



Mandatory Disclosure: A New Reality

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November 18, 2008**

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Today's Agenda

- Background
- New Cause for Suspension/Debarment
 - A retroactive “mandatory” disclosure
- FAR clause
 - Mandatory Disclosure of Certain Misconduct
 - Expansion of Code of Conduct/Internal Controls requirements to commercial item/overseas contracts
- What Do We Do Now: Recommendations for Implementation
- Questions

Background

- DOJ initiated a letter to OFPP -- (May 23, 2007)
- Two proposed rules
 - Lots of public and agency comment
- Close the Contractor Fraud Loophole Act (June 30, 2008)

DOJ Perspective

- Darlene Druyun
- Duke Cunningham
- Jack Abramhoff
- David Safavian
- The Alaska Investigations/Stevens Conviction
- Katrina Task Force
- Iraq Contracting, contractor employee indictments
- Procurement Fraud Task Force
- Purchase/Travel Card Abuse
- 100+ Trade Agreements Act
- DOD Voluntary Disclosures – too few and far between

DOJ Letter

- “[T]he 1980s witnessed significant innovations in the federal procurement system. Many of those reforms, including corporate compliance programs and corporate self-governance, were adopted with industry cooperation, and were later incorporated into evolving regulatory schemes in other business sectors and industries. In fact, the U.S. Sentencing Guidelines’ treatment of corporations, adopted in 1991, borrowed heavily from the reforms that were first instituted for government contractors in 1986. ***However, since that time, our government’s expectations of its contractors have not kept pace with reforms in self-governance in industries such as banking, securities, and healthcare.***”

Close the Contractor Fraud Loophole Act

- Requires “timely notification by Federal contractors of violations of Federal criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts, including those performed outside of the United States and those for commercial items.”
- Requires revision to FAR within 120 days
- “Covered contract” is any contract greater than \$5 million and more than 120 days in duration

Final Rule (Nov. 12, 2008)

- 142 page “preamble” summarizing public comments and drafters’ responses
 - Provides insight into rationale for some of the new rules
 - DOJ view is that procurement self-governance has not kept pace with the health and banking industries
 - DOJ does not accept the view that DOD should share part of the responsibility for few voluntary disclosures
- Effective date: December 12, 2008
 - New suspension/debarment rule poses a trap, however, because it has a “look back” requirement

Suspension and Debarment

- Changes to
 - FAR Part 3.1003
 - FAR Part 9
 - Definition of principal added in Part 2

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 –

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

Retroactive Disclosure Issues

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

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 . . .”

- “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.”

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 . . .”

- “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.*”

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 . . .”

- Effective date: December 12, 2008
- *Timely* disclosures required after effective date
 - NO minimum thresholds, materiality
 - NO exemptions for commercial item or overseas contracts
 - Limited only by “final payment”

Retroactive Disclosures

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

- Definition of principal added to FAR 2.101
- “*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).”

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 . . .”

- 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

Retroactive Disclosures

“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 starts ticking on December 12, 2008 (effective date)

Retroactive Disclosures

“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
- Contract Clause (FAR 52.203-13) – disclosure required to IG with copy to CO

Retroactive Disclosures

“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.”

Retroactive Disclosures

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

- Conclusion:
 - Disclosure to CO alone (not IG) is sufficient to avoid suspension/debarment
 - Previous disclosures made to Government (CO or others in authority) do not have to be repeated or made to IG

Retroactive Disclosures

“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.”

