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Preparing for Enhanced
Antitrust Enforcement in
Government Procurement

December 4, 2019

MCLE Certificate Information

- Most participants should anticipate receiving their certificate of attendance in four weeks following the webcast
- Virginia Bar Association members should anticipate receiving their certificate of attendance in six weeks following the webcast
- All questions regarding MCLE Information should be directed to Jeanine McKeown (National Training Administrator) at 213–229-7140 or jmckeown@gibsondunn.com

Webcast Agenda

- Introductions
- DOJ Procurement Collusion Strike Force
- Antitrust and Government Procurement: An Overview
- Antitrust Corporate Leniency Policy
- Precedential Cases
- Red Flags for DOJ Antitrust
- DOJ Investigations
- Government Procurement Regulations
- False Claims Act Enforcement
- Preparing for Increased Enforcement Activity

We encourage your questions throughout this presentation

Today's Presenters



[Scott Hammond](#) is a partner in the Washington, D.C. office and Co-Chair of the Antitrust and Competition Practice Group. Previously, Mr. Hammond served as a DOJ prosecutor for 25 years, including 8 years as the Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement – the highest ranking career lawyer in the Antitrust Division.



[Kristen Limarzi](#) is a partner in the Washington, D.C. office. Before joining Gibson Dunn, Ms. Limarzi was the Chief of the Appellate Section of DOJ's Antitrust Division, and she was involved in every civil non-merger matter and all of the most complex criminal cases the Division litigated in the last decade.



[Jonathan Phillips](#) is a partner in the Washington, D.C. office where he focuses on white collar enforcement matters and related litigation. Previously, Mr. Phillips served as a Trial Attorney in DOJ's Civil Division, Fraud Section, where he investigated and prosecuted allegations of fraud against the United States under the False Claims Act and related statutes, including cases involving bid rigging and other allegations of fraud by government contractors.



[Jeremy Robison](#) is a partner in the Washington, D.C. office. His practice focuses on defending companies and individuals involved in antitrust investigations by U.S. and international enforcement authorities, conducting internal investigations, and advising companies on antitrust compliance programs and policies.



[Joe West](#) is a partner in the Washington, D.C. office and former Co-Chair of the firm's Government Contracts Practice. For 40 years, Mr. West has concentrated his practice on contract counseling, compliance/enforcement, and dispute resolution.



[Lindsay Paulin](#) is a litigation associate in the Washington, D.C. office. Her practice focuses on a wide range of government contracts issues, including internal investigations, claims preparation and litigation, bid protests, and government investigations under the False Claims Act.

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The Procurement Collusion Strike Force

The Procurement Collusion Strike Force

- On November 5th, DOJ announced an interagency effort to detect, investigate, and prosecute suspected violations of antitrust and other laws in government procurement
- The newly formed Procurement Collusion Strike Force will involve 13 district-based teams comprising participants from:
 - DOJ Antitrust Division
 - U.S. Attorneys' Offices
 - Federal Bureau of Investigation
 - Inspectors General offices, including
 - Department of Defense
 - Department of Justice (including Bureau of Prisons, etc.)
 - General Services Administration
 - U.S. Postal Service



The Procurement Collusion Strike Force

- The Strike Force will pursue four enforcement/deterrence strategies:
 1. **Coordination** with USAO, FBI, Inspectors General offices, and state/local authorities
 2. **Education** of external stakeholders, such as trade associations, to raise awareness of criminal antitrust enforcement
 3. **Training** of federal, state, and local government procurement personnel on “red flags” suggestive of collusion
 4. **Analysis** of government procurement data for indicia of fraud or collusion
- Although it is a federal initiative, Strike Force will also probe antitrust violations involving state and local government procurement

The Procurement Collusion Strike Force

Prior enforcement initiatives have been successful in focusing resources and increasing interagency coordination:

Health Care Fraud Strike Force

- Targeted at suspected fraud involving health insurance, medical billing, and related crimes
- Combined resources from DOJ, FBI, HHS, and other agencies
- Resulted in at least 4,000 cases and over 1,000 arrests

Financial Fraud Enforcement Task Force

- Formed for the prosecution of financial fraud stemming from 2008 financial crisis
- Involved enforcement actions against 343 criminal and 189 civil defendants
- LIBOR and FX investigations were outgrowth of this effort

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Antitrust and Government Procurement: An Overview

Antitrust and Government Procurement



- **DOJ Antitrust Division** is responsible for prosecuting criminal antitrust violations
 - Cases involve *per se* violations—price fixing, bid rigging, and customer/market allocations
- **DOJ Civil Division** is responsible for recovering for financial harm to federal government
 - Primarily relies on False Claims Act
- **73 Inspectors General** responsible for auditing and investigating fraud, waste, and abuse
 - Many have internal law enforcement agents
 - Coordinate prosecutions with DOJ Antitrust or U.S. Attorney Offices



Sherman Act, Section 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 declared to be illegal.”

