

CRISIS PLANNING: When Your Company Is In The Government's “Crosshairs”



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Good Companies Can Have Bad Things Happen

- Sometimes the “bad thing” is an ambitious or scoundrel employee stepping “over the line” to the ire of the Government
- The processes that the company puts into place long before the Government’s ire often determines whether the company is allowed to continue to do business with the Federal government

Outline

I. Sea Change in S&D

II. Crisis Planning to
Minimize Risk

of Potential
S&D



Sea Change In S&D

- Number of DoD proposed debarments almost doubled in first Obama Administration
- OMB Memo November 2011 stated agencies have not adequately used S&Ds
- FAR § 52.203-13 “Contractor Code of Business Ethics and Conduct”
- FRAPIIS

A CEO's Day Of Infamy

- An “Inter-Agency” Task Force of CID, AFOSI, DODIG, and NASA IG is in the lobby
- They have a search warrant and plan to confiscate every hard drive in the company
- They have asked for your cooperation to interview employees
- The local newspaper and TV station have reporters on the scene
- You are only topically aware of the alleged wrongdoing

Huntsville defense contractor raided by federal agents



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By WAFF.com Staff - email

HUNTSVILLE, AL (WAFF) - Federal agents raided Huntsville defense contracting business, System Studies and Simulation, Inc. (S3) Thursday. At least one agent remained at the location Friday.

Witnesses said agents stopped by the building Thursday morning and had everyone leave.

A lot of information is being withheld, but several men removed files and boxes from the building and loaded them into a large, white truck.

S3's website remains down, and their Facebook page is inactive.



S3 is a defense contracting company located in Research Park in Huntsville.

A CEO's Day Of Infamy

The Most Likely Causes

1. Disgruntled employees
2. Employee bad judgment
3. Ignorance
4. Affiliation

A CEO's Day Of Infamy

The Most Likely Causes

1. **Disgruntled employees**
2. Employee bad judgment
3. Ignorance
4. Affiliation

Disgruntled Employee Example #1

- Fired embezzling bookkeeper
- Bookkeeper “downloads” to DODIG
- Man years of Special Agent time devoted to investigating
- Axion suspended
- Axion acquitted
- Business severely damaged

Disgruntled Employee Example #2

- Successful Huntsville 8(a) Company
- Largest contract was a subcontract with a top five government contractor
- Disgruntled employee claimed 8(a) had submitted false claims
- 8(a) retained a retired SES attorney to conduct investigation
- Because of excellent “damage control,” no adverse impact

A CEO's Day Of Infamy

The Most Likely Causes

1. Disgruntled employees
2. **Employee bad judgment**
3. Ignorance
4. Affiliation

Employee Bad Judgment



If It Can Happen To Boeing....

Bad Judgment Example #1

- Boeing possessed a large amount of rival LM proprietary data during the 1998 Evolved Expendable Launch Vehicle (EELV) competition
- The data was capable of providing great insight into LM cost and pricing
- Boeing waited four years to disclose the misconduct

If It Can Happen To Boeing....

Bad Judgment Example #1

- In July 2003, the Air Force suspended three of Boeing's Integrated Defense System business units

If It Can Happen To Boeing....

Bad Judgment Example #2

- In 2002, Boeing's CFO offered a job to Darleen Druyun, the Air Force chief acquisition official
- For a reduced sentence, Druyun admitted that she favored Boeing on multiple contracts because of favors she granted to Boeing

If It Can Happen To Boeing....

Bad Judgment Example #2

- Boeing's CEO was forced to resign
- Contracts awarded to Boeing by Druyun were successfully protested
- Boeing's problems in winning the Air Force tanker program were largely attributable to the scandal

If It Can Happen To Boeing....

Bad Judgment

In June 2006, Boeing settled Example #1 and Example #2 collectively for \$615 million

If It Can Happen To Boeing....

Bad Judgment = Bad Ethics

“I also went back and counted the number of vice presidents who have been separated from the company for ethics violations over the last few years. The total is 15.”

