

Updates on Compliance, Enforcement, and Mandatory Disclosures

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... today I'm announcing . . . reforms . . . which will save the American people up to \$40 billion each year. It starts with reforming our **broken system of government contracting**. There is a fundamental public trust that we must uphold. The American people's money must be spent to advance their priorities – not to line the pockets of contractors or to maintain projects that don't work.

Recently that public trust has not always been kept. . . . Far too often, [government contract] spending is plagued by massive cost overruns, outright fraud, and the absence of oversight and accountability.

Remarks by
President Barack Obama on Procurement
March 4, 2009

Four General Areas

- Contract Audit and Oversight
- IG and GAO Investigative Authority
- Contractor Obligations
- Liability under the False Claims Act

Audit Authority

- Access to Contractor Records
 - Memorandum 08-PAS-042(R), Subject: Audit Guidance on Denial of Access to Records Due to Contractor Delays (December 19, 2008)
- Internal Control Systems
 - Memorandum 08-PAS-043(R), Subject: Audit Guidance on Significant Deficiencies/Material Weaknesses and Audit Opinions on Internal Control Systems (December 19, 2008)
- GAO reports sharply criticizing DCAA audits

Access to Contractor Records

- DCAA requires documentation in a “timely manner”
- “Timely” given an aggressive interpretation
 - “Reasonable time period to provide the data given the specific circumstances”
 - “**Generally** . . . should be readily available”
- Untimely is treated as a denial of access
 - A suspension or withhold of any unsupported costs until received and analyzed
 - Questioned costs if not received prior to the completion of audit fieldwork
 - Potentially improper penalty

Access to Contractor Records

- Encourages liberal contact with Contractor employees during the audit
 - Recommends obtaining data “directly from the person responsible for the information”
 - Disapproves of Contractor “liaisons”
 - Lacks support in standard Access to Records Clauses

Access to Contractor Records

- “Fast Track” process for data not provided by requested due date
 - Five days - a formal written request to high-level contractor management (e.g., no lower than business segment vice president) with a copy to the contracting officer
 - One week – notification that a formal denial of records exists and is being reported within the Government
 - Review need for a DCAA subpoena pursuant to 10 U.S.C § 2313(b)
 - Review need for an IG subpoena
- Procedure is arguably inconsistent with IG subpoena authority
 - Limited to fraud-related issues—not contractor accounting systems issues (See 5 U.S.C. App. § 8)

Aggressive Review of Internal Control Systems

- “[**A**]ny significant deficiencies/material weaknesses” will now result in a finding of an inadequate system
 - No “inadequate in part” opinions
- **Any** deficiency found at a major contractor is, by definition, “material”
- Disapproval and suspension of progress payments or cost reimbursement
- No suggestions for improving the contractor’s system

Oversight on Organizational Conflicts of Interests

- Weapon Systems Acquisition Reform Act of 2009 (Pub. L. 111-23).
 - Prohibits Systems Engineering Contractors from participating in the development or construction of the major weapon systems on which they have advised DOD.
 - Requires tightened oversight of organizational conflicts of interests by contractors in the acquisition of major weapon systems.

GAO Authority

- Section 871 of the 2009 Defense Authorization Act modified 41 U.S.C. 254d and 10 U.S.C. 2313 by adding at the end ...
“and to interview any current employee regarding such transactions”
- Now GAO can both examine records and interview current employees regarding transactions relating to the contract or subcontracts under the contract

Investigative Authority

- 2009 Stimulus Bill
- IG authorized to:
 - Examine the records of every contractor, grantee, subcontractor and subgrantee, and any State or local agency administering the affected contracts, subcontracts, grants and subgrants
 - “Interview any employee of the contractor, grantee, subgrantee, or agency regarding such transactions” (Sections 1514 and 1515)
- GAO also authorized to access documents and interview employees (Section 902)

The National Defense Authorization Act for 2010 (Pub. L. No. 111-84)

- Authorizes the DOD Inspector General to subpoena the attendance and testimony of witnesses necessary to carry out a DOD audit or investigation. (Sec. 1056)
- Requires additional information to be included in the federal database on the integrity and performance of federal contractors and grantees (Sec. 824; Hunter Act).

More to Come

- Senate Subcommittee on Contracting Oversight
 - First hearings held on April 29, 2009: “Improving Ability of IG’s to Detect, Prevent, and Prosecute Contracting Fraud”
 - Featured testimony of IGs seeking legislation to
 - Expand IG subpoena power
 - Establish national procurement fraud database
 - Compel contractor employees to cooperate with interviews
 - Promote initiatives identified in National Procurement Fraud Task Force White Paper: *Procurement Fraud: Legislative and Regulatory Reform Proposal (June 9, 2008)*

More to Come

- The House has also amended its rules to require each standing committee to hold periodic hearings on fraud, waste, abuse, or mismanagement in Government programs under the authority of that committee.

Contractor Obligations

- FAR Mandatory Disclosure & Ethics Rules
- Effective December 12, 2008
- Contractors and subcontractors must disclose to the OIG and/or contracting officer whenever a principal has credible evidence, in connection with the award, performance or closeout of a contract or subcontract thereunder, of
 - Certain enumerated violations of Title 18 of the U.S. Code
 - A civil False Claim Act violation
 - A significant overpayment

FAR Mandatory Disclosure & Ethics Rules

- Requires Code of Conduct, Ethics Awareness and Compliance Program and Internal Controls
 - Applicable to contracts/subcontracts with value greater than \$5 million and performance period greater than 120 days
 - Small businesses and commercial items contracts exempt from Ethics Awareness and Compliance Program and Internal Controls requirements (not Code of Conduct)
- OMB Guidance (April 3, 2009) extended Mandatory Disclosure requirements to grants, cooperative agreements, and other transactions under ARRA

Key Implementation Issues

- Triggering Conduct – “Fraud” under 18 U.S.C. may capture any potentially criminal conduct
 - “In connection with” will be key to whether disclosure is required
- Small contractors will need ethics training, compliance programs and internal controls to comply with mandatory disclosure requirements

Key Implementation Issues

- “Full cooperation” likely will be the universal standard, regardless of whether the contractor is subject to FAR 52.203-13
- Ability to protect disclosures from release under FOIA is unclear
- Use of disclosures for past performance evaluation is unclear

Status

- DoD reported 14 Disclosures as of April 21, 2009
- Agencies continue to develop internal procedures
- ABA Task Force preparing “best practices” guide

Federal Awardee Performance and Integrity Information System

- 74 Fed. Reg. 45579 (Sept. 3, 2009)
- Captures the past performance information of existing data bases
- Contracting Officers required to review information prior to making award
- Requires self reporting of certain criminal, civil and administrative proceedings for contractors with contracts valued at over \$10 million in total

DCAA Audits of Internal Procedures

- DCAA conducting Contractor Code of Business Ethics and Conduct Audits
- Establishing standards and definitions
- Requesting a list of violations
- Requesting a copy of contractor's reports

Expanding False Claims Act Liability

- The Fraud Enforcement and Recovery Act (Pub. L. 111-10)
 - Bill intended to prevent mortgage fraud and expand FCA passed by Senate in a 92-4 vote on April 28, 2009
 - Includes “clarifications” to “reflect the original intent” of the FCA
 - Expands liability to include claims to government for non-U.S. funds or property
 - Eliminates presentment requirement
 - Adds Concealment of an obligation to pay as an offense
 - Defines “Material” as “having a natural tendency to influence, or be capable of influencing,”