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Changes in Federal Contracting under Obama Administration

S. Lane Tucker
Perkins Coie, LLP
(907) 263-6927
ltucker@perkinscoie.com

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New Mandatory Disclosure Requirement in Contractor Code of Business Ethics and Conduct (Dec. 2008) FAR 52.203-13

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- Applies to all contracts in which the value of the contract is expected to exceed $5 million and the performance period is 120 days or more
- Requires contractors to make a timely disclosure to the agency Office of the Inspector General whenever they have credible evidence that
  - A principal, employee, agent or subcontractor has committed a violation of federal criminal law
    - Involving fraud, conflict of interest, bribery, or gratuity violation in Title 18 of the U.S. Code,
    - a violation of the civil False Claims Act,
    - or substantial overpayments by the government
- Inserted into all new and existing contracts
- Creates new bases for suspension and debarment

Significant Aspects of the New Rule

- Contractors must be familiar with mandatory internal control requirements
- Requires contractors with a covered contract to have:
  - Written code of business ethics and conduct
  - Business awareness and compliance program
  - Certain mandatory minimum internal controls

Notable Required Internal Controls

- Reasonable efforts not to hire or promote as a principal any person who due diligence would have exposed as having engaged in conduct that conflicts with the contractor's code of business ethics and conduct
- Reasonable efforts not to do business with subcontractors with poor records of business integrity and ethics
- Training for subcontractors and agents "as appropriate"

Application

- Small businesses are specifically exempted from the requirements in the new rule relating to a business ethics awareness and compliance program and internal control system
  - It would be wise to pay close attention to these requirements and consider adopting them anyway.

Wrong Assumptions

- The most basic mistake contractors can make
  - Assume that, because they do not hold a "covered contract," the requirements of the new rule will not affect their company.
  - Or assume they can safely ignore certain aspects of the new rule because of the exemptions for commercial-item contractors and small businesses.

Wrong Assumptions
And Why Not to Make Them

- The new bases for suspension and debarment established in the new rule exist independent of the clause at FAR 52.203-13
  - Applies to all contractors. Commercial-item contractors and small businesses can be suspended and debarred if they knowingly fail to disclose to the government credible evidence of certain violations, even if they do not hold a "covered contract."

Reasons to Comply

- Minimum internal controls will, as a practical matter, become the de facto standard of reasonableness for all contractors-regardless of whether they are exempted from certain requirements
- Government investigators will look first to see whether the company has appropriate internal procedures in place for communicating its business ethics and conduct standards to its employees, for reporting suspected violations, and for investigating, documenting, and assessing reports of misconduct.

Minimum Steps to Take

- Minimum internal controls are necessary to ensure compliance with the mandatory disclosure requirement.
  - To effectively ensure compliance with the requirement to timely disclose credible evidence of violations, contractors should have
    - (1) proper compliance training for employees,
    - (2) effective internal reporting mechanisms for reporting suspected instances of improper conduct, and
    - (3) established procedures for centrally collecting reports of misconduct, for conducting internal investigations, and for making credible evidence determinations.

QUESTIONS TO ASK TO ENSURE COMPLIANCE

- Do we have a written code of business ethics and conduct that addresses the company's policies in key government contracts compliance areas (e.g., gifts and gratuities, conflicts of interest, bribery, etc.)?
- Do our employees engaged in the performance of government contracts receive regular training on the policies addressed in the code of business ethics and conduct and other pertinent compliance issues?

- Do we have an internal reporting mechanism in place which allows our employees to report anonymously and confidentially suspected violations?
  - Are our employees aware of it through training and posters advertising the hot line?
- Have we designated a senior officer of the company (or of the division that performs government contracts) as being responsible for coordinating and overseeing internal investigations of reports of suspected violations and decision-making processes about disclosure to the government?
- Do we have formal procedures in place for documenting internal investigations and decisions to disclose or not to disclose to the government?

