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Overview of Ethics & Compliance Risks Associated  
with Business Capture for Federal Government  
Contractors

**May 23, 2023**



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- Partner, DC & LA.
- Recognized debarment “expert” by Legal 500.
- Former Air Force Debarring Official, “Director Suspension & Debarment Operations.”
- One of only a few practitioners to have successfully enjoined a DoD debarment.
- Crisis practice focuses on contractors under investigation, facing civil FCA litigation, S&D and parallel proceedings.
- Broad-based government contracts practice includes bid protests and appeals, disputes, contractor disclosures, building ethics, and compliance programs.

# Agenda



- I. Pursuit of Federal Business
- II. Overview of Government's Remedies
- III. Overview of Business Capture Risks
- IV. Risk Mitigation Practices

# I. PURSUIT OF FEDERAL BUSINESS

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# Pursuit of Federal Government Business



- Pursuing business opportunities creates risks
- Many enforcement cases brought against contractors and individuals relate to misconduct occurring in the pursuit of business
- Passively waiting for business to come versus active engagement in capture
- This session will explore the intersection of business capture and compliance risks in an effort to sensitize you to them

# Pursuit of Federal Government Business – Where the Risks Arise

- Relationship development with government customers, prime contractors and higher-tier subcontractors
- Entering foreign markets to support USG and encountering foreign customs
- Attendance at industry events and networking
- Hiring employees from government, competitors and others
- Efforts to pursue small business socioeconomic designations designed to increase capture

## II. OVERVIEW OF GOVERNMENT'S REMEDIES

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# Overview of Government's Remedies & Stakeholders



- **Criminal Enforcement** – *Who?* Federal prosecutors and investigators
  - Wire fraud, false statements, conspiracy, major procurement fraud, bribery, kickbacks, procurement integrity, antitrust, conflicts of interest.
  
- **Civil FCA enforcement** – *Who?* Federal prosecutors, investigators and relators
  - Government recovers treble damages plus penalties for each claim
  - Government can pursue false claims under any USG contract
  
- **Suspension & Debarment** – *Who?* SDOs, investigators, auditors, contracting personnel, competitors and news media
  - Government can pursue S&D activity wherever there is a “cause” for suspension/debarment as defined by FAR subpart 9.4
  
- **Termination/Default** – *Who?* Contracting officers
  - Where misconduct or noncompliance occurs, government may pursue T4D



# Evidentiary Standards



- Suspension – *Adequate evidence (low standard)*
- Proposed Debarment – *Preponderance of evidence*
  - Once established, burden shifts to contractor to either raise a genuine dispute of material fact or where the allegations are undisputed to demonstrate present responsibility
- Civil Liability – *Preponderance of evidence*
- Criminal Liability – *Beyond a reasonable doubt*

# On the Government's Radar



- Enforcement actions proceed from:
  - Grand Jury Subpoena
  - IG Subpoena
  - Civil Investigative Demand
  - Notice of Proposed Debarment
  - Notice of Suspension
  - Show-Cause Letter
  - Complaints by/from competitors, bid protests alleging wrongdoing
  - Whistleblower
  - *Qui tam* lawsuits
  - Negative media coverage



- Increased coordination and information sharing:
  - When one component within enforcement receives info re: a contractor; often that info is shared with stakeholders
  - Increased coordination among DOJ, investigators, agency fraud counsel, DCMA, DCAA and SDOs
  - Mandatory disclosures are being shared in real time within DoD investigative agencies, leading to subpoenas and investigations
    - Disclosures to DODIG are shared with DOJ

# Expect Parallel Proceedings



- Due to increased info sharing, parallel proceedings should be expected
- When government representatives discover evidence of misconduct, contractors should expect the government to pursue all appropriate remedies – in many cases, concurrently
- Parallel proceedings include concurrent criminal actions, civil FCA actions, contractual remedies and suspension/debarment
- Creates challenges for responding – e.g., transparency & candor v. defensive response; government stakeholders will share information
- Navigating parallel proceedings can be incredibly complex

# Consequences for Non-Compliance

- Penalties for noncompliance with laws, regulations, contract terms or acting unethically:
  - Being found non-responsible and losing out on contract awards
  - Having existing contracts terminated for default
  - For individuals, loss of employment
  - Harm to reputation
  - Civil False Claims Act liability (31 U.S.C. §§ 3729–3733)
  - Criminal prosecution, including, among others, criminal False Claims Act liability (18 U.S.C § 287) and False Statements liability (18 U.S.C. § 1001)
  - Suspension or debarment under FAR Subpart 9.4

