The Procurement Fraud Advisor

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

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Message from the Chief, Procurement Fraud Branch (PFB)

According to figures provided in the Interagency Suspension and Debarment Committee's (ISDC) report to Congress for FY14, the number of suspensions, proposed debarments, and debarments processed by the 42 department/agency members of the ISDC in FY14 marked an 82% increase over FY10 levels. Within the Army, the number of suspensions, proposed debarments and debarments processed in FY14 is approximately double what was processed in FY10. Why the increase?

A number of factors have contributed to this increase in volume. First, there has been increasing Congressional scrutiny on agencies which did not have active suspension and debarment programs and, accordingly, many of these agencies are now increasing their suspension and debarment practice. Within the Army, the increase in volume is primarily a testament to the degree to which we are enhancing our coordination with the Department of Defense Inspector General (DoDIG), law enforcement, and the acquisition community. For example, we are processing an increasing number of cases arising from the DoDIG Mandatory Disclosure Program (FAR 52.203-13). In addition, better communication between PFB, law enforcement, and the procurement community, is resulting in an increase in the processing of fact and performance based actions. While these numbers are impressive, and represent a good deal of hard work and proactive effort, one may ask whether the numbers, in and of themselves, can accurately gauge whether an agency's procurement fraud and remedies program is sufficiently robust.

The short answer is that suspension and debarment activity is one key indicator of a strong procurement fraud remedies program. That said, there are other key elements to consider. Are agencies actively pursuing all available remedies (i.e., contractual, civil, criminal, and administrative)? Do agencies effectively utilize their available remedies when they can be of the most benefit? As we know, appropriated funds are only available for a set time limit (i.e., generally expiring within a year and cancelling five years after an appropriation expires at which point, they revert to the Treasury) (31 U.S.C. §§ 1552(a), 1553 (a), and 3302(b)). Accordingly, while only the Department of Justice can settle issues involving fraud, whatever contract remedies can be used early on can be instrumental in minimizing losses to the Army when performance problems arise.

A comprehensive assessment of an agency's procurement fraud remedies program will take into account how effectively the agency can utilize all of its available remedies. The ability to do this well, however, is not easy. It is the product of a constant effort to cultivate good collaborative relationships with law enforcement, prosecutors, and acquisition professionals to ensure that no selected remedies compromise the availability of other remedies.

The effective coordination of remedies, and particularly contract remedies, is a PFB mission that relies heavily upon the initiative, expertise and active assistance of field contract attorneys, Procurement Fraud Advisors (PFA) and Procurement Fraud and Irregularities Coordinators (PFIC).

So, be on the look out for the right cases to exercise these remedies and be sure to work with PFB to ensure that any available remedies are fully coordinated among the key stakeholders. We look forward to working with you in identifying the right cases to create Army success stories in maximizing our use of available remedies and protecting the Army's interests.

— Mark Rivest

Interagency Suspension and Debarment Committee Reports to Congress on FY14 Suspension and Debarment Activity

On March 31, 2015, the Interagency Suspension and Debarment Committee (ISDC) submitted its report to Congress on agency suspension and debarment activity for FY14. The report notes, among other things, that in FY14, Army Procurement Fraud Branch (PFB) processed a total of 802 suspension, proposed debarment, and debarment actions, which was the most actions processed in FY14 by any activity within the Department of Defense.

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Interagency Suspension and Debarment Committee Reports to Congress on FY 14 Suspension and Debarment Activity

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"Data on agency activity for FY 2014… shows an increase in suspensions and debarments from the prior year (e.g., 1,929 debarment actions in FY 2014 compared to 1,696 in FY 2013) and a continued upward trend compared to FY 2009, when the ISDC formally began to collect data on suspensions and debarments."

- ISDC FY14 Report to Congress

The volume of suspension and debarment actions processed by PFB in FY14 represents approximately a 24% increase over the number of actions processed in FY13 and is more than double the number of actions processed by PFB in FY09.

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.

In accordance with 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 FY14 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.

<u>Practice Note</u>: In FY14, 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

Suspension and Debarment Actions in FY 2014

Agency	Suspension	Proposed for Debarment	Debarments	Total
Army	131	392	279	802
Navy	145	262	208	615
USAF	109	177	138	424
DLA	15	164	110	289

Procurement Fraud 101: Administrative Agreements

- Angelines McCaffrey, Attorney-Advisor, Procurement Fraud Branch

Contracting with the Government is a privilege; not a right. This privilege is reserved for entities characterized by the Federal Acquisition Regulation (FAR), Part 9.103, as "responsible" contractors. Before the award of a Government contract, a contracting officer must make an affirmative determination of the prospective contractor's present responsibility.

Although Government purchases generally must be awarded to the lowest bidder, the successful bidder must also be determined to be "responsible." A contractor's present responsibility is a far-reaching concern addressed in the pre-award stage of the contracting process, which may eliminate even the lowest bidder from competing. In the event that a contractor is deemed not to be responsible, the Defense Federal Acquisition Regulation Supplement (DFARS), section 209.105-2 requires that a copy of the non-responsibility determination be sent to the Army's Suspension and Debarment Official (SDO). With Procurement Fraud Branch's assistance, the SDO will assess the non-responsibility determination and evaluate whether action is required to suspend and/or debar the prospective Government contractor from contracting with agencies within the Executive Branch of the Federal Government.

While an action to suspend and/or debar a prospective Government contractor is within the SDO's discretion, the Army SDO will only take such steps if the interests of the Government need to be protected. An entity served with a notice of suspension and/or proposed debarment can take remedial steps and submit matters in opposition to the SDO's action and ask that the suspension and/or debarment be terminated.

In addition to providing written matters in opposition, contractors facing suspension and/or proposed debarment action often request to meet with the Army SDO to present matters in person explaining why suspension and/or debarment is not necessary to protect the Government's interests and demonstrate why the contractor remains presently responsible within the meaning of the FAR.

As a general matter, a presently responsible contractor must demonstrate a working knowledge of the issues and a willingness to implement a robust code of business conduct and ethics within its organization. When meeting with the SDO, the contractor should highlight mitigating factors which argue against suspension and/or debarment, in order to demonstrate the Government's interests do not need to be protected.

If the SDO is convinced that the contractor is presently responsible, the SDO may terminate the suspension or proposed debarment. The SDO may also consider entering into an administrative agreement with the company as a pre-condition to terminating the suspension and/or debarment action. Such agreements document the specified remedial measures the contractor must take in order to prevent reoccurrence of the problem at issue. Administrative Agreements also sometimes include a requirement for the company to engage outside

consultants/monitors in an effort to secure independent review/evaluation/audit of the contractor's efforts.

