

Today's Agenda

- The Government Perspective
- Value Proposition
- Final Rule – FAR Contractor Code of Business Ethics and Conduct (Nov. 23, 2007)
- Proposed Rule – FAR Compliance Program and Contractor Integrity Reporting (Nov. 14, 2007)
- High Risk Compliance Areas
 - Domestic preferences (Trade Agreements Act/Buy American Act)
 - Most favored pricing clauses
 - Subcontractor flowdown requirements
 - Gifts and gratuities to federal employees



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The New Federal Compliance Mandate

Navigating the Mandatory Compliance Program
Requirements for Commercial Companies Doing Business
with the Federal Government

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The Government Perspective

- Duke Cunningham
- Jack Abramhoff
- David Safavian
- The Alaska Investigations
- Katrina Task Force
- Iraq Contracting
- Procurement Fraud Task Force
- Purchase/Travel Card Abuse
- 100+ False Claims Act Cases related to Trade Agreements Act
- Health Care Scrutiny
- DOD Voluntary Disclosures



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Value Proposition

- Factors in criminal prosecution and amount of fines/penalties
- Factors in civil false claims suits and fines/penalties
- Factor in whether a false claim was knowingly presented (e.g., reckless disregard associated with failure to have a compliance program)
- Factors in suspension/debarment decision (collateral consequences: state and local sales, export control licenses)
- Commercial business
- Press/public attention



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Code of Conduct / System of Internal Controls

- Published November 23, 2007 (72 Fed. Reg. 65,873)
- New policies at FAR 3.1002 (“Guidance to all Government contractors”):
 - “Government contractors must conduct themselves with the highest degree of integrity and honesty.”
 - “Contractors should have a written code of business ethics and conduct. To promote compliance with such a 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 the 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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Code of Conduct / System of Internal Controls

- Final Rule adds 2 new contract clauses:
 - FAR 52.203-13 “Contractor Code of Business Ethics and Conduct”
 - FAR 52.203-14 “Display of Hotline Poster(s)”
- FAR 52.203-13 “Contractor Code of Business Ethics and Conduct”
 - Must be added by contracting officer to new FAR contracts/solicitations for > \$5 million (and 120+ performance days) issued after December 24, 2007
 - Not effective for new task/delivery orders
 - Potential contract modifications
 - Prospective only
 - \$5 million threshold includes base year + option years.



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Code of Conduct / System of Internal Controls

- FAR 52.203-13 “Contractor Code of Business Ethics and Conduct” Requirements:
 - Written Code of Business Ethics and Conduct (30 days of award)
 - Provide a copy to each “employee engaged in performance of contract” (independent contractors, consultants, indirect functions?)
 - Promote compliance



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Code of Conduct / System of Internal Controls

- FAR 52.203-13 “Contractor Code of Business Ethics and Conduct”
 - Create “Ongoing Business Ethics and Business Conduct Awareness Program and Internal Control System” (90 days)
 - Internal Control System shall:
 - Facilitate timely discovery of improper conduct in connection with government contracts
 - Ensure corrective measures are promptly instituted and carried out
 - Internal Control System Should:
 - Provide for periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Contractor’s code of business ethics and conduct and the special requirements of Government contracting
 - Provide 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 and/or external audits
 - Disciplinary action for improper conduct



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Code of Conduct / System of Internal Controls

- FAR 52.203-14 “Display of Hotline Poster(s)”
 - If the contractor has implemented a business ethics and conduct awareness program, including a reporting mechanism, such as a hotline poster, then the contractor need not display any agency fraud hotline posters except those required by DHS.
 - If contractor has not implemented a program:
 - Contractor shall prominently display agency hotline poster(s) identified by contracting officer in common work areas in business segments performing work under contract
 - Post electronic version on Company website



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Proposed Mandatory Disclosure Rule

- Proposed Rule – FAR Compliance Program and Contractor Integrity Reporting (Nov. 14, 2007)
- “The Contractor shall notify, in writing, the agency office of the Inspector General, with a copy to the Contracting Officer, whenever the Contractor has reasonable grounds to believe that a principal, employee, agent, or subcontractor of the contractor has committed a violation of Federal Criminal law in connection with the award or performance of this contract or any subcontracts thereunder.”
- Full cooperation with any Government agencies responsible for audit, investigation or corrective actions.”



