



Mandatory Disclosure: A New Reality

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Today's Agenda

- Overview of the New Mandatory Disclosure Rules
- New Cause for Suspension/Debarment
 - Amendments for FAR 9.406-2 and 9.407-2
 - A retroactive “mandatory” disclosure obligation
- FAR Clause – FAR 52.203-13
 - Mandatory Disclosure of Certain Misconduct
 - Expansion of Code of Conduct/Internal Controls Requirements
- What Do We Do Now: Recommendations for Implementation and Best Practices
- Questions



Executive Summary

- **New Cause for Suspension/Debarment**
 - Contractors can be suspended/debarred for failure to timely notify the Government of the existence of credible evidence (related to federal contracts) of:
 - Significant overpayments
 - Civil False Claims
 - Bribery
 - Gratuity
 - Fraud (Title 18)
 - Conflict of Interest
 - Disclosure of previous violations/overpayments required to avoid suspension/debarment



Executive Summary

- New Contract Clause (FAR 52.203-13)
 - Contractors required by contract to timely notify IG & CO of credible evidence of violations in connection with contract containing FAR 52.203-13:
 - Civil False Claims
 - Bribery
 - Gratuity
 - Fraud (Title 18)
 - Conflict of Interest
 - Contractors must give “full cooperation”
 - Clause mandates specific internal control functions



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Background

- DOJ initiated a letter of OFPP (May 23, 2007)
- Two proposed rules – FAR Case 2007-006
 - Lots of public and agency comment
- Final rule published on November 12, 2008 at 73 Fed. Reg. 67,064 – 67,093
- Effective Date: December 12, 2008



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New Suspension/Debarment Cause

- Changes to
 - FAR 3.1001 and 3.1003
 - FAR 9.406-2 and 9.407-2
 - Definition of “principal” added in FAR 2.101(b)(2)



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New Suspension/Debarment Cause

- Knowing failure by a principal, until 3 years after final payment on any Government contract, to timely disclose to the Government, in connection with the award performance, or closeout of the contract or subcontract, credible evidence of—
 - 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.



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New Suspension/Debarment Cause

- “Principal”
- “Final Payment”
- Disclosure to whom?
- “Credible Evidence”
- Title 18 violations
- Civil False Claims Act violations
- “Significant Overpayment”



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New Suspension/Debarment Cause

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

- Timely – the clock starts ticking on December 12, 2008 (effective date)
- “[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 events occurs later.” 73 Fed. Reg. 67,075



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New Suspension/Debarment Cause

“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...”

- *Timely* disclosures required after effective date
 - Conduct occurring prior to and after December 12, 2008
 - NO minimum thresholds or materiality standard
 - NO exemptions for commercial item or overseas contracts
 - Limited only by “final payment”



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Retroactive S&D 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...”

- “If violations relating to an ongoing contract occurred prior to the effective date of the rule, then the contractor must disclose such violations, *whether or not the clause [FAR 52.203-13] is in the contract and whether or not an internal control system is in place*, because of the cause for suspension and debarment in Subpart 9.4.” 73 Fed. Reg. 67,074



Retroactive S&D 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...”

- “The Councils do not agree with the respondents who think that disclosure... as a potential cause for suspension/debarment should only apply to the conduct occurring after the date the rule is effective or the clause is included in the contract... *The laws against these violations were already in place before the rule became effective.*” 73 Fed. Reg. 67,073-74



New Suspension/Debarment Cause

“Knowing failure by a *principal*... 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.” 73 Fed. Reg. 67,079.



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New Suspension/Debarment Cause

“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 # of final payment voucher.
- FAR 52.216-7 “Allowable Cost & Payment”
 - Assignment required



New Suspension/Debarment Cause

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

- Proper individual/authority for disclosure is **NOT** defined for the purpose of suspension/debarment
- Compare with contract clause (FAR 52.203-13)—written disclosure required to IG with copy to CO
- Disclosure to CO alone (not IG) is sufficient to meet requirements of suspension/debarment clause
- Previous disclosures made to Government (CO or others in authority) [do] not have to be repeated or made to IG



New Suspension/Debarment Cause

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

- New FAR 3.1003
- “If the contracting officer is notified of possible contractor violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C., or a violation of the civil False Claims Act, the contracting officer shall—
 - (1) Coordinate the matter with the agency [IG]; or
 - (2) Take action in accordance with agency procedures.”



