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AGC – TAX AND FISCAL AFFAIRS

**Federal Government Contracting – Mandatory
Disclosure and Compliance Requirements for Federal
Contractors**

March 17, 2010

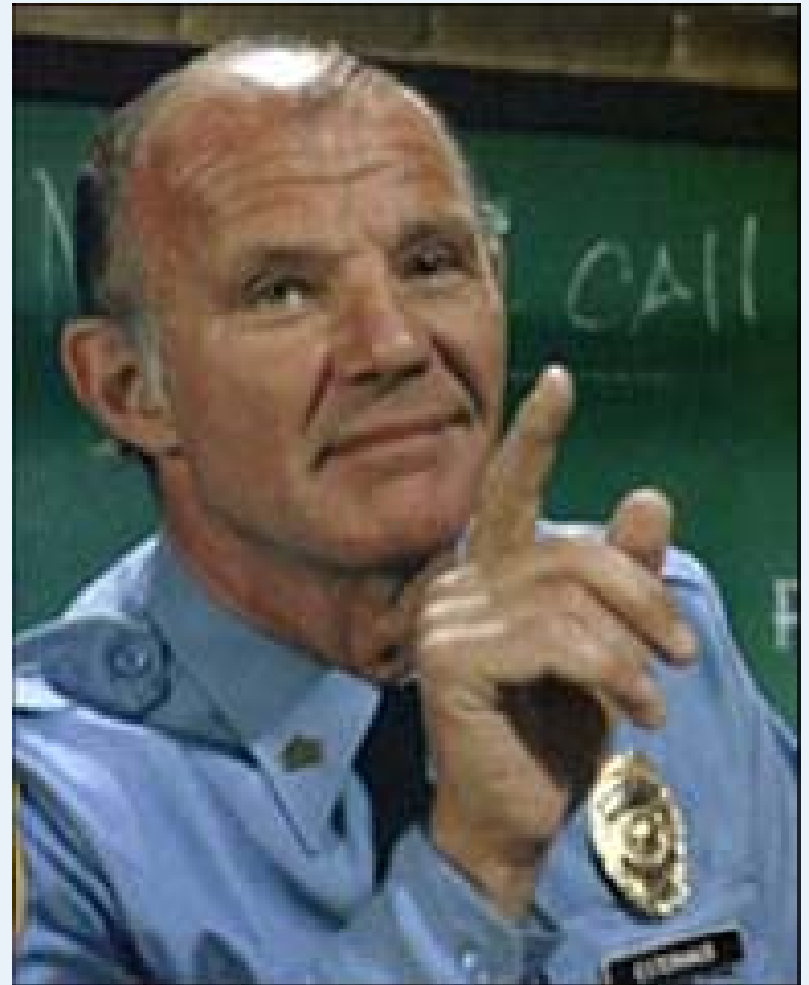
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“Be Careful Out There”



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TODAY'S OUTLINE

- New FAR Compliance and Ethics Program Requirements
 - Internal Control System
- New FAR Mandatory Disclosure Rule
- FERA – Fraud Enforcement and Recovery Act
- ARRA – Stimulus Reporting Requirements

Rule on Compliance and Ethics

- 2008 Rule: Requirements
 - Written Code of Business Ethics and Conduct
 - Make code available to all employees involved in performance of contract
 - Exercise “due diligence” to prevent and deter improper conduct
 - Promote an organizational culture that encourages ethical conduct and commitment to compliance

Rule on Compliance and Ethics

- 2008 Rule: Requirements
 - Timely disclose (in writing) to OIG and CO whenever contractor has “credible evidence” of criminal or civil False Claims Act violations or significant overpayments
 - Fully cooperate in government audits, investigations and corrective actions relating to fraud and corruption

Compliance and Ethics Program with Internal Controls System

- Further 2008 Rule Requirements
 - Reasonable steps to communicate compliance standards and procedures (training appropriate to individual roles and responsibilities)
 - Internal Controls System to facilitate discovery of improper conduct (See Sentencing Guidelines)
 - Assign oversight responsibility at high level
 - Reasonable efforts to exclude violators as principals
 - Periodic reviews of policies, procedures and controls
 - Monitoring and auditing to detect violations

Compliance and Ethics Program with Internal Controls System

- Internal Controls System:
 - Periodic evaluation of effectiveness of program and internal controls
 - Periodic assessment of compliance risks
 - Establish internal reporting system that allows for anonymous reports
 - Establish consistent system of disciplinary action

To What Contracts Does the New Rule Apply?

