



Federal Procurement Fraud in a COVID-19 World

December 3, 2020

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Today's Speakers

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- Focuses on representing corporate entities during criminal investigations and complex civil litigation.
- Conducts internal investigations, both internationally and domestically, in response to allegations of misconduct or to government inquiries.
- Defends entities in a wide variety of white collar criminal matters, regulatory enforcement matters, internal investigations, False Claims Act actions, nationwide consumer class actions, complex contract disputes and unfair competition actions.



Richard Hartunian

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- Former United States Attorney for the Northern District of New York; served in national leadership positions, providing advice and guidance to the department's leaders on the full range of criminal and civil issues affecting Department of Justice and U.S. Attorneys' Offices nationally.
- Offers clients the benefit of his decades of experience as lead government counsel in high-profile, high-stakes criminal and civil disputes.
- Helps clients manage crises that result from litigation and government enforcement efforts, particularly when investigations involve multiple agencies and jurisdictions.

Today's Speakers

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- Significant experience representing clients in civil litigation and administrative enforcement actions involving U.S. sanctions compliance and enforcement and related federal and state financial regulatory matters, including representing federal government contractors in civil litigation involving allegations of procurement fraud.
- As a licensed private pilot, Andrew leads Manatt's unmanned aircraft practice advising clients on matters relating to Part 107, FAA enforcement proceedings, and civil litigation.
- Served on active duty as a judge advocate in the U.S. Navy



Jon Mellis

Director and Assistant
General Counsel,
VMware

- As the lead Federal attorney within VMware's Government, Education and Healthcare organization, Jon provides guidance regarding all aspects of government acquisitions, compliance and cybersecurity requirements.
- Prior to VMware, was an in-house counsel with Lockheed Martin, where he supported the Rotary and Mission Systems, C4ISR and Undersea Systems line of business.
- Government experience includes seven years as an Assistant General Counsel with the FBI's National Security Law and Civil Litigation units, and ten years active duty as a Judge Advocate in the U.S. Navy.

- Government Transition: What Does It Mean?
- COVID-19 Measures to Support Federal Contractors
- Expected Uptick in Fraud Due to Massive COVID-19 Funding
- Comparison to Troubled Asset Relief Program (TARP)
- Investigating and Prosecuting Procurement Fraud
- Key U.S. Statutes, Penalties and Other Consequences
- Lifecycle of a Fraud Investigation and What to Do

Government Transition: What Does It Mean?

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- **Families First Coronavirus Relief (Families First) Act**
 - Signed into law in March 2020 and went into effect in April 2020
 - Includes two new forms of leave: (1) 12 weeks of mostly paid leave for employees (the FMLA Expansion Act) and (2) 14 days of Emergency Paid Sick Leave.
 - Applies only to companies with 500 or fewer employees, exempting large employers
 - Small businesses with fewer than 50 employees may qualify for an exemption if compliance would jeopardize the viability of the business as a going concern.
 - The federal government reimburses companies for this leave through tax credits for certain wages paid to employees for mandated paid emergency or sick leave.

***Additional
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available at
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CLIENT ALERT

**President Signs
Substantially Revised
Families First
Coronavirus
Response Bill**



- The Coronavirus Aid, Relief, and Economic Security (CARES) Act
 - Signed into law on March 27, 2020, and allocated \$2.2 trillion to support individuals, small businesses and key industries with additional funding already in the pipeline.
 - Includes provisions related to unemployment benefits, loans and aid to industries (such as airlines), tax credits for businesses that keep idled employees on their payroll during the pandemic, emergency assistance for schools, and stimulus checks (i.e., direct deposits) to most Americans.
 - The Paycheck Protection Program: Provided increased loan amounts for eligible small businesses for payroll obligations, emergency grants to cover immediate operating costs, and a mechanism for loan forgiveness where the small business can demonstrate that the loan proceeds were used for payroll and related costs.
 - Economic Injury Disaster Loans (EIDLs): Expanded the SBA's EIDL program, loans available to small business borrowers that have suffered economic injury as a result of a pandemic or other disaster
 - Offers federal contractor relief for facility closures and allows for modification of contracts and reimbursement of sick leave.

- COVID-19 Relief Funding
 - Section 3610 of the CARES Act
 - Contractor employees and subcontractors kept in a “ready state”
 - Billions allocated to federal contractors and subcontractors
 - Section 3610 is discretionary but implemented differently by federal agencies
 - Limitations on employee compensation



- Department of Defense Rules Finalized on April 8 to Facilitate Payments
 - Accelerated progress payments to contractors and subcontractors
 - Reducing invoice payment period from 30 to 15 days for small contractors
 - \$3 billion in increased cash flow to contractors announced on April 20
 - Lockheed Martin, Boeing, and other large primes accelerating pass-through payments to subcontractors and suppliers



- Department of Defense provides further guidance
 - April 30, 2020 – DoD publishes updated guidance for reporting COVID-19 related actions to the Federal Procurement Data System
 - July 2, 2020 – DoD publishes guidance addressing cost issues related to COVID-19 and stating that “Contracting Officers are granted discretion, subject to the availability of funds, to modify contracts”
 - August 17, 2020 – DoD provides template for Contracting Officers to use to document the files for contract actions resulting from contractor requests for reimbursement under the CARES Act

