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 78) **Summer 2014**

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Message from the Chief, Procurement Fraud Branch (PFB)

Welcome to this new edition of The Procurement Fraud Advisor. We've redesigned the newsletter to provide more useful information to Procurement Fraud Advisors (PFAs). Each quarter, we'll be watching for new developments, key cases, practice tips, best practices from the field, and upcoming training opportunities that we can share with you via the newsletter. The PFB team will be on the look out for information that we think would be most relevant and helpful to your practice in the field.

In addition to re-launching the newsletter, we've also re-designed and re-launched the JAGCnet PFB web page. Again, our re-design was done with the field PFA in mind. We've added a number of additional features to the web page to include hot topics, an updated list of Procurement Fraud and Irregularities Coordinators (PFICs) with appropriate contact information, training material, and links to helpful websites.

Among the new resources you'll find on the new PFB web page is the PFA Quick Start Guide. The guide was designed to be of value to all PFAs, regardless of their level of experience, explaining the basic duties of PFAs, their role in the Army Procurement Fraud Program, and providing practice tips such as how to assemble a request for Suspension or Debarment.

This is a particularly exciting time to serve as a PFA. The practice area has evolved from a Fraud, Waste, and Abuse model of the 1970s and 1980s featuring Suspension and Debarment, to an "Acquisition Integrity" model, which now encourages early implementation of contract remedies and early engagement with industry to encourage ethical business practices and robust corporate ethics programs in order to maximize the number of responsible contractors competing for Government business.

In this resource constrained era, the PFA's job becomes all the more critical in securing remedies that protect the procurement process, alerting PFB of cases in which Suspension and Debarment are appropriate, and in helping to ensure that local installations have robust Procurement Fraud programs to reach acquisition and non-acquisition personnel alike. Nothing PFB can do from the National Capital Region can effectively substitute for a strong, local, Procurement Fraud Program.

The past 10 years have been a period of great change for the Army, from the stand up of the Installation Management Command, to the reorganization of contracting functions following the recommendations of The Gansler Commission. No longer do PFAs fall neatly at subordinate installations of Army MACOMs, with PFAs advising their local command's Directorate of Contracting. Today, a PFA is more likely to find themselves assigned to a "requiring activity" and asked to provide PFA assistance on a case by an attorney from the Mission Installation Contracting Command. PFAs may also have both a mission and technical chain PFIC.

I believe that the most effective way forward is to enhance our communication and coordination with PFICs and PFAs who really comprise the backbone of the Army's Procurement Fraud program. Together, we comprise a formidable "coalition of the willing" to combat procurement fraud and protect the Army's interests. I look forward to working closely with all of you as we create the Army's modern Procurement Fraud Program. As always, let us know when you have comments and suggestions. We need to hear from you!

— Mark Rivest

Interagency Suspension and Debarment Committee Reports to Congress

On March 5, 2014, the Interagency Suspension and Debarment Committee (ISDC) submitted its report to Congress on agency suspension and debarment activity in FY12-13. The report notes, among other things, that in FY13, Army Procurement Fraud Branch (PFB) processed a total of 645 suspension and debarment actions, which was the most actions processed in FY13 by any activity within the Department of Defense.

The volume of suspension and debarment actions processed by PFB in FY12 and FY13 represents approximately a 20% increase over the number of actions processed in FY11 and a 40% increase over the actions processed in FY10. Since FY09,

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Interagency Suspension and Debarment Committee Reports to Congress

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"[In Fiscal Year 2012,] the Government proposed 2,081 individuals and entities for debarment and ultimately debarred 1,722. In Fiscal Year 2013, the Government proposed 2,244 individuals and entities for debarment and ultimately debarred 1,715."

- ISDC FY12-13 Report to Congress

PFB's suspension and debarment activity has approximately doubled.

The ISDC was established via Executive Order in 1986 and is an interagency body consisting of representatives from Executive Branch organizations that work together to provide support for suspension and debarment programs throughout the government. All 24 agencies covered by the Chief Financial Officers Act are standing members of the ISDC. In addition, 18 independent agencies and government corporations participate in the ISDC. The Committee also facilitates lead agency coordination, serves as a forum to discuss current suspension and debarment related issues, and assists in developing unified Federal policy. Collectively, ISDC member agencies are responsible for the suspension and debarment practice area involving virtually all procurement and non-procurement transactions in the federal government. IAW Sec. 873(a)(7), the ISDC is required to report to congress annually on the status of the federal suspension and debarment system. Specifically, the ISDC must report: progress and efforts to improve the suspension and debarment system by ensuring the fair and effective use of this administrative remedy; the extent to which federal agencies participate in ISDC activities; and provide a summary of each agency's activities and accomplishments in the government-wide debarment system. In addition to providing a statistical breakdown of PFB activity in FY12 and FY13 in issuing suspensions, proposed debarments and debarments, the report positively highlighted PFB's proactive efforts to provide field Procurement Fraud Advisors (PFA) with guidance concerning the effective performance of PFA duties to include the importance of closely coordinating with contracting officers, identifying fraud or performance issues, and providing guidance on the evidentiary requirements necessary to impose a suspension or debarment. The report's DoD statistical analysis is set out below.

Suspension and Debarment Actions in FY 2012

Agency	Suspension	Proposed for Debarment	Debarments	Total
USAF	76	369	234	679
Army	195	284	186	665
DLA	18	179	202	399
Navy	47	151	146	344

<u>Practice Note</u>: In FY13, Army Procurement Fraud Branch processed more suspension and debarment actions than any other activity in the Department of Defense.

Suspension and Debarment Actions in FY 2013

Agency	Suspension	Proposed for Debarment	Debarments	Total
Army	71	316	258	645
USAF	39	216	192	447
Navy	139	189	109	437
DLA	18	190	167	375

<u>Practice Note</u>: In accordance with FAR 9.104-5(a)(2) (Certification regarding responsibility matters), prior to proceeding with an award, contracting officers are required to notify the agency Suspension and Debarment Official when an offeror indicates the existence of an indictment, charge, conviction, or civil judgment, or Federal tax delinquency in an amount that exceeds $3,000.

