



November 8, 2014
10:45 AM – 12:00 PM

Session 605: Defending the Defenders: The Military's War on Procurement Fraud

Each year, the U.S. Government spends approximately \$500 billion on government contracts. Unfortunately, precious taxpayer dollars are lost due to contractors and Government officials engaging in fraudulent behavior. In addition to lost dollars, national security and safety may also be compromised when acquisition fraud occurs. As a result, the Government dedicates a significant amount of resources towards combatting acquisition fraud and securing procurement integrity. This seminar will briefly discuss, from the Air Force perspective, the different acquisition fraud cases that are making news headlines and educate attendees on the various laws, regulations, policies, and principles related to procurement integrity.

Program Chair:

CAPT Megan C. Mallone, *Chief Recruiting Branch, Office of the Judge Advocate General, U.S. Air Force*

Moderator:

Speakers:

MAJ Jeremy de Roxas, *Chief, Accessions Branch, Professional Development Directorate, U.S. Air Force*

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Headquarters U.S. Air Force

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Defending the Defenders: the Military's War on Procurement Fraud



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Speakers

- **Col Won Lee**
 - **Staff Judge Advocate, 66 ABG/JA, Hanscom AFB, MA**
- **Ms. Amy Anaya-Smith**
 - **Deputy General Counsel, SAF/GCR (Contractor Responsibility), Arlington, VA**
- **Maj Jeremy de Roxas**
 - **Chief, Accessions Branch, Professional Development Directorate, JB Andrews, MD**



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The mania for stealing seems to have run through all the relations of Government. Almost from the General to the drummer-boy; from those nearest the throne of power to the merest tide-waiter. Nearly every man who deals with the Government seems to feel or desire that it would not long survive, and each had a common right to plunder while it lived.

Charles Van Wyck (R – NY), 1861



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Agenda

- **Fraud Headlines**
- **Procurement Basics**
- **Common Misconduct**
- **Fraud-fighting Weapons**
- **Challenges**
- **Moving Forward**
- **Audience Questions**

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Why Pay Attention?

Top 5 Reasons – Why You Should Pay Attention

- 5. Government Procurement is exciting! (at least it is to us)**
- 4. You're probably claiming CLE credit**
- 3. Better understanding when media covers Government "fraud"**
- 2. You burn more calories when you're awake vs. asleep**
- 1. You might not know it, but you've all interacted with government contractors**



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FRAUD HEADLINES

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Fraud Headlines

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The Washington Times

RADIO LOG IN WEEKLY ADS SUBS

Lockheed Martin to pay back government for subcontractor scheme

Cost mischarging - \$15.8 million

11 SIZE: + / - PRINT | REPRINTS



Retiree faces 60 years for contracting fraud

Bribery, conflict of interest, unlawful disclosure, conspiracy - \$5.4 million



'Fat Leonard', Lady Gaga and the U.S. Navy: New details in bribery case

Bribery, unlawful disclosure, cost mischarging, conspiracy - \$20+ million



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Fraud Headlines

Air Force Procurement Fraud Poster Child

Darleen Druyun



- Former No. 2 procurement executive for the Air Force for 10 years
- Tough contract negotiator – “The Dragon Lady”
- Oversaw \$30 billion/year expenditures
- Negotiated jobs with Boeing in the midst of contracts negotiations
 - Jobs for daughter & fiancé = \$4 billion for C-130s
 - Job for herself = \$23.5 billion for refueling tankers
- Agreed to higher prices, favoring Boeing over competitors, and agreeing to higher claims settlement payments to Boeing
- Influence = \$30 billion in procurement decisions favoring Boeing



