



The Procurement Fraud Advisor

Newsletter of the Procurement Fraud Division,
Office of The Judge Advocate General

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The Procurement Fraud Advisor (Issue 81)

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Message from the Chief, Procurement Fraud Division (PFD)

This has been a very busy year for those of us in the Procurement Fraud practice area. A brief summary of the most significant developments of the past year is set out below.

In recognition of the Army's efforts to further develop the Army Procurement Fraud Program and better align the program's functions, in September 2015, Procurement Fraud Branch, U.S. Army Legal Services Agency, was re-designated as Procurement Fraud Division (PFD), Office of The Judge Advocate General. As currently aligned, PFD now falls solely within the program responsibility of the Army Suspension and Debarment Official.

During FY15, PFD experienced another record year as we processed 1,033 suspension, proposed debarment, and debarment actions. This represented an increase of almost 29% over the number of actions processed in FY14. Within the Army, much of this increase is attributable to our efforts to enhance coordination with law enforcement, the acquisition community, and field fraud counsel. For example, we are processing an increasing number of cases arising from the Department of Defense Office of the Inspector General (DoDIG) Mandatory Disclosure Program (FAR 52.203-13). In addition, better communication

between PFD, law enforcement, and the procurement community is resulting in an increase in the processing of fact and performance based actions.

While these numbers reflect the results of hard work on the part of PFD attorneys, it should be remembered that suspension and debarment activity is only one indicator of a strong procurement fraud remedies program. Other key elements include factors such as whether we can actively pursue all available remedies (i.e., contractual, civil, criminal, and administrative), and whether we can do so when the remedies can be of the most benefit to the Army.

FY15 also proved to be a very active year for the Department of Justice (DoJ) in the area of procurement fraud. In FY15, DoJ recovered more than \$3.5 billion in settlements and judgments from civil cases. This marked the fourth consecutive year that DoJ exceeded \$3.5 billion in recoveries under the False Claims Act. It also brings total recoveries from January 2009 to the end of FY15 to \$26.4 billion. Of the \$3.5 billion recovered in FY15, \$1.9 billion came from the area of healthcare fraud, while \$1.1 billion came from settlements and judgments in cases alleging false claims for payment under government contracts.

Of the \$3.5 billion DoJ recovered in FY15, more than \$2.8 billion was attributable to cases filed under the *qui tam* provisions of the False Claims Act. It is interesting to note that FY15 was also a record year for *qui tam* recoveries where the government elected not to intervene (i.e., almost \$1.15 billion in recoveries for cases in which intervention was declined versus \$1.76 billion for cases in which the government elected to intervene).

In addition to DoJ issuing a new policy memorandum (informally known as the "Yates Memo" discussed separately in this edition) which announced a new DoJ emphasis on the accountability of individuals in corporate fraud cases, DoJ also retained a full time compliance expert (also discussed separately in this edition) to assist prosecutors in evaluating corporate compliance and remediation measures.

These developments all underscore the fact that the more the government increases its efforts to combat procurement fraud, the greater the Army's reliance on its Procurement Fraud Advisors. As always, PFD stands ready to work with you on these issues as they arise.

— Mark Rivest

Department of Justice Memorandum on Individual Accountability for Corporate Wrongdoing

- Mark Rivest, Chief, Procurement Fraud Division

On September 6, 2015, the Deputy Attorney General, Sally Yates, issued a memorandum entitled "Individual Accountability for Corporate Wrongdoing." In this memo-

randum (sometimes referred to as "the Yates memo"), the Deputy Attorney General issued policy guidance concerning an enhanced DoJ effort to hold

individual corporate wrongdoers accountable for their misconduct. While the concepts set forth in the memorandum

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Department of Justice Memorandum on Individual Accountability for Corporate Wrongdoing

- Mark Rivest, Chief, Procurement Fraud Division
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“One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity; it incentivizes changes in corporate behavior; it ensures that the proper parties are held responsible for their actions; and it promotes the public’s confidence in our justice system.”

- Sally Quillan Yates,
Deputy Attorney
General

are not entirely new, they do represent an enhanced DoJ policy focus on individual accountability in fraud cases. The stated goal of the memorandum is to help ensure that all attorneys across the DoJ are consistent in their efforts to hold individuals to account if they are responsible for illegal corporate conduct.

The guidance set forth in the memorandum reflects six key steps designed to strengthen DoJ’s pursuit of individual wrongdoing:

1. In order to qualify for cooperation credit, corporations must provide all relevant facts to DoJ relating to the individuals responsible for the misconduct;
2. criminal and civil corporate investigations should focus on individuals from the inception of the investigation;

3. criminal and civil attorneys handling corporate investigations should be in routine communication with one another;

4. absent extraordinary circumstances or approved departmental policy, DoJ will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation;

5. DoJ attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and

6. civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based upon considerations beyond that individual’s ability to pay.

How the implementation of this memorandum will play out in practice remains to be seen. At this point, there is much discussion in the private sector suggesting that the memorandum has the potential to fundamentally affect how companies and senior executives evaluate their responsibility to cooperate, raise issues as to whether a company can still be considered to be cooperating with DoJ when the company disagrees with DoJ on the facts and the culpability of individuals, and whether companies will be less apt to report systemic internal issues to DoJ if they cannot tie any misconduct to specific individuals. For the time being, at a minimum, it appears that the policy set forth in the Yates memo may require companies to re-evaluate the processes of both their internal investigations and compliance programs to ensure that they are properly synchronized with the evaluation methodology used by DoJ.

New Compliance Counsel Retained by the Department of Justice Fraud Section

- Mark Rivest, Chief, Procurement Fraud Division



On November 3, 2015, the Department of Justice (DoJ) Fraud Section retained Hui Chen as a full-time compliance expert. Ms. Chen’s duties will include providing guidance to Fraud Section prosecutors as they evaluate cases involving the prosecution of business entities. Specifically, Ms. Chen will advise on issues such as the existence and effectiveness of any compliance program that the company had in place at the time of the misconduct, whether the company has taken meaningful remedial measures to detect and prevent future

misconduct. In addition to her other responsibilities, Ms. Chen will help prosecutors develop metrics for evaluating corporate compliance and remediation measures which will assist prosecutors when deciding whether to criminally charge a company or how to resolve criminal charges.

Prior to her arrival at DoJ, Ms. Chen served as Global Head for Anti-Bribery and Corruption, Standard Charter Bank. Ms. Chen has also served as Assistant General Counsel, Pfizer, Inc.

