

*An Examination of the 2022 Government
Contracts Enforcement Environment:
Battlefield Observations & Best Practices in
Ethics & Compliance*

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- Recognized debarment “expert” by Legal500
- Former Air Force Debarring Official, “Director Suspension & Debarment Operations”
- Crisis practice focuses on contractors under investigation, facing civil FCA litigation, S&D and parallel proceedings
- Broad-based government contracts practice includes bid protests and appeals, disputes, contractor disclosures, building ethics and compliance programs



Today's Agenda

- Overview of Government Remedies
- A Look At Enforcement Activity
 - Criminal, Civil, Suspension & Debarment
- S&D Hypothetical Scenarios
- Strategy in Handling Mandatory Disclosures & Parallel Proceedings
- Best Practices In Sophisticated E&C Programs



Overview of Government Remedies

- The Government has several remedies at its disposal
 - Criminal enforcement - federal prosecutors and investigators
 - Wire Fraud, False Statements, Conspiracy, Major Procurement Fraud, Bribery, Kickbacks, Procurement Integrity, Antitrust, etc.
 - Civil FCA enforcement - federal prosecutors, investigators, and relators
 - Government recovers treble damages plus penalties for each claim
 - Government can pursue false claims under any USG contract
 - Suspension & Debarment - Suspension Debarment Officials, investigators, auditors, contracting personnel, competitors, and news media
 - Government can pursue S&D activity wherever there is a “cause” for suspension/debarment as defined by FAR subpart 9.4
 - Termination/Default – contracting officers
 - Where misconduct or noncompliance occurs, Government may pursue T4D



Standards in Criminal, Civil, and Debarment Proceedings

- **Suspension/Debarment:**
 - Adequate evidence = suspension
 - Preponderance of evidence = proposed debarment, debarment
 - **Civil Liability**
 - Preponderance of Evidence
 - **Criminal Liability**
 - Beyond a Reasonable Doubt
- Once established, burden shifts to contractor to either raise a genuine dispute of material fact or where the allegations are undisputed, to demonstrate **present responsibility**



Enforcement Actions On The Rise

- Increased coordination and information sharing within USG
 - Anticipate increased coordination among DOJ, investigators, agency fraud counsel, DCMA, and SDOs
 - Mandatory disclosures are being shared in real-time within DoD investigative agencies, leading to subpoenas and investigations
 - Anticipate an increase in investigations and enforcement by all USG stakeholders
 - Expect increase in suspension and debarment actions due to a brief drop during COVID as agencies work through backlog



DOJ Criminal Enforcement Perspective

- October 2021 DAG Monaco emphasized DOJ will continue to focus on individual accountability in white-collar criminal investigations and prosecutions
 - *First*, to be eligible for *any* cooperation credit, corporations now required to provide DOJ “with all non-privileged information about individuals involved in or responsible for the misconduct at issue.” No longer sufficient to limit such disclosures to those individuals who were “substantially involved.”
 - *Second*, prosecutors are now directed to consider “the full range” of prior state or federal “criminal, civil and regulatory” misconduct by a company, rather than limiting such consideration to misconduct of the same type or that is factually related to the misconduct at issue.
 - *Third*, corps. will again be regularly subject to the prospect of monitorships as part of resolutions. Prosecutors will be free to require monitorships as a condition of resolutions whenever it is appropriate to ensure that a company is living up to its compliance and disclosure obligations.



DOJ Criminal Resolutions

- **United Airlines Inc.** – in 2021, United entered into NPA agreeing to pay over \$17mm to resolve allegations that it made false statements re the international delivery of packages that were not delivered. United also entered into an FCA settlement agreeing to pay \$32mm.
 - Pursuant to contract with USPS, United was obligated to provide bar code scans of mail when United took possession of the mail and when the mail was delivered to the foreign postal administration.
 - Instead of providing USPS accurate delivery scans based on the movement of the mail, United submitted automated delivery scans based on aspirational delivery times.
- **Edgar Porras** – in 2022, Porras pleaded guilty to bid rigging (rotation of bids) in violation of the Sherman Antitrust Act involving 111 BOP contracts cumulatively worth approx. \$2mm.
- **Stronghold Engineering, Inc.** – in 2021, paid \$2.5 million to resolve criminal and civil investigations re allegations that firm set up a shell SDVOSB to obtain lucrative construction contracts.



