

MEMORANDUM FOR COMMAND COUNSELS
CHIEF COUNSELS
STAFF JUDGE ADVOCATES
PROCUREMENT FRAUD IRREGULARITIES COORDINATORS
PROCUREMENT FRAUD ADVISORS

SUBJECT: Procurement Fraud Advisors Update No. 38

1. **Message from the Chief, PFD:** On the personnel front, COL Robert C. McFetridge has been selected to be the Chief of Procurement Fraud Division (PFD) beginning in late June. COL McFetridge is currently in the senior service school position as the Department of Justice Fellow. The decision to fill this position with a senior service school graduate sends a positive message that the JAGC leadership is intent on maintaining a strong procurement fraud program. It is also a positive reflection on the job all you PFAs are doing in the field. The bottom line is, we are getting important results in important cases and it pays to invest in placing excellent people at PFD. Speaking of excellent people, we also received word that MAJ Kary B. Reed will be joining the PFD staff. MAJ Reed is currently a student in the 47th Judge Advocate Officer Graduate Course. She will be replacing MAJ Cheryl R. Lewis, who is awaiting word on her next assignment.

2. **Statutory Developments:**

a. The International Anti-Bribery and Fair Competition Act of 1998. Pub.L. 105-366, 112 Stat. 3302 (10 November 1998) amended the Foreign Corrupt Practices Act (FCPA), 15 USC § 78dd-1 *et seq.*, to implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions negotiated last year. The FCPA was amended to expand the illicit purposes covered for giving anything of value to a foreign official or political party. The definition of foreign official was expanded. Coverage was also expanded to apply the prohibited conduct to foreign as well as domestic concerns. (Mrs. McCommas)

b. The Department of Defense Appropriations Act for Fiscal Year 1999. Pub.L. 105-262, 112 Stat. 2279 (17 Oct. 1998) contains a provision at Section 8052 which requires compliance with the Buy American Act in using appropriated funds. Firms violating the provision shall be debarred. Implementing regulations are being drafted by agencies.

c. Ethical Standards for Federal Prosecutors. Section 801 of the Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year 1999, Pub. L. 105-277, 112 Stat. 2681 (21

Oct. 1998) added a new provision at 28 USC § 530B stating that an attorney for the Government shall be subject to state laws and rules, and local federal court rules, governing attorneys in each state where such attorney engages in that attorney's duties to the same extent and in the same manner as other attorneys in that state. (See article in paragraph 5 of this *Update* for a complete discussion.)

3. Recent PFD Cases:

a. Computer Firm and Employees are Convicted and Debarred. Computer Systems Development Corporation (CSDC), Jose Luis Hernandez, Araselia Hernandez, Jose Jesus Hernandez, and Comtel International Corporation (Comtel) were convicted in the U.S.D.C., E.D. Va., and debarred by the Army for defrauding the Government under a CECOM contract for automation and telecommunications support. On 9 October 1998, Jose Jesus Hernandez pled guilty to one count of obstruction of proceedings before a government agency (18 U.S.C. § 1505) and was sentenced to probation and a fine. On 16 October 1998, each of the remaining three defendants was found guilty of all counts of the indictment to include: one count of conspiracy, 36 counts of major fraud against the Government, and one count of obstruction of proceedings. CSDC was sentenced to pay an assessment of \$10,200; a fine of \$10,000; and restitution of \$100,286. Mr. Martinez was sentenced to 27 months imprisonment to be followed by three years probation. Mrs. Martinez was sentenced to 21 months imprisonment to be followed by three years probation. The convictions were based upon inflated invoices for computer components. Special Assistant United States Attorney Major Denise Council-Ross served as trial counsel, together with AUSA Tom McQuillan. She received excellent support from NCIS Agent Alma Peterson, CECOM's Contracting Officer's Representative, Andrea Montedoro, and Senior DODIG Auditor Steve Silverstein.

