The Procurement Fraud Advisor

Newsletter of the Procurement Fraud Branch, Contract and Fiscal Law Division
U.S. Army Legal Services Agency

The Procurement Fraud Advisor (Issue 79) **Fall/Winter 2014**

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Message from the Chief, Procurement Fraud Branch (PFB)

Welcome to the Fall/Winter edition of The Procurement Fraud Advisor. This has been an especially busy quarter for PFB both in terms of workload and outreach efforts.

In FY14, PFB processed a record 802 suspension, proposed debarment, and debarment actions. That represents more than a 24% increase over FY13. While part of this increase is attributable to performance issues and investigations involving contracting in the Iraq and Afghanistan theaters of operation, the increase is also attributable to better communication between PFB, law enforcement, Procurement Fraud Advisors (PFA) in the field, and more aggressive PFB efforts to pursue fact and performance based suspension and debarment actions.

In FY14, PFB's outreach efforts included attending and presenting at the Army Material Command (AMC) CLE from 19-22 May 14. My sincere thanks go out to Brian Toland, AMC's Command Counsel for giving PFB the opportunity to attend and present a break out session at this excellent course.

PFB also presented procurement fraud instruction at the CID Major Procurement Fraud Unit (MPFU) Expeditionary Fraud Agency / Washington Metro Fraud Agency training at Marine Corps Base Quantico, Virginia from 4-6 Jun 14.

Between 18-20 Aug 14, PFB hosted the PFA Course at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. This was a unique and very well received course attended by over 100 attorneys, auditors, investigators, and acquisition specialists from the Department of Defense as well as Federal civilian agencies. The course covered a wide variety of topics of relevance to PFAs, to include: the duties and challenges associated with being a PFA; Fraud Indicators; Fraud Investigations; Coordination of Remedies; Suspension and Debarment; Parallel Proceedings; and Litigation Holds. I thank the PFB team, as well as our teammates from the sister services, both legal and investigative, for making this course a great success. The next iteration of the PFA Course will be in the Summer of 2016.

Building upon our success at the PFA Course, PFB presented instruction at the MPFU Senior Leaders' Conclave, in San Antonio, Texas between 16-19 Sep 14. This was an exceptional opportunity to get to know and forge better working relationships with MPFU investigators throughout the U.S. I would like to extend my special thanks to my teammates Terese (T) Harrison, Procurement Fraud Advisor from Army Sustainment Command, and Jerry Krimbill, Procurement Fraud and Irregularities Coordinator (PFIC) from the U.S. Army Medical Command, for assisting me in providing this worthwhile training.

It is my hope that FY15 will provide even more opportunities for PFB to help enhance our communication with the field and the quality of our practice. As always, let us know when you have comments and suggestions. We need to hear from you!

— Mark Rivest

PFB Welcomes New Army Suspension and Debarment Official

The Judge Advocate General appointed Mr. Mortimer C. Shea, Jr. to serve as the Army Suspension and Debarment Official (SDO) effective on 12 Nov 14.

Mr. Shea also serves as the Director of Soldier and Family Legal Services. As such, he is responsible for policy and oversight of legal services provided to Soldiers and their Families, including legal assistance and claims services, support to sexual assault victims, and to Army Wounded Warriors in the Medical Evaluation and Physical Disability Evaluation processes. He supervises the Office of The Judge Advocate General's Legal Assistance Policy Division, which includes the Special Victims Counsel Program as well as the U.S. Army Claims Service. Mr. Shea has technical oversight of the Judge Advocates and civilian attorneys serving as Soldiers' Counsel within the U.S. Army Medical Command.

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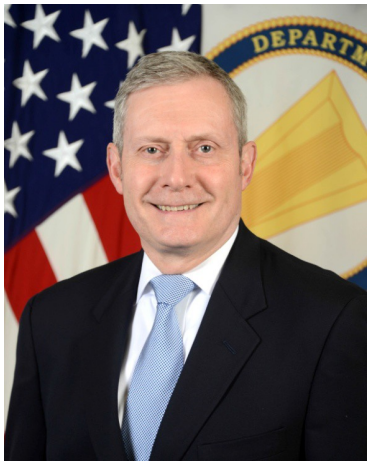

PFB Welcomes New Army Suspension and Debarment Official

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***Practice Note**: In FY14, Army Procurement Fraud Branch processed a total of 802 suspension, proposed debarment, and debarment actions—more than any other activity in the Department of Defense.*

Mr. Shea has a distinguished career of government service that spans over three decades. His military service includes serving as Staff Judge Advocate of the Military District of Washington and the Defense Language Institute; Deputy Staff Judge Advocate, 2d Armored Division; Chief, Labor and Employment Law Division, Office of The Judge Advocate General; Chief of General Law, Army Litigation Division; Associate Attorney, Office of the Deputy General Counsel for Personnel and Health Policy, Office of General Counsel, Department of Defense; and in various positions with line units including the 82d Airborne Division and the 172d Infantry Brigade (Alaska). As a civilian, he has served as the Chief of General Law for Headquarters, United States Coast Guard and Senior Supervisory Attorney with the Financial Management Service and the Bureau of the Fiscal Service of the Department of Treasury.

Mr. Shea is a member of the bars of the State of Indiana and the District of Columbia. He is a 1978 graduate of the United States Military Academy and received his J.D. from Notre Dame Law School in 1985 and an LL.M. in Military and Administrative Law from The Judge Advocate General's School, U.S. Army in 1990.

PFB welcomes Mr. Shea to his new position, and would also like to thank Mr. Michael J. Meisel, Director of Civil Law and Litigation, U.S. Army Legal Services Agency, who served superbly as the Army SDO from 12 Jul 13 to 11 Nov 14. We are appreciative of the many contributions Mr. Meisel made to the Army Procurement Fraud Program during his tenure as SDO and are confident that these contributions will serve the Army well in years to come.

Considering Classified Information in Suspension and Debarment Cases

- Mark Rivest, Chief, Procurement Fraud Branch

***Practice Note**:*

Suspension and debarment cases can be initiated based upon classified information. However, PFAs should keep three factors in mind:

1. ***The request must be supported by sufficient evidence to meet the preponderance evidentiary standard;***
2. ***The requesting organization should be ready to support requests for clearances and access.***
3. ***There may be other avenues to protect the Army.***

A Suspension and Debarment Official (SDO) may debar any individual or entity for any of the grounds set forth in Federal Acquisition Regulation (FAR) 9.406-2. It is sometimes erroneously asserted that the Army will not pursue suspension and debarment in cases which are based upon classified evidence. In fact, nothing could be further from the truth. As long as the evidence presented to the Army is sufficient to establish by a preponderance of the evidence that an individual or business entity lacks present responsibility, the Army can and will pursue debarment action as warranted by the facts.

While requesting the initiation of debarment action based upon classified evidence may be appropriate in a specific case, Procurement Fraud Advisors (PFAs) should also be cognizant of three important considerations. First, that the organization requesting debarment should be prepared to produce the necessary evidence sufficient to warrant debarment. Second, that the requesting organization also be prepared to receive, coordinate, and promptly process associated requests from the respondents and their counsel for proper security clearances, access to classified materials, etc. in order to develop and submit matters in opposition. Lastly, PFAs should also be mindful of the fact that, in some circumstances, there may be potential avenues available to protect the Army other than Suspension and Debarment that merit consideration.

In accordance with FAR 9.406-2, subparagraphs (b) and (c), an SDO may propose an individual or business entity for debarment where a preponderance of the evidence establishes that the contractor engaged in conduct of such a serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor. In order to make such a determination, however, the SDO must be presented with sufficient information to meet the evidentiary burden (e.g., including investigative reports, witness statements, or other appropriate exhibits or documentation) (See, Defense Federal Acquisition Regulation Supplement (DFARS) Procedures, Guidance, and Informa-

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Considering Classified Information in Suspension and Debarment Cases

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tion (PGI) 209.407-3(b)). In certain cases, some or all of this evidence may be classified. This fact alone does not affect whether debarment can be pursued as an administrative remedy.

