REPORT TO CONGRESS
DEPARTMENT OF DEFENSE PROCESS FOR DECISION-MAKING IN CASES OF FALSE CLAIMS

REPORT ON THE DOD PROCESS FOR DECISION-MAKING IN CASES OF FALSE CLAIMS, SECTION 1054, NATIONAL DEFENSE AUTHORIZATION ACT OF FY 2001

INTRODUCTION

Section 1054, Public Law 106-398, the "Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001," directed the Secretary of Defense to submit a report to Congress describing the policies and procedures for Department of Defense (DoD) decision-making on issues arising under the Civil False Claims Act, sections 3729 through 3733, of Title 31, United States Code.

Section 33.209 of the Federal Acquisition Regulation provides that if there is evidence that a contractor cannot support a claim because of misrepresentation of facts or fraud on the part of the contractor, the contracting officer shall refer the matter to the agency responsible for investigating fraud. The DoD has adopted DoD Instruction 5505.2, Criminal Investigations of Fraud Offenses, and DoD Directive 7050.5, Coordination of Remedies for Fraud and Corruption Related to Procurement Activities, as the overarching guidance for investigating and coordinating remedies associated with fraud against the programs and operations of DoD.

Procedures and decision making for False Claims Act issues within DoD are decentralized. The Military Departments, the Defense Logistics Agency (DLA), the Defense Contract Audit Agency (DCAA), and the Defense Contract Management Agency (DCMA) have procedures for addressing suspected or alleged violations of the False Claims Act. The Military Departments, DLA, and DCMA have a central point of contact responsible for monitoring all significant investigations of fraud and corruption related to procurement activities. The central point of contact is responsible for ensuring that all possible criminal, civil, administrative, and contractual remedies are identified to cognizant procurement and command officials, and appropriate remedies are pursued expeditiously. DCAA does not make decisions concerning claims that are suspected to be false. It reports allegations of fraud directly to the DoD investigative components.

In early 2000, the DoD established, for an 18-month trial period, a Qui Tam Review Panel. The trial period expired June 25, 2001. There are no plans to continue the operations of the Panel. The Panel and its activity during the trial period are detailed after the discussion of the DoD Components' programs.

DEFENSE LOGISTICS AGENCY

Policies and Procedures

The DLA has a Fraud Remedies Program to coordinate criminal, civil, contractual, and administrative remedies in cases of procurement fraud. Internal guidance on the DLA

Fraud Remedies Program is provided by Defense Legal Services Agency Pamphlet P2 (DLSA P2) "Fraud Remedies Program Procedures." Procurement professionals of the DLA are instructed to report indicators of fraud or other wrongdoing to their local DLA Office of General Counsel. The DLA attorneys in turn review the information provided and ensure that an appropriate referral, with specific information in support of the allegations or suspicions, is made to the responsible Defense Criminal Investigative Organization (DCIO) office.

In DLA-related cases subject to the qui tam provisions of the False Claims Act, the Department of Justice (DOJ) sends them to DLA through its General Counsel. DOJ will normally ask DLA for a recommendation as to whether the Government should intervene in the matter.

The DLSA P2 provides guidance on referral of allegations to investigative agencies and directs, to the greatest extent possible, that referrals provide specific information.

The central point of contact for coordination of remedies in the DLA is in the Office of General Counsel, Defense Logistics Agency.

There have been no changes to DLA policies and procedures since January 1, 2000.

DEFENSE CONTRACT AUDIT AGENCY

Policies and Procedures

The Defense Contract Audit Agency does not independently make decisions regarding claims that are suspected or alleged to be false. Government auditing standards established by the Comptroller General and their implementing DoD directives and instructions require that DCAA (1) report allegations of fraud and other misconduct to DoD investigative components and (2) provide audit support to properly constituted investigations into such allegations. All referrals originating within DCAA are reviewed for sufficiency by the Assistant Director, Operations, or his designee, using proper criteria, and then forwarded to the appropriate investigative agency.

