

Chapter 28
Procurement Fraud



2014 Contract Attorneys Deskbook

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CHAPTER 28

PROCUREMENT FRAUD

I.	INTRODUCTION.	1
II.	IDENTIFYING FRAUD.	1
	A. Fraud Before Contract Award	1
	B. Fraud After Contract Award	4
III.	REPORTING FRAUD.	7
	A. Stop Everything Upon Uncovering Fraud	7
	B. Government Reporting	7
	C. Contractor “Mandatory Disclosure” Reporting	8
	D. Individual Reporting	10
IV.	COMBATTING FRAUD.	12
	A. The Four Government Remedies	12
	B. The Government Fraud Fighters	12
	C. DOJ Fraud Policy	12
	D. DoD Policy	13
	E. Service Policies	13
V.	CRIMINAL REMEDIES	13
	A. Conspiracy to Defraud	13
	B. Criminal False Claims	14
	C. False Statements	14
	D. Mail Fraud and Wire Fraud	15
	E. Major Fraud Act	15
	F. Bid Rigging	16

G.	Title 10 (UCMJ) Violations	16
VI.	CIVIL REMEDIES.	16
A.	The Civil False Claims Act (FCA)	16
B.	Liability Under the FCA	17
C.	Damages	18
D.	Civil Penalties.....	18
E.	The “Qui Tam” Provisions of the Civil False Claims Act.....	19
F.	Special Plea in Fraud	20
VII.	ADMINISTRATIVE REMEDIES.....	21
A.	Debarment and Suspension Basics	21
B.	Debarment - Causes for debarment	21
C.	Suspension - Causes for suspension	23
D.	Effect of Debarment or Suspension.....	24
E.	Period of Debarment.....	25
F.	Period of Suspension.....	26
VIII.	CONTRACT REMEDIES.	26
A.	Historical Right.....	26
B.	Contracting Officer Authority.....	27
C.	Denial of Claims.....	28
D.	Counterclaims Under the CDA	28
E.	Default Terminations Based on Fraud.....	29
F.	Voiding Contracts Pursuant to FAR 3.7	30
G.	Suspending Payments Upon a Finding of Fraud	30
H.	Voiding Contracts Pursuant to the Gratuities Clause	31
IX.	BOARDS OF CONTRACT APPEAL’S TREATMENT OF FRAUD.	31

A.	Jurisdiction.....	31
B.	Dismissals, Suspensions and Stays.....	32
C.	Fraud as an Affirmative Defense.....	32
XI.	CONCLUSION.....	32

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CHAPTER 28

PROCUREMENT FRAUD

I. INTRODUCTION.

- A. “Corruption wins not more than honesty.” (Shakespeare, King Henry VIII, Act 3, Scene 2, Line 444; Cardinal Wolsey’s concessionary speech to Lord Thomas Cromwell, after the King expresses his displeasure with Wolsey).
- B. “The United States does not stand on the same footing as an individual in a suit to annul a deed or lease obtained from him by fraud. . . . The financial element in the transaction is not the sole or principle thing involved. This suit was brought to vindicate the policy of the Government. . . . The petitioners stand as wrongdoers, and no equity arises in their favor to prevent granting the relief sought by the United States.” Pan Am. Petroleum and Transp. v. United States, 273 U.S. 456, 509 (1927).
- C. Fraud is defined as “[a]ny intentional deception . . . including attempts and conspiracies to effect such deception for the purpose of inducing . . . action or reliance on that deception. Such practices include . . . bid-rigging, making or submitting false statements, submission of false claims . . . adulterating or substituting materials, or conspiring to use any of these devices.” Army Regulation (AR) 27-40, Legal Services, Section II, Terms.
- D. Understanding fraud is important as restrictions on funds have now been implemented to prohibit funding of those contractors convicted of fraud and officially suspended from further participation in contracting. This affects funding from the 2014 Department of Defense Appropriations Act (Division C of Public Law 113-76). *See* Memorandum of the Undersecretary of Defense for Acquisition, Technology, and Logistics, SUBJECT: Class Deviation – Prohibition Against Using Fiscal Year 2014 Funds to Contract with Entities Convicted of Fraud Against the Federal Government (dated March 20, 2014) *found at* http://www.acq.osd.mil/dpap/dars/class_deviations.html.

II. IDENTIFYING FRAUD.

- A. Fraud Before Contract Award: These types of fraud may occur prior to contract award. More than one type of fraud, however, may be present in one case, and at any time within the same acquisition. This is not an all-inclusive list.¹

¹ *See* AR 27-40, Chapter 8 (For additional possible indicators of fraud, the Army’s Indicators of Fraud are laid out in AR-27-40, figure 8-1); *see also* Auditor Fraud Resources – Scenarios and Indicators, *available at* <http://www.dodig.mil/resources/fraud/scenarios.html>.

1. Bribery, Public Corruption, and Conflicts of Interest.
 - a. The breach of an employee's duty of loyalty. See, e.g., United States v. Carter, 217 U.S. 286 (1910); United States v. Brewster, 408 U.S. 501 (1972). In these types of fraud, government employees collude with one or more contractors to effectuate the fraud. The breach of the government employee's duty of confidentiality may occur as a result of a direct *quid pro quo* bribe, or an indirect conflict of interest.
 - b. Possible indicators of Bribery, Public Corruption, and Conflicts of Interest.
 - (1) Unjustified favorable treatment to a contractor.
 - (2) Acceptance of low quality goods, nonconformance to contract specifications, and/or unjustifiably late delivery of goods or services.
 - (3) An unusually high volume of purchases from the same contractor or set of contractors.
 - (4) Procurement officials fail to file financial disclosure forms (this may occur when a procurement official remains directly involved in a procurement in which he/she has a substantial financial stake in).
 - (5) Procurement official has family members who are employed by contractors which were awarded a government contract.
 - (6) Purchasing unnecessary or inappropriate goods or services.
2. Bid-Rigging.
 - a. Under the Sherman Act, 15 U.S.C. § 1, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several States, or with foreign nations, is declared to be illegal." Circumvents competition, which increases cost to the government, and deprives it of the most reliable measure of what price should be. The measure of damages is "the difference between what the government actually paid on the fraudulent claim and what it would have paid had there been fair, open and competitive bidding." United States v. Killough, 848 F.2d 1523, 1532 (11th Cir. 1988); see also Brown v. United States, 524 F.2d 693, 706 (1975); United States v. Porat, 17 F.3d 660 (3rd Cir. 1993).

- b. Possible indicators of Bid Rigging.
 - (1) The winning bid price seems to be much higher than the independent government estimate (IGE) or industry averages.
 - (2) There is a pattern of winning bidders.
 - (3) The losing bidder(s) typically become the subcontractor of the winning bidder.
 - (4) The solicitations and/or specifications are written in an overly restrictive way (i.e. only one contractor could possibly provide the desired product).
- 3. Defective Pricing.
 - a. The Truth in Negotiations Act (“TINA”), 10 U.S.C. § 2306a and 41 U.S.C. Chapter 35, requires contractors in certain negotiated procurements to disclose and certify that disclosed details concerning expected costs are accurate, current and complete (see Contract Pricing Chapter, Chapter 12, Contract Attorneys Course Deskbook). Defective Pricing arises when those certified details of expected costs are inaccurate or incomplete. A perceived or actual violation of TINA may serve as the predicate for a fraud investigation and civil or criminal prosecution by the Government. United States v. Broderson, 67 F. 3d 452 (2d Cir. 1995).
 - b. Possible indicators of Defective Pricing.
 - (1) Unrealistic cost estimates.
 - (2) Incomplete cost estimates.
- 4. Fraudulent Sole Sourcing.
 - a. Occurs when procurement officials collude with a contractor to unjustifiably direct a contract to a contractor without “full and open” competition (and at a higher price than the government would have paid if the requirement was properly competed). FAR Subpart 6.2 (Full and Open Competition After Exclusion of Sources) and FAR Subpart 6.3 (Other Than Full and Open Competition) provide the limited situations in which contracts may be awarded without full and open competition. Each of the Subparts provides justification criteria for when full and open competition can be waived. A procurement that cannot meet this criterion may be suspect and indicative of fraud.