### III. ETHICS & COMPLIANCE RISKS PRESENTED BY BUSINESS CAPTURE

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# Government Contracting Is a Complex and Heavily Regulated Area



- There are many laws and regulations governing the conduct of contractors and government personnel.
- Contractors are expected to be familiar with these laws and regulations, to recognize the sensitivities, and to seek guidance and direction when needed.
- The acts of others, including government customers, can create exposure for government contractors.

# Common Business Capture Risks



- Appearances of impropriety
- Gifts
- Bribery & gratuities
- Kickbacks
- Personal conflicts of interest
- Antitrust & collusion
- Procurement integrity (SSI/BPI)
- Obtaining nonpublic government info or a competitor's trade secrets
- Post-government employment restrictions
- Misrepresenting small business status or socioeconomic status to obtain competitive advantage



# Avoiding Appearances of Impropriety or Optics Issues

- Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none.
- The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in government-contractor relationships.
- Many enforcement cases stem from questionable relationships between contractors and their government counterparts.

# Gifts in Connection with a Public Procurement

- It is a violation of the law to give, solicit or receive any item of value from customers, vendors, subcontractors or competitors or to any public official **to receive favorable treatment in connection with a prime contract** or subcontract relating to a prime contract with the U.S. government.
- Items of value pretty much include anything, including but not limited to cash or the equivalent, tickets to any events, meals, entertainment, gifts, or personal fees, travel costs, commissions or other forms of remuneration.

# Gifts in Connection with a Public Procurement

*(cont'd)*

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- Since providing any item of value **to a government official** may raise an appearance of impropriety, you should generally refrain from doing so.
- Under governing laws and regulations, federal executive branch employees **may accept** the following items:
  - Publicly available discounts and commercial loans
  - Inconsequential items or items of a nominal value if offered infrequently, such as coffee, donuts, greeting cards and certificates

# Giving or Accepting Items of Value in Connection with a Public Procurement

*(cont'd)*

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- **Key gift rule: Other unsolicited gifts with a market value of \$20 or less per occasion, aggregating no more than \$50 in a calendar year from any single source. Tracking of these gifts is essential to compliance.**
- Gifts motivated by a family relationship or personal friendship.
- Free attendance at certain widely attended gatherings, such as conferences and receptions, when the cost of attendance is borne by the sponsor of the event.
- Food, refreshments and entertainment at certain meetings or events while on duty in a foreign country.

# Gifts Explored



- Gifts are problematic in themselves
- Gifts can compromise a good professional relationship
- Gifts can raise eyebrows of those watching
- Improper gift cases are pursued by government:
  - Recurring meals with government counterparts (a/k/a Germany “wine and dine”)
    - One lunch leads to recurring lunches and leads to lavish dinners
  - Gifts to Foreign Officials re: DoD contracts
    - Rolex watches given as a “custom”
    - “World Tour” enroute to a facility visit, tour of many cities and excursions organized
  - Improper gifts lead us to our next topic

# Bribery & Illegal Gratuities



- It is improper to give or accept bribes and illegal gratuities.
- Bribery refers to a situation where an individual or company **corruptly gives** or offers anything of value **to a public official** with the **specific intent to influence an official** act or induce the public official to commit some fraud or violate an official duty.
  - In the bribery context, the gift is viewed as a **“quid pro quo”** for the official action taken by the government official.

# Bribery & Illegal Gratuities

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- In the illegal gratuities context, the government need not prove corrupt intent or that a *quid pro quo* existed
- Just that there is an offer or acceptance of anything of value ***“for or because of an official act”***:
  - As a practical matter, the illegal gratuities statute prohibits all gifts to public officials made as a reward for an act that they would perform anyway.
  - **Oftentimes, even permissible gifts create the appearance of an illegal gratuity; thus, you should refrain from providing gifts to government officials.**

# Bribery Explored



- Contracting officer at Midwest Air Force base approaches airplane maintenance contractor and suggests an arrangement:
  - Scenario involves info sharing by CO in exchange for regular recurring cash payments
  - *Quid pro quo!*



