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Significant Ethical Breaches in Modern U.S. Government Contracting and Their Impact on the Federal Acquisition Environment

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Significant Ethical Breaches in Modern U.S. Government Contracting and Their Impact on the Federal Acquisition Environment

Abstract:

During the defense expansion in the 1950s and 1960s, along with the renewed expansion in the 1980s, the acquisition environment in the United States experienced a series of significant breaches of the ethical standards set for government contracting. These violations in procurement legislation have led to important additions to the body of case law that governs procurement policy in the United States and sets the tone for the culture of ethics in all transactions involving the federal government. This study of federal court cases and legislative elements addresses these issues and analyzes both the effect these violations have on the acquisition environment and the effectiveness of the legislative measures implemented in response to ethical transgressions. The work will conclude with an analysis of the accountability present in the system and the outlook for the prevention of ethical breaches in the future.

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Abstract

During the defense expansion in the 1950s and 1960s, along with the renewed expansion in the 1980s, the acquisitions environment in the United States experienced a series of significant breaches of the ethical standards established for government contracting. These violations in procurement legislation have led to important additions to the body of case law that governs procurement policy in the United States and sets the tone for the culture of ethics in all transactions involving the federal government. This study of federal court cases and legislative elements addresses these issues and analyzes both the effect these violations have on the acquisitions environment and the effectiveness of the legislative measures implemented in response to ethical transgressions. The work will conclude with an analysis of the accountability present in the system and the outlook for the prevention of ethical breaches in the future.

Introduction

By analyzing the effect ethics violations in government contracting have on the acquisition environment, general trends in the system can be discerned through the case law, statutes, and regulations that result from such ethical transgressions. This basis of common law, legislation, and regulatory measures forms the mechanism through the state of ethical compliance in the U.S. acquisition system may be examined. The analysis begins with the Cold War era and moves forward into the present, looking at case law concerning violators of Anti-Kickback legislation, the U.S. anti-bribery legislation codified in Section 201 of Title 18 of the United States Code, and other laws that prohibit unethical behavior by public officials or by those who enjoy privity of contract with the federal government.

In the aftermath of the Second World War, Congress increasingly recognized the incredibly detrimental impact that bribery, gratuities, kickbacks, and fraud perpetrated in the course of the federal procurement process actually had on government operations. Taxpayer interests are not well-served when public funds are illegally used for personal gain, and so the legislature drafted and passed the Anti-Kickback Act in 1946. With the ability to impose both civil and criminal penalties upon those found guilty of violations, the Anti-Kickback Act was a powerful piece of acquisition legislation and, after multiple revisions and amendments, continues to be effective even into the twenty-first century. During the remainder of the 1940s, and into the 1950s and 1960s, the most significant judicial opinions resulting from the commission of ethical violations concerned the issue of intent, both criminal and legislative. At each of the appellate and Supreme Court levels, federal courts consistently found that one need only have the intent to commit bribery to be guilty under the statute, meaning that a bribe may not need to be paid or received to establish guilt. The concept that intent may be inferred from action in bribery cases clearly illustrates the government's highly antagonistic stance toward this type of ethical transgression. This sentiment was echoed within other court decisions, which tended to focus on the legislative intent behind the construction of statutes like the Anti-Kickback Act and the federal bribery statutes at 18 U.S.C. § 201, thus allowing for broader application of their provisions and penalties.

With the dawn of the 1970s came a dramatic increase in the number of highly publicized ethical breaches committed by Washington's public officials, culminating in the Watergate scandal and President Nixon's resignation in August of 1974. Just three weeks later, the Office of Federal Procurement Policy Act was passed, establishing the Office of Federal Procurement Policy as a major source of guidance and direction in the acquisition environment. This attitude of reform was also evident in the 1981 passage of the first of three executive orders, all entitled "Integrity and Efficiency in Federal Programs." Along with the 1989 President's Commission on Federal Ethics Law Reform, the President's Council on Integrity and Efficiency established by these executive orders sought to increase economy and efficiency in federal programs and operations by curbing fraud, waste, and abuse. The 1989 Federal Ethics Reform Act also attempted to reform the climate of ethical compliance in the federal government, and was relatively successful in strengthening the ethical measures already in place and improving transparency in the system. Another focus of the federal government during the 1980s and 1990s was on the use of commissions, committees, and reviews to detect the vulnerabilities present in the acquisition system and devise recommendations for legislative or regulatory solutions. With the defense expansion of the 1980s, the federal government found itself dealing with increased instances of bribery, graft, and fraud, resulting in a desire to utilize more of the commercial best practices established for use in the private sector.

With the transition from the 1980s to the 1990s came a new sense of what it meant to be a public official, with several key cases hinging on the issue of the exact definition of the term "public official" under Title 18 of the United States Code. As the nation moved from a system in which contractors maintained distant and egocentric relationships with the government to a more cooperative system in which contractors often collaborate with the government, the gap between private employee and public official decreased significantly. Here again, the government illustrated its extreme hostility toward the practice of ethical noncompliance, for appellate courts consistently interpreted legislation to the effect that an individual need not actually be employed by the government to be considered to occupy a position of public trust and responsibility. This conclusion is highly reminiscent of the issue concerning the requirement of criminal intent under federal bribery legislation, and indicates a certain measure of consistency throughout the evolution of common law perspectives on ethical breaches in modern federal acquisitions. The recurring themes that thus appeared in the federal acquisition environment in the years following the Second World War have continued to endure through the first decade of the twenty-first century, and portend the development of further sea changes in ideas about ethicality in the public sector.

United States of America v. Charles V. Labovitz and Martin Abrams; Martin Abrams, Appellant

United States Court of Appeals for the Third Circuit

251 F.2d 393. Jan. 13, 1958

In a set of circumstances that often recurs within the U.S. acquisition system, the Department of the Army awarded a supply contract that by 1958 found itself at the United States Court of Appeals for the Third Circuit. The litigation revolved around a complex issue, the crux of which concerned the issue of criminal intent as it pertains to the federal bribery statute codified in Section 201 of Title 18 of the United States Code. The Army contracted with the corporation for a set number of items under a fixed price contract, allowing for a price redetermination clause that could be implemented based on costs incurred by the contractor during work on the contract. When renegotiating this price adjustment, the contracting officer made the determination that, under the terms of the contract's price redetermination clause, the government was entitled to a refund from the contractor of approximately $16,000. The contractor responded to the government's calculations by asking leave to represent a more thorough accounting of their costs for the contract in the hopes of reducing the amount owed. The president of the contracting company, Charles V. Labovitz, along with Martin Abrams, conspired together to bribe a government accountant in an effort to induce him to submit a favorable recommendation to the contracting officer and in doing so reduce the amount owed to the government.

The government made no claim that, had the bribery not occurred, the government accountant might actually have lawfully and factually concluded that his recommendation to the government should allow for a reduction in the government's refund claim. Moreover, the court found that there was no credible evidence as to whether the contractor's proposed supplementary submission could actually make a legal or factual case for reduction of the refund claim. In fact, the trial judge made a statement as to the significance of the intent behind the violation. In charging the jury with their instructions at trial, the district court judge specifically emphasized that at the core of the bribery charge is the intent to influence an official decision. The issue of criminal intent here centers not on the success of the act or even on the lawfulness of the outcome, but rather focuses strictly on the intention to commit the act in violation of the statute and of well-established public policy. Section 201 of Title 18 of the United States Code is specific in its condemnation of bribery, clearly stating that the "intent" to influence official acts, to influence public officials to engage in fraudulent activity, or to induce public officials to violate their lawful duties, is the at the very core of the violation, and thus must be considered as a material issue (18 U.S.C. § 201). In order to satisfy the requirements for guilt under the statute, a defendant must be proven to have either an intention to influence official behavior or an intention to induce an unlawful action of a public official or an individual considered a public official for the purposes of the statute [251 F.2d 393 (3rd Cir. 1958)]. In this case the defendants were shown to have the requisite intent to engage in criminal behavior and so were subject to the penalties the law prescribes, allowing the Court of Appeals to affirm the decision.

Interestingly, the court felt it was necessary to include in its opinion a brief explanation of its rationale for affirming the decision of the district court. Specifically, the court reasoned:

> It is a major concern of organized society that the community have the benefit of objective evaluation and unbiased judgment on the part of those who participate in the making of official decisions. Therefore, society deals sternly with bribery which would substitute the will of an interested person for the judgment of a public official as the controlling factor in official decision[s]. The statute plainly proscribes such corrupt interference with the normal and proper functioning of the government. [251 F.2d 393 (3rd Cir. 1958)]

The Court of Appeals went so far as to cite a 1927 case out of the Court of Appeals for the Ninth Circuit, *Daniels v. United States,* in which the court determined "that to constitute the offense of attempted bribery it is immaterial whether the official action sought to be influenced be right or wrong" [17 F.2d 339, 343 (9th Cir. 1927)]. The message the 1958 decision was meant to convey was little different from that of the 1927 decision. Both courts recognized that bribery, particularly in government contracting situations, is in direct conflict with public policy, and the fact that an individual may have violated bribery legislation without actually receiving or supplying a bribe does not exempt him from guilt. The *United States v. Labovitz* decision is a prime example of the type of situation where intent is quite probably as significant a factor as the factual circumstances of the case and the consequences of the defendant's actions. For those individuals covered under 18 U.S.C. § 201 who choose to violate its provisions, the intent can be incriminating whether the actual outcome is criminally realized or not.

Truth in Negotiations Act

Public Law 87-653

Sept. 10, 1962

On September 10, 1962, Congress passed Public Law 87-653, commonly known as the Truth in Negotiations Act, or TINA. The act, codified by 10 U.S.C. 2306(a) was intended to improve transparency in an acquisition environment where contractors held significant advantage over the government. In situations where the procuring agency determines that there is a necessity to employ sole source procedures, the contractor is in a far more favorable pricing position, for there is much less motivation to lower prices in the normal competitive fashion. The resulting inflation of costs passed on to the government in the form of higher prices is precisely the phenomenon that the Truth in Negotiations Act sought to prevent and rectify. Ultimately, the act was an attempt to reach a determination of what constitutes a fair and reasonable price in sole source procurements, and the legislation employed a number of different tactics in this endeavor. The act established a specific definition of what would be considered cost and pricing data and gave contractors rules for when they would be required to submit such information. Cost or pricing data, as defined in the Federal Acquisition Regulation, is described as follows:

> "Cost or pricing data" (10 U.S.C. 2306a(h)(1) and 41 U.S.C. 254b) means all facts that, as of the date of price agreement or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price, prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are data requiring certification in accordance with 15.406-2. Cost or pricing data are factual, not judgmental; and are verifiable. While they do not indicate the accuracy of the prospective

> contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. (FAR 2.101)

TINA applies to all types of contracts, and is not limited to prime contracts alone, as it includes subcontracts and contract modifications as well, with subcontract cost or pricing data required for submission if the amount of the subcontract exceeds 10% of the proposed prime price. The submission of cost and pricing information is required only in certain situations. The original legislation under TINA required the submission of cost and pricing data for prime contracts meeting or exceeding a specified government-wide threshold which was raised from $100,000 to $500,000 by means of the Federal Acquisition Streamlining Act of 1994. The threshold has since been raised to $550,000, and subsequently to $600,000 and $650,000, though there do exist certain exceptions to TINA, involving such cases as exist where prices are set by law or regulation, where adequate price competition has been established, where the procurement involves commercial items, or where the contract is actually a subcontract for a commercial item or a modification to an existing contract (FAR 15.403-1(b), United States Agency for International Development). The act does allow for exceptions even when the acquisition does not meet one of the above criteria through the establishment of provisions for TINA waivers, which absolve the contractor of the responsibility for cost and pricing data submission regardless of the prime contract's expected price. The act also specifies that the government maintains audit rights, and with this broad ability to examine contractor records, the passage of this act brought the government closer to a balance of power with contractors in the acquisition environment of the early Cold War era. The section on Government Responsibility within the Federal Acquisition Regulation states that, "[i]f, before agreement on price, the contracting officer learns that any cost or pricing data submitted are inaccurate, incomplete, or not current, the contracting officer shall immediately bring the matter to the attention of the prospective contractor, whether the defective data increase or decrease the contract price" (FAR 15.407-1(a)).

