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Procurement Integrity, Unfair Competitive Advantages, and OCIs: The Intersection of Ethics, Compliance, and Business Capture

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- Partner, DC & LA.
- Recognized by Chambers USA Nationwide for Government Contracts.
- Recognized debarment “expert” by Legal 500.
- 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.

Our Agenda for Today

- I. Setting the Stage with a Hypothetical
- II. Overview of Key Compliance Risks
 - I. Conflicts of Interest & Organizational Conflicts of Interest
 - II. Source Selection, Bid and Proposal, and Non-Public Information
 - III. Employment Discussions & Post-Government Employment Restrictions
 - IV. Gifts, Bribes, Kickbacks
- III. Overview of Enforcement Environment & Government Remedies
- IV. Enforcement of “Unequal Access” Cases
- V. Best Practices in Ethics & Compliance

I. SETTING THE STAGE WITH A HYPOTHETICAL

“Eye of the Beholder” Hypothetical Explored

- Imagine facing a bid protest after receiving a lucrative award. The protester alleges that that your employee improperly received information he shouldn't possess affording an unfair competitive advantage ... this type of protest happens regularly.
 - Scenario 1 - CO examines allegations and defends award. GAO/COFC sustains bid protest and you lose the award.
 - Scenario 2 – CO takes corrective actions, mitigates the OCI, and you receive the award.
 - Scenario 3 – CO takes corrective actions terminating the award and disqualifies you from the procurement. CO also refers the case to an SDO for debarment consideration, the SDO agrees that the conduct reflects poorly on integrity, and suspends company and those involved – now company is ineligible. The CO also refers the matter to DOJ and you receive a subpoena for documents re the matter and are facing a DOJ investigation.
- These unequal access cases can be pursued in a number of ways, each with different risks, impact, and outcomes. In Scenario 3, this run of mill protest turned into a serious enforcement action. You are facing parallel proceedings.

II. OVERVIEW OF KEY COMPLIANCE RISKS

Conflicts of Interest & Organizational Conflicts of Interest

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Avoiding the Appearance of a Conflict In Contractor-Government Relationships

- Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none.
- The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.
- Many enforcement cases stem from questionable relationships between contractors and their government counterparts. Avoid them

Organizational Conflicts of Interest

There are three types of OCIs that generally arise in government contracting:

- **Unequal access to information** – Through its performance of one government contract, a company has or will have access to **non-public government information** (“NPI”) that could provide it an unfair advantage in competing for another government contract.
 - NPI could mean (i.e., source selection info, bid or proposal info, another contractor’s proprietary info, non-public documents provided by gov’t, info obtained through access to gov’t restricted systems, or info governed by an NDA);

Organizational Conflicts of Interest *(cont.)*

- **Biased ground rules** – Through its performance of one government contract, a company is or will be in a position to set the ground rules (such as through **drafting specifications or the statement of work**) for a different acquisition and thereby influence that future competition, whether intentionally or not, in its own favor;
- **Impaired objectivity** – This type of OCI generally arises when a contractor or subcontractor is in a position to evaluate the performance of another business unit of the same company or advise the Government regarding selection of contractors, which could include a business unit within the same company.
- ***Focus today is unequal access

Organizational Conflicts of Interest *(cont.)*

- OCI Mitigation / Avoidance
 - Unequal Access to Information –
 - May create a firewall.
 - Remove subject employees from covered scope;
 - Ensure document access is properly limited; and
 - Provide training on respecting the firewall.
 - Government could decide to release non-public information to all bidders.

Organizational Conflicts of Interest *(cont.)*

- Biased Ground Rules / Impaired Objectivity –
 - Avoidance is key.
 - Bring in a third-party/subcontractor to perform some portions of scope.
 - Can obtain waiver from Government under FAR 9.503.
 - OCI may be waived if enforcement “would not be in the Government’s interest;”
 - Must request waiver in writing, setting forth the extent of the conflict; and
 - Must be approved by the head of the procuring agency.

