

“Five Ideas to Fight Fraud that IG’s Should Be Interested In”

by

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As IG’s, we labor at fighting procurement fraud, which is becoming increasingly subtle, complex, and widespread. Our job is hard and becoming harder. Rapidly expanding procurements are combining with a greater reliance on contractors to perform essential services, including assisting with acquisition planning, defining technical requirements, drafting statements of work, evaluating proposals, and helping with source selection. This combination makes procurement more vulnerable to fraud. In many cases, audit and investigation resources have not kept pace with the growth in spending.

Reform is needed to address what appears to be an increasingly vulnerable environment. This paper outlines five ideas for oversight tools to improve the Government’s ability to prevent and detect procurement fraud. The combined efforts of both Congressional and Executive oversight institutions are needed to make the changes that will strengthen the Federal government’s ability to protect taxpayer dollars spent on procurement.

Recently there have been some important steps towards both regulatory and legislative remedies that can address various features of the procurement environment, including the emphasis on creating procurement databases, requiring contractors to report overpayments and fraud, extending background check requirements to contractors, and updating applicable laws. Most notably, the “Close the Contractor Loophole Act” was passed by Congress and signed by the President on June 30, 2008. More can be done, however, and I hope that the ideas that are presented, here, will inform those efforts. The IG community can offer vital wisdom and support to the development of these ideas, as they are reflected in legislation and administrative decisions.

The following sections present an outline of five ideas that I believe IG’s should be interested in from the standpoints of both clarity and strength of the oversight function in government, today. The first idea is a direct response to the holding in *United States v. Safavian*, No. 06-3139 (D.C. Cir. June 17, 2008), that a Federal employee has no duty to disclose information to a Federal law enforcement officer (LEO). The second idea focuses on expanding IG subpoena authority to include compelled interviews to strengthen the ability of IG’s to investigate and present cases for prosecution. The third idea deals with computer matching to improve the Government’s ability to prevent and detect procurement fraud. The fourth idea involves extending criminal conflicts of interest provisions to contractors, recognizing the vast increase in the reliance on the use of contractors in Federal government work. Finally, the fifth idea concerns expanding and reforming the Procurement Fraud Civil Remedies Act (PFCRA.) All of these ideas are aimed at improved use of investigation, prosecution, and adjudication resources.

1. Duty to Disclose: *Create a duty for Federal employees to disclose material information when they are interviewed by an LEO, consistent with their Fifth Amendment rights.*

The U.S. Court of Appeals for the District of Columbia Circuit in *Safavian* held federal employees have no duty to disclose material information when they seek an opinion from an agency ethics officer or when they are interviewed by an LEO. Based on this holding, the court reversed *Safavian*'s convictions under 18 USC 1001 for concealing facts from the ethics officer and an LEO. The court noted, however, that a duty to disclose could be created by a requirement in federal statutes, regulations, or government forms. This article addresses only the duty to disclose material information when a federal employee is interviewed by an LEO. It does not address whether there should be a corresponding duty when seeking an ethics opinion.

Public officials have always had additional restrictions placed on them due to their position, for example, through government-wide ethics regulations and criminal provisions regarding conflicts of interest. There are restrictions on their financial dealings, on outside employment, and on what they can do when they leave the government. The same principles that warrant these restrictions are also applicable to federal employees being interviewed by an LEO. Federal employees should not be allowed to mislead an LEO by choosing to reveal some material information while withholding other information to create a false impression. This precedent – that a Federal employee can mislead an LEO with impunity so long as the employee does not make an affirmative false statement – will erode public trust in government and place an undue burden on LEO's to cover the waterfront with their questions.

There are at least three possible remedies for this holding, each of which would impose an affirmative duty to disclose on Federal employees. One option would be for Congress to amend 18 USC 1001. Another would be for the President to issue an executive order amending the fourteen "general principles" for employee conduct to include a specific requirement for employees to provide material information to an LEO, consistent with their Fifth Amendment rights, when they are interviewed. The third option would be to require employees to sign a form acknowledging such an obligation; this could be done government-wide or by individual agencies. Possible language to implement the second option could be to amend Principle Eleven (Executive Order 12674) to read: "Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities. When interviewed by a Federal law enforcement officer, employees who do not assert their right against self-incrimination have a duty to disclose all information that a reasonable person would consider material to the officer's questions."