Perhaps the most essential part of the act is the requirement that all cost and pricing data submitted be certified as current, accurate, and complete by the contractor. Such certification as is submitted under TINA must be submitted as soon as practicable after the contractor and the government reach agreement on the final contract price, as is required by the Federal Acquisition Regulation (FAR Table 15-2). Also according to the FAR, certification of cost and pricing data applies only to data upon which contractors base their decisions and make their judgments, not to the accuracy of the judgments themselves (FAR 15.406-2). More significantly, TINA provisions specify that a contractor's responsibility for the submissions to be current, accurate, and complete is distinct from and not negated by a lack of personal knowledge that these requirements were not met, so that ignorance is not considered a defense to TINA violations. Thus, it is common practice for contractors to conduct a sweep of all records pertaining to the contract just prior to their final submission of a TINA certificate. During this sweep, which typically takes place after the agreement on contract price but before official award of the contract, the contractor reviews its records to determine if the cost and pricing data to be submitted to the government needs to be amended or updated. Covering factual data existing and available prior to the agreement on the final contract price, information turned over to the government as a result of a contractor's sweep is that which would have otherwise had an impact on the price, whether an increase or a decrease, and is that which was previously unknown to at least one of the parties. Although sweeps are not an absolute government requirement, they are of substantial benefit to the contractor, allowing for the submission of cost or pricing data all the way up to the time the certificate is submitted and providing a final opportunity to correct mistakes or oversights that could potentially lead to costly TINA violations. In the event that a contractor is found noncompliant with the provisions of TINA, it is said to be guilty of defective pricing, for which five points must be established:

1. The information in question must fit the definition of cost and pricing data as defined by TINA;
2. Current, accurate, and complete data must have existed and been reasonably available to the contractor before the contract price was agreed upon;
3. Current, accurate, and complete data must not have been submitted or disclosed to the contracting officer or one of the authorized representatives of the contracting officer and these individuals must not have had actual knowledge of such data or its significance to the proposal;
4. The government must have relied on the defective data in negotiating with the contractor; and
5. The government's reliance on the defective data must have caused an increase in the contract price. (Muskopf, 2006)

Over the years, the Truth in Negotiations Act experienced a series of revisions and updates that provided further guidance and specifications regarding defective pricing. The Defense Authorization Act for the 1986 fiscal year (FY86) added a requirement that contractors be charged interest on the portion of government payments found to be in excess of what the contractor would have received had the correct cost and pricing data been submitted. In the FY87 Defense Authorization Act, TINA was amended to establish the government's non-reliance on cost or pricing data as a legitimate defense to defective pricing, meaning that, if the nondisclosure of required information had no effect on the actual amount of the government's payments to the contractor, then the contractor could not be prosecuted for defective pricing. Moreover, the same authorization act established *unacceptable* defenses to defective pricing, including such conditions as appear in sole source procurements or where a superior bargaining position exists, where a contracting officer should have known of the defective pricing, where an agreement was reached on the basis of total costs, or where a certificate was never submitted at all. These defenses may not be used for any reason as a negation of responsibility for defective pricing under TINA, and as such, they provide considerable strength to the position of the government in defective pricing disputes. Further Defense Authorization Acts, such as the FY87 Defense Authorization Act and the FY88 Defense Authorization Act, gave a specific definition to the term "cost or pricing data," which also lent strength to TINA's many provisions concerning the treatment of this type of data. In the 1990s, developments such as those of the Federal Acquisition Reform Act had the opposite effect on TINA, weakening the legislation's power to preserve the government's rights to transparency and curb the contractor's ability to leverage cost data into elevated profits. Since the turn of the twenty-first century, however, it seems that the system has reverted back to reflect the attitudes of the 1980s, favoring the government and its right to make informed decisions about the costs associated with major procurements. (Muskopf, 2006)

In 2001, the Department of Defense Investigator General issued “Contracting Officer Determinations of Price Reasonableness When Cost or Pricing Data Were Not Obtained,” an audit report which concluded that contracting officers failed to require data in 32% of contracting actions reviewed and that many of the exceptions granted were invalid (Muskopf, Department of Defense). Further evidence led to conclusions that the documentation submitted in 86% of the contracting actions reviewed was inadequate to support a positive determination of price reasonableness, that many items categorized as commercial acquisitions were not challenged by the acting contracting officer, and that often catalog prices and price lists were accepted without analysis (Muskopf, 2006). Moreover, in a 2002 Government Accountability Office Report, “Contract Management: DOD Needs Better Guidance on Granting Waivers for Certified Cost or Pricing Data,” the Government Accountability Office considered the negative effects that price inflation in sole source procurements have on the government and recommended that the Secretary of Defense take specific measures to provide more guidance to contracting professionals to help clarify which situations would merit an exceptional case TINA waiver, what type of data and analyses can be used to determine a price when a waiver is granted, and what types of outside assistance should be obtained (Government Accountability Office, 2002). These recommendations reflect the general slant toward increased accountability and accuracy of cost and pricing information as required under TINA, and illustrate the growing concern that large sole source procurements are particularly vulnerable to overpayment. The next year’s Defense Authorization Act established increased restrictions on the circumstances under which a TINA waiver may be issued, directing that the Head of the Contracting Authority may only issue waivers upon a determination that the property or services being purchased cannot reasonably be obtained without issuance of a TINA waiver, the price can be determined reasonable without the submission of cost or pricing data as defined under TINA, and there are demonstrated benefits to the issuance of the waiver. The condition requiring that the acquisition be one which cannot reasonably be obtained without a waiver is a significant departure from previous requirements for obtaining waivers under TINA, for before, waivers were granted merely if both the contract price could be established as reasonable without cost or pricing data and there would be demonstrated benefits to granting the waiver. The FY03 Defense Authorization Act also instituted Congressional Reporting Requirements for TINA waivers granted to contracts priced over $15 million, including those acquisitions for commercial items. This, too, indicated the government's focus on the TINA waiver as an exception rather than a common practice, and as a result of the Defense Authorization Acts of FY02 and FY03 in particular, the number of TINA waivers significantly decreased (Muskopf, 2006). With the FY05 Defense Authorization Act came more developments in the evolution of TINA, applying further constrictions to the circumstances under which an exception to cost and pricing data submission requirements may be made by stating that a TINA exception does not apply to noncommercial modifications of commercial items with a cost exceeding $500,000 or 5% of the value of the contract in its entirety, whichever is to be the greater sum. These revisions indicate that the government has a vested interest in utilizing the provisions of the Truth in Negotiations Act as a means of ensuring legal compliance and preventing procurement fraud, particularly in large Department of Defense acquisitions where sole source procurement and limited commercial availabilities increase the potential for ethical violations. (Muskopf, 2006)

Robert E. Howard, Defendant, Appellant v. United States of America, Appellee

United States Court of Appeals for the First Circuit

345 F.2d 126. May 11, 1965

As the decade further progressed, the 1965 decision by the United States Court of Appeals for the First Circuit affirmed the district court's judgment in the trial of Robert E. Howard, establishing a ruling that had several significant implications for the state of federal ethics legislation and its effects on government contracting. Howard, of Andover, Massachusetts, along with Bernard J. Champy, of Methuen, Massachusetts, were indicted for violating the provisions of the Anti-Kickback Act while functioning as employees of a federal contractor or subcontractor as defined by 41 U.S.C. § 52. From June 20 to October 20, 1958, Howard worked as an assistant plant manager for Raytheon Manufacturing Company's Andover plant, which at the time was operating under a cost-reimbursable prime contract to produce Hawk missiles for the U.S. Army. Champy was the general manager of Champy Construction Company, the Lawrence, Massachusetts, subcontractor which had taken on the Hawk missile contract through Raytheon. Coincidentally, Howard was in the process of constructing a home in Andover during this time, and the legal and ethical quagmire that emerged was a direct result of the conflict created by Howard's failure to separate his personal affairs from his fiduciary duties and professional responsibilities.

The first count of the indictment alleged that, on multiple occasions, Champy knowingly provided Howard with labor and building materials through Champy Construction Company, with the intention that Howard would use these resources in the construction of his new home. Though the gain was purely personal for Howard, the intention of Champy was to have the items act as "a fee, commission, gift, gratuity, and compensation" from Champy Construction Company that would provide "an inducement for awards of subcontracts and orders" from Raytheon to Champy Construction and an "acknowledgement of subcontracts and awards previously awarded" [345 F.2d 126 (1^{st} Cir. 1965)]. While this first count was focused on the actions of Champy, the second count centered on Howard and presented the same allegations with the adjustment that it was Howard who was charged with knowingly receiving such materials and labor and in doing so violating the relevant legislation in the federal bribery statutes (18 U.S.C. § 201).

In Howard's appeal to the First Circuit, he contended that the trial court erred in its interpretation of the Anti-Kickback Act, and asserted that the legislation was presented as a "Caesar's wife law," alleging that the court allowed the conviction to stand not on a showing of specific criminal intent but instead on the mere appearance of guilt [345 F.2d 126 (1^{st} Cir. 1965)]. The Court of Appeals found that the Anti-Kickback Act holds much the same purpose as the general federal bribery statute codified at 18 U.S.C. § 201, and therefore concluded that it was based on the same principles. Howard asserted that there must be a "connection" between the acceptance of a bribe paid and the goodwill it was designed to procure, but the court returned once more to the statutory construction of the Anti-Kickback Act, and concluded that the purpose of the act is the prevent and prohibit payments granted for the purpose of inducing the award of subcontracts, as was the case in this situation [345 F.2d 126 (1^{st} Cir. 1965)]. The Court referenced *Kemler V. United States,* among others, in concluding that one's only motivation for paying or offering to pay a bribe is the expectation of some consideration therefore, and thus any such individual has the requisite intention to influence an official decision that constitutes a violation of the federal bribery legislation at 18 U.S.C. § 201. Using this rationale, the government was thus able to prove criminal intent for the acts of bribery. If Howard's contentions were allowed to stand, then the indictment would have dissolved, along with the jury charges, and the verdict would be insupportable. However, the government's arguments prevailed and Howard, after being denied both an acquittal and a new trial, appealed in an effort to gain a retrial and again was denied. Overall, the Court of Appeals discerned that the case was composed of but a few critical elements, and that those elements, when combined, were enough to affirm Howard's conviction. In such a case as this where the parties and contract types were covered under the definitions listed in the statute and at least one bribe was knowingly paid, the decision to affirm is merely one in which the court must align the circumstances at hand with the boundaries of contemporary legislation. [345 F.2d 126 (1st Cir. 1965)]

The bribe in question in this case may not even have resulted in the award of a contract, but the very acts of soliciting, providing, or receiving a bribe are so clearly prohibited by the Anti-Kickback Act that defenses to these ethical violations are not often successful. The decisions that result from these cases are frequently less important as common-law delineators between that which is acceptable business practice and that which is a violation of federal legislation and more important as commentaries on what has been a steady and deeply-ingrained public policy prohibiting fraud and corruption. Such questions as whether or not a bribe must result in the intended goodwill, whether the element of criminal intent must be present, whether it matters if the outcome would have been unchanged regardless of ethical transgressions committed—all are significant elements of federal bribery legislation and its application to acquisition professionals, and all are questions that are answered thoroughly through such cases as are discussed here.

United States of America, Appellee v. George A. Bergman, Jr., Appellant

United States Court of Appeals for the Second Circuit

354 F.2d 931. Jan. 19, 1966

In 1966, the United States Court of Appeals for the Second Circuit handed down its decision in a case involving George A. Bergman, Jr., the Post Office Transportation Manager for New York State from 1952 to 1961, and the Deputy Regional Director for the New York region in 1962. Bergman resigned from his post in April 1962, at which point he was called before Grand Juries in the United States District Court for the Southern District of New York. He was asked to give testimony concerning the federal government's investigations into corruption and bribery activity present among postal employees and mail contractors in the New York region, but when under oath, Bergman made multiple statements that were proven to be false. Bergman was convicted on six counts of a seven-count indictment charging perjury in violation of 18 U.S.C. 1621, and was subsequently sentenced to six one year terms of imprisonment set to run concurrently.

Bergman had multiple contentions upon appeal, none of which the court found sufficiently convincing. The government was easily able to present evidence of the falsity of Bergman's statements under oath regarding his involvement in the bribery activities under investigation, and the Court of Appeals found no legal error in the jury's reliance on certain prosecutorial evidence. Such evidence pertained directly to the manner in which Bergman engaged in illegal financial transactions, which involved an additional party and an apparent lack of cognizance of the money's illegal source. Although the trial court did strike some of the evidence of Bergman's participation in kickback activities, he nevertheless argued that the presentation of this evidence to the jury tainted his credibility to an unfair extent and was ultimately prejudicial; the Court of Appeals disagreed. Instructions were given to the jury limiting the points they were legally allowed to consider in deciding upon a conviction, though the evidence was still recognized as an important piece of the prosecution's case and necessary to prove other counts of the indictment. In addition to affirming Bergman's conviction and sentence, the Court of Appeals astutely recognized the principle that, in order to violate anti-kickback legislation, a bribe need not be paid directly to or by an individual but only be paid for his benefit or at his request. This distinction is highly significant in a situation such as that of Bergman, who perjured himself with statements denying the receipt of kickbacks and other questionable income, as well as association with other individuals suspected of involvement in kickback schemes. The application of anti-corruption legislation to those who even indirectly engage in unethical activities is here again indicative of the willingness of the judiciary system to consistently reinforce the legislative sector's intent to create effective anti-corruption legislation. Yet it is nonetheless a constant struggle to bring together the three branches of government to cooperate in the *implementation* of effective punitive and preventative measures for the impediment of ethical breaches in government acquisition.

United States of America, Petitioner v. Acme Process Equipment Company

Supreme Court of the United States

385 U.S. 138. Dec. 5, 1966

In perhaps one of the most significant decisions of the period, the Supreme Court under Chief Justice Earl Warren ruled to reverse a 1965 decision of the U.S. Court of Claims involving a claim filed against the United States by the Acme Process Equipment Company on behalf of itself and numerous subcontractors. Acme contended that it was entitled to reasonable compensation for the costs incurred as a result of a highly problematic 1953 contract with the Army Ordnance Corps for the manufacture of 2,751 recoilless rifles. Terminated in the summer of 1954 upon the discovery of an elaborate kickback scheme perpetrated by three Acme employees, the contract was structured so that the price of each rifle was fixed at a set dollar amount, but included a clause for price renegotiation within limits after 30% of the rifles were delivered. The Government contended that certain contingent-fee arrangements and bribes as were proven to take place prior to and concurrent with the term of the contract formed a valid legal basis for the contract's termination. In contrast, Acme argued that because upper management remained unaware of the illegal activities, the company should not be required to bear the heavy burdens of termination without the aid of government reimbursement for its investments.