- Expanded Use of Existing Federal Acquisition Regulations (FARs)
 - Excusable delays
 - Stop work and suspension orders
 - Related cost recoveries
 - Equitable adjustments
 - Negotiated agreements with contracting officers



Expected Uptick in Fraud Due to Massive Funding

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- As of September 1, 2020, over \$2.59 trillion in COVID-19 relief funds allocated
- Legislative initiatives currently stalled:
 - \$1 trillion proposed in Health, Economic Assistance, Liability Protection and Schools (HEALS) Act (S. 1624)
 - \$3.4 trillion proposed in Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act (H.R. 6800)



- The administration of the CARES Act programs has contributed to the potential for fraud
 - EIDL and PPP loan programs were administered at rapid speeds and likely received less scrutiny than typical SBA loans would during non-emergency times.
 - SBA allowed banks to rely on borrowers' own certifications to determine their eligibility for these loans while pushing to get funds out
 - In his October 1, 2020, congressional testimony, William Shear of the U.S. Government Accountability Office (GAO)'s Financial Markets and Community Investment Team explained,

“

*“There was a push to get loans out, but with the passage of time it becomes much more troubling that the fraud framework is not in place.”
“[I]t will be a long time until we know how much fraud” has affected the EIDL and PPP programs.”*

Comparison to Troubled Asset Relief Program (TARP)

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- SIGTARP pursued investigations leading to 24 enforcement actions against banks and other organizations
- 291 individuals convicted including 76 bankers
- SIGTARP recovered \$11 billion, including \$900 million in 2019
- 10-year investigation/prosecution/conviction time horizon based on TARP
- \$440 billion pumped into TARP vs. \$2+ **trillion** through CARES Act and PPP



- SBA has focused on investigating borrowers of PPP loans \$2 million or more to obtain information about their business activities.
- For a PPP loan of any size, SBA may undertake a review at any time in SBA's discretion.
 - SBA may review a loan if the loan documentation submitted to SBA by the lender or any other information indicates that the borrower may be ineligible for a PPP loan, or may be ineligible to receive the loan amount or loan forgiveness amount claimed by the borrower.
 - As noted on the Loan Forgiveness Application Form, the borrower must retain PPP documentation in its files for six years after the date the loan is forgiven or repaid in full, and permit authorized representatives of SBA, including representatives of its Office of Inspector General, to access such files upon request.

***Additional
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CLIENT ALERT

**Did You Really
Need That
PPP Loan?
The SBA
Wants to Know**



- The Department of Justice (DOJ) has been aggressively pursuing abusers of the CARES Act loan programs.
 - Partnered with other law enforcement agencies to carry out its CARES Act fraud investigations, including Federal Bureau of Investigation (FBI), the Internal Revenue Service (IRS), the U.S. Postal Inspection Service (USPS), the Federal Deposit Insurance Corporation OIG, the U.S. Secret Service, the SBA, and local law enforcement.
 - Announced in May its first charges against two individuals who to steal PPP funds by falsifying loan documents claiming to need the funds to pay non-existent employees of non-existent companies.
 - Has pursued a wide variety of criminal charges to combat COVID-19 fraud, such as: conspiracy, wire fraud, mail fraud, bank fraud, theft of government property, false statements to the SBA, false statements to a financial institution, money laundering, identity theft, aggravated identity theft, and engaging in transactions in unlawful proceeds.



JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Wednesday, September 30, 2020

Hawaii CEO Charged with COVID-Relief Fraud

A Hawaii man has been taken into custody on allegations he fraudulently obtained more than \$12.8 million in Paycheck Protection Program (PPP) loans guaranteed by the Small Business Administration (SBA) under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, announced Acting Assistant Attorney General Brian C. Rabbitt of the Justice Department's Criminal Division and U.S. Attorney Kenji M. Price of the District of Hawaii.

Martin Kao, 47, of Honolulu, Hawaii, was charged in a federal criminal complaint, unsealed today, filed in the District of Hawaii with two counts of bank fraud and five counts of money laundering. Kao will make his initial appearance Thursday at 9:30 HST before U.S. District Court Judge Kenneth J. Mansfield.

The complaint alleges that Kao, as Chief Executive Officer of Navatek LLC (now known as Martin Defense Group LLC), submitted at least two fraudulent PPP loan applications. In sum, Kao received approximately \$12.8 million in PPP funds, over \$2 million of which he transferred to his own personal accounts. According to the charges, Kao falsely inflated the number of employees on the loan application and falsely certified that the applicant and its affiliates would not receive, and had not received, another PPP loan.

The CARES Act is a federal law enacted March 29. It is designed to provide emergency financial assistance to millions of Americans who are suffering the economic effects resulting from the COVID-19 pandemic. One source of relief the CARES Act provides is the authorization of up to \$349 billion in forgivable loans to small businesses for job retention and certain other expenses through the PPP. In April 2020, Congress authorized over \$300 billion in additional PPP funding.