- b. Possible indicators of Fraudulent Sole Sourcing.
 - (1) Specifications so tailored that it appears as if only one contractor could satisfy the requirement.
 - (2) The required J&A (Justification and Approval) to approve the sole source acquisition is vague and/or incomplete.
 - (3) The required J&A (Justification and Approval) to approve the sole source acquisition is just below a threshold that would require the J&A to be approved by a higher-level procurement official. The J&A for a sole source acquisition whose price is \$650,000 or less, for example, requires approval of the contracting officer (unless agency rules require higher-level approval), while those greater than \$650,000 require the approval of the Competition Advocate, the head of the procuring activity, or the senior procurement executive of the agency. *See* FAR 6.304.
 - (4) Previously, the requirement being sole-sourced was successfully procured with full and open competition.
 - (5) One purchase is unjustifiably split into multiple purchases simply to avoid competition (i.e. using simplified acquisition procedures).

B. Fraud After Contract Award: These types of fraud may occur after the contract award. This is not an all-inclusive list.

- 1. Product Substitution/Defective Product/Defective Testing.
 - a. Product substitution is “delivery to the government of a product that does not meet the contract requirements.” Nash, Schooner, O’Brien-DeBakey, Edwards, *The Government Contracts Reference Book*, 3rd Edition; The George Washington University, 2007. These terms generally refer to situations where contractors deliver to the Government goods that do not conform to contract requirements without informing the Government. United States v. Hoffman, 62 F. 3d 1418 (6th Cir. 1995).
 - b. Defective Products and Defective Testing cases are subsets of Product Substitution and occur as a result of the failure of a contractor to perform contractually required tests, or its failure to perform such testing in the manner required by the contract.

- (1) Acquisition officials sometimes cannot spot defective products at time of acceptance due to the high volumes of goods or services being delivered. Latent defects are the most susceptible to being undiscovered.
- c. Possible indicators of product substitution.
- (1) Delivery of look-alike goods made from non-specification materials.
 - (2) Non-testing or defective testing of materials contravening the contract's specifications.
 - (3) Goods that appear to be used when the government contract specifies that new goods should be delivered.
 - (4) Missing source documentation.
 - (5) Source information accompanying the shipping materials that contain the product, or the actual product's identification information is removed.
- d. Deliverables that contain counterfeit components.
- (1) Section 818 of the 2012 National Defense Authorization Act brought about a renewed focus on counterfeit parts in Government procurements.² Included within this section was a change to the Federal criminal code (18 U.S.C. § 2320) to criminalize any trafficking of known counterfeit military goods or services, for which the use of the counterfeits could cause death, serious injury, classified disclosures, or impairment of combat operations.³
 - (2) This is further implemented by DoD Instruction 4140.67, the DoD Counterfeit Prevention Policy (April 26, 2013), and in new additions to Defense Federal Acquisition Regulation Supplement (DFARS). The DoD's Counterfeit Policy sets forth a holistic approach for prevention and detection. But the new DFARS sections pertain only to counterfeit electronic parts.⁴

² National Defense Authorization Act (NDAA), Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1493, § 818.

³ Id. At § 818(h), 125 Stat. 1497.

⁴ *Detection and Avoidance of Counterfeit Electronic Parts*, 79 FR 26092 (DFARS Case No. 2012-D055); codified at 48 CFR 202, 231, 244, 246, and 252 (May 6, 2014).

- (3) However, proposed amendments to the FAR are broadening the spectrum of regulatory coverage for contractors to detect and to prevent counterfeits in their supply chain, and in final Government deliverables.⁵
- (4) Suspected counterfeits are reported in GIDEP, the Government-Industry Data Exchange Program, an information clearinghouse to report and to track instances of non-conforming materials.

2. False Invoices.

- a. May occur when the contractor submits false invoices and/or claims requesting government payment of goods and/or services that were not delivered to the government. Shaw v. AAA Engineering & Drafting, Inc., 213 F.3d 545 (10th Cir. 2000) (stating that monthly invoices submitted when the contractor was knowingly not complying with contract terms can be the basis of False Claims Act liability. A claimant can premise a claim on a “false implied certification of contractual compliance.”) False invoices may also occur when a contractor delivers goods but the invoices are inflated (e.g., inflated cost invoices in a cost-reimbursement contract).
- b. Possible indicators of False Invoices.
 - (1) Copied or inappropriately altered supporting documentation (i.e. white-outs or other redaction).
 - (2) Payment invoice exceeds contract amount.
 - (3) Invoiced goods cannot be located.
 - (4) Missing or copied receiving documents.
- c. Audits can uncover credible evidence of False Invoices
 - (1) Contractors are put on notice of the Defense Contract Audit Agency (DCAA) audit practices and procedures, as found in Information for Contractors, DCAA Manual No. 7641.90 (June 26, 2012).
 - (2) Employees completing false timesheets and/or supervisors who allow this to happen can be spotted during labor floor checks or interviews. *See* DCAA Manual No. 7641.90 at enclosure 2, page 16.

⁵ *Expanded Reporting of Nonconforming Items*, 79 FR 33164 (FAR Case Number 2013-002) (June 10, 2014).

III. REPORTING FRAUD.

- A. Stop Everything Upon Uncovering Fraud: Upon uncovering substantial indications of procurement fraud, STOP EVERYTHING related to that procurement until the allegations of fraud are properly investigated and resolved. Of note, 41 U.S.C. §7103(c), as implemented by FAR 33.210(b), prohibits any contracting officer or agency head from settling, paying, compromising or otherwise adjusting any claim involving fraud.
- B. Government Reporting: Upon receiving or uncovering substantial indications of procurement fraud, the Procurement Fraud Advisor (PFA), usually a contracts attorney in the respective installation or deployed Area Of Responsibility (AOR), will need to report the suspected fraud to the appropriate authorities. AR 27-40, Chapter 8. Prior to submitting any official reports, the PFA should first consult with the Procurement Fraud Branch (PFB) at the Contracts and Fiscal Law Division, USALSA. After consulting with the PFB, the PFA should take the following actions:
1. Report the matter promptly to their supporting Army Criminal Investigation Command (USACIDC or Army CID) element.
 2. Submit a “Procurement Flash Report” to PFB. The flash report should contain the following information:
 - a. Name and address of contractor;
 - b. Known subsidiaries of parent firms;
 - c. Contracts involved in potential fraud;
 - d. Nature of the potential fraud;
 - e. Summary of the pertinent facts; and
 - f. Possible damages.
 3. FAR Subsection 9.406-3. Promptly refer to debarring official of matters appropriate for that official’s consideration.
 4. Remedies Plan. Prepare a comprehensive remedies plan. The remedies plan should include the following:
 - a. Summary of allegations;
 - b. Statement of adverse impact on DoD mission;
 - c. Statement of impact upon combat readiness and safety of DA personnel; and

