

Professional Perspective

Procurement Fraud Enforcement & Business Impact

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Procurement Fraud Enforcement & Business Impact

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Massive government spending due to the Covid-19 pandemic has created an environment ripe for fraud. However, a national crisis is not a defense to criminal charges by businesses and individuals competing for government money. Now that the Antitrust Division of the Department of Justice is taking the lead in investigating and prosecuting procurement fraud, the business community is well-advised to evaluate the effectiveness of their internal compliance programs.

The federal government allocates billions of dollars to meet the needs of businesses withstanding natural disasters, a financial meltdown, or a once-in-a-lifetime pandemic. As of April 30, 2021, the U.S. [spent](#) over \$2.75 trillion in recovery and relief efforts in response to Covid-19.

As the government sees opportunities to help business, so do those who aim to take advantage of the spending. Procurement fraud occurs when companies or individuals undermine the integrity of the process by which grants, loans, or contracts are awarded from the federal, state, or local government. Such behavior victimizes the government and taxpayers.

Companies that do not plan to take advantage of federal grants distributed in response to the pandemic should still pay close attention to the government's refreshed focus on procurement fraud. With the vast amount of funds leaving the government coffer, enforcement of procurement fraud will assuredly increase regardless of the circumstance. All businesses are well-advised to adopt the mitigating steps detailed in this article to show the federal government they will play fair with government funds.

The chaos motivating the spending breeds a misguided belief that the government deprioritizes enforcement mechanisms targeting acts of procurement fraud. As a result, some businesses may feel incentivized to secure public grants, loans, or contracts despite lacking eligibility or misuse funds appropriated for specific purposes. Even those with good intentions may not fully understand the requirements during times of severe uncertainty, and might succumb to pressure to take advantage of public funds.

However, a national crisis is not a defense. History shows engaging in fraudulent conduct to solicit competitive bids for relief and recovery grants can result in criminal charges down the line. Businesses convicted for collusive behavior related to bid rigging, price fixing, or customer or market allocation in connection with government contracts risk potential multimillion-dollar fines, treble civil damages, and permanent debarment from future government contracts.

Suspension and debarment proceedings threaten a company's interest in doing business with the government at all. When faced with charges to defraud the U.S. government, business owners and employees can be personally liable for their own involvement and may find themselves facing lengthy prison sentences and extensive criminal fines. Suspected employees cannot hide behind a corporate entity.

While the story may seem familiar, this time, such investigations are under the purview of a recently formed [Strike Force](#) led by the Antitrust Division within the Department of Justice. Business concerns over criminal investigations relating to this type of fraud are no longer solely tied to a local U.S. Attorney's office or the Criminal Division, but to a fully funded Strike Force with an impetus to curtail such behavior. While the pandemic has created conditions ripe for fraud, the risks of detection have likely never been greater.

Criminal Enforcement to Increase

In the years following Hurricane Katrina, the government [brought](#) federal charges against more than 900 individuals in 43 federal judicial districts for disaster-related fraud. During the 2007-2009 financial crisis, investigative activity sharply increased as the government pursued cases of fraud in connection with the billions of funds doled out through the Troubled Asset Relief Program (TARP). Over a decade later, TARP-related fraud is still enforced by an investigative body receiving approximately \$20 million in funding [annually](#).

According to the most recent [quarterly report](#) submitted to Congress, the Office of the Special Inspector General for TARP has recouped more than \$11 billion and conducted criminal prosecutions of over 450 defendants, 307 of which have been

convicted and sentenced to prison. In 2019 alone, the Special Inspector General brought federal [enforcement activity](#) against three corporations/organizations and criminal charges against 13 individuals, carried out investigations that resulted in prison sentences for 28 individuals, referred 26 cases to prosecutors, and secured 18 criminal convictions.

The continued enforcement of TARP-related fraud underscores the Department of Justice's commitment to combat attempts by businesses to exploit government procurement funding. We can expect an even higher level of scrutiny and a dramatic increase in investigations and prosecutions of business and individual recipients of federal grants under the Coronavirus Aid, Relief, and Economic Security Act ([CARES Act](#)) and other Covid-19 relief measures for years to come.

Antitrust Division Strike Force

The Antitrust Division [established](#) the Procurement Collusion Strike Force (PCSF) in 2019 explicitly to combat fraudulent activity that undermines competition in government procurement, grant, and program funding. The PCSF is a multi-agency effort working in tandem with U.S. Attorneys' offices around the country, the FBI, and Offices of Inspectors General. Though historically the Department of Justice has opened temporary task forces to meet the moment in times of emergency, the PCSF was established before the pandemic took hold.

Since its development, the PCSF has been active and forceful in protecting taxpayer funds. Armed with an influx of resources devoted to weeding out procurement crimes and a new [permanent director](#), the PCSF is expected to play a larger role as the economy recovers. Despite changes in leadership within the Department of Justice, under the Biden Administration, the PCSF continues to train thousands of investigators, fraud examiners, data scientists, and other individuals dedicated to spotting collusion in the public procurement sphere. The Antitrust Division has a dedicated [online form](#) for reporting potential suspicions of procurement fraud related to Covid-19.

The establishment and subsequent growth of the PCSF signals a renewed emphasis on investigating criminal conduct in this area. Apart from investigations targeted at the misuse of CARES Act funds, the PCSF [opened](#) almost three dozen investigations since its launch in 2019. In the first quarter of 2021, the Strike Force secured one [indictment](#) and two [guilty pleas](#) from owners of companies within the construction industry for conspiring to gain access to federal funds. The individual owners are accused of, in part, placing a service-disabled veteran as a superficial business owner to win over \$250 million in a set-aside contract under the Small Business Administration's Service-Disabled Veteran-Owned Small Business program.

Advantages of Expanding Antitrust Role

The business community, though susceptible to greater enforcement actions, should not ignore the benefits of having the Antitrust Division lead such investigations: the Division values—and rewards—companies with strong internal compliance programs. In July 2019, the Division [published](#) its first-ever guidance for corporate compliance programs and [said](#) the Division would begin to “consider compliance at the charging stage,” meaning a company could potentially avoid being charged for a crime, including procurement fraud orchestrated by employees, based on demonstration of a robust compliance program. This was a clear change from the previous mentality of the Division that a violation was evidence of an ineffective compliance program and thus deserved no consideration.

The significance of this approach is that it allows businesses to endeavor to mitigate future harm. Just as the best time to plant a tree was 20 years ago and the second-best time is now, businesses should use this time to evaluate their compliance programs. This includes reexamining policies, employee and supervisor training, and, here, the process by which government funding is secured and used. Internal efforts to facilitate quick reporting of suspicious behavior, remediate inappropriate actions, and prevent future conduct can go a long way in reducing criminal charges.

Businesses Should Enhance Internal Compliance Programs

In addition to prioritizing the development or enhancement of a robust internal reporting system to allow employees to submit anonymous reports of suspected fraud, businesses should be exceedingly cautious and ensure all bids for government contracts pass through a heavily scrutinized internal process before submission. Recipients of federal relief funds related to Covid-19 should ensure proper substantiation of eligibility and maintain a strong record showing that allocated funds are being used appropriately. Finally, businesses should make sure they are providing their employees

with antitrust compliance training that addresses procurement fraud, details guidance on the use of government funds, and targets relevant employees.

The combination of massive government spending and increased enforcement in procurement fraud by a newly stated task force underscores the need for companies to evaluate the effectiveness of their compliance programs, and also reminds us that enforcement will remain vigilant years after the pandemic subsides.