

# Settling Up

Contractors ensnared in foreign bribery cases are avoiding suspension from federal contracts.  
 BY ROBERT BRODSKY

During the past few years some of the largest federal contractors have paid multimillion-dollar settlements to resolve allegations that they violated the 1977 Foreign Corrupt Practices Act by bribing overseas government officials to win international business.

While the Justice Department is making headlines for its nine- and 10-figure settlements, companies are escaping arguably the harshest penalty the government can impose: the inability to compete for federal contracts. In fact, legal experts cannot recall a single firm that has ever been suspended or debarred from federal work for an FCPA violation.

“When that happens we will have a new paradigm,” says Mike Koehler, an assistant professor of business law at Butler University in Indiana and a former FCPA attorney. “We will have a new enforce-

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Take the case of BAE Systems, the Defense Department’s second-largest contractor. The firm pleaded guilty on March 1 to making false statements to federal officials about implementing an FCPA compliance program and agreed to pay a \$400 million fine. BAE allegedly set up shell companies and third-party intermediaries to make payments to foreign officials to win defense contracts. But the firm’s settlement with Jus-

ti- ce makes no mention of suspension or debarment—a punishment that could be devastating for a company that won more than \$7 billion in government contracts in fiscal 2009, including nearly \$1 million in Recovery Act work.

Ditto for Siemens AG, Europe’s largest engineering company, which pleaded guilty in 2008 to violating FCPA provisions. Siemens paid the United States an \$800 million fine, the largest ever in a foreign bribery case, after it admitted to funding \$1.4 billion to officials worldwide to win or retain contracts. Siemens won more than \$500 million in U.S. government contracts last year, including \$5.6 million in stimulus awards. Other contracting goliaths such as KBR/Halliburton, the largest contractor in Iraq, and Chevron Corp., also have settled FCPA cases in

recent years, but avoided suspension. Justice declined a request to discuss its FCPA enforcement.

Koehler, who blogs on FCPA issues, suggests the recent civil cases prove the 1977 law is a “facade” and lacks enforcement teeth: “What kind of message does this send? That you can negotiate your way out of an anti-bribery violation?”

Others say suspending a U.S. firm for an FCPA violation can be tricky because the corrupt payments are to win overseas, rather than domestic, contracts. “There’s not always a nexus between the Foreign Corrupt Practices Act violation and U.S. government contracts,” says

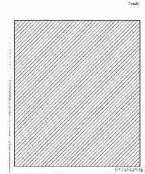
Angela Styles, a partner in Crowell & Moring’s government contracts group and the new coordinator for the Defense Industry Initiative, an ethics organization. “Very often, FCPA payments had nothing to do with a government contract.”

The Federal Acquisition Regulation states that companies can be suspended or debarred for an “offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or

**PENALTY CALL** Violators can ward off suspension by implementing their own anti-bribery programs, says former procurement chief Angela Styles.



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*Trends*

subcontractor.” The FAR does not specifically mention FCPA breaches, but federal guidelines state that a person or firm found in violation—or even indicted—for an FCPA offense can be banned from doing business with the government.

But that hasn’t happened. Frequently, Justice Department investigations culminate in the corporation admitting wrongdoing in a carefully worded settlement agreement that lets the company pay a hefty fine but still continue its government contracting operations.

Styles, who served as head of procurement policy during George W. Bush’s first term, says if a company has reached a settlement with Justice,

**58**

Foreign Corrupt Practices Act cases from 2005 to 2009

**140**

Ongoing cases as of February

**\$87.2 M**

Fines imposed on FCPA violators in 2007

**\$620 M**

Fines imposed in 2009

SOURCES: JUSTICE DEPARTMENT, FRESHFIELDS BRUCKHAUS DERINGER LLP

then it likely has implemented a substantial compliance and anti-bribery remediation program. “That’s normally sufficient for suspension and debarment officials,” she says.

Skeptics suggest that many of these contractors are “too big to fail” and agency officials fear the political repercussions of banning a key supplier. But Joseph Neurauter, a suspension and debarment official at the General Services Administration, says that’s not the case. GSA runs the Excluded Parties List System database of blacklisted companies. “I don’t worry about the company or how much business it does with the federal government,” he says.

While contractors might not yet fear

suspension or debarment, they should be concerned about potential jail sentences. Justice recently altered its prosecutorial strategy, targeting individuals rather than just the companies' purse strings.

"We tried more individuals for FCPA violations than in any prior year," Assistant Attorney General Lanny A. Breuer told the American Conference Institute's National Forum on Office of Foreign Assets Control Enforcement and Compliance in November 2009. "And we indicted more individuals than ever before. That is no accident. . . . Put simply, the prospect of significant prison sentences for individuals should make clear to every corporate executive, every board member and every sales agent that we will seek to hold you personally accountable for FCPA violations."

Between 2005 and 2009, Justice brought 58 FCPA cases—more than the total number of previous prosecutions. Those figures could rise dramatically as Breuer recently announced that Justice has more than 140 open investigations centering on foreign bribes. The department also set up a new FCPA task force and requested additional funding in the fiscal 2011 budget to beef up its workforce.

The renewed FCPA focus was evident in January's unprecedented federal sting operation in Las Vegas, which nabbed 22 defense contractor executives who allegedly paid bribes to an undercover FBI agent posing as an African defense ministry official. Half the 16 companies charged won contracts in fiscal 2009 for items such as guns, ammunition and body armor.

Justice Department officials heralded the undercover investigation, which included 150 FBI agents and 14 search warrants, as the largest single prosecution in the history of the FCPA. Most of the companies are relatively small, some with just a handful of employees—a significant

change from recent high-profile cases.

"This is a game changer," says Bethany Hengsbach, an FCPA attorney at Sheppard Mullin Richter & Hampton's Los Angeles offices. "The level

of resources was enormous and unprecedented. We are now looking at [FCPA] on par with organized crime and narcotics in how they are approached by law enforcement." 