Boeing General Counsel (2006)

Local

Bad Judgment Example #3

- Successful Huntsville large business
- Hires a “hard charging” retired military officer to pursue \$2X,000,000 contract
- Selected for award
- Disqualified because employee repeated contacted SSA and SSAC members
- Because of excellent “damage control,” no other adverse action against company

A CEO's Day Of Infamy

The Most Likely Causes

1. Disgruntled employees
2. Employee bad judgment
3. **Ignorance**
4. Affiliation

Ignorance Example #1

- Georgia company makes small arms training simulators
- Imports demilitarized small arms from Europe to insert laser beam firing
- Ignorant that ITAR applies
- Federal agents seize all records and most of inventory
- Delinquent on delivering products to clients
- Impact almost fatal to company

Ignorance Example #2

- Coast Janitorial Service was awarded a contract at Redstone Arsenal for \$19,128,277
- Coast's Project Manager, "to keep overhead low," did not pay employees who worked overtime time and a half

Ignorance Example #2

- Instead, Coast credited employee with “comp time” which was paid at regular hourly rates.
- DOL found SCA violation involving two employees at an amount of \$6,596.

Ignorance Example #2

- Coastal responsible for “willful and deliberate” violations of supervisor
- Coast debarred for 3 years
- President, Mr. Grimes, debarred
- VP, Mr. Scott, debarred

A CEO's Day Of Infamy

The Most Likely Causes

1. Disgruntled employees
2. Employee bad judgment
3. Ignorance
4. **Affiliation**

Affiliation Example #1

- Taos acquired by Agility Defense and Government Services Inc.
- Agility owned by DGS, a Dutch Company
- DGS owned by PWC, a Kuwait Company

Affiliation Example #1

- A Special Security Agreement prohibited DGS for exercising control of Agility
- In 2009 PWC indicted for defrauding US Govt of > \$1B
- Agility suspended as an affiliate of PWC

Affiliation Example #1

- Suspension Official rejected a management buy-out where officers in Agility would acquire 60% of company
- After 32 months, Judge Lynwood Smith gave summary judgment to lift suspension

Crisis Management

The decisions you make on Day #1 could be the most important decisions you make during the crisis

A CEO's Day Of Infamy

Range of First Day Decisions

- No Comment v. Press Release
- Denial v. Admissions
- Commit to full cooperation v. Do not cooperate
- Call an “All-Hands” meeting
- Offer to pay legal fees for any employee whom Government wishes to interview

A CEO's Day Of Infamy

Consequences Of 1st Day Decisions

- **No comment.** *Lack of damage control on adverse publicity*
- **Denial.** *Debarment Official annoyed*
- **Admission.** *Used against company in civil and criminal proceeding*
- **Commit to full cooperation.** *Damaging evidence used against company*

A CEO's Day Of Infamy

Consequences Of 1st Day Decisions

- **Don't cooperate.** *Greater chance of suspension & debarment. Maybe violate FAR § 52.203-13*
- **Call an "all-hands" meeting.** *Risk of accused of obstruction of justice*
- **Do not call meeting.** *Employees bewildered; loss of morale*
- **Offer to pay employee's attorney fees.** *Expensive; annoys Government*
- **Do not offer.** *Appear disloyal to employees*

Guidance For A Prudent CEO

I. Prevent

II. Preparation

III. Reaction

I. Prevent

The best
precaution is an
exceptional
compliance
program

I. Prevent

Compliance Program

Insert FAR § 52.203-13

Presentation

I. Prevent

Compliance Program

	<i>Organization For Economic Co-Operation</i>	<i>US Sentencing Commission</i>	<i>Federal Acquisition Regulation</i>	<i>Federal Corrupt Practice Act Guidance</i>
Standards & Procedures	Y	Y	Y	Y
Knowledgeable Leadership	Y	Y	N	Y
Exclude Risky Personnel	Y	Y	Y	Y
Training	Y	Y	Y	Y
Monitor & Evaluate	Y	Y	Y	Y
Hot Line	Y	Y	Y	Y
Discipline	Y	Y	Y	Y
Adjust To Risk	Y	Y	Y	Y