Legislative Update

In the wake of a number of Government Accountability Office reports which highlighted weaknesses primarily in civilian agency Suspension and Debarment Programs, Congress has increasingly taken an interest in the Suspension and Debarment arena. That level of interest did not diminish in the 2013-14 legislative cycle. Highlights include:

The Stop Unworthy Spending (SUSPEND) Act (H.R.3345): The House Oversight and Government Reform Committee passed the SUSPEND Act out of committee on October 29, 2013. This proposed legislation would fundamentally change how agencies pursue Suspension and Debarment. Under the proposed legislation, Federal agency Suspension and Debarment would be consolidated into a single "Board of Civilian Suspension and Debarment" at the General Services Administration (GSA). The SUSPEND Act would centrally manage civilian executive agency suspension and debarment activities. It would provide for a waiver process which would enable agencies, such as the Department of Defense (DoD) to retain their Suspension and Debarment programs if several criteria are met. First, that the agency has a dedicated Suspension and Debarment program and staff. Second, that the agency has detailed procedures and policies in place concerning Suspension and Debarment. Third, that these policies and procedures encourage an active Suspension and Debarment program under a single Suspension and Debarment Official. Finally, that the agency has handled at least 50 Suspension and Debarment cases in the past three years. This bill remains in "introduced" status.

The Afghanistan Suspension and Debarment Reform Act (H.R. 2912): On August 1, 2013, the Afghanistan Suspension and Debarment Reform Act was referred to the full House Oversight and Government Reform Committee, as well as the House Committee on Foreign Affairs. This legislation would permit the Special Inspector General for Afghanistan Reconstruction (SIGAR) to refer cases for suspension and debarment to a "lead" Federal agency and notify the Interagency Suspension and Debarment Committee (ISDC) of such a referral. If the lead agency declines or fails to act on the case, the legislation would allow SIGAR to exercise Suspension and Debarment Official functions if the Interagency Suspension and Debarment Committee grants "lead agency" status to SIGAR. This proposal remains in committee.

FY14 Consolidated Appropriations Act (CAA): Congress has also been interested in carving out categories of contracting ineligibility since at least 2012. Section 8124 of the FY12 CAA prohibited the expenditure of appropriated funds to enter into a contract, memorandum of understanding, or cooperative agreement with, make a grant or loan or loan guarantee to any corporation that has an unpaid Federal tax liability for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner. This prohibition is in effect until the agency Suspension and Debarment Official has considered suspension or debarment in the case and has made an affirmative determination that further action is not necessary to protect the interests of the Government. Section 8125 of the FY12 CAA contained a similar provision applicable to corporations convicted of a felony criminal violation under any Federal law within the preceding 24 months. These provisions were renewed in the FY14 CAA, Sections 536 (Federal Felony convictions) and 537 (Federal tax arrearages).

These provisions are interesting for two reasons. First, they essentially move the burden from the company involved with the disqualifying condition to report disqualifying conditions to the government, to the contracting officer who may be in violation of fiscal rules if he or she fails to recognize and coordinate the issue with the agency Suspension and Debarment Official. Second, rather than presume a company is presently responsible until a finding to the contrary is made by a contracting officer or Suspension and Debarment Official, these provisions essentially declare companies ineligible to receive Federal contracts until they have been considered for Suspension or Debarment by an agency Suspension and Debarment Official who has concluded that such action is unnecessary to protect the interests of the Federal government.

These provisions have resulted in an increase in the number of instances in which companies self-report to PFB when they are seeking to settle a case with the Department of Justice.

Sec. 831, FY14 NDAA, Prohibition on Contracting With the Enemy: This provision, (addressed in greater length at page 5 of this newsletter), provides a mechanism for specified-combatant commanders to designate individuals and entities believed to be supporting insurgent forces and then request that the Head of Contracting Activity end current contracts/grants with the entities and restrict future awards to designated entities. With regard to restricting future awards, this effectively results in an in-theater debarment.

PFB will monitor legislative developments and keep you informed in future newsletters.

Practice Note DFARS Procedures, Guidance, and Information (PGI) 209.406-3 sets out the specific information and documentation that should be provided when referring any matter to the agency Suspension and Debarment Official.

Practice Note: In FY13, PFB processed 250 suspension, proposed debarment, and debarment actions arising out of the Afghanistan theater of operations. While cases in theater are often jointly investigated by SIGAR and the International Contract Corruption Task Force (ICCTF), 200 of these actions were based upon SIGAR requests for review and recommendations for suspension and debarment.

Conviction Based Statutory Exclusions Versus Debarment

- CPT Eric M. Liddick, Procurement Fraud Branch

Practice Note: There are a number of statutory exclusions to contracting in addition to suspension and debarment. However, these exclusions are separate and distinct from suspension and debarment and do not preclude such action.

The basic rule: The U.S. Government may only award contracts to "presently responsible" contractors. Thus, in order to protect the integrity of the procurement and non-procurement processes, and to ensure that only presently responsible contractors receive awards, agencies are empowered to propose for debarment those contractors deemed "not presently responsible." This process – administrative debarment – is one with which we are all familiar. But there exists a separate category of "debarments" imposed automatically without regard to a contractor's present responsibility: "statutory" or "inducement debarments."

These exclusions find their source in federal legislation prescribing and prohibiting certain contractor conduct. For example, if a contractor is convicted of failing to pay prescribed wages for laborers and mechanics in violation of the Davis-Bacon Act, that contractor faces a three-year, Government-wide exclusion from federal contracting. What if the contractor was convicted of violating the Clean Water Act? Mandatory, indefinite, Government-wide exclusion limited to the facility that violated the Act lasting until the condition is remedied. And if the contractor is convicted of failing to pay the minimum wage to its employees in violation of the Walsh-Healey Act? Mandatory, three-year, Government-wide exclusion from federal contracting. In short, a variety of federal statutes permit strict, mandatory exclusion *penalties* for contractors convicted of engaging in prohibited conduct.

