

Procurement Fraud: Legislative and Regulatory Reform Proposals

National Procurement Fraud Task Force Legislation Committee

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This white paper does not represent the views of the Department of Justice or any other Federal Agency. It only represents the views of the National Procurement Fraud Task Force Legislation Committee.

Introduction

On October 10, 2006, Deputy Attorney General Paul J. McNulty announced the formation of the National Procurement Fraud Task Force (Task Force), a partnership among Federal agencies charged with the investigation and prosecution of illegal acts in connection with Government contracting and grant activities. Task Force principals include representatives from Federal law enforcement, Offices of Inspectors General (OIGs), and the litigating arms of the United States Department of Justice (DOJ) and United States Attorneys offices (USAOs). DOJ has strongly encouraged the formation of smaller regional task forces to ensure greater coordination and focus of resources across the Federal districts.

Seven committees operate under the Task Force: Grant Fraud, Information Sharing, Intelligence, International, Legislation, Private Sector Outreach, and Training. Each committee formulated a strategic plan describing its mission and goals.

The Legislation Committee (Committee) is co-chaired by General Services Administration (GSA) Inspector General Brian D. Miller, who also serves as the vice chair of the Task Force, and Department of Homeland Security (DHS) Inspector General Richard L. Skinner. The Committee established a clear mission and four key goals:

Mission: To improve the Federal Government’s ability to detect, prevent, and prosecute procurement fraud through legislative modifications and/or changes in policies and practices.

Goal 1: To conduct a systematic review of statutes and Federal regulations utilized in procurement fraud criminal and civil litigation;

Goal 2: To consider potential legislative/regulatory amendments or new legislation/regulations to improve the capacity to review, investigate, and prosecute procurement fraud offenses and to ensure an appropriate penalty system;

Goal 3: To review the adequacy of current legislative and audit protocols and prosecution standards and practices to facilitate thorough and timely responses to procurement fraud; and

Goal 4: To memorialize recommendations for changes in statutes, regulations, or practices for addressing procurement fraud in a “white paper” for consideration by policy-makers and the Congress.

Examining Federal Procurement Practices

The Federal procurement system consists of those processes, procedures, and personnel with the responsibility to distribute funds for the purchase of goods and services. During Fiscal Years 2000-2007, Federal outlays increased about 56 percent, from \$1.8 trillion to \$2.8 trillion.¹ Over the same period, the value of procurement actions grew over 102 percent, from \$219.3 billion to \$444 billion.² The average value of a contract more than doubled over the same years, from just over \$22,000 in Fiscal Year 2000 to nearly \$50,000 in Fiscal Year 2007. In Fiscal Year 2000, about 1 in 8 dollars of Federal spending was paid to contractors for procurements; in Fiscal Year 2007, about 1 in 6 dollars went for procurement.

Beginning in 1996 with the Clinger-Cohen Act and continuing through the Services Acquisition Reform Act of 2003, there have been a wide variety of legislative and regulatory reforms aimed at ensuring a more effective Federal procurement system. A recent study by the Office of Federal Procurement Policy indicates that there has been enormous change in the types of purchases by the Government with a major shift toward services. In Fiscal Year 2007, 60 percent of Federal procurement dollars, or \$257.5 billion,³ were used for the acquisition of services.

Federal agencies' ability to detect and avert fraud have been diminished by a combination of rapidly increased procurement and greater reliance on contractors to perform essential services, including assistance with acquisition planning; defining technical requirements; drafting statements of work; evaluating proposals; and source selection. In addition, in many cases, audit and investigation resources have not kept pace with the growth in spending. The Legislation Committee concluded that three areas of reform are needed to address what appears to be an increasingly vulnerable environment: 1) improved ethics and internal controls among contractors; 2) improved prosecution and adjudication resources; and 3) improvements in the Government's ability to prevent and detect procurement fraud.

Proposals for Reform

Improving Ethics and Internal Controls Among Contractors

This white paper contains a specific proposal that requires contractors to provide codified procedures governing the conduct of their employees and subcontractors performing work under Government procurements. The Committee believes that contractor-managed ethics and internal controls programs should include elements such as periodic

¹U.S. Office of Management and Budget, *Budget of the United States Government, Historical Tables*, annual. See <http://www.whitehouse.gov/omb/budget/fy2008/>

² Federal Procurement Data System – Next Generation (FPDS-NG), *Federal Contract Actions and Dollars*, Standard Report. See <http://www.fpds.gov>

³ Federal Procurement Data System – Next Generation (FPDS-NG), *Total Actions by PSC Report*, Standard Report. See <http://www.fpds.gov>

compliance reviews; employee avenues for reporting suspicious conduct, such as posting of an applicable OIG hotline number; regular and recurring internal audits; a schedule of disciplinary penalties for misconduct while working on Government-funded activities; mandatory reporting of law or regulatory violations to the contracts office and cognizant Office of Inspector General (OIG); and assurances of full cooperation with Government audits and investigations.

These initiatives can largely be implemented through modification of the Federal Acquisition Regulations (FAR), making the proposed regulatory reforms mandatory items for contract officer review prior to award of a contract. It should be noted that recently, the FAR was amended to include requirements for a contractor code of business ethics and conduct and the display of Federal agency Office of the Inspector General (OIG) Fraud Hotline Posters. Another related FAR rule was recently proposed which would impose mandatory self-reporting requirements on certain Federal Government contractors. In addition, some new legislative requirements may be needed to ensure the enforceability of mandatory reporting provisions and assistance in investigations and audits conducted by the Federal Government.

Improvements in the Prosecution and Adjudication of Procurement Fraud Defendants

The Committee has identified four proposals for improvements, which, if implemented, would ensure more systematic decision-making in the handling of procurement and grant fraud cases. These include:

- 1) Amending Federal Sentencing guidelines to better define economic loss in procurement and grant fraud cases;
- 2) Expanding OIG subpoena authority to include compelled interviews and clarifying that current subpoena authority includes electronic and physical evidence;
- 3) Encouraging OIG Counsel staff to be detailed to DOJ to assist in prosecuting procurement fraud cases, and providing funding for the details; and
- 4) Extending the applicability of the Program Fraud Civil Remedies Act (PFCRA) Amendments to all IG offices and reforming PFCRA.

Improvements in the Government's Ability to Prevent and Detect Procurement Fraud

There are seven proposals for enhancing the capacity of Federal agencies to better identify opportunities to reduce vulnerabilities. These include:

- 1) Amending the FAR and applicable OMB Circulars to require notification by the contractor to the Federal Government of significant overpayments;
- 2) Extending criminal conflict of interest requirements to contractors performing acquisition guidance or services on behalf of the Government;
- 3) Reinstating audit rights for GSA OIG over negotiations with respect to pricing information in the GSA MAS Program;

- 4) Establishing a National Procurement Fraud Database that integrates contractor information from all Federal agencies with State and local procurement data on adverse actions taken against contractors;
- 5) Ensuring appropriate background checks for contractor personnel/principals responsible for Federal contracts;
- 6) Amending the Computer Matching and Privacy Protection Act of 1988 (Pub. L. 100-503), so that OIGs are exempt.; and
- 7) Allowing the use of Social Security numbers for the identification of individuals in the Excluded Parties Lists System (EPLS), which is a Federal system that identifies suspended and debarred individuals and companies.

