



Contractor Internal Audit Directors (CIAD) Conference
"Speak Up In Spokane"

Business Ethics

or *"How I stopped worrying and learned to love the truth"*
(with apologies to Dr. Strangelove)

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Contractor Internal Audit Directors (CIAD) Conference



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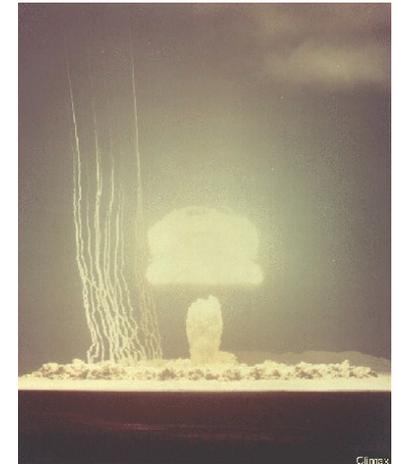


A brief reminder of the movie

- ▶ During the height of the nuclear arms race between the Soviet Union and the United States, people were building bomb shelters in their backyards.
- ▶ Some generals were trying to persuade the President to launch a pre-emptive nuclear strike on the Soviets while they did the same.
- ▶ Stanley Kubrick assembled a star-studded cast to do a satire on the concept of Mutually Assured Destruction = M.A.D.

Dr. Strangelove

- ▶ The title character (played by Peter Sellers) was a former Nazi scientist who toyed with the notion of a nuclear war, even if it meant the destruction of all life on the planet.
- ▶ Slim Pickens played the pilot of the **only** B-52 that managed to penetrate the Soviet air defenses. When the bomb that would unleash the Doomsday weapon failed to dislodge from the bomb bay, he went into the bomb bay, climbed onto it and rode it down like a cowboy on a bucking bronco, waving his hat in his hand.



On the edge of nuclear war

- ▶ Tension had been building for years
- ▶ Both sides were engaging in “brinksmanship”
- ▶ Consequences of a mistake were severe
- ▶ Extremists were egging them both on
- ▶ It would have been hilarious if it weren’t deadly
- ▶ Proxy wars were erupting all over the place
- ▶ The players were losing their fear of M.A.D.
- ▶ Though most bombers will be stopped, a few would make it through
- ▶ The final result will be Big and Ugly

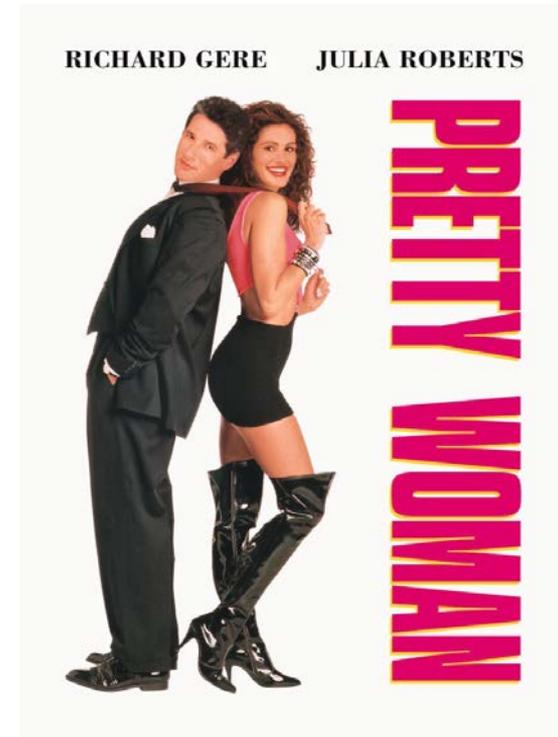


Are you confused yet?

- ▶ By now, you may be asking yourself, “What’s this got to do with business ethics?” If so, you’re not alone.
- ▶ The answer is that government contractors appeared to disregard federal auditors for years on ethical issues while the danger loomed ever higher.
- ▶ Finally, regulators launched a pre-emptive strike to require contractors to self-disclose ethical violations, waving their hats all the way down!

