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# **Civil FCA, Criminal, & Debarment Enforcement: A Look at the Current Enforcement Environment Facing Government Contractors**

TODD J. CANNI, PARTNER | BakerHostetler  
Co-Chair, Government Contracts  
[tcanni@bakerlaw.com](mailto:tcanni@bakerlaw.com)  
Cell: 202.384.6223

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# Todd J. Canni

BakerHostetler



- Partner, DC & LA
- Chambers USA, National rated for government contracts
- Recognized debarment “expert” by Legal500
- Former Air Force Debarring Official, “Director Suspension & Debarment Operations”
- One of only a few practitioners to have successfully enjoined a DoD debarment
- 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

Tel: 202-384-6223

E-Mail: [tcanni@bakerlaw.com](mailto:tcanni@bakerlaw.com)

# Agenda



- I. Overview of Government's Remedies
- II. Overview of Enforcement Environment
  - A. DOJ Criminal Enforcement
  - B. DOJ Civil Enforcement
  - C. S&D Enforcement
- III. S&D Actions Against Small Government Contractors
- IV. How to Mitigate Being the Next Case

# I. Overview of Government's Remedies

# Overview of Government Remedies



- **Criminal Enforcement** – *Who?* Federal prosecutors and investigators
  - Wire Fraud, False Statements, Conspiracy, Major Procurement Fraud, Bribery, Kickbacks, Procurement Integrity, Antitrust, etc.
- **Civil FCA enforcement** – *Who?* 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** – *Who?* SDOs, 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** – *Who?* 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
- 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
- **Civil Liability**
  - Preponderance of Evidence
- **Criminal Liability**
  - Beyond a Reasonable Doubt

# Common Compliance Risk Areas



- False statements/certifications
- Time mischarging
- Use of unqualified labor
- Falsifying documents
- Personal Conflicts of Interest
- Organizational Conflicts of Interest
- Defective pricing & TINA
- Kickbacks, Bribery, Improper Gifts
- Post-government employment restrictions
- Supplying non-conforming parts
- Repeated on-time delivery issues
- Product substitution
- Billing for out-of-scope work
- 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
- Buy American Act / Trade Agreements Act / Specialty Metals
- Corruption and FCPA violations
- Misrepresenting small business status or socioeconomic status
- Subcontracting with claimed small businesses who don't meet reqs

# Consequences for Non-Compliance

- Penalties for non-compliance with laws, regulations, contract terms or acting unethically:
  - Being found non-responsible and losing out on contract awards;
  - Having existing contracts terminated for default;
  - Harm to reputation;
  - Civil False Claims Act liability (31 U.S.C. §§ 3729–3733);
  - Criminal prosecution, including, among others, criminal False Claims Act liability (18 U.S.C § 287) and False Statements liability (18 U.S.C. § 1001);
  - Suspension or debarment under FAR Subpart 9.4;
  - For individuals, loss of employment.



## II. Overview of Enforcement Environment

# Enforcement Activity



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

# Enforcement Actions 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
- Whistleblower
- Qui tam lawsuits
- Negative media coverage

# Expect Parallel Proceedings



- When government representatives discover evidence of misconduct or non-compliance events, contractors should expect the government to pursue all appropriate remedies, in many cases, concurrently.
- Parallel proceedings include concurrent criminal actions, civil FCA actions, contractual remedies, and suspension/debarment.
- Creates challenges for responding – e.g., transparency & candor v. defensive response; government stakeholders will share information.
- Navigating parallel proceedings can be incredibly complex.

# Parallel Proceedings Hypothetical

- Imagine receiving a notice of suspension from a DoD debaring official, which results in your immediate ineligibility. You have 30 days to respond fully addressing the allegations identified in the Notice. You are ineligible immediately. No more new USG contracts.
- Days later, you are contacted by DOJ's civil fraud division informing you of a civil FCA investigation concerning the same matter.
- You receive a subpoena for all of your documents, including emails, relating to the same matter.
- Immediately, the contractor is facing a parallel proceeding and one where whatever is shared with the agency SDO re the allegations will be shared with the DOJ, who is seeking treble damages and penalties.
- Candor and transparency is key to resolving the suspension matter. However, such transparency also may give DOJ a roadmap into proving its civil FCA case.
- This is a typical parallel proceeding and one all contractors need to be prepared for in the modern sophisticated enforcement environment.

# A. DOJ Criminal Enforcement

# DOJ Criminal Enforcement Perspective



- In October 2021 Dep. AG Lisa Monaco issued a memo focusing on three policies:
  - *First*, DOJ emphasized it will continue to focus on individual accountability and to be eligible for any cooperation credit, corporations now required to provide DOJ “with all non-privileged information about [all] 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 Enforcement Perspective (Cont.)