Additional Ideas

In addition to the recommendations previewed above, the Committee has discussed several other proposals. Although the Committee believes these general proposals would be beneficial to detecting and prosecuting procurement fraud, the Committee expects to examine them further in the future. The Committee has not provided specific language in this white paper.

The first general proposal improves audit access rights to Government contractors' records for the Federal Government. The National Reconnaissance Office (NRO) has implemented enhanced audit authorities recently through contractual language; it is understood that this has improved the NRO's ability to prevent and detect procurement fraud.

The Committee is also examining the Procurement Integrity Act, 41 U.S.C. § 423, for possible changes – particularly with respect to its remedies provisions. This important statute, which mandates appropriate treatment and access to proprietary and source selection information and regulates negotiating for employment by Government procurement officials, appears to be underused in the procurement fraud area. Also, the Committee is examining ways to extend the False Claims Act statute of limitations, 31 U.S.C. § 3731(b), to 10 years in criminal cases and to 15 years in civil cases.

Finally, the Committee is examining ways to provide agencies with better resources, within reasonable limits, to pursue procurement fraud activities. The Committee has considered general proposals to amend appropriations-related statutes in order to allow closed or expired funds to be credited back to the accounts of agencies that have experienced a procurement fraud-related loss. Currently, these recoveries often are deposited in Treasury's miscellaneous receipts fund. A related proposal would involve establishing a working capital fund – possibly located at DOJ and comprised of a portion of procurement fraud-related recoveries – which would be available to various OIGs for certain limited purposes in connection with funding future procurement fraud investigations and activities. The Committee looks forward to refining these ideas and reporting on them in the future.

The Committee offers these specific recommendations as a set of ideas to reduce identified gaps in current practice. A number of bills could easily be modified to incorporate these proposed changes. Currently, manifestations of many of the proposals in this white paper can be found in bills and proposed regulations. Other committees of the Task Force are likely to have additional ideas for improving the administration of Federal procurement.

Procurement fraud adversely affects almost every aspect of Government, such as national defense, homeland security, health care, transportation, and education. This white paper represents only a first step toward ensuring the improved ability of the Federal government to protect taxpayer funds used for so many important purposes across the Federal Government.

Respectfully submitted,
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Legislative and Regulatory Proposals to Improve the Administration of Procurement in the Federal Government

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IMPROVE ETHICS AND INTERNAL CONTROLS

I. Requirement for Ethics Compliance Program for Government Contractors

A. Language (41 U.S.C. for civilian agencies; 10 U.S.C. for defense agencies)

Section 1. Requiring Ethics Codes and Internal Control Systems.

- (a) Prohibition on new awards. A contracting officer shall not determine a Government contractor to be responsible, for purposes of award of a new contract, unless the contractor has an internal compliance program, including an ethics code and internal controls to facilitate the timely detection and disclosure of improper conduct in connection with the award or performance of its Government contracts, and measures to ensure that related corrective action is taken.
- (b) Contents of program.
 - (1) The contents of such a program shall include, at a minimum –
 - (A) periodic reviews to ensure compliance with Government contracting requirements, including laws, regulations, and guidelines;
 - (B) an internal reporting mechanism, such as a hotline, for employees to report suspicious conduct;
 - (C) internal and/or external audits ;
 - (D) disciplinary action for improper conduct by individual employees and, to the extent possible, exclusion of such individuals from the exercise of substantial authority;
 - (E) timely reporting to appropriate Government officials, including the contracting officer and OIG of the relevant agency, of any suspected violations of law, regulations, or other requirements, including contractual provisions, in connection with such contracts; and
 - (F) full cooperation with any Government agencies responsible for investigations or corrective actions related to Government contracts.
 - (2) Reporting requirements to Government officials.
 - (A) The reports referenced in subsection (b)(1)(E) of this section shall include, but are not limited to, all instances where violations of criminal law are related to Government contracting;
 - (B) To be deemed timely, reports of violations to Government officials must be made no later than 30 days after discovery of the conduct by responsible contractor officials;
- (c) Training. Government contractors shall conduct training on the ethics code and Government contracting requirements on a regular basis.

- (d) Oversight. The vendor must ensure high-level oversight of its compliance program.
- (e) Implementation of Program. An awardee shall not be deemed to have a compliance program sufficient to meet the requirements of this section unless the program has been implemented within 30 days after award of the contract.
- (f) Representation Regarding Compliance Program. Awardees will represent to the Contracting Officer that they have a compliance program in place that meets the requirements of this section within 30 days after award of the contract.
- (g) Applicability. The requirements of this section apply to all Government contractors with aggregate sales under Government contracts, in the year prior to potential award, which exceed \$5 million.
- (h) Implementing Regulations. The FAR Council shall promulgate regulations to implement this section within 180 days of enactment of this Act.

Section 2. Remedies for Failure to Report Suspected Violations of Law, Regulation or Other Requirements

- (a) Government contractors subject to the requirements of Section 1 of this Act who knowingly fail to report suspected improper conduct in connection with the award or performance of a Government contract may be subject to suspension or debarment.
- (b) Within 180 days of enactment of this act, the FAR Council shall promulgate proposed regulations to implement this section.

Section 3. Requirement to Report Overpayments; Related Remedies

- (a) Government contractors must provide timely written notification to the contracting officer of any significant overpayments received under its Federal Government contracts.
- (b) Applicability.
 - (1) The requirement to timely notify regarding significant overpayments is applicable to all Government contractors with aggregate sales under its Government contracts which exceed \$5 million in the year prior to receipt of any overpayment.
 - (2) Such contractors are also required to include a provision requiring notification of significant overpayments in any relevant subcontracts.
- (c) Knowing Failures to Report. Any knowing failure to timely report a significant overpayment on the part of a contractor or subcontractor shall be
 - (1) referred to the relevant agency OIG; and
 - (2) constitute sufficient cause for suspension or debarment.

(d) Implementing Regulations. Within 180 days of enactment of this Act, the FAR Council shall promulgate regulations implementing this requirement.

Section 4. Savings Provision

Nothing in this Act shall supersede, preempt or otherwise limit any other provision of law.

B. Explanation/Justification

This legislative proposal focuses on two areas of concern, and imposes related compliance and reporting requirements. First, the proposal would require all vendors with significant Government sales¹ to implement a more formalized compliance program, with attendant requirements to report any suspicious conduct to the Government. Failure to establish such a program would make an offeror ineligible for new Federal contract awards, including task and delivery orders. Further, knowing failure to report suspicious conduct in a timely fashion would constitute a basis for suspension or debarment. Currently, the FAR provides that timely self-reporting of internal problems and violations can be considered as a mitigating factor in a debarment. FAR § 9.406-1(a)(2). Next, the proposal would require vendors to report any significant overpayments to the Government. Again, knowing failures to report overpayments would be a basis for suspension and debarment.

