Corruption in Procurement

Presentation to the
Institute of Brazilian Issues

Christopher Yukins

The George Washington University
Topics

- Introduction
  - Christopher Yukins/GWU Law School
- Anti-Corruption in Public Procurement in the United States
- New Approaches to Fighting Corruption
Other Professors in Program

Ralph Nash

John Cibinic (d. 2005)

Fred Lees

Joshua Schwartz
Special thanks to Professor Steven Schooner
Reasons for Reform: Desiderata, Goals, Constraints?

- Transparency
- Integrity
- Competition
- Uniformity
- Risk Avoidance
- Wealth Distribution(*)
- Best value
- Efficiency (administrative)
- Customer Satisfaction

Traditional?
Transitional?
Current?
U.S. Tools for Fighting Corruption

- Corporate Compliance
- Audits
- Tender Boards
- Oversight
- Transparency
- Prosecution
- Bid Challenges
- Ethics
- Suspension / Debarment
Quick Comparisons: Ethics
Misperception:
It’s Okay To Feed a Government Official
Reality

- It’s against the law – both the criminal law and the government’s ethics rules – for a contractor to give government employees “anything of value,” or for government officials to accept.
- That includes meals. Contractors should not pay for meals to government employees.
  - **Exception:** snacks can be provided.
    - **Question:** What’s a snack? What’s meal?
Perception:
It’s Okay for a Contractor To Loan Money To Government Officials, So Long As They Promise To Pay It Back
Reality: A Loan Can = A Criminal Gratuity

- Federal law makes it a criminal offense to give “anything of value” to a government official “for or because of” an official act.
- A loan is a “thing of value,” and may constitute an illegal gratuity.
  - Federal law calls for a sentence of up to two years for a gratuity.
  - The possible sentence for a bribe (a quid-pro-quo) is up to fifteen years in prison.
Perception:
It’s Improper for a Contractor To Talk To A Contracting Official About an Upcoming Procurement
Federal procurement regulations encourage interactions with industry before a solicitation is issued.

After the solicitation is issued, the contracting officer should control any further exchanges.
Perception:
Once a company has helped design a government system, it is forever barred from selling components for that system to the government
Principles of *organizational conflicts of interest* ("OCI") prohibit contractors from gaining an unfair advantage, such as by designing systems that they will deliver.

But if a contractor and a contracting officer *set up safeguards*, to ensure that the contractor doesn’t gain an unfair advantage or provide biased advice, *the OCI can be “mitigated”* – and, with the contracting officer’s consent, the contractor may proceed with follow-on work.
Perception:
Government Employees Can Accept *Anything* at a Trade Show
Reality:
“Small Item” Exception Is Limited

- Under the gift rules, government officials may accept up to $20 per donor, up to a total of $50 per year per donor
  - This includes low-value items given out at trade shows
  - But the exception extends to *all* items from a single corporation -- they may not exceed $50/year per official
Misperception: In Handling Ethics, A Government Employee Is On His Own
A government official may always ask an ethics official for advice.

If the ethics officer gives a “comfort letter” – an ethics opinion approving of the employee’s proposed conduct – that comfort letter may help protect the employee and the contractor from criminal prosecution.
Misperception

“All’s fair in love and government contracting” – it’s okay to use a competition to “sneak a peek” at competitors’ information
Reality:
It’s Illegal To Steal Inside Information

- Procurement Integrity Act bans improper access to:
  - Bid-and-proposal information from other bidders
  - Source selection information (information used by the government evaluators and procurement planners)
Perception: It’s Okay for a Contractor To Recruit a Government Employee
Reality: Recruiting Triggers Ethical Requirements

- The “revolving door” ethical requirements are very complex:
  - A procurement official may have to recuse herself from all procurements
  - Other government employees have similar requirements, under other laws

- Bottom line: contact your HR department and/or ethics officer before even beginning the process

Darleen Druyun
New Approaches to Fighting Corruption
What’s Corruption?

Is it a form of market barrier?
Dissecting a Conflict of Interest

Principal → Purchase → Agent → Purchase → Principal
Dissecting a Conflict of Interest – cont’d
Dissecting a Conflict of Interest – cont’d

Are these conflicts of interest?