New Suspension/Debarment Cause

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

- No definition of term “knowing”– but appears to require actual knowledge
- “With regard to the term ‘knowing failure to disclose’ the ‘knowing’ refers to the failure to disclose... “ 73 Fed. Reg. 67,079
- “...principals are only required to disclose what they know.” *Id.*
- “The Councils do not agree with adding ‘or should have known.’” *Id.*



New Suspension/Debarment Cause

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

- No definition
- The term “credible evidence” indicates a higher standard than “reasonable grounds to believe” that was used in the 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.” 73 Fed. Reg. 67,073



New Suspension/Debarment Cause

- Application to Subcontractors
 - New cause for suspension/debarment only applies to contractors, not subcontractors
- Application to Subcontracts
 - Does not impose on prime contractor any new obligation to search for subcontractor violations
 - BUT, contractor must disclose violations/significant overpayments by subcontractors (on its subcontracts) if contractor principal has knowledge
- No general requirement to disclose information about other contractors or violations by government employees



New Suspension/Debarment Cause

“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 can be charged as a mail or wire fraud violation (18 U.S.C. §§ 1341 and 1343)
- 21 conflict of interest/bribery/gratuity provisions (§§ 201 – 226)
 - 18 U.S.C. § 208, “Acts Affecting Personal Financial Interest”
 - 18 U.S.C. § 207, Revolving Door Restrictions
- Conspiracy involving fraud, conflict of interest, bribery or gratuity object
- Qualified by “in connection with the award, performance, or closeout of the contract or subcontract”



New Suspension/Debarment Cause

- Civil False Claims Act – 31 U.S.C. §§ 3729-33
 - Substantial uncertainty in law and conflicts among circuits
 - DOJ Civil Division view that any contract breach or dispute is a False Claims Act violation
 - Congress considering modifications
- “Genuine disputes over the proper application of the civil FCA may be considered in evaluating whether the contractor knowingly failed to disclose a violation of the civil FCA.” 73 Fed. Reg. 67,081
 - Does it matter what the law is in the circuit where the contract was awarded, where it is being performed, or where the close-out CO is located?
- “[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.” *Id.*
 - Amen



New Suspension/Debarment Clause – “Significant Overpayment”

- “Significant” is not defined
- Excluded – FAR 32.001 Contract Financing
 - 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



New Business Conduct Contract Requirements

- Changes to
 - FAR Part 3.1003
 - FAR Part 52
 - 52.203-13
 - 52.212-5
 - 52.244-6



New Contract Requirements

- Effective for new contracts/solicitations issued on or after December 12, 2008 (with the new clause)
 - Not effective for new task/delivery orders under existing contracts
 - Potential contract modifications

- What and who is covered by mandatory disclosure?
 - Prime contracts and subcontracts – only the offeror
 - \$5 million (base + options)/performance 120 days+
 - Applies to contracts performed overseas
 - Applies to commercial item contracts
 - Applies to small businesses



New Contract Clause Mandatory Disclosure

- Drafters recognize this is both a “sea change” and a “major departure”
- FAR 52.203-13(b)(3)(i)

The contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed –

(A) 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

(B) A violation of the civil False Claims Act (31 U.S.C. §§ 3729-3733)



New Contract Clause Mandatory Disclosure

- 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 Overpayments

- No duty to notify IG's or CO's of overpayments under 52.203-13
- The drafters note that there already exists a contractual obligation to disclose overpayments under various Payments clauses of the FAR
 - *E.g.*, FAR 52.212-4, Contract Terms and Conditions for Commercial Items
 - (i)(5) Overpayments. If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall immediately notify the Contracting Officer and request instructions for disposition of the overpayment.
- Failure to disclose significant overpayment to government is a new cause for suspension/debarment



New Contract Clause Mandatory Disclosure

- For contractual purposes, timeliness is measured from the later of:
 - The date a contractor determines that there is credible evidence of a violation;
 - The date the contract clause was incorporated; or
 - The date that the contractor's internal control system was established.
- The mandatory disclosure requirement applies until three years after final payment on the contract