The proliferation of Government contractors, including services contractors, and the significant increase in Federal procurement spending since the events of September 11, 2001², have led to an increased need for more efficient oversight mechanisms to ensure compliance with Government contracting requirements. In particular, mechanisms, like internal compliance programs, which put some responsibility on contractors to self-police, are called for. Recently issued proposed³ and final FAR rules impose requirements similar to those in this proposal; however, the final rule does not apply to commercial items vendors (a large part of the contractor community) or overseas contractors, and it would provide chiefly only for withholding payments or loss of an award fee as a remedy for noncompliance. Proposed Rule: 73 Federal Register 28407, May 16, 2008 (FAR Case 2007-006), Final Rule: 72 Federal Register 65873, November 23, 2007 (FAR Case 2005-22; FAR Case 2006-007).

¹ The proposal would apply to vendors with Government sales that exceed \$5 million in the year prior to the year in which a new award is sought. At GSA, in the context for example of the MAS program, the chief commercial items acquisition program, this threshold would encompass 1,108 vendors out of 17,820 vendors (6%). This threshold seems appropriate in that it would impose meaningful internal compliance requirements without unduly burdening smaller businesses. We also suspect that many Government contractors have similar systems in place already as a matter of good practice.

² The Section 1423 Panel, for example, noted that Federal procurement spending has increased by nearly 75% from fiscal year 2001 to fiscal year 2005. Acquisition Advisory Panel Draft Report, 12/06, Page 2.

³ The previous version of the proposed FAR rule published on November 14, 2007 had exempted commercial item vendors and overseas contractors. 72 Federal Register 64019, November 14, 2007 (FAR Case 2007-006).

IMPROVE PROSECUTION AND ADJUDICATION

I. Amendment of Federal Sentencing Guidelines to Better Define Economic Loss in Procurement and Grant Fraud Cases

A. Language

Pursuant to its authority under 28 U.S.C. Section 994(p), the United States Sentencing Commission shall –

(a) amend existing sentencing guidelines and application notes, including specifically Section 2B1.1 (Theft, Embezzlement, Receipt of Stolen Property, Property Destruction, and Offenses Involving Fraud or Deceit), Application Note 3, to provide for increased penalties for persons convicted of procurement or grant fraud by:

(1) defining loss to include the value of any impacted Federal contract or grant, to include the amount paid by the Federal Government under a contract or grant, as well as the amount of any procurement costs; and

(2) prohibiting credits against loss calculation for the value of the property or services rendered under the tainted contract or grant.

(b) ensure, in promulgating such guidelines, that they reflect the serious nature of Federal procurement and grant fraud offenses; are reasonably consistent with other relevant guidelines; and account for aggravating or mitigating circumstances.

B. Explanation/Justification

The proposal would direct the Federal Sentencing Commission to promulgate specific provisions that would allow the value of any impacted contracts or grants to be considered when assessing loss in procurement or grant fraud cases. Currently, the Guidelines at Section 2B1.1 define loss in this context (where there has been no actual pecuniary harm) to include only procurement costs. We believe these cases, which can involve serious procurement integrity violations, financial conflicts violations, or small business-related violations merit more stringent treatment. We note that this limitation in the Sentencing Guidelines prevented more severe and appropriate sentencing from being imposed in the matter of high-level Air Force official Darlene Druyun's egregious behavior.

With respect to small-business related cases in particular, we note that the existing sentencing guidelines language stifles effective prosecution and deterrence of cases where contractors or grantees make material false statements to the Government regarding their compliance with Federal requirements such as contract or grant eligibility, but the Government suffers no financial loss. Under the current Guidelines, prosecution

of these cases will generally result only in a sentence of probation or at most a sentence of no more than six months. A recurring example relates to bidders' false certifications of their status as a small business or a business that is owned by minorities or other disadvantaged persons. Although there is no direct impact on the quality of the goods or services procured or provided, and no related financial loss, there is a significant societal cost to the fraudulent conduct, including that legitimate contractors or grantees are prevented from obtaining program benefits.

II. Expand OIG subpoena authority to include compelled interviews; clarify that the scope of OIG subpoena authority (at 5 U.S.C. § 6(a)(4)) includes tangible things and electronic evidence

A. Language

Amend 5 U.S.C. App. 3, § 6(a)(4) to provide:

“(4) to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data in any medium (including electronically stored information, as well as any tangible thing), and interviews necessary in the performance of the functions assigned by this Act, which subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district court: Provided, that procedures other than subpoenas shall be used by the Inspector General to obtain documents, information or testimony from Federal agencies.”

B. Explanation/Justification

This proposal would clarify that OIG subpoena authority includes electronic evidence and tangible things. The proposal also would expand OIG subpoena authority to authorize compelled interviews in connection with OIG investigations, audits, and other special reviews.

Compelled interviews -- IG subpoenas are the most commonly used and versatile tool in investigating civil fraud cases. They are currently limited to documentary evidence and could be expanded to include interview evidence. Many fraud matters are brought against companies, and being able to compel interviews from employees or customers during investigations would be invaluable in investigating and prosecuting a case.

Typically, if there is a criminal aspect, it is dealt with using grand jury subpoenas. Frequently, however, it is not clear at an early stage whether criminal, civil or administrative action is appropriate. Moreover, use of legal restrictions on the use of information gathered through grand jury subpoenas can prevent the use of such evidence to improve problems with agency oversight that may have allowed or caused the problem to occur.

Electronic & physical evidence -- OIG investigations often involve the requirement to access computers, personal digital assistants (PDAs) and other items with electronically stored information. Procurement fraud investigations often involve sorting through significant amounts of electronic pricing or other business data. The IG Act was enacted thirty years ago, before many of the technological advances taken for granted today had been developed; in addition, various OIGs, including DOD, have expressed a need to be able to access physical evidence including, for example, handwriting exemplars and defective products. Clarifying the IG Act to unequivocally make clear that its scope includes electronic information, and to include physical evidence, would be a beneficial change to IGs. This change is already embodied in legislation amending the IG Act that has passed both the Senate (S. 2324) and the House (H.R. 928).

III. Details of OIG Counsel Employees to the Department of Justice to Assist in Prosecuting Certain Procurement Fraud Matters

Appropriations for Facilitating Details of OIG Counsel Personnel to Prosecute Procurement Fraud Cases

Funds in the amount of \$X are hereby appropriated to the DOJ to facilitate and fund personnel details from OIGs to litigating components of DOJ. Such funds shall be available for all expenses reasonably associated with such details.

Explanation/Justification

This proposal would provide funding for OIGs to detail lawyers in their Offices to DOJ's litigating components in order for those lawyers to prosecute or assist in prosecuting criminal or civil procurement fraud cases. The proposal is intended to provide some funds, at least in the first year, to facilitate details by reimbursing participating OIGs. It has been noted that there is currently authority for details to DOJ for service under the Special Assistant United States Attorney program, and under other authorities.

Currently, many OIGs are finding that DOJ litigating components decline to prosecute, on a civil or criminal basis, smaller dollar procurement fraud cases due to resource constraints at DOJ. DOJ could capitalize on an available and knowledgeable pool of OIG Government attorneys and set up an arrangement similar to the Special AUSA program currently in use by various USAOs. It is understood that USAOs are generally receptive to such arrangements; as for OIGs, such an arrangement would allow them to pursue otherwise sound procurement fraud cases and at the same time provide a valuable litigation training experience in appropriate circumstances.