The PPP allows qualifying small businesses and other organizations to receive loans with a maturity of two years and an interest rate of one percent. Businesses must use PPP loan proceeds for payroll costs, interest on mortgages, rent and utilities. The PPP allows the interest and principal to be forgiven if businesses spend the proceeds on these expenses within a set time period and use at least a certain percentage of the loan towards payroll expenses.

A federal criminal complaint is merely an accusation. A defendant is presumed innocent until proven guilty beyond a reasonable doubt in a court of law.

This case was investigated by IRS-Criminal Investigation and the SBA's Office of Inspector General. Trial Attorney Tom Tynan of the Criminal Division's Fraud Section and Assistant U.S. Attorney Craig Nolan for the District of Hawaii are prosecuting the case.

Anyone with information about allegations of attempted fraud involving COVID-19 can report it by calling the Department of Justice's National Center for Disaster Fraud Hotline at 866-720-5721 or via the NCDF Web Complaint Form at: <https://www.justice.gov/disaster-fraud/ncdf-disaster-complaint-form>.

The year 2020 marks the 150th anniversary of the Department of Justice. Learn more about the history of our agency at www.Justice.gov/Celebrating150Years.

Attachment(s):

Download Kao Complaint

Component(s):

Criminal Division
Criminal - Criminal Fraud Section
USAO - Hawaii

Topic(s):

Coronavirus
Disaster Fraud

Press Release Number:

20-1035

Updated September 30, 2020

Procurement fraud: Unlawful manipulation of the procurement process to acquire contracts, goods or services or to obtain an unfair advantage during the process

Common Procurement Fraud Schemes:

- Conflicts of Interest
- Bid rigging
- Collusive bidding between bidders
- Bribery/public corruption
- Kickbacks/“pay-to-play” schemes
- Split purchase orders/split orders
- Personal Purchases
- Falsifying qualifications or contractor status
- Labor mischarging
- Duplicate payments
- Defective or counterfeit products
- Product substitution
- Unneeded or excess goods or services
- False, inflated or duplicate invoices
- Change order schemes
- False statements and claims

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Thursday, August 27, 2020

Commercial Flooring Contractor Agrees To Plead Guilty To Bid Rigging

Vortex Commercial Flooring Inc., a Chicago-area commercial flooring contractor, has been charged for its role in a long-running antitrust conspiracy to rig bids and fix prices for commercial flooring services and products sold in the United States, the Department of Justice announced.

Vortex has agreed to plead guilty and pay at least \$1.4 million in fines and restitution for its role in the conspiracy and to cooperate in the Division's ongoing investigation. This is the second corporate guilty plea in this investigation. Four flooring executives, including two from Vortex, have pleaded guilty as well.

According to a one-count superseding felony charge filed today in the U.S. District Court in Chicago, Vortex and its previously charged executives engaged in a conspiracy to suppress and eliminate competition in the commercial flooring market by agreeing with other individuals and companies to submit complementary bids so that the designated company would win the contract. Vortex participated in the conspiracy from at least as early as 2009 until at least June 2017.

"Vortex is the largest flooring corporation charged to date in the Justice Department's ongoing investigation of Chicago-area commercial flooring contractors," said Assistant Attorney General Makan Delrahim of the Justice Department's Antitrust Division. "The conduct cheated public institutions, including public schools, and the defendant has agreed to pay restitution to the victims. The Antitrust Division will continue its efforts to make whole victims of criminal conspiracies."

"Vortex ultimately cheated innocent businesses and communities out of the competitive pricing necessary to complete flooring projects," said Special Agent in Charge Emmerson Buie, Jr., FBI Chicago. "This charge exemplifies the FBI's commitment to working with its government partners to hold contractors accountable when they attempt to profit at their community's expense."

A violation of the Sherman Act carries a statutory maximum penalty of a \$100 million criminal fine for corporations. The maximum fine may be increased to twice the gain derived from the crime or twice the loss suffered by the victims of the crime, if either of those amounts is greater than the statutory maximum fine.

The charges are the result of an ongoing federal antitrust investigation into bid rigging, price fixing, and other anticompetitive conduct in the commercial flooring industry being conducted by the Antitrust Division's Chicago Office and the FBI's Chicago Field Division. Anyone with information on bid rigging, price fixing, or other anticompetitive conduct related to the commercial flooring industry should contact the Antitrust Division's Chicago Office at 312-984-7200 or visit www.justice.gov/atr/contact/newcase.html.

Component(s):
Antitrust Division

Press Release Number:
20-838


Updated August 27, 2020

U.S. Attorneys » Eastern District of Virginia » News

Department of Justice

U.S. Attorney's Office

Eastern District of Virginia

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FOR IMMEDIATE RELEASE

Wednesday, August 26, 2020

Hampton Defense Contractor and Employees Indicted on Fraud Charges

NEWPORT NEWS, Va. – Federal charges were unsealed today in a case involving a Hampton-based business, its owner and employees, and their alleged involvement in an extensive procurement fraud scheme involving millions of dollars in government contracts targeting the Department of Defense and other federal government agencies.