Procurement Integrity Act & Non-Public Gov't Info

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Restrictions on Obtaining Non-Public Sensitive Information

- Major Concerns:
 - Procurement Integrity Act;
 - Non-Public Government Information;
 - Restrictions placed on government officials regarding their communications w/ contractors involving NPI (5 C.F.R. § 2635.703(a)-(b));

- Companies are prohibited, when competing for the award of a U.S. government contract or subcontract, from knowingly obtaining “*source selection information*” or “*bid or proposal information*.”
 - Source selection information includes: proposed costs or prices submitted to the government; source selection plans and technical evaluation plans; evaluations of technical and cost/price proposals by the government, competitive range determinations, rankings of bids, proposals, or competitors, and/or reports and evaluations of source selection panels, boards, or advisory councils; and any other information marked Source Selection Information.

Contractor Bid or Proposal Information

- Contractor bid or proposal information may include any information submitted by a contractor to a federal agency as part of or in connection with a bid or proposal to enter into a federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly.
 - Examples include: cost or pricing data; indirect costs and direct labor rates; proprietary information about manufacturing processes, operations, or techniques; or information marked by the contractor as “contractor bid or proposal information” or containing a similar restriction on disclosure.
- These restrictions also prohibit current and former government employees from knowingly disclosing source selection information or bid or proposal information.

Government Officials May Not Share “Nonpublic information”

- Regulations prohibit government officials from allowing the improper use of “nonpublic information” obtained during their federal employment to further their private interests or that of another
 - “Nonpublic government information” is any information that an employee gains by reason of his/her role as a federal government contractor and knows (or reasonably should know) has not been made available to the general public, regardless of whether or not the information is marked with a restrictive legend
- Nonpublic government information includes information that:
 - Has not actually been disseminated to the general public and is not authorized to be made available to the public upon request.
 - Is exempt from disclosure under the Freedom of Information Act;
 - The Government has designated as “confidential” or “protected” in some way, although legends are not necessary.

Contractor's Duty to Safeguard Nonpublic Government Information

- Exercise due care and take appropriate measures to safeguard nonpublic government information as required by their assigned contracts/subcontracts, specific NDAs and other restrictive agreements, and applicable federal laws/regulations.

- ***Non-Disclosure Agreements***

- Sometimes, the Government places additional restrictions on the use of NPI by requiring individuals to execute personal NDAs.
- An NDA is a contract between at least two parties that outlines confidential material, knowledge, or information that the parties wish to share with one another for certain purposes, but wish to restrict access to.
- An NDA creates a confidential relationship between the parties to protect any type of nonpublic confidential, proprietary, or trade secret information, which can include nonpublic government information.

- Individuals must review carefully such NDAs to understand their personal compliance obligations. Typically, NDAs:
 - Prohibit employees from sharing nonpublic government information, directly or indirectly, with any individuals except for authorized government, contractor, and subcontractor personnel;
 - Restrict employees from using nonpublic government information for any purpose other than activities directly specified in their assigned contracts/subcontracts; and/or
 - Require employees to comply with the NDA restrictions for the duration of their contracts/subcontracts or, sometimes, indefinitely.

How to Use Nonpublic Government Information Properly

- When performing work as an “incumbent contractor,” employees may acquire specific firsthand knowledge and expertise regarding a government program or project.
- While an employee may know certain information regarding a Federal contract or project and may have had a role in developing or creating nonpublic government information, an employee may access and use this information ***only to the extent authorized by the Government.***

How to Use Nonpublic Government Information Properly

(cont.)

- Employees are prohibited from using nonpublic government information for any purpose other than performance of their assigned federal government contracts and subcontracts.
- Employees may draw upon their firsthand knowledge and technical experience in delivering services and preparing proposals to the Government, but they must be very careful not to leverage anything beyond their own memory.

Employment Discussions & Post-Government Employment Restrictions

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Employment Discussions & Post-Government Employment Restrictions

- There are laws and regulations governing:
 - 1) employment discussions with current government personnel; and
 - 2) post-government employment restrictions limiting what a former government employee can do post-gov't employment.
- These rules are designed to prevent conflicts of interest from arising where the government or former gov't employee has a conflict between his duties to the government and future contractor employer.
- Restrictions largely pertain to government officials who participate personally and substantially in a competitive federal agency procurement in excess of certain thresholds.

Employment Discussions & Post-Government Employment Restrictions *(cont.)*

- These “seeking employment” restrictions include provisions governing contact or negotiations with current government employees to discuss:
 - Their potential employment with your company; and
 - Their retention by your company as consultants or subcontractors.