What is “Business Ethics” anyway?

- ▶ It’s not about beliefs, it’s about behavior
- ▶ Everyone is entitled to their own *morality*, but society decides what is acceptable *behavior*
- ▶ Not everything that is legal is ethical nor is everything that is ethical, legal – Got that?



Why we need to study ethics?



Trying to incorporate ethics too late

DILBERT



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A Quick Review

► The “old familiar” ethics laws:

- Truth in Negotiations Act (TINA) – Lockheed Martin
- Sarbanes-Oxley (for commercial firms) - Enron
- Whistleblower Protection - KBR
- False Claims Act – KBR in Kuwait and Iraq
- Fraud, waste & abuse – pick any Defense contractor
- Gifts & gratuities – KBR again
- Conflicts of Interest (personal & organizational)
- Outside activities – IP rights, proprietary info
- Anti-trust - Microsoft
- Foreign Corrupt Practices Act (Siemens paid \$800M)
- International Emergency Economic Powers Act
 - Plus more are being added each year

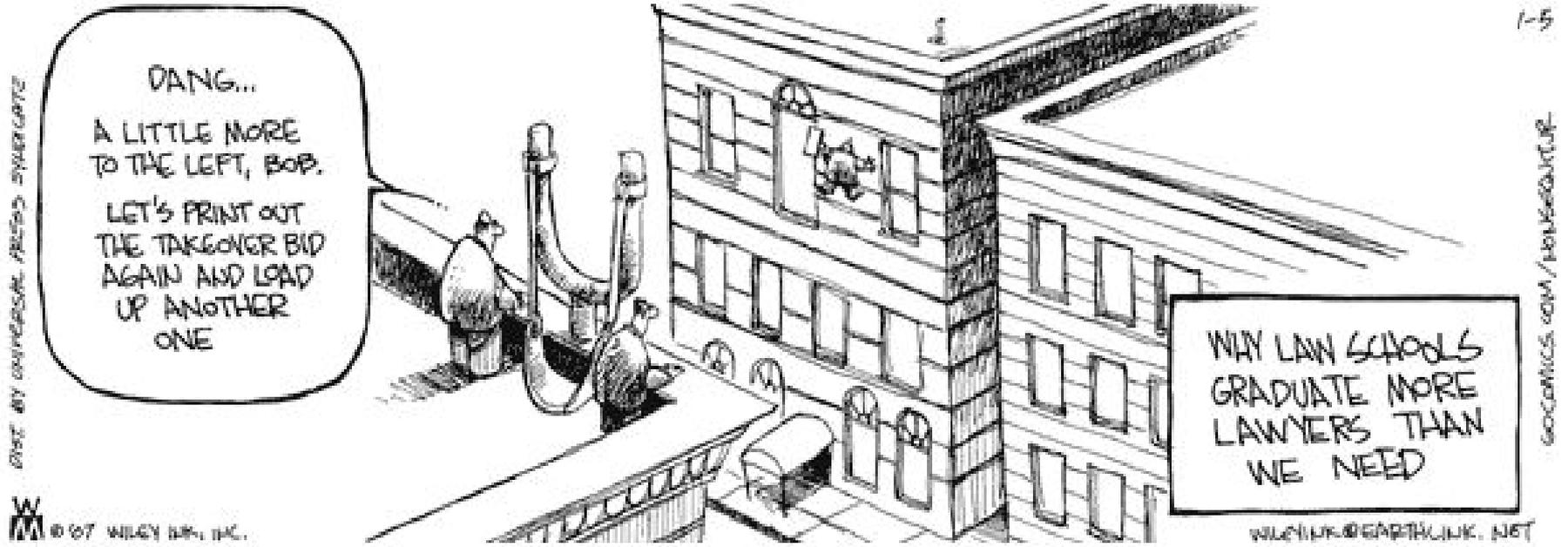
Hoping to just blend in with the crowd



Sarbanes-Oxley (House 423 -3, Senate 99 – 0)