- Contracts in excess of \$5 million with performance period of 120 days or more
- Former exclusions of commercial item contracts and contracts performed outside the US are eliminated
- Small businesses exempted from internal controls system requirement
- Flowdown requirement to subcontractors

THE BASICS

- Amendments to FAR 3.10, 9.4, and 42.15
- Requires disclosure of certain crimes, False Claims Act violations, and Overpayments
- Applies to **all** contractors (large, small, commercial-item, OCONUS)
- Effective Date: December 12, 2008
- Noncompliance is grounds for suspension or debarment

HOW BIG A CHANGE?

"There is no doubt that mandatory disclosure is a sea change and major departure from [the status quo]."

—The FAR Councils

KEY LANGUAGE

- **FAR 9.406-2(b)(vi): Causes for Debarment**

“Knowing failure by a principal **until 3 years after final payment** on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract 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 U.S. Code

(B) Violation of the **civil False Claims Act** (31 U.S.C. § 3729 *et seq.*)

(C) **Significant** overpayments on the contract, other than overpayments resulting from contract financing as defined in 32.001.”

LOTS OF GRAY AREAS

“Knowing failure by a principal until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract 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 U.S. Code
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- (C) Significant overpayments on the contract, other than overpayments resulting from contract financing as defined in 32.001.”

“KNOWING FAILURE”

- The Principal Must Have **Actual** Knowledge of the violation or overpayment
- “**or should have known**” standard **rejected** by FAR Councils
- For **disclosure purposes**, the knowledge of lower level employees is **not automatically imputed** to Principals
 - (Not so for **liability purposes**)

KEY TERM TO UNDERSTAND

“Knowing failure by a principal until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government . . . credible evidence of [violations and overpayments].

BY A “PRINCIPAL”

- FAR 2.101 Definition
 - "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**)."
- FAR Councils: "This definition should be **interpreted broadly**, and could include compliance officers or directors of internal audit, as well as other positions of responsibility."

KEY TERM TO UNDERSTAND

“Knowing failure by a principal until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, . . . , credible evidence of [violations and overpayments].

THREE-YEAR LOOK BACK

- Contractor's Must disclose violations or overpayments that occurred **before** the effective date of the new Rule
 - Relating to **all federal contracts** for which final payment was made on or after **December 12, 2005**
- Do any "Principals" know of any violations or overpayments?

KEY TERM TO UNDERSTAND

“Knowing failure by a principal until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, . . . , credible evidence of [violations and overpayments].

“ANY GOVERNMENT CONTRACT”

- **CLARIFYING THE SCOPE OF THE LOOK-BACK**
 - Mandatory disclosure will be a **contractual** obligation under amended FAR 52.203-13, which will be incorporated into contracts awarded after **December 12, 2008**.
 - **BUT**, to avoid debarment, a contractor must disclose violations and overpayments within three years of final payment on **ANY federal contract**, including those without FAR 52.203-13
 - If the Feds discover it first, this will add to the contractor’s risk of debarment

KEY TERM TO UNDERSTAND

“Knowing failure by a principal until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, . . . , credible evidence of [violations and overpayments].

TO “TIMELY” DISCLOSE

- FAR Councils **Rejected** Fixed Deadline (*i.e.* “30 days”)
- A “Timely” Disclosure includes time for the Contractor to **investigate** the potential violation or overpayment
 - “Until the contractor has **determined the evidence to be credible**, there can be no ‘knowing failure to disclose.’”
- Low risk of “timeliness” problem if you disclose before the Government independently discovers the problem

KEY TERM TO UNDERSTAND

“Knowing failure by a principal until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, . . . , credible evidence of [violations and overpayments].

