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# Fundamentals of Government Contracting

## Session Seven





# Laws, Regulations, and Compliance

# Laws, Regulations, and Compliance

**Part A – The No-No’s:** Bribery and Gratuities, Kickbacks,

**Part B – The Line-Drawings:** Procurement Integrity, Conflicts of Interest, Hiring from the Government, Other Compliance Issues

**Part C – The Dark Side:** False Claims and False Statements, Certifications, Suspension and Debarment, and Compliance Programs



# Who is Our Federal Government Customer?

The government is the sovereign, but it wears two hats:

Sovereign Role – Public trust:

- The government is spending our money!
- The playing field should be level.
- No corruption



Proprietary Role – Buying power

- Laws and regulations protect government (i.e., us!)
- False Statement = Crime
- Government has the cops



# What Does This Mean?

- Federal government contracting is heavily regulated.
- ***Practices or activities that are legal and acceptable in the commercial marketplace may not be legal or acceptable in the US government marketplace!***

Contractor must maintain a rigorous Compliance Program

- To comply with federal regulations
  - To avoid/mitigate risks of non-compliance
  - To maintain credibility and trust of customers, employees, and community
- Contractor employees must be sensitive to issues before they take improper and irreversible actions.

# What Happens If You Don't Comply?

## Bad Stuff!

Company is at risk:

- fines and criminal penalties
- protests and cancellation of awarded contracts
- “suspension” or “debarment” –i.e., temporary or permanent preclusion from seeking government business
- negative “responsibility” determinations
- damage to company’s reputation

Individual employees are also at risk:

- loss of employment
- criminal penalties
- suspension or debarment



# Boeing and U.S. Air Force – Conflicts of Interest, Bribery, and Gratuities

- Darleen Druyan - second ranking USAF procurement official
- Michael Sears - CFO, Boeing Aerospace, heir-apparent to become CEO.
- Activity/Behavior
  - Druyan negotiated \$20B contract with Boeing, while discussing home purchase, post-government employment, and employment for future son-in-law.
  - Sears held “non-meetings” with Druyan.



# Darleen Druyan and Michael Sears

What was the result?

- A) Only Darleen Druyan went to jail.
- B) Only Michael Sears went to jail.
- C) Neither went to jail.
- D) Both went to jail.



“Collateral” damage:

- Congress cancelled the \$20B contract
- **Contracting community: Intensified scrutiny**



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# Fat Leonard Scandal

In 2013, ship support contractor Glenn Defense Marine Asia (GDMA) became focus of investigation.

Validated charges:

- GDMA overcharged Navy by \$20M by steering ships to specific ports, and falsifying service charges.
- Leonard Glenn Francis (a/k/a “Fat Leonard”), a Malaysian national, supplied Navy officials with cash (\$500K) prostitutes, cigars, travel expenses, 5-star accommodations, and other lavish perks.
- Francis obtained classified information from Navy contacts.
- Francis recruited two “moles” in Navy to alert him when probe was coming.



# Fat Leonard - Consequences

- Francis was lured to San Diego hotel and arrested. Francis pled guilty, admitted allegations stated above, forfeited \$35M, and faces a maximum prison sentence of 25 years.
- Fourteen individuals charged, >nine pled guilty. Francis identified seven Navy officials who accepted bribes, including two Navy Commanders, Navy Captain, and NCIS agent (12 years!). Several have been criminal charged or pleaded guilty, including Rear Admiral who faces maximum of 5 years. 200 people may be under investigation.
- Chief of Naval Intelligence was stripped of his security clearance, two Admirals were suspended, and three Admirals were forced into retirement.
- Navy has canceled all contracts with GDMA – doh
- Stay tuned – this drama has been renewed for next season.



# Part A: The No-No's

## Bribes and Gratuities



## Kickbacks

# Bribery and Gratuities Statutes

## 18 U.S.C. § 201

- **These Criminal statutes Prohibit:**

- Giving/receiving, offering/requesting
- money or anything of value
- directly or indirectly
- to a public official
  - to influence an official act (bribe)
  - for or because of an official act (gratuity)



- These statutes punish BOTH the public official and the person making the gift, offer or promise
- The offer does NOT have to be accepted or bribe paid; the mere offer of a bribe may be a crime.
- FAR compliance requirements impose a duty on contractors to report violations. FAR 52.203-13(b)(3)(i)(A))

# Executive Branch Regulations

## – 5 C.F.R. § 2635

Executive branch employees may not solicit or accept “items of value” from contractors or contractor employees.