In order to make an Administrative Agreement a more likely outcome, the company must demonstrate a genuine willingness to implement remedial measures and be willing to neutralize the threat the wrongdoer poses to the procurement process. This could be accomplished through terminating the employee(s) responsible for misconduct, or providing additional ethics training to the offending employee. If the offending employee was an officer or principal of the company, additional steps must be taken to remove or isolate the wrongdoer's managerial control over the company and demonstrate that the underlying cause for the SDO's action has not affected the company's institutional culture or unjustly enriched it. Common elements of Administrative Agreements require the establishment of a comprehensive corporate ethics program to include the establishment of a training program for employees, as well as a hotline through which employees can report misconduct. Administrative Agreements typically contain provisions requiring periodic reporting requirements and monitoring by the Army. Ultimately, the acceptance and implementation of internal controls or remedial measures is designed to help ensure that the underlying cause of the misconduct does not recur.

While entering into an Administrative Agreement with the Army will effectively terminate a company's suspension or debarment under the circumstances described herein, it is important to note that the use of an Administrative Agreement does not necessarily spare the actual wrongdoers from being individually excluded from contracting with the Government through the imposition of suspension or debarment action. The key is whether the Government's interests can be protected and the company's present responsibility confirmed and monitored under the aegis of the Administrative Agreement.

Avoiding "Punishment Creep" in Administrative Remedies

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

In 2014, and after the problematic rollout of healthcare.gov, the Internal Revenue Service (IRS) awarded a $4.5 million contract to CGI Federal to perform internet technology functions related to "[Affordable Care Act] Program-Wide Consolidated Release Management Support." In light of CGI Federal's earlier role in the healthcare.gov rollout, internet commentators and politicians cried foul with some demanding assurances from the IRS that taxpayer dollars were being used wisely, and others suggesting that CGI Federal should be debarred.

In any case involving contract fraud, irregularity, or poor performance, there are four basic categories of available remedies (i.e., contractual, civil, criminal, and administrative). It is important to remember that each exists for a particular purpose, and equally important to ensure that the right remedy is targeted to the specific facts of the case.

Setting aside the merits concerning CGI Federal, procurement fraud practitioners and stakeholders frequently find themselves to be recipients of external temptations to "punish" contractors for malfeasance, misfeasance, or nonfeasance. The root of these temptations continues to grow exponentially through various legislative proposals designed – sometimes explicitly – to "punish" contractors for misconduct by excluding the contractors from future contracting with the government. These "statutory" or "inducement debarments" ignore considerations of present responsibility in favor of automatic penalties. (For more on statutory exclusions, *see Conviction Based Statutory Exclusions Versus Debarments, "The Procurement Fraud Advisor"* (Issue 78)).

It is easy to see why so many misunderstand the intent of suspension and debarment under the Federal Acquisition Regulation. Although no federal contractor desires to suffer criminal penalties, many contractors fear suspension or debarment *more* than criminal or civil sanctions, especially given the potential for financial ruin. In light of this causation, and as a sort of ontological debasement of Descartes', "I think; therefore, I am," those not thoroughly familiar with the suspension and debarment practice area, or those with a vested interest in such an interpretation, may see debarment and think, "It harms; therefore, it is punishment."

This battle remains more than semantics. Allowing others, including counterparts in the criminal and civil sectors, to view suspension and debarment as "punishment" can cause deleterious effects to the Government's interests. Savvy defense counsel continue to play upon these misconceptions, citing a defendant's suspension or debarment as "punishment enough." In a recent sentencing hearing, one defense counsel argued: "He has been debarred from ever having any contract work with the United States. He cannot go back to the two things he knows how to do: Serve his country in the military and work as a contracting officer in defense work." Although there may be a number of errors in counsel's argument, the potential effect of such an argument remains noteworthy: A judge, who may be inexperienced in administrative remedies, might improperly consider the suspension or debarment as an agency-imposed punishment in handing down a lesser sentence. The Assistant United States Attorney, who may be similarly inexperienced in this arena, might struggle to oppose the downward departure.

Each remedy available to the government seeks to accomplish set goals. The criminal process, for example, seeks to punish an offender, deter future misconduct, and foster healing. The administrative process, on the other hand, aims to protect the integrity of the procurement process and safeguard taxpayer funds. Each has its respective mission. Accomplishing that mission plugs a "gap". These gaps, though, spring leaks when practitioners allow the creep of punishment into other lanes which are non-punitive by nature.

The sentencing argument above highlights the very real concern of this creep. When courts and criminal practitioners allow administrative remedies to be raised and accepted as "other punishment" in sentencing, the defendant may receive a less-than-just punishment, in turn diminishing the overall deterrent effect. Ultimately, where the goal is to maximize use of the remedies available, the government may be deprived of the full value of the criminal remedy.

Practitioners, stakeholders, and investigators alike must remember that suspension and debarment under the Federal Acquisition Regulation may be imposed "only in the public interest for the Government's protection *and not for purposes of punishment*." That is, neither suspension nor debarment may be considered or used as "punishment." Congress is always free, of course, to transform suspension and debarment into a punitive system. However, unless and until such a time arrives, we must resist the temptation, however natural, to view suspension and debarment in punitive terms, and must work to ensure that all stakeholders in the process are aware of the purpose of administrative remedies. By doing so, we can help fight "punishment creep" and attendant obfuscation of the remedies' true policy goals.

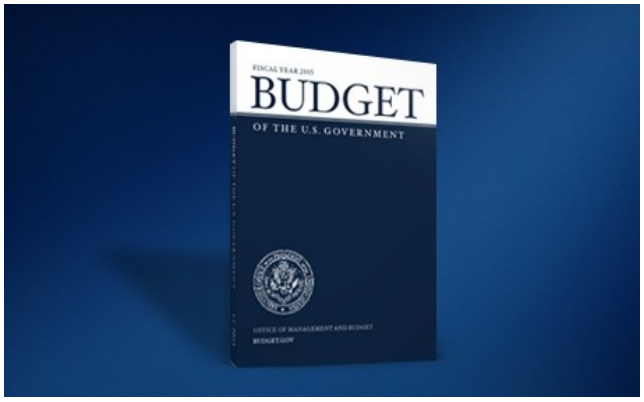
How Procurement Fraud Advisors and Procurement Fraud and Irregularities Coordinators Can Help In the Area of Fraud Recoveries

- Trevor Nelson, Attorney-Advisor, Procurement Fraud Branch

Pursuant to a June 1, 2010 Memorandum of Understanding Between the Defense Finance and Accounting Service (DFAS), the Army, the Department of Justice (DoJ), and the U.S. Courts, on Collection of Army Procurement Fraud Recovery Funds, fraud-related recoveries are tracked by PFB through CID's Major Procurement Fraud Unit (MPFU) and the DoJ Financial Litigation Unit to DFAS. Tracked recoveries include civil settlements, False Claims Act (FCA) and *qui tam* settlements, and restitution payments. By staying abreast of CID investigations into acquisition fraud matters, Procurement Fraud and Irregularities Coordinators (PFICs) and Procurement Fraud Advisors (PFAs) can help ensure that recoveries can be returned to the purchasing activity or command, or the Army, whenever possible.