Under provisions of FAR 406-3(c), when proposing debarment, the SDO must set forth the reasons underlying the proposed action in terms sufficient to put the contractor on notice of the conduct upon which the proposed debarment is based, and provide the contractor with an opportunity to submit materials and/or to appear before the SDO to present matters in opposition to the proposed debarment. In order to meet this burden, the SDO must provide the respondents with sufficient information to allow them to provide a "meaningful response" presenting relevant evidence refuting the charges. *See*, ATL, Inc. v. United States, 736 F.2d 677 (Fed. Cir. 1984). DFARS Appendix H (Suspension and Debarment Procedures), paragraph H-101 (Notice) provides that, as a general matter:

> Contractors will be notified of the proposed debarment or suspension in accordance with FAR 9.406-3 or 9.407-3. A copy of the record which formed the basis for the decision by the debarring and suspending official will be made available to the contractor. **If there is a reason to withhold from the contractor any portion of the record, the contractor will be informed of what is withheld and the reasons for such withholding** (emphasis added).

Accordingly, DFARS Appendix H appears to envision a circumstance, such as would be the case with classified information, where security officials may have legitimate reason to withhold a portion of the administrative record from the contractor pursuant to regulations governing access to classified information. If the administrative record contained classified information, the SDO would be required, in accordance with FAR 406-3(c), to provide the respondent with sufficient notice of the reason for the underlying action to enable the respondent to prepare a "meaningful response." Such a notice could be based upon the unclassified portion of the administrative record or an unclassified summary of the evidence which has been approved by the Original Classification Authority (OCA) in accordance with relevant security regulations.

Following receipt of the notice of a proposed debarment based upon classified information, respondent's counsel will face two issues under applicable security regulations. First, obtaining a security clearance sufficient to view the underlying information. Second, obtaining approval from the OCA regarding counsel's need for access to the specific classified information concerned. Presuming both of these requirements are satisfied, arrangements can be made for respondent's counsel to view the evidence underlying the proposed debarment and to submit appropriately classified matters in response to the proposed debarment. If counsel's request for a security clearance or for access to the material were denied by security officials, the SDO would then assess whether respondent's counsel has sufficient information upon which to develop a "meaningful response." If so, DFARS Appendix H, paragraph H-101 would permit a partial withholding of the administrative record from the respondent.

In most respects, processing a suspension and debarment action based upon classified evidence would be very similar to processing a typical case which is supported by unclassified evidence. One primary difference, however, would be in the methodology used to process the respondent's request for access to the evidence in the administrative record. In most cases involving unclassified evidence, there is no legitimate reason to withhold evidence from the respondent. Accordingly, the DFARS generally requires that respondents be notified of suspensions and proposed debarments and that a copy of the record which formed the basis for the decision will be made available to the respondent (DFARS, Appendix H, paragraph H-101). As discussed above, when the supporting evidence is classified, requests for access to such information must be made in accordance with the applicable security regulations and security officials may determine that the respondent's access to particular classified evidence must be denied. Cases based upon classified evidence may also differ with regard to the type of evidence requested to support the debarment action. For example, Procurement Fraud Branch or the SDO could request additional information to augment the administrative record, such as an affidavit from an intelligence analyst, to assist in the evaluation of particular documents or reports.

As noted above, PFAs should also consider whether there are other authorities or procedures available that would serve the same objective of protecting the Army and the procurement process. For example, if the case at issue arises from a "covered combatant command" under the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2014, section 831 (i.e., United States Central Command, United States European Command, United States Africa Command, United States Southern Command, or United States Pacific Command) and involves a "covered person or entity" within the meaning of section 831 (i.e., a person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the armed forces are actively engaged in hostilities), the acquisition community may have the additional option to cancel/revoke existing contracts/grants/cooperative agreements with a "covered person or entity" and be able to "restrict the award" of future contracts to such a person or entity under section 831 (i.e., essentially providing authority for a legal *de facto* debarment within the combatant command operational theater).

While a provision such as section 831 of the FY14 NDAA may provide a more streamlined mechanism for restricting

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Considering Classified Information in Suspension and Debarment Cases

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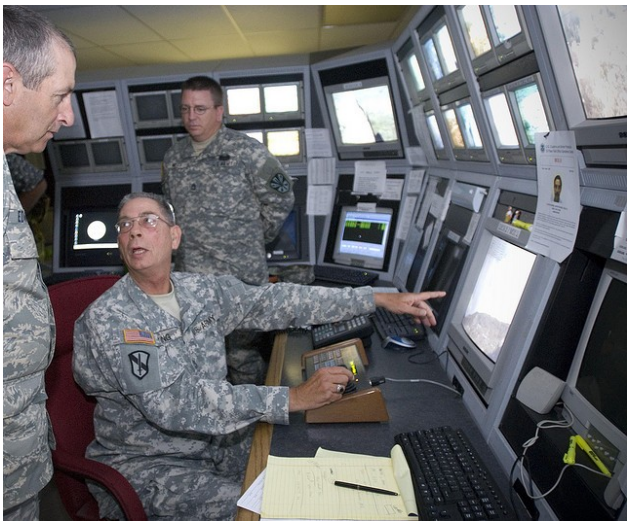
awards of contracts to individuals and entities when classified information suggests they are actively opposing United States or coalition forces in covered military operations (e.g., in terms of fewer notice and evidentiary burdens), it does not change the fact that suspension and debarment remains a fully functional administrative remedy despite the fact that all or some of the underlying evidence may be classified. In the area of suspensions and debarments, it is not a question of the classification of the evidence, but rather, the quality of the evidence which matters. As is the case in all debarment cases, the key issue will be whether the underlying information is sufficient to establish the lack of an individual's or contractor's present responsibility by a preponderance of the evidence. As long as the activity requesting suspension and debarment in such cases is able to produce the necessary evidence and support associated requests for security clearances, access to classified information, etc., suspension and debarment remains an option to process the case.

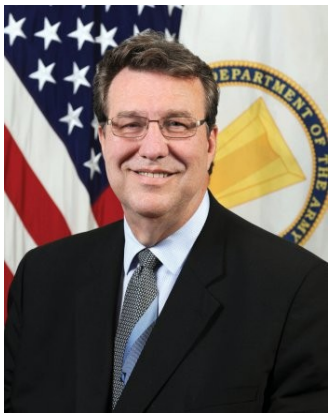


Update on Army Procurement Management Reviews (PMRs)

- Mr. Harry Hallock, Deputy Assistant Secretary of the Army (Procurement) (DASA(P))

The success of the Army Contracting Enterprise is directly related to our workforce. Right now, although we are 8,000 strong, more than half our workforce has less than 10 years contracting experience. That's a challenge, as many of these folks have only contracted in an accelerated contingency environment where they may not have had the time to assess the consequences of their contracting actions. Often they relied on their legal advisors not only for legal counsel, but also for the business judgment they should have developed themselves. As we look to a future with declining contracting dollars and requirements, our workforce challenge is to ensure that the next generation of contracting professionals are true business advisors to our customers. That's where you can help – I ask that you assist me to teach our junior contracting professionals how to make sound business decisions. Together, we can help our contracting workforce produce acquisition documents that are so well drafted they present no legal objection and require little further policy comment. I can't say enough good things about the excellent counsel the contracting community consistently receives when we require legal reviews and advice. You've helped us prevail in a myriad of litigation actions, from pre-award and post-award protests to contract claims. You hold us accountable to ensure we're following procurement laws, regulations, and policies, and help us in doing our best to assure our contracts do not become targets for fraud, waste, or abuse. My goal as we forge ahead is to work hand-in-hand with you to assure that contracting business decisions remain firmly in the hands of our Contracting Officers with input and guidance from the technical experts, which includes the legal advisor.

Department of the Army policy is to ensure every level of management reviews, assesses, and analyses avenues to improve contracting operations and management for effectiveness, efficiency, and compliance with acquisition policies and regulations. For the Army, DASA(P) has the oversight responsibility, via Procurement Management Reviews (PMRs), to ensure this is occurring across the Army Contracting Enterprise. My team establishes and executes oversight with a tiered PMR program that ensures the review of every Army contracting activity every three years, at a minimum. With more than 240 contracting activities around the globe it's not easy.



I see PMRs as an opportunity to partner with Procurement Fraud Advisors (PFAs); something that isn't standard practice, but perhaps should be. We all benefit from multi-disciplined teams participating in our PMRs, but PFAs and others in the legal shop are not always on the team. It's a command decision whether or not to include attorneys in the PMR process. Usually the Head of the Contracting Activity (HCA) or his/her Principle Assistant Responsible for Contracting (PARC) determines PMR team composition. Oftentimes procurement attorneys or other folks in the legal office are on the team, but a PFA is rarely included. The HCA is responsible for executing his/her PMR program under the direction of the DASA(P), using the Army mandated toolkit to ensure standardization in

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Update on Army Procurement Management Reviews (PMRs)

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measurement of processes and procedures in a historical context. My team performs Command Assessments to review the implementation of HCA directed PMRs to insure Army guidance is followed.

