issued Executive Order 12,931 to increase the use of purchase cards for micro-purchases identified as transactions under \$2,500. Exec. Order No. 12,931, 59 Fed. Reg. 52,387 (Oct. 13, 1994). The DOD Purchase Card Program Management Office manages the DOD Purchase Card Program. See Dep't of Defense Purchase Card Program Management Office, at <http://purchasecard.saalt.army.mil/default.htm> (last visited June 27, 2005); see also Army Purchase Card Program, at <http://aca.saalt.army.mil/army/default.htm> (last visited June 27, 2005).

⁴ Chief Warrant Officer Two Sticky Fingers is a fictitious name and the offered hypothetical reflects a collection of facts taken from reported military justice cases.

⁵ See *United States v. Duff*, 2004 CCA LEXIS 281 (N-M. Ct. Crim. App. 2004) (A Sailor with fourteen years of service over-purchased on IMPAC accounts for personal use); *United States v. Albright*, 58 M.J. 570 (2003) (An active duty supply specialist purchased a number of goods and services using the IMPAC); *United States v. Palagar*, 56 M.J. 294 (2002) (A CW2 battalion maintenance officer used the IMPAC to make \$2,242 worth of unauthorized purchases for personal use. Appellant signed and submitted a false "Statement of Account" to his IMPAC Approving Official, and he supported this statement with phony receipts that he created on a computer. The phony receipts purported to document purchases that were never made); *United States v. Durant*, 55 M.J. 258 (2001) (A Soldier approached by senior enlisted supervisor and initiated a scheme: Soldier would make unauthorized purchases of personal items with his IMPAC card for both himself and his supervisor who in turn would approve the purchase of these items and authorize payment with government funds. Soldier made over ninety unauthorized purchases totaling more than \$30,000 over two years); *United States v. Hawkins*, 2000 CCA LEXIS 266 (A.F. Ct. Crim. App. 2000) (unpublished) (An Air Force master sergeant fraudulently procured services and wrongfully used the IMPAC for personal use in his role as a superintendent of a fitness center and lodging facility at the Royal Air Force Base, Lakenheath, United Kingdom); *United States v. Hurt*, 1999 CCA LEXIS 161 (A.F. Ct. Crim. App. 1999) (unpublished) (An airman supply specialist used an IMPAC to order electronic goods for personal use.).

⁶ The General Accounting Office changed its name to the Government Accountability Office in 2004. See The GAO Human Capital Reform Act, Pub. L. No. 108-271, § 8(a), 118 Stat. 811, 814 (2004).

⁷ GEN. ACCT. OFF., NO. GAO-04-156, *Purchase Cards: Steps Taken to Improve DOD Program Management, but Actions Needed to Address Misuse* (Dec. 2, 2003), available at <http://www.gao.gov/new.items/d04156.pdf> [hereinafter GAO-04-156]; GEN. ACCT. OFF., NO. GAO-01-995T, *Purchase Cards: Control Weaknesses Leave Two Navy Units Vulnerable to Fraud and Abuse* (July 30, 2001), available at <http://www.gao.gov/new.items/d01995t.pdf>; GEN.

In December 2003, the GAO identified fifty-one cases of fraudulent or potentially fraudulent purchases by cardholders and one hundred-twenty cases where cardholders made improper and abusive or questionable purchases.⁹ Government purchase card abuse and procurement fraud have been topics of concern throughout the Department of Defense as well as other federal agencies.¹⁰

In the last several years, there have been numerous news articles and stories highlighting fraud investigations of corporate America and potential suspension or debarment. Some of the companies subject to investigation were: Boeing,¹¹ Enron,¹² Arthur Anderson,¹³ WorldCom,¹⁴ CACI,¹⁵ and Halliburton.¹⁶ Acquisition related wrongdoing by Soldiers, however, is not thought of in the same or a similar context.¹⁷ Historically, the military services have treated acquisition related misconduct through the military justice system without thought of administrative remedies outside personnel actions.¹⁸ Of course, the higher the rank of the offender, the more newsworthy the story.¹⁹

