

Be Careful What You Wish For: Government Contracting & the Unwary Contractor – Current State of Ethics Issues & Obligations – Part I

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Over the past six-plus years, we have observed a decided uptick in the amount of government oversight, investigation and prosecution of government contractors for ethics-related issues. The number of stories in the news about false claims act violations, allegations of fraud, kickbacks, bribes and the like appears, from an empirical perspective, to have increased seemingly exponentially. While we have not done exhaustive research and calculations to verify these observations, they are apparent and continue to be on the rise. If you or your company transact business in the federal contracting realm (and likewise, state or local government procurement realms), then you are likely held to a higher standard from an ethics and business conduct perspective than a strictly private/commercial vendor or contractor. Over the next several issues of this newsletter, we will provide a high-level overview of how to avoid the pitfalls and traps associated with ethics and government contracting. This multipart piece will provide a solid, high-level introduction to government contracts ethics issues and ways to avoid or mitigate those issues.

ETHICS – An Introduction

To fully understand and address the panoply of unique ethics and business issues attributable to government contracts, one must start at the beginning and gain an understanding of where these items come from and how they become part of the contract. There are numerous laws that apply to ethics in public procurement, including several statutes and regulations.

Where Are the Laws & Regulations?

Almost all of the laws, regulations and contract clauses dealing with these ethics issues and relating to federal procurement can be found under Part 3 of the *Federal Acquisition Regulations (FAR)* (under Title 48 of the *Code of Federal Regulations*). The FAR is supplemented by each agency through what are called the FAR Supplements. It is key that government contractors become familiar with the FAR and FAR Supplements for the agencies with which they contract.

FAR Part 3, entitled “Improper Business Practices and Personal Conflicts of Interest” (48 C.F.R. Part 3) discusses safeguards, contractor gratuities to government personnel, suspected antitrust violations, contingent fees, kickbacks, unreasonable restrictions on subcontractor sales, contracts with government employees or organizations owned or controlled by them, payment of funds to influence federal transactions, whistleblower protections and the contractor code of business ethics and conduct, as well as other areas.

- Many of these topics are derived from a plethora of statutes and laws relating to ethics, whistleblowers and the like.
- FAR Part 3 refers the contractor and agency to the contract clauses included in FAR Part 52, which clauses are, for the most part,

- incorporated into government contracts as a matter of law, *even if they are not expressly referenced or reproduced in the contract!*
- Under a legal regime known as the *Christian Doctrine*, the courts have found that certain regulations have the force and effect of law, that ignorance of that law is no excuse, and that they are either required by law/statute or in order to address a public policy concern, or they are incorporated by reference. This is one of the rare unusual cases in contract law where even if the contract clause is not expressly stated in the contract it is still enforceable as if it were expressly stated in the contract.

Many of these provisions and requirements have been in place for decades, and should come as little surprise to the experienced government contractor. Regardless, it is prudent for all government contractors to remain vigilant and familiar, and refamiliarize/remind itself of these requirements and recognize that there are serious implications of not complying with and following their mandate.

With this background in mind, over the this and the next two editions, we will introduce, or reintroduce, as the case may be, the reader to certain of the more critical or newer elements arising in the FAR's business ethics and illegal activities requirements. Some of these items are relatively new additions and others warrant revisiting. We will start off with one of the newest ethics-related requirements and work through this quagmire of regulations and laws.

Contractor's Code of Business Ethics and Conduct:

In late 2008, the current Presidential Administration saw fit to continue its heightened oversight and investigation of government contractors. In order to assist in accomplishing this goal, the Government promulgated FAR Subpart 3.10. This section,

entitled "Contractor Code of Business Ethics and Conduct," created a policy to require certain government contractors to prepare, set in place and develop a government contracts-specific business ethics and conduct code or employee manual, as well as associated employee training. It also mandated that those contractors obtain and post a whistleblower fraud hotline poster (similar to the prior requirements for posting employment-related posters such as minimum wage, etc.). This requirement also extend to subcontractors.