## High-Profile Case

### “Fat Leonard”– Gifts, Bribes and Improper Disclosure

Leonard Glenn Francis, a defense contractor nicknamed “Fat Leonard,” was the owner of Glenn Defense Marine Asia:

- For years, this Singapore-based businessman was alleged to shower Navy officers with gifts, gourmet dinners, companionship and cash so they would look the other way while he obtained Navy contracts.
- Navy officers shared with Mr. Francis classified material about U.S. warship and submarine movements, confidential contracting information, and files about active law enforcement investigations into Mr. Francis’ company.
- Mr. Francis exploited the intelligence for illicit profit, even ordering the compromised Navy officers to redirect aircraft carriers to ports he controlled in Southeast Asia so he could obtain more lucrative business (fuel, tugboats, barges, food, water, and sewage removal).
- Pleaded guilty to defrauding the Navy of \$35 million.
- More than a dozen Navy officers have pleaded guilty in connection with the Fat Leonard bribery and corruption scandal.
- Many, many debarments.



# Kickbacks



- All transactions and business dealings with your prime contractors, subcontractors and suppliers must be conducted in compliance with the provisions of the Anti-Kickback Act (AKA).
- The AKA prohibits prime contractors and subcontractors from offering, soliciting, providing or accepting **anything of value** for the purpose of **obtaining or rewarding favorable treatment** in connection with the **award** of government **prime contracts and subcontracts**.

# Kickbacks

(cont'd)



- A “kickback” includes anything of value, including:
  - any money, fee, commission, credit, gift, gratuity, thing of value or compensation of any kind that is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a government prime contract or subcontract.
- You must deal fairly and honestly with your suppliers and prime contractor customers.
- This means that your relationships should be based on price, quality, service and reputation, among other factors.

# Kickbacks

(cont'd)



- When dealing with suppliers, you should carefully guard your objectivity. **Avoid acts that create an “appearance of impropriety.”**
- Specifically, you should not accept or solicit any personal benefit from a supplier or potential supplier.
- Similarly, you should not offer or provide any personal benefit to a prime contractor customer.

# High-Profile Case



## Boeing Buyers Solicit Kickbacks from Small Subcontractors in SoCal

- Several years ago, one or more Boeing buyers in SoCal were allegedly involved in a scheme to solicit kickbacks from local build-to-print subcontractors
- The buyers were alleged to have visited the subcontractors periodically, seeking envelopes of cash in exchange for assistance in sharing info and continuing to award the small businesses subcontracts
- Ultimately, the buyers and some of small business owners were pursued criminally and entered into plea agreements
- Some of the small business subcontractors were later pursued for suspension and debarment

# Personal Conflicts of Interest



- Personal conflicts of interest occur whenever the private interests, activities or relationships of an individual interfere or appear to interfere with the interests of the employer thereby.
- Do my personal interests impair or appear to impair my ability to make objective and fair decisions when performing my job?

# Personal Conflicts of Interest

*(cont'd)*

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- Here are some other ways a conflict could arise:
  - Employment/consultancy with a competitor, supplier or customer while employed by your company.
  - Acceptance of gifts, payment or services from suppliers seeking to do business with your company.
  - Placement of business with a firm owned or controlled by your family.
  - Ownership of, or substantial interest in, a company that is a competitor, customer or supplier.
- Apparent conflicts of interest can arise easily.
- The issue is whether your personal interests are involved and interfere with your role for the company.

# Personal Conflicts Explored



- John Doe was working for a major prime contractor in charge of overseeing certain programs
- Company needed more suppliers, and Doe recommended a company
- Government alleged that he had a personal conflict of interest and alleged that kickbacks were given he allegedly did not disclose relationship and allegedly had an interest in a subcontractor
- Outcome:
  - Terminated from employment
  - Disclosure occurred
  - Proposed for debarment



# Compliance with Antitrust Laws



- Government contractors must ensure open and fair competition:
  - Winning is important, but you must win with integrity.
  - Do not knowingly enter into business arrangements that eliminate or discourage competition.
- FAR 3.301 provides “(a) Practices that eliminate competition or restrain trade usually lead to excessive prices and may warrant criminal, civil, or administrative action against the participants.”
  - “Examples of anticompetitive practices are collusive bidding, follow-the-leader pricing, rotated low bids, collusive price estimating systems, and sharing of the business.”