- ▶ At the turn of this century, the commercial world was shaken by the collapse of WorldCom, Enron Arthur Anderson and a host of other companies acting illegally
- ▶ **Lawyers & accountants told them it was legal**
- ▶ Congress reacted by passing a law requiring the CEOs and CFOs to personally sign all sorts of certifications to enable prosecutors to bring them to justice for shady practices.
- ▶ In the years since, other lawyers & accountants have had full employment working out details.
- ▶ But it didn't prevent the 2008 financial crisis.

Why we always need more lawyers



Dirty SOX



- ▶ Introduced major changes to the regulation of corporate governance and financial practice
- ▶ Requires certification by corporate officers that the report:
 - Does not contain any material untrue statements/omission or be misleading
 - Financial statements and related information fairly present condition and results in all material respects
 - Signing officers are responsible for internal controls and have evaluated these internal controls within the previous 90 days and reported on findings
 - All deficiencies reported in internal controls and information on any fraud that involves employees involved with internal activities
 - Any significant changes to internal controls or related factors that could have a negative impact on the internal controls
- Penalties up to \$1 million / 10 years imprisonment

TINA 10 U.S.C. 2306(a) / FAR 15.403

- ▶ Requirement to submit certified cost or pricing data for any negotiated contract or subcontract, including any changes, that exceeds \$700,000
- ▶ Cost or pricing data include all the verifiable facts in a contractor's possession (as of the time of an agreement on price) that prudent buyers and sellers would reasonably expect to affect price negotiations significantly.
- ▶ TINA does not apply where:
 - The procurement involves adequate price competition
 - Prices set by law or regulation or which relate to commercial items
 - The procuring Federal agency has waived the certified cost or pricing data requirement (rarely given)



Consequences of Failing to Comply with TINA

- ▶ Government is entitled to damages in the amount of the price attributable to the “defective” cost or pricing data. (*Defective pricing is inaccurate, incomplete, or non-current cost or pricing data*).
- ▶ The Government is entitled to double damages if defective cost or pricing data is submitted *knowingly*.
- ▶ Treble damages + penalties if there is suspected fraud.
- ▶ Individual liability – staff members responsible for submitting the defective cost or pricing data may be subject to either criminal or civil liability under the fraud and false statement/false claims statutes.

TINA Tips

- Required TINA disclosures might include facts that the contractor decided not to rely upon.
- When providing certified cost or pricing data, the contractor must disclose all cost or pricing data in the possession of any of its staff members, in order to assure that the Government is in the same position of the contractor when negotiating the contract price.
- *Staff members who become aware of cost or pricing data that may be relevant to a particular proposal should promptly inform their contracts negotiator or business office.*

▶ The Gov't is under no reciprocal obligation

Accused of hindering progress?

“Like a muddied spring or a polluted well are the righteous who give way to the wicked.”

Proverbs 25:26



False Claims Act (FCA)

- ▶ Considered the fundamental statute for promoting honesty in dealing.
- ▶ Knowing submitting false claims for the payment of government funds; conspiring to do so; making false or fraudulent statements of records.
- ▶ Civil (31 U.S.C. 3729-3733) and Criminal (18 U.S.C. 287) aspects of the statute.

Penalty: Three times the government's damages + civil penalties of \$5,500 - \$11,000 per false claim.

Includes Qui Tam provisions & whistleblower protections.

GAO: \$100 Billion Wasted on Bogus Federal Payouts Annually

The Government Accountability Office says the federal bureaucracy wasted more than \$100 billion on bogus payments last year, partially because it doesn't keep track of its spending programs.

"Imagine beginning every month not knowing what money you have and not being able to track how much you've spent," said committee Chairman Darrell Issa, a California Republican, according to The Times. "Yet year after year, that's where the federal government operates."