Take the case of Colonel (COL) Richard J. Moran.²⁰ While Commander of the U.S. Army Contracting Command Korea, COL Moran orchestrated a scheme of kickbacks and bribes involving hundreds of thousands of dollars in exchange for his influence in the award of millions of dollars in contracts to Korean contractors.²¹ Despite being sentenced to fifty-four months in federal prison after pleading guilty,²² COL Moran continued to express his desire to work in the federal procurement system following his confinement because it was “what he knew.”²³ The Army Suspension and Debarment Official (SDO) suspended COL Moran from future contracting throughout the executive branch of the U.S. government pursuant to the Federal Acquisition Regulation (FAR) on 14 March 2003.²⁴ On 27 July 2004, after pleading guilty in the U.S.

ACCT. OFF., NO. GAO-02-506T, *Purchase Cards, Continued Control Weaknesses Leave Two Navy Units Vulnerable to Fraud and Abuse* (Mar. 13, 2002), available at <http://www.gao.gov/new.items/d02506t.pdf>; GEN. ACCT. OFF., NO. GAO-02-844T, *Purchase Cards: Control Weaknesses Leave Army Vulnerable to Fraud, Waste, and Abuse* (July 17, 2002), available at <http://www.gao.gov/new.items/d02844t.pdf>; GEN. ACCT. OFF., NO. GAO-03-154T, *Purchase Cards: Navy Vulnerable to Fraud and Abuse but Is Taking Action to Resolve Control Weaknesses* (Oct. 8, 2002), available at <http://www.gao.gov/new.items/d03154t.pdf>.

⁸ DOD AUDIT REPORT, *supra* note 3.

⁹ GAO-04-156, *supra* note 7, at 13.

¹⁰ *Id.*; see also GEN. ACCT. OFF., NO. GAO-04-430, *Contract Management: Agencies Can Achieve Significant Savings in Purchase Card Buys* (Apr. 28, 2004), available at <http://www.gao.gov/htext/d04430.html>.

¹¹ Press Release, U.S. Air Force, AF Announces Boeing Inquiry Results (July 25, 2003), available at <http://www.af.mil/news/story.asp?storyID=123005322>.

¹² News Release, General Services Administration, GSA Suspends Enron and Arthur Andersen and Former Officials (Mar. 15, 2002), available at <http://w3.gsa.gov/web/x/publicaffairs.nsf/deal168abbe828fe9852565c600519794/576435646c09ff9185256b7d004800b8?OpenDocument>.

¹³ *Id.*

¹⁴ News Release, General Services Administration, Worldcom Agrees To Stringent Reporting Requirements (Jan. 7, 2004), available at http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_BASIC&contentId=14648&noc=T; see also News Release, General Services Administration, GSA Proposes Debarment of MCI WorldCom (July 31, 2003), available at http://www.gsa.gov/Portal/gsa/ep/contentViewdo?contentType=GSA_BASIC&contentId=8947&noc=T.

¹⁵ Ellen McCarthy, *CACI Faces New Probe Of Contract, Interrogators Hired Under Army IT Deal*, WASH. POST, May 28, 2004, at E1.

¹⁶ News Release, Project on Government Oversight, Government Should Consider Suspending Halliburton Contracts (Aug. 18, 2004), available at <http://www.pogo.org/p/contracts/ca-040801-haliburton.html>.

¹⁷ The term acquisition is broadly interpreted to include the purchase of, or contract for, goods or services using appropriated funds for use by the federal government. See GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 2.101 (Mar. 2005) [hereinafter FAR].

¹⁸ Telephone Interview with Special Agent Thomas Barnes, U.S. Army Criminal Investigation Command, Major Procurement Fraud Unit, Laguna Niguel, Cal. (12 Jan. 2005) [hereinafter Barnes Interview].

¹⁹ Press Release, DOJ, U.S. Army Colonel Pleads Guilty to Taking Bribes from South Korean Companies Seeking Military Contracts (Jan. 29, 2003), available at <http://www.usdoj.gov/usao/cac/pr2003/011.html> [hereinafter DOJ Press Release, Jan. 29, 2003]; see also Press Release, DOJ, U.S. Army Colonel, Four Others Indicted in Scheme to Collect Bribes from South Korean Companies Seeking to Obtain Large Military Contracts (July 3, 2002), available at <http://www.usdoj.gov/usao/cac/pr2002/103.html>.