Restrictions on Employment Discussions (18 U.S.C. 208, FAR 3.104)

- Before engaging in employment discussions with a prospective employer, the government employee should notify his/her ethics office of the anticipated communication and recuse himself/herself from all matters involving that employer.
- Where a government official receives an unsolicited contact regarding employment from an offeror competing for such a procurement, the official **must notify his supervisor and the designated ethics official immediately, and promptly reject the employment opportunity or disqualify himself from further participation in the procurement** until the discussions have concluded without employment or the contractor is no longer an offeror in that procurement.

Post-Government Employment Restrictions (18 USC 207)

- Former Federal employees may face restrictions on their new employment activities.
- These restrictions particularly apply to activities that involve appearing before or communicating with Federal agencies or courts after the former Federal employee has left the government.
- Prior to leaving the gov't, employees need post-government employment advice and after leaving the Federal government, former gov't employees can and should continue to contact the agency's ethics office about post-gov't employment advice.

- Section 207's Main Restrictions:
 - **Lifetime Ban** - An employee is prohibited from communicating with or appearing before the government with the intent to influence on a particular matter involving specific parties in which the employee participated personally and substantially during government service.
 - **Two-Year Ban** - An employee is prohibited for two years from communicating with or appearing before the government with the intent to influence on a particular matter involving specific parties that was pending under that employee's official responsibility during their last year of government service.
 - **One-Year Ban** - A senior employee is prohibited from communicating to, or appearing before with the intent to influence, the agency in which the former senior employee served during the last year of government service.

Gifts, Bribes, and Kickbacks

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Giving or Accepting Items of Value In Connection with a Public Procurement

- It is a violation of the law to give, solicit, or receive any item of value from customers, vendors, subcontractors, or competitors or to any public official **to receive favorable treatment in connection with a prime contract** or subcontract relating to a prime contract with the U.S. Government.
 - Items of value pretty much include anything (i.e., cash or the equivalent, tickets to any events, meals, entertainment, gifts, or personal fees, travel costs, commissions or other forms of remuneration).
- Since providing any item of value **to a government official** may raise an appearance of impropriety, you should generally refrain from doing so.

Giving or Accepting Items of Value In Connection with a Public Procurement *(cont.)*

- Federal executive branch employees **may accept** the following items:
 - **Key gift rule: Other unsolicited gifts with a market value of \$20 or less per occasion, aggregating no more than \$50 in a calendar year from any single source. Tracking of these gifts is essential to compliance.**
 - Publicly-available discounts and commercial loans;
 - Inconsequential items or items of a nominal value if offered infrequently, such as coffee, donuts, greeting cards, and certificates;
 - Gifts motivated by a family relationship or pre-existing personal friendship;
 - Free attendance at certain widely-attended gatherings, such as conferences and receptions, when the cost of attendance is borne by the sponsor of the event; and
 - Food, refreshments, and entertainment at certain meetings or events while on duty in a foreign country.

- It is improper to give or accept bribes and illegal gratuities.
- Bribery refers to a situation where an individual or company **corruptly gives** or offers anything of value **to a public official with the specific intent to influence an official** act or induce the public official to commit some fraud or violate an official duty.
 - In the bribery context, the gift is viewed as a “*quid pro quo*” for the official action taken by the government official.

- In the illegal gratuities context, the government need not prove corrupt intent or that a “*quid pro quo*” existed; just that there is an offer or acceptance of anything of value “*for or because of an official act.*”
 - As a practical matter, the illegal gratuities statute prohibits all gifts to public officials made as a reward for an act that they would perform anyway.
 - **Oftentimes even permissible gifts create the appearance of an illegal gratuity, thus you should refrain from providing gifts to government officials.**

- All transactions and business dealings with your prime contractors, subcontractors, and suppliers must be conducted in compliance with the provisions of the Anti-Kickback Act (“AKA”).
- The AKA prohibits prime contractors and subcontractors from offering, soliciting, providing, or accepting anything of value for the purpose of obtaining or rewarding favorable treatment in connection with the award of government prime contracts and subcontracts.
- A “kickback” includes anything of value, including:
 - any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind that is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a government prime contract or subcontract.