These "codes" have typically been prepared in the form of a supplement to an employer/contractor's existing employee manual. Under its policy statement, the FAR mandates that "Government contractors *must* conduct themselves with the highest degree of integrity and honesty." FAR 3.1002(a). As a result, the FAR requires that a written code of business ethics and conduct be set in place along with associated training programs and internal control systems that are:

- "(1) ...suitable to the size of the company and extent of its involvement in Government contractor;
- (2) Facilitate[s] timely discovery and disclosure of improper conduct in connection with Government contract; and
- (3) Ensure[s] corrective measures are promptly instituted and carried out." *Id.* at (b).

While seen as guidance to all government contractors, the placement of the Code and Display of Hotline Poster is mandatory where:

- The contract is not for a commercial item or will not be fully performed outside the United States;
- The contract exceeds \$5,000,000.00 (or a lesser amount if so established by the contracting agency); and

- The contracting agency has such a fraud hotline poster or the contract is funded with disaster assistance funds.

The same applies to subcontracts, mandating that any subcontractor with a subcontract valued in excess of \$5,000,000 and a performance period of more than 120 days shall also comply with the Code and Poster requirements. FAR 52.203-13(d).

While the FAR is not specific as to what must be in, or the form of, the Code, it does mandate that the contractor, and if appropriate, subcontractors, have the plan in place within 30 days of the date a contract is awarded (or longer if the contracting officer so allows). The training can follow thereafter, but not more than 90 days after award.

As part of the aforementioned 30-day period, not only must the plan be in place, but the contract must make it available to all employees working on the contract. Towards this end, in addition to having the written plan itself, the contractor must exercise “due diligence to prevent and detect criminal conduct; and [o]therwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.” FAR 52.203-13(b)(2).

As referenced above, unless the business represented itself as “small” under the procurement, within 90 days (or longer if allowed by the CO), the contractor (and if applicable, subcontractor) must establish:

- (1) An ongoing business ethics awareness and compliance program.
 - (i) This program shall include reasonable steps to communicate periodically and in a practical manner the Contractor’s standards and procedures and other aspects of the Contractor’s business ethics

awareness and compliance program and internal control system, by conducting effective training programs and otherwise disseminating information appropriate to an individual’s respective roles and responsibilities.

- (ii) The training conducted under this program shall be provided to the Contractor’s principals and employees, and as appropriate, the Contractor’s agents and subcontractors.

(2) An internal control system.

- (i) The Contractor’s internal control system shall—

- (a) Establish standards and procedures to facilitate timely discovery of improper conduct in connection with Government contracts; and
- (b) Ensure corrective measures are promptly instituted and carried out.

- (ii) At a minimum, the Contractor’s internal control system shall provide for the following:

- (a) Assignment of responsibility at a sufficiently high level and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system.
- (b) Reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the

Contractor's code of business ethics and conduct.

(c) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Contractor's code of business ethics and conduct and the special requirements of Government contracting, including—

- Monitoring and auditing to detect criminal conduct;
- Periodic evaluation of the effectiveness of the business ethics awareness and compliance program and internal control system, especially if criminal conduct has been detected; and
- Periodic assessment of the risk of criminal conduct, with appropriate steps to design, implement, or modify the business ethics awareness and compliance program and the internal control system as necessary to reduce the risk of criminal conduct identified through this process.

(d) An internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.

(e) Disciplinary action for improper conduct or for failing to take

reasonable steps to prevent or detect improper conduct.

(f) Timely disclosure, in writing, to the agency OIG, with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of any Government contract performed by the Contractor or a subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed a 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 (31 U.S.C. 3729-3733).

- If a violation relates to more than one Government contract, the Contractor may make the disclosure to the agency OIG and Contracting Officer responsible for the largest dollar value contract impacted by the violation.
- If the violation relates to an order against a Governmentwide acquisition contract, a multi-agency contract, a multiple-award schedule contract such as the Federal Supply Schedule, or any other procurement instrument intended for use by multiple agencies, the contractor shall notify the OIG of the ordering agency and the IG of the agency responsible for the basic

contract, and the respective agencies' contracting officers.