Doesn't “govern” contractors – but do you really want to get your customer in trouble?

Strict Liability – Intent doesn't matter.

“Unintentional” violations are still violations:

- Paying for meals and entertainment
- Paying for travel expenses
- Paying for sporting events





# Bribery and Gratuities - Exceptions

- Government official can pay their own way.
- Modest items of food and refreshments (e.g., soft drinks, coffee) not part of meal
- Greeting cards, plaques, trophies intended for presentation
- Gifts worth \$20 or less – e.g., promotional items - provided that aggregate gifts to government employee from all company employees do not exceed \$50 in calendar year.
  - But how will your company track this?
- Some agencies (and many companies) take stricter positions.
- **Unreimbursed** gifts made to personal friend or relative. But
  - Would you make gift if the company did not have a contract?
  - Did “friendship” predate business relationship?
  - Will government investigator believe you?



# Bribery and Gratuities – Blended Workplace

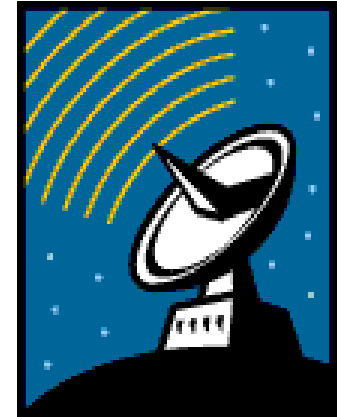
- Contractor employees co-located with government personnel may want to contribute to “common” gift for birthdays, office parties, retirement luncheons, etc.
- Uniforms may blur. Lines do not. Gift rules still apply.
- Soliciting for contributions is prohibited.
- Contractor employee may voluntarily choose to “contribute” to a common gift, subject to the gift limits (\$20 per contribution, \$50 annually from all contractor employees)
- Note: Just because someone is retiring (and therefore can’t provide quid-pro-quo) doesn’t mean they are outside this rule.





# Bribery and Gratuities - Lessons

- Misconception: Investigators only care about big ticket items. The small stuff will fly under the radar.
  - But it's an easy win for the prosecutor!
  - Government officials have calendars, expense reports and enemies!
- Before you give something of value to a government official, ask yourself:
  - What is the purpose of the gift?
  - How would it look to a government investigator?
- It is acceptable and common for government personnel to pay for their meals, and for contractor to ask government personnel for reimbursement for meals.
  - **It should not offend the government employee; you are protecting them from legal harm!**

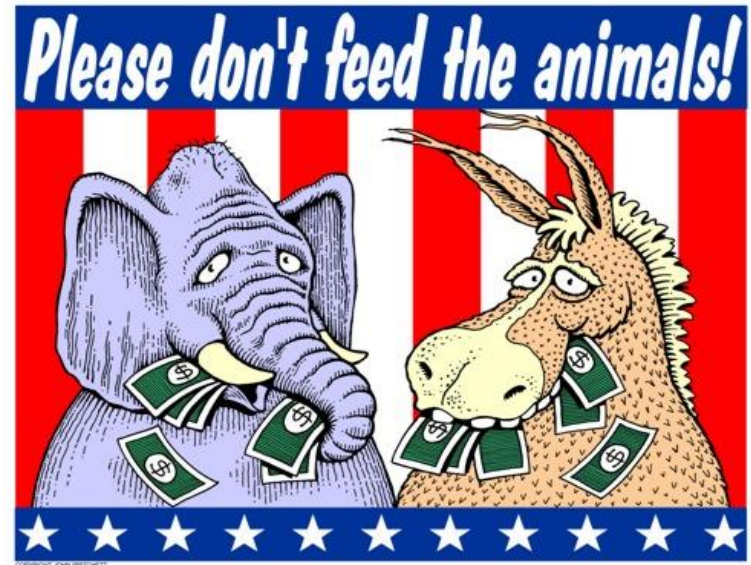


# Lobbying Gift Rules

- Honest Lobbying and Open Government Act (HLOGA) of 2008 tightened gift rules against contractors as well as Members of Congress and staffers. Sanctions are severe.