One such statutory exclusion directly impacts the Department of Defense (DoD): 10 U.S.C. § 2408. Specifically, section 2408 precludes individuals convicted of fraud or other felonies arising out of a DoD contract from involvement in any supervisory or decision making capacity in a defense contract or first-tier subcontract on a defense contract for a five-year period. Additionally, a defense contractor convicted of knowingly employing disqualified individuals or allowing such individuals to serve on the board of directors faces mandatory criminal penalties not to exceed $500,000.

Although a misnomer to refer to these exclusions as "debarments" since they (1) focus on past misconduct, as opposed to present responsibility, (2) are intended as punishment, and (3) in some cases, are limited to particular agencies, understanding their existence and role remains important for those involved in the administrative debarment process. A contractor's violation of statutory prohibitions provides useful insight into the contractor's present responsibility and may, in many circumstances, form the basis for an administrative debarment that protects all agencies' interests after accounting for the case-specific facts, including remedial measures adopted by the respondents in reaching a determination as to present responsibility.

Administrative and statutory exclusions, then, operate from different positions; but do not be surprised to see a contractor simultaneously excluded by both.

FY14 NDAA Amendments to the No Contracting with the Enemy Act

- LTC Wayne S. Wallace, Procurement Fraud Branch

A number of interesting issues arise in a theater of operations where the Federal government does business with local national contractors and obtains adverse information, perhaps of a classified nature, suggesting that a particular vendor lacks present responsibility. While a Suspension and Debarment Official may consider classified information when making a decision as to whether suspension or debarment is appropriate, the traditional suspension and debarment process is not the only avenue available to protect the government.

In December 2011, to ensure that U.S. contracting dollars did not end up in the hands of our enemies, Congress enacted "The No Contracting With the Enemy Act," which is codified in Sections 841 and 842 of the National Defense Authorization Act for Fiscal 2012 (FY12 NDAA). Under Section 841, the U.S Central Command (CENTCOM) Commander was given the authority to both designate individuals and entities that support the insurgency or oppose U.S. or coalition forces in the CENTCOM theater of operations and also request that the Head of Contracting Activity (HCA) restrict the award, terminate, or void any DoD contract, grant, or cooperative agreement, with the designated entity or person. Under the provision, any classified information relied upon in the decision to designate an individual or entity under Section 841 could not be provided to the individual or entity unless it was under the protective order of an Article III court (Note that the U.S. Court of Federal Claims is an Art. I court). Section 842 provided DoD with the authority to require the insertion of contract provisions authorizing the examination of a contractor's records, and those of any of its subcontractors, to ensure that contract funds were not directly, or indirectly, supporting the enemy, or subject to extortion or corruption.

In December 2013, Congress amended the Act through the enactment of Section 831 of the FY14 NDAA. Section 831 expanded the applicability of the Act beyond the CENTCOM theater of operations to also cover U.S. European Command (EUCOM), U.S. Africa Command (USAFRICOM), U.S Southern Command (SOUTHCOM), and U.S. Pacific Command (PACOM). Section

831 also lowered the applicable contract threshold from $100,000 to $50,000 and expanded the HCA's authority to "prohibit, limit or otherwise place restrictions" on the award of any DoD contracts to identified persons and entities, and to specify that all voided or terminated contracts are to be treated as "default" actions for the purpose for reporting such actions in the Federal Awardee Performance and Integrity Information System (FAPIIS).

While the legislation now permits combatant commanders to delegate the HCA notification and request that the HCA exercise their authorities under the legislation, this provision also now requires designations and requests to be made in consultation with the Under Secretary of Defense for Policy, the Under Secretary of Defense for Acquisition, Technology and Logistics, and the appropriate Chief of Mission. Section 831 now allows an opportunity to challenge the action by requesting administrative review and provides for an opportunity to view the classified information underlying the action if under the protective order of an Art. I or Art. III court. Section 831 also extended the Act's expiration date from December 2014 to December 2018.

2013 Record Year for Department of Justice Recoveries

- Mark Rivest, PFB and Kate Drost, AMC

Fiscal year (FY) 2013 saw a new record high of Department of Justice (DoJ) recoveries in Department of Defense (DoD) cases. In FY13, DoJ recovered $713 million in False Claims Act (FCA) settlements and judgments on behalf of DoD in procurement fraud cases. This exceeded DoJ's previous record recovery year for DoD which was FY 08 when DoJ recovered $640 million in FCA settlements and judgments on behalf of DoD.

Of FY13's total of $713 million, only $47million came from *qui tam* actions (*i.e.,* a suit filed by a private party, known as a "relator," on behalf of the United States alleging FCA violations). For FY 13, all recoveries in *qui tam* actions involving DoD cases were obtained in cases in which DoJ intervened. Where DoJ declined to intervene, there were no DoD recoveries in FY13.

Interestingly, FY13's $713 million recovery for DoD is only part of the story as that figure only covers civil cases. According to the DoD Inspector General's Semi-Annual reports to Congress for FY13, criminal fines, penalties, restitution and forfeitures in criminal cases investigated by the Defense Criminal Investigative Service (DCIS) alone totaled $768.5 million, bringing total recoveries for DoD in FY 13 to almost $1.5 billion.

The Army Fraud Recovery Program: Returning Fraud Recoveries to the Army

- Angelines R. McCaffrey, PFB

Despite limitations placed on funds received on behalf of the U.S. Government by the Miscellaneous Receipts Act (31 U.S.C. § 3302(b)), the Army has specific authority to deposit funds recovered under the False Claims Act (FCA) (31 U.S.C. § 3729) into an appropriation or fund account to reimburse the Agency for losses resulting from fraud. (See, Matter of: Federal Emergency Management Agency – Deposition of Monetary Award Under False Claims Act, 69 Comp. Gen 260, B-230250). If the loss resulted from an adjudicated criminal offense, the Victim and Witness Protection Act (VWPA) (18 U.SC. § 3663A) provides statutory authority for Federal Government agencies to collect court-ordered restitution when they have been a victim of fraud or deceit. However, close coordination among the command PFAs, the PFB and the Office of the Assistant Secretary of the Army, Financial Management and Comptroller (ASA(FM&C)) is essential to help ensure that the recovered funds are processed with sufficient speed to help ensure that they can reach their respective fund account before the funds are "cancelled" and returned to the U.S. Treasury as "Miscellaneous Receipts."

