

Government's Proposed New Rules for Contractor Compliance to be Subject of ABA/Public Contract Law Section Procurement Fraud and Suspension & Debarment Committees Meeting with DOJ Representatives

As has been widely reported, on November 14, 2007, the Civilian Agency Acquisition Council and the Defense Acquisition Regulation Council (the Councils), at the request of the Department of Justice, proposed to amend the Federal Acquisition Regulation (FAR) to add strict new rules for contractor compliance and ethics that include requiring mandatory disclosure of suspected criminal violations (the Proposed Rule). 72 Fed. Reg. 64019 (Nov. 14, 2007). This Advisory provides a summary of some threshold issues and questions raised by the Proposed Rule, and a notice of comment opportunities.

Self Disclosure Requirement

The most striking aspect of the Proposed Rule is a provision requiring that a contractor or subcontractor must notify the agency Inspector General and the Contracting Officer in writing whenever the contractor has reasonable grounds to believe that a principal employee, agent, or subcontractor of the contractor has committed a violation of the Federal Criminal Law in connection with the award or performance of any government contract or subcontract over \$5 million with performance periods of 120 days or more (excluding contracts for the acquisition of commercial items and contracts performed entirely outside the United States).

The Proposed Rule also provides that contractors may be suspended and debarred for a knowing failure timely to disclose a possible crime or an overpayment on a government contract. Further, contractors must have internal control systems that mandate these disclosures and require "full cooperation" with any government investigation.

Threshold Issues

The Councils specifically invited comments on two issues: retroactivity, i.e., how far back does the company need to report violations; and, the relationship between the Proposed Rule and waiver of attorney-client privilege. Other threshold issues are apparent: (1) what standards should companies use for determining whether "reasonable grounds" exist for self disclosure; (2) whether "crimes" is intended to encompass non-procurement related offenses; (3) how such new rules will impact internal investigations, e.g., whether employees must be advised of the company's new obligations; (4) how the Proposed Rule would affect an individual's 5th Amendment privilege; (5) the relationship between the Proposed Rule and the Attorney Client Protection Act of 2007 now pending in the Senate; (6) whether the Proposed Rule eliminates "voluntary" disclosures.

Compliance and Ethics Program Requirements

The Proposed Rule requires contractors to have a Code of Ethics and Business Conduct (Code), conduct business ethics and compliance program training and establish and maintain strict internal controls to prevent and detect improper conduct in connection with government contracts. The required internal controls reflect the principles of the Federal Sentencing Guidelines (FSG) criteria for effective contractor compliance and ethics program. FSG §8B2.1. In addition to the internal controls mentioned above, the contractor's system must provide for the following:

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- assignment of responsibility at a sufficiently high level of the organization and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system;
- reasonable efforts not to hire as principals persons who have engaged in conduct that is illegal or otherwise in conflict with the Contractor's Code;
- periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Contractor's Code and the special requirements of government contracting covering specified areas;
- 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; and
- disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct.

Small businesses would be exempt from the business ethics awareness and internal control requirements of the rule.

Comment Opportunities

A number of industry organizations are planning to prepare comments, which are due on January 14, 2008. In addition, on December 18, 2007, at the Washington, DC office of McKenna Long & Aldridge LLP, the ABA Public Contract Law Section Suspension & Debarment and Procurement Fraud Committees, both of which are co-chaired by Fred Levy, will conduct a joint meeting to discuss the proposed regulation. The Committees will be joined at the meeting by Steve Linick, Deputy Chief of the Department of Justice Fraud Section and Director of the National Procurement Fraud Task Force, and by Jim Graham, a Senior Trial Attorney at the Fraud Section, who were involved in the development of the proposed rule and will be providing their views on the rule. In addition, MLA is preparing comments on the proposed rule; if you wish to participate in the generation and submission of these comments, please contact us as soon as possible.

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