

CHAPTER 6

CRIMINAL REMEDIES AND CRIMINAL LAW UPDATE

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CHAPTER 6

CRIMINAL REMEDIES AND CRIMINAL LAW UPDATE

I. INTRODUCTION

- A. Criminal prosecution of procurement fraud remains the Federal Government's most powerful and important remedy.

- B. For an individual defendant, imprisonment is of greater significance than any other possible sanction. The possible impact of collateral proceedings following a criminal indictment or conviction may be of greater significance for an organization than the actual criminal sanctions.
 - 1. Suspension or debarment from government contracting and other government business.
 - 2. Treble damages and civil penalties under the civil False Claims Act.
 - 3. Class action shareholder suits and loss of market confidence and value.
 - 4. Denial, suspension or loss of export licenses.

- C. Department of Justice United States Attorney's Offices (USAOs).
 - 1. USAOs have primary responsibility for prosecuting violations of federal criminal law.

2. 93 USAOs throughout the 50 states, Guam, Marianas, Puerto Rico, and the U.S. Virgin Islands.
3. Each United States attorney is a presidential appointee and is the principal federal law enforcement officer in his or her district.
4. Prosecutions are the responsibility of Assistant United States Attorneys (AUSAs).

D. Department of Justice Criminal Division, Washington, D.C.
(<http://www.usdoj.gov>)

1. Responsible for developing, implementing, and coordinating federal criminal law policy issues.
2. Criminal Division attorneys prosecute selected cases.
3. Fraud Section is part of the Criminal Division in Washington, D.C.
 - a. Responsible for criminal law policy issues related to procurement fraud.
 - b. Acts as clearing house of information for AUSAs and investigative agencies regarding procurement fraud prosecutions.
 - c. Prosecutes procurement fraud cases referred directly by investigators, when requested by USAOs, or when USAOs are recused.
 - d. In coordination with the DOD IG, reviews, determines admissibility, and supervises verification investigations of

voluntary disclosures submitted under the DOD IG Voluntary Disclosure Program.

II. CONVINCING AN AUSA TO PROSECUTE A PROCUREMENT FRAUD CASE.

- A. Referring agency or criminal investigators must convince an AUSA that a procurement fraud case warrants prosecution. This is not always an easy task.
 - 1. Procurement fraud is not the first priority in many USAOs. Health care fraud is frequently a higher white collar priority. Procurement fraud referrals must compete with other white collar priorities such as telemarketing fraud, financial institution fraud, and public corruption.
 - 2. Some USAOs lack AUSAs with procurement fraud experience and are understandably reluctant to commit significant resources to the development of a complex, document intensive case with uncertain prosecution potential.
 - a. Large offices such as the Central District of California, Eastern District of Pennsylvania, and the Eastern District of Virginia are exceptions, but may still have only a limited number of AUSAs available to consider procurement fraud cases.
 - b. Some USAOs have a military judge advocate or an agency attorney detailed as a Special AUSA who may be more available to support a procurement fraud case.
 - 3. USAO may have a dollar amount loss threshold for procurement cases higher than the loss typical for fraud at camp, post or installation level.

4. Health or safety issues may cause an AUSA to accept for prosecution a case without a large monetary loss.

5. The type of case and evidence available are important considerations for any AUSA.
 - a. Resource question - how much time and effort will be required to make the case and what is the likelihood of success?

 - b. Jury appeal.
 - (1) Complex or difficult cases might be declined in the absence of strong evidence of criminal intent:
 - (a) Complex IR&D issues.

 - (b) Defective pricing.

 - (c) Product substitution or defective testing cases involving deliverables that work or disputed specifications.

 - (d) Cost mischarging cases involving complicated overhead or labor rate issues.

 - (2) Government complicity or bungling reduces prosecution potential.

- (a) Government employees (e.g., COTRs, QARs, program managers) were aware of conduct but did nothing or implicitly condoned it.
- (b) Formal or informal waivers by government employees.
- (c) "Form, fit & function." Deliverable does not meet letter of applicable specifications but works well or is consistent with current industry standard.