- d. Consideration of each criminal, civil, contractual, and administrative remedy available.
 - 5. Litigation Report. Consult PFB to determine if a litigation report is necessary.
- C. Contractor “Mandatory Disclosure” Reporting: The FAR *requires* contractors to disclose “credible evidence” of criminal and/or civil fraud. Prior to 2008, there was a *voluntary* reporting regime.
- 1. Contractor Disclosure to Avoid Suspension or Debarment (FAR 3.1003(a)(2) and (3)): This requirement applies to all contractors and subcontractors, in all current and future government contracts *and remains a cause of action* for suspension and/or debarment until 3 years after final payment on a contract.
 - a. FAR 3.1003(a)(2): A contractor may be suspended and/or debarred if a “principal”⁶ of the contractor knowingly fails to timely disclose to the Government (in connection with the award, performance, or closeout of a Government contract, *performed by the contractor or one of their subcontractors*) credible evidence of:
 - (1) a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations of Title 18, US Code; or
 - (2) a violation of the Civil False Claims Act (31 U.S.C. §§ 3729-3733).
 - b. Violations of FAR 3.1003(a)(2) remain a cause for suspension and/or debarment for three (3) years *after* the final payment on a contract.
 - c. FAR 3.1003(a)(3): A contractor may be suspended and/or debarred if a principal of the contractor knowingly fails to timely disclose to the Government (in connection with the award, performance, or closeout of a Government contract, *performed by the contractor or one of their subcontractors*) credible evidence of significant overpayments of a contract.
 - 2. Disclosures Required for Certain Contractors by Contract Clause:⁷ This is prescribed in FAR 3.1004(a) for when the value of the contract

⁶ FAR 2.101, Definitions (“Principal” means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity). Also found at FAR 52.203-13(a).

⁷ FAR 52.203-13, *Contractor Code of Business Ethics and Conduct*, applies if FAR 3.1004 thresholds are met.

is to exceed \$5 million and will have a performance period of 120 days or more. FAR 52.203-13(b)(3) requires the contractor shall timely disclose in writing to the agency Inspector General (with a copy to the contracting officer) credible evidence that a principal, employee, agent, or subcontractor has committed:

- a. a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations of Title 18, US Code; or
- b. a violation of the Civil False Claims Act (31 U.S.C. §§ 3729-3733).

3. Business Ethics Awareness and Compliance Program and Internal Control System Required by Contract Clause (FAR 52.203-13(c)): Unless the contractor holds itself out as a small business concern to obtain contract award, or unless the contract is for acquisition of a commercial item, FAR clause 52.203-13(c) applies to contracts that exceed \$5,000,000 and the period of performance is 120 days or more.⁸ If the FAR 3.1004 threshold (\$5 million/120 days) is met, then the small business and commercial item exemptions do not apply to the other sections of 52.203-13, such as 52.203.13(b).

- a. FAR 52.203-13(b)(1) requires the contractor to:
 - (1) within 30 days of contract award, have a written business code of ethics; and
 - (2) make available this code of ethics to each employee engaged in the performance of the contract.
- b. FAR 52.203-13(c) requires contractors, within 90 days of award, to establish:
 - (1) an ongoing Business Ethics Awareness and Compliance Program that periodically trains the contractor's principals, employees, and if appropriate, its agents and subcontractors, on the standards and procedures of the contractor's business ethics awareness and compliance program; and
 - (2) an Internal Control System that facilitates the timely discovery of improper conduct related to the contractor's Government contracts, ensures the corrective measures are promptly instituted and carried out. Among other minimum requirements, the Internal

⁸ FAR 52.203-13(d) requires that contractors incorporate the provisions of FAR 52.203-13 in all subcontracts that have a value of more than \$5 million and a period of performance of more than 120 days.

Control System must provide for the timely disclosure, in writing, to the agency Inspector General (IG), whenever the contractor has “credible evidence” that a principal, employee, agent, or a subcontractor has committed:

- (a) a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations of Title 18, US Code; or
 - (b) a violation of the Civil False Claims Act (31 U.S.C. §§ 3729-3733).
- c. FAR 42.302(a)(71) requires contract administrators to ensure that contractors are complying with the requirements of FAR 52.203-13.

D. Individual Reporting:

1. Hotline Posters / General Notice to Employees. FAR 3.1004(b) states that unless the contract is for acquisition of a commercial item or will be performed entirely outside the United States, FAR Clause 52.203-14, Display of Hotline Poster(s) shall be inserted into the contract if it exceeds \$5,000,000 or a lesser amount established by the agency⁹; and
- a. The agency has a fraud hotline poster; or
 - (1) The DoD Hotline posters are found at <http://www.dodig.mil/Hotline/posters.cfm>.
 - (a) DFARS Subpart 203.7001(b) provides that if a contract meets the \$5 million threshold and is not being performed in a foreign country, the Hotline posters must be displayed unless the contractor has established an internal reporting mechanism and program i.e. its own hotline by which employees may report suspected instances of improper conduct
 - b. If the contract to be performed is funded with disaster assistance funds, hotline posters should be displayed unless the threshold is not met or unless the work is to be done in a foreign country. FAR 3.1004(b)(1)(ii)(B).

⁹ FAR Clause 52.203-14, *Display of Hotline Poster(s)*, also applies to subcontractors, unless meeting the commercial item/foreign performance exceptions, and if the value meets the \$5 million and/or agency determined thresholds noted for prime contractors.

2. Whistleblower Protection for Contractor Employees.

- a. The 2008 NDAA (Pub. L. 110-181); 2009 NDAA (Pub. L. 110-417); and 2013 NDAA (Pub. L. 112-239) provided enhanced whistleblower protections for contractor employees, by amending 10 U.S.C. § 2409, Contractor employees: protection from reprisal for disclosure of certain information.
- b. 10 U.S.C. § 2409 is applicable only to DoD, NASA, and the Coast Guard. 41 U.S.C. § 4705 provides protections for contractor employees from reprisals for disclosures of certain information pertaining to contracts issued by the civilian agencies. 41 U.S.C. § 4712 codifies the pilot program for enhancement of those protections.
- c. The DoD/NASA/Coast Guard statute (10 U.S.C. § 2409) prohibits a contractor or a subcontractor employee from being discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress, a committee representative of Congress, disclosing to an IG¹⁰, a DoD employee responsible for contract management or oversight, disclosing to the Government Accountability Office, or an authorized official of an agency of the Department of Justice information the person reasonably believes is evidence of –
 - (1) Gross mismanagement;
 - (2) Gross waste of funds;
 - (3) Substantial and specific danger to health and safety; or
 - (4) A violation of law related to the contract.
- d. FAR Subpart 3.9 – Whistleblower Protections for Contractor Employees implements the statutory authority and further provides procedures for the filing of complaints and their investigation, along with remedies the head of the agency or the designee may take if reprisal is substantiated.
 - (1) FAR Clause 52.203-17, Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights shall be placed in all solicitations and contracts that exceed the simplified acquisition threshold of \$150,000. DoD uses the clause at DFARS 252.203-7002 to inform employees of rights.

¹⁰ For DoD commands, activities, or agencies, it is an Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of the DoD. DFARS 203.903(1)(iii).