The case stems from Acme's 1952 decision to hire Harry K. Tucker, Jr., and James S. Norris to establish and manage the company's new government contracting division. The two were responsible for submitting bids, signing government contracts, entering into subcontracting agreements, and expediting subcontracting operations, all of which gave them virtually unlimited control over transactions within the government contracting division. However, Tucker was not under an exclusive employment contract with Acme, and was in fact under the employ of other firms at the time, all of which was stated in his employment agreement with Acme. One of the firms with which Tucker consulted was, like Acme, pursuing largely civilian contracts at the time, and had entered into an entirely common and legal agreement with Tucker under which he was to receive a commission for sales he procured. The company was All Metals Industries, Inc., and it would later become a major subcontractor in the contract in dispute in this case with over one third of the Army rifle contract. During negotiations for the contract, Acme was represented by Tucker and Norris, though All Metals was allowed to participate due its vested interest in the outcome. As the low bidder, Acme eventually was granted award of the prime contract in 1953, with the understanding that the contract price would require government approval of all subcontracts in excess of $25,000, as was applicable in this case.

Although this progression of events had heretofore been relatively straightforward for the concerned parties, Tucker complicated Acme's position as a government contractor by entering into questionable agreements with potential subcontractors while negotiations between Acme and the Army were still taking place. In these agreements, two separate firms agreed to pay Tucker a commission on any orders he could procure from Acme, including those subcontracting agreements necessary for completion of the Army contract. Army contracting officers learned of these contingent-fee arrangements and informed Acme's president Joshua Epstein that one of his employees was under suspicion of these activities, but the contract was not cancelled at that time. Meanwhile, Tucker was being paid the solicited kickbacks for awarding subcontracts to All Metals and the two other companies, but was apparently desirous of a more lucrative arrangement, prompting an escalation of his involvement. Tucker approached Jack Epstein, who was employed as the superintendent of Acme's main plant and happened to be the son of Acme's president and principal stockholder, and brought Epstein into the scheme. Tucker and Epstein threatened to cancel All Metals' lucrative subcontract with Acme unless All Metals agreed to pay $25,000 for fictitious consulting services to them through a dummy corporation that Tucker, Norris, and Epstein set up for this purpose. The bribe was paid, the conspirators discovered and forced to resign, and the excess cost added to the subcontract price paid by Acme, thus increasing the cost of Acme's prime contract and in turn the final cost to the government.

The Court of Claims, upon examination of Acme's claim that it should not be held to account for the kickback activities of its agents, whether or not those agents were criminally liable, found that the Anti-Kickback Act did not give the United States the legal right to terminate Acme's prime contract for default and fail to reimburse the company for its significant investments. Acme claimed the government knew for months that the bribery was occurring and neglected to terminate the contract, thus forfeiting its right to do so. Acme contended that the reason for termination was, in fact, the growing obsolescence of the weapons ordered in the contract, and the government's desire to cancel the order without the costs associated with a termination for convenience. As Acme had little experience in government contracting, the firm had always planned to subcontract out the bulk of the work, leaving only final assembly and finishing for the main plant to perform. Unfortunately, however, Acme's inexperience and poor choices coupled with various other complications not of the firm's own making caused massive cost overruns at all levels of production. As the prime contract was a fixed-price with limited price redetermination contract, Acme was eligible for a price increase of approximately 18% when 30% of the rifles had been successfully produced and accepted. During production, the government was aware of the cost increases and, to some extent, the questionable activities of at least one Acme employee, and waited to cancel the contract until after the offending individuals had resigned publicly. The Court of Claims found the government's actions in this case suspicious and worthy of pause, finding in favor of Acme, and holding that the government had all the knowledge necessary to make its decision about termination in May of 1953 and thus had no legal basis for waiting until July of 1954 to cancel the contract. The Court also ruled that the Anti-Kickback Act in its contemporary form could not be said to apply to Acme, making a highly significant distinction between Acme as the *principal* and Tucker, Norris, and Epstein as the *agents*, and concluding that Acme could not be at fault. The Court reasoned that the civil remedy imposed in the 1946 Act was sufficient to allow the government to recoup any losses as a result of bribery, gratuities, and kickbacks in public procurement. Regarding government claims that conflicts of interest and false claims by Acme would allow for the contract to be legally voided, the Court ruled again for Acme, finding no legal grounds for termination.

The United States brought the case before the Supreme Court in 1966, where the question moved from one of legal technicality to one of legislative intent. The Supreme Court focused on the potential impact of a policy following the Court of Claims decision, and determined that the original drafters of the Anti-Kickback Act intended for the legislation to provide both criminal penalties for violators and civil remedies to recoup lost government funds. In observing the "decidedly hostile" attitude of the legislation's authors toward kickbacks and bribery in general, the Supreme Court recognized such activities were prohibited because they are in direct contradiction with U.S. goals to promote an efficient procurement system (385 U.S. 138). The Supreme Court noted the failure of the Court of Claims to fully consider both the monetary and nonmonetary costs associated with the commission of acts of bribery in government procurement. Any kickback or gratuity costs incurred at the subcontracting level are ultimately passed on to the prime contractor and then the government through higher contract prices and price redeterminations in both sealed bidding and negotiated contracting situations. However, the Court of Claims rested on Acme's assumption that kickbacks are easily recoverable and can thus be recouped through the provisions expressly stated in the Anti-Kickback Act. The Supreme Court astutely observed that kickbacks and bribery conspiracies are quite often clandestine operations, and the cost inflation to which they directly contribute is rarely detectable or easily defined. Cases involving defense contracts are particularly vulnerable to the ethical violations as they more often require developmental products not readily available on the commercial marketplace. In these situations, there may be additional opportunities for inflating bids, for comparison with other comparable contractors can be difficult, and even if the inflated prices are apparent, the discovery may not be made until after the contract has been awarded, forcing the government to endure the costs of cancellation and reprocurement. Furthermore, the

Supreme Court found that Acme's argument about the kickback recovery provisions in the Anti-Kickback Act did not consider the fact that the amount of bribes paid is not necessarily equivalent to the actual cost incurred by the government (385 U.S. 138). The Court reasoned that subcontractors paying kickbacks would not only include the price of the bribe in the contract price charged to the prime contractor, but would also produce elevated contract costs because they have no incentive to control costs or improve efficiency and quality. Subcontracts obtained through kickbacks are inherently more costly to the government, for without needing to engage in fair competition, the subcontractor may inflate its bid in ways that may be virtually untraceable, especially when competing in the defense sector. Moreover, subcontractors who obtain contracts by such means create higher risk in the contract through increased potential for problems in production quality, efficiency, and scheduling, and such issues are often ill-tolerated on defense contracts such as that held by Acme in this case.

As schemes like the kickback conspiracy engineered by Tucker, Norris, and Epstein pose a serious problem with very real financial consequences for the government, legislation has been enacted to provide a means of recovering funds disbursed as kickbacks as well as deter such acts through punitive mechanisms. The 1946 Anti-Kickback Act created such a civil and criminal remedy, expressly prohibiting kickbacks to employees of a prime contractor if the contract was on a cost-plus-fixed-fee or other cost reimbursable basis, as those were the only commonly used contract types at the time (385 U.S. 138, 142). However, the act did not specifically cover fixed price contract types such as that used by Acme in this case, and so when Norris, Epstein, and Tucker were indicted and tried for violation of the Anti-Kickback Act in 1956, all were acquitted by means of the legal loophole. At trial, the District Court found the defendant's actions "despicable, and morally reprehensible, but unfortunately within the narrow letter of the law"

[*United States v. Norris*, Crim. No. 18535 (D.C.E.D. Pa.), April 14, 1956]. The Court recommended that the law be revised to more appropriately reflect the intentions of the original drafters, and in 1960, Congress at the behest of the Comptroller General did pass Public Law 86-695, allowing for coverage of the Anti-Kickback Act to extend to all negotiated contracts. In addition, the amendment allowed for retroactive recovery of kickbacks so that even those paid or incurred by the subcontractor before the act came into effect were subject to recovery by the federal government. The Anti-Kickback Act remains a powerful piece of acquisition legislation in its amended form today, particularly after further revisions in 1986 with the passage of Public Law 99-634. The District Court's decision to acquit Tucker, Epstein, and Norris of the charges laid against them proves the tenuous nature of acquisition ethics during the early cold war era and the need for legislative reform in a post-war, modern America. The Supreme Court specifically acknowledged the 1960 amendments to the Anti-Kickback Act, indicating the significant fact that acquisition practices had evolved since the 1946 passage of the original legislation and the necessity for updated language. The Court did, however, emphasize that the Congressional stance toward bribery, kickbacks, and gratuities has always been one of fervent opposition, stemming from the logical conclusion that these activities are contrary to the public good and in direct conflict with societal conceptions of ethical behavior and fiduciary responsibility.

United States of America v. Albert Solomon Heffler and Donald Joseph Cecchini, Donald Joseph Cecchini, Appellant

United States Court of Appeals for the Third Circuit

402 F.2d 924. Nov. 6, 1968

Here again, a case hinges on more than one point of law, and an analysis of the circumstances is not so much a finding-of-fact but rather a fitting-of-fact to the appropriate provision of legislation. The 1968 case from the U.S. Court of Appeals for the Third Circuit centers on the conviction of Donald Joseph Cecchini on two counts: (1) that he, in conjunction with Albert Solomon Heffler, formed a conspiracy to violate 18 U.S.C. § 201(c) and (2) that he committed a substantive violation of 18 U.S.C. § 201(c) [402 F.2d 924 (3rd Cir. 1968)]. The violations arose when Heffler attempted to coordinate with Eggart, a manufacturing company, in order to exchange kickbacks and bribes for assurances that Eggart would be the successful bidder on various contracts to be awarded by the Air Force Materiel Command. Eggart, however, reported Heffler's scheme to the Federal Bureau of Investigation, who began to monitor the situation. The F.B.I. collected evidence proving that both Heffler and Cecchini visited Eggart, together and alone, and Eggart testified that during these visits, Cecchini made a significant effort to exaggerate his authority and influence on the selection of bidder. At this time, Cecchini supposedly also solicited bribes for future influence and admitted to doing so at least twice before. The trial court sentenced Cecchini to two years of imprisonment, with all but 60 days to be a suspended sentence, and Cecchini appealed to the Third Circuit.

Cecchini's defense was that he did not violate the statute, for he was not actually a public official with the authority to choose the bidder to whom the contract was awarded. However, although he was not a contracting officer, he was a senior technician, and sometimes an acting chief, of the Ground Support Equipment Section in the Directorate of Research, Development, and Engineering at the St. Louis installation of the Army Aviation Materiel Command [402 F.2d 924 (3rd Cir. 1968)]. His expert advice was regularly relied upon when decisions were being made concerning contractors and their technical evaluations, and thus he qualifies as a public official for the purposes of 18 U.S.C. § 201. The court reasoned that it is irrelevant whether or not Cecchini actually had the power to make the decision he promised. Cecchini's actual responsibilities merit some consideration, but overall, the primary factors to consider are the actions and intent of the offender, and not the individual's authority level. The significant role the element of intent plays in this case is reminiscent of that in the case of *United States of America v. Charles V. Labovitz and Martin Abrams*, and illustrates the importance of criminal intent as it relates to ethical violations in federal government procurement [251 F.2d 393 (3rd Cir. 1958)].

Office of Federal Procurement Policy Act

Public Law 93-400

Aug. 30, 1974

By the early 1970s, the federal government had become increasingly concerned about the state of economy and efficiency within the agencies of the executive branch. The exposure of various ethical violations by public officials, culminating in the Watergate scandal and President Nixon's resignation on August 9, 1974, quite obviously had wide-reaching effects throughout the agencies of the executive branch. One such resultant of this reform-hungry climate of the early 1970s arrived in the form of the Office of Federal Procurement Policy Act of 1974, which established as an agency within the Office of Management and Budget the Office of Federal Procurement Policy and mandated that the institution provide guidance and direction in areas involving the development and application of procurement policy. Charged with duties such as the prescription of policies, regulations, forms, and procedures, the Office of Federal Procurement Policy was given major responsibility to shape the acquisition environment during a critical time in its evolution. The six administrative functions assigned to the Administrator of the Office of Federal Procurement Policy illustrate the significant impact the establishment of this office has had on government procurement policy:

1. Establishing a system of coordinated uniform procurement regulations for executive agencies;
2. Establishing criteria and procedures for an effective method of soliciting the viewpoints of interested parties in the development of procurement policies;
3. Monitoring and revising policies, regulations, procedures, and forms concerning reliance on the private sector to provide needed property and services;
4. Promoting and conducting research in procurement policies, regulations, procedures, and forms;
5. Establishing a system for collecting and developing procurement data; and
6. Recommending programs for recruitment, training, development, and performance evaluation of procurement personnel. (Office of Federal Procurement Policy Act, 1974)

The first of these functions gave the Office of Federal Procurement Policy the authority to develop the most influential body of regulations regarding federal procurement policy. Codified in Title 48 of the Code of Federal Regulations, the Federal Acquisition Regulation, or FAR, serves as the primary source of regulations in the federal acquisition system. Applicable to virtually every government agency, the FAR was promulgated in 1984 in an effort to create a "uniform set of policies and procedures" and decrease the level of inconsistency that had thus far existed among various agencies (FAR 1.101). Divided into fifty-three numbered parts, the FAR is organized into eight lettered subchapters, which are each then divided into subparts, sections, subsections, and subsequent divisions. The FAR's various subchapters (General, Competition and Acquisition Planning, Contracting Methods and Contract Types, Socioeconomic Programs, General Contracting Requirements, Special Categories of Contracting, Contract Management, and Clauses and Forms) contain provisions regarding such topics as Part 3: "Improper Business Practices and Personal Conflicts of Interest;" Part 13: "Simplified Acquisition Procedures;" Part 14: "Sealed Bidding;" and Part 15: Contracting by Negotiation." Though government agencies are allowed to develop supplements to the FAR, no provision within a supplement may contradict the terms and conditions set forth with the bounds of the FAR. Here again the government makes an effort to implement measures to increase economy, efficiency, and ethicality. Even through its statements of vision for the U.S. acquisition system as they are laid out in the Federal Acquisition Regulation, the government maintains its emphasis on minimizing operating costs, fulfilling public policy objectives, and conducting business with integrity, fairness, and openness (FAR 1.102(b)).

