



Contractor Compliance Programs: What's DOJ Got To Do With It

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Today's Agenda

- Background – Government / DOJ Perspective
- Final Rule – FAR Contractor Code of Business Ethics and Conduct (Nov. 23, 2007)
 - > Implementation Guidance
 - > Questions
- Proposed Rule – FAR Compliance Program and Contractor Integrity Reporting (Nov. 14, 2007)
 - > Key Concerns
 - > Self-Disclosure
 - > Sentencing Guidelines
 - > Strategies for Commenting
 - > Questions

Background

Government / DOJ Perspective

- Darlene Druyun
- Duke Cunningham
- Jack Abramhoff
- David Safavian
- The Alaska Investigations
- Katrina Task Force
- Iraq Contracting
- Procurement Fraud Task Force
- Purchase/Travel Card Abuse
- 100+ False Claims Act Cases related to Trade Agreements Act
- Health Care Scrutiny
- DOD Voluntary Disclosures

Final Rule

Code of Conduct / System of Internal Controls

- Effective for new FAR contracts/solicitations issued after December 24, 2007
 - > Not effective for new task/delivery orders
 - > Potential contract modifications
 - > Prospective only
- What is covered?
 - Prime contracts & subcontracts
 - > \$5 million (base + options)/performance 120 days+
- Exceptions
 - Performance overseas – but not that part performed in the U.S.
 - Commercial item contracts under FAR Part 12

Final Rule

Code of Conduct / Internal Control System

Requirements

- > Written Code of Business Ethics
(30 days of award)
- > Provide a copy to each employee engaged in performance of contract (independent contractors, consultants, indirect functions?)
- > Promote compliance

Final Rule

Code of Conduct / Internal Control System

Additional requirements for other than small businesses (not “represented as small” pursuant to award of specific contract)

- > Create Awareness Program and Internal Control System (90 days)
- > Internal Control System shall:
 1. Facilitate timely discovery of improper conduct in connection with government contracts
 2. Ensure corrective measures are promptly instituted and carried out

Final Rule

Code of Conduct / Internal Control System

Internal Control System Should

1. Provide for periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Contractor's code of business ethics and conduct and the special requirements of Government contracting
2. Provide an internal reporting mechanism such as a hotline, by which employees may report suspected instances of improper conduct and instructions that encourage employees to make such reports
3. Internal and/or external audits
4. Disciplinary action for improper conduct

Final Rule

Code of Conduct / Internal Control System

- Flowdowns:
 - New Contract Clause FAR 52.203-13
 - > Must be flowed down in subcontracts >\$5 million (exceptions: (1) commercial item; or (2) performed entirely outside U.S.)
 - > Commercial Item subcontract issue (FAR 52.244-6)
 - > Prime responsibility to “check” subcontractor compliance

- What to expect from the Government

Final Rule

Code of Conduct / Internal Control System

- Deletes proposed requirement to post Hotline posters if the contractor has its own mechanism



QUESTIONS?

Proposed Rule: Background Disclosure / Cooperation

- DOJ “requested”
 - Stated objective: DOD Voluntary Disclosure Program not working
- Key concerns – FAR Council invites comments and alternatives to achieve DOJ “objective”
 - Mandatory disclosure
 - Full cooperation

Proposed Rule: Background

- What will be covered?

 - Prime contracts & subcontracts

 - > \$5 million (base + options)/performance 120 days+

- Exceptions

 - Performance overseas – but not that part performed in the U.S.

 - Commercial item contracts under FAR Part 12

- FAR placement

 - Part 9 – Contractor Qualifications, including responsibility and suspension/debarment

 - Part 42 – Past performance

 - Part 52 – Contract Requirements

Federal Contractor Compliance Programs: What's DOJ Got to Do With It?

- The Problem: Mandatory Self-Disclosure and Cooperation

“The Contractor shall notify, in writing, the agency office of the Inspector General, with a copy to the Contracting Officer, whenever the Contractor has reasonable grounds to believe that a principal, employee, agent, or subcontractor of the contractor has committed a violation of Federal Criminal law in connection with the award or performance of this contract or any subcontracts thereunder.”

and

Federal Contractor Compliance Programs: What's DOJ Got to Do With It?

“Full cooperation with any Government agencies responsible for audit, investigation or corrective actions.”

- Does this mean waiver of privileges?
- Does this mandate cooperation in audits beyond what the contract audit clauses require?
- What does “corrective actions” mean?

Federal Contractor Compliance Programs: What's DOJ Got to Do With It?

- Voluntary Self-Disclosure has a long history
 - Biblical basis: “Acknowledgment of wrongdoing,” Ezra 9; Psalm 130; and Hosea 14.
 - Proverbs: 28:13, “*He who conceals his transgressions will not prosper, but he who confesses and forsakes them will find compassion.*”
 - New Testament: encouragement of confession, Romans 3:23; Romans 6:23; James 5:16.

Federal Contractor Compliance Programs: What's DOJ Got to Do With It?

- Sentencing Guidelines for Organizations
 - Self-disclosure is not listed as one of the elements of an effective compliance and ethics program. §8B2.1.
 - However, self-reporting to appropriate governmental authorities is listed as a factor in mitigation of culpability for sentencing purposes. §8C2.5(g).

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- McNulty Memorandum
 - “The corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents”... is a factor to consider in charging the corporation.
 - Waiver of attorney-client privilege and work product is not a prerequisite to finding that the company has cooperated in the government’s investigation.