Just saying it doesn't...



Russian Anti-Corruption Plan (July 31, 2009)

“In the Russian Federation, mainly formed and are functioning legal and institutional frameworks for combating corruption. A serious anti-corruption potential is in the Concept of administrative reform in the Russian Federation in 2006 - 2010 and action plans for its conduct, approved by order of the Government of the Russian Federation dated October 25, 2005 № 1789-r, as well as in the legislation of the Russian Federation governing matters of public service.



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Despite the measures, corruption, as the inevitable consequence of excess administration by the State, still seriously hampers the normal functioning of all social mechanisms, prevents social transformation as well as improvement of the national economy, raises in Russian society serious concern and distrust to public institutions, creates a negative image of Russia in the international arena and is rightly regarded as one of the threats to security to the Russian Federation.



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Good on paper, but no actual progress

In this regard, the development of anti-corruption measures, primarily to address its root causes, and implementation of such measures in the context of the development country as a whole is becoming imperative.”



What does it take then?

“Management is doing things right; leadership is doing the right things.”

Peter Drucker

TINA + FCA = Qui Tam trouble

Campbell v. Lockheed Martin

Lockheed settled a case about the **Truth in Negotiations Act**, 10 U.S.C. § 2306a, and the **False Claims Act**, 31 U.S.C. § 3729, *et seq.* “The *qui tam* suit accused Lockheed Martin of deliberately inflating the cost of four contracts for the purchase of navigation and targeting pods for military jets. Campbell’s complaint alleged that Lockheed Martin violated the Act by knowingly failing to provide current, accurate and complete cost and pricing data to Air Force contract negotiators. (*emphasis mine*)

Three Main Prohibitions:

1) Obtaining or Disclosing Procurement Related Information

Contractors are prohibited from knowingly obtaining any other contractor's bid or proposal information or source selection information regarding an ongoing procurement.

2) Prohibition on Employment Contacts

A federal official participating “personally and substantially” in a competitive acquisition in excess of \$100,000 must report employment –related discussion with an offeror or bidder to his/her manager and agency ethics advisor. The official must either reject the employment offer or recuse him/herself from further participation in the procurement action.

3) Restrictions on Future Employment

Government officials involved in the source selection or program management of a contract that exceeds \$10 million, may be barred for 1 year from working for the contractor that holds the contract. The restriction also applies to any Government employee who exercises the authority to decide/award/ or compromise transactions work in excess of \$10 million, including rate negotiations and claims.

Procurement Integrity Practice Tips

- ▶ Train employees who may initiate contact with prospective hires (especially HR Recruiters) on Gov't postemployment restrictions.
- ▶ If possible, have the former Gov't employee provide an ethics advisory opinion letter from their agency ethics advisor. These are often referred to as "30-day letters" and are referenced in FAR 3.104-6.
- ▶ Ask that the former-government employee sign a statement that they understand and agree to comply with any applicable postemployment restrictions. This could be added to the employment application or employment agreement.

Darlene Druyun (Air Force) and Michael Sears (Boeing) did not comply with the Procurement Integrity Act. See what happened in the next slide.....

The Boeing tanker scandal

\$ Darlene Druyun oversaw billions of dollars in procurements.

\$ She retired from the Air Force in 2002 and immediately went to work for Boeing managing missile defense contracts.

\$ She began serving her prison sentence in January 2005 for violating federal conflict of interest laws by negotiating a \$250,000-a-year job with Boeing, admitted favoring Boeing in exchange for jobs for her daughter and son-in-law.



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But wait... there's more!

- \$ Defense Department reviewed all contracts that Druyun oversaw or awarded from 1993 until she retired for signs of fraud.
- \$ Boeing CEO Phil Condit resigned a week after she was fired, and Boeing CFO Michael Sears was sentenced to six months for secretly negotiating to hire Druyun. Boeing paid a \$615 million dollar fine.
- \$ Air Force Secretary James Roche and Air Force Assistant Secretary for acquisition Marvin Sambur left the Pentagon as a result of the Druyun scandal.



