

Convincing Contractors to Report Their Own Procurement Fraud to the Inspector General

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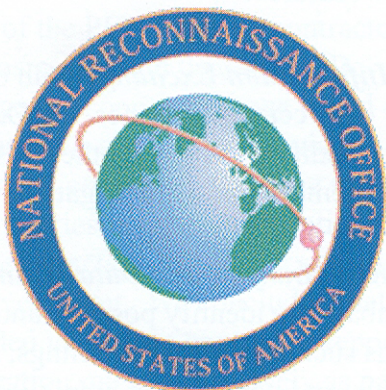
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The government has always accomplished important parts of its work through the use of contractors, from Revolutionary War days to the present. Even back then, we are told, a few scoundrels delivered a mule instead of the horse that the government bargained for. Today, the use of contractors and the problems that arise are more complex than ever. There is even greater impetus today—formal and informal—for agencies to use contractors: to supplement government personnel; to research, develop, and adapt to government use the technological advances made in the commercial sector; and to build and deliver products of all sorts, from pencils to satellites.

At the National Reconnaissance Office (NRO), contractors are a huge part of what we do.

Many NRO functions are staffed

by contractors. A large portion of our budget is spent on acquisitions (mostly satellites, rather than pencils, we would note). The NRO believes so strongly in this close relationship with our contractors that we capture it in our vision statement: Freedom's Sentinel in Space: One Team Revolutionizing Global Reconnaissance.



But this “one team” concept can only work if each member of the team is equally committed to the mission of the organization, and accountable for executing its role in accordance with the rules to which all have agreed. In the Inspector General community, we recognize that there can be problem employees who violate the rules, in both government positions and inside contractor companies. Agencies themselves have violated statutes and regulations, just as corporations have. Oversight organizations, such as the Offices of Inspector General (OIG) created by the Inspector General Act of 1978, have been established in recognition of these harsh realities.

At the NRO, our OIG certainly had purview over, and mechanisms to address, such issues when they arose in the contractor worlds. However, it was somehow consistently easier for us to get at the problems when they arose with our “govvies” than when it involved employees of our contractors. Piecing together statutes, federal regulations, and agency regulations, there was no doubt we had authority to pursue our audits and investigations, demand and obtain documents, and conduct interviews.

However, it was undeniable that as a practical matter, it was much more time consuming, and required more threats and more steps—indeed, more lawyers than acquisition people—to get the information and the cooperation we needed in matters involving our contractors.

A fairly predictable, often repeated, scenario went like this: OIG investigators came to OIG Counsel complaining that they had requested information from one of our contractors, only to be told (often by the legal staff) to go away because the contractor does not have to cooperate, let alone provide the information.

The OIG Counsel writes a letter to the company, citing three separate regulations, a statute, and some general language from the agency's contract with the company. The company's lawyer writes back, saying, that may be, but he wants to see a subpoena. We are confident that we do not need a subpoena and don't intend to jump through hoops for entertainment sake. The IG brings the matter to the attention of a senior agency official, who calls a senior company official and asks if their lawyer's position is the one the company really intends to defend. The OIG investigator gets his documents. What a way to do business - especially in an organization like the NRO that has so many contracts and contractors! The reader will be astounded to learn that the OIG's best sales job, even when combined with our assurance, "We're from the OIG and we're here to help," was just not yielding the results we needed in terms of cooperation from the contractors.

Just as this battle scenario was playing out over and over again, NRO OIG was developing and implementing an ambitious and comprehensive Procurement Fraud Initiative (PFI), designed to deter and detect contract fraud, whether stemming from action on the government side or the contractor side.

We identified our most significant vulnerabilities, and the indicators in those areas, and went after them in a concerted way.

