



Practical Guidelines for Smaller Contractors in Meeting the FAR Ethics & Compliance Requirements

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FAR Ethics & Compliance Guidance

- What we will cover:
 - New **CAUSE** for suspension and debarment
 - New **CLAUSE** requiring disclosures and stronger company internal controls
 - The key elements of company internal controls
 - Government sanctions and remedies for non-compliance
 - Question & Answers



New Cause for Suspension or Debarment at FAR Subpart 9.4

Knowing failure by a principal, until 3 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 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;
- violation of the Civil False Claims Act; or
- Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in FAR 32.001



Retroactive Disclosures

“Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government... credible evidence of...”

- New rule at FAR 9.4 has retroactive application
- If violations relating to an open or ongoing contract occurred prior to December 12, 2008 – the effective date of the rule – the contractor must disclose the violations, whether or not the new mandatory disclosure clause at FAR 52.203-13 is in the contract and whether or not an internal control system is in place.



Final Payment

“Knowing failure by a principal, until 3 years after ***final payment*** on any Government contract awarded to the contractor, to timely disclose to the Government... credible evidence of...”

- FAR 4.804 “Closeout of Contract Files”
 - FAR 4.804-5(b)(8) requires CO “Contractor Completion Statement” including number of final payment voucher.
- FAR 52.216-7 “Allowable Cost & Payment”
 - Assignment required





Disclosures Must Be “Timely”

“Knowing failure by a principal... to *timely* disclose to the Government... credible evidence of...”

- “[T]imely disclosure of credible evidence as required by the rule as cause for suspension or debarment would be measured from the date of determination by the contractor that the evidence is credible, or from the effective date of the rule, whichever event occurs later.”
- Timely– the clock began ticking on December 12, 2008 (effective date)



Disclosure to Government

“Knowing failure by a principal... to timely disclose ***to the Government...*** credible evidence of...”

- For Part 9.4 purposes:
 - Disclosure to the contracting officer alone (not IG) is sufficient to avoid suspension/debarment based on non-disclosure
 - Previous disclosures made to government (contracting officer or others in authority) do not have to be repeated or made to IG
 - New FAR 3.1003 requires that contracting officer who receives a disclosure must
 - Coordinate the matter with the agency IG; or
 - Take action in accordance with agency procedures





Disclosures

“Knowing failure by a principal... to timely disclose to the Government... ***credible evidence*** of...”

- No definition in the FAR
- The term “credible evidence” indicates a higher standard than “reasonable grounds to believe” that was used in proposed rule, “implying that the contractor will have the opportunity to take some time for preliminary examination of the evidence to determine its credibility before deciding to disclose to the Government.”



Title 18 Violations

“Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code.”

- 100+ references to “fraud” in Title 18
 - Nearly any procurement-related offense may be charged as mail or wire fraud violations under 18 U.S.C. §§ 1341 and 1343)
- 21 conflict of interest/bribery/gratuity provisions in 18 U.S.C. §§ 201 – 226
- Includes conspiracy with an object involving fraud, conflict of interest, bribery or gratuity
- Qualified by “in connection with the award, performance, or closeout of the contract or subcontract”



Civil False Claims Act

“Violation of the Civil False Claims Act
(31 U.S.C. §§ 3729 – 3733).”

- Determining credible evidence of a violation may be difficult due to substantial uncertainty in the law and conflicts among circuits
- DOJ Civil Division views any contract breach or dispute as a False Claims Act violation
- “Genuine disputes over the proper application of the civil FCA may be considered in evaluating whether a contractor knowingly failed to disclose a violation.”
- “[T]he mere filing of a *qui tam* action . . . Is not sufficient to establish a violation under the statute, nor does it represent, standing alone, credible evidence of a violation.”



Significant Overpayment

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

- Contract financing exclusion is broad
 - Advance payments
 - Performance-based payments
 - Commercial advance and interim payments
 - Progress payments based upon cost
 - Progress payments based upon percentage/stage completion
 - Interim payments under a cost reimbursement contract, except when contract is for services and Alt. I of 52.232-25 (“Prompt Payment”) is used





Knowing Failure by Principal

“Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government... credible evidence of...”