DOJ Criminal Resolutions

- ***Balfour Beatty Communities*** – in 2021, BBC pleaded guilty to defrauding DoD, paid \$33.6 million in criminal fines, \$31.8 million in restitution, will serve three years of probation, and engage an independent compliance monitor for a period of three years.
 - BBC also entered into a FCA settlement under which it is obligated to pay approximately \$35.2 million in civil restitution and penalties to the United States, which the Justice Department credited against BBC's criminal restitution and fine.
 - From around 2013 to around 2019, BBC employees falsified information submitted to DoD re military housing projects showing it met performance objectives which entitled BBC to bonuses under contract
 - BBC employees altered or manipulated data in property management software and destroyed and falsified resident comment cards to falsely inflate these metrics re resident satisfaction and maintenance of facilities
- ***Lawrence O'Brien, Bruce LaRoche and Thomas Dailey*** – in 2022, three FL men indicted for rigging bids and defrauding U.S. military. The men allegedly conspired to create the illusion of competition when each were working together as one.
 - To carry out this scheme, they formed three entities and submitted bids from each entity, and the bids were all prepared by the three individuals.
 - They appeared to be competitive because, for example, each listed a different salesperson, price or product description, despite the fact that all of the bids were drafted by the co-conspirators and the companies were owned or controlled by them.



Civil Enforcement Actions On The Rise

- Last year, DOJ recovered \$5.6B under the FCA
 - Approximately \$600mm attributable to procurement fraud recoveries
 - Second largest annual total in FCA history, and the largest since 2014
- Reported cases involved kickbacks, falsified cost and pricing data, unqualified labor, falsified compliance with small business subcontracting requirements, BAA/TAA, and obtaining SSI/BPI



DOJ Civil FCA Resolutions

- ***Navistar Defense LLC*** - paid \$50 million to resolve allegations that it submitted fabricated invoices (for non-existent sales) to the Marine Corps in an effort to inflate its pricing negotiated with the USG.
- ***Insitu, Inc.*** – paid \$25 million to settle allegations that it knowingly submitted materially false cost and pricing data for contracts with the U.S. Special Operations Command and the Navy to supply and operate Unmanned Aerial Vehicles. Specifically, submitted cost data for “new” parts and materials whereas it used less expensive used/recycled parts.

DOJ Civil Enforcement Perspective

- **Level 3 Communications, LLC** – paid \$12.7 million to resolve allegations that management accepted kickbacks from subs in exchange for favorable treatment including sharing other contractor BPI and that Level 3 falsified WOSB participation re a subcontractor owned and controlled by men to comply with small business subcontracting goals.
- **AAR Corp.** – paid \$11mm to resolve allegations that AAR knowingly failed to maintain nine helicopters in accordance with DoD contract requirements and that the helicopters, which were billed under two U.S. Transportation Command contracts to transport cargo and personnel in support of missions in Afghanistan and Africa, were not airworthy and should not have been certified as fully mission capable.



S&D Activity 2019 to 2020

- Notwithstanding Covid-related issues, S&D activity remained strong through FY2020 w/ total of 2,988 actions compared to 3,358 for 2019 (-11%)
- Inside the numbers for FY2019-FY2020
 - Total reported debarments increased from the prior year (1199 to 1256) (+5%)
 - **Total number of suspensions decreased (722 to 415) (-43%)**
 - Total number of proposed debarments decreased (1437 to 1317) (-8%)
- Administrative Agreements increased for 2020 (54 to 58) (+7%)
- 139 pre-exclusion notices in 2019 compared to 103 (2020) (-26%)
- Contractors proactively engaged and disclosed matters largely consistent with prior year (40 to 36) (-10%)