Sherman Act, Section 1

Sherman Act, Section 1

- Critical question: Is there an **agreement** to act jointly?
- “**Meeting of the minds**” through communication:
 - Oral or written
 - Formal or informal – no “magic” words required
 - Express or implied
 - Can be arrived at through a series of communications
- **Agreement is enough**: the agreement or understanding itself constitutes the complete violation
 - It does not matter if the agreement is not implemented or not successful

Antitrust and Government Procurement

Antitrust enforcement actions can have significant repercussions even if a conspiracy was brief, ineffective, or small:

- Significant criminal fines for companies, along with non-monetary penalties (e.g., probation, monitor)
- Incarceration for individuals
- Civil restitution and penalties under FCA or Section 4A
- Suspension or debarment
- Private class-action litigation
- Reputational harm and negative publicity
- Legal expenses for government and internal investigations

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Antitrust Corporate Leniency Policy

The DOJ Leniency Program

The DOJ Antitrust Division offers certain benefits to the first company meeting the eligibility requirements of its Leniency Program, including the possibility that:

- The company might avoid criminal conviction and mitigate the collateral consequences that follow from criminal conviction
- The company might avoid a criminal fine (a 100% reduction)
- Cooperating current employees may not be prosecuted (i.e., go to jail)
- Civil private damage liability exposure may be reduced from triple to single damages and joint and several liability may be eliminated

The DOJ Leniency Program

- The Leniency Program’s “marker” system is designed to create a **race to the prosecutor’s office** between the conspirators
 - The DOJ has purposefully set the evidentiary threshold for obtaining a marker extremely low in order to incentivize companies to move quickly, and not wait until an internal investigation has been concluded
 - Companies initially have to only reveal their identity and the product(s)/service(s) with regard to which they seek protection
- Companies can still apply for leniency even **after the Antitrust Division has initiated an investigation**, including the issuance of subpoenas
- Most of the largest Antitrust Division cases have involved a leniency applicant and were initially built on the evidence provided by the cooperator

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Precedential Cases

Antitrust Enforcement Actions Involving Procurement

United States v. GS Caltex Corp., et al.

- Whistleblower claim to DLA IG uncovered bid rigging conspiracy for fuel supplied to U.S. military bases in South Korea
- Investigation resulted in coordinated resolution between Antitrust and Civil Divisions with five companies pleading guilty and paying more than \$360 million in fines and damages
- Seven executives indicted for antitrust violations, with one also charged with witness tampering

“Section 4A of the Clayton Act is a powerful yet historically underused enforcement tool that empowers the United States to obtain treble damages for anticompetitive conduct when the government is itself the victim. The Antitrust Division has a long history of vigilantly protecting the interests of American consumers through civil and criminal antitrust enforcement. Going forward, it is my goal to apply that same vigilance to protect the interests of American taxpayers. When a firm cheats the United States by rigging bids, the Division will insist on robust civil settlements like those announced today.”

AAG Makan Delrahim (Nov. 14, 2018)

Antitrust Enforcement Actions Involving Procurement

United States v. Heritage Pharmaceuticals Inc.

- Heritage entered a deferred prosecution agreement with DOJ Antitrust for its alleged participation in a conspiracy to fix prices, rig bids, and allocate customers for glyburide, a drug used to treat diabetes
- Former CEO and president each pleaded guilty to antitrust violations
- Heritage paid a \$225,000 monetary penalty to DOJ Antitrust and more than \$7 million in civil penalties and damages to DOJ Civil for alleged harm to indirect government purchasers
- Investigation launched following NY Times report about price increases for certain generic drugs

“Price fixing of generic drugs harms federal health care programs and the beneficiaries those programs serve. The Department of Justice will use every tool at its disposal to hold generic drug manufacturers accountable for wrongdoing.”
AAG Jody Hunt (May 31, 2019)

Antitrust Enforcement Actions Involving Procurement

United States v. Rivera-Herrera, et al.

