

# Best Practices in Ethics & Compliance Programs for *Space Tech* Companies Focused on U.S. Government Contracting

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**June 4, 2025**

# Intersection of Space & Contracting with the U.S. Government

- While your work is out of this world, you are still contracting with the U.S. Government, the most bureaucratic customer
- Your relationships are governed by many ethics and compliance risks, any one of which can be business or career ending
- The old adage, that you “**must turn square corners when working with the Government**” could not be truer (Justice Holmes, 1920)
- USG has many enforcement weapons including False Claims Act, debarment, criminal prosecution and contract terminations
- Today, we will explore in warp speed the enforcement risks in contracting with the USG and end with “best practices” in E&C to mitigate being the next case

# How to Avoid Being the Next Target of A Government Enforcement Case

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- I. E&C Requirements for Government Contractors
- II. Mandatory Disclosure Regimes
- III. Overview of Government's Remedies
- IV. Overview of Enforcement Environment
  - A. DOJ Criminal Enforcement
  - B. DOJ Civil Enforcement
  - C. S&D Enforcement
- V. Best Practices in Ethics & Compliance

- Co-Chair of Government Contracts Practice
- Based in Los Angeles
- Nationally rated by Chambers-USA
- LAW360 “MVP” for Government Contracts 2023
- Recognized debarment “expert” by Legal500
- Former Air Force Debarring Official, “Director Suspension & Debarment Operations”
- Enjoined a DoD debarment in federal court
- Federal jury trial first-chair experience in FCA case
- 20 years of experience assisting government contractors with their most challenging legal issues
  - Building compliance programs, bid protests and appeals, disputes, contractor disclosures, jury trials
- Crisis practice focuses on contractors under investigation, facing civil FCA litigation, S&D and parallel proceedings

# Ethics & Compliance Requirements for Government Contractors

# Awards May Only Be Made to Responsible Contractors

- To be eligible for contracts, you must be “*responsible*”
  - “*Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.*”  
“*No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility.*” (FAR 9.103)
  - Among the requirements, you must “have a satisfactory record of integrity and business ethics”

# Awards May Only Be Made to Responsible Contractors

- What does it mean to have a “satisfactory record of integrity and business ethics”?
  - The dictionary defines “*responsible*” as can be **“trusted to do what is right or to do the things that are expected or required.”**
  - “SDO Hat” - “*Responsible*” means that the contractor is **capable of performing in accordance with the contract requirements and can be trusted to do so ethically**

# Awards May Only Be Made to Responsible Contractors

- COs are looking at your past performance record and overall character to see if—
  - (a) you consistently perform satisfactorily (no T4Ds, no performance blemishes), and
  - (b) you do not have a checkered past (criminal, civil FCA, and debarment) and,
    - If you do, remediation is key!



# COs Rely, In Part, On Contractor Certifications Re Responsibility

- FAR 52.209–5 Certification Re Responsibility Matters
  - a) Are ( ) are not ( ) **presently debarred, suspended, proposed for debarment**, or declared ineligible ...;
  - b) Have ( ) have not ( ), within a three-year period preceding this offer, **been convicted of or had a civil judgment** rendered against them ...;
  - c) Are ( ) are not ( ) **presently indicted** for, or otherwise criminally or civilly charged by a governmental entity with, commission of any of the offenses enumerated in subdivision (a)(1)(i)(B) of this provision; and
  - d) Have ( ), have not ( ), within a three-year period preceding this offer, been notified of any delinquent Federal taxes in an amount that exceeds \$3,000 for which the liability remains unsatisfied.

# Contractors Must Maintain A Code of Conduct & E&C Program

- FAR 52.203-13 generally requires contractors to maintain a “Code of Business Ethics and Conduct” (clause inserted where CO believes contract value may > \$6mm)
- For contractors other than small businesses, the clause also requires an ethics and compliance program
- We will talk more about E&C Programs later ...