III. CONDUCTING THE INVESTIGATION.

- A. Inspector General Subpoenas. 5 U.S.C. App. § 6(a)(4).
 - 1. Broad subpoena power for documents relevant to the investigation of waste, fraud, and abuse in an agency program.
 - 2. No power to compel testimony.
 - 3. Production of responsive documents is often slow and compelling production of originals is problematic.
 - 4. Enforcement of IG subpoenas is the responsibility of the U.S. Department of Justice Civil Division through a "show cause" hearing in U.S. District Court in the district in which the subpoenas are served.

5. Information collected may be shared with other government investigators or agencies and may be used for civil or administrative actions. IG subpoenas are the subpoena of choice for civil False Claims Act investigations.

B. Grand Jury Subpoenas.

1. Grand jury subpoenas can compel production of documents and testimony.
2. In many circumstances, Fed.R.Crim.P 6(e) secrecy requirements preclude the use of evidence obtained by the grand jury in administrative or civil matters except with a court order.
3. Enforcement of grand jury subpoenas is typically handled by the AUSA responsible for the investigation for which the subpoena was issued by filing a contempt motion before the U.S. District Court supervising or responsible for the grand jury.

C. Search Warrants. Fed.R.Crim.P. 41.

1. Search warrants afford no notice and prevent destruction or withholding of evidence.
2. Search warrants can be executed quickly without a lot of time-consuming motions.
3. Evidence seized can support civil, administrative or contractual actions.

4. Search may cause "panic effect" and encourage contractor employee cooperation with investigators.
 5. Successful suppression motions based on defects in the search warrant or search procedure may taint entire investigation.
- D. Electronic Surveillance under "Title III." 18 U.S.C. §§ 2510-2521.
1. Wiretaps are rarely used in procurement fraud investigations, although the Ill Wind prosecutions in the late 1980's and early 1990's proved their effectiveness. Application for and operation of wiretaps require a substantial dedication of USAO and FBI resources, which are typically forthcoming only in major cases with a high likelihood of success.
 2. By DOJ Policy, video surveillance is treated as if it fell under Title III, even if no voice intercept is done.
 3. More common are consensually monitored telephone conversations or use of body wires by cooperating witnesses, particularly qui tam relators. Defense Criminal Investigative Service and military investigative organizations must obtain DOD IG or secretarial-level consent prior to consensual tape recordings.
- E. Undercover operations and stings have been used successfully in a number of procurement fraud prosecutions, particularly in the fastener and aviation parts industries.

IV. CRIMINAL STATUTES AND ELEMENTS OF PROOF.

The following statutes are those most commonly utilized in procurement fraud prosecutions. Unless specifically noted, the maximum punishment for federal felonies for

individuals is a fine of \$250,000 and imprisonment for five years and for organizations is a fine of \$500,000. 18 U.S.C. § 3571. The United States Sentencing Guidelines control the actual sentence imposed.

A. False Statement. 18 U.S.C. § 1001.

1. Prohibits the knowing making or use of a false statement, representation or writing, or the concealment or cover up by any trick, scheme, or device, of a material fact, in relation to a matter within the jurisdiction of any department or agency of the United States.
2. Elements:
 - a. Defendant makes or uses a false statement or writing. Statement can be oral or written, sworn or unsworn, signed or unsigned.
 - b. False statement must be made knowingly and willfully, i.e., with knowledge that statement was false.
 - c. Statement must be made in relation to a matter within the jurisdiction of a department or agency of the United States, that is, the executive, judicial or legislative branch department or agency had authority to act on the statement.
 - d. Statement was material, i.e., statement could have influenced the outcome of the department or agency decision or action. There is no need that the department or agency actually acted on statement or even knew of statement. Materiality is a jury question. United States v. Gaudin, 515 U.S. 506 (1995)(overturning substantial lower court precedent).
3. Death of the "Exculpatory No" Doctrine. In Brogan v. United States, 118 S.Ct. 805 (1998), the Supreme Court killed the "exculpatory no" doctrine previously recognized by a number of circuit courts. Under the

judicially created doctrine, false statements consisting of a simple denial of one's own wrongdoing (and in some jurisdictions the denial of any individual element of a crime, any subset of elements or of material facts that might establish an element or elements) were excluded from the scope of 18 U.S.C. § 1001.