Organizational Conflicts of Interest (OCIs) & Limitations on Future Contracting (LOFCs)

- ▶ FAR Subpart 9.5 discusses OCIs
- ▶ Conflicts of Interests are defined as follows:
 - “Because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.”

Limitations on Future Contracting

- ▶ Over the past few years, LOFC clauses have been increasingly found in government contracts.
- ▶ Some Gov't contracting officers see them as a way to prevent protests and believe that they are necessary in cases where an OCI cannot be effectively mitigated. Some contractors see them as unnecessarily limiting competition and foreclosing the Gov't from obtaining the best & most responsible offerors.
- ▶ LOFC clauses can be a stand-alone clause or embedded into the OCI clause. They're typically phrased as:
“IF YOU DO THIS, THEN YOU CANNOT DO THAT”

LOFC / OCI Practice Tips

- ▶ Train staff how to properly identify OCIs & LOFCs. Sometimes they can be difficult to recognize. In addition to Gov't contracts, OCI/LOFC clauses can appear in commercial agreements, IP transactions, and exclusive licenses.
- ▶ If you don't already have one in place, develop a business system to identify and track possible conflicts between proposed work and current or prior work. Such a system can help prevent contractual and ethical breaches and provide you with advance notice to determine if a conflict can be mitigated or if a waiver should be sought.

Gifts, Gratuities, Bribes & Kickbacks

- ▶ Federal Executive Branch employees are prohibited from seeking or accepting gifts from “prohibited sources” (contractors).
- ▶ Gifts include: any gratuity, favor, discount, entertainment, hospitality, loan, forbearance or other item of monetary value.
- ▶ Gifts do not include: Modest items of food & refreshment such as coffee, soft drinks and donuts (not meals) Items of little intrinsic value (e.g. cards, certificates, plaques for presentation purposes) and anything for which the Gov't employee pays full market value.

Gifts, Gratuities, Bribes & Kickbacks (cont'd)

- ▶ Unless one of the exclusions applies, the gift must have a market value of \$20 or less per occasion. The value of multiple gifts to the same Gov't employee by the same contractor cannot exceed \$50 in one year.
- ▶ Practice Tip: If a gift is over \$20, the government employee must pay the entire amount. *For example, you cannot give a Gov't employee tickets to a sporting event with a face value of \$30 and ask them to pay the extra \$10.*

Foreign Corrupt Practices Act (FCPA)

- ▶ The FCPA makes it illegal for a company, directly or through other, to give or offer any payment, gift, bribe or anything of value to a foreign official, political party, or candidate for the purpose of influencing an official act, or a failure to act, or inducing the foreign official or party to use influence to affect the decision of a foreign government or agency.
- ▶ Even an extremely small payment or gift to a foreign official can result in a violation of the FCPA

Consequences of FCPA violation

- ▶ On 12/15/08, Siemens pleaded guilty to violating the FCPA's internal-controls and books-and-records provisions. They face \$800 million in fines and "disgorgement" penalties. Siemens cooperated during the Gov't investigation, avoiding a guilty plea to fraud and debarment.
- ▶ Justice and the SEC investigated Siemens for failure to prevent or account for improper payments made to foreign officials. Siemens paid bribes to secure contracts around the world. According to Gov't filings, Siemens made in excess of 4,200 improper payments totaling \geq \$1.4 billion, while mischaracterizing the bribes and using improper accounts to conceal such payments from auditors.

But that's not all...

- ▶ In 2006, outside auditors reported to Siemens that at least 250 suspicious payments were made through the parent to companies in foreign jurisdictions. Neither the board nor the compliance office made any attempt to investigate or explore whether there were similar instances of wrongdoing.
- ▶ Siemens also failed to adequately investigate after learning of government inquiries into corruption in Israel, Hungary, Azerbaijan, Taiwan, and China.
- ▶ The Siemens settlement is ~ 20 times larger than any previous penalty under the FCPA.