- You must deal fairly and honestly with your suppliers and customers.
- Relationships should be based on price, quality, service, and reputation, among other factors.
- When dealing with suppliers, you should carefully guard your objectivity. **Avoid acts that create an “appearance of impropriety.”**
- You should not accept or solicit any personal benefit from a supplier or potential supplier.
- Similarly, you should not offer or provide any personal benefit to a prime contractor customer.

III. Overview of Enforcement Environment & Government Remedies

Overview of Enforcement Environment

- **Termination/Default** – *Who?* Contracting Officers
 - Where misconduct or noncompliance occurs, Government may pursue T4D
- **Bid Protests** – *Who?* Contracting Officers, Competitors, GAO and COFC
 - Corrective action, including termination of award, exclusion from the competition, or referrals to SDOs and/or DoJ, are remedies the government may seek
- **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 media
 - Government can pursue S&D activity wherever there is a “cause” for suspension/debarment as defined by FAR subpart 9.4

Enforcement Actions May Proceed From

- Bid protests alleging wrongdoing
- Grand Jury Subpoena
- IG Subpoena
- Civil Investigative Demand
- Notice of Proposed Debarment
- Notice of Suspension
- Show Cause Letter/Termination
- CO Referrals
- Complaints by/from Competitors
- Whistleblower allegations
- Qui tam lawsuits
- Negative media coverage

Coordination & Information Sharing

- 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 investigations, subpoenas and SDO inquiries
 - Disclosures to DODIG are shared with SDOs, DOJ civil and criminal

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.

Contract Termination

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- Termination for Default
 - Where a CO does not believe the contractor is meeting the contract requirements or discovers misconduct under the contract, the CO may proceed to terminate the contract for default
 - A termination for default means that the contract will be over and the contractor may be held liable for re-procurement costs and suffer a negative past performance evaluation.
 - Notice of Termination issued under FAR 49.402-3 constitutes a final decision

Bid Protests



- Allegations involving OCIs, PIA, PGE
 - Unequal Access to Competition Sensitive Information
 - Allegations involving SSI, BPI, NPI
 - Employment discussions or Solicitation of employment by certain Government personnel
 - Violation of post-employment restrictions for former Government personnel
 - Improper gifts, kickbacks or bribes

- Competitor has an OCI (See FAR 9.5)
 - Impaired Objectivity
 - Contract work involves evaluation of itself or related entity
 - Biased Ground Rules
 - Sets ground rules for competitive award of another contract by writing SOW or specifications
 - Unequal Access to Information
 - Access to non-public information provides unfair competitive advantage

- GAO provides recommendations to agencies
- The Court issues rulings that agencies must follow
- Before a recommendation or ruling, the agency may take corrective action that may result in the original awardee being:
 - Ineligible for award
 - Excluded from the competition
 - Found non-responsible
 - Terminated

DOJ Criminal Enforcement

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DOJ Criminal Enforcement Perspective

- DOJ can pursue criminal fraud cases in its discretion including Wire Fraud, False Statements, Conspiracy, Major Procurement Fraud, Bribery, Kickbacks, Procurement Integrity, Antitrust, etc.
- In October 2021 Dep. AG Lisa Monaco addresses 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 consideration to the same type of misconduct or that is factually related.
 - *Third*, companies 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.”
 - *Second*, “speed is of the essence.” If disclosures come too long after the misconduct, they reduce the likelihood that USG may be able to adequately investigate the matter in time to seek appropriate criminal charges against individuals.

DOJ Criminal Enforcement Perspective *(Cont.)*

- *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*, prosecutors must complete their investigations into the “responsible individuals” (by filing charges or deciding not to) before reaching a corporate resolution.
- *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.

DOJ Civil Enforcement

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Civil Enforcement Actions On The Rise

- Last year, DOJ recovered approx. \$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

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

Causes for Suspension & Debarment

- FAR 9.4 identifies many specific causes for S&D
 - Key is any improper conduct reflecting negatively on 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 ...)