# Mandatory Disclosure Regimes

# Mandatory Disclosures to the Government

- USG requires you to blow the whistle on yourselves!
- FAR 52.203-13 Contractor Code of Business Ethics and Conduct
- Companies have a mandatory disclosure obligation whenever, in connection with the award, performance, or closeout of any government contract or subcontract performed by the Company, the Company has ***“credible evidence”*** that a principal, employee, agent, or subcontractor of the Company **has committed a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations** found in Title 18 U.S.C. or a **violation of the civil False Claims Act** (31 U.S.C. Sections 3729-3733).

# Mandatory Disclosures to the Government *(Cont.)*

- **FAR 52.203-7 Anti-Kickback Procedures**
- Companies must make timely disclosures, in writing, to the appropriate government officials, whenever they have ***“reasonable grounds”*** to believe a violation of the AKA occurred.
- The AKA prohibits:
  - Providing or attempting to provide or offering to provide any kickback;
  - Soliciting, accepting, or attempting to accept any kickback; or
  - Including, directly or indirectly, the amount of any kickback in the contract price charged by a prime contractor to the United States or in the contract price charged by a subcontractor to a prime contractor or higher tier subcontractor.

# Key Elements of A Disclosure

- Typical considerations to have in mind when preparing a disclosure:
  - what happened
  - when did it happen
  - why it happened (i.e., the root cause of the event)
  - who was involved
  - how it was discovered (if delay in reporting, why delay)
  - whether internal policies/training were violated by action
  - Whether disciplinary action taken and, if not, why
  - Whether such could be mitigated and if so, corrective actions implemented
  - And discussion of overall present responsibility, including E&C Program

\*\*\*Following a disclosure, expect it to be shared with all stakeholders and for the potential for parallel proceedings to develop

# Overview of Enforcement Environment

# Overview of Government Enforcement Environment

- **Criminal Enforcement** – *Who?* Federal prosecutors and investigators
  - Wire Fraud, False Statements, Conspiracy, Major Procurement Fraud, Bribery, Kickbacks, Procurement Integrity, Antitrust, etc.
- **Civil FCA enforcement** – *Who?* Federal prosecutors, investigators, and relators
  - Government recovers treble damages plus penalties for each claim
  - Government can pursue false claims under any USG contract
- **Suspension & Debarment** – *Who?* SDOs, investigators, auditors, contracting personnel, competitors, and news media
  - Government can pursue S&D activity wherever there is a “cause” for suspension/debarment as defined by FAR subpart 9.4
- **Termination/Default** – *Who?* Contracting Officers
  - Where misconduct or noncompliance occurs, Government may pursue T4D



# Common Compliance Risk Areas

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- False statements/certifications
- Time mischarging
- Use of unqualified labor
- Falsifying documents
- Personal Conflicts of Interest
- Organizational Conflicts of Interest
- Defective pricing & TINA
- Kickbacks, Bribery, Improper Gifts
- Post-government employment restrictions
- Supplying non-conforming parts
- Repeated on-time delivery issues
- Product substitution
- Billing for out-of-scope work
- Antitrust Violations
- Procurement Integrity (SSI/BPI)
- Improperly obtaining non-public government or competitor's data
- Environmental Violations
- Export Control Violations
- Illegal Immigration/Employment of Undocumented Aliens
- BAA/TAA Specialty Metals
- Cyber Security
- Corruption and FCPA violations
- Misrepresenting small business status or socioeconomic status
- Subcontracting with claimed small businesses who don't meet reqs

# Origins of Government Enforcement

- Enforcement actions may proceed from:
  - Grand Jury Subpoena
  - IG Subpoena
  - Civil Investigative Demand
  - Notice of Proposed Debarment/Suspension
  - Terminations for default/cause
  - Qui tam lawsuits
  - Complaints by/from competitors, bid protests alleging wrongdoing
  - Negative media coverage

# DOJ Civil Enforcement

- The False Claims Act, 31 U.S.C. §§ 3729-3733, is the federal government's tool for combatting fraud against government agencies and programs.
  - Falsity
  - Materiality
  - Scienter
    - Can be actual knowledge, deliberate ignorance, or reckless disregard.
- Entitles the USG to recover **treble or triple** the damages sustained plus civil penalties

- The FCA authorizes qui tam suits allowing relators (or “whistleblowers”) to bring an action in the government’s name.
  - The government may intervene in those cases.
  - Relators may receive up to 30% of the recovery
- The Government can bring FCA cases itself or intervene in a relator’s suit.
- During Government’s initial investigation of relator’s complaint, the relator’s case is under seal while the government evaluates the claims.