IV. COMBATTING FRAUD: COORDINATING THE FOUR REMEDIES.

- A. The Four Government Remedies. There are four general types of remedies available to the government in response to fraud. These four types of remedies are: criminal remedies, civil remedies, administrative remedies and contract remedies. Prior to taking any action in response to fraud, the government must determine what their response strategy will be, because action in one remedy type may limit action in other remedy types. The DOJ will be the lead agency when the government pursues criminal and civil remedies, while the affected agency will be the lead when pursuing administrative and contract remedies.
- B. The Government Fraud Fighters:
1. DOD Inspector General and DCIS. Inspector General Act of 1978, Pub. L. 95-452, as amended by Pub. L. No. 97-252; DOD Dir 5106.1. Inspector General of Department of Defense (Apr. 20, 2012).
 2. Military Criminal Investigative Organizations. (CID, NCIS, AFOSI).
 3. Department of Justice. DOD Instruction. 5525.07, Implementation of the Memorandum of Understanding (MOU) Between the Departments of Justice (DOJ) and Defense Relating to the Investigation and Prosecution of Certain Crimes (Jun. 18, 2007).
 4. PFB of the Contract and Fiscal Law Division (formerly, the Procurement Fraud Division (PFD)), United States Army Legal Services Agency. AR 27-40, Litigation, Ch. 8. Procurement Fraud Advisors (PFA) (subordinate commands) - ensure that commanders and contracting officers pursue, in a timely manner, all applicable criminal, civil, contractual, and administrative remedies.
- C. DOJ Fraud Policy. *DOJ policy requires coordination of parallel criminal, civil, and administrative proceedings* so as to maximize the government's ability to obtain favorable results in cases involving procurement fraud. *See* U.S. Dep't of Justice, U.S. Atty's Man. ch. 1-12.000 (Coordination of Parallel Criminal, Civil, Regulatory and Administrative Proceedings) (February 2013), citing Attorney General policy on the same subject, dated January 30, 2012, at www.justice.gov/usao/eousa/foia_reading_room/usam/title1/doj00027.htm.
- D. DOD Fraud Policy. *DOD policy requires the coordinated use of criminal, civil, administrative, and contractual remedies* in suspected cases involving procurement fraud. *See* DOD Instr. 7050.05, Coordination of Remedies for Fraud and Corruption Related to Procurement Activities (June 4, 2008). This policy is further explained in individual service regulations.

1. DOD policy requires each department to establish a centralized organization to monitor all significant fraud and corruption cases.
 2. Definition of a “significant” case.
 - a. All fraud cases involving an alleged loss of \$500,000 or more.
 - b. All corruption cases that involve bribery, gratuities, or conflicts of interest.
 - c. All investigations into defective products, non-conforming products, or product substitution in which a serious hazard to health, safety, or operational readiness is indicated (regardless of loss value).
 3. Each centralized organization monitors all significant cases to ensure that all proper and effective criminal, civil, administrative, and contractual remedies are considered and pursued in a timely manner.
 4. Product Substitution/Defective Product cases receive special attention.
- E. Service Policies:
1. Army Policy: Found in [U.S. Dep't of Army Reg. 27-40](#), Litigation, 19 Sept. 1994.
 2. [U.S. Dep't of Air Force, Inst. 51-1101](#), The Air Force Procurement Fraud Remedies Program, 21 Oct. 2003.
 3. Navy Policy: Found in [SECNAVINST. 5430.92B](#), Assignment of Responsibilities to Counteract Fraud, Waste, and Related Improprieties within the Department of the Navy, 30 Dec. 2005.

V. CRIMINAL REMEDIES.

- A. Conspiracy to Defraud, 18 U.S.C. §286 (with claims) and 18 U.S.C. §371 (in general). The general elements of a conspiracy under either statute include:
1. Knowing agreement by two or more persons which has as its object the commission of a criminal offense, or to defraud the United States; [United States v. Upton](#), 91 F.3rd 677 (5th Cir. 1996);
 2. Intentional and actual participation in the conspiracy; and
 3. Performance by one or more of the conspirators of an overt act in furtherance of the unlawful goal. [United States v. Falcone](#), 311 U.S. 205, 210-211 (1940); [United States v. Richmond](#), 700 U.S. 1183, 1190 (8th Cir. 1983).

B. Criminal False Claims, 18 U.S.C. §287.

1. The elements required for a conviction under Section 287 include:
 - a. Proof of a claim for money or property, which is false, fictitious, or fraudulent and material.
 - b. Made or presented against a department or agency of the United States; and
 - c. Submitted with a specific intent to violate the law or with a consciousness of wrongdoing, i.e., the person must know at the time that the claim is false, fictitious, or fraudulent. See generally United States v. Slocum, 708 F.2d 587, 596 (11th Cir. 1983) (citing United States v. Computer Sciences Corp., 511 F. Supp. 1125, 1134 (E.D. Va. 1981), rev'd on other grounds, 689 F.2d 1181 (4th Cir. 1981)) (false indemnity claims made to USDA).
2. It is of no significance to a prosecution under section 287 that the claim was not paid. United States v. Coachman, 727 F.2d 1293, 1302 (D.C. Cir.), cert. denied, 419 U.S. 1047 (1984).

C. False Statements. 18 U.S.C. §1001.

1. The elements include proof that:
 - a. The defendant made a statement or submitted a false entry. “Statement” has been interpreted to include oral and unsworn statements. United States v. Massey, 550 F.2d 300 (5th Cir.), on remand, 437 F. Supp. 843 (M.D. Fla. 1977).
 - b. The statement was false.
 - c. The statement concerned a matter within the jurisdiction of a federal department or agency.
 - d. The government also must prove that a statement was “material.” The test of materiality is whether the natural and probable tendency of the statement would be to affect or influence governmental action. United States v. Lichenstein, 610 F.2d 1272, 1278 (5th Cir. 1980); United States v. Randazzo, 80 F. 3d 623, 630 (1st Cir. 1996); United States ex. Rel. Berge v. Board of Trustees University of Alabama, 104 F.3d 1453 (4th Cir. 1997).
 - e. Intent.

- (1) The required intent has been defined as “the intent to deprive someone of something by means of deceit.” United States v. Lichenstein, 610 F.2d 1272, 1277 (5th Cir. 1980).
- (2) A false statement must be knowingly made and willfully submitted. United States v. Guzman, 781 F.2d 428, (5th Cir. 1986).

D. Mail Fraud and Wire Fraud, 18 U.S.C. §§1341-1343.

1. The essence of the mail fraud and wire fraud statutes is the use of mails or wire communications to execute a scheme to defraud the United States. Both statutes are broadly worded to prohibit the use of the mails or interstate telecommunications systems to further such schemes.
2. The elements of the two offenses are similar. Because the elements are similar, the cases interpreting the more recent wire fraud statute rely on the precedents interpreting mail fraud. See, e.g., United States v. Cusino, 694 F.2d 185 (9th Cir. 1982), cert. denied, 461 U.S. 932 (1983); United States v. Merlinger, 16 F. 3rd 670 (6th Cir. 1994). They include:
 - a. Formation of a scheme and artifice to defraud.
 - b. Use of either the mails or interstate wire transmissions in furtherance of the scheme. See United States v. Pintar, 630 F.2d 1270, 1280 (8th Cir. 1980) (mail fraud); United States v. Wise, 553 F.2d 1173 (8th Cir. 1977) (wire fraud).

E. Major Fraud Act, 18 U.S.C. §1031.

1. The Act created a new criminal offense of “major fraud” against the United States. It is designed to deter major defense contractors from committing procurement fraud by imposing stiffer penalties and significantly higher fines.
2. Maximum Punishments: ten years confinement; fines are determined on a sliding scale based on certain aggravating factors. Basic Offense: \$1,000,000 per count. Government loss or contractor gain of \$500,000 or more: \$5,000,000. Conscious or reckless risk of serious personal injury: \$5,000,000. Multiple counts: \$10,000,000 per prosecution.
3. Elements:
 - a. Knowingly engaging in any scheme with intent to defraud the U.S. or to obtain money by false or fraudulent pretenses;

- b. On a U.S. contract; and
 - c. Valued at \$1,000,000 or more. United States v. Brooks, 111 F.3d 365 (4th Cir. 1997). But see United States v. Nadi, 996 F.2d 548 (2nd Cir. 1993); United States v. Sain, 141 F.3d 463 (Fed. Cir. 1998).
- F. Bid Rigging, 15 U.S.C. §1
- 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.
 - 2. Maximum Penalty. Fine not exceeding \$ 100,000,000 if a corporation, or, if any other person, \$ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.
 - 3. Elements.
 - a. Agreement;
 - b. Not to Bid, or
 - c. To Submit a Sham Bid, or
 - d. To Allocate Bids;
 - e. Between two or more independent, horizontal entities;
 - f. Affecting interstate or foreign commerce
- G. Title 10 (UCMJ) Violations. Besides Article 132 – Frauds Against the U.S., there are various specific criminal charges that could apply to Servicemembers involved in fraud, including (but not limited to): Article 92 - Failure to Obey Order or Regulation, Article 98 - Noncompliance with Procedural Rules, Article 107 – False Official Statements, Article 121 – Larceny and Wrongful Appropriation, Article 133 – Conduct Unbecoming an Officer and a Gentleman. If all else fails, the command can charge one of the enumerated Article 134 articles or fashion their own punitive article related to fraud.