- In September 2022, DAG Monaco provided updated guidance:
  - *First*, to be eligible for *any* cooperation credit, corporations required to provide DOJ “all relevant, non-privileged facts about individual misconduct.” No longer sufficient to limit such disclosures to those individuals who were “substantially involved.” The mere disclosure of records is also not enough.
  - *Second*, “speed is of the essence.” If disclosures come too long after the misconduct in question, they reduce the likelihood that the government may be able to adequately investigate the matter in time to seek appropriate criminal charges against individuals.
  - *Third*, DAG Monaco directed all DOJ components to draft and publicly issue a Corporate Enforcement Policy so that corporations can understand what to expect “if they meet the standards for voluntary self-disclosure.”
  - *Fourth*, DOJ prosecutors must complete their investigations into the “responsible individuals” (by filing charges or deciding not to) before reaching a resolution with the corporation.
  - *Fifth*, DAG Monaco made clear there will be no presumption for or against using monitors but rather such decisions will be made on a case by case basis. DAG Monaco set out factors DOJ will consider in deciding whether to impose a monitor, including:



# DOJ Criminal Enforcement Perspective *(Cont.)*



1. Whether the corporation voluntarily self-disclosed the underlying misconduct in a manner that satisfies the particular DOJ component's self-disclosure policy;
2. Whether, at the time of the resolution and after a thorough risk assessment, the corporation has implemented an effective compliance program and sufficient internal controls to detect and prevent similar misconduct in the future;
3. Whether, at the time of the resolution, the corporation has adequately tested its compliance program and internal controls to demonstrate that they would likely detect and prevent similar misconduct in the future;
4. Whether the underlying criminal conduct was long-lasting or pervasive across the business organization or was approved, facilitated, or ignored by senior management, executives, or directors (including by means of a corporate culture that tolerated risky behavior or misconduct, or did not encourage open discussion and reporting of possible risks and concerns);
5. Whether the underlying criminal conduct involved the exploitation of an inadequate compliance program or system of internal controls;

# DOJ Criminal Enforcement Perspective *(Cont.)*



6. Whether the underlying criminal conduct involved active participation of compliance personnel or the failure of compliance personnel to appropriately escalate or respond to red flags;
7. Whether the corporation took adequate investigative or remedial measures to address the underlying criminal conduct, including, where appropriate, the termination of business relationships and practices that contributed to the criminal conduct, and discipline or termination of personnel involved, including with respect to those with supervisory, management, or oversight responsibilities for the misconduct;
8. Whether, at the time of the resolution, the corporation's risk profile has substantially changed, such that the risk of recurrence of the misconduct is minimal or nonexistent;
9. Whether the corporation faces any unique risks or compliance challenges, including with respect to the particular region or business sector in which the corporation operates or the nature of the corporation's customers; and
10. Whether and to what extent the corporation is subject to oversight from industry regulators or a monitor imposed by another domestic or foreign enforcement authority or regulator.

\*\*\*The factors listed above are intended to be illustrative of those that should be evaluated and are not an exhaustive list of potentially relevant considerations. Department attorneys should determine whether a monitor is required based on the facts and circumstances presented.



- ***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.



- ***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.

## B. DOJ Civil Enforcement

# Civil Enforcement Actions On The Rise

- Last year in 2021, 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,
  - Using unqualified labor,
  - falsified compliance with small business subcontracting requirements,
  - BAA/TAA, and
  - obtaining SSI/BPI, among others

# 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.



# DOJ Civil Enforcement Perspective



- ***TriMark USA, LLC*** – in 2022, agreed to pay \$48.5 million to resolve allegations that its subsidiaries improperly manipulated federal small business set-aside contracts
  - A former executive in charge of the company’s government business agreed to pay an additional \$100,000 as an individual civil penalty for her conduct.
  - TriMark provides kitchen and food service equipment to government customers.
  - TriMark admitted that it identified federal set-aside contract opportunities for small businesses to bid on using false set-aside status; instructed their subsidiaries regarding how to prepare their bids and what prices to propose; and “ghostwrote” emails for those companies to send to government officials to make it appear as though the small businesses were performing work that TriMark was performing.
  - Case began in May 2019, when a whistleblower filed a qui tam complaint