In 2013, ASA(FM&C) contracted with Turtle Reef Holdings, LLC (TRH) to serve as the ASA(FM&C) facilitator specifically tasked with helping maximize the Army's timely and efficient processing of funds recovered from Department of Justice cases. While the ideal is always to have funds returned to the field requiring activity whose contract was affected by the fraud, that is not always possible given the relatively short periods of availability associated with particular types of funds. For instance, Operation and Maintenance and Personnel funds each have a 1-year period of availability, while Procurement funds have a 3-year period of availability. Shipbuilding and Military Construction funds each have a 5-year period of availability. If the funds can be recovered within five years after the appropriation's normal period of availability has expired, the funds still retain their fiscal identity and while they may or may not be returned to the affected command, the funds remain available to the Agency as "expired" funds which can be used to adjust and liquidate previous obligations arising from the original period of availability. Five years after funds "expire," they are "cancelled" and are returned to the U.S. Treasury as "Miscellaneous Receipts."

In an effort to rapidly identify and process recoveries and, thus, maximize the Army's use of recovered funds, in April 2013, ASA (FM&C) awarded a non-personal services contract to TRH under which TRH provides expertise and functional support services to coordinate the Army recovery and collection process. As the "monitor" of this process, TRH will coordinate issues relating to specific Army fraud recoveries with PFB, investigative agencies, the Department of Justice, the Offices of the U.S. Attorney, the Defense Finance and Accounting Service, the local PFICs, PFAs and Command Resource Managers. TRH provides program management support by researching and conducting fraud case contract analysis aimed at identifying contract line item numbers and applicable lines of accounting.

While decisions regarding the proper use of the recovered funds remains within the exclusive purview of the ASA(F&MC), the more limited and ministerial function of the contract "facilitator" is to track and expedite the return of funds to the Army. However, the assistance of the PFICs and PFAs, is essential in this effort. Providing PFB with prompt notice of recoveries and actively assisting PFB and the ASA(FM&C) monitor in obtaining line of accounting information will provide the Army and the affected field command with the best chance at realizing the benefit of securing recoveries before they are cancelled and returned to the Treasury.

Upcoming Training Update

- **18-20 August 2014: Procurement Fraud Advisor's Course, The Judge Advocate General's Legal Center and School, Charlottesville, VA.**
- **24-26 June 2014: National Suspension and Debarment Training Program (Export Course) Federal Law Enforcement Training Center (FLETC), Washington, DC. Course description, dates and locations of course offerings, and registration information available at: www.fletc.gov.**

Army Material Command (AMC) Update

AMC Hosts Procurement Fraud Outreach Event

- Kate Drost, AMC Procurement Fraud and Irregularities Coordinator (PFIC)

In March of 2014, the Procurement Fraud and Irregularities Coordinator (PFIC) for the Army Materiel Command (AMC), Kate Drost, and the AMC Liaison from the Army Criminal Investigation Command (CID), SA Bailey Erickson, co-hosted an AMC outreach to the Huntsville and Birmingham, Alabama, Federal Bureau of Investigation (FBI) offices and the U.S. Attorney's Office for the Northern District of Alabama. AMC is headquartered at Redstone Arsenal in Huntsville, Alabama. The purpose of the outreach was twofold: (1) to brief the FBI and Senior Assistant Criminal and Civil Division Attorneys on AMC operations in relation to potential procurement fraud; and (2) to foster interagency communication and cooperation by providing a "meet and greet" opportunity.

AMC's contracting mission is performed by a Major Subordinate Command, the Army Contracting Command (ACC). The ACC obligates approximately 80% of the Army's annual expenditures on contracts. At the outreach meeting, the PFIC for the ACC, Carol Wolf, provided a briefing on the basics of the ACC, such as how it is structured and what the major locations are. Like AMC, ACC is headquartered at Redstone Arsenal, but procurement operations are conducted at local acquisition centers that are co-located with major customers. The largest ACC acquisition centers are in Huntsville, AL; Rock Island, IL; Warren, MI; and Aberdeen Proving Ground, MD. The Mission Installations Contracting Command (MICC) and the Expeditionary Contracting Command (ECC) are components of ACC, and their procurement operations are throughout CONUS and OCONUS.

One of the immediate benefits of the outreach meeting was that the Assistant U.S. Attorneys (AUSA) from Birmingham, Alabama, who had very little familiarity with AMC/ACC operations just two hours away in Huntsville, were able to find out who they could go to for litigation support. The role of the Army Procurement Fraud Branch was explained and emphasized, so that the AUSAs would know that coordination of remedies is centralized for the Army but that procurement activities have procurement fraud advisors to provide local support. The outreach meeting was well-received by all participants, and the FBI agents and AUSAs have expressed interest in making it a quarterly or semi-annual briefing.

Practice Note: ***The Army Contracting Command obligates approximately 80% of the Army's annual expenditures on contracting.***

U. S. Army Europe (USAREUR) Update

Understanding Procurement Fraud Challenges in Europe

- CPT Kurt Gurka, PFIC, USAREUR

Coordinating procurement fraud remedies in foreign jurisdictions differs markedly from doing so in the U.S. Treaties will normally fix primary criminal jurisdiction with the foreign government, so foreign law enforcement agencies will normally investigate crimes because U.S. law enforcement lacks jurisdiction. Foreign prosecutors will prosecute the crimes. And the practical implications of these treaty provisions will dictate how procurement fraud remedies are coordinated and effected. In this setting, procurement fraud advisers must understand the implications of these treaty provisions and prepare to mitigate adverse impacts they may have on a case.

