

NATIONAL CONTRACT MANAGEMENT ASSOCIATION

**NCMA BOSTON CHAPTER'S  
MARCH WORKSHOP  
MARCH 13, 2013**

**MANDATORY DISCLOSURE RULE &  
ETHICS COMPLIANCE IN A NUTSHELL**

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Business Success Through Contract Management Excellence

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## AGENDA

- **Why do you need to know about the Mandatory Disclosure Rule under the “Contractor Code of Business Ethics and Conduct” clause**
- **What is the Code of Business Ethics and Conduct that is required under FAR 52.203-13?**
- **How do you structure an ethics awareness program and internal control system to protect your company’s business integrity and contractor responsibility?**
- **What does “reportable conduct” or “credible evidence” mean?**
- **What are your responsibilities if you find both “reportable conduct” and “credible evidence” and how do you determine “timely disclosure”?**

## **Why do you need to know about the Mandatory Disclosure Rule & the “Contractor Code of Business Ethics and Conduct” clause?**

- Large contractors are required to have “real compliance” programs, but.....
  - **Can small businesses & commercial firms afford to not know about the Rule?**
- Contractors are expected to fully cooperate in any Gov’t fraud and corruption investigations arising from their contracts
  - **What does “fully cooperate” mean?**
- All Contractors are expected to disclose to the PCO and IG, if they become aware of fraud or corruption in their contracts
  - **What is expected to be disclosed?**

## **What is the Code of Business Ethics and Conduct required under FAR 52.203-13(b)?**

**(1) Within 30 days after contract award, unless the Contracting Officer establishes a longer time period, the Contractor shall—**

- (i) Have a written code of business ethics and conduct; and**
- (ii) Make a copy of the code available to each employee engaged in performance of the contract.**

**(2) The Contractor shall—**

- (i) Exercise due diligence to prevent and detect criminal conduct; and**
- (ii) Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.**

## **What is the Code of Business Ethics and Conduct required under FAR 52.203-13(b)?**

**(3)(i) The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, 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 ([31 U.S.C. 3729-3733](#))**

**THE CLAUSE DISCUSSES FOUR TYPES OF DISTINCT CONDUCT, BUT THE RULE OVERLAPS A PLETHORA OF OTHER SECTIONS -- BOTH CRIMINAL AND CIVIL**

## What is a “principal, employee, agent or subcontractor?”

**“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 division or business segment; and similar positions).**

FAR 52.203-13(a), Definitions

- **UNDER THE GOVERNMENT-WIDE DEBARMENT AND SUSPENSION RULES, “Principal means — (a) An officer, director, owner, partner, principal investigator, or other person within a participant with management or supervisory responsibilities related to a covered transaction; or (b) A consultant or other person, whether or not employed by the participant or paid with Federal funds, who —**
  - (1) Is in a position to handle Federal funds;
  - (2) Is in a position to influence or control the use of those funds; or,
  - (3) Occupies a technical or professional position capable of substantially influencing the development or outcome of an activity required to perform the covered transaction.”

2 CFR § 180.995, Principal

**WHICHEVER EMPLOYEES THE CONTRACTOR DETERMINES ARE COVERED BY THE “PRINCIPAL” DEFINITION, ARE THE SAME EMPLOYEES WHO ARE CERTIFIED AS THE CONTRACTOR’S REPS UNDER FAR CLAUSE 52.209-5 & ARE LISTED IN THE ORCA DATABASE**

## **What is a “principal, employee, agent or subcontractor?”**

**“Agent” means any individual, including a director, an officer, an employee, or an independent Contractor, authorized to act on behalf of the organization.**

**“Subcontract” means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract.**

**“Subcontractor” means any supplier, distributor, vendor, or firm that furnished supplies or services to or for a prime contractor or another subcontractor.**

**FAR 52.203-13(a), Definition**

- THERE IS NO DISTINCTION BETWEEN LARGE OR SMALL BUSINESS AS SUBCONTRACTORS, BUT THE CONTRACTOR IS REQUIRED TO FLOW DOWN FAR CLAUSE 52.203-13 TO ITS SUBCONTRACTS WITH A VALUE IN EXCESS OF \$5,000,000 AND A PERIOD OF PERFORMANCE GREATER THAN 120 DAYS**



## **Who's easier to control -- agent or subcontractor?**

### **Arguably -- the agent - Why?**

- **Contractors exert greater control over their agents -- often because of the contractual relationship that exists**
  - **It's easier to conduct due diligence reviews**
  - **It's easier to train the agent than the subcontractor**
  - **It's easier to investigate any potentially reportable allegations**

## **HOW WILL YOU VERIFY WHETHER THE SUBCONTRACTOR HAS CODES, COMPLIANCE PROGRAMS, OR INTERNAL CONTROLS?**

- **The guidance doesn't state that you must verify the existence of such programs -- but, should you? What is at risk, if you don't?**
- **Will a certification at the time of a subcontractor's bid submission be enough to protect you?**