²⁰ DOJ Press Release, Jan. 29, 2003, *supra* note 19.

²¹ *Id.*

²² Press Release, DOJ, U.S. Army Colonel Sentenced to Prison for Taking Bribes From South Korean Companies Seeking Military Contracts (June 9, 2003), available at <http://www.fbi.gov/fieldnews/june/21a060903.htm>. Trial tactics and various evidentiary issues contributed to the decision to have the Assistant U.S. Attorney for the Central District of California prosecute Colonel Moran. Barnes Interview, *supra* note 18.

²³ Barnes Interview, *supra* note 18.

²⁴ *Id.*; see also FAR, *supra* note 17, 9.407.

District Court for the Central District of California to conspiracy,²⁵ bribery,²⁶ and aiding and abetting,²⁷ the Army SDO debarred COL Moran for a period of twenty-five years.²⁸ At the time of the debarment, COL Moran was no longer on the military rolls.²⁹

The military justice system is often the vehicle used to address fraud by active duty Soldiers in the procurement process. Similar to COL Moran, these Soldiers often wish to work within the acquisition system after their punishment because it is what they know. This article looks at the use of suspension and debarment as administrative remedies to protect the federal procurement system from active duty Soldiers who are “non-responsible”³⁰ by virtue of their misconduct in the procurement system.³¹ Additionally, this article addresses the need to report such misconduct so as to trigger review by the relevant procurement fraud offices.³²

Basis for Suspension and Debarment

Subpart 9.4 of the FAR governs the debarment, suspension, and ineligibility of “non-responsible” contractors under the federal acquisition system.³³ These administrative remedies are far-reaching and apply throughout every executive agency.³⁴ The procedures and regulations governing suspension and debarment of contractors are designed to protect the overall integrity of the government procurement process. Significantly, the government should not use suspension and debarment for *punishing* non-responsible contractors.³⁵

Suspension—Immediate Protection

Suspension is the process by which the government “disqualif[ies] a contractor temporarily from Government contracting and Government-approved subcontracting.”³⁶ Normally, suspensions will last until the “completion of investigation and any ensuing legal proceedings.”³⁷ In order to suspend a contractor, there must be “adequate evidence” of:

- (1) Commission of fraud or a criminal offense in connection with—(i) Obtaining; (ii) Attempting to obtain; or (iii) Performing a public contract or subcontract;
- (2) Violation of Federal or State antitrust statutes relating to the submission of offers;

²⁵ 18 U.S.C. § 371 (2000).

²⁶ *Id.* § 201.

²⁷ *Id.* § 2(a).

²⁸ Lists of Parties Excluded from Federal Procurement and Nonprocurement Programs (search “Moran, Richard P.”), available at <http://www.epls.gov/epl/servlet/EPLSGetInputSearch/WIHMUFGOKJCYXSNEILXBWUYTNDUENIYF>; see also FAR, *supra* note 17, at 9.404.

²⁹ Barnes Interview, *supra* note 18. By being removed from the military rolls, COL Moran forfeited his retirement. U.S. DEP’T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 5-15 (30 July 2004).

³⁰ The FAR provides that contractors are not considered responsible unless the contractor: (1) has adequate financial resources to perform; (2) is able to comply with required or proposed delivery dates and performance schedules; (3) has a satisfactory performance record; (4) has a satisfactory record of integrity and business ethics; (5) has the necessary organization, experience, controls, skills or ability to obtain such; (6) has the necessary production, construction, and technical support; and (7) is qualified and eligible to receive an award under law and regulation. FAR, *supra* note 17, at 9.104-1.

³¹ This article focuses on those illegal actions by active duty Soldiers directly related to federal acquisitions. It does not address other illegal activity by Soldiers that prompt a similar review of their “responsibility.” Further, it does not address administrative remedies against those civilians involved in procurement misconduct while employed by the U.S. government.