- In 2024, DoJ recovered **\$2.9B** under the FCA:
- \$2.4B due to qui tam whistleblowers.
  - \$400M paid out to whistleblowers.
  - 970 qui tam suits were filed in 2024.
- Procurement fraud cases involved:
  - Cyber fraud;
  - Kickbacks;
  - Falsified cost and pricing data;
  - Using unqualified labor;
  - Falsified compliance with small business subcontracting requirements; and
  - Obtaining SSI/BPI.

# RECENT FALSE CLAIMS ACT SETTLEMENTS

# Raytheon Technologies, Corp. (2024) - \$950mm

- Case Origin: Whistleblower (former Raytheon employee)
- Allegations & Aggregating Factors – Defective Pricing – Overstating Expected Costs:
  - Raytheon knowingly failed to provide truthful certified cost and pricing data during negotiations on contracts between 2009 and 2020 in violation of the Truth in Negotiations Act (“TINA”).
    - “Lot 3” Contract Fraud Scheme
      - Raytheon submitted a proposal using a pricing approach that relied on the same cost and pricing data used in an earlier contract.
      - **The proposal significantly overstated the costs Raytheon expected to occur**—Raytheon failed to disclose that it had incurred much lower-than-expected costs in the earlier contract.
      - **Raytheon submitted false TINA certifications attesting that it had provided “accurate, complete, and current” cost and pricing data.**
    - “FOS2” Contract Fraud Scheme
      - During contract negotiations, Raytheon submitted a memorandum to the Air Force arguing that **it was necessary to provide site employees lucrative compensation packages to maintain adequate staffing.**
      - At the same time, **Raytheon was secretly preparing to reduce the pay of the site employees to improve the company’s profitability.**
      - Once awarded the contract, Raytheon implemented pre-planned compensation cuts for site employees while actively concealing those cuts from the Air Force.



# Raytheon Technologies, Corp. (2024)

- Allegations & Aggregating Factors – Foreign Corrupt Practices Act (“FCPA”):
  - Between 2012 and 2016, Raytheon engaged in a **scheme to bribe a high-level official at the Qatar Emiri Air Force** to assist Raytheon in obtaining and retaining business from Qatar’s Armed Forces.
    - Raytheon **made payments on sham subcontracts** for air defense operations-related studies to obtain the official’s assistance in securing certain air defense contracts.
    - Raytheon also entered into a teaming agreement with a Qatari entity to obtain the official’s assistance in directly awarding a contract to Raytheon to build a joint operations center.
- Allegations & Aggregating Factors – International Traffic in Arms Regulations (“ITAR”):
  - Raytheon engaged in a scheme to violate ITAR by **failing to disclose to the State Department fees and commissions paid** in connection with two Qatar-related contracts.
    - Specifically, Raytheon failed to disclose the bribes paid to the high-level official through sham subcontracts.
- Settlement Paid: **\$950 million**

- ***Navistar Defense LLC*** - paid ***\$50 million*** to resolve allegations that it submitted fabricated invoices (for non-existent sales) to the Marine Corps in an effort to inflate its pricing negotiated with the USG.
- ***Insitu, Inc.*** – paid ***\$25 million*** to settle allegations that it knowingly submitted materially false cost and pricing data for contracts with the U.S. Special Operations Command and the Navy to supply and operate Unmanned Aerial Vehicles. Specifically, submitted cost data for “new” parts and materials whereas it used less expensive used/recycled parts.