VI. CIVIL REMEDIES.

- A. The Civil False Claims Act (FCA). 31 U.S.C. §§ 3729-3733.
- 1. Background.
 - 2. The primary litigation weapon for combating fraud is the FCA.

3. 1986 Amendments.
 4. 2009 Amendments
- B. Liability Under the FCA.
1. In General. 31 U.S.C. §3729(a) imposes liability on any person (defined comprehensively to include corporations, companies, associations, partnerships . . . as well as individuals) who:
 - a. Knowingly presents, or causes to be presented a false or fraudulent claim for payment or approval.
 - b. Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.
 - c. Conspires to defraud the government by having a false or fraudulent claim allowed or paid.
 2. The Fraud Enforcement and Recovery Act of 2009 (FERA) clarifies the FCA by holding a contractor liable if they “knowingly presents, or causes to be presented a false or fraudulent claim for payment or approval” or “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.” Pub. L. No. 111-21, 123 Stat. 1617. This change eliminated language “to get a false or fraudulent claim paid” and thereby clarified the reach of the FCA.
 - a. Clarification of the FCA was necessary because the Supreme Court decision in *Allison Engine*¹¹ which held that the FCA did not extend to claims submitted to prime contractors that were then submitted to the government for payment.
 - b. Before the FERA, *Allison Engine* required *intent* to defraud the Government. There the Supreme Court held: that “it is insufficient for a plaintiff asserting a §3729(a)(2) claim to show merely that the false statement’s use resulted in payment or approval of the claim . . .,” 553 U.S. 662, 663. Instead, a

¹¹ *Allison Engine, et al. v. United States, ex rel. Sanders*, 553 U.S. 662 (2008). The Allison Engine Company was a subcontractor to a Navy prime shipyard contractor for a contract to build destroyers. Allison Engine was subcontracted to build the destroyer generators. Allison Engine knowingly submitted false Certificates of Conformance (CoCs) to the prime asserting that the generators met all the required contract specifications, even though they knew that the generators did not meet the required contract specifications. Allison Engine also submitted payment requests (claims) for the generators. The shipyards subsequently submitted payment claims to the KO with the fraudulent CoCs (unknown to the prime) provided by Allison Engine. The government only introduced the fraudulent claims and CoCs submitted by Allison Engine to the primes, but no evidence of the subsequent claims submitted to the government, or evidence of Allison Engine’s intent to defraud the government (as opposed to an intent to defraud the primes).

plaintiff asserting a §3729(a)(2) claim must prove that the defendant intended that the false statement be material to the Government's decision to pay or approve the false claim. Similarly, a plaintiff asserting a claim under §3729(a)(3) must show that the conspirators agreed to make use of the false record or statement to achieve this end. Id. at 664.¹²

3. Source of funds used to pay. The funds at issue need not be the United States' own money from Congressional appropriations and drawn from the Treasury. Rather, it is enough if the money belongs to the United States. United States ex rel. DRC, Inc. v. Custer Battles, LLC, et. al., 562 F.3d 295, 304-3052 (holding that Developmental Funds Iraq met the requirements to be a claim under the FCA).

C. Damages.

1. Treble Damages are the substantive measure of liability. 31 U.S.C. §3729 (a); United States v. Peters, 110 F.3d 66 (8th Cir. 1997). Voluntary disclosures of the violation prior to the investigation, could preclude the imposition of treble damages.
2. Different Scenarios.
 - a. Defective Products.
 - b. Defective Testing.
 - c. Bid-Rigging.
 - d. Bribery and Public Corruption.

D. Civil Penalties.

1. A civil penalty of between \$5,500 and \$11,000 is authorized per false claim. 31 U.S.C. §3729. The amounts stated in the False Claims Act, 31 U.S.C. section 3729, are \$5,000 and \$10,000; however, under the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134, §31001, 110 Stat. 1321-373 (1996)), federal agencies are required to review and adjust statutory civil penalties for inflation every four years. Consequently, the Department of Justice has adjusted penalties under the False Claims Act to range not less than \$5,500 and not more than \$11,000 per violation. 28 C.F.R. § 85.3(a)(9)(2011).
2. Imposition is "automatic and mandatory for each false claim." S. Rep No. 345 at 8-10. See also United States v. Hughes, 585 F.2d 284, 286

¹² Allison Engine, et al. v. United States, ex rel. Sanders, 553 U.S. 662 (2008)

(7th Cir. 1978) (“[t]his forfeiture provision is mandatory; it leaves the trial court without discretion to alter the statutory amount.”)

3. There is no requirement for the United States to prove that it suffered any damages. Fleming v. United States, 336 F.2d 475, 480 (10th Cir. 1964), cert. denied, 380 U.S. 907 (1965). The government also does not have to show that it made any payments pursuant to false claims. United States v. American Precision Products Corp., 115 F. Supp. 823 (D.N.J. 1953).
 4. United States v. Halper, 490 U.S. 435 (1989). Defendant faced aggregated penalties of \$130,000 for fraud, which had damaged the government in the amount of \$585. The court disallowed the full \$130,000 penalties, holding that a civil sanction, in application, may be so divorced from any remedial goal as to constitute punishment under some circumstances. The scope of the holding is a narrow one, addressed to “the rare case . . . where a fixed-penalty provision subjects a small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused.” See United States v. Hatfield, 108 F.3d 67 (4th Cir. 1997).
- E. The “Qui Tam” Provisions of the Civil False Claims Act. “Qui tam pro domino rege quam pro se ipso in hac parte sequitur.” (“Who as well for the King as for himself sues in this matter.”). Allows a private individual to sue contractors for fraud in civil court on behalf of the government.
1. The Civil False Claims Act authorizes an individual, acting as a private attorney general, to bring suit in the name of the United States. 31 U.S.C. §3730. The statute gives the Government 60 days to decide whether to join the action. The Government may ask for an extension of the 60 days. If the Government joins the action, the Government conducts the action. If the Government decides not to join the suit, the individual, known as the “qui tam relator,” conducts the action.
 2. As an inducement to be a whistleblower, the statute provides that relators are entitled to portions of any judgment against the defendant. 31 U.S.C. § 3730(d).
 - a. If the government joins and conducts the suit, the relator is entitled to between 15 and 25 percent of judgment, depending on the relator’s contribution to the success of the suit.
 - b. If the Government declines to join and the relator conducts the suit, the relator is entitled to between 25 and 30 percent of the judgment, at the discretion of the court.

3. Limitations on Relators. 31 U.S.C. § 3730(e)(4)¹³ limits a person's ability to become a qui tam relator by providing that "The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (ii) in a Congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. This is referred to as the "public disclosure bar."
4. There have been various Qui Tam developments since the 1986 Qui Tam amendments.¹⁴

F. Special Plea in Fraud. 28 U.S.C. § 2514.

1. A claim against the US **shall be forfeited** to the US by any person who corruptly practices or attempts to practice fraud against the United States in the proof, statement, establishment, or allowance thereof.
2. Can only be pled before the Court of Federal Claims.

