

Doing Business with the Government? DOJ's Pursuit of Fraud and Corruption Prosecutions in the Wake of *McDonnell v. United States*

Marcia G. Madsen

Partner

+1 202 263 3274

mgmadsen@mayerbrown.com

Lori E. Lightfoot

Partner

+1 312 701 8680

llightfoot@mayerbrown.com

Howard W. Waltzman

Partner

+1 202 263 3848

hwaltzman@mayerbrown.com

J. Gregory Deis

Partner

+1 312 701 8035

gdeis@mayerbrown.com

July 27, 2016

Today's Speakers



Marcia G. Madsen
Washington DC



Lori E. Lightfoot
Chicago



Howard W. Waltzman
Washington DC



J. Gregory Deis
Chicago

Overview of Presentation

- Federal Bribery-Related Statutes – Overview/History
- *McDonnell v. United States* and Implications Going Forward
- Special Considerations for Government Contractors
- Interplay With Campaign Finance Law
- Compliance/Best Practices

Overview of Federal Bribery-Related Statutes

- 18 U.S.C. § 201 (federal official bribery/gratuity)
- 18 U.S.C. § 666 (federal program bribery)
- 18 U.S.C. § 1346 (honest services fraud)
- 18 U.S.C. § 1951 (Hobbs Act extortion)

History of Honest Services Fraud

- Pre-1987
- *McNally v. United States*, 483 U.S. 350 (1987)
- Congressional response: 18 U.S.C. § 1346
- *Skilling v. United States*, 561 U.S. 358 (2010)

McDonnell v. United States – Alleged “Official Acts”

- **Arranging meetings** with Virginia government officials
- **Hosting and attending events** to encourage Virginia universities to initiate studies/promote products
- **Contacting** other government officials to encourage Virginia universities to initiate studies
- **Allowing businessman to extend invites** to exclusive events at governor’s mansion
- **Recommending government officials meet** with businessman/colleagues to discuss product

McDonnell v. United States – “Official Act” Definition

- Two requirements under 201(a)(3)
 - First, the Government must identify a “question, matter, cause, suit, proceeding or controversy” that “may at any time be pending” or “may by law be brought” before a public official.
 - Second, the Government must prove that the public official made a decision or took an action “on” that question, matter, cause, suit, proceeding, or controversy, or agreed to do so.

McDonnell v. United States – Issues Presented

- **Issue 1**: Whether arranging a meeting, contacting another official, or hosting an event – without more – can be a “question, matter, cause, suit, proceeding or controversy.”
- **Issue 2**: If not, whether arranging a meeting, contacting another official, or hosting an event can be a decision or action on a “question, matter, cause, suit, proceeding or controversy.”

McDonnell v. United States – Issue 1

- Court held that a typical meeting, telephone call, or event arranged by a public official – without more – does not qualify as a “question, matter, cause, suit, proceeding or controversy.”
- What would qualify? Factors noted by Supreme Court:
 - Associated with formal exercise of governmental power, such as a lawsuit, hearing, or administrative determination
 - Focused, concrete and circumscribed, e.g., “the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete”
 - “Something within the specific duties of an official’s position – [i.e.,] the function conferred by the authority of his office”

McDonnell v. United States – Issue 2

- Court upheld the following three “questions” or “matters” identified by CA4:
 - (1) The initiation of a university research study of Anatabloc;
 - (2) A financial grant from a state agency for the study of the anatabine;
 - (3) A decision for state employee health insurance plans to cover Anatabloc.
- **Rationale/Test**: The Supreme Court held these three things met the question/matter test, noting “[e]ach is [1] focused and concrete, ...[2] involves a formal exercise of governmental power that [3] is similar in nature to a lawsuit, administrative determination, or hearing.”

McDonnell v. United States – Issue 2 (Cont.)

- After approving the CA4’s three questions/matters, Supreme Court turned to the question of what constitutes a “decision” or “action”
- What’s the test? Aside from clear official action (e.g., the approval of a research study/state), the Supreme Court noted two categories of conduct:
 - Using one’s official position to exert pressure on another official to perform an “official act”
 - Using one’s official position “to provide advice to another official, knowing or intending that such advice will form the basis for an ‘official act’ by another official”

McDonnell v. United States – Issue 2 (Cont.)