IV. Extension and Reform of the Program Fraud Civil Remedies Act (PFCRA)

Extension of PFCRA

A. Proposed Statutory Language

31 USCS § 3801. Definitions

(a) For purposes of this chapter [31 U.S.C. §§ 3801 et seq.]--

(1) “authority” means:

(A) an executive department;

(B) a military department

(C) an establishment (as such term is defined in section 11(2) of the Inspector General Act of 1978) which is not an executive department; and

(D) a designated Federal entity (as such term is defined under Section 8G of the Inspector General Act of 1978, as amended);

31 U.S.C. § 3801(a)(4)(A)(i)

In the case of an authority in which an Office of Inspector General is established by the Inspector General Act of 1978, as amended,⁴ or by any other Federal law, is the Inspector General of that authority or an officer or employee of such Office designated by the Inspector General;

31 U.S.C. § 3801(a)(4)(A)(ii)

In the case of an authority in which an Office of Inspector General is not established by the Inspector General Act of 1978, as amended, or by any other Federal law, is an officer or employee of the authority designated by the authority head to conduct investigations under section 3803(a)(1) of this title;

⁴ The Inspector General Act was amended in 1988. The relevant amendments follow: § 8G(a)(2) “the term “designated Federal entity” means Amtrak, the Appalachian Regional Commission, the Board of Governors of the Federal Reserve System, the Board for International Broadcasting, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Corporation for Public Broadcasting, the Denali Commission, the Equal Employment Opportunity Commission, the Farm Credit Administration, the Federal Communications Commission, the Federal Election Commission, the Federal Housing Finance Board, the Federal Labor Relations Authority, the Federal Maritime Commission, the Federal Trade Commission, the Legal Services Corporation, the National Archives and Records Administration, the National Credit Union Administration, the National Endowment for the Arts, the National Endowment for the Humanities, the National Labor Relations Board, the National Science Foundation, the Panama Canal Commission, the Peace Corps, the Pension Benefit Guaranty Corporation, the Securities and Exchange Commission, the Smithsonian Institution, the United States International Trade Commission, and the United States Postal Service;” § 8G(a)(5) “the term “Office of Inspector General” means an Office of Inspector General of a designated Federal entity;” § 8G(a)(6) “the term “Inspector General” means an Inspector General of a designated Federal entity.” and § 8G(b) “No later than 180 days after the date of the enactment of this section [Oct. 18, 1988], there shall be established and maintained in each designated Federal entity an Office of Inspector General. * * * .”

31 U.S.C. § 3808(c)

If at any time during the course of proceedings brought pursuant to this chapter [31 USCS §§ 3801 et seq.] the authority head receives or discovers any specific information regarding bribery, gratuities, conflict of interest, or other corruption or similar activity in relation to a false claim or statement, the authority head shall immediately report such information to the Attorney General, and in the case of an authority in which an Office of Inspector General is established by the Inspector General Act of 1978, as amended, or by any other Federal law, to the Inspector General of that authority.

B. Explanation/Justification

Amending 31 U.S.C. §§ 3801-3812, as highlighted above, will provide all OIG offices with the authority to utilize the provisions of PFCRA. Unlike PCIE OIGs and the United States Postal Service OIG, DFE agencies may not currently utilize PFCRA. Most DFE agencies, however, would benefit from PFCRA because they are confronted with relatively small dollar frauds that are less than \$150,000.00 – the PFCRA threshold. Many times, DOJ cannot pursue these smaller frauds due to resource constraints. Congress' intent in 1986, when it enacted PFCRA, was to provide all OIG offices with a tool to address false claims where the dollar amounts are less than \$150,000.00. The proposed amendments to PFCRA, highlighted above, will include DFE OIG offices under the umbrella of PFCRA and are consistent with Congressional intent. The Inspector General Reform Act of 2008 (S. 2324) that has already passed the Senate includes DFEs under the umbrella of PFCRA.

Reform of PFCRA

I. Update the upper dollar limit on PFCRA claims and penalties.

A. Proposed Change

1. Raise the PFCRA coverage jurisdictional limit in 31 U.S.C. § 3803(c)(1) from \$150,000 to \$500,000.
2. Increase the civil penalty limit at 31 U.S.C. § 3802(a) sections (1) and (2) from \$5,500 to \$15,000.

B. Explanation/Justification

Changes are needed to keep up with inflation from 1986 to today. According to the U.S. Bureau of Labor Statistics, it takes nearly \$300,000 in today's dollars to equal the purchasing power of \$150,000 in 1986,¹ and it takes \$10,000 in today's dollars to equal

¹ The exact amounts are \$292,237.23 and \$9,741.24. See <http://data.bls.gov/cgi-bin/cpicalc.pl>.

the purchasing power of \$5,000.² As far back as 1991, GAO documented the widespread concern that the cost of processing a PFCRA claim might exceed the recovery.³ This concern has proven to be justified. For example, in a 2002 Army PFCRA test case, the projected cost of fully litigating the case exceeded the maximum recovery.⁴

However, simple adjustments for inflation may not be enough. Even shortly after PFCRA was enacted there were concerns that the \$150,000 limit was too low.⁵ Today there is a widespread belief that federal agencies have not embraced PFCRA to the degree Congress expected.⁶ The reluctance of some federal agencies to make widespread use of PFCRA has resulted in a vacuum in which many cases are not prosecuted as the Department of Justice often lacks resources to be able to accept low-dollar cases. It is our experience that a number of DOJ offices decline prosecution of many cases under \$500,000. Increasing the dollar limits will likely make PFCRA more attractive to agencies and increase deterrence of fraud.

II. Allow agencies to retain PFCRA recoveries to the extent needed to make them whole.

A. Proposed Change

Modify 31 U.S.C. § 3806(g)(1) to read as follows.

(g)(1) Except as provided in paragraph (2) of this subsection, any amount of penalty or assessment collected under this chapter shall be deposited in the Treasury of the United States to the credit of the appropriation or appropriations supporting the operation of the authority. The authority shall allocate such penalties and assessments, in priority, to the credit of accounts that (1) incurred the damages underlying the assessment, (2)

² 28 C.F.R. § 85.3 raised the civil penalty limit from the amount in the statute (\$5000) to \$5,500, in accordance with the inflation adjustment procedures prescribed in section 5 of the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, effective on or after September 29, 1999. However, an additional increase is needed, for the reasons set forth in the text.

³ U.S. Gen. Accounting Office, "Program Fraud: Implementation Of The Program Fraud Civil Remedies Act Of 1986," GAO/AFMD-91-73, at 11 (1991) (hereinafter "1991 GAO Report") "[A]gency officials [interviewed by GAO] referred to various procedural and other reasons for not using the act [PFCRA] more frequently, such as ... the cost associated with developing a case may exceed the potential monetary recovery."

⁴ M. Davidson, "Combating Small-Dollar Fraud Through A Reinvigorated Program Fraud Civil Remedies Act," 37 Pub. Cont. L.J. 213, 219 (Winter 2008) (hereinafter referred to as *Davidson*).