¹³ The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, § 1303 (j)(2) Mar. 10, 2010 (PPAC), amended 31 U.S.C. § 3730(e)(4), likely in response to Schindler Elevator Corp. v. United States ex rel Daniel Kirk, 131S.Ct. 1885 (2011) which applied the public disclosure bar in the prior version of 31 U.S.C. § 3730(e)(4) to disclosure made in response to FOIA request. In Schindler, the relator received a no record response, which was held to be a government record. This holding is likely overruled by the PPAC.

¹⁴ See Hughes Aircraft Company v. United States ex rel. Schumer, 520 U.S. 939 (1997) (The first United States Supreme Court case to address the qui tam provisions since the 1986 Amendments); see also Bly-Magee v. California, 236 F.3d 1014 (9th Cir. 2001) (FCA claim viable without proof of government injury; state employees liable for acts beyond official duties); see also Searcy v. Philips Electronics North America Corp., 117 F.3d 154 (5th Cir. 1997) (Federal Circuits split on government's unlimited right to veto qui tam settlements); but see Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir. 1994); see also United States ex rel Doyle v. Health Possibilities, P.S.C., 207 F.3d 335 (6th Cir. 2000); see also United States, ex rel. Dhawan v. New York City Health & Hosp. Corp., 2000 U.S. Dist. LEXIS 15,677 (S.D.N.Y. Oct. 27, 2000) (Prior state court litigation resulted in public disclosure of FCA allegations); see also United States, ex rel. Summit v. Michael Baker Corp., 40 F. Supp. 2d 772 (E.D. Va. 1999) (the court held that a qui tam relator may settle his retaliation claim under the FCA); see also United States, ex rel. Stevens v. Vermont Agency of Natural Resources, 120 S.Ct. 1858 (2000) (A private individual may not bring suit in federal court on behalf of the United States against a state or state agency under the False Claims Act); see also Galvan v. Federal Prison Indus., Inc., 199 F.3d 461 (D.C. Cir. 1999) (Sovereign immunity bars qui tam suit against government corporation); see also Cook County v. United States ex rel. Chandler, 123 S. Ct. 1239 2003 (2003) (a municipality is a "person" subject to suit under the FCA); see also United States, ex rel. Riley v. St. Luke's Episcopal Hospital, 196 F.3d 514 (5th Cir. 1999), rev'd and remanded en banc, 252 F.3d 749 (5th Cir. 2001) (qui tam does not violate the "Take Care" and separation of powers provisions of the Constitution); see also United States, ex rel. Thorton v. Science Applications Int'l Corp., 207 F.3d 769 (5th Cir. 2000) (the value of administrative claims released by a contractor pursuant to a FCA settlement with the government are part of the settlement "proceeds" that the government must share with the relator); see also United States ex rel Holmes v. Consumer Insurance Group, 318 F.3d 1199 (10th Cir. 2003) (en banc) (federal employee could be a qui tam plaintiff); and see also United States ex rel. Oberg v. Kentucky Higher Education Student Loan Corp. et al., 681 F.3d 575 (4th Cir. 2012)(extends the *Stevens* analysis to whether an entity is an "arm of the state").

VII. ADMINISTRATIVE REMEDIES.

- A. Debarment and Suspension Basics. 10 U.S.C. §2393; FAR Subpart 9.4.
1. Suspension. Action taken by a suspending official to disqualify a contractor temporarily from Government contracting.
 2. Debarment. Action taken by a debarring official to exclude a contractor from Government contracting for a specified period.
 3. Government policy is to solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. FAR 9.103.
 4. Debarment and suspension are discretionary administrative actions to effectuate this policy and shall not be used for punishment. FAR 9.402; United States v. Glymp, 96 F.3d 722, 724 (4th Cir. 1996).
 5. Debarring and suspending officials. DFARS 209.403. Any person may refer a matter to the agency debarring official. However, the absence of a referral will not preclude the debarring official from initiating the debarment or suspension process or from making a final decision. 64 Fed. Reg. 62984 (Nov. 18, 1999). In the Army, the debarring official is the Director, Soldier and Family Legal Services.
 6. Debarments can be narrowly tailored to individuals, portions of a company, or to specific products that were the subject of the misconduct. FAR 9.406-1(b).
- B. Debarment. Causes for debarment. FAR 9.406-2. DFARS 209.406-2.
1. Debarring official may debar a contractor for a **CONVICTION OF or CIVIL JUDGMENT** for:
 - a. commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract;
 - b. violation of federal or state antitrust statutes relating to the submission of offers;
 - c. commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property;
 - d. commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects

- the present responsibility of a government contractor or subcontractor;
- e. criminal conviction for affixing “Made in America” labels to non-American good; or
 - f. knowingly providing compensation to a former DoD official in violation of section 847 of the National Defense Authorization Act for Fiscal Year 2008 (involving post employment restrictions.)
2. Debarring official may debar a contractor, based upon a **PREPONDERANCE OF THE EVIDENCE** for:
- a. Violation of the terms of a government contract or subcontract so serious as to justify debarment, such as;
 - (1) Willful failure to perform in accordance with the terms of one or more contracts.
 - (2) A history of failure to perform, or unsatisfactory performance of, one or more contracts.
 - b. Violation of the Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.
 - c. Intentionally affixing a label bearing a “Made in America” inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States or its outlying areas (see Section 202 of the Defense Production Act (Pub. L. 102-558)).
 - d. Commission of an unfair trade practice as defined in [9.403](#) (see Section 201 of the Defense Production Act (Pub. L. 102-558)).
 - e. Delinquent Federal taxes in an amount that exceeds \$3,000.
 - f. Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract there under, credible evidence of—
 - (1) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

- (2) Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or
 - (3) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in [32.001](#).
- g. “Preponderance” means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not. FAR 9.403. See Imco, Inc. v. United States, 33 Fed. Cl. 312 (1995).
- 3. A contractor may be debarred, based on a determination by the Secretary of Homeland Security or the Attorney General of the United States, that the contractor is not in compliance with Immigration and Nationality Act employment provisions (see Executive Order 12989, as amended by Executive Order 13286). Such determination is not reviewable in the debarment proceedings. FAR 9.406-2(b)(2).
 - 4. A contractor or subcontractor may be debarred for any other cause of so serious or compelling a nature that it affects the present responsibility of a government contractor or subcontractor. FAR 9.406-2(c).
- C. Suspension. Causes for suspension. FAR 9.407-2.
- 1. Upon **ADEQUATE EVIDENCE** of:
 - a. commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract;
 - b. violation of federal or state antitrust statutes relating to the submission of offers;
 - c. commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
 - d. violation of the Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181;
 - e. intentionally affixing a “Made in America” label to non-American made goods (see section 202 of the Defense Production Act (Pub. L. 102-558));
 - f. commission of an unfair trade practice as defined in [9.403](#) (see section 201 of the Defense Production Act (Pub. L. 102-558));

- g. delinquent Federal taxes in an amount that exceeds \$3,000. See the criteria at [9.406-2\(b\)\(1\)\(v\)](#) for determination of when taxes are delinquent;
- h. knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract there under, credible evidence of—
 - (1) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;
 - (2) Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or
 - (3) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in [32.001](#); or
- i. Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor.

- 2. Upon adequate evidence, contractor may also be suspended for any other cause of so serious or compelling a nature that it affects the present responsibility of a government contractor or subcontractor. FAR 9.407-2.
- 3. “Adequate evidence” means information sufficient to support the reasonable belief that a particular act or omission has occurred. FAR 2.101.
- 4. Indictment for any of the causes in paragraph a above constitutes “adequate evidence” for suspension. FAR 9.407-2.
- 5. “Adequate evidence” may include allegations in a civil complaint filed by another federal agency. See SDA, Inc., B-253355, Aug. 24, 1993, 93-2 CPD ¶ 132.