## C. S&D Enforcement

# Overview of S&D Under FAR

## Subpart 9.4

- S&D are tools used to protect the government from the risks associated with doing business with “non-responsible” contractors
- Non-responsible = info before the government that reflects negatively on the contractor’s integrity, ethics, or competency in performing contracts
- S&D act to render a contractor ineligible from receiving new contracts
- Exclusion is accomplished by sending the contractor a notice of suspension or proposed debarment and posting their name on a public website (SAM)
- S&D, by one agency, has government-wide effect
- S&D are not supposed to be used to punish contractors for past misconduct; that’s the role of the criminal justice system – protection is focus
- “Present responsibility” is the focus of a S&D proceeding
- The FAR sets forth 10 factors to assess present responsibility

# Mitigating Factors & Remedial Measures Considered by SDOs

Standards of Conduct / Internal Control Systems	Disciplined Employee
Voluntary Disclosure	Implemented Remedial Measures
Internal Investigation Conducted & Shared	Ethics Policy and Training
Full Cooperation	Adequate Amount of Time Has Passed Since Event
Paid Costs/Restitution	Management Recognition of Problem

*\*Not all of these will apply in every case*

# Suspension vs. Debarment



- Suspension
- Facts still being developed through an investigation or legal proceedings
- No conviction or civil judgment exists
- Adequate evidence = probable cause
  - *Very low standard; gives SDOs much discretion*
- An indictment = adequate evidence
- S&D, by one agency, has government-wide effect
- S&D are not supposed to be used to punish contractors for past misconduct; that's the role of the criminal justice system
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# Suspension



- Used where “immediate action” is necessary to protect Government’s interests
- Generally, may last 12 months before legal proceedings must be instituted
- Once legal proceedings are initiated, suspension may stay in place until the proceedings conclude (an indictment = legal proceedings)
- Where the Department of Justice requests, suspensions may continue for 18 months

# Debarment



- Investigation or legal proceeding has concluded resulting in conviction or civil judgment
- In the absence of a conviction or civil judgment, agency may proceed on a fact-based debarment, whereby a preponderance of evidence of improper conduct is required
  - Evidence that leads to conclusion that the fact is more probably true than not
- The FAR provides that generally 3 year term imposed, but SDOs have discretion to depart upwardly or downwardly from that number

# Causes for Suspension & Debarment

- FAR 9.4 identifies many specific causes for S&D
  - Key is any improper conduct reflecting negatively on a contractor's responsibility
    - Fraud or criminal offense in connection with obtaining, attempting to obtain, or performing a contract
    - Antitrust violations relating to submission of offers
    - Embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property
    - Unethical conduct indicating a lack of business integrity or business honesty
    - Willful violations of contract terms
    - History of a failure to perform or of unsatisfactory performance
    - Failure by a principal to disclose credible evidence of fraud, conflicts of interest, bribery, gratuity, violations of civil False Claims Act, or significant overpayments



# Causes for Suspension & Debarment *(Cont.)*

- Catch-all ***“Any other cause of so serious or compelling a nature....”***
- **SDOs have much discretion in deciding what conduct gives rise to a cause for suspension or debarment**
- Conduct need not be related to government contracting *(i.e., mortgage fraud, passing bad checks ....)*

# SDO Decision-Making & Potential Outcomes

## Does a cause for suspension/debarment exist?

- If “yes,” then:
  - Has contractor demonstrated its present responsibility?
    - If “yes” – termination is appropriate
    - If “almost” but . . . – termination and/or administrative agreement may be a candidate depending upon circumstances
    - If “no” – debarment is possible (the term depends on the circumstances)
- Where debarred, potential appeal to district court alleging APA or Due Process Violations

# Administrative Agreements



- Typically, three years, but may be shorter or longer
- Administrative agreements may also provide for early termination upon satisfying certain conditions
- Elements generally include –
  - Development or enhancement of Ethics and Compliance Program, other policies and practices, and internal controls
  - Leadership engagement in Ethics and Compliance Program
  - Regular reporting obligations and other oversight efforts
  - Other specific corrective measures given the issues involved
  - Potential retention of an Independent Monitor who likely will visit company facilities several times a year and prepare a report to SDO

# 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)
<b>TOTAL ACTIONS</b>	<b>103</b>	<b>415</b>	<b>1317</b>	<b>1256</b>	<b>58</b>	<b>2988</b>
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
<b>DOD TOTAL</b>	<b>35</b>	<b>137</b>	<b>547</b>	<b>484</b>	<b>15</b>	<b>1168</b>
○ 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



## “Fat Leonard” Case Study – Gifts, Bribes, Disclosure of NPI

- Leonard Glenn Francis, a defense contractor nicknamed “Fat Leonard,” was the owner of Glenn Defense Marine Asia.
- For years, this Singapore-based businessman was alleged to shower Navy officers with gifts, gourmet dinners, companionship, and cash so they would look the other way while he obtained Navy contracts.
- Navy officers shared with Mr. Francis classified material about U.S. warship and submarine movements, confidential contracting information, and files about active law enforcement investigations into Mr. Francis’ company.