Mitigating Factors & Remedial Measures Considered by SDOs

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

Sources of Suspension & Debarment Cases

- Investigators
- Auditors
- Contracting personnel
- Prosecutors
- Whistleblowers (competitors, contractor employees)
- Public Records: Civil judgments, indictments, plea agreements, deferred prosecution agreements, settlement agreements, and convictions
- News stories (proactively address issues w/ SDO)
- Contractor disclosures (voluntary and mandatory)

Effects of Suspension & Debarment

- Ineligibility for new contracts, including task orders
 - **May continue existing contracts and subcontracts**
 - But, as for existing contracts/subcontracts, may not exercise options or issue modifications that add work or extend duration
 - May not be awarded subcontracts in excess of \$35K (FAR 9.405-2) (***Caution: cannot break-up awards to circumvent dollar threshold***)
- May not conduct business w/ government as rep or agent of other contractors
- Listed on System for Award Management, which is available to the public
- Exclusion under FAR, results in exclusion under non-procurement rule & vice versa

Collateral Consequences of S&D

- Potential debarment on State/Local level
- Potential termination of ongoing contracts (government & commercial)
- Reputational damage and loss of goodwill
- Loss of revenue
- Potential loss of security clearances
- Contraction of credit and/or denial of loans

Collateral Consequences of S&D

(Cont.)

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- Reduction in size of business
- Delay/cancellation of growth plans
- Reduction in employees
- Loss of employees to competitors and/or layoffs
- Bankruptcy
- For individuals, loss of employment

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 Projected to Rise for 2023

- COVID had some impact in slowing S&D 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
- Investigation were hampered as a result of COVID; as a result, less investigative referrals to SDOs and less suspensions
- We predict agency SDOs developed fairly sizeable backlogs in 2020-2022, and we expect to see actions taken on these 2022-2024, which should lead to an uptick in activity
 - This inevitably will mean older cases are being acted on

IV. Enforcement of Cases Involving Unequal Access to Information Potentially Affording an Unfair Competitive Advantage

Enforcement of Cases Involving Unequal Access

- There is an intersection in these areas of law that could give rise to bid protests, contract terminations, suspension/debarment, civil FCA liability or criminal enforcement.
- Some cases involving unequal access are handled purely in the bid protest context; others pursued for contract termination or debarment; and even some pursued under the civil FCA or for criminal prosecution.
- The enforcement weapon used often appears to depend on the eye of the beholder – the role of the enforcement official looking at the conduct.
- Bid protest lawyers see grounds for protest; COs see protests and grounds to terminate for default; SDOs see questionable business practices questioning a contractor's integrity; DOJ seems civil FCA violations and/or crimes
- Accordingly, being aware of the compliance risks contractors face in handling sensitive information and how such can be pursued, may keep you from being the next story

Unequal Access OCIs and Bid Protests

- *NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511 (2011)
 - Protester alleged that awardee had BPI due to access to the agency's shared drive during the bidding process, which contained incumbent's labor rates.
 - The awardee had access due to separate ongoing contract.
 - The CO required the awardee to implement a mitigation plan, which "relied heavily upon [the awardee] promising to comply with procedures that the CO knew they had violated in the past."
 - COFC found the plan inadequate and sustained since "remedies adopted after-the-fact cannot be effective if they look only forward and fail adequately to address unequal access problems that have occurred in past."

Unequal Access OCI and Bid Protests

- *McCarthy/Hunt, JV*, B-402229.2, Feb. 16, 2010, 2010 CPD ¶ 68
 - U.S. Army Corps of Engineers (USACE) contracted with Joint Venture to prepare solicitation and evaluate proposals for a Fort Benning contract.
 - One year later, Joint Venture's parent company, AECOM, began negotiations to acquire JV member Ellerbe Becket (EB) and USACE issued the FB RFP
 - An AECOM executive learned that EB intended to pursue the Fort Benning contract as a subcontractor and the executive was concerned that negotiating the acquisition could create a potential OCI
 - The AECOM executive did not disclose this issue to CO because of an existing non-disclosure agreement (NDA) between EB and AECOM