• What if the agent buying the bus accepts a glass of water from the vendor?
• Or a free hotel room?
• Or a free watch?
• What if the agent is a priest?
• What if the agent has to report anything received?
OECD Convention on Combating Bribery

- Foreign Corrupt Practices Act - baseline
- OECD
  - Art. 1, The Offense of Bribery of Foreign Public Officials
  - Art. 8, Accounting
    - Corporate books should not hide payments
    - Effective penalties
  - Revised Recommendation – V.
    - Adequate accounting controls
  - Revised Recommendation – VI
    - WTO transparency initiative
    - Laws should allow suspension for bribery
    - Should require anti-corruption provisions in aid-funded procurement
Article 1

The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.
OECD – Article 1 - Definition

4. For the purpose of this Convention:
   
a. “foreign public official” means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;
A Political History of the New U.S. Compliance Rules
Operation Ill Wind – 1980s

- 3-year investigation during Reagan administration
- Revealed cronyism and corruption in defense procurement
- Dozens of corporate and individual convictions, including an Assistant Secretary of the Navy
- Resulted in passage of Procurement Integrity Act, 41 USC 423
- Industry launched the Defense Industry Initiative (www.dii.org)
Limited Compliance System After *Ill Wind*—Not Mandatory

<table>
<thead>
<tr>
<th>Defense Federal Acquisition Regulation Supplement (DFARS) 203.7001 (<a href="http://farsite.hill.af.mil">http://farsite.hill.af.mil</a>)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Code of Ethics</strong></td>
</tr>
<tr>
<td><strong>Training</strong></td>
</tr>
<tr>
<td><em>Periodic review; audits; hotline</em></td>
</tr>
<tr>
<td><strong>Discipline</strong></td>
</tr>
<tr>
<td><em>Timely reporting to government</em></td>
</tr>
<tr>
<td><em>Full cooperation with government</em></td>
</tr>
</tbody>
</table>
Historical Progression

Sealed Bids

Negotiated Procurements

“Frameworks” Contracting 1990s
Impact of Shift to “Frameworks”

Contracting

Competition

Procurement

Integrity

Transparency
U.S. Corporate Scandals

- Enron (Ken Lay, Jeff Skilling, et al.) scandal led to many high-profile corporate convictions
- Other corporate scandals
- Congress passed Sarbanes-Oxley Act, requiring financial compliance systems
Boeing Tanker Scandal
“They [Airbus] came in a couple of weeks ago and offered to build the majority [of the tankers] here in America. . . . I am not sure where this will lead, but the benefits of competition may be revealing....”
“Mike, you must be out of your mind!!!”
AF Secretary JAMES ROCHE
Darleen Druyun

- Previously highest-ranking civilian official in Air Force procurement systems
- Convicted of improper job negotiations with Boeing during tanker procurement
- Admitted favoring Boeing in hundreds of millions of dollars in procurement
- Sentenced to prison
- $650M Boeing settlement
Ex-Aide to Bush Found Guilty
Safavian Lied in Abramoff Scandal
By Jeffrey H. Birnbaum
Washington Post Staff Writer
Wednesday, June 21, 2006; Page A01

Duke Cunningham
California Republican admits
selling influence for $24 million
bribery plea
Monday, November 28, 2005

Congressman resigns after
bribery plea
Cunningham

More
Obvious
Problems
SEC. 830. COMPTROLLER GENERAL REVIEW OF NONCOMPETITIVE AWARDS OF CONGRESSIONAL AND EXECUTIVE BRANCH INTEREST ITEMS.

Not later than one year after the date of the enactment of this Act, the Comptroller General of the United States shall submit to the congressional defense committees a report on the use of procedures other than competitive procedures in the award of contracts by the Department of Defense. The report shall compare the procedures used by the Department of Defense for the award of funds for new projects pursuant to congressionally directed spending items, as defined in rule XLIV of the Standing Rules of the Senate, or congressional earmarks, as defined in rule XXI of the Rules of the House of Representatives, with the procedures used by the Department of Defense for the award of funds for new projects of special interest to senior executive branch officials.
Acquisition Workforce & Procurement Spending
Defense
(reflective of government-wide experience)

- Acquisition Workforce (in hundreds of thousands, Packard Commission Methodology)
- DoD Procurement Spending (in billions of dollars)

Fiscal Year (FY)
Other Causes for Concern: Outsourcing of Procurement Positions

Which code of ethics – government or contractor’s?
September 11, 2001
Total U.S. Federal Procurement (by fiscal year)
UN Convention Against Corruption (Art. 9)