Consider a case where a contractor employee and a U.S. Government employee conspire to steal U.S. property. A U.S. witnesses reports the crime to U.S. law enforcement. With only limited jurisdiction and authority in a country such as Germany, U.S. law enforcement will likely ask their German counterparts to also investigate. If German law enforcement takes over the investigation, they will apply German law.

The dual U.S. - German investigation will now likely require significant additional processing time. For purposes of illustration, we can presume a one month lag between when the crime occurred and when it was reported. If the witness reported the crime to U.S. law enforcement, U.S. law enforcement will likely open its own investigation and they will want to collect evidence and interview witnesses available on the U.S. installations. Three weeks into their investigation, U.S. authorities determine that both the contractor and the U.S. employee suspected of the theft are German nationals. Without the ability to execute searches and seizures in Germany, U.S. law enforcement will ask their German counterparts to investigate the crime. Say, for example, it takes another week for U.S. and German law enforcement to set up a coordination meeting.

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U. S. Army Europe (USAREUR) Update (continued from page 7)

Under our hypothetical, two months have now passed since the theft took place. Now, at the coordination meeting, U.S. law enforcement brings its case file, which includes hand receipts, contract documents, standard operating procedures, Army Regulations, and DoD manuals. Naturally, these documents are useless to the German investigators until they are translated into German, which may take an additional six weeks.

After translating the relevant documents the German investigators need time to review the documentation and they identify a number of issues and have a number of questions. That requires another coordination meeting and another alignment of conflicting schedules. Under our hypothetical scenario, when the meeting finally happens, it is discovered that the German authorities have far more questions than U.S. law enforcement can answer and it appears that the contracting office only supplied a copy of the contract itself rather than the entire contracting file. So, that additional documentation must be obtained and again, weeks are lost as it undergoes translation.

After finally getting the documents the Germans determine a crime likely did take place. They obtain search warrants for both the contractor employee's home and the U.S. Government employee's home. Because they want to execute the searches simultaneously, the Germans must de-conflict schedules to have enough agents available. That takes another three weeks.

This is the typical case in Germany. The point should be clear: even relatively minor crimes take months, if not years, to be investigated. While most procurement fraud investigations in the U.S. share many characteristics with those in Germany, it cannot be gainsaid that there are unique challenges overseas. Foremost among these are foreign law enforcement's unfamiliarity with U.S. Government practices and procedures; the time and cost of translating documents; adapting to foreign customs; and the availability of witnesses.

The protracted investigations can make it difficult to protect the U.S. Government from irresponsible parties. In a protracted investigation, where law enforcement's efforts continue but the contractor is unaware of the investigation, suspension will often be inappropriate because its announcement to the contractor would often disclose the ongoing investigation or, at the least, confirm the ongoing investigation. Not only are protracted investigations a hurdle to protecting the U.S. Government from irresponsible contractors, but so is collection of evidence. Consider obtaining evidence of a crime, normally a routine matter for cases arising in the U.S. Practically speaking, if the Germans investigate a case, they will have the evidence. How does the U.S. get the evidence or at least access to it? The NATO Status of Forces Agreement provides that the two countries must assist each other in the collection and production of evidence. But the Status of Forces Supplemental Agreement between the U.S. and Germany states that the Germans need not violate domestic law in executing obligations under the Treaty. So, for example, under the German Code of Criminal Procedure, public prosecution offices can deny the victim of a crime access to its evidentiary files while the case is pending. In crimes against the U.S. Government perpetrated by its German employees, German prosecutors have indeed relied on this provision to deny U.S. law enforcement access to evidence of crimes on the basis that the U.S. Government is a victim and not entitled to the evidence under either the NATO SOFA or the SOFA Supplemental Agreement. That's a major problem if the Suspension and Debarment Official needs an administrative record to make a decision.

In these situations, it's all the more important to be prepared to present cases for suspension and debarment as soon as appropriate. So what can procurement fraud advisers do to mitigate the impact of delays due to ongoing investigations? We have taken a back to basics approach that focuses on the factors we have control over. First, the single most helpful mitigation measure comes from Army Regulation 27-40: the remedies plan. Remedies plans can effectively capture the evolution of a case from its initial reporting through the prosecution. If the procurement fraud adviser continually updates the remedies plan and captures the operatives facts, then cases can quickly be presented to the relevant Suspension and Debarment Official. In instances where two or three Procurement Fraud Advisers (PFA) have advised on a case, a thorough remedies plan will allow for an easy transition between PFAs while preserving vital information. This last point is key. Often times understanding the evolution of a case will require annotation of why particular courses of action were taken – such as why a case wasn't presented to the SDO earlier – and a remedies plan will save a later PFA or the Procurement Fraud and Irregularities Coordinator (PFIC) from tracking down emails and people years later to figure out what happened.

Second, PFAs should coordinate with their PFIC as soon as it appears likely a case warrants consideration for suspension or debarment. Discussing the case early will allow the PFA to efficiently gather operative facts about the current investigation while allowing the PFIC to review other investigations and complaints involving the same contractor. The PFIC can then engage the Procurement Fraud Branch, the Department of Justice, and any other appropriate agency or entity.

In a foreign environment that features language barriers, customs barriers, jurisdictional barriers, and treaty barriers, procurement fraud investigations will inevitably take longer than in the U.S. Experience has taught us that recognizing these barriers, understanding their impact, and getting our ducks in a row early has been the most effective way to mitigate these delays.

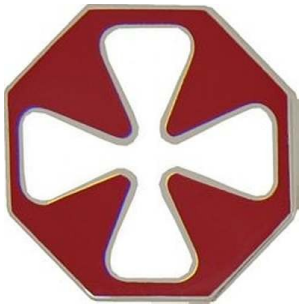
Practice Note: ***Debarment actions must be based upon a preponderance of the evidence demonstrating that a contractor lacks present responsibility. Examples of supporting evidence are set forth in the DFARS DoD Procedures, Guidance and Information (PGI) 209.406-3. These include, pertinent extracts of each contract at issue, witness statements, copies of investigative reports, copies of indictments/judgments/sentencing actions, and the command's recommendation.***

8th U.S. Army (Korea) Update

The Army Procurement Fraud Program utilizes three Suspension and Debarment Officials (SDO). The Army SDO has Army-wide jurisdiction. There are also SDOs within the U.S. Army Europe (USAREUR) and 8th Army (Korea) who handle theater specific contractors and issues. The Suspension and Debarment practice area in Korea is a busy one. In FY 13, the Korea SDO processed a total of 67 suspension and debarment cases and this activity level remains high in FY14.