For more than a decade, we've been contracting in a contingency environment; and the evidence shows that we definitely moved things along in a quicker fashion. In fact you could say we were very effective in getting much needed products and services to our Soldiers operating in harm's way. But how much did we sacrifice efficiency in the process? It's now time to step back; to review how the Army Contracting Enterprise operated in recent contingencies and consider how we might change our paradigm in a world that has not only reduced our need for an all out wartime footing but an economic environment that requires us to shift the ever changing balance toward efficiency over effectiveness. I believe there are opportunities for PFAs to assist us in identifying systemic weaknesses in documentation that impact our litigation position and contribute to the potential for increased fraud, waste, and abuse. Together we can collaborate to determine if we missed something along the way or if we need to take corrective action to prevent future problems. This type of comprehensive review will allow us to identify better contracting solutions when building our solicitations and putting together our supporting documentation. The result: an environment that fosters more defendable positions; decreases litigation losses; and effects changes with fewer opportunities for others to take advantage of the Government through documentation loopholes.
As the Army Contracting Enterprise looks ahead, in this constrained budgetary environment we must contract "smarter" while increasing our oversight to ensure contracting personnel are doing their jobs to the best of their ability As such, the Army PMR program is currently being restructured to increase standardization of contract execution reviews across the enterprise, improve the automation and ability to conduct remote reviews, address root causes of findings, identify trends, share best practices, and manage implementation of corrective actions across the enterprise.

Should we include PFAs in this process? Let's open a dialog. Feel free to submit your thoughts and comments through your servicing Procurement Fraud and Irregularities Coordinator to Mark Rivest, Chief, Procurement Fraud Branch. He'll forward them on to me and I'll give your comments serious consideration as we go about restructuring the PMR program.

Army contacting has always had its challenges. In many respects that's just the nature of the business. I'm hopeful that with your continued assistance some of our challenges will be less daunting.

DOD Instruction 7050.05: Coordination of Remedies for Fraud and Corruption Related to Procurement Activities

- Pamoline McDonald, Attorney-Advisor, Procurement Fraud Branch

DoD Instruction (DoDI) 7050.05, Coordination of Remedies for Fraud and Corruption Related to Procurement Activities, was reissued on May 12, 2014 by its proponent, the DoD Office of Inspector General. This instruction requires that each DoD component monitor significant investigations of fraud or corruption related to procurement fraud activities from the ***inception*** of the investigation. The instruction defines the term "significant investigation" as: an investigation involving a loss of greater than $500,000; all investigations of corruption involving bribery, gratuities, or conflicts of interest; all defective and non-conforming product, counterfeit material or product substitution; and investigations otherwise determined to be significant by agency officials. This reissuance also incorporated and cancelled the Contract Audit, Internal Audit and Criminal Investigations Joint Policy Memorandum.

DoDI 7050.05 requires DoD component heads to designate a single, centralized organization to monitor the progress of each significant investigation affecting its organization, and to take action necessary to ensure the coordination of criminal, civil, contractual, and administrative remedies. Within the Army, AR 27-40, Chapter 8 implements DoDI 7050.05 by designating the Army Procurement Fraud Branch as being responsible for these functions. The goal of monitoring investigations at inception is to ensure that all possible criminal, civil, contractual and administrative remedies are identified by procurement officials, investigators, and the Department of Justice (DOJ), and pursued expeditiously. The instruction directs Defense Criminal Investigative Organizations (DCIO) to immediately notify the appropriate DoD component in writing at the start of all significant investigations, with the exception of undercover operations, investigations, or audits.

One of the major changes in this reissuance was the delineation of DCIO procedures for handling fraud or corruption investigations and the addition of considerations for DCIOs which will enhance the ability to share investigative information and encourage the earliest possible coordination of available remedies. Accordingly, in addition to providing for notification of significant investigations of fraud or irregularity to DoJ (both Crimi-

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DOD Instruction 7050.05: Coordination of Remedies for Fraud and Corruption Related to Procurement Activities

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nal and Civil Divisions), the appropriate DoD component, and the Defense Security Service when a particular investigation may impact DoD-cleared facilities or personnel, the instruction now encourages use of non-grand jury investigative techniques wherever possible to enhance the ability to share the information with the DoD component for use in evaluating civil, administrative and contractual remedies. The instruction advises DCIOs that grand jury investigative techniques (i.e., use of grand jury testimony and subpoenas) should be used only when other investigative techniques have proven unsuccessful or are deemed inappropriate based upon the specific circumstances of the investigation.

The instruction also provides that the DCIO should regularly discuss the status of their investigation and substance of their communications with prosecutorial authorities and with the DoD component concerned. As noted in the instruction, reports of their activities, court records, documents or other evidence of fraud or corruption should be provided to procurement officials, commanders, and suspension and debarment authorities to allow the timely consideration of applicable remedies. It also directs DCIOs to engage early in the process of gathering relevant information concerning the subjects of the investigations to include securing information on organization structure, finances and contract history of DoD contractors or subcontractors. In addition to outlining the responsibilities of the key players in procurement fraud investigations (e.g., DoDIG, USD (AT&L), and the military departments), the instruction also provides a listing for DCIOs of the key sources of information regarding Government contractors. These sources include: Defense Contract Management Agency (DCMA), Defense Contract Audit Agency (DCAA), Federal Procurement Data System – Next Generation (FPDS-NG), the System for Award Management (SAM), and Dun and Bradstreet reports.

The instruction sets out available contractual, criminal, civil, and administrative remedies which are available for use in response to evidence of procurement fraud. Finally, the instruction sets forth the actions to take in non-conforming product, defective product, product substitution, and counterfeit material investigations.

While DoDI 7050.05 encourages early communication and coordination of remedies, this is only possible to achieve in an atmosphere of mutual trust. That, in turn, requires open and regular communication between the DCIOs, procurement officials, Procurement Fraud Branch (PFB), and field Procurement Fraud Advisors (PFA). PFB maintains an ongoing dialogue with all of these individuals in the course of monitoring Army investigations. In addition, PFB actively seeks opportunities to participate in CID training events, and participates in a number of interagency working groups – each of which is dedicated to sharing issues and ideas and negotiating barriers to the early coordination and implementation of available remedies. PFAs should review their local practices and examine how to best open and maintain an effective line of communication with their organization's procurement officials, supporting law enforcement and audit organizations, servicing Assistant U.S. Attorneys, etc. Whether the vehicle is the establishment of a work group which meets regularly, a recurring teleconference, or similar arrangement, regular communication and the creation of "success stories" when coordinating remedies in particular cases will help to make the provisions of DoDI 7050.05 most effective.

Experience and Duty Status: Two Key Issues in Suspension and Debarment

- MAJ Susana Watkins, Attorney-Advisor, Procurement Fraud Branch

One of the questions a PFB attorney may ask of his or her supporting investigative agent or a field Procurement Fraud Advisor (PFA) concerns the work experience of the person being considered for potential suspension and/or debarment. The answer to this question is critical to PFB's analysis of the person's "contractor" status. This is because the suspension and debarment provisions under the FAR only apply to "contractors," as that term is defined in the FAR.

FAR 9.403 provides that a "contractor" is an 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 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." This definition therefore encompasses both contractors and potential contractors.

Before the facts of the actual misconduct of any person can be considered for potential administrative action, there must be a determination that the person is a contractor or potential contractor who is properly subject to suspension and debarment action under the FAR. Regardless of whether the potential respondent is a former military

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Practice Note:

In order for an individual to qualify under FAR 9.4 for suspension or debarment, the individual must be an actual or potential government contractor. As long as an individual is on extended active duty, or is employed as a government employee, he or she is generally not considered a potential contractor.

Experience and Duty Status: Two Key Issues in Suspension and Debarment

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service member, or a former government employee, reviewing a description of the person's duties and the nature of their actual duties, is important. PFB will ask for something more than a Military Occupational Specialty or duty title. Likewise, even when the potential respondent is a government contract employee, particularly an employee not holding a management position within the contractor's business organization, PFB may ask for a description of that employee's duties.

