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Federal Government Contractor's Compliance Toolkit

National Contract Management Association

April 17, 2015



Introducing Our Panel

- **Doug Hibshman**
Federal Government Contracts & Procurement
- **Dennis Boyle**
White Collar Compliance & Defense
- **Nick Solosky**
Federal Government Contracts & Procurement



Fox Rothschild LLP

Washington, DC

- **Fox Rothschild LLP**

- 600 attorney full-service firm
- 22 offices
- Government Contracts, Construction, Infrastructure Practices, & White Collar
 - Represent small, medium, and large contractors, subcontractors, suppliers, owners, sureties, developers in all federal and state contracting matters
 - Bid protests, contract claims, litigation / mediation / arbitration, False Claims Act, FCPA, transactional work, and other federal compliance advice
 - White Collar criminal matters

Summary of Today's Training: Federal Compliance 101

- Topic I** – Code of Business Ethics and Conduct
- Topic II** – Civil False Claims Act
- Topic III** – Federal Compliance Regulations
- Topic IV** – Small Business Overview
- Topic V** – Foreign Corrupt Practices Act



Why Are You Here Today?



- **Government contracting is different than commercial contracting**
- Must understand **unique aspects** of government contracting to **succeed**
- Many things that you “**Must Do**” / “**Can’t Do**”
- Federal government is **cracking down** on not doing what you “**Must Do**” and doing what you “**Can’t Do**”
- **It’s better to be here than . . .**





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Real Examples of Compliance Failures

- **8 contract executives guilty of 8(a) contracting fraud**
 - Owners falsely claimed they were an 8(a) business
- **4 arrested in alleged bribery and kickback scheme**
 - Contractor and Corps employees traded kickbacks for work
- **General Electric Aviation Systems Pays Over \$6.5 Million to Settle Whistleblower-Initiated FCA Case**
 - Provided fuel tanks that did not comply with specifications
- **Contractor liable for False Claims Act Violation for Buy American Act violation based on \$11,000 of Korean pipe**
 - Small amount of Korean pipe on \$30 million project led to huge fine



Federal Ethical Requirements

- **Things that you “MUST DO ”**
 - Comply with the FAR, DFARS, Contract requirements
 - Have a Code of Business Ethics and Conduct
- **Things that you “CAN’T DO”**
 - Submit “False Claims” – Requests for Payment
 - Submit false cost data, reports, compliance certificates, etc.
 - Provide non-compliant work or parts
 - Collude on prices
 - Pay “Contingent Fee”
 - Pay or accept “Kickback”
 - Pay “Gratuity” to government employee



Federal Contracting “Best Practices”

- Know the rules
- Educate your team
- Perception is reality
- Ask for permission first, not forgiveness later
- The customer is not always right
- Good faith counts for a lot
- Keep records, keep records, keep records
- **USE COMMON SENSE!!!**



Topic I

Code of Business Ethics and Conduct



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Ethical Code Required by the Rules

How to be an Ethical Contractor

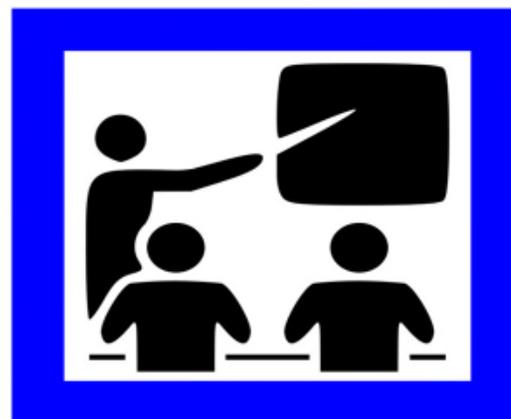
- Contractors “Must Do” the following under FAR 52.203-13:
 - Implement Contractor Code of Business Ethics and Conduct
 - Establish Business Ethics Awareness and Compliance Program
 - Establish Internal Control System
 - Inform OIG of “credible evidence” of any violation
- Government wants to work with “ethical contractors”
- These steps help contractors educate employees and follow the rules