Basic Rule: **NO GIFTS** To Congressmen, Senators, Staffers, or their families from Lobbyists or Entities that retain lobbyists.

**There are 24 exceptions.**



# What Should You Do?

A prospective government customer asks you to pay for transportation, lodging and meals for a meeting she will be attending. She tells you that it is a common practice in her agency and that, during the past year, two of your competitors have covered similar expenses.

**What should you do?**

- A) Agree to pay because otherwise your competitors will have a competitive advantage.**
- B) Decline to pay, report the issue to your legal department, and discuss with them whether additional steps should be taken.**
- C) Agree to pay if she can get approval from her Designated Agency Ethics Officer (DAEO).**
- D) Agree to pay but record it as a reimbursement to a company employee.**

# Anti-Kickback Act

- Prohibits payments or other things of value given by subcontractors, vendors and suppliers to prime contractors, other subcontractors, etc., or vice versa “for the purpose of improperly obtaining or rewarding favorable treatment” in connection with prime *or* sub contract.
- Kickbacks are illegal because:
  - They undermine competition.
  - They cause supplier selections to be made on other than merit.
  - The cost may ultimately be paid by the government.

# Healthcare Anti-Kickback Act(s)

Anti-Kickback Act prohibits exchange of anything of value for referrals for services payable by federal program (i.e., Medicare or Medicaid). May also violate False Claims Act.

- Statute contains complex “safe harbors”

October 2018 – SUPPORT Act = “Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act”

- Section 8122 – “Eliminating Kickbacks in Recovery Act” (EKRA)
- Applies to all health care benefit programs (not just those involving federal money)
- Prohibits solicitation or payment in exchange for or to induce patient referrals to a recovery home, clinical treatment facility or clinical laboratory



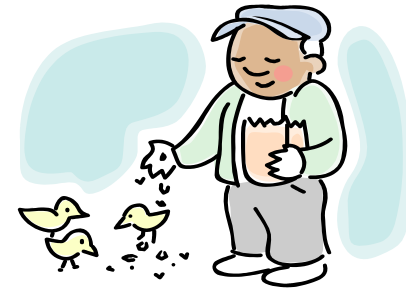
# Anti-Kickback Act - Lessons

- Kickback rule compliance is difficult to manage because:
  - Parties are not always clearly identified (is supplier a commercial vendor or a government subcontractor?)
  - Violation depends on “intent.”
  - ***Contractor is obligated to report, in writing, suspected violations of kickback laws to the government. Failure to report is an independent violation.***
- **Business “courtesies” that are normal in the commercial marketplace may be seen as kickbacks in the government contracting marketplace. Therefore, kickback rules are particularly troublesome where commercial and federal supply chain activities are integrated.**

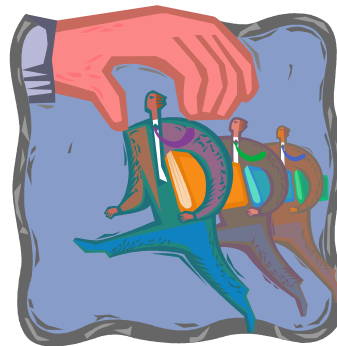
# Part B – The Line-Drawings

Reminder - Procurement Integrity

Reminder - Conflicts of Interest



Hiring from the Government





# Procurement Integrity Act – Improper Disclosure

Applies during procurement process.

- (Aren't we always in a procurement process?)

Regulates behavior of

- contractors and subcontractors
- government employees

Prohibits improper **disclosure** or **receipt** of procurement information.

Purpose: ensure level playing field.

Enacted by the Office of Federal Procurement Policy (OFPP) in 1988 (41 U.S.C. §423), implemented in FAR 3.104



# Procurement Integrity Act – Improper Disclosure

- The Procurement Integrity Act prohibits:
  - federal officials from knowingly *disclosing*; or
  - contractor employees (or teaming partners) from knowingly *obtaining*, either:
    - contractor bid or proposal information, or
    - source selection information

Applies to written **or verbal** information

Blended workplace: take extra care to avoid disclosure or receipt of proprietary or source selection or other non-public information.



# Contractor Bid and Proposal Information (CBPI)

- Any information submitted to the government by a competitor in connection with a bid or proposal, such as:

- proposals
- technical questions
- cost or pricing information
- technical solutions



- Information is usually marked proprietary, but does not have to be marked to be protected.
- Ask yourself – if this were your company’s own information, would you want competitors to be able to see it? If not, you can assume the reverse is true.

