SPECIAL COMPLIANCE AND ETHICS CONSIDERATIONS FOR CONTRACTORS

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Civil False Claims Act

• Civil False Claims Act ("FCA")
  – Enacted in 1863 to punish contractors who defrauded the Union Army
  – Major amendments in 1986, 2009 and 2010
  – Since 1986, has become Government’s primary enforcement weapon for combating fraud, waste, and abuse
  – Rising number of actions, investigations, and referrals

• Also Criminal False Claims Act
Offenses under the FCA

• **False Claim** – *knowing submission* of a false claim to the Government or a recipient of Government funds, or causing another to submit a false claim.

• **False Record or Statement** – *knowingly making* a false record or statement material to a false claim.

• **Reverse False Claim** – *knowingly making* a false record or statement material to an obligation to pay money to the Government, or *knowingly and improperly avoiding* an obligation to pay money to the Government.

• **Conspiracy** – *conspiring to do* any of the above.
**Qui Tam Provisions**

- FCA actions may be initiated by individuals under the FCA’s *qui tam* provisions
  - “Relators” (a/k/a “whistleblowers”)
- Relator must file a complaint under seal
- Relator must also serve written disclosures on DOJ describing “substantially all material evidence and information the person possesses”
- DOJ has 60 days to investigate and make intervention decision (extensions are common)
Damages and Penalties

• Measure of FCA damages: Difference between what the government actually paid and what it should have paid absent the alleged FCA violation *trebled*

• FCA provided for penalties of $5,500 to $11,000 *per claim* and may be applied even in the absence of actual damages

• Increased to $10,781 to $21,563 for violations after November 2, 2015
Common FCA Examples

- Labor and Material Overcharging
- False Certifications of Compliance
- Product Substitution
- Unauthorized Substitution of Personnel
- Misrepresentations in Proposals
- Implied Certifications
- Failure to Monitor Subcontractors
- Kickbacks
Key FCA Trends

- Materiality post-*Escobar*
- “Knowing” ≠ intent to defraud
- Causation not required; instead tendency to influence
- Implied certifications
- New damages theories and use of statistical sampling
Mandatory Disclosure

• Must disclose in a “timely” fashion “credible evidence” of:
  – Certain violations of criminal law
  – Violations of the Civil FCA
  – “Significant overpayments” that occur “in connection with the award, performance, or closeout” of a Government contract

• If fail to disclose when required, possible suspension/debarment

• Both a FAR contract clause and a requirement under the FAR suspension/debarment regulations
Suspension and Debarment

• Administrative exclusions from government contracting
• No new contracts, orders, option exercises, or contract extensions
  – Agencies cannot solicit offers from, award contracts to, or consent to subcontracts with
  – No “discussions” or placement in competitive range
  – Cannot act as agent, representative, or surety
• Continuation of current contracts
  – Agencies “may continue contracts or subcontracts . . .” (i.e., termination not required)
  – Prevailing practice is not to terminate
• To protect the government’s business interests and not to punish
Suspension and Debarment

• Key concept is “present responsibility”
  – Generally able to be trusted to deal fairly and honestly with the government customer on a going-forward basis

• Who can be suspended/debarred?
  – Individuals and entities (e.g., corporations, partnerships, divisions, or business units within an entity)
  – Parents and affiliates, if warranted
  – Prime contractors, subcontractors, and/or participants at any tier

• Collateral impacts
  – State and local procurement reciprocity
  – Security clearances
  – Export licenses
  – Commercial customers
Compliance & Ethics Hotspots

- Code of business ethics and conduct
- Gifts, gratuities & entertainment
- Anti-corruption statutes
- Off-limits information
- Hiring decisions
Suspension and Debarment

• Currently active agencies
  – DoD / Army
  – DoD / Navy
  – DoD / DLA
  – EPA
  – SBA
  – GSA

• Recently active agencies currently on hiatus
  – DoD / Air Force
  – Commerce
Service Contract Act