The FAR Code

- Contractors “Must Do” the following under FAR 52.203-13:

- Code
- Train
- Monitor
- Report



- Every employee is an ethical watchdog
 - If it looks bad and smells bad, it probably is bad
 - Good code enforcement equals good faith

The FAR Code

- Is required of all government contractors with a contract or subcontract over:
 - **\$5 million in value and**
 - **120 days in contract duration**
- Even if you don't meet these thresholds – should still have a Code in place
 - Tells employees how to comply with federal rules
 - Addresses false claims, conflicts of interests, bribes, kickbacks, anticompetitive actions, hiring government employees
 - **Mandatory reading for employees at all levels**



Awareness and Compliance Program

Must Train

- Contractors must take “Reasonable Steps” to educate principals and employees
 - Having Code is not enough, must do a lot more
 - Communicate “Periodically” and in a “Practical Manner” about ethics program
 - Conduct effective training programs
 - Disseminate information regarding roles and responsibilities
 - Include agents and subcontractors – flow-down Code



Awareness and Compliance Program

- Contractors should do the following:
 - Provide Code training to all employees once a year
 - Give Code to all new employees
 - Provide Code training to all current employees
 - E-mail Code out every 6 months
 - Keep records of who trained on Code and when
- Key – The more you do, the more forgiving the government will be if a violation occurs



Internal Control System

Must Monitor

- Contractors must have programs to Monitor and detect improper conduct
 - Conduct periodic reviews of business practices – audits, compliance reviews, stand downs
 - Establish internal reporting mechanisms
 - Hotline (should be anonymous) – Display
 - Compliance Officer - Display
 - Investigate possible violations and correct
 - Punish violators
 - No retaliation against Whistleblowers



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Must Report Violations

Must Report

- Report violations of the federal ethical laws and regulations to agency OIG
 - Must self report
- Reporting obligation triggered if have “credible evidence” of a violation
 - Not defined in federal regulations
 - Use common sense
 - Contact an attorney first
 - Not reporting leads to more penalties



Must Report Violations

- **Timely disclose** “credible evidence” of improper conduct, in writing, to the agency Office of the Inspector General, with a copy to the contracting officer involving:
 - Criminal Acts:
 - Fraud
 - Bribery
 - Gratuities
 - Violations of the Civil False Claims Act



Ethics Quiz

- You are member of project team
 - As a PM, you see invoices from a supplier for work the supplier did not perform or the costs are vastly inflated
 - Possible Pre-billing or work was questionable
 - Supplier assures you everything is compliant with FAR
 - Invoice was submitted as part of your payment application to DLA
 - What do you do?



Ethics Quiz

- Investigate
 - Was invoice a mistake?
 - Was it fraudulent?
 - Were your employees involved?
- Report up the chain
 - Contact compliance officer
 - Call Hotline
- Internal investigation
- Report to OIG if “credible evidence” of fraud



Topic II

The Civil False Claims Act



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FAR Requirements

- **Cannot Do the Following:**
 - Submit “False Claims” – Requests for Payment
 - Submit false cost data, reports, compliance certificates, etc.
 - Provide non-compliant work or parts
 - Collude on prices
 - Pay “Contingent Fee”
 - Pay or accept “Kickback”
 - Pay “Gratuity” to government employee



False Claims Act



Civil False Claims Act - 31 U.S.C. §§ 3729 *et seq.*

- Key government anti-fraud weapon
- Prohibits submitting false documents or information to government
- Violations of False Claims Act lead to severe penalties
 - Suspension / debarment
 - \$5,000 - \$11,000 fine for each false claim submitted to the Government
 - Treble damages even if the Government is not harmed
 - In the last **4 years**, the U.S. has recovered **more money from private contractors** based on alleged fraud against the Government than it had in the previous **150**



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What is a False Claim?

