

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

SUBJECT: Procurement Fraud Advisors Update No. 40

1. **Message from the Chief, PFD:** It is indeed a pleasure to serve with the great team of investigators, special agents, contracting officers, attorneys, and support staff who constitute the Army's first line of defense against procurement fraud. I spent last year at the U.S. Department of Justice where I served as Special Counsel to the Assistant Attorney General for the Civil Division. That unique assignment, part of the U.S. Army's War College Fellowship Program, provided valuable insight into how well your efforts to counter fraud, waste, and abuse in the procurement process have succeeded in civil and criminal enforcement actions by the Justice Department. I was also impressed with just how big the business of fraud can be if the government procurement process is left unguarded.

All of the active duty military attorneys in the Army's Procurement Fraud Division (PFD) are new. LTC Dave Franke is the next senior military attorney in the office and is the Branch Chief for Litigation Branch - East. He came to PFD from Contract Appeals Division (CAD), and possesses a wealth of experience in contract law. He also previously served with the Criminal Fraud Section at the Justice Department. LTC Jeff Caddell arrived from West Point and served briefly with PFD this summer until TJAG personally selected him to fill a critical command judge advocate vacancy at PERSCOM. During his short tenure at PFD, LTC Caddell made significant contributions to the office and improved our automated database. Fortunately, his unexpected loss was quickly filled by the arrival of LTC Mike Fucci from the Army Chief of Staff's Technology Management Office. LTC Fucci is the new Branch Chief for Litigation Branch - West. MAJ Kary Reed came to PFD from the JAGC Graduate Course and replaced MAJ Paul DeAgostino, who is now working at CAD. Finally, CPT Daryl Witherspoon arrived from Fort Stewart, Georgia, and replaced MAJ Cheryl Lewis, who is now at Fort Hood, Texas.

Despite all the summer transitions of active duty military personnel, the wheels never fell-off the PFD train due to the outstanding efforts and expertise of our civilian attorneys and paralegals. Mrs. Chris McCommas, the senior civilian attorney in the office, has been with PFD since 1988, previously having served as an attorney advisor with the U.S. Army Materiel Command (AMC). Mrs. McCommas serves as the Army's representative to the Debarment, Suspension and Business Ethics Committee of the Defense Acquisition Regulatory Council, and the Suspension and Debarment Interagency Coordinating Committee. Mr. Gordon Bobell, who has been with PFD since 1990, "almost retired" last year to pursue the siren of private practice. Fortunately for PFD,

JALS-PF

SUBJECT: Procurement Fraud Advisors Update No. 40

this former police officer, high school teacher, deputy city and county district attorney, and retired Army signal officer saw some noneconomic value in his continued selfless service to the government and remained with PFD. We are certainly glad he did. Mr. Curt Greenway has been a litigation attorney with PFD since 1997. He is a former Army AG officer who engaged in private practice and served as an assistant county prosecutor in Ohio before returning to active duty and serving as a JAGC officer until his retirement in 1997. Ms. Sheryl Butler has been a litigation attorney with PFD since 1998. Previously, she worked as an attorney with the Virginia Department of Corrections, served five years on active duty with the Army JAG Corps, and spent four years as a trial attorney for the Army's Regulatory Law Office. Ms. Zetta Proffitt is the Paralegal Specialist for Litigation Branch - East. She has been with PFD since 1988, having served in both the private sector (abstract, title insurance, and real estate industry) and with the Government (AAFES, USMC, National Science Foundation, Department of Agriculture, and FAA). Ms. Proffitt has a B.S. degree in business. Mr. Greg Campbell is the Paralegal Specialist for Litigation Branch - West. He joined PFD in 1988, having previously served as a legal technician at the Armed Forces Institute of Pathology. Mr. Campbell has earned a law degree from Howard University School of Law. Finally, PFD's Legal Technician, Mr. Brian Thorpe, who had been with PFD since 1988, recently departed to accept a promotion and a position with the Contract Appeals Division. Mr. Thorpe's organizational skills, legal technician expertise, and automation talents will be sorely missed.