4. 18 U.S.C. § 1001 was substantially revised in 1996 by the False Statements Accountability Act of 1996, P.L. 104-292, 110 Stat. 3459, in response to Hubbard v. United States, 514 U.S. 695 (1995), which held that section 1001 did not apply to the judicial branch, and by implication the legislative branch of the Federal Government. The revised statute specifically provides that section 1001 applies to statements made to each branch of government. However, the revised statute explicitly incorporates the judicial and legislative function exceptions that were settled law prior to the Hubbard decision. The judicial function exception exempts from section 1001's application those representations made by a party or party's counsel to a judge during a judicial proceeding, so as to avoid any chilling effect upon the adversarial process. The legislative function exception exempts from section 1001's application those communications made to or before Congress and which do not constitute administrative filings and which are not furnished in connection with a duly authorized investigation.

B. False Claim. 18 U.S.C. § 287.

1. Prohibits the knowing making or presentation of a false, fictitious, or fraudulent claim to a department or agency of the United States.
2. Elements:
 - a. A claim exists, i.e., any attempt to secure money or property.
 - b. Making or presentation of claim to United States.

c. Knowledge that the claim is false, fictitious or fraudulent.

C. Conspiracy. 18 U.S.C. § 371.

1. Prohibits any agreement between two or more persons to defraud the United States or to commit any offense against the United States.
2. Elements:
 - a. Agreement between two or more persons to accomplish one or both of the following objects:
 - (1) To commit a criminal offense; or
 - (2) To defraud the United States by cheating the government out of property or money or to impair, impede, interfere with or obstruct one of the government's lawful functions, such as procurement, by deceit, trickery or other dishonest means.
 - b. Defendant must be aware of conspiracy, intend to participate in it, and actually participate.
 - c. Commission of an overt act in furtherance of the conspiracy by at least one of the co-conspirators. Overt act need not itself be unlawful.
3. Applications.

- a. Proof of conspiracy makes admissible against all co-conspirators the statements of each made in furtherance of the conspiracy (although a conspiracy need not be charged). Fed.R.Evid. 801(d)(2)(E).
- b. As a continuing offense, the statute of limitations runs from the last overt act thus reaching earlier activities which otherwise may be outside the statute of limitations.

D. Conspiracy to Make False Claims. 18 U.S.C. § 286.

- 1. Prohibits any agreement to defraud the United States or any federal agency by obtaining payment of any false, fictitious or fraudulent claim.
- 2. Elements:
 - a. Agreement between two or more persons to defraud the United States or a federal agency.
 - b. Attempt to obtain or obtaining of payment by submission of a false claim pursuant to the agreement.
- 3. Same conspiracy may be charged as either a violation of the general conspiracy statute, 18 U.S.C. § 371, or as a violation of 18 U.S.C. § 286, or both. United States v. Lanier, 920 F.2d 887 (11th Cir.), cert. denied, 502 U.S. 872 (1991).

E. Mail and Wire Fraud. 18 U.S.C. §§ 1341 and 1343.

1. Mail Fraud (18 U.S.C. § 1341) prohibits use of the mails (or use of private or commercial interstate carrier) and Wire Fraud (18 U.S.C. § 1343) prohibits use of the interstate wires to attempt to execute or to execute a scheme to defraud or to obtain money by false pretenses or representations.

2. Elements:
 - a. Existence of a scheme or artifice to defraud or to obtain money by false pretenses or representations.

 - b. Intent to defraud by knowing participation in the scheme or artifice

 - c. Use of the mails (or private or commercial interstate carrier such as Federal Express) or interstate wires in furtherance of the scheme or artifice to defraud or to obtain money by false pretenses or representations.

3. Applications.
 - a. Need not show that defendant intended that mails, commercial carrier, or wires be used. Sufficient if defendant knew that a mailing or use of the wires would follow in the ordinary course of business or if such use could be reasonably foreseen.

 - b. Mailing or material provided to commercial carrier or use of wires need not itself be false or illegal.

 - c. Success or failure of scheme or artifice is not material and there is no need to prove an actual loss.