³² This article does not address the restriction set in place by 10 U.S.C. § 2408. Pursuant to 10 U.S.C. § 2408, implemented by U.S. DEP’T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 203.570-2 (Dec. 2004) [hereinafter DFARS], a contractor or subcontractor shall not knowingly allow a person, convicted after 29 September 1988, of fraud or any other felony arising out of a contract with the DOD, to serve as an agent, or representative in solicitations and contracts exceeding the simplified acquisition threshold, except solicitations and contracts for commercial items, for a period of no less than five years.

³³ FAR, *supra* note 17, at 9.4.

³⁴ *Id.* at 9.401.

³⁵ Steven A. Shaw, *Suspension and Debarment: The First Line of Defense Against Contractor Fraud and Abuse*, REPORTER, AIR FORCE RECURRING PERIODICAL 51-1, vol. 26, No. 1, at 4 (Mar. 1999) (Mr. Shaw currently serves as the suspension and debarment official for the Department of the Air Force.); see also *Frequency Elecs. v. United States Dep’t of the Air Force*, 1998 U.S. App. LEXIS 14888 (4th Cir. 1998).

³⁶ FAR, *supra* note 17, at 2.101; see also PRACTITIONER’S GUIDE TO SUSPENSION AND DEBARMENT, ABA, COMMITTEE ON DEBARMENT AND SUSPENSIONS 5 (3d ed. 2002) [hereinafter ABA GUIDE TO SUSPENSION & DEBARMENT].

³⁷ FAR, *supra* note 17, at 9.407-4.

- (3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property;
- (4) Violations of the Drug-Free Workplace Act of 1988 (citations omitted);
- . . .
- (5) . . . “Made in America” [label violations];
- (6) Commission of an unfair trade practice; . . . or
- (7) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.³⁸

As a final catch-all, an SDO may suspend a contractor, upon adequate evidence, “for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.”³⁹

Adequate Evidence: Preferral versus Referral of Charges

The FAR 2.101 defines “adequate evidence” as information sufficient to support the reasonable belief that a particular act or omission has occurred.⁴⁰ An indictment, information, or other filing by a competent authority charging a criminal offense constitutes adequate evidence for suspension purposes.⁴¹ An indictment, as defined in *Black’s Law Dictionary*, is:

- 1. The formal written accusation of a crime, made by a grand jury and presented to a court for prosecution against the accused person.

. . .

The act or process of preparing or bringing forward such a formal written accusation.⁴²

In contrast, an information is defined as:

A formal criminal charge made by a prosecutor without a grand-jury indictment.⁴³

A civilian defendant in federal court has the right, unless waived, to be prosecuted by indictment when punishment may include death, hard labor, or confinement for more than one year.⁴⁴ Any other offense may be prosecuted by indictment or information.⁴⁵

Active duty Soldiers accused of offenses arising under the UCMJ are prosecuted by courts-martial.⁴⁶ Soldiers may also be prosecuted in federal court by a U.S. attorney for offenses not charged under the UCMJ. In the court-martial setting, Soldiers may be tried before a general court-martial authorized to impose the sentence of death or confinement in excess of one year only after an independent pretrial investigation by an appointed investigating officer.⁴⁷

In the military context, it is arguable whether a preferral of charges against a Soldier alone would constitute “adequate evidence.”⁴⁸ When charges are preferred, the person preferring the charges must “[s]ign the charges and specifications under

³⁸ *Id.* at 9.407-2(a).

³⁹ *Id.* at 9.407-2(c).

⁴⁰ *Id.* at 2.101.

⁴¹ The FAR 9.407-2(b) states that an “[i]ndictment for any of the causes in paragraph (a) . . . constitutes adequate evidence for suspension.” *Id.* at 9.407-2(b). The FAR 9.403 further provides that “[a]n information or other filing by competent authority charging a criminal offense [shall be] given the same effect as an indictment.” *Id.* at 9.403.

⁴² BLACK’S LAW DICTIONARY 788 (8th ed. 2004); see also DEPARTMENT OF JUSTICE, U.S. ATTORNEYS’ MANUAL tit. 9-12.000, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm (last visited June 28, 2005).

