

**THE TWENTY-FOURTH ANNUAL MAJOR FRANK B.  
CREEKMORE LECTURE<sup>1</sup>**

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I appreciate the introduction. And it is indeed my pleasure to be here today in front of my colleagues, and many of my friends.

Indeed, it is a pleasure to be here today to talk about a subject that has over the years become increasingly important to me as a government contracts practitioner: fraud remedies. Fraud remedies, for most of my career, were nothing but a footnote. This is probably the case for most acquisition professionals in this room and certainly for our clients. Fraud was a subject I did not have to deal with in my day-to-day acquisition-related duties. Not my problem. And, that is absolutely wrong.

I want to do a survey. How many in this room, by a show of hands, have in their portfolio procurement fraud remedies, or any aspect of procurement fraud remedies? Okay. Actually, it is a trick question. As acquisition professionals, each of you has in your portfolio responsibilities to deal with procurement fraud. And that really is the takeaway I have for you today. You are a part of the team, whether you recognize it or not.

An effective procurement fraud remedies program is captured in Department of Defense (DoD) Instruction 7050.05.<sup>2</sup> That instruction

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Rodney A. Grandon is a member of the Senior Executive Service, and serves as the Deputy General Counsel for Contractor Responsibility, Department of the Air Force, Washington, D.C. In that capacity, he is the Air Force's Suspending and Debarring Official, and is responsible for providing legal advice concerning contractor responsibility matters to senior Air Force and Department of Defense (DoD) leadership, as well as leading the Air Force's Procurement Fraud Remedies Program. Before assuming his present duties, Mr. Grandon served as the Chief of Procurement Law and Chief Trial Attorney for the United States Coast Guard.

<sup>1</sup> The Major Frank B. Creekmore Lecture was established on January 11, 1989. The Lecture is designed to assist The Judge Advocate General's School in meeting the educational challenges presented in the field of government contract law.

requires each of the military services to have a central coordinating activity that is responsible for communicating, coordinating, and controlling fraud remedies within that specific military service; in fact, more broadly, with external stakeholders to include agency leadership, our friends in the Department of Justice (DOJ), and any other individuals or organizations affected by a given set of circumstances.

Instruction 7050.05, unfortunately—and I know there are a lot of folks from civilian agencies out there—has not been exported effectively to the civilian agencies. I recently came out of the Coast Guard within the Department of Homeland Security (DHS). When I arrived at the Coast Guard, I was stunned to discover that not only was there no *effective* procurement fraud remedies program, there was not a procurement fraud remedies program in existence at all. There was no effective program or process for suspensions and debarments, even though at the time the authority for suspensions and debarments rested with the head of the contracting activity in the Coast Guard. The DHS has come under a lot of heat recently from the Hill and from the Government Accountability Office (GAO) along with many other civilian agencies for not taking these responsibilities seriously.

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Frank Creekmore graduated from Sue Bennett College, London, Kentucky, and from Berea College, Berea, Kentucky. He attended the University of Tennessee, School of Law, graduating in 1933, where he received the Order of the Coif. After graduation, Mr. Creekmore entered the private practice of law in Knoxville, Tennessee. In 1942, he entered the Army Air Corps and was assigned to McChord Field in Tacoma, Washington. From there, he participated in the Aleutian Islands campaign and served as the Commanding Officer of the 369th Air Base Defense Group.

Captain Creekmore attended The Judge Advocate General's School at the University of Michigan in the winter of 1944. Upon graduation, he was assigned to Robins Army Air Depot in Wellston, Georgia, as a contract termination officer for the southeastern United States. During this assignment, he was instrumental in the prosecution and conviction of the Lockheed Corporation and its president for a \$10 million fraud related to World War II P-38 Fighter contracts. At the war's end, Captain Creekmore was promoted to the rank of major in recognition of his efforts.

After the war, Major Creekmore returned to Knoxville and the private practice of law. He entered the Air Force Reserve in 1957 and returned to active duty in 1952. Major Creekmore remained active as a reservist and retired with the rank of Lieutenant Colonel in 1969. Mr. Creekmore died in April 1970.

<sup>2</sup> U.S. DEP'T OF DEF., INSTR. 7050.05, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO PROCUREMENT ACTIVITIES (4 June 2001).