- d. Mail and wire fraud statutes reach a scheme or artifice to defraud the United States by cheating the government out of property or money or to impair, impede, interfere with or obstruct one of the government's lawful functions, such as procurement, by deceit, trickery or other dishonest means.
4. There is a split among the circuits whether materiality is an element of mail fraud, 18 U.S.C. § 1341, or wire fraud, 18 U.S.C. § 1343. Materiality is not an element. United States v. Neder, 136 F.3d 1459 (11th Cir. 1998); United States v. Uchimura, 125 F.3d 1282 (9th Cir. 1997). Materiality is an element. United States v. Klausner, 80 F.3d. 55 (2d Cir. 1996).
- F. Major Procurement Fraud. 18 U.S.C. § 1031.
1. Prohibits procurement fraud involving contracts or subcontracts with the United States valued at \$1 million or more.
 2. Elements:
 - a. Defendant executed or attempted to execute a scheme or artifice with the intent to defraud the United States or to obtain money or property from the United States by false pretenses or representations.
 - b. Defendant did so knowingly.
 - c. Defendant attempted to execute or executed the scheme or artifice in a procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there was a prime contract with the United States.
 - d. The value of the contract or subcontract was \$1 million or more.

3. Applications.
 - a. Similar to mail and wire fraud statutes except that the acts in execution of the scheme or artifice are not limited to the use of the mails, commercial carrier, or interstate wires. Each act in execution of the scheme is a separate offense. United States v. Sain, 141 F.3d 463 (3d Cir. 1998); United States v. Frequency Electronics, 862 F.Supp. 834 (E.D.N.Y. 1994); United States v. Broderson, No. 93-1177 (JM)(E.D.N.Y. 1994), 1994 U.S. Dist. LEXIS 12982; contra, United States v. Wiehl, No. 94-CR-443 (N.D.N.Y. Dec. 7, 1994), 1995 U.S. Dist. LEXIS 15999. To determine if an action is a separate execution of the scheme, the court will look to whether the actions are substantively and chronologically independent from the overall scheme (e.g., a separate effort to obtain money). Sain, supra.
 - b. The circuits are split whether the \$1 million jurisdictional amount is determined by reference only to the value of the contract which is the subject of the fraud (United States v. Nadi, 996 F.2d 548 (2d Cir. 1993)) or by reference to any related prime contract, subcontract at any tier or constituent part of the procurement (United States v. Brooks, 111 F.3d 365 (4th Cir. 1997)). See also, United States v. Sain, 141 F.3d 463 (3d Cir. 1998)(fraud in connection with contract modifications with a value less than \$1 million was within the scope of 18 U.S.C. § 1031 where the total contract value exceeded \$1 million; no need to resolve split between 2d and 4th circuits).
 - c. Statute significantly escalates maximum fines if the loss to the government is greater than \$500,000 or the offense involves a conscious or reckless risk of serious personal injury.
 - d. Seven year statute of limitations.

- e. 10-year maximum term of imprisonment.

G. Obstruction of Federal Audit. 18 U.S.C. § 1516.

- 1. Prohibits obstruction of a federal auditor in the performance of official duties.

- 2. Elements:

- a. The federal auditor was in the performance of official duties.

- b. The official duties must relate to a person or organization receiving in excess of \$100,000, directly or indirectly, from the United States in any one-year period under a contract or subcontract.

- c. Defendant must know that the auditor was in the performance of official duties.

- d. Defendant must endeavor to influence, obstruct, or impede the auditor in the performance of his official duties.

- e. Defendant must act willfully, with the intent to deceive or to defraud the United States.

- 3. Applications.

- a. The statute broadly defines "federal auditor" to include quality assurance inspectors as well as traditional auditors.

- b. The government need not prove that the auditor was actually influenced, obstructed or impeded.

H. Bribery of Public Officials. 18 U.S.C. § 201(b)(1-2).

- 1. Prohibits corruptly offering or giving anything of value to any officer or employee of the United States (§ 201(b)(1)) or the corrupt solicitation or receipt by such officer or employee of anything of value (§ 201(b)(2)).

- 2. Elements:

- a. Giving, offering, or promising to a public official, or the demand or receipt by a public official, of:

- b. Anything of value

- c. With intent to:

- (1) Influence any official act; or

- (2) Commit a fraud on the United States; or

- (3) Do or omit to do an act in violation of the officer's or official's duty.

