

## SESSION 2

# INVESTIGATIONS, DISCLOSURES, AND SUSPENSION AND DEBARMENT

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2:00 PM to 3:00 PM

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PUBLIC CONTRACTS



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## Subtopic: Internal Investigations and Mandatory Disclosure

- Enforcement Focus Procurement Collusion Strike Force (PCSF)
- Practical Considerations for Internal Investigations:
  - Proactive Internal Investigations
  - Mandatory Disclosure Refresh
  - Privilege Case Update: In re Fluor Intercontinental, Inc., No. 20-1241 (Mar. 25, 2020).
  - Special risk areas for 2021-2022
    - CARES Act Related Matters
    - CyberSecurity Certifications

## Enforcement Focus: The Procurement Collusion Strike Force (PCSF)

- **November 5, 2019:** Justice Department Announces Procurement Collusion Strike Force (PCSF): a Coordinated National Response to Combat Antitrust Crimes and Related Schemes in **Government Procurement**, Grant and Program Funding:
  - ▶ Focus on Procurement Anti-Trust Crimes and Fraudulent Schemes
  - ▶ Announcement of Interagency Partnership
  - ▶ Includes reporting by anonymous complaint form and public hotline

## November 12, 2020: Justice Department Publishes PCSF Inaugural Report

- ▶ Additional focus on fraud and collusion associated with Pandemic and International procurements
- ▶ Permanent PCSF Director Announced: Daniel Glad
- ▶ Support of Council of the Inspectors General on Integrity and Efficiency (CIGIE)
- ▶ Several thousand government employees trained on antitrust crimes and schemes
- ▶ Expansion of In-District Working Partners
- ▶ Investment in the use of Machine Learning & Data Analytics
- ▶ More than 24 active grand jury investigations
- ▶ PCSF expanding by adding nine new U.S. Attorney's Offices, the Department of Homeland Security Office of Inspector General, and the U.S. Air Force Office of Special Investigations, to the interagency partnership



## November 12, 2020 Strike Force Communications

- November 12, 2020: Justice Department Announces its expansion in 2020 by adding 11 new national partners to the Strike Force, for a total of 29 agencies and offices
- Highlights from Assistant Attorney General Makan Delrahim Remarks to ABA on the Past and Future of Antitrust Enforcement, November 12, 2020

# Internal Investigations & Mandatory Disclosures

## Internal Investigations

- Annual Risk Assessment
- Annual Internal Audits
- Ethics Hotline
- Employee Disclosure
- Disgruntled Employee
- Competitor Disclosure
- Formal Complaint, Subpoena

# Special Risk Areas - 1 of 2

## CARES Act 2020 & Consolidated Appropriations Act, 2021

- ▶ False Claims, Fraud-Waste-Abuse
- ▶ PPP, EIDL versus Federal Contractor Authority, Section 3610\*
  - ▶ Treatment by Executive Agencies versus DoD

\*CAA extended through 3-31-2021, Section 1002, CONTRACTOR PAY.

# Special Risk Areas - 2 of 2

## CyberSecurity Certification: Increased Importance after Government-wide Breach

- ▶ False claims risk associated with recent/new certification requirements:
  - Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment (7-14-2020, Interim Rule)
  - DFAR, CMMC and FedRAMP certifications
  - Anticipated Certifications under the IoT Internet Act (12-4-2020)
- ▶ **Instructive Cases**
  - ▶ United States ex rel. Adams v. Dell Computer Corp., No. 15-CV-608 (TFH), 2020 WL 5970677, (D.D.C. Oct. 8, 2020)
  - ▶ United States v. Aerojet Rocketdyne Holdings, Inc., 381 F. Supp. 3d 1240 (E.D. Cal. 2019)

# Mandatory Disclosure & A/C Privilege

1. FAR 52.203-13 (Contractor Code of Business Ethics and Conduct);
2. FAR 9.406-2 (Causes for Debarment)
3. FAR 9.407-2 (Causes for Suspension)

## FAR 52.203-13(b)(3)

(i) The Contractor shall **timely disclose**, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the **Contractor has credible evidence** that a principal, employee, agent or subcontractor of the Contractor has committed -

**(A)** A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or

**(B)** A violation of the civil False Claims Act (31 U.S.C. 3729-3733).

[Emphasis Added]