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PROCUREMENT BASICS

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Procurement Basics

Government needs goods and services in order to function



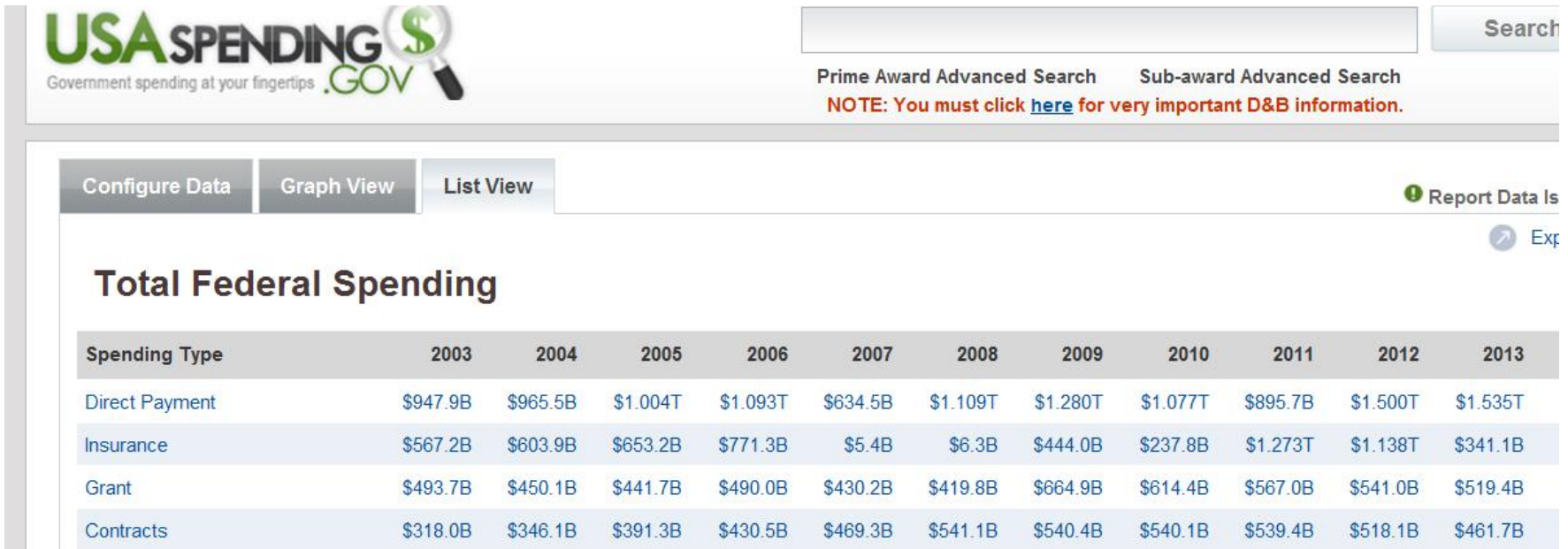
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Procurement Basics

GOVERNMENT BUSINESS IS BIG BUSINESS



\$981.1 billion between grants and contracts in 2013





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Procurement Basics

“Contract” means a *mutually binding legal relationship* obligating the seller to furnish the *supplies or services (including construction)* and the buyer to pay for them. It includes *all types of commitments that obligate the Government* to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing.

-FAR subpart 2.101 Definitions

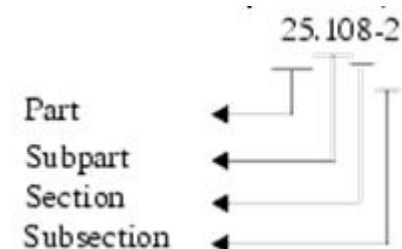


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Procurement Basics

- Statutes, regulations and decisions govern procurement process
- Protect public's interests and fair treatment
- The Federal Acquisition Regulation (FAR) sets the ground rules that Agencies must follow when procuring goods & services
 - Many agencies have FAR supplements

- FAR begins at 48 C.F.R. Chapter 1 = FAR Part 1





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Procurement Basics

- **Contracting officer (CO) has to authority to obligate, administer and terminate**

Commanders Contracting Officers

- **Three pillars underlying U.S. Procurement**

Competition

System Transparency

Procurement Integrity



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Procurement Basics

- Competition and the power of the marketplace drives U.S. procurement
- Agencies post their requirements on a website called FedBizOpps



- How many contracts did the DOD award in fiscal year 2012?
A) 530,410 B) 907,230 C) 1,454,522

C) 1,454,522



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Procurement Basics

- **Types of contract can lend itself to types of fraud**

- **Two basic types of contracts** (FAR Part 16 – Types of Contracts)
 1. **Fixed-price contract** (FAR Subpart 16.2)
 2. **Cost-reimbursement contract** (FAR Subpart 16.3)

- **Major considerations when deciding the type of contract to use**
 - How well can the agency articulate its requirement?
 - How much risk (performance/cost) are the parties willing to take?