⁴³ BLACK’S LAW DICTIONARY, *supra* note 42, at 795.

⁴⁴ See FED. R. CRIM. P. 7(a).

⁴⁵ *Id.*

⁴⁶ See generally U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE (6 Sept. 2002) [hereinafter AR 27-10]; see also *Solorio v. United States*, 483 U.S. 435 (1987).

⁴⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405 (2002) [hereinafter MCM]; see also UCMJ art. 32 (2002).

⁴⁸ MCM, *supra* note 47, R.C.M. 307.

oath before a commissioned officer⁴⁹ and vouch that he “has personal knowledge of or has investigated the matters set forth in the charges and specifications”⁵⁰ The preferral is also accompanied by an affidavit⁵¹ while an information does not require one.⁵² Upon preferral, the Soldier’s immediate commander must notify the Soldier “of the charges preferred against him,” “the name of the person who preferred the charges and of any person who ordered the charges to be preferred.”⁵³

A preferral of charges may be made by “[a]ny person subject to the [UCMJ].”⁵⁴ In contrast, only a licensed attorney representing the government can file an information or draft an indictment.⁵⁵ A referral of charges, however, adds an indicia of reliability that a preferral alone cannot.⁵⁶

A referral of charges is an order by a convening authority that the charges against the Soldier will be tried by court-martial.⁵⁷ Before referring charges to court-martial, “the convening authority [must] find [] or [be] advised by a judge advocate that there are reasonable grounds to believe that an offense triable by court-martial has been committed and that the accused committed it.”⁵⁸ Convening authorities are generally senior grade officers with substantial training and experience.⁵⁹

Clearly, an information or indictment provides greater indicia of reliability than a preferral standing alone cannot. A criminal information is drafted and filed by an attorney licensed to practice law and representing the United States. An indictment is drafted by an attorney and issued by a grand jury after reviewing the evidence. On the other hand, a preferral can be drafted and filed by any person subject to the UCMJ. Further, a preferral is not required to be reviewed by a judge advocate before notification of the allegations to the accused.

A referral, however, is more akin to an information or indictment. In order to refer a charge to a court-martial, a convening authority either seeks advice from a judge advocate or relies upon his military experience to weigh the evidence for reasonableness. Convening authorities, because of their extensive experience, would seem a more “competent authority” than just any soldier subject to the UCMJ. Further, the process of referring charges to a court-martial has an indicia of reliability that preferral does not. As a result, a SDO should recognize a convening authority as a “competent authority” and a referral as “adequate evidence” in support of a suspension action.

Debarment—Long Term Protection

Debarment is defined as the exclusion of a contractor from government contracting and government-approved subcontracting for a reasonable, specified period.⁶⁰ The FAR provides that “[g]enerally, debarment should not exceed 3 years.”⁶¹ Given the seriousness of a case, however, debarments may be longer.⁶² In order to debar a contractor, the government must provide notice to and an opportunity to the contractor to rebut the underlying reasons for the proposed debarment.⁶³

⁴⁹ *Id.* R.C.M. 307(b)(1).

⁵⁰ *Id.* R.C.M. 307(b)(2).

⁵¹ *Id.* R.C.M. 307(b); *see also* U.S. Dep’t of Defense, DD Form 458, Charge Sheet (May 2000).

⁵² FED. R. CRIM. P. 9(a).

⁵³ MCM, *supra* note 47, R.C.M. 308(a).

⁵⁴ *Id.* R.C.M. 307(a).

⁵⁵ FED. R. CRIM. P. 7(e)(1).

⁵⁶ *See generally* MCM, *supra* note 47, R.C.M. 601.

⁵⁷ *Id.* R.C.M. 601(a).

⁵⁸ *Id.* R.C.M. 601(d)(1).

⁵⁹ *See* UCMJ arts. 22, 23 (2002); *see also* MCM, *supra* note 47, R.C.M. 504(b). Only the President of the United States, the Secretary of Defense, and various commanding officers may convene general and special courts-martial.

⁶⁰ FAR, *supra* note 17, at 2.101, 9-406-4(a).

