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FAR Council Issues Mandatory Disclosure Regulations

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In November 2007, at the request of the Justice Department, the FAR Council issued controversial proposed regulations requiring *mandatory* disclosure of criminal violations and overpayments on federal contracts. The proposed regulations were later expanded to include mandatory disclosure of civil False Claims Act violations. Earlier this year, Congress required the issuance of regulations regarding these matters before the end of the year. Those regulations were issued on November 12, 2008 and become effective December 12, 2008. The new regulations essentially adopt the proposed rules, with some refinements. The core requirements for mandatory disclosure of crimes, false claims, and overpayments on federal contracts remain.

The critical features of the new regulations are set forth below:

The New Regulations Require Mandatory Disclosure By All Contractors

The new regulation clarifies that a contractor may be suspended or debarred, even when the clause is not in the contract.

- The current regulation imposes contractual requirements for ethics/compliance programs only on contracts in excess of \$5 million and with a period of performance in excess of 120 days.
- The new regulation does not change this scheme. Contractors will have a *contractual* obligation to adopt compliance programs and make mandatory disclosures only on contracts meeting the \$5 million/120 day thresholds. FAR 3.1004(a) (requiring insertion of the clause in specified contracts). This obligation will become effective on the date the provision is incorporated into the contract.
- However, the new regulation clarifies that a contractor may be suspended or debarred, *even when the clause is not in the contract*, if a principal of the contractor knowingly fails to timely disclose credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18, or a violation of the civil False Claims Act, or a significant overpayment. FAR 3.1003(a)(2) & 3.1003(a)(3). This is because the failure to make such timely disclosures constitutes a cause for debarment, regardless of any contractual obligation to disclose. *Id.*; FAR 9.406-2(b)(1)(vi) & FAR 9.407-2(a)(8).

Contractors must be prepared to disclose known past misdeeds within a timely period after December 12, 2008—or face possible suspension or debarment.

Timeliness Rules

- Timeliness of disclosure as required by contract or internal control systems is measured from the date of determination by the contractor that evidence is credible or the date the contract clause was incorporated, or date the internal control system was established (as the case may be), whichever is later.
- But, *for suspension/debarment purposes*, timely disclosure is measured from the date the contractor determines the evidence is credible, or from the effective date of the rule (December 12, 2008), whichever event occurs later.
- Use of specific time frames (e.g., 30, 60, or 90 days) for considering disclosures “timely” was rejected.

Contractors Will Have To Disclose All Past Crimes, False Claims and Overpayments—And Do So Shortly After December 12, 2008

- The *contractual* obligation to disclose is prospective only. It becomes operative only when the clause requiring disclosure is incorporated into the contract
- However, once the new cause for debarment becomes effective (on December 12, 2008), the new suspension/debarment provisions will trump the contract disclosure provisions. Contractors will have to timely disclose any past misdeeds, or else risk suspension or debarment for failing to do so.
- The obligation to disclose extends for 3 years after final payment, so contractors will have to disclose any wrongdoing on contracts that have not been closed for 3 years, or else face suspension or debarment.

Disclosure Rules

- Disclosures must be made whenever, in connection with the award, performance, or closeout of the contract or any subcontract under it, the Contractor has *credible evidence* that a principal, employee, agent, or subcontractor of the Contractor has committed (a) 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 (b) a violation of the civil False Claims Act. FAR 52.203-13(b)(3)(i).

The ‘credible evidence’ standard is higher, allowing the contractor to determine credibility before deciding to disclose.

- The new regulation substituted in “credible evidence” instead of “reasonable grounds to believe” to clarify that a contractor has the ability to conduct an internal investigation before making a report. The “credible evidence” standard is higher, allowing the contractor to determine credibility before deciding to disclose.
- The new regulation substituted the above language for “crime” to clarify that acts unrelated to the specified crimes are not subject to disclosure.

- The contractual requirement to disclose overpayments arises under the Payments clause; the failure of a principal knowingly to disclose overpayments is a cause for suspension/debarment. FAR 3.1003(a)(3).
- A failure to disclose is not a ground for suspension/debarment unless a “principal” of the contractor knowingly fails to timely disclose the wrongdoing.
 - A “Principal” means 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 2.101(b)(2) & FAR 52.203-13(a).
 - The limitation to Principals is intended to preclude suspension/debarment when only low level employees have knowledge of the violation and do not inform their superiors.
 - The unreported overpayment must be “significant” or “material” to invoke the suspension/debarment provisions.