# Source Selection Information (SSI)

- Procurement-related information developed by ***the government*** that has not been made available to the public, and whose knowledge could benefit a competitor.

Includes verbal information and electronic, audio, and video material, whether or not marked.

Examples:

- bid prices, proposed costs
- source selection or evaluation plans
- competitive range determinations
- rankings of proposals or competitors
- government evaluations of proposals
- reports of source selection boards or boards

# Procurement Integrity Act – “The Drill”

If the conversation starts to get into information you think may be bid and proposal or source selection information – **STOP** the conversation!

If you receive (or come into contact with) written or email information you think may be bid, proposal or source selection information, immediately:

- **limit accidental access**: retrieve and secure all copies, stop email distributions.
- **limit further exposure**: do not discuss, show, or forward (via email) the information to anyone, including your manager.
- **report it**: call [Legal/Contracts/Compliance], explain how you received the information and who else has it.

If you are in doubt about whether you or company should have certain information, contact Legal/Contracts/Compliance.

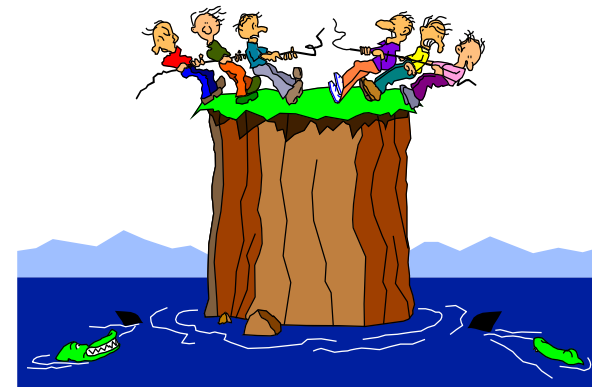
- verifying your right to have information before you use it is much better than trying to mitigate improper use of information after the fact.

# Organizational Conflicts of Interest (OCI)

An OCI “means that because of other activities or relationships with another person, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.”

There are three kinds of Organizational Conflicts of Interest:

- Unequal access to information
- Impaired objectivity
- Ability to set biased ground rules



# Unequal Access to Information OCI

- Arises when contractor, as part of its performance, has access to nonpublic information that will give it an unfair competitive advantage over other offerors.

As a general rule, simply being the incumbent (and thereby having a better understanding of the customer) does not create an OCI.

“Experience” is considered a “natural advantage of incumbency.”

An OCI will arise, however, when an incumbent contractor has proprietary information, source selection information, or other nonpublic information not provided to competitors that gives the contractor ***unique insight*** into the bidding or evaluation process (i.e., knowledge of future requirements, budget estimates, etc.)

- Unfair competitive advantage is presumed if access to information is shown.
- Usual mitigation is a firewall (or disclosure to all parties).

# Biased Ground Rules OCI

- Arises when contractor has the ability to **set the ground rules** for another procurement. Unfair advantage is presumed.
  - Government's primary concern is that contractor could
    - skew the competition, whether intentionally or not, in its own favor (and away from government's goals), or
    - gain an unfair advantage in the competition by virtue of its special knowledge of the agency's future requirements.
- Example: contractor writes the specifications or SOW and bids on the contract, or wants to provide a system for which it has provided Systems Engineering Technical Assistance (SETA). (DFARS has strict rule for Major Defense Acquisition Programs.)
- Very difficult to mitigate after the fact.
  - Note: Trying to “shape the deal” before the RFP is issued does not create an OCI, as long as other potential bidders are free to do the same.

# Impaired Objectivity OCI

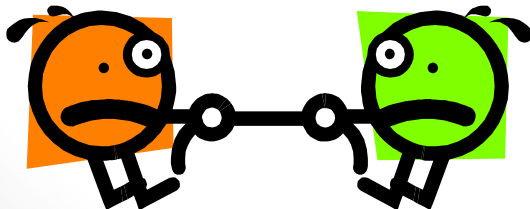
Arises when contractor has opportunity to provide advice that might affect its own business interests:

- E.g., evaluating work different division of contractor performed under another separate contract
- E.g., evaluating work performed by a competitor
- E.g., providing advice that might affect an affiliate's business interest

If opportunity exists, lack of objectivity is presumed.

