

U.S. AIR FORCE



FRAUD FACTS

EDITION FOCUS: DEMYSTIFYING SUSPENSION/DEBARMENT AND FRAUD REMEDIES

The media has focused intensely on Government contractor misconduct in recent months, and Congressional hearings, audits and other reviews have shone a spotlight on the suspension and debarment process. Much of the news has dealt with problems in the suspension/debarment system in other agencies. What has not been covered, however, is how effective suspension/debarment and fraud remedies systems work.

This issue of Fraud Facts discusses the architecture of the Air Force suspension/debarment and fraud remedies apparatus, the roles of the various stakeholders, and how we work together to protect the Air Force's interests, and the interests of the U.S. government.

Among other things, this issue will:

- Explain the suspension and debarment process, in general, and the major phases of each action;
- Describe the path of several suspension and debarment cases as they work through the system, and the impact stakeholders have on the process;
- Discuss how group discussions among stakeholders lead to optimal outcomes for the Air Force when faced with allegations of contractor fraud, corruption, misconduct or repeated poor performance.

We also summarize recent debarment decisions and SAF/GCR staffing changes. Enjoy!

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SAF/GCR YEAR IN REVIEW

BY: STEVEN SHAW, AIR FORCE SUSPENDING AND DEBARRING OFFICIAL

This is my 14th year as Deputy General Counsel (Contractor Responsibility) and, in the past, as fiscal years closed, I drafted brief summaries of the year's accomplishments for Fraud Facts. The summaries have, in the past, focused on numbers. Specifically, they have focused on the numbers of administrative actions or dollars recovered from contractors. Although this year's numbers are some of the best in my tenure (380 actions, nearly \$450 million recovered), they do not tell the whole story. Numbers can depend on a variety of things, including staffing levels in SAF/GCR, or in the investigator ranks, level of U.S. Department of Justice engagement, changing investigative missions, and which Department has contracting lead for war-zone acquisition, among other things.

This year, in addition to processing actions and working to recover funds for the U.S. Government following contractor fraud and misconduct, we also focused on strengthening our relationships and processes for information sharing with the Defense Criminal Investigative Organizations (DCIOs). Good relationships with the DCIOs are essential to the entire SAF/GCR mission (and not just to suspension and debarment) because, in accordance with DoD Instruction 7050.05, SAF/GCR has the responsibility for monitoring significant investigations of fraud or corruption related to procurement fraud activities from the *inception* of the investigation. Monitoring "from the inception" ensures that all possible criminal, civil, contractual and administrative remedies are identified to cognizant procurement and command officials and to the Department of Justice officials, as appropriate, and that appropriate remedies are pursued expeditiously. Para. 4.1.

Although SAF/GCR always has had, and continues to have, excellent relationships with the DCIOs, fundamental changes in the DCIOs'

missions are occurring. Resources that, for nearly the last decade, had been allocated away from contractor fraud and misconduct to counterterrorism and counterintelligence are cycling back to investigating fraud, waste and abuse. In recent years the DCIOs have "plussed up" central systems fraud agent hiring and new cases are being opened constantly. In order to ensure prompt — and early — consideration of contractual and administrative remedies in the future, continuous good relationships with DCIOs, and reinvigorated information flow protocols are essential to fulfill SAF/GCR's mission and to comply with DODI 7050.05 and its Air Force equivalent AFI 51-1101.

I am proud of SAF/GCR's accomplishments, and I look forward to building on the foundation for communication and information flow with the DCIOs for years to come.

- Steven A. Shaw

SUSPENSION AND DEBARMENT: HOW THE PROCESS WORKS

BY: RODNEY GRANDON

Although each suspension and debarment case is unique, there are generally four stages to each action. First, SAF/GCR becomes aware of allegations of misconduct or poor performance and works with the field to build the administrative record. Second, GCR issues notice to the contractor commencing the action. Third, the contractor opposes the action or otherwise provides comments to the Air Force to inform its decision. Fourth, the Air Force, through the Suspending and Debarment Official, reaches a final decision.