FCPA red flags

- ▶ “Special” requests for payment that are out of proportion to those provided for under the contract;
- ▶ Requests for payment for stated purposes not provided for in an agreement;
- ▶ Requests that payment be made to third parties (such as reimbursement of a government official’s travel or other expenses);
- ▶ Requests for payment in a form or to a bank or business location not set out in the agreement;
- ▶ Payments that are drawn from other than the normal accounts appropriate for the type of payment; and
- ▶ A lack of documentation supporting a payment request.

Whistleblower Protection



A federal agency violates the Whistleblower Protection Act if it takes or fails to take (or threatens to take or fail to take) a personnel action with respect to any employee or applicant because of any disclosure of information by the employee or applicant that he or she reasonably believes evidences a violation of a law, rule or regulation; gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.

Whistleblower Protection purpose

- ▶ The underlying purpose of whistleblower protection laws is to allow employees to stop, report, or testify about employer actions that are illegal, unhealthy, or violate specific public policies. However, one of the most hotly contested issues in whistleblower law is the exact definition of protected whistleblower activity.
- ▶ You must report to OIG evidence or allegations of misconduct, research misconduct, accounting irregularities, fraud, waste, abuse, or corruption.

International Emergency Economic Powers Act (IEEPA)

- ▶ Schlumberger Oilfield Holdings Ltd. pleaded guilty and agreed to pay over **\$232 million** for violating U.S. sanctions by facilitating trade with Iran and Sudan
- ▶ Even though work was done outside the U.S. it was planned from their Texas offices
- ▶ They disguised embargoed destinations in emails calling Iran the “Northern Gulf” and Sudan “Southern Egypt”

How can we remember all this?



Remember “CATS GO WIFFF”

Conflicts of Interest

Anti-Trust

Truth in Negotiations Act

Sarbanes-Oxley

Gifts & Gratuities

Outside Activities

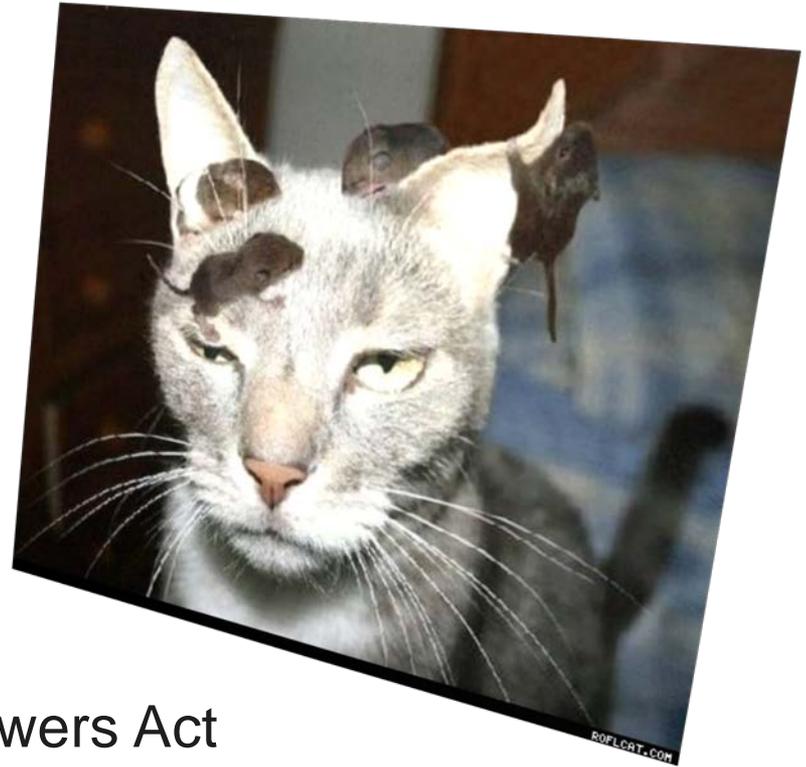
Whistleblower Protection

International Emergency Economic Powers Act

False Claims Act

Fraud, Waste & Abuse

Foreign Corrupt Practices Act



How did we get into this trouble?