⁵ 1991 GAO Report at 2.

⁶ As explained in Mr. Davidson's article:

Unfortunately, only a handful of agencies have successfully used PFCRA as a procurement fraud-fighting tool. Most agencies, including the Department of Defense (DoD), have used PFCRA only sparingly and many agencies have failed to pursue a single PFCRA case. In short, with few exceptions, PFCRA has proved largely ineffective as a vehicle for addressing small-dollar fraud.

Davidson at 214.

incurred the administrative costs of the proceeding (including the costs of any investigation, litigation or other cost associated with the proceeding), and (3) support the general operations of the activity of the authority responsible for such proceedings.

B. Explanation/Justification

One obstacle for agencies in PFCRA actions is the nonreimbursable costs associated with pursuing a PFCRA action, including investigative fees, and costs of discovery and litigation.⁷ Allowing agencies to retain some or all of the funds collected under PFCRA would be a logical way to address this problem, but such an arrangement may be illegal under current law. PFCRA specifies that all agencies except two⁸ must deposit any PFCRA recoveries into the Treasury Miscellaneous Receipts account.⁹ This is a disincentive to investing significant time or effort into pursuing PFCRA claims. In fact, PFCRA not only disallows agency reimbursement, but pursuing a PFCRA claim requires the agency to spend money beyond what it has already lost, without any anticipated compensation.

Allowing agencies to be made whole for damages suffered and administrative costs expended would provide an incentive for agencies to pursue PFCRA claims, and it would better fulfill one of the key reasons Congress enacted PFCRA: “to provide Federal agencies which are the victims of false, fictitious, and fraudulent claims and statements with an administrative remedy to recompense such agencies for losses resulting from such claims and statements.”¹⁰

III. Improve efficiency by allowing Offices of Inspectors General to conduct PFCRA litigation.

A. Proposed Change

1. Add the following definition in 31 U.S.C. § 3801 for “proposing official”:

(10) “proposing official” means either an investigating official or a reviewing official.

2. Modify 31 U.S.C. § 3803(a) as follows:

(a)(1) The investigating official of an authority may investigate allegations that a person is liable under section 3802 of this title and may either act as the proposing official and transmit the notice to the Attorney General

⁷ *Davidson* at 232.

⁸ U.S. Postal Service and Health and Human Services. *See* 31 U.S.C. § 3806(g)(2).

⁹ 31 U.S.C. § 3806(g).

¹⁰ Congressional Statement of Findings and Declaration of Purposes, Section 6102(b)(1), Pub. L. 99-509 (1986).

pursuant to paragraph (3) and provide a copy to the reviewing official or shall report the findings and conclusions of such investigation to the reviewing official of the authority for action by the reviewing official. The preceding sentence does not modify any responsibility of an investigating official to report violations of criminal law to the Attorney General.

(2) If the reviewing official of an authority determines, based upon the report of the investigating official under paragraph (1) of this subsection, that there is adequate evidence to believe that a person is liable under section 3802 of this title, the reviewing official shall act as the proposing official and transmit to the Attorney General a written notice pursuant to paragraph (3).

(3) The proposing official shall transmit to the Attorney General a written notice of the intention of such official to refer the allegations of such liability to a presiding officer of such authority. Such notice shall include--

- (A) a statement of the reasons of the ~~reviewing~~ proposing official for the referral of such allegations;
- (B) a statement specifying the evidence which supports such allegations;
- (C) a description of the claims or statements for which liability under section 3802 of this title is alleged;
- (D) an estimate of the amount of money or the value of property or services requested or demanded in violation of section 3802 of this title; and
- (E) a statement of any exculpatory or mitigating circumstances which may relate to such claims or statements.

3. Replace the phrase “reviewing official” with the phrase “proposing official” in the following provisions of 31 U.S.C. § 3803: (b)(1), (b)(2), (c)(1), (d)(1), (g)(2)(G)(ii), (j), and in 31 U.S.C. § 3809(2).

4. Replace the phrase “reviewing official” with the phrase “investigating or reviewing official” in 31 U.S.C. § 3805.

B. Explanation/Justification

As long ago as 1991, GAO documented the fears of agency officials that PFCRA “imposes cumbersome procedural requirements.”¹¹ A more recent review of the law concluded that PFCRA is “too procedurally burdensome and not worth the cost of pursuing.”¹²

¹¹ 1991 GAO Report at 11..

¹² *Davidson* at 219.

In order to reduce unnecessary procedures, the proposal would eliminate the current restriction in the statute that limits the role of the Offices of Inspectors General (OIGs) only to conducting investigations. Under the proposal, OIGs would also be able to present proposed PFCRA actions to the Department of Justice (DOJ) for authorization and conduct the litigation before the presiding official. OIGs would also retain the option of referring a PFCRA claim to the agency which would be helpful to smaller OIGs with limited staff resources. Whichever official makes the referral to DOJ and conducts the litigation would be identified as the “proposing official.”

Given the review by DOJ and the presiding official and the availability of subsequent judicial review, there is extensive due process given to the subject of the PFCRA action. Thus, the current statutory requirement that the claim also be assessed by the reviewing official is unnecessary. Eliminating unnecessary layers of review can only make PFCRA more effective.

IV. Permit greater delegation within the Department of Justice to authorize PFCRA claims.

A. Proposed Change

1. Modify 31 U.S.C. § 3812 so it reads as follows:

Any function, duty, or responsibility which this chapter specifies be carried out by the Attorney General or an Assistant Attorney General designated by the Attorney General, ~~shall not may~~ be delegated to, ~~or carried out by, any other officer or employee of the Department of Justice~~ the Director, Commercial Litigation Branch (Civil Fraud) or a United States Attorney for the judicial district in which the PFCRA case is to be filed.

B. Explanation/Justification

Experience has shown that requiring involvement of the highest-ranking Department of Justice officials may contribute to PFCRA delays. The proposed revision would change the PFCRA authority delegation limits so they would parallel those under the False Claims Act, a complementary statute.¹³

¹³The inconsistencies in the current system include the following, as explained in *Davidson* at 6 (footnotes omitted):

Under the current statutory scheme, the director of the Commercial Litigation Branch can settle an FCA case in which the original claim was between \$500,000 and \$5,000,000, depending upon the terms of the settlement, but cannot approve a PFCRA case with a potential recovery of only \$5,500. Similarly, he can delegate FCA cases "where the amount of single damages, plus civil penalties, if any, [does not exceed] \$1,000,000" to a U.S. attorney but cannot delegate settlement authority to a U.S. attorney for a PFCRA case with a statutory cap of \$150,000 per claim or a group of related claims.

V. Allow agencies greater flexibility in selecting presiding officers.

A. Proposed Change

Add a new section (C) to the definition of “presiding officer” at 31 U.S.C. § 3801(a)(7), to read as follows:

(C) members of Agency Boards of Contract Appeal as defined at 41 U.S.C. § 601 and military judges as defined in 10 U.S.C. § 801.