- 3. Applications

- a. A quid pro quo must be proved.
- b. No defense if public official does not have authority to act or would have acted in the same fashion in the absence of the bribe.
- c. 15-year maximum term of imprisonment and prohibition against government employment.

I. Gratuity to Public Official. 18 U.S.C. § 201(c)(1-2).

1. Prohibits giving, offering, or promising a public officer or official anything of value because of an official act (§ 201(c)(1)), or a public officer or official from seeking, demanding, or receiving anything of value because of an official act.
2. Elements:
 - a. The giving, offering, or promise to a public official, or the demand, receipt, or acceptance by a public official, of
 - b. Anything of value
 - c. For or because of an official act.
3. Applications.
 - a. A gratuity need not be "corruptly" given or received, i.e., a quid pro quo is not required.

b. Two-year maximum term of imprisonment.

4. The gratuity statute requires some intent to affect or reward official conduct, i.e., the gift must be "for or because of the act." United States v. Sun-Diamond Growers of California, 138 F.3d 961 (D.C. Cir. 1998)(rejecting jury instructions that it is not necessary to show that a payment is intended for a particular matter then pending before the official, it is sufficient if the motivating factor for the payment is just to keep the official happy or to create a better relationship in general with the official). Sun-Diamond implicitly rejects those decisions holding that gifts motivated solely by the recipient's official position may be illegal gratuities. E.g., United States v. Bustamante, 45 F.3d 933 (9th Cir. 1995).

J. Conflicts of Interest.

1. 18 U.S.C. § 207 makes criminal under certain conditions instances where former government employees from certain private activity or employment related to their former official duties.
2. 18 U.S.C. § 208 prohibits a government official from personally or substantially participating in government actions in which he or his immediate family have a financial interest, to include employment negotiations with a contractor.
3. The use of a criminal prosecution for the disposition of conflicts of interest is uncommon, but not unheard of. These violations can be dealt with as misdemeanors or felonies. Typically, administrative disciplinary actions are brought against government employees. Violations can also be dealt with in a civil action with fines up to \$50,000 per violation.

K. Anti-Kickback Enforcement Act. 41 U.S.C. §§ 51-58.

1. Prohibits the payment or acceptance, attempts to pay or accept, and the offer or solicitation of a kickback.
2. Elements:
 - a. In a prime contract with the United States or a subcontract to such a prime contract
 - b. Defendant provided, attempted to provide, or offered to provide a kickback; or defendant solicited, accepted, or attempted to accept a kickback; or defendant included the amount of any kickback to the price of the prime contract or subcontract.
 - c. Defendant acted knowingly and willfully.
3. The statute broadly defines a kickback as "any money, fee, commission, credit, gift, gratuity, **thing of value**, or compensation of any kind which is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract."
4. Anti-Kickback Act does not require proof that the defendant intended to obtain government business or that the defendant even knew that his kickback activity related to Federal Government contracts or subcontracts. Kickbacks made at any point in the government procurement process for the purpose of improperly obtaining favorable treatment are prohibited. United States v. Purdy, 144 F.3d 241 (2d Cir. 1998).

L. Theft and Conversion of Government Property. 18 U.S.C. § 641.

1. Prohibits the theft, conversion, or conveyance without authority of government property of a value over \$100 for a felony offense or \$100 or less for a misdemeanor offense.
2. Elements:
 - a. Defendant embezzled, stole, purloined or knowingly converted to his use or the use of another; or without authority sold or conveyed or received and retained
 - b. A thing of value
 - c. Which was the property of the United States.
3. Application.
 - a. Applies to the theft, conversion or unauthorized conveyance of classified information.
 - b. 10-year maximum term of imprisonment.

M. Revised Procurement Integrity Act. 41 U.S.C. § 423.

1. Prohibition on Disclosing Procurement Sensitive Information.
 - a. A present or former government official, or person acting for the government;
 - b. Knowingly disclosed contractor bid or proposal information or source selection information before award of a competitive federal agency procurement contract to which the information relates;
 - c. The official or person had access to that information by virtue of his or her office; and
 - d. The official or person acted with the purpose of exchanging the information to receive something of value **or** to obtain or give another party a competitive advantage in the award of a contract.