# Compliance with Antitrust Laws

(cont'd)



- FAR 3.303 describes the types of practices/events that may evidence violations:
  - (c) Practices or events that may evidence violations of the antitrust laws include:
    - 1) The existence of an “industry price list” or “price agreement” to which contractors refer in formulating their offers.
    - 2) A sudden change from competitive bidding to identical or nearly identical bidding.
    - 3) Simultaneous price increases or follow-the-leader pricing.
    - 4) Rotation of bids or proposals, so that each competitor takes a turn in sequence as low bidder, or so that certain competitors bid low only on some sizes of contracts and high on other sizes.
    - 5) Division of the market, so that certain competitors bid low only for contracts awarded by certain agencies, for contracts in certain geographical areas or on certain products, and bid high on all other jobs.

# Compliance with Antitrust Laws

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- 6) Establishment by competitors of a collusive price estimating system.
- 7) The filing of a joint bid by two or more competitors when at least one of the competitors has sufficient technical capability and productive capacity for contract performance.
- 8) Any incidents suggesting direct collusion among competitors, such as the appearance of identical calculation or spelling errors in two or more competitive offers or the submission by one firm of offers for other firms.
- 9) Assertions by the employees, former employees or competitors of offerors that an agreement to restrain trade exists.

# Collusion Explored



## Scenarios

- 1. Employee for a competitor suggests an alliance to avoid beating each other up over prices. Suggests maybe you can decide which customers and business make sense for each other ...
- 2. Company sets up multiple affiliated entities to bid on contracts, all while colluding but creating appearance of a competitive bidding environment.
- 3. Two competitors use an intermediary to review and comment on their respective proposals as a way to facilitate information sharing among them ...
  - \*\*\* DOJ has established a procurement fraud task force to focus on these cases.

# Restrictions on Obtaining Nonpublic Sensitive Information

- Major Concerns:
  - Procurement Integrity Act (SSI/BPI).
  - Use of nonpublic government information.
  - Restrictions placed on government officials regarding their communications with contractors (5 C.F.R. § 2635.703(a)-(b)).
  - Trade secrets.

# Source Selection Information



- Companies are prohibited, when competing for the award of a U.S. government contract or subcontract, from knowingly obtaining “*source selection information*” or “*bid or proposal information.*”
  - Source selection information includes proposed costs or prices submitted to the government; source selection plans and technical evaluation plans; evaluations of technical and cost/price proposals by the government; competitive range determination; rankings of bids, proposals or competitors; and/or reports and evaluations of source selection panels, boards or advisory councils; and any other information marked source selection information.

# Contractor Bid or Proposal Information



- Contractor bid or proposal information may include any information submitted by a contractor to a federal agency as part of or in connection with a bid or proposal to enter into a federal agency procurement contract if that information has not been previously made available to the public or disclosed publicly.
  - Examples include cost or pricing data; indirect costs and direct labor rates; proprietary information about manufacturing processes, operations or techniques; or information marked by the contractor as “*contractor bid or proposal information*” or containing a similar restriction on disclosure.
- These restrictions also prohibit current and former government employees from knowingly disclosing source selection information or bid or proposal information.



## Booz Allen Case Study – Procurement Integrity

In April 2011, BAH hired a retired Air Force Lt. Col. as a senior associate responsible for business development in military and civilian health markets:

- He previously served as the deputy chief of the Information Technology Division in the Air Force Medical Support Agency surgeon general's office.
- In that role, he was privy to nonpublic information, which included information about source selection, bids and proposals.
- The Air Force alleged he brought an external hard drive containing sensitive information with him on his first day of work.



# High-Profile Case



- In an email to colleagues, he shared information with the BAH capture team about an IT services contract that they were competing for.
- That information allegedly provided the company with an unfair competitive advantage.
- His supervisors allegedly failed to report this improper disclosure, and he continued to be involved in efforts to compete for the follow-on contract.
- Ultimately, the AF suspended the BAH office involved until an administrative agreement was reached, avoiding debarment.

# Nonpublic Government Information



- “Nonpublic government information” is any information that an employee gains by reason of his/her role as a federal government contractor and knows (or reasonably should know) it has not been made available to the general public, regardless of whether or not the information is marked with a restrictive legend.

# Nonpublic Government Information

- Nonpublic government information includes but is not limited to information that:
  - Is exempt from disclosure under the Freedom of Information Act.
  - The government has designated as “confidential” or “classified.”
  - Has not actually been disseminated to the general public and is not authorized to be made available to the public upon request.