According to allegations in the unsealed indictment, from at least 2011 through at least 2018, Iris Kim, Inc., (aka I-Tek), owner Beyung S. Kim, 61, of Newport News, and employees Seung Kim, 30, of Newport News, Dongjin Park, 53, of Yorktown, Chang You, 61, of Yorktown, Pyongkon Pak, 53, of Toano, and Li-Ling Tu, 57, of China, engaged in a conspiracy and scheme related to certain government contracts for which I-Tek acted as a supplier of goods, including items for the U.S. Marine Corps, U.S. Army, U.S. Coast Guard, and the National Guards of various states, among other agencies.

Based on the invoices submitted related to the contracts in this indictment, the United States paid I-Tek approximately \$8.1 million from around January 2012 through about December 2018. The United States paid I-Tek approximately \$24 million for the entirety of the contracts I-Tek supplied during this same time period, with over \$20 million in revenue resulting from contracts where I-Tek obtained goods from China.

According to the indictment, these government contracts had certain set-aside preferences and source of good requirements. The indictment alleges that the defendants acted to defraud the United States by fraudulently importing goods into the United States that were made in China, in violation of the terms of these contracts. The defendants then falsely relabeled these goods as if they were made in the United States. The indictment further alleges that the defendants acted through a separate nominee company to conceal the importing of goods from China and installed a nominee officer of I-Tek in order to be able to fraudulently qualify for certain set-aside contracts.

G. Zachary Terwilliger, U.S. Attorney for the Eastern District of Virginia; Raymond Villanueva, Special Agent in Charge of U.S. Immigration and Customs Enforcement's (ICE) Homeland Security Investigations; Robert E. Craig, Special Agent in Charge for the Defense Criminal Investigative Service's (DCIS) Mid-Atlantic Field Office; and Gregory Scovel, Special Agent in Charge of the Naval Criminal Investigative Service (NCIS) Norfolk Field Office, made the announcement. Assistant U.S. Attorney Brian J. Samuels and Special Assistant U.S. Attorney Matthew Mattis are prosecuting the case.

The U.S. Small Business Administration's Office of the Inspector General and the U.S. Department of State provided significant assistance to this case.

A copy of this press release is located on the website of the U.S. Attorney's Office for the Eastern District of Virginia. Related court documents and information are located on the website of the District Court for the Eastern District of Virginia or on PACER by searching for Case No. 4:20-cr-57.

An indictment is merely an accusation. The defendant is presumed innocent until proven guilty.

Topic(s):
Financial Fraud

Component(s):
USAO - Virginia, Eastern

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Updated August 26, 2020

JUSTICE NEWS

Department of Justice
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FOR IMMEDIATE RELEASE

Thursday, November 19, 2020

Employee of Government Contractor Pleads Guilty to Fraud and Kickback Charges

An employee of a government contractor pleaded guilty today to his involvement in a scheme to overbill a contract administered by the General Services Administration (GSA) by approximately \$1.25 million, and solicit and receive kickbacks from a subcontractor in exchange for providing that subcontractor valuable contract modifications.

Acting Assistant Attorney General Brian C. Rabbitt of the Justice Department's Criminal Division; Special Agent in Charge Eric D. Radwick, Mid-Atlantic Division, Office of Investigations, GSA Office of Inspector General; Assistant Director in Charge Steven M. D'Antuono of the FBI's Washington Field Office; and Special Agent in Charge Robert J. Smolich of the Department of State's Office of Inspector General, Office of Investigations, Americas, Pacific, and Asia Division made the announcement.

Elmer Baker, 68, of Gulf Breeze, Florida, pleaded guilty to one count of conspiracy to violate the anti-kickback statute and four counts of wire fraud before Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia. Sentencing will be scheduled for a later date.

According to admissions made in connection with the plea agreement, Baker served as the project manager for his company on the contract administered by the GSA. After his company awarded a subcontract to a construction company for work on the facility, Baker began receiving kickbacks in the form of meals, golf sessions, vacations, and other things of value. In or around 2015, Baker began demanding monetary kickbacks that were valued at 10 percent of the amount of each of the subcontract modifications that he awarded the subcontractor. Baker sent the subcontractor fake invoices to make it appear as though the payments he was receiving were for legitimate work, and he set up a shell company to receive the payments. Additionally, Baker took the subcontract estimates provided to him and illegally inflated them in his requests to the GSA. Over the course of several subcontract modifications, Baker defrauded the GSA out of approximately \$1.25 million.

The Criminal Division's Fraud Section is the nation's leading prosecuting authority on government procurement fraud and corruption matters.

The GSA Office of Inspector General, FBI's Washington Field Office, and the State Department Office of Inspector General are investigating this case. Trial Attorney Vasanth Sridharan of the Criminal Division's Fraud Section is prosecuting the case.

The year 2020 marks the 150th anniversary of the Department of Justice. Learn more about the history of our agency at www.Justice.gov/Celebrating150Years.

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JUSTICE NEWS

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FOR IMMEDIATE RELEASEThursday, September 10, 2020

Asphalt Contractor To Pay \$4.25 Million To Settle Claims That It Misled The Government As To The Materials Used To Pave Road

Dave O’Mara Contractor Inc. (DOCI), an Indiana-based asphalt contractor, has agreed to resolve allegations that it violated the False Claims Act by misrepresenting to the government the materials that it was using to pave federally-funded roads in the state of Indiana, the Department of Justice announced today. Under the settlement agreement, DOCI has agreed to pay over \$4.25 million over a period of four years.

