



# DII Best Practices Forum: Hot Topics

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# Agenda

- Current Enforcement Environment
- Suspension and Debarment
- Procurement Integrity Act
- Hiring Former Government Officials
- Organizational Conflicts of Interest
- Business Systems Rule
- FAPIIS
- Mandatory Display of DoD IG Fraud Hotline Posters
- Identification of Critical Safety Items
- On the Horizon
- Questions and Discussion

## Current Enforcement Environment

- January 2012 Holder Memorandum: Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings
  - Encourages information sharing within DOJ and across the federal government
  - Goal: “Realize all of the remedies available to the United States”
- Pressure from shareholders
- Increased complexity of investigations

# Suspension and Debarment

- Purpose
  - To protect the public interest – not to punish
  - Key concept of “present responsibility”
  - Details in FAR 9.4
- Who can be suspended/debarred?
  - Individuals
  - Entities (e.g., corporations, partnerships, divisions, or business units within an entity)
  - Parents and affiliates, if warranted
  - Prime contractors, subcontractors, and/or participants at any tier

## Suspension and Debarment

- Increased activity due to
  - Enhanced interagency cooperation
  - Reporting requirements
  - Competitors reporting directly to SDO
  - Media reports of contractor misconduct
  - Agency response to Congressional criticisms
- Three key trends
  - Focus on number of suspensions and debarments
  - Focus on fact-based suspensions
  - Focus on conduct “unrelated” to government contract

## Suspension and Debarment

- July 2011 DoD IG Report: “Additional Actions Can Further Improve the DoD Suspension and Department Process”
- Contracting officers not referring “poorly performing contractors” to SDO, meaning “poorly performing contractors may still be receiving Federal contracts”
- Potential for more fact-based S/D if contracting officers were more engaged with S/D process and made a greater number of referrals

## Suspension and Debarment

- August 2011 GAO Report
- “Non-robust” S/D programs at Commerce, HHS, State, Treasury, and FEMA
- Factors for successful S/D programs
  - Dedicated S/D staff
  - Detailed S/D guidance
  - Systems to encourage referrals

## Suspension and Debarment

- October 2011 House Oversight and Government Reform Committee Hearing on Federal Agency Contracting Practices
  - Air Force SDO Testimony: “On the policy side of this, the fact-based cases are an important part of what we do. I think there’s a lot of agencies that only do debarments or suspensions where there is an indictment or a conviction, and I think that’s ill-advised. That’s just delegating all of your power to the Justice Department. If they don’t have the resources to do a case, they won’t do it, but we in the Air Force are still worried about that. So we will reach out and do a debarment anyway based upon facts.”



## Suspension and Debarment

- October 2011 House Oversight and Government Reform Committee Hearing on Federal Agency Contracting Practices
  - Air Force SDO Testimony: “The power of a debarment under the FAR is not limited to fraud in a government contract. If an Air Force contractor, for example, is committing fraud in [a] commercial contract or personal income tax evasion or anything more than jaywalking probably, we are going to be concerned about it because if they’re defrauding a commercial customer, they’re going to defraud us.”

## Suspension and Debarment

- November 2011 OMB Memorandum
  - Certain agencies have failed to adequately use S/D
  - Directed agencies to appoint a senior accountable official to review internal procedures and guidance to ensure agency is protecting government interests and taxpayer funds by effectively using S/D where appropriate
  - Use relevant information sources to prevent awards to non-responsible parties
  - Take prompt corrective action when improperly made awards are identified

## Suspension and Debarment

- 2012 Consolidation Appropriations Act
  - 9 appropriations bills - S/D provisions in 5
- Prohibit use of funds for contract, grant, cooperative agreement, loan, etc., if corporation:
  - Is convicted of felony criminal violation of any federal law
    - ✓ Within the preceding 24 months
    - ✓ Where the agency is aware of the conviction
  - Has unpaid tax liability if remedies have been exhausted
- Unless the agency has considered S/D and made the determination that further action is not necessary to protect the interests of the government
- Differences among appropriations bills – some include convictions of officers or agents of corporation and/or state law violations

## Suspension and Debarment

- Spring 2012 Air Force Fraud Facts
  - Director, Air Force S/D Operations: “Starting retroactively and for an unlimited period of time, for every contract you terminate, send them our way and you have GCR’s promise to evaluate the contractor’s present responsibility under FAR Subpart 9.4 and to consider whether debarment is appropriate. You have the opportunity to ensure a contractor that you terminated is evaluated for government-wide exclusion from contracting. This is an opportunity to save your government, your agency, yourself and your fellow colleagues from having to work with the poor performer again and again. Listen to poor excuses, no more. You have the opportunity to save taxpayers bundles of money. At a time when procurement dollars are scarce and programs are understaffed, you cannot miss out on this opportunity.”