Other Matters

The new rules do not require that disclosures by subcontractors be made through their prime contractors.

- “Full Cooperation” means disclosure to the Government of 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 responses to the Government’s requests for documents and access to employees with information. FAR 52.203-13(a).
 - It does not require waiver of attorney privileges, or Fifth Amendment rights.
 - It does not restrict a Contractor from conducting an internal investigation or defending a proceeding or dispute related to a potential or disclosed violation.
- The Government, to the extent permitted by law and regulation, will treat information disclosed as confidential where the information has been marked “confidential” or “proprietary.” FAR 52.203-13(b)(3)(ii).
- Violations must be disclosed to the agency Office of Inspector General (OIG), with a copy to the Contracting Officer. FAR 52.203-13(b)(3)(i).
 - The report must be made to the agency that awarded the contract. If the violation relates to an order under an ordering vehicle used by multiple agencies, the Contractor must notify the OIG of the ordering agency and the IG of the agency responsible for the basic contract. FAR 52.203-13(b)(iii).
 - If the violation relates to more than one government contract, the Contractor may make the disclosure to the agency OIG and Contracting Officer with the largest dollar value contract affected by the violation.
- Prime Contractors are not required to review or approve subcontractors’ compliance programs. Primes are subject to suspension/debarment only if they fail to disclose known violations by subcontractors.
 - The new rules do not require that disclosures by subcontractors be made through their prime contractors.

DOD Preference for SDB's Held Unconstitutional by Federal Circuit

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On November 4, 2008, the Federal Circuit issued a decision in Rothe v. Dept. of Defense and Dept. of the Air Force, Case No. 2002-1017, November 4, 2008. This decision could have a major impact on small business contracting. By declaring the DOD's small disadvantaged business goal of 5% unconstitutional, the Federal Circuit calls into question the opportunities for small disadvantaged businesses (SDB) as prime contractors and also the requirements for prime contractors to meet certain small business subcontracting goals. The full impact of the decision is not yet certain.

The Federal Circuit held that the statute creates an explicit racial classification and thus is subject to strict scrutiny.

In 1988, Rothe Development Corporation lost a competition for an Air Force contract to a SDB even though Rothe's price was lower. The Air Force gave the SDB a price evaluation preference authorized by the current 10 U.S.C. § 2323, which authorizes DOD to grant a price evaluation preference of up to 10% for SDB's. The statute, 10 U.S.C. § 2323, sets a goal of awarding 5% of DOD contracts to SDB's, including 8(a) firms. It also incorporates the Small Business Act's presumption that certain minorities are socially disadvantaged, and allows DOD to use a price evaluation preference of up to 10% to award contracts to small disadvantaged contractors. Rothe alleged that the statute on its face violated the Equal Protection Clause of the Fifth Amendment. The District Court granted the Government's motion for summary judgment. The Federal Circuit reversed, and enjoined DOD from implementing the statute.

The Federal Circuit held that the statute creates an explicit racial classification and thus is subject to strict scrutiny. The statute may survive such strict scrutiny only if it serves a compelling government interest and is narrowly tailored to meet that interest. To establish a compelling governmental interest, the court held that the Government had the burden of proving that Congress had a "strong basis in evidence" that remedial action based on race was necessary.

The District Court relied upon a number of studies and concluded that the government met its burden. The Federal Circuit reviewed the same studies and concluded that their methodology was flawed and thus that they did not provide the strong evidence required to justify Congress' decision to take remedial action based on race. For example, the Federal Circuit noted that the studies did not consider whether a company's size affected its capacity to obtain contracts, and that this might explain why small disadvantaged firms got fewer contracts than big companies. The Federal

Circuit did not hold that the studies were without merit; rather it only held that they do not provide the strong evidence required to justify a racial classification.

The Court held that in 2006, when Congress most recently enacted this preference for SDB's, Congress did not have before it strong evidence to determine that remedial action based on race was necessary. Thus, the court held that 10 U.S.C. § 2323 was facially unconstitutional, violated the Equal Protection clause of the Fifth Amendment, and deprived the plaintiff of due process. The Federal Circuit remanded the case to the district court in Texas with instructions for that district court to enjoin DOD's implementation of the statute, 10 U.S.C. § 2323.