“Today’s settlement demonstrates our commitment to hold accountable companies that provide false information to obtain government contracts,” said Acting Assistant Attorney General Jeffrey Clark for the Department of Justice’s Civil Division. “Misrepresenting the materials that will be used to pave federally-funded roads not only defrauds the government but potentially endangers the lives of motorists.”

“The safety and security of the citizens of Indiana are paramount to this office,” stated Josh Minkler, U.S. Attorney for the Southern District of Indiana. “To risk the safety of the motoring public for the sake of saving money cannot be tolerated. This recovery sends the message that contractors must comply with various applicable state and federal regulations when billing the U.S. Government, or they will face the consequences of their choices.”

“It is important to ensure that taxpayers get what they pay for so that the quality of products used in highway transportation projects is not compromised,” stated Andrea M. Kropf, Regional Special Agent-In-Charge, U.S. Department of Transportation Office of Inspector General. “Today’s settlement sends a message that putting the safety of the travelling public at risk for personal gain is an unacceptable way of conducting business.”

The settlement resolved allegations that in applying for government contracts, DOCI falsely represented the materials it would use to pave roads that are funded in part by the Federal Highway Administration. Specifically, the government alleged that DOCI claimed that its hot mix asphalt mixture contained a sufficient amount of binder or glue to hold the mix together when, in fact, DOCI frequently failed to meet the minimal levels of binder required to pave the roads. DOCI thereby allegedly created the false impression that its mixture met the contract requirements and that the roads would last a reasonable period of time before they would develop cracks and become unsafe for driving.

The settlement was the result of a coordinated effort by the Civil Division of the Department of Justice, the U.S. Attorney’s Office for the Southern District of Indiana, and the Chicago Office of the Office of Inspector General for the U.S. Department of Transportation. The U.S. Government also received significant assistance in this matter from Indiana’s Department of Transportation.

The claims resolved by the settlement are allegations only, and there has been no determination of liability.

Attachment(s): Download Settlement	Component(s): Civil Division
Topic(s): False Claims Act	

Updated September 10, 2020

Investigating and Prosecuting Procurement Fraud

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CARES Act Oversight	United States Attorneys' Offices	Department of Justice: Criminal Division, Criminal Fraud Section	Government Accountability Office	Procurement Collusion Task Force
<ul style="list-style-type: none">▪ Pandemic Response Accountability Committee▪ SIGPR (Special Inspector General for Pandemic Recovery) appointed under CARES Act▪ Bipartisan Congressional Oversight Commission	<ul style="list-style-type: none">▪ National Center for Disaster Fraud Hotline▪ Coronavirus Fraud Coordinators	<ul style="list-style-type: none">▪ Investigates and prosecutes procurement fraud throughout the United States and abroad, enforcing both U.S. criminal and civil statutes▪ Works closely with other agencies to investigate and prosecute both companies and individuals, resulting in prison, penalties and fines.	<ul style="list-style-type: none">▪ Procurement Law Division adjudicates bid protests▪ FraudNet hotline for waste, fraud, abuse, and mismanagement of federal funds, including CARES Act funds	<ul style="list-style-type: none">▪ National reach▪ Partners from 29 agencies and offices, including 22 Districts USAOs▪ “Doubling efforts” to investigate and prosecute collusion cartels▪ Training local, state, and federal agents▪ Using data analytics to uncover red flags

JUSTICE NEWS

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Friday, October 23, 2020

Engineering Firm And Its Former Executive Indicted On Antitrust And Fraud Charges

North Carolina Department of Transportation Targeted in Decade-Long Scheme

A federal grand jury in Raleigh, North Carolina returned an indictment charging Contech Engineered Solutions LLC and Brent Brewbaker, a former executive at the company, for participating in long-standing conspiracies to rig bids and defraud the North Carolina Department of Transportation (NC DOT), the Department of Justice announced.

According to the six-count indictment filed in the U.S. District Court for the Eastern District of North Carolina, Contech and Brewbaker conspired to rig bids for aluminum structure projects funded by the United States and North Carolina Department of Transportation for nearly a decade. These aluminum structure projects included headwalls and other structures that facilitate drainage underneath or around paved roads, bridges, and overpasses. Contech and Brewbaker were also charged with defrauding the NC DOT by submitting bids that were falsely held out to be competitive and free of collusion, and using the U.S. Postal Service and email to carry out their scheme.

“The Antitrust Division continues to redouble our efforts to detect and prosecute those who cheat and steal from taxpayers through collusion and fraud in government procurement,” said Assistant Attorney General Makan Delrahim of the Department of Justice’s Antitrust Division. “The division will work with all of our law enforcement partners to ensure that the individuals and corporations that defraud government programs are held fully responsible for their actions and pay for the harm they cause.”

“Federal laws prohibiting bid rigging and collusion in the award of government contracts are designed to protect the taxpayers and to ensure that they get the best quality service at the most competitive pricing,” said U.S. Attorney Robert J. Higdon Jr. for the Eastern District of North Carolina. “Here, the defendants are accused of having conspired to violate those laws and to deprive the people of North Carolina of both the best service and the best pricing. Prosecution of these types of cases is critical to ensuring fairness and integrity in our public contract bidding system.”