## Suspension and Debarment

- Spring 2012 Air Force Fraud Facts
  - Director, Air Force S/D Operations: “Not only should you want to send us these poor performers for consideration, but, more importantly, AFFARS 5309.406-3 requires you to do so. Contracting officials MUST send us a copy of all termination for default/cause decisions, non-responsibility decisions, indictments, convictions, civil judgments, and other information reflecting negatively on a contractor’s present responsibility. We also want to learn about significant performance failures that did not result in termination for one reason or another.”

# Suspension and Debarment

- Best practices and implications
  - Be proactive and view list of mitigating factors as guidance for contractor's ethics/compliance program and culture
  - Get to know your SDO
  - Engage SDO when issues arise and keep SDO informed during ongoing investigations, inquiries, and disputes
  - Prepare S/D toolkit with key documentation
- Not just compliance
  - Expectation is that contractors adopt values-based ethics programs
- Address culture holistically
  - Train employees to do more than just comply with rules
  - How are you telling employees to “do the right thing”?

## Procurement Integrity Act

- 41 U.S.C. §§ 2101-2107
- Prohibitions on disclosing and obtaining procurement sensitive information (§ 2102)
  - Subsection (a): “Except as provided by law, [a current or former government official] shall not knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.”
  - Subsection (b): “Except as provided by law, a person shall not knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.”
- Criminal, civil, and administrative penalties (§ 2105)
- Requirement for prompt reporting of potential PIA violation (§ 2106)

## Procurement Integrity Act

- Recent Suspension by Air Force
  - Company was a participant in an Air Force procurement
  - Contracting Officer inadvertently sent company an e-mail with source selection sensitive attachments relating to the evaluation of a competitor and information about that competitor's proposal
  - Company's point-of-contact forwarded e-mail to other employees without realizing what it was
  - Air Force attempted to recall the e-mail 10 minutes later
  - Recipients of the e-mail continued to work on proposal revisions before inadvertent disclosure was quarantined



# Procurement Integrity Act

- Recent Suspension by Air Force
  - Air Force SDO concluded that company's conduct was potentially in violation of the PIA and suspended company
  - SDO faulted company because it did not have documented process for handling inadvertent disclosure
  - Company's suspension was lifted only after it demonstrated that it was implementing a new ethics program within the firm, as well as new procedures to more quickly respond to information quarantine scenarios
  - No allegation that company "acted affirmatively" to acquire info

## Procurement Integrity Act

- *The GEO Group, Inc.*, B-405012, July 26, 2011
  - A former employee of the protester left with proprietary information belonging to the protester, formed his own company, and submitted a competing bid in a follow-on contract for the protester's major contracts
  - The former employee utilized language that was almost identical to language from the protester's proposal, suggesting usage of the confidential documents
  - The former employee's new company won the award for the follow-on contract
  - Protester alleged that the agency had overlooked a PIA violation

## Procurement Integrity Act

- *The GEO Group, Inc.*, B-405012, July 26, 2011
  - GAO concluded that there was no violation of the PIA
  - GAO found that the PIA was not designed to resolve the “private disputes” between contractors
  - The former employee was given the confidential information voluntarily by the protester, thus implicating the “savings clause” provision at 41 U.S.C. § 2107
  - Despite protester’s assertion that the information was provided through fraudulent inducement, GAO ruled that the motives of the recipient are irrelevant to the savings clause

# Hiring Former Government Officials

- Common Fact Pattern
  - Bidder hires former government official to assist in drafting its proposal
  - During employment at agency, official attended procurement planning meetings, participated in development of requirements, and had access to early planning documents
  - Former government official obtains so-called “clean letter” from the Designated Agency Ethics Official
  - No firewall implemented and bidder allows former government official to help craft proposal
  - CO disqualifies offeror because of unfair competitive advantage or GAO sustains protest if disappointed offerors challenge award to bidder that used former government official during proposal preparation

## Hiring Former Government Officials

- To avoid tainting the proposal drafting team and risking disqualification of the firm from the procurement, former government officials with inside knowledge of a particular procurement or contract program should be firewalled
- *VSE Corp.*, B-404833.4, Nov. 21, 2011
  - Need to show actual access to competitively sensitive nonpublic information while government official
- *TeleCommunication Systems Inc.*, B-404496.3, Oct. 26, 2011
  - No need to show actual benefit – presumption of use