# Nonpublic Government Information



- When performing work as an “incumbent contractor,” employees may acquire specific firsthand knowledge and expertise regarding a government program or project.
- While an employee may know certain information regarding a federal contract or project and may have had a role in developing or creating nonpublic government information, an employee may access and use this information ***only to the extent authorized by the government.***



- Employees are prohibited from using nonpublic government information for any purpose other than performance of their assigned federal government contracts and subcontracts.
- Employees may draw upon their firsthand knowledge and technical experience in delivering services and preparing proposals to the government, but they must be very careful not to leverage anything beyond their own memory.

# Misuse of NPI



- Misuse can occur when an employee or company uses nonpublic government information in a manner that violates:
  - Contract/subcontract requirements.
  - A federal law or regulation.
  - An NDA or other restrictive agreement.

# Government Officials May Not Share “Nonpublic Information”



- Regulations prohibit government officials from allowing the improper use of “nonpublic information” obtained during their federal employment to further their private interests or that of another.

# NPI Explored



- High-ranking agency official shares information with a contractor via email concerning internal agency discussions following a stop work order on contractor's services.
- Contractor officer receives the emails or reviews and discusses them internally.
- Ultimately, contractor officer and official strategize how to get services restored under the existing contract.
- SDO pursued this even absent a violation of law by contractor, concluding it reflected negatively on business integrity.
- Watch What Your Government Customers Send You!



# Other Contractors' Confidential Business Information and Trade Secrets

- Laws and regulations also restrict one company from improperly obtaining and utilizing a competitor's confidential business information.
- You should not seek to obtain a competitor's confidential business information. This restriction covers all competitor confidential business information, even if not submitted to the government in connection with a procurement.
- Do not gather for competitive purposes any proprietary information about your competitors that is not in the public domain or otherwise available publicly through the FOIA.

# Other Contractors' Confidential Business Information and Trade Secrets *(cont'd)*

- Similarly, as a result of prior employment elsewhere, employees might possess a company's or client's proprietary information. The employee may neither disclose that information to other employees nor use it in conducting the company's business unless the information has since become available publicly.
- A company also may not ask employees for proprietary information obtained from their prior employers.
- These restrictions do not pertain to information that is publicly available.

# Employment Discussions & Post-Government Employment Restrictions

- There are laws and regulations governing:
  - (1) contractor employment discussions with **current** government personnel, and
  - (2) post-government employment restrictions limiting what a former government employee can do post-government employment.
- These rules are designed to prevent conflicts of interest from arising where the government or former government employee has a conflict between his duties to the government and a future contractor employer.

# Employment Discussions & Post-Government Employment Restrictions *(cont'd)*

- These “seeking employment” restrictions include provisions governing contact or negotiations with current government employees to discuss:
  - Their potential employment with your company.
  - Their retention by your company as consultants or subcontractors.

# Restrictions on Employment Discussions (18 U.S.C. 208, FAR 3.104)

- **Before** engaging in employment discussions with a prospective employer, the government employee should notify his/her ethics office of the anticipated communication and recuse himself/herself from all matters involving that employer.
- When a government official receives an unsolicited contact regarding employment from an offeror competing for such a procurement, the official **must notify his supervisor and the designated ethics official immediately, and promptly reject the employment opportunity or disqualify himself from further participation in the procurement** until the discussions have concluded without employment or the contractor is no longer an offeror in that procurement.
- The restrictions pertain to government officials who participate personally and substantially in a competitive federal agency procurement in excess of certain thresholds.

# Post-Government Employment Restrictions (18 USC 207)

- Former federal employees may face restrictions on their new employment activities. These restrictions particularly apply to activities that involve **appearing before** or **communicating with** federal agencies or courts after the former federal employee has left the government.
- Prior to leaving the government, employees need post-government employment advice, and after leaving the federal government, former government employees can and should continue to contact the agency's ethics office about post-government employment advice.

# Overview of PGE Restrictions



- Section 207's main restrictions:
  - **Lifetime Ban** - An employee is prohibited from communicating with or appearing before the government on a particular matter involving specific parties in which the employee participated personally and substantially during government service.
  - **Two-Year Ban** - An employee is prohibited for two years from communicating with or appearing before the government on a particular matter involving specific parties that was pending under that employee's official responsibility during their last year of government service.
  - **One-Year Ban** - A senior employee is prohibited from communicating to or appearing before the agency in which the former senior employee served during their last year of government service.