Information regarding work duties and experience can come in various forms, to include a description from the person's military or civilian evaluation, personnel record, a witness interview, an award citation/recommendation, e-mails, etc. This information also may be located in a person's plea agreement (in which case, PFB may not need anything else). The precise source for information about a person's work duties and experience is not as important as the source's reliability and whether the source can be used in the administrative record which supports any potential administrative action.

To illustrate how work experience figures into the analysis, consider the case of a lower-level employee who performs maintenance functions for a federal contractor who manufactures protective vests for the Army. In this hypothetical situation, the maintenance worker is convicted of stealing protective vests from his employer and selling them on the black market. At first blush, the maintenance worker may not seem like a potential contractor under the FAR. However, a closer review of the investigation reveals a number of other facts. The maintenance worker has been a long-term employee who has gained considerable knowledge about the strict requirements for government contracts, the manufacturing process for protective vests, government inspection procedures, and the recycling of material and Kevlar from the protective vests, and who has gained valuable experience from interacting with higher management in the closure of a large facility. These facts, coupled with the discovery that that the employee's labor hours were billed to a federal contract and the employee abused his access to this particular government contract in order to commit his offense, helps to make it more apparent that the worker may indeed be valuable as a prospective employee to a government contractor. With this information, the Suspension and Debarment Official (SDO) is now in a position to make a determination that the maintenance worker may reasonably be expected to conduct business with the government in the future and thus is a potential contractor under FAR 9.403.

The significance of contractor status in the suspension/debarment process also may appear in PFB's practice in another way. In this second example, consider a former Soldier who engaged in misconduct while serving on active duty as a Pay Agent in Iraq. Thereafter, the Soldier leaves military service (either voluntarily or involuntarily) and is hired by the government as a civilian employee. Following a lengthy investigation and prosecution, the former Soldier is convicted in Federal District Court for theft of government funds while performing duties as a Pay Agent in Iraq. Now the former Soldier is under consideration for proposed debarment. The practical problem is that the former Soldier is now a civilian government employee which renders his potential to leave the government in order to join the staff of a federal contractor ispeculative at best. Under such circumstances, PFB would generally not pursue debarment action in the case. It is completely possible, however, that depending upon the collateral effects of the conviction on the former Soldier's security clearance and the application and terms for his civilian employment, his supervisory chain may initiate employment termination action against the employee. If the employee is ultimately terminated, it is reasonable to presume the employee will seek substitute employment and, with his former experience as a Pay Agent, may obtain a position with an Army contractor. Under such circumstances, the Army could pursue debarment action against the individual.

So, the next time you receive questions from PFB concerning what an individual did in their past job, what the individual is doing now, or what are the responsibilities of a particular MOS, you will know why these questions are necessary.

Upcoming Training Opportunities

- **17-19 Mar 15; 12-14 May 15; 11-13 Aug 15: Next offerings of the National Suspension and Debarment Training Program (Export Course) Federal Law Enforcement Training Center (FLETC), Locations TBD, but at least two of these sessions should be offered in Washington, DC. Course description, dates and locations of course offerings, and registration information available at: www.fletc.gov.**

Responsibility Determinations in the Wake of the FCi Federal, Inc. Case

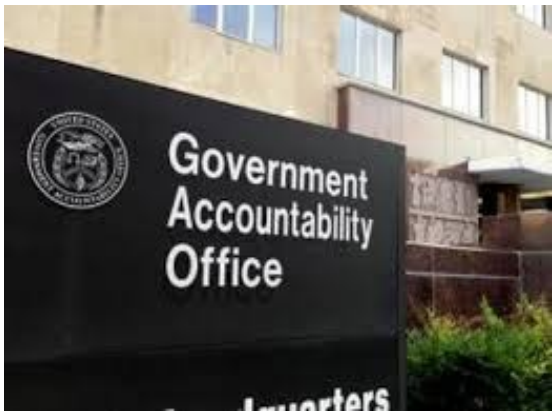
- Mark Rivest, Chief, Procurement Fraud Branch

On 20 October 2014, GAO issued its bid protest decision in the matter of FCi Federal, Inc. (B-408558; B-408558.5; and B-408558.6). FCi protested the Department of Homeland Security's (DHS) award of a contract to U.S. Investigative Services Professional Services Division, Inc (USIS PSD) for field support services, to include correspondence management, file operations and maintenance, data reviews and updates, interview scheduling, production of certificates, ceremony support, and interview preparation in support of 68 U.S. Citizenship and Immigration Services field offices and 10 asylum offices located throughout the United States. FCi protested the award challenging the DHS contracting officer's affirmative determination of responsibility and contended that allegations of fraud against USIS PSD's parent corporation should have raised questions about whether the awardee was a responsible contractor.

Six offerors, to include FCi and USIS, submitted proposals by the closing date and following evaluation by the Technical Evaluation Committee and Business Evaluation Committee, DHS established a competitive range consisting of USIS PSD and FCi, and conducted discussions. Ultimately, the Source Selection Advisory Committee determined that the two proposals were essentially equal from a technical standpoint and were essentially equal overall. In October 2013 (i.e., approximately six months after the agency received the initial proposals, but before the award decision), the Department of Justice (DoJ) announced that it was intervening in a *qui tam* case filed under the False Claims Act (FCA) against USIS PSD's parent company (i.e., USIS LLC). The relator's allegation under the FCA was that the company failed to perform quality control reviews in connection with its background investigations for the Office of Personnel Management (OPM).

In January 2014, DoJ intervened in the FCA complaint alleging that USIS management engaged in a scheme to deliberately circumvent contractually required quality reviews of completed background investigations in order to increase the company's revenues. The complaint alleged that starting in 2008, USIS engaged in a practice known at USIS as "dumping" wherein USIS used a proprietary computer software program to automatically release to OPM background investigations that had not gone through the full review process and thus were not complete. USIS allegedly would dump cases to meet revenue targets and maximize its profits. The complaint alleged that USIS concealed this practice from OPM and improperly billed OPM for background investigations it knew were not performed in accordance with the contract.

During a GAO protest hearing, the DHS contracting officer testified that she became aware of the allegations of fraud by USIS, LLC sometime in October 2013 through media reports. In addition, she testified that she was aware that the DoJ had intervened in the qui tam case prior to making the responsibility determination, she did not read the DoJ civil complaint for details regarding the allegations and that she neither received nor requested any information from ISIS PSID or USIS LLC regarding the alleged fraud. The contracting officer also testified that her only sources of information regarding the allegations of fraud were media reports and a generalized description of the allegations of fraud provided by agency counsel. The contracting officer stated that she did not seek additional information from anyone at DoJ or from the Suspension and Debarment Officials at either OPM or DHS. When asked whether she was aware of the specific allegations in the DoJ complaint, the contracting officer answered in the negative. On 22 May 2014, the contracting officer documented her determination that USIS PSD



was a responsible contractor. She recorded the awardee's record of integrity and business ethics as "satisfactory" on a one page form with the rationale for the determination being simply listed as "Past Performance Eval/EPLS" (sic). Having determined USIS PSD to be responsible, the contracting officer awarded the contract to USIS PSD on 1 July 2014 and the instant protest followed. FCi argued in its protest that DHS failed to evaluate USIS PSD's record of integrity and business ethics, as required by FAR 9.104-1(d), given that the DoJ complaint raised serious allegations of fraud in the performance of a government contract and suggested that USIS LLC management was fully aware of, and participated in, the fraud.

GAO began its analysis of the protest by observing that as a general matter, GAO does not review affirmative determinations of responsibility by contracting officers (4 C.F.R. § 21.5 (c) (2014); CapRock Gov't Solutions, Inc.; ARTEL, Inc; Segovia, Inc., B-402490 et. al., May 11, 2010, 2010 CPD ¶ 124 at 26; Navistar Defense, LLC; BAE Sys., Tactical Vehicle Sys. LP, B-401865 et al, Dec. 14, 2009, 2009 CPD ¶ 258 at 20). GAO will, however, review a challenge to an agency's affirmative responsibility determination where the protester presents specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible (4 C.F.R. § 21.5(c); see, Southwestern Bell Telephone Co., B-292476, Oct. 1, 2003, 2003 CPD ¶177 at 8). Ultimately, GAO upheld FCi's protest, noting that in this case, the contracting officer's statements in response to the protest indicate that she lacked the facts necessary to

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Responsibility Determinations in the Wake of the FCi Federal, Inc. Case

(Continued from page 8)

make an informed decision about, and thus failed to adequately consider, the DoJ's specific allegations of fraud.