DII Defense Industry Initiative ON BUSINESS ETHICS AND CONDUCT

Defense Industry Initiative on Business Ethics and Conduct

- Angela Styles and Laura Kennedy, Defense Industry Initiative

The Defense Industry Initiative on Business Ethics and Conduct (DII) is a nonpartisan, non-profit association of U.S. defense contractors committed to conducting business in accordance with the highest standards of ethical conduct and in full compliance with the law.

DII HISTORY

The origins of DII trace back to 1985, when reports of corruption throughout the defense acquisition process led President Reagan to create the Packard Commission. In 1986, the Commission released a report on waste, fraud, and abuse in the defense contracting community, and proposed that contractors strengthen self-governance to reduce fraud and abuse. In response, Jack Welch of General Electric met with CEOs and senior officials from 17 other defense contractors to commit themselves to principles of self-governance by pledging to promulgate a code of ethics, communicate that code to all employees, share best practices among its members, disclose wrongdoing to the government, and be held accountable to the public. These principles still serve as the foundation of DII. Since its founding, DII has grown to 81 signatories committed to serving the military and the U.S. taxpayers with honesty, integrity and accountability.

LEADERSHIP

DII is governed by a Steering

Committee, a policy-making body of 15 member-CEOs, and is currently chaired by Tony Moraco of SAIC. The Working Group, now led by Laura Kennedy of SAIC, is comprised of representatives from the same companies as the Steering Committee, and is tasked with implementing the programs and activities of the organization. Angela Styles of Crowell & Moring is DII's coordinator and manages the overall day-to-day operation of the organization.

DII'S MISSION

DII is committed to ensuring that its members have the tools and resources needed to enable its members to operate in accordance with the highest ethical standards. DII promotes the sharing of best practices through an annual best practices forum, webinars throughout the year, and a range of tools and services on its website. Members have access to a Model Supplier Code of Conduct, which establishes standards to which member companies should hold their suppliers. The website also shares training content, case studies, and weekly news updates on ethics and compliance matters.

DII'S ACCOMPLISHMENTS AND INITIATIVES

In 2015, DII conducted several benchmark studies, including an ethics program assessment,

ethical culture survey and organization benchmarking analysis. The results of this benchmarking established that ethics programs in the defense industry are far more mature and robust than in other industries based on the elements of the Federal Sentencing Guidelines. The survey results also showed that DII companies have stronger ethical cultures than other industries, as evidenced by a number of factors such as their lower rates of observed misconduct and higher rates of reporting misconduct.

DII members convene once a year for the Best Practice Forum, where members share ideas and practices to enable every company to strengthen their programs. The 2015 Best Practice Forum attracted over 250 attendees. Speakers included the Secretary of the Air Force, DOD suspension and debarment officials, DOD Inspector General among others, and panels offered interactive discussions on best practices for investigations and values-based ethical cultures. The 2016 Best Practices Forum will be a special 30th Anniversary program and feature joint industry/DOD panels on a wide range of current issues.

One of DII's primary goals is to engage with the government customer. Over the last year, members from DII held a number of discussions with DOD

Ethics Officers. Those discussions helped shape many of DII's initiatives for the upcoming year, such as the small business toolkit. DII's small business toolkit is designed to help smaller companies implement effective programs through a comprehensive set of tools and resources, including a model Code and sample policies, procedures, training, communications, monitoring and auditing programs. This initiative also provides mentors for small businesses to guide them through the process of establishing effective ethics and compliance programs on limited budgets.

As it enters its 30th year, DII remains more committed than ever to its principles of establishing effective ethics programs and strong ethical cultures throughout the defense industry. More information can be found at www.dii.org.

Angela Styles is a Partner at the Crowell & Moring law firm in Washington, DC where she specializes in government contracts. Ms. Styles also serves as the Coordinator for DII.

Laura Kennedy is the Senior Vice President, Ethics & Compliance, SAIC. Ms. Kennedy also serves as the Chair, DII Working Group.

Coordination of the Suspension and Debarment Remedy: When It Could Have (and Really Should Have) Gone Better

- Mark Rivest, Chief, Procurement Fraud Division

In procurement fraud cases, there are generally four types of available remedies: contractual, civil, criminal, and administrative. Contractual remedies (e.g., termination of a contract for default, revocation of acceptance, use of contract warranties, withholding payments, rejection of non-conforming goods, etc.) fall within the purview of the contracting officer. Civil remedies are court actions seeking monetary damages and/or penalties and generally fall within the responsibilities of the Department of Justice (DoJ) and Assistant U.S. Attorneys (AUSAs). Criminal remedies are prosecutions which also fall within the purview of the DoJ and AUSAs. Administrative remedies (e.g., removal or reassignment of Government personnel, revocation of security clearances, revocation of a contracting officer's warrant, or suspension and/or debarment) can fall within the purview of the command concerned (in the case of removal or reassignment of Government personnel or revocation of security clearances), acquisition officials (in the case of revocation of a contracting officer's warrant), or the Army Procurement Fraud Division (PFD) and Army Suspension and Debarment Official (SDO) (in the case of suspension and/or debarment of a contractor). Each of these remedies exist in order to protect the Government's interests and the procurement process. However, these remedies can only be effectively utilized if those responsible for implementing them are aware of procurement fraud issues involved and have the opportunity to propose potential remedies which can be coordinated among all primary stakeholders (i.e., acquisition special-

ists and command legal staffs, investigators, prosecutors, and PFD to ensure that their use will not interfere with or compromise other available remedies that should have priority (e.g., criminal or civil prosecutions).

Army PFD attorneys invest a good deal of effort coordinating closely with law enforcement and prosecutors to ensure that suspension and/or debarment action does not get in the way of an investigation or prosecution. The vast majority of times, that effort pays off through the creation of well coordinated judicial and administrative actions that complement each other and comprehensively protect the Government's interests. In theory, the use of administrative remedies should always fit in smoothly with the investigatory and prosecutorial function. After all, it is unlikely that PFD would initiate suspension or debarment action if it appeared that the remedy would compromise an ongoing investigation or prosecution. Similarly, if coordination indicated that the initiation of suspension or debarment action would not interfere with an investigation or prosecution, the use of such a remedy would be unlikely to cause any controversy. While this theory has a sound basis in fact, the key factor that can overshadow all others is that the ability to effectively coordinate remedies will always be dependent upon the specific personalities and factual dynamics present in a particular case. The case described below is a true case, with identities removed, that can serve as a valuable example of what can happen when remedies unnecessarily collide.