Prohibition on Obtaining Procurement Sensitive Information.a.

A person knowingly obtained contractor bid or proposal information or source selection information;b. Before the award of a competitive federal agency procurement contract to which the information relates;c. The person acted with the purpose of exchanging the information to receive something of value or to obtain or give another party a competitive advantage in the award of a contract.3. Source selection information includes any of the following, if not previously disclosed publicly: bid prices or proposed costs or prices submitted in response to a Federal agency solicitation, or lists of those proposed costs or prices; source selection plans; technical evaluations of proposals; cost or price evaluations of proposals; competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract; rankings of bids, proposals or competitors; or reports and evaluations of source selection panels, boards, or advisory councils. 1.

Prohibition on Disclosing Procurement Sensitive Information.

- a. A present or former government official, or person acting for the government;
- b. Knowingly disclosed contractor bid or proposal information or source selection information before award of a competitive federal agency procurement contract to which the information relates;
- c. The official or person had access to that information by virtue of his or her office; and
- d. The official or person acted with the purpose of exchanging the information to receive something of value **or** to obtain or give another party a competitive advantage in the award of a contract.

2. Prohibition on Obtaining Procurement Sensitive Information.

- a. A person knowingly obtained contractor bid or proposal information or source selection information;

b. Before the award of a competitive federal agency procurement contract to which the information relates;

c. The person acted with the purpose of exchanging the information to receive something of value or to obtain or give another party a competitive advantage in the award of a contract.

3. Source selection information includes any of the following, if not previously disclosed publicly: bid prices or proposed costs or prices submitted in response to a Federal agency solicitation, or lists of those proposed costs or prices; source selection plans; technical evaluations of proposals; cost or price evaluations of proposals; competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract; rankings of bids, proposals or competitors; or reports and evaluations of source selection panels, boards, or advisory councils.

5. Contractor bid or proposal information means any of the following information submitted to a Federal agency as part of or in connection with a bid or proposal to enter into a contract, if not disclosed publicly: cost or pricing data (as defined by 10 U.S.C. § 2306a(h)); indirect costs and direct labor rates; proprietary information about manufacturing processes, operations or techniques marked by the contractor in accordance with applicable law or regulation; or information marked in accordance with FAR § 52.215-12.

6. Penalties. Criminal violations of the statute may result in imprisonment for not more than five years and a fine not to exceed \$250,000 for individuals or \$500,000 for organizations. Can be disposed of by civil action with a maximum fine of \$50,000 per violation.

7. The Procurement Integrity Act also provides that agency officials must report contact regarding non-governmental employment, and further sets forth a one year post employment ban on compensation. These two sections are not subject to criminal penalties, but can be enforced in a civil action with penalties of up to \$50,000 per violation.

N. Money Laundering. 18 U.S.C. §§ 1956 and 1957.

1. Generally prohibit certain financial and other transactions involving the proceeds of predicate crimes called "specified unlawful activities," to include mail and wire fraud.
2. In a procurement fraud case, additional proof for money laundering often involves only the introduction of banking and other financial records.
3. Under the United States Sentencing Guidelines, the base offense level and potential sentencing range are higher for money laundering offenses than for fraud offenses, unless the dollar loss is substantial. Many AUSAs add money laundering counts to a procurement fraud indictment to increase the potential sentence and, as a result, to encourage and to gain leverage in plea negotiations.

O. The Economic Espionage Act. 18 U.S.C. §§ 1831-1839.

1. Effective October 11, 1996, Pub. L. No. 104-294, Title I, § 101(a), 110 Stat. 3488, the Economic Espionage Act is the first Federal statute specifically making criminal the theft of trade secrets.
2. Elements:
 - a. The defendant stole, or without authorization of the owner or through deception, obtained, received, possessed, copied, duplicated, downloaded, uploaded, transmitted, destroyed or conveyed information;
 - b. The information was a trade secret;

- c. The defendant intended to convert the trade secret to the benefit of someone other than the owner;
- d. The defendant knew or intended that the owner of the trade secret would be injured; and
- e. The trade secret was related to or was included in a product that was produced or placed in interstate commerce.