New Contract Clause Mandatory Disclosure

- Disclosure must be made, in writing, to the Agency OIG, with a copy to the Contracting Officer
- For a violation that spans several different contracts, disclosure should be made to the Agency OIG for the largest dollar value contract impacted
- For a Government-wide acquisition, multi-agency, or multiple-award schedule contract, disclosure should be made to all of the following:
 - The OIG of the ordering agency
 - The OIG of the agency responsible for the basic contract
 - Respective agencies' contracting officers



New Disclosure Clause Subcontract Flow Down Obligations

- FAR 52.203-13(d) subcontracts over \$5 million and a performance period of more than 120 days
- FAR 52.212-5, Terms and Conditions Required to Implement Statutes or Executive Orders – Commercial Items – paragraph (e)(1)(i) adds FAR 52.203-13 as a mandatory flowdown
- FAR 52.244-6, Subcontracts for Commercial Items, adds FAR 52.203-13 as a mandatory flowdown



New Disclosure Clause Subcontract Flow Down Obligations

- *Subcontract* defined as “any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or subcontract”
- *Subcontractor* defined as “any supplier, distributor, vendor, or firm that furnished supplies or services to or for a prime contractor or another subcontractor”



New Disclosure Clause Subcontract Flow Down Obligations

- Subcontractor disclosures of violations of criminal law or civil FCA are made directly to the agency OIG and CO, NOT through prime -
- 52.203-13(d)(2)
- Does not impose on prime contractor any new obligation to search for subcontractor violations
 - 52.203-13(c)(1) requires that a contractor have an “ongoing business ethics awareness and compliance program” and that training under that program “shall be provided to . . . as appropriate . . . the Contractor’s agents and subcontractors”
 - NOT applicable to commercial items contracts or to small business prime contractors



New Mandatory Disclosure “Full Cooperation”

- “Full cooperation” must be given to all government agencies involved with audits, investigations or corrective actions
 - Full cooperation is 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’ request for documents and access to employees with information.” FAR 52.203-13(a).
 - “. . . [I]t is reasonable for investigators and prosecutors to expect that compliant contractors will encourage employees to both make themselves available and to cooperate with the Government investigation.” 73 Fed. Reg. 67,078
 - What advice should company counsel give employees?



New Mandatory Disclosure “Full Cooperation”

- Full cooperation does not foreclose any contractor rights arising in law, the FAR, or contract terms – FAR 52.203-13(a)
 - Contractor does not waive attorney-client privilege or work product doctrine
 - No contractor officer, director or employee waives attorney-client privilege or Fifth Amendment rights
 - What about agents?
 - 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



New Mandatory Disclosure “Full Cooperation”

- Full cooperation requirement has no application or impact on the government’s audit and access to records rights in routine contract administration 73 Fed. Reg. 67,078
 - Except contractor disclosures or an independent government investigation of fraud or corruption
- The rule has no application to routine DCAA audits. *Id.*
- Employees do not forfeit their right to indemnification from their employers. 73 Fed. Reg. 67,077
- Inappropriate for the government to direct a contractor to fire an employee, but government may require that an employee be removed from the performance of a government contract. *Id.*



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Other Contractual Obligations

- FAR 52.203-13, Contractor Code of Business Ethics and Conduct
 - For all covered Contracts and Subcontracts, within 30 days after contract award (even small businesses)
 - Written Code of Conduct
 - Made available to each employee engaged in performance of the contract (drafters recognize electronic access, e.g., intranet)
 - Exercise due diligence to prevent and detect criminal conduct (drafters conform rule to Sentencing Guidelines)
 - Mandatory Disclosure



Other Contractual Obligations

- FAR 52.203-13, Contractor Code of Business Ethics and Conduct
 - For all covered Contracts and Subcontracts (but not small businesses or contracts for commercial items as defined in Part 2), within 90 days of contract award
 - An ongoing business ethics awareness and compliance program, to include “reasonable steps” to communicate periodically “and in a practical manner” the contractor’s standards, procedures, and “other aspects” of the program, including effective training programs