## Hiring Former Government Officials

- New DFARS clause: “Representation relating to compensation of former DoD Officials” (252.203-7005)
- Effective on November 18, 2011
- Requires offerors submitting proposals to DoD to represent whether former DoD officials receiving compensation from the offeror are in compliance with post-employment restrictions
- Scope of the representation is limited to individuals that will have a role on any resulting contract
- Excludes commercial items

## Hiring Former Government Officials

- Language of the DFARS clause:  
“By submission of this offer, the offeror represents, to the best of its knowledge and belief, that all covered DoD officials employed by or otherwise receiving compensation from the offeror, and who are expected to undertake activities on behalf of the offeror for any resulting contract, are presently in compliance with all post-employment restrictions covered by 18 U.S.C. 207, 41 U.S.C. 2101–2107, and 5 CFR parts 2637 and 2641, including Federal Acquisition Regulation 3.104–2.”

## Hiring Former Government Officials

- “Covered DoD Official” is defined by the DFARS clause as an individual that:
  - Leaves or left DoD service on or after January 28, 2008; and
  - Participated personally and substantially in an acquisition with a value in excess of \$10 million, and serves or served—
    - ✓ In an Executive Schedule position under subchapter II of chapter 53 of Title 5, United States Code;
    - ✓ In a position in the Senior Executive Service under subchapter VIII of chapter 53 of Title 5, United States Code; or
    - ✓ In a general or flag officer position compensated at a rate of pay for grade O-7 or above under section 201 of Title 37, United States Code;

**OR**



## Hiring Former Government Officials

- “Covered DoD Official” is defined by the DFARS clause as an individual that:
  - Leaves or left DoD service on or after January 28, 2008; and
  - Serves or served in DoD in one of the following positions: program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team for a contract in an amount in excess of \$10 million

# Hiring Former Government Officials

- Substantive restrictions
  - Many former government employees have “post-employment” or “revolving door” restrictions that restrict:
    - ✓ The companies they can work for; and
    - ✓ The types of work assignments they may perform and positions that they may accept within the private sector
  - Compensation bans
  - Representation bans
  - Requirement to obtain ethics opinion prior to receiving compensation

# Hiring Former Government Officials

- Implications and Best Practices
  - Beware of so-called “clean letters” from Designated Agency Ethics Officials
  - Screening process
  - Incorporate key concepts into HR policies/procedures
  - If mitigation is required or advisable in connection with particular procurement, seek approval from contracting officer
  - When in doubt, establish firewall to separate former government official from business capture effort, including proposal preparation

# Organizational Conflicts of Interest

- FAR 2.101
  - An OCI occurs when, “because of other relationships or circumstances, a contractor may be unable, or potentially unable, to render impartial advice or assistance to the government, the contractor’s objectivity in performing the contract work is or might be impaired, and/or the contractor would have an unfair competitive advantage.”
- Three categories of OCIs
  - Impaired Objectivity
  - Biased Ground Rules
  - Unequal Access to Information

## Organizational Conflicts of Interest

- Potential attribution of OCIs to non-affiliated entities
  - “Affiliate rule” recognizes that knowledge of an affiliate can be attributed to its corporate affiliates
  - *McTech Corp.*, B-406100, *et al.*, Feb. 8, 2012
    - ✓ McTech, a large business construction firm, and BrooAlexa, a small business construction firm, were partners in a mentor-protégé agreement under the SBA’s 8(a) mentor-protégé program
    - ✓ GAO upheld the Army’s determination that McTech had an unequal access to information OCI as a result of BrooAlexa’s inside knowledge
  - Contractors must be aware that the language of teaming agreements and joint venture agreements, as well as conduct of firms in those arrangements, could create a conduit for OCI attribution

## Organizational Conflicts of Interest

- No conflicts where information is not marked
- *CACI, Inc.-Federal*, B-403064.2, Jan. 28, 2011
  - Protester-incumbent alleged that the awardee, in its capacity as an agency support contractor, had received confidential information from the protester while the protester was performing the incumbent contract
  - Alleged that this information created an unequal access to information OCI by affording the awardee insights into the protester's technical and pricing approach
  - GAO found that the information provided to the awardee was not marked proprietary/confidential and thus refused to consider the information as proprietary/confidential after the fact

## Organizational Conflicts of Interest

- Traditionally, GAO and the COFC have shown considerable deference to agency OCI investigations when the agency actually looks at the alleged OCI issue and reaches a final decision
- In the last year, however, three significant protests have been won by the protester convincing GAO/COFC that the agency did not do enough to evaluate the potential OCI
- Implications and best practices

