



Government Contracting Ethics and Compliance Update May 24, 2022

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Examples of High-Risk Areas

- ▶ Product quality
- ▶ Supply chain
- ▶ Bids & Proposals/COIs
- ▶ Antitrust
- ▶ Competitor information
- ▶ Confidential information
- ▶ Mischarging & time charging
- ▶ Cost & Pricing Issues
- ▶ Cyber/Electronic communications
- ▶ Environmental issues
- ▶ Hiring former US employees
- ▶ Agents/Consultants
- ▶ Gifts and gratuities
- ▶ Export issues
- ▶ Int'l Business
- ▶ DOL Issues – SCA, DBA, EEO, OFCCP
- ▶ Privacy
- ▶ Political activities

Compliance Initiatives

- ▶ US Asst. AG Kenneth Polite's Remarks on Corp. Compliance and Enforcement at NYU, 5/22/22
- ▶ DOJ Announces Environmental Justice Office and Focused Enforcement Initiative, 5/5/22
- ▶ Executive Order 14069, 3/15/22, Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency (directs FAR Council to consider issuing proposed rule)

Compliance Initiatives

- ▶ Executive Order on Nondisplacement of Qualified Workers Under Service Contracts, 11/19/21
- ▶ Procurement Collusion Task Force, 2d Anniversary Remarks 10/13/21
- ▶ Deputy Attorney General Announces New Cyber-Fraud Initiative, 10/6/21
- ▶ Executive Order on Promoting Competition; Limiting Non-Compete Clauses & Agreements, 7/9/21

Compliance Program Requirements

- ▶ FAR 52.203-13 “Contractor Code of Business Ethics & Conduct” (Nov 2021)
 - Applies to contracts > \$6M and > 120 days
 - Flows down to subcontracts
 - Main requirements:
 - ¶ (b): Written code of business ethics within 30 days and contractor must timely disclose, in writing, to the agency OIG and CO if Contractor has credible evidence of violations of Title 18 violations or violation of the civil False Claims Act.
 - ¶ (c): Establish ethics awareness program & internal control system suitable to size of company and extent of involvement in Government contracts within 90 days.

Compliance Program Requirements

▶ ¶ (c) Internal Controls

- Periodic review of practices & procedures for compliance with ethics and Government contract requirements, including:
 - Monitoring & auditing to detect criminal activity
 - Periodic review of effectiveness of compliance program & internal controls
 - Periodic assessment of risk of criminal conduct
- Internal reporting mechanism such as “hotline”
- Disciplinary action for violations or failure to take reasonable steps to detect improper conduct

Leadership Commitment

- ▶ Must avoid “Potemkin Village”
- ▶ Committed leadership is essential
 - Lead by example
 - Ensure employees understand ethical standards
 - Create a culture to encourage compliance
 - Respond immediately when concerns are raised
 - Ensure employees have access to Code of Conduct
 - Ensure employees complete training and certifications as required

Tips for Program Evaluation

- ▶ Periodically evaluate effectiveness
 - Is Code of Conduct up to date?
 - Are inquiry and reporting mechanisms working?
 - Is training schedule being maintained?
 - Is communication program getting the word out?
 - Documentation
- ▶ Tools for making evaluation
 - History of internal reports
 - Internal audits
- ▶ Internal Coordination
 - All departments (HR, Finance, Contracts, etc.) must be speaking to each other

Statements re Status Of Program

- ▶ ITT Corp. – matter involved allegation that facts included in a voluntary disclosure were inaccurate
- ▶ BAE Systems – matter involved allegation that company's statement about the status of compliance program was inaccurate

FAR 52.203-13 Disclosure

- ▶ Applies to business ethics & conduct code as well as internal control system (§§ (b) and (c))
 - Timely disclose, in writing, to agency OIG, copy KO
 - “Credible evidence”
 - In connection with award, performance, or close of “this contract or any subcontract thereunder”
 - Principal, employee, agent, or subcontractor committed violation of –
 - Federal criminal law involving fraud, conflict of interest, bribery, gratuity violations (USC Title 18)
 - Civil FCA (31 USC 3729–3733)
 - Obligation continues until “at least 3 years” after final payment

Suspension/Debarment Disclosure

- ▶ “Knowing” failure by “principal” to disclose in connection with award, performance, or close out of any Government contract/subcontract credible evidence of:
 - Violation of fraud, COI, bribery or gratuity law
 - Violation of civil False Claims Act
 - Significant overpayments other than those relating to contract financing payments
- ▶ Obligation continues for 3 years after final payment. FAR 9.406–2(b)(iv)
- ▶ If not “required,” disclosure may be best course.