- ***Level 3 Communications, LLC*** – paid \$12.7 million to resolve allegations that ***management accepted kickbacks*** from subcontractors in exchange for favorable treatment, including sharing other contractor BPI, and that Level 3 falsified WOSB participation re a subcontractor owned and controlled by men to comply with small business subcontracting goals.
- ***AAR Corp.*** – paid \$11 million to resolve allegations that ***AAR knowingly failed to maintain nine helicopters*** in accordance with DoD contract requirements and that the helicopters, which were billed under two U.S. Transportation Command contracts to transport cargo and personnel in support of missions in Afghanistan and Africa, were not airworthy and should not have been certified as fully mission capable.

# AECOM (2023)

- Case Origin: Whistleblower (former AECOM employee)
- Allegations & Aggregating Factors:
  - AECOM served as a FEMA contractor, providing technical assistance to support FEMA’s disaster response following Hurricane Katrina.
    - One employee was assigned to complete an evaluation, called a “Project Worksheet,” of the gymnasium at Xavier University.
    - The employee claimed **he discovered significant structural damage to a concrete foundation slab**—accordingly, the gymnasium was qualified for full FEMA replacement funding.
      - A reverse image search revealed that the photographs of the foundation cracks submitted with the Project Worksheet were fraudulent and were stock photos taken off the internet.
    - The employee prepared and submitted similarly fraudulent Project Worksheets for several other buildings in New Orleans.
  - Relator notified AECOM management of the employee’s fraudulent submissions.
    - ***AECOM never notified FEMA of the fraudulent submissions or mitigated overpayments made by FEMA—rather, AECOM terminated relator.***
- Settlement Paid: **\$11.8 million**

# Sikorsky Support Services, Inc. & Derco Aerospace, Inc. (2024)

- Case Origin: Whistleblower (former Derco employee)
- Allegations & Aggregating Factors:
  - Sikorsky and the Navy entered into a cost-plus contract for spare parts.
  - Sikorsky then entered into an improper cost-plus-percentage-of-cost (“CPPC”) subcontract with Derco, a wholly-owned subsidiary of the same parent company.
    - Under the subcontract, **Sikorsky agreed to purchase parts from Derco at the cost that Derco paid its suppliers for those parts, plus a fixed 32% markup.**
    - Sikorsky then submitted cost vouchers to the Navy for reimbursement of the amounts it paid to Derco.
  - Sikorsky and Derco expected to make over \$11 million in profit based on this scheme.
- Settlement Paid: **\$70 million**

# Booz Allen Hamilton Holding Corp. (2023)

- Case Origin: Whistleblower (former Booz Allen employee)
- Allegations & Aggregating Factors:
  - Booz Allen undertook efforts to create a Commercial / International business component—not by acquisition, but organically.
    - In doing so, Booz Allen experienced massive losses which left the Commercial / International business operations unsustainable.
  - To stop the bleeding, **Booz Allen mixed its government contract work with its Commercial / International operations and then charged the Government for the inflated costs, which are expressly unallowable under the FAR.**
  - Relator notified her supervisor that Booz Allen had “a major legal compliance issue.”
    - In response, Relator was told that while Booz Allen’s practices were at least in a “legal gray zone,” the DOD’s DCAA was “too stupid or not smart enough to catch Booz.”
    - Ultimately, Relator resigned, providing “Booz Allen is currently incurring more financial risk than I feel comfortable defending as a member of the Corporate Finance Team.”
- Settlement Paid: **\$377 million**

# Boeing Company (2023)

- Case Origin: Whistleblowers (former Boeing employees)
- Boeing held a contract with the Naval Systems Command to produce, maintain, repair, and/or modify V-22 Osprey aircraft.
- Allegations & Aggregating Factors:
  - Boeing held a contract with the DOD, Naval Systems Command to produce, maintain, repair, and/or modify V-22 Osprey aircraft.
    - The Contract required absolute adherence to rigid calibration and testing procedures called “Temperature Uniformity Surveys” (“TUS”)
    - The TUS specifications mandated that Boeing verify the **required surveys be performed at least once a month.**
  - In 2013, during contract performance, Boeing ceased performing the surveys.
    - Boeing continued to manufacture and deliver approximately 80 V-22 aircraft to the Naval Systems Command and received payment for all of those deliveries.
  - In presentations shown and circulated to all Boeing engineers, managers, and technicians, Boeing’s Engineer-in-Charge admitted that “maintenance requirements ... are not presently being performed.”
- Settlement Paid: **\$8.1 million**