Having reintroduced the PFD team, I have two administrative announcements. First, all new PFAs and PFICs should register to attend the Army's Procurement Fraud Course at The Judge Advocate General's School in Charlottesville, Virginia. Reservations should be submitted through your personnel office using the Army Training Requirements and Resources System (ATRRS). The course was rescheduled from its less convenient time in the Fall for procurement fraud advisors (the end of the fiscal year), and it is now scheduled for 31 May to 2 June 2000. The 3-day course of instruction is geared for personnel assuming procurement fraud advisory responsibilities, rather than for those with substantial prior experience or those who have attended the course recently (in the past 3 years). Space is limited to 150 attendees; therefore, you should register early to reserve a space.

Second, please advise us if you are aware of a Procurement Fraud Irregularities Coordinator (PFIC) or a Procurement fraud Advisor (PFA) who did not receive a copy of this update. Please telephone or e-mail Mr. Gregory Campbell to receive a copy of the Update. Mr. Campbell's telephone number and e-mail address are listed in the PFD roster attached to this Update. Eventually, we plan to place the Update on the Army's reconstructed Judge Advocate General's Corps website (JAGCNET), which is replacing the LAAWS BBS. We also have plans to create our own webpage. Until these goals are realized, we will rely upon our e-mail transmissions to the MACOM addresses listed in our Procurement Fraud Advisor's Directory. Due to the transitory nature of personnel assigned to PFIC or PFA duties, some e-mail addresses may not be current. We have attached a copy of our current PFA Directory to the e-mail we send to the MACOM PFICs in order to assist them with further dissemination of this Update. We will fax our PFA Update to

those who do not have access to e-mail or to the JAGCNET.

2. Regulatory Developments: Executive Order 13126 Restricts the Federal Government's Purchase of Goods Made by Forced or Indentured Child Labor. On 12 June 1999, President Clinton issued an executive order titled "Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor." The order resulted from evidence that use of child labor is steadily rising and concerns that child slavery remains a serious problem, particularly in South Asia and in Africa. The federal government purchases millions of dollars of products from industries that are known to rely on forced or indentured child labor. The order directs the Labor Department to publish within 120 days a list of products, identified by country of origin, for which there is a "reasonable basis to believe have been mined, produced, or manufactured by forced or indentured child labor." Whenever a contracting officer determines that forced or indentured child labor has been used to produce one of the products; the contracting officer must refer the matter for investigation. The head of the agency may terminate a contract or suspend or debar a contractor that has furnished products that have been mined, produced, or manufactured using forced or indentured child labor. The Federal Acquisition Regulatory Council has been tasked with issuing proposed regulations within 120 days to implement the order. (Mrs. McCommas)

3. Army Procurement Fraud Cases:

a. Government Employee Who Solicited a Bribe Debarred - John P. Seidler. On 19 January 1999, Mr. John P. Seidler pled guilty to one count of Bribery of Public Officials and Witnesses (18 U.S.C. § 201(b)(2)(B)). He was sentenced to six months home detention, three years probation and was ordered to pay a \$5,000 fine and \$100 special assessment fee. Mr. Seidler was the Chief of the Quality Assurance Section, Construction Branch, United States Army Corps of Engineers (COE) Jacksonville District, temporarily assigned to Puerto Rico to help in the disaster relief process after Hurricane George. Mr. Seidler solicited a bribe from Mr. Robert Isakson, managing Director of DRC, Inc., a company under contract with COE to remove hurricane debris. Mr. Isakson informed the FBI, whereupon he was wired for sound by the FBI and provided with \$15,000 in marked bills to deliver to Mr. Seidler. At their final meeting, Mr. Seidler gave Mr. Isakson unauthorized information to assist him in negotiating with the contracting officer, and in return, Mr. Isakson paid Mr. Seidler with the marked bills. Mr. Seidler was arrested by the FBI and admitted to soliciting the bribe from Mr. Isakson. Mr. Seidler was terminated from his employment with the COE and he was debarred for three years as a result of this misconduct.