Questions About Coverage

- ▶ When do disclosure obligations “begin” and “end”
 - Obligations under 52.203–13 exist while contract exists -- if you learn of violation after close out, no contractual duty to disclose
 - Prompt payment clause, 52.232–25, requires disclosure of duplicate or overpayments while contract exists
 - Debarment/Suspension disclosure not tied to contract -- obligation arises on effective date of regulation and continues indefinitely.

Questions About Coverage

- ▶ Whose “knowledge” determines whether there is credible evidence of a violation
 - FAR 52.203–13 does not focus on knowledge of individual, but rather on quality of compliance program – a well run program will bring “credible evidence” to attention of senior management which, in turn, triggers disclosure requirement
 - With FAR 52.203–13, concern over whether “knowledge” of low-level employee would trigger disclosure
 - For suspension/debarment, disclosure required only when company’s “principals” – officer, director, owner, partner or a primary manager within a segment – is/are aware of “credible evidence.” FAR 9.406–2(b)(1)(vi).

Questions About Coverage

- ▶ What constitutes “full cooperation” has evolved
 - 10/28/2021 Dep. AG Lisa Monaco Announcement
 - Restores Yates memorandum = “to be eligible for any cooperation credit, companies must provide [DOJ] with all non-privileged information about individuals involved in or responsible for the misconduct at issue . . . Regardless of their position, status or seniority.”
 - Expands historical misconduct review = “[A]ll prior misconduct needs to be evaluated when it comes to decisions about the proper resolution with a company, whether or not that misconduct is similar to the conduct at issue in a particular investigation . . . Going forward, prosecutors will be directed to consider the full criminal, civil and regulatory record of any company”
 - Emphasizes use of monitors = “I am making clear that the department is free to require the imposition of independent monitors whenever it is appropriate to do so in order to satisfy our prosecutors that a company is living up to its compliance and disclosure obligations under the DPA or NPA.”

“Credible Evidence”

- ▶ *Kappouta v. Valiant Integrated Services, LLC*, 2021 WL 4806437 (S.D. Cal. Oct. 14, 2021) (52.203–13 not implicated for off-the-clock incident).
- ▶ *Anderson v. Fluor Intercontinental, Inc.*, No. 1:19–CV–0289, 2021 WL 837335 (E.D. Va. Jan. 4, 2021) (rejecting terminated employee’s claim of improper disclosure).
- ▶ *United States ex rel. Marsteller v. Tilton*, 556 F. Supp. 3d 1291 (N.D. Ala. 2021) (finding disputed facts whether alleged violations of bribery and gratuity constituted credible evidence).

DOD IG Mandatory Disclosures

- ▶ DOD IG Semi-Annual Report to Congress, 1/1/20 – 3/31/21; 207 disclosures identified \$17.4M of potential recoveries; majority of disclosures related to mischarging labor and materials, false certification, and standards of conduct.
- ▶ DOD IG Semi-Annual Report to Congress, 4/1/21 – 9/30/21; 170 disclosures identified \$21.47M in potential recoveries; majority related to mischarging labor and materials, non-compliance and mismanagement of contract, and kickbacks.

GSA IG Mandatory Disclosures

- ▶ GSA IG Semi-Annual Report to Congress, 10/1/20 – 3/31/21; 11 new disclosures for inflated timesheets, unqualified labor; PRC clause violations; disclosure deficiencies, IT security, and kickbacks; completed review of 8 disclosures leading to \$1.2M in settlements.
- ▶ GSA IG Semi-Annual Report to Congress, 4/1/21 – 9/30/21; 3 new disclosures for inflated timesheets, unreported IFF payment; potential PIA violations; completed evaluation of 7 disclosures resulting in over \$17.5M in settlements.