D. Effect of Debarment or Suspension. FAR 9.405; DFARS 209.405.

- 1. FAR 9.401 provides for government-wide effect of the debarment, proposed debarment, suspension, or any other exclusion of an entity from procurement OR nonprocurement activities.

2. Contractors proposed for debarment, suspended, or debarred may not receive government contracts, and agencies may not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless acquiring agency's head or designee determines that there is a compelling reason for such action. FAR 9.405(a).
3. The general rule is that absent a contrary determination by the ordering activity, debarment has no effect on the *continued performance* of contracts or subcontracts in existence at the time of the proposed or actual suspension or debarment. However, unless an agency head makes a compelling needs determination, orders exceeding the guaranteed minimums may not be placed under indefinite delivery contracts, nor may they be placed orders against Federal Supply Schedule contracts, nor may options be exercised or the period of performance be extended in anyway. FAR 9.405-1.
4. Bids received from any listed contractor are opened, entered on abstract of bids, and rejected unless there is a compelling reason for an exception.
5. Proposals, quotations, or offers from listed contractors shall not be evaluated, included in the competitive range, or discussions held unless there is a compelling reason for an exception.

E. Period of Debarment. FAR 9.406-4.

1. Commensurate with the seriousness of the cause(s). Generally, debarment should not exceed three years. The period of any prior suspension, is considered in determining period of debarment. FAR 9.406-4(a).
2. Administrative record must include relevant findings as to the appropriateness of the length of the debarment. Coccia v. Defense Logistics Agency, C.A. No. 89-6544, 1990 U.S. Dist. LEXIS 6079, (E.D. Pa. May 15, 1990). (Upholding 15-year debarment of former government employee convicted of taking bribes and kickbacks from contractors in exchange for contracts.)
3. Debarment period may be extended, but not solely on the original basis. If extension is necessary, normal procedures at FAR 9.406-3 apply. FAR 9.406-4(b).
4. Period may be reduced (new evidence, reversal of conviction or judgment, elimination of causes, bona fide change in management). FAR 9.406-4(c).
5. The APA does not usually provide a right to judicial review of an agency's decision not to take enforcement action. Heckler v. Chaney,

470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985). In Caiola v. Carroll, 851 F.2d 395 (D.C.Cir.1988), however, the DC Circuit Court rejected an agency suspension of two corporate official, but not a third when the agency did not provide in their administrative record support for the differing treatment. In Kisser v. Cisneros, 14 F.3d 615 (D.C.Cir 1994) the court made clear that there is no reasoned explanation requirement” when exercising discretion.

- F. Period of Suspension. FAR 9.407-4.
1. Suspension is temporary, pending completion of investigation or any ensuing legal proceedings.
 2. If legal proceedings are not initiated within 12 months after the date of the suspension notice, terminate the suspension unless an Assistant Attorney General requests extension.
 3. Extension upon request by an Assistant Attorney General shall not exceed 6 months.
 4. Suspension may not exceed 18 months unless legal proceedings are initiated within that period.

VIII. CONTRACT REMEDIES.

- A. Historical Right.
1. Under common law, where a party to a contract committed an act of fraud affecting a material element of the contract, the fraudulent act constituted a breach on the part of the party committing the act. The innocent party could then, at its election, insist on continuation of contract performance, or void the contract. Once voided, the voiding party would be liable under equity to the other party for any benefit received. Stoffela v. Nugent, 217 U.S. 499 (1910); Diamond Coal Co. v. Payne, 271 F. 362, 366 (App. D.C. 1921) (“equity refuses to give to the innocent party more than he is entitled to.”).
 2. Since the U. S. government was often viewed as acting in a “commercial capacity” when it engaged in commercial transactions, the rules of common law and equity applied to resolution of disputes. As such, if the government sought to rescind a contract, it was obligated to restore the contractor to the position it would be in, but-for the breach. Cooke v. United States, 91 U.S. 389, 398 (1875) (“If [the government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that

govern individuals there.”); Hollerbach v. United States, 233 U.S. 165 (1914); United States v. Fuller Co., 296 F. 178 (1923).

3. The Supreme Court rejected the general rule that the government should be treated like any other party to a contract when fraud occurred. Pan American Petroleum and Transport Co., v. United States, 273 U.S. 456 (1927).
4. Courts and boards have developed an implied or common-law right to terminate or cancel a contract in order to effectuate the public policy of protecting the government in instances of procurement fraud. See United States v. Mississippi Valley Generating Co., 364 U.S. 520, reh’g denied 365 U.S. 855 (1961); Four-Phase Sys., Inc., ASBCA No. 26794, 86-2 BCA ¶ 18,924.
5. A contractor that engages in fraud in dealing with the government commits a material breach, which justifies terminating the entire contract for default. Joseph Morton Co., Inc. v. United States, 3 Cl. Ct. 120 (1983), aff’d 757 F.2d 1273 (Fed. Cir. 1985).

B. Contracting Officer Authority.

1. Actions Clearly Exceeding KO Authority. The Contract Disputes Act (CDA), 41 U.S.C. §7103(a), as implemented by FAR 33.210(b), prohibits any contracting officer or agency head from settling, paying, compromising or otherwise adjusting any claim involving fraud.
2. Actions Clearly Within KO Authority.
 - a. Refusing Payment. It is the plain duty of administrative, accounting, and auditing officials of the government to refuse approval and to prevent payment of public monies under any agreement on behalf of the United States as to which there is a reasonable suspicion of irregularity, collusion, or fraud, thus reserving the matter for scrutiny in the courts when the facts may be judicially determined upon sworn testimony and competent evidence and a forfeiture declared or other appropriate action taken. To the Secretary of the Army, B-154766, 44 Comp. Gen. 111 (1964).
 - b. Suspend Progress Payments. 10 U.S.C. §2307(i); Brown v. United States, 207 Ct. Cl. 768, 524 F.2d 693 (1975); Fidelity Construction, DOT CAB No. 1113, 80-2 BCA ¶ 14,819.
 - c. Withhold Payment.
 - (1) When a debarment/suspension report recommends debarment or suspension based on fraud or criminal

conduct involving a current contract, all funds becoming due on that contract shall be withheld unless directed otherwise by the Head of the Contracting Activity (HCA) or the debarring official. AFARS 5109.406-3.

- (2) Labor standards statutes provide for withholding for labor standards violations. WHA – 41 U.S.C. §6503; DBA – 40 U.S.C. § 3144.
- (3) Specific contract provisions may provide for withholding (e.g., service contract deductions for deficiencies in performance).
- (4) Terminate Negotiations. FAR 49.106 (end settlement discussions regarding a terminated contract upon suspicion of fraud); K&R Eng'g Co., Inc., v. United States, 222 Ct. Cl. 340, 616 F.2d 469 (1980).
- (5) Determine Contractor to be Nonresponsible. FAR Subpart 9.4.

C. Denial of Claims.

1. Section 7103(a) of the CDA prohibits an agency head from settling, compromising or otherwise adjusting any claim involving fraud. 41 U.S.C.S § 7103(a). This limitation is reflected in FAR 33.210, which states that the authority of a contracting officer to decide or resolve a claim does not extend to the “settlement, compromise, payment, or adjustment of any claim involving fraud.” Subpart 33.209 of the FAR further provides that contracting officers must refer all cases involving suspected fraud to the agency official responsible for investigating fraud.
2. As a practical matter, the term “denial” is a misnomer in that the contracting officer is precluded from making a final decision on a contractor’s claim where fraud is suspected. As such, denial of a claim consists simply of doing nothing with the claim while other courses of action are pursued.
3. Denial of a claim should be viewed as simply the first of possibly many steps in the resolution of a fraudulent claim.