Fraud Recoveries: When recoveries occur outside of the fiscal life cycle, the funds are returned to the U.S. Treasury pursuant to 31 U.S.C. §3806(g)(1), and are therefore unavailable for use by the purchasing activity. An appropriation is available for obligation for a finite period of time (i.e., generally one year for most funds) (*See,* 31 U.S.C. § 1502(a)). If an agency fails to obligate funds before they expire, those funds are no longer available for new obligations. However, expired funds retain their "fiscal year identity" for five years after the end of the period of availability. (*See* 31 U.S.C. § 1553(a)). During the five years following the period of availability, the funds are available at agency headquarters level to adjust existing obligations, or to liquidate prior valid obligations, but not to incur new obligations. Five years after the funds have expired, they are "cancelled" and are returned to the Treasury.

So What? Recoveries that are related to identifiable contracts, with funding sources which are not yet expired, are available to the buying activity for reuse. Even funds that are expired, but not yet cancelled, can be utilized by the agency concerned in accordance with 31 U.S.C. §1553(a). To ensure that the buying activity will benefit from any recoveries made available within the fiscal life cycle, PFAs need to become aware of CID investigations into contract fraud-related activities within their organizations at the earliest possible time. This requires developing a good working relationship based upon mutual trust with the CID and MPFU agents with investigative responsibility for your command. This will help ensure that PFAs are made aware, as early as possible, of ongoing or new investigations. PFAs should also know, and develop a working relationship with, their command resource manager. (Note, the resource manager may be at your higher headquarters). With the use of a contract number, the resource manager can quickly identify the character of the obligation and identify where the funds are within the fiscal life cycle.



What can PFAs/PFICs do to assist? As soon as PFAs become aware of a fraud-related investigation into a contracting activity at their buying command, they should try to determine, with the help of CID and contracting officers, the specific contracts affected. Once contract numbers are identified, PFAs should work within the contracting channels to contact the resource manager with the responsibility over the funding source for that contract. Having a situational awareness of the fiscal life cycle of the funds concerned will greatly assist in making a usability determination when a recovery is made. (Usability determinations are made by fiscal officers of the U.S.). If the funds are not yet cancelled, there is a possibility of return of the recoveries to the purchasing activity or the Army. At this point the PFIC/PFA should contact PFB regarding the recovery process. In some instances, PFB may already be aware of the CID/MPFU investigation. In those instances, the PFA can serve as a conduit to accelerate the process with the buying activity. If PFB was not previously aware of the investigation, this will represent a new case to be initiated and developed with PFIC/PFA assistance.

PFB Role. Once PFB is aware of possible fraud recoveries, PFB will coordinate with the appropriate DoJ personnel and the Army Comptroller's office to maximize the opportunity of the return of funding to the buying activity and/or the Army. PFAs will be asked to assist with completing a fraud recovery form, which PFB uses pursuant to a standing agreement to track the funding from DoJ payment, through Army fiscal officers who make usability determinations, and then the funds ultimately move to DFAS. By working closely together, this interdisciplinary team can maximize recoveries to the Army and preserve funds which were appropriated to support Soldiers and operational requirements.

Practice Note: ***In accordance with the Defense Federal Acquisition Regulation Supplement (DFARS), subpart 209.105-2, a copy of non-responsibility determinations must be forwarded to PFB for evaluation as to possible suspension and debarment action. PFB is especially interested in terminations for default which raise responsibility issues.***

Evolution of the Defense Contractor Fraud Disclosure Program

- Pamoline McDonald, Attorney-Advisor, Procurement Fraud Branch

Mandatory contractor disclosure has been in effect since 2008; however its origins date back almost thirty years. In February 1986, a Presidential Blue Ribbon Commission on Defense Management issued a report in which it concluded that "contractors have a legal and moral obligation to disclose to government authorities misconduct discovered as a result of self-review," and recommended that "defense contractors . . . promulgate and vigilantly enforce codes of ethics that address the unique problems and procedures incident to defense procurement." As a result of this report, the Department of Defense ("DOD") instituted the "Voluntary Disclosure Program" in July of 1986.

Under the voluntary disclosure program, defense contractors could make disclosures of "potential fraud" to the DOD Office of the Inspector General. Disclosures were accepted into the program if they contained sufficient information to be useful and if they were not triggered by the contractor's recognition that the potential criminal or civil fraud matter was about to be discovered by the Government. After acceptance into the voluntary disclosure program, the contractor had an opportunity to conduct an internal investigation, and the contractor could choose to provide the investigation's results to DOD.

In addition to the opportunity to conduct an internal investigation before intervention by federal investigators, the U.S. Sentencing Guidelines have required that courts take into account whether a company reported the offense to appropriate governmental authorities promptly and prior to an imminent threat of disclosure or government investigation, and whether the company fully cooperated in the investigation, when setting fines as part of criminal sentencing. Companies that made voluntary disclosures under the DOD program received consideration during the Department of Justice's ("DOJ") deliberations on the issue of whether to prosecute the case. Specifically, DOJ's consideration included factors such as the degree and timeliness of corporate cooperation and whether the corporation made a candid and complete disclosure.

However, the number of disclosures under the program was small. Between 1986 and 1994, the disclosures peaked at 58 reports in a one year period in the first year of the program. The reports declined in subsequent years. At the conclusion of the Voluntary Disclosure Program in December 2008, it was receiving fewer than 10 disclosures per year.

In 2006, the National Procurement Fraud Task Force ("NPFTF") was formed. It consisted of the DOJ, the Federal Bureau of Investigation, federal inspectors general, defense investigative agencies and federal prosecutors from United States Attorneys' offices across the country. The NPFTF's goal was to promote the prevention, early detection and prosecution of procurement fraud.

One of the things the NPFTF focused on was proposing regulatory and legislative changes that would improve fraud detection and contractor accountability, including a proposed amendment to the FAR requiring contractors to report crimes and overpayments. Subsequently, expansion of sections 9.406-2, 9.407-2, and 52.203 of the FAR were proposed. The proposed expansion provided, among other things, that companies could be suspended or debarred from contracting with the federal government if they failed to timely disclose an overpayment or violation of federal criminal law.

