

ETHICS IN GOVERNMENT CONTRACTING

I. INTRODUCTION

A. A proposed rule will amend the Federal Acquisition Regulations (“FAR”) to require contractors to have a written code of ethics and business conduct. Under the proposed rule, contractors (and subcontractors) receiving awards in excess of \$5 million must within 30 days of award have a written code of ethics and business conduct and, in addition, must within 90 days of award establish an employee ethics and compliance training program and an internal control system proportionate to the size of the company and the extent of its business with the Federal Government. The proposed rule does not apply to commercial item contracts awarded pursuant to FAR Part 12, contracts performed outside the United States, or contracts with performance periods less than 120 days. Currently, this is a unique requirement of the Department of Defense FAR Supplement, but is proposed to be required of contractors dealing with all agencies that are governed by the FAR. The proposed new contract clause will require contractors who receive contracts expected to exceed \$5 million to have a written code of ethics and business conduct that includes an ethics and compliance training program and internal control system. FAR Case 2007-07, 72 Fed. Reg. 7588 (Feb. 16, 2007).

B. The commercialization of federal contracting in the 1990’s put an emphasis on the relationship between contractor and government customer and relaxed the emphasis on traditional government formalities.

1. Multiple award task-order contracts

a. Pressure on contractors to actively market their services to their government customers--multiple award contract seen as a “license to hunt” task orders

b. No bid protest oversight for task order awards

2. Simplified acquisition procedures/commercial items

C. Decline in the acquisition work force

1. Fewer trained and experienced contracting officers

2. Contractors performing some contract administration functions that government employees formerly performed

3. Problems fester and get referred to the Department of Justice before contract administration has been given a chance to resolve disagreements

- Higher stakes when DOJ gets involved

- DOJ motivation is to get the case resolved; not to satisfy the customer—performance doesn't impress them

D. Recent events in the headlines

1. 2004 – Boeing and Air Force – procurement integrity
2. 2005 – Jack Abramhoff – buying influence
3. 2006 – Iraq War – contractor overcharging

E. In the meantime, the Government is prosecuting and debaring contractors

F. What can you do to keep your company out of the Government's target zone?

1. Company should have a compliance plan that demonstrates its commitment to ethical conduct
2. Employees should be aware and vigilant to protect the company from making mistakes

II. POTENTIAL SANCTIONS

A. Contractual and administrative remedies

1. Penalties under contract clauses

- Penalty for submitting cost or pricing data that were not complete, accurate, and current as of the date of agreement on price
 - Contractor repay the overpayment, plus interest
 - Contractor pay additional amount equal to amount of overpayment if contractor knowingly submitted improper cost or pricing data

2. Suspension and debarment

- Suspension: Contractor is temporarily disqualified from Government contracting and Government-approved subcontracting
- Debarment: Contractor is excluded from Government contracting and Government-approved subcontracting for a specified period

B. Civil false claim prosecution

1. Punishable conduct includes

- Knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval. (31 U.S.C. § 3729(a)(1))

2. Penalty: Up to treble damages plus up to \$10,000 per occurrence (which could be each invoice).

C. Criminal prosecution

1. Criminal false claims: This crime occurs when a person presents false, fictitious or fraudulent claims against the United States knowing such claims are false. 18 U.S.C. § 287

2. Penalty: Punishment is a fine up to \$250,000, up to five years in prison, or both

III. BENEFITS OF HAVING A CULTURE OF COMPLIANCE (DOCUMENTED AND IMPLEMENTED IN A COMPLIANCE PLAN)

A. It is good business

B. It is required by government contracts

C. It is required and encouraged by the law

1. DFARS Subpart 203.70 (and pending FAR revision)

- Contractors must have standards of conduct and internal control programs that:
 - Promote adherence to such standards
 - Facilitate the timely discovery and disclosure of improper conduct in connection with government contracts
 - Ensure that corrective measures are promptly instituted and carried out.
- A contractor's system of management controls should provide for
 - A code of business ethics of conduct and employee training

- Periodic reviews of policies and procedures for compliance with applicable standards of conduct
- A mechanism by which improper conduct may be reported, and instructions encouraging such reports
- Internal and/or external audits
- Disciplinary action for improper conduct
- Timely reporting to government officials of possible violations
- Full cooperation with investigating government agencies