Thanks to Special Agent Dave Brotherton, Florida Field Office, USACIDC, for bringing this case to the attention of PFD and providing all the pertinent information and documents in a timely manner. (Ms. Butler)

b. UniGroup, Inc. (UG), DoD Common Carrier, Enters Administrative Settlement Agreement

with Army. The Army has entered into a settlement agreement with UG, a common carrier providing freight and household goods moving services to DoD. UG recently purchased Mayflower Transit, Inc. (Mayflower), which provided transportation services to the Department of Defense (DoD) and its agencies during 1997 and 1998 for the movement of personal property, household goods, and freight for military personnel. Between 1 April 1997 and 31 May 1998, Mayflower submitted a significant number of duplicate SF 1113s, Public Voucher for Transportation Charges, to DFAS requesting payment for transportation services rendered to DoD. The submission of the duplicate SF 1113s by Mayflower resulted in overpayments totaling approximately \$1,142,562. UG subsequently discovered the overpayments and voluntarily refunded the full amount to the United States. The administrative settlement agreement ensures that procedures are in place to prevent double billing in the future. UG has also agreed to a civil settlement with the U.S. Attorney's Office for the Southern District of Indiana and will pay damages in the amount of \$765,000.

Thanks to Dan Rothlisberger, our PFA at the Military traffic Management Command (MTMC), for his assistance in bringing this case to our attention. (Ms. Butler)

4. Developing Issues in Procurement Fraud Cases:

a. New Professional Ethics Requirements for Special Assistant U.S. Attorneys and other Attorneys Acting with Justice Department's Authorization. As we reported in PFA Update #38, the "McDade Amendment," which took effect on 19 April 1999, subjects a government attorney to the state laws, professional ethics rules, and local federal court rules of the states in which the attorney *engages in his or her government duties* (28 U.S.C. § 530B). The statute is directed to Justice Department attorneys, but includes any attorney (1) appointed as a Special Assistant U.S. Attorney or (2) "employed" by the Department of Justice and authorized to conduct criminal or civil law enforcement proceedings on behalf of the United States (28 CFR §77.2(a)).

The statute was enacted, in part, over a controversy regarding the Justice Department's contacts with persons represented by legal counsel. The ABA Model Rules of Professional Conduct state 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 other lawyer's consent or is authorized by law to do so. Most states and the District of Columbia have similar rules. The Army adopted the ABA rule verbatim (Rule 4.2, Army Regulation 27-26, Rules of Professional Conduct for Lawyers). A 1994 Justice Department regulation, however, attempted to exempt DOJ lawyers from state ethics rules that prohibit unauthorized contact with represented persons. The 8th Circuit invalidated the Justice regulation in a case involving DOJ contacts with employees of a defendant corporation, 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 (8th Cir. 1998)). The McDade Amendment seeks to codify O'Keefe. In response to the McDade Amendment, the Justice Department has established a Professional

Responsibility Advisory Office, which has provided training on the amendment for its attorneys, and has published an interim final ethics rule to replace the regulation O'Keefe invalidated (64 Fed. Reg. 19273, 20 April 1999). Army lawyers who are Special Assistant U.S. Attorneys or who litigate criminal or civil cases with the Justice Department need to be familiar with the new ethics requirements and should seek training and advice on the McDade Amendment from the Justice Department office they support.

The McDade Amendment does not specifically apply to investigative agents, although under the DOJ interim final rule agents *operating under the direction of a covered attorney* must conform their conduct to McDade to avoid creating ethical problems for the attorney. This rule will affect the way in which the Army Criminal Investigation Command and the other defense investigative organizations conduct their investigations. (Mr. Greenway)

b. Court Rules that *Qui Tam* Suits Cannot be Based upon Information Obtained via FOIA. The Third Circuit Court of Appeals ruled on 30 July that *qui tam* suits under the False Claims Act may not be based upon information that the plaintiff obtained through a Freedom of Information Act (FOIA) request. United States ex rel. Mistick PBT v. Pittsburgh Housing Authority, No. 97-3248 (3d Cir., 30 July 1999). The court stated that a FOIA disclosure is a “public disclosure” within the meaning of 31 USC§ 3730(e)(4)(A), which bars False Claims Act suits based upon such disclosures unless the plaintiff is the attorney general or an “original source” of the information. Because the *qui tam* relator learned of the allegedly misrepresented facts through its FOIA request, it was not an original source of the information, and its *qui tam* suit was barred, the court ruled. The majority cited a Ninth Circuit decision and three district court decisions in support of its holding.

