

PRESENTATION TO BEST
PRACTICES FORUM-DEFENSE
INDUSTRIES INITIATIVE
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*views expressed here are personal only and not those of the United States Department of Justice

What were DOJ's goals in proposing the Rule?

- It was important in 2008 for the government to explicitly express its expectation that contractors are required to alert the Government when they discover employees are involved in fraud or corruption i.e., disclosure no longer just voluntary, and
- DOJ expects IGs and COs to work closely together when fraud or corruption is disclosed
- DOJ hopes contractor compliance programs and the IGs to work more closely
- Expressing clearly what full cooperation means for the government

What Has the Rule changed?

- Requires Contractors to have Compliance Programs
 - As part of those programs contractors are expected to cooperate with the government in fraud and corruption investigations arising in their contracts
 - All contractors are expected to disclose to the CO and the IG if they become aware fraud or corruption in their contracts with the federal government
 - Provides extra incentive for contractors to report significant overpayments to the CO

The Specific Language on Disclosure

3.1003 Requirements

2) Whether or not the clause at 52.203-13 is applicable, a contractor may be suspended and/or debarred for knowing failure by a principal to timely disclose to the Government, in connection with the award, performance, or closeout of a Government contract performed by the contractor or a subcontract awarded thereunder, credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code or a violation of the civil False Claims Act. Knowing failure to timely disclose credible evidence of any of the above violations remains a cause for suspension and/or debarment until three years after final payment on a contract (see 9.406-2(b)(1)(vi) and 9.407-2(a)(8)).

The Specific Language on Full Cooperation?

Full cooperation – (1) Means disclosure to the Government of the information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct. It includes providing timely and complete response to Government auditors' and investigators' request for documents and access to employees with information.

New Grounds for Debarment

(b)(1) A contractor, based upon a preponderance of the evidence, for any of the following --

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(vi) Knowing failure by a principal, until three years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of --

(A) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

(B) Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or

(C) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001.

How will the effectiveness of the rule be measured?

- Effectiveness will not be how many disclosures contractors decide to make or the number of contractors debarred for not complying with the Rule.
- The Rule is already a success in terms of the government clearly stating its expectations of contractors on disclosure and cooperation.
- Effectiveness will be how the government responds to disclosures made and not made.
- In just the first 5 months, important disclosures and in a few cases inadequate disclosures have been made by well-known defense contractors.

Issues For Contractors

- When it become aware of an allegation, does the contractor conduct an internal investigation before deciding whether to disclose?
- How conservative should the contractor be on disclosures—only clear instances of a violation?
- Does the contractor help itself by hiring outside counsel to conduct an internal investigation? To render an opinion on whether there is credible evidence?

Issues For Contractors (cont'd)

- What should the contractor tell its employees in the process of conducting an internal investigation?
- Can the matter be disclosed to the CO as an overpayment only and meet the disclosure to the IG requirements? Any risks?
- Should the contractor add the rule to its annual compliance training?

Issues For The Government

- How much to rely on a contractor's internal investigation in deciding whether to initiate an investigation?
- How to distinguish between an actionable fraud and a matter for the CO without conducting an investigation?
- How can the investigative and decision process be expedited to encourage contractor disclosure?
- How can the government reward contractors who disclose to encourage contractor disclosure?