Unequal Access OCI and Bid Protests

- *McCarthy/Hunt, JV*, B-402229.2, Feb. 16, 2010, 2010 CPD ¶ 68 (cont.)
 - USACE awarded the Fort Benning contract to an offeror that proposed EB as a subcontractor
 - AECOM acquired EB one month after USACE's award decision
 - Unsuccessful offeror filed protest alleging unequal access OCI because AECOM, through Joint Venture, had access to NPI regarding the USACE's priorities, preferences, and dislikes relating to the Fort Benning contract.
 - GAO sustained the protest and emphasized that the NPI would have been valuable to EB because the solicitation afforded offerors wide latitude to determine how to meet USACE's requirements.
 - EB argued that the NDA between AECOM and EB mitigated any potential OCI but GAO rejected this argument because there was no evidence of an OCI mitigation plan approved by the Contracting Officer.
 - There was no firewall to prevent Joint Venture personnel from learning of the potential EB acquisition or from disclosing NPI to EB.
 - Nor was there any record of the specific individuals who were aware of the merger negotiations, or of any physical or electronic access control measures.

Unequal Access OCI and Civil FCA Enforcement

- *Cape Henry Associates*, DOJ Press Release (May 20, 2022)
 - DOJ alleged contractor failed to disclose potential Unequal Access OCI
 - Contractor allegedly funded the direct labor of a subcontractor employee that was assisting the Navy for projects under the Navy SeaPort-e contract
 - At the same time, the contractor was submitting proposals to the Navy for the SeaPort-e contract
 - DOJ alleged that could affect the Contractor's funding and treatment in connection with project proposals
 - The solicitation required it to divulge "any potential conflicts of interest to maintain the integrity ..."
 - The Contractor settled under FCA for \$425,000



Unequal Access/PIA/NPI and T4D

- *CLC Constr. Co.*, ASBCA No. 59110, 20-1 BCA ¶ 37,584 (Apr. 15, 2020)
 - Appeal of U.S. Army’s termination for default where contractor allegedly violated the PIA when it received before contract award (1) the government’s internal cost estimate, and (2) the price of the lowest cost proposal submitted to the government
- *Litton Sys., Inc.*, B- 234060, May 12, 1989, 89-1 CPD ¶ 450
 - Recommending that “the integrity of the procurement system would be best served by a termination of the awardee’s contract” because of evidence that an agency official had passed to the awardee nonpublic information regarding technology developed by its competitor.

Unequal Access/PIA Concerns and Bid Protests

- *Dell Servs. Fed. Gov't, Inc.*, B-414461, June 21, 2017, 2017 CPD ¶ 192
 - Offeror informed CO that it obtained copies of incumbent's previous proposals.
 - CO prepared Procurement Impact Determination (PID), concluding that despite the release of the incumbent's previous proposals, there was be no adverse impact.
 - GAO sustained the incumbent's protest since the PID failed to consider the fact that the incumbent's proposals included detailed information relating to how the incumbent priced the existing contract, including:
 - Labor rates for work currently being performed
 - Staffing strategies and level of effort for performance of generic work that would be performed under follow-on contract; and
 - How the offeror obtained the incumbent's proposals.

Unequal Access/PIA Concerns and Debarment

- *Booz Allen Hamilton, Suspended*
 - In April 2011, BAH hired a retired Air Force Lt. Col. as a senior associate responsible for business development in military and civilian health markets.
 - He 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, he was privy to non-public information, which included information about source-selection, bids and proposals.
 - The Air Force alleged he brought an external hard-drive, containing sensitive information, with him on his first day of work at Booz Allen.

Unequal Access/PIA Concerns and Debarment

- Booz Allen Hamilton, Suspended (*cont.*)
 - In an email to colleagues, he shared information with the BAH capture team about an IT services contract that they were competing for.
 - That information allegedly provided the company with an unfair competitive advantage.
 - His supervisors allegedly failed to report this improper disclosure, and he continued to be involved in efforts to compete for the follow-on contract.
 - Ultimately, AF suspended the BAH office involved until an administrative agreement was reached avoiding debarment.

