

Ethics Compliance for Federal Construction Contractors – What the Regulations Require of Your Company

Diana Parks Curran, Esq.

Ms. Curran has experience in Federal procurement as in-house counsel for over a decade with the General Services Administration, and in the private sector where she has practiced law since 2006. She advises on all aspects of Government contracts and Federal procurement law, with an emphasis on construction and leasing issues. She counsels clients engaged in Government contracting from the bidding stage through contract administration and claims issues.

Federal contracting opportunities come with a host of compliance requirements. Recently exposed and heavily reported government spending scandals have placed government contracting abuse, ethics and the Inspector General's Office in the news. Consider these two May 2012 headlines:

[Feds Eye New Misdeeds To Suspend More Contractors](#)

U.S. agencies are under great pressure to protect taxpayer money by suspending unscrupulous contractors, and might meet the increased demand by expanding their consideration of crimes that are unrelated to contracting and poor — but noncriminal — contract performance, a top Air Force official said Wednesday.

[GOP Says Lack Of Obama IG Nominees Boosts Fraud Risk](#)

House Republicans on Thursday urged the Obama administration to act quickly to fill inspector general vacancies in 10 federal agencies, claiming that the failure to appoint permanent IGs has exposed taxpayer dollars to fraud and abuse.

What does all this potentially mean to a well-meaning contractor? All contractors are required to abide by federal laws, but at the end of 2007, the federal government imposed new requirements applicable to the majority of federal construction contracts due to the triggering threshold value and performance duration. Specifically, an Ethics and Compliance program designed to ensure compliance with federal law is required by Federal Acquisition Regulation ("FAR")¹ Subpart 3.10 of every contractor with a contract award valued at or exceeding \$5 million and taking 120 days or more to perform.

A compliance program should incorporate all of the following requirements:

- Adopt a written code of business ethics and conduct within 30 days after award of the triggering contract, which at a minimum according to FAR 52.203-13(b)(1) and (2), must be:
 1. Distributed to "each employee engaged in the performance of the contract;" and
 2. Used by the contractor to "promote compliance with its code of business ethics and conduct."
- Establish a business ethics awareness program and internal control system within 90 days after award of the triggering contract (contractors that were small businesses with respect to the award of the triggering contract need only promote compliance with their code).

- Display agency fraud information or company hotline posters in common work areas, at contract work sites and on company websites that provide information to employees.

According to FAR Subpart 3.10, an effective internal control system must facilitate timely discovery of improper conduct in connection with government contracts, ensure prompt corrective action and include the following:

- Periodic reviews of business practices, procedures, policies and internal controls for compliance with the contractor's code of business ethics and conduct;
- An internal reporting mechanism, such as a hotline, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports;
- Internal or external audits, as appropriate; and
- Disciplinary action for improper conduct.

In general, FAR 3.1002(b) states that the employee business ethics and compliance training program and internal control system should:

- Be suitable to the size of the company and extent of its involvement in government contracting;
- Facilitate timely discovery and disclosure of improper conduct in connection with government contracts; and
- Ensure corrective measures are promptly instituted and carried out.

Requirements of Subcontractors. FAR Subparts at 52.203-13(d) and FAR 52.203-14(d) require prime contractors to include the compliance program regulations in any subcontracts (including purchase orders) that meet the threshold requirements (a \$5 million contract value, or more, and a performance period of 120 days, or more). The prime contractor should include in its qualifying subcontract a flowdown clause incorporating all of the clauses referencing FAR Subpart 3.10 in the government awarded prime contract.

Remedies for Violation. The initial enforcement burden falls to the Inspector General (IG) of the agency awarding the contract. Imagine a contractor that discovers an instance of overbilling the government through its internal control system. Voluntary disclosure of such an instance, if not occasioned by fraud, would likely result in required repayment of the amount overbilled to the government, perhaps with a penalty, certainly with interest. Investigation by the IG or involvement of an auditor, with whom the contractor should stress full cooperation, is likely, but not mandated by FAR. Suspension and debarment are possible government remedies for severe violations. FAR Subpart 9.405 defines suspension or debarment as exclusion from receiving future federal contracts, and agencies are barred from soliciting, awarding to, or even consenting to subcontracts with these contractors. Essentially, contractors debarred, suspended, or proposed for debarment are excluded from conducting business with the government, even as agents or representatives of other contractors. If a criminal law has been broken, the Inspector General Act of 1978 (Pub.L. 95-452) requires the IG to notify the U.S. Attorney General at the Department of Justice for possible coordination and prosecution.

Compliance Programs Advised Even if Not Required by Law. While the new federal regulation applies (thus far) only to contractors working on federal contracts larger than \$5 million and taking 120 days or more to complete, it is prudent for contractors to institute a compliance program even if they are not required to do so by law. Reasons for this recommendation include:

- A compliance program will help ensure compliance on both federal and state projects thereby reducing a contractor's exposure to fines and damaging claims.
- Many regulatory fines and penalties are mitigated, or reduced, if the contractor has an active compliance program because the contractor can show it is making an effort to ensure compliance with ethics rules and regulations.
- The federal regulations' compliance program requirements are likely to be referred to as the standard of care for contractors even if the federal regulation is not applicable. For example, if a government claim is brought against a contractor, the fact that a contractor had a compliance program involving the claim at issue may be important evidence that the contractor satisfied the industry standard of care.
- A compliance program will likely be considered by government officials as a positive factor in any best value procurement. Now that public entities are looking for ways to differentiate between companies on factors other than price, the existence of a compliance program can be a competitive advantage in both state and federal procurements for construction or construction services.

In conclusion, the current political and procurement landscape suggests contractors should anticipate increased government scrutiny and investigation of compliance. A meaningful Ethics and Compliance Program can help prevent potential issues of non-compliance. In addition, agency Inspector Generals and Justice Department attorneys will examine a contractor's Ethics and Compliance Program to determine if the company implemented a program in substance, or just in form. If the record demonstrates that the contractor sought to reinforce its program on a continuous basis, that record may mitigate the penalty for a failure to comply with the multitude of laws and regulations. In contrast, the lack of an Ethics and Compliance Program or one that merely offers lip service to the expected standard of business ethics and conduct will substantially increase the risk of a violation, as well as punishing civil and criminal penalties, or even debarment.

If you have any questions, please contact me through www.CurranLegal.com or phone me at 404-556-7341.

ⁱ The Federal Acquisition Regulations are the federal regulations that govern federal government procurement, which are generated and issued jointly by the Department of Defense, the U.S. General Services Administration, and the National Aeronautics and Space Administration. They are codified at 48 C.F.R. 1.