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## EDITORIAL

This issue contains five articles, five student notes, and a bonus book review.

Our lead article, written jointly by attorneys from the Air Force and Lockheed Martin, provides a fascinating look at allegations of procurement fraud from both sides of the table. After discussing Lockheed Martin's ethics program in detail, the authors use a hypothetical case study to demonstrate how the Government and the contractor would each handle an investigation launched by an internal whistleblower who won't give up.

Major Sondra Bell Nensala next examines the anticompetitive side effects of Homeland Security Directive 12, which established investigation and credentialing requirements for workers to protect the nation's critical infrastructure. Major Nensala, who is currently assigned to the Air Force Commercial Law and Litigation Directorate in Washington, D.C., argues that without reform, the directive will thwart some competition.

Kara Sacilotto, a partner in the Washington, D.C., office of Wiley Rein LLP, suggests that current policy shifts in favor of fixed price contracting bring to mind one of Yogi Berra's most famous quips. She looks at the first Air Force program to use the concept of total package procurement, examines the resurgence of fixed price contracting in the 1980s and subsequent congressional prohibitions of the practice, and concludes with an analysis of the current shift back to first base.

Kingsley Osei, who is contracts counsel for the State University of New York statewide system in Albany, examines the use of arbitrary preference schemes that favor in-state bidders and the responses that such practices evoke. Most states take either a reciprocal or punitive approach toward out-of-state bidders, but the author argues that a mix of both may provide the best result for the procuring agency.

Would the Weapon Systems Acquisition Reform Act of 2009 (WSARA) have saved the beleaguered F-22 procurement if it had been in force thirty years ago? Major Tom Gabriele, who is currently assigned to Wright Patterson Air Force Base, reviews WSARA, evaluates its effectiveness, and speculates whether it would have saved the F-22 from extinction.

We are pleased to include five student notes in this issue, all from authors who expect to receive their law degrees from The George Washington University Law School in May 2011. *Journal* member Dan Oakes starts out by looking at the unprecedented growth of Alaskan Native Corporations (ANCs), evaluating changes proposed by the Small Business Administration (SBA), and proposing a model that would allow ANCs to receive special contracting advantages without endangering the SBA's Section 8(a) program. This Note was selected as the Division I first-place winner of the Section's 2010 Writing Competition.

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PATH OF AN INVESTIGATION: HOW A MAJOR  
 CONTRACTOR'S ETHICS OFFICE AND AIR FORCE  
 PROCUREMENT FRAUD AND SUSPENSION/DEBARMENT  
 APPARATUS DEAL WITH ALLEGATIONS OF POTENTIAL  
 FRAUD AND UNETHICAL CONDUCT

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I. INTRODUCTION

In recent years, media coverage of wartime contracting, congressional hearings, and even some Government Accountability Office audits of federal agencies' contracting methods have combined to present an unbalanced and decidedly negative view of government contractors and of the Government's ability to deal with government contracting misconduct. Indeed, even reputable news agencies have covered stories about "contractors gone wild."<sup>1</sup> Although there have certainly been challenges for the Government and contractors to work through, we do not think that "contractors gone wild," or anything close to that, is a fair description of the vast majority of government contractors. Nor does it reflect how the Government responds to allegations of fraud or misconduct by government contractors.

This Article provides insight by long-tenured government contracts and ethics professionals into procurement fraud and contractor ethics programs, from the viewpoints of both a contractor and the Government. We follow the path of a hypothetical ethics investigation into a high-profile government contract with one of the world's largest defense contractors and analyze how one of the more aggressive procurement fraud and suspension and debarment offices in the Government would deal with such allegations. We have crafted an ethics case based on a real-life issue, although naturally many of the details have been changed (including the Department of Defense (DoD) entity involved) to protect the privacy of the individuals involved. The program described below is fictional but shares some of the attributes of the actual program involved in the actual ethics case.

1. See, e.g., Bruce Falconer, *Contractors Gone Wild*, MORRIS JONES (May 1, 2008), <http://motheijones.com/politics/2008/05/contractors-gone-wild/>; ABCNEWS.COM (Sept. 9, 2009), <http://abcnews.go.com/video/playerindex?id=4184740>.

First, the Lockheed Martin Ethics and Business Conduct team presents an overview of its ethics program, the origins of the ethics case, including the initial allegations, the facts as developed through the investigation, the timeline of the investigation, along with its findings, conclusions, and aftermath. Members of the Air Force Office of the Deputy General Counsel (Contractor Responsibility) ("SAF/GCR") then present an overview of its organization and how the Air Force would verify allegations, reach conclusions, and coordinate the four remedies available to the Air Force: contractual, civil, criminal, and administrative (suspension and debarment). In conclusion, both Lockheed Martin and the Air Force address a series of questions in a written "Q&A" format to provide additional clarity into common issues in contractor ethics and possible procurement fraud investigations. This analysis will provide an example of how seriously the Government and responsible contractors take their obligations to deliver the highest-quality solutions to the warfighter, and to avoid and deter unethical conduct and procurement fraud.

## II. OVERVIEW OF THE LOCKHEED MARTIN ETHICS PROGRAM

An ethics office existed within both the legacy companies of Lockheed Martin ("the Corporation")—Lockheed Corporation and Martin Marietta Corporation—dating back to the mid-1980s. Lockheed Martin established its Office of Ethics and Business Conduct in 1995 from both legacy programs when the two companies merged, and in partnership with SAF/GCR in response to a Foreign Corrupt Practices Act violation as one of many steps taken to demonstrate present responsibility for government contracting.

Lockheed Martin's vice president of Ethics and Business Conduct reports to the chairman and chief executive officer, and to the Ethics and Corporate Responsibility Committee of the board of directors, and oversees a rigorous corporate-wide effort to promote a positive, inclusive, and ethical work environment. Whereas compliance merely requires following the rules, ethics goes further and focuses on every employee and officer doing the "right" thing. Elements of the Lockheed Martin ethics program include a code of ethics and business conduct; a toll-free Helpline for reporting issues; annual ethics awareness training required of all employees; compliance training to educate employees on the laws, rules, and regulations applicable to their job responsibilities; biennial surveys of employees to gauge perceptions of the corporation's ethical culture; an annual Chairman's Award presented to the employee who best exemplifies the corporation's commitment to ethics and integrity; and sixty-five ethics officers assigned to the various business elements to respond to employee concerns.