Approximately one year before our case at issue arose, an AUSA (for our purposes, I will

call him AUSA John Smith) contacted PFD with a proposal to enter into a "global settlement" with a contractor (for our purposes, ABC Co.) in a fraud case. Because ABC Co. was fearful that any settlement would lead to the initiation of debarment action, AUSA Smith wanted to add the Government's waiver of the debarment remedy into a "global settlement" with ABC Co. We explained to AUSA Smith, and the law enforcement agent working with AUSA Smith on the case, that debarment was a business decision vested exclusively in the Army SDO and that, as a matter of policy, the Army would not negotiate away this discretionary function through such a settlement. Furthermore, we explained that the U.S. Attorney's Manual, paragraph 9-28.1300, specifically provides that "(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." We concluded by explaining to AUSA Smith that in such situations, the normal solution is to have the contractor brief PFD and the Army SDO on the case and details of the proposed plea or settlement (to include explaining how the misconduct arose, and most importantly, what the company has done to remedy the problem and prevent recurrence). If the SDO is satisfied with the company's present responsibility, the SDO can issue the company a "comfort" or "safe harbor" letter which essentially provides that if the facts are as the company purports them to be, and if the company fulfills its obligations under the plea or settlement agreement, the SDO finds the company to be

presently responsible. After securing a "comfort" or "safe harbor" letter, a company may be significantly more comfortable when working with a prosecutor toward a case resolution. Ultimately, in our case, the AUSA disposed of the ABC Co. case through pre-trial diversion and the law enforcement agent working the case coordinated the matter with PFD to assess whether debarment was appropriate.

Approximately one year after this discussion, AUSA Smith (and the same law enforcement agent) were working toward a non-prosecution agreement in a different procurement fraud case involving an Army contractor (for our purposes, XYZ, Inc.). PFD had a standing request, sent to both the supporting law enforcement agent and AUSA Smith, to be copied on any draft agreement prior to its execution. Ultimately, however, in this case the agreement was signed without pre-coordination with the Army. As AUSA Smith was no longer in sensitive negotiations with XYZ, Inc., the Army moved forward and the Army SDO issued a "show cause" action to XYZ, Inc. asking why it should not be debarred from Federal contracting due to the misconduct underlying the non-prosecution agreement. Within days of issuing the show cause action, AUSA Smith contacted PFD and expressed significant aggravation that the Army had issued its show cause action despite the prosecutor's intentional insertion of language in the non-prosecution agreement to the effect that "there shall be no further or additional administrative proceedings or civil

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Coordination of the Suspension and Debarment Remedy: When It Could Have (and Really Should Have) Gone Better

- Mark Rivest, Chief, Procurement Fraud Division

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actions... brought by the government... related to the conduct... (at issue).” AUSA Smith argued that this language was specifically incorporated into the non-prosecution agreement to preclude administrative action such as debarment. AUSA Smith indicated that he was aware from a previous case that the Army would not concur to the insertion of such language. Accordingly, he simply elected to insert the language and not coordinate it with the Army. Army PFD’s position was that AUSA Smith’s actions were *ultra vires* (i.e., beyond the powers of the prosecutor) and had no legal effect. Accordingly, PFD did not terminate its show cause action.

Given the importance of the underlying principle of SDO discretion in the suspension and debarment process, this issue was a key area of discussion between the SDO, the Chief, PFD, the First Assistant U.S. Attorney for the district concerned, and the U.S. Attorney for the district concerned. Ultimately, all agreed that there should have been better coordination by the AUSA with the Army, that this provision should not have been included in the non-prosecution agreement, and that the provision could not properly bind the Army. Arrangements were subsequently made for the SDO to conduct a direct meeting with the corporation concerned in order to assess their present responsibility as a government contractor pursuant to the previously issued show cause notice.

This experience, while atypical and certainly less than ideal, carries important lessons. First and foremost is that suspension and debarment are discretionary actions by agency SDOs that are separate and distinct from judicial action. Accordingly, the free exercise of this discretion cannot be “bargained away” by a prosecutor seeking to arrive at a “global settlement” with a contractor. Second, the experience teaches that the administrative remedies of suspension and debarment can, if properly coordinated, run in parallel with a judicial action complimenting a prosecution and case settlement, rather than complicating or compromising it. In fact, it also demonstrates that poor coordination of remedies is much more likely to complicate or compromise an investigation or prosecution. Third, this case also illustrates the importance of open communication between PFD, investigators, and prosecutors during the coordination of remedies phase of a case.

In this case, the prosecutor’s actions were intentional. The more common scenario involves prosecutors who are simply unfamiliar with the suspension and debarment remedies and the rules and considerations associated with the debarment process when fashioning a settlement in a case. Open dialogue between PFD and prosecutors routinely avoids any conflict.

In addition, our case also underscores the critical role played by law enforcement agents in the coordination of remedies process. Understandably, law enforcement agents give significant deference to the wishes of

prosecutors working on their cases. Case agents are privy to the most sensitive information and work hard to adhere to the prosecutor’s guidance concerning with whom the information should (and should not) be shared. Some information (e.g., Grand Jury information protected under Federal Rules of Criminal Procedure, Rule 6(e)) is particularly sensitive and simply may not be shared outside of the narrow categories of authorized parties enumerated in that rule. Most other information, however, is not as tightly controlled and the determination of which government employees have a “need to know” in order to perform their duties becomes a matter of the case agent’s and prosecutor’s knowledge of available remedies and judgment. In such cases, it is important to keep in mind that case agents do not work for individual prosecutors and their ultimate responsibility lies with protecting the best interests of the agency they represent. It should be noted that there was no Army law enforcement agent assigned to the case at issue here. However, had there been an agent in place who better understood the functions of PFD, the effective potential of properly coordinated administrative remedies, and the limitations of a prosecutor’s authority, the agent would have been uniquely situated to advise both PFD and the prosecutor concerned, thus possibly avoiding a situation in which the terms of a prosecutor’s agreement were unnecessarily jeopardized due to inadequate coordination.

Practice Tip: The U.S. Attorney’s Manual, paragraph 9-28.1300, specifically provides that “(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.”

Practice Tip: If a contractor is concerned that a DoJ settlement may trigger a proposal for debarment, the contractor can request to brief PFD and the Army SDO on the case and the details of the proposed settlement. If the SDO is satisfied with the company’s remedial actions and level of cooperation, the SDO can issue the company a “comfort” or “safe harbor” letter which provides that if the facts are as the company purports them to be, and if the company fulfills its obligations under the plea or settlement agreement, the SDO finds the company to be presently responsible.