James Slater, Defendant-Appellant v. United States of America, Appellee

United States Court of Appeals for the First Circuit

562 F.2d 58. Dec. 22, 1976

Although many of the federal government's actions in pursuit of economy, efficiency, and ethicality in the 1970s were meant to be more generalized in order to allow for greater extension of use, in some cases, the generalities built into the laws prohibiting certain types of ethical violations did become a point of contention in the judicial branch when a singular set of circumstances once again raised the familiar question of legislative intent. In a 1969 agreement with the City of Boston, the federal government agreed to pay for one hundred percent of the grants and eighty percent of the administration costs for a new Model Cities program, to be run by the City of Boston in an effort to help make more grants available to low-income homeowners who wished to repair their homes (42 U.S.C. § 3301). The program necessitated that someone be in charge of inspecting the work of contractors hired for repairs, and in this case, that individual was James Slater. Slater was given various responsibilities, and he had the authority to stop work on a project if he was unsatisfied with the work being performed. He also had control over the issuance of progress payments, which, if delayed significantly, could seriously impact a contractor, and he had the power to make it difficult for contractors to get further jobs under the Model Cities program if he wished to do so. At a certain point in August of 1971, the Model Cities administration had agreed to pay a contractor $5,000 for repair work on a home. Slater took the contractor to the site and inquired as to whether the work could perhaps be completed for $4,500 and the remaining $500 given to Slater as a kickback. The contractor agreed and paid Slater $300 at the time of the first progress payment. Slater was subsequently convicted of two counts of conspiring to defraud the United States under 18 U.S.C. § 371 and violating the Anti-Kickback Act under 18 U.S.C. § 874. He appealed both convictions to the Court of Appeals, with the arguments that the Anti-Kickback Act is inapplicable, and that even if it is applicable, that the two statutes contradict one another and thus he cannot be convicted on both.

The court thoroughly examined the breadth of the Anti-Kickback Act, and found that its generalities, though useful in allowing for the prosecution of those would exploit legal loopholes, do demand a close inspection of who should be covered under the act as is judged by original legislative intent. Because Slater never actually had an employment relationship with the federal government and was technically an independent contractor, he was, thus, not considered covered under the Anti-Kickback Act's mandates. Once the court had stricken the count relating to the Anti-Kickback Act violation, Slater's complaint about conflicting convictions was of negligible merit, though the court does take the time to recognize the unique scope of the Anti-Kickback Act and the potential it may have to contradict some other piece of legislation in a set of hypothetical circumstances. On December 22, 1976, the Court of Appeals vacated Slater's sentence. The original sentence was imposed for both counts together, and as the Court of Appeals could not discern the weight given to each count at sentencing, it felt compelled to vacate and remand for resentencing under the only remaining conviction, which was that for conspiracy to commit bribery under 18 U.S.C. § 371. This case is significant in that it represents the dilemma that can arise when the Congressional intent behind an article of legislation is questionable or open to interpretation, as some would argue that it is when such a broad statute as the Anti-Kickback Act is enacted with deliberate generalities in place.

Integrity and Efficiency in Federal Programs

Executive Orders 12301, 12625, and 12805

Mar. 26, 1981; Jan. 27, 1988; and May 11, 1992

On March 26, 1981, President Reagan signed into law Executive Order 12301, establishing as an interagency committee the President's Council on Integrity and Efficiency (PCIE). The order, in keeping with what was rapidly becoming the federal government's mantra, was an attempt to prevent and detect fraud, waste, and abuse in government programs and operations, and thus the order listed several specific functions to be carried out by council members. Firstly, the council was charged with the development of plans for coordinated activities spanning the entire breadth of federal agencies, and ensuring that those activities be directed at the problems of fraud and waste in government systems. Next, the order required that the council develop coordinated relationships between federal, state, and local government agencies, as well as nongovernmental entities so that there may be cooperation with respect to the promotion of economy and efficiency. Furthermore, the order mandated the development of standards for the management and operation of investigator-general-type actions, and required that the council establish policies to "ensure the development of a corps of well-trained and highly skilled auditors and investigators" (Woolley, 2010). The interagency audit and investigation programs that result from this initiative were directed to target problems with fraud, waste, and abuse that were outside the capability or jurisdiction of a single government agency with efficiency and effectiveness, which indicate that this order is very much a reaction to the sentiments of other legislative and judicial efforts of the 1970s and 1980s. Through this executive order, the council was charged with the implementation of the many coordinated plans, standards, and policies that they may have the power to conduct and supervise government audits and investigations and that, as a foremost concern, they "promote economy, efficiency, and effectiveness in the administration of programs and operations of the [g]overnment, as well as to detect fraud and abuse in such programs and operations" (Executive Order 12301, 1981). (Woolley, 2010)

However, the provisions of this order did not even remain in effect for the duration of Reagan's Presidency, for on January 27, 1988, he signed into law Executive Order 12625, also entitled "Integrity and Efficiency in Federal Programs," thus revoking Executive Order 12301.

Executive Order 12625's changes to Executive Order 12301 included such alterations as the inclusion of the Deputy Director of the Office of Personnel Management in place of the Director, and the Associate Attorney General in place of the Deputy Attorney General. Other members of the council, such as the designee of the Secretary of Defense and the designee of the Director of the United States International Development Cooperation Agency were deleted from the order's list of required members, and others, such as the Director of the Office of Government Ethics and the Special Counsel of the Merit Systems Protections Board were added to the group. Other significant changes included the increased emphasis on the "preeminent" role the Department of Justice plays in the government's struggle against ethical violations and the misuse of government resources, as well as the specific mention of law enforcement and litigation as pertains to the functions of the council. (Woolley, 2010)

Yet, again, the order did not stand in effect for long. On May 11, 1992, President H. W. Bush signed into law the third "Integrity and Efficiency in Federal Programs" order, numbered Executive Order 12805. This order instituted minor changes in the President's Council for Integrity and Efficiency membership as well, such as adding the Vice Chairperson of the Executive Council on Integrity and Efficiency as a position, as well as seats for the Controller of the Office of Federal Financial Management, the Associate Deputy Director for Investigations of the Federal Bureau of Investigations (in place of the Executive Assistant Director of Investigations), and the Special Counsel of the Office of Special Counsel (in place of the Special Counsel of the Merit Systems Protections Board). More significantly, however, the order not only reestablished the President's Council on Integrity and Efficiency, but also established a new inter-entity committee called the Executive Council on Integrity and Efficiency (ECIE), which included many of the same members as hold positions on the President's Council on Integrity and Efficiency. The executive order maintained the position of the first two orders in that it charged the councils with the identification and analysis of areas of weakness in the federal government's operations that leave the United States vulnerable to fraud, waste, and mismanagement of resources. The councils were also charged with the promotion of economy and efficiency both in ensuring compliance in others and in conducting their own activities. The role of audits, investigations, and the Department of Justice in enforcement of legal provisions for preventing government fraud and abuse is again stated to be of critical importance, indicating the government's recognition that in order to increase efficiency, violations must be detected and prosecuted. With this order, it was mandated that individuals serving on the councils adhere to the professional standards developed by the councils and participate in their activities, a requirement which seems to indicate that this responsibility had not heretofore been performed satisfactorily. Moreover, the order states that the councils may not diminish or interfere with the scope of authority and responsibility of other agencies, indicating that the level of oversight authority allowed the President's Council on Integrity and Efficiency in the past created conflicts among governmental agencies. (Woolley, 2010)

Taken as a whole, the three orders on "Integrity and Efficiency in Federal Programs" comprise a decade's worth of efforts at curbing fraud, waste, and abuse within the federal government's programs and operations through the promotion of economy and efficiency at the interagency level. The measures taken by these councils mark a point at which the public demand for active, investigative oversight reached new heights, and so, though many of the changes from one order to another are minor, they are important as representations of the national pressures to continually improve the government's system of detecting, preventing, and prosecuting fraud, waste, and abuse in government programs and operations.

Competition in Contracting Act

Public Law 98-369

July 18, 1984

Codified in the United States Code in sections of Titles 10, 31, 40 and 41, the Competition in Contracting Act of 1984, or CICA, was another attempt at fairness on a national level, as it was intended to level the playing field among federal government contractors, ensuring that all received equal opportunity to do business with the United States government. The legislation required that contracts be awarded only through "full and open competition through the use of competitive procedures" unless otherwise authorized by law (Manuel, 2009, ii). There are situations in which the law permitted contracts to be awarded without the use of "full and open competition," in such circumstances in which approval had been obtained through submission of justification and approval documents and there existed:

1. Only one responsible source and no other supplies and services will satisfy agency requirements;
2. Unusual and compelling urgency;
3. Industrial mobilization; engineering, developmental, or research capability; or expert services;
4. International agreement;
5. Authorized or required by statute;
6. National security [concerns]; or
7. Public interest. (FAR 6.302-1-7; .10 U.S.C. § 2304(c)(1)-(7); 41 U.S.C. § 253(c)(1)-(7).)

The Competition in Contracting Act also provided for special simplified procedures for micropurchases, purchases above the micropurchase threshold but below the simplified acquisition threshold, and purchases of commercial items whose prices fall between the simplified acquisition threshold and $5.5 million (in most cases). The legislation was passed based on several assumptions about the benefits the government would reap from increased competition in contracting, with many of those benefits pertaining to the reduction of fraud and waste in the acquisition system. Proponents of the act believed that increased competition would force agencies to use a wider variety of contractors, which would decrease the number of the blatantly unethical collusive agreements existing in an acquisition system that exhibits a tolerance for preferential treatment for certain contractors. Further support for the act was based on the reasoning that competition promotes accountability, as contracts would be awarded based solely on the merits, and the competitive environment is a positive force in ensuring the public that tax dollars are not being wasted on elevated contract prices. It is this pressure to maintain integrity in the expenditure of public funds that drove much of the ethics and procurement reform during this period. (Manuel, 2009, 1-19)

President's Commission on Federal Ethics Law Reform

Executive Order 12668

Jan. 25, 1989

On January 25, 1989, President H. W. Bush signed the "President's Commission on Federal Ethics Law Reform," deemed Executive Order 12668. Under this order, a commission was established to review federal ethics laws, past executive orders, and current policies and then make recommendations as to the legislative, administrative, and other reforms deemed necessary to ensure public confidence in the integrity of the system and of public officials and employees. As a result of this comprehensive review, the commission submitted its report in March of 1989, entitled "To Serve with Honor: Report of the President's Commission on Federal Ethics Law Reform." Recommendations varied across such topics as employment and post-employment issues, financial disclosure, remedies and enforcement mechanisms, and the structure of federal ethics regulation. The study was conducted in keeping with several key principles, all of which maintain the same concern over integrity and efficiency that is so pervasive within the realm of federal ethics law:

1. Ethical standards must be exacting enough to ensure that public officials act with the utmost integrity and fulfill the public's confidence in them;
2. Standards must be fair and objective;
3. Standards must be equitable across all three branches of the Federal Government; and
4. Standards must not be so unreasonably restrictive that they discourage able citizens from entering public service. (Gilman, 1995)

This executive order, like other passed around the same time, reflects the government's efforts at becoming more responsible and responsive, holding to higher standards the individuals who choose to serve as public officials or public employees. This order established reform in such a way that was not only in keeping with past efforts at improving the government's methods of conducting transactions, but also a foray into developing a performance-driven system that would have a significant effect on the acquisition environment's policies and procedures in future years.