B. Explanation/Justification

Currently, PFCRA provides that the “presiding officer” who decides PFCRA claims must be an Administrative Law Judge (ALJ) or appointed in a manner similar to ALJs. Many agencies, including the Department of Defense, do not employ ALJs.¹⁴ Civilian agencies and some military organizations might make greater use of PFCRA if they possessed flexibility to appoint qualified persons who are not ALJs to act as presiding officers over PFCRA actions. Members of Boards of Contract Appeal¹⁵ are familiar with contract law, the basis for many PFCRA claims, and military judges have considerable experience in adjudicating fraud claims.¹⁶ Both sets of adjudicators have sufficient levels of independence from the agency to ensure that fair and objective decisions are issued.

VI. Remove ambiguity concerning definition of “benefits” under PFCRA.

A. Proposed Change

Add a new section 31 U.S.C. § 3801(a)(3)(D) to read as follows:

(D) made to obtain admission to Governmental programs, including a preferential status in Government contracting programs, such as those established at 15 U.S.C. § 637 and 15 U.S.C. § 657a.

B. Explanation/Justification

31 U.S.C. § 3801(a)(3)(A) defines a “claim” as “any request, demand, or submission made to authority for property, services, or money (including money representing grants, loans, insurance, or benefits).” It is unclear whether the term “benefits” includes preferential status under contracting programs like SBA’s 8(a) and HUBZone programs.

¹⁴ *Davidson* at 236.

¹⁵ This includes members of (1) the Armed Services Board of Contract Appeals; (2) the Civilian Board of Contract Appeals; (3) the board of contract appeals of the Tennessee Valley Authority; and (4) the Postal Service Board of Contract Appeals.

¹⁶ *Davidson* at 236.

The proposed language would clarify the ambiguity, thus making agencies more likely to pursue false statements made on applications for program admission.

VII. Require issuance of regulations implementing these reforms.

A. Proposed Change

Include in the legislation making these proposed amendments, the following language:

Within 180 days after the date of enactment of this amendment, each authority head shall promulgate rules and regulations necessary to implement the provisions of this amendment.

B. Explanation/Justification

This amendment is necessary to ensure that agencies issue regulations implementing the proposed reforms.

IMPROVE THE ABILITY TO PREVENT AND DETECT PROCUREMENT FRAUD

I. Requiring Notification of Overpayments and Related Remedies

A. Proposed Regulatory Language

- *FAR Part 32 proposed coverage (Contract Financing; Payments) & accompanying FAR contract clause*

FAR § 32.008 -- Notification of Overpayments

- (a) Contractors will timely notify the contracting officer of the relevant agency in writing of any significant overpayments, including duplicate payments occurring on that contractor's contracts.
- (b) If the contractor notifies the contracting officer of an overpayment, the CO must promptly provide instructions to the contractor, in coordination with the cognizant payment office, regarding timely disposition of the significant overpayment.
- (c) The contracting officer shall include FAR clause 52.232-XX in all solicitations and contracts (including task and delivery orders) expected to exceed \$5 million in annual sales, and shall require the clause to be included in any subcontracts with expected sales exceeding \$5 million annually.

FAR Clause § 52.232-XX, Notification of Overpayments

- (a) The Contractor shall immediately notify the Contracting Officer if he or she becomes aware that the Government has overpaid on a contract, including any duplicate payments; and
- (b) The Contractor shall include the substance of this clause in all subcontracts that exceed \$ 5 million in annual sales.

- *Proposed FAR Part 9 coverage adding additional suspension & debarment bases*

FAR § 9.406-2, Causes for Debarment

[add new subsection (b)(1)(iv)]

The debarring official may debar a contractor based on a preponderance of the evidence for –

- (iv) Knowing failure to timely disclose significant overpayments as required under FAR § 32.008 & related clause FAR § 52.232-XX.

FAR § 9.407-2, Causes for Suspension

[add new subsection (a)(8)]

The suspending official may suspend a contractor suspected, upon adequate evidence, of

—
(8) Knowing failure to timely disclose significant overpayments as required under FAR § 32.008 & related clause FAR 52.232.XX.

B. Explanation/Justification

In recent years, GAO, as well as agency OIGs, have noted that Federal agencies have significant problems with improper payments, including in particular with contract overpayments. Congress enacted the Improper Payments Information Act to address improper payments generally. GAO has noted that 19 agencies with significant contracting activity reviewed over \$300 billion in payment activity in fiscal year 2005. Of this amount, these agencies identified over \$557 million in improper payments. GAO Testimony to Senate Governmental Affairs Committee, Subcommittee on Government Management, GAO-06-581, page 12. Although much of this was recovered, a significant amount of contract overpayments remains unidentified and unrecovered. More is needed to solve the problem of recovering overpayments under Government contracts.

This regulatory proposal would impose a requirement (and related contract clause) for all contractors holding Government contracts, with sales expected to exceed \$5 million, to notify in writing and in a timely manner the Contracting Officer (CO) of the relevant agency of any significant overpayments made to them. The FAR currently imposes such a requirement only for vendors of commercial items. FAR § 12.215. Further, the proposal would provide that any knowing failure to timely disclose overpayments, including in particular repetitive failures to disclose, or particularly flagrant failures to disclose, would be a sufficient basis for considering debarring or suspending a vendor.

A recently proposed FAR rule would impose requirements similar to those in this proposal, 73 Federal Register 28407, May 16, 2008 (FAR Case 2007-006).

II. Extending Criminal Conflict of Interest (18 U.S.C. § 208) provisions to contractors who perform key acquisition functions

A. Language

Amend 18 U.S.C. § 202 (Definitions), subsections (c) & (f) to provide:

202(c). Except as otherwise provided in such sections, the terms “officer” and “employee”

(1) in sections 203, 205, 207 through 209, and 218 of this title . . . and

(2) for purposes of Section 208, shall include contractors and consultants, and their employees, to the extent they are engaged by the Federal Government to

perform key acquisition assistance functions including planning, evaluating, or selecting a source in connection with a Federal contract.

202(f). For purposes of the financial conflicts prohibition of Section 208, as applied to acquisition contractors and consultants, and their employees, under Section 202(c)(2), an acquisition contractor and consultant engaged by the Government will be deemed to have a prohibited financial interest in a matter if the subject acquisition involves, as an offeror or awardee, an individual or entity that is related to the acquisition contractor and consultant. Such relationship exists where the entity is a subsidiary, parent, affiliate, or joint venture partner of the acquisition contractor and consultant; where the entity has an ongoing significant business relationship with the acquisition contractor and consultant; or where the individual employee has an immediate familial or other close personal relationship with an employee or official of the acquisition contractor and consultant.

B. Explanation/Justification

This provision would extend the criminal financial conflicts provisions of 18 U.S.C. § 208 to contractors that perform key acquisition assistance functions on the Federal Government's behalf by expanding the definitions of "officer," "employee," and "financial interest" in Section 202 of the statute. The proposal would prohibit such acquisition contractors from favoring related entities or individuals.

The Government is increasingly using contractors in the acquisition process to assist in acquisition planning; helping to define technical requirements; drafting statements of work; and assisting in evaluating proposals and source selection. In this environment, the Federal Government needs a mechanism to ensure those acquisition contractors are not biased and do not have organizational conflicts of interest. Currently, the FAR has some coverage on conflicts of interest at Part 9.5 regarding recognizing and addressing such conflicts of interest through contractual clauses and restrictions on future work. This coverage, however, places the entire burden on agency contracting officers; we believe it is appropriate to make contractors primarily responsible for screening for and preventing such conflicts. This provision would more effectively deter contractors with conflicts from engaging in conduct that benefits a related entity or individual.