- Do we have human resources policies and procedures in place to conduct adequate background checks to vet current and prospective principals for hiring and promotions?
- Do we have policies and procedures in place for assessing the record of business integrity and ethics of our subcontractors and teaming partners and for verifying whether they have a compliance program and appropriate training in place?
- In the past six months, have we conducted a review of the effectiveness of our company's business practices, procedures, policies and internal controls for compliance, and have we assessed the risk of criminal conduct?

Define the Scope of Any Reporting Requirement

- 1. Compile an inventory of current Government contracts and any contract for which final payment was received after December 12, 2005 – the "trigger" date for disclosure of past violations. Determine whether instances of past covered conduct under these contracts must be disclosed and whether documentation exists describing past instances of covered conduct (audit reports, etc.).
- 2. Compile an inventory of prior disclosures of violations and overpayments on contracts within the relevant period (#1 above), including to whom such disclosures were made; determine whether the new rule requires renewed disclosure to the cognizant IG.
- 3. Identify all personnel within the organization who are "principals" within the broad definition provided in the revised FAR clause (FAR 52.203-13(a)), including personnel who may be principals for a particular contract or project.

Establish or Identify Internal Procedures for Investigation and Reporting

- 1. Review and/or establish internal procedures for reporting possible violations or significant overpayments, including designated reporting channels.
  - Communicate procedures and internal channels to all principals.
- 2. Identify a principal point of contact within the organization who is responsible for internal investigations, credible evidence determinations and required reporting.
- 3. Review and/or establish policies and procedures to capture, process, investigate, assess and report possible violations from a wide variety of sources
  - hotline calls, information provided by auditors, workplace reports to management, news media, etc.
  - if necessary, revise procedures to ensure reports are adequately documented and are likely to result in standardized, documented and sound investigations and/or “credible evidence” reporting determinations.

- 4. In reviewing internal investigation procedures, consider the need to implement best practices that address various issues, but tailored to the unique circumstances of each individual investigation situation, including, among others:
  - (a) developing essential information and preliminary assessments during intake;
  - (b) taking effective steps to preserve the *status quo* or take immediate corrective actions when necessary;
  - (c) developing and implementing an investigation plan;
  - (d) properly conducting and documenting employee interviews;
  - (e) effectively preserving records and documents as necessary; and
  - (f) effectively managing attorney-client privileges where appropriate, and taking steps to maintain any privilege through the disclosure process.

- 5. Determine whether existing internal controls and investigation/reporting mechanisms have effectively captured violations or overpayments known to principals:
  - if not, consider requiring all principals to verify that they are unaware of pre-existing possible violations/overpayments for any contracts within the relevant time period.

Prepare and Implement Procedures to Minimize Risks of Non-Disclosure

1. Communicate new mandatory disclosure requirements to all principals (if not to all employees)
2. Review internal training policies and procedures to determine whether additional or specific internal training is required
3. Review model subcontract or teaming agreements to ensure that the revised FAR 52.203-13 clause is flowed-down where appropriate/necessary and any nondisclosure obligations do not prevent mandatory disclosures to the Government.
   - Consider whether these standard terms should include a clause that requires subcontractors and teaming partners to participate in internal investigations of possible violations and overpayments, including access to relevant records.
4. Evaluate contract administration procedures to determine if more emphasis can or should be placed on the contract closeout process to raise final payment and closeout as a contract administration priority

Ensure that "Principals" are Adequately Qualified

1. Identify all personnel within the organization who are “principals,” including personnel who may be principals for a particular contract or project.
2. Revise Human Resources procedures to include adequate background checks to vet current and prospective principals in connection with any hiring and promotion decisions. May require some centralization of hiring and promotional decision-making to ensure proper background checks are conducted before an individual is selected as a principal
3. Review HR policies to ensure that employee misconduct involving violations are adequately documented in the organization’s and the employee’s HR/employment files so that those violations are tracked and considered in subsequent promotion decisions involving potential principals.
4. Provide HR staff with notice of new obligations and HR procedures.