Government's primary concern is that the contractor will not be able to behave objectively because of other economic pressures and consequences.

Usual mitigation involves limiting scope of work.





# OCI Regulation (FAR 9.5)

- Contracting Officer is directed to “avoid, neutralize or mitigate significant potential conflicts before contract award.”

- Preferably EARLY!!!!**

Each situation is different. “The exercise of common sense, good judgment, and sound discretion is required.” FAR 9.505

Communication – internal and external - is key!

Contractors:

- Ask yourself: are you being asked to provide advice or information that might help your company in future competitions or in your other business interests?
- Remember that your competitors are always on the lookout.
- You may have to choose which contract you want – you can’t always have your cake and eat it, too.



# Hiring from the Government

Former government employees may be valuable recruits. But revolving door statutes regulate when and how they may be hired and what they may do after being hired.

They:

- Prohibit certain government personnel (“procurement officials”) from even discussing employment with contractors who are participating in procurement.
- Restrict current and former government personnel with major roles on major programs from accepting employment with affected contractors.
- Restrict former government personnel (personally involved in or supervising matter) from communicating to agency regarding that matter. 18 U.S.C. §207.
- Require “covered” DoD officials to obtain ethics letter before being hired by major defense contractors (and requires contractors to certify compliance).



# Hiring from the Government - Lessons

- Rules are complex and change frequently.
- Government employees can obtain “30-day letter” from DAEO
  - Senior DoD officials are required to do so if hired by Major Defense Contractor
  - Contractor should request letter
    - But does ethics letter address all issues?
    - Generally does not address “representation” restrictions.
- Contractor: Remember, by staying within the lines, you are protecting former government employee as much as you are protecting company.

# What Should You Do?

Your customer, a senior agency official, tells you she wants to leave government and go into private industry. She says that she is aware that your company is looking for someone with her expertise. What should you do?

- A) Promise her a job elsewhere in the company.
- B) Promise that you'll recommend her to the hiring department if she gives you a favorable response to your most recent REA.
- C) Offer her a job on your team as "government liaison."
- D) Ask a knowledgeable person in HR or Legal what the hiring rules are.

# Other Compliance Issues

## Lobbying Laws

- Byrd Amendment: contractor may not use appropriated funds to lobby legislative and executive branches of the federal government. (FAR 52.203-11)
- HLOGA (Honest Lobbying and Open Government Act of 2008): imposes registration and reporting requirements.

## Antitrust Laws

- Restrict sharing competitive information
- Restrict collusive bidding, market division
- Restrict joint offer where each offeror can fully perform
- Require Certificate of Independent Price Determination (FAR 52.230-2)
- CO must report suspected violations



# International Compliance Issues

- Export Control Laws
  - Export Administration Regulation (Commerce) for dual use products, ITAR (State Department) for defense products, services
  - Note: “Deemed Export” occurs if foreign national is shown technical data in U.S.

## Foreign Corrupt Practices Act

- Anti-bribery law for activities outside the U.S. for US companies and those acting on their behalf
- Anti-bribery and recordkeeping provisions

## Country of Origin Rules

- **Domestic preference (“Buy-America”) laws**
- Trade Agreements Acts
- Falsely affixing a “Made in America” label is a basis for suspension or debarment.



# Part C – The Dark Side

## False Claims and False Statements



Certifications



Suspension and Debarment

Compliance Programs





# False Claims Acts (FCA) and False Statements Acts

- FCA prohibits knowing attempts to obtain money or property from government relating to false or misleading information (even if not presented directly to government).
- Does not have to be an intentional lie; the Civil False Claims Act also applies to deliberate ignorance or reckless disregard of truth.
- Criminal False Statements Act prohibits false written or oral statement concerning a matter that is material and within government agency's jurisdiction.