The essence of an effective procurement fraud remedies program<sup>3</sup> really comes down to something as basic as promoting communication and cooperation among the various stakeholders to achieve understanding and alignment necessary to pursue and execute appropriate fraud-related remedies. Who are those various stakeholders?

You can really boil it down to three fundamental stakeholders, the first being the attorneys. The attorneys include the acquisition lawyers who are responsible for giving advice to the contracting officers and program officials. It also includes the procurement fraud counsel. Some agencies assign attorneys fulltime to work procurement fraud matters. I know the Navy, the Army, and the Air Force have very effective, very robust programs and very proactive programs that rely on fulltime procurement fraud counsel. So we have our attorneys as the first set of stakeholders.

The second set of critical stakeholders are the acquisition professionals. When I say acquisition professionals, I mean big “A” acquisition, to include the contracting specialists, contracting officers, purchasers, and other program personnel.

Lastly, we have, along with the acquisition community and the lawyers, the investigators as the third set of stakeholders. The investigators include the Inspectors General (IGs) and agency-specific investigative activities such as the Coast Guard Investigative Service and Defense Criminal Investigative Service. These are the three major elements or the three critical groups of stakeholders in an effective procurement fraud remedies program.

And what is the key? The key is to make sure that those organizations or those three sets of stakeholders are moving more-or-less in the same direction when presented with a given set of circumstances. More importantly, it requires that there be communication at the inception of a matter. When somebody first discovers some indication of procurement fraud, that information needs to start flowing early on in the process. Historically, what we have seen in procurement fraud remedies programs are agencies waiting for an

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<sup>3</sup> See, e.g., U.S. DEP'T OF AIR FORCE, INSTR. 51-1101, THE AIR FORCE PROCUREMENT FRAUD REMEDIES PROGRAM (2012), available at <http://www.safgc.hq.af.mil/shared/media/document/AFD-111103-005.pdf>.

indictment or conviction before they think of doing anything that might be considered a procurement fraud remedy.

That is way too late in the process. Agencies lose opportunities when they wait for that indictment or conviction. Consideration of procurement fraud remedies has to begin at the inception of an investigation when information is first presented that there may be fraud relating to a given contract or program. And it is necessary to begin that communication, that cooperation, and to begin looking at what remedies are available and to do that as early as possible in the process, particularly as it relates to contract remedies.

Often when government officials consider the elements of an effective procurement fraud remedies program, they think of civil recoveries, they think of criminal penalties, and they think of suspension and debarment. They forget that there are many contractual remedies the agency has at its disposal. In many cases, contractual remedies offer the biggest bang for the agency in terms of returning dollars back to contracts and programs that have been victimized by misconduct.

If an agency waits for the criminal and civil actions to be completed, what ultimately happens if there is a recovery is that the agency will not get the benefit of the dollars recovered because the associated program funds have already canceled. They are gone. Instead, the recovered money goes back to the Treasury.<sup>4</sup> The agency itself must still find funds to cover the cost associated with repairing or replacing that defective product or service that was compromised by the fraud.

Securing effective contract remedies requires agencies to be smart, aggressive, and proactive. Agencies can revoke acceptance. Agencies can begin termination proceedings. Agencies can go and get their money back if they have already paid that money, or they can withhold payment if they have not yet made payment to the contractor. Contract remedies can be almost endless. Agencies are only limited by the creativity of legal counsel and their clients.

With that as context, what I really want to do and intend to do today is to focus on a specific case involving a Coast Guard program. The case has lessons for everybody in this room on how agencies can effectively

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<sup>4</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 5-79-80 (3 ed. 2006).

conduct a procurement fraud remedies program, as well as the challenges that result when agencies do not have an effective program.

#### Case Study Overview

In the late 1990s the Coast Guard had a need for new patrol boats. The patrol boats that the Coast Guard had were old, and they were very expensive to operate. The need to recapitalize was not limited to the patrol boats; the need extended to almost all of the Coast Guard's surface and air assets. There was a need to move out very aggressively to replace these assets. Thus, the word "Deepwater" came into being. The Deepwater program was based on turning over many major systems acquisition program responsibilities to a lead systems integrator, a construct that ultimately experienced all sorts of problems, including the failure to secure a replacement for the aging patrol boats.