2. Department of Justice Policy for deciding when to charge corporations with the commission of a crime:

- In making a charging decision, a prosecutor should consider
 - The nature and seriousness of the wrongdoing
 - Pervasiveness of wrongdoing and complicity of management
 - Corporate history of similar wrongdoing
 - Voluntary disclosure and cooperation with investigation
 - Existence and adequacy of a corporate compliance program
 - Corporate remedial actions after an incident of noncompliance
 - Collateral consequences of a prosecution, such as harm to shareholders and employees not personally culpable
 - Adequacy of non-criminal remedies

3. Federal sentencing guidelines for sentencing organizations

- Establish compliance standards and procedures
- Assign overall responsibility to a high-level individual

- Use due care not to delegate substantial discretionary authority to an individual with a propensity to act illegally
- Communicate the program effectively to employees and agents
- Monitor and audit appropriately to ensure compliance
- Consistently enforce standards through appropriate discipline
- Response appropriately after detection of a violation to prevent recurrence, including making any necessary program changes

4. Suspension and debarment regulations. Factors considered by Government (FAR §§ 9.406-1(a); 9.407-1(a)(2))

- Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for suspension or debarment or had adopted such procedures prior to any government investigation of the activity cited as a cause for suspension or debarment
- Whether the contractor brought the activity cited as a cause for suspension or debarment to the attention of the appropriate government agency in a timely manner
- Whether the contractor has fully investigated the circumstances surrounding the cause for suspension or debarment and, if so, made the result of the investigation available to the suspending or debarring official
- Whether the contractor cooperated fully with Government agencies during the investigation and any court or administrative action
- Whether the contractor has paid or has agreed to pay all criminal, civil and administrative liability for the improper activity, including any investigative or administrative costs incurred by the government, and has made or agreed to make full restitution
- Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for suspension or debarment
- Whether the contractor has implemented or agreed to implement remedial measures, including any identified by the government
- Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs

- Whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for suspension or debarment
- Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for suspension or debarment and has implemented programs to prevent recurrence

IV. GENERAL TOPICS

A. Areas of compliance that generally are unique to government contractors

1. Anti-Kickback Act
2. Contract compliance (quality, material substitution, etc.)
3. Cost recording/expense reports/time charging
4. Defective pricing/proposal preparation (TINA)
5. Gratuities
6. Procurement integrity
7. Organizational conflicts of interest
8. Fraud and false claims

B. But, similar to all businesses, government contractors still must comply with other business standards, which include:

1. Antitrust
2. Environmental/health/safety
3. Export controls
4. Foreign Corrupt Practices Act
5. Insider trading
6. Political contributions and activities

V. ANTI-KICKBACK ACT; RULE (41 U.S.C. § § 51-58; FAR 3.502)

A. “Kickback” means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.

B. Anti-Kickback Act of 1986 prohibits any person from Providing, attempting to provide, or offering to provide any kickback; Soliciting, accepting, or attempting to accept any kickback; or Including, directly or indirectly, the amount of any kickback in the contract price charged by a subcontractor to a prime contractor or higher tier subcontractor or the contract price charged by a prime contractor to the United States.

VII. CONTRACT COMPLIANCE (QUALITY, MATERIAL SUBSTITUTION, ETC.)

A. Scenario: Contractor performs engine overhaul using refurbished parts rather than the new OEM parts called out in the contract

B. Rule: A contractor shall perform its obligations under a contract

C. Discussion

1. At a minimum this is failure to perform the contract and the contractor is not entitled to payment;

2. This also could be viewed as criminal fraud.

VII. COST RECORDING/EXPENSE REPORTS/TIME CHARGING

A. Scenario: Contractor has a contract that includes a cost reimbursement line item for travel. Employee makes a day trip from Norfolk to Baltimore and back to pick up parts for both commercial and government jobs. Employee gets reimbursed for mileage. Entire cost is charged directly to a contract with the Navy.