Each option has advantages and disadvantages. For example, efforts to amend 18 USC 1001 could create interpretation arguments and court challenges, and the executive order option would require convincing the President this matter warranted his attention. The third option – a form acknowledging such an obligation – could be implemented quickly by individual agencies.

2. Compelled Interviews: *Expand OIG subpoena authority to include compelled interviews.*

IG subpoenas are a commonly used and versatile tool in investigating civil fraud cases. They are currently limited to documentary evidence, however, and should be expanded to include compelled interviews. Companies in fraud investigations may throw up barriers to interviews, and being able to compel interviews with employees during an investigation would be invaluable.

At the beginning of an investigation, it is not clear where the evidence will lead. The evidence may lead to a criminal case, but it may also lead to a civil or administrative case -- or to no case at all. There may not be enough evidence to get the prosecutor's attention -- or even for the OIG to make a referral or know whether to close the case. Witness interviews may often be a necessary step to get the case to a prosecutor in the first place. The prosecutor then may use grand jury subpoenas to compel interviews and develop the evidence. Without the ability to compel those initial interviews, however, the case may never make it to a prosecutor or the grand jury.

Compelled interviews may also be helpful in an audit context to obtain information that has not been reduced to writing. Auditors often need to speak with individuals who can explain how a financial system operates. If the contractor takes the position that it will produce documents but will not allow its employees to provide information orally to the auditors, the audit becomes much more difficult and there may be unnecessary delays at getting to the truth. Simple questions regarding the organizational charts and diagrams or asking for a list of individuals who keep the books (if no directory exists) are often necessary.

There may be other benefits to initial OIG compelled interviews. For example, evidence developed from these interviews could be shared with the agency for agency action, whereas evidence developed by the grand jury may not be shared. Because many investigations demonstrate civil or administrative problems but no prosecutable criminal conduct, information gained from compelled non-grand jury interviews would be much easier to share with agency officials who could then take corrective action.

Agents need to interview employees of contractors for various reasons, such as confirming the statements of agency employees. If the contractor refuses to cooperate, the IG cannot currently compel the interview. OIG agents or auditors may need to talk with employees of a company that is attempting to obtain a government contract; is in the process of obtaining a government contract; or has recently completed or been terminated from a government contract. Often a contractor seeking a government contract will submit to interviews, but a contractor who has recently been terminated for convenience may not be so willing. Currently, the OIG has little recourse if this happens.

3. Computer Matching: *Enhance OIG authority for computer matching by permitting IG's to 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.*

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 certain 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 for 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 IG's in identifying control weaknesses within agency programs to prevent fraud would be facilitated by expanding that law enforcement exemption to permit IG's, 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 IG's rarely control the databases to be matched, much effort and time is involved, now, in convincing agency systems managers that matching is appropriate and necessary and to cooperate with the OIG to fulfill the Computer Matching Act administrative requirements. Sometimes, this allows agencies to delay, and even obstruct, legitimate OIG oversight because the OIG's are dependent on agency cooperation to meet the Computer Matching Act requirements.

Even though several IG's (at the Department of Homeland Security, Department of Agriculture, Department of Housing and Urban Development [HUD], and the Small Business Administration) had pursued computer matching agreements with the Federal Emergency Management Administration (FEMA) 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, HUD successfully executed a computer matching agreement with FEMA. 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.

4. Criminal Conflict of Interest: *Extend Criminal Conflict of Interest (18 U.S.C. 208) provisions to contractors who perform key acquisition functions, including planning, evaluating, or selecting a source in connection with Federal contracts.*

The Federal government is increasingly using contractors in the acquisition process to assist in acquisition planning, help to define technical requirements, draft statements of work, and assist in evaluating proposals and source selection. In this environment, a mechanism is needed to ensure that those acquisition contractors are not biased and do not have organizational conflicts of interest. Recently issued advance notices of rulemaking highlight the need to determine how contractor personal conflicts of interest and organizational conflicts of interest should be addressed *See* 73 Fed. Reg. 15961 (March 26, 2008, FAR Case 2007-017) and 73 Fed. Reg. 34686 (June 18, 2008, FAR Case 2007-018). Currently, the Federal Acquisition Regulation (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.

The coverage places the entire burden on agency contracting officers, however. It is appropriate, though, to make contractors primarily responsible for screening and preventing such conflicts.