**Routine mistakes are not violations . . . as long as they are corrected promptly.**





# False Claims Acts – Criminal vs. Civil

## **Criminal** (18 U.S.C. § 287)

**Penalties** = Imprisonment (up to 5 years), Fine (up to \$250,000)

**Elements** = “knowing claim to be false, fictitious, or fraudulent”

**Burden of Proof** = Beyond a reasonable doubt

## **Civil** (31 U.S.C. §3729 et seq.)

**Penalties** = Fine (\$11,181 to \$22,363 per false claim (invoice), plus treble damages.)

**Elements** = "knowingly presents, or causes to be presented, . . . a false or fraudulent claim

**Burden of Proof** = Preponderance of evidence

**Qui Tam Relator** – shares in recovery

***Prosecutors prefer to bring civil cases because penalties are similar but burden of proof is lower.***

# False Claims/Statements - Examples

- **False claims:**

- Submitting invoices for services not provided or accepted
- Submitting invoices on the basis of erroneous time cards, prices, or indirect rates

- **False statements:**

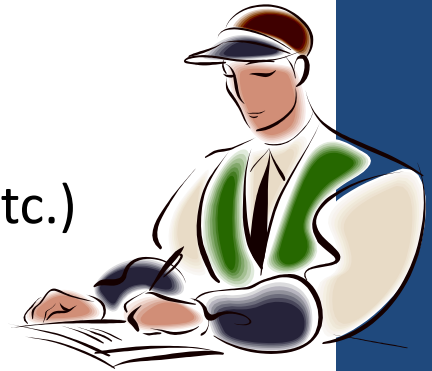
- Altering information or results in reports provided to government (e.g., test results, milestone completions, etc.)
- False certifications (of any sort)

- **Product Substitution**

- Different product/person, even if superior or cheaper
- May be considered fraud unless contract is modified

- **Special FCA issues for schedule contracts**

- Failure to disclose “discounts” and “concessions” on Commercial Sales Practices Format.
- Failure to implement Price Reductions clause.



# Certifications

**Certificate of Current Cost or Pricing Data (FAR 15.406-2)** – Truth in Negotiations Act (TINA) requires contractor to submit cost or pricing data that is accurate, current and complete as of date of price “handshake.”

**Certification of Final Indirect Costs (FAR 52.242-4)** – must certify that all costs in final indirect rate proposal are allowable (and none are expressly unallowable).

**Certification Regarding Responsibility Matters (FAR 52.209-5)** – Must disclose whether Offeror or Principals are suspended or debarred, or have (within 3 years) been:

- (a) convicted, indicted, or had civil judgment or charge against them, relating to specific listed crimes, including fraud, contract-related criminal offenses, bribery, making false statements, tax evasion
- (b) notified of any unsatisfied, unchallenged, delinquent federal taxes (in excess of \$3,000)
- (c) terminated for default.



# Suspension and Debarment

- Government will do business only with “responsible” contractors, which includes including having “a satisfactory record of integrity and business ethics.” FAR 9.104-1(d)
- General Services Administration ("GSA") maintains government-wide a List of Excluded Parties at [www.sam.gov](http://www.sam.gov).
- Prime must verify (and should document) that subcontractors are not on excluded parties list.