## **What is the Code of Business Ethics and Conduct required under FAR 52.203-13(c)?**

**Business ethics awareness and compliance program and internal control system. . . The Contractor shall establish the following within 90 days after contract award, unless the Contracting Officer establishes a longer time period:**

### **(1) An ongoing business ethics awareness and compliance program:**

- (i) This program shall include reasonable steps to communicate periodically and in a practical manner the Contractor's standards and procedures and other aspects of the Contractor's business ethics awareness and compliance program and internal control system, by conducting effective training programs and otherwise disseminating information appropriate to an individual's respective roles and responsibilities.**
- (ii) The training conducted under this program shall be provided to the Contractor's principals and employees, and as appropriate, the Contractor's agents and subcontractors.**

### **(2) An internal control system**

**How do you structure an ethics awareness program and internal control system to protect your company's business integrity and contractor responsibility?**

**The Contractor's internal control system shall—**

**(i)(A) Establish standards and procedures to facilitate timely discovery of improper conduct in connection with Government contracts; and**

**(B) Ensure corrective measures are promptly instituted and carried out.**

**(ii) At a minimum, the Contractor's internal control system shall provide for the following:**

**(A) Assignment of responsibility at a sufficiently high level and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system.**

**(B) Reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business ethics and conduct.**

**How do you structure an ethics awareness program and internal control system to protect your company's business integrity and contractor responsibility?**

**(C) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Contractor's code of business ethics and conduct and special requirements of Government contracting, including—**

**(1) Monitoring and auditing to detect criminal conduct;**

**(2) Periodic evaluation of the effectiveness of the business ethics awareness and compliance program and internal control system, especially if criminal conduct has been detected; and**

**(3) Periodic assessment of the risk of criminal conduct, with appropriate steps to design, implement, or modify the business ethics awareness and compliance program and the internal control system as necessary to reduce the risk of criminal conduct identified through this process.**

**How do you structure an ethics awareness program and internal control system to protect your company's business integrity and contractor responsibility?**

**(D) An internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.**

**(E) Disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct.**

## What does “reportable conduct” include?

- Fraud violations -- “a **knowing misrepresentation of the truth or concealment of a material fact** to induce another to act to his or her detriment. . . .”
  - “Signifigicant overpayment(s) other than overpayments resulting from contract financing payments as defined by 32.001
  - Violations arising from indirect costs (false invoices related to a Gov’t contract)
- Procurement Integrity Act violations
- Trade Agreement Act Violations
- Buy American Act Violations
- Foreign Corrupt Practices Act violations
- Arms Export Control Act/International Traffic Arms Regulations violations

## What does “significant overpayment” mean?

- The interpretation is dependent upon the following facts
  - The overall value of the contract;
  - Any non-monetary affect on contract performance;
  - The frequency of overpayment;
  - The impact on the program;
  - The root cause of the overpayment, and
  - The handling of similar overpayments in the past.

**DCAA DEFINES “SIGNIFICANT OVERPAYMENT,” GENERALLY IN ITS CAM 5-1100 AND 6-1007, AS PAYMENT IS \$50,000 ON A SINGLE ISSUE OR CONTRACT AND (1) THE CONTRACTOR HAS NOT NOTIFIED THE GOV’T AND (2) THE OVERPAYMENT IS >30 DAYS OLD AND HASN’T BEEN RETURNED.**

**ABA’s “Guide to Mandatory Disclosure Rule”. . . P.60 & FN 35**

## **What does “credible evidence” include?**

- Based upon an evaluation of all of the facts and circumstances that a contractor becomes aware of during a preliminary investigation**
  - How thorough an investigation has occurred of the allegation or concern?**
  - Was the allegation/concern a vague, anonymous assertion?**
  - Factors that might bear on the credibility of the information**
    - What is the background/reliability of the individual making the statement?**
    - Did the individual have direct knowledge of the circumstances?**
    - What are the possible motivations of the individual making the report?**
    - Is there specificity of the information provided?**
    - What is the extent of corroboration of the information (i.e., documentation, direct evidence (photographs, audio/visual info, witnesses, the investigation itself)?**

**To what extent and type of contradictory information is there?**



## What are the requirements of “Full Cooperation?”

**“Full cooperation”—**

**(1) Means disclosure to the Government of the 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 response to Government auditors’ and investigators’ request for documents and access to employees with information;**

**(2) Does not foreclose any Contractor rights arising in law, the FAR, or the terms of the contract. It does not require—**

- A Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or**
- Any officer, director, owner, or employee of the Contractor, including a sole proprietor, to waive his or her attorney client privilege or Fifth Amendment rights; and**

**(3) Does not restrict a Contractor from—**

- Conducting an internal investigation; or**
- Defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.**