- Supreme Court did not hold that *McDonnell's* conduct did not violate (left that question for CA4 on remand)
- Instead, held that jury instructions were erroneous
 - First, failed to “adequately explain to the jury how to identify the ‘question, matter, cause, suit, proceeding or controversy’” (e.g., the three identified by CA4);
 - Second, failed to “inform the jury that the ‘question, matter, cause, suit, proceeding or controversy’ must be more specific and focused than a broad policy objective” (e.g., Virginia economic development – a theory argued by prosecutor in closing argument);
 - Third, failed to “instruct the jury that it had to find that the governor made a decision or took an action – or agreed to do so – on the identified ‘question, matter, cause, suit, proceeding or controversy,’” as the Supreme Court construed that requirement.

McDonnell v. United States – What's Next?

- CA4 has to decide whether there is sufficient evidence that *McDonnell* committed an “official act” as defined in the Supreme Court’s decision.
- If CA4 holds there is sufficient evidence to retry *McDonnell*, DOJ has to make a decision on whether to proceed.

Does *McDonnell* Move the Line?

- Supreme Court clearly rejected DOJ's view that “nearly anything a public official accepts – from a campaign contribution to lunch – counts as a *quid* and nearly anything a public official does – from arranging a meeting to inviting a guest to an event – counts as a *quo*”
- Clearly influenced by amici – former federal officials, former VA AGs, and 77 other former AGs
 - Cites *Stevens* and *Sun-Diamond* – cannot construe a criminal statute on the assumption that the Government will use it responsibly

Does *McDonnell* Move the Line? [Cont.]

- Supreme Court also noted constitutional concerns
- **Bottom line**: *McDonnell* clarifies that things public officials routinely do to assist constituents in dealing with government bureaucracies should not be construed as an “official act”
 - Example: Locating the right agency, bureau, office and/or arranging a meeting so that a constituent can present their concerns and receive a fair hearing or process
 - But be mindful of *McDonnell*’s warning that a public official’s efforts could cross the line if designed to **exert pressure** or **provide advice** – the exact contours of this line will be drawn in subsequent cases

Impact of *McDonnell* Going Forward

- Current cases
 - *Menendez*
 - *Skelos*
 - *Silver*
- Impact on future prosecutions

Government Contractors – A High Standard

- In FY 2015 federal agencies spent \$430.5 billion on goods and services to meet their mission needs
- Each year, millions of Govt. contract source selection decisions are made by executive branch officials
- Because misuse of their office and influence involves taxpayer funds and so visibly compromises the public trust, procurement officials and those who interact with them are subject to special rules and special scrutiny
- Criminal, civil, and administrative restrictions apply uniquely and with special force to Govt. contractors

Government Contractors – A High Standard

- FAR 3.101-1 Standards of Conduct

Government business shall be conducted in a manner above reproach . . . , with complete impartiality and with preferential treatment for none. Transactions involving public funds require . . . an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest.

Gratuities

- In addition to bribery, 18 U.S.C. § 201(c) prohibits giving or accepting gratuities, i.e., accepting anything of value “for or because of” an official act (also applies to the gratuity giver)
 - A gratuity does not require a *quid pro quo*
- Govt. employees involved with public contracts expressly prohibited from seeking gratuities (FAR 3. 101-2)
- Govt. contractors are subject to administrative sanctions, if, after notice and hearing, the Govt. determines that the contractor offered a gratuity (FAR 52-203-3)

Gratuities [Cont.]

- If the Govt. determines that the contractor offered or gave a gratuity in violation of 18 U.S.C. 201, in addition to criminal prosecution, the agency has administrative remedies including:
 - Termination of the contract with normal breach remedies
 - Exemplary damages
 - Suspension/Debarment
- Office of Government Ethics (OGE) has adopted regulations defining “gifts” (5 C.F.R. 2635.203(b)). The gift rules are detailed and complex and include hospitality, as well as any “item having monetary value,” such as services. Exceptions exist but are narrow.

Other Criminal Laws That Apply to Government Employees and Contractors

- In addition to the bribery-related criminal statutes, multiple other criminal laws extend beyond gifts and are intended to prohibit federal employees from misusing their offices and influence, trading favors, or giving and accepting benefits – and are especially relevant to government contracting:
 - 18 U.S.C. § 208 prohibits a federal employee from participating personally and substantially in any particular matter in which he or a family member or business associate has a financial interest
 - 18 U.S.C. § 209 prohibits federal employees from receiving compensation from outside sources for government work

Other Criminal Laws That Apply to Government Employees and Contractors [Cont.]