### A. *The Ethics Investigation Process at Lockheed Martin*

Employees (and occasionally nonemployees) contact Lockheed Martin's Ethics Office to seek guidance on issues (e.g., the propriety of giving or

receiving gifts and business courtesies) or to make an allegation of wrongdoing. Contacts are made through the Helpline, e-mails to the corporate ethics mailbox, calls, and e-mails or visits to an ethics officer; by facsimile; and even by snail mail. These procedures allow for anonymous or confidential reporting. All contacts with the Ethics Office that seek guidance or make allegations of misconduct are entered into a database with a log of activity completed in response to the contact. Allegations requiring an investigation are entered into the database as a case and the case is assigned to an Ethics Officer for follow up and resolution.

Ethics Officers conduct investigations, frequently relying upon subject matter experts to analyze and provide perspective on technically complex issues. After a thorough investigation that generally involves interviews, review of supporting documentation, and assessment of facts, the Ethics Officer concludes that the allegations are either substantiated or unsubstantiated. If an allegation is substantiated, the Ethics Officer discusses the case with management, human resources, legal, and other affected departments to determine appropriate disciplinary action (e.g., employment termination, suspension, written reprimand, or oral reprimand) and, as necessary, any corrective action to prevent recurrence of the issue. For certain substantiated cases, Lockheed Martin notifies the affected government agency's inspector general and the Contracting Officer, in compliance with the requirements of the Federal Acquisition Regulation (FAR).

An appeal of an ethics case typically is handled by a higher-level representative of the Ethics Office. Normally, when the reporting party does not present any additional factual evidence in connection with an appeal, the second investigation will consist of a review of the original investigation to determine if it was thorough and fair. When new facts are presented, or issues are found not to have been adequately investigated, the person conducting the appeal works with the Ethics Officer to complete the investigation.

Using a hypothetical situation that mirrors real life, this Article explores how this works in practice.

### B. *Background of the Program*

In October 2007, Lockheed Martin, competing as prime contractor, won the Communication Ground Station ("CGS") contract, valued at approximately \$500 million. The CGS was a significant opportunity for Lockheed Martin and an important program for the Air Force. The CGS required the design and construction of a series of communication ground stations that send and receive classified signals to and from orbiting satellites and aircraft operated by the Government. The CGS program was critical to improve the command and control capabilities of the Air Force and it was going to be a state-of-the-art system-of-systems replacement for the existing ground stations, many of which were built in the 1960s. The Air Force awarded the CGS program as a cost-plus award fee contract, requiring Lockheed Martin and its subcontractors to meet certain performance criteria and milestones

that would determine the amount of its award fee. The initial CGS contract had a five-year period of performance, with options for two additional years.

### C. Allegations

In December 2009, a Lockheed Martin lead systems architect, who was relatively new to the CGS program, contacted Lockheed Martin's Office of Ethics and Business Conduct and alleged that management failed to address certain design issues in the following areas:

- The ground stations' antennae did not provide sufficient redundancy to ensure continuous communications availability in all weather conditions, which the systems architect believed was required by the contract;
- The ground stations were not radiation hardened ("rad hard"), i.e., the stations were not designed to withstand nuclear warfare, as required by the contract; and
- In one configuration used to meet unique and classified requirements for communications between all three nodes (i.e., aircraft, satellites, and ground stations) of the system concurrently, classified transmissions to and from the ground station could be intercepted.

### D. The Investigative Plan

The Office of Ethics and Business Conduct assigned an Ethics Officer at the business unit that was responsible for the CGS program to look into the employee's allegations. The Ethics Officer determined that the following steps would be taken to investigate the allegations:

- Understand the history of the CGS program;
- Understand additional details of the specific allegations;
- Interview Lockheed Martin's key CGS program personnel;
- Request local subject matter experts to review the technical issues involved;
- Review contractual requirements;
- Assess the evidence; and
- Conclude whether the allegations are substantiated or unsubstantiated.

Each of the investigative steps will be discussed below in the context of the allegations raised.

#### 1. History of the CGS Program

From the beginning of the program, the management team struggled with cost, schedule, and technical issues. The customer did not think that extensive systems design work or engineering would be required to upgrade and modernize the ground stations. The Air Force believed that many "off-the-shelf" items could be used.

After contract award, Lockheed Martin and the Air Force had differences of opinion on what would be required to meet the contract requirements. The end-user customer also began to request significant changes to the ground

stations. The Air Force's view of the system and the ability to maximize the use of "off-the-shelf" items contrasted sharply with the opinion of Lockheed Martin architects and engineers, who were now certain that extensive design work and systems engineering would be required to meet contract specifications. Due to these differences in approach and delays in reaching agreement on how to resolve the differences, the program schedule began to slip.

Several of the first ground stations to be upgraded were in worse condition than specified in the Request for Proposal ("RFP"), requiring much more work than anticipated. Additional issues included requirements that were not always clearly defined, difficulty finalizing subcontracts, a scheduling tool that was ill-suited for the upgrading effort (particularly coordinating across the large industry team working on the ground and space-based activities as required by the CGS program), a personality conflict between the lead architect (the reporting party in this case) and other members of the team, and poor morale due to the many issues on the program. In total, program personnel identified more than 400 issues during the early phases of the program, all of which were disclosed to, and discussed with, the customer.

Discovering these types of issues during the early phases of contract performance is not uncommon. Issues often surface as the program goes through its preliminary and critical design reviews. For this program, the issues discovered early in performance ranged from disputes over who was responsible for the ground stations being in worse condition than Lockheed Martin anticipated, to the customer expanding the scope of the contract by specifying how the system would work, not merely what the system would do.