The Winds of Change? Does the Supreme Court's Allison Engine Remand Signal an Attempt to Reign in the Scope of the False Claims Act?

The direct link
between the false
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establish liability.
Id. at *6.

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For any subcontractor doing business with the federal government, the Supreme Court's recent decision in Allison Engine Co. v. United States ex rel. Sanders, No. 07-214, 2008 WL 2329722 (S. Ct. June 9, 2008) may represent a welcome attempt to clarify the scope of subsections (a)(2) and (a)(3) of the False Claims Act ("FCA"), which were the subject of a controversial circuit split between the Sixth and D.C. Circuits. In its decision, the Supreme Court vacated and remanded the Sixth Circuit's decision in United States ex rel. Sanders v. Allison Engine Co., 471 F.3d 610 (6th Cir. 2006) based on the appellate court's reliance on "an incorrect interpretation of §§ 3729(a)(2) and (3)." 2008 WL 2329722, at *7.

At the heart of its ruling, the Court recognized the need for clarification of "what a plaintiff asserting a claim under these provisions must show regarding the relationship between the making of a 'false record or statement' and the payment or

approval . . . by the government.” *Id.* at *3. Specifically, the Court acknowledged the circuit split created by the D.C. Circuit’s decision in United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004) and the Sixth Circuit’s decision in *Allison Engine*.

In its decision, the Court criticized the Sixth Circuit’s decision with respect to, among other things, the intent element of (a)(2) and the presentment element (or lack thereof) in both (a)(2) and (3). As an initial matter, the Court noted that the Sixth Circuit’s interpretation of (a)(2) “impermissibly deviat[ed] from the statute’s language.” *Id.* at *5. The Court opined that “getting a false or fraudulent claim ‘paid . . . by the Government’ is not the same” as getting paid for such a claim by government funds.” *Id.* As such, the Court held that elimination of the (a)(2) intent element would improperly expand the scope of the FCA by providing for almost boundless liability for the submission of false or fraudulent claims subsequently paid with pass-through government funds—regardless of whether the defendant “intend[ed] that the Government itself pay the claim.” *Id.*

The Court also clarified the question of whether (a)(2) contains a presentment requirement. While it recognized that Congress’s omission of presentment language from (a)(2) must be taken as purposeful and intentional, it also expressly required a causal link between the false claim and the payment in order for FCA liability to attach. As the Court explained, the making of a false or fraudulent claim to a private entity without intending that the government rely on the statement should not subject the maker to FCA liability. “In such a situation, the direct link between the false statement and the Government’s decision to pay or approve a false claim is too attenuated to establish liability.” *Id.* at *6.

As to (a)(3), the Court held that FCA liability will not attach in the conspiracy context unless it is shown that the conspirators intended to defraud the government. While actual presentment of the false claim may not be necessary, there must still be evidence that the conspirators “agreed that the false record or statement would have a material effect on the Government’s decision to pay the false or fraudulent claim.” *Id.* at *7.

With the confusion that followed the Sixth Circuit’s decision, and the corresponding circuit split, the Court’s decision provides much needed clarification of the permissible scope of the FCA—a welcome offering for any federal subcontractor!

Contractor Must Submit Proposal to Protest Sole-Source Award

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Contractors must be mindful of complying with standing and other prerequisites for maintaining bid protests and must structure their activities accordingly. Failure to adhere to proper protest prerequisites may result in a waiver of a contractor's protest rights. In *Infrastructure Defense Technologies, v. United States*, Nos. 07-582 C & 07-695 C, 2008 WL 1047660 (Fed. Cl. Apr. 7, 2008), the Court of Federal Claims denied a pre-award protest brought by Infrastructure Defense Technologies, LLC ("IDT") of the award of a sole source contract to Hesco Bastion, Ltd. ("Hesco") based, in part, on a lack of standing. The court found that IDC had no standing to bring the protest because IDT did not submit a proposal expressing an interest in the procurement that would make it eligible for award.

Failure to adhere to proper protest prerequisites may result in a waiver of a contractor's protest rights.