- Three types of False Claims
 - **Direct False Claim**
 - Knowingly presenting or causing to be presented a false claim
 - **False Statement**
 - Knowingly making, using or causing to be made or used a false record / statement material
 - **Reverse False Claim**
 - Knowingly concealing or decreasing an obligation to pay money to Government



What is a False Claim?

- Elements of a False Claim
 - A “Claim” is any request for money or property submitted to government
 - Multiple requests = multiple false claims
 - Claim just needs to make it to the government, not even directly
 - \$1 of federal money enough
 - Claim Must be submitted “Knowingly” to government
 - Know of falsity
 - Acts in deliberate ignorance of truth/falsity
 - Acts in reckless disregard of truth/falsity
 - Don’t need intent to defraud government – irrelevant

Who Can Bring a False Claims Action?

- **Contracting Officer**

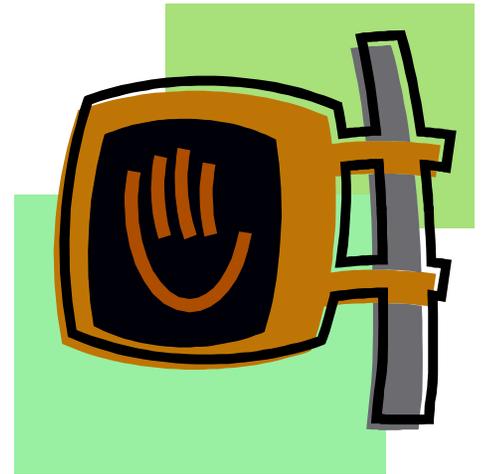
- What must CO do if false contract claim is suspected?
 - FAR 33.209 – If contractor is unable to support any part of a claim, assumed to be false and must be reported to agency's fraud unit

- ***Qui Tam* Relator (Private Citizen Plaintiff)**

- Whistleblower Action
- Competitor
- Employee
 - Incentive = up to 30% of the government's damages



False Claims Act: What Can't You Do?



- Submit false invoices
- Submit false contract claims
- Conceal rebate or credit
- Illegitimately front load invoices
- Submit inflated material/personnel/equipment costs
- Substitute non-conforming materials
- Conceal defective/non-conforming work
- Submit false certifications – SBA certifications
- Collude on bid/proposal prices
- Submit a false federal Small Business Subcontracting Plan



False Claims Act: What Can't You Do?

- **Daewoo Eng'g & Const. Co. v. United States**,
73 Fed. Cl. 547 (2006)
 - Bid low and planned to submit REAs to recover costs
 - Submitted \$13 million claim disguised as \$64 million claim
 - COFC held Daewoo liable under fraud provision of the CDA for \$50 million
- Required Daewoo to forfeit \$14 M legitimate claim



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What Happens if You Do?

- **Statutory Damages**
 - Up to \$11,000 civil penalty for each false claim
 - Automatic Treble damages – Three times the amount of damages sustained by the government (e.g., 3 times the amount of the false invoices
 - Only two times amount if you self report
- **Other Damages**
 - Forfeit legitimate claims
 - “Benefit of the Bargain” damages
 - *Morse Diesel Int’l v. U.S.*, 79 Fed. Cl. 116 (2007)
 - \$467,000 claim led to \$7 million in penalties
 - Presumed Loss Rule



Preventing False Claims

- Simple steps to prevent False Clair
 - Follow your Code
 - Train your employees
 - Monitor your employees
 - Report possible violations
- Be proactive
- Encourage employees to be proactive
 - Safety Awareness example
- Want to be an ethical workplace



Topic III

Federal Compliance Regulations



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Must Submit Accurate Cost / Pricing Data



- Truth in Negotiations Act
- Contractors must submit accurate cost / pricing data to the government
 - FAR 15.403 – Requires Contractors to submit CERTIFIED cost / pricing data for all contract proposals and modifications over \$700,000
 - Must certify cost / pricing is accurate
 - Not required when firm fixed priced bid
- Example – T & M modification prices must be exact