**FAR 52.203-13(a), Definitions**

## **OK -- so what's it mean?**

- **Full cooperation by operation of the clause appears to only apply to other than small businesses selling other than commercial items, but. . .**
  - **The Gov't is highly unlikely to apply a different standard of cooperation amongst contractors - large or small, commercial or not**
  - **Contractors may be subject to other statutory, regulatory, or contractual terms that require cooperation with Gov't auditors and investigators, and**
  - **The amount of detail in your disclosure may call into question as to the sufficiency of the evidence and the forthrightness of the information**
    - **BE AWARE THAT ON-LINE FORMS FOR DISCLOSURE MAY REQUIRE MORE INFORMATION THAN THE RULE ENVISIONS (i.e., SPECULATION ON THE FACTS PRIOR TO THE COMPLETION OF THE INVESTIGATION, WAIVER OF ATTORNEY-CLIENT PRIVILEGE/ WORK PRODUCT DOCTRINE)**

## What are your responsibilities?

To make a “[t]imely disclosure, in writing, to the agency OIG, with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of any Government contract performed by the Contractor or a subcontractor . . . .

(1) If a violation relates to more than one Government contract, the Contractor may make the disclosure to the agency OIG/Contracting Officer responsible for the largest dollar value contract impacted by the violation

– **THE SERVICE WITH THE LARGEST DOLLAR VALUE WILL TAKE THE LEAD ON ANY RESULTING INVESTIGATION OF THE DISCLOSURE**

(2) If the violation relates to an order against a Government[-]wide acquisition contract, a multi-agency contract, a multiple-award schedule contract. . . , or any other procurement instrument intended for use by multiple agencies, the Contractor shall notify the [ordering agency OIG and the agency IG] responsible for the basic contract, and the respective agencies’ contracting officers

(3) The disclosure requirement for an individual contract continues until at least 3 years after final payment on the contract.

## What is “timely disclosure?”

- How soon is soon enough for disclosures?
  - It’s dependent upon the facts;
  - The complexity of the law and the issues raised; and
  - The effort it takes to determine whether “credible evidence” exists through internal investigations by the contractor

**THE RULE INTENDS THAT ONCE CREDIBLE EVIDENCE EXISTS THAT THE OBLIGATION TO REPORT IS IMMEDIATE AND THAT THERE SHOULD BE NO DELAYS IN COMMUNICATING THE SITUATION TO THE GOV’T**

**TO DO OTHERWISE -- RISKS SUSPENSION AND DEBARMENT ON THE AGENCY LEVEL, AND PROSECUTION PERHAPS CRIMINALLY AND/OR CIVILLY BY DOJ**

**CONSIDER WHETHER AN EARLY “HEADS-UP” TO THE GOV’T IS IN YOUR BEST INTERESTS -- BUT DON’T WAIT TOO LONG - ERE ON THE SIDE OF CAUTION, THOUGH THERE ARE RISKS -- INORDINATE AMOUNT OF “HELP” FROM THE OIG AND/OR DOJ**

## What are the contents of a “timely disclosure?”

- When and how was the company alerted to a problem?
  - **HOW LONG HAS IT BEEN SINCE YOU DECIDED TO ALERT THE GOV'T (> 30 DAYS)?**
- What has the company determined to be the issues in its initial investigation?
  - **ARE THE CONCLUSIONS REASONABLE, THUS FAR?**
- What was/were the contract(s) involved and the details as to the program, dollar value, contract type, period of performance, etc?
  - **WHO WILL ULTIMATELY TAKE THE LEAD ON THE INVESTIGATION? DO THE CONTRACTS AFFECTED CROSS OVER OTHER AGENCIES?**
- What are the facts to date that have been discovered and what else does the contractor feel is necessary to determine?
  - **WHAT ARE YOU MISSING? NEED TO HAVE SOME IDEA OF WHAT ELSE YOU NEED FOR EVIDENCE**
- What has management done to respond to the situation and what corrective actions has it taken to protect the interests of the Gov't?

**THE MORE THOROUGH YOUR DISCLOSURE -- MANY TIMES -- THE BETTER AS THERE IS OFTENTIMES AN ISSUE OF CREDIBILITY**

## SUMMARY

### - WE TALKED ABOUT:

**Why you need to know about the Mandatory Disclosure Rule under the "Contractor Code of Business Ethics and Conduct" clause**

**What is the Code of Business Ethics and Conduct that is required under FAR 52.203-13?**

**How you structure an ethics awareness program and internal control system to protect your company's business integrity and contractor responsibility?**

**What is "reportable conduct" or "credible evidence" mean?**

**- What are your responsibilities if you find both "reportable conduct" and "credible evidence" and how do you determine "timely disclosure"**

**WHAT HAS BEEN PRESENTED HERE IS IN A NUTSHELL**

**-- TO HAVE AN EFFECTIVE ETHICS COMPLIANCE PROGRAM AND INTERNAL CONTROL SYSTEM**

**-- YOU NEED TO MAKE IT PART OF YOUR CORPORATE CULTURE  
EVERY DAY!**

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## REFERENCES

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