# High-Profile Cases *(Cont.)*



- Mr. Francis exploited the intelligence for illicit profit, even ordering the compromised Navy officers to redirect aircraft carriers to ports he controlled in Southeast Asia so he could obtain more lucrative business (fuel, tugboats, barges, food, water, and sewage removal).
- Pleaded guilty to defrauding the Navy of \$35 million.
- Over a dozen Navy officers have pleaded guilty in connection with the Fat Leonard bribery and corruption scandal.
- Many, many debarments.



## Booz Allen Case Study – Procurement Integrity / Hiring Former Gov’t Employees / Disclosure of NPI/SSI

- In April 2011, Booz Allen hired retired Air Force Lt. Col. Joselito Meneses as a senior associate responsible for business development in military and civilian health markets.
  - Meneses had previously served as the deputy chief of the Information Technology Division in the Air Force Medical Support Agency surgeon general’s office.
  - In that role, Meneses was privy to non-public information, which included information about source-selection, bids and proposals.

# High-Profile Cases *(Cont.)*



- The Air Force alleged Meneses brought an external hard-drive, containing sensitive information, with him on his first day of work at Booz Allen.
- In an email to colleagues, Meneses shared information about an IT services contract that Booz Allen was competing on a follow-on contract.
- That information provided the company “with an unfair competitive advantage.”
- Meneses’ supervisors “failed to report this improper disclosure,” and Meneses continued to be involved in efforts to compete for the follow-on contract.
- Booz Allen’s San Antonio office was suspended until an administrative agreement was reached avoiding debarment
- Some of the individuals involved were proposed for debarment and/or debarred





## Darleen Druyun Case Study – Trading Employment for Lucrative Ks!

- She was the top civilian procurement official for the Air Force and worked on contract negotiations.
- In the early 2000s, the Air Force announced awards to Boeing for several major projects, including a \$20 billion leasing agreement for 100 airborne tankers, a \$4 billion upgrading of the C-130 aircraft, and a \$412 million payment on a C-17 contract.
- In 2003, after contract negotiations had ended, she accepted an executive position at Boeing that paid her \$250,000 per year.

# High-Profile Cases *(Cont.)*



- A year later, she pleaded guilty to awarding the contracts to Boeing in exchange for jobs at Boeing for herself, her daughter, and her son-in-law.
- She served a 9-month prison sentence and paid fines.
- The awards to Boeing were canceled.
- Boeing was forced to pay a \$615 million fine for its involvement in the scheme.
- Boeing's Chief Financial Officer was sentenced to 4 months in prison for negotiating new jobs for Darleen and her family members.
- Debarments followed and Boeing was suspended.

# S&D Actions Against Small Government Contractors

# 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

# Alleged Misconduct by Owner/CEO *(Cont.)*



## Response & Outcome:

- Negotiated 3-year AA with the Government:
  - 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

# Alleged Misconduct by Owner/CEO *(Cont.)*



- Negotiated 3-year AA with the Government:
  - 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 day-to-day
  - Subject to independent monitoring

# 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:
  - XYZ did perform monthly services it was contractually obligated to perform despite invoicing the government for these services
    - Actions of family member-employee imputed to company

# Alleged Misconduct by Family Member – Employee *(Cont.)*



## Response & Outcome:

- Negotiated a 1-year AA with the Government, as part of which:
  - 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



# Alleged Misconduct by Family Member – Employee *(Cont.)*

## Response & Outcome: (cont.)

- Negotiated a 1-year AA with the Government, as part of which:
- XYZ would establish and maintain E&C Program
  - Quarterly reports to monitor and government on E&C program
- Subject to independent monitoring

# 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

# Alleged Misconduct by Contractor Employee *(Cont.)*



- Response & Outcome:
  - Negotiated a 1-year AA under which:
  - 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

# Alleged Misconduct of Owner/Officer



- Owner of 123, Inc. was indicted on allegations of small business fraud
- 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

# Alleged Misconduct of Owner/Officer *(Cont.)*



- Years after indictment of former owner and 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