No Collusion

- Contractors cannot share cost / pricing data with competitors when submitting proposal
 - Cannot collude to fix prices
 - FAR 52.203-2 requires all contractors to certify that its proposed prices have been:
 - Arrived at independently
 - Not shared with other offerors
 - OK to share subcontractor prices with other subcontractors



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No Kickbacks

- **Kickback** is anything of value used to get a contract or a subcontract on federal project
- FAR 52.203-7 – prohibits giving anything of value to prime contractor / employee or subcontractor / employee to obtain favorable treatment on prime contract or subcontract
- Example – subcontract provides ballgame tickets, cash, or gifts to Contractors project manager in hopes of getting subcontract



No Contingent Fees

- Contractors cannot pay fee to **improperly influence** Government contract
- FAR 52.203-5 – Contractors cannot pay fee to any person or agency to solicit work from the government unless a “bona fide” employee / agency
 - No brokers or middlemen
 - No finder’s fees
 - Business development employees OK
 - Proposal writers OK
 - Lobbyists OK
- Example – Broker offers a contract for 10% fee



No Gratuities

- Contractors cannot give gratuity to federal employee
 - Gratuity is a gift of some value, to include cash, merchandise, food, beverages, travel, discounts to get favorable treatment from government employee
 - Non-cash gifts under \$20 are OK
 - T-shirt, coffee mug, key chain, lunch
 - Safest method is to prohibit all gifts to federal employees



Cost Principles – FAR Part 31

- FAR 31 requires all contract costs to be:
 - Allowable
 - Allocable
 - Reasonable
- Costs that are not allowable, allocable, or reasonable cannot be paid by the government
- DCAA audit usually finds unallowable costs



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Cost Principles – FAR Part 31

- “Allowable” – Costs are permissible under FAR Part 31
 - Part 31 has laundry list of allowable and unallowable costs
 - Allowable
 - Labor costs, pension costs, material costs, fuel costs, office overhead costs
 - Unallowable
 - Advertising costs, bad debt costs, charitable contributions, employee entertainment costs
- “Reasonable” – Costs elements must be reasonable based on the work performed
 - Based on objective analysis of the CO
- “Allocable” – Chargeable to the contract, i.e., benefits contract and related to the contract work



Buy American Act

- Buy American Act found at FAR Part 25
 - MUST use “domestic materials” on all federal projects
 - Applies to **all** prime and subcontractors working on a federal project
 - Applies to all suppliers on federal project
 - All materials used on a project must be made in the United States



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Buy American Act

- Can get exemptions from Buy American Act from Contracting Officer
- Must request exemption from Act in advance when submitting proposal
- Must show that using Buy American Act
 - Inconsistent with the public interest
 - Domestic material is unavailable
 - Unreasonable costs to the government
 - Application of certain international treaties and agreements



Buy American Act

- Failure to comply with Buy American Act leads to significant penalties
 - Costs to remove/replace non-domestic construction materials
 - Termination of a prime/subcontract
 - Suspension/Debarment
 - False Claims Act liability
 - Civil and Criminal penalties



Buy American Act

- Keys points to remember with Buy American Act
 - Only takes **1** employee to violate the Buy American Act
 - Violations are often committed by junior project personnel unfamiliar with the rules
 - Trying to save project costs is not an excuse
 - Make sure all project personnel are aware of the applicable Buy American requirements



Limitations on Hiring Former Government Employees

- Contractors cannot hire former federal employees and have employee “represent” Contractors on matters related to their federal work
 - Restrictions found at 18 USC § 207
 - Representation means any contact with any government personnel on a matter
 - Can work behind the scenes but not as point man for issue
 - Includes federal civilian employees and military members
 - Need all potential employees to show federal “Authorization Letter” before offer job
 - Neither Contractors or employees can break rules
 - Significant penalties



Limitations on Hiring Former Government Employees

- Series of Bans for former federal employees if hired by Contractors:
 - Lifetime Ban for all matters “personally and substantially” involved in during federal work
 - 2 Year Ban for all matters under “official responsibility” during federal work
 - 1 Year Ban for all SES / O-6 or above representations before any government agency