b. Update on FMC Case: (See *PFA Update 35* for original report on the FMC case). During FY 1998, Army civil, criminal, and administrative recoveries, including judgments entered but under appeal, exceeded \$167 million. Approximately one half of the total resulted from a single case -- the Bradley Fighting Vehicle (Bradley) litigation. In 1986, Mr. Henry Boisvert (Relator) filed a *qui tam* lawsuit against FMC Corporation (FMC), his former employer. The complaint alleged that FMC knowingly misrepresented that the Bradley complied with contract specifications concerning its swim capability. After a four-month trial, in April 1998, a federal jury returned a verdict against the company for \$125 million in damages. Statutory penalties raised the judgment to over \$300 million. On 24 December 1998, the court reduced amount of the verdict and entered a judgment of slightly over \$87 million. In January 1999, FMC filed a notice of appeal. Subsequently, Mr. Boisvert filed a notice of cross appeal. (LTC Hoffman)

c. Tank Removal Contractor Debarred, Paul Calvo and LandRec, Inc. (LandRec). DA debarred Mr. Paul Calvo, president and owner of LandRec, for taking fuel without proper authorization and making false statements to CID concerning the theft. DA debarred LandRec based on imputation of

the misconduct of Mr. Calvo and affiliation with Mr. Calvo. LandRec sub-contracted with J.C. Construction Company (JCCC) to do some fuel tank removal work at Fort Jackson, South Carolina. LandRec was under contract to remove fuel and the fuel tanks adjacent to tank 1700 but was not contracted to remove any fuel from tank 1700. However, LandRec removed the remaining 10,000-gallons of fuel from fuel tank 1700, a 250,000-gallon fuel tank, without proper authorization or supervision, from Fort Jackson's Petroleum Oil Lubricants area. LandRec was also required to have someone from JCCC on hand to supervise all work LandRec performed. However, the fuel was removed from tank 1700 without any supervisory representative from JCCC on site. On several occasions government officials asked Mr. Calvo/LandRec to return the fuel. However, Mr. Calvo did not return the fuel until JCCC informed Mr. Calvo that he would not be paid \$10,000 until the fuel was replaced. Upon questioning by CID agents, Mr. Calvo repeatedly falsely claimed that individual government employees authorized him to remove the additional fuel. PFD thanks to PFA Robert Gay of Fort Jackson who assisted in preparing the case. (MAJ Lewis)

4. Developing Issues in Procurement Fraud Cases:

a. Release of Information in *Qui Tam* Cases. The Procurement Fraud Division is currently involved in several cases in which a *qui tam* suit has been filed with the court and the United States has elected not to intervene as a party to the suit. This raises the question of what the Government's responsibility is in regard to the release of official information and the appearance of present and former DA personnel as witnesses in these cases. AR 27-40 is DA's regulation governing litigation, and Chapter 7 specifically addresses these issues.

The general policy is that the involvement of present or former DA personnel in private litigation is a personal matter, unless (1) the testimony involves official information (2) the witness is to testify as an expert or (3) the absence of the witness from duty will interfere seriously with the completion of a military mission. Present DA personnel will refer all requests for testimony in private litigation through their supervisor to the appropriate SJA or legal adviser. Former DA personnel need only advise the appropriate SJA or legal adviser in instances involving official information or concerning expert testimony.

In instances concerning official information, the matter will be referred to the SJA or legal adviser serving the organization of the individual whose testimony is requested. If that individual is unable to resolve the matter, it will be referred for approval or action to HQDA, the Litigation Division. Matters involving procurement fraud, including *qui tam* cases, will be submitted to the Procurement Fraud Division. If the deciding official determines that the information may be released, the individual will be permitted to comply. Note that a JA or DA civilian attorney should be present during any interview or testimony to act as legal representative of the Army.

