

As Suspension and Debarment Grows the National Discourse, We Should Not Lose Sight of Broader Procurement Fraud Remedies

By DAVID ROBBINS



As the government procurement fraud community, contractors, and the private bar react to increasing congressional interest into the numbers of suspensions and debarments that federal agencies issue, there is some concern that we are losing sight of the government's ability to engage an integrated remedies approach

coordinating all applicable remedies—civil, criminal, contractual, and administrative—in every case. The US Air Force has an effective procurement fraud remedies program that facilitates this coordination and requires consideration of every applicable remedy in every case.¹ By focusing too heavily on suspension and debarment, we run the risk of becoming reactive in our procurement fraud remedies approach. For agencies without well-established procurement fraud remedies programs, suspensions and debarments are lagging indicators of the relative effectiveness of the programs. By comparison, trends in monetary recoveries to affected programs are leading indicators. Many agencies focus almost exclusively on debarments after the conclusion of civil or criminal cases, which means the allegations of wrongdoing are generally years old. Not only does that risk taking the “present” out of the present responsibility inquiry following the conclusion of a judicial case, but the delay associated with this approach harms the ability of agencies impacted by procurement fraud to return money to affected programs.

To the extent that overall numbers of suspensions, debarments, and proposed debarments are useful metrics, they are helpful tools to separate agencies into general tiers of procurement fraud program activity. Specifically,

agencies with high procurement spends and a few hundred actions a year are highly active. Other agencies with fewer than a half-dozen actions a year, despite billions in procurement and grant spending, are less active. But beyond this analysis, the metric begins to lose its utility. A helpful complimentary metric is to analyze trend lines in monetary recoveries to the programs affected by procurement fraud. This metric is useful because it analyzes the speed of the only remedy that an agency may invoke on its own.² This begs the question: why does the speed of contractual remedies matter? It makes all the difference in the world.

Generally, under fiscal law rules, the funds cancel five years after an appropriation expires (i.e., the fiscal year where the appropriation is authorized ends).³ After that point, all monies must be returned to the US Treasury.⁴ Active procurement fraud remedies programs constantly work on their relationships with all relevant stakeholders, are extremely aware of the fiscal law sunset dates on each program, and are able to coordinate contractual recoveries without harming the ability of any stakeholder to implement any other remedy. The most effective procurement fraud remedies programs are interwoven into the fabric of the organization such that the agency looks for and willingly brings forward allegations of procurement fraud to be remedied early and in a way that generates returns for the program and does not unnecessarily impact its schedule. As such, while overall numbers of suspensions and debarments are helpful lagging indicators of the strength of a procurement fraud program, contract recoveries to affected programs are useful leading indicators. When taken together, these two metrics paint an accurate picture of the overall health and effectiveness of an agency's procurement fraud program.

There are six guiding principles that the Air Force uses, I believe effectively, to bolster its procurement fraud remedies program that may be useful to other agencies.

1. Procurement fraud is a term of art. “Procurement fraud” in the government is far broader than convictions for civil or criminal fraud. For example, the Federal Acquisition Regulation treats as causes for debarment and suspension one or more performance failures or serious and compelling conduct calling into question a contractor's present responsibility.⁵ Agencies must think more broadly than legal definitions of civil and criminal fraud and invoke the procurement fraud remedies apparatus far more frequently. By considering a procurement fraud remedies program to be more of a “Better Business Bureau of

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government contracting,” meaning having active relationships among stakeholders and considering both creative remedies to problems and proactive risk mitigation efforts, agencies are likely to win more procurement fraud stakeholders.

2. Do not rely on investigating agents to bring in cases. Federal law enforcement agents are effective allies and partners in an agency’s procurement fraud mission, but no program should rely on them exclusively to find instances of procurement fraud. Agents must develop sources, receive tips, investigate them, and determine which direction to take the investigation and decide when to bring in other stakeholders. All the while, the fiscal law clock runs. Agencies are better positioned to bring tips to investigators proactively, work together to develop the facts, and deal with the allegations in a coordinated manner.

3. Do not wait for convictions before starting the fraud remedies machinery. Waiting for convictions is too easy. Convictions conclusively establish the facts for the purposes of FAR Subpart 9.4 exclusion.⁶ But this is not the only way to establish nonresponsibility. Convictions also follow the underlying misconduct by a substantial period of time, often years. And lost years often mean lost ability to recover money to the affected program.

4. Be part of a team and bring something useful to the table. Nobody likes being told what he or she is failing to do. In fact, as one Air Force colonel I respect told me recently, “Coming in loud and fast” with criticisms “attracts all the SAMs [surface-to-air missiles].” It is far easier to have tough conversations when you have something to offer. The Air Force offers acquisition fraud counsel to any interested stakeholder in order to provide contract law advice and expertise, as well as an extra body to assist with the difficult tasks associated with procurement fraud remedies (e.g., discovery, proof analysis, etc.).⁷ When acquisition fraud counsel are available and add value to all stakeholders, they become part of the team building trust that facilitates parallel proceedings in a coordinated fashion.

5. Contractual remedies are the agency’s obligation, but they must be done in a coordinated fashion. Agencies cannot abrogate their responsibility to administer their contracts. While only the Department of Justice can settle fraud, an agency has an obligation to do its business in an efficient and effective manner as a steward of the public’s trust and the taxpayers’ dollars. Particularly in this fiscal climate where receiving additional funds to remedy the effects of procurement fraud is difficult, the fiscal law expiration date is vitally important to every agency lawyer.

However, that deadline is not a license to act without coordinating. Contractual actions can eviscerate civil and criminal cases if not done in a coordinated fashion. This type of coordination is difficult, but it is far easier if there is an existing relationship among the stakeholders.

6. Do not take “no” for an answer (but be polite and respectful). Procurement fraud stakeholders are immensely busy and each has favored “default” techniques for obtaining desired results—sometimes without thinking about it—in light of all stakeholder needs. For example, grand jury secrecy may impact the ability to share information or case agents may run interference for the prosecutor and refuse to coordinate. Or, a remedies coordination official may favor remedies that may tip off contractors before law enforcement is ready. The easy reaction for stakeholders may sometimes be to say, “no, you can’t do what you want to do.” This author has found that pushing back, politely, and explaining the agency’s need and the relevant laws, regulations, and practices is a helpful way to get past the initial “no” and into more effective coordination.

Coordinating procurement fraud remedies is difficult. There are undoubtedly many effective techniques used by agencies across the government as we perform our various missions. No matter the techniques, the mindset must be that “doing the right thing to protect the Air Force” means that all remedies are potentially on the table, and the appropriate stakeholders should work together to decide the appropriate mix of remedies in each case. This approach has helped the Air Force increase both its suspension and debarment numbers and the overall contractual recoveries in recent years. 

Endnotes

1. See, e.g., Department of Defense Instruction 7050.05; Air Force Instruction 51-1101.

2. It is well-established that agencies cannot settle fraud cases contractually. That ability is reserved for the Department of Justice. See 41 U.S.C. § 605(a). But agencies have the authority and the obligation as stewards of public funds to administer their contracts. Appropriately coordinated contractual remedies can serve both purposes—effectively administering a program and reserving for the Department of Justice the obligation to punish fraudulent contract.

3. See 31 U.S.C. §§ 1552(a), 1553(a).

4. See 31 U.S.C. § 3302(b).

5. See, e.g., 48 C.F.R. § 9.406-2(b)(i); § 9.406-2(c).

6. 48 C.F.R. § 9.406-2(a). 7. See Air Force Instruction 51-1101; Department of Defense Instruction 7050.05.