Topic IV

Small Business Overview



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Small Business Utilization

- FAR 52.219-8: U.S. policy is to provide small businesses with a “maximum practical opportunity to participate in performing contracts and subcontracts”
 - Contractors must carry out this policy in awarding subcontracts to “fullest extent consistent with efficient contract performance”
- FAR 52.219-9: For contracts over \$1 million, contractor must submit a small business subcontracting plan



Small Business Subcontracting Plans

- Contracting agency specifies goals for each small business category
 - Small Business (SB)
 - Veteran-owned small business (VOSB)
 - Service-disabled veteran-owned small businesses (SDVOSB)
 - HUBZone businesses
 - Small disadvantaged businesses (SDB)
 - Woman-owned small businesses (WOSB)



Small Business Subcontracting Plans

- **Large Contractors Must:**
 - Develop plan for meeting the goals
 - Solicit SB's for each award over \$100,000 (and if a SB was not selected, explain why)
 - “Flow down” FAR 52.219-9 to large business subcontractors and reasonably monitor large business subcontractors' compliance



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Small Business Subcontracting Plans



- Individual Subcontract Reports (ISRs)
 - Submitted on April 30th & October 30th & at contract completion
 - Report cumulative small business subcontract dollars
- Summary Subcontract Reports (SSRs)
 - Submitted on October 30th for civilian agencies; on April 20th & October 30th for DoD
 - Report each **first tier** SBC award
 - Must print a hard copy of the SSR, have it signed by the CEO and keep the signature copy on file for 4 years.
- Certify that data is accurate

Small Business Subcontracting Plans

- Goals are usually higher for contracts awarded late in the Government's FY
- The Small Business Subcontracting paradox: With higher goals comes increased focus on small business fraud
- Liquidated damages for failing to make a “good faith effort” to meet plan requirements or intentionally “frustrating” the plan
- Potential false claim liability for misrepresenting SB participation



What Makes a Business “Small”?

- Cannot exceed average revenue/employee count expressed in North American Industry Classification System (NAICS) codes
 - \$36.5 million for General Construction
 - \$15 million for Specialty Trade Construction
- For “status” categories (VOSB, SDVOSB, SDB, HUBZone, WOSB), the individual holding the status must “control” the business
 - Must be able to make all long-term and day-to-day decisions



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Types of Affiliation

- 13 C.F.R. 121.103
 - Stock ownership
 - Stock options & agreements to merge
 - Common management
 - “Identity of interest” (two businesses are owned by family members, persons with common investments/interests)
 - “Newly organized concern rule” (key person leaves Company A and starts Company B)
 - Joint ventures
 - Franchise/license Agreements



How to Avoid Contracting with Small Business “Shams”

- Don't be an ostrich



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Topic IV

Foreign Corrupt Practices Act



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Recent Developments in FCPA Enforcement

Dennis E. Boyle, Esq.

Agenda

- Recent Trends in FCPA Enforcement
 - Increased FCPA Enforcement
 - Gifts, Travel and Entertainment
 - Expanded Theories of Liability
 - Other Developments
- The Dodd-Frank and Consumer Protection Law
- Money Laundering



Increased FCPA Enforcement

- A Clear Priority for DOJ.
- Significant Increase in Cases from 2000 to Present.
 - 2004 4 cases filed
 - 2010 36 cases filed
 - 2013 23 cases filed, but 150 ongoing investigations

There has been a slight decrease in “announced” FCPA cases following the SHOT Show Prosecutions ending in 2011 and 2012. This should not be viewed, however, as a trend.

Increase in FCPA Penalties

- Until 2007, the largest FCPA penalty ever paid was \$44,000,000.
- In 2008, Siemens paid a penalty of \$800,000,000.
- In 2009, KBR/Halliburton paid a penalty of \$579,000,000.