S&D Activity Compared 2019 to 2020

FY2019 vs FY2020	Total Actions (Excluding Pre-Notice and AA's) 2019 vs. 2020		Pre-Notice 2019 vs. 2020		Administrative Agreements 2019 vs. 2020	
TOTAL ACTIONS	3358	2988	139	103	54	58
GSA	227	103	5	7	2	5
DHS	306	448	8	12	1	2
EPA	294	252	11	16	14	5
SBA	39	86	5	3	3	1
DOD TOTAL	1225	1168	75	35	17	15
○ Air Force	210	146	21	4	1	3
○ Army	367	263	14	2	5	4
○ DLA	265	392	0	1	7	6
○ Navy	389	367	40	28	4	2

S&D Activity 2020

FY2020	Pre-Notice	Suspensions	Proposed Debarments	Debarments (doesn't include vol. excl.)	Administrative Agreements	Total Actions (Excluding Pre-Notice and AA's)
TOTAL ACTIONS	103	415	1317	1256	58	2988
GSA	7	15	28	60	5	103
DHS	12	2	231	215	2	448
EPA	16	66	88	98	5	252
SBA	3	28	26	29	1	86
DOD TOTAL	35	137	547	484	15	1168
○ Air Force	4	34	57	55	3	146
○ Army	2	15	139	109	4	263
○ DLA	1	30	184	178	6	392
○ Navy	28	58	167	142	2	367

S&D Activity Projected to Rise for 2022

- COVID had some impact in slowing activity for 2020 due to remote work, challenges in coordinating and discussing actions, employees on leave, court delays processing cases, challenges holding contractor meetings virtually, outreach to referral sources
- We predict agency SDOs developed fairly sizeable backlogs in 2020 and 2021, and we expect to see actions taken on these in 2022, which should lead to an uptick in activity
 - This inevitably will mean older cases are being acted on



Common S&D Risk Areas

- Fraud
- False statements/certifications
- Time mischarging
- Use of unqualified labor
- Falsifying documents (test reports, for example)
- Personal Conflicts of Interest and OCIs
- TINA
- Kickbacks, Bribery, Improper Gifts
- Post-government employment restrictions
- Antitrust Violations
- Procurement Integrity (SSI/BPI)
- Improperly obtaining non-public government or competitor's data
- Environmental Violations
- Export Control Violations
- Illegal Immigration/Employment of Undocumented Aliens
- Small business contracting/subcontracting compliance
- BAA/TAA



Hypo. 1 – *Alleged Misconduct by Owner/CEO*

- ABC Corp. is a build-to-print manufacturer for the DoD
- ABC Corp. received a notice from a DoD SDO after prime contractor submitted a disclosure alleging misconduct by the CEO and owner of ABC Corp.
- Actions of owner/officer imputed to company under imputation and affiliation principles because he allegedly performed such acts on behalf of company and was in control of the company

Hypo. 1 – Alleged Misconduct by Owner/ CEO *(cont.)*

- **Response & Outcome:**
 - Negotiated 3-year Administrative Agreement w/ USG:
 - Owner resigned his position as CEO and transitioned to a non-leadership position
 - Owner accepted a voluntary exclusion from government contracting and agreed not to be involved in company's government contracting business
 - Owner participated in intensive ethics & compliance training

Hypo. 1 – Alleged Misconduct by Owner/ CEO *(cont.)*

- Negotiated 3-year AA w/ USG:
 - ABC Corp. instituted values-based ethics & compliance program
 - Quarterly ECO reports to monitor and government on E&C program
 - ABC Corp. implemented internal controls and corrective actions to prevent similar events from reoccurring
 - ABC Corp. appointed new, majority-independent Board and puts control of company in hands of Board
 - The Board appointed a new CEO to lead company on day-to-day basis
 - Subject to independent monitoring



Hypo. 2 – Alleged Misconduct by Family Member – Employee

- XYZ, Inc. is a small business who maintains certain equipment at government facilities
- XYZ, Inc. received a notice of proposed debarment that alleged it not perform monthly maintenance services at government facilities despite invoicing the government for these services
- Actions of family member-employee imputed to company



Hypo. 2 – Alleged Misconduct by Family Member – Employee (cont.)