⁶¹ *Id.* at 9.406-4(a)(1).

⁶² *Id.* at 9.406-4(a).

⁶³ *Id.* at 9.406-3.

An SDO can debar a contractor for numerous reasons, some of which differ from his suspension authority.⁶⁴ Causes for debarment include:

- (1) a conviction of or civil judgment for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain or performing a public contract or subcontract;
- (2) violation of anti-trust laws;
- (3) commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property;
- (4) Made-In-America label violations;
- (5) commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.⁶⁵

Further, an SDO can debar a contractor upon a showing of a preponderance of evidence that a contractor:

- (1) seriously violated the terms of a Government contract or subcontract by willfully failing to perform in accordance with the terms of one or more contracts or having a history of failing to perform or continued unsatisfactory performance;
- (2) Drug-Free Workplace violations;
- (3) commission of unfair trade practice;
- (4) immigration related violations; or
- (5) any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor subcontractor.⁶⁶

Given the array of causes for debarment, many practitioners overlook the fact that Soldiers who engage in acquisition related misconduct are eligible for suspension or debarment. Each case, however, is fact driven and only relevant for Soldiers that can be considered “contractors” under the FAR.

Soldiers and Contractors: One and the Same?

It may seem surprising to equate “Soldiers” as “contractors” in this day and age of contractors accompanying the force on the battlefield.⁶⁷ The lines between contractors and Soldiers, however, are increasingly fading. The current suspension and debarment process is structured to address this phenomenon.

The FAR 9.403 broadly defines “contractor” for purposes of suspension and debarment as:

any individual or other legal entity that—

- (1) Directly or indirectly (*e.g.*, through an affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract, including a contract for carriage under Government or commercial bills of lading, or a subcontract under a Government contract; or
- (2) Conducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative of another contractor.⁶⁸

This broad definition includes those that “may be expected to conduct business with the Government.”⁶⁹ When applying this definition to CW2 Fingers’ scenario, it is clear that subpart 9.4 of the FAR can easily be applied to active duty Soldiers both with acquisition experience and also who are likely to seek employment in the federal acquisition workforce or federal

⁶⁴ *Id.* at 9.406-2 - 9.406-5.

⁶⁵ *Id.* at 9.406-2(a).

⁶⁶ *Id.* at 9.406-2(b), (c).

⁶⁷ Linda Robinson & Douglas Pasternak, *America’s Secret Armies: A Swarm of Private Contractors Bedevils the U.S. Military*, U.S. NEWS & WORLD REP., Nov. 4, 2002, at 38.

⁶⁸ FAR, *supra* note 17, at 9-403.

⁶⁹ *Id.*

contracting. However, it is necessary to draw a clear “nexus” between a Soldier’s likelihood to pursue federal contracting and the need to protect the military’s acquisition system.

Arguably, there may be little reason to “suspend” an active duty Soldier for procurement related misconduct.⁷⁰ The preferral of charges alone limits a Soldier’s actions.⁷¹ Further, the simple issuance of a commander’s order or a change in official duties can normally rectify a situation and protect the government from acquisition related misconduct while the Soldier remains on active duty. When the situation involves a Soldier nearing retirement, administrative separation,⁷² excess leave, or a post-trial scenario, however, it would be prudent to consider the harm that Soldier may cause the military acquisition system in the future. For those Soldiers, debarment may be an effective preventative measure, and a nexus can be articulated. Colonel Moran’s and CW2 Fingers’ situations provide clear examples of a need to protect the government’s acquisition system and a nexus to an expectation of conducting business with the government in the future.⁷³ Further, the length of any debarment must be tailored to protect the procurement system when it is likely a Soldier may enter the contractor workforce or attempt to contract with the government.⁷⁴

Double “Punishment” or Double Protection?