Increase in FCPA Penalties

- More recently
 - 2014 Alcoa entered into an agreement to pay \$384,000,000 in penalties.
 - 2013
 - Total paid civil penalty of \$398,000,000
 - Weatherfield International paid civil penalty of \$250,000,000

The FCPA appears to be a vehicle for the government to recover significant civil penalties which go into the U.S. Treasury.

Trends in Individual Enforcement

“The number of individual prosecutions has risen—and that’s not an accident. . . That is quite intentional on the part of the Department [of Justice]. It is our view that to have a credible deterrent effect, people have to go to jail. People have to be prosecuted where appropriate. This is a federal crime. This is not fun and games.”

Non-compliance **Costs**



Non-compliant
Organization



The Law

Deputy Chief of the Fraud Section
U.S. Dept. of Justice
September 2008



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Individual Prosecutions by the Numbers

- 2004 2 prosecutions
- 2005 3 prosecutions
- 2006 6 prosecutions
- 2007 7 prosecutions
- 2008 14 prosecutions
- 2009 18 prosecutions
- 2010 33 prosecutions
- 2011 10 prosecutions
- 2012 2 prosecutions
- 2013 12 prosecutions



Increase in Government Resources

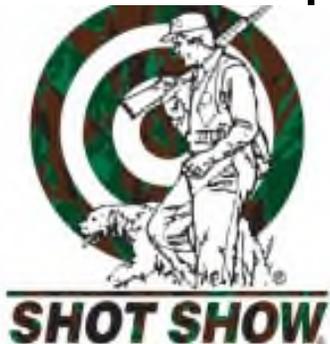


- Since 2010, the budget for fraud enforcement in the Justice Department has been rumored to have increased more than 50%.
- Unlike other divisions, recoveries offset budget increases.
- Not all of this is going to FCPA enforcement; Medicare/Medicaid Fraud and False Claims Act recoveries are also high priorities.



2010 “SHOT SHOW” Sting DOJ Enforcement Strategy

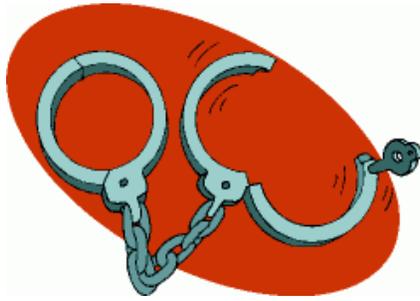
- At some time prior to 2010, Richard Bistrong, a salesman for a U.S. based law enforcement equipment manufacturer was arrested for a violation of the FCPA.
- Bistrong agreed to cooperate with DOJ, and over the next year, worked to set up his former employer and other manufacturers.



2010 “SHOT SHOW” Sting DOJ Enforcement Strategy

- Undercover operatives of the Federal Bureau of Investigation approached a number of manufacturers posing as representatives of the Ministry of Defense of an African nation.
- Offered to place contracts for the sale of military and/ or law enforcement equipment in the amount of \$15,000,000.
- Demanded a \$1,500,000 facilitation payment to the Minister.





2010 “SHOT SHOW” Sting DOJ Enforcement Strategy

- A large number of American and British companies agreed to the terms of the contract, including the facilitation payment.
- “Takedown Day”—at the annual trade show for manufacturers of military, law enforcement and sporting equipment (the “SHOT Show”), 150 FBI agents arrested multiple executives very publicly, removing them from the show in handcuffs.



2010 “SHOT SHOW” Sting DOJ Enforcement Strategy

- While arrests were being made in the United States, U.K. Authorities executed 11 search warrants on company offices and individual homes in the U.K.
- Press Conference by the Attorney General and the Director of the FBI.
- Front page news stories in the New York Times and the Washington Post.

A Closer Look at the Investigation

- Involved massive government resources. 150 FBI agents, scores of prosecutors, international cooperation with the U.K.
- Targets were smaller manufacturers and individuals.
- Everything about the transaction was “made up” by the government.