The using community, which was not sufficiently involved in developing requirements for the CGS, did not like how the ground station computers would display the integrated data coming from space. This seemingly minor issue raised the question of whether a contract requirement to display integrated data allowed the contractor the discretion to decide how to configure and display the data or permitted the customer to specify how the data would be displayed. If the former, then the Contracting Officer would need to issue a change order to achieve the graphical user interface desired by the using community; if the latter, then the contractor would need to redesign the graphical user interface to meet the customer's requirements within the cost and schedule of the original contract.

#### 2. Additional Details of the Allegations

Within this context, the Lockheed Martin lead systems architect began to raise concerns with the Lockheed Martin program office and other engineers on the program. Program management attempted to address the architect's issues. However, the architect was not satisfied with any explanations or proposed resolutions. The architect was convinced that he was right. Eventually, dissatisfied with his management's response, the lead systems architect elevated his concerns to his local Lockheed Martin Ethics Officer. The following is a summary of the allegations that he brought forward to the Ethics Officer:

- Ground station antennae: The employee alleged that due to the placement of the ground station antennae and the antennae design, during extreme weather conditions, such as severe lightning storms or earthquakes, the ground stations did not have sufficient redundant capabilities to ensure continuous communications with satellites and aircraft. The lead systems architect alleged that the failure of the ground station to provide this higher level of redundant capability was a safety and security concern, and the contract required higher-level redundancy. The employee felt strongly that Lockheed Martin should have insisted that the customer include in the contract additional capability to ensure continuous communications through any catastrophic weather event. Therefore, the architect believed that Lockheed Martin's technical solution raised an ethical issue even with customer knowledge of, and consent to, that solution.
- Ground stations not rad hard: The architect alleged that the ground stations were not designed to withstand nuclear warfare. On the day the ground station's ability to withstand ionizing radiation was tested, the station's high-speed direct-to-disk data acquisition system, which downloads information from satellites, failed. The employee alleged that Lockheed Martin, not the customer, should be responsible for replacing the direct-to-disk acquisition systems and that it was unethical for Lockheed Martin to have installed systems that were not rad hard given its knowledge of their intended use and the failed test.
- Risk of classified transmissions being intercepted: The ground stations are designed to be easily reconfigured to meet different mission requirements. In one configuration that was anticipated to be used only rarely to meet a classified requirement, the employee alleged that classified transmissions to and from the ground station could be intercepted by commercially available radios. As with the redundancy and rad hard issues, the employee believed that it was unethical to proceed with a configuration of the system that could permit classified transmissions to be intercepted and that doing so represented a risk to national security.

### 3. Interviews of Program Personnel

After a lengthy discussion with the lead systems architect to understand his allegations, the Ethics Officer began to collect relevant documents and conduct interviews. During interviews, the Ethics Officer noted common themes, including the myriad of issues in the early phases of the program, philosophical differences with the customer, subcontractor problems, and, significantly, difficulties in working with the lead systems architect. Program personnel described the lead systems architect as arrogant, condescending, and having poor people skills. The lead systems architect's abrupt management style was consistently viewed as a negative, divisive element on the program.

The interviews with the program personnel also revealed additional facts surrounding the lead systems architect's allegations:

- Ground station antennae: The customer, after conducting a cost-benefit trade-off analysis, determined that the redundant capabilities of the ground station were sufficient. The customer accepted the risk of not having the extra level of redundancy that the architect recommended due to mitigating features of the CGS system, including the ability of one ground station to alert a ground station in a different location prior to entering a failsafe mode. The alerted ground station could take over the work of the failing ground station within two minutes of receiving such an alert. Based on these mitigating factors, the customer elected to save the additional costs that would be required to obtain a higher level of redundant capability for each ground station. Further, the redundant capabilities of the system that Lockheed Martin designed met the requirements of the contract.
- Ground stations not rad hard: The customer had specifically requested the type of direct-to-disk data acquisition system to be used at the ground stations and did not want to change brands due to supply chain issues. Lockheed Martin installed the direct-to-disk data acquisition system as specified by the customer. After the direct-to-disk data acquisition system failed, the customer approved a different brand of rad hard direct-to-disk data acquisition system to be installed, and the failed systems were replaced.
- Risk of classified transmissions being intercepted: Although classified transmissions could be intercepted when the system was in this unique configuration, the customer approved the design of this configuration to meet its classified requirements because it deemed the chance of interception to be extremely remote. Also, the customer had developed classified processes that would make it difficult to detect when the CGS system was operating in this configuration, making it even less likely that hostile parties would be able to intercept these transmissions. Finally, it had always been the plan to test the security of the system in all of its configurations and, if vulnerabilities were identified, then additional security features were to be added. The customer was fully aware of and approved this approach.

In summary, the Ethics Officer's interviews and review of documentation revealed that in all instances, Lockheed Martin management had disclosed the issues that the lead systems architect identified on the program to the customer, including the three that were the focus of the investigation, and reached agreement on how the issues would be addressed.

The Ethics Officer also learned that the lead systems architect repeatedly raised the three issues that eventually became the allegations in this case, but paid less attention to the hundreds of other issues facing the program. He was characterized as "unable to see the forest from the trees." As a result, his performance was not up to par. Other team members commented that the lead systems architect was very inexperienced and did not close issues, as was

expected in his position. Despite counseling, feedback on his management style, and appropriate management direction, the lead systems architect was not successful in his role. Based on poor performance and inability to operate effectively in the team environment, Lockheed Martin removed the lead systems architect from the program.

#### 4. Subject Matter Expert Review of the Issues

The Ethics Officer requested that two subject matter experts review the technical and security issues involved in this case. Both concluded that management's approach to addressing the issues was appropriate, that the customer was fully informed of the risks involved, and that the customer approved of the method management employed to mitigate those risks. In hindsight, the program could have made better decisions on certain issues presented, such as continuing with a subsystem that failed during rad hard testing, but it was not considered unethical to abide by customer preferences (i.e., to use the specified direct-to-disk acquisition system).