# High-Profile Case



**Darleen Druyun Case Study** - She was the top civilian procurement official for the Air Force and worked on contract negotiations.

- In the early 2000s, the Air Force announced awards to Boeing for several major projects, including a \$20 billion leasing agreement for 100 airborne tankers, a \$4 billion upgrading of the C-130 aircraft and a \$412 million payment on a C-17 contract.
- In 2003, after contract negotiations had ended, she accepted an executive position at Boeing that paid her \$250,000 per year.





# High-Profile Case



- A year later, she pleaded guilty to awarding the contracts to Boeing in exchange for jobs at Boeing for herself, her daughter and her son-in-law.
- She served a nine-month prison sentence and paid fines.
- The awards to Boeing were canceled.
- Boeing was forced to pay a \$615 million fine for its involvement in the scheme.
- Boeing's chief financial officer was sentenced to four months in prison for negotiating new jobs for Darleen and her family members.
- Debarments followed, and Boeing was suspended.



# Small Business & Socioeconomic Designations

- Classic case is misuse of socioeconomic designations
- Woman-owned small business (WOSB) fraud:
  - Business set up as 51%/50% in favor of a woman owner
  - Woman involved in business
  - *But* men control the business
  - Men serve in the highest officer position as well
- Misuse of the service-disabled veteran owned small business (SDVOSB) designation

## V. RISK MITIGATION PRACTICES

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# Best Practices in Ethics & Compliance



## Core Components:

- 1) Values-based E&C programs
- 2) Day-to-day management of E&C program by ECO/CECO
- 3) Leadership engagement and support of program with periodic messaging
- 4) Maintenance of ethics helpline to allow anonymous reporting
- 5) Compliance policies tailored to risk profile
- 6) Live periodic E&C training
- 7) Employee reporting policy

# Best Practices in Ethics & Compliance

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- 8) Policies and procedures for investigating events
- 9) Periodic monitoring and auditing to assess compliance and gaps
- 10) Policies and procedures for assessing events for possible disclosure
- 11) Policies encouraging “root-cause” analysis and corrective actions
- 12) Disciplinary program
- 13) Performance evaluation systems that consider ethics, integrity and promotion of program

# Values-Based Ethics Programs



- Many companies are moving beyond rules-based compliance and are also adopting values-based ethics programs
- Core values are inculcated into the company's culture (i.e., integrity, trust, fairness and respect)
- Values guide employees' decision-making
- Such programs encourage employees to adopt a new way of approaching their work and issues they encounter
- Even where the act may be legal, does it comport with our values?
- Encourage employees to think before they act and to always “do the right thing”

# How To Inculcate a Values-Based Ethics Program

- Select values that are tailored to your business and risks
- Define values in a way that makes sense to employees
- Ensure values are marketed and visible within the company
- Ensure leadership engagement in values promotion
- Use cascading training, where each supervisor periodically meets with his/her team to discuss ethical issues

# How To Inculcate a Values-Based Ethics Program

*(cont'd)*

- Appoint and utilize ethics officers to serve as a POC
- Recognize and reward employees who promote values
- Tie performance evaluations to core values
- Use questionnaires/surveys to periodically assess culture

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# The Ethics Decision-Making Tree



- Train employees on how to approach ethical decision-making:
  - Am I the right person to make this decision or take this action?
  - Are there any rules governing this decision?
  - Does my company have a policy addressing this issue?
  - Is the decision consistent with my organization's/my core values?
  - Will someone be adversely affected by my actions?
  - Am I acting honestly and transparently?
  - Are there “appearance” issues associated with this decision?
  - How would this look to my family or in the newspaper?
  - Am I afraid of contacting someone about my concerns?