- 18 U.S.C. § 203 and § 205 prohibit federal employees from misusing their offices and influence to participate in claims against the government on behalf of private interests
- 18 U.S.C. § 207 addresses conflicts of interest by former Govt. employees
 - Former Govt. employees are not barred from accepting private employment, but their ability to use relationships is restricted
 - Regardless of rank, a former Govt. employee is barred from representing other persons by communicating with or appearing before Govt. agencies or in court concerning the same “particular matter involving specific parties” (contract or grant) with which he was involved while in Govt.

Other Criminal Laws That Apply to Government Employees and Contractors [Cont.]

- If the contract or grant was under his official responsibility, he is barred for two years; if he participated “personally and substantially” the bar is permanent
- Former senior level officials are subject to a “cooling-off” period of one-year after leaving Govt. and may not appear before or communicate with his former agency
- Former “very senior” Govt. employees are subject to a similar prohibition, except the bar lasts for two years and extends to contacts with specific high-level officials at any department or agency
 - That is, senior procurement officials cannot trade on their government contacts to influence lucrative contracts or grants

Civil & Administrative Provisions Protecting the Integrity of the Procurement Process

- DoD “revolving door” restriction
 - A covered DoD official (Pub. L. 110-181) (DFARS 203.171) who intends to work for a DoD contractor within 2 years after leaving DoD is required to request a post-employment restriction ethics opinion prior to accepting compensation from any DoD contractor
 - A DoD contractor may not provide compensation to such an official within two years after the official leaves DoD unless the DoD official has received or requested the ethics opinion
 - A DoD contractor that “knowingly” fails to comply is subject to administrative actions such as contract cancellation, or suspension/debarment proceedings

Civil & Administrative Provisions Protecting the Integrity of the Procurement Process [Cont.]

- The Procurement Integrity Act, implemented in FAR 3.104, reflects an effort to target specific conduct by federal officials and contractors that is viewed as corrupting the integrity of the procurement process. These provisions are intended to enhance and fill in perceived gaps in other statutes.
 - Present or former Govt. officials who have acted for or advised the Govt. regarding a federal procurement are prohibited (unless otherwise authorized) from disclosing contractor bid or proposal information or agency source selection information
 - Contractors (or prospective contractors) are prohibited from obtaining such information (release of trade secrets also is prohibited under 18 U.S.C. § 1905)

Civil & Administrative Provisions Protecting the Integrity of the Procurement Process [Cont.]

- Revolving door restrictions – beyond 18 U.S.C. § 208:
 - Agency officials participating personally and substantially in a procurement who are contacted regarding possible non-Govt. employment must report the contact AND either reject the opportunity or disqualify themselves
 - Agency officials who served as a Contracting Officer, Source Selection Authority, or Technical or Cost Evaluator for a contract award valued at \$10M or more are prohibited from accepting compensation from the contractor for one year
 - A similar prohibition applies to an official who served as the Program Manager, deputy PM, or CO for a contract in excess of \$10M and made the decision to award a contract, subcontract, task or delivery order, contract modification, establish overhead rates, approve payments (in excess of \$10M) or settle a claim in that amount

Subcontractor Kickbacks

- Another form of payment that is viewed as corrupting the procurement system is subcontractor kickbacks
 - The Anti-Kickback Act (41 U.S.C. chapter 87), implemented in FAR 3.502-2, prohibits subcontractors from making payments and contractors from accepting payments with the objective of obtaining a subcontract or rewarding favorable treatment for providing a subcontract. The statute provides for criminal penalties, but there also are civil penalties. Administrative remedies also may be used, such as offsets, suspension or debarment.