Seize the Opportunity to Review Standards of Ethics and Business Conduct

- Review existing Standards of Ethics and Business Conduct and internal controls and compare to FAR 52.203-13 compliance matrix to determine what revisions need to be made to existing code.

Conclusion

- Carefully considered caution should be exercised when it comes to mandatory disclosures.
- While contractors need not (and should not) run to the nearest agency IG with non-covered disclosures in hand, the obligations under the new final rule cannot be taken lightly.
- Ambiguities and “grey areas”, yet to be adequately addressed as to the scope and definition of certain terms in the new final rule, further enforce the need for contractors to approach this new reporting obligation carefully. In this age of aggressive government enforcement, contractors can do otherwise at their peril.

New GAO and IG Rights To Interview Employees

- Section 871 of the Defense Authorization Act of 2009 (P.L. 110-417):
  - allows GAO to interview current employees during an audit of the contractor's records. [March 31, 2009 Fed. Reg. notice amending FAR clauses 52.215-2 and 52.214-26]
  - Appears to apply only to solicitations and contracts issued *after* the effective date
  - Does not apply to commercial item contracts

Sections 902 and 1515 of the American Recovery and Reinvestment Act of 2009 (Recovery Act)

- Gives GAO and IGs authority to review any records of the contractor or subcontractor related to Recovery Act transactions.
  - Provides authority to interview employees concerning Recovery Act transactions.

- Rule requires that if a contract/subcontract is funded with Recovery Act funds:
  - Existing contracts must modified on a bilateral basis to contain appropriate audit clauses reflecting the Recovery Act provisions (while a contractor can refuse, it will not be eligible for Recovery Act funds, and termination for convenience of the contract may be a real possibility).
  - Future solicitations/contracts are to contain appropriate audit clauses.
  - Applies to all contracts, including
    - commercial item contracts
    - contracts and subcontracts under the simplified acquisition threshold of $100,000

- Recovery Act interim rule permits
  - GAO to “interview any officer or employee” of a contractor or subcontractor regarding “transactions relating to” a prime “contract or a subcontract hereunder.”
  - Appropriate OIG representatives to interview ***only*** prime contractor officers or employees regarding transactions pertaining to a prime contract.

Considerations

- Consider the employees' right under:
  - The U.S. Constitution
  - Right to decline to be interviewed
  - Rights under applicable labor law
  - Right to counsel
  - Caution against transgressing the False Statements Act, 18 U.S.C. § 1001, the Obstruction of Federal Audit Act, 18 U.S.C. §1516, or other felony statutes

Recovery Act Reporting Requirements

- Under FAR Case 2009-009 (March 31, 2009), contractors and subcontractors funds are required to report information regarding:
  - A description of the "employment impact" of work funded by the Recovery Act, including number and types of "jobs created" or "jobs retained" by the prime contractor; and
  - Names and "total compensation" (as defined in the rule) for the five highest compensated officers of the contractor or subcontractor for the calendar year in which the contract or subcontract is awarded.

Review Subcontractor Controls

1. Review subcontractor selection procedures to ensure that due diligence is exercised to exclude subcontractors who have engaged in illegal acts. If subcontractor selection procedures are not adequately documented, they should be memorialized in some way..
2. Establish controls to verify whether a subcontractor has a training program and provide subcontractor (including agents, such as consultants) training if necessary. This may also require revision of standard subcontract terms and conditions to include training “as necessary.”

New FOIA Policies

- New FOIA guidelines (March 19, 2009) http://www.usdoj.gov/ag/foia-memo-march2009.pdf
- The guidelines established three key policies for the administration of FOIA requests by government agencies.

FOIA Guideline

1. Agencies were instructed that they were not to "withhold information simply because [they] may do so legally" or "merely because [they] can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption." To the contrary, agencies were "strongly encourage[d]" to make discretionary disclosures of information.