The Committee is considering proposing a contractor self-certification requirement to this effect.

A recently issued advance notice of rulemaking notes that there is a need to determine how contractor personal conflicts of interest need to be addressed. 73 Federal Register 15961, March 26, 2008 (FAR Case 2007-017).

III. Reinstate Audit Rights over Pricing Information in the GSA MAS Program

A. Language

Section 1.

GSA will amend the GSAR, including the GSA Examination of Records Clause, within 180 days of enactment of this provision to provide for contractual post award audit authority for all Multiple Award Schedule contracts for a period of 2 years from final payment under each such contract. Such authority shall be for the purpose of checking whether information offerors or vendors submit for negotiation purposes is accurate, current, and complete. For purposes of applying this 2 year time period, each 5 year base or option period shall be considered a separate contract.

B. Explanation/Justification

This proposal would amend the General Services Administration's acquisition regulation to reinstate the agency's authority to audit pricing information submitted to GSA contracting officers during negotiations in GSA and VA Multiple Award Schedule (MAS) contracts. GSA removed these audit rights in 1997 because they were ostensibly not a commercial practice and because GSA pledged to have more pre-award audits performed. Qui tam suits and recoveries, as well as hotline complaints received in recent years have provided evidence that defective pricing conduct exists and may even be increasing among MAS contractors. The MAS program is the premiere commercial items contracting program in the Federal Government with sales of over \$35 billion in a recent fiscal year. The important deterrent effect of these audit rights needs to be reestablished.

IV. Establishing a National Procurement Fraud Database

To provide for the establishment of a national procurement fraud background check system (PICS-Procurement Inquiry Check System) that can be utilized by Federal, state, and local procurement officials prior to the authorization of contract actions using Federal funds.

Findings

1. There is overlap between Federal and state suspension and debarment listings of contractors who have failed to perform satisfactorily or have committed frauds against a Governmental entity under a procurement or non-procurement program.
2. Procurement fraud results in substantial losses for the taxpayers and those who receive program services.
3. Mobility permits fraudulent contractors and service providers to move between levels of Government and across jurisdictions with little fear of detection since a national database does not exist.

4. National databases are commonly used by agencies to ensure public safety and to examine the compliance with licensing restrictions in areas such as the issuance of commercial drivers' licenses, firearms sales, and physician license suspensions.

Definitions

1. Procurement fraud - Procurement fraud includes, but is not limited to, cost/labor mischarging, defective pricing, defective parts, price fixing and bid rigging, and product substitution.
2. Background check - A background check, for purposes of this Act, is the examination by a procurement official of the prior suspension or debarment history of contractors utilizing a national database containing such information.
3. Eligible contributors-To construct the national database to support the PICS, all Governmental units engaging in procurement and non-procurement activities using Federal funds are eligible to contribute performance information, including suspensions and debarments, to the national repository at GSA.
4. Adverse action information-Adverse action information to be submitted to the PICS database includes identification information for the contractor (name, address, DUNS number) and detail on the nature of the fraud and the contingencies of the suspension or debarment including date of expiration.

Title I. Establishment of the Procurement Inquiry Check System

Section 1: Use of Federal Grant/Revenue-Sharing Funds to Build the National Database---1% Set-Aside

All Federal grants or assistance programs, including Highway Trust Funds and Medicare funds, will be authorized to permit localities and units of government to set-aside up to 1% of program funds for the development and operation of contractor suspension and debarment programs and to facilitate national sharing of such performance information.

Section 2: Establishment of National Database

GSA will develop and maintain the PICS database. GSA will promote the participation of all units of government at the Federal, State, and local levels and will provide for immediate on-line inquiries by authorized Federal, State, and local procurement officials.

Title II. Definition of Procurement Fraud Offenses and Eligible Contributors

The PICS will rely on the submitting agency's definition of suspension/debarment-eligible contractors. Offenses may involve civil and criminal instances of a failure to perform, provision of substandard services, use of substandard materials, misrepresentations of contractor capabilities or product quality, a lack of business integrity, and other relevant acts involving fraud, bribery, or public corruption in connection with procurement matters.

The Governor in each State receiving Federal grant or assistance funds will designate an official (the Procurement Official) responsible for the acquisition and compilation of listings of debarred and suspended contractors and who will ensure the timely submission and maintenance of listings from that State to the national database. In addition, the Procurement Official will authorize all users within the State to use the national database prior to procurement decisions.

Title III. Administration of the National Database and Inquiry System

Section 1: Administration

GSA will designate an official (the Director) to implement and administer the PICS System. The Director will establish a steering committee composed of Federal, State, and local procurement officials to assist in securing the participation of governmental entities nationwide.

The Director will define the content of the records system and the means of access for both record importation and record checks. In addition, periodic reviews will be conducted by GSA to ensure the accuracy of the content in the database, particularly with respect to the end-dates of debarments and suspensions.

The Director will also work with Federal granting and assistance agencies to promote the use of the 1% set-aside among governmental units receiving Federal funds.

Section 2: Updating and Correcting Errors in Records

The Director will require all States to provide an error correction procedure and will review and approve those proposed procedures.

The Director will provide a monthly listing of those suspended and debarred contractors supplied from a particular State back to the Procurement Official at the State level for verification of the currency of the suspension or debarment status. Contractors denied a contract by any unit of government on the basis of the background check, may request a review and correction of their record through the State Procurement Official.

V. Background Check Requirements for Contractors

A. Recommendation

Supplement existing Federal contractor and subcontractor personnel security and suitability requirements by requiring minimum background checks for all principals (as defined in the FAR)¹⁷ who have responsibilities with respect to Federal contracts.

¹⁷ Federal Acquisition Regulation (FAR) § 52.209-5(a)(2), Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters, defines “Principals,” for the purposes of this

B. Explanation/Justification

There has been an enormous growth in the number of individuals performing services for the Federal government through private companies, as well as significant growth in outsourced expenditures. While a significant number of the contractor personnel performing services for the Federal government are subject to background checks, certain key contractor personnel who have responsibilities with respect to Federal contracts are not subject to existing background check requirements.

The Federal government has a significant interest in ensuring the integrity of individuals and entities with whom it intends to do business, including those who own, control, or manage entities seeking or performing Federal contracts, who will have responsibilities in connection with those contracts.

Contractor and subcontractor principals who have a background of committing fraud may present a risk or heightened concern to the Federal government by virtue of the control they exercise with regard to a Federal contract and/or because of their access to federally controlled facilities and/or sensitive information. Therefore, in order to mitigate this risk it is imperative to determine if prior convictions or civil judgments have been rendered against them for: 1) commission of fraud or other criminal offense in connection with obtaining, attempting to obtain, or performing a Federal, state or local government contract or subcontract; 2) violation of Federal or state antitrust statutes relating to the submission of offers; or 3) commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property; or other unsuitable conduct.