“Activities related to collusion, bid rigging, and market allocation do not promote an environment conducive to open competition which harms the consumer,” said Director Steven Stuller, U.S. Postal Service (USPS) Office of Inspector General. “The USPS spends hundreds of millions of dollars on new construction, maintenance, and renovation of USPS facilities. Along with the Department of Justice and our federal law enforcement partners, the USPS Office of Inspector General will aggressively investigate those who would engage in this type of harmful conduct.”

“Today’s indictment sends a clear message to those who engage in bid rigging and other criminal conduct that such actions will not be tolerated,” stated Jamie Mazzone, regional Special Agent-in-Charge of the United States Department of Transportation Office of Inspector General. “We remain steadfast in our commitment to working with our prosecutorial and law enforcement partners to protect the taxpayers’ investment in our nation’s transportation infrastructure from fraud, waste, and abuse.”

An indictment merely alleges that crimes have been committed, and all defendants are presumed innocent until proven guilty beyond a reasonable doubt.

The offense charged in Count One carries a statutory maximum penalty of 10 years in prison and a \$1 million fine for individuals, and a criminal fine of \$100 million for corporations. The offenses charged in Counts Two, Three, Four, Five, and Six each carry a statutory maximum penalty of 20 years in prison and \$250,000 fines, and a criminal fine of \$500,000 for organizations. The maximum fines for each count may be increased to twice the gain derived from the crime or twice the loss suffered by victims if either amount is greater than the statutory maximum fine.

This case is the result of an ongoing federal antitrust investigation into bid rigging and other criminal conduct in the aluminum structures industry, which is being conducted by the Antitrust Division with the assistance of the USPS Inspector General, the U.S. Department of Transportation Office on Inspector General, and the U.S. Attorney’s Office for the Eastern District of North Carolina.

In November 2019, the Department of Justice created the Procurement Collusion Strike Force, a joint law enforcement effort to combat antitrust crimes and related fraudulent schemes that impact government procurement, grant, and program funding at all levels of government — federal, state, and local. To contact the Procurement Collusion Strike Force, or to report information on market allocation, price fixing, bid rigging, and other anticompetitive conduct related to the aluminum structures industry, go to <https://www.justice.gov/procurement-collusion-strike-force>.

- The False Claims Act (FCA), 31 U.S.C. §§ 3729 – 3733
- The two liability provisions that are most often used in FCA litigation are:
 - False claims provision: creates liability for knowingly presenting, or causing to be presented, a false or fraudulent claim for payment (31 U.S.C. § 3729(a)(1)(A))
 - False statement provision: creates liability for knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim (31 U.S.C. § 3729(a)(1)(B))
- A person or entity may also be liable under the FCA for:
 - Conspiring to commit a violation of any of the other liability provisions (31 U.S.C. § 3729(a)(1)(C))
 - Knowingly and improperly withholding part or all of the government's money or property (31 U.S.C. § 3729(a)(1)(D))
 - A reverse false claim, which involves improper conduct to avoid paying the government or improper retention of an overpayment by the government (31 U.S.C. § 3729(a)(1)(G))

- The government and whistleblowers' success under the FCA due to five factors:
 - **Mandatory treble damages.** These are reduced to mandatory double damages if the company self-discloses fraudulent activity. Mandatory civil penalties of up to \$23,331 per false claim. In cases concerning federal reimbursements, each invoice is considered a separate false claim.
 - **Strong whistleblower incentives.** Both the U.S. Attorney General and private persons may bring a civil action under the FCA (31 U.S.C. § 3730). A whistleblower bringing a suit on behalf of the government can receive up to 30% of the recovery. The FCA also prohibits retaliatory actions against employees, contractors or agents who report or act to stop an FCA violation (31 U.S.C. § 3730(h)(1)).
 - **A permissive knowledge requirement.** “Knowledge” under the FCA includes reckless disregard and deliberate ignorance, not just actual knowledge. Specific intent to defraud is not required (31 U.S.C. § 3729(b)(1)).
 - **Exposure of contractors to liability.** An entity or individual may be liable not only for directly submitting a false claim, but also for causing the submission of a false claim. (See 31 U.S.C. § 3729(a)(1)(A) and 31 U.S.C. § 3729(b)(2)(A)(ii)).