Whistleblower

- ▶ False Claims Act – protects and rewards (15–25% if USG intervenes, 25–35% if USG does not; attorney fees).
- ▶ FY13 NDAA / 41 U.S.C. § 4712 / 10 U.S.C. § 2409 / FAR 52.203–17, Enhancement of protection from reprisal for disclosure of information “reasonably believes” is evidence of “gross mismanagement” of Federal contract/grant, “gross waste of Federal funds,” “abuse of authority,” danger to public, violation of law.

Whistleblower

- ▶ Whistleblower Study, 5/4/21 by Harvard Profs. Dey, Heese, and Cavazos states:
 - Firms often ignore the issue raised
 - A high prevalence of short-term retaliation; firing in 1/3 of cases; threats (10% of all cases), and demotions (6% of cases). Only 21% of cases did not involve retaliation.
 - Surveyed 89 whistleblowers; average found new job w/l one-year, next job = to or better in 52% of cases, 10% worse, 21% are self-employed; 16% moved to another state and 35% change industry.
- ▶ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3837308

Whistleblower

► Potential Approaches

- Training (document HR actions)
- Policies: do they address current risks, cyber?
- Timely Response
- Take Seriously
- Investigation
- Non-Retaliation
- Feedback to Reporter

Cyber Resources / References

- ▶ Federal Information Security Management Act, 44 U.S.C. § 3551
- ▶ OMB Circular A-130, Managing Information as a Strategic Resource
- ▶ DFARS 252.204-7012, Safeguarding Covered Defense Information & Cyber Incident Reporting
- ▶ Controlled Unclassified Information (CUI)
 - Executive Order No. 13556
 - 32 C.F.R. Part 2002
 - DoD Instruction 5200.48
 - GSA Order CIO 2103.2
 - NIST SP 800-171
 - DFARS 252.204-7019
 - DFARS 252.204-7020
- ▶ Cybersecurity Maturity Model Certification (CMMC)
 - FAR 52.204-21; DFARS 252.204-7021

Cyber

- ▶ October 6, 2021, Deputy Attorney General Announces New Cyber-Fraud Initiative
 - Utilize FCA to pursue cybersecurity related fraud by government contractors and grant recipients.
 - “[H]old accountable entities or individuals that put U.S. information or systems at risk by knowingly providing deficient cybersecurity products or services, knowingly misrepresenting their cybersecurity practices or protocols, or knowingly violating obligations to monitor and report cybersecurity incidents and breaches.”
- ▶ March 9, 2022: SEC announces proposal for mandatory cybersecurity disclosure.

Cyber

- ▶ Pub. L. No. 117–103, Consol. Approps. Act 2022, Div. Y–Cyber Incident Reporting
- ▶ Sec. 2242 – “A covered entity that experiences a covered cyber incident shall report ... to [USG] not later than 72 hours after ... entity reasonably believes that [an incident] has occurred.”
- ▶ “A covered entity that makes a ransom payment as the result of a ransomware attack shall report the payment ... within 24 hours.”
- ▶ Requires preservation of relevant data, proposed rule and effective date TBD .

Cyber

- ▶ Whistleblower's Paradise?
- ▶ 1st settlement under Cyber Task Force announced 3/8/22, contractor agreed to pay \$930,000 to resolve relators' allegations that electronic medical records had not been stored securely
- ▶ DOJ release states that company failed to act, even after staff raised concerns

Cyber

- ▶ *Aerojet Rocketdyne* – whistleblower was Sr. Dir. of Cyber Security, Compliance & Controls, and alleged in \$2.6B suit that:
 - DOD/NASA contracts required certain cybersecurity standards and adherence.
 - Company contracted knowing it did not meet the minimum standards and misled the government by concealing non-compliance, including in reported computer system breaches in 2013 and 2014.
 - Attempt to notify the board was allegedly quashed by the Aerojet president.
- Jury trial settled on 2d day of trial for \$9M, plus attorneys' fees and other costs, per Bloomberg.

No Poaching Agreements

- ▶ “[DOJ] ... focused on executives and businesses who fix wages or allocate workers through so-called “no-poach” agreements.
- ▶ DOJ indicted a medical care center “for agreeing with competitors not to solicit senior-level employees.”
- ▶ DOJ stated: “[No-poach] agreements deprive people of the chance to bargain for better work or better working conditions. They are also per se illegal.”
- ▶ Effect on teaming, JV’s, prime-sub terms?