B. Rule: A cost is allowable only when it is allocable to the contract

C. Discussion: Mischarging can result in contractual, administrative, and criminal sanctions

VIII. DEFECTIVE PRICING/PROPOSAL PREPARATION (TINA)

A. Rule: When a contractor is required to submit cost or pricing data with its proposal, that cost or pricing data must be complete, accurate, and current

B. Discussion: The requirement for submission of cost or pricing data kicks in for proposals for negotiated contracts over \$650,000 and for modifications with price adjustments over \$650,000 and termination for convenience settlement proposals. See FAR 14.403-4.

IX. BRIBERY AND ILLEGAL GRATUITY

A. Scenarios

1. Contractor pays government official cash in exchange for award of a contract
2. Contractor offers government official a pair of tickets to the Orioles/Yankees game

B. Rule (FAR Subpart 3.2)

1. Bribery: Bribery involves a specific *quid pro quo* (direct payment for a contract). Bribery is a crime. 18 U.S.C. § 201.
2. Gratuity: Offer of a gratuity to an employee of the Government intended to obtain a contractor or other favorable treatment is a crime. 18 U.S.C. § 201.

C. Discussion

1. Contract clause prohibits gratuities. FAR 52.203-3. Can result in termination of the contract, recovery of breach of contract damages, and penalty of up to 10 times the cost of the gratuity
2. You can bet the situation will be reported to the Justice Department as well
 - Bribery punishment — fine of three times the amount of the bribes or \$250,000, whichever is greater, or fifteen years imprisonment, or both
 - Gratuity punishment — fine up to \$250,000, or two years imprisonment, or both
 - Remember, these sorts of charges require two participants, and so there will usually also be a conspiracy charge

X. PROCUREMENT INTEGRITY

A. Restrictions on hiring government workers

1. You cannot talk with a government employee about a job with your company unless the government worker stops all work on matters related to the company

2. Best course is for government worker to give notice in writing to ethics advisor

B. Post-Government restrictions (examples)

1. Lifetime ban – representing company before former agency on matter on which former employee worked

2. Two-year ban – representing company before former agency on matter subordinates worked

C. Information disclosure

1. 41 U.S.C. § 423 prohibits disclosure or receipt of contractor bid information and source selection information

2. Contractor proposal information is

- a. Cost or pricing data

- b. Indirect costs and direct labor rates

- c. Information marked “Proprietary” by offeror

3. Source selection information includes

- a. Source selection plans

- b. Technical evaluation plans

- c. Cost or price evaluations including cost realism

- d. Competitive range determinations

- e. Ranking of proposals

- f. Reports of source selection technical evaluation or price evaluation committees

- g. Information marked “Source Selection”

XI. ORGANIZATIONAL CONFLICTS OF INTEREST

A. Scenarios

1. Biased ground rule cases

- These cases involve situations in which a firm, as part of its performance of a prior government contract, has set the ground rules for the competition for later government contract by writing the statement of work or the specifications
- These cases also raise the concern that the firm by virtue of its special knowledge of an agency's future needs could have an unfair advantage in a competition for those requirements

2. Unequal access to information

- These situations arise when a firm has access to non-public information as part of performance of a government contract where that information may provide the firm with an unfair competitive advantage on a later contract

3. Impaired objectivity cases:

- These arise where a firm will evaluate itself or a related entity either through performance assessment or evaluation of proposals. The concern is that the firm's ability to be impartial will be compromised by its financial relationship with the firm that is going to be evaluated.

B. Rules

1. Contracting officers shall identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible

2. Contracting officers shall avoid, neutralize, or mitigate significant potential conflicts before contract award

C. Discussion: Contractors must be proactive

1. Don't wait for the contracting officer to identify potential problems

2. Don't bid on contracts that might put you in an unacceptable OCI situation

XII. FRAUD AND FALSE CLAIMS

A. Scenarios

1. Mischarging
 - a. Time – direct vs. overhead, overhead vs. non-allowable
 - b. Material
 - c. Product substitutions
 - d. Seeking early progress payments
2. Fraud in the inducement (false statements in proposal)
3. False certification

B. Rule

1. This crime occurs when a person presents false, fictitious or fraudulent claims against the United States knowing such claims are false. 18 U.S.C. § 207. Punishment is a fine up to \$250,000, up to five years in prison, or both.
2. False representation of fact
3. Concealment of facts

XIII CONCLUSION

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