Before publishing the proposed rule, Congress took notice that the proposed rule included exemptions for commercial item contracts and contracts performed overseas. The "Close the Contractor Fraud Loophole Act," followed and required Federal contractors to disclose crimes and significant overpayments related to their federal contracts. Congress enacted the "Close the Contractor Fraud Loophole Act" as part of Public Law No. 110-252 on June 30, 2008. This law directed that the FAR be revised within 180 days to require timely notifications by contractors of violations of criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts, including those for commercial items and those performed outside the United States.

The FAR changes essentially extended to three areas. First, it created a cause for suspension or debarment of contractors for failure to timely disclose to the Government credible evidence of violation of criminal law involving fraud, conflict of interest, bribery or gratuity; violation of the civil False Claims Act; or, significant overpayments on contracts. Second, it required that future government contracts the value of which was expected to exceed $5,000,000 with a performance period of 120 days or more, contain a clause requiring timely

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Upcoming Training Update

- **August 2016: Procurement Fraud Advisor's Course, The Judge Advocate General's Legal Center and School, Charlottesville, VA.**

Evolution of the Defense Contractor Fraud Disclosure Program

(Continued from page 6)

- Pamoline McDonald, Attorney-Advisor, Procurement Fraud Branch

disclosures. Third, the rule required contractors, other than small business concerns and those with contracts for the acquisition of a commercial item, to establish an ongoing business ethics awareness and compliance program.

There were many concerns expressed during the rulemaking process that the mandatory disclosure rule would cause conflicts with the attorney-client privilege or other, similar, evidentiary privileges. The final rule did provide protection for the information that a contractor making a disclosure provides. It included the provision that "the Government, to the extent permitted by law and regulation, will safeguard and treat information obtained pursuant to the Contractor's disclosure as confidential where the information has been marked confidential or proprietary by the company. To the extent permitted by law and regulation, such information will not be released by the Government to the public pursuant to a Freedom of Information Act (5 U.S.C. 552) request without prior notification to the Contractor. The Government may transfer documents provided by the Contractor to any department or agency within the Executive Branch if the information relates to matters within the organization's jurisdiction.

One instance in which the concern about conflicts with legal privileges arose was in March 2014 when the U.S. District Court for the District of Columbia ordered a defendant to produce 89 documents generated during a Mandatory Disclosure Rule investigation that related to the case at hand. See, *United States of America ex rel. Harry Barko v. Halliburton Co., et al.*, (D.D.C. Mar. 6, 2014) (order compelling production of certain documents). The defendants sought protection of the documents under the attorney-client privilege or the attorney work product doctrine. The documents were generated pursuant to internal investigations that the company undertook, in part, in order to comply with the mandatory disclosure rule's requirement that a contractor investigate potential civil or criminal violations by its personnel.

In ruling that the defendants were required to turn over the documents, the Court noted that "the [Disclosure Rule] investigations were undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." Accordingly, the attorney-client privilege did not apply to the documents generated pursuant to the internal investigation. The Court also found that the work product doctrine did not protect the documents from disclosure, in part because "government regulations require [the defendant] to investigate potential fraud," and the defendant conducted the "internal investigation in the ordinary course of business . . . ." Therefore, the documents generated as a result of a regulatory-mandated, internal investigation were not protected by either the attorney-client privilege or the work product doctrine, and they must be turned over to the plaintiff in the case.

However, in June 2014, the U.S. Court of Appeals for the D.C. Circuit reversed the district court opinion. The Court of Appeals looked to Supreme Court precedent in *Upjohn Co. v. United States, 449 U.S. 383 (1981)* characterizing the attorney-client privilege as the "oldest of the privileges for confidential communications known to the common law." The D.C. Circuit reiterated *Upjohn's* rule that privilege applies to internal investigations performed by in-house attorneys, and covers the communications between company employees and company attorneys.

The appeals court also rejected the position that an internal investigation is not privileged if conducted pursuant to a regulatory requirement (e.g., under the FAR). The D.C. Circuit recognized that this "novel approach" to the attorney-client privilege would "eliminate the attorney-client privilege for numerous communications that are made for both legal and business purposes" and would "eradicate the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs."

As the contractor disclosure rule has evolved, more disclosures are being made pursuant to the mandatory rule. DODIG reported 214 disclosures for Fiscal Year 2014. However, almost 70% of the disclosures involved labor mischarging with significant overpayments a distant second at approximately 8%. As anticipated, when investigators request access to internal company investigations, concerns about conflicts with attorney-client or other evidentiary privileges predictably materialize.

PFB has generally found companies to be cooperative in processing requests for additional information pursuant to mandatory disclosures. As an example, if a company reports a case of labor mischarging involving a former employee, PFB may request additional information regarding the employee when assembling an administrative record in any potential proposed debarment of the former employee. Such information could include: the former employee's position title and duties, last known address, and whether they were required to maintain a security clearance in the performance of their contract duties. PFB may also have additional questions concerning what the company found in its internal investigation.

Many, if not most, companies structure their ethics and compliance (to include the investigations function) within their office of general counsel. So, occasionally, companies are hesitant to share information based upon attorney-client privilege or attorney work product concerns. Normally, these concerns can be satisfied once the company understands that while PFB's due diligence analysis of the case facts may require a wide ranging review of the issue and the company's response to it, PFB does have considerable discretion in deciding what exhibits will be included in the administrative record which will be seen by the Suspension and Debarment Official as well as the respondent. In addition, as long as PFB can review the information, there is often no problem reviewing the material in excerpt form, or with appropriate company redactions.

As PFB continues its efforts to develop processes to more effectively review meritorious performance issues, we anticipate that in the future, an increasing number of cases PFB reviews will originate from the DODIG Mandatory Disclosure Program.

Army Material Command (AMC) Update

Counterfeit Mitigation

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

"The failure of a single electronic part can leave a soldier, sailor, airman, or Marine vulnerable at the worst possible time. Unfortunately, a flood of counterfeit electronic parts has made it a lot harder to prevent that from happening." This is a quotation from the Senate Armed Services Committee Report released May 21, 2012: *Inquiry into Counterfeit Electronic Parts in the Department of Defense Supply Chain*. Among the report's conclusions: that DoD lacks knowledge on the scope and impact of counterfeit parts on critical defense systems.