There were, indeed, a number of unique factors at play in this case. The contracting officer was generally aware, from media coverage and from information obtained by agency counsel, of serious allegations contained in a *qui tam* case in which DoJ had elected to intervene, yet the contracting officer made a responsibility determination without seeking out more detailed information from DoJ, from agency counsel, or from suspension and debarment officials. GAO noted that the record indicated that the contracting officer misunderstood, and as a result, failed to consider, the close relationship between USIS PSD and its parent USIS LLC with respect to performing the contemplated contract. Finally, GAO noted that there was reason to question whether the contracting officer knew that she had the authority to find a contractor non-responsible in the absence of a suspension or debarment. During the course of the protest, the contracting officer submitted a written statement noting that "(u)nder the standard of 'innocent until proven guilty in a court of law' there is no basis for (the agency) to not award a contract to USIS PSD through a de facto debarment." At the hearing, to the specific question by the hearing officer "Could you still find a contractor non-responsible whether or not they've been debarred?" the contracting officer responded "I do not believe I can do so."

Given the available evidence, GAO concluded that the weight of the evidence indicated that the contracting officer here was unclear of her authority and was mistaken regarding the presumptions to be applied in a responsibility determination. Whereas FAR 9.103(b) provides that a contractor is presumed non-responsible until the contracting officer affirmatively finds that there is information clearly indicating that the offeror is responsible, here, the contracting officer incorrectly shifted the presumption to one of responsibility until "proven" non-responsible. In sustaining FCi's protest, GAO concluded that the record in this case included ample evidence that the contracting officer may not have considered information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. Specifically, the contracting officer failed to obtain and consider the specific allegations of fraud alleged by DoJ, relying instead on general media reports.

It is perhaps too early to determine exactly what this decision means for the daily practice of the acquisition attorney and Procurement Fraud Advisor, however it is instructive in underscoring the importance of cross talk between law enforcement, legal, and acquisition professionals. Law enforcement agents, quite appropriately, are protective of the sensitivity of ongoing investigations. Prosecutors are understandably protective of their cases prior to the court's decision. However, the fact remains that the full utilization of available contractual, civil, criminal and administrative remedies in cases involving procurement fraud or irregularities requires a healthy degree of continuous cross talk between law enforcement, legal, and acquisition channels. There is a healthy and natural tension when interdisciplinary professionals collectively become proactive in their respective lanes to pursue the best interests of the Government and the taxpayer. A constant dialogue between these professionals is critical to ensure that prospective remedies do not adversely impact investigations or prosecutions. At a minimum, the FCi decision underscores the fundamental importance of this dialogue. However, the decision also underscores that when contracting officials become aware of a case impacting upon a prospective awardee's present responsibility, it is especially critical that the law enforcement, legal and acquisition communities communicate effectively to ensure that the contracting officer is fully aware of the facts of the particular case as well as his or her authority with regard to responsibility determinations.

Army Material Command (AMC) Update

New Southeast Region MPFU-PFA Working Group Established

- Kate Drost, AMC Procurement Fraud and Irregularities Coordinator

Thanks to the dedicated service of many great Procurement Fraud Advisors (PFAs) out there, there is growing appreciation within the investigatory community of the value added by Army PFAs. The feedback from fraud investigators who attended the PFA Course that was presented at the Army JAG School in August 2014 was very favorable concerning the potential for making more effective use of PFAs during the course of criminal investigations. As a result of course attendance, several agents have expressed new awareness of PFAs as a valuable Army resource.

Possibly as an outgrowth of the good will garnered at the JAG School, the Resident Agent in Charge of the Major Procurement Fraud Unit, Southeast Region, SA Johnny Belyeu, invited the PFAs within his area of operations to form a joint working group with MPFU investigators. At the first meeting on October 1st, PFAs were in attendance from the Aviation and Missile Command, the Expeditionary Contracting Command, the Army Contracting Command,

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Army Material Command (AMC) Update

New Southeast Region MPFU-PFA Working Group Established

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the Anniston Army Depot, and Headquarters, Army Materiel Command. The meeting focused on early inclusion of PFAs, with SA Belyeu committing to route to the PFAs all unrestricted reports of investigation from first opening of the case. Beyond notifying PFAs of the presence of an investigation, SA Belyeu encouraged his agents to seek the involvement of the PFAs in ensuring that the Army asserts more timely contractual and administrative remedies. Where parallel proceedings are conducted with full coordination among investigators, DoJ attorneys, Army Procurement Fraud Branch attorneys, and PFAs, the Government is able to make more efficient use of its investigative resources. Equally important, the Government can take more timely and effective remediation actions.

The MPFU Southeast Region PFA Working Group will meet quarterly to collaborate on issues of common concern, with an overall focus on better coordination of criminal, civil, contractual and administrative remedies. HQ AMC will host the next meeting.

Practice Note: ***In order to optimize their working relationships with acquisition professionals and investigators, PFAs should consider forming working groups with their supporting MPFU office.***

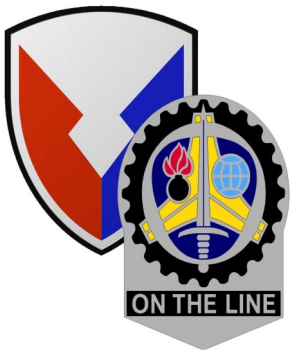
PFB, ASC, and MEDCOM Procurement Fraud Attorneys Present Instruction at the 2014 MPFU Senior Leaders Conclave

- Terese "T" Harrison, ASC Procurement Fraud Advisor

CID Major Procurement Fraud Unit (MPFU) held a Senior Leader Conclave in San Antonio, Texas between 16-18 September 2014. Marion (Frank) Robey, Director MPFU, extended an invitation to Mark Rivest, PFB Branch Chief, Gerald (Jerry) Krimbill, PFIC, MEDCOM, and Terese (T) Harrison, PFA, Army Sustainment Command (ASC), to speak to attendees on the Army Procurement Fraud Program, the duties/responsibilities of PFAs/PFICs and how those tasked with PFA/PFIC duties can most effectively interface with law enforcement. The purpose of the Conclave was to gather and train senior MPFU leaders, primarily Resident Agents in Charge (RAC) and Senior Agency in Charge (SAC) throughout the world along with elements of the MPFU Headquarters located at Marine Corps Base Quantico, Virginia.

Mr. Rivest provided an overview of PFB's regulatory responsibilities under AR 27-40, chapter 8, and noted that these duties extended considerably beyond merely suspension and debarment, and encompassed the mission of serving as the Army's central point of contact for accomplishing the coordination of remedies in cases involving procurement fraud and irregularities. Mr. Rivest then enumerated the four basic categories of remedies: contractual (e..g., termination for default, revocation of acceptance, use of contract warranties, etc.); civil (i.e., actions initiated by the Department of Justice and U.S. Attorneys for monetary damages), criminal (e.g., cases initiated by the Department of Justice and U.S. Attorneys seeking criminal penalties and restitution), and administrative (e.g., removal/reassignment of government personnel, revocation of contracting warrants, and suspension /debarment). Rather than the historical norm of PFB activity happening at the very end of an investigation/ prosecution, Mr. Rivest noted that law enforcement can expect PFB to lean forward in the future attempting to provide early coordination of as many available remedies as possible. As noted by Mr. Rivest, as procurement dollars become more scarce, the greater the need to maximize recoveries and return them to requiring activities before the funds expire. The effective early coordination of available remedies will require a good degree of timely communication between PFB, PFAs and law enforcement as well as effective pre-existing teaming relationships between PFAs and law enforcement.

Mr. Krimbill and Ms. Harrison briefed on the roles of PFICs and PFAs within the Army, including the challenges of their duties with respect to those with whom they regularly interface: Contracting, investigators, DOJ, and PFB. Specifically, Mr. Krimbill and Ms. Harrison discussed the importance of recognizing fraud indicators and coordinating early with law enforcement with PFAs and PFICs assisting in the process of identifying key contract provisions and witnesses, as well as the key role that PFAs and PFICs play in interfacing with PFB and DoJ, preparing flash reports, litigation reports, and realizing monetary recoveries for the command. Given the fact that at least half, and in some locations 60%, of the acquisition workforce have fewer than ten years of experience in procurement, Mr. Krimbill and Ms. Harrison stressed the importance of PFA and PFIC efforts to inform the acquisition workforce of the importance of such duties and how PFAs and PFICs can be of assistance in cases of fraud and irregularities.