Anyway, so jump forward approximately ten years. The Coast Guard now has a new contract in place for the Fast Response Cutter, a cutter that will be used to replace the old patrol boats. The Coast Guard believes the Fast Response Cutter is an excellent ship, one capable of surpassing many expectations in its performance capability. The problem for the Coast Guard is that the contractor for the Fast Response Cutter is alleged to have defrauded the Coast Guard on the earlier Deepwater effort to replace the aging patrol boats, causing the Coast Guard to waste almost \$100 million. That is the situation the Coast Guard finds itself in today.

Every time the Coast Guard puts money on this contract, what happens? By way of example, when the Coast Guard exercised options for the Fast Response Cutter at the end of 2011, a critical piece by Alice Lipowicz, dated March 5, was published in the *Federal Computer Week*<sup>5</sup>:

Coast Guard Commandant Admiral Robert Papp appeared at a dockside ceremony in Lockport, Louisiana, with the governor and other dignitaries on March 2 to

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<sup>5</sup> Alice Lipowicz, *Coast Guard Commandant Celebrates Contractor While DOJ Lawsuit Is Pending*, FCW: THE BUS. OF FED. TECH., Mar. 5, 2012, available at <http://fcw.com/articles/2012/03/05/coast-guard-cmdt-papp-celebrates-contractor-while-lawsuit-is-pending.aspx>.

accept delivery of the latest cutter from federal contractor, Bollinger Shipyards.

But going unmentioned at the large gathering was that the Justice Department eight months ago went to court to accuse Bollinger of making false statements to the Coast Guard on a related contract. That unresolved False Claims Act lawsuit brought by the DOJ seeks unspecified damages expected to be in the millions of dollars from Bollinger. Bollinger appears to be experiencing little fallout from the lawsuit, and the U.S. Attorney General's Office seems to be mostly on its own with little support from the other federal agencies in the lawsuit.

DOJ brought the legal action against Bollinger Shipyards in August 2011 to recoup an unspecified amount of money from Bollinger [for allegedly] making false statements about the hull strength of eight patrol boats it was elongating for the Coast Guard under the Deepwater program. The Coast Guard rejected the completed boats as unseaworthy, and eventually refashioned, and then terminated, the Deepwater Program.

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The agency's total contracts to Bollinger to date were valued at \$597 million, the company said at the time. The total value of the contracts is 1.5 billion, if all options are exercised.

At the ceremony on March 2, Papp praised Bollinger and appeared overjoyed at the new cutter . . . .

In an interview afterwards, Papp described the current lawsuit as something the Department of Justice chose to pursue and said that it had no impact on future contracts . . . .

Folks, that is bad press. Our friends in the DOJ, who read the same stuff that we do, were not happy with that one.

Now let's fast-forward to 2012. In September of 2012, the Coast Guard ordered another six ships from Bollinger Shipyards, and again the negative press came out, this one dated October 11. It was a blog from a retired captain, and it states:

U.S. taxpayers can be excused for smelling something foul in the \$250 million the Coast Guard recently awarded Bollinger Shipyards to build six additional fast response cutters. The six are a part of a \$1.5 billion contract to build up to 34 [FRCs].

Bollinger is the defendant in an ongoing Justice Department civil suit filed in August 2011 that claims that the Lockport, La.-based shipyard "made material false statements to the Coast Guard under the Deepwater Program."<sup>6</sup>

After news of the lawsuit broke last year, Coast Guard Commandant Adm. Robert Papp commented on Deepwater at a hearing, stating that, "we weren't prepared to start spending this money and supervising a project this big."