# Case Update on Privilege & Mandatory Disclosure

- In re Fluor Intercontinental, Inc., 803 Fed. Appx. 697 (4th Cir. 2020).
  - ▷ Terminated employee sought privileged internal investigation
  - ▷ Held: Privilege not waived by Contractor's Mandatory Disclosure
- Estate of Bryant v. Baltimore Police Department, 2020 WL 6363965 (2020).
  - ▷ Work product not waived by sharing documents with organization conducting post-exoneration review of wrongful conviction

# Case Update on Privilege & Mandatory Disclosure (cont'd.)

But see the following:

- In re Grand Jury Investigation, No. MC 17-2336 (BAH), 2017 WL 4898143 (D.D.C. Oct. 2, 2017).
  - ▶ Response by counsel to DOJ inquiry was waiver
- S.E.C. v. Herrera, No. 17-20301-CIV, 2017 WL 6041750 (S.D. Fla. Dec. 5, 2017).
  - ▶ Voluntary sharing with SEC oral summaries of internal investigation witness interview notes waived privilege

# Suspension & Debarment: Trends

- Numbers of actions on multi-year decline
  - ▶ Per SAM.gov, FY2016 to FY2020 decline more than 40%
- Anecdotally, speed of actions slowed in FY2020 (for understandable reasons)
- Individuals and small businesses remain a substantial focus
- EPA, GSA, and Military Departments most active



# Suspension & Debarment Scenario: Alleged CEO Misconduct

- ABC Corp. is a build-to-print manufacturer for the DoD
- ABC Corp. received a notice from a DoD SDO after prime contractor submitted a disclosure alleging misconduct by the CEO and owner of ABC Corp.
- Actions of owner/officer imputed to company under imputation and affiliation principles because he allegedly performed such acts on behalf of company and was in control of the company

# Suspension & Debarment Scenario: Alleged CEO Misconduct

## Response & Outcome:

- ▶ Negotiated 3-year AA with the Government:
  - ▶ Owner resigned his position as CEO and transitioned to a non-leadership position
  - ▶ Owner accepted a voluntary exclusion from government contracting and agreed not to be involved in company's government contracting business
  - ▶ Owner participated in intensive ethics & compliance training

# Suspension & Debarment Scenario: Alleged CEO Misconduct

## ■ Negotiated 3-year AA with the Government:

- ▶ ABC Corp. instituted values-based ethics & compliance program
  - ▶ Quarterly ECO reports to monitor and government on E&C program
- ▶ ABC Corp. implemented internal controls and corrective actions to prevent similar events from reoccurring
- ▶ ABC Corp. appointed new, majority-independent Board and placed control of company in hands of Board
- ▶ The Board appointed a new CEO to lead company on day-to-day basis
- ▶ Subject to independent monitoring

# Suspension & Debarment Scenario: Alleged CEO Misconduct

- *But the story does not end there. . .*
- Less than one year after AA is executed, government alleges that owner has violated restrictions on his role and affords company an opportunity to resolve the concerns
- In response:
  - ▶ Owner accepted responsibility for some of the findings

# Suspension & Debarment Scenario: Alleged CEO Misconduct

## ■ In response:

- ▶ To resolve Government concerns, relinquished his ownership interest in the company, transferring his shares to a family member
- ▶ Owner completely resigns from company and agrees to have no involvement
- ▶ Voluntary exclusion from government contracting continues for owner
- ▶ Devised a set of controls governing the relationship between the family member shareholder and the company to limit their influence and address government's concerns

# Investigation Scenario: Competitor Pricing

- Internal hotline report alleging awareness of competitor pricing during proposal effort
  - ▷ Issue spotting:
    - ▷ Procurement Integrity
    - ▷ Procurement collusion and related issues
    - ▷ Ethics & compliance

# Investigation Scenario: Competitor Pricing

## ■ Strategic Considerations

- ▷ Disclosure dynamics – MDR, procurement integrity related, others?
- ▷ Information security – identifying, securing, and disposing of competitor information
- ▷ Preparation for request for affidavits
- ▷ Scoping of investigation and privilege issues when multiple disclosures and government communications are likely

# Panel Discussion



## Challenge Question



Submit your answer to [craig@pubklaw.com](mailto:craig@pubklaw.com)  
Subject line: Panel 2 Challenge Question