The MPFU leaders were extremely interested in these presentations and posed a number of excellent questions. Some of the key questions and responses are provided below:

Army Material Command (AMC) Update

PFB, ASC, and MEDCOM Procurement Fraud Attorneys Present Instruction at the 2014 MPFU Senior Leaders Conclave

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1) Question: When do you tell the Procuring Contracting Officer (PCO) about fraud, and whether or not the PCO can proceed with contract actions?

Answer: The PFA will not reveal there is a fraud investigation unless the criminal investigative agent gives permission to do so. In the absence of specific approval to brief on a law enforcement investigation, the PFA will not brief on an investigation and will, instead, rely upon the responsible criminal investigative agents to do so as they deem appropriate. Contract actions will proceed in accordance with the Federal Acquisition Regulation (FAR) and statute. Advising on coordination of remedies, which includes contractual action/inaction is one of the PFA's key roles.

2) **Question:** How do you handle Crime Prevention Surveys (CPSs)? What do you do with them?

Answer: The PFA ensures that all addressees on the CPS receive a copy of the document. If the CPS requires follow-up action, the PFA will monitor that and engage as appropriate.

3) **Question:** What designates an investigation's PFA when more than one PFA (or agency) may be involved?

Answer: While the FAR/ Defense Federal Acquisition Regulation Supplement (DFARS) provide for a single (or where there are multiple, a primary) agency Suspension and Debarment Official, and Department of Defense Instruction (DoDI) 7050.05 provides for a single agency recipient of procurement fraud reports (in the Army's case, PFB), there is no regulatory authority designating a single service or organization PFA. Often, there is more than one PFA or procurement integrity attorney involved in a matter. Arguably, the PFA for the contracting activity working in concert with the organization contract law attorney is the primary source for providing advice with respect to available remedies in cases of procurement fraud or irregularities.

4) **Question:** Does DOD have PFAs?

Answer: No, however, different elements of Department of Defense (DOD) (i.e., Defense Logistics Agency, Defense Contract Management Agency) have procurement integrity counsel which perform similar functions.

U.S. Army Medical Command (MEDCOM) Update

Ethics Opinions: Guidance for Prudent Employees or "Get Out of Jail Free" Cards?

- Jerry Krimbill, Procurement Fraud and Irregularities Coordinator, MEDCOM

In many instances, Government civilian employees or Soldiers who recognize a potential financial conflict of interest seek the written advice from an Ethics Counselor. While in most cases individuals treat such opinions as "shields" to inform them of the left and right limits of their conduct, some of those ethics opinions, if not carefully worded, can be used as "swords" to effectively immunize individuals from adverse action resulting from their improper conduct that was unwittingly sanctioned by a narrowly worded ethics opinion. Procurement Fraud Advisors would be well advised to remind the Ethics Counselors with whom they work to take care when drafting such ethics opinions.

There is interplay between the Joint Ethics Regulation (JER) and the Army Procurement Fraud Program. JER, para. 10-201e provides, "For matters not handled within the DoD Component's procurement fraud program, any civil or criminal referrals to [the Department of Justice] or the local U.S. Attorney of violations of this Regulation shall be coordinated with the DoD Component [Designated Agency Ethics Official (DAEO)]. The DoD Component DAEO shall be informed of referrals of violations of this Regulation handled within the DoD Component's procurement fraud program." Thus, violations of the JER, such as conflicts of interest, can have procurement fraud implications.

Potential conflicts of interest can arise in a variety of contexts. Perhaps a civilian employee is being furloughed and, to compensate for the lost income, is seeking part-time employment with a Government contractor who provides services to the Government employee's office. Alternatively, a Soldier's duties may involve interaction with a contractor by whom one of the Soldier's family members is employed. Regardless of the particular circumstances, there are many ways an employee's or Soldier's personal financial interests can come into conflict with their official duties.

Written ethics opinions are authorized, and in some cases encouraged, upon discovery of a potential conflict of interest. The JER, para. 8-501, provides, "DoD employees may obtain counseling and written advice

(Continued on page 12)

U.S. Army Medical Command (MEDCOM) Update

Ethics Opinions: Guidance for Prudent Employees or "Get Out of Jail Free" Cards?

(Continued from page 11)

concerning restrictions on seeking other employment from their Ethics Counselor." Similarly, JER, para. 5-302a, provides that supervisors who are approached by their employees seeking an individual conflict of interest waiver under 18 U.S.C. 208(b)(1) should consider, *inter alia*, the advice of the Ethics Counselor. Conflicts of interest are somewhat unique in that the mere *appearance* of a conflict of interest results in a violation, even in the absence of an actual conflict. Thus, it is critical that PFAs remind their supporting Ethics Counselors to be mindful of the potential for the appearance of a conflict of interest when they are crafting an ethics opinion.

A narrowly worded ethics opinion can stand in the way of potential prosecution of an individual with a conflict of interest. For example, take the case of a Government employee who works with her spouse on Government research collaborations. Recognizing the potential conflict of interest, the employee sought an opinion from her Ethics Counselor. The ethics opinion she received prohibited the employee from supervising her spouse, required the Government employee to direct research collaboration requests to the Government employee's supervisor, and prohibited the employee from serving as the Contracting Officer's Representative on any collaboration involving awards to the Government employee's spouse's firm. Perhaps because this ethics opinion was so specific in what it required and what it proscribed, it was determined that conduct that wasn't specifically prohibited by this ethics opinion could not be prosecuted, notwithstanding the fact that the conduct clearly violated the spirit (if not the letter) of the law. Specifically, the government employee signed the technical certification for multiple sole-source justification and approval documents designating the spouse's firm as the only responsible source (and identifying the her spouse by name as a contributing collaborator).

Ensuring that ethics opinions contain the right balance of specific guidance, coupled with general principles to avoid appearances of, and actual, conflicts of interest, will enhance the effectiveness of the Army's Procurement Fraud Program.

U. S. Army Europe (USAREUR) Update

PFB Welcomes New Theater Suspension and Debarment Official (SDO) and PFIC

- Mark Rivest, Chief, Procurement Fraud Branch

Since the publication of the last Procurement Fraud Advisor, COL Paula I. Schasberger reported for duty as USAREUR's new Deputy Judge Advocate and theater SDO. In addition, USAREUR also gained a new Procurement Fraud and Irregularities Coordinator (PFIC), CPT Matt Haynes, who also serves as a Contract and Fiscal Law Attorney at the USAREUR Office of the Judge Advocate. PFB welcomes both COL Schasberger and CPT Haynes to their new positions and looks forward to working closely with them in the future.

Recent Debarments:

Truva Nakliyat Gida Ith. Ltd. Stl. (aka, Truva International Transportation & Logistics), Ms. Mudje Ozel and Mr. Servet Tumkaya (Failure to Perform): On 21 October 2014, the USAREUR SDO debarred Truva (a company headquartered in Adana, Turkey), and its principal officers Mudje Ozel and Servet Tumkaya through 21 October 2024 for their failure to satisfactorily perform on contracts to deliver goods from Army and Air Force Exchange Service (AAFES) locations in Germany and Iraq to designated AAFES receiving points in Afghanistan.

In April, 2011, AAFES executed a tender agreement with Truva to transport 20 and 40 foot containers containing freight of all kinds to Afghanistan with the last delivery occurring in November 2012. Many of these containers were delivered late (on occasion up to 185 days late), and on at least two occasions, Truva was found to have used improper routing to include a route through Iran. In addition, the evidence indicated that Truva failed to deliver 87 containers resulting in the loss of $3.7 million in merchandise. Truva did not respond to AAFES' subsequent claim.

Mr. Mourad Chedani (Falsification of qualifications): On 27 October 2014, the USAREUR SDO debarred Mr. Chedani through 26 October 2017. On 31 May 2011, the Army entered into a contract with SOS International, Inc. (SOSI) to provide intelligence analysis services in support of Operation Enduring Freedom, Trans Sahara. In January, 2013, Mr. Chedani was hired by SOSI as an intelligence analyst. Investigation revealed that Mr. Chedani falsified both his educational background and work experience in order to secure employment with SOSI.

Practice Note:

In addition to having an Army SDO with world wide suspension and debarment authority, the Army also has SDOs in USAREUR and Korea to handle theater specific issues.