Following up on the Senate Report, the 2012 National Defense Authorization Act (NDAA) required the Secretary of Defense to issue guidance on defense acquisition policies and systems for the detection and avoidance of counterfeit electronic parts, which includes appropriate detection and reporting systems for both Government and contractors. In compliance with the NDAA, DoD has strengthened its long-standing effort to prevent and mitigate the impact of counterfeit materiel within our supply chain. The principal implementing procedures are in DoDI 4140.67, DoD Counterfeit Prevention Policy, April 26, 2013, which serves to: (1) establish policies; and (2) assign responsibility for the prevention, detection, and remediation of counterfeit material. DoD strategies focus on materiel that has the potential to adversely affect weapon system performance or operation or to endanger the life or safety of operating personnel.

As the Army's primary provider of materiel, including components and parts for weapon systems, the U.S. Army Materiel Command (AMC) is vitally concerned about counterfeit mitigation. At the Headquarters, the Procurement Fraud and Irregularities Coordinator (PFIC) provides support for all legal and policy matters pertaining to discrepant materiel, whether the materiel is suspected counterfeit, an unauthorized product substitution, or simply nonconforming materiel. Currently, the PFIC serves on two counterfeit mitigation working groups. The first group is re-mapping the process for reporting and investigating suspect counterfeit parts to ensure effective procedures that are compliant with DoDI 4140.67, including expanded use of Government Industry Data Exchange Program Alerts to notify other Government and industry stakeholders. The other AMC working group is developing acquisition strategies to reduce the risk of receiving counterfeit materiel.

All of the AMC Life Cycle Management Commands and Contracting Centers are involved in counterfeit mitigation, and Procurement Fraud Advisors (PFAs) throughout the Command need

As attorneys, PFAs have an important perspective to provide to the logisticians, engineers, and technical personnel who are on the front lines of counterfeit mitigation. Not only can PFAs assist in the correct interpretation of the statutes and regulations that bear directly on counterfeit mitigation, but they have knowledge of other statutes and regulations that indirectly bear upon mitigation strategies, especially acquisition laws and regulations.

U. S. Army Europe (USAREUR) Update

Suspension: A Primer

- CPT Matthew W. Haynes, PFIC, USAREUR

Suspension is a temporary, but severe, action. In accordance with FAR 9.407-1, subparagraph (b)(1), it is appropriate only when, pending the completion of an investigation or legal proceeding, adequate evidence exists of a basis for suspension and immediate action is necessary to protect the Government's interest.

Given the low evidentiary standard required for a suspension, and the devastating effects it can have on a contractor, PFICs and PFAs should be cautious in recommending suspension as a short term solution to a suspected fraud. The FAR defines "adequate evidence" as "information sufficient to support the reasonable belief that a particular act or omission has occurred," and has been described as comparable to that which is required for a finding of probable cause.

Even when adequate evidence exists of a basis for suspension, a Suspension and Debarment Official (SDO) may determine that suspension is unnecessary if mitigating factors and/or remedial measures are available to protect the Government. It should always be remembered that the purpose of suspension is not to punish, but rather, to stem the harm while the Government gathers the facts necessary to make a more enduring determination.

The grounds for suspension largely track those for debarment, and in practice, the effects of suspension on a contractor are similar to those of debarment. A suspension has Government-wide effects. Like debarment, it causes the contractor to be listed on the System for Award Management (SAM), and is thereby excluded from receiving new Government contracts until the exclusion is removed (barring an agency head determination of compelling need to contract).

Suspended contractors are also generally prohibited from working as subcontractors, and cannot act as individual sureties for the duration of the suspension. One notable difference between suspension and debarment is

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U. S. Army Europe (USAREUR) Update (continued from page 8)

that a suspension may not last longer than 12 months unless legal proceedings have been initiated in that period (or 18 months if an Assistant Attorney General has requested the extension), whereas debarments are generally for a 3 year period unless the SDO decides that a longer (or shorter) period is appropriate under the circumstances (FAR 9.406-4(a)(1)).

So, when would a suspension be appropriate? Like most legal issues, the answer depends on the specific facts and circumstances of each individual case. Consider a contractor which manufactures Meals Ready to Eat (MREs) for Soldiers in the field. When Soldiers start to report illnesses after eating the MREs, an investigation is initiated. Preliminary reports indicate that contractor used substandard ingredients in an effort to lower manufacturing costs and increase their profit margin. Here, the Government's interest is the health and safety of its Soldiers. Given the nature and scope of this example, this would be a matter handled by the Army SDO. To protect this interest and prevent potentially harmful food from entering other Government supply chains, a suspension by the Army SDO might be appropriate. [NOTE: In conjunction with the suspension, the servicing PFIC and PFA should coordinate with the responsible contracting activity to discuss the availability and use of contract remedies, (e.g., issuance of a contract discrepancy report, show cause letter, or a termination for default)].

On the other hand, consider a contractor who provides freight shipping services for the Army. When it comes to light that a series of invoices might have been improperly inflated, a CID investigation reveals that shipping services are being performed adequately, and that the inflated invoices are due to a suspected small-scale gas receipt fraud perpetrated by four contractor employees. Here, suspension of the company might not be appropriate because remedial measures exist to protect the Government's interest (e.g., termination of the four contractor employees, repayment of any false claim received, contractor retraining, and/or the imposition of a fuel-card payment system to better track purchases.

In the early stages of a procurement fraud investigation, it is not uncommon for the commander of an affected unit to contact his or her servicing PFIC or PFA to ask why the contractor in question is not suspended. After all, a suspension represents prompt and decisive protective action. As PFAs, we should always be ready to answer this question.

However, suspension should be viewed and explained as a severe action appropriate only when immediate protection is required to protect the Army from the effects of fraudulent contractor activity. As noted in FAR 9.407-1(b)(1), in assessing the adequacy of the evidence, agencies should consider how much information is available, how credible it is, whether key allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as contracts, inspection reports, and correspondence.

Remember also that in accordance with FAR 9.407-1(b)(2), the existence of a cause for suspension does not necessarily require that the contractor be suspended. Consideration should be given to the seriousness of the contractor's acts or omissions, as well as mitigating factors such as remedial actions taken by the contractor.

Consequently, at the onset of a procurement fraud case there often exists a friction between what the commander wants and what the SDO ultimately decides. Walking the commander through the analysis above will go a long way towards alleviating any misunderstandings.