Principles of Ethical Conduct for Government Officers and Employees

Executive Order 12674

Apr. 12, 1989

Shortly thereafter, Executive Order 12674 was signed on April 12, 1989, by President H. W. Bush, directing the Office of Government Ethics to develop a “single, uniform, and comprehensive set of ethical standards” for the executive branch’s officers and employees (Gilman, 1995). Due partially to the recommendations of the President’s Commission on Federal Ethics Law Reform, the Office of Government Ethics issued its final rule promulgating fourteen standards of conduct for executive branch employees in August of 1992, with the date of effectiveness some months later on February 3, 1993. Codified in Part 2635 of Title 5 of the Code of Federal Regulations, the rules were based on previous concepts of appropriate standards for ethical behavior in government, but attempted to improve upon the previous standards by consolidating them into a single set for the executive branch rather than separating them by agency. Before the consolidated standards took effect, each agency still followed its own standards based on a model rule promulgated by the Office of Personnel Management in 1965. The new, comprehensive standards utilize a statement of general principles found in Executive Order 12674 and focus the individual standards on the topics of gifts, conflicting financial interests, impartiality, employment-seeking, misuse of position, and outside activities. The crux of the executive order and the standards of ethical conduct that resulted is the government’s emphasis on a public trust as a mandate of public office, a concept that has had numerous applications to case law, and one that has endured within the U.S. acquisition system. Following the lead of the executive order, the Department of Defense developed the Joint Ethics Regulation, or JER, which serves as the “single source of standards of ethical conduct and ethics guidance, including direction in the areas of financial and employment disclosure systems, post-employment rules, enforcement, and training" (JER 1-100). The promulgation of the JER in 1993 marked a significant step toward creating a more comprehensive set of ethical regulations and a clearer statement regarding the priority the federal government places on ethical compliance. (Gilman, 1995)

Ethics Reform Act

Public Law 101-194

Nov. 30, 1989

Signed into law by President George H. W. Bush on November 30, 1989, the Ethics Reform Act of 1989 was passed largely as a result of the conclusions and Recommendations of the President's Commission on Federal Ethics Law Reform and the report of the House Bipartisan Ethics Task Force. The act was intended to strengthen ethical standards and implement key reforms, with principal provisions to include such terms as the following: "the extension of post-employment 'revolving door' restrictions to the legislative branch; a ban on receipt of honoraria by Federal employees (except the Senate); limitations on outside earned income for higher-salaried, noncareer employees in all branches; increased financial disclosure; creation of conflict-of-interest rules for legislative branch staff; and limitations on gifts and travel" (Woolley, 2010). President Bush emphasized his focus on reasonable specificity in the construction of the act, with the intention that this exactness help ensure that all public officials act in manner that warrants the public's confidence, indicating a national concern that government agencies are all too prone to fraud and waste. The President also cited his desire for fairness and objectivity, but also emphasized the importance of using common sense in ethical matters and applying the law equally across all branches of the government. This is completely consistent with the concerns that motivate so much of the legislation passed in the preceding decade, which centered on improving efficiency through decreased abuse in the system. (Woolley, 2010)

The act made further strides in preventing unethical behavior in government transactions by amending the federal conflict-of-interest statutes and prohibiting officers and employees of all three branches from soliciting or accepting gifts from unauthorized sources. The act also authorized the supervisory ethics office in each branch of the government to issue regulations to implement the different provisions and terms, and gave executive branch agencies the authorization to accept payment from non-federal sources for certain travel expenses. Also, the act set certain limits on the amount of outside earned income allowable by law and imposed restrictions on employment terms for covered senior officials in the executive, legislative, and judicial branches of government. Though a public financial disclosure system was established government-wide in 1978 under the Ethics in Government Act, the Ethics Reform Act provided for an improved system of financial disclosure as well. The system was implemented to bring more transparency into the system so that the financial interests of public officials would be subject to more oversight, identifying potential conflicts-of-interest before they become problematic, allowing remedies to be developed in advance of any real detriment to the public. This line of thinking was partially a response to the myriad of scandals in government that occurred in the 1970s, beginning most notably with that of Watergate. The 1978 Ethics in Government Act established the Office of Government Ethics as a part of the Office of Personnel Management, and charged the new office with providing leadership and direction for the ethics program within the executive branch. The act also strengthened post-employment restrictions on former executive branch officials, hedging against potential conflicts of interest and putting in place stronger legislation for the prevention of ethical violations. The Ethics Reform Act of 1989 was also brought about by two other 1978 acts, the Inspector General Act and the Civil Service Reform Act, both of which enacted important ethics-related provisions. The Inspector General Act established Offices of Inspector General within certain executive branch departments and agencies and gave those institutions the responsibility and autonomy necessary to detect and prevent fraud, waste, and mismanagement within the federal government. The Civil Service Reform Act established the Merit Systems Protection Board, which was charged with the oversight of executive branch personnel practices as well as the integrity of the federal merit systems. The legislation also included significant provisions regarding the treatment of those who make lawful disclosures of abuse or mismanagement and enlarged the functions and authorities of the Merit Systems Protection Board's Office of Special Counsel to deal with the new responsibilities; subsequent acts such as the Whistleblower Protection Act of 1989 instituted further protections for similar situations. Other legislation passed during the same time period, including the Federal Managers' Financial Integrity Act of 1982, focused on internal and administrative controls, more effective auditing measures, and increased efficiency, all with central concerns of curbing unnecessary costs and decreasing the size of individual budgets. The Office of Government Ethics Reauthorization Act of 1988 marks a significant point in ethics legislation, for with this legislation, the Office of Government Ethics was separated from the umbrella of the Office of Personnel Management, establishing it as a separate executive agency in order to ensure the effectiveness of the ethics program within the executive branch of the federal government as well as to clarify the mandate of the Office of Government Ethics and increase the agency's stature, independence, and effectiveness. Also in that same year, Congress passed the Office of Federal Procurement Policy Act Amendments of 1988, which sought to increase integrity in acquisitions. The procurement provisions dealt with the areas of post-employment restrictions, the seeking of employment, gratuities, and information disclosure, and the act specifically designated that, excepting the case of post-employment restrictions, the provisions extend to not only officers and employees, but also contractors, subcontractors, consultants, advisors, and experts who may act on behalf of or provide advice to an agency regarding an agency procurement. This clearly relates back to the issue of delineation between what does and does not constitute a duty to act with the responsibility of a public official, which is a common point of contention in procurement fraud cases. (Gilman, 1995)

Federal Acquisition Streamlining Act

Public Law 103-355

Oct. 13, 1994

Further legislation continued to promote the government's philosophy of cost-reduction and greater effectiveness among the agencies of the executive branch. Signed into law on October 13, 1994 by President Clinton, the Federal Acquisition Streamlining Act (FASA) was intended to eliminate some of the waste in the acquisition system through a series of new regulations implemented to facilitate the procurement of commercial items. The government's preference for commercial items is well-established, as is the positive impact that increased use of simplified acquisition procedures has on contract costs. The Federal Acquisition Streamlining Act responded to the government's drive to reduce costs and curb waste, altering contemporary legislation in several primary ways. First, FASA established that a contract must not only fall short of the simplified acquisition threshold of $100,000 but must also receive the correct authorization to implement simplified acquisition procedures. Such authorization was to depend upon the procuring agency's implementation of the Federal Acquisition Computer Network, or FACNET, the usage of which determined where the acquisition must be publicized and to which thresholds the contracting agency must adhere. The legislation allowed for greater freedom for contracting officers in that it allowed for the use of new approaches for the awarding of contracts using simplified acquisition procedure, opening up FAR Parts 14, "Sealed Bidding," and Part 15, "Contracting by Negotiation," as potential avenues for adaptation. Previously, the simplified acquisition procedures outlined in Part 13 were the only ones available for use, so this development indicates a willingness to loosen restrictions in order to allow for expedited and abbreviated acquisitions. Furthermore, FASA established that acquisitions falling below the simplified acquisition threshold of $100,000 but above the micro-purchase threshold of $2,500 be reserved for small businesses, excepting certain sets of circumstances involving such situations as arise with required sources of supply or sole source procurements. Also, FASA abolished the rule that allowed the use of small business, small purchase set-asides for contracts awarded to small non-manufacturers for the sale of domestically-produced or manufactured products. The act further instituted regulations requiring that acquisitions priced between the micro-purchase threshold and the simplified acquisition threshold be reserved for small businesses, as well as mandating that the products must be furnished by a small business manufacturer in all cases except those where the Small Business Administration grants a special waiver of the requirement. (United States Department of Labor)

Implementation of certain FASA requirements, such as those concerning the authorization to use simplified acquisition procedures, was not as effective as the legislation's drafters had hoped, as is evinced by a Letter Report of the General Accounting Office from January of 1997, just over two years after FASA was signed into law. The report, entitled, "Acquisition Reform: Obstacles to Implementing the Federal Acquisition Computer Network," relays the findings of the Government Accountability Office pertaining to the government's progress in implementing FACNET for use in procurements across all agencies. The report concluded that the difficulties of doing business through the FACNET system have overshadowed the cost-curbing benefits originally expected to result from the new system, and alleged that the approach to the system, which was supposed to facilitate lower prices and better access to vendors, was not correctly synced with the most current cost-effective technologies and buying practices. Individual agencies also conducted analyses of the effectiveness of FACNET in reaching its goals for cost reduction and alignment with simplified acquisition policies and procedures, which reached the conclusion that the use of FACNET for contracts priced at or below a $25,000 threshold often resulted in a need for greater time and resources than if traditional simplified purchasing methods had been employed, to the direct contradiction of the intent of the Federal Acquisition Streamlining Act. The Federal Acquisition Streamlining Act required that the implementation of the FACNET system be concentrated on competitive contract awards, a mandate that necessitated the exchange of information with multiple vendors with whose reputations the contracting agency may or may not be well-acquainted. This brings up many varied concerns regarding the sharing of potentially sensitive information, especially since the GAO concluded that the majority of contracts utilizing FACNET under FASA at the time of the January 1997 report's release were awarded through the Department of Defense. According to this GAO letter report, Department of Defense contracts accounted for about eighty percent of the number and value of the contracting actions surveyed for the study, which covered 18 federal agencies and accounted for about ninety percent of all federal acquisitions priced at or below $100,000 and reported to the Federal Procurement Data System when the study was conducted in the 1995 fiscal year. According to the letter report, “[f]ederal officials have stated that FASA's requirement to focus FACNET's implementation principally on competitive contract awards . . . may not have been a good approach and has contributed significantly to FACNET's problems,” which clearly illustrates the problems that arose and detrimental effects that resulted from certain of FASA’s requirements. (General Accounting Office, 1997)

Nevertheless, FASA marks a significant point in the government’s efforts to prevent waste in federal procurement and shows the government’s acute awareness of the enormous problem unethical behavior presents in the U.S. acquisition environment. Without the development of this legislation, federal acquisitions would not be able to utilize many of the methods of procurement that are so essential to conducting business in the public sector today.

United States of America, Plaintiff-Appellee v. Tou Hang, Defendant-Appellant

United States Court of Appeals for the Eighth Circuit

75 F.3d 1275. Feb. 7, 1996

One such example of the extent to which ethical breaches penetrated government programs and operations can be found in the case of *United States v. Hang.* In a 1996 decision arising out of the Eighth Circuit, the Court of Appeals affirmed the conviction and sentence handed an eligibility technician for the Minneapolis Public Housing Authority named Tou Hang, who was, in September of 1994, indicted for three counts of accepting a bribe as a public official in direct violation of 18 U.S.C. § 201(b)(2)(A). Hang worked for the Minneapolis Public Housing Authority, an “independent private corporation organized under Minnesota law and established for the purpose of administering federal programs" from January of 1985 until April of 1993, and though this did not technically classify Hang as an employee of the federal government, his salary was paid using largely federal money as virtually all the housing authority's budget was comprised of federal funds [75 F3d 1275 (8th Cir. 1994)]. Like other public housing authorities, Hang's employer was responsible for implementation of the Federal Low Income Housing Program, the purpose of which is to provide federally subsidized housing to low-income families; the conduction of these operations necessitates that housing authorities comply with strict regulations, including mandatory budget and expense approval, set forth by the United States Department of Housing and Urban Development, or "HUD" [75 F3d 1275 (8th Cir. 1994)]. Hang's position as an eligibility technician required him to determine whether the individuals who applied for the federally subsidized housing opportunities were eligible according to federally imposed criteria and if they qualified for any federal or local housing preferences, allowing for more desirable placement on the waiting list. Hang screened applications, confirmed eligibility, and constructed a waiting list, which was typically quite long. His salary and performance reviews were taken care of by local employees of the housing authority, not the Department of Housing and Urban Development, a fact which provided the basis for a critical claim of Hang's appeal.

The district court case against Hang alleged that the Laotian native used his bilingual skills to elicit bribes from Southeast Asian immigrants who had applied for housing through the Minneapolis Public Housing Authority. Hang had apparently communicated to these individuals that it was necessary to pay him a bribe in order to secure HUD housing. The government alleged that on three separate occasions, as represented by the three separate counts of the indictment, Hang accepted a monetary bribe from an Asian individual in exchange for the promise of an accelerated progression through the application process. The district court convicted Hang on all three counts and sentenced him to three concurrent thirty-three month terms of imprisonment, which amounted to the lowest possible prison term allowed by relevant legislation. The term was calculated by adjusting the base offense level according to the value of the benefit conferred on the individuals from whom Hang elicited bribes, but was also lengthened by a sentencing enhancement he earned for obstruction of justice based on evidence that Hang's friends and associates engaged in considerable witness intimidation on his behalf [75 F3d 1275 (8th Cir. 1994)]. Hang's contentions upon appeal hinged on two separate theories, one of which is significantly more germane and has greater implications for the interpretation of 18 U.S.C. § 201.

The less relevant contention deals with the district court's decision to deny Hang's motion requesting the issuance of several subpoenas for records regarding the mental health and medical records of witnesses for the prosecution. The Court of Appeals found that the request was a mere "fishing expedition" and did not merit the intrusion into the personal information of the witnesses, which left Hang without the evidence he might have used to impeach the credibility of the witnesses against him. [75 F3d 1275 (8th Cir. 1994)]

More importantly, Hang claims that the issue is a jurisdictional one, for as an employee of the Minneapolis Public Housing Authority, Hang contended that he was not subject to the same constraints on ethical behavior as an employee of the federal government. The Court of Appeals found Hang's claims that he was a low-level official without the authority to act on behalf of the government to be without sufficient merit. To help reach this conclusion, the Court relied on the Supreme Court's 1984 decision in *Dixson v. United States* to determine that the Congressional intent underlying 18 U.S.C. § 201 was to "enact a broadly applicable federal bribery statute" that should apply to all those who hold a position of public trust [465 U.S. 482, 104 S.Ct. 1172, 79 L.Ed.2d 458 (1984); 75 F3d 1275 (8th Cir. 1994)]. This indicates a willingness to allow for reasonably broad interpretation of legislation enacted to reduce the negative impacts of ethical transgressions in government procurement, and illustrates the desire of the federal government to apply federal ethical standards to private citizens when in the best interest of the United States to do so. In 1999, *United States v. Hang* would serve as a precedent in *United States v. Kenney*, and along with other cases featuring similar conclusions, *United States v. Hang* helps to further the understanding that one need not necessarily be an employee of the federal government to be subject to the government's requirements for ethical behavior [75 F3d 1275 (8th Cir. 1994); [185 F.2d 1217 (11th Cir. 1999)].