Six months later, however, the government apparently forgot all about the pending Bollinger lawsuit and was prepared to spend the money posthaste. But don't blame Bollinger. They didn't award the Coast Guard contract to themselves.<sup>7</sup>

I use these article excerpts to illustrate the problem that was created for the Coast Guard by not having an aggressive, robust, proactive procurement fraud remedies program—a program that would have promoted early consideration of all appropriate fraud remedies, thereby

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<sup>6</sup> United States v. Bollinger Shipyards et al., No. 2:12-cv-00920, at 2 (E.D. La. Jan. 30, 2013), [http://www.gpo.gov/fdsys/pkg/USCOURTS-laed-2\\_12-cv-00920/pdf/USCOURTS-laed-2\\_12-cv-00920-0.pdf](http://www.gpo.gov/fdsys/pkg/USCOURTS-laed-2_12-cv-00920/pdf/USCOURTS-laed-2_12-cv-00920-0.pdf) (citing R. Doc. 1 at 4–5).

<sup>7</sup> Capt. Max Hardberger, *Despite Suit, Feds Give Bollinger Another \$250 Million*, WORKBOAT.COM (Oct. 11, 2012), available at <http://www.workboat.com/blogpost.aspx?id=18649>.

better positioning the Coast Guard to respond to the inevitable challenges aimed at the Fast Response Cutter contract. And there were questions from the Coast Guard's stakeholders, the press, and members of Congress: "Really, folks, really? You're pursuing this? You think this is a good relationship, a good business partner?" Oh course, the Coast Guard had little choice but to support the Fast Response Cutter contract with Bollinger.

#### Deeper Dive into Deepwater<sup>8</sup>

Back in the late '90s, mid-2000s, the Coast Guard had a dire need to recapitalize practically every asset that it had. At the same time, the Coast Guard did not have the program professionals, the acquisition professionals, and, to some extent, the legal support necessary to take on this multi-billion dollar challenge.

Recognizing this gap, the Coast Guard entered into a contract to use contractors as lead systems integrators. You all remember lead systems integrators—a widely acclaimed strategy to let industry guide government programs down the path of righteousness and goodness. This program was known as Deepwater.

The Coast Guard selected a Lockheed Martin/Northrop Grumman joint venture team to serve as lead systems integrators. Bollinger Shipyards, Inc., was part of the industry team responsible for the effort to extend a 110-foot patrol boat into a 123-foot patrol boat. Bollinger proposed to cut the end off the 110s and extend the boats about thirteen feet. The end product supposedly would be better able to handle Coast Guard missions. Throughout the pre-award process, there were some people scratching their heads asking if Bollinger really could cut the end off of a ship and extend it such that it could go out into rough seas for unrestricted use. Bollinger assured those asking questions that the company had done the engineering calculations and that the project was viable. Bollinger said, "Trust us." The Coast Guard did.

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<sup>8</sup> The facts concerning this case study were drawn from the Complaint filed by the United States in the matter of *United States v. Bollinger Shipyard, Inc., et al.*, in the United States District Court for the Eastern District of Louisiana. Subsequent to the delivery of the 2012 Creekmore Lecture, the court granted Bollinger's Motion to Dismiss. *United States v. Bollinger Shipyards et al.*, Case No. 2:12-cv-00920, sec. R (5), doc. 71 (Oct. 21, 2013), [http://www.gpo.gov/fdsys/pkg/USCOURTS-laed-2\\_12-cv-00920/pdf/USCOURTS-laed-2\\_12-cv-00920-0.pdf](http://www.gpo.gov/fdsys/pkg/USCOURTS-laed-2_12-cv-00920/pdf/USCOURTS-laed-2_12-cv-00920-0.pdf).



The effort was awarded in 2000, which included the 123 foot patrol boat effort. The patrol boat, you have to understand, is the workhorse of the Coast Guard's coastal fleet. It performs as a multi-mission asset, and is responsible for performing critical coastal missions. The existing 110 foot patrol boats had operated for approximately twenty years with no major structural failures. Now, that does not mean that the patrol boats did not have maintenance and repair challenges. Things broke as they aged, yes; but basically the vessel itself was sound and had done an incredible job. In fact, the 110s are still a major asset today in the Coast Guard inventory.

Pre-award, the Coast Guard expressed concerns about the structural integrity of the proposed 123s. Bollinger assured the Coast Guard, in response, that indeed the elongated vessel would meet the strengths necessary to perform the Coast Guard's missions. The Coast Guard relied on those representations. The effort was subcontracted by the prime to Bollinger. Bollinger had control over the 123 effort.