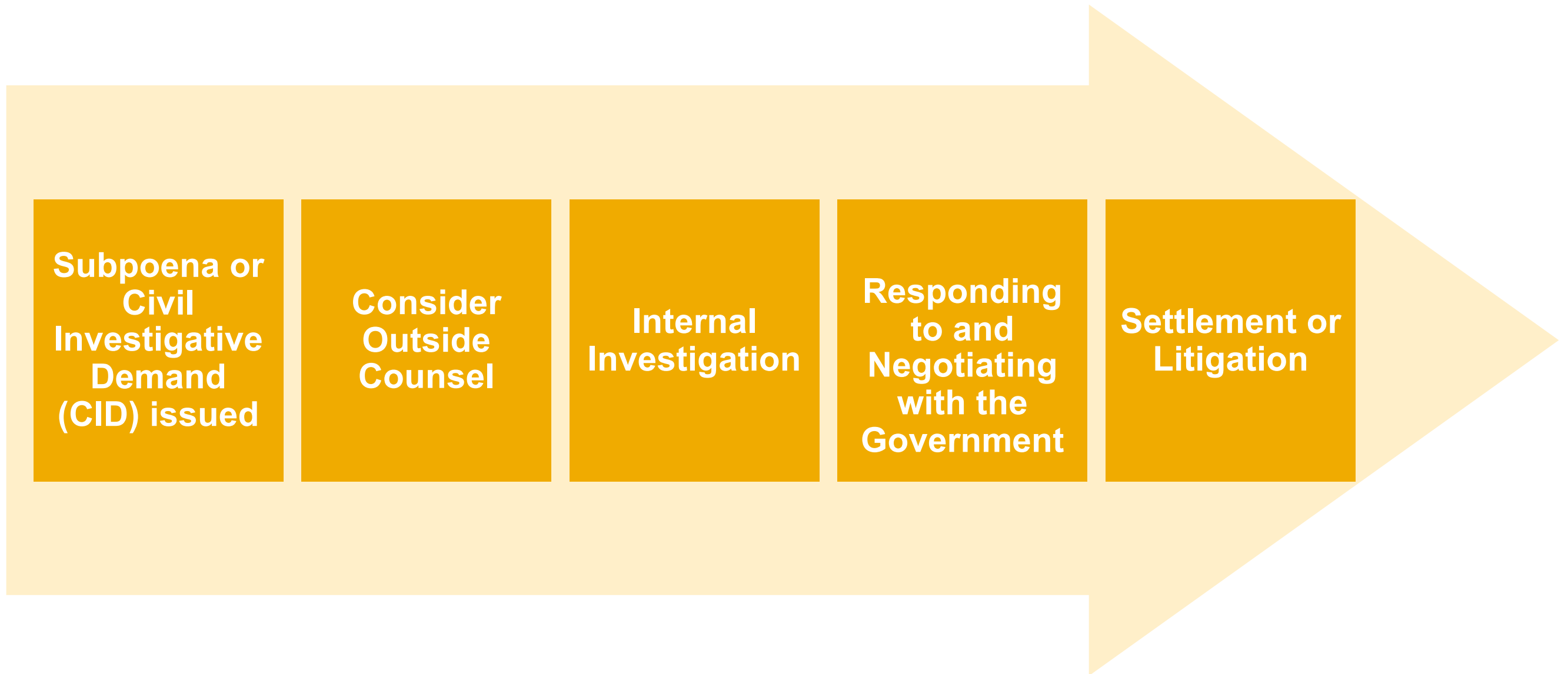
- DOJ announced more than \$3 billion in FCA settlements in 2019
- As in recent years, DOJ secured most of its FCA recoveries from enforcement actions involving healthcare and life sciences entities, and cases involving alleged violations of the Anti-Kickback Statute (AKS) and the Stark Law
- Government contracting also provided significant recoveries
 - November 13, 2019: a development corporation agreed to pay \$2.8 million and give up \$16 million in potential administrative claims, settling allegations that it fraudulently induced the Army to award a contract by falsely representing that it would perform when its Israeli parent company intended to do so, and for presenting false claims certifying that it was performing the work as the prime contractor
 - January 31, 2020: two companies agreed to pay \$29 million to resolve FCA allegations that they rigged bidding in an auction to acquire a U.S. Department of Energy Loan.
 - November 20, 2020: company agreed to pay the United States ~\$19 million to resolve allegations that it violated the FCA by using unqualified labor and overcharging the United States for services provided to government agencies under two GSA contracts

■ Federal Criminal Statutes:

- FCA criminal liability for any person who “makes or presents... any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent,” 18 U.S.C. § 287
- Mail and Wire Fraud, 18 U.S.C. §§ 1341-43
- Conspiracy to Defraud the United States, 18 U.S.C. §§ 286, 371
- Major Fraud against the United States, 18 U.S.C. § 1031
- False Statements and Obstruction of Justice, 18 U.S.C. §§ 1001, 1512
- Procurement Integrity Act, 41 U.S.C. §§ 2101-07
(implemented at FAR Part 3.104)



- **Debarment: Excluding a contractor from government contracting**
 - For conviction or civil judgment under many statutes, including those previously mentioned.
 - Based on preponderance of the evidence for willful failure to perform contracts, history of failure to perform, unsatisfactory performance, or other serious or compelling causes.
 - Generally, no longer than three years – agencies have different regulations.
- **Suspension: Temporary disqualification of contractor**
 - Upon “adequate evidence” of commission of fraud or other statutory violations, including any offense indicating a lack of business integrity or honesty.
 - “Adequate evidence” means information sufficient to support the reasonable belief that a particular act or omission has occurred – includes indictments and allegations in a civil complaint filed by a federal agency.
 - May not exceed 18 months unless legal proceedings are initiated.