3. Application.

- a. The term "trade secret" is to be construed broadly, to encompass "all forms and types of financial, business, scientific, technical, economic, or engineering information . . . whether tangible or intangible, and whether or how stored, compiled or memorialized . . . [provided that] the owner thereof has taken reasonable measures to keep such information secret" and "the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public." 18 U.S.C. § 1839. The definition of "trade secret" includes bid estimates and production schedules and reaches circumstances where competitors are "attempting to uncover each other's bid proposals." H.R. Rep. No. 788, 104th Cong., 2d Sess. 9 (1996), reprinted in 1996 U.S.C.C.A.N. 4021, 4023.
- b. The Act is much broader than theft, which normally requires the physical removal of property with the intent to deprive the owner of its use. Under the Act, no tangible property need be removed from its owner.

- c. Copying and conveying are separate. An individual who had authorization to copy information may violate the Act if he or she conveys it without authorization.
- d. Penalties. An individual violating the Act can be fined up to \$500,000 and imprisoned for not more than 10 years. A corporation violating the Act can be fined up to \$5 million or in an amount twice the value of the gain or loss resulting from the theft of the trade secret, whichever is larger.
- e. Forfeiture. The Act provides for criminal forfeiture of any property or proceeds derived from the violation, to include the facilities of an organization at which the violation occurred.
- f. The Act requires the approval of the Attorney General, the Deputy Attorney General or the Assistant Attorney General for the Criminal Division prior to the filing of an indictment charging a violation of the Act.
- g. Extraterritoriality. The Act specifically applies to conduct outside the United States if the offender is a U.S. citizen or permanent resident or an act in furtherance of the offense was done in the United States.
- h. The Act provides no private right of action for a violation.

V. UNITED STATES SENTENCING GUIDELINES (U.S.S.G.).

- A. Application to Procurement Fraud Offenses. U.S.S.G. § 2F1.1.
 - 1. U.S.S.G. § 2F1.1(a) assigns a base offense level of six to procurement fraud cases.

2. U.S.S.G. § 2F1.1(b)(1)(A) - (S) is a fraud table which increases the base offense level by increasing amounts based on the monetary loss.
3. U.S.S.G. § 2F1.1(b)(2) provides for a two-level enhancement if the offense conduct involved "more than minimal planning."
4. In procurement fraud cases, the loss is the actual loss to the government or, if the loss did not come about, the expected or intended loss. U.S.S.G. § 2F1.1, comment. (n.7(b)).
5. In procurement fraud cases, the calculation of loss includes reasonably foreseeable consequential damages. For example, in a product substitution case, the government's reasonably foreseeable costs of reprocurement, fixing the defective product, or disposing of the defective product may be added to the total loss figure. U.S.S.G. § 2F1.1, comment. (n.7(c)).
6. If an offense involved the conscious or reckless risk of serious bodily injury, the offense level may be increased by two levels. If the resulting offense level is less than level 13, the offense level may be increased to level 13. U.S.S.G. § 2F1.1(b)(4).

B. Organizational Sentencing Guidelines. U.S.S.G. Chap. 8.

1. Applicable to offense conduct occurring after November 1, 1991.
2. "Corporate Death Penalty." Organizations existing primarily for criminal purposes or by criminal means should have a fine imposed which divests the organization of its net assets. U.S.S.G. § 8C1.1.
3. Restitution and Probation are authorized punishments.

4. A fine is the primary means of punishment. Fines are determined by calculating a base fine using the offense driven calculations applicable to individual defendants. The base fine is then revised upward or downward based on the organization's level of culpability and specified aggravating or mitigating factors (culpability score).

5. Aggravating factors increase the culpability score. They include:
 - a. Involvement in the criminal activity by "high level personnel" or pervasive tolerance of the offense throughout the organization by "substantial authority personnel."

 - b. Obstruction of justice.

 - c. Misconduct similar to misconduct that previously had been the subject of criminal adjudication or two or more civil or administrative adjudications.

 - d. Violation of a judicial order or a term of probation.

6. The mitigating factors are applied to reduce the culpability score. These factors go the heart of corporate self-governance. They are:
 - a. An effective program to prevent and detect violations of law in place prior to the offense occurring.
 - (1) Not applicable if high level official of organization involved in misconduct.