- DOJ Antitrust prosecuted four owners of school bus transportation companies accused of rigging bids for public school bus transportation in Puerto Rico
- Owners predetermined the winning bidder for each contract, and then submitted inflated complementary bids to create the appearance of competition. Also submitted fraudulent certifications of non-collusion
- All four were convicted of Section 1 violations and related Title 18 violations for mail fraud and conspiracy to commit mail fraud, with three individuals receiving one-year prison sentences



Antitrust and Government Procurement

United States v. Holland, et al.

- Sherman Act prosecution of bidders at online public auctions of surplus government equipment conducted by the General Services Administration, a government agency that manages federal property
- Bidders determined in advance who would submit bids for a particular lot of goods and which bidder would win a particular auction
- At least two individuals have agreed to plead guilty to criminal violations of Section 1



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Potential Collusive Conduct: Red Flags for DOJ Antitrust

Red Flags: Indicia of Collusion Risk

- DOJ criminal antitrust cases typically exhibit certain characteristics:
 - **Industry concentration:** few qualified bidders
 - **Barriers to entry:** obstacles to new entrants seeking to compete
 - **Few substitutes:** services/products cannot be readily replaced
 - **Commoditized products:** competition primarily based on price
 - **Recurring purchases:** long-term customers and supply contracts
 - **Rush/emergency work:** constraints limit competitive bidding
 - **Employee turnover:** transient workforce between competitors
 - **Industry stability:** consistent pricing over time and stable competitors



Red Flags: Industry Interactions

- Evidence of actual or potential communications between horizontal competitors during the bidding process will almost certainly attract DOJ's attention:
 - Industry trade shows or association meetings
 - Legitimate business contacts on unrelated issues
 - Employee turnover resulting in contacts between the companies
 - Geographic proximity between competitors
- Communications to government procurement officials suggesting awareness of another competitor's price or other bid aspects
- Post-award conduct, such as awarding a subcontract to a losing bidder or a company that did not bid after requesting a bidding package

Red Flags: Bidding Process Irregularities

- **Withdrawn bids:** Post-submission withdrawal of bids, particularly by the lowest bidder or when the withdrawing bidder later receives a subcontract
- **Changes to specific bids:** Post-submission changes to bid prices, discounts, rebates, or other material provisions
- **Industry-wide price increases:** Sudden and nearly identical price increases among competitors that cannot be readily explained; similar explanations offered by competitors to justify price increase
- **Sole source:** Repeated bidding exemptions for “emergency” work within a single industry, resulting in little or no competition in the bidding process
- **Unqualified losing bidder:** Losing bidders are obviously unqualified, unknown within industry, or appear to be a shell company

Red Flags: Bidding Process Irregularities

- **Similarities in bidding documents:** Indicia that bidding documents were jointly drafted or exchanged, such as common typos, metadata consistencies in bidding documents; submissions from same IP address
- **Limited effort by losing bidders:** Losing bidders reuse documents from prior bids or make limited effort to tailor bids to current RFP
- **Unexpected lack of competition:** Companies expected to bid, or that express initial interest in bidding, choose not to do so without obvious explanation; an RFP receives fewer bids than prior bidding cycles
- **Smaller RFPs:** Competitors encourage agencies to split RFPs to keep numbers lower, or only bid on projects below a certain dollar threshold, thereby reducing the level of scrutiny
- **Referrals:** Company refers potential bidding opportunity to a competitor when it is qualified to bid itself

Red Flags: Evidence of Bidding Process Irregularities

MR. [REDACTED], Director
Department of Parks and Recreation
Tiyán, Guam.

Subject: Repair of one Paseo Stadium Light Tower

Dear Mr. [REDACTED],

Please find our estimate for the Restoration of one lighting tower at the Paseo Stadium damage by Typhoon Paka. The total amount of our estimate is **"One Hundred Forty Five Thousand Eight Hundred Fifty Dollars and 00/100 (\$ 145,850.00)"**. Including the supply and installation of Lighting fixtures and power hook up.

We sincerely hope that this is according to your requirements. Please give us a call us if you have any question. Thank you very much.

Sincerely,
[REDACTED]
President

MR. [REDACTED], Director
Department of Parks and Recreation
Tiyán, Guam.