Our PFI started from the premise that there is no greater tool in the detection of procurement fraud than knowledgeable government and contractor employees looking for, and reporting, potential procurement fraud indicators. The PFI uses a multifaceted methodology that combines several elements:

1. **Education** of contracting officers, contracting officers' representatives, program officials, and others in identifying the "red flags" of procurement fraud. This is done through lectures at training classes, special briefings, professionally produced video vignettes, and "Messages from the IG" distributed to the government and contractor workforce.
2. **Information Exchange** with other federal law enforcement agencies, the Defense Contract Audit Agency, and other IGs involved in procurement fraud investigations.
3. **Risk Analysis and Data Mining** of agency databases to identify possible anomalies in areas such as contractor billings, agency payments, and government employee behavior.
4. **Audit and Inspection Steps** used in all OIG projects to help detect "red flags," internal control weaknesses, and other vulnerabilities that may exist in agency contracting procedures.

Perhaps the most innovative and risky approach of our PFI was to develop and maintain

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an effective program of contractor self-referral of suspected fraud on their contracts through regular interaction with corporate business ethics and compliance officers and other corporate officials of the NRO's most important industrial partners.

The success of the NRO's PFI in helping to prevent and detect fraud, and bring forward cases for prosecution, was recognized when Deputy U.S. Attorney General Paul McNulty asked the NRO Inspector General Eric Feldman to be a founding member of the Eastern District's Procurement Fraud Working Group, designed to share investigative information, best practices, and trends in procurement fraud investigative techniques involving federal contracts.

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The aspect of the PFI involving contractor self-referral was easier said than done. Despite oral pledges of cooperation, we found out through various back-channel mechanisms that several contractors continued to pursue their own internal inquiries involving allegations of fraud in NRO contracts, while rarely reporting them to the government. We concluded that we somehow needed to address contractor reporting and cooperation more aggressively as part of the larger PFI. It became evident that, not surprisingly, contractors viewed their overriding connection to us to be their contract - not an agency Directive, not a FAR provision, but the contract. When a question arose, “they” (especially a company front line manager) would say, “Show me where it says so in the contract.”

Boom! The lights went on in our OIG. Even though we may have already had all the authority we needed to be legally entitled to cooperation, reporting, etc., it was more difficult to obtain responsiveness because we could not point to a full-text statement that clearly articulated this obligation in the contract. With this epiphany, the NRO Acquisition Manual (NAM) reporting clause was born.

Inserting such a simple clause in the NAM would be an easy proposition, right? Well, not so fast. First, we encountered internal skepticism that we won't recount blow-for-blow in these pages so we can maintain the sanctity of our “one team” solidarity.

Suffice it to say that it is important, indeed critical, for an agency such as the OIG considering an approach similar to ours to work with the agency General Counsel, Office of Contracts, and senior-level management to convince them of the need for a procurement fraud reporting clause before ever floating anything outside the agency. It will be absolutely necessary to go forward with a united front—because the outside world will pick and probe, looking for a chink in the agency resolve to adopt and enforce such a clause.

What we created was a contract clause that would become part of the NAM, applicable by reference in essentially every prime and sub contract. The NRO's Office of Contracts then presented this contract clause, that had been fully vetted internally and agreed to throughout NRO, to our contractors for comment - and comments we did receive!

Many were helpful while identifying language in our draft that needed clarification, or questioning the need for provisions in the clause given other existing requirements. Some were hysterical, accusing NRO of violating four different amendments to the U.S. Constitution.

We modified the draft clause in response to those comments that raised legitimate concerns, but then we quickly moved forward, adopting the clause without feeling compelled to rebut some of the law review-styled tomes submitted by outside counsel, and without seeking full consensus among those who had staked out the more extreme positions.¹

Our clause states:

N52.203-001 NRO Inspector General and the NRO Hotline.

As prescribed in N3.101-72, use the following clause in all solicitations and contracts exceeding the simplified acquisition threshold:

NRO Inspector General and Hotline

(A) The contractor must report to the NRO Inspector General (IG) any and all possible violations of federal law or illegal intelligence activities related to this contract by individuals charging directly or indirectly to this contract.