# Considerations for a Tailored Compliance Program

- Identify your risk profile, taking into account your industry, location(s), operations and activities of the company
- Focus on high-risk areas, and work your way to addressing all compliance risks
- Periodically reassess risk profile and update program to reflect developments
- Consider linking compliance requirements to your values (i.e., procurement integrity relates to honesty, fairness, competition)
- Audit periodically to identify gaps and/or areas for improvement
- Make your written policies accessible to employees

# Considerations for a Tailored Compliance Program

*(cont'd)*

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- Supplement written policies with training (live training particularly for high-risk areas)
- Screen employees, particularly principals, before hiring
- Conduct periodic audits, particularly in high-risk areas
- Regularly remind employees of available reporting channels, including supervisors, ethics officer or hotline
- Train those who may receive reports on what to do
- Train employees following events, using each as a lesson learned
- Document employee training and annual certifications

# Considerations for Internal Investigations

- Maintain policies and procedures for responding to reports of misconduct
- Ensure all stakeholders are trained on what to do
- Ensure that consideration is given to preserving attorney-client privilege and work product protections
- Ensure a document hold is put in place
- Ensure investigations are conducted promptly
- Consider developing an investigative plan identifying the steps to be taken and issues to be investigated
- Ensure investigators are experienced and capable

# Considerations for Internal Investigations

*(cont'd)*

- When attorneys are used, inform employees that attorneys represent the company and that the company holds the privilege
- Ensure personnel interviewed are aware of the company's potential reporting obligations where certain evidence is discovered (i.e., MDR, Anti-Kickback Act)
- Ensure someone is responsible for reviewing and evaluating the investigative findings and for determining how to proceed following the investigation, including whether the company has disclosure obligations, corrective action needed, disciplinary action, etc.
- Ensure someone is responsible for assessing “root cause” of events and whether corrective actions are appropriate

# Mandatory Disclosures to the Government



## FAR 52.203-13 Contractor Code of Business Ethics and Conduct

- Companies have a mandatory disclosure obligation whenever, in connection with the award, performance or closeout of any government contract or subcontract performed by the company, the company has “*credible evidence*” that a principal, employee, agent or subcontractor of the company has committed a violation of federal criminal law involving fraud, conflict of interest, bribery or gratuity violations found in Title 18 U.S.C. or a violation of the civil False Claims Act (31 U.S.C. Sections 3729-3733).

# Mandatory Disclosures to the Government

(cont'd)

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- The FAR provides that a cause for suspension (9.407-2) and a cause for debarment (9.406-2) exist where a contractor knowingly fails to timely disclose “*credible evidence*” of a Title 18 violation identified above, a violation of the civil False Claims Act or a “*significant overpayment*.”
- FAR 3.1003(a)(3), in conjunction with the payment clauses, provides that if a contractor becomes aware of an *overpayment*, it shall remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment.

# Mandatory Disclosures to the Government

(cont'd)



## FAR 52.203-7 Anti-Kickback Procedures

- Companies must make timely disclosures, in writing, to the appropriate government officials whenever it has “*reasonable grounds*” to believe a violation of the AKA occurred.
- The AKA prohibits:
  - Providing or attempting to provide or offering to provide any kickback.
  - Soliciting, accepting or attempting to accept any kickback.
  - Including, directly or indirectly, the amount of any kickback in the contract price charged by a prime contractor to the United States or in the contract price charged by a subcontractor to a prime contractor or higher tier subcontractor.



# Considerations for Disclosure Policies

- Maintain a policy establishing procedures for responding to events giving rise to potential disclosure obligations
- Assign responsibility to an individual or team of individuals to determine whether the company has a reporting obligation
- Disclosures should be complete and accurate
- Vague or incomplete disclosures could trigger further review and may dissipate the benefits of making the disclosure

# Considerations for Disclosure Policies

*(cont'd)*

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- Be aware that disclosures are often shared with the appropriate agency SDO, so the disclosure should also address the likely present responsibility concerns (including the present responsibility of individuals identified)
- Consider disclosing direct to the “lead agency” SDO
- Many S&D actions are taken against individuals identified in disclosures; more than 50% of cases are against individuals
- Even where no mandatory disclosure obligation exists, assess whether it would be beneficial to make a voluntary disclosure and whether to engage with the SDO

# Considerations for Disclosure Policies

*(cont'd)*

- Typical considerations to have in mind:
  - What happened
  - When it happened
  - Why it happened (i.e., the root cause of the event)
  - Who was involved
  - How it was discovered (if delay in reporting, why delay)
  - Whether internal policies/training were violated by action
  - Whether disciplinary action was taken and, if not, why
  - Whether such could be mitigated and if so, corrective actions implemented
  - Discussion of overall present responsibility, including E&C program

Questions?