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The Legal Case

- December 11, 2009—22 individual executives and/or employees indicted for Conspiracy to violate the FCPA and Money Laundering.
- Two defendants entered pleas of guilty, 20 opted to go to trial.
- July 7, 2011—the first trial of four defendants ends in a mistrial after the jury cannot agree of a verdict. Charges are dismissed.



The Legal Case

- December 30, 2011—Second trial of two more defendants ends with the Judge entering a Judgment of Acquittal in favor of one defendant and the jury being unable to agree to on a verdict as to the other.
- February 21, 2012—The government moves to dismiss all charges against all defendants
- July 31, 2012—Richard Bistrong, the individual who originally cooperated and served in an undercover capacity receives an 18 month sentence.



Takeaways



- Tremendous government resources used to prosecute a case that did not exist.
- Catastrophic and permanent damages to the reputations of the people involved, even though the charges were dismissed.
- Hundreds of thousands of dollars expended by defendants in fighting that charges.
- There were no winners.

Takeaways

- No evidence that the government's failure in this case will deter it from further undercover type actions in the future.
- Government blames its failure to secure convictions on certain "evidentiary rulings" made by the court.



" What did you take away from the meeting ? "



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Takeaways

“This appears to be the end of a long and sad day in the annals of white collar crime enforcement. Unlike Takedown day in Las Vegas, however, there will be no front page story in the New York Times or the Post for that matter reflecting the government’s decision today to move to dismiss the charges against the pending defendants in this case. Funny isn’t it what sells newspapers. . . .”

U.S. District Judge Richard Leon

Department of Justice Enforcement Strategies

- The enforcement is to focus on “high risk” industries proactively.
 - Conducting of sector wide or industry wide investigations.
 - Pharmaceutical, medical device, freight forwarding in the oil and gas sector.
- Increased Cooperation with Governments.
 - Germany—Siemens
 - United Kingdom—BAE



Department of Justice Enforcement Strategies

- Follow on prosecutions by local authorities
 - Siemens is being investigated in China, Greece, Hungary, Indonesia, etc.
 - Daimler is being investigated in Russia, Egypt and Switzerland.



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What to Expect Investigative Techniques

- Use of Wiretaps (including monitoring of emails).
- Use of cooperating witnesses.
- Increased use of MLAT's
 - Using other countries investigative and legal processes to secure evidence for use in U.S. courts.
 - Creates issues as to legal privilege, due process and reliability of evidence received.
 - Defense does not have access to same processes.



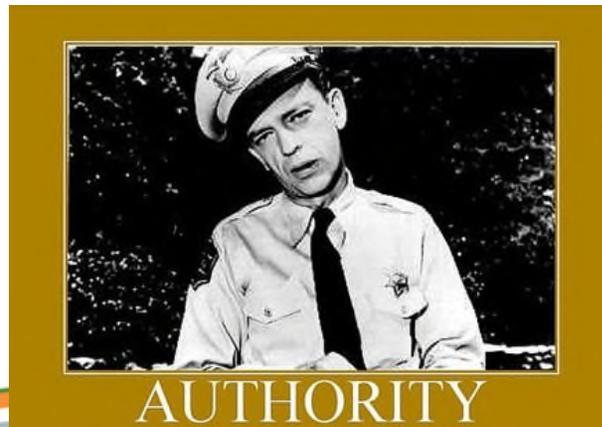
Expanded Theories of Liability

- “Control Person” Liability:
 - In July, 2009, Nature’s Sunshine Products Inc., settled FCPA charges with the SEC stemming from a payment of \$1,000,000 to Brazilian customs officials by a Brazilian subsidiary.
 - Alleged the CEO and CFO were “control persons” as defined under section 20(a) of the Securities and Exchange Act.
 - Theory was that the CEO and CFO were negligent, but not complicit, in the corrupt conduct in that they had insufficient internal controls and inadequate management of personnel involved.



Expanded Theories of Liability

- Split of Authority between the courts as to what is required:
 - Some courts require “culpable participation”.
 - Majority rule is “potential control”.
 - Exercise actual control over the relevant area of the corporation; and,
 - The power to control the transaction that gave rise to the violation.