8th U.S. Army (Korea) Update

PFB Welcomes New Theater Suspension and Debarment Official (SDO) and PFIC

- Mark Rivest, Chief, Procurement Fraud Branch

Since the publication of the last Procurement Fraud Advisor, COL Craig Meredith reported for duty as the new SJA for Eighth Army (Korea), and theater SDO for Korea. In addition, Korea also gained a new Procurement Fraud and Irregularities Coordinator, LTC Pat Vergona, who also serves as the Executive Office for Eighth U.S. Army. PFB welcomes both COL Meredith and LTC Vergona to their new positions and looks forward to working closely with them in the future.

Korea is a busy suspension and debarment jurisdiction with 37 suspension, proposed debarments and debarments having been processed there in FY14.

Recent Debarments:

Mr. Patrick Kim (Conviction): On 8 July 2014, the Korea SDO debarred Mr. Patrick Kim, a former government employee, through 19 February 2017. On 19 February 2014, Mr. Kim was convicted in U.S. District Court, District of Nevada, for making false claims to the government. In 2008, Mr. Kim created and submitted fraudulent documents in order to receive living quarters allowances. This misconduct resulted in Mr. Kim improperly receiving approximately $64,000 in living quarters allowance.

Suspension and Debarment Case Law Update

- CPT Eric Liddick, Attorney-Advisor, Procurement Fraud Branch

Suspension:

- The Department of Housing and Urban Development (HUD) suspended James Hodge, President of Allied Home Mortgage Corporation ("Allied Corp"), Allied Home Mortgage Capital Corporation ("Allied Capital"), and Allied Corp. Hodge filed suit under the Administrative Procedure Act seeking a declaration that the suspensions were arbitrary and capricious. After HUD rescinded the initial suspensions and reissued notices of suspension, HUD moved to dismiss Plaintiffs' claims. Plaintiffs moved for summary judgment, arguing that the suspensions were contrary to law "given the age of the evidence against Hodge and the paucity of evidence directly attributable to Allied Corp." Plaintiffs' complained that HUD, in suspending Allied Corp, had conflated and misapplied misconduct committed by Allied Capital. The district court found no error in HUD's reliance on a Southern District of New York investigation and in HUD's "reasonable inference . . . based on the nature of the circumstances giving rise to a cause for suspension." Specifically, "HUD had before it evidence of recent violations committed by Allied Corp and a history of violations committed by its President. The role and involvement of Hodge in the operations of Allied Corp clearly supported an inference that Allied Corp would be operated . . . in the same manner as Allied Capital." Accordingly, a "rational connection exists between the choice made by HUD and the factual circumstances underlying the suspension of Allied Corp." *Allied Home Mortg. Corp. v. Donovan*, No. H-11-3864, 2014 WL 3843561, *1-3, 9 (S.D. Tex. Aug. 5, 2014).

Standard of Review:

- In determining whether an agency action is arbitrary and capricious, courts will consider whether "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). . . . [T]he court must determine whether the agency considered relevant data and articulated an explanation establishing a 'rational connection between the facts found and the choice made.'" *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). *Allied Home Mortg. Corp. v. Donovan*, No. H-11-3864, 2014 WL 3843561, *5 (S.D. Tex. Aug. 5, 2014).

Suspension and Debarment Case Law Update

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Administrative Record On Review:

- "In limited circumstances, the court can supplement the [administrative] record." A court may, for example, consider "extra-record evidence relating to the plaintiffs' allegations that the agency failed to consider all the relevant factors" where a question before the court is whether the agency had, in fact, considered all relevant factors. Here, however, the extra-record evidence was not considered because it failed to demonstrate that the Department of Housing and Urban Development had not considered all relevant factors. *Allied Home Mortg. Corp. v. Donovan*, No. H-11-3864, 2014 WL 3843561, *5 (S.D. Tex. Aug. 5, 2014).

- Evidence related to an agency's decision not to suspend a contractor is not relevant to whether the agency's decision to suspend a separate contractor was appropriate. An agency's decision to not take action is a decision committed to that agency's absolute discretion. *Allied Home Mortg. Corp. v. Donovan*, No. H-11-3864, 2014 WL 3843561, *5 (S.D. Tex. Aug. 5, 2014) (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

Due Process:

- Department of Housing and Urban Development (HUD) did not violate Plaintiffs' substantive or procedural due process rights under law. HUD's suspension of Plaintiffs' was neither arbitrary nor capricious; accordingly, Plaintiffs' substantive due process claim fails. HUD provided post-suspension procedural rights consistent with applicable regulations. Although Plaintiffs argued that they should have received an opportunity to respond to the allegations before HUD imposed the suspension, "[a]s a general rule, due process does not always require pre-deprivation procedural protection." *Barry v. Barchi*, 443 U.S. 55, 65 (1979). Because Plaintiffs failed to demonstrate that these post-deprivation procedures were constitutionally inadequate, Plaintiffs' procedural due process claim fails. An injury to reputation alone is insufficient to implicate due process. *Allied Home Mortg. Corp. v. Donovan*, No. H-11-3864, 2014 WL 3843561, *10-11 (S.D. Tex. Aug. 5, 2014).

- "[T]ermination from the Medicare/Medicaid program or debarment from government contract bidding constitutes a deprivation of a property or a liberty interest protected by due process. . . . [But t]he right to due process is *not* implicated when a contractor is not completely cut off from doing business with the government." *ABA, Inc. v. District of Columbia*, No. 14-550, 2014 WL 1863944, *8 (D.D.C. May 9, 2014) (citing *Trifax Corp. v. District of Columbia*, 314 F.3d 641, 643 (D.C. Cir. 2003)) (emphasis in original).

- "[D]ecertification as a qualified Medicaid provider implicates a protected property interest and . . . total debarment from government contracting implicates a corporation's protected liberty interest." *New Vision Photography Program, Inc. v. District of Columbia*, No. 13-1986, 2014 WL 3029713, *11 (D.D.C. July 7, 2014) (citing *ABA, Inc. v. District of Columbia*, No. 14-550, 2014 WL 1863944, *8 (D.D.C. May 9, 2014)).

Damages:

- Plaintiffs brought an action against the Department of Veteran Affairs (VA) and its "Debarment Committee," *inter alia*, for alleged misconduct affecting Plaintiffs' ability to obtain set-aside government contracts through their qualified Service-Disabled, Veteran-Owned Small Business. Plaintiffs alleged damages resulting from the VA's decision to debar certain Plaintiffs from bidding on any government contracts. Eventually the VA vacated the debarments. Plaintiffs sought limited written discovery on the "members of the . . . debarment committee." The Magistrate Judge held the discovery responses in abeyance pending disposition of the Defendants' motion to dismiss. Plaintiffs filed a second motion for discovery, which the Court denied. In a motion for reconsideration, Plaintiffs argued that Defendants' refusal to respond to discovery was "intended to inflict additional harm" and that Defendants had "refused to correct the 'lingering effects' of the VA's debarment." Plaintiffs also requested that the Defendants take "affirmative steps to correct these lingering issues," such as removing references to the debarment from government websites or publications. The district court denied Plaintiffs' motion, reiterating that "arguments regarding the alleged harm from the 'lingering effects' of the debarment . . . essentially concern the merits of Plaintiffs' damages claims. *Storms v. United States*, No. 13-CV-0811, 2014 WL 3547016 (E.D.N.Y. July 16, 2014).

Suspension and Debarment Case Law Update

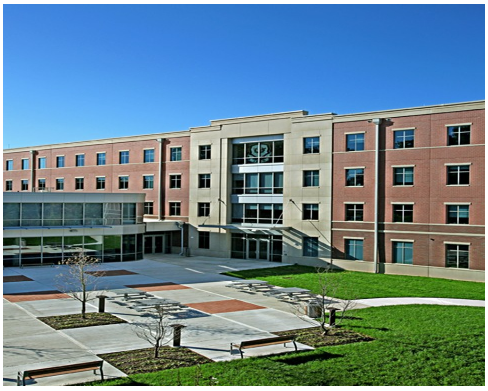
(Continued from page 14)

Bid Protest Case:

- Protestor filed a post-award bid protest challenging award of a contract for transportation and storage of privately-owned vehicles of military members and Department of Defense civilian employees. During the hearing before the Court of Federal Claims, Protestor suggested that the winning bidder, International Auto Logistics, LLC (IAL), had subcontracted with a "fairly notoriously debarred company," namely Agility International and Agility Defense and Government Services ("Agility Defense"). According to Protestor, subcontracting with the debarred contractors put IAL in violation of procurement regulations. The Court of Federal Claims disagreed with the Protestor, concluding that as of the date of the award of the protested contract, both Agility entities were allowed to contract with the government. Thus, IAL could have subcontracted with either at the time the contract was awarded without violating procurement regulations. (The Court of Federal Claims discussed the unique procedural history surrounding the suspension of the Agility entities, including a successful action by Agility International and Agility Defense to have the suspensions terminated). *Am. Auto Logistics, LP v. United States*, 117 Fed. Cl. 137 (Fed. Cl. 2014).