[N]either money penalties nor debarment have historically been viewed as punishment. We have long recognized that “revocation of a privilege voluntarily granted,” such as a debarment, “is characteristically free of the punitive criminal element.”⁷⁵

The underlying premise of suspensions and debarments is to protect the federal government, not to punish individuals or companies.⁷⁶ In *Hudson v. United States*,⁷⁷ the Supreme Court ruled that debarment did not amount to criminal punishment and did not violate the double jeopardy clause of the Constitution.⁷⁸ Since many debarments are “conviction” driven, Soldiers convicted at courts-martial are clear candidates for administrative remedies.⁷⁹ On the other hand, the extensive record created through a military law enforcement investigation normally provides the administrative record necessary to support a suspension or debarment action. Depending on their completeness, however, records in the form of administrative personnel actions or investigation reports⁸⁰ alone may not produce an adequate administrative record for suspension or debarment.⁸¹

⁷⁰ The authority and decision to suspend or debar an active duty Soldier lay solely with the discretion of a suspension and debarment official. There may be instances where a suspension and debarment official’s interest in protecting the acquisition system may not be congruent with the interests or motivations of a Soldier’s commander. As a result, there may be cases that require suspension despite the administration curtailments normally imposed by the preferral of charges.

⁷¹ See generally AR 27-10, *supra* note 46, para. 5-15(b). Upon preferral of charges, “all favorable personnel actions, including discharge, promotion, and reenlistment” are automatically suspended. *Id.*

⁷² See U.S. DEP’T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (15 July 2004) [hereinafter AR 635-200]. Administrative separation for enlisted Soldiers, pursuant to AR 635-200, para. 10, is frequently used to administratively separate Soldiers pending charges in “Lieu of Discharge.” *Id.* Doing so can avoid the courts-martial process and a conviction. *Id.* para. 10-1. It is important to keep in mind that nothing in the FAR prevents matters submitted by Soldiers in support of their separation request from being considered by the suspension and debarment official as evidence in a suspension or debarment action. Trial defense counsel must consider the materials submitted by their clients and any potential long term consequences on their clients.

⁷³ See FAR, *supra* note 17, at 9-403.

⁷⁴ The author does not suggest that Soldiers, based on their military status, incur longer suspension or debarments than civilian contractors. Suspension and debarment officials must consider the facts of each case, any punishment imposed, and the contractor’s potential involvement in government contracting. The FAR cautions SDOs to limit debarments to three years, but it does not prevent a SDO from issuing debarments in excess of three years. FAR, *supra* note 17, at 9-406(a)(1).

⁷⁵ *Hudson v. United States*, 522 U.S. 93, 104 (1997) (citing *Helvering v. Mitchell*, 303 U.S. 391, 399 n.2 (1938)).

⁷⁶ Robert Kittel, *Not Just a Punishment: Debarment Can Be Tool to Improve Acquisition System*, FEDERALTIMES.COM (on file with author) (Mr. Kittel currently serves as the suspension and debarment official for the Department of the Army.).

⁷⁷ 522 U.S. 93 (1997).

⁷⁸ See *id.* at 105; see also ABA GUIDE TO SUSPENSION AND DEBARMENT, *supra* note 36, at 5 (citing FAR 2.101).

⁷⁹ FAR, *supra* note 17, at 2.101 (defining “conviction” as “a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of nolo contendere”).

⁸⁰ See U.S. DEP’T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (30 Sept. 1996).

⁸¹ The extent of the administrative record in support of suspensions or debarments can face scrutiny. See, e.g., *Lion Raisins, Inc. v. United States*, 51 Fed. Cl. 238 (Ct. Cl. 2001); *Shane Meat Co. v. United States Dep’t of Defense*, 800 F.2d 334, 337 (3d Cir. 1986); *Robinson v. Cheney*, 876 F.2d 152 (D.C. Cir. 1989); *Sloan v. HUD*, 231 F.3d 10 (D.C. Cir. 2000); *Kirkpatrick v. White*, 351 F. Supp. 2d 1261 (N.D. Ala. 2004); *Silverman v. United States Dep’t of Defense*, 817 F. Supp. 846 (S.D. Cal. 1993).

The Missing Link: A Lack of Reporting

Courts-martial and investigations involving Soldiers engaged in acquisition-related misconduct often go unreported to procurement fraud officials despite DOD policy to coordinate remedies.⁸² In the Army, a system exists for criminal investigators and commands to report acquisition misconduct to a procurement fraud advisor (PFA) and irregularities (PFI) coordinator at major Army commands and a procurement fraud advisor at local installations.⁸³ Despite the availability of PFI coordinators and PFAs, these personnel are infrequently utilized.