Subject: Repair of one Paseo Stadium Light Tower

Dear Mr. [REDACTED],

We submit here with our estimate for Repair and Restoration of one Lighting Tower at the Paseo Stadium that was damage by Typhoon Paka. The total amount of our estimate is **"One Hundred Forty Eight Thousand Three Hundred Fifty Dollars and 00/100 (\$ 148,350.00)"**. Including Labor, Materials and Equipment.

We hope that the above quotation is satisfactory. Please give us a call us if you have any question. Thank you very much.

Sincerely,
[REDACTED]
Project Engineer

Red Flags: Bidding Data Analytics

Government enforcers are using increasingly sophisticated systems to analyze bidding data for potential irregularities:

- Equal rotation of winning bids among competitors over time
- Companies repeatedly win the same bidding opportunities
- Company suddenly ceases to bid for specific agencies
- Companies limit their bids to certain geographic areas
- Winning bid is higher than prior bids or estimates
- Large gaps between winning bid and other bids
- Company bids higher for local customers than to distant ones
- Identical bids among competitors for specific contract line item
- Unexplained disparities in company's bids across projects
- Certain companies do not bid against one another
- Lower bid prices when infrequent bidder participates

Antitrust Considerations: Teaming Agreements

- DOJ, FTC, and DoD have issued guidance for bidding collaborations with competitors, such as teaming agreements
 - Enforcers and agencies recognize **pro-competitive benefits** that often accrue: combining unique capabilities, lowering costs, speeding production, enhancing innovation, and sharing risks for larger projects
 - But also note **competitive harm** will occur if the result is higher prices or reduced output, quality, service, or innovation
- To minimize antitrust risks in teaming agreements:
 - Document pro-competitive benefits at time of formation
 - Preserve ability to compete independently, including in other teams
 - Carefully scrutinize agreements between companies that would otherwise submit competing bids
 - Control information sharing between teaming agreement members

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DOJ Investigations

DOJ Investigations: Initial Contact

- **Grand jury subpoena requesting documents**
 - Low standard for issuance; limited grounds to challenge
- **Search warrant of company premises or employees' residences**
 - Unannounced search conducted by FBI agents and DOJ prosecutors
 - Often focused on servers, computers, and mobile devices
 - Also involves seizure of hard copy documents, with particular interest in notebooks and phonebooks
 - Requests to voluntarily interview relevant employees while on-site
- **Drop-in interviews**
 - FBI agents and DOJ prosecutors make unannounced visit to residence or workplace of relevant employees
 - Voluntary interview, although many feel compelled to speak
 - Often occur early in the morning and individual confronted with documents gathered during DOJ's investigation to date

DOJ Investigations: Lifecycle

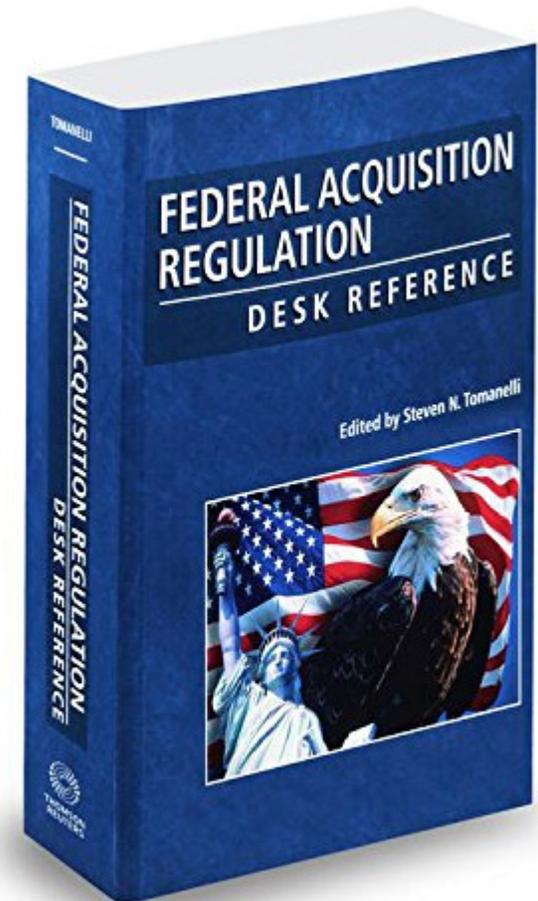
- DOJ investigations typically last for **at least 12-18 months**, even when unlawful conduct is not identified, and often proceed in four stages:
 1. **Documents.** Companies will be required to review and produce relevant documents, with some investigations involving millions of pages. Documents seized during execution of a search warrant may also be made available for a privilege review
 2. **Interviews.** DOJ may seek voluntary interviews with key employees or require their testimony before a grand jury
 3. **Proffers and Legal Discussions.** Counsel for the company will often engage DOJ in protracted discussions about the evidentiary findings and their potential legal consequences
 4. **Resolution (if appropriate).** DOJ may engage the company in plea negotiations or provide opportunities to advocate for a particular form of resolution (e.g., Filip presentation)