First phase: Developing the AR.

Unlike some other suspension and debarment operations within the Executive Branch, the Air Force Suspension and Debarment Authority is rarely, if



SUSPENSION & DEBARMENT: HOW THE PROCESS WORKS

(CONT'D)

ever, first made aware of an action against a contractor involving an Air Force interest after an indictment, agreement, settlement, or judgment is entered as part of a civil or criminal proceeding. In almost every matter, SAF/GCR is involved from the inception of fraud-related investigations and civil/criminal actions. Regardless of the source, as soon as SAF/GCR becomes aware of a matter involving procurement fraud or corruption, or significant poor performance issues, we immediately begin to coordinate the identification and pursuit of all appropriate remedies, including suspension and debarment, with the stakeholders.

Suspension and debarment actions must be based upon documentary evidence in an administrative record. This record is released to the contractor respondent upon request. SAF/GCR attorneys work directly with the Air Force field to build the record in a way that meets the evidentiary burden, and is fair to the contractor, but also protects from disclosure sensitive information that should not be disclosed during the course of an administrative action (e.g., classified, grand jury sensitive, law enforcement sensitive . . . etc.)

We either interact with the field directly, or if needed, go through acquisition fraud counsel. We generally locate the relevant acquisition fraud counsel at the Major Command level. For AFMC, AFMCLO/JAF houses a number of fraud attorneys and coordinates a significant number of Air Force actions. For non-AFMC facilities, AFLOA/JAQ will soon stand up an organization that will be the coordinating activity.

Second phase: Initiating the Action.

Once a sufficient record has been assembled to support a given action, SAF/GCR attorneys use the information in the assembled record to draft the action memorandum and notice letter. Once the SAF/GCR attorneys finish drafting the appropriate memoranda

and notice letters, they present the draft documents and assembled record to the Air Force Suspending and Debarring Official for review and signature. Once signed, the SAF/GCR attorneys distribute the notice and supporting memorandum to the contractor, and enter the contractor's name into the Excluded Parties Listing System (www.epls.gov)

Third phase: Contractor Response.

After receiving notice of the administrative action, the contractor must decide whether to respond, either in person or in writing, or both, with information and argument in opposition to the administrative action. In general, contractor responses either contest the facts, or concede the facts and focus their opposition on the mitigating factors and remedial measures such as those contained at FAR Subpart 9.406-1(a); including full cooperation with all ongoing investigations. SAF/GCR provides these responses to the investigating agents and to other appropriate stakeholders (e.g., fraud counsel, contracting/acquisition community members . . . etc.) for comment and evaluation. If additional clarification is necessary, SAF/GCR may engage in rounds of Q&A with the contractor and all stakeholders are usually invited to participate. In those rare times when the contractor identifies disputed material facts, SAF/GCR will conduct a fact-finding hearing to resolve the disputed material facts. Once all facts and arguments have been submitted and resolved, the record closes.

Fourth phase: Final Decision.

After evaluating the entire administrative record, the Air Force Suspending and Debarring Official renders a decision for the Air Force. This decision involves making a present responsibility finding, determining if the contractor should be excluded from contracting, and for debarments, determining how long the exclusion lasts.



PRESENTATION BY DAVID ROBBINS, DIRECTOR, AIR FORCE OFFICE OF PROCUREMENT FRAUD REMEDIES, PATRICK AFB, OCT. 2010

It's a pleasure to be here for the inaugural Patrick Air Force Base Procurement Fraud Working Group session. As you may know, we in the Air Force General Counsel's Office have been pushing these groups for some years now. It's a tremendous feeling to see both the great things that established groups have done and the exhilarating possibilities that the newer groups have stretched in front of them.