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Procurement Basics

Fixed-Priced Contracts – FAR Subpart 16.2

- Examples: grounds maintenance, Information Technology (IT) services, commercially available goods and services, base security
- Detailed requirements (based on experience)
- Adequate price competition
- Once price is set, the contractor must manage costs in order to make a profit/fee (or not lose money)
- Price does not vary even if contractor needs to expend more or less resources than planned
- Contractor risk > Government risk
- Potential for upward/downward adjustments, but requires CO determination and findings



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Procurement Basics

Cost-Reimbursement Contracts (FAR Subpart 16.3)

- Examples: complex research & development projects, professional services
- Requirements too difficult to define = FFP contract not an option
- Too many uncertainties allowing for a FFP contract
- Offerors compete on their proposed methods and costs to meet requirements
- Lowest cost/price is not always the most important factor
- Cost ceiling that contractor can't exceed without CO approval
- Established and approved contractor accounting system
- Appropriate Government surveillance; effective contract administration



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COMMON MISCONDUCT

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Common Misconduct

■ Required conduct

- COs must ensure contractors receive impartial, fair, and equitable treatment (FAR subsection 1.602-2(b))
- Implied duty of good faith and fair dealing
- Proper payment for proper work

■ Common Misconduct

- Improper influence of government decisions
- Honesty in dealing
- Obtaining information improperly



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Common Misconduct

Improper Influence of Government Decisions

- **Bribery** – 18 U.S.C. 201(b)
 - Crime to offer, give, solicit or receive a bribe to influence behavior
- **Gratuities** – 18 U.S.C. 201(c)
 - Crime to offer, give, solicit or receive a gratuity related to an official act
- **Conduct of Former Employees** – 18 U.S.C. 207
 - Unfair use of prior positions or affiliations
 - Procurement Integrity Act – 41 U.S.C. 2104
- **Conduct of Current Employees** – 18 U.S.C. 208
 - No personal and substantial participation in any matter concerning an organization with which an employee has a financial interest
- **Kickbacks** – 41 U.S.C. 8701-07
 - Payments involving prime and sub contractors that impede competition



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Common Misconduct

Honesty in Dealing

- **False Claims** – 31 U.S.C. 3729 (civil fraud); 18 U.S.C. 287 (criminal fraud)
 - Contractor demands payment for goods/services that it did not actually deliver
 - Possible in both fixed-price and cost-reimbursement contracts, but more frequent and in larger dollar amounts in CR contracts

- **Product Substitution** – 2012 NDAA; 18 U.S.C. 2320; DoDI 4140.67
 - Contractor delivers a product that does not conform to the contract requirements
 - Intent to deceive the government
 - E.g. mismarking products (“Made in America”), deviations from contract specs (Chinese microchips); defective products; defective testing
 - Big focus on prime contractors’ supply chains made up of many subcontractors



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Common Misconduct

Obtaining Information Improperly

Reduced budgets → increased competition → drastic measures?

- **Disclosure of Confidential Info by Govt Employees** – 18 U.S.C. 1905
- **Disclosure of and Obtaining Contractor Bid/Proposal and Source Selection Info** – 41 U.S.C. 2102
 - Contractor bid or proposal information – submitted by offerors to win a contract
 - Source selection information – information agencies use to evaluate proposals
- **Exchanging Information Between Competitors**
 - E.g. bid-rigging, collusion and price-fixing
 - Competitors collude to drive prices up and can take turns winning contracts
 - Offerors in FP contracts must certify independent prices – FAR 3.103-1
 - Certificate of Independent Price Determination requirement – FAR 52.203-2



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FRAUD-FIGHTING WEAPONS

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Fraud-fighting Weapons

- **Body of laws previously mentioned**
- **Qui Tam Actions** - 31 U.S.C. 3730
 - *Who as well for the King as himself sues in this matter*
 - Allows a private individual (the relator) to sue contractors for fraud in civil court on behalf of the government and receive 15% to 25% of award or settlement amount
 - FY 13 – DOJ recovered \$2.9 billion w/ \$345 million going to relators
- **Truth in Negotiations Act (TINA)** – 10 U.S.C. 2306a; 41 U.S.C. 3501-09
 - Offerors/contractors must certify “cost or pricing data”
 - Failure may result in a “refund” with penalties and interest
 - Possible False Claims Act violation



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Fraud-fighting Weapons

- **Sherman Act** - 15 U.S.C. 1
 - Criminal antitrust law
 - Prohibits any agreements among competitors to fix prices or rig bids
 - Felony and punishable by a fine up to \$10 million and/or 3 years imprisonment