No Poaching Agreements

- ▶ *Conroy et al. v. Agilis Eng'g, Inc. et al.*, No. 3:21-cv-01659 (D. Conn., Dec. 14, 2021) (complaint alleging antitrust violations due to “no poach” agreements)
- ▶ *R. Granata v. Pratt & Whitney et al.*, No. 3:31-cv-01657 (D. Conn., Dec. 14, 2021) (complaint alleging antitrust violations due to “no poach” agreements)
- ▶ *Cf., DaVita*, Ex-CEO acquitted in antitrust no-poach jury trial (No. 1:21-cr-00229 (D. Col. April 15, 2022))

Collusive Bidding

- ▶ Four basic situations:
 - Bid suppression – agreement not to bid
 - Complementary bidding – agreeing who will win
 - Bid rotation – taking turns as low bidder
 - Market division – territorial or other restrictions
- ▶ Exemption?
 - Affiliated companies – bid with or against each other, not for World Bank
 - Joint ventures and teaming agreements. FAR Subpart 9.6

Employment Restrictions

- ▶ Standards of Ethical Conduct for Employees of the Executive Branch
 - 5 C.F.R. Part 2635
 - Subpart D – Conflicting Financial Interests
 - Subpart F – Seeking Other Employment
 - Subpart G – Misuse of Position
- ▶ 18 U.S.C. § 207
- ▶ 18 U.S.C. § 208

Employment Restrictions

- ▶ OCI – FAR 9.5, intended to avoid:
 - Unequal access to information
 - Impaired objectivity
 - Biased ground rules
- ▶ Procurement Integrity Act (PIA) – implemented in FAR 3.104, restricts:
 - Handling of bid and proposal information and source selection information
 - Discussing employment or making offers of employment to certain government officials

Employment Restrictions

- ▶ The PIA includes rules and restrictions on the hiring of government employees (includes military personnel)
 - Bidders cannot discuss employment opportunities or offer post-government employment to federal agency officials
 - Lifetime Ban – Agency official may not communicate with agency on particular matter in which he or she personally and substantially participated
 - One-Year Ban – Agency officials involved in procurement worth over \$10 million cannot accept compensation from certain contractors for one year after the award decision

Employment Restrictions

- ▶ DOJ filed a six-count Complaint in Maryland, alleging three violations of the Civil False Claims Act as well as counts for breach of contract, payment by mistake, and unjust enrichment.
- ▶ As alleged, the misconduct involved an elaborate plan to conceal from DHS that contractor had engaged a former senior DHS official as a subcontractor/consultant.
- ▶ DHS employee was within 1 year “cooling off” period; false invoices charging time to another employee. DOJ seeks treble damages of ~\$1.9M

Employment Restrictions

- ▶ Ethics rules are also used offensively in competitions.
- ▶ In *ASRC Fed. Sys. Sols, Inc.*, B-420-443 (April 12, 2022), GAO denied protest alleging that awardee gained an unfair competitive advantage based on employment of a former government official where the agency, after conducting an investigation of the alleged conflict of interest, reasonably concluded that the former official did not have access to non-public, competitively useful information.

Employment Restrictions

- ▶ In *Insight Public Sector v. U.S.*, 157 Fed. Cl. 416 (Fed. Cl. 2021), Court granted protest alleging Navy's failure to conduct a Procurement Integrity Act investigation as bidder sufficiently alleged reasonable probability of unlawful conduct by Navy in providing bidder's CLIN level pricing.
- ▶ Navy's failure to open PIA investigation was not reasonable or rationale for allegedly disclosing bidder pricing.

Tips on Employment Restrictions

Practices for PIA Compliance

- ▶ Vet each bidding opportunity for agency and employee contacts for conflicts/disclosures
- ▶ Train bid and proposal and contracts staff who interact with USG; online training; handbooks
- ▶ Issue periodic email updates/lessons learned
- ▶ Periodic external/independent review of policies/procedures
- ▶ Perform pre-hiring due diligence of candidates
- ▶ Obtain ethics letters for covered officials
- ▶ Tracking covered employees once hired, how often?

Questions

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