Coordination of the Suspension and Debarment Remedy: When It Works Well

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

The previous article highlighted an example of how misunderstandings, personalities, and ineffective coordination can combine to produce unnecessary dysfunction and complicated parallel proceedings. As the article aptly notes, it need not be so. In his 30 January 2012 memorandum, then-U.S. Attorney General Eric Holder reminded Department of Justice Attorneys and federal investigators of the need to “communicate, coordinate, and cooperate” with agency attorneys in cases giving rise to the potential for parallel proceedings. Attorney General Holder recognized that the effective coordination and use of parallel proceedings helps the Government to “make more efficient use of its investigative and attorney resources.” And, in the vast majority of cases, stakeholders effectively communicate and coordinate parallel remedies in a complementary way, maximizing the full spectrum of remedies available to the Government. The case described below is a true case, with identities removed, that serves as a valuable example of what can happen when those interested coordinate remedies. Shortly after the criminal AUSA (for our purposes, I will also call him AUSA John Smith) obtained an indictment against a corporate executive for wire fraud, the law enforcement agent working with AUSA Smith contacted Army Procurement Fraud Division (PFD). We immediately researched the executive’s company and asserted lead via an

Interagency Suspension and Debarment Committee announcement. We communicated directly with AUSA Smith and discussed suspension of the executive. AUSA Smith expressed no concern and supported our efforts to pursue parallel remedies. Accordingly, the Army Suspension and Debarment Official (SDO) suspended the executive pending completion of the criminal proceedings.

We also identified and communicated directly with the civil AUSA (for our purposes, I will call him AUSA Adam Jones). AUSA Jones was monitoring the criminal proceeding with a view towards potential action upon conviction. We expressed a desire to continue coordination of parallel remedies (e.g. False Claims Act claims and debarment) at the conclusion of the criminal proceeding. For the next year, we communicated regularly with the supporting law enforcement agent concerning criminal case developments. Then, after a multi-day trial, a jury convicted the executive agent of wire fraud.

We immediately requested trial evidence from the supporting law enforcement agent and AUSA Smith. The law enforcement agent and AUSA Smith gladly supplied copies of all trial exhibits for our use and consideration. Additionally, the law enforcement agent produced additional investigative materi-

als that AUSA Smith produced in discovery, but did not use at trial. Neither the supporting law enforcement agent nor AUSA Smith could provide copies of the trial testimony transcripts for our consideration. This resulted not from an unwillingness to assist, but rather from a simple reality that AUSA Smith had no need to order the transcripts, which can be costly to reproduce.

The inability (or cost) to obtain the trial transcripts presented challenges to our evaluation of the evidence against the executive and his company. We discussed this matter with the AUSA Jones, who also expressed a need to review the trial testimony. AUSA Jones agreed to order and fund transcription of the trial testimony. He provided the transcripts to PFD at no cost.

Once we reviewed the evidence, we re-engaged AUSA Jones in parallel proceeding strategy discussions. AUSA Jones desired to pursue civil action against the executive’s company; we desired to pursue debarment of the executive’s company. In an effort to maximize benefits to the Government, but recognizing the gains to be made by near-simultaneous execution, we discussed the advantages of pursuing one remedy (administrative versus civil) slightly before the other and

anticipated the company’s arguments in either forum. We also “war-gamed” how the timing of our remedies might maximize bargaining power and leverage in the Government’s camp during future negotiations with the company. After careful deliberation and close coordination, we took action.

The Army SDO proposed the company for debarment. Within a day, AUSA Jones issued a False Claims Act contact letter. In doing so, we conducted parallel proceedings and painted the company into an uncomfortable corner. The company recognized that its cooperation in the civil proceedings, as well as the debarment proceedings, would be considered by the SDO. The company also likely realized that settlement in the former could serve as mitigating evidence in the latter. Neither AUSA Jones nor PFD needed to identify these realities for the company.

The company ultimately agreed to pay a significant sum to settle the False Claims Act claims. Throughout negotiations, AUSA Jones kept PFD involved. He identified arguments from the company and provided drafts of the settlement agreement for review. AUSA Jones acknowledged that the pending debarment proceeding helped to motivate the company in resolving the dispute as quickly as possible.

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Upcoming Training Update



- **24-26 May 2016: Procurement Fraud Advisor’s Course, The Judge Advocate General’s Legal Center and School, Charlottesville, VA.**
- **2017 (date TBD): Department of Homeland Security Federal Law Enforcement Training Center Suspension and Debarment Course, USALSA, Ft. Belvoir, VA. Course description, dates and locations of course offerings, and registration information available at: www.fletc.gov.**



Coordination of the Suspension and Debarment Remedy: When It Works Well

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

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Meanwhile, the Army SDO met with the company’s representatives to assess “present responsibility” and whether debarment was necessary to protect the Government’s interests. Although the company settled claims with the Government – a factor, among others, considered – the Army SDO debarred the company and its President. This experience, as with the more atypical experience in the previous article, carries

important lessons. First, the experience reiterates the point that administrative remedies can operate in parallel with a judicial action without complicating or compromising that action. It simply requires open communication and teamwork between PFD, investigators, and AUSAs. Second, parallel remedies, when properly coordinated, can advance the aims embodied by different remedies while protecting the overall interests of the Government. Here,

there was no “either-or” proposition. Both agencies achieved the mission. The Government was made whole through a civil settlement (with the money returned to the affected Army commands) and protected from a non-responsible contractor by the subsequent debarment. The chances of securing this full range of remedies would have been more challenging absent the close coordination and cooperation.

Third, this dialogue and team-

work need not be arduous. Positive relationships and open dialogue ensure that each side can explain his or her purpose in action, the intended result, and voice concerns. It’s as simple as picking up the phone and engaging our partners. And, when done properly, as this experience shows, the Government wins.

Army Material Command (AMC) Update

Deputy Judge Advocate General and Army Suspension and Debarment Official Recognize AMC Procurement Fraud Counsel and CID Major Procurement Fraud Unit Liaison

Agent

In October, The Deputy Judge Advocate General, MG Thomas Ayres, and Mr. Mort Shea, the Army Suspending and Debarment Official (SDO), made a site visit to the Redstone Arsenal in Huntsville, Alabama. Mr. Shea met with the area Procurement Fraud Advisors (PFAs) for the AMC and the Space and Missile Defense Command, providing insights into how the Army suspension and debarment process works. He also discussed recent suspension and debarment trends and, most importantly, how PFAs can work more closely with the Army Procurement Fraud Division, law enforcement, and acquisition professionals to maximize their contributions toward effective Army outcomes. In turn, the PFAs had the opportunity to share insights with the SDO and each other about their work in support of the coordination of criminal, civil, administrative,

and contractual fraud remedies. During the visit, The Judge Advocate General’s coin was presented to Kate Drost, the AMC Procurement Fraud and Irregularities Coordinator (PFICs); SA Bailey Erickson, the CID Major Procurement

Fraud Unit (MPFU) liaison to AMC; and Sylvia Wilmer, the PFA for the Army Aviation and Missile Command. The coins were presented in recognition of the strong collaboration the recipients have developed with each other, and the highly effective remedies coordination results



this close teamwork produces. This AMC procurement fraud team serves as a model of how the Army Procurement Fraud Division (PFD), PFICs, PFAs, and MPFU can collaborate as a multi-disciplinary team and maximize the Army’s ability to fully coordinate and utilize available remedies.

