

Compliance Plans, Ethics and Internal Controls – The New Rules

It seems that every few years or so, the government goes on a push to ensure that contractors are doing everything they can to curb fraud, waste and abuse. The latest iteration came on November 23, when the Federal Acquisition Regulation was amended to address the establishment of contractor codes of business ethics and conduct, to promote compliance with such plans, and to ensure specified internal control procedures for selected contractors and subcontractors. These new regulations will affect most contractors as the requirements are incorporated into new contract awards.

Applicable Contracts

The new regulations apply to federal contracts in excess of \$5 million and a period of performance of more than 120 days. Exceptions to the regulations are granted for the acquisition of commercial items under FAR Part 12 procurements or when the work effort will be performed entirely outside the United States. The newly issued clauses, FAR 52.203-13 and FAR 52.203-14, will be incorporated into the applicable contracts.

Business Ethics and Conduct

Within 30 days after contract award (of a contract with these clauses included), the contractor must have a written code of business ethics and conduct, and provide a copy of the code to each employee engaged in performance of the contract. When developing a code of ethics and conduct, some of the typical provisions you would see include:

- Emphasis on commitment to compliance and corporate integrity.

- Commitment to compliance with all procurement laws and regulations.
- Strict compliance with the company's internal policies and procedures.
- Immediate disciplinary action against any employee or officer whose conduct violates laws, regulations or business ethics.
- Prompt reporting of perceived violation.

A company's general code of ethics should be supplemented with detailed written policies and procedures specific to the company.

Education and Training

Communication to employees of a company's code of ethics as well as its internal policies and procedures is one of the most important aspects to an effective compliance program. This can be achieved through comprehensive training or retraining programs as well as through effective internal actions and communications. An ethics and compliance program will never be effective unless the management adheres to it in practice.

The new regulations require an awareness program as well as an internal control system for certain matters. Fortunately, small business concerns are exempted from this provision, though it still makes good business sense to implement such a plan.

The rule calls for:

- An ongoing business ethics and business conduct awareness program; and
- An internal control system that (1) facilitates timely discovery of improper conduct in connection with government contracts, (2) establishes an internal report mechanism, such as a hotline, to report instances of improper conduct, (3) provides for internal and/or external audits as appropriate, and (4) provides for disciplinary action for improper conduct.

Applicability to Subcontractors

These clauses and provisions must be included in any subcontracts let by the contractor that have a value in excess of \$5 million and a period of performance of more than 120 days. However, if the subcontract is for the acquisition of a commercial item or it will be performed entirely outside the United States, then these subcontracts would be exempt.

Conclusion

I have always believed that whenever you have substantial turnover in Congress, you are going to have substantial regulatory changes within government contracting, as everybody attempts to mold procurement to their own point of view. When the Democrats took control of Congress, one of their primary initiatives was to ensure that fraud, waste and abuse in contracting was being caught and minimized. Having an effective ethics and compliance program is a good first step to ensuring that fraud, waste and abuse are discovered and handled appropriately.

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