I am here in my capacity as Director of Air Force Procurement Fraud Remedies to share some best practices for working groups and to facilitate a discussion about how this group can organize and work together to fight fraud. You are already moving along the path to doing things differently by being here today. And this momentum MUST be sustained. Coordination is the name of the game. And it is vital. I used to defend contractors. Some who you would call criminals, and some who I thought were misunderstood. Whatever your perspective, this is important: many contractors know that the response to fraud allegations is unfocused. Contractors know that if they mount an aggressive defense before DoJ, then the case may languish for years and they may end up with a declination. They know that the Suspending and Debarring Official likely won't hear of a case for years until OSI's investigation progresses. And they are getting away with it because we're not coordinated in our response.

That stops today. With this meeting. As you develop this group and decide how you want it to progress, I hope you will keep these three best practices in mind.

FIRST: Installations and commands that have dedicated fraud counsel have more success in fighting procurement fraud. The reason should be obvious. Contracting is a busy place, with systemic stresses we're all familiar with. Adding acquisition fraud counsel as an additional duty can cause more stress and create a conflict between the pressure to get under contract and the policy of the Air Force and the US Government to do business only with responsible contractors. History has shown us that, when these two pressures clash, the acquisition fraud counsel function loses out. In so doing, we ignore our fundamental duty to police our contractors for unethical behavior and deal with it with every tool at our disposal.

Let me be plain. And with all due respect to the

contracting community, we do not exist solely to get goods under contract. When we deal with unethical or unscrupulous contractors, and fall victim to the pressure to get under contract, we fall into traps that include performance problems, shoddy work, safety concerns, and more. They say that if you include famous quotes in your presentations, your words will be better remembered. To that end, let me quote a modern literature hero, Harry Potter's Professor Albus Dumbledore, who said "remember this when you're faced with the choice between doing what's right and doing what's easy."

We want you to do what's right. And dedicated acquisition fraud counsel can help. They, along with contracting, observe all the pressures on the system and analyze whether installations and commands are doing business with questionable contractors. And, where problems arise, these dedicated fraud counsel can assess what remedies are available and coordinate their implementation. Have we revoked acceptance? Have we taken action against moneys payable to the contractor? What about suspension and debarment? Have we sent notice to SAF/GCR of the contract actions called out in the AFFARS? Have we documented past performance accurately? All these questions should be answered. And, dedicated acquisition fraud counsel can help.

Usually, at this point, the PK community's eyes glaze over. They think fraud fighting is not aligned with their mission, and they check out. That is a mistake. Not only does it ignore the express policy of the US government to do business only with presently responsible contractors, but there are tools to reduce the fraud fight's impact upon contracting. Which brings me to a second best practice.

SECOND: A robust and well-attended working group is a fantastic tool to get all fraud fighter stakeholders together to talk through issues of concern. This must include the acquisition community. These meetings are excellent opportunities to sit in a room and discuss the pressures you face, and the methods of working together to make sure all stakeholders get what they need, and with a minimum of disruption to their daily tasks, in order to fight fraud. Questions like "What contract documents do investigators really need?" "while this investigation is ongoing, what else can be done contractually to show that we take this allegation of fraud seriously?" and "when is the right time for a present responsibility review?" all need to be answered. It is much eas-



PROCUREMENT FRAUD WORKING GROUP PRESENTATION, CONT'D

ier to answer these questions here, in this meeting, when you've built a rapport with group members and have learned to trust them. I'll say it again...working groups are excellent placed for these discussions, provided meetings are regularly attended by the same people, and that the group as a whole can build trust through that continuity.

THIRD, and finally: A robust working group can also be proactive. Working individual case roadblocks is important. But working groups should also be focused on the future. What problems are arising among the various stakeholder communities? What patterns of misconduct are emerging? Can extra training help? What about targeted communication of issues of concern to contractors on certain procurements? Does OSI need to focus on a particular kind of fraud indicator that is appearing regularly? All these questions can, and should, be addressed in the working group.