The PFD team passes along its appreciation and congratulations to Kate, Sylvia and Bailey for this well deserved recognition.



Sylvia Wilmer (left) and Kate Drost (right)
Not pictured: SA Bailey Erickson

U. S. Army Europe (USAREUR) Update

Challenges in Debarment: Contractor Employee Misconduct, Use of Aliases, and Imputation

- CPT Matthew Haynes, USAREUR Procurement Fraud and Irregularities Coordinator



On September 15, 2015, the USAREUR Suspension and Debarment Official (SDO) debarred Mr. Rickey Dean Smith for three years. The debarment occurred after investigation by the U.S. Department of State Diplomatic Security Service (DSS) and Defense Criminal Investigation Service (DCIS) revealed that Mr. Smith used a false identity to gain employment with several U.S. Government contractors.

In 1982, Mr. Smith was released on parole from a prison sentence associated with a felony conviction. Shortly thereafter, Mr. Smith stole a cousin's birth certificate and assumed his cousin's identity as Mr. Donald Glenn Grimes. In 1990, Mr. Smith applied for and was issued a U.S. passport under the alias "Donald Glenn Grimes." That passport was reissued under the same alias in 2000 and in 2010, Mr. Smith applied for a third U.S. passport under the same alias. However, unbeknownst to Mr. Smith, his cousin had died in 2004. Consequently, Mr. Smith's passport application was flagged by DSS. DSS subsequently seized Mr. Smith's passport and false identification, and notified his employer

at the time, which was a Federal contractor.

Subsequent investigation by DCIS revealed that from 2006 to 2010, Mr. Smith worked as an antenna repairman for various U.S. Government contractors using the alias and false documentation. In each of these positions, Mr. Smith applied for and obtained Department of Defense (DoD) computer access and regularly entered DoD installations in Germany using the alias. In an effort to conceal his true identity, Mr. Smith admitted that he actively avoided any contractor positions that required a secret or top secret security clearance.

Use of Multiple Aliases / Corporate Identities:

In this case, the Procurement Fraud Advisor (PFA) who worked the issue ensured that the names of both Mr. Smith and Mr. Grimes were listed in GSA's System for Award Management (SAM) as excluded parties. But what happens when a subject individual or company tries to circumvent exclusion by doing business under a different name? When such an instance becomes known to the SDO through law enforcement or

other sources, the SDO can proceed with a proposed exclusion against the new identity and potentially initiate a new proposed debarment against the subject effectively extending their period of debarment based upon the new misconduct (i.e., attempting in bad faith to circumvent a debarment). In some cases, this can be a repetitive process, but it is fairly rare. It does, however, underscore the need for the PFA to know what the rules and options are with regard to debarment, and also remain in contact with law enforcement on some cases even after they are closed. At the end of the day, as long as all these various issues are correctly identified, the PFA/SDO can effectively address them.

Debarment of Individuals / Imputation:

Debarment is sometimes thought of as something that only happens to companies or other business entities. However, the facts presented in this case illustrate that misconduct on the part of a contractor's employees holds the potential to be as damaging as that of company principal officers. The debarment of individuals

is not unusual as long as they are actual or potential contractors. Principal officers of a company or other business entity can be debarred due to their personal misconduct, or through the doctrine of imputation. Federal Acquisition Regulation (FAR) 9.406-5 permits fraudulent, criminal, or other improper conduct of any officer, director, shareholder, partner, employee, or any other individual associated with an organization to be imputed to the organization where (a) the conduct occurred in connection with work for the organization, (b) the organization acquiesced in or knew or approved of the conduct, or (c) the organization accepted benefits from the conduct. In this particular case, Mr. Smith's/Grimes' misconduct was not imputed to the company that employed him as there was no evidence that the company was aware of Mr. Smith's/Grimes' misconduct or use of an alias.

Practice Tip: In the practice area of suspension and debarment, it is always important to consider enlarging the government's "protective net" where appropriate. This is done through the principles of Affiliation and Imputation. Parties are "affiliates" if one has the power to control the other, or a third party has the power to control both. The key factor in affiliation is control. Indicia of control include, but are not limited to, interlocking management or ownership, identify of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor having the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended or proposed for debarment. (FAR 9.403)

Imputation is a means of transferring misconduct from one party to another. It can be used to hold the company responsible for employee misconduct if it happens within the scope of employment or with the knowledge/approval/acquiescence of the company (e.g., the company accepting benefits of the misconduct). One individual's misconduct can be imputed to another if the individual participated in, had knowledge of, or had reason to know of the misconduct (FAR 9.406-5).

8th U.S. Army (Korea) Update

Effective Coordination of Remedies in Fraud Cases: Timing is Everything

LTC Pat Vergona, PFIC, Headquarters, Eighth Army

In procurement fraud cases, the Government's goal should always be the effective and maximum use of the full range of available remedies (i.e., contractual, civil, criminal, and administrative). However, this can only happen when there is effective and timely communication between the law enforcement, legal, and acquisition communities. Law enforcement agents and prosecutors have good reason to be concerned that premature coordination of the facts underlying an ongoing investigation or prosecution could compromise investigative and prosecutorial efforts. However, it is always important to keep in mind that the government has a wide range of available remedies to combat fraud and they can only be used to their maximum effectiveness when law enforcement, legal, and acquisition professionals understand their availability in specific cases, and communicate sufficiently to use them in a wise, sequenced, and timely fashion. In many cases, too exclusive a focus on civil or criminal remedies means lost opportunities to effectively use additional available remedies.