On 5 March 2014, the Korea SDO debarred Sung Shin Industrial Co. and Mr. Kim, Young Bae (Director) for 3 years. On 3 December 2013, the Korea SDO debarred Ms. Kim, Ok Im (a former Army local national employee) for 3 years, and Mr. Son, Pyung Kil (a former Army local national employee) for 5 years. These debarments occurred after investigation revealed that Mr. Kim, Young Bae provided improper compensation to Mr. Son, Pyung Kil and Ms. Kim, Ok Im in order to secure favorable consideration of Sung Shin Industrial Co, during the award of a contract for Deep Well Flat Rail Cars.

On 9 February 2014, the Korea SDO debarred Jeil Environment Co. (Jeil), Mr. Hwang, Su Ki (President), Mr. Yu, Gye Seon (Director-Hansung), and Mr. Min, Sun Chol (local national employee, Osan Commissary) for 3 years. The Korea SDO also debarred Hansung Steel Co, and Mr. Yun, Po Sop (President) for 5 years. These debarments were initiated after investigation revealed that Jeil and Mr. Yun, Po Sop, Jeil's subcontractor, provided Osan Commissary



employee, Mr. Min, Sun Chol payments in excess of $18,000 over a three-year period in exchange for favorable treatment during contract performance.

Suspension and Debarment Case Law Update

Due Process:

- The government is not permitted to debar a person or entity from competing to win government contracts without affording the process due under the Fifth Amendment. *Transco Sec., Inc.. v. Freeman,* 639 F.2d 318, 321 (6th Cir. 1981) (*citing Old Dominion Dairy Products., Inc. v. Sec'y of Def.,* 631 F.2d 953 (D.C.Cir. 1980). A bidder's liberty interest is impacted when he is denied the opportunity to bid on government contracts on the basis of a charge of fraud or dishonesty. *Id.* The Fifth Amendment entitles such a bidder to certain procedural safeguards, including notice of the charges, an opportunity to rebut them, and sometimes a hearing. *Id.* ***Highview Engineering, Inc. v. U.S. Army Corps of Engineers***, 864 F. Supp. 2d 645, 647 (W.D. Ky. 2012).

- Suspension of an affiliate that exceeds 18 months is not a violation of due process because the applicable regulations afford the affiliate Constitutionally sufficient process to contest its suspension. ***Agility Def. and Gov't Svcs. Inc. v. Dep't of Def.***, 11th Cir. No. 13-10757 (December 31, 2013)

Affiliation:

- The Defense Logistics Agency may suspend an affiliate when a contractor has been indicted despite the fact that no indictment was filed against the affiliate within 18 months of the indictment of the parent contractor. ***Agility Def. and Gov't Svcs., Inc. v. Dep't of Def.***, 11th Cir., No. 13-10757 (December 31, 2013).

De Facto Debarment:

- Plaintiffs must meet a high standard when seeking to prove a *de facto* debarment claim. "To succeed, [the plaintiff] must demonstrate a systematic effort by the procuring agency to reject all of the bidder's contract bids." *TLT Const. Corp. v. U.S.,* 50 Fed. Cl. 212, 215 (2001). *De facto* debarment may be proved (1) by an agency's statement that it will not award the contractor future contracts; or (2) by an agency's conduct demonstrating that it will not award the contractor future contracts. ***Highview Eng'g, Inc. v. U.S. Army Corps of Engineers***, 864 F. Supp. 2d 645 (W.D. Ky. 2012), citing *TLT Construction Corp*., 50 Fed. Cl. at 216.

Suspension and Debarment Case Law Update (Continued from page 9)

De Facto Debarment (Continued):

- Contractor brought suit alleging de facto debarment by the Department of the Navy and asserted that contracting officials stated that the contractor would not be permitted to work on any future contracts. Existing contracts then ended. In order to show de facto debarment, a plaintiff must show a systemic effort by the contracting authority to reject all bids by either an agency statement that it will not award the contractor future contracts, or conduct demonstrating that it will not award a contractor future contracts. The court denied the Navy's motion to dismiss and observed that the plaintiff does not have to prove a complete loss of work. Rather, it is sufficient to show that the contracting official's actions were aimed at the contractor's overall status as a contractor. The court also held that a plaintiff is not required to present factual evidence that it attempted to get new awards and was prevented from doing so. **Phillips v. Mabus**, No. 11-2021 (EGS), 2012 WL 476539 (D.D.C. 2012).

Processing Time Limits:

- Approximately a year into a proposed debarment action, a contractor sought judicial relief (*i.e.,* specifically, an order enjoining the Navy from issuing a debarment and compelling a final agency decision). Three months later, the Navy terminated the proposed debarment action. The contractor continued the litigation and argued, among other things, that even if a proposed debarment is not a final agency action, it should be ripe for judicial review under the Administrative Procedure Act's unreasonable delay provision which allows a court to compel action withheld or unreasonably delayed. The court rejected the contractor's argument, observing that it no longer had subject matter jurisdiction where the only final agency action was the action terminating the proposed debarment which resolved the matter in favor of the contractor. ***Tudor v. Dep't of the Navy***, No. 11-5362, 20133 WL 366434 (N.D. Cal. 2013).