DISCLOSE TO “THE GOVERNMENT”

- **FAR 9.4** (to avoid debarment)
 - “to the Government”
 - CO is sufficient
 - Applies to contracts without FAR 52.203-13
- **FAR 52.203-13** (to avoid breach of contract)
 - “to the agency OIG with a copy to the CO”
 - **If FSS: both ordering agency and the contracting agency**
 - “in writing”
 - Applies to contracts that incorporate FAR 52.203-13 (\$5M/120 days)

KEY TERM TO UNDERSTAND

“Knowing failure by a principal until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, . . . , credible evidence of [violations and overpayments].”

“CREDIBLE EVIDENCE”

- **No definition** of “Credible Evidence”
- **Subjective** standard
- Standard was **changed** from “Reasonable Grounds to Believe”
 - FAR Councils: Credible Evidence “indicates a higher standard”
- Expectation: Contractor will **examine the evidence** (documents and witnesses) to determine its credibility
 - If you don’t disclose, consider documenting why evidence was not credible

KEY TERM TO UNDERSTAND

“Knowing failure by a principal until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract 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 U.S. Code

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“SIGNIFICANT” OVERPAYMENTS

- **No definition** of “Significant”
- FAR Councils: “significant” overpayment “implies **more than just dollar value**, including and depends on the circumstances of the overpayment as well as the amount.”
- **Contractual obligation**: FAR Payment clauses require notice and remittance of **any** overpayment

POTENTIAL CONSEQUENCES OF NON-COMPLIANCE

- **Suspension or Debarment**
 - Barred from any new contracts
- **Adverse performance assessment**
 - under FAR 42.15
 - Can make the company less competitive
- **Termination for Default and Damages**
 - when FAR 52.203-13 applies

Potential Grounds for Violations

- False Claims Act
- False Statements Act
- CDA Violations
- TINA Violations
- Wire Fraud
- Mail Fraud
- Suspension
- Debarment
- Bribes
- Gratuities

WISHFUL THINKING?

"The Councils do not anticipate that companies are going to flood the OIG with trivialities, as some respondents fear."

– The FAR Councils

Federal Sentencing Guidelines - Two Key Requirements (Just like the FAR)

- Exercise “Due Diligence” to Prevent and Detect Improper Conduct
- Promote a Culture that Encourages Ethical Conduct and a Commitment to Compliance with Law

Federal Sentencing Guidelines - Two Key Requirements

- Must be bona fide – not just “binders on a shelf.”
- Fully Implemented – And Documented
 - “If it is not documented, it wasn’t done.”
- Not just a “check the box” mentality

What Does This Mean?

- Visible and Known
 - Written Standards and Procedures
 - Training and Awareness
- Tailored
 - Based on Risk Assessment
- Process
 - Avoid Problems
 - Respond Appropriately
 - Prevent Repeat Issues
 - Evolving to meet new challenges

What Does This Mean?

- Informative
 - Guides Employee Conduct
 - Follow the Law
 - Act Ethically
 - Company Values
 - The law is not always clear

How to Avoid Procurement Integrity Violations:

- Take Compliance Seriously
- Always Use “Best Practices”
- Educate Employees About this Risk
- Never Cut Corners or “Guess” When Submitting a Claim that Will Be Paid by the Federal Government
- If you Discover a Problem, Immediately Engage Counsel and **Be Proactive**

Business ethics and compliance obligations

- Mandatory reporting requirements
 - Fraud Enforcement and Recovery Act of 2009 (FERA)
 - FAR 52.203-13 (Mandatory Reporting)
 - ARRA (Stimulus Act)
- Accounting Practices
 - Cost Accounting Standards (FAR Part 30)
 - Cost Principles and Standards (FAR Part 31)

Audits

- Proposal Audits
- Pay Application Audits
- Claim Audits
- Defective Pricing Audits
- Comptroller General Audits

PART I

Fraud Enforcement and Recovery Act of 2009

FERA

- **Addresses fraud in several areas**
 - Financial Services
 - Mortgage Indexing
 - TARP
 - Government Contracts (False Claims)

FERA

- **Key Elements**

- Overrules U.S. Supreme Ct. ruling in *Allison Engine*
- Amends definition of “claim”
- Overrules D.C. Circuit Ct. ruling in *Totten*
- Applies to retention of overpayments