With respect to qui tam cases, DCAA does not directly advise the DOJ on whether to intervene. Because we support investigative agencies as they pursue these cases, we do not work directly with the DOJ. Accordingly, DCAA would provide advice (as requested) to the investigative agencies that would be responsible to make recommendations to DOJ.

There have been no changes in DCAA policies and procedures since January 1, 2000.

DEFENSE CONTRACT MANAGEMENT AGENCY

Policies and Procedures

Defense Contract Management Agency publication "Office of General Counsel Defense Contract Management Agency Contract Integrity Center Guidebook" contains the DCMA policies and procedures for dealing with suspected or alleged violations of the False Claims Act. Pursuant to these policies and procedures, DCMA fraud counsels receive allegations of fraud from within DCMA. Once received, an allegation and its impact are assessed to determine what action is necessary. A fraud counsel determines whether referral to a DCIO is warranted and makes the referral when appropriate. The decision not to refer a matter does not preclude the consideration of whether contractual or administrative action offer appropriate remedies.

Referrals of False Claims Act cases to the Department of Justice are forwarded through the Director, Contract Integrity Center (CIC), to the DCMA General Counsel. After review and approval, the DCMA General Counsel sends the referral to DOJ.

The DOJ sends DCMA-related qui tam cases it receives to the DCMA General Counsel for agency advice on whether the Government should intervene in the matter. The DOJ request for advice is forwarded through the Director, CIC to the cognizant Regional Fraud Counsel. The Regional Fraud Counsel, after consultation with the administrative contracting officer, determines whether the initial allegation in the qui tam complaint warrants initiating a formal investigation. The Regional Fraud Counsel recommends to the Director, CIC whether the Government should intervene, not intervene, or should not intervene and file a motion to dismiss. The Director, CIC forwards his recommendation to the DCMA General Counsel who makes the agency recommendation to DOJ.

The central point of contact for coordination of remedies in the DCMA is the Director, Contract Integrity Center, in the Office of General Counsel, DCMA.

The DCMA policies and procedures were established in May 2000. Prior to its establishment on March 27, 2000, DCMA was known as the Defense Contract Management Command (DCMC), a major subordinate command of DLA. DCMC, as a part of DLA, followed DLA procedures until DCMA established its own procedures.

ARMY

Policies and Procedures

Army Regulation (AR) 27-40, “Litigation" governs the manner in which false claims are dealt with in the Army. The Procurement Fraud Division (PFD) at the U.S. Army Legal Services Agency serves as the single centralized organization within the Army to coordinate and monitor the status of criminal, civil, contractual, and administrative remedies in significant cases of fraud or corruption relating to Army procurement. The PFD receives reports and allegations of procurement fraud or irregularities from diverse

sources, including military investigative agencies and over 250 procurement fraud advisors stationed at Army installations worldwide. The Chief, PFD, is the Army's official responsible for decisions to refer cases to the DOJ under the False Claims Act. This official also recommends whether or not the DOJ should intervene in a particular qui tam case.

The central point of contact for coordination of remedies in the Army is in the Office of The Judge Advocate General of the Army.

There have been no changes to Army policy or procedures for dealing with false claims since January 1, 2000. The Army is amending AR 27-40 to better memorialize the process for recommending the type of action DOJ should take with respect to a qui tam complaint.

NAVY

Policies and Procedures

Department of the Navy (DON) policy and procedures for decision-making on issues arising under 31 USC 3729-33, the Civil False Claims Act, are contained in the Federal Acquisition Regulations (FAR), DoD and Navy FAR Supplements, the US Navy Regulations and Secretary of the Navy instructions. Pursuant to these documents, DON personnel who suspect the submission of a False Claim are required to inform the Office of the Naval Inspector General (NAVINSGEN), the Deputy Naval Inspector General for Marine Corps Matters (IGMC) for claims involving the Marine Corps, or the Naval Criminal Investigative Service (NCIS), who coordinate action on the complaint to determine whether a criminal or civil investigation is appropriate.