Unequal Access/NPI Concerns and Debarment

- A high-ranking agency official shared information w/ U-Buy's President John Smith concerning internal agency communications re U-Buy's contract. Smith and official discuss issues and strategy.
- U-Buy and President received Notice of Proposed Debarment after a whistleblower reported that the sharing of NPI by the government official.
- U-Buy entered into an Administrative Agreement to resolve the matter
- President lost his job and was criticized harshly in media coverage which quoted and showed his emails with the government official

Unequal Access/NPI Concerns and Debarment

- Demonstrated that President had done nothing legally wrong
 - Requirements to protect NPI rest upon the Government Official
 - While it may give the appearance of impropriety, it is not in and of itself illegal or violation of law that President received the information
 - SDO found that it reflected poorly on President's integrity and judgment
- Negotiated AA under which:
 - Smith had to exclude himself from work on government contracts for a period of time
 - Participated in intensive ethics and compliance training
 - Subject to quarterly reports and monitoring

Unequal Access/PIA/NPI Concerns and Debarment

- Gold Corp. is a small business providing waste removal services at DoD facilities
- The Government alleged in Notice of Proposed Debarment:
 - Receipt of government estimates (NPI) from a government employee
 - Receipt of internal agency email communications re sensitive NPI
 - Receipt of Technical Evaluation Factors prior to the solicitation being issued (SSI) from a government employee
 - Improper gifts given to gov't official

PIA & NPI Concerns and Debarment Enforcement

- Accepted responsibility for past events involving unequal access
- Explained that the events occurred long ago and at a time when company was just being founded and parties involved lacked sophistication and sensitivity
- Company and individuals involved were much more sophisticated today
- Demonstrated that company developed strong E&C program:
 - Enhanced Code of Ethics and Conduct and Government Contracting Compliance Policy
 - Targeted ethics training for owner
 - Created role of Ethics & Compliance Officer
 - Installed Ethics Helpline for Employees to report concerns/questions
 - Enhanced E&C training for all employees
- Demonstrated company's strong past performance record since the events
- In light of strong corrective actions taken and passage of time, SDO terminated action

Unequal Access, PIA, Bribes, Gifts, Criminal and Debarment Enforcement

Fat Leonard Saga

- 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.



Unequal Access, PIA, Bribes, Gifts, Criminal and Debarment Enforcement

- Mr. Francis exploited the intelligence for 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 debarments followed.



Unequal Access, PGE, PIA, Criminal & Debarment Enforcement

Darleen Druyun

- 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.



Unequal Access, PGE, PIA, Criminal and Debarment Enforcement

- A year later, Druyun pleaded guilty to awarding the contracts to Boeing in exchange for jobs for herself, her daughter, and son-in-law.
- She served a 9-month prison sentence and paid fines.
- The awards to Boeing were canceled.
- Boeing paid a \$615 million fine for its involvement in the scheme.
- Boeing's CFO was sentenced to 4 months in prison.



Unequal Access, Kickbacks, Criminal & Debarment Enforcement

Boeing Buyer Solicits Kickbacks from Small Subcontractors

- Several years ago, one or more Boeing buyers in SoCal were allegedly involved in a scheme to solicit kickbacks from local build-to-print subcontractors
- The buyer was alleged to have visited the subcontractors periodically seeking envelopes of cash in exchange for assistance in sharing info and continuing to award the small businesses subcontracts
- Ultimately, the buyers and some of small business owners were pursued criminally and entered into plea agreements
- Some of the small business subcontractors were later pursued for suspension and debarment

V. Best Practices in Ethics & Compliance Programs to Mitigate Being the Next Case

Best Practices in Ethics & Compliance

Core Components:

1. Values-based E&C programs
2. Day-to-day management of E&C Program by ECO/CECO
3. Leadership engagement and support of program w/ periodic messaging
4. Maintenance of ethics helpline to allow anonymous reporting
5. Compliance policies tailored to risk profile
6. Live periodic E&C training
7. Employee reporting policy

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

Core Components (Cont.)

8. Policies and procedures for investigating events
9. Periodic monitoring and auditing to assess compliance and gaps
10. Policies and procedures for assessing events for possible disclosure
11. Policies encouraging “root-cause” analysis and corrective actions
12. Disciplinary program
13. 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”

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

The Ethics Decision-making Tree

- Train employees on how to approach ethical decision-making:
 - 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?

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

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; over 50% of all S&D cases are against individuals
- 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.)*

- Typical considerations to have in mind when preparing a disclosure:
 - what happened
 - when did it happen
 - why it happened (i.e., the root cause of the event)
 - 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 such could be mitigated and if so, corrective actions implemented
 - And discussion of overall present responsibility, including E&C Program

Questions?

BakerHostetler



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