We recently had a case which illustrates this point as it involved largely unnecessary friction between local commands and the law enforcement team working the case. The friction arose over the issue of sharing information concerning an investigation and the processing of administrative employment actions concerning the civilian

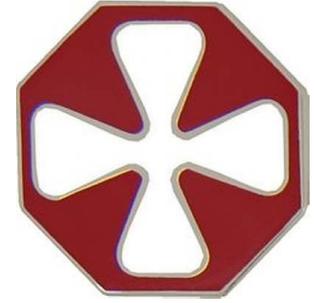
employee who was the subject of the case. The investigation at issue began months prior when it was discovered that Korean contractors were not providing safety related equipment to various Army bases on the Korean peninsula as required by contract. After several months of investigation, it was determined that a Department of the Army civilian employee, functioning as the contracting officer's representative (COR) may have accepted bribe payments from the Korean contractor in exchange for help in concealing the contractor's failure to deliver and install the required equipment.

With no direct evidence of misconduct on the part of the COR other than statements from confidential informants, law enforcement agents elected to stage a sting operation involving the COR. It was determined that the U.S. Attorney's Office in California would handle the case and authorize the undercover operation because the local Korean prosecutor had no interest in pursuing the case as it pertained to a U.S. civilian. In order to effect the arrest, it was determined that the COR would need to be physically located in the United States. Accordingly, this led law enforcement agents to seek the cooperation of the command which employed the COR.

Generally, the command is not informed of an investigation until sufficient evidence is amassed

against the employee to support disciplinary action. In this case, the command was now aware of the alleged misconduct of its COR, but it lacked sufficient evidence to support initiating action to remove or terminate the employee. Such evidence would be only be produced once the sting operation was complete, and in this case, it was anticipated that the operation would take a few months to complete due to preparation and coordination requirements. Matters were further complicated by law enforcement's concern that the COR could flee to another country where he had family. Accordingly, the command was, in essence, being asked to keep a COR in place, in a procurement sensitive position, despite being aware of the COR's potential serious misconduct. In addition, the command had to find a way to send the employee to the U.S. all without alerting him to the existence of the investigation.

Ultimately, the employee was terminated and will likely face prosecution. However, unnecessary stress was placed on the critical relationship between the investigators, the command, and the supporting legal office. In this case, had coordination between investigators and a procurement fraud advisor (PFA) taken place earlier, it may have been possible to de-conflict and perhaps sequence available remedies (i.e., one of the key functions of a PFA) so



that when the command was approached, they would have been able to facilitate the investigation while also ensuring that a plan was in place to ensure that the employee no longer had access to sensitive procurement information and was no longer performing procurement sensitive functions (e.g., through the creation of other duties that still fall within the employee's position description). There is often a natural tension between the desire to protect an investigation and the desire to fully utilize all available fraud remedies. However, these tensions are healthy and are best resolved through ongoing communication and mutual cooperation rather than surrendering to the temptation to simplify the process by unnecessarily stove-piping important information in every case and adopting a default position of letting important available remedies pass by unutilized.

At the end of the day, fraud remedies are most likely to be effectively utilized when there is good communication between the stakeholders, and the precursor to good communication is fostering an atmosphere of trust and mutual support between all members of the Government's fraud fighting team regardless of whether they are law enforcement, prosecution, contract law, or acquisition professionals.

Suspension and Debarment Case Law Update

Subject-Matter Jurisdiction

- District courts lack subject-matter jurisdiction over tort claims, namely negligence and intentional infliction of emotional distress, brought against agency debarring officials. Debarment is a “quasi-adjudicative action” of the agency debarring official. “No private individual or entity could be held liable for the conduct alleged here, which consists of alleged failures to adhere to . . . debarment procedures, and a failure to provide due process of law, a right secured against the government, not private entities.” *Storms v. United States*, No. 13-CV-0811, 2015 U.S. Dist. LEXIS 31998, *68-70 (E.D.N.Y. March 16, 2015) (internal citations omitted).

- A plaintiff’s burden in surviving a facial challenge to a court’s subject-matter jurisdiction – that is, a challenge to the sufficiency of the pleading itself – “is not onerous.” Where a defendant makes a “facial attack” in requesting dismissal, the district court “will review [the complaint] in a light most favorable to [p]laintiff, accept as true all of his well-pleaded factual allegations, and consider whether [p]laintiff can prove any set of facts supporting his claims that would entitle him to relief.” *AUI Mgmt., LLC v. Department of Agric.*, No. 11-CV-0121, 2015 U.S. Dist. LEXIS 37628, *14-15 (M.D. Tenn. March 23, 2015) (internal citations omitted).

Standing

- “Reputational harm can confer standing.” A plaintiff need only plead reasonably definite

allegations that present a “live case or controversy” to survive a motion to dismiss based on standing and mootness. *AUI Mgmt., LLC v. Department of Agric.*, No. 11-CV-0121, 2015 U.S. Dist. LEXIS 37628, *16, 24 (M.D. Tenn. March 23, 2015) (citing *Meese v. Keene*, 481 U.S. 465, 476 (1987)).

Mootness

- Agency review under the Administrative Procedure Act is not rendered moot simply because a suspension or debarment has expired. “Mootness” is “the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).” A claim is moot “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” A “live case or controversy” may exist where, for example, an expired suspension impacts a historical reliance on government contracts or impedes the ability to bid on future government contracts because the expired suspension remains available, in archive form, to the public and contracting officers on the Excluded Parties List System (i.e., the System for Award Management). A plaintiff need only plead reasonably definite allegations that present a “live case or controversy” to survive a motion to dismiss based on standing and mootness. *AUI Mgmt., LLC v. Department of Agric.*, No. 11-CV-0121, 2015 U.S. Dist. LEXIS 37628, *16-24 (M.D. Tenn. March 23, 2015) (internal quotations and citations omitted).

- An agency arguing that a vacated or terminated debarment renders a plaintiff’s action moot “bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.” Where the agency “does not provide any indication as to whether the debarment could or would recur” and cannot demonstrate that “interim relief or events have completely and irrevocably eradicated the [lingering] effects of the [d]ebarment”, the plaintiff’s claim for declaratory relief remains ripe. *Storms v. United States*, No. 13-CV-0811, 2015 U.S. Dist. LEXIS 31998, *77-79 (E.D.N.Y. March 16, 2015) (internal citations omitted).