Because voluntary compliance wasn't working and Federal auditors felt like they were being ignored.

Therefore, the Federal Government rolled out revisions to FAR Part 3 (improper practices) and FAR Part 9 (Suspension & debarment) and made disclosures of ethical violations mandatory under FAR 52.203-13



Why did we need more rules?

FAR changes were in response to the “Close the Contractor Fraud Loophole Act,” Public Law 110-252, Title VI, Chapter 1

- ▶ Concern regarding government overpayments
- ▶ Department of Justice voluntary disclosure program was not its achieving goals
- ▶ Government not benefiting from Sarbanes- Oxley requirements
- ▶ Government not equipped to identify all improper behavior by contractors
- ▶ Contractors **will not** behave appropriately absent requirement to disclose (*lack of trust – no surprise!*)

FAR subpart 3.10

Contractor Code of Business Ethics and Conduct

3.1002 Policy.

- (a) Government contractors must conduct themselves with the highest degree of integrity and honesty.
- (b) Contractors should have a written code of business ethics and conduct. To promote compliance with such code of business ethics and conduct, contractors should have an employee business ethics and compliance training program and an internal control system that —
- (1) Are suitable to the size of the company and extent of its involvement in Government contracting;
 - (2) Facilitate timely discovery and disclosure of improper conduct in connection with Government contracts; and
 - (3) Ensure corrective measures are promptly instituted and carried out.



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What should we do about it?

- ▶ As usual, when faced with new requirements, it became an “economic stimulus” for lawyers and accountants who will have to negotiate and litigate hundreds of cases before the details become clearer.
- ▶ Training staff and establishing new ethics policies will require more effort.
- ▶ Avoiding these pitfalls will keep your organization out of the headlines and give you an edge over those who don't think it could happen to them.



Requirements

Contract Clauses

FAR 52.203-13 Contractor Code of Business Ethics and Conduct

Within 30 days of contract award:

Written code of business ethics & conduct

Make a copy available to each employee engaged in performance of the contract

Exercise due diligence to prevent and detect criminal conduct

Timely disclosure to the Inspector General with copy to the C.O. whenever you have “credible evidence” that a “principal,” employee, agent or subcontractor has violated:

Federal criminal laws – fraud, COI, bribery or gratuity

False Claims Act



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But that's not all

- ▶ Within 90 days of Contract Award:
 - Establish an ongoing Business Ethics Awareness and Compliance Program
 - Conduct training programs and disseminate information appropriate to an individual's respective roles and responsibilities.
 - Establish an internal control system which ensures:
 - Procedures are implemented for timely discovery of improper conduct
 - Corrective-action measures are carried out
 - Assignment of responsibility is made at a high level to assure compliance



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What else???

- Efforts are taken not to hire “Principals” who are in violation of your company’s code of conduct
- Monitor and Audit to detect criminal conduct
- Periodic reviews of business ethics practices
- Controls and Instructions encourage reporting
- Disciplinary action for - or failing to take - “reasonable steps” to prevent improper conduct
- Timely disclosure to IG and C.O.

These 90-day requirements (Compliance Program/Internal Controls) do not apply to small business concerns or commercial item contracts.

- ▶ The suspension & debarment rule changes require the mandatory disclosure of violations of:
 - Federal criminal laws – fraud, COI, bribery or gratuity
 - False Claims Act *plus*
 - Significant overpayment(s) on contracts, other than overpayments resulting from contract financing payments.
- ▶ Disclosure obligation lasts for 3 years after final payment

Important words not defined

- ▶ The term “principal” should be interpreted broadly. “Timely” allows the contractor to do a preliminary investigation of the evidence to determine if it is credible before deciding whether or not to disclose. (But we are still required to “immediately notify” the Government C.O. of overpayment under the FAR prompt payment clauses.)
- ▶ If you need to make a disclosure, check the agency’s OIG website to determine if electronic reporting is an option.