***Practice Note**: On 31 Jul 14, POTUS issued an Executive Order (E.O.) entitled "Fair Pay and Safe Workplaces" which places a number of obligations on contractors with regard to labor rules (e.g., wage/hour, safety/health, collective bargaining, family/medical leave, etc.). The new E.O. impacts contracts worth more than $500k, and requires contractors to disclose during the bid process any labor law violations committed within the past three years. The Contracting Officer will then use this information to assess present responsibility. The E.O. also establishes a requirement for contractors to certify that each of their subcontractors whose compensation exceeds $500k meets the standards. The E.O. requires agencies to designate a senior official as a Labor Compliance Advisor to provide guidance to procurement officials in the areas above. Under the E.O., contracting officers and Labor Compliance Advisors will, as appropriate, submit such non-responsibility determinations to the agency Suspension and Debarment Official. Accordingly, the E.O. will bring acquisition officials into the consideration of administrative merits determinations, arbitral awards or decisions, and civil judgments and the task of assessing whether a record of violations merits assessment for debarment. The E.O. required the FAR Council to propose/implement rules to implement the E.O.'s provisions, after notice and comment proceedings. These proposed rules are now being coordinated for comment.*

***Practice Note**: On occasion, there is confusion among law enforcement agents and Assistant U.S. Attorneys regarding whether debarment can be added as a term in a criminal/civil settlement or deferred prosecution agreement. The short answer is no. Debarment is a discretionary, non-punitive business decision reserved exclusively to agency Suspension and Debarment Officials. Agencies must always have the latitude to make individual determinations of present responsibility on potential contractors it may do business with. As noted in paragraph 9-28.1300 of the United States Attorneys' Manual, "(w)here the corporation was engaged in fraud against the government (e.g., contracting fraud), a prosecutor may not negotiate away an agency's right to debar or delist the corporate defendant."*

8th U.S. Army (Korea) Update

Cultural Factors in Procurement Fraud

- LTC Patrick L. Vergona, PFIC, 8th U.S. Army (Korea)

A tour in Korea presents many challenges from the threat of North Korean bombardment to the Army's most enthusiastic physical training regimen. The prosecution of procurement fraud cases in Korea also has challenges, the most significant being the conflict between cultural norms within the Korean business community and the Joint Ethics Regulations for federal employees.

Within the Korean business community, it is not uncommon to find Korean businessmen providing gifts to the employees of businesses that they are contracting with to demonstrate their respect and commitment to the business relationship. While this is an acceptable practice within the private business community, fraud and ethics allegations are routinely raised when the recipient of such largess is a contracting officer's representative or other employee of the U.S. involved in a procurement action

Nine transportation contractors were recently investigated for inflating weights on household goods shipments and conspiring to bribe U.S. employees in exchange for preferential treatment. Involved were several sub-contractors who were informed by the prime that contributing to the gift fund for the government employees was a prerequisite to being awarded additional work. Each of the contractors is currently facing suspension or debarment action. Several corporate officers have admitted to Korean National Police investigators that the companies conspired to provide bribes in the form of gift certificates to Transportation Office employees, and regular entertainment of those same officials through dinners and golf games. Corporate officers also provided U.S. employees loans in addition to the gifts. As with several other similar cases, the Korean corporate officers stated they were engaged in normal practices in Korea for maintaining good relations

Such crimes are uncovered due to the tremendous effort of our Joint Procurement Fraud Investigations Team which is comprised of agents from CID, DCIS, IG and FBI. These team members serve tours in Korea of five or more years thus ensuring continuity of effort. Team members also speak Hangul, the language commonly spoken in South Korea. CPT Daniel Mow, the Eighth Army Procurement Fraud Advisor is actively involved in the investigations of the Joint Procurement Fraud Investigations Team. In 2014, 20 allegations from across the Korean peninsula were investigated with suspension or debarment actions occurring against 18 contractors.

The Korean business custom of providing gifts to their customers is proving to be a common refrain in our procurement fraud investigations. However, instead of providing a defense, the often obvious gift giving conduct leads investigators to the conspiracy, involving items of value given in exchange for preferential treatment, lying beneath.

U. S. Army Medical Command (MEDCOM) Update

Procurement Fraud Scheme Uses Soldiers to Target TRICARE

- Jerry Krimbill, PFIC, U.S. Army Medical Command

Most procurement fraud activities in some way involve contracting personnel. Generally, such cases include as players a contracting officer, contracting specialist, contracting officer's representative and/or other individuals who participate in the contracting process. Recently, however, there is a new crop of potential procurement fraud cases that do not involve any contracting personnel. Rather, these cases focus on Soldiers – ANY Soldier -- who has access to TRICARE. The implications of this development to Procurement Fraud Advisors (PFAs) are huge.

This scheme involves compounding pharmacies, which differ from traditional pharmacies in that compounding pharmacies prepare customized prescription compounds (e.g., flavored cough syrups, topical creams, etc.) for patients based on the patient's specific medical need.

Compounding pharmacies have become big business; the value of prescriptions submitted to TRICARE from compounding pharmacies has increased exponentially in the last 10 years. In 2005, TRICARE paid approximately $5 million to compounding pharmacies. In 2015, that number has ballooned to $12 million ***per day***, and is expected to exceed $2 billion by the end of the year.

One or more of these compounding pharmacies has hired marketers to solicit TRICARE beneficiaries (e.g. Soldiers and other service members) via telephone or in person to provide their personally identifiable information (PII) in exchange for financial incentives (cash or free meals). Soldiers are also frequently offered additional financial incentives if they are able to refer additional TRICARE beneficiaries to the marketer. The marketer then turns over the Soldier's PII to a civilian doctor, who will often contact the Soldier by phone in what may be meager attempt to establish a doctor-patient relationship. The doctor will then prescribe a medication (typically a topical cream) for the Soldier and then forward the prescription to TRICARE.

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Procurement Fraud Scheme Uses Soldiers to Target TRICARE (Continued from page 10)

- Jerry Krimbill, PFIC, MEDCOM

Monthly billings to TRICARE for such prescriptions often range from $10,000 to up to nearly $100,000 per Soldier. This scheme results in Soldiers receiving prescriptions they likely neither want nor need, and TRICARE paying out millions of dollars for prescriptions that do not appear to be legitimately medically indicated.

These marketers can be exceptionally bold in their approach. In early April, two such marketers set up shop in front of the Post Exchange on Joint Base San Antonio – Fort Sam Houston. The marketers offered service members a free BBQ plate from a nearby food truck, and used the opportunity while the service member was eating to solicit PII from the member. Luckily, law enforcement learned of this activity while it was occurring and was able to disrupt any further activities. However, this demonstrates how brazen these marketers can be and the lengths to which they will go to gain access to a ready population of TRICARE beneficiaries.

PFAs should be aware of this scheme and educate their commands accordingly to avoid having any of their Soldiers unwittingly participate in the potential fraud being perpetrated by such compounding pharmacies.

Practice Note: ***If suspensions and debarments under FAR 9.406 cover FAR based contracts, what do we use in a non-procurement action (e.g., a grant or cooperative agreement)? Although rarely used within the DoD, the non-procurement common rule (2 CFR 1125) provides for a government-wide system of non-procurement suspensions and debarments.***

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 examples of the types of cases recently processed by PFB.