The Chief Judge dissented, arguing that materials obtained through a FOIA request do not constitute a “public disclosure” because “a government agency’s act of locating and duplicating records for a single FOIA requester is fundamentally different from the disclosure of discovery material in civil litigation,” which the Third Circuit has held to be a public disclosure.

The dissent closely parallels a July 16 letter to Attorney General Reno from Sen. Charles Grassley and Rep. Howard Berman, the chief architects of the 1986 amendments for the False Claims Act which established the bar, and who complained that the courts have misinterpreted the public disclosure bar by applying it too broadly. (LTC Franke)

c. Conviction for Progress Payment Fraud Vacated. On 2 April 1999, in the case of United States v. Gatewood, 173 F.3d 983 (6th Cir., 1999), the court vacated a contractor’s conviction for violation of the false statement provisions of Title 18 U.S.C. § 1001, predicated on two separate false certifications under the Prompt Payment Act. The ultimate issue in the case centered on a general ambiguity in the required certification language. This brief note explains the ambiguity and offers revised certification language for use in construction contracts subject to FAR 52.232-5 and

JALS-PF

SUBJECT: Procurement Fraud Advisors Update No. 40

52.232-27.

Mr. Gatewood, the owner and operator of G & L Contractors, was awarded a Navy construction contract at the Naval Air Station in Millington, Tennessee. Pursuant to this contract, Gatewood signed two separate Prompt Payment Certifications stating in pertinent part as follows: “I hereby certify, to the best of my knowledge and belief, that ... payments to subcontractors and suppliers have been made from previous payments received under the contract.”

Based on these certifications, Gatewood received two payments from the Government, totaling over \$23,228. In reality, some of Gatewood’s subcontractors had not been paid the full amount due under their subcontracts. A federal grand jury indicted Gatewood on two counts of making a false statement to the Navy in violation of 18 U.S.C. § 1001. Count 1 of the indictment alleged that Gatewood knowingly and willfully made a false statement,

in that he certified that he had made payments to subcontractors and suppliers from previous payments received under a contract with the United States Navy when in truth and in fact as he then well knew he had not made full payments to the subcontractors and suppliers from previous payments received

The court noted that a prosecution under Section 1001 for making a false statement cannot be predicated on an ambiguous question where the response may be literally and factually correct. Here, Gatewood had made some payments, although not full payments as the indictment alleged. Thus, the court saw a direct conflict between the language of the certification and the allegation of not making full payments. In the court’s view, “certifying that one has made payments to subcontractors is not inconsistent with having yet to pay the subcontractors in full.” The court vacated the conviction and remanded the case with orders that the indictment be dismissed.

The court suggested that the certification language should be changed if it were intended to ensure that all payments then due the subcontractors had been made. The court even offered by way of an example, the following language: “I hereby certify, to the best of my knowledge and belief, that . . . all payments due to subcontractors and suppliers at the time of the last payment received under the contract have been made.”

The certification language that Gatewood used in his two requests for payments came from FAR 52.232-5, which requires certification to accompany each request for a progress payment. Using the guidance provided in Gatewood, a revised certification form might look like the sample provided herein (Enclosure). The language that the court found inadequate is still mandated by the FAR. Unless or until the FAR requirements are altered to account for this decision, the suggested revised form should only be used with the knowledge and approval of a supervising contract attorney-advisor. (LTC Caddell)

5. Defense Industry Initiative: What is it and what does it do?

During June 1999, three attorneys from the Army's Procurement Fraud Division were invited to attend the Defense Industry Initiative (DII) "Best Practices Forum" in Washington, DC. We observed, first hand, the attitude of the major United States defense industry corporations in regard to ethical business practices. This article will explain the genesis of DII and the impact this type of program has on the defense industry in United States.