This recommendation supplements the security requirements of Homeland Security Presidential Directive (HSPD) 12 by requiring background checks for individuals who may only have “intermittent access” (rather than “long-term access”) to federally controlled facilities or individuals who have access to sensitive Federal information that may not be part of a federally controlled information system. Implementation guidance for HSPD 12 requires background checks of contractor personnel who have long term access to federally controlled facilities or access to federally controlled information systems.

C. USProtect Case Illustrates Need to Supplement Background Check Requirements

During the course of a recent procurement fraud investigation of USProtect Corporation (USP), a contractor responsible for security guard services at numerous Federal facilities nationwide, it became clear that a number of Federal agencies were not requiring

certification, to mean officers; directors; owners; partners; and, persons having primary management or supervisory responsibilities within a business entity (*e.g.*, general manager; plant manager; head of a subsidiary, division, or business segment, and similar positions).

background checks for principals of contractors with whom they did business. In the case of USP, while the security guards at Federal facilities were required to have background checks, background check requirements were not imposed on principals of the company who had intermittent access to Federally controlled facilities and/or access to sensitive Federal information.

The investigation highlighted, among other things, the vulnerability associated with having a policy that did not require such background checks. In the USP case, a principal, Richard Hudec (Hudec), who indirectly owned and directly managed the company, was a four time convicted Federal felon. On November 30, 2007, Hudec pled guilty to tax evasion and a scheme to conceal material information from Federal contracting officials in obtaining Federal contracts worth over \$150 million. The material information concealed included four prior felony convictions and numerous civil judgments for fraud and false statements.

Hudec began working at USP in 2001, while on probation, after pleading guilty to felony fraud charges. From 2001 through February 2005, Hudec assisted in preparing and submitting the company's proposals to provide security to federal agencies. As of October 2001, Hudec had been convicted of fraud in four separate federal criminal prosecutions and had numerous civil judgments for fraud and false statements entered against him. A background check of Hudec by any of the Federal agencies with whom he dealt would likely have disclosed his history of fraud.

Hudec faces a maximum sentence of five years in prison for concealing material information, and five years in prison and a fine of \$250,000 for tax evasion.

The crimes committed by Richard Hudec reflect the potential risk associated with doing business with such individuals and the companies they own and/or control. Modification of existing background check requirements for contractor and subcontractor personnel, to include principals who will have responsibilities with respect to Federal contracts, will assist in mitigating potential vulnerabilities to procurement fraud.

VI. Enhanced OIG Authority for Computer Matching

A. Language

Notwithstanding 5 U.S.C. § 552a, Inspectors General may match any Federal or non-Federal records while conducting an investigation, audit, or inspection authorized under the Inspector General Act of 1978, as amended, to identify control weaknesses that make a program vulnerable to fraud, waste, or abuse.

B. Explanation/Justification

The Computer Matching and Privacy Protection Act of 1988 (Pub. L. 100-503), as amended, revised the Privacy Act to add procedural requirements that agencies must

follow when matching electronic databases. The requirements include formal matching agreements between agencies, notice in the Federal Register of the agreement before matching may occur, and review of the agreements by Data Integrity Boards at both agencies. While the Computer Matching Act provides an exemption to law enforcement from these administrative requirements, the exemption applies only when a specific target of an investigation has been identified. Moreover, the Government Accountability Office, as an arm of the Legislative Branch, is not subject to the Computer Matching Act.

The work of Inspectors General in identifying control weaknesses within agency programs to prevent fraud would be facilitated by expanding that law enforcement exemption to permit Inspectors General, as part of audits or inspections, not only targeted investigations, to match computer databases of contractor personnel, excluded parties, Government acquisitions personnel, sole proprietorships, etc., to uncover control weaknesses within procurement activities. Because Inspectors General rarely control the databases to be matched, much effort and time is involved now in encouraging the agency system manager that matching is appropriate and necessary and to cooperate with the OIG to fulfill the Computer Matching Act administrative requirements. This allows agencies to delay, and even obstruct, legitimate OIG oversight because the OIGs are dependent on the cooperation of the agency to meet the Computer Matching Act requirements.

Even though the Inspectors General at the Department of Homeland Security, Department of Agriculture, Department of Housing and Urban Development, and the Small Business Administration pursued computer matching agreements in the aftermath of Hurricane Katrina to facilitate audits and investigations, only one agreement was executed. In June 2006, almost 10 months after Hurricane Katrina struck, the Department of Housing and Urban Development successfully executed a computer matching agreement with the Federal Emergency Management Administration. The absence of computer matching agreements forced the Hurricane Katrina Fraud Task Force to rely on manual record searches to detect improper payments and fraud.

VII. Unique Identification for Individuals in the Excluded Parties List System (EPLS)

A. Language

Section 1.

In order to ensure that the Federal Government can effectively enforce decisions not to do business with excluded and ineligible parties under the Non-Procurement Debarment and Suspension regulations of the Federal Government, the Federal Acquisition Regulation, and Federal statutes, suspension and debarment program officials of Federal agencies may collect the Social Security Account number of an individual who is subject to a suspension or debarment action or a Federal eligibility determination and use that number to confirm the identity of the individual on the Excluded Parties List System.

B. Explanation/Justification

Section 7 of the Privacy Act of 1974 (Pub. L. 93-579, Sec. 7) (Act) provides that no Federal, State, or local government within the United States may deny any right, benefit or privilege provided by law based on an individual's refusal to disclose his or her Social Security account number (SSN). Section 7 exempts from this requirement any disclosure that is required by Federal statute and any program that pre-dates the Act that used the SSN as an identifier. Under this section, an agency of the Federal Government may not request that an individual provide his or her SSN when the individual is suspended or proposed for debarment because there is no statutory authorization for such requests.

The Excluded Parties List System (EPLS) maintained by GSA lists all individuals and other persons who are excluded from non-procurement covered transactions, e.g., grants, cooperative agreements, loans, etc., procurement transactions, e.g., contracts and certain subcontracts, and persons who have been declared ineligible under a Federal statute.

Persons who intend to enter into a covered transaction under the non-procurement regulations or a contract (and certain subcontracts) under the Federal Acquisition Regulation are required to verify that the persons with whom they plan to do business are not excluded or ineligible parties. For Federal officials, checking the EPLS and verifying an individual's identity is required for either a procurement or a non-procurement transaction. For lower tier contractors and participants, other methods of verification are also available. However, experience demonstrates that lower tier contractors and participants use the EPLS as one of the primary sources for verifying whether persons with whom they plan to do business are excluded or ineligible.

Because agencies generally cannot collect SSNs or use an individual's SSN to identify excluded and ineligible individuals on the EPLS, persons checking the EPLS cannot positively identify whether an individual with whom they plan to do business is excluded or ineligible.

The Federal Government needs to use SSNs to identify those individuals who have been excluded or found ineligible in order to protect the Federal Government from doing business with these individuals. Using the SSN as an identifier ensures that only those persons who are excluded or determined ineligible are prohibited from entering into covered transactions, contracts and certain subcontracts. In addition, use of the SSN as an identifier protects the privacy of those individuals who have not been excluded or found ineligible.