Recent Debarments:

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

- **Virgie Dillard, Roland M. Evans, Mark A. Morgan, Igor Levelev, Missouri Office Systems and Supplies, Inc. (MOSS), BMW IT Solutions, LLC, PRM Technology Equipment, LLC, GoodIT, LLC, and TechtronicsIT, LLC (Wire Fraud; Counterfeit Goods):** On 10 December 2014, the Army SDO debarred Roland M. Evans, Mark A. Morgan, Igor Levelev, BMW IT Solutions, LLC, PRM Technology Equipment, LLC, GoodIT, LLC, and TechtronicsIT, LLC. On 19 December 2014, the Army SDO debarred Virgie Dillard and MOSS. Ms. Dillard, the President and CEO of MOSS, conspired with Mr. Evans, a MOSS employee, and Mr. Morgan, a computer product supplier, to defraud the Army and the Army Recreation Machine Program. Specifically, MOSS falsely represented that the Cisco Systems, Inc. goods and services it provided to the Army were sourced from Cisco Authorized Distribution Channels and protected by full Cisco warranties. In reality, MOSS purchased the counterfeit Cisco products from Mr. Morgan and his company, PRM Technology; Mr. Morgan obtained the counterfeit products from numerous sources, including Igor Levelev and Techtronics IT, LLC. The Army ultimately paid more than $1 million for counterfeit Cisco products and/or products that were used and modified post - manufacture outside of Cisco Authorized Distribution Channels. Ms. Dillard, Mr. Evans, and Mr. Morgan pleaded guilty to conspiracy to commit wire fraud. (CPT Liddick)

- **Charlie Takhyun Song and Chasong Enterprises, LLC (Aiding and Abetting Conflict of Interest):** On 12 March 2015, the Army SDO debarred Charlie Takhyun Song and Chasong Enterprises, LLC (Chasong) through 19 February 2017. Chasong, which Mr. Song owned and operated, held itself out as a medical device distributor for Altiva Spine, LLC (Altiva). Mr. Song's son-in-law, Dr. Richard Rooney, was assigned to several Army hospitals where he participated personally and substantially as a government employee in recommending the purchase of spinal implants and instruments from Altiva. Between approximately 2005 and 2008, Dr. Rooney conspired with Altiva's Director of Supply Chain Operations, Julia Lynn Eller, to recommend that the Army hospitals to which he was assigned purchase Altiva products. In exchange, Dr. Rooney received financial compensation in the form of commissions paid to Altiva's distributor, Chasong. Mr. Song knowingly permitted Chasong to serve as a pass-through for these payments. Mr. Song pleaded guilty to aiding and abetting Dr. Rooney in committing acts affecting a personal interest. (CPT Liddick)

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Procurement Fraud Branch Case Update

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Recent Debarments (Continued):

- **James C. Pitman and A&J Towing Company (Money Laundering):** On 16 January 2015, the SDO debarred James C. Pitman and his landscaping company, A&J Towing Company, for five years, based on his conviction in U.S. District Court for money laundering. Mr. Pitman, a former active duty Soldier, conspired with a deployed Soldier in Afghanistan to launder the kickback money he received from Afghan contractors. As part of the scheme, the deployed Soldier mailed the kickback money to Mr. Pittman in packages containing toy Afghan trucks, known as "jingle trucks." Concealed inside these toy trucks were $50 and $100 bills of kickback money, totaling $70,000. On receipt, Mr. Pitman laundered the money by using his company's payroll and bank accounts to make fraudulent salary payments via paychecks issued to the deployed soldier. Mr. Pitman kept 11-13% of the kickback money for himself as payment for his services. (Mr. Wallace)

- **Lakeshore Toltest Corporation (LTC) and affiliates (Failure to Perform, Inadequate Financial Resources, and Failure to Cooperate):** On 10 December 2014, the SDO debarred Lakeshore Toltest Corporation (LTC) and its 29 affiliated companies for three years for failure to perform on a major $78.8 million contract to build several Afghan National Army (ANA) facilities, including the Afghan National Security University, the Afghan National Defense University, the Joint Services Academy, the Legal Branch School, and the Religious and Cultural Affairs School. The basis for the debarment was LTC's failure to complete the projects, adequate financial resources to pay millions of dollars owed to its subcontractors, and failure to cooperate in a government investigation to determine its financial capability. (Mr. Wallace)

- **Patrick K. Wiley, Clayton Poaipuni, Sardar Mohammad, and Aryana Green Light Support Services (Theft of Government Property):** On 18 March 2015, the SDO debarred Patrick K. Wiley, Clayton Poaipuni, Sardar Mohammad and his company, Aryana Green Light Support Services for 5 years for theft of government fuel in Afghanistan. A federal investigation revealed that Mr. Wiley and Mr. Poaipuni, employees of a fuel supplier on Kandahar Airfield (KAF), completed the necessary paperwork to allow Mr. Mohammad's fuel trucks to enter KAF and refuel at the KAF fuel depot. Mr. Mohammad then resold tens of thousands of gallons of the stolen fuel on the local economy. In exchange, Mr. Mohammad paid his co-conspirators as much as $10,000 for each truckload of stolen fuel. (Mr. Wallace)

- **Samuel Muturi and Shannel Mwakio (Theft of Government Property):** On 25 February 2015, the SDO debarred Samuel Muturi and Shannel Mwakio for three years. A federal investigation revealed that while Mr. Muturi was employed as a warehouseman for a civilian contractor on Kandahar Airfield, Afghanistan (KAF), he used his position to allow Mr. Mwakio, an employee of another contractor, to steal over 100 barrels of government motor oil, valued at over $15,000, and sell it on the local economy. In exchange, Mr. Mwakio paid cash kickbacks to Mr. Muturi. Also, Mr. Muturi confessed to stealing other government equipment at KAF, including laptop computers, cameras, and power tools. (Mr. Wallace)

- **Masood Ahmad and Jaweed Ahmad (Bribery):** On 25 February 2015, the SDO debarred Masood Ahmad and Jaweed Ahmad for three years. A federal investigation revealed that while employed as a cultural advisor for the Regional Contracting Center (RCC) at Kandahar Airfield, Afghanistan, where he was responsible for processing contractors' invoices for payment, Masood Ahmad admitted that he and his brother, Jaweed Ahmad, demanded bribery payments from Afghan contractors as a precondition to processing their invoices for payment by the Defense Finance and Accounting Service. (Mr. Wallace)