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Government Regulations Regarding Procurement

Government Procurement Regulations

- Federal Acquisition Regulation
 - Primary set of rules regarding federal agency procurement
 - Mandates reporting of suspected fraud and antitrust violations
 - Provides for suspension or debarment for fraud, antitrust violations, embezzlement, and other offenses



Government Procurement Regulations

- Certification of Independent Price Determination (48 C.F.R. § 52.203-2)
 - Included in solicitations for most fixed price contracts
 - Certification that:
 - Prices in any bid have been determined independently and not for purpose of limiting competition
 - Prices in bid have not been shared with competitors
 - No attempt made to induce a competitor to submit an offer (or not) for the purpose of restricting competition
 - Essentially prohibits same conduct as Section 1 of the Sherman Act, but easier to prove—with potential harsher penalties under Title 18 for false statements
 - Miscertification could give rise to FCA liability

Government Procurement Regulations

- Contractor Code of Business Ethics and Conduct (48 C.F.R. § 52.203-13)
 - Mandatory disclosure program finalized in December 2008 after voluntary disclosure system proved ineffective
 - Requires reporting of “credible evidence” of misconduct by employees and contractors involving violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations; False Claims Act violations; and significant overpayments
 - Disclosure must be made to agency Office of the Inspector General
 - Certain contractors and subcontractors required to create codes of business ethics and compliance, as well as internal control systems
- Consequences for violations include suspension or debarment, financial penalties, and loss of future contracts

Government Procurement Regulations

Contract Type	Code of Business Ethics and Conduct	Business Ethics Awareness and Compliance Program	Internal Control System	Mandatory Disclosure / Suspension and Debarment
Contractors with commercial item contracts	Yes, with contractors containing FAR 52.203-13	Not required, but recommended by the FAR	Not required, but recommended by the FAR	Yes
Contractors with noncommercial item contracts	Yes, with contractors containing FAR 52.203-13	Yes, with contractors containing FAR 52.203-13	Yes, with contractors containing FAR 52.203-13	Yes
Small business contractors	Yes, with contractors containing FAR 52.203-13	Not required, but recommended by the FAR	Not required, but recommended by the FAR	Yes
Contracts being performed wholly overseas	Yes, with contractors containing FAR 52.203-13	Yes, with contractors containing FAR 52.203-13	Yes, with contractors containing FAR 52.203-13	Yes
Subcontracts	Yes, with contractors containing FAR 52.203-13	Yes, with contractors containing FAR 52.203-13	Yes, with contractors containing FAR 52.203-13	Yes

Government Procurement Regulations

- Disclosing Credible Evidence
 - Standard of “Credible Evidence”
 - Cooperation
 - Timeliness
 - Who Must Report?
 - Disclosure Process
- Contractor Code of Business Ethics and Conduct
 - Code Requirements
 - “Ongoing” Business Ethics Awareness and Compliance Program
- Internal Control System
- Consequences

Government Procurement Regulations

- Reporting Antitrust Violations, FAR Subpart 3.3
 - Directs contracting personnel to report evidence of suspected antitrust violations in acquisitions for possible referral to the Attorney General or the agency Suspension and Debarment Office
 - Practices or events that may evidence violations of antitrust laws include:
 - (1) The existence of an “industry price list” or “price agreement” referenced in offers
 - (2) Sudden change from competitive bidding to identical bidding
 - (3) Simultaneous price increases or follow-the-leader pricing
 - (4) Rotation of bids or proposals, so that each competitor takes a turn in sequence as low bidder, or so that certain competitors bid low only on some sizes of contracts and high on other sizes