- **Response & Outcome:**

- Negotiated a 1-year AA w/ USG:

- Employee accepted responsibility for her role and while company tried to maintain family members' employment, she was ultimately terminated to resolve government's concerns.
- The employee proposed and the government agreed to a “voluntary exclusion” from government contracting for one year
- XYZ would establish and maintain E&C Program
 - Quarterly reports to monitor and government on E&C program
- Subject to independent monitoring

Hypo. 3 – *Alleged Misconduct by Contractor Employee*

- John Doe was working for a major prime contractor in charge of overseeing certain programs
- Government alleged that he had a personal conflict of interest given he had an interest in a subcontractor his employer was doing business with
 - Government alleged he had helped sub obtain business

Hypo. 3 – *Alleged Misconduct by Contractor Employee* (cont.)

- **Response & Outcome:**
 - Negotiated a 1-year AA w/ USG:
 - Individual agreed not to engage in certain agent and representative activities but carved out certain activities Doe could do
 - Agreed to submit certifications on periodic basis confirming his compliance with the agreement
 - Agreed to report to independent monitor on a monthly basis
 - Monitor would report to government on monthly basis on Doe's compliance

Hypo. 4 – *Alleged Misconduct of Owner/Officer*

- Owner of 123, Inc. was indicted on allegations of small business fraud involving a SDVOSB
- Owner resigned position at company at time indictment was issued and transferred all his shares in company to spouse
- However, this was a family business
 - Family members still involved

Hypo. 4 – *Alleged Misconduct of Owner/ Officer (cont.)*

- Years after indictment of former owner, company received notice of suspension
 - Notice was based on indictment and allegations therein
 - Alleged actions of former owner imputed to 123, Inc. under imputation and affiliation

Hypo. 4 – *Alleged Misconduct of Owner/Officer (cont.)*

- **Response & Outcome:**

- Negotiated AA under which:

- Installed majority outside, independent Board
 - Put control of company in hands of Board
 - Removed ability of spouse (majority-owner) to control management/daily operations of company
 - Revamped and bolstered E&C program
 - Severed all ties with small business involved in alleged misconduct
 - Precluded former owner from being able to have any interest or employment with company during period of his exclusion from government contracting



Typical Mandatory Disclosure Scenario

- A government contractor discovers credible evidence of disclosable conduct (i.e., bribes, false invoices, BAA/TAA violations)
- This triggers mandatory disclosure rule under FAR 52.203-13
- However, upon making disclosure to IG and CO, disclosure likely to be shared w/ investigators, DCMA, DCAA, SDOs, and/or prosecutors
- Risk of parallel proceedings - may lead to civil, criminal, or debarment proceedings being initiated while company is investigating what occurred and root causes

Cues You're In Trouble

- Enforcement actions may proceed from:
 - Grand Jury Subpoena
 - IG Subpoena
 - Civil Investigative Demand
 - Notice of Proposed Debarment
 - Notice of Suspension
 - Show Cause Letter
 - Complaints by/from competitors, bid protests alleging wrongdoing
 - *Qui tam* lawsuits
 - Negative media coverage



Best Practices to Mitigate Exposure

- Values-based ethics programs with leadership engagement
- Compliance programs and practical procedures tailored to risk profile
- Policies and procedures for responding to and investigating reports of misconduct
- Policies and procedures for assessing events for possible disclosure and handling disclosures; knowing when to engage w/ the lead agency SDO



Values-Based Ethics Programs

- Core values are inculcated into the company's culture (i.e., Integrity, Trust, Fairness, and Respect)
- Values guide employees' decision-making
- Such programs encourage employees to adopt a new way of approaching their work and issues they encounter
- Even where the act may be legal, does it comport with our values?
- Encourage employees to think before they act and to always “do the right thing”
- Common test used to distinguish ethics from compliance; if you want to know if something is ethical, ask your mother/father; if you want to know if something is legal, ask your attorney