When information is received or developed indicating that contract fraud may be involved, NAVINSGEN or IGMC tasks the Command responsible for the contract with preparation of a remedies plan and submission of that plan to both NAVINSGEN and or IGMC, the DON Procurement Integrity Office (PIO) in the Office of the General Counsel (OGC). The PIO will manage and track the case for purposes of developing and imposing any administrative remedies on the contractor determined appropriate by the DON Suspension and Debarment Official. That determination may include referral to the Department of Justice (DOJ) for further civil or criminal proceedings.

The Litigation Office, a component of OGC, is responsible for coordinating civil fraud and qui tam litigation issues with the DOJ. This includes making recommendations as to intervention and settlement of civil fraud and qui tam cases. These recommendations are based on the recommendations of Command Counsel, the results of any investigation, and the views of the DOJ. There has been only one change to DON policy and procedures since January 2000. In March 2000, the Principal Deputy General Counsel issued a memo requiring that when DON does not recommend that DOJ intervene in pending qui tam litigation, it also explore whether the DON should recommend that DOJ move to dismiss that particular case. The Navy Litigation Office relies heavily on the recommendation of the cognizant Command Counsel in making a

dismissal recommendation to the DOJ. It is anticipated, however, based on past experience that such recommendations will be infrequent.

The central point of contact for coordination of remedies in the DON is in the Office of the NAVINSGEN.

AIR FORCE

Policies and Procedures

The Air Force policy and procedures for handling issues arising under the False Claims Act are contained in Air Force Instruction 51-1101, "The Air Force Procurement Fraud Remedies Program."

As a general rule, the Air Force becomes aware of possible fraudulent claims either by receiving an investigative report from a DCIO or by receiving a qui tam complaint from DOJ. If the DOJ seeks to intervene, file suit in a False Claims Act matter, or settle a False Claims Act case, it seeks the recommendation of the Air Force Deputy General Counsel (Acquisition). Acquisition Fraud Counsel at the appropriate Air Force command gather information, review, and make a recommendation to the Deputy General Counsel whether to intervene in, file, or settle a case. The Deputy General Counsel recommends whether the DOJ should intervene, decline to intervene, or move to dismiss a qui tam complaint, file suit in a False Claims Act matter, or settle a False Claims Act case.

The central point of contact for coordination of remedies in the Air Force is in the Air Force Office of General Counsel.

The only change to Air Force procedures since January 1, 2000, is that when an Acquisition Fraud Counsel in the field recommends declining to intervene in a qui tam case, the attorney must also assess whether it would be appropriate for the Government to move to dismiss the complaint. This change has been implemented by adding language to the Air Force tasking letter, not by a formal amendment to the applicable Air Force Instruction.

QUI TAM REVIEW PANEL

On January 25, 2000, after a 2-year internal review of the Defense industry's proposals for changes to the False Claims Act, the Department of Defense decided that the Act remained an important tool in the fight against procurement fraud and decided not to seek to change the Act.

At the same time, after coordination with the Department of Justice, the DoD decided to establish, for an 18-month trial period, a Qui Tam Review Panel. The Panel was to be an in-house panel that would be available to consider extraordinary cases where the Government had declined to intervene in a qui tam action, and the military department or defense agency involved had decided not to recommend that the DOJ seek

to dismiss the action, but the affected contractor believed that there were compelling reasons that the case should be dismissed. The Panel was to consider and make recommendations concerning dismissal only in those cases where there was extraordinary justification for a recommendation for dismissal, for example, a case that demonstrably was without merit. The Panel's proceedings were to be informal and its recommendations were to be advisory only and not binding on the DoD, the DOJ, or the parties to the underlying litigation.

The 18-month trial period for the Panel expired June 25, 2001. During the trial period, the Panel considered requests from three defense contractors but did not forward any recommendations to the DOJ. There are no plans to continue the operations of the Panel.