- The disclosure requirement for an individual contract continues until at least 3 years after final payment on the contract.
- The Government will safeguard such disclosures in accordance with paragraph (b)(3)(ii) of this clause.

(g) Full cooperation with any Government agencies responsible for audits, investigations, or corrective actions.

FAR 52.203-13. Note that requirement for "full cooperation" under subsection (G). The FAR defines this as:

- (1) Means 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;
- (2) **Does not foreclose** any Contractor rights arising in law, the FAR, or the terms of the contract. It does not require—
 - (i) A Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or

(ii) Any officer, director, owner, or employee of the Contractor, including a sole proprietor, to waive his or her attorney client privilege or Fifth Amendment rights; and

(3) Does **not** restrict a Contractor from—

- (i) Conducting an internal investigation; or
- (ii) Defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.

(Emphasis added). While disclosure requires that the contractor/subcontractor provide sufficient information for law enforcement officials to "identify the nature and extent of the offense and the individuals responsible"; inclusive of providing documents and access to employees, this does not mean that the company has no rights and must either waive its rights to attorney-client and/or work-product privileges or self-implicate themselves in violation of the 5th Amendment.

Lastly, another key defined term to consider for the government contractor is who is exposed to liability. The term "principal" is defined under the FAR as: "... an officer, director, owner, partner, or a 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)." While a broad definition, it is not all inclusive.

A significant issue that has arisen with the introduction of these self-reporting and business ethics plan requirements is when and what must an organization report? This is a very gray area of the law, which will continue to develop over time. In fact, prior to the introduction of the self-reporting requirements, government contractors traditionally were limited to purely a voluntary disclosure system, which was spearheaded by the

Department of Defense, and its formation of the Voluntary Disclosure Program in 1986.

“CREDIBLE EVIDENCE” – What is that?

The FAR places an affirmative duty on the contractor to timely disclose in writing to the applicable Office of Inspector General, with a copy to the CO, whenever it has “credible evidence that a principal, employee, agent, or subcontract of the Contractor has committed” either a violation of federal criminal law under Title 18 of the U.S. Code relating to “Fraud, conflict of interest, bribery, or gratuity”; a violation of the civil False Claims Act (18 U.S.C. §§3729-3733). *Id.* at (b)(3)(i). It bears noting that if such a disclosure is made, it is treated as protected from disclosure under the Freedom of Information Act.

Likewise, notwithstanding the specific reference to Title 18, which unto itself contains literally dozens of potential statutory sections that discuss “fraud, conflict of interest, bribery, or gratuity,” this is not the end of the analysis. There are other laws and sections, outside of Title 18, which government contractors must also take into consideration, including, without limitation, the Procurement Integrity Act (41 U.S.C. §423); Buy American Act (41 U.S.C. §§10a-10c); Foreign Corrupt Practices Act (15 U.S.C. §78dd-1 *et seq.*); and many others. Even assuming for the sake of argument that these and the other relevant non-Title 18 sections/acts were not directly covered by the FAR, there is an argument that violation of the non-Title 18 acts/laws may still implicate Title 18 through a secondary criminal violation existing under Title 18 (e.g., conspiracy, RICO, mail or wire fraud; etc.). If it involves or deals with the “award, performance, and closeout” of a government contract or applicable subcontract, then it is fair to assume that the panoply of applicable criminal statutes and codes is well beyond Title 18.