The U.S. Army Criminal Investigation Command has overall responsibility to notify, in writing, installation PFAs as well as the Army's Procurement Fraud Branch (PFB)⁸⁴ within thirty days of initiation of a significant investigation of fraud or corruption related to Army procurement.⁸⁵ Once received, PFI coordinators and PFAs must forward reports of procurement fraud to the PFB in the form of "Procurement Flash Reports."⁸⁶

Despite this reporting scheme and the number of courts-martial cases related to acquisition fraud, the Army has initiated relatively few suspension or debarment actions because such cases have gone unreported.⁸⁷ Another reason for the underreporting is that investigators, PFAs, and PFI coordinators may not have realized that misconduct by Soldiers may be appropriate for suspension and debarment.⁸⁸ Army investigators, PFAs, and PFI coordinators must recognize that Soldiers can be viewed as "contractors" under the FAR and be suspended or debarred as appropriate. Finally, staff judge advocates and their chiefs of military justice should be more sensitive to the reporting requirements imposed when Soldiers commit acquisition fraud. The increased use of suspensions and debarments of active duty Soldiers, in appropriate cases, not only will serve to protect the military's acquisition system but will also act as a significant deterrent.

Summary

Many people do not realize that, under the FAR, Soldiers who commit acquisition related misconduct may constitute "contractors" and fall within the purview of the Army's suspension and debarment process. The serious abuses and corruption committed by COL Moran, and demonstrated in the hypothetical CW2 Fingers scenario, are clear cases where suspension and debarment is appropriate. Other instances of procurement misconduct or abuse of the IMPAC program by service personnel may not merit suspension or debarment. Use of these potent administrative actions depends on the underlying facts.

The key for Army practitioners is to recognize that suspensions and debarments are important administrative measures for addressing procurement misconduct by military personnel—and ones that may properly augment criminal prosecution, separation actions, or other administrative measures. It is everyone's duty to protect the overall integrity of the government procurement process and to ensure that Soldiers receive safe, reliable goods and services.

⁸² Department of Defense policy requires the coordinated use of criminal, civil, administrative, and contractual remedies in suspected cases involving procurement fraud. See U.S. DEP'T OF DEFENSE, DIR. 7050.5, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO PROCUREMENT ACTIVITIES (7 June 1989) [hereinafter DOD DIR. 7050.5]; U.S. DEP'T OF ARMY, REG. 27-40, LITIGATION para. 1-4n (19 Sept. 1994) [hereinafter AR 27-40].

⁸³ AR 27-40, *supra* note 82, para. 8-2; see also DOD DIR. 7050.5, *supra* note 82.

⁸⁴ AR 27-40, *supra* note 82, para. 8-2(c) (establishing "the Procurement Fraud Division (PFD), U.S. Army Legal Services Agency, as the single centralized organization within the Army to coordinate and monitor criminal, civil, contractual, and administrative remedies in significant cases of fraud or corruption relating to Army procurement"). Effective July 2003, the Procurement Fraud Division was redesignated as the Procurement Fraud Branch of the U.S. Army Contract Appeals Division, U.S. Army Legal Services Agency. A change to the regulation is currently being staffed.

⁸⁵ *Id.* para. 8-4(f). Of note, DOD DIR. 7050.5, *supra* note 82, para. 3-2, identifies any case involving gratuities or bribery as "significant."

⁸⁶ AR 27-40, *supra* note 82, paras. 8-5(b), (c).

⁸⁷ Interview with Christine McCommas, Branch Chief, Procurement Fraud Branch, U.S. Army Contract Appeals Division, U.S. Army Legal Services Agency, Arlington, Va. (Jan. 14, 2005).

⁸⁸ Telephonic Interview with Mr. Curtis L. Greenway, Legal Advisor, 701st Military Police Group, U.S. Army Criminal Investigation Command, Fort Belvoir, Va. (Jan. 14, 2005).