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High Risk Compliance Areas

- High Risk Compliance Areas
 - Domestic preferences (Trade Agreements Act/Buy American Act)
 - Most favored pricing clauses
 - Subcontractor flowdown requirements
 - Gifts and gratuities to federal employees



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Domestic Preferences

- Trade Agreements Act
 - Products you supply (even as a reseller) must be manufactured or substantially transformed in the U.S. or a country that has signed the World Trade Organizations – Government Procurement Agreement
 - You can't supply products manufactured in CHINA
 - You can't supply product manufactured in Taiwan or Malaysia
- Buy American Act/Berry Amendment
 - Watch for procurements that include a clause requiring manufacture in the United States
 - Trade Agreements Act will override most Buy American Act provisions, but you need a careful legal assessment if the clause is in the contract.
 - Certain products for the Department of Defense MUST be manufactured in the United States



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Domestic Preferences

- Current TAA GPA Countries
 - Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, Sweden, UK
 - Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovak Republic and Slovenia
 - Canada
 - Iceland
 - Israel
 - Japan
 - Korea
 - Liechtenstein
 - Norway
 - Singapore
 - Switzerland



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Most Favored Pricing Clauses

- Price Reductions/Price Warranty
 - A price reduction shall apply to purchases under this contract if, after the date negotiations conclude, the Contractor—
 - (i) Revises the commercial catalog, pricelist, schedule or other document upon which contract award was predicated to reduce prices;
 - (ii) Grants more favorable discounts or terms and conditions than those contained in the commercial catalog, pricelist, schedule or other documents upon which contract award was predicated; or
 - (iii) Grants special discounts to the customer (or category of customers) that formed the basis of award, and the change disturbs the price/discount relationship of the Government to the customer (or category of customers) that was the basis of award.



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Mandatory Subcontractor Flowdown Requirements

- 52.219-8, Utilization of Small Business Concerns (MAY 2004)
- 52.222-26, Equal Opportunity (MAR 2007) (E.O. 11246)
- 52.222-35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (SEP 2006) (38 U.S.C. 4212(a))
- 52.222-36, Affirmative Action for Workers with Disabilities (JUN 1998) (29 U.S.C. 793)
- 52.222-39, Notification of Employee Rights Concerning Payment of Union Dues or Fees (DEC 2004) (E.O. 13201)
- 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (FEB 2006) (46 U.S.C. Appx 1241 and 10 U.S.C. 2631)



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Gifts and Gratuities for Federal Employees

- What types of things are we talking about?
 - A gift, gratuity, or entertainment includes anything of value, including cash, a meal, transportation, training, lodging, a discount, advertising mementos, alcoholic beverages, golf outings, hunting trips, other forms of recreation, and tickets to sporting or cultural events.
- Why does it matter?
 - Criminal bribery and gratuities (18 U.S.C. § 201)
 - Office of Government Ethics Standards of Conduct Regulation “bright line” rules for Executive Branch employees
 - FAR Gratuities clause – contract cancellation
 - Debarment and suspension risk
 - Publicity



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Gifts and Gratuities for Federal Employees

- Gift guidelines for Executive Branch employees:
 - Know your Company's Policy!
 - Never offer cash
 - Never offer anything of value in excess of \$20
 - Coffee and donuts and plaques are o.k.
 - Working lunches < \$20 per government employee are o.k.
 - Follow the \$50 annual limit per government employee rule
 - Follow the same rules for close relatives of federal employees, including offers of employment
 - Financial interests of relatives are often imputed to the government employee



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Gifts and Gratuities for Federal Employees

- Gift guidelines for Legislative Branch personnel:
 - Know your Company's policy!
 - The House and Senate have banned the acceptance of most gifts from outside sources
 - Even a gift to a legislative branch member's "significant other" is banned if provided because of member's official position
 - Gifts of free attendance at certain widely attended gatherings are acceptable if event is sponsored by your Company and invitation is open to the public



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Gifts and Gratuities for Federal Employees

- Pitfalls
 - “Everyone does it”
 - “We’re friends”
 - “Sometimes she pays, sometimes I pay”
 - “Who’s going to find out?”
- Traps for the unwary
 - Contractor personnel assisting the government
 - Industry wining/dining practices off limits



Conclusion

- Questions?