You know, I am excited for you all. I'm excited to follow the evolution of this group. Space is not well represented in the working group community – not yet anyway. This is a real chance to create a structure and a process that may be replicated across space. But that is a few years down the road. For now, the work is ahead of you. But, so is the opportunity to shape this group and make it great.

Incidents of procurement fraud, like bid protests, are regrettably unavoidable. They must be met, forcefully, with all tools at our disposal. It is my sincere hope that you will rise to the challenge. Again to borrow from the tactic of quoting famous literature to be memorable, and to quote from Harry Potter one more time, it is the difference between being dragged, kicking and screaming, into the arena for a fight, or walking in with your head held high. And accepting the mission and meeting it eagerly, proudly, and with all the tools at our disposal, makes all the difference in the world.



IMPACT OF PK, INVESTIGATOR, AND OTHER STAKEHOLDERS ON THE SUSPENSION AND DEBARMENT PROCESS

BY: DAVID ROBBINS

⇒ L-3 Communications, Special Support Programs Division:

In the late Spring of 2010, the contracting arm of the Special Operations Force Support Activity (SOFSA) and of the U.S. Special Operations Command (SOCOM) transmitted a referral package asking the Air Force Suspending and Debarring Official to consider administrative action against L-3 Special Support Programs Division (SSPD), a contractor that had served as, among other things, information technology administrator on the SOFSA unclassified e-mail server. The referral alleged that during the provision of IT administration services, and in response to a perceived threat to L-3 proprietary data, SSPD employees deliberately reviewed SSPD employee emails sent and received through the SOFSA unclassified e-mail network. The review captured Government users' emails as well as SSPD users' emails. This referral, and subsequent review by SAF/GCR, caused the Air Force to suspend SSPD from Government contracting on June 3, 2010.

Throughout the process, the focus of the SOFSA/SOCOM contracting apparatus, and their willingness to task employees to review submissions from the contractor and provide their insight on the facts was helpful to provide an "on the ground" point of view of the facts as presented by L-3 and SSPD. The active involvement of SOFSA/SOCOM assisted the Air Force with coming to a relatively rapid conclusion of the suspension with a July 27, 2010, Administrative Agreement, available here: <http://www.safgc.hq.af.mil/shared/media/document/AFD-100727-044.pdf>. Over the course of the Administrative Agreement, the Air Force will work with L-3 (as with any other contractor in this position) to improve their ethics program, share best practices, and generally be a resource for the company.



STAKEHOLDER IMPACT ON SUSPENSIONS AND DEBARMENTS (CONT'D)

⇒ Lt. Col. Doris Wong and Mr. John Sims

Suspension and debarment may be imposed upon Government employees where, as in these two cases, employees reasonably may be expected to become contractors (e.g., after separating from the U.S. Government's employ). FAR 9.403 (Definition of Contractor). Here, in two different cases, members of the Air Force Office of Special Investigations (AFOSI) brought to SAF/GCR's attention government employees who had engaged in impermissible misconduct with respect to contracting. In each case, because of the diligence of AFOSI, the Air Force was able to address the potential harm that could be caused by these individuals who engaged in contracting misconduct transitioning into the private sector and becoming contractors without a full appreciation for the rules and regulations affecting contractors and the level of business ethics and integrity demanded of them. Both Ms. Wong and Mr. Sims have separated from the U.S. Government, both educated themselves extensively on the expectations of government contractors, and both were debarred for brief periods.

⇒ Where Coordination Breaks Down

Occasionally, SAF/GCR works a case where administrative actions (generally, suspensions or proposed debarments) must be terminated because stakeholders do not respond to requests for information or review of contractor presentations. Since none of the recent cases where this has occurred have resulted in final, and publicly available actions, we must discuss them only generally here. Although the Air Force continues to develop processes to avoid this lapse in information flow, it is absolutely vital for stakeholders to accept the fraud fighting mission as an important one. Fraud and poor performance should not be accepted as "business as usual" or "part of the process." It is worth spending additional time every now and then to review a contractor submission or to respond to an inquiry by SAF/GCR in order to protect the Air Force.