Bollinger had built the 110s, and the 110s were an incredibly effective boat for the Coast Guard. The Coast Guard was confident that Bollinger had the ability to build boats. Bollinger was responsible for the entire design and engineering of the 123 effort, including the strength calculations that go to the heart of this matter. Bollinger was required to submit these strength calculations as part of the data deliverables under the contract. The Coast Guard placed a total of eight 123s on contract. All of them structurally failed; all of them were useless. The 123 effort was halted and the ships parked dockside. The Coast Guard has eight of the 123s sitting dockside of no use whatsoever except for potential scrap value. That's it.

Let's talk about the alleged wrongdoing in this suit. Bollinger had to perform the section modulus strength calculations. While I am not a Naval engineer, I understand the section modulus calculation is absolutely critical in determining strengths of the ship. As concerns mounted about the structural integrity of the 123, the Coast Guard suggested that Bollinger bring in neutral parties to review the effort. Bollinger was not interested.

The Coast Guard relied on Bollinger's representations that the 123s would have sufficient structural integrity to meet the Coast Guard's mission. It turns out that the Coast Guard's reliance may have been misplaced. The evidence indicates that Bollinger used a host of different

assumptions and variables, some of them arguably unreasonable, to conduct its strength calculations. Some of Bollinger's calculations reflected sufficient structural integrity; others reflected a lack of structural integrity. Bollinger passed on to the Coast Guard only those calculations establishing the ship would meet the required strength.

What do we find in Bollinger's internal e-mails? This is from a senior Bollinger corporate official: "[W]e did lead the Coast Guard into a false sense of security by telling them early on that of the Section Modulus for a 123 would be 5230 inches cubed as opposed to the real number just above 2600."<sup>9</sup> It takes about 3,000 or 3,200 or greater to have a ship that will be structurally sound. That is the problem.

#### The Fast Response Cutter

Now, we transition to the Fast Response Cutter. The 123 failure left the Coast Guard with a huge problem. It had 110-foot patrol boats that were getting increasingly expensive to operate, and losing the ability to support the Coast Guard's coastal missions.

As part of the post-Deepwater acquisition strategy, the Coast Guard set off on a plan to develop and have built—designed and built—a Fast Response Cutter (FRC). The Coast Guard selected Bollinger to build the Fast Response Cutter.<sup>10</sup> The Coast Guard is thrilled with this vessel. It is an incredibly competent, capable, vessel. The Coast Guard likes it, and wants more of them. The contract includes options for fifty-eight of the vessels. Bollinger delivered their first FRC in 2012. Everybody's thrilled with this thing. The contract efforts continue today, and I believe it has another five or six years associated with it.

I moved over to the Coast Guard in May of 2011. The FRC contract had been awarded at that point. I was interested in how the Coast Guard acquisition community concluded Bollinger was responsible for purposes

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<sup>9</sup> *Id.* at 13.

<sup>10</sup> Press Release, Bollinger Shipyards, Inc., Bollinger Receives Award of Fast Response Cutter "Sentinel" Class from U.S. Coast Guard (Sept. 26, 2008), available at <http://www.bollingershipyards.com/news-resources/Bolling-Receives-Award-of-Fast-Response-Cutter-Sentinel-Class-From-US-Coast-Guard> (providing picture of the Fast Response Cutter).

of the FRC award.<sup>11</sup> I was told that “Bollinger is a very competent contractor. They can build a good ship, we’re very happy with them. They are a very competent design-build operation. We looked at them very closely and ultimately concluded that they could build the Fast Response Cutter. We wouldn’t want them to try to modify one of our vessels, but we trust them to build from scratch one of our vessels.” And that was the essence of the pre-award responsibility determination.

It was clear to me that the Coast Guard had considered Bollinger’s failed 123 effort as part of the contracting officer’s pre-award responsibility determination. It remained unclear to me, however, to what extent the contracting officer had considered Bollinger’s ethics, compliance, and oversight controls. Regardless, the company had been determined responsible to receive a contract.

Could the Coast Guard have reached a different conclusion? Should they have reached a different conclusion? I think there is enough gray area that the contracting officer’s decision reasonably could have gone either way.