The general rule regarding expert testimony is that present DA personnel will not provide, with or without compensation, opinion or expert testimony either in private litigation or in litigation in

which the United States has an interest for a party other than the United States. Additionally, former DA personnel will not provide, with or without compensation, opinion or expert testimony concerning official information, subjects or activities either in private litigation or in litigation in which the United States has an interest for a party other than the United States. There is an exception to the general rule if a requester can demonstrate exceptional need or unique circumstances and the anticipated testimony will not be adverse to the interests of the United States. Then Litigation Division may grant special written authorization. There are exceptions for medical personnel as well (Chapter 7-paragraph 10c).

Remember that even if the United States isn't a party to the suit, our responsibilities have not ended. (Sheryl Anne Butler)

b. More on DOJ Contacts with Represented Persons. The controversy continues between the American Bar Association, Congress, and the Justice Department on the issue of when DOJ attorneys may contact represented persons (and in particular, when DOJ attorneys may contact contractor employees without the knowledge of corporate counsel).

Rule 4.2 of the ABA Model Rules of Professional Conduct states that in representing a client, a lawyer may not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. Most states and the District of Columbia have adopted similar rules. The Army follows ABA Rule 4.2 verbatim (*see* Rule 4.2, Army Regulation 27-26, Rules of Professional Conduct for Lawyers).

In 1994, the Justice Department issued its own regulation stating that DOJ attorneys could, in a number of circumstances, contact people they know to be represented by counsel (28 C.F.R. Part 77). In a case involving DOJ contacts with contractor employees, the 8th Circuit invalidated the Justice Department regulation, putting federal prosecutors in that circuit squarely under state ethics rules. U.S. ex rel. O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252 (1998).

The Citizens Protection Act, supported by the ABA, the American Corporate Counsel Association, and the National Association of Criminal Defense Lawyers, seeks to codify the result in O'Keefe. The Act, which is due to become effective 19 April 1999, simply says that "an attorney for the government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State" (P.L. 105-277 § 801; 28 U.S.C. § 530B). On 19 January 1999, Senator Orrin Hatch introduced legislation (S.250) that would exempt federal prosecutors from complying with state ethics provisions that interfere with federal law enforcement. Time will tell whether Senator Hatch will be successful in derailing the Citizens Protection Act. The Act, if it becomes effective, is likely to make it more difficult to investigate procurement fraud cases. (Mr. Greenway)

c. Recovery of Funds under Army Contracts in Fraud Cases: Normally, restitution of funds, whether civil or administrative, are payable to the U.S. Treasury and deposited in the general fund, as required by Congress. Most funds are now electronically transferred to the U.S. Treasury and the Army is given credit for the funds, *if* the appropriate Army fund code is provided. Over the past ten years, PFD has made several unsuccessful attempts to get this process changed so the funds are returned direct to the losing installation.

One exception - where the contract is still open! Funds can be returned directly to the installation, *if* the required fund codes and accounting classifications are provided. This requires an Electronic Fund Transfer (bank wire code), installation bank account number, and the contract number under which the loss occurred. When funds are returned, the funds may have to be de-obligated for the FY in which they were spent and re-obligated for the current FY.

In one particular case, the AUSA sought PFD approval of a civil settlement. PFD approved the settlement, provided the funds would be returned direct to the losing installation, instead of the U.S. Treasury. When the AUSA was ready to distribute funds, PFD was unable to obtain and provide the bank wire code, bank account number, and accounting classification in order to return the funds to the installation.

It appears there may not be a consistent system and each installation may differ in the handling of these matters. Please work with PFD and your installation resource managers in finding ways to lawfully get funds back to defrauded commands. If you want money returned to the installation, not the U.S. Treasury, you need to provide PFD with bank wire code, account number, and accounting classification. (Ms. Proffitt)

d. Reporting Old Misconduct – An Obstacle to Debarment: In one case, the investigation took five years. Criminal prosecution was declined. Finally, in January 1999 (10 years later), a civil settlement was reached with the parent company which will pay about \$500,000. PFD may not be able to take any administrative action. The subsidiary, division, or branch, which did the misconduct, is no longer operating. The Suspension and Debarment Official is not likely to sign off on a case that old, or cases where the Army continues to do business with the firm. In such cases, contractors can claim they are presently responsible because Army continued to do business with them.