(B) The IG shall have access to any individual charging directly or indirectly to this contract whose testimony is needed for the performance of the IG's duties. In addition, the IG shall have direct access to all records, reports, audits, reviews, recommendations, documents, e-mails, papers, or other material that relate to this contract with respect to which the IG has responsibilities. Failure on the part of any contractor to cooperate with the IG shall be

¹ Nothing in this clause requires a contractor to waive any privileges it may have, or to forfeit any right to assert such privilege. Further, nothing in the clause is inconsistent with or supersedes the Department of Defense "Voluntary Disclosure Program."

grounds for administrative action by the Director, Office of Contracts, including contractual remedies.

(C) NRO contractors and contractor personnel may report suspected instances of improper conduct through the NRO IG Hotline at 703-808-1OIG (1644). Contractors shall make their employees aware of this Hotline.

(D) The contractor agrees to include the substance of this clause in all subcontracts exceeding the simplified acquisition threshold except those for commercial items or components, and those where the NRO association must be protected.

There are thus two primary elements of the contractor obligations to the OIG under this clause. First, the contractor has a reporting obligation—to come to OIG on its own when it becomes aware of certain information. Second, it has a cooperation obligation, to provide information and access to employees, when OIG is performing a review and comes to the contractor. While these obligations do exist independent of the clause, by virtue of statute, regulation, and Executive order, the clause does result in additional enforcement mechanisms and remedies, by virtue of being a contract requirement.

Our jobs would be easier if we could say this was the end of the story. But actually, it is the beginning of the real story. In our view, a requirement, even a clear contractual requirement, does not constitute a procurement fraud program. It is the ongoing relationship, built on mutual trust and much communication that will eventually yield the results we are seeking.

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Using this NAM clause as our statement of what is required and what we expect, we are in the process of building and solidifying ongoing relationships with our contractors. Certainly, we will now be able to obtain needed information more quickly from a contractor when we become aware of a procurement fraud and ask about it. But, we view as more important the contractor referral portion of our PFI. We are in the process of reaching understandings with our contractors about the circumstances in which we expect them to come to us with information, at what stage that should occur, and who should be talking to whom.

We have been conducting a series of one-on-one meetings to establish these expectations and understandings, to exchange business cards and phone numbers, and to put working-level people in both organizations in touch with one another. This has been occurring to some extent with our industrial partners in the Washington area, but is happening at a more intense pace at our West Coast OIG office, where many of the top NRO contractors reside within a mile radius of our operation. We also recently conducted our first ever Corporate Business Ethics and Compliance Officers Conference, bringing together the NRO OIG, other IGs (mostly from the Intelligence Community), and the self-selected "right" people from our contractors' ethics, legal, security, and compliance shops.

Deputy Attorney General McNulty addressed the group and emphasized the high priority that the Justice Department is placing on procurement integrity at this critical juncture in our nation's history, where procurement fraud stories hit the papers almost daily. Several companies also presented their Business Ethics and Compliance programs at the conference, and one even highlighted their new NRO OIG fraud reporting protocol in response to the new NAM clause!

We view this conference a success on many levels, not the least of which is the fact that several weeks later, the floodgates of fraud reporting mysteriously opened from companies that had previously had little interest in talking to us about potential vulnerabilities on their contracts. Nevertheless, we believe that we have barely scratched the surface in identifying possible fraudulent activity on our contracts, and much more needs to be done to solidify the OIG's relationship with our contractor base.

There are also several other areas of our PFI, including data mining and risk analysis that offer more potential than concrete results to date. But our proactive procurement fraud prevention and detection efforts have, on the whole, provided us a window into fraudulent activity that would never have opened with more traditional, "wait for a complaint to come in" approach to fraud investigations.

Today's procurement of satellites, major defense systems, and information technology costs far too much, and is too vulnerable to fraud and abuse, to warrant anything less than the development of an aggressive, proactive, and mutually supportive antifraud strategy that is pursued jointly with our contractor partners.~

About the NRO

The NRO designs, builds and operates the nation's reconnaissance satellites. NRO products, provided to an expanding list of customers like the Central Intelligence Agency (CIA) and the Department of Defense (DoD), can warn of potential trouble spots around the world, help plan military operations, and monitor the environment. The mission of the NRO is to develop and operate unique and innovative space reconnaissance systems and conduct intelligence-related activities essential for U.S. National Security.