Government Procurement Regulations

- Reporting Antitrust Violations, FAR Subpart 3.3
 - Practices or events that may evidence violations of antitrust laws include (cont.):
 - (5) Division of the market, so that certain competitors bid low only for contracts awarded by certain agencies, or for contracts in certain geographical areas, or on certain products, and bid high on all other jobs
 - (6) Establishment by competitors of a collusive price estimating system
 - (7) The filing of a joint bid by two or more competitors when at least one of the competitors has sufficient technical capability and productive capacity for contract performance
 - (8) Any incidents suggesting direct collusion among competitors, such as the appearance of identical calculation or spelling errors in two or more competitive offers or the submission by one firm of offers for other firms
 - (9) Assertions by the employees, former employees, or competitors of offerors, that an agreement to restrain trade exists

Government Procurement Regulations

- Suspension & Debarment Legal Framework
 - FAR
 - Non-Procurement Common Rule
 - Federal Statutes
- Purpose of Suspension & Debarment
 - Used to ensure that the Government only enters into financial relationships with “responsible” entities
 - Intended to protect government programs from persons who engage in dishonest or illegal conduct or who are otherwise unable to perform government contracts.
 - Importantly, suspensions and debarments are to be used “only in the public interest for the Government’s protection.” FAR 9.402(a), (b); see 2 C.F.R. § 180.125. Not meant to be employed by the Government “for purposes of punishment.” FAR 9.402(b); 2 C.F.R. § 180.125(c).

Government Procurement Regulations

- Debarment—disqualifies a firm from contracting with the Government or participating in government non-procurement transactions for a specific amount of time.
 - Length of debarment is usually limited to a maximum of three (3) years.
 - Discretionary—FAR permits, but does not *require*, suspension & debarment
- Suspension—temporary disqualification of a firm that lasts until an investigation, litigation, or agency determination has settled the facts relevant to the grounds for debarment.
 - While “temporary,” in instances where an investigation or litigation lasts more than three years, the term of a suspension may actually exceed the typical maximum term of a debarment
- Agency should not suspend or debar a *presently responsible* contractor

Government Procurement Regulations

Causes for Debarment (FAR)

1. **A conviction or civil judgment for fraud or the commission of a criminal offense:**
 - a. Fraud or a criminal offense in connection with a public contract or subcontract.
 - b. Violation of federal or state antitrust laws.
 - c. Embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property.
 - d. Intentionally affixing a “Made in America” label to foreign goods.
 - e. Any other offense indicating a lack of business integrity.
2. **A serious violation of the terms of a Government contract, subcontract, or transaction (established by a preponderance of the evidence)**
 - a. This can be shown by a willful failure to perform or a history of failure to perform one or more contracts
3. **Any other cause so serious or compelling in nature that it affects an entity’s “present responsibility”:**
 - a. Violations of the Drug Free Workplace Act.
 - b. Unfair trade practices.
 - c. Non-compliance with the Immigration and Nationality Act’s (INA) employment provisions.

Plus NCR Bases for Debarment

Government Procurement Regulations

- Causes for Suspension
 1. On the basis of an indictment, or if there is “adequate evidence” of grounds for debarment; and
 2. Where immediate action is necessary to protect the Government’s and the public’s interest.
- **Adequate Evidence:** information sufficient to support the *reasonable belief* that a particular act or omission has occurred.
- Overview of the Administrative Suspension & Debarment Process
- Mitigating Factors
- Effect of Suspension & Debarment

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False Claims Act Enforcement

The False Claims Act (FCA)

- The FCA, 31 U.S.C. §§ 3729-3733, is the federal government's *primary weapon to redress fraud* against government agencies and programs
- The FCA provides for recovery of *treble damages* and *civil penalties* from any “person” (natural or corporate entity) who knowingly submits or causes the submission of a false or fraudulent claim to the United States for money or property
- FCA investigations primarily originate from *qui tam* lawsuits filed by whistleblowers, called “relators”
- DOJ attorneys (Civil Division, as well as U.S. Attorneys’ Offices) investigate and pursue FCA cases
 - Increasingly, other enforcement agencies and components scour *qui tams* for cases



“It seems quite clear that the objective of Congress was broadly **to protect the funds and property of the Government from fraudulent claims**”

Rainwater v. United States,
356 U.S. 590 (1958)

Key Provisions

31 U.S.C. § 3729(a)(1)	Statutory Prohibition	Summary
(A)	Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval	False/Fraudulent Claim
(B)	Knowingly makes, uses or causes to be made or used, a false record or statement material to a false or fraudulent claim	False Record/Statement
(G)	Knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government	“Reverse” False Claim
(C)	Conspires to violate a liability provision of the FCA	Conspiracy