#### 5. Contract Requirements

Lockheed Martin and the customer had a collaborative decision-making approach, with contract letters used to document agreements on the handling of issues and open items. In all instances, the Contracting Officer agreed to and appropriately documented deviations from contract requirements in accordance with normal contracting procedures.

#### 6. Assessing the Evidence

The three allegations made by the lead systems architect were legitimate issues, which were appropriately raised to the Ethics Office. After reviewing the results of his investigation, however, the Ethics Officer determined that the risks associated with the issues were well understood and accepted by the customer. Significantly, the allegations raised were only three of hundreds of issues identified in the program, all of which were documented and disclosed to the customer. The Ethics Officer also viewed the poor performance of the lead systems architect as a contributing factor to many issues of the program that were not resolved.

#### 7. Investigation Conclusion

There was no evidence that management failed to address any of the design, safety, and security issues that the lead systems architect brought forward. The customer understood and fully documented the three issues identified by the lead systems architect, and either resolved or reached agreement with Lockheed Martin on how the issues would be resolved. The Ethics Officer closed the case as unsubstantiated.

Although the case was not substantiated, the lead systems architect persisted in raising the same issues, and seemed unwilling to listen to any alternative view. Program and engineering management became less tolerant and patient

about the lead systems architect's concerns. As a corrective action, the Ethics Officer recommended that program and engineering management receive training on how to deal with difficult employees. They also were reminded of the importance of taking all employee issues and concerns seriously.

#### E. Aftermath of the Investigation

The lead systems architect vehemently disagreed with the Ethics Officer's conclusion that his allegations were unsubstantiated and requested an appeal of the findings. In this case, the appeal was assigned to the ethics director of the affected business area. Due to the high visibility of the program in question, the ethics director requested that additional subject matter experts conduct a completely independent review of the technical and security aspects of the reporting party's original concerns. The conclusion in this second investigation was the same as that reached in the first investigation: the allegation that management failed to address certain design issues was unsubstantiated.

Similar to the first investigation, the reporting party did not agree with the results of the second investigation, and he began to raise his concerns to others, including writing letters to company executives and the board of directors. Again, the reporting party requested an appeal of the findings, this time from the second investigation. As a result, the vice president of Ethics and Business Conduct conducted a review of the reporting party's concerns, concluding that a thorough and fair investigation had been performed, and that the allegation that management failed to address certain design issues was unsubstantiated. At no time in either the second investigation or the additional review conducted by the vice president of Ethics and Business Conduct did the reporting party provide any additional facts. The vice president personally sat down with the reporting party to try to help him understand the basis for the findings. The Ethics Office concluded its investigation.

After the reporting party continued to have a strong belief that Lockheed Martin was not responding appropriately to his concerns, the Lockheed Martin CGS program management voluntarily informed the customer of its employee's concerns and provided a summary of the ethics investigation. Thereafter, Lockheed Martin provided the customer with the status of the various appeals and investigations.

After the ethics investigations and an additional review that the legal organization conducted at the reporting party's request, the reporting party began a campaign through various social media channels to call attention to his concerns. His campaign sparked significant interest. Various media organizations, including newspapers and television, interviewed the reporting party. Lockheed Martin offered only a limited public response to this barrage of media out of respect for its customer. Congress and the press were questioning many of the decisions that had been made on this program, including the use of a lead systems integrator. Lockheed Martin's response to the reporting party likely would have provided further fodder for this debate. Finally, the

reporting party filed a whistleblower suit against the corporation under the False Claims Act.<sup>2</sup>

### III. AIR FORCE OVERVIEW

The secretary of the Air Force delegated authority for imposing suspension and debarment to SAF/GCR. SAF/GCR also houses the Air Force Procurement Fraud Remedies Program ("Remedies Program"), which deals more broadly with allegations of contractor misconduct. Suspension and debarment are administrative actions taken to protect the Government's interests by excluding contractors from doing business with the Government for a period of time.<sup>3</sup> The Remedies Program is empowered to coordinate the four remedies for contractor fraud on behalf of the Air Force.<sup>4</sup> Those four remedies are administrative (i.e., suspension and debarment, which are directly administered by SAF/GCR), criminal and civil (which are generally administered by the U.S. Department of Justice (DoJ)) and coordinated by the Remedies Program), and contract (which can involve a wide variety of contract-specific actions, driven by contracting personnel and coordinated by the Remedies Program).<sup>5</sup>

SAF/GCR's mission is to protect the Air Force and taxpayers by ensuring contractor business integrity, business honesty, competency, and performance standards. SAF/GCR uses proactive and reactive measures to prevent fraud by encouraging and improving contractors' ethical practices and, when necessary, preventing those who have engaged in misconduct from obtaining new business with the Air Force (and the U.S. Government in general) through suspension or debarment. SAF/GCR's proactive measures include significant outreach efforts to the government antifraud and contracting communities, and to industry and ethics organizations worldwide, to set the standard for ethical behavior in government contracting. SAF/GCR also generally offers contractors an incentive that if they work with SAF/GCR to develop world-class (or, at a minimum, market segment-leading) ethics operations before allegations of misconduct arise, then SAF/GCR is more likely to offer the contractor the chance to respond to allegations through show cause letters (explained further, below) before a suspension or proposed debarment.

The ethics case discussed in this article shows the reactive side of SAF/GCR's work, including how the Air Force would respond upon learning of these allegations of misconduct. In order to provide the most complete view of how the Air Force deals with possible procurement fraud or actionable conduct, this article will describe how each program reacts generally when

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presented with allegations of misconduct, and then analyze how the specific facts in this article might have been addressed had they been presented to or discovered by the Air Force.

#### A. How Does the Air Force Evaluate Potential Suspension and/or Debarment Cases?

Pursuant to the FAR, "[a]gencies shall solicit offers from, award contracts to, and consent to subcontracts with, responsible contractors only."<sup>6</sup> "Present responsibility" is a term of art. To simplify, the analysis of present responsibility is the mechanism for government agencies and departments to make business judgments about contractors and to determine whether these are the types of contractors with which the Air Force (and, by extension, the Government) should conduct business.<sup>7</sup> Suspension and debarment exist to protect the Government's interests, and although it may feel like punishment to suspended or debarred contractors, the suspension/debarment regime does not exist to punish.<sup>8</sup> This process is designed to be similar to the process a private sector business would go through when deciding that its business interests are best served by no longer executing any new business deals with a particular supplier or partner.