DII was created in the mid-1980s after the environment surrounding the defense industry had become, or at least had appeared to become, unhealthy and suspect in the eyes of the American public. Because of this public concern, President Ronald Reagan, in July 1985, asked a former Deputy Secretary of Defense and present Chairman of Hewlett-Packard Corporation, David Packard, to chair an independent Blue Ribbon Commission on Defense Management. Known as the Packard Commission, this group was tasked to study defense management and make recommendations for streamlining and improving that industry. Specific focus was placed upon the budget process, procurement, organization and operation, and legislative oversight.

On February 28, 1986, the Packard Commission released an interim report stating that federal regulation alone might have limited effect in achieving the recommendations it had set forth. Government regulation in conjunction with corporate self-governance might be the best way to effectively address "the unique problems and procedures incident to defense procurement. To accomplish effective self-governance, defense contractors must therefore create ethical codes of conduct and implement internal corporate controls to allow for monitoring the development and application of the codes."

As a response to the Packard's Commission's interim report, early in 1986, representatives from 18 major defense contractors met and drafted six principles that subsequently became known as the "Defense Industry Initiative on Business Ethics and Conduct." The signatory companies pledged to promote ethical business conduct through the implementation of policies, procedures, and programs that would focus on and create:

- (1) Codes of ethics;
- (2) Ethics training;
- (3) Internal reporting of alleged misconduct;
- (4) Self-governance through the implementation of systems to monitor compliance with federal procurement laws and the adoption of procedures for voluntary disclosure of violations to the appropriate authorities;

- (5) Responsibility to the industry through attendance at Best Practice Forums; and
- (6) Accountability to the public.

These six principles were considered essential by the signatories to restore public confidence in the defense industry. The Government had begun the process by forming the Packard Commission; defense industry commercial companies showed their desire to participate by carrying the initiative forward through the development of the DII. Twenty-four companies had become signatories to the DII by the time the Packard Commission had released its final report in June 1986. The number stood at 50 members by May 1999. This group includes nearly all of the top 25 defense contractors and represents nearly half of all major defense contract awards.

A steering committee of senior executives from the signatory companies established policy for the DII. The steering committee was supplemented by a "working group," which was tasked to analyze policy issues and to carry out the programs of the DII. The Best Practices Forum was created to promote defense industry-wide cooperation among the DII members, to allow them and invited guests to share experiences, and discuss business conduct and compliance with laws and regulations. The initial forum was held in Washington DC on October 30-31, 1986. Annual forums have been held every year since that date.

DII, through the annual Best Practice Forums, has attempted to establish an ethical environment in which its members conduct business. The attitude of its members during the 1999 Forum was one of genuine enthusiasm; they were not merely "going through the motions" with disingenuous concern. Ethical responsibility is good for business because it assists in supporting a healthy business environment. DII demonstrates that the leaders of the defense industry are committed to doing business in accordance with the highest standards of business conduct. Their present and future success will serve as an example for defense industry companies not yet involved with the DII and, as a result, the membership of the DII should show healthy growth. Ideally, each member of the DII will benefit from membership (thus encouraging membership growth); public confidence will be restored; and, most importantly, the industry upon which the national defense rests will remain strong, efficient, and effective. (Mr. Bobell)

6. PFD on the Web. As stated in Update #39, we were working to post useful procurement fraud program information on the Army Judge Advocate General's Corps website (www.jagcnet.army.mil). We intend to post the PFD staff directory, a directory of Army PFAs world-wide, recent issues of the Procurement Fraud Advisors Update, the Procurement Fraud Course deskbook, an outline for your use in teaching procurement fraud classes, procurement fraud references, and links to other sites of interest. While this effort has not progressed as quickly as we would like due to the JAG Corps' transition from the LAAWS BBS to JAGCNET, it is still a priority for this office.