Expanded Theories of Liability

- Willful Blindness
 - As with other fraud statutes, the FCPA requires intent and knowledge.
 - Courts have created the doctrine of “Willful Blindness” in the absence of knowledge. A person is Willfully Blind if he or she avoid obtaining knowledge of facts that would have alerted him or her to the violation.



Expanded Theories of Liability

– United States v. Bourke

Frederick Bourke was convicted of Conspiracy to violate the FCPA in connection with the potential purchase of a state-owned oil company in Azerbaijan. Mr. Bourke's co-venturer, a Mr. Kozney was alleged to have made the corrupt payments in question. The government's theory at trial was that Bourke was willfully blind in failing to conduct "adequate due diligence" with respect to the transaction. A jury returned a verdict of guilty on this theory.



Other Developments

- “Local Law Defense” Narrowed.
 - Bourke attempted to assert “local law” defense.
 - Argued that under the law of Azerbaijan, payer could not be subjected to criminal liability if the bribes were the result of extortion.
 - Rejected by court, since the local law defense focuses upon the payment, which was illegal under the laws of Azerbaijan.
 - Decision may not be correct.



Other Developments

- Coercion or Extortion not a defense to FCPA violation.
 - In 2010, SEC settled an enforcement actions against NATCO Group Inc.
 - NATCO presented evidence that Kazakh government threatened to fine, jail or deport NATCO employees if bribes were not paid. The payments were made in order to protect workers.
 - Justification was not accepted by SEC.
 - Case was not litigated to verdict or decision of court.



Other Developments: Alternative to Prosecution Under the FCPA

- Bribery under the Travel Act.
 - The Travel Act makes it unlawful to travel in interstate commerce or to use the mails or other interstate facilities to engage in certain unlawful activity, including bribery.
 - In 2009, Control Components, Inc., pled guilty to violating the FCPA and the Travel Act and paid a criminal fine of \$18,200,000 based upon almost \$7,000,000 in bribes paid to employees of state owned companies.



Other Developments: Alternative to Prosecution Under the FCPA

- Mail Fraud and Wire Fraud
 - Oil for Food cases generally have been charged as mail fraud and wire fraud cases and FCPA books and records violations because of difficulties in tracing payments to Iraqi officials.
- Arms Export Control Act
 - United States v. Shu Quan-Sheng
- False Statements



Dodd-Frank Act: Whistleblower Provisions

- Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 contains a provision designed to reward Whistleblowers who provide original information to the SEC relating to securities laws (including the FCPA) resulting in monetary sanctions exceeding \$1,000,000.



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Dodd-Frank Act: Whistleblower Provisions

- The Whistleblower is entitled to an award of between 10% and 30% of the recovery.
- Provides significant incentive for reporting of violations.
- In the Health Care industry, plaintiffs law firm routinely advertise for whistleblowers to represent (False Claims Act).
- Culpability, short of a conviction, does not bar recovery.

Money Laundering

- Among the broadest of criminal statutes.
- Involves, in general terms, the concealment of the source of money illegally obtained.
- Since the FCPA involves the transfer of funds illegally, any attempt to convert the funds to other property or to disguise their character (by running them through a legitimate account) constitutes money laundering.



Money Laundering

- Currency Requirements.
- DOJ has used money laundering charges to reach corrupt foreign officials (who are not covered by the FCPA).
- United States v. Siriwan. Ex-governor of Tourism Authority of her daughter charges with money laundering based upon \$1,800,000 in bribes she accepted from American film producers.



Money Laundering

- United States v. Equenazi. Two employees of Haitian state-owned national telecommunications company charges with money laundering for accepting \$800,000 in payments from a Florida base company in exchange for improved contract terms.



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Summary – Best Practices



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Federal Contracting “Best Practices”

- Know the rules
- Educate your team
- Perception is reality
- Ask for permission first, not forgiveness later
- The customer is not always right
- Good Faith counts for a lot
- Keep records, keep records, keep records



Any Questions ???



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