FRAUD FACTS: COMMENTS/SUBMISSIONS/FEEDBACK

Comments, questions, concerns or brief articles for consideration for publication in Fraud Facts should be directed to:

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WANT TO HARM OR DESTROY YOUR CASE? THEN WAIT ON PROSECUTION BEFORE CONSIDERING OTHER REMEDIES

By: David Robbins and Todd Canni

This edition of Fraud Facts has already discussed the Department of Defense Instruction and Air Force Instruction language requiring the consideration of contractual and administrative remedies early in the process. This article will not revisit that discussion. There is another reason why these remedies should be considered early — the prosecution is more likely to be successful. While we often discuss this point with DCIOs and the Department of Justice, we think the following mock cross-exam is illustrative of what a prosecutor may experience during trial if contractual and administrative remedies are not considered early.

Contractor's Defense Lawyer (DL): "Mr. Contractor, you are accused of submitting multiple false claims to the DoD. That's why we are here. Did you submit knowingly false claims?"

Contractor: "No. And it's unfortunate we are here, but that contract specification was ambiguous and I discussed what we did and billed for with the COTR repeatedly throughout the project."

DL: "And how did the COTR respond to those discussions?"

Contractor: "Well, I thought we were on the same page and had a common understanding, until I received the DCIS subpoena and then, well, this proceeding began."

DL: "But you maintain that you did not submit any false claims?"

Contractor: "Right. I still, to this day, believe I communicated every step of the way with the COTR. Maybe we did not mod the contract, but the COTR led me to believe that he agreed with me. I mean, he definitely knew what I was doing and why and I thought he was ok with it."

DL: "Well, we're here today, in court, so the wheels fell off somewhere. Did you receive a cure no-

tice from the Contracting Officer or any letter of concern for your billing or work?"

Contractor: "No, nothing."

DL: "Well, what about your past performance rating. Anything negative there?"

Contractor: "No, we've always received high marks."

DL: "What about suspension or debarment. Do you know what they are?"

Contractor: "Those are actions that stop us from getting new work, right? If our customer decides that one of us doesn't have the integrity or business honesty to be trusted to do new work or act responsibly, suspension or debarment stop us from getting new work."

DL: "And were you suspended or debarred?"

Contractor: "Never. No one has ever mentioned either one. In fact, we received four new contract awards from the customer in question, at different facilities, in the past three years while this case has been investigated and seven other contracts across DoD."

DL: "So, really, from what you're saying, the Government's concerns about you can't be that serious?"

Contractor: "Exactly. I just don't understand it. Multiple agencies have since trusted us with millions of dollars of new work, including the agency in question. I just can't understand why we're here."

VERDICT: IN FAVOR OF THE CONTRACTOR.

The jury concludes that the contractor did NOT submit false claims because no cure notice issued, past performance evaluations remained positive, and the government never suspended or debarred the contractor. The jury finds that the facts speak for themselves and in favor of the contractor.