- **Contractor self-reporting and mandatory disclosure** - FAR 52.203-13
 - Contractors must timely disclose credible evidence of procurement fraud
 - Disclosure requirement continues until at least 3 years after final payment
 - Reduced to no financial penalties and leniency for self-reporting



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Fraud-Fighting Weapons

■ **Four Remedies**

- **(1) Civil and (2) Criminal prosecution – (DOJ and AUSAs)**
 - E.g. Conspiracy to defraud, civil and criminal false claims, false statements, mail and wire fraud, Major Fraud Act (18 U.S.C. 1031), Bid-rigging
- **(3) Administrative Remedies**
 - Suspension and Debarment – 10 U.S.C. 2393; FAR Subpart 9.4
 - Suspension - Action taken by a suspending official to disqualify a contractor temporarily from Government contracting
 - Debarment - Action taken by a debarring official to exclude a contractor from Government contracting for a specified period.
 - Goal is to protect the Government from irresponsible partners lacking integrity
- **(4) Contractual Remedies**
 - Contracting Officer has authority to refuse payment, withhold payment, deny claims for payment, default termination, termination for convenience performance evaluations, stop work, liquidated damages, re-inspection, unilateral price reduction



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Fraud-fighting Weapons

■ **Dedicated procurement fraud units. Examples include:**

- National Procurement Fraud Task Force
- DoD – Defense Criminal Investigative Service
- Special Inspector General for Iraq Reconstruction (SIGIR)
- Special Inspector General for Afghanistan Reconstruction (SIGAR)
- Army – Army Legal Services Procurement Fraud Division, US Army Criminal Investigation Command (CID) Procurement Fraud Unit
- Navy – Navy Office of the General Counsel Acquisition Integrity Office, Navy Criminal Investigative Service (NCIS) Procurement Fraud Division
- Air Force – Air Force General Counsel, Contractor Responsibility (SAF/GCR), Air Force Office of Special Investigations (AFOSI) Office of Procurement Fraud, Air Force Materiel Command Law Office Procurement Fraud Division (AFMCLO/JAN), Contract Law Field Support Center Fraud Remedies Branch
- DOJ – Criminal Division Fraud Section



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CHALLENGES

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Challenges

The DoD needs a capable acquisition workforce to plan, negotiate, and administer complex procurements

- **Demands on acquisition workforce greater than supply of acquisition personnel and skills**
 - Acquisition workforce began shrinking in the 1990s w/ hiring freeze
 - Shortage of acquisition personnel with 5-15 years of experience
 - Significant number of experienced acquisition professionals are retiring or near retirement
 - **Good News:** DoD has increased its acquisition workforce by approximately 22,500 personnel over the last 5 years
 - **Impact on Fraud:** A bigger more capable acquisition workforce can better deter, detect, identify and resolve procurement fraud. Eg. Defense Contract Management Agency



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Challenges

Conflicts in Iraq and Afghanistan Cost Approximately \$6 trillion – What were the procurement fraud costs?

■ **Commission on Wartime Contracting in Iraq and Afghanistan**

- Independent, bipartisan commission established in 2008 to study government contracting related to contingency operations in Iraq and Afghanistan
- Aug 2011 Final Report – “at least \$31 billion, and possibly as much as \$60 billion, has been lost to contract waste and fraud in America’s contingency operations in Iraq and Afghanistan”
- Dedicated board to implementing Commission’s recommendations

■ **Wartime Suspension of Limitations Act (WSLA) - 18 U.S.C. 3287**

- Tolls statute of limitations for fraud offenses when country is at war
- Issues: Does WSLA apply to civil actions for fraud? Does it apply when there has not been any formal declaration of war?
- Supreme Court granted certiorari in a case that raises these two issues
- Qui tam relators may help the U.S. Government recover billions



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Moving Forward

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Moving Forward

- **Agency focus:** move from responding to fraud to promoting acquisition integrity in government practices and industry engagement
- **Industry focus:** embrace an ethical culture beyond mere compliance
- **Contracting Officer focus:** use contractor performance evaluations to promote highest degree of integrity (evaluation factors dedicated to integrity?)
- **Congress/Presidential focus:** continue to strengthen the acquisition workforce



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Thank you for your time and attention!
Questions/Comments from the Audience

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