Considerations for a Values-Based Ethics Programs

- Select values that are tailored to your business and risks
- Define values in a way that makes sense to employees
- Ensure values are marketed and visible within company
- Ensure leadership engagement in values promotion
- Use cascading training where each supervisor periodically meets with his/her team to discuss ethical issues
- Appoint and utilize ethics officers to serve as a POC
- Recognize and reward employees who promote values
- Tie performance evaluations to core values
- Use questionnaires/surveys to periodically assess culture



Considerations for a Tailored Compliance Program

- Identify your risk profile taking into account your industry, location(s), operations, and activities of the company
- Focus on high risk areas
- Periodically re-assess risk profile and update program to reflect developments
- Consider linking compliance requirements to your values (i.e., procurement integrity relates to honesty, fairness, competition)
- Audit periodically to identify gaps / areas for improvement
- Make your written policies accessible to employees
- Develop procedures to make compliance practical for the business



Considerations for a Tailored Compliance Program (cont.)

- Supplement written policies with training (live training particularly for high risk areas)
- Screen employees, particularly principals, before hiring
- Conduct periodic audits, particularly in high risk areas
- Establish independent employee helpline
- Regularly remind employees of available reporting channels, including supervisors, ethics officer, or hotline
- Train those who may receive reports on what to do
- Train employees following events using as a lesson learned
- Document employee training and annual certifications



Considerations for Internal Investigations

- Maintain policies and procedures for responding to reports of misconduct
- Ensure all stakeholders are trained on what to do
- Ensure that consideration is given to preserving attorney-client privilege and work product protections
- Ensure a document hold is put in place
- Ensure investigations are conducted promptly
 - It is critically important to commence fact-finding as soon as possible
- Consider developing an investigative plan identifying the steps to be taken and issues to be investigated
- Ensure investigators are experienced and capable



Considerations for Internal Investigations (cont.)

- Where attorneys are used, inform employees that attorneys represent the company and that the company holds the privilege
- Ensure personnel interviewed are aware of the company's potential reporting obligations where certain evidence is discovered (i.e., MDR, Anti-Kickback Act)
- Ensure someone is responsible for reviewing and evaluating the investigative findings and for determining how to proceed following the investigation, including whether the company has disclosure obligations, is corrective action needed, disciplinary action, etc.



Considerations for Handling Search Warrants

- Advance Preparation for Search Warrant
 - Distribute *Privileged* Search Warrant Protocol to Key Personnel laying out how to proceed
 - Advise Employees of Rights if Interview Requested
 - Protect Privileged Documents and ensure proper markings
- Response to Search Warrant
 - Immediately call legal counsel
 - Let employees go home if possible
 - Do not interfere with search, but observe, take notes if possible
 - Do not give formal “consent” to search (without consulting with counsel)

Considerations for Disclosure Policies

- Maintain a policy establishing procedures for responding to events giving rise to potential disclosure obligations
- Assign responsibility to an individual or team of individuals to determine whether the company has a reporting obligation
- Disclosures should be complete and accurate
- Vague or incomplete disclosures could trigger further review and may dissipate the benefits of making the disclosure



Considerations for Disclosure Policies (cont.)

- Be aware that disclosures are often shared with the appropriate agency SDO, so the disclosure should also address the likely present responsibility concerns (including the present responsibility of individuals identified)
- Many S&D actions are taken against individuals identified in disclosures
- Even where no mandatory disclosure obligation exists, assess whether it would be beneficial to make a voluntary disclosure and whether to engage with the SDO
- When making a voluntary disclosure, treat it as formally and seriously as a mandatory disclosure and with the same considerations in mind

Considerations for Disclosure Policies (cont.)

- Typical considerations to have in mind when preparing a disclosure:
 - what happened
 - when did it happen
 - why it happened (i.e., root cause)
 - who was involved
 - how it was discovered (if delay in reporting, why delay)
 - whether internal policies/training were violated by action
 - whether disciplinary action taken and, if not, why
 - whether corrective action taken
 - ***why it is unlikely to reoccur

Questions?



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