Federal Acquisition Reform Act

Public Law 104-106

Feb. 10, 1996

Further reforms arrived on February 10, 1996, when President Clinton signed into law Public Law 104-106, the National Defense Authorization Act for Fiscal Year 1996, included in which was the Federal Acquisition Reform Act of 1996, or FARA. This legislation represented government efforts to restructure the acquisition system into a more efficient system in which procurements could be conducted fairly and without bias. The law was thus intended to have a major impact on the way the government acquires goods and services, and did so in many ways. One important provision of FARA pertains to the policy of full and open competition that the federal government had long since emphasized in its procurements. The terms do not alter those of the Competition in Contracting Act, but instead merely state that the Federal Acquisition

Regulation will be responsible for ensuring that this requirement to obtain full and open competition in acquisitions is implemented in a way “consistent with the need to efficiently fulfill the Government's requirements” (FARA Title XLI § 4101, 1996). Though this provision would allow for complete openness in the marketplace, many contractors feared that by emphasizing the necessity that all contracts be awarded to support the goal of government-wide efficiency, small businesses who may not be able to compete in terms of price or scheduling may be left out of certain aspects of the acquisition system where there are significant benefits to contracting with larger organizations. Further provisions of FARA detail procedures for ensuring fairness and efficiency in determining the competitive range and rating proposals under consideration, as well as provide details regarding pre-award debriefings and the terms under which an offeror excluded from the competitive range may request such a debriefing. Also, FARA details an exception to the requirement for the submission of certified cost or pricing data under the Truth in Negotiations Act in the case of commercial items, but the act does allow the contractor to reserve the right to require the submission of such information other than certified cost or pricing data to the extent necessary for the determination of price reasonableness, without the contractor is not eligible to receive the award. The concept of contracting for commercial items is again addressed in the next section of the act, where FARA authorizes the FAR to allow for the application of simplified acquisition procedures for acquisitions priced above the simplified acquisition threshold but below $5,000,000, if the contracting officer can reasonable expect, based on the nature of the property or services sought and the market research conducted, that offers will include none but commercial items (FARA Title XLI § 4202, 1996). The Federal Acquisition Reform Act thus served as yet another illustration of the federal government’s desire to increase efficiency and effectiveness while still promoting fairness within the system. The government's drive toward reform in the federal acquisition environment is one that has persisted through numerous efforts at increased simplicity and integrity. (eGov Strategies, 1996)

United States of America, Plaintiff-Appellee v. James Lippert, Defendant-Appellant

United States Court of Appeals for the Eighth Circuit

148 F.3d 974. Jul. 2, 1998

This drive toward acquisition reform appears also in the continued application of the Anti-Kickback Act, which allows the United States to attempt to recover some portion of the losses it incurs as a result of the ethical violations the legislation also strives to prevent. For those transgressions that do occur in the public sector, the penalties for engaging in unethical activities such as bribery and kickbacks are clearly defined in the Anti-Kickback Act. There are two methods by which the government seeks to recoup its losses, both civil and criminal. In some instances, an individual convicted of anti-kickback violations questions the right of the government to invoke the civil and criminal penalties prescribed by the statute. In one such case arising out of the Court of Appeals for the Eighth Circuit, an individual named James Lippert brought forth this very issue. Lippert had been the company president of C.B. Forms, L.P., a company that was under contract to print and supply forms to the United States government agency the Commodity Credit Corporation, or CCC. While employed at C.B. Forms, Lippert was proven to have received offers of kickbacks from certain shipping contractors, who then submitted their invoices to C.B. Forms with the kickback-inflated prices already factored into the subcontract price. The cost was subsequently transferred to the United States when C.B. Forms submitted its inflated invoice for payment, as C.B. Forms was reimbursed for shipping costs under the terms of the contract. The actual kickbacks were then paid to C.B. Forms, and in some cases, kickbacks were paid to Lippert himself. The scheme unraveled when the government learned that one subcontractor was inflating his shipping rates charged to Lippert's company so that other companies were paying up to thirty percent less than C.B. Forms. The sum totals of bribes paid amounted to $176,411.80, of which C.B. Forms received $140,114.70 and Lippert received $36,297.10 [148 F.3d 974 (8th Cir. 1998)].

In 1993 Lippert plead guilty to a single count of "knowingly and willfully soliciting and accepting kickbacks in violation of the Anti-Kickback Act of 1986," which earned him a criminal fine of $5,000 and an eighteen-month prison sentence [148 F.3d 974 (8th Cir. 1998)]. Upon his official criminal conviction, the district court held a sentencing hearing, the purpose of which was to determine the amount of loss to the United States, and the result of which was an estimate of between $200,000 and $350,000 [148 F.3d 974 (8th Cir. 1998); U.S.S.G. §§ 2B4.1(b)(1),2F1.1]. The court arrived at their determination based on several factors, one of which was the testimony of a procurement officer who asserted that the kickbacks resulted in the ability of C.B. Forms to lower their bid, knowing that they would make up any losses with the reimbursable shipping charges [148 F.3d 974 (8th Cir. 1998)]. In September of 1994, the United States filed a claim to seek civil penalties under the Anti-Kickback Act and the False Claims Act, as well as damages for common law fraud [148 F.3d 974 (8th Cir. 1998)]. Civil action was also sought against C.B. Forms, but the government claims were dismissed when the company filed for bankruptcy protection.

The court found for the government as to the application of the Anti-Kickback Act, reasoning that one of the goals of the legislation was to help recover funds lost through kickback schemes, as was the case with Lippert and C.B. Forms. The court did not, however, feel that it would be appropriate to pursue both the Anti-Kickback Act and the False Claims Act as sources of financial remedy because the two would create a legal redundancy with regards to recovery of funds. The district court gave a summary judgment due to the defendant's conviction under a guilty plea, and at that time, the court "advised the government that it was entitled to immediate judgment as a matter of law under the Anti-Kickback Act for double the amount of the kickbacks, or $352,823.60, or under the False Claims Act for civil penalties totaling $50,000; alternatively, the government could try its claims for a greater recovery [148 F.3d 974 (8th Cir. 1998)]. Not surprisingly, the government decided upon the $352,823.60 sum, and, also not surprisingly, Lippert appealed to the Court of Appeals.

Lippert's primary contention and complaint in this case was that his rights were violated under both the Double Jeopardy Clause and the Excessive Fines Clause. In making their decision, the Court of Appeals for the Eighth Circuit relied heavily on the Supreme Court decisions of *Hudson v. United States* and *United States v. Bajakajian,* the former of which "protects only against the imposition of multiple criminal punishments for the same offense," and the latter of which expresses a more conflicted view of how to determine whether a fine is to be counted as punitive or remedial under the Anti-Kickback Act and other legislation [118 S.Ct. 488, 139 L.Ed.2d 450 (1997); 148 F.3d 974 (8th Cir. 1998)]. To determine whether the double jeopardy principle applies, the court needed to discern that only an extremely clear element of proof is sufficient when considering whether a civil remedy is so punitive it transforms into a criminal one. In this case, the court determined that no such proof existed and the Anti-Kickback legislation held no disproportionately punitive provisions that would cause the act's civil penalties to be considered criminal. Moreover, the court noted the relative leniency of the district court in sentencing Lippert with only double the kickback cost and not a $10,000 fine for each occurrence of prohibited conduct, a provision of the Anti-Kickback Act which is justly viewed as the most punitive of the civil provisions. In addition to denying his claims of double jeopardy, the Court of Appeals did not agree with Lippert's arguments regarding the imposition of excessive fines, but instead found that the fines to which Lippert was sentenced were not constitutionally excessive but instead mere compensatory remedies.

Lippert's arguments gave the Court of Appeals a valuable opportunity to articulate the standards and boundaries for applying the Anti-Kickback Act and, to some extent, the False Claims Act. Given the enormity of the problem of corruption in government procurement, coupled with the long span of time over which the nation's courts have battled similar issues, bribery and kickback legislation should have evolved to a relatively stable state. However, the ever-evolving acquisition environment continually ensures that the legislation developed by Congress and the opinions composed by the justice system are in need of examination and potential revision, particularly in such a complex and technology-dependent field as acquisitions. Decisions such as that in *United States v. Lippert* thus act as critical measures of evaluation for current legislation and help serve as a benchmark for those in positions of authority and responsibility.

United States of America, Plaintiff-Appellee v. Ronnie Brunson Kenney, Defendant-Appellant

United States Court of Appeals for the Eleventh Circuit

185 F.2d 1217. Aug. 26, 1999

The issue of just who is defined as occupying such positions of authority and responsibility arises again in the case of *United States v. Kenney.* In June 1997, Ronnie Brunson Kenney was named in an indictment filed with the United States District Court for the Panama City Division of the Northern District of Florida. The indictment listed three separate counts of soliciting a bribe as a public official, each of which referenced some form of kickback, gratuity, or bribe. The first count of the indictment referred to a solicitation of a kickback for a contract change regarding substitution of materials, the second referred to a more general promise of favorable treatment made to a contractor in exchange for gratuity payments, and the third referred to a solicited bribe in exchange for a change in contract specifications describing shipment materials. All alleged violations were committed by Kenney during his term as Acquisition Manager on a contract Florida's Tyndall Air Force Base awarded to Starflite Boats. As per the contract, Starflite agreed to provide edge markers on combat zone airfields as a mechanism for illuminating damage as part of the Air Force's runway repair program. While Kenney was operating in a position of apparent authority, he was in fact, not a government employee, but an employee of BDM International, Inc., a large public corporation that was under contract with the United States Air Force to provide systems integration support to supplement Air Force functions. Though his salary was paid by BDM and not the United States Air Force, the funds used were proven at trial to stem directly from receipts of payment from the government in return for the services provided under BDM's contract.

On August 29, 1997, the jury found Kenney guilty of the lesser included offense of soliciting a gratuity under the first and third counts of the indictment, but returned a verdict of not guilty as to the second, less specific, count of the indictment. Kenney filed an appeal with the United States Court of Appeals of the 11th Circuit, in which he alleged errors in the pre-indictment delay and the government's failure to offer sufficient proof of the allegations at indictment, both of which claims were dismissed as without merit by the Court of Appeals. However, the court did agree to debate the merits of Kenney's most critical enumeration of error, whereby he asserted that the district court should not have denied his motion to dismiss as he was not a "public official" as defined by the statute codified in 18 U.S.C. § 201 (c)(1)(B), under which Kenney was convicted by the trial court. This statute states that a "public official" may not "demand, seek or accept anything of value in return for being influenced in an official act" (185 F.2d 1217 11th Cir. 1999). The statute also disallows public officials from seeking, receiving, or accepting anything of value for or because of an official act performed or to be performed, meaning that an official need not accept a gratuity payment or bribe but only conspire to do so in order to violate the statute (185 F.2d 1217 11th Cir. 1999). See 18 U.S.C. § 201 (c)(1)(B). Under 18 U.S.C. § 201(a)(1), the term public official is specifically defined as follows:

> Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency, or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror. (185 F.2d 1217 11th Cir. 1999)

Kenney claimed that his employment by a non-governmental organization classified him as a private citizen rather than a public official, yet the district court agreed with the government's assertion that Kenney occupied a "position of public trust with official federal responsibilities" (185 F.2d 1217 11th Cir. 1999). Although Kenney contended that he was not authorized to alter the contract or bind the government in acquisition matters, the district court relied on the precedents of *United States v. Hang* among others to conclude that a defendant need not have final decisive power as to federal programs or policies, but instead need only to be in "a position of providing information and making recommendations to decision makers as long as the defendant's input is given sufficient weight to influence the outcomes of the decision at issue" (185 F.2d 1217 11th Cir. 1999). Because trial testimony proved that Kenney did hold a position of public trust due to the Air Force's reliance on his advice, the appellate court found sufficient evidence that Kenney's job required him to function as the primary contractor liaison in Starflite's Air Force contract and that he thus possessed some measure of federal responsibility. Kenney's position placed him in the role of technical advisor to the acquisition, and his status as Acquisition Manager demanded that he perform federal duties as well as serve non-governmental functions. Therefore, the appellate court affirmed the denial of Kenney's motion to dismiss on the basis that he was, in fact, acting as a public official at the time of his offenses. Furthermore, the appellate court spent considerable energy debating the validity of the jury instructions given at trial, which, in relevant part, stated that:

> A "public official". . . is any person who acts for or on behalf of the United States, that is, a person who possesses some degree of official responsibility for carrying out a federal program or policy . . . who . . . either (a) makes official governmental decisions . . . or (b) makes recommendations regarding official governmental decisions, or (c) processes or evaluates information for use by others in the making of official governmental decisions . . . . A "public official" need not be an employee of the federal government or of any government at all; a person who acts for or on behalf of the federal government pursuant to a contract or other business relationship can be a "public official". . . . The term . . . thus includes an employee of a private corporation who acts for or on behalf of the

> federal government pursuant to a contract. (Record Excerpt 26 at 10, 185 F.2d 1217 11th Cir. 1999)

Kenney attempted to claim that the instructions were "vague, open-ended, and left the jury no choice but to find him a public official," and thus return a conviction (185 F.2d 1217 11th Cir. 1999). Yet again, the appellate court found for the government and affirmed the findings of the trial court. While this decision was in full agreement with the district court on the meaning of the term "public official," the court of appeals did find the jury instructions somewhat less than precise by the court's own standards (185 F.2d 1217 11th Cir. 1999).

This case illustrates an important point in the development of acquisition culture in the United States. The nation has moved from a system in which contractors maintained distant and egocentric relationships with the government to a more cooperative system in which contractors can collaborate with the government, sharing information and engaging in the co-development of project strategy in an effort to increase quality and productivity. This closing of the gap between the government and the private sector is evident in *United States v. Kenney* in the discussion of the inclusion of contractor employees in the definition of "public official." Cases like these, in which a nongovernmental employee is also held to the ethical standards required of those in government, illustrate just how much the line between public and private can be blurred in a changing acquisition environment.