Presently, the mandatory self-reporting requirement is triggered by a finding of “Credible Evidence” of

fallacious or fraudulent conduct. What is “Credible Evidence” remains to be seen, as it is undefined and subjective. That being said, some general guidance can be developed which helps, but does not definitize, the contractor’s obligations. These include, without limitation:

- Reasonableness. What would a reasonable contractor know or have reason to know under the circumstances. Likewise, what would that contractor reasonably believe or conclude from the conduct in question? This is a good start, but the standard is actually higher than the more objective standard of “reasonableness.” In fact, in the preamble to the rulemaking effecting these “new” requirements of self-reporting/disclosure, the FAR councils stated that “credible evidence” and its standard “implies” a standard higher than the prior “reasonable grounds to believe.” 73 *Fed.Reg.* at 67,073, App. B. This standard provides the contractor with a reasonable period of time to investigate internally and determine if “credible evidence” exists, but that investigation period is not unlimited. In modifying the prior standard, the “new” credible evidence standard “...indicates a higher standard ... rather than ‘reasonable grounds to believe’ [which] will help to clarify ‘timely [disclosure]’ because it implies that the contract 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.” *Id.* at 67,074. Prior to being afforded the time to investigate, there would not be a “‘knowing failure to timely disclose’”. *Id.* All of this being said, the FAR Councils did recognize that it would take judicial decisions in the then-future to definitize the vague “credible evidence” standard. *Id.* at 67,081.

Unlike “credible information,” “credible evidence” is recognized as likely creating a higher standard (how high is of some question), in that “evidence” as opposed to “information” is different and distinguishable. Again, as case law develops, this fluid situation will develop some structure; however, that is an on-going process, and a process which is highly case- and fact-specific.

- **Credibility of the Evidence:** Is the evidence, statement or other information giving rise to the unethical allegation, or developed through an internal investigation, sufficient and credible? How specific is it? Are there biases, contradictions, falsities, or ulterior motives that need to be considered?
- **Filing of a Qui Tam or Private Whistleblower Action:** Unto itself, the mere filing of a whistleblower or *qui tam* action by a private person is not a *de facto* finding of improper conduct. Upon such an occurrence, it is critical that counsel be consulted to respond, investigate and address the issues, defenses and claims appropriately.
- **Common Sense:** The most important aspect of this issue is **do not panic**. Retain all of your files, do not shred files, delete files/programs or the like. A litigation hold should be put into place immediately and again, counsel retained. Keeping a cool head is key to working one’s way through the labyrinth of laws, regulations, codes and conduct.

There is significant exposure and risk to the contractor that lacks a Code of ethics, waste fraud, and abuse hotline poster. These are mandatory requirements, and under FAR 3.1003, even if the clause were not applicable, “... a contractor may be suspended and/or debarred from knowing failure by a principal [of the contractor] to timely disclose to

the Government in connection with the award, performance, or closeout of a Government contract performed by the contractor or a subcontract awarded thereunder, 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 or a violation of the civil False Claims Act.” FAR 3.1003(a)(2). This conduct remains a viable cause for suspension and/or debarment for three years after final payment on a given contract. *Id.*

In particular, this provision recognizes that there is a duty on contractors to recognize and refund any overpayment on a contract, and that failure to recognize and report such an overpayment is likewise a basis for suspension and/or debarment.

Poster

The FAR mandates that a contractor (and as applicable subcontractor) “prominently display in common work areas within business segments performing work under [the] contract and at contract work sites” for the relevant contract(s), all appropriate agency fraud hotline posters of the Department of Homeland Security (DHS) fraud hotline poster as well as any other DHS posters subsequently identified by the contracting officer. FAR 52.203-14(b). Also, if the contractor maintains a company website to provide information to employees, they must display an electronic version of the poster(s) on the website.

Most agencies have their own Office of Inspector General (OIG), and most have developed their own hotline poster, to be posted per FAR 3.1003(c). The FAR assigns responsibility to each OIG to determine if they have a need for, and the content of, a fraud hotline poster. Some examples include:

Department of Homeland Security

DEPARTMENT OF HOMELAND SECURITY
OFFICE OF INSPECTOR GENERAL



The DHS OIG wants to work with DHS employees and the public to protect the integrity, effectiveness, and efficiency of DHS programs.

El Departamento de la Seguridad de la Patria (DHS), Oficina del Inspector General (OIG) desean asociarse con los empleados de DHS y el Publico para proteger la integridad, la efectividad, y eficiencia de progamas de DHS.