Bid Protest Case: Vendor Vetting in Afghanistan:

- Protestor was an Afghan-American owned company engaged in trucking and security services. The bid protest was brought in connection with a multiple award procurement for trucking services in Afghanistan. The protestor challenged the contracting officer's finding of non-responsibility which, in part, used a classified vendor vetting rating process list. The contractor argued, among other things, that the Army's reliance on this classified list constituted application of a de facto debarment. Based upon the contractor's claim of de facto debarment as a grounds for a bid protest, the Claims Court exercised jurisdiction. In upholding the use of the vendor vetting list, the court distinguished the holding in *Old Dominion* that due process ordinarily requires a contractor to be accorded notice and an opportunity to contest allegations impugning business honesty and integrity. The court articulated an exception stating that "the requirements of due process vary given the circumstances" and that in a war zone environment "when the required notice would necessarily disclose classified material and could compromise national security, normal due process requirements must give way to national security concerns." ***MG Altus Apache Co. v. United States***, 11 Fed. Cl. 425 (Fed. Cl. 2013).

The U.S. Army Legal Service Agency's New Facility

In October 2011, Procurement Fraud Branch relocated to the new U.S. Army Legal Services Agency building at Ft. Belvoir. The new, approximately 100,000 square foot facility houses the U.S. Army Court of Criminal Appeals, Trial Judiciary, Government Appellate Division, Defense Appellate Division, Trial Defense Service, Contract and Fiscal Law Division, Environmental Law Division, Litigation Division, Regulatory Law and Intellectual Property Division, Judge Advocate Recruiting Office, and Information Technology Division.

Procurement Fraud Branch Case Update

U.S. Army Legal Services Agency, Ft. Belvoir

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:

- **Dr. Peter J. Kannam and Advanced Device Technology, Inc. (ADT) (Poor Performance, Overcharging):** On 18 April 2014, the Army SDO debarred Dr. Kannam and his company, ADT, through 8 January 2017. Several Defense Contract Audit Agency audits over a period of 20 years revealed consistent inadequacies in ADT's accounting systems. These inadequacies, including failure to regularly record labor hours, resulted in significant overcharging on a U.S. Army Space and Missile Defense Command contract. The audits, which documented consistent demands for remedial efforts, as well as evidence demonstrating a failure to adopt new practices, proved crucial. (CPT Liddick)

- **Ms. Ildiko Pinero (Willful Failure to Pay Taxes)**: On 24 April 2014, the Army SDO debarred Ms. Pinero through 18 March 2017. Ms. Pinero pled guilty to willful failure to pay taxes owed by Alpha Machining Products & Development, Inc., a company owned by Ms. Pinero and her father. As a result of her conviction, the Department of Justice, using authority granted by Congress under 10 U.S.C. § 2408, entered Ms. Pinero in the System for Award Management (SAM) and prohibited her from working on defense contracts and first-tier subcontracts for five years (see article, page 4). Section 2408 is based solely upon past misconduct and the fact of conviction. Furthermore, it only extends ineligibility to defense contracts (and certain positions related to those contracts). Accordingly, the Army SDO's action considered Ms. Pinero's present responsibility and the debarment action makes her exclusion from contracting effective throughout the Executive Branch. (CPT Liddick)

- **Mr. John Eisner and Taurus Holdings, LLC (Conspiracy to Commit Wire Fraud / Imputation)**: On 6 March 2014, the Army SDO debarred John Eisner and his company, Taurus Holdings, LLC, through 8 January 2020. Mr. Eisner pled guilty to conspiring with three other contractors to defraud the Government through kickbacks, bid structuring, and fraudulent purchase orders between 2007 and 2009. Because Mr. Eisner used Taurus Holdings, LLC to further the conspiracy, the SDO imputed Mr. Eisner's conduct to Taurus Holdings. (CPT Liddick)

- **Mr. Wajdi Reziq Birjas (Conspiracy to Commit Bribery and Money Laundering):** On 30 January 2014, the SDO debarred Mr. Birjas through 4 July 2019 following his conviction and sentencing for conspiracy to commit bribery and money laundering. From approximately September 2004 to June 2009, Mr. Birjas was a contract employee at the Host Nation Affairs Office at Camp Arifjan, Kuwait. Investigation revealed that Mr. Birjas and other individuals provided Government employees with cash, airplane tickets, and hotel accommodations in exchange for the facilitation of various contracts. (Ms. McDonald).

- **John Wayne Smith, Jr. (Tax Fraud and Kickbacks)**: On 10 April 2014, the Army SDO debarred Mr. Smith through 2 February 2017 following Mr. Smith's conviction and sentencing for filing a false tax return in which he failed to report $108,938 of income from a foreign source received while he worked in Iraq as a Quality Control Manager for PWC, a defense transportation contractor. Investigation indicated that Mr. Smith received money and gifts in the amount of $108,938 in exchange for favorable treatment of a particular Iraqi contractor. (Ms. McDonald)

- **Eli Fattal (Falsified Test Data)**: FAR clause 52-203-13 requires that contractors provide written disclosures to the cognizant Office of Inspector General upon discovery of fraudulent activity on government contracts. In 2008, the Under Secretary of Defense for Acquisition Technology, and Logistics (USD (AT&L)) designated DoD IG as the DoD point of contact for such disclosures. PFB reviews each of these disclosures to determine if the circumstances warrant a suspension, proposed debarment or debarment against the reporting company and/or one or more of its employees. On 31 August 2012, United Technologies Corporation (UTC) notified the DoDIG that Pratt & Whitney, a division of UTC, had received an anonymous report that Pratt & Whitney Canada (P&WC), also a subsidiary of UTC, had completed an investigation revealing that employees of its affiliate, Carmel Forge, had made unapproved adjustments to the test data pertaining to forgings used in aircraft parts it supplied to PW&C. Although the investigation revealed the adjustments did not result in non-conformances with product design requirements, product integrity, or flight safety issues, PFB required Carmel Forge to show cause why it should not be debarred and on 2 January 2014 also debarred Mr. Fattal (Carmel Forge's former Chief Metallurgist) through 13 June 2016. (Ms. McCaffrey)

Procurement Fraud Branch Case Update

Recent Debarments (continued)