Procurement Fraud Branch Case Update

The debarment and Administrative Compliance Agreement cases discussed below are not intended as an exhaustive listing of all actions processed by PFB. Rather, these summaries are provided as informative examples of the types of cases recently processed by PFB.



Recent Debarments:

- **Monica L. Naples, Qtronika, and Hong-Liang Cui (Conflict of Interest; Fraud):** On 31 July 2014 and 13 August 2014, the Army SDO debarred Monica L. Naples and Qtronika, and Hong-Liang Cui, respectively, through 23 June 2019. Ms. Naples husband, Dr. Dwight Woolard, worked as a Program Manager, Contracting Officer Representative, and Grants Officer Representative for the U.S. Army Research Office. In his position, Dr. Woolard influenced funding decisions for Small Business Innovation Research. Dr. Woolard and Ms. Naples conspired to use Dr. Woolard's position and authority to enrich themselves and Ms. Naples's company, Qtronika. Specifically, Dr. Woolard used his government position to advance Ms. Naples's and Qtronika's interests by steering additional funding to third-party conduits, such as Mr. Cui and his companies, so that those companies could hire Qtronika as a sub-contractor for various projects. Additionally, Dr. Woolard used his position to ensure payment of Qtronika invoices and to threaten non-compliant third-parties, such as Mr. Cui, with decreased funding for their research. Mr. Cui and his companies benefitted from willful participation in the conspiracy as each received continued funding for their personal innovative research. (CPT Liddick)

- **Christina Ausk (Theft; Fraud; Overcharging):** On 26 September 2014, the Army SDO debarred Christina Ausk through 14 August 2017. Ms. Ausk, a contractor employee and Project Manager, became romantically involved with an Installation Commander. An investigation revealed that the two conspired to collect and sell recyclable items and scrap metal located on the installation and owned by the Government, and then split the proceeds. Ms. Ausk also directed contractor employees to collect recyclable items and scap metal, and to charge their work on logs later billed to the Government. (CPT Liddick)

- **John W. Strawn (Labor Mischarging):** On 22 September 2014, the Army SDO debarred Mr. Strawn through 9 July 2015. A defense contractor, DRS SSI made a FAR mandatory disclosure to DODIG of labor mischarging which arose from an anonymous tip made on its hotline. The complainant alleged that two employees were charging time to the M1200

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Procurement Fraud Branch Case Update

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Recent Debarments (Continued):

- **Mr. John W. Strawn (Continued from page 15):** Armored Knight contract while they worked on personal business. A DRS SSI internal investigation substantiated that one of the employees identified, Mr. Strawn, spent considerable time working on personal business while charging his time to the M1200 contract. Mr. Strawn, a trainer on the M1200 program, conceded in his company interview that he spent time on personal matters during training "down time." DRS SSI estimated the value of Strawn's time spent on personal business over a 28 month period to be $53,124. Strawn left DRS SSI before the conclusion of the investigation because he was recruited to work for another defense contractor. The Army SDO proposed Mr. Strawn for debarment and Mr. Strawn's matters in opposition included letters of support from former DRS SSI co-workers and his current supervisor at the new employer. The co-workers stated that Strawn was a committed employee who gave 110% to the program, but noted that they all struggled to find work when not in the training cycle. Mr. Strawn's current supervisor noted that Mr. Strawn worked with him on a daily basis in the past year and Mr. Strawn's performance was nothing less than superb. The supervisor described Mr. Strawn's work ethic as beyond reproach and noted that he is productive in the office, as well as making himself available during non-duty hours. Based on the evidence and matters in extenuation and mitigation, the Army SDO debarred Strawn for one year. (McDonald)

- **James E. Travis (Bribery and Theft of Government Property**): On 22 September 2014, the SDO debarred James E. Travis through 9 April 2022, based on his conviction for bribery. While serving as a Paying Agent and Contracting Officer Representative with U.S. Army Special Forces at FOB Sharana , Afghanistan, SFC Travis accepted bribery payments, ranging from $4,000 to $7,000, from Afghan vendors in exchange for preferential treatment in the award of "jingle truck" transportation and construction contracts. In addition, SFC Travis conspired with the Afghan vendors and another soldier to steal fuel from the installation fuel point, by paying the soldier to escort Afghan fuel trucks onto the installation to steal fuel at the fuel point and then off the installation undetected with the stolen fuel. The total value of the stolen fuel was estimated at $400,000. The Court sentenced Mr. Travis to 60 months confinement, and ordered him to pay restitution in the amount of $422,302.65 (Wallace).

- **Gul Agha Khairullah and Yar-Mohammad (Bribery)**: On 22 September 2014, the SDO debarred Afghans nationals, Gul Agha Khairullah and Yar-Mohammad through 3 February 2019, based on their bribery convictions in an Afghan Criminal Court, Ghazni, Afghanistan. As part of a sting operation at FOB Ghazni, federal agents observed the two Afghans at the installation fuel depot paying a $500 cash bribe to a fuel operator working undercover, in exchange for 2,825 gallons of fuel. The Afghan Court sentenced both of them to two years confinement (Wallace)

- **Former SFC Mauricio Espinoza and former SSG Philip S. Wooten (Conspiracy to Defraud and Theft of Government Property):** On 22 September 2014, the SDO debarred Mauricio Espinoza through 7 June 2021, based on his conviction for conspiracy to defraud, and theft of government property. In addition, the SDO debarred his co-conspirator, SSG Philip S. Wooten, through 5 June 2017. While serving as a Paying Agent for a Special Forces unit in Afghanistan, SFC Espinoza conspired with SSG Wooten, the unit's Field Ordering Officer (FOO), to steal over $100,000 in operational funds (OPFUNDS) and reconstruction (CERP) funds. After stealing the funds, they accounted for the missing funds and concealed their crimes, by fabricating false vendor receipts for undelivered goods and services to the unit, and submitting them to the finance office for payment. In addition, they stole unit government funds, by inflating bids for civil work projects, and once they were approved, they paid the vendors an amount less than the approved bid, and kept the difference. Later, they transferred a portion of the stolen funds back to the United States through U.S. postal money orders, electronic wire transfers, carrying cash on their person. The Court sentenced Mr. Espinoza to 51 months confinement, and ordered him to pay restitution in the amount of $114,034.80. The Court sentenced Mr. Wooten to 15 months confinement, and ordered him to pay restitution in the amount of $110,250 (Wallace)

- **Mr. Garo M. Chacmajian, Al Mahran Group International, Ms. Lara Chacmajian, Mr. Hani Chacmajian, and Chacmajian Group Holding (Circumvention of Prior Debarment):** On 22 July 2014, the Army SDO debarred Mr. Garo M. Chacmajian a/k/a "Karo Chacmajian" a/k/a "Garo Mahran" a/k/a/ "Garo Chacmagian" a/k/a "Chakmakgian" and his company, Al Mahran Group International through 28 February 2026. The Army SDO debarred Ms. Lara Chacmajian a/k/a "Lara Dimitri Maaz," Mr. Hani Chacmajian a/k/a "Hani Mahran Chakmakgian," and Chacmajian Group Holding through 29 April 2017. The Army SDO previously debarred Mr. Garo M. Chacmajian and Al Mahran Group International on 18 June 2013 through 28 February 2016. Mr. Garo M. Chacmajian used various aliases, his relatives, Ms. Lara Chacmajian and Mr. Hani Chacmajian, and Mr. Hani Chacmajian's company, Chacmajian Group Holding, to solicit and/or win government contracts with the Air Force and DLA. (MAJ Watkins)

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PFB welcomes your thoughts and suggestions regarding the Army Procurement Fraud Program as well as potential future articles for the Army Procurement Fraud Newsletter. Suggestions should be directed to: mark.a.rivest.civ@mail.mil

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