FERA

- **Key Elements**

- Amends time and subject matter limitations on Government intervention in Qui Tam cases
- Expands whistleblower protections
- Allows for greater sharing of materials during seal period
- Eases the requirement for issuing and sharing information received under CIDs

FERA

- **Overruling *Allison Engine***

- Removes the “specific intent” requirement
- Broadens definition of “claim” to include any demand for payment made to anyone if the money is spent or used on the Government’s behalf or to advance a Government program or interest

FERA

- **Key impact of Change:**

- Extends FCA to claims made by vendors, lower-tier subs and others
- Encompasses grants, TARP, ARRA (Stimulus Act)
- Retroactive to June 7, 2008

FERA

- **Amends Definition of “Claim”**

- “whether or not the United States has title to the money or property...”
- Money spent or used “on the Government’s behalf or to advance a Government program or interest...”

FERA

- **Overrules *Totten* (Eliminates “Presentment”)**

- no longer necessary to make demand or seek payment from an “officer or employee of the United States”
- covers claims or demands made to subs, primes, grantees and others who are using federal money to “advance a Government program or interest”
- applies to overpayments (appears not to require false record or statement)

FERA

- **Changes to Qui Tam Cases**

- Government may add new substantive claims if it intervenes
- New claims “relate back” to filing date of original Qui Tam case
- Expands Whistleblower Protections

FERA

- **Changes to Qui Tam Cases**

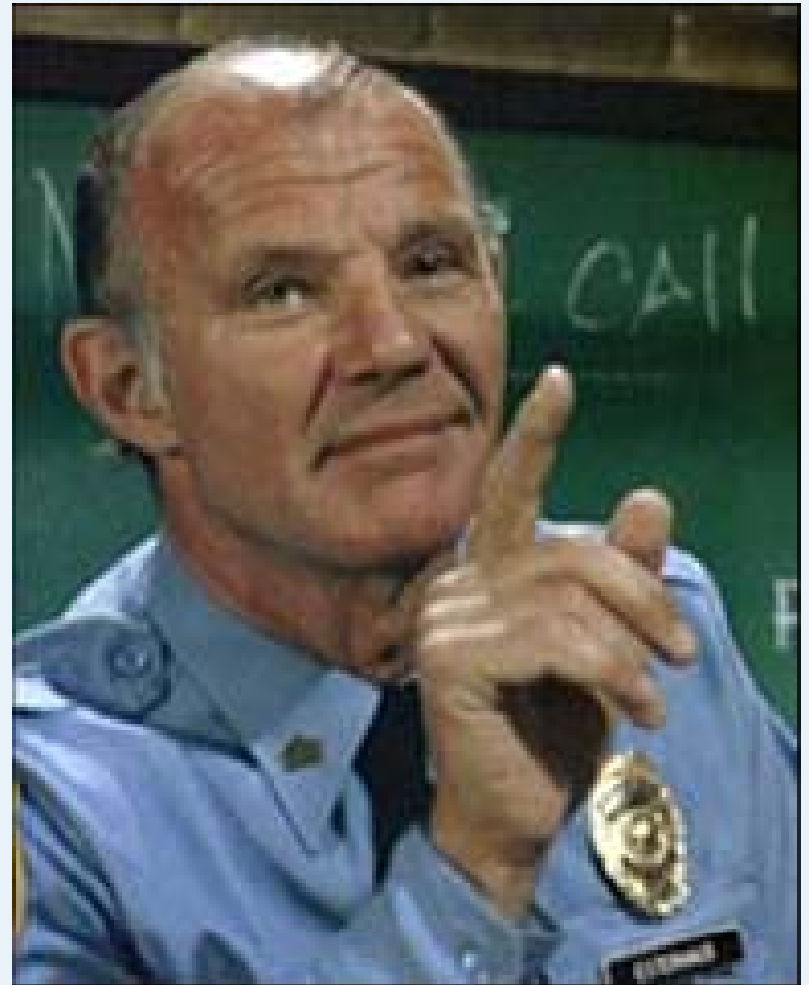
- Relator and Government can share information with state and local governments
- Eases requirements for sharing information received under CIDS

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Questions?
