

# INTRODUCTION

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This book explains the United States Government's often disjointed, inconsistent, and occasionally overwhelming response to procurement fraud and public corruption from a former "insider's" point of view. It then offers suggestions to better navigate the system, investigate problems, communicate with the government, and defend enforcement matters. The hope is to reduce some of the friction present in the procurement fraud system and permit more efficient interactions.

The stakeholders in the procurement fraud system often talk past one another, leading to inefficiency, delay, and escalation of procurement fraud cases. There are a multitude of reasons for the miscommunication. For just a few examples, many government procurement fraud professionals have never worked in the private sector, and an alarming number express doubt about whether a contractor's desire to profit is in the government's interest. These professionals miss the idea that profit motive is a helpful driver of customer service—do good work, on time, on budget, and more work (and more profit) will follow. Also, many contractors fail to understand the challenges and complexities involved in the procurement system, and the varied interests of the diverse set of government stakeholders in a procurement fraud case. Because of the tremendously divergent viewpoints, it can be difficult for the contractor and various government stakeholders to communicate effectively. This friction-filled communication wastes government resources, and the time and expense of defending procurement fraud matters can distract contractors from ongoing performance, dramatically increase overhead rates, and in extreme cases cause companies to fail even if they are innocent of the underlying procurement fraud allegations.

I have worked on every side of the procurement fraud system, and it is my impression that the lack of transparency in the processes and responses involved increases costs and risk unnecessarily. Although I am a private-practice government contracts lawyer with a practice focusing on investigating and defending against allegations of procurement fraud and False Claims Act violations, that is not the only lens through which I view procurement fraud allegations, prosecutions, remediation efforts, and defenses. During business school and law school, I worked as a government contractor. After several years in large private law firms, I joined the Air Force Office of the General Counsel, where I served as Air Force Procurement Fraud Remedies Director with a docket of between 750 and 1,000 fraud cases per year; Co-Chair of the Department of Defense Procurement Fraud Working Group; and acting Deputy General Counsel and Suspending and Debarment Official, in which capacity I signed 300 suspension, proposed debarment, and debarment actions. I then rejoined private legal practice, where I have defended executives and companies from global leaders to small mom-and-pop businesses against allegations of various types of procurement fraud and related misconduct. These defense efforts are aided by my "insider's" understanding of the processes, policies, procedures, and personalities involved in the government's procurement fraud mission. But that feels like an unfair advantage. This system and its processes are too critical to the government, and too impactful to the contractor community, to keep behind a veil and available only to those who have worked in the government procurement fraud community.

This book is an effort to consolidate the lessons and observations learned over the course of a professional career for the broader benefit of the system and all impacted by it. It is my hope that the information contained herein will facilitate smoother communication, less friction in professional interactions, and proper use of government enforcement power—as well as the discretion not to exercise that power in particularly deserving situations. I expect neither government stakeholders nor contractors will be satisfied with the analysis contained herein: each will likely feel that they are portrayed as too black-and-white, or feel like they are unnecessarily faulted for friction and inefficiency. But that illustrates the key point: these interactions are fraught with risk, friction, and inefficiency. Better understanding of the often complex motivations on each side permits more efficient, less risky interactions between government and contractor communities that respect each other's role in the process but (in an ideal world) would rather not have to interact at all.

Using extensively cited publicly available information and my own observations made at every stop along the procurement fraud spectrum, this book explains the various components of the procurement fraud system, how they work, where the friction points are, why and how delays occur, and where the government's response coalesces into a powerful deterrent and punishing force. This book also presents strategies and tips for avoiding escalation of fraud investigations. It provides suggestions for how to address customer and stakeholder concerns. It has tips for investigating and remediating misconduct. Perhaps most importantly, it covers ways to avoid (whenever possible) and defend (when necessary) parallel procurement fraud enforcement proceedings.

The foundation for all of this is an expansive view of the procurement fraud system. Many lawyers will set case strategy by analyzing an individual cause of action or defense. That is too narrow. Whether prosecuting or defending procurement fraud cases, the system makes sense when viewed as a whole. Emotional intelligence and a firm understanding of organizational behavior of the other side are essential both to address fraud allegations and to defend against them. This is not to minimize the importance of a technical mastery of individual areas of the law: that is and will continue to be vitally important. But the strategic awareness of these additional “soft skills” enables practitioners to “see around corners,” anticipate next steps, and deescalate and defend a case more effectively.

In the procurement fraud system, there are always additional remedies that the government can impose against a contractor. Government agencies and stakeholders communicate frequently, and any of these communication and coordination steps can lead to an additional enforcement effort. This is especially true in departments and agencies with higher procurement spends, such as the Department of Defense, where investigations and parallel proceeding considerations happen as a matter of routine business. Contractors and defense counsel generally do not see any indication that these coordination efforts are occurring ... until it is too late. And with each additional remedy sought by the government, bet-the-company litigation becomes more likely. Although sophisticated defense counsel do not shy away from litigating a case (and many of us relish the fight), litigation should be the last option.

Although the government has a distinct information, resource, and power advantage over contractors, contractors are not helpless. The tools in this book should help contractors and their counsel anticipate what other remedies might be under consideration and by which stakeholder. With that knowledge, contractors and their counsel will be better able to coordinate and communicate effectively, and in a manner that reduces government stakeholder enthusiasm for a case and positions the contractor for a discretionary end to a matter before it escalates. In the unlikely event that the government is set on bringing a case to trial, the information in this book should assist contractors and their counsel in mounting an aggressive defense effort.

This book is also intended to be of some benefit to the procurement system as a whole. Deliberate criminal fraud is a scourge on the procurement system and an affront to taxpayers. However, the vast majority of government contractors are law-abiding providers of necessary goods and services to the government while trying their best to remain in compliance with often difficult-to-understand government regulations. Business mistakes are not criminal events, and the dollars involved in civil fraud cases are often high enough to drive contractors out of business entirely. Over time, aggressive defense efforts encourage the government to gain necessary perspective, better investigate cases, and use discretion not to bring certain cases when there is a compelling reason to avoid them.