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- FAR Factors Mitigating the Necessity for Debarment
 - The contractor “brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner.” (FAR 9.406-1(a)(2))

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- DFARS Contractor Standards of Conduct

“Timely reporting to appropriate Government officials of any suspected or possible violation of law in connection with Government contracts or any other irregularities in connection with such contracts . . .” DFARS 203.7001(a)(6) (stated as a “should”; not mandatory)

Many defense contractors take “appropriate Government officials” to mean the contracting officer, the program manager, the contract administrator and not the IG.

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- DOJ Guidelines for Prosecuting Environmental Crimes
 - Disclosure must be “voluntary, timely and complete.”
 - Disclosure is not considered to be voluntary if it was “specifically required by law, regulation, or permit.” (Part II.A., DOJ Guidelines.)

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- DOD Voluntary Disclosure Program
 - Specifically, “is not an amnesty or immunity program.”
 - Encourages self-policing and voluntary disclosure by defense contractors of defense contract fraud.
 - No explicit assurances, but may result in DOJ decision not to prosecute the company and a DOD decision not to debar the company.
 - At one time was widely accepted and used.

Federal Contractor Compliance Programs: What's DOJ Got to Do With It?

- DOJ Antitrust Division, Corporate Leniency Program

Policy provides assurance that criminal charges will not be brought against a company which discloses its illegal acts before the Division has begun an investigation, provided certain conditions are satisfied. Not mandatory.

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- HHS OIG HealthCare Provider Self-Disclosure Protocol
 - Not mandatory
 - Waiver of privileges not required
 - Published in the Federal Register
 - Prominently featured on the HHS OIG website
 - Periodic “Open Letters” to the HealthCare Provider community issued by the HHS OIG

Federal Contractor Compliance Programs: What's DOJ Got to Do With It?

- Defense Industry (DII) Principles
 - Practice self-governance through the implementation of systems to monitor compliance with federal procurement laws and the adoption of procedures for voluntary disclosure of violations to the appropriate authorities.
 - The terms “appropriate authorities” do not necessarily mean the Inspector General.

Federal Contractor Compliance Programs: What's DOJ Got to Do With It?

- Examples of Mandatory Disclosure Requirements
- NRO contract clause: The contractor must report to the IG “any and all” possible violations of federal law or illegal intelligence activities related to this contract.
- FAR Clause 52.203-7, implementing the Anti-Kickback Act, requires a report to the IG of “reasonable grounds to believe” a violation has occurred.

Federal Contractor Compliance Programs: What's DOJ Got to Do With It?

- Legislative basis for mandatory disclosure?
- “Defense Contracting Ethics Oversight Act of 2007” (H. R.3383)
- Introduced by Mr. Castle on August 3, 2007
- Would require most of the same features as the proposed FAR Rule.

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Proposed FAR: Penalty for Non-Compliance with Mandatory Self-Disclosure

- A new ground for debarment:

Proposed FAR 9.406-2 (b)(1)(v)

“Knowing failure to timely disclose —

- (A) An overpayment on a Government contract;
or
- (B) Violation of Federal criminal law in
connection with the award or performance
of any Government contract or subcontract.

Federal Contractor Compliance Programs: What's DOJ Got to Do With It?

- Converting debarment from a Government protective measure to a penalty would upset over 20 years of Government policy and precedent.

Federal Contractor Compliance Programs: What's DOJ Got to Do With It?

Why mandatory self-disclosure is not good policy for contractors:

- Encroaches on the constitutional rights and legal protections of employees
- Destructive of the foundation of corporate self-governance
- Inimical to employee morale, loyalty, good order and discipline
- Makes good companies unwilling to enter the Federal market

Federal Contractor Compliance Programs: What's DOJ Got to Do With It?

Why mandatory self-disclosure is not good policy for contractors (cont'd):

- Tends to “criminalize” contract administration
- Converts employee perceptions of company management from leaders to policemen
- Reverses 20 years of working with voluntary disclosure and voluntary cooperation

Federal Contractor Compliance Programs: What's DOJ Got to Do With It?

Why mandatory self-disclosure is not in the Government interest:

- Destructive of 20 years of Government policy to encourage contractor self-governance
- Destructive of attorney-client privilege communications by compelling disclosure and compelling so-called cooperation
 - HR 3013/Attorney Client Privilege Protection Act
- Will chill employee willingness to report suspected misconduct internally
- Potentially may raise “state action” problems for Government prosecutors

Federal Contractor Compliance Programs: What's DOJ Got to Do With It?

- Alternative is that DOD/DOJ give the current Voluntary Disclosure Program more visibility and make it more and “user friendly”.
- Determine from industry why the voluntary program is not being used (five VDs this CY) and work with industry to make it more attractive.
- Aggressively promote the voluntary program; make clear its value; make the expectations regarding no company prosecution or company debarment more explicit.

Proposed Rule: Strategies for Commenting

Standard FAR Comment Process

- Due January 14, 2008
- Benefits of Trade Association Comments
- Benefits of Individual Company Comments
- General Suggestions
 - temper outrage
 - focus on substance
 - give real examples
 - attempt to cost compliance with the rule (in real \$\$)
 - offer alternatives

Proposed Rule: Strategies for Commenting

- Non-Traditional Mechanisms To Influence Proposed Rule
 - > Office of Information and Regulatory Affairs (OIRA)
 - > Major Rules Process
 - > FAR Council Members
 - DOD – DARC
 - GSA – CAAC
 - NASA
 - OFPP
 - > Congress



QUESTIONS?

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