2. The memorandum requires agencies, whenever they determine that they cannot make a full disclosure of a requested record, to consider making partial disclosures

3. The memorandum advises agencies that the DOJ will defend an agency's denial of a FOIA request only if the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions or disclosure is otherwise prohibited by law.

How Contractors can Protect Proprietary Commercial Information from FOIA

- Noticeable changes in the way agencies administer FOIA requests as a result of the Obama administration's new guidelines.
- Agencies are taking increasingly aggressive positions with respect to the type of information they propose for release and to provide contractors little time to object to the proposed disclosure of their proprietary commercial information.
- Some contractors have received letters from agency FOIA offices proposing to release hundreds of unredacted pages of their technical and price proposals and been given as little as five days to respond.

Simple Steps to Protect Against "Aggressive Disclosure" of Proprietary Commercial Information

- 1. **Act immediately upon receiving notice from an agency that a FOIA request has been received.**
  - Agencies are required by Executive Order 12600 to notify contractors before releasing their confidential commercial information pursuant to a FOIA request and must afford them a reasonable time to object to the disclosure
  - If a contractor receives notice from an agency that its proprietary commercial information has been proposed for release
  - The contractor should immediately notify the agency that it intends to submit a formal objection and confirm the date by which the objection must be received by the agency
  - Request an extension of time from the agency if necessary

Simple Steps to Protect Against "Aggressive Disclosure" of Proprietary Commercial Information

- **Explain in detail the basis for the objection.**
  - Due to AG's memorandum, it is likely that agencies will increasingly seek to release portions of records if they are unable to release a record in its entirety.
  - Contractors should
    - Avoid relying on blanket statements that they will "suffer irreparable competitive harm" if the record is released.
    - If possible, seek to provide a proposed redacted version of the record with a detailed factual and legal analysis of the specific competitive harm that would be suffered if the redacted information were released publicly.

Simple Steps to Protect Against "Aggressive Disclosure" of Proprietary Commercial Information

- **Be prepared to seek an injunction in federal court.**
  - If an agency decides to disclose the requested record (or portions thereof), the agency must provide the contractor a final written notice explaining why its objections were not sustained and the anticipated date of release.
  - Only way a contractor can stop disclosure: file an action in federal district court seeking to enjoin the agency from releasing the record. Although agencies typically provide contractors final written notice 10 days prior to releasing the record, it would not be surprising in light of the new FOIA policies to see agencies accelerate disclosure.
  - A contractor seeking to stop an agency from releasing its proprietary commercial information should be prepared to file an action in federal court at the time it submits its objection to the agency.

Whistleblower
Recovery Act whistleblower provisions
FAR 3.907

- To be protected from retaliatory action:
  - Employee must make a disclosure about a protected topic to a particular recipient

New Whistleblower Provisions

- Protections affect all non-federal employers receiving covered funds as:
  - (1) a contractor, subcontractor, grantee or recipient;
  - (2) a professional membership organization, certification or other professional body, agent or licensee of the federal government, or a person acting in interest of an employer receiving covered funds; or
  - (3) a state or local government and any contractor or subcontractor thereof receiving covered funds.
  - (4) individuals working for any of these employers are protected from being discharged, demoted or otherwise discriminated against as a reprisal for disclosing a potential fraud.

"Protected Topic"

- Protection is awarded if the employee "reasonably believes" that the information contained in the disclosure evidences:
  - Gross mismanagement of agency contract or grant,
  - Gross waste of funds,
  - Substantial and specific danger to public health or safety,
  - Abuse of authority related to implementation or use of funds, or
  - Violation of law, rule or regulation related to agency contract or grant.