D. Counterclaims Under the CDA

1. Per 41 U.S.C. §7103(c)(2): “If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he

shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim.”

2. Until recently, this provision of the CDA has been applied in only a small number of cases. This may in part be due to the deterrent effect of this statute. See United States ex. ral. Wilson v. North American Const., 101 F. Supp.2d 500, 533 (S.D. Tex 2000) (district court unwilling to enforce this provision of the CDA because there were “very few cases applying 41 U.S.C. 604 [previous location in the US Code].”). But see Railway Logistics Intern. v. United States, __ Fed. Cl. __, 2012 WL 171895 (Fed. Cl. 2012) (finding for the government on counterclaim of fraud under 41 U.S.C. §7103(c)(2)); Larry D. Barnes, Inc. (d/b/a TRI-AD Constructors) v. United States, 45 Fed. Appx. 907 (Fed. Cir. 2002) (provision successfully applied by CAFC); UMC Elecs. v. United States, 249 F.3d 1337 (Fed. Cir. 2001) (upholding the COFC determination that the plaintiff was liable under a CDA counterclaim).
3. It is not possible to enforce this section of the CDA in litigation before the boards because of the language at 41 U.S.C. Section 7103(a)(5), which states: “[t]he authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle or determine.” The boards have generally interpreted this language as meaning only Department of Justice (DOJ) has the authority to initiated a claim under this provision. This is because (in the eyes of the boards) only DOJ has the authority to administer or settle disputes involving fraud under the current statutory scheme. See TDC Management, DOT BCA 1802, 90-1 BCA ¶ 22,627.

E. Default Terminations Based on Fraud.

1. Where a contractor challenges the propriety of a default termination before a court or board, the government is not precluded under the CDA from introducing evidence of fraud discovered after the default termination, and using that evidence to support the termination in the subsequent litigation. See Joseph Morton Co., Inc. v. United States, 757 F.2d 1273, 1279 (Ct. Cl. 1985) (upholding termination for default when the contractor fraud was unknown at the time of the termination).
2. Some grounds for default termination.

- a. Submission of falsified test reports. Michael C. Avino, Inc., ASBCA No. 317542, 89-3 BCA ¶ 22,156.
- b. Submission of forged performance and payment bonds. Dry Roof Corp., ASBCA No. 29061, 88-3 BCA ¶ 21,096.
- c. Submission of falsified progress payment requests. Charles W. Daff, Trustee in Bankruptcy for Triad Microsystems, Inc. v. United States, 31 Fed. Cl. 682 (1994).

F. Voiding Contracts Pursuant to FAR 3.7

1. Subpart 3.7 of the FAR establishes a detailed mechanism for voiding and rescinding contracts where there has been either a final conviction for illegal conduct in relation to a government contract, or an agency head determination of misconduct by a preponderance of the evidence.
2. Authority to void a contract pursuant to Subpart 3.7 of the FAR is derived from:
 - a. 18 U.S.C. §218;
 - b. Executive Order 12448, 50 Fed. Reg. 23,157 (May 31, 1985); and,
 - c. 41 U.S.C. § 2105(c)(1).

G. Suspending Payments Upon a Finding of Fraud, FAR 32.006.

1. FAR 32.006 allows an agency head to reduce or suspend payments to a contractor when the agency head determines there is “substantial evidence that the contractor’s request for advance, partial, or progress payments is based on fraud.”
2. The authority of the agency head under this provision may be delegated down to Level IV of the Executive Schedule, which for the Department of the Army is the Assistant Secretary of the Army for Acquisition, Logistics, and Technology (ASA (ALT)).
3. This provision of the FAR is a potentially powerful tool in that the government can stay payment of a claim without the danger of a board treating the claim as a deemed denial, thus forcing the government into a board proceeding before the government’s case can be developed.
4. Only one recorded board decision involving this provision of the FAR. TRS Research, ASBCA No. 51712, 2001-1 BCA ¶ 31,149 (contracting officer suspended payment on invoices pending completion of an investigation involving fraud allegation, but failed to seek written

permission from the agency head to take such action; ASBCA found the government in breach of the contract and sustained the appeal).

H. Voiding Contracts Pursuant to the Gratuities Clause, FAR 52.203-3.

1. Allows DOD to unilaterally void contracts, prior to the beginning of performance, upon an agency head finding that contract is tainted by an improper gratuity. Decision authority for the Department of the Army has been delegated to the ASA (ALT).
2. Authority stems from 10 U.S.C. § 2207, which requires the clause in all DOD contracts (except personal service contracts).
3. Considerable due process protections for the contractor.
4. Exemplary damages of between three to ten times the amount of the gratuity.
5. Procedures used very effectively in response to a fraudulent bidding scheme centered out of the Fuerth Regional Contracting Office, Fuerth, Germany. See Schuepferling GmbH & Co., ASBCA No. 45564, 98-1 BCA ¶ 29,659; ASBCA No. 45565, 98-2 BCA ¶ 29,739; ASBCA No. 45567, 98-2 BCA ¶ 29,828; Erwin Pfister General-Bauunternehmen, ASBCA Nos. 43980, 43981, 45569, 45570, 2001-2 BCA ¶ 31,431; Schneider Haustechnik GmbH, ASBCA Nos. 43969, 45568, 2001 BCA ¶ 31,264.

IX. BOARDS OF CONTRACT APPEAL'S TREATMENT OF FRAUD.

A. Jurisdiction.

1. Theoretically, the boards are without jurisdiction to decide appeals tainted by fraud.
 - a. Under 41 U.S.C. §7105(e), the boards have jurisdiction to decide any appeal from a decision by a contracting officer involving a contract made by their respective agencies.
 - b. Because the CDA precludes contracting officers from issuing final decisions where fraud is suspected, and the boards only have jurisdiction over cases that can be decided by a contracting officer, the boards are effectively barred from adjudicating appeals involving fraud. See 41 U.S.C. §7103(a)(5).
 - c. As a practical matter, the boards exercise a form a de facto jurisdiction in that a decision concerning a motion to dismiss an appeal for fraud will have a dispositive effect on the case.

B. Dismissals, Suspensions and Stays.

1. Government must demonstrate that the possibility of fraud exists or that the alleged fraud adversely affects the Board's ability to ascertain the facts. Triax Co., Inc., ASBCA No. 33899, 88-3 BCA ¶ 20,830.
2. Mere allegations of fraud are not sufficient. General Constr. and Dev. Co., ASBCA No. 36138, 88-3 BCA ¶ 20,874. Four-Phase Systems, Inc., ASBCA No. 27487, 84-1 BCA ¶ 17,122.
3. Boards generally refuse to suspend proceedings except under the following limited circumstances:
 - a. When an action has been commenced in a court of competent jurisdiction, by the handing down of an indictment or by filing of a civil action complaint, so that issues directly relevant to the claim before the board are placed before that court;
 - b. When the Department of Justice or other authorized investigatory authority requests a suspension to avoid a conflict with an ongoing criminal investigation;
 - c. When the government can demonstrate that there is a real possibility that fraud exists which is of such a nature as to effectively preclude the board from ascertaining the facts and circumstances surrounding a claim; and
 - d. When an appellant so requests to avoid compromising his rights in regard to an actual or potential proceeding. See Fidelity Constr., 80-2 BCA ¶ 14,819 at 73,142.

C. Fraud as an Affirmative Defense.

1. Most often, the government elects to treat fraud as a jurisdictional bar, and pursues the issue in a motion to dismiss.
2. When fraud is cited as an affirmative defense, the boards generally treat the issue consistent with cases where it is presented as a jurisdictional bar. See ORC, Inc. ASBCA No. 49693, 97-1 BCA ¶ 28,750.

X. CONCLUSION.