# Adobe, Inc. (2023)

- Case Origin: Whistleblowers (former Adobe managers)
- Allegations & Aggregating Factors:
  - Adobe sold software through vendors that were on the GSA IT Schedule.
  - Adobe had a “Partner Program,” under which Adobe offered a payment (percentage of the purchase price) to any reseller that marketed or helped generate sale of its software.
    - The Partner Program was implemented across commercial and government sales departments.
  - Between 2015-2016, Adobe paid over \$4.7 million to federal contractors via the Partner Program.
  - The relators alleged that Adobe and the resellers were entirely aware that this kickback scheme was improper and unlawful.
    - Certain “partners” – including Accenture and Deloitte – declined to accept payments from Adobe
    - Relator contended this showed Adobe’s compliance department knew the “payouts” were illegal kickbacks that violated that Anti-Kickback Act.
- Settlement Paid: **\$3 million**



# S&D Enforcement

# Overview of S&D Under FAR

## Subpart 9.4

- S&D are tools used to protect the government from the risks associated with doing business with “non-responsible” contractors
- Non-responsible = info before the government that reflects negatively on the contractor’s integrity, ethics, or competency
- S&D act to render a contractor ineligible from receiving new contracts
- Exclusion is accomplished by sending the contractor a notice of suspension or proposed debarment and posting their name on a public website (SAM.gov)
- S&D, by one agency, has government-wide effect
- S&D are not supposed to be used to punish contractors for past misconduct; debarment only for protection where needed
- “Present responsibility” is the focus of a S&D proceeding

# High Profile Debarment Cases Explored

# High-Profile Cases



- Leonard Glenn Francis, a defense contractor nicknamed “Fat Leonard,” was the owner of Glenn Defense Marine Asia.
- For years, this Singapore-based businessman was alleged to shower Navy officers with gifts, gourmet dinners, companionship, and cash so they would look the other way while he obtained Navy contracts.
- Navy officers shared with Mr. Francis classified material about U.S. warship and submarine movements, confidential contracting information, and files about active law enforcement investigations into Mr. Francis’ company.
- Mr. Francis exploited the intelligence for illicit profit, even ordering the compromised Navy officers to redirect aircraft carriers to ports he controlled in Southeast Asia so he could obtain more lucrative business (fuel, tugboats, barges, food, water, and sewage removal).
- Pleaded guilty to defrauding the Navy of \$35 million.
- Over a dozen Navy officers have pleaded guilty in connection with the Fat Leonard bribery and corruption scandal.
- Many, many debarments.

## **Booz Allen Case Study – Procurement Integrity / Hiring Former Gov't Employees / Disclosure of NPI/SSI**

- In April 2011, BAH hired a retired Air Force Lt. Col. as a senior associate responsible for business development in military and civilian health markets.
  - He previously served as the deputy chief of the Information Technology Division in the Air Force Medical Support Agency surgeon general's office.
  - In that role, he was privy to non-public information, which included information about source-selection, bids and proposals.
- The Air Force alleged he brought an external hard-drive, containing sensitive information, with him on his first day of work at Booz Allen.