Public Information
Advance award criteria and publication
Objective and predetermined criteria for award
Bid protest and appeal
Measures to control procurement personnel – e.g., rules and codes
Transparency, including in budgeting and accounting

- Supreme Court has said that the sentencing guidelines are not binding on judges
- Reduced corporate sentences if compliance system in place
### How Guidelines and Old Rule Compared

<table>
<thead>
<tr>
<th>Sentencing Commission Guidelines</th>
<th>DFARS 203.7001</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Standards and procedures</td>
<td>Code of Ethics</td>
</tr>
<tr>
<td>2. Knowledgeable leaders</td>
<td>Training</td>
</tr>
<tr>
<td>3. Exclude risky personnel</td>
<td>Periodic review; audits; hotline</td>
</tr>
<tr>
<td>4. Training</td>
<td>Discipline</td>
</tr>
<tr>
<td>5. Monitor, evaluate, reporting</td>
<td></td>
</tr>
<tr>
<td>hotline</td>
<td></td>
</tr>
<tr>
<td>6. Incentives and discipline</td>
<td></td>
</tr>
<tr>
<td>Adjust program to risk</td>
<td></td>
</tr>
<tr>
<td>Self-reporting = sentencing factor</td>
<td></td>
</tr>
<tr>
<td>Cooperation = sentencing factor</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Current U.S. Corporate Compliance Rules
<table>
<thead>
<tr>
<th>US Sentencing Commission Sentencing Guidelines - § 8B2.1</th>
<th>FIDIC (International Federation of Consulting Engineers) Business Integrity Management System (BIMS)</th>
<th><strong>Final FAR Rule</strong> (73 Fed. Reg. 67064 (Nov. 12, 2008) (effective 12/12/08), amending FAR 52.203-13): If contract &gt; $5m/120 days, then:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Standards and procedures</td>
<td>Code of Conduct &amp; Business Integrity Policy</td>
<td>W/in 30 days: written code of business ethics and conduct</td>
</tr>
<tr>
<td>2. Knowledgeable leadership</td>
<td>Firm Leadership = Key to Success</td>
<td>No explicit reference.</td>
</tr>
<tr>
<td>3. Exclude risky personnel</td>
<td>Corruption-Free Procedures</td>
<td>W/in 90 days: “reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with Contractor's code of business ethics and conduct.”</td>
</tr>
<tr>
<td>4. Training</td>
<td>Training Program</td>
<td>W/in 90 days: business ethics awareness and compliance program</td>
</tr>
<tr>
<td>5. Monitor, evaluate, reporting hotline</td>
<td>Resources, manuals, forms, check-lists and records</td>
<td>W/in 90 days: internal control system to facilitate timely discovery</td>
</tr>
<tr>
<td>6. Incentives and discipline</td>
<td>Specification of Responsibilities</td>
<td>W/in 90 days: internal control system to ensure corrective measures</td>
</tr>
<tr>
<td>7. Adjust program to risk</td>
<td>Organizational Structure</td>
<td>W/in 90 days: review and adjust</td>
</tr>
</tbody>
</table>

EXEMPT: SMALL BUSINESSES AND COMMERCIAL-ITEM CONTRACTORS
**Final FAR Rule:**

**Mandatory Disclosure**

<table>
<thead>
<tr>
<th>USSC Sentencing Guidelines - § 8B2.1</th>
<th>Self-reporting = sentencing factor § 8C2.5.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Government may suspend/debar contractor for <strong>knowing failure</strong> by <strong>principal</strong>, for up to 3 years after final payment, to <strong>timely report</strong> – to both agency Inspector General and contracting officer – <strong>credible evidence</strong> of [1] a violation of certain federal criminal laws (fraud, conflict of interest, bribery or gratuity), [2] civil fraud, or [3] significant overpayment, in connection with award or performance or closeout of government contract or subcontract.</td>
<td></td>
</tr>
</tbody>
</table>

| Cooperation = sentencing factor § 8C2.5. | Full cooperation . . . but need not waive attorney-client privilege or attorney work product protections |
| No exception for commercial item contracts | Limited exceptions for commercial-item contracts |
| No exception for work performed abroad | **No exception for contracts outside US** |
| [Not tied to contracts] | Reporting clause flowed down to subcontracts over $5 million/120 days |
Conclusion

Christopher Yukins
cyukins@law.gwu.edu
Tel. 202-994-9992