Commissions, Committees, and Reviews

Throughout the second half of the twentieth century and now into the twenty-first, the federal government has attempted to improve the levels of economy, efficiency, and accountability in various agencies and programs, and a primary catalyst for many of these improvement initiatives has arrived in the form of a federal commission, committee, or review. Named for its chairman, former President Herbert Hoover, the first of the two legendary Hoover Commissions began its work in 1949, and focused its attention on the defense management process, concluding that the rigidity created by the National Security Act of 1947 did not help unify the process as hoped. The commission also concluded that waste and inefficiency were abundantly present in the system, and that the implementation of the more centralized system of control that was so favored in the years directly following World War II was a major contributing factor to that level of inefficiency. Though the commission's reports received widespread support, many of their recommendations were not implemented for years. In 1953 President Eisenhower established the President's Advisory Committee on Government Organization, and assigned as its chairman Nelson Rockefeller. The Rockefeller Committee focused on the need to achieve greater economy and efficiency as well, recommending changes that would produce more "effective DoD planning and civilian control" (Reeves, 1996, 14). Like the Hoover Commission, the Rockefeller Committee found that the Department of Defense, though more centralized and structured, did not achieve the level of unity and cohesiveness that was desired. The Rockefeller Committee recommended the elimination of such entities as the Munitions Board, the Research and Development Board, and the Defense Supply Management Agency and Office of Director of Installations, all to be replaced by six assistant secretaries of defense to act in an advisory capacity to the Secretary. The Rockefeller Commission was largely successful in garnering support for their recommendations, getting approval from both President Eisenhower and Congress to pass Public Law 88-3 in 1953 (Reeves, 1996, 14). However, within mere days of President Eisenhower's approval of the Rockefeller Committee reorganization plans, Congress took its own step toward reform with the establishment of a new Commission on Organization of the Executive Branch, which was again chaired by former President Hoover. While this second Hoover Commission did work toward improving economy and efficiency and preventing fraud, waste, and abuse across the agencies of the executive branch, the majority of the focus was again directed at the Department of Defense, due to the simple fact that the Department of Defense's budget accounted for approximately three-fifths that of the federal government at the time (Reeves, 1996, 14). With a broader Congressional charter than the first Hoover Commission, Hoover II was able to make bolder policy recommendations, such as those that would serve to reduce government direct business operations, and in the case of the Department of Defense, reorganize the arsenal system. With Eisenhower still in the White House, the executive branch mounted a counterassault against this reorganization in the form of increased competition and commercialization in the arsenal system, which served to forestall further action by Congress on that issue. Nonetheless, the second Hoover commission was largely successful in attaining approval for its recommendations, as is evidenced by the DoD Reorganization Act of 1958, in which the government yet again turned its focus toward efficiency, though the commission did not meet their goal of further addressing the management of contemporary acquisition issues. Perhaps one of the most important recommendations of the commission was that regarding the federal government's concern that conflict of interest laws may have a dissuasive impact on private sector employees who might otherwise become qualified candidates for insertion into government service vacancies. Thus, the commission recommended relaxing the conflict of interest laws for certain categories of senior government personnel. The commission believed this recommendation would make great strides in making government service seem like a more acceptable option to many private sector employees, but Congress, rather uncooperatively, denied the recommendation and instead instituted even stricter legislation. (Reeves, 1996, 10-15)

In July of 1969, President Nixon appointed Gilbert Fitzhugh to chair the Blue Ribbon Defense Panel, or what has since become known as the Fitzhugh Commission. The first major study to specifically focus on defense acquisition reform, the Fitzhugh Commission was a systemic evaluation of defense acquisition practices that ultimately concluded the system was plagued by a set of interrelated issues that desperately required the implementation of both organizational and procedural changes (Reeves, 1996, 16). The committee differed notably from the views of past commissions, which favored centralization, and instead found that such centralization and management layering, along with the large span of control enjoyed by the Secretary of Defense, had contributed to major problems with costs, scheduling, and performance. The commission fought many of the defense acquisition business practices instituted under Secretary of Defense Robert McNamera beginning in 1961, all concentrated on the idea of excessive centralization in the Department of Defense. The commission did favor, however, such strategies as the use of flexible acquisition methods, incrementally developing subsystems, professional development for acquisition personnel, multiple decision points for use in program developments, and increased testing during acquisitions (Reeves, 1996, 16). The commission and its recommendations were quite well-received by the Department of Defense at the time, and although the Department (instead of Congress) was given the responsibility for seeing the changes realized, few were actually implemented, leaving the next Blue Ribbon Commission on Defense Management under David Packard to basically repeat the findings of the Fitzhugh Report. With respect to the other executive agencies, procurement issues were investigated beginning in November of 1969 by Congress's Commission on Government Procurement. The commission noted a lack of uniformity among federal agencies and questioned the ability of such a system to provide any suitable measure of efficiency. This commission, like others before it, noted the waves of paperwork that seemed to overwhelm the process and the complicated regulations that seemed to do nothing except get in the way of productivity. The lack of a unified policy meant that, when the need for guidance arose, the Department of Defense dominated that lead. In 1974, Congress implemented the Commission on Government Procurement's recommendation to create the Office of Federal Procurement Policy to establish a single, unified source of guidance to simplify the procurement process. Like the Fitzhugh Commission, the Commission on Government Procurement concluded the following: competitive negotiated contracts should be the preferred approach in comparison to formal advertising, multi-year contracts should be used to greater advantage, acquisition personnel should receive more professional development opportunities, small-purchase and socioeconomic thresholds should be raised, competition should be strongly emphasized in all areas of acquisitions, an independent operational test and evaluation activity should be established, and more authority for program decisions should be delegated. Interestingly, a 1980 study conducted by the Office of Federal Procurement Policy to determine the OFPP's level of success at effectively unifying the federal procurement process determined that there still existed a considerable amount of complexity and confusion. Two years later, a n OFPP follow-on report noted the adversarial relationship that existed between the government and its suppliers, and blamed the oppositional atmosphere on the "cumbersome, costly and frustrating [procurement process that led] to less competition and erosion of the industrial base" and the lack of adequate professional development programs for the professional workforce (Reeves, 1996, 19). The information collected by the OFPP had a dramatic effect on the future of the acquisition environment, beginning with Congress's passage of the Federal Acquisition Regulation System in 1980, through which it intended to reduce and standardize federal procurement regulations. The initial and subsequent OFPP reports, combined with the changes implemented by the new Federal Acquisition Regulation System, were major factors in the passage of the Competition in Contracting Act in 1984 to "encourage greater industry participation in government procurements" (Reeves, 1996, 19). (Reeves, 1996, 16-19)

In 1982, President Reagan attempted to follow through on a campaign promise to reduce "outright fraud" as well as other waste and abuse in the federal budget, lowering costs by two percent. He sought to do this through the establishment of the President's Private Sector Survey on Cost Control, whose chairman position was to be filled by J. Peter Grace. This commission rapidly arrived at the decision that the government could save $424 billion just by engaging in sound business practices, and issued a set of 2, 478 recommendations for the government to consider for implementation, though not one of those recommendations included the elimination of a federal government program. The Grace Commission, like nearly every other such body, noted the need for reform within the Department of Defense, but here, the Grace Commission determined that the government's acquisition functions would be most efficiently coordinated when centralized under a single Under Secretary of Defense for Acquisition, creating a "streamlining approach" that would have much greater influence in the remainder of the 1980s and into the 1990s (Reeves, 1996, 20). While the commission strongly recommended this idea of a consolidated procurement and contract administration agency in the Office of the Secretary of Defense, they met with little Congressional support, due primarily to the fact that the Grace Commission was very vocal about blaming Congress for contributing to the problems in the defense acquisition process. Nevertheless, some of the commission's recommendations, such as "decreasing the use of military specifications, repealing or amending selected socioeconomic laws, and increasing the use of multi-year contracts" proved to be important to the acquisition system long after the commission disbanded, though they went largely unnoticed at the time of issue (Reeves, 1996, 21). (Reeves, 1996, 20-21)

What *did* garner attention was the discovery of instances of contractor fraud within the department of defense. The highly publicized cases involving "$400 hammers, $500 toilet seats, and $700 coffee pots" occurred during an intense period of growth for the Department of Defense, with the DoD's budget growing by forty percent between 1980 and 1985. By time May of 1985 arrived, the Department had 131 investigations pending against 45 of its 100 largest contractors (Reeves, 1996, 21). This startling situation is the partly the result of years of procedural and organizational problems within the Department of Defense and other executive branch agencies, all exaggerated by the rapid growth and expansion of the 1980s. President Reagan attempted to systematically evaluate the DoD in such areas as "defense acquisition, organization and decision-making, Congressional oversight, and the national command structure" through the charter of a new commission under former Secretary of Defense David Packard (Reeves, 1996, 21). This Blue Ribbon Commission on Defense Management focused on developing a model on which to base the defense acquisition system, and they relied heavily on the management solutions set forth in private-sector business books, including "clear command channels, stability, limited reporting requirements, small quality staffs, dialogue with customers (end users), and prototyping and testing" (Reeves, 1996, 21). Like past commissions, such as that chaired by Fitzhugh, their recommendations on reorganization and best practices did not receive widespread support, yet many of the Packard Commission's recommendations were implemented in the next decade. Such recommendations as the creation of an Under Secretary of

Defense for Acquisition; establishment of service acquisition executives; creation of program executive officers; recodification of federal law into a single, consistent, simplified procurement statute; and increased utilization of commercial products through the elimination of military specifications have all had a major impact on the acquisition environment, and were all the result of recommendations made by Presidential and Congressional commissions and committees (Reeves, 1996, 22). Also, as so many of the commissions and committees found fault with the system of professional development for acquisition personnel, Congress finally moved forward to establish the Federal Acquisition Institute in 1993 so that the workforce may not only be improved but maintained as well. The early 1990s brought about heightened tension in Congress about the inefficiencies still lurking in defense procurement processes. As a result, in 1991, Section 800 of the Fiscal Year 1991 DoD Authorization Act directed the Department of Defense to establish the Acquisition Law Advisory Panel. Using a similar pattern to that of the Packard Commission, this panel was intended to conduct a review of the acquisition legislation that governs DoD procedures, processes, and policies and determine whether certain laws should be repealed or amended (Reeves, 1996, 22). The result was an 1,800 page report reviewing approximately 600 different laws, within which the panel recommended such measures as the establishment of simplified acquisition procedures for procurements valued under $100,000, as well as legislation allowing for the Department of Defense to act as a commercial purchaser, new thresholds pertaining to various socioeconomic programs, and the elimination of requirements under the Truth in Negotiation Act that necessitated the submission of cost or pricing data for procurements valued at less than $500,000 (Reeves, 1996, 22).

These recommendations, too, found their way into the national consciousness, particularly within the Clinton Administration's 1993 National Performance Review and the subsequent Federal

Acquisition Streamlining Act of 1994. The 1993 National Performance Review instituted by Vice President Gore came at a critical point in time, for with the end of the Cold War, the threats to U.S. national security changed, and the defense budget decreased by more than 41% from the 1985 peak to the year 1997 (Reeves, 1996, 23). Yet, although the review came at one of the most significant sea changes in the history of the U.S. acquisition environment, many of the recommended changes meant to fundamentally alter and improve the Department of Defense and other programs were, in fact, echoes of the recommendations of earlier committees and commissions. The review concluded that the DoD should adopt businesslike procedures with an emphasis on maintaining the industrial base and increasing the use of commercial item contracting. Like its predecessors, the review also recommended the elimination of military specifications, and the streamlining and simplification of procurement processes whenever possible. The review did have one seemingly original idea in the establishment of defense acquisition pilot programs, which were intended to "test whether or not efficiencies could be achieved from using standard, commercial industrial practices to procure defense goods and services" and enjoyed widespread implementation in 1994 through FASA's authorization of thirteen government-wide pilot programs (Reeves, 1996, 23). (Reeves, 1996, 16-24)

Taken in sum, the commissions, committees, and reviews of the latter half of the twentieth century provide a nearly continuous stream of ultimately similar concerns and conclusions. With a strict focus on promoting economy, efficiency, and effectiveness and reducing fraud, waste, abuse, and misrepresentation in federal government procurement, these groups have all had ideas in common. The differences lie in the Presidential administration in office and body of Congress in session at the time each commission or committee conducted its research and issued its findings. Taking into account the national political and socioeconomic considerations that affect the passage of legislation and the promulgation of regulations, it is clear that many of these recommendations, if properly implemented, would have precluded the need for the prescription of these policies by later commissions.