Hesco, the awardee, had a \$500 million contract with the Defense Logistics Agency ("DLA") for Concertainers, which are collapsible force protection units used by the military in hostile areas as substitutes for sandbags and other barrier devices. Towards the end of Hesco's contract, the Government issued a presolicitation notice which stated that the Government intended to issue a request for proposal ("RFP") for a long-term, follow-on sole source indefinite delivery/indefinite quantity contract for Hesco Concertainers. The presolicitation notice described the Concertainers by part number and noted that Hesco held a patent on the design of the barriers. However, it also stated that all technically acceptable proposals would be evaluated to determine whether a competitive procurement would be more appropriate. Subsequently, an RFP was issued, which described the Concertainers by part number, manufacturer, and picture. Ultimately, Hesco's offer was the only technically acceptable offer.

IDT, which also manufactured a collapsible barrier product, did not submit a proposal in response to the RFP or a protest during the proposal period. However, prior to award, IDT filed a protest, alleging that a sole source award was improper. The court held that IDT lacked standing to maintain the protest because it did not submit a proposal in response to the RFP. In doing so, the court noted that IDT did not meet the requirements of being an "interested party" or of having a "direct economic interest" such that it was prejudiced by the award to Hesco. IDT argued that because the RFP lacked performance specifications and relied on part numbers to describe the barriers, the RFP was defective and IDT was unable to submit a proposal. The

court held that IDT's failure to bid or to file a protest during the proposal period was a bar to the action, noting that the RFP sufficiently described the Concertainers such that IDP knew that its product was a competitor and that the presolicitation notice specifically stated that alternatives to the Concertainers would be considered.

IDT's failure to provide a bid or proposal in response to the presolicitation notice or the RFP was a bar to its right to protest the award, despite the fact that it indicated to the agency that it believed that a competitive procurement was warranted. Had IDT submitted a bid or filed a protest before the date called for in the notice for interested offerors, the agency would have had the ability to respond and may have conducted a competitive procurement. In short, when contractors want to compete for opportunities that are announced as sole source awards, they must submit a proposal expressing an interest in the procurement or file a protest before the date called for in the notice issued by the Government.

Contractor Liable Under False Claims Act & Anti-Kickback Act for Failure to "Self-Police" OCI Issues

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The United States District Court in Massachusetts has issued a warning to contractors on the importance of effective compliance policies and the need to actively monitor Organizational Conflict of Interest ("OCI") issues. In United States v. Dynamics Research Corp. ("DRC"), No. 03cv11965, 2008 WL 886035 (D. Mass. Mar. 31, 2008), the court found that the company was liable for False Claims Act ("FCA") and Anti-Kickback Act violations under vicarious liability because of its "failure to self-police – in particular to ensure that its employees did not have conflicts of interest...." The court left open a decision on damages which the Government alleges at \$24M for FCA penalties and treble damages, \$19M for double damages under the Anti-Kickback Act, and \$10M in breach of contract damages.

DRC was a technical management support contractor under two contracts for the Air Force at Hanscom AFB. In that role, DRC provided technical support and advice on the purchase, development, and deployment of computer systems. The

The United States District Court in Massachusetts has issued a warning to contractors on the importance of effective compliance policies.

contracts contained an Organizational Conflicts of Interest clause which prohibited the contractor from assigning an employee to the contract to perform any task “concerning any program, contractor, contract, or other matter” in which the employee or family member had a financial interest. The contracts also required the contractor to obtain yearly financial disclosure statements from each employee working on the contract.

Two DRC employees, a Vice President and a Program Manager (who later became a Vice President), engaged in three schemes under the contracts that were the basis for the government’s complaint. First, in his job providing technical advice to the Air Force, the Program Manager convinced the Air Force to purchase a computer training module from a small disadvantaged Missouri company. He then directed the Missouri company to submit invoices to a company, Greenleaf, owned by his wife (using her maiden name). In the second scheme, DRC recommended that the Air Force purchase a computer system known as “Ravens” from a company named ECCS based on sole source justifications drafted by the DRC Program Manager. The DRC Program Manager did not disclose that he had a prior consulting relationship with ECCS and that Greenleaf received payments for “installation” services on each sale of the program. When ECCS graduated from its small business status, the DRC Program Manager helped set up another 8(a) company (known as KKP) to provide the “Ravens” software. He again received “installation” payments through ECCS and another company he set up. Finally, the Program Manager arranged for the Air Force to buy computer memory through KKP. He recommended to KKP that it price the memory at the same unit price that the previous contractor sold it to the government, and then the Program Manager advised the Government that the price was “fair and reasonable.” When the cost of computer memory dropped dramatically, the Program Manager, his boss, and the head of KKP agreed to a process where Greenleaf would provide the memory to KKP at a significant markup and then KKP would sell it to the Government. The three agreed to split the extra profit.