We cannot just look the other way

“THE ONLY THING
NECESSARY FOR THE
TRIUMPH OF EVIL IS
THAT GOOD MEN DO
NOTHING.”

Edmund Burke



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What things must be disclosed?

- ▶ The new rule requires disclosure of credible evidence.
- ▶ The following types of information should be reported:
 - Company name and location(s) of the affected divisions;
 - Company official name and contact information;
 - Date when the company learned of the potential violation
 - How the company learned of the violation;
 - Credible factual evidence
 - Remember that no attorney/client privileged information or work product needs to be disclosed;
 - Mark “proprietary” and “confidential” information for FOIA protection

Describe any corrective actions taken, identify contract(s) associated with the violation: contract #, type, value, etc.

Get your attorney involved at the start

- ▶ Avoid assigning an attorney to oversee compliance with the internal control measures. This will avoid complicating privilege issues. The “privilege” attaches to legal (not business) advice.
- ▶ Rule does not require waiver of Attorney-Client privilege or attorney work product or Fifth Amendment rights.
- ▶ Rule does not restrict internal investigations or defense of violations.
- ▶ Recommend that access to staff by the OIG occur with the knowledge and possible participation of company counsel.
- ▶ Communications by attorneys during investigations remain protected (but not mundane business advice)

Other considerations

- ▶ Efforts must be taken not to hire “principals” who are in conflict with the company’s code of ethics (*i.e. its “principles”*)
- ▶ Monitor and audit to detect criminal conduct.
- ▶ Periodically review business ethics practices.
- ▶ Once the decision to disclose is made, be sure full cooperation is provided to the Government.
- ▶ Report to senior management and to the board of directors on compliance.



TEAMWORK

NEVER UNDERESTIMATE THE PERSONAL SATISFACTION
OF HAVING PLENTY OF OTHERS TO BLAME FOR YOUR OWN MISTAKES.

Penalties for noncompliance

- ▶ Suspension or debarment
- ▶ Prosecution for violation of the underlying criminal law in Title 18 of the U.S. Code or fines under applicable civil laws
- ▶ False Claims Act violation
- ▶ Breach of contract action
- ▶ Poor performance ratings
- ▶ Damage to stock value



You can make a difference

“Personal leadership is the process of keeping your vision and values before you and aligning your life to be congruent with them.”

Stephen Covey, author

Learning to “Love the Truth”

- ▶ Setting the “tone from the top”
- ▶ More than just rules – it’s a way of life
- ▶ Back to basics approach to values
- ▶ “The quality goes in before the name goes on”
- ▶ No legal or contractual requirement can replace self-regulation founded on integrity
- ▶ The “displacement theory” of ethical behavior
- ▶ Take the initiative and make a “first strike”
- ▶ Embrace ethics and enjoy the ride

Benefits of Ethical Conduct

- ▶ When you view ethical behavior as the norm, then a greater sense of trust develops among employees, regulators and the public
- ▶ Customers, clients and others who have dealt with unreliable organizations in the past will come to expect better treatment from you
- ▶ Mark Twain said, “If you tell the truth, you don’t have to remember anything.” That lets us concentrate on doing what we’re paid for.

Questions?



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POP QUIZ

- ▶ What does “CATS GO WIFFF” mean?
- ▶ At what point does TINA apply?
- ▶ Why should you care about an LOFC clause?
- ▶ Who are the sort of “principals” you must vet?
- ▶ What’s the difference between compliance and incorporation of these principles?
- ▶ The Procurement Integrity Act has three main prohibitions - what are they?
- ▶ FAR 52.203-13 “Contractor Code of Business Ethics and Conduct” requires that a contractor must do what to whom and when?

Staying on the right road