Retroactive Disclosures

- **Application to Subcontractors**
 - New cause for suspension/debarment only applies to contractors, not subcontractors
- **Application to Subcontracts**
 - 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**

Review Suspension/Debarment

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 –

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

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”

- **Chapter 11 “Bribery, Graft and Conflicts of Interest”**
 - 21 provisions (18 U.S.C. §§ 201 – 226)
 - Not limited to Chapter 11

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”

- **Fraud**

- 100+ references to “fraud” in Title 18
- Qualified by “in connection with the award, performance, or closeout of the contract or subcontract”

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”

- **Conflict of Interest**

- 18 U.S.C. § 208, “Acts Affecting Personal Financial Interest”
- 18 U.S.C. § 207, Revolving Door Restrictions
- Druyun - conspiracy
- Qualified by “in connection with the award, performance, or closeout of the contract or subcontract”

Civil False Claims Act

- State of the Law
 - Substantial uncertainty in law
 - Conflicts among circuits
 - 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.”
 - 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.”
 - Amen

“Significant Overpayment”

- 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
- “Significant” not defined

Retroactive Disclosure

“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 . . .”

- **Recommendations:**

- Create a reasonable mechanism to demonstrate the company collected or attempted to collect and assess possible violations/significant overpayments
- Make disclosures to “friendly” contracting official
- Keep written information supplied to government to a minimum (FOIA issues)

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
 - > Not effective for new task/delivery orders under existing contracts
 - > Potential contract modifications

- What and who is covered?
 - Prime contracts & subcontracts – only the offeror
 - > \$5 million (base + options)/performance 120 days+
 - > prior exception for contracts performed overseas removed
 - > prior exception for “commercial” contracts removed

New Mandatory Disclosure Applies to Small Businesses

New Mandatory Disclosure

- Drafters recognize this is both a “sea change” and a “major departure”
- 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

- 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

- The drafters note that there already exists a contractual obligation to disclose overpayments (see 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.
- Note: no existing duty to notify IGs, but see suspension/debarment risk

New Mandatory Disclosure

- 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 violation;
 - ❖ The date the contract clause was incorporated; or
 - ❖ The date that the contractor's internal control system was established.
- How long does the disclosure requirement apply?
 - The mandatory disclosure requirement applies until three years after final payment on the contract

New Mandatory Disclosure

- Who do you tell?
 - 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 Mandatory Disclosure

- You have disclosed the violation—now what?
- “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).
 - Drafters: “compliant contractors will encourage employees to both make themselves available and to cooperate with the Government investigation.”
 - How does -- and can -- company counsel so advise employees?

New Mandatory Disclosure

- 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

Recommendations for Implementation

- Employee training a must, plus a written policy
 - Define and give examples of conduct that must be reported internally and refresh existing policy of internal disclosure
 - What is fraud? What is a crime? What is a civil False Claims Act violation? What is a mere mistake? And who decides?
 - Reckless disregard, deliberate ignorance, “knowing” (failure to monitor and audit? failure to adequately resource the Compliance Department? Delay in implementing corrective action?)
 - Contracting officer solicits employment with the contractor during a competition (208 violation?)

Recommendations for Implementation

- Training and a written policy
 - 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?
- Adopt a form for employees to streamline internal disclosures?
- What about promises of anonymity?
- Factor in performance evaluations?
 - Failure to disclose or untimely disclosure up the chain?

Recommendations for Implementation

- Ensure that managers and supervisors understand they **MUST** report up the chain to legal, compliance, etc.
 - Give special attention to other repositories of employee complaints, such as Human Resources, the Security Department, etc.
 - Exit interviews and exit forms – who reviews these? Follow up with former employees?
 - Implement internal certifications? How often?

Recommendations for Implementation

- 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

Thoughts on Implementation

- The disclosure
 - Content
 - Tone
 - Level of detail
 - Outside or inside counsel
 - Local counsel? Or experience with federal IGs? Criminal counsel?
 - Point of Contact – requires sophistication (many traps, tricky)
 - Employee interviews
 - Company counsel present?
 - Offer individual counsel or indemnity? Drafters says “full cooperation” will not be impacted (KPMG)

Thoughts on Implementation

- 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

Recommendations for Implementation

- 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)

Recap of 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

Recap of 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

Recap of 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 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)

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”

Subcontract Flow Down Obligations

- FAR 52.203-13(d) subcontracts over \$5M 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

Questions?

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