■ Subpoena

- Unlike a search warrant, no probable cause requirement exists for the issuance of a grand jury (or an administrative) subpoena.
- Grand jury subpoenas are issued either to collect documents (a subpoena duces tecum) or to compel testimony of company employees.

■ CID

- Essentially a civil subpoena from the government directed to the company.
- A CID can command documents, interrogatories, witness testimony, or any combination thereof.
- Failure to comply can subject the company to court sanctions.

- Consider conducting your own internal investigation to allow you to:
 - Stop any ongoing wrongdoing
 - Take steps to prevent problems from reoccurring.
 - Remediate
 - Protect executives and members of the board of directors from claims they have breached any fiduciary duties owed to the company
- Consider engaging outside counsel to handle the internal investigation
 - Neutral third party conducting the investigation
 - Protect the attorney-client privilege

- Corporate counsel: Responding and negotiating with the government
 - If a government agent contacts you or the company, do not “blow off” the government
 - Acknowledge immediately when you receive a government subpoena or CID
 - Engage outside counsel
 - Try to ascertain scope and see if the parties can reach common ground for limitations (temporal, search terms, custodians)
 - Agree upon a reasonable schedule for production
 - If response will require voluminous document review, explore ways to mitigate
 - Make clear to the government attorneys that you and your company are taking seriously the government’s investigation
 - Be cooperative (subject to reasonable restraints such as cost, time, effort and concerns about privilege)

- Why is cooperation important?: DOJ FCA Guidance [JM Section 4-4.112]
 - In considering the value of the voluntary disclosure or additional cooperation, the DOJ will consider the following factors:
 - (1) the timeliness and voluntariness of the assistance;
 - (2) the truthfulness, completeness, and reliability of any information or testimony provided;
 - (3) the nature and extent of the assistance; and
 - (4) the significance and usefulness of the cooperation to the government.

KEY TAKEAWAY

If the corporation preserves documents, voluntarily discloses known misconduct, identifies wrongdoers, undertakes remedial measures, and is responsive and forthcoming to the government, the corporation should receive substantial cooperation credit, even if it is unable to identify and disclose each and every wrongdoer

- Corporate counsel: strategies for managing officer and board member expectations when responding to a government investigation
 - Make sure that officers and board members:
 - Clearly understand who general counsel and defense Counsel represent and what their duties are.
 - Do not go into panic or reactionary mode.
 - Do not start deleting computer records, emails, voicemail messages, documents, etc.
 - Do not start selling equity or other interests in the company.
 - Do not retaliate against the employee whistleblower.
 - Keep communications confidential.
 - Implement protocols to avoid conflicts of interest for legal, governance and operational aspects
 - Liability analysis
 - Continued operations
 - Criminal vs. civil problems
 - Proactive risk management
 - Legal fees vs. organizational budgetary constraints

Document hold

- Notice to preserve sent to people who may have responsive documents
- Any document destruction is suspended

What's a document?

- Paper
- Electronic
- Emails
- Text
- Messaging
- Faxes
- Voicemails

Understanding the document repositories

- Emails (corporate, personal)
- Shared folders
- Locally saved documents
- Hard copy documents
- Other potential sources (external media, company issued or personal smartphone, etc.)
- Document destruction policies
- Unintentional document destruction or collection difficulties

Data analysis

**Why linear review may not
always be possible**

Use of predictive coding

Privilege screens

- Corporate Counsel: ensure employees are complying with document management policies
 - All company information, even if off-premises, belongs to the company
 - Employees should not store copies of electronic documents on their home/personal computers or in personal cloud storage accounts
 - Employees should not delete voice messages on their personal phone on matters covered by a document hold or retention policy
 - Communications made for business purposes should be made using only company-approved channels, such as company email accounts or shared drives

- Corporate Counsel: include ephemeral messaging apps in your acceptable use policies
 - Ephemeral messaging apps allow messages and photos to “self-destruct,” e.g., SnapChat, Confide, Telegram, Hash, Signal, Wickr
 - These messaging apps promote themselves on their end-to-end encryption and their ability to disappear without a trace.
 - Acceptable use policies that specifically address communications via social media and messaging apps set clear expectations for end-users



- Facilitating Employee Interviews by the Government
 - Company witness
 - Individual witnesses
 - Corporate counsel may represent
 - Pool counsel



■ Parallel Investigations

- The term “parallel investigation” refers to separate investigations being conducted by different state or federal government entities into the same set of facts.
- This could mean that there is a civil enforcement agency pursuing an investigation at the same time as a criminal law enforcement agency
- The clearest indication of a parallel investigation is when a company receives a civil investigative demand from a federal regulatory agency and is contemporaneously served with a federal grand jury subpoena.

- Settlement or Litigation



■ Corporate counsel: key takeaways

— Must be proactive

- Define the role of outside and inside counsel
- Establish and maintain attorney-client privilege early
- Thoroughly understand what the potential criminal and civil repercussions are
- Ascertain the long-term implications for the company

— Be sensitive to employee whistleblower privacy issues

— Identify who is implicated

- Exclude those implicated from the investigation
- Manage communications during course of investigation

— Build a trusted team (smaller is better)

- Consider a subcommittee of the board of directors
- Communication kept solely within team



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