Other Contractual Obligations

- For all covered Contracts and Subcontracts (but not small businesses or contracts for commercial items as defined in Part 2), within 90 days of contract award
 - An internal control system that
 - facilitates timely discovery of improper conduct in connection with government contracts, such as a hotline
 - ensures corrective measures are promptly carried out
 - assigns high level responsibility to individuals for compliance, with adequate resources
 - includes periodic audits and reviews of business practices and internal controls (both operational functions and the business conduct program itself)



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Implementation Consideration

- Retroactive Disclosures
- Policy Updates
- Collecting Data
- Assessing Potential Disclosures
- Substance of Disclosure
- Other Considerations



Retroactive Disclosure Considerations

- Retroactive Disclosure
 - Create a reasonable mechanism to demonstrate the company collected (attempted to collect) information on previous violations/overpayments
 - Choose a reasonable retroactive timeframe
 - Survey principals
 - Document process
 - Choose appropriate disclosure official
 - Written disclosure not required
 - Make disclosure forthcoming, but be cautious on written information (FOIA protections limited)
 - “No credible evidence” documentation



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Policy Updates

- Review Current Policies
 - DII Companies must clarify mandatory from voluntary disclosures
- Other Potential Policy Changes
 - Emphasize importance of reporting
 - Definitions
 - Credible Evidence
 - Significant Overpayment
 - Breadth of reporting required
 - Risk of too much information



Collecting Error/Violation Data

- Process
 - Ongoing written/electronic disclosure process
 - Periodic survey
 - Periodic internal certification
 - Give special attention to other repositories of employee complaints, such as Human Resources, the Security Department, etc.
 - Exit interviews and exit forms
 - Follow up with former employees



Collecting Error/Violation Data

- Consider examples for employees
 - Define and give examples of conduct that must be reported internally and refresh existing policy of internal disclosure
 - What must be reported?
 - Former flag officer contacts his former agency 11 months and 29 days after she retires (207 violation?)
 - Company's marketing consultant treats COTR to a round of golf and lunch – exceeds OGE gift rule “safe harbor” (criminal gratuity?)
 - Teaming partner alludes to having been provided a copy of the competitor's proposal (fraud? procurement integrity violation?)
 - How far back should employees go in their memory banks?



Assessing Potential Disclosures

- Consider a written protocol to capture the process for vetting possible disclosures
 - What did the company know and when did it know it
 - What records were reviewed and who was interviewed
 - Document hold orders (internal and outside records storage)
 - What factors were used to assess credible evidence?
 - Who was involved in the deliberations?
 - Who made the final decision?
 - Is it the lawyers' call? The business people? Compliance Officer? Compliance Committee? The Board Audit Committee? Consensus?
 - Not your typical "balance the risk" exercise
 - Time is of the essence



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Substance of Disclosure

- Electronic Disclosure Forms
 - DoD IG (Submit via e-mail)
 - disclosures@dodig.mil
 - GSA IG (Available Today)
 - <http://oig.gsa.gov/integrityreport.htm>
 - NASA IG
 - <http://oig.nasa.gov>
- Content/Level of detail
- Tone
- Outside or inside counsel
 - Local counsel? Or experience with federal IGs? Criminal counsel?
- Point of Contact – requires sophistication (many traps, tricky)
- FOIA (DoD IG Office has stated that not every disclosure will trigger an “investigation”)



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FAR Contractor Reporting Form

FAR Contractor Reporting Form

No electronic submissions using this form will be possible until Dec 12th at 9:00am EST

To implement the December 12th, 2008 FAR amendment this form is to allow the Contractor to notify, in writing, the agency (GSA) Office of the Inspector General, whenever the contractor has **credible evidence** that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of the civil False Claims Act or a violation of Federal criminal law involving fraud conflict of interest, bribery, or gratuity violations in connection with the award, performance, or closeout of a contract or any related subcontract. The individual completing this form must be an officer or manager empowered to speak for the company by filing this report. When you submit this electronic form an email will automatically be generated to send you a copy of what you have submitted with a tracking number. The information you are providing is not deemed to be submitted until you have received that confirmation email. If you wish to provide information that does not fall within these guidelines, please visit the [Inspector General Hotline](#).