"Particular Recipient"

- A disclosure concerning one of these topics is protected provided the statement is made to one of the following recipients:
  - The Recovery Accountability and Transparency Board,
  - The Agency's IG, the Comptroller General,
  - A member of Congress,
  - A state or federal regulatory or law enforcement agency,
  - A person with supervisory authority over employee,
  - A court or grand jury,
  - A head of a federal agency or
  - A representative of any of the above.

Investigation and Remedies

- An employee who believes that he or she has been subjected to reprisal may submit a complaint to the appropriate inspector general of the executive agency related to the covered funds at issue.
  - Within 180 days of the complaint being filed, the inspector general must complete investigation and submit report, or make determination that the complaint is frivolous or unrelated to covered funds
  - If the complaint merits an investigation, findings must be reported to employee, employer, head of the grant-issuing Federal agency and Accountability and Transparency Board
  - Upon receipt of the report, relevant agency head has 30 days to determine whether there is sufficient basis to conclude that the non-Federal employer has subjected the complainant to reprisal
  - If such violation is found, the agency head has the power to order remedies. (Such an order would preclude the employee from filing a private cause of action.)

Remedies

- 1. Order the employer to take affirmative action to abate the reprisal
- 2. Order the employer to reinstate the employee to the employee's previous position as if the reprisal never occurred (which might mean providing the employee with lost compensation from the period of reprisal, including back pay and employment benefits); and/or
- 3. Order the employer to compensate the complainant in an amount equal to the aggregate costs and expenses incurred in bringing the complaint, including reasonable attorneys' fees.

Remedies: Private Cause of Action

- Employee may have a private cause of action under certain circumstances:
  - 1. if the agency head issues an order denying relief to the complainant;
  - 2. the agency head fails to issue an order within 210 days of the submission of the complaint;
  - 3. the agency had decides not to investigate the complaint or discontinues the investigation

Private Action

- A private civil lawsuit may be filed in Federal District Court without regard to the amount in controversy
- Employee may elect to have a jury trial
- Employee has the right to seek compensatory damages and other relief
- Case will be a *de novo* action

Executive Orders signed by President Obama

see: **http://www.perkinscoie.com/news/pubs_detail.aspx?publication=2015&op=updates**

- Executive Order 13494: Economy in Government Contracting
  - Denies reimbursement to contractors for funds spent in attempts to persuade employees to join a union, to not join a union, or that "concern the manner of exercising rights to organize and bargain collectively.
  - Unallowable Costs

Executive Order 13495: Nondisplacement of Qualified Workers Under Service Contracts

- After one contractor is replaced with another performing "the same or similar services at the same location"
  - Successor contractor must offer "right of first refusal" to qualified employees of the predecessor contractor
  - Does not apply to managerial or supervisory employees
  - Successor contractor may choose to employ fewer employees than the predecessor contractor employed
  - Willful violations of the policy could result in debarment from further government contract work

Executive Order 13496: Notification of Employee Rights Under Federal Labor Laws

- Contractors are required to post notices describing employees' rights to organize pursuant to the National Labor Relations Act
- Failure to comply risks cancellation or termination of contract and being declared ineligible for further government contracts
- Unallowable certain costs include
  - distributing printed materials
  - Engaging consultants or legal counsel
  - Holding meetings, or planning or conducting activities by managers, supervisors or union representatives during work hours that are designed to influence the decision to bargain collectively

- Executive Order 13502: Use of Project Labor Agreements for Federal Construction Projects
  - Encourages, but does not mandate agencies to use Project Labor Agreements ("PLAs") in federal construction projects with total cost to the government of $25 million or more.
  - Government cannot compel a contractor to enter into an agreement with any particular labor organization
  - Does not explicitly exclude non-union contractors from competition
  - Repeals President Bush's Executive Order 13202 and 13208, which prevented federal agencies and recipients of federal funding from requiring or prohibiting contractors from signing union-only PLAs as a condition for performing work on federal projects.

MISCELLANEOUS

- Other ARRA provisions
  - Buy American Act provisions related to
    - Textiles
    - Construction Materials