- (2) Not applicable if the organization unreasonably delayed reporting the offense to appropriate governmental authorities.
- b. Self-reporting of the offense to the appropriate government authority, cooperation with any subsequent government investigation, and acceptance of responsibility for the misconduct.

VI. CORPORATE CRIMINAL LIABILITY.

- A. Generally. Corporations are liable for crimes of their employees and agents acting within the scope of their employment with the intent to benefit the corporation. New York Central and Hudson R.R. Co. v. United States, 212 U.S. 481 (1909); United States v. McDonald & Watson Waste Oil Co., 933 F.2d 35, 42 (1st Cir. 1991); United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989), cert. denied, 493 U.S. 1021 (1990).
- B. Employees and Agents.
 1. Corporations are liable even for acts of low level employees. United States v. Basic Construction Co., 711 F.2d 570, 572 (4th Cir.), cert. denied, 464 U.S. 956 (1983).
 2. Statements of any employee are admissible as admissions against the organization. Fed.R.Evid. 801(d)(2)(D).
- C. Scope of Employment.

1. The acts of an employee are within the scope of employment if they are done on behalf of the corporation or for its benefit. United States v. Hilton Hotels, 467 F.2d 1000, 1004 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973).
2. "Scope of employment" is broadly interpreted beyond conduct that is actually authorized to conduct within the apparent authority of the employee or agent. Id.

D. Intent to Benefit the Corporation.

1. Must be some evidence that employee acted to benefit the corporation although mixed motive involving personal and corporate benefit is sufficient. United States v. Automated Medical Labs, Inc., 770 F.2d 399, 407 (4th Cir. 1985).
2. A corporation may be held liable for crimes by employees even when committed contrary to express instructions or company policy. United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989)(company's compliance program, however extensive, does not immunize the corporation from liability when employee acting within scope of authority fails to comply with the law.), cert. denied, 493 U.S. 1021 (1990); but see United States v. Beusch, 596 F.2d 871, 878 (9th Cir. 1979)(compliance policy may be considered in determining whether employee was acting to benefit the corporation.).

E. Collective Knowledge.

1. A corporation's knowledge consists of the collective knowledge of all of its employees, so that a corporation may be convicted even if no single employee had a culpable state of mind. United States v. Bank of New England, 821 F.2d 844, 855 (1st Cir.), cert. denied, 484 U.S. 943 (1987).

2. Collective knowledge cases have limited jury appeal.

VII. CORPORATE SELF-GOVERNANCE.

- A. Corporate "self-governance" or "self-policing" involves the implementation by corporate management of a comprehensive and effective compliance program to prevent and detect crimes, as well as mechanisms for voluntarily disclosing to the government misconduct the corporation discovers on its own.

- B. Corporations have many incentives for "self-governance."
 1. Avoid prosecution by appealing to prosecutorial discretion not to prosecute a good corporate citizen for acts of "rogue" employees or by taking advantage of various DOJ voluntary disclosure and leniency programs.

 2. Mitigate penalties under the Organizational Sentencing Guidelines.

 3. Demonstrate present responsibility to avoid suspension or debarment.

 4. Fulfillment of management's responsibility to shareholders to protect corporate assets by ensuring that the board of directors will receive compliance information in a timely manner as a matter of ordinary operations. In re Caremark International, Inc. Derivative Litigation, 698 A.2d 959 (Del.Ch. 1996).

- C. Corporate "self-governance" also involves risks.
 1. Risk of prosecution regardless of disclosure and cooperation.

2. Disclosure may expose corporation to civil actions such as wrongful termination lawsuits and shareholder derivative lawsuits.
3. Corporate internal investigations may encourage employees to file qui tam lawsuits against the corporation under the Civil False Claims Act.
4. Disclosures may waive applicable attorney-client and other privileges with respect to information contained in the disclosure, making information available to civil litigants. E.g., Westinghouse Electric Corp. v. The Republic of the Philippines, 951 F.2d 1414 (3d Cir. 1991)(disclosure of Westinghouse's internal investigation report to the SEC and to a grand jury waived the attorney-client privilege and work-product doctrine protections).
5. Internal investigations, employee discipline, and "giving up" individual employees to the government result in morale problems and reduced productivity.