Report suspected criminal violations, misconduct, wasteful activities, and allegations of civil rights or civil liberties abuse to the:

Reporte la sospecha de violaciones criminales, la mala conducta, actividades despilfarradas, o alegaciones del abuso de las libertades civiles o del abuso de las derechas civiles al:

DHS OIG HOTLINE
245 Murray Drive, Building 410 Stop: 2600
Washington, DC 20528
DHSOIGHOTLINE@DHS.GOV
1-800-323-8603

*Calls can be made anonymously and confidentially
llamadas se pueden hacer anonimamente y confidencialmente*

U.S. Department of Defense:

DEPT. OF DEFENSE
HOTLINE
FOR REPORTING
FRAUD, WASTE, AND ABUSE
800/424-9098

OR WRITE:
DEFENSE HOTLINE
THE PENTAGON
WASHINGTON, D.C.
20301-1900

E-Mail us at hotline@dodig.mil or visit our
Website at <http://www.dodig.mil/hotline>

IDENTITIES OF WRITERS & CALLERS
FULLY PROTECTED.

NASA:

National Aeronautics and Space Administration



It's Your Tax Money
Report Crime, Fraud,
Waste, and Abuse

NASA Inspector General Hotline:
1-800-424-9183
<http://oig.nasa.gov/hotline.html>
PO Box 23089 | L'Enfant Plaza | Washington, DC 20026
www.nasa.gov

U.S. Department of Veteran's Affairs:

Department of Veterans Affairs
OFFICE OF INSPECTOR GENERAL




DUTY TO REPORT

Federal regulations require VA employees must report any information about actual or possible violations of criminal law involving VA or its contractors to a supervisor, management official, VA police, or the Office of Inspector General (OIG). VA employees must report all criminal matters involving felonies to the OIG.

To report criminal activity, waste, abuse, mismanagement, and safety issues to the OIG, call **1-800-488-8244**, or write VA OIG Hotline (53E), 810 Vermont Avenue NW, Washington, DC 20420, or fax to 202-495-5861, or email vaogh hotline@va.gov.

VA HELP LINES

Disability (VBA): 1-800-827-1000
Pension (VBA): 1-877-294-6380
Disability & Pension (TDD) (VBA): 1-800-829-4833
VA Education Benefits (VBA): 1-888-442-4551
Whistleblower Reprisal-Office of Special Counsel (OSC): 1-800-872-9855
Discrimination-Office of Resolution Management (ORM): 1-888-737-3361
VA Billing Issues-Compliance & Business Integrity (CBI): 1-866-842-4357

U.S. Department of the Interior:



U.S. Postal Service:



Failure to Post the Poster or Have a Code

What happens if you do not post the poster(s) or have a Code in place? It is not exactly clear what independent liabilities exist, as the regulations do not identify specific penalties. One thing that is clear is that failure to have these in place could result in a finding that the contractor (or subcontractor) is in breach of contract and exposes the contractor possible termination for default.

At present, contractors must have a written Code and training in place, and identify and post the appropriate poster(s).

CONCLUSION: Do You Have a Code in Place? Do You Post?

Many government contractors (or subcontractors) are not aware of these requirements, both as to the mandate to have a Business Ethics Code in place and having the poster for the applicable agency(ies) posted in the appropriate location(s). We have extensive experience in developing these plans, the cost for training and development of which is minimal when compared with the potential exposure and claims that can be brought against a contractor or applicable subcontractor for failure to timely and properly act.

In the next installment of this series, we shall discuss bribes, kickbacks, gratuities and use of appropriated funds to influence certain federal transactions. The third installment will discuss the Covenant Against Contingent Fees, Truth in Negotiation Act, and the Procurement Integrity Act.

Thompson Hine also offers government contracts-specific Code/Manual development and training for employees. Working with our labor and employment attorneys we can also perform a full audit of your in place employment and government contracts policies, procedures and needs. Please do not hesitate to contact us to discuss any concerns or issues you may have.

This article should not be construed as legal advice. For more information, contact [Lawrence M. Prosen](#) or [Daniel P. Broderick](#).