#### Fraud Remedies—Considerations and Consequences

The Coast Guard has a problem. It has a contractor that it believes engaged in fraudulent activity, and the Coast Guard needs to do business with that contractor. The Coast Guard is now wedded to that contractor because the Coast Guard wants and needs the FRC. Bollinger is now starting to deliver FRCs. Every time the Coast Guard puts money on the FRC contract, individuals on the Hill go crazy, and the press starts churning up their blogs and their reports. The Coast Guard is stuck with this bad situation. How does the Coast Guard go about balancing and reconciling these conflicting interests?

##### A. Stakeholders

Any solution had to focus on the interests of critical stakeholders. Who are those critical stakeholders?

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<sup>11</sup> See Federal Acquisition Regulation (FAR) subpt 9.1 (2012); 48 C.F.R. subpt. 9.1 (2012).

Leadership: Coast Guard senior leaders were concerned: “What’s going on with this false claims act suit? What are we going to do? We’re going to award options, and they’re going to go after us again. What do we say?”

Operators: The Coast Guard operators and users are partisans in this fight. The 110-foot patrol boats are not as useful as they had been over the preceding decades. The operators are expressing concerns about going out in rough seas with the old 110s. And, by the way, the operators had learned that the new Fast Response Cutter was an incredible boat; they wanted to get them as quickly as possible.

Acquisition community: The acquisition community is willing to respond to its customers’ needs. It does not want to deal with fraud-related allegations either. Notwithstanding these pressures, the Coast Guard was forced to deal with matters pertaining to fraud involving its FRC contractor, in large part, because of the congressional demands and because of the adverse press.

DOJ: The DOJ became one of the Coast Guard’s stakeholders. The DOJ had been involved with the 123, and it was necessary for the Coast Guard and the DOJ to work the fraud allegations together, even as the Coast Guard moved forward with the FRC contract.

Congress and other oversight activities: I have already touched on that. Other oversight activities included the Department of Homeland Security, the Office of Management and Budget, the Government Accountability Office, and the public.

## B. Remedies

I talked about the elements of an effective fraud remedies program; it has to be proactive, it has to be robust. But what are the remedies? The remedies can be broken into four buckets: Criminal, civil, contractual, and administrative. When I say administrative, I mean suspension and debarment. So let’s go back to the case study.

### 1. *Criminal*

By May 2011, the decision as to whether or not to pursue criminal charges against Bollinger Shipyards had come and gone. Could we have pursued something criminally? I don't have a good answer at this time.

### 2. *Contractual*

In May 2007 the Coast Guard revoked acceptance; that was a good first step. We sent a demand letter saying, "Give us our \$97 million back." The Coast Guard had discussions with Bollinger, but there was no contractual recovery. While there may have been some evidentiary challenges associated with obtaining a contractual recovery, the Coast Guard also was in a position to get dollars back from a False Claims Act recovery. At this time, however, the demand letter is outstanding.

### 3. *Civil*

A civil complaint was filed July 2011, after approximately five years of investigation. The delay in getting the complaint filed created problems for the Coast Guard. During an investigation, matters sometime look worse than they really are. At least when you have a complaint filed, the allegations are limited to specific facts and circumstances. The uncertainty created by the ongoing investigation was a huge problem for the Coast Guard.

At the time of filing the False Claims Act damages were unspecified. The Justice Department took the view that the government was entitled to treble damages based on all amounts spent by the Coast Guard on the 123 effort. Ninety-seven million times three comes up to almost \$300 million. Given the need for the FRCs, it would do the Coast Guard no good to have Bollinger bankrupted by the False Claims Act suit.

Why did the Coast Guard need Bollinger? The FRC was a contractor-owned design; the Coast Guard did not own it. So if to the Coast Guard severed its relationship with Bollinger Shipyards, the Coast Guard would have at least two or three years before it could get a new contract awarded. The Coast Guard would have to go through all of the design efforts again. Before the Coast Guard could start getting ships delivered again, it probably would be eight to ten years down the road.

That was not satisfactory to the Coast Guard operators seeking a new and more reliable cutter. That was unsatisfactory to Coast Guard leaders. That was unsatisfactory to the Coast Guard. So, again, the Coast Guard needs Bollinger Shipyards to produce and deliver the FRC.