Overview of Key False Claims Act Theories

Factual Falsity

- False billing (e.g., services not provided)
- Overbilling (e.g., labor misclassification)

Legal Falsity / False Certification

- Certification of compliance with legal requirements
- Submission of claim with representations rendered misleading as to goods / services provided

Promissory Fraud / Fraud in the Inducement

- Obtaining a contract through false statements or fraudulent conduct
- *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (claims made by contractors who colluded on bids)

Reverse False Claims

- Improper avoidance of obligation to pay money to the government
- Retention of government overpayment

Applicable False Claims Act Theories for Pricing Conduct

- DOJ's focus on procurement-related enforcement may significantly increase the interest in pursuing parallel civil actions under the FCA as the government's primary civil tool for recovering defrauded funds
- DOJ has a variety of recognized theories it may employ to support an FCA action based on alleged violations of the antitrust laws
 - **Fraudulent Course of Conduct:** The Supreme Court has recognized that bid rigging and price fixing among government contractors is a fraudulent course of conduct that renders false every claim for payment of the inflated, collusive price. *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537 (1943)
 - **Express False Certification:** Certificate of Independent Pricing Determinations and similar certifications may become actionable as express false statements to fraudulently induce a contract award
 - **Implied False Certification:** Statements about prices that omit material information about price or bid collusion may be actionable under an implied certification theory. *See Univ. Health Servs. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016)

Recent Parallel Antitrust/FCA Settlements

Hyundai Oilbank Co. and S-Oil Corp.

- Had contracts with the U.S. military to supply fuel to bases in South Korea
- Agreed to pay approximately \$127 million to resolve allegations that they conspired to suppress and eliminate competition during the contract award process (“bid rigging”)
- The payments settled criminal and civil antitrust claims and civil FCA claims
- DOJ noted that the Antitrust Division and the Civil Fraud Section “worked together effectively to reach coordinated global settlements that were equitable and proportionate to the defendants’ conduct” in accordance with the Anti-Piling On policy

Heritage Pharmaceuticals

- Alleged to have participated in a criminal conspiracy to fix prices, rig bids, and allocate customers for glyburide, a drug used to treat diabetes
- CEO and former president were also charged with criminal antitrust violations
- Heritage agreed to pay a \$225,000 criminal penalty and more than \$7 million in civil penalties and damages

Increased Antitrust/FCA Activity – Potential Issues

- Expanded use of the FCA to pursue recoupment of funds and civil penalties in antitrust enforcement context may raise a number of important legal issues:
 - Scope of FCA falsity theories:
 - Relevance of *Escobar* to “fraudulent course of conduct” theory under *Hess* where there is not an express certification of independent pricing
 - Use of anti-kickback theories to capture pricing conduct not under direct contract with the government
 - Causation: Use of FCA to pursue funds paid by the government as an *indirect* purchaser, such as actions involving subcontractors or government health programs
 - Materiality: How will DOJ prove materiality in cases involving indirect purchases?

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Preparing for Increased Enforcement Activity

What Should Your Company Be Doing to Prepare?

1. **Renew internal antitrust training efforts.** Refresh any existing antitrust training materials and conduct a new round of training sessions, particularly for senior executives, sales personnel, and government contracting staff.
2. **Implement protocols for search warrants and dawn raids.** Adopt procedures and checklists in the event that government authorities arrive unexpectedly. Train key personnel who will be responsible for coordinating with government agents.
3. **Review compliance programs.** Robust compliance policies satisfy FAR 52.203-13 and aid in early detection of potential misconduct, providing greater response options. DOJ also credits compliance programs, in some circumstances, in determining the appropriate resolution when an antitrust violation occurs.

What Should Your Company Be Doing to Prepare?

- 4. Strengthen internal controls.** Identify high-risk procurement events, such as teaming agreements and sole source bids, and ensure robust internal controls are in place to minimize potential risks.
- 5. Establish employee whistleblower program.** Providing an internal mechanism for reporting potential issues can minimize risks of external reporting. Also aids in early detection of possible misconduct, thereby maximizing a company's options.
- 6. Monitor industry developments.** Be alert to DOJ activity and qui tam cases involving your competitors or in related industries. Execution of search warrants, for example, can be reported in industry publications or local news. Public companies may also disclose search warrants or subpoenas in quarterly filings.

Final Thoughts

- If you have any unanswered questions, please feel free to contact any of our presenters:
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