Instructions:

Fill in the form at right. *If you are unsure if this form applies or you have any questions, please contact Counsel to the Inspector General at OIGCounsel@gsa.gov or (202) 501-0155.*

Your Company Information (All mandatory fields are denoted with a *)

Your First Name*:	<input type="text"/>
Your Last Name*:	<input type="text"/>
Your Title*:	<input type="text"/>
Your Business Email*:	<input type="text"/>
Confirm Your Business Email*:	<input type="text"/>
Company Name*:	<input type="text"/>
Business Address1*:	<input type="text"/>
Business Address2:	<input type="text"/>
Business City*:	<input type="text"/>
Business State / Province*:	<input type="text"/> <input type="button" value="v"/>



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FAR Contractor Reporting Form

Business Zip or Postal Code*:		<input type="text"/>
Business Country*:		<input type="text" value="v"/>
Business Phone Number*:		<input type="text"/> <input type="text"/> <input type="text"/>
Business Fax Number:		<input type="text"/> <input type="text"/> <input type="text"/>
Relationship		
My company is the:		<input data-bbox="562 607 800 643" type="text" value="Prime"/>
I am reporting on:		<input data-bbox="562 659 800 695" type="text" value="My Company"/>
Contract Information		
Contract No:		<input type="text"/>
DUNS or TINS:		<input type="text"/>
GSA Contracting Officer Name:		<input type="text"/>
GSA Component / Region:		<input data-bbox="680 919 1073 954" type="text" value="Administrator"/> / <input data-bbox="1142 919 1409 954" type="text" value="1 - Boston, MA"/>
If other, please specify:		<input type="text"/>
Description of Services/Supplies/System:		<input type="text"/>
Incident		
Estimated Amount of Loss:		<input type="text"/>
Loss Description:		<input type="text"/>
Incident Date:		<input data-bbox="821 1317 884 1352" type="text" value="01"/> / <input data-bbox="932 1317 995 1352" type="text" value="01"/> / <input type="text"/>
Date contractor learned of potential violation:		<input data-bbox="821 1377 884 1412" type="text" value="01"/> / <input data-bbox="932 1377 995 1412" type="text" value="01"/> / <input type="text"/>



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FAR Contractor Reporting Form

Has an investigation been conducted? Yes No

Attributes

Does the incident you are reporting include any of the following attributes:

(check all that apply)

- Duration of the activity longer than 3 months
- Multiple individuals involved
- Actual or potential security compromise
- Actual or potential employee/public safety/health threat
- Actual or potential misuse of personally identifiable information
- Actual or potential national security threat

Comments

Please provide a complete description of the facts and circumstances surrounding the reported activities, including the evidence forming the basis of this report, the names of the individuals involved, dates, location, how the matter was discovered, potential witnesses and their involvement and any corrective action taken by the company.

NOTE: Please provide the names, email contact, and business phone for any individuals involved and/or potential witnesses.

Please list any other entities you are notifying:



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FAR Contractor Reporting Form

Attachments

Browse...

Add File

Certification (Mandatory)

I certify that the information contained herein is true and correct to the best of my knowledge.

NAME:

Validation

Please enter the number from the image into the adjacent field:



I cannot read the image

No electronic submissions using this form will be possible until Dec 12th at 9:00am EST

Clear

Submit



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Other Disclosure Issues

- Other disclosures
 - Is other credit available, such as civil FCA double damages, DOD VD program, HHS VD program, DOJ Antitrust VD program
 - DOJ/AUSAs– on-going relationship with the company? Company as victim versus company as felon?
- Disclosure to the suspension/debarment official
 - Be prepared to address present responsibility at the outset



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Other Disclosure Issues

- Assess legal and compliance resources NOW
 - Assume the contractor will need to self-investigate and that multiple investigations may have to be undertaken simultaneously
 - Swat team approach
 - You don't want to scramble
 - Rush to the government (teaming partners and subs)
 - Can't afford for present responsibility to be questioned -- suspension a real possibility
 - Rush to the courthouse (whistleblowers)



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ANY QUESTIONS?



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