• Applies to contracts
  – In excess of $2,500 with Federal Government
  – Performed in the “United States”
  – Principally for “service” through the use of “service employees”

• Requirements
  – Pay prevailing minimum wage and fringe benefits in accordance with an incorporated wage determination or collective bargaining agreement
Defining “Principally for Service”
Identifying “Service Employees”
Compliance Challenges
– Wage Determinations and Mapping Issues
– Collective Bargaining Agreements
– Calculating Wages and Fringe Benefits
– Flow-Down Requirements
– Recordkeeping
**Davis-Bacon Act**

- **Applicability**
  - Contracts in excess of $2,000
  - With the Federal Government or District of Columbia
  - For Construction, Alteration, Repair
    - SCA/DBA Mixed Contracts

- **Coverage**
  - Laborers and Mechanics
  - “Site of Work”
Davis-Bacon Act

• Key Requirements
  – Pay wages and fringe benefits in accordance with wage determinations
  – Weekly submission of certified payroll

• DBA v. SCA
Paid Sick Leave Executive Order

- Applicable to certain “new” contracts after 1/1/17
- Coverage: All employees who work “on or in connection with” covered contracts
- Accrual: One hour for every 30 hours worked or 56 hours per year granted up front
- Impact on general use PTO policies and CBAs
A Few Other Obligations

• Federal Minimum Wage for Contractors
• Non-Displacement of Qualified Workers (Service Contracts)
• Anti-Discrimination/Affirmative Action/Pay Equity
Export Controls - Overview

- What are U.S. Export Controls and why do we care?
- Identifying export activity and applicable regulatory control
- Compliance steps
What are U.S. Export Controls?

• U.S. regulations that govern the cross-border transfer
  • of certain goods, technical data/information, software, or services
  • to certain foreign countries, entities, and end-users
  • or for certain end uses

• Why? National security, foreign policy
Why do we care?

- Long arm of U.S. jurisdiction -- attaches to U.S. Persons, and U.S. items, wherever located
- Strict liability standard for civil penalties
- Restrictions apply to export-controlled items
  - Even if data is not marked
  - Even if USG contract doesn’t provide notice
  - Even if contracting officer says that activity is permissible
Key Regulatory Authorities

- **United States**
  - **International Traffic in Arms Regulations (ITAR)**
    - Covers defense articles and related technical data and defense services that appear on the U.S. Munitions List (USML)
  - **Export Administration Regulations (EAR)**
    - Covers just about everything else - commodities, software, and technology
    - Many appear on the Commerce Control List (CCL)
    - EAR 99 designation for everything else ‘subject to the EAR’
What is an Export?

- Sending or taking a controlled commodity, software, or data across a national boundary
  - US to France = export
  - France to U.K. = reexport
- Oral or visual disclosure of controlled data or source code to a Foreign Person, even in the U.S.
- Defense Service: Providing assistance to Foreign Persons involving use of an ITAR-controlled item
Export Controls: Big Picture

• (1) Evaluate - is the item (or service) potentially subject to U.S. export controls?

• (2) If yes, determine which agency(ies) has jurisdiction
  – Is the item identified on the U.S. State Department’s International Traffic in Arms Regulations (ITAR)? or
  – Regulated by the U.S. Commerce Department’s Export Administration Regulations (EAR)

• (3) Identify the item or technology’s export control classification
  – USML entry or an Export Control Classification Number (ECCN)

• (4) Review whether that classification and the transaction being contemplated are subject to licensing or reporting requirements
Compliance Steps

• Know your programs
  – Where are you providing services or sending items/data?
  – Nationality of program participants?
  – What kind of data are you receiving, transmitting, or creating?

• Safeguarding data
  – Electronic controls
  – Physical controls

• Formal compliance program
  – Classification & jurisdiction, licensing, recordkeeping, audits

• Don’t rely solely on prime contractors or contracting officers
QUESTIONS?

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