

PROSECUTORIAL DISCRETION

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[U]nder American law, government prosecuting attorneys have nearly absolute powers. A prosecuting attorney has power on various matters including those relating to choosing whether or not to bring criminal charges, deciding the nature of charges, plea bargaining and sentence recommendation. This discretion of the prosecuting attorney is called prosecutorial discretion.

-U.S. Legal Definitions (<http://definitions.uslegal.com/p/prosecutorial-discretion/>)

The following are two recent cases, one prosecuted and one not prosecuted:

Martha Stewart

Martha Stewart, lifestyle diva and now a billionaire, sold \$228,000 worth of ImClone Systems stock on Dec. 27, 2001, just a day before it was announced that the Food and Drug Administration had rejected ImClone's application for approval of a cancer drug. ImClone's stock plummeted that day. Stewart avoided \$51,000 in losses by selling when she did. After being interviewed at two meetings with the U.S. Attorney's Office for the Southern District of NY, the Securities and Exchange Commission, and FBI agents, Stewart was charged with two counts of making false statements, conspiracy and obstruction of justice.

Stewart said she sold her 3,928 ImClone shares because she had a pre-existing agreement with Mr. Bacanovic (her broker) to sell when the stock fell below \$60 a share. At trial, the government argued that the agreement was fabricated afterward to conceal that Stewart had been tipped by Mr. Bacanovic's assistant about attempted selling by the then-chief executive of ImClone, Samuel Waksal. Dr. Waksal pleaded guilty to insider trading and other charges and was given a seven-year prison sentence.

The government's indictment alleged that Stewart had:

- made two false statements on two occasions to the FBI, SEC and U.S. Attorney's office on February 4, 2002 and on April 10, 2002.
- engaged in conspiracy to obstruct justice by making those false statements
- obstructed justice by providing false information about the sale of her stock.

The case, which was brought by the U.S. Attorney for the Southern District of New York, resulted in Stewart's conviction on all four counts. She was sentenced to five months in prison and two years' probation. The Judge also ordered Stewart to serve five months of home confinement after her release and fined her \$30,000. Stewart served her sentence and was eventually released from prison.

Susan Taylor, Deputy Chief Procurement Officer, Veteran's Health Administration ("VHA"), US Department of Veterans Affairs ("VA")

In an 82 page report released September 26, 2014, VA's Inspector General ("IG") alleged that Ms. Susan Taylor, the Deputy Chief Procurement Officer of the VHA, used her position to promote and award a contract to FedBid, a reverse auction government contractor, and improperly acted as an agent of the contractor creating a conflict of interest. The IG report also alleged that Taylor improperly disclosed non-public VA information to unauthorized persons, misused her position and VA resources for private gain, and engaged in a prohibited personnel practice when she recommended that a subordinate senior executive service ("SES") employee be removed from SES during her probation period.

Taylor also allegedly interfered with the IG's investigation by making false statements about her involvement with VA's FedBid contract and her relationship with executives of the company. The following is taken from the IG's report concerning Taylor's alleged false statements under oath:

- Taylor continually and falsely stated that FedBid's reverse auction services were free or at no cost to the Government (see explanation below).
- Taylor told the IG that about 6 months into her VHA employment, a FedBid staff person contacted her regarding the use of Fedbid at VHA, however, Taylor initiated the first contact.
- Taylor denied any involvement in VHA's order for reverse auction services from FedBid, although she was intimately involved and "pushed" the order.
- Taylor denied advocating for FedBid during a meeting with the Defense Logistics Agency, even though email records show that she acted as an agent of FedBid during the meeting.
- Taylor misrepresented her actions in connection with an IG subpoena issued to FedBid in 2013
- Taylor denied she prohibited agency staff from using a General Services Administration reverse auction tool, and falsely claimed that she attempted to contact GSA officials about using that tool, when GSA had no record of such contacts.

Reverse auction: Reverse auctions are similar to traditional auctions, except that the sellers compete against each other to sell their products or services to one buyer (the government). Unlike a traditional auction, in which multiple buyers bid against one another to *push the price up*, in reverse auctions the sellers compete against each other to *push the price down* for the same item or service. When the auction ends, the price should be significantly lower than the starting bid price. The buyer (the agency) selects the winning (low bid) proposal. See Government Accountability Office ("GAO") report, "Guidance Is Needed to Maximize Competition and Achieve Cost Savings," GAO-14-108 (Dec 9, 2013). Reverse auctions are normally held electronically.

How FedBid charges fees for reverse auctions: When a vendor submits a bid, FedBid automatically adds its fee, which is 3% of the bid price, and ranks the adjusted bid (i.e., the vendor's bid plus the fee) against adjusted bids submitted by other vendors. When the reverse auction ends, the bids, which already include FedBid's fee, are ranked from lowest to highest and the low bidder is normally selected. When the agency receives the goods or services, the

government pays the entire bid amount to the selected vendor, including the reverse auction fee. FedBid then sends an invoice to the selected vendor for the reverse auction fee. *Id.*, GAO-14-108. It is not correct to state that FedBid's services are "free" to the government because the government pays out *more than* the contractor bid, and the amount the Government pays *includes* FedBid's fee.

For the 2012 fiscal year, GAO estimated that FedBid collected about \$13.4 million in fees from \$0.8 billion in contract awards for four large agencies (Army, Homeland Security, Interior and VA). In 2013, FedBid awarded \$1.8 billion in government contracts through its system, although FedBid's revenue figures are not available.

Outcome of Taylor's IG Investigation: The VA IG made a criminal referral of the conflict of interest and false statements to the U.S. Department of Justice (presumably, to the U.S. Attorney in Washington, DC) but it declined to prosecute "in favor of appropriate administrative actions." VA has promised to take appropriate administrative actions within 90 days.

Conclusion: Martha Stewart's false statements involved \$51,000 in personal loss-avoidance on a stock sale and she was prosecuted, convicted and jailed, stemming from these false statements. Susan Taylor's alleged false statements involved fees paid to FedBid of \$13.4 million in 2012, and unknown (but probably larger) fees in 2013 and 2014, however the U.S. Attorney declined to prosecute. The difference will undoubtedly be attributed to "prosecutorial discretion." Judgment on these two cases is left up to the reader.