To assure the prompt completion of administrative actions, as soon as fraud is suspected, the contracting officer (CO) must notify the PFA who must provide a flash report to PFD. Second, the CO and PFA should coordinate, prepare and forward to PFD the report required by the Defense Acquisition Regulation Supplement (DFARS) 209.406-3. Documents substantiating evidence of misconduct must be attached to the report. Don't wait to see if criminal or civil action will be taken. PFD coordinates with the Assistant United States Attorney (AUSA) before any action is taken to insure the action won't interfere with AUSA's case. When the PFA or PFD requests an

investigation, the PFA must stay in the loop with all pertinent parties. PFAs should go with investigator to present case to criminal and civil AUSAs. The PFA must keep abreast of the current status and keep PFD informed on the case status. If any of you encounter a problem with coordination or cooperation, please let PFD know. (Ms. Proffitt)

e. Considerations in Debarment. Well, the investigation discovered fraud. The contracting command has pursued the available contract remedies. The U.S. Attorney's office has reviewed the case for criminal and civil prosecution. What's left to do? Should we debar the contractor from future government contracting? What factors do we consider when deciding whether to propose a contractor for debarment? Why do we sometimes decline to pursue debarment when we have clear evidence of fraud? Why do we need so much information about your case?

We need a "contractor". The FAR's debarment provisions define a "contractor" as a person or organization that 1) submits offers for a government contract or subcontract, 2) is awarded a government contract or subcontract, 3) *reasonably may be expected* to submit offers for a contract or subcontract, 4) *reasonably may be expected* to be awarded a contract or subcontract, or 5) conducts business with, or *reasonably may be expected to conduct business with*, the government on behalf of another contractor. Therefore, we need evidence that the person or business meets the definition before debarment is appropriate.

Debarment is not punishment. It is frustrating to spend time and money on an investigation, only to find that contract, criminal, and civil remedies are not available. It is tempting to view debarment as a means to avenge a wrong when nothing else can be done. But debarment is not designed to punish the wrongdoer; its sole purpose is to *protect the Government from contractors who are not presently responsible*.

Present responsibility. We look at several factors when considering whether a contractor, despite its wrongdoing, is one the Government should do business with in the future. How serious was the misconduct? How frequent was it and how long did it last? Does the contractor have a history of wrongdoing? Has the contractor accepted responsibility for its actions? Did the contractor voluntarily disclose the wrongdoing to the government? Did the contractor cooperate with the Government during the investigation and beyond? Has the contractor "made things right", by making restitution and by paying fines and penalties? Has the contractor disciplined the people involved? Has the contractor changed its organizational structure or taken remedial measures to prevent future misconduct? Did the Government continue to do business with the contractor long after learning of the misconduct (making it hard to argue that the contractor is not presently responsible)?

We need proof. A debarment proposal requires clear, documented proof of the misconduct. If we can't understand what happened, it is unlikely that others will. Sworn statements, relevant documents, and confirming/supporting evidence are best. Speculation or summary reports are not enough. Even with a conviction or a civil judgment, we need information about the facts of the case

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so the debarment official can make an informed decision. In some cases, debarment may not be possible when crucial evidence is tied up in grand jury proceedings. Finally, *the contractor gets a copy of all evidence supporting the debarment*; if you have evidence you do not want to disclose to the contractor, we cannot use that evidence for the debarment.

If we don't do it right, the Army can be sued. The contractor can ask a federal court to review the debarment decision. The debarment decision can be overturned if we have not followed the required procedures or if the decision is found to have been arbitrary or an abuse of discretion. If we lose in court, the Army may be liable for the contractor's legal fees. (Mr. Greenway)

5. **Contacting PFD:** PFD's current office roster with telephone numbers and e-mail addresses is attached. Mrs. Christine S. McCommas is the editor of the Update. She may be contacted at DSN 426-1542, at (703) 696-1542, or at MccomCS@hqda.army.mil.

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