- **SGT Lisa Devilme (False Statements and Bribery):** On 12 February 2015, the SDO debarred Ms. Devilme through 24 October 2018 for making false statements and accepting bribes to influence her decisions on official matters. Ms. Devilme was the designated Government Purchase Card (GPC) holder for her unit. Rimrock Office Supply devised a scheme in which it sought out GPC holders to purchase their office supplies. It would propose that the GPC holder make purchases under the GPC threshold to circumvent approval safeguards. Rimrock also recommended that the GPC holder make split purchases in violation of GPC policy. In exchange for these GPC purchases, Rimrock promised gifts, gift cards and money. Ms. Devilme was one of four Army Soldiers who participated in this scheme. Rimrock gave her $3,400 in money and gift cards. She was charged under the UCMJ for her actions and was administratively discharged under other than honorable conditions in lieu of courts-martial and reduced to the grade of Private (E-1). (Ms. McDonald)

- **Geraldine Champion and CBA Properties (Failure to Perform and Theft):** On 15 April 2015, the SDO debarred Geraldine Champion and CBA Properties through 18 December 2017 for failure to perform pursuant to contract. CBA was awarded a contract for Blue Coat Software Support (BCSS). The full contract amount of $123,600 was paid soon after contract award. A request to replace a part was made to CBA. After an extended period of time, CBA sent a non-conforming part which

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Procurement Fraud Branch Case Update

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Recent Debarments (continued)

- **Geraldine Champion and CBA Properties (Failure to Perform and Theft) (Continued):** was rejected by the Army as non-conforming. Despite requests for service, CBA failed to fulfill its obligations under the contract, causing it to be terminated for cause and the contracting officer referred the case to CID. The investigation revealed that CBA was not qualified to fulfill the terms of the contract and that CBA was not an authorized vendor to procure BCSS products. In addition, CBA failed to reimburse the Government for any money from the advance after termination for cause. (Ms. McDonald)

- **MSG (Ret.) Lawrence Fenti (Conspiracy, Bribery, False Claims, Wire Fraud)**: MSG (Ret.) Lawrence Fenti was debarred for 5 years, based on his convictions in U.S. District Court for conspiracy, bribery, false claims, false statements, wire fraud, and money laundering. MSG(R) Fenti was in-charge of Brooke Army Medical Center's (BAMC) Radiology Department. He was the BAMC Radiology Department Chief Non-Commissioned Officer from 2006 to 2008 where he supervised enlisted military personnel and civilian employees, and facilitated procurement activities. Between 2007 and 2009, MSG(R) Fenti, and others conspired to take advantage of rules that gave preference to small disadvantaged businesses, secretly steering the bulk of work performed under $8.15 million in contracts to companies run by the co-conspirators. MSG(R) Fenti was in a position to create, possess, and steer technical data that would easily provide a contractor an unfair advantage. MSG(R) Fenti also had the authority to influence the selection the responsible bidder. The deals included a $2 million BAMC magnetic resonance imaging (MRI) contract in June 2008, a $4.9 million BAMC MRI contract in July 2008, a $633,407 BAMC staffing contract in September 2008, and a $336,600 MRI contract in September 2009 for Womack Army Medical Center at Fort Bragg, N.C. Once contracts were secured by the prime contractor, MSG(R) Fenti and others caused the prime contractor to overcharge the Army, by submitting substantially overinflated invoices from sub-contractors owned by co-conspirators to the prime contractor which allowed the conspirators' companies to collect money that had not been earned. (Mr. Nelson)

Recent Administrative Compliance Agreements:

- **Saena Tech Corporation and Jin Seok Kim (Bribery of a Public Official):** On the 26 May 2015, the Army SDO entered into a three-year Administrative Agreement with Saena Tech Corporation ("Saena Tech") and Jin Seok Kim ("Mr. Kim"). Saena Tech is a corporation licensed to do business in Seoul, South Korea with its principal place of business in Yongsan, South Korea. Saena Tech is in the business of providing information technology services, such as network design and development, video teleconferencing and security solutions. It has operated as a subcontractor for U.S.-based Government contracting companies providing technical services and equipment for 8th U.S. Army since Mr. Kim founded Saena Tech in 2005. In 2009, Saena Tech entered into a subcontract under 8th United States Army Command and Control C4IT Technical Support Services, and paid a public official approximately $70,000 to assist Saena Tech with obtaining and retaining subcontracting opportunities through the subcontracts this public official administered. From April through May 2010 Saena Tech submitted invoices to a Government subcontractor for work it had not actually performed. The proceeds minus the 30% for the taxes Saena Tech would owe on the payment of $250,000 were paid to the public official in installments to ensure the continued award of Government subcontracts. From 2009 through April 2014, Saena Tech was awarded more than 15 subcontracts from various subcontractors under the prime contract with 8th U.S. Army. On 24 March 2014, the United States Attorney for the District of Columbia filed a criminal information charging Saena Tech with bribery of a public official. On 16 April 2014, Mr. Kim as Saena Tech's Managing Director signed a Deferred Prosecution Agreement accepting responsibility for the bribery allegations.

- **SofTec Solutions, Inc., Theodore R. Fells, and Bruce E. Kirkpatrick (Conspiracy, Making a False Statement and Filing False Tax Returns):** On 14 May 2015, the Army SDO entered into a three-year Administrative Agreement with SofTec Solutions, Inc. ("SofTec"), and Theodore R. Fells and Bruce E. Kirkpatrick, Voting Trustees. SofTec is an IT outsourcing and consulting services firm headquartered in Englewood, Colorado. Since 2005 the U.S. Army has awarded SofTec a series of contracts with an estimated value of $20.4 million. In 2010 and 2012 SofTec was awarded two 8(A) set-aside contracts reserved for a contractor qualified by the SBA as an 8(A) small disadvantaged business. In 2009, CID investigated SofTec and determined that its President and CEO, Hemal Ramesh Jhaveri, had concealed assets and income from the SBA and the IRS. Had Mr. Jhaveri's true income been accurately reported to the SBA, SofTec would have been ineligible for 8(A) status. On 6 August 2014, the U.S. Attorney for the District of Colorado indicted Mr. Jhaveri and charged him with conspiracy, making a false statement, and filing false tax returns in violation of 18 U.S.C. § 371, 15 U.S.C. § 645 and 26 U.S.C. § 7206. On 10 December 2014, the Army suspended Mr. Jhaveri and SofTec from future contracting with agencies within the Executive Branch. Following the notice of suspension, Mr. Jhaveri relinquished his direct ownership of his shares of SofTec stock, placed them in a Voting Trust to be managed in accordance with the Voting Trust Agreement by the Voting Trustees, Messrs. Fells and Kirkpatrick.

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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