# 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

# IV. How to Mitigate Being the Next Case

# Best Practices in Ethics & Compliance

## Core Components:

- Values-based ethics programs
- Installation of ECO to manage day-to-day program and to keep management apprised
- Leadership engagement and support of program w/ periodic messaging
- Ethics helpline to allow anonymous reporting
- Compliance policies tailored to risk profile
- Live periodic ethics and compliance training



# Best Practices in Ethics & Compliance *(Cont.)*

- Policies and procedures for investigating reports
- Periodic monitoring and auditing to assess compliance and gaps
- Disclosure policies
- Knowing when to engage w/ the lead agency SDO
- Policies encouraging “root-cause” analysis and corrective actions following events
- Disciplinary program
- Performance evaluation systems that consider ethics, integrity, and promotion of program

# Values-Based Ethics Programs



- Many companies are moving beyond rules-based compliance and are also adopting 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”

# Reporting Obligations



- Employees are obligated to bring any issue concerning a suspected violation of the Code, law, or regulations to ***the immediate attention*** of the Company
- All reports are treated confidentially to the maximum extent consistent with the enforcement of the Code.

# The Ethics Decision-making Tree

- Contractor employees should be asking themselves:
  - Am I the right person to make this decision or take this action?
  - Are there any rules governing this decision?
  - Does my company have a policy addressing this issue?
  - Is the decision consistent with my organization's/my core values?
  - Will someone be adversely affected by my actions?
  - Am I acting honestly and transparently?
  - Are there “appearance” issues associated with this decision?
  - How would this look to my family or in the newspaper?
  - Am I afraid of contacting someone about my concerns?

# How to Inculcate A Values-Based Ethics Program

- 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

# How to Inculcate A Values-Based Ethics Program *(Cont.)*

- 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 and work your way to addressing all compliance risks
- 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

# Considerations for a Tailored Compliance Program *(Cont.)*

- Make your written policies accessible to employees
- 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
- 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
- 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.
- Ensure someone is responsible for assessing “root cause” of events and whether corrective actions are appropriate

# Mandatory Disclosures to the Government

- **FAR 52.203-13 Contractor Code of Business Ethics and Conduct**
- Companies have a mandatory disclosure obligation whenever, in connection with the award, performance, or closeout of any government contract or subcontract performed by the Company, the Company has “*credible evidence*” that a principal, employee, agent, or subcontractor of the Company has committed a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C. or a violation of the civil False Claims Act (31 U.S.C. Sections 3729-3733).

# Mandatory Disclosures to the Government *(Cont.)*

- The FAR provides that a cause for suspension (9.407-2) and a cause for debarment (9.406-2) exist where a contractor knowingly fails to timely disclose “*credible evidence*” of a Title 18 violation identified above, a violation of the civil False Claims Act, or a “significant overpayment.”
- FAR 3.1003(a)(3), in conjunction with the payment clauses, provides that if a contractor becomes aware of an overpayment, it shall remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment.

# Mandatory Disclosures to the Government *(Cont.)*

- Consistent with FAR 52.203-7 Anti-Kickback Procedures, companies must make timely disclosures, in writing, to the appropriate government officials, whenever it has “*reasonable grounds*” to believe a violation of the AKA occurred.
- The AKA prohibits:
  - Providing or attempting to provide or offering to provide any kickback;
  - Soliciting, accepting, or attempting to accept any kickback; or
  - Including, directly or indirectly, the amount of any kickback in the contract price charged by a prime contractor to the United States or in the contract price charged by a subcontractor to a prime contractor or higher tier subcontractor.

# Mandatory Disclosures to the Government *(Cont.)*



## ■ Common types of disclosures made by the Government:

- Anti-Kickback Act
- Berry Amendment
- Bid-Rigging
- Bribery
- Buy American Act
- Conflict Of Interest
- Cost Mischarging
- Counterfeit Parts
- Davis Bacon
- Defective Pricing
- False Certification
- False Claims
- False Statements
- False Testing
- Graft And Gratuities
- Labor Mischarging
- Non-Compliance With Contract
- Nonconforming Parts
- Procurement Integrity Act
- Product Substitution
- Progress Payments
- Significant Overpayment
- Theft of Gov't Funds/Property
- TINA

# 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

# 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)
- Consider disclosing direct to the lead agency SDO, but keep in mind privilege issues (i.e., waiver)
- 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

# Considerations for Disclosure Policies *(Cont.)*

- When making a voluntary disclosure, treat it as formally and seriously as a mandatory disclosure and with the same considerations in mind
- 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

# Considerations for Disclosure Policies *(Cont.)*

- whether disciplinary action taken and, if not, why
- what is the “root cause” of the event
- whether corrective action taken
- why it is unlikely to reoccur

# Questions?