Other Restrictions

- Many other restrictions – too many to enumerate – also exist that are aimed at reducing opportunities for corruption, including:
 - Restrictions on use of contingent fees (FAR 3.4)
 - Contracts with businesses owned or controlled by Govt. employees (FAR 3.6)
 - All pricing must be independently arrived at – no collusion (FAR 52.203-2)

Campaign Finance Overview

- House and Senate rules prohibit the use of official resources for campaign purposes
 - Nothing contribution related should ever be conducted in official buildings (Capitol, House/Senate office buildings, district offices, etc.)
 - Same with official phone lines or official email addresses – never use for contribution or campaign-related issues
- Just because you ask for something doesn't mean it'll happen
 - Even with the Supreme Court's rejection of the idea that "nearly anything" a public official accepts can qualify as a *quid*, strict gift rules still apply and federal officials must make decisions based on more than just contributions

Campaign Finance Overview [Cont.]

- Practical considerations:
 - Be prudent when discussing substantive issues like legislation, even at fundraisers

Best Practices – Code of Ethics and Mandatory Disclosure

- Since 2009, contractors have been required to have a written code of business ethics and conduct, employee training and internal controls that are appropriate to the size of the company and its level of Govt. business and that will facilitate timely discovery and disclosure of improper conduct. (FAR 52.203-13)
- As a result, companies with any significant amount of Govt. business typically have a robust ethics and compliance program.
- The FAR clause also contains a provision known as the “mandatory disclosure rule”

Best Practices – Code of Ethics and Mandatory Disclosure [Cont.]

- Under the mandatory disclosure rule, contractors are required to “timely disclose” to the agency IG and the CO whenever the contractor has “credible evidence” that it has committed
 - A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18; or
 - A violation of the civil False Claims Act (31 U.S.C. 3729-3733)
 - A violation of FAR provisions aimed at protecting procurement integrity could be an FCA violation
 - The “teeth” in the mandatory disclosure rule come from the Govt.’s power to debar contractors – a failure to disclose can be grounds for debarment

Best Practices – Gifts and Gratuities

- Compliance program for dealing with gifts and gratuities should be simple and straightforward. Some lessons learned include:
 - Compliance program prohibits gifts to Govt. personnel unless in strict accordance with specific policy or expressly approved by head of compliance or counsel
 - Specific guidance of acceptable “gifts” should be provided and no other gifts should be permitted – no application of judgment required by company personnel

Best Practices – Gifts and Gratuities [Cont.]

- Company needs to decide its level of comfort with OGE rules, e.g.,
 - Are soft drinks, coffee, or donuts permitted at meetings (meals are prohibited)?
 - Are small items with little intrinsic value permitted to be provided such as plaques, mugs, certificates, trophies?
 - If permitted, specific responsibility for tracking the amount from the company to a specific official should be clear (Govt. officials can accept up to a total of \$50 per year, per donor – it adds up quickly)
- Specific prohibitions should be clear, e.g.,
 - No meals, loans, trips

Best Practices – Gifts and Gratuities [Cont.]

- Specific guidance needed for dealing with family and friends who are government officials, e.g.,
 - Attending company functions – widely attended rule
 - Family vacations
 - No gifts that are from your company
 - Nothing can be given to a person because of their position
- All government facing personnel – marketing, contracting, program management – should receive regular training and clear instruction on the limits of their discretion
- Hotline or other means for reporting violations to company compliance officials

Best Practices for Corporation's Compliance Program

– DOJ View

- Outside the Government Contractor realm, the following resources provide guidance to companies:
 - DOJ's Principles of Federal Prosecution of Business Organizations and U.S. Sentencing Guidelines
 - DOJ/SEC 2012 FCPA Resource Guide
- General guidelines
 - High level commitment/tone at the top
 - Policies/procedures
 - Periodic risk-based review
 - Proper oversight/independence for compliance function
 - Training/guidance
 - Internal reporting/investigation
 - Enforcement and discipline

Best Practices – Code of Ethics and Mandatory Disclosure [Cont.]

- Gifts and hospitality for government officials present significant risk, both inside the U.S. and abroad, and should be tightly restricted/limited and monitored

Thank You

For questions, please reach out to:

- **Marcia Madsen, Partner**

+1 202 263 3274

mgmadsen@mayerbrown.com

- **Lori Lightfoot, Partner**

+1 312 701 8680

llightfoot@mayerbrown.com

- **Howard Waltzman, Partner**

+ 1 202 263 3848

hwaltzman@mayerbrown.com

- **J. Gregory Deis, Partner**

+ 1 312 701 8035

gdeis@mayerbrown.com