JALS-PF

SUBJECT: Procurement Fraud Advisors Update No. 40

7. **Contacting PFD:** PFD's current office roster with telephone numbers and e-mail addresses is attached. Our e-mail addresses are new, reflecting HQDA's use of first and last names in all addresses. Mrs. Christine S. McCommas is the editor of the Update. Please contact her with questions regarding the content of articles appearing in the Update or with items for publication. Mr. Gregory Campbell, paralegal, is our POC for requests to receive the Update. Ms. Zetta Proffitt, paralegal, is our POC for changes to our PFA Directory.

Encls

ROBERT C. MCFETRIDGE
COL, JA
Chief, Procurement Fraud
Division

Enclosure

Prompt Payment Certification
I. Under Fixed-Price Construction Contract
[FAR PART 52, Section 52.232-5 & 52.232-27]

1. Contractor Name, Address & Phone: _____

2. Invoice Date: _____
3. Contractor Number: _____
4. Description of Work or Services Performed (e.g. see attached invoice):

JALS-PF

SUBJECT: Procurement Fraud Advisors Update No. 40

5. Delivery and Payment Terms (e.g. prompt payment discount terms):

6. Name, address, and telephone number of Contractor's Payment Recipient:

7. Name, address, and telephone number of Contractor's contact for defective invoice:

8. Certification: I hereby certify, under penalty of law, that to the best of my knowledge, and belief, that:

- a. The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;
- b. All payments due to subcontractors and suppliers at the time of the previous payments received under the contract have been made, and timely payments due will be made from the proceeds of the payments covered by this certification, in accordance with sub-contract agreements and the requirements of chapter 39 Title 31, United States Code; and
- c. This request for progress payments does not include any amounts, which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract.

[False or fraudulent certification is subject to criminal & civil punishment, and administrative action.]

Signature: _____ Title: _____

Name: _____ Date: _____

PROCUREMENT FRAUD DIVISION (JALS-PF) -- (703) 696-1550

MCFETRIDGE, Robert C., COL (Chief) Robert.McFetridge@hqda.army.mil 696-1550
Fax Line (Non-Secure)696-1559

(Litigation Branch -- East)

FRANKE, David C., LTC (Branch Chief) David.Franke@hqda.army.mil696-1547
MCCOMMAS, Christine S. (Litigation Attorney) Christine.Mccommas@hqda.army.mil 696-1542.....
WITHERSPOON, Daryl, CPT (Litigation Attorney) Daryl.Witherspoon@hqda.army.mil 696-1552
BUTLER, Sheryl A. (Litigation Attorney) Sheryl.Butler@hqda.army.mil.....696-1544
PROFFITT, Zetta M. (Paralegal) Zetta.Proffitt@hqda.army.mil.....696-1545

JALS-PF

SUBJECT: Procurement Fraud Advisors Update No. 40

CHILD, MICHAEL S, LTC.....(202) 307-0237
Commercial Litigation Branch (Fraud), Civil Division
U.S. Department of Justice
Room 3547, Main Justice Building
P.O Box 261, 10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Fax Line (Non-Secure).....(202) 616-3085

TELLITOCCHI, Mark A., MAJ(703) 299-3842
Office of the U.S. Attorney
Eastern District of Virginia
Suite 502, 2100 Jamieson Ave.
Alexandria, VA 22314
Fax Line (Non-Secure)(703) 299-3981

(Litigation Branch -- West)

FUCCI, Michael J., LTC (Branch Chief) Michael.Fucci@hqda.army.mil696-1553
REED, Kary B., MAJ (Litigation Attorney) Kary.Reed@hqda.army.mil696-1555
ELDER, Pamela D., SFC (Senior Legal NCO) Pamela.Elder@hqda.army.mil696-1558
BOBELL, Gordon F. (Litigation Attorney) Gordon.Bobell@hqda.army.mil696-1554
GREENWAY, Curtis L. (Litigation Attorney) Curtis.Greenway@hqda.army.mil696-1548
CAMPBELL, Gregory W. (Paralegal) Gregory.Campbell@hqda.army.mil696-1556

CIEPLY, Kevin, MAJ.....(602) 514-7553
Office of the U.S. Attorney
District of Arizona
230 N. 1st Avenue, Suite 400
Phoenix, AZ 85025-0025
Fax Line (Non-Secure)(602) 514-7693