And now the DOJ is saying Bollinger owes the government \$300 million. Bollinger Shipyards is a privately held company. The Coast Guard was certain that if Bollinger were hit with a huge judgment, the company was going to go belly up. That is something that the Coast Guard could not tolerate in this process. That was a point of contention with the DOJ: how do we get an effective remedy that does not kill a critical contractor?

There were discovery challenges. All of you know discovery: it is horrible and when you have a little organization like the Coast Guard, it is exceptionally horrible. That being said, the Coast Guard seems to be doing okay.

The civil suit also had an adverse impact on the FRC contract. Every time the Coast Guard put money on the FRC contract, stakeholders and critics questioned the wisdom of doing so because of the False Claims Act suit. While we now have specific facts and circumstances to talk about, the civil suit has an adverse programmatic impact on the FRC, and it continues to be a public relations challenge for the Coast Guard. Moreover, once the False Claims Act suit was filed, it took away from the Coast Guard the ability to control a great deal of the messaging surrounding the contractual relationship with Bollinger.

The False Claims Act suit also keeps the Coast Guard tied to the unsuccessful Deepwater program. Rather than looking at the many positive developments achieved by the Coast Guard's acquisition community since Deepwater terminated, the outside focus kept getting pulled back to the problems associated with the Deepwater program. The Coast Guard does not want anything to do with the Deepwater program. As you may have noted from those press clips in the beginning, the press still likes to drag the Coast Guard through the Deepwater mess.

The press reporting concerning the civil suit also makes it more difficult for the Coast Guard to manage communications with government stakeholders. I am not so sure those quotes from the commandant in the press reports were entirely accurate, but Coast Guard

stakeholders in the DOJ were furious that the Coast Guard was taking public positions perceived as being contrary to the DOJ's litigation positions. After reading the press communications the DOJ trial attorney demanded: "How could your commandant say that? The Coast Guard is undermining our litigation, making it impossible to work this case." The DOJ was not particularly interested in the current state of the relationship between the Coast Guard and Bollinger concerning the FRC. DOJ's focus was on pressing the fraud case against Bollinger. Coast Guard efforts to explain the current need for Bollinger to the DOJ did little to heal the rift.

There's one other factor I want to touch on involving an agency's relationship with DOJ when the DOJ's litigation posture in a fraud matter adversely impacts on the agency's programmatic and contractual needs. Too often when such tension arises, agencies retreat from smart program management or contracting, taking the position that the agency cannot play in what is perceived as DOJ's space because only DOJ has the ability to settle fraud cases. Agencies take the position that they will not touch the matter. It is fraud; it is the DOJ's matter. We cannot settle. We cannot do anything.

That is not the right answer. The DOJ does have the exclusive authority to settle, resolve, and compromise matters relating to fraud,<sup>12</sup> but in many cases the contractual remedies are within the control of the agency, as those remedies appropriately constructed do not serve to settle, resolve, or compromise fraud. Clearly, there should be communication and cooperation with the DOJ, or perhaps the Assistant U.S. Attorney who might be working that matter, but from a contractual remedy standpoint, in most cases the agency controls the remedy.

And, frankly, if I am a DOJ attorney, I want to be able to go to that jury in my fraud case and say, "Hey, the agency was victimized. It doesn't bleed, no bruises, no contusions, nothing like that, but look at this. It is angry. It revoked acceptance. It terminated this contract. It recovered its money. It showed that it was upset with this contractor. By sitting on its rights, including contractual rights, an agency does a disservice to the strength of the civil litigation that may follow. Think about that relationship.

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<sup>12</sup> Executive Order 6166, June 10, 1933 (provisions of this executive order do not appear in the *Federal Register*).

#### 4. *Administrative*

Around the time the civil suit was filed, the Coast Guard issued a Show Cause Letter to Bollinger.<sup>13</sup> The Show Cause Letter is a letter that notifies Bollinger Shipyards that the Coast Guard believes the company has engaged in conduct that casts doubt on the company's present responsibility. Bollinger was given a specified number of days to provide the Coast Guard with any information the company believed established its present responsibility.