## Business Systems Rule

- Interim rule took effect on May 18, 2011
  - Interim rule covered six contractor business systems: accounting, estimating, purchasing, earned value management, material management and accounting, and property management systems
- On February 24, 2012, DoD issued a final rule adopting the interim rule, with modest changes
  - CO will discontinue withholding payments, if based on the evidence submitted by the contractor, the CO determines that there is a reasonable expectation that the contractor's corrective actions have been implemented and are expected to correct the significant deficiencies



## Business Systems Rule

- Commentary accompanying the final rule also clarifies that CO is not limited to withholding against only those contracts and invoices that could be affected by the system deficiency
- DCMA has published guidance about the process it follows for withholding, including limitation of withholding to contracts valued at more than \$50 million
- Expectation that audit activity will increase now that final rule has been released
  - See DCAA Annual Report to Congress (March 2012)

# FAPIIS

- Federal Awardee Performance and Integrity Information System
- FAPIIS was created in 2010 as a one-stop shop for contracting officers to review information about contractors' business ethics, integrity, and performance
- Interim rule implemented congressional mandate that the public have access to all information in FAPIIS (excluding past performance reviews)

# FAPIIS

- Final rule, FAR 52.209-9, issued on January 3, 2012
  - Addressed concerns raised about the disclosure of a contractor's proprietary and confidential material included when government inputs information into FAPIIS
  - Contractors given a seven calendar day review period to object to the public release of information
  - If contractor objects, the information is removed by the government and the issue will be resolved in accordance with agency FOIA procedures
  - If there is no objection, the entry will be automatically released to the public part of the FAPIIS site within 14 calendar days after the review period began

## Display of DoD IG Fraud Hotline Posters

- Final rule, DFARS 252.203-7004, issued on September 16, 2011
- Clause requires contractors to prominently display fraud hotline posters prepared by the DoD Office of the Inspector General
  - Exception for acquisition of commercial items, contracts that will be performed entirely outside the United States, or contracts that do not exceed \$5 million

## Display of DoD IG Fraud Hotline Posters

- Example of poster from DoD IG



## Identification of Critical Safety Items

- Final rule, DFARS 252.209-7010, issued on August 19, 2011
- Clause identifies any items being purchased that are critical safety items so that the proper risk-based surveillance can be performed
  - “Heightened quality assurance surveillance” for the designated items
- Language of clause focuses on ship and aviation equipment and components

## On the Horizon

- System for Award Management (“SAM”)
  - Consolidation of nine existing systems, including Central Contractor Registration, Online Representations and Certifications Application, and Excluded Parties List System
  - First phase is scheduled to occur in July 2012 and will likely involve migration of CCR, ORCA, and EPLS into SAM
  - For additional information: [www.sam.gov](http://www.sam.gov)

## On the Horizon

- DCAA Access to Internal Audit Reports
  - December 2011 GAO Report examining role of defense company internal audit departments and their ability/willingness to provide DCAA with information relating to internal controls and business systems
  - GAO found that many of the internal audit reports were related to contractor control environment reviewed by DCAA
  - GAO found that DCAA's access to internal audit information is limited, in part, because of companies' interpretations of court decisions concerning DCAA's access to documents



## On the Horizon

- DCAA Access to Internal Audit Reports
  - DoD concurred with GAO recommendation
    - ✓ Secretary of Defense should direct DCAA to issue guidance “to reiterate how, and under what circumstances, company internal audit reports should be accessed and used”
    - ✓ “This guidance will also emphasize the importance of pursuing access to records, and ultimately issuing a subpoena if the contractor denies access to necessary internal audits”
  - DCAA request to Congress: Strengthen the statutory basis for access to records via subpoena

## On the Horizon

- Counterfeit Electronic Parts
  - Under Section 818 of the FY2012 National Defense Authorization Act, DoD must revise DFARS to address the detection and avoidance of counterfeit electronic parts
  - Widely expected that revisions will:
    - ✓ Shift risk to contractors
    - ✓ Limit allowable costs associated with detection, avoidance, replacement, and rework
    - ✓ Outline remedial actions

## On the Horizon

- Counterfeit Electronic Parts
  - On May 21, 2012, the Senate Committee on Armed Services published a report finding approximately 1,800 cases of suspected counterfeit electronic parts in the defense supply chain during 2009 and 2010 involving over one million individual parts
  - Report concluded there was overwhelming evidence of large numbers of counterfeit parts making their way into critical defense systems, failures by defense contractors and DoD to report counterfeit parts, and gaps in DoD's knowledge of the scope and impact of such parts on defense systems

# Questions and Discussion

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