Prevention of Ethical Violations and Recommendations for Future Action

The U.S. Department of Justice is a primary resource for information about the prevention of fraudulent activities in government procurement. On October 10, 2006, the Assistant Attorney General's Office at the Criminal Division of the Department of Justice released a report entitled "Combating Procurement Fraud: A National Initiative to Increase Prevention and Prosecution of Fraud in the Federal Procurement Process" (United States Department of Justice, 2010). The Department of Justice has charged the National Procurement Fraud Initiative with the "early detection, prevention, and prosecution of procurement fraud" that is inevitably present in the system (United States Department of Justice, 2010, 1). Among the most important goals set for the task force are those that demand increased criminal enforcement in the areas of "ethics and conflict of interest violations, and public corruption associated with procurement fraud," and the focus is to be placed on the training of law enforcement agents and procurement specialists in the areas of fraud detection and investigation (United States Department of Justice, 2010, 1-2). Also, in addition to the Fraud Section of the Civil Division that this National Procurement Fraud Initiative has established to manage the civil recovery aspects of procurement fraud cases, there is a separate Fraud Section of the Criminal Division to manage the criminal side of these cases. There are several key prosecutorial resources that the Department of Justice utilizes in carrying out the tasks of the National Procurement Fraud Initiative. The Criminal Division's Fraud Section is known for its close working relationship to the Department of Defense Inspector

General (DoD-IG), as well as the IG community as a whole. As an active and vital member of the DoD-IG's existing Procurement Fraud Working Group, the Fraud Section helps train investigators on the prevention and detection of procurement fraud. With a multitude of experience dealing with the legal elements of procurement fraud, the Fraud Section often assists United States Attorneys' Offices in the prosecution of their cases. The Department of Justice's Public Integrity Section (PIN) is also a major asset to the Initiative. The Public Integrity Section focuses on public corruption, and has developed a high level of expertise. This section of the Criminal Division is closely affiliated with the Offices of Inspector General (OIGs), and in 2002, the relationship further solidified when the PIN assigned trial attorneys to liaise with each major OIG and advise on prosecutor, evidentiary, and law enforcement matters. The Criminal Division also contains another critical section, the Asset Forfeiture and Money Laundering Section (AFMLS). This section serves to supply seizure warrants to investigators of procurement fraud so that the tasks of the initiative may be carried out quickly and effectively to minimize the loss of taxpayer funds or substitution of inferior goods and services. Perhaps a more critical function of this section lies in its duties regarding the forfeiture remedies available under federal law. The AFMLS works diligently alongside trial attorneys to advise in the prosecution of these procurement fraud cases. The Civil Division's Commercial Litigation Branch, Fraud Section, is the section charged with the recovery of the losses that federal agencies incur as a result of procurement fraud. The Fraud Section works with the United States Attorneys' Offices to enforce the False Claims Act, federal statutes like those condemning the bribery of a public official at 18 U.S.C. § 201, and common law remedies established through judicial precedent. Types of procurement fraud ranging from overcharging and defective pricing under TINA, to quality deficiencies and product substitution, to bribery and corruption of public officials are all enforced by the Fraud Section of the Department of Justice's Civil Division. With the aid of the many investigative agencies with whom all sections work closely, the Civil Division has recovered over three billion dollars in DoD procurement fraud losses since 1986, and continues to add to that figure. (United States Department of Justice, 2010, 1-4)

The National Procurement Fraud Task force has established a series of key goals that it believes will make it more effective and efficient as a combatant of procurement fraud. These priorities are outlined below:

1. Identification and prosecution of viable procurement fraud cases through coordination with United States Attorneys' Offices, IG field Offices, and the regional procurement fraud working groups . . . ;
2. Ensuring adequate resources are available to successfully investigate and prosecute procurement fraud cases;
3. Standardization of "best practices" (*e.g.*, recruitment of sources, consensual calls, and witness interviews);
4. Better coordination between agency auditors and investigators to ensure that red flags and badges of fraud are promptly reported to criminal investigators for follow-up investigation;
5. Better identification and resolution of investigative and coordination issues as they arise in joint cases (*e.g.*, audit support and expanded efforts to share information);
6. Specialized training for OIG agents and auditors on the investigation and prosecution of procurement fraud cases;

7. Examination of existing laws and policies, including conflict of interest laws and voluntary disclosure policies, to determine if they need strengthening or change;
8. Development of strategies to encourage agencies, auditors and contracting officers to refer more cases for criminal and civil prosecution; and
9. Better coordination of targeted civil, regulatory and criminal enforcement actions. (United States Department of Justice, 2010, 5-6)

The above elements are being pursued by the National Procurement Fraud Task Force at present, with many positive outcomes. The methods and strategies used to produce these results are thus advisable as a course of action for any government agency or program that deals with fraud and corruption, as all do at some point in the conduct of their activities. Some of the most effective among the strategies adopted by Task Force participants are as follows:

1. Collaboration between federal agents and government contractors to educate them on effective means for preventing fraud, waste and abuse;
2. Collaboration between special agents and prosecutors at early stages of procurement fraud investigations to ensure successful prosecutions and civil recoveries;
3. Education of government contracting officers, program managers and other agency personnel on issues relating to the detection and prevention of procurement fraud;
4. Placement of agency investigators at major procurement offices to work with agency employees who are directly involved in negotiating government contracts;

5. Use of computer data-mining and other programs to uncover and detect procurement fraud; and

6. Enhanced efforts to detect ethics violations and conflicts of interest by current and former agency officials. (United States Department of Justice, 2010, 6)

With these strategies proven to increase the National Procurement Fraud Task Force's ability to prevent and prosecute procurement fraud, the acquisition community can employ similar measures across the board. As part of the purpose of public prosecutions is to act as a deterrent to the commission of fraudulent activity in federal procurement, increased prosecutorial efficiency brought about by increased communication and collaboration among the Department of Justice and various agencies is key to the prevention of ethical violations in public procurement. Equally important are measures such as training and education, however, and the National Procurement Fraud Initiative represents a recognition of the impact that a well-trained acquisition workforce can have on the acquisition environment's level of ethical compliance.

Another excellent example of an organization committed to the prevention of ethical violations is the Defense Industry Initiative, or DII. The DII was formed in July of 1986 when Jack Welch, the CEO of General Electric, and the CEOs and senior officials of seventeen other defense contractors voluntarily met and created the Defense Industry Initiative on Business Ethics and Conduct, a set of principles that were then adopted by thirty-two major defense contractors, including such industrial titans as The Boeing Company, General Dynamics Company, Lockheed Corporation, McDonnell Douglas Corporation, and Raytheon Company. The DII was established largely in response to the February 1986 Interim Report of the Packard Commission (The President's Blue Ribbon Commission on Defense Management), which noted the high level of fraud, waste, and abuse in the system and called for widespread improvement in the defense industry's level of self-governance. The Packard Commission would serve as a significant source of direction and guidance for the DII, with the organization's principles appearing in the Appendix of the Packard Commission's June 1986 report to the President entitled, "A Quest for Excellence." The original principles have been in use continually since the time of issue, and are outlined below:

1. Have and adhere to written Codes of Conduct;
2. Train employees in those codes;
3. Encourage internal reporting of violations of the Code, within an atmosphere free of fear of retribution;
4. Practice self-governance through the implementation of systems to monitor compliance with federal procurement laws and the adoption of procedures for voluntary disclosure of violations to the appropriate authorities;
5. Share with other firms their best practices in implementing the principles, and participate annually in "Best practices Forums;' and
6. Be accountable to the public. (Defense Industry Initiative on Business Ethics and Conduct, 2010)

The DII explicitly states that "DII members, and the CEOs of every DII company, must abide by DII's core principles," indicating the organization's sincere commitment to ensuring compliance with compliance, and instilling a passion for the prevention of ethical violations within each of its signatory contractors (Defense Industry Initiative on Business Ethics and Conduct, 2010). By becoming a signatory member of the DII, companies are required to affirm the following:

We, the members of the Defense Industry Initiative on Business Ethics & Conduct (DII), affirm our commitment to uphold the highest ethical standards in all our business dealings with the government, as expressed through the following principles:

1. We shall act honestly in all business dealings with the U.S. government, protect taxpayer resources and provide high-quality products and services for the men and women of the U.S. Armed Forces.

2. We shall promote the highest ethical values as expressed in our written codes of business conduct, nurture an ethical culture through communications, training, and other means, and comply with and honor all governing laws and regulations.

3. We shall establish and sustain effective business ethics and compliance programs that reflect our commitment to self-governance, and shall encourage employees to report suspected misconduct, forbid retaliation for such reporting, and ensure the existence of a process for mandatory and voluntary disclosures of violations of relevant laws and regulations.

4. We shall share best practices with respect to business ethics and compliance, and participate in the annual DII Best Practices Forum.

5. We shall be accountable to the public, through regular reporting by DII to Congress and the public. These reports will describe members' efforts to build and sustain a strong culture of business ethics and compliance. (Defense Industry Initiative on Business Ethics and Conduct, 2010)

The DII is significant in that it represents a highly prominent example of private industry taking the steps to implement strict ethics programs within contractors' organizations. This commitment to integrity in government contracting, long before regulations mandated the implementation of such ethics codes and programs, illustrates the potential for increased compliance with ethical standards in the acquisition environment.

There are ethics program standards and requirements for contractors outlined in the Federal Acquisition Regulation. Though specific ethical requirements are not prescribed so that contractors may create their own appropriate ethics compliance systems, the FAR Council has established a firm framework for institutional ethics management and disclosure. Required components for federal contractors include: a code of business ethics and conduct, an ethics awareness and compliance program, an internal control system, a high level of management oversight, periodic reviews and/or audits, an internal mechanism for reporting misconduct, disciplinary systems, and timely disclosure of violations (FAR 3.1002-1003; 52.203-13; 73 Fed. Reg. 67064-93 (Nov. 12. 2008)). However, mere compliance with the basic government standards is unlikely to create a successful system of ethical prevention. A contractor must take steps to ensure the total commitment of management to ethical compliance at all levels of the organization, from corporate to business to functional.

Perhaps the world's leader in ethical compliance is the Ethics and Compliance Officer Association, or ECOA. The ECOA is a nonprofit, 501(c)(6), "member-driven association exclusively for individuals responsible for their organization's ethics, compliance, and business conduct programs (Ethics and Compliance Officer Association). With the largest group of ethics and compliance practitioners in the world as its membership body, it is the only organization of its kind and is credited with the formal founding of the field of ethics and compliance when the

ECOA was founded (initially as the Ethics Officer Association) in 1991. When the ECOA was initially incorporated, nineteen companies signed on as ECOA "Sponsoring Partner" members, including such companies as Northrop, Raytheon, Westinghouse Hanford, Texas Instrument, Honeywell, and the Internal Revenue Service. By the end of 1992, after the ECOA officially filed for status as a 501(c)(6) corporation, the group had grown to twenty-five companies and included McDonnel Douglas, Allied Signal, American Express, Dun & Bradstreet, Teledyne, and Northern Telecom. The organization works to bring together the knowledge bases of those with varying degrees of experience in the field, and attempts to help practicing ethics and compliance officers address the issues they face in the workplace. The organization leverages its global commitment to ethics and integrity in business as well as the diversity and collegiality of its members and its trusting and open environment to create a network of core competencies in the prevention of ethical violations that has had a substantial impact on the growth of the field. Like the DII, the ECOA has developed a set of Standards of Conduct for Ethics and Compliance Practitioners, including a list of responsibilities to the organization and to the field. The ECOA's recommendations for ethical standards are listed below:

> Responsibilities to [the] Employing Organization:
>
> 1. Be a role model in adhering to my employer's code of conduct.
> 2. Proactively advocate the integration of ethical organizational practices and a commitment to compliance into all aspects of my employer's business.
> 3. Ensure to the best of my abilities that my employer upholds all relevant laws and regulations wherever it conducts business.

4. Be a leader in the formation of ethical organizational practices in support of evolving organizational strategies and opportunities, taking into consideration legal requirements, customs, and best practices.
5. Raise and escalate, as necessary, significant organizational ethics and compliance issues.
6. Protect confidential information obtained in the course of my professional activities unless disclosure of such information is required by law, applicable regulation, or company policy, or if maintaining the confidentiality of such information would create an appreciable health or safety risk.
7. Avoid any actual, potential, or perceived conflicts between my personal and organizational responsibilities, and promptly disclose and resolve any issues that may arise.

Responsibilities to the Field:

1. Maintain exemplary standards of personal and professional integrity.
2. Strive to continually advance my knowledge of organizational ethics and compliance.
3. Work both individually and collectively with other members of the ethics and compliance field to advance the development of organizational ethics and compliance.

4. Take advantage of opportunities to improve public understanding of organizational ethics and compliance and their importance to sound organization management. (Ethics and Compliance Officer Association)

Developed by the Ethics Subcommittee of the ECOA Board of Directors, the ethics standards above are periodically revised to provide the public with the most current best practices available. The ECOA standards "reflect a recognition of responsibilities to the practitioner's employer, to the field itself, and thus to the public at large" (Ethics and Compliance Officer Association). The standards are meant to educate ethics and compliance officers as well as the workforce at large, in an effort to take ethical compliance beyond the bounds and requirements of law and illustrate the positive impact of increased ethical compliance across all industries.

Conclusions

At present, the acquisition system would seem to present a very different face from that of early Cold War America. Technology has revolutionized the procurement process, and many of the hierarchies and organizational structures of the last half-century are nearly unrecognizable today. But the one thing that remains ever-present is the existence of fraud in the acquisition system. Despite the numerous legislative, executive, and judicial attempts to establish punitive and preventative measures, the system is simply too large, too complex, and too easy to defraud. While the Department of Justice through the National Procurement Fraud Initiative and the National Procurement Fraud Task Force is working diligently alongside countless federal investigators and prosecutors, the corruption that has plagued the U.S. acquisition system since its inception is still a significant threat, and one that is not likely to abate. Without increased ethics training and education for government personnel and contractors, as well as further improvements to systems of fraud detection, even the most eloquently composed legislation will remain only partially effective. Through greater cooperation among the executive, legislative, and judicial branches, it is possible to work toward more effective implementation of statutory and regulatory provisions regarding ethical behavior in government contracting. This increase in the effectiveness of ethics legislation, regulations, and case law, combined with an increase in ethics compliance training and guidance, has the potential to create a system in which accountability is a prerequisite for the operation of any government program or agency.

The issue is not whether it is possible to eradicate all ethical noncompliance from the procurement process. In fact, this will never be a realizable possibility. Instead, the issue is simply that it is imperative the system continue to constantly monitor, evaluate, and improve upon the methods of preventing ethical breaches in government contracting. The concept of public trust, though meant to apply to individual action, is also applicable here to the federal government in its entirety, and can only be preserved when integrity and ethicality are as well.

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