Cause of Action

- Plaintiffs’ assertion of claims for damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (“*Bivens*”) cannot survive a motion to dismiss under Federal Rule of Civil Procedure 12 (b)(6) (failure to state a claim). *Bivens* is a “creation of federal common law” and the remedy “is an extraordinary thing that should rarely if ever be applied in ‘new contexts.’” While other courts, including the Supreme Court, “have extended the *Bivens* remedy to particular claims alleging Fifth Amendment due process violations,” none have extended the remedy to claims concerning debarments issued without procedural and substantive due process. Nor would extending the *Bivens* remedy be

appropriate; Plaintiffs may avail themselves of “an alternative, existing process for relief”, namely the Administrative Procedure Act (APA). “[T]he sheer breadth and comprehensiveness of the APA counsels against the judicial creation of a separate remedy.” That Plaintiffs “will not receive monetary damages, or ‘retrospective compensation,’ under the APA does not warrant a different conclusion.” *Storms v. United States*, No. 13-CV-0811, 2015 U.S. Dist. LEXIS 31998, *15-47 (E.D.N.Y. March 16, 2015) (internal citations omitted).

- A district court’s authority to grant declaratory relief is discretionary and depends upon a careful evaluation of several “prudential factors.” Where an agency debarring official has vacated a debarment, even when “unlawfully issued,” the prudential factors may weigh against declaratory relief. Once vacated, the debarment “is no longer an issue to be litigated between the parties” and a “declaration that the [d]ebarment was unlawful would not offer any relief from uncertainty, nor any conclusion to the issues between the parties”; whether a declaration that the debarment was unlawful would abate any “lingering effects” remains unclear; and there exists a “better or more effective remedy” for any prospective debarment action, i.e., agency review under the Administrative Procedure Act. *Storms v. United States*, No. 13-



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Suspension and Debarment Case Law Update

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CV-0811, 2015 U.S. Dist. LEXIS 31998, *80-84 (E.D.N.Y. March 16, 2015).

Administrative Record on Review

- A court's review – here, of a contracting officer's determination of non-responsibility – remains limited to “the administrative record already in existence, not some new record made initially in the reviewing court.” Although a party may seek to supplement the administrative record, the moving party bears the burden of demonstrating that “omission of extra record evidence precludes effective judicial review.” That burden remains unmet where, for example, the documents the moving party seeks to include merely provide cumulative information or provide no insight into the actions taken by an agency involved. *Sims v. United States*, No. 15-367C, 2016 U.S. Claims LEXIS 48, *23-24 (Fed. Cl. February 3, 2016).

Damages

- Although plaintiffs may not recover “monetary damages, or ‘retrospective compensation,’” under the Administrative Procedure Act (APA) for the actions of agency debarment

officials, such inability does not justify extending judicially-created remedies under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (“*Bivens*”). The judicial extension of the *Bivens* remedy “would supplant Congress’ intent for the APA to redress claims arising out of agency action and inaction.” *Storms v. United States*, No. 13-CV-0811, 2015 U.S. Dist. LEXIS 31998, *44, 47-48 (E.D.N.Y. March 16, 2015).

Collateral Effect

- Whether to suspend or debar a contractor under Federal Acquisition Regulation Subpart 9.4 is a decision rooted in an agency's debarment official's discretion. For this reason, the decision of one agency's debarment official does not bind another agency's debarment official or establish precedent that the second agency must follow. “The ‘government’ does not make suspension and debarment decisions; each agency's suspending/debarment official (SDO) does.” *Legion Constr., Inc. v. Gibson*, No. 14-1045, 2015 U.S. Dist. LEXIS 91779, *7 (D. D.C. July 15, 2015).

- An administrative agreement between one agency and a contractor is not evidence of what another agency, and its

independent debarment official, could or would have done in a proceeding before the latter agency. “[D]ebarment decisions are inherently ad hoc, fact-dependent exercises in which the individual [Suspension and Debarment Officials] are given considerable discretion.” Here, the Air Force entered into an administrative agreement with FedBid, Inc.; the administrative agreement considered the removal of FedBid's CEO to be a change sufficient to sever affiliation for debarment purposes. The Air Force debarment official's determination, though, “is not evidence of what the VA's independent [Suspension and Debarment Official] could or would have done in Plaintiffs' [unrelated] proceeding.” *Legion Constr., Inc. v. Gibson*, No. 14-1045, 2015 U.S. Dist. LEXIS 91779, *8 (D. D.C. July 15, 2015).

Subject-Matter Jurisdiction

- District courts lack subject-matter jurisdiction over tort claims, namely negligence and intentional infliction of emotional distress, brought against agency debarment officials. Debarment is a “quasi-adjudicative action” of the agency debarment official. “No private individual or entity could be held liable for the conduct alleged here, which consists of alleged failures to adhere to . . .



. debarment procedures, and a failure to provide due process of law, a right secured against the government, not private entities.” *Storms v. United States*, No. 13-CV-0811, 2015 U.S. Dist. LEXIS 31998, *68-70 (E.D.N.Y. March 16, 2015) (internal citations omitted).

- A plaintiff's burden in surviving a facial challenge to a court's subject-matter jurisdiction – that is, a challenge to the sufficiency of the pleading itself – “is not onerous.” Where a defendant makes a “facial attack” in requesting dismissal, the district court “will review [the complaint] in a light most favorable to [p]laintiff, accept as true all of his well-pleaded factual allegations, and consider whether [p]laintiff can prove any set of facts supporting his claims that would entitle him to relief.” *AUI Mgmt., LLC v. Department of Agric.*, No. 11-CV-0121, 2015 U.S. Dist. LEXIS 37628, *14-15 (M.D. Tenn. March 23, 2015) (internal citations omitted).

Procurement Fraud Division Case Update

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

Recent Debarments:

- **MAJ (Ret.) Kenneth Wayne Sheets (Theft; Fraud):** On 17 June 2015, the Army SDO debarred MAJ (Ret.) Kenneth Wayne Sheets through 25 March 2018. MAJ Sheets, the Installation Commander for Military Ocean Terminal Concord, became romantically involved with a contractor employee and Project Manager. An investigation revealed that the two conspired to collect and sell recyclable items and scrap metal located on the installation and owned by the Government, and then split the proceeds. (CPT Liddick)
- **Kasey Ray Bickerstaff (False Claims):** On 28 May 2015, the SDO debarred Kasey Ray Bickerstaff through 14 April 2018 for submitting false claims. Mr. Bickerstaff was a member of the Oklahoma Army National Guard (OKARNG). While a member, he signed up to serve as a recruiting assistant for the Guard Recruiting Assistance Program (G-RAP). Between January 2009 and April 2010, Bickerstaff received bonus payments for recruits that he did not interact, engage or otherwise assist with their enlistment into the OKARNG. Bickerstaff entered into a civil settlement agreement with the Department of Justice to repay \$12,000 to resolve the matter. (Ms. McDonald)
- **Zabihullah Aziz and Zabihullah Aziz Company Ltd. (Conspiracy to Defraud):** On April 1, 2016, the Army SDO debarred Mr. Aziz and his company through 8 February 2019. A federal investigation revealed that Mr. Aziz (respondent) and a U.S. Army supply sergeant at Camp Eggers, Kabul, Afghanistan, conspired to defraud the U.S. government on a supply contract. The Army supply sergeant sought the assistance of the respondent in providing a furnished apartment in Kabul to an Afghan Army Sergeant Major at no expense to the Sergeant Major. The two then agreed that upon finding a suitable apartment for the Sergeant Major in Kabul, respondent would pay for the apartment's furnishings and the monthly rent. Respondent also agreed to pay for the Sergeant Major's office furnishings at the Afghanistan Ministry of Defense. In order to reimburse the respondent for these unauthorized expenditures with U.S. government funds, the Army supply sergeant agreed to process a false invoice submitted by respondent in the amount of \$10,900 for purportedly supplying 100 cell phones and 200 boxes of copier paper to the U.S. government, which were never delivered. (Mr. Wallace)
- **Luis Ramon Casellas (Theft of Government Property and Bulk Cash Smuggling):** On April 1, 2016, the Army SDO debarred Luis Ramon Casellas through 17 November 2022, based on his criminal conviction in U.S. District Court for theft of U.S. government property and bulk cash smuggling into the United States. Between June and August 2013, while serving as an Army Staff Sergeant (SSG) and team leader in the breakdown of installation property and equipment at Forward Operating Base Wolverine in Afghanistan, respondent stole multiple items of U.S. government property, including tools, laptops, and other equipment, and mailed four boxes to his wife in Puerto Rico, containing over \$113,000 in cash. (Mr. Wallace)
- **Oscar O. Carrillo and El Paso Best Way Construction and Services, Inc. (Fraud):** On February 18, 2016, the Army SDO debarred Mr. Carrillo and his company through 17 January 2019. A federal investigation revealed that respondents engaged in fraud on a Small Business Administration Section 8(a) set aside contract to provide HVAC (heating and cooling) maintenance services at Fort Bliss, Texas. The investigation revealed that respondents subcontracted the entire HVAC contract to another contractor without the prior written approval of the contracting office, in direct violation of the terms of the contract. Furthermore, respondents grossly inflated/marked up the subcontractors' labor and material costs, and submitted \$80,000 in inflated costs to the Government on a \$45,000 funded contract. (Mr. Wallace)



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

Procurement Fraud Division Case Update

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Recent Debarments (continued)

- **Ramiro Pena, Jr. (Bribery):** On February 18, 2016, the SDO debarred Ramiro Pena, Jr. through 10 December 2022, based on his criminal conviction in U.S. District Court for conspiracy to commit bribery. In 2008 and 2009, while deployed to Bagram Air Field (BAF), Afghanistan, then Sergeant First Class (SFC) Pena, Jr. conspired with another senior non-commissioned officer and local Afghan vendors to accept \$100,000 in bribery payments, along with a Rolex 18 karat gold watch, from these vendors, in exchange for awarding them supply contracts for supplies needed for the BAF Humanitarian Assistance Yard. (Mr. Wallace)



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

Recent Administrative Compliance Agreements:

- **SofTec Solutions, Inc. (SofTec) (Conspiracy, Making a False Statement and Filing False Tax Returns):** On 14 May 2015, the Army SDO entered into a three-year Administrative Agreement ("AA") with SofTec which 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 prime contractor qualified by the SBA as an 8(a) small disadvantaged business. In 2009, Army criminal investigators determined that SofTec's 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 the award of the 8(a) set-aside contracts it was awarded. 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, and consistent with the terms of the AA, 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 terms of a Voting Trust Agreement (VTA) which also provided for the appointment of a board of directors. With a board of directors to manage the daily operations of SofTec, the trustee is free to manage the finances of the company in accordance with the terms of the VTA. On 17 March 2016, the Army SDO proposed the debarment of Mr. Jhaveri after he was convicted of conspiring to commit offenses against the United States, SBA and IRS. Mr. Jhaveri was sentenced to serve six months in prison; upon release, 2 years on supervised release and ordered to pay an assessment of \$100,000; a fine of \$250,000.00 and make restitution in the amount of \$1,171,179.00. Proceedings concerning Mr. Jhaveri are ongoing.
- **Thomas Harris, Robert Luster, and Luster National, Inc. (Wire Fraud; Small Business Program Abuse):** On 23 October 2015, the Army SDO entered into an administrative compliance agreement with Robert Luster and his company, Luster National, Inc. Tropical Contracting, LLC (an 8(a) small business) and Luster National, Inc. (a non-8(a) business) entered into a joint venture agreement to pursue program, project, and construction management contracts with the Government. The agreement, and Small Business Administration regulations, required that Tropical Contracting perform the majority of any labor, manage the overall JV operation, and receive 51% of any profits. Although the Tropical Luster Joint Venture (TLJV) obtained several small business set-aside contracts, Tropical Contracting performed no labor and was only minimally involved in business operations. Instead, Mr. Harris, the former Senior Vice President of Operations for Luster National, Inc., purposefully and fraudulently fostered the perception that TLJV was formed to be, and functioned as, a bona fide entity rather than as a mere "pass-through" for Luster National to obtain contracts set aside for 8(a) concerns (i.e., contracts for which Luster National would have been otherwise ineligible). The Army SDO concluded that Mr. Luster knew of Mr. Harris' efforts to use TLJV as a "pass-through" for Luster National's benefit and that Luster National willingly accepted the economic benefits of Mr. Harris' actions. Under the agreement, Luster National, Inc. agreed to retain an independent monitor for three years, undertake remedial measures to improve its Contractor Responsibility Program, and not knowingly enter into a business relationship with any 8(a) business for the purpose of obtaining small business set-aside contracts. Mr. Harris was convicted of wire fraud and, on 18 May 2015, the Army SDO debarred Thomas Harris through 2 March 2022. (MAJ Pruitt)
- **Patricia Winters and Tropical Contracting, LLC (Small Business Program Abuse):** On 15 October 2015, the Army SDO entered into an administrative agreement with Patricia Winters and her company, Tropical Contracting, LLC. (facts addressed above). Under the agreement, Ms. Winters and Tropical Contracting, LLC agreed to retain an independent monitor for three years, create and adopt a Contractor Responsibility Program, implement training programs for employees, and place renewed emphasis on compliance with applicable Government contracting laws, including SBA program rules and guidelines. (CPT Liddick)



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

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