Recent Debarments of Interest

- ⇒ **Anderson:** The Air Force debarred Daria Ebrio Anderson a/k/a Daria Ebrio Hodge a/k/a Daria Ebrio Leblanc a/k/a Daria Ebrio Martires for offering kickbacks to Government officials in exchange for her former employer being awarded a contract for carpet installation.
- ⇒ **Sanders Engineering Co., Inc.:** The Air Force debarred California-based Sanders Engineering Co., Inc., several corporate affiliates, and its President, Craig Jackson, to conclude the long-running inquiry into the present responsibility of APM, Sanders Engineering and dozens of corporate and individual affiliates for misconduct involving the respondent's efforts to mislead the SBA concerning the contractors' 8(a) status.
- ⇒ **Himbele:** The Air Force debarred John Himbele, a former employee of DC-based Nova International, Inc., for engaging in a complementary bidding scheme with other Government contractors that undermined competition for DoD furniture acquisitions.
- ⇒ **Brooks, Campbell, Corley:** The Air Force debarred Gary N. Brooks, Herbert E. Campbell, and Kenneth B. Corley. As former employees of the same contractor, Brooks, Campbell, and Corley participated in, or had knowledge of, the false representation that contractually-required tests had been conducted on C-130 vertical stabilizer bearings.
- ⇒ **Zick:** The Air Force debarred David Zick. As a former General Manager at a contractor, Zick had knowledge that the contractor's Controller was intentionally inflating the inventory amounts in financial reports to increase the contractor's reported Income Before Taxes.
- ⇒ **Information Solutions Design, Inc.:** The Air Force debarred Illinois-based Information Solutions Design, Inc., and two of its principals, for providing educational services to Air Force personnel without being properly credentialed to provide such educational services.
- ⇒ **Bosco:** The Air Force debarred Karen Bosco. Over the course of several years as an employee of a contractor, Bosco, a former controller of the contractor, intentionally inflated the inventory amounts in financial reports in order to increase the contractor's reported Income Before Taxes.
- ⇒ **Advanced Office Concepts:** The Air Force debarred Minnesota-based Advanced Office Concepts and its president, Steven Goldstein, based on the company's participation in collusive bidding schemes designed to undermine price competition for DoD furniture acquisitions.
- ⇒ **Nova International, Inc.:** The Air Force debarred a D.C.-based contractor, Nova International, Inc., and its principal, Timothy Rose, for engaging in a complementary bidding scheme with other Government contractors. The Air Force also debarred four of Nova's former employees (Andrew Dickie, Kenneth Cho, John Bowers, and McKenzie Lyle) for engaging in the same misconduct.



SAF/GCR's ONLINE PRESENCE

The SAF/GCR website is:

<http://www.safgc.hq.af.mil/organizations/gcr/index.asp>

The SAF/GCR Facebook site is:

**Air Force Debarment Headquarters
(or just Google Air Force Debarment)**

SAF/GCR STAFFING UPDATE

SAF/GCR has a new Associate General Counsel:

Mr. Todd Canni: Todd joins us from private practice where he was a government contracts attorney and represented contractors facing suspension/debarment, and worked a number of suspension and debarment cases on the defense side (but we won't hold that against him). Todd has clerked on the U.S. Court of Federal Claims, holds an LL.M. (with highest honors) in government contracts from George Washington University, a J.D. (*magna cum laude*) from Catholic University, and a B.A. from Hofstra University. He has authored a number of law review and other scholarly articles, several dealing with suspension and debarment issues, including one in the current issue of the Public Contract Law Journal reviewing the World Bank's suspension and debarment regimes. We are delighted to have him join us.

SAF/GCR ROSTER

- Mr. Steven Shaw, Deputy General Counsel (Contractor Responsibility) and Air Force Suspending and Debarring Official
- Mr. Rodney Grandon, Assistant Deputy General Counsel (Contractor Responsibility)
- Mr. David Robbins, Director, Air Force Office of Procurement Fraud Remedies
- Mr. Todd Canni, Associate General Counsel (Contractor Responsibility)
- Mr. Horace Blankenship, Administrative Paralegal Specialist
- Ms. Christina Patton Black, Law Clerk
- Mr. Adam Munitz, Law Clerk
- Ms. Carly Humphrey, Law Clerk

Upcoming Presentations:

- ⇒ **Fraud Remedies Coordination, Andrews AFB, Jan 13.**
- ⇒ **Contract Remedies, Hanscom AFB, Feb 8.**

The views and opinions of the authors expressed herein do not necessarily state or reflect the official policy or position of the Department of the Air Force, Department of Defense or the United States Government.



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