- Definition of principal added to FAR 2.101(b)(2)
 - “Principal means an officer, director, owner, partner, or person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division or business segment; and similar positions.)”
- “[T]his definition should be interpreted broadly, and could include compliance officers or directors of internal audit, as well as other positions of responsibility.”
- Principals are only required to disclose what they know
- Actual knowledge required – not what a principal “should have known”



Disclosures

- Application to Subcontractors
 - New cause for suspension/debarment is applied only to contractors, not subcontractors
- Application to Subcontracts
 - BUT, the contractor must disclose violations/significant overpayments by subcontractors (on your subcontracts) if contractor principal has knowledge
- No general requirement to disclose information about other contractors or violations by government employees



New Mandatory Disclosure Clause

- To be inserted in solicitations and contracts if the contract value is expected to exceed \$5 million and performance is 120 days or more.
- What has to be disclosed? FAR 52.203-13
 - In connection with the award, performance, or closeout of a covered Government contract, the contractor has credible evidence that a principal, employee, agent, or subcontractor has committed a violation of Federal criminal law involving:
 - **Fraud**
 - **Conflict of interest**
 - **Bribery**
 - **Gratuities**
 - Or a violation of the Civil False Claims Act (31 U.S.C. §§ 3729-3733) includes employee retaliation claims



New Mandatory Disclosure Clause

- Agent means
 - An individual, including a director, an officer, an employee, or an independent contractor, authorized to act on behalf of the organization
 - Teaming partners?
 - Marketing consultants?
 - JV partners?



New Mandatory Disclosure Clause

- When do you have to tell?
 - For contractual purposes, timeliness is measured from the later of:
 - The date a contractor determines that there is credible evidence of a violations; or
 - The date the contract clause was incorporated
- Who do you have to tell?
 - Agency Inspector General with copy to contracting officer – in writing
- How long does the disclosure requirement apply?
 - The mandatory disclosure requirement applies until three years after final payment on the contract



New Mandatory Disclosure Clause

- You have disclosed credible evidence of a violation– now what?
- “Full cooperation” must be given to all Government agencies involved with audits, investigations or corrective actions
 - Full cooperation defined as “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’ requests for documents and access to employees with information” FAR 52.203-13(a).
 - **Drafters: “Compliant contractors will encourage employees to both make themselves available and to cooperate with the Government investigation.”**



New Mandatory Disclosure Clause

- No automatic waiver of privileges
 - No waiver of attorney-client privilege or protections afforded by the work product doctrine
 - Drafters' comment: "facts are never protected"
- Individuals not required to waive Fifth Amendment rights
- Contractor not restricted from conducting an internal investigation
- Contractor not precluded from defending a proceeding or dispute arising under the contract related to a potential or disclosed violation



What Have We Covered So Far?

- **ALL** contractors are now subject to suspension or debarment for failure of a principal to timely disclose to the Government, credible evidence of:
 - Specified violations of **criminal law** in connection with award, performance or close out of a Government contract on subcontract thereunder.
 - Violation of the Civil False Claims Act
 - Significant overpayment[s]
- Several FAR terms are not defined and require reasonable interpretation
- The disclosure obligation has a three-year “look back”
- **In addition** to the above, there is an independent reporting obligation under FAR Clause 52.203-13 to contract over \$5 million and 120 days of performance
 - Adds potential sanction of default termination



FAR Ethics & Compliance Guidance

ISSUE: My company has no Government contracts over \$5 million and with 120 days of performance. What should we do?

- **ALL** companies should have a written code of the business ethics and conduct expected of all personnel
 - Simple, plain language, endorsed by the CEO, expressing company values, such as honesty, integrity, quality, and respect.
 - Code should provide for discipline, including dismissal for code violations
 - Code should include a procedure for internal reporting of observed misconduct.



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Where can I obtain more guidance on drafting a code?

Email:

JHawkins@crowell.com

-or-

RJB@rjbednar.com

-or-

rrsprole3@therm.com

FAR Ethics & Compliance Guidance



FAR Ethics & Compliance Guidance

- **Information and Awareness Program about the Code:**
 - Formal “roll out” to all employees
 - Always at new employee orientation
 - Annual requirement for each employee to read the Code and acknowledge in writing of having done so
 - Periodic reminders at staff meetings and otherwise
- **Leadership Commitment**
 - Leaders must be both seen and understood as serious about ethical conduct
 - Leaders should invite employees to “bring me the bad news.”
 - Leaders should take prompt and effective disciplinary action for code violations



FAR Ethics & Compliance Guidance

- **Other Practical Observations**

- Do not simply pass the word “credible evidence” on to employees in setting up internal reporting. Use lay terms more likely to be understood.
- Suppliers with no direct sales to the Government by either contract or subcontract are not covered by the new rule.
- Suppliers who are “potential” contractors or subcontractors may be suspended or debarred under existing rules.
- Studies demonstrate that 50% of misconduct observed by employees is not reported within the company. Why?
- Suspension and debarment are not mandatory. Good internal controls are a good reason not to suspend or debar.



Questions?

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