Because the FAR provides discretion to suspending and debarring officials,<sup>9</sup> different agencies have somewhat different processes for conducting present responsibility evaluations. The Air Force generally conducts an initial and final present responsibility review. In the initial review, the Air Force analyzes whether the alleged wrongdoer is a contractor within the definition of the FAR.<sup>10</sup> The Air Force then addresses whether it has "lead agency" status to conduct a FAR Subpart 9.4 present responsibility determination that will affect the entire executive branch of the Federal Government.<sup>11</sup> That coordination occurs within the DoD and government-wide.<sup>12</sup> The Air Force assesses the completeness of the administrative record, including whether it supports suspension or debarment and what mitigating factors may argue against suspension or debarment. If the record is incomplete, the Air Force will work with "the field" (generally Air Force Acquisition Fraud Counsel, investigators, acquisition personnel, and auditors) to ascertain the facts.

In its final review, SAF/GCR assesses whether there has been actionable misconduct, then analyzes whether suspension or debarment is necessary given the misconduct and any mitigating factors. Relevant misconduct may include the commission of crimes, issues involving integrity, contract perfor-

2. 31 U.S.C. § 3730 (2006).

3. See FAR 9.4.

4. See ORDER OF THE SECRETARY OF THE AIR FORCE, AIR FORCE INSTRUCTION 51-1101, THE AIR FORCE PROCUREMENT FRAUD REMEDIES PROGRAM 1.1.1 (2003).

5. *Id.* art. 3 § IV.

6. FAR 9.402(a).

7. See generally FAR 9.4.

8. See FAR 9.402(b).

9. FAR 9.406-3 (debarment procedures); FAR 9.407-3 (suspension procedures).

10. See FAR 9.403 (defining "contractor").

11. See FAR 9.402(d).

12. *Id.*

mance failures, or any other serious and compelling cause that calls the contractor's present responsibility into question.<sup>13</sup> The Air Force analyzes which companies or individuals are responsible for the misconduct or are otherwise not presently responsible. Finally, the Deputy General Counsel (Contractor Responsibility) in his capacity as the Air Force suspending and debarring official, determines whether immediate action is necessary to protect the Government's business interests. If the suspending and debarring official determines that administrative action is required, he issues a memorandum and notice that comply with the FAR procedural requirements<sup>14</sup> and the contractor's name is placed into the Excluded Parties List System to effectuate the action.<sup>15</sup>

#### B. *How Does the Procurement Fraud Remedies Program Implement Its Mission?*

The Remedies Program implements its mission proactively and in response to allegations of fraud. The Remedies Program proactively develops stakeholders throughout the corporate Air Force and coordinates its actions through these stakeholders. Part of that effort is to continue to impress upon Air Force personnel that fighting fraud is important. Lives can be in danger in some cases. For example, if a fraudulently substituted part—that was not what the Air Force contracted for—falls midflight, it could cause an airplane to fall from the sky. Even in the seemingly mundane example of a base construction contractor, substituting lesser-quality fencing as a security perimeter than what the contract called for can put lives of airmen and women at risk because the barriers may not hold up as well as required in the event of a security breach. Even when lives are not at risk, the ability of the Air Force to fulfill its mission is adversely affected every time fraud occurs.

In addition to conducting frequent speaking and training engagements for acquisition personnel, investigators, and fraud attorneys worldwide, SAF/GCR works to develop Air Force antifraud priorities by listening and responding to the concerns of the acquisition community. The Remedies Program also encourages the development and expansion of working groups to address concerns in the field about potential fraudulent activity. Successful working groups involve attorneys, acquisition personnel, investigators, and auditors. Such groups meet regularly to discuss issues of concern. They can be focused on particular cases, or more general best practices. These working groups are an effective means of discovering and countering fraud quickly, and dissemin-

nate a unified message to the contractor community that we are all partners in preventing and remedying fraud.

When reacting to allegations of misconduct, the Remedies Program director first conducts an initial determination of whether the allegations suggest possible fraud, and if so, opens a case and assigns acquisition fraud counsel.<sup>16</sup> The Remedies Program director is an experienced attorney with an acquisition and contract law background both in the federal service and in the private sector. If a case is opened, the director and the assigned acquisition fraud counsel coordinate all remedies with appropriate stakeholders, with a focus on using contract and administrative remedies earlier in the process.

#### C. *How Does the Procurement Fraud Remedies Program Align Its Objectives with Those of the Department of Justice During Pending Fraud Litigation?*

Government agencies (including the Air Force) avoid taking action that may prejudice pending or potential fraud litigation. However, the Air Force could be compelled by independent administrative or contracting program concerns to take actions that could go against the wishes of an assistant U.S. attorney or DoJ that the Air Force await the outcome of the prosecution. With DoJ coordination, reasonable remedial action to address administrative or contracting program concerns are within the corporate Air Force's authority. Accordingly the Procurement Fraud Remedies Office generally requests that Air Force contracting personnel who learn of fraudulent activity coordinate with the Procurement Fraud Remedies Office as soon as possible so that contract remedies may be coordinated in such a manner that they will address administrative or program concerns without harming a pending or contemplated fraud action by DoJ. On balance, the Air Force and DoJ understand that these types of coordinated remedial actions have proven helpful to the Government as a whole. That said, there have been times when the Air Force has taken necessary administrative or contract action that DoJ did not initially support.