- **Michael George Rutecki and Sean Patrick O'Brien (Acceptance of Gratuities):** On 10 January 2014, the Army SDO debarred Mr. Rutecki and Mr. O'Brien (two former Captains) through 15 March 2017 and 25 September 2019, respectively, based on their convictions for improperly accepting gratuities in connection with the performance of their official duties in Baghdad, Iraq. These combined gratuities received between 2007-11 totaled $77,942.09. Then-CPT Rutecki created a fictitious charity to hide some of the proceeds from the scheme. The SDO also debarred Mr. Nibras Talib and Nibras Group for General Construction & Suppliers through 15 March 2017 for paying improper gratuities in an attempt to seek favorable treatment. (MAJ Watkins)

- **Harold D. Broek (Acceptance of Kickbacks):** On 7 April 2014, the Army SDO debarred LTC (Ret.) Broek through 30 January 2019, based on his conviction for Criminal Conflict of Interest. Also, on 7 April 2014, the Army SDO debarred LTC (Ret.) Broek's wife (Susan Broek), brother (Dustin Broek), sister-in-law (Jaina Kearns), Mr. Rohit M. Goel, and Mr. Vikramaditya Kamlapuri, through 30 January 2017. The named parties conspired with LTC Broek to form a family company to receive orders on U.S. government contracts from Mr. Goel's employer, Avalon International Limited, when LTC Broek had personally and substantially participated in awarding contracts to Avalon as the Chief of Contracting, Tikrit (Iraq) Regional Contracting Center. The family company reported a $52,400.16 profit in 2007-08 and is now dissolved. (MAJ Watkins)

- **Daniel Christian Hutchinson (Conspiracy to Embezzle)**: On 24 February 2014, the Army SDO debarred former-SGT Hutchinson based upon his conviction for Conspiracy to Embezzle U.S. Army funds during his 2007-08 deployment to Talil Air Base, Iraq in support of Operation Iraqi Freedom. When a contractor failed to appear to accept a $12,000 payment, the finance cashier (proposed for debarment separately) concealed the money in a stuffed animal and mailed it to then-SGT Hutchinson who was in Los Angeles. (MAJ Watkins)

- **Mesopotamia Group (MG) (Unsatisfactory Performance, Unethical Conduct, and Lack of Adequate Financial Resources)**: On 4 February 2014, the Army SDO debarred MG, a multi-service contractor operating in Afghanistan, based on several factors pursuant to FAR 9.406-1 and 2. First, MG demonstrated a history of unsatisfactory performance on government contracts, including poor performance on a host nation trucking contract and an Afghan National Army hospital medical equipment maintenance contract. Secondly, after it was found non-responsible for a new contract in Afghanistan for documented poor performance, MG engaged in unethical conduct by attempting to obtain another U.S. contract in Afghanistan through a secretive joint venture agreement with an Afghan trucking contractor. Thirdly, MG lacked adequate financial resources to effectively perform on government contracts as required under FAR 9.104-1. (LTC Wallace)

Recent Administrative Compliance Agreements:

- **D&N Electric Company, DNS Consolidated, Inc., Michael Munroe and Matthew Armstrong**: On 28 February 2014, the subject individuals and entities entered into an Administrative Agreement with the Army. In November of 2011, a relator in a *Qui Tam* case in the U.S. District Court for the Middle District of Georgia, alleged that the respondents made false certifications, statements and false claims in violation of the False Claims Act (31 USC, sec. 729, *et. seq*.) when they falsely certified that the construction materials they used were in compliance with the Buy America Act (41 USC, sec. 8301, et. seq.). On 21 April 2013, D&N signed a settlement agreement with the Department of Justice to resolve the suit. In this settlement, the respondents agreed to pay $76,966. Under the Administrative Agreement, which will be in effect for a period of one year from the date of signature, the company is implementing an ethics and compliance program and adopting internal procedures to prevent recurrence. (Ms. McDonald)

- **Unity Logistics and Supply Services (ULSS):** On 13 December 2013, the SDO proposed Afghan contractor, ULSS, for debarment based on evidence revealing that ULSS failed to reimburse the U.S. government for obtaining unauthorized no-cost government fuel and dining facility meal cards at Kandahar Airfield, Afghanistan. The SDO agreed to enter into an Administrative Compliance Agreement with ULSS through 10 April 2016, wherein ULSS agreed to reimburse the U.S. government at a minimum of $253,414.04, and to undertake remedial measures to improve its Contractor Responsibility Program. (LTC Wallace)

Procurement Fraud Branch
Contract and Fiscal Law Division
U.S. Army Legal Services Agency
9275 Gunston Rd., Bldg

(703) 693-1228
FAX: (703) 806-0654

Area Code: (703) /
DSN: 223

We're On the Web!

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Contract and Fiscal Law Division (KFLD)
On Line: https://

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U.S.ARMY

Mr. Mark A. Rivest, Chief, PFB: (703) 693-1152 or mark.a.rivest.civ@mail.mil

Ms. Pamoline J. McDonald, Attorney Advisor: (703) 693-1154 or pamoline.j.mcdonald.civ@mail.mil

Ms. Angelines R. McCaffrey, Attorney Advisor: (703) 693-1159 or angelines.r.mccaffrey.civ@mail.mil

Mr. Trevor B. Nelson, Attorney Advisor: (703) 693-1158 or trevor.b.nelson2.civ@mail.mil

LTC Wayne S. Wallace, Attorney Advisor: 693-1150 or **wayne.s.wallace.mil@mail.mil**

MAJ Susana E. Watkins, Attorney Advisor: (703) 693-1151 or susana.e.watkins.mil@mail.mil

CPT Eric M. Liddick, Attorney Advisor (703) 693-1149 or eric.m.liddick.mil@mail.mil

Belinda B. Wade-Fentress, Paralegal Specialist (703) 693-1228 or belinda.b.wade-fentress.civ@mail.mil

MAJ Kesabii L. Moseley, PFB DoJ Liaison: (202) 307-1183
Civil Division, Commercial Litigation Branch (Fraud Section), U.S. Department of Justice
kesabii.l.moseley.mil@mail.mil or kesabii.l.moseley@usdoj.gov

The views expressed by the authors in the PFA Advisor Newsletter are theirs alone and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army.

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