Notably, the Program Manager and Vice President refused to provide DRC with annual financial disclosures, and DRC never pressed them to do so.

The Program Manager and the Vice President both pled guilty to multiple counts of defrauding the government. The question for the district court was whether DRC was directly liable for their actions under a theory that the employees were working within the scope of their employment with actual authority and with the intent to benefit the company. The court was unwilling to find DRC directly liable because the employees had hidden their activities from DRC and were “wholly motivated by self-interest.” In sum, the court found that DRC was not involved in the schemes as a company, it never received payments from the schemes, and it was kept in the dark on their activities. The court also found that neither of the employees was a part of the “apex of power” within the company that would make it automatically liable for their actions.

However, the court found that DRC was vicariously liable on the basis of “apparent authority” because “it put its agents in the position to do harm.” 2008 WL 886035 at *14. Under vicarious liability, the company does not have to benefit from its

Under vicarious liability, the company does not have to benefit from its employees actions – nor does the employee have to intend to benefit his company.

employees' actions – nor does the employee have to intend to benefit his company. According to the court, it is only necessary that the company put its employee in a position where others would believe that the employee was acting with the authority on behalf of his employer. The court, in effect, placed the burden on the employer to make sure its employees did not violate the law, stating: "Vicarious liability provides an important incentive for government contractors to self-police for the type of corruption that occurred here by placing liability on the actor in the best position to control the undesired conduct." *Id.* at *15. Even though DRC did not know about the schemes of the employees, it was vicariously liable because it did not "self-police" its employees on conflict of interest. Of particular note, the court found that DRC did not obtain the required financial disclosure statements from its employees, especially from the Program Manager whose job it was to work closely with the Air Force and provide technical advice on purchasing computer systems.

From a policy point of view, this case highlights potential issues with contracting-out government functions. The Air Force apparently allowed and encouraged DRC employees to essentially act as government procurement managers by signing documents and preparing sole source determinations, but the court was not willing to absolve DRC of liability even if the Air Force overstepped its bounds. Moreover, DRC attempted to argue that there was no illegal kickback because, as the technical advisor, the employees received payments for setting up direct contracts between the Air Force and the shell companies rather than receiving payments for issuing a subcontract with DRC. The court rejected that argument. In sum, the court found that the employee used DRC's position as the advisor to the Air Force to steer government funds "into his own pockets," and, according to the court, DRC was liable because it put the employee in a position with the Government where that could happen.

The Latest on Line-Item Prices and FOIA Exemption 4

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Line-item pricing information in a Government contract falls within Exemption 4 of the FOIA if its disclosure would 'impair the government's ability to obtain necessary information in the future' or 'cause substantial harm to the competitive position of the person from whom the information was obtained'.

On January 29, 2008, the D.C. Circuit published its decision in Canadian Commercial Corp. v. Air Force, No. 06-5310 (D.C. Cir. Jan. 29, 2008). The case addresses the controversial question of whether line-item prices in government contracts are exempt from public disclosure under the Freedom of Information Act (FOIA). The court's opinion concludes that "line-item pricing information in a Government contract falls within Exemption 4 of the FOIA if its disclosure would 'impair the government's ability to obtain necessary information in the future' or 'cause substantial harm to the competitive position of the person from whom the information was obtained.'" Applying this rule, the Court held that line-item prices for three one-year renewal options in Canadian Commercial's contract for aircraft maintenance services may not be released to the public under FOIA.

The case is noteworthy not only because it addresses line-item prices, but because of its approach to the proof of competitive harm that is required in applying FOIA Exemption 4. There is nothing in the opinion that would suggest releasing Canadian Commercial's option-year prices would reveal its proprietary business methods, its costs, or its profits. Rather, the Court found that releasing the option-year prices would allow Canadian Commercial's competitors to make better decisions about whether to attempt to compete for that work and to be more effective in persuading the government to consider unsolicited proposals. In light of such competition, the Air Force might be less likely to exercise the options and the value of Canadian Commercial's status as the incumbent contractor might be marginally reduced. Although the course of events leading to submission of unsolicited proposals could be seen as enhancing competition, the opinion suggests that the Air Force did not even make such an argument.

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