#### D. *How Would the Air Force Learn About a Case Like the Lockheed Martin Hypothetical Case?*

The Air Force can learn, and has learned, about specific allegations of contractor misconduct from a variety of sources. Recently SAF/GCR has opened cases based on contractor disclosures, referrals from Defense Contract

13. See, e.g., FAR 9.406-2, 9.407-2.

14. FAR 9.406-3 (debarment procedures); FAR 9.407-3 (suspension procedures).

15. FAR 9.404. All federal executive branch Contracting Officers are required to review the Excluded Parties List System prior to making awards. FAR 9.404(c)(7). The Excluded Parties List System is available at <http://www.epls.gov>. For information on the process for a contractor to contest the action or demonstrate present responsibility notwithstanding the misconduct, see FAR 9.406-3 (debarment) and FAR 9.407-3 (suspension).

16. Acquisition fraud counsel are assigned by staff judge advocates at various major commands and individual installations to administer the Procurement Fraud Remedies Program at that location. See Air Force Instruction 51-1101, *supra* note 4, at 1.1.3, art. 1. Among other objectives, the Air Force Procurement Fraud Remedies Program exists to coordinate all remedies (civil, criminal, administrative, and contractual) for the benefit of the Air Force when facing allegations of contractor fraud or misconduct. See *id.* at 1.1.1; see generally *Def'r of Def.*, INSTRUCTION No. 7050 05, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO PROCUREMENT ACTIVITIES (2008).

Management Agency fraud counsel and Air Force Materiel Command Acquisition fraud counsel, qui tam cases referred by DoJ, Air Force Office of Special Investigation and Defense Criminal Investigative Service case status reports, media coverage, and information from whistleblowers. Because of the 400 or so contract issues associated with the CGS program in the Lockheed Martin hypothetical case, a procurement fraud counsel at the major command ("MAJCOM") level (here, the Air Force Space Command) likely would have already been alerted and would be monitoring the contract developments. To provide a more complete view of the entire Air Force process, however, this article assumes that the Air Force learned about the issues on the CGS program from media coverage. At that point, the Air Force Public Relations team likely would have contacted SAF/GCR seeking comment about possible suspension or debarment of Lockheed Martin, SAF/GCR staff would have read or seen media coverage, and SAF/GCR staff likely would also have been responding to an inquiry from a congressional office caused by the barrage of media on this high-visibility program.

#### *E. How Would the Air Force Proceed with Its Investigation in This Case?*

The first step for SAF/GCR after deciding that a case merits further development, would be to contact fraud counsel at the Air Force Space Command and at the newly constituted Contract Law Field Support Center ("KLFSFC") within the acquisition law division of the Air Force Legal Operations Agency ("AFLOAJAQ") and ask that they work together to develop the facts and coordinate the response. Through KLFSFC, AFLOAJAQ is responsible for providing acquisition fraud counsel to supplement the efforts of the various major commands in supporting SAF/GCR and its Remedies Program mission for all Air Force major commands other than Air Force Materiel Command ("AFMCC").<sup>17</sup>

SAF/GCR requests MAJCOM-level support because acquisition fraud counsel at MAJCOM are closer to all the stakeholders and are more likely to be familiar with the missions, contracts, and issues affecting programs in their area of responsibility. The acquisition fraud counsel contracts the relevant stakeholders (investigator, auditor, acquisition attorney, and contracting staff) to coordinate possible contractual, statutory, and administrative remedies in consultation with SAF/GCR. Among the fraud counsel's first tasks would be to review the contract to understand the relevant requirements and amendments. This record can be voluminous in a large program, but the analysis is essential to determining whether allegations of unethical or fraudulent con-

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duct have merit. The acquisition fraud counsel would then provide an analysis of the contract provisions and requirements and, generally in concert with investigators or auditors, compare the requirements to what was delivered in order to identify gaps and shortcomings.

In addition to the acquisition fraud counsel's work, SAF/GCR would review the case to determine if a safety or security issue is present, and, if so, make the Air Force safety operation aware of the issue (generally through the Air Force Office of Special Investigations). In addition SAF/GCR makes a preliminary determination of whether the alleged misconduct is significant enough, and the threat to the Government imminent enough, that immediate exclusion from all government contracting through suspension is warranted until the end of the investigation and any resulting legal proceedings. Suspensions may be broad, covering the entire corporate operation, or narrowly tailored to address a specific division, office, or even the team on a specific contract. No matter the scope, suspensions are serious actions and are only "imposed on the basis of adequate evidence, pending the completion of investigation or legal proceedings," following a determination "that immediate action is necessary to protect the Government's interests."<sup>18</sup>

Because the Air Force (other than program personnel) learned of the alleged misconduct following media accounts rather than through a formal referral after an exchange of views with the contractor, SAF/GCR likely would determine that the record is one-sided, and not developed fully enough to decide whether immediate action is necessary to protect the Government. However, the allegations would likely be considered serious enough to warrant a show cause letter. The Air Force typically uses show cause letters in lieu of immediate action sparingly to address situations where the evidence of misconduct is not clear but the allegations are so serious as to require our immediate inquiry. Show cause letters offer contractors a brief period of time, generally thirty days, to respond and convince the suspending and debarring official that administrative action is not warranted. This procedure permits contractors to tell their side of the story, explain the facts, provide any relevant documents, and discuss in-depth the steps taken to mitigate the misconduct, make the Government whole, and change policies and procedures to prevent the misconduct from happening in the future. Agencies are not required by the FAR to consider such factors when evaluating whether to suspend a contractor,<sup>19</sup> but the Air Force generally does.

Once the contractor responds to the show cause letter, SAF/GCR would forward it to the relevant stakeholders for comment. In this case MAJCOM procurement fraud counsel for Air Force Space Command, AFLOAJAQ, the contract staff, and any investigator or agent assigned to the case would have the chance to comment on the facts as represented in the show cause letter

17. The Air Force Legal Operations Agency's acquisition law division ("AFLOAJAQ") provides acquisition fraud counsel support for all Air Force major commands other than the Air Force Materiel Command ("AFMCC"), which has its own dedicated unit of highly experienced fraud counsel. If this case had arisen within the AFMCC, SAF/GCR would make the same request for fraud counsel of the AFMCC fraud section, the AFMCC/OJAF.