- In an email to colleagues, he shared information with the BAH capture team about an IT services contract that they were competing for.
- That information allegedly provided the company with an unfair competitive advantage.
- His supervisors allegedly failed to report this improper disclosure, and he continued to be involved in efforts to compete for the follow-on contract.
- Ultimately, AF suspended the BAH office involved until an administrative agreement was reached avoiding debarment

# High-Profile Cases *(Cont.)*

## Darleen Druyun Case Study – Trading Employment for Lucrative Ks!

- She was the top civilian procurement official for the Air Force and worked on contract negotiations.
- In the early 2000s, the Air Force announced awards to Boeing for several major projects, including a \$20 billion leasing agreement for 100 airborne tankers, a \$4 billion upgrading of the C-130 aircraft, and a \$412 million payment on a C-17 contract.
- In 2003, after contract negotiations had ended, she accepted an executive position at Boeing that paid her \$250,000 per year.



# High-Profile Cases *(Cont.)*

- A year later, she pleaded guilty to awarding the contracts to Boeing in exchange for jobs at Boeing for herself, her daughter, and her son-in-law.
- She served a 9-month prison sentence and paid fines.
- The awards to Boeing were canceled.
- Boeing was forced to pay a \$615 million fine for its involvement in the scheme.
- Boeing's Chief Financial Officer was sentenced to 4 months in prison for negotiating new jobs for Darleen and her family members.
- Debarments followed and Boeing was suspended.





# DOJ Criminal Enforcement

- ***United Airlines Inc.*** – in 2021, United entered into an NPA, agreeing to pay ***over \$17mm*** to resolve allegations that it made false statements re the international delivery of packages that were not delivered. United also entered into an FCA settlement agreeing to pay \$32mm.
  - Pursuant to contract with USPS, United was obligated to provide bar code scans of mail when United took possession of the mail and when the mail was delivered to the foreign postal administration.
  - Instead of providing USPS accurate delivery scans based on the movement of the mail, **United submitted automated delivery scans based on aspirational delivery times.**
- ***Edgar Porras*** – in 2022, Porras pleaded guilty to bid rigging (rotation of bids) in violation of the Sherman Antitrust Act involving 111 BOP contracts cumulatively worth approx. \$2mm.
- ***Stronghold Engineering, Inc.*** – in 2021, paid \$2.5 million to resolve criminal and civil investigations re allegations that firm set up a shell SDVOSB to obtain lucrative construction contracts.

- ***Balfour Beatty Communities*** – in 2021, BBC pleaded guilty to defrauding DoD, paid \$33.6 million in criminal fines, \$31.8 million in restitution, and agreed to serve three years of probation, and engage an independent compliance monitor for a period of three years.
  - BBC also entered into a FCA settlement under which it is obligated to pay approximately \$35.2 million in civil restitution and penalties to the United States, which the Justice Department credited against BBC's criminal restitution and fine.
  - From around 2013 to around 2019, BBC employees falsified information submitted to DoD re military housing projects showing it met performance objectives which entitled BBC to bonuses under contract
  - BBC employees altered or manipulated data in property management software and destroyed and falsified resident comment cards to falsely inflate these metrics re resident satisfaction and maintenance of facilities
- ***Lawrence O'Brien, Bruce LaRoche and Thomas Dailey*** – in 2022, three FL men indicted for rigging bids and defrauding U.S. military. The men allegedly conspired to create the illusion of competition when each were working together as one.
  - To carry out this scheme, they formed three entities and submitted bids from each entity, and the bids were all prepared by the three individuals.
  - They appeared to be competitive because, for example, each listed a different salesperson, price or product description, despite the fact that all of the bids were drafted by the co-conspirators and the companies were owned or controlled by them.

# Best Practices in Ethics & Compliance: Programs to Mitigate Being the Next Case

# Best Practices in Ethics & Compliance

1. Values-based E&C programs
2. Day-to-day management of E&C Program by ECO/CECO
3. Leadership engagement and support of program
4. Maintenance of ethics helpline to allow anonymous reporting
5. Compliance policies tailored to risk profile
6. Live periodic E&C training
7. Employee reporting policy
8. Policies and procedures for investigating events
9. Monitoring and auditing to assess compliance
10. Policies and procedures for assessing events for possible disclosure
11. Policies encouraging “root-cause” analysis and corrective actions
12. Disciplinary program
13. Performance evaluation systems that consider ethics, integrity, and promotion of program