I. Prevent

Board Of Directors

Gabig's Recommendation

Any corporation that derives the majority of its revenue from government contracts should have a Compliance Committee (not unlike it has an Audit Committee and a Compensation Committee)

II. Prepare

- Make “the day of infamy” and related decisions an off-site discussion topic
- Lawyers are the equivalent to “emergency responders”

II. Prepare

- For documents vital to carry on operation of the company, have off-site copies frequently updated
- Make sure privileged documents are marked

II. Prepare

- Review insurance coverage and decide what is appropriate
- Review indemnity in employment contracts and bylaws

III. Reaction

- Be civil to all govt personnel
- Obtain name and meet with lead agent
- Ask who is lead prosecutor
- Ask for copy of search warrant

III. Reaction

- Do not interfere with the search
- Unlock doors and file cabinets rather than have govt break in
- Never alter, hide or destroy any thing the govt is seeking
- Do not consent to search

III. Reaction

- If the search exceeds geographic location or scope of search warrant, politely object
- Do not volunteer information
- Avoid temptation to engage in “small talk”

III. Reaction

- Make inventory list of seized property -- take pictures
- Ask lead Special Agent for an inventory of all property seized
- Ask to make copies of all seized documents/files

III. Reaction

- If samples seized, ask to split; keep corporate sample under control of single custodian
- If classified documents seized, notify lead agent. Follow promptly with written notice

III. Reaction

Employees...

- Consider sending home
- Inform of rights:
 - It is the employee's decision whether to speak with a Special Agents

III. Reaction

Employees...

- Suggest that a condition of speaking is to have company counsel present
- If employees speak to a Special Agent, they must tell the truth

III. Reaction

Expect Local News Coverage

- Sometimes notified of “the bust”
- Direct the reporter to the person in company designated to work with the news media
- Often comments to press are more harmful than beneficial

III. Reaction

Master the facts before the government — complete an internal investigation ASAP

- “Damage assessment” vital
- Present “solution” to Govt before Govt dictates

III. Reaction

Internal investigation should be independent

- *Appears more objective*
- *Distances senior management*
- *Use lawyers to protect report as attorney-client privilege*

III. Reaction

- Multiple agency involvement
 - *Global settlement preferred but difficult to arrange*
- Timely responses to agency vital for appearance of cooperation

III. Reaction

- Notify insurance carrier
- Need for Board involvement
- Manage shareholder concern
- If public company, may be SEC complications

III. Reaction

- Lead Counsel pursues an acceptable outcome
 - *DOJ (declination or deferred prosecution)*
 - *Regulators (no action)*
 - *Civil law suits (settle)*
 - *Suspension & Debarment (avoid)*

KELLOGG, BROWN & ROOT

COFC No. 09-351C, May 02, 2012

- KBR awarded food services contract at Camp Anaconda, Iraq.
- KBR submitted claims of ~ \$11.5M
- Govt sought forfeiture of claims arguing violation of Anti-Kickback Act

KELLOGG, BROWN & ROOT

COFC No. 09-351C, May 02, 2012

- Govt proved that kickbacks were given to KBR employee, Mr. Hall
- KBR claimed no knowledge of kickbacks
- KBR awarded \$11,79,505
- Two key facts favored KBR:

KELLOGG, BROWN & ROOT

COFC No. 09-351C, May 02, 2012

Key Fact #1

KBR “required employees to have training in professional responsibility and to sign agreements signifying that they would comply with KBR policies, which prohibited the acceptance of kickbacks.”

KELLOGG, BROWN & ROOT

COFC No. 09-351C, May 02, 2012

Key Fact # 2

At trial, KBR “introduced, Mr. Hall’s signature page, whereby Mr. Hall had acknowledged that he had read, and would abide by, Halliburton’s Company Code of Business Conduct.”

III. Reaction

DOJ's Corporate Fraud Task Force *"Aims High"* – Convictions

- CEOs 82
- Presidents 85
- Vice Presidents 102
- CFOs 36

Bottom Line



Being
caught
by
surprise
can be
fatal!