18. FAR 9.407-1(b)(1).

19. See, e.g., FAR 9.407-2.

response. Of specific concern would be whether the contractor's version of the facts is the same as the facts uncovered by the government stakeholders, and the sufficiency of the mitigation or remedial steps taken by the contractor. If issues were to remain after the show cause letter response, the contractor might be proposed for debarment, or if the issues are substantial but not serious enough to warrant the immediate exclusion of the contractor from government contracting, then the suspending and debarring official might call all stakeholders together for a meeting to discuss the issues. In the past, these meetings have provided an opportunity for contractors and government acquisition and technical staff to speak directly to each other without undue interruption by lawyers, and have led to favorable outcomes.

The likely outcome of the hypothetical case is that Lockheed Martin's show cause letter response would have explained in detail all the various levels of review by Lockheed Martin's internal Ethics and Business Conduct apparatus, up to the vice president. The response would include full copies of the multiple and independent subject matter experts' reviews of the underlying allegations. The response also would have detailed the history of the contract, explained how each of the three principal issues raised by the complainant had been handled through discussions and agreement with Air Force contracting personnel, explained that the process of addressing disagreements through the relevant contracting office is functioning well, and concluded that, to the best of Lockheed Martin's knowledge, no ethical issues or incidents of possible procurement fraud had occurred.

The Air Force team would take a very serious look at all three of the issues raised—force protection/safety, security of classified transmissions, and the use of non-trad hard direct-to-disk acquisitions systems—and also would look at the progress on the contract as a whole, including whether the Lockheed Martin team (including the lead systems architect) engaged in any known misconduct over the life of the program. It would then require answers from Lockheed Martin to the satisfaction of the Air Force on every outstanding issue, including going beyond the allegations of misconduct from the lead systems architect, as well as an explanation as to why the allegations were not disclosed to the DoD inspector general if such disclosure was required.<sup>20</sup> The Air Force team also would check the Federal Awardee Performance and Integrity Information System ("FAPIIS") and coordinate with other DoD agencies to determine if other misconduct has occurred in recent years relating to the same business unit that could, in combination with these allegations, affect Lockheed Martin's present responsibility.

Assuming there was no substantial disagreement about the underlying facts when reviewed by Air Force stakeholders, and the record reflected common-sense efforts by Lockheed Martin and the Air Force acquisition team to meet

and confer about any disagreements and handle them effectively, then SAF/GCR would most likely take a "wait and see" approach while the government team reviewed the facts and completed its investigation, rather than an immediate suspension or proposed debarment. If the Government's ultimate analysis is the same as Lockheed Martin's—that no misconduct occurred and remedial training should prevent or mitigate reoccurrence—and there is no evidence of other misconduct relating to the subject business unit, then the case would likely be closed without any action taken. If the Air Force uncovered evidence of misconduct, then the Procurement Remedies team would work in concert to pursue the appropriate remedies, including contractual, civil, criminal, and, if necessary, debarment.

#### IV. QUESTIONS AND ANSWERS

##### A. *Questions for Lockheed Martin from the Air Force*

1. Would You Reach Out to the Air Force to Disclose the Investigation of the Hypothetical Case? When? How? To Whom? What Would the Content of That Communication Be? Who Would Need to Approve the Communication Internally Before It Occurred?

Lockheed Martin CGS program management likely would have notified the Air Force customer of the lead systems architect's concerns. Because there was no credible evidence of misconduct found, this disclosure likely would have been to the Air Force's CGS program office. This disclosure likely would have been made after the lead systems architect refused to accept the findings of the first ethics investigation into his concerns, if not sooner. The vice president of Ethics and Business Conduct would make the decision to contact the customer in consultation with the legal department and relevant business executives.

The vice president of Ethics and Business Conduct, in coordination with Lockheed Martin's legal department, also would have likely reached out to SAF/GCR. Given that the ethics investigations concluded that the lead systems architect's allegations were not substantiated and did not give rise to an ethical violation, Lockheed Martin would have made this contact informally to ensure that the deputy general counsel was not surprised when he learned of the situation, which was inevitable in light of the lead systems architect's persistence in pursuing his claims. In this instance the contact probably would have been made after the vice president of Ethics and Business Conduct informed the reporting party that his appeal had been denied as no ethical or legal violations were found. Lockheed Martin would have informed SAF/GCR of the allegations, the efforts taken to investigate the allegations, and the findings. Of course, if credible evidence of reportable misconduct, such as a False Claims Act violation, had been found at any time during the investigations, then Lockheed Martin would have disclosed the alleged misconduct to the cognizant inspector general and the CGS Contracting Officer.

20. See FAR 9.406-2(b)(1)(vi).

2. How Would Lockheed Martin's Response Have Been Different if Your Review Had Uncovered Unethical Behavior? For Example, What if Your Review Uncovered Use of Non-Rad Hard Direct-to-Disk Acquisition Systems Despite a Requirement for Rad Hard Ground Stations, Including All Subsystems? Has the New FAR Mandatory Disclosure Rule Changed Your Procedure for Disclosing the Investigation?

Lockheed Martin's response would be different if our review had uncovered unethical behavior. The allegations regarding non-rad hard direct-to-disk acquisition systems, if substantiated, could be considered product substitution, which can give rise to criminal or civil liability under the False Claims Act.<sup>21</sup> Accordingly, at the point where we found that there was credible evidence of a violation of the False Claims Act (i.e., product substitution), we would have notified the agency's inspector general and the Contracting Officer, in accordance with the FAR mandatory disclosure rule.<sup>22</sup>

For significant cases, such as a suspected product substitution, Lockheed Martin would notify the customer as soon as the issue was known, to rectify the problem. In this instance because the CGS program was a development program, the system would not likely have been used in the field. Lockheed Martin would have determined how many of the nonconforming direct-to-disk acquisition systems had already been delivered to and accepted by the customer. We also would have quickly sought to identify the location of all noncompliant material and taken corrective action to replace all such material with compliant product. If the product had been integrated into a fielded system, we would have worked with the customer to assess the potential damage that could occur as a result of the noncompliance to determine whether the Air Force could continue to use the system.