In response to the letter, Bollinger Shipyards hired attorneys familiar with contractor responsibility matters, which is good, frankly, very good, because those attorneys knew what needed to be addressed by Bollinger. In response to the Show Cause Letter Bollinger moved out smartly to strengthen its internal controls, to create an ethics program, and to begin thinking about who were the right people to be doing its quality assurance, who were the right people to be doing its testing. They made personnel changes. And Bollinger took these steps in a very short period of time.

Based on the company's assurances, the Coast Guard entered into what is essentially an administrative agreement, or compliance type agreement, with Bollinger in which the Coast Guard required Bollinger to hire an independent consultant who would look at their systems, controls, and ethics programs, and report unfiltered directly back to the Coast Guard.<sup>14</sup> The Coast Guard also asked the company to make quarterly reports to the Coast Guard about what it was doing to improve the areas that the Coast Guard thought indicated a potential lack of responsibility.

The Coast Guard has been satisfied with the improvements that the company has made. I believe that through this process the Coast Guard

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<sup>13</sup> When considering present responsibility under the FAR Subpart 9.4 (48 C.F.R. Subpart 9.4), agencies increasingly have been using Show Cause Letters to develop the record without first excluding contractors from contracting with the government. A Show Cause Letter provides the government and the contractor with the opportunity to engage in a dialogue that ultimately permits the government to make a more informed determination of whether there is a need to protect the government's interest by excluding the contractor.

<sup>14</sup> See Defense Federal Acquisition Regulation Supplement (DFARS) 209.406-1 (2012); 48 C.F.R. 209.406-1 (2012) (If a debarring official determines that debarment is not necessary, the official may enter a written agreement that includes appropriate terms and conditions.).



has helped Bollinger to become a better company, but just as importantly from the Coast Guard's standpoint, the Coast Guard now has real facts that it can take to the Hill, that it can show the GAO and other overseers, establishing that this company is, in fact, presently responsible. They may not have been a couple of years ago, but the Coast Guard is looking at *present* responsibility, and presently Bollinger is responsible.

### Lessons Learned

When Congress gets involved, as you all know, agencies quickly lose control over what is going on. Agencies can get battered around and the best way an agency can position itself is to think ahead, particularly when it relates to fraud. Be proactive, be robust, and move out swiftly so that the agency has facts, and not speculation, that can be used to respond to overseers and critics. When agencies give them facts, as opposed to opinion, agencies get a lot more traction.

Damages. The Coast Guard is still working this. What would the Coast Guard do if the government ultimately prevails and is wildly successful with the False Claims Act suit and secures a huge verdict against this company? What does the Coast Guard do? It likely will come down to the Coast Guard, the DOJ, and Bollinger being very smart and figuring out some sort of a structured settlement that makes the government whole, yet allows the company to continue.

Discovery. You all know the hassles associated with that. It just gets worse as we learn more about the expectations associated with e-discovery and the fact that we are being held to a present-day standard when most of the e-information in this case goes back to the late '90s when the Coast Guard did not have sophisticated e-systems, and the e-systems that the Coast Guard did have frequently are stored on brittle tape that may or may not work. Agencies are required to spend lots of money on forensics. It can be a nightmare.

Aligning with the DOJ. I want to make it very clear I do not in any way intend to malign the Department of Justice. I think the DOJ attorneys are outstanding. I think they do a great service, but there is some learning that has to go on focusing on how the DOJ and agencies can effectively coordinate and work fraud remedies together. The DoJ and the investigators supporting DOJ's efforts must break with past practices in which they direct the acquisition community to stand down

during an investigation and related litigation. That has been a way of doing business in the past that is inconsistent with the current focus on promoting parallel proceedings.<sup>15</sup>

Lastly, in many fraud cases the biggest bang for the buck for the agency, program, or contract, is going to be aggressively pursuing contractual remedies. Agencies should work them, keep the DOJ informed, but recognize that in most cases agencies do not need DOJ's approval to take advantage of contractual remedies.

An aggressive, proactive procurement fraud remedies program is critical if federal agencies are going to successfully fight fraud. Each of you as an acquisition professional has a role to play.

With that, I think, my time is up.

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<sup>15</sup> Memorandum from Office of the Attorney General, for All United States Attorneys et al., Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings (Jan. 30, 2012).