One way to address this issue and more effectively deter contractors from favoring a related entity or individual is to expand section 208 to include contractors. For example, section 208 could be amended to provide that an acquisition contractor/consultant engaged by the Government would be deemed to have a prohibited financial interest in a matter if the subject acquisition involved, as an offeror or awardee, an individual or entity that was in defined ways related to the acquisition contractor/consultant. The defined relationship could include: 1) where the entity is a subsidiary, parent, affiliate, or joint venture partner of the acquisition contractor/consultant; 2) where the entity has an ongoing significant business relationship with the acquisition contractor/consultant; and 3) where an individual offeror or awardee has a familial or other relationship (as currently defined in section 208) with an employee or official of the acquisition contractor/consultant. Without such a control, contractors heavily involved in the government contracting process do not face the same criminal penalties for favoring certain parties as government employees do.

5. Extend and Reform PFCRA: *Extend the applicability of the Program Fraud Civil Remedies Act (PFCRA), 31 U.S.C. §§ 3801-3812, to all OIGs and reform PFCRA.*

With limited resources, U.S. Attorney's Offices and the Department of Justice do not often take procurement fraud cases unless the dollar amounts are high or the defendant is facing serious jail time. Many of the smaller procurement fraud cases are declined for prosecution, which is unfortunate because prosecution is the ultimate deterrent for procurement fraud. This sends a harmful message to contractors: "It's okay to commit procurement fraud as long as the amounts do not get too high." To rebut this message, it is vital that IG's and law enforcement pursue even small procurement fraud cases. One way to do that is through PFCRA. Especially, smaller agencies and smaller OIG's should use PFCRA. Ironically, these smaller agencies cannot use PFCRA as it is currently drafted. This needs to change.

One way to change this is to extend the applicability of PFCRA to all OIG's and reform PFCRA. Today, there is a widespread belief that Federal agencies have not embraced PFCRA to the degree Congress expected. 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 DOJ often lacks resources to be able to accept low-dollar cases, and some DOJ offices have declined prosecution of many cases under \$500,000. Below I suggest some ideas for making PFCRA more useful.

Extend PFCRA coverage. Including all OIG's in PFCRA would be consistent with the purposes of that act. Many Designated Federal Entity (DFE) agencies – where the IG is appointed by the agency head -- cannot currently use PFCRA. They could benefit from inclusion, though, because they are confronted with relatively small dollar frauds. The intent of Congress in 1986, when it enacted PFCRA and before there were DFE's, was to provide all OIG's with a tool to address false claims where the dollar amounts are less than \$150,000. The Inspector General Reform Act of 2008 (S. 2324) that has already passed the Senate includes DFE's under the umbrella of PFCRA.

Update the dollar limit on PFCRA claims and penalties. Raising the PFCRA jurisdictional limit to \$500,000 and the maximum civil penalty to \$15,000 would make PFCRA more useful to Federal agencies. This would keep up with the fact that it takes nearly twice as much money in today's dollars to equal the purchasing power in 1986. In addition, concern that the cost of processing a PFCRA claim might exceed the recovery has proven to be justified. In a 2002 Army PFCRA test case, e.g., the projected cost of fully litigating the case exceeded the maximum recovery. See M. Davidson, "Combatting Small-Dollar Fraud Through A Reinvented Program Fraud Civil Remedies Act," 37 Pub. Cont L.J. 213, 219 (Winter 2008).

Allow agencies to retain PFCRA recoveries to make them whole. PFCRA has a built-in disincentive, since almost all agencies are not allowed to keep any PFCRA recoveries. Consequently, agencies will (1) not recover losses; and (2) have to expend additional non-recoverable amounts to pursue a PFCRA action, such as the costs of the investigation, discovery and litigation. Allowing agencies to be made whole for damages and administrative costs would provide an incentive to pursue PFCRA claims. It would also address a key reason that 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." Congressional Statement of Findings and Declaration of Purposes, Section 6102(b)(1), Pub. L. 99-509 (1986).

Conclusion

Taken together, these five ideas for improvements to the oversight ability of IG's would strengthen the hands of IG's and increase the odds for effective identification of waste, fraud, and abuse in Government activities. I hope that the changes described, here, will be of interest to other IG's and all those who are looking to find ways to ensure that the interests of the American taxpayers are properly protected.

NOTES

- [1] Brian D. Miller is the Vice Chair of the National Procurement Fraud Task Force (NPFTF) and Co-Chair of the Task Force's Legislation Committee. The views expressed in this article are Mr. Miller's, however, and do not necessarily represent the official views of the NPFTF or the Legislation Committee.