Most of these notifications and actions also would have occurred before the issuance of the FAR mandatory disclosure rule. The one exception is that we likely would not have informed the inspector general of the findings unless the investigation found some indication of criminal misconduct. Before the FAR mandatory disclosure rule, Lockheed Martin likely would not have notified its customer of less significant allegations of unethical behavior—for example, isolated labor mischarging on a small scale—until the investigation was complete and the mischarging was substantiated. It also would not have notified the inspector general. In either case, we would quantify any financial impact to our customer, reimburse the customer in the correct amount, and identify any corrective actions taken to prevent recurrence of the situation.

3. More Than 400 Issues Seen Like a Lot for the Early Phases of One Contract. Is That Typical for Complex Contracts Like the Ones Lockheed Martin Typically Performs? What Internal Policies and Procedures Are in Place to Ensure That These Issues Are Resolved Ethically and Fairly for Both the Government and the Contractor?

Complex programs typically have many issues that require resolution. Although there is not a "standard" number, 400 issues are not unusual, especially on a development program involving new technology. Lockheed Martin's values (do what is right, respect others, and perform with excellence) and ethical culture are instilled in our workforce from the time of hiring and reinforced throughout an employee's career. Employees know that they are expected to speak up and report concerns, as the reporting party did in the hypothetical case. Even when an employee's allegations are not substantiated, we consider it a good thing that the issues were raised and that management took the concerns seriously.

Lockheed Martin has various program management policies, procedures, and practices that are rigorously applied to identify, track, and resolve program issues early and throughout the life of a program. Our contracts organization and program management are heavily involved in working with the customer to ensure ethical and fair resolution of the issues, for both our customers and Lockheed Martin.

4. What About the Following Difficult Customer Relations Situation—What Happens if Your Investigation Uncovered Misconduct by the Air Force in Its Administration of Your Contract? Would Giving the Customer What It Wants Need to Take a Back Seat to "Doing the Right Thing"? How Would You Address That Type of Situation?

Fortunately, abiding by customer wishes generally is consistent with doing the right thing. However, if our customer suggests something that legally is incorrect, such as seeking a contract modification that potentially would violate procurement rules, we would not take such action. If our customer is requesting something contrary to what we believe is the right thing to do, we have and will decline to abide by the customer's preferences. We would present the reason for our objections and seek to convince the customer to do the right thing. We would escalate to higher levels of the customer, if necessary.

If Lockheed Martin discovered illegal behavior, we would inform the appropriate level of the customer about the behavior rather than agree to engage in the illegal activity. For example, if an Air Force official solicited a bribe to guarantee Lockheed Martin award of a contract, we would inform the appropriate level of the customer and possibly other law enforcement officials, including SAE/GCR.

If a customer is seeking to have Lockheed Martin do something that is legally permissible, but could be considered unethical, this becomes a harder issue. In such situations, Lockheed Martin would assess the requested action based on its values, its reputation, and the needs of the customer. If Lockheed

21. See 31 U.S.C. § 3729 (2006).

22. FAR 52.203-13.

Martin concluded that it should not concede to the customer's request, it would attempt to work with its customer at the program level to explain its ethical concerns. Lockheed Martin would escalate these ethical concerns within the customer hierarchy to ensure that higher levels understand what is being requested and the reasons Lockheed Martin is declining to take the action requested. Ultimately, absent an extraordinarily compelling national security reason, Lockheed Martin would refuse the customer's request that it engage in behavior that could be considered unethical.

#### B. *Questions for the Air Force from Lockheed Martin*

##### 1. What Is Lockheed Martin's Responsibility When the Air Force

Adamantly Insists upon a Resolution to a Technical Issue That the Lockheed Martin Technical Community Strongly Believes Is Not the Optimum Solution?

The Air Force respects the views of its contractors, who often have some of the world's foremost technical experts servicing the Air Force's needs. Both formal and, when appropriate, informal exchanges of ideas are welcome and useful. However, in the end, our business relationship is defined and controlled by the contract itself. If the Air Force places the technical solution into the contract, then Lockheed Martin must deliver that solution unless the contract is properly modified. We hope that contractors would raise concerns to the highest levels of the Air Force that contractors feel needed to hear their views, but the contract is what controls.

#### C. *Questions Frequently Asked of the Air Force*

##### 1. Are There Any Contractors That Are Too Big to Be Suspended or Debarred? The United States Does Business with Some of the Largest Contractors in the World. Isn't It Unreasonable to Consider Debarring Them?

No contractor is too big to be suspended or debarred. Indeed, as noted at the outset of the article, even Lockheed Martin has faced an inquiry from SAF/GCR, and other large contractors have been suspended and debarred. Not only can the Air Force debar large contractors, but as defense agencies are increasingly dependent upon ever fewer contractors, we must continually focus our insistence that these contractors act responsibly. When contractors fail to do so, the Government must act swiftly, regardless of the short-term effect of such actions on the availability of products and services, understanding that there is a safety valve available in the form of compelling interest waivers for vitally important and irreplaceable services.<sup>23</sup> Further, we always focus on the specific business unit responsible for the misconduct, and, if necessary, debar that business unit. The Air Force does this regardless of the size of the contractor.

##### 2. What Happens if the Investigation Uncovers Misconduct by Air Force Personnel? Does the Air Force Take Any Action Against Its Own Employees?

Yes. There are a number of tools at the Air Force's disposal to deal with misconduct by Air Force employees, including suspension, debarment, personnel action, and referral for prosecution in egregious cases. For example, in a recent case, an investigation into a suspended contractor revealed that several Air Force employees accepted bribes in return for "looking the other way" when presented with increased costs and substandard, or unordered, goods and services. The Remedies Program has taken the lead in coordinating personnel actions, up to and including termination from government employment for those individuals. Also, in the event of—or likely event of—a termination from government service, SAF/GCR can debar, and has debarred, government officials.

#### V. CONCLUSION

It is our hope that this Article, which follows an ethics case based on a real-life issue, shows how seriously the Air Force and Lockheed Martin take allegations of unethical conduct in the procurement process.

23. See FAR 9.405(a).