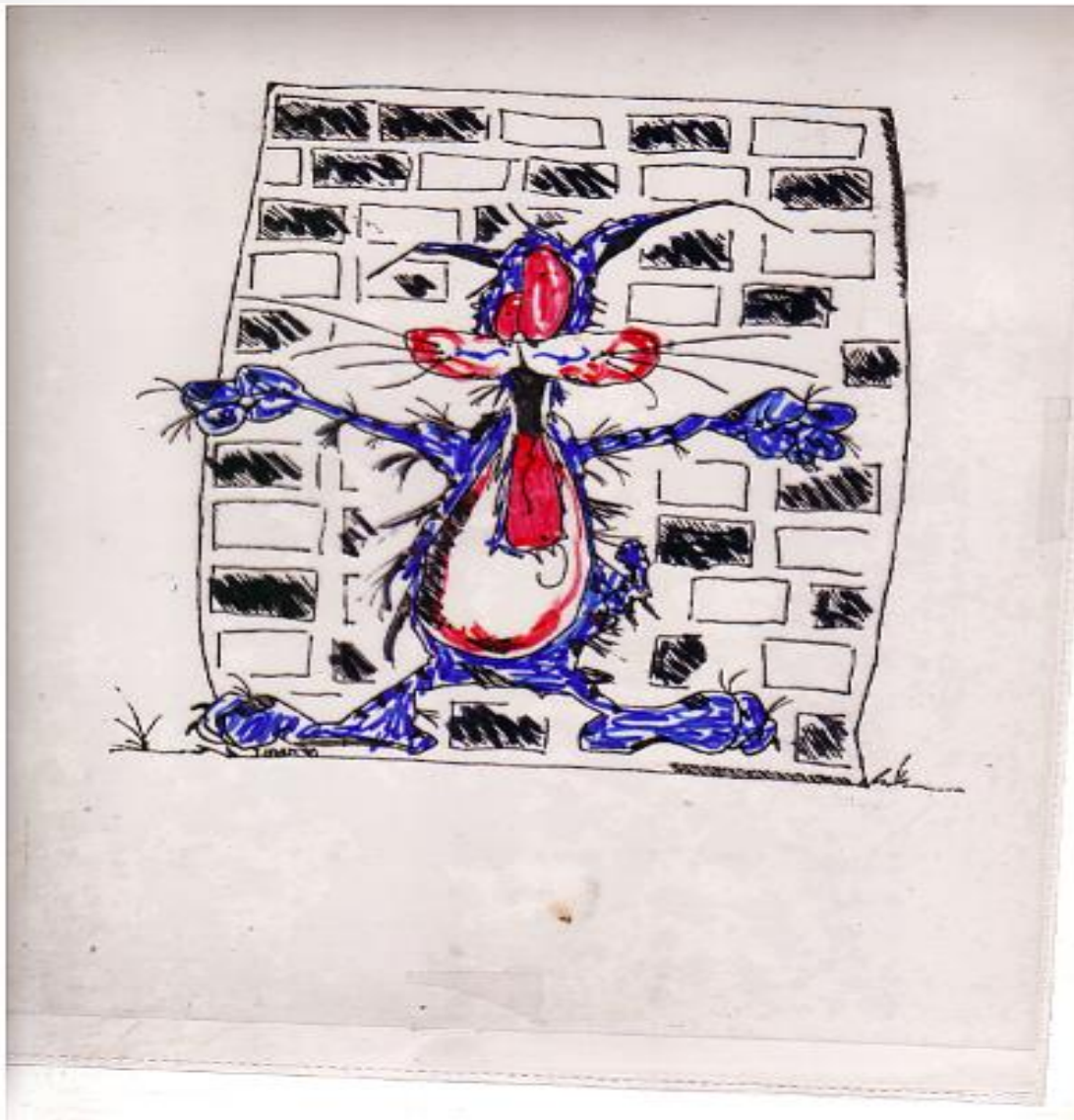
# Suspension and Debarment - Grounds

- Conviction or civil judgment for (OR INDICTMENT OR ADEQUATE EVIDENCE OF) fraud, antitrust, theft, embezzlement, false statements or integrity matters
- Serious violation of government contract terms – i.e., willful failure to perform or history of failure to perform
- Violation of Drug-Free Workplace Act
- Affixing false origin label
- Commission of offense indicating lack of business integrity that affects present responsibility
- Any other cause so serious that it affects present responsibility
- Failure to disclose credible evidence of violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations, violation of civil False Claims Act, or significant overpayment on contract

# Suspension or Debarment - Consequences

- No new contracts (unless waiver)
- No new subcontracts (unless waiver)
- Loss of teaming opportunities
- No new mods or options to previously awarded contracts
- No orders beyond guaranteed minimum in IDIQ contracts
- No orders under Federal Supply Schedule, BPA's BOA's
- Keep previously awarded contracts (but CO could decide to terminate for convenience because of integrity concerns)





# Contractor Code of Business Ethics and Conduct

- Required if contractor has contract valued over \$5.5 Million with performance period of 120 days or more.
- Commercial items contracts and small businesses have scaled down requirements.
- FAR 52.203-13 (derived from DOJ Sentencing Guidelines) requires that contractor must
  - conduct business “with the highest degree of honesty and integrity”
  - have ongoing business ethics awareness and compliance program, including written code of business ethics and compliance, which it must provide to all employees, plus agents/subcontractors (training) “as appropriate” (usually annually).

# Contractor Code of Business Ethics and Conduct

- Contractor must have internal control system that:
  - Assigns responsibility at sufficiently high level (Ethics Officer reporting to senior management) and provides adequate resources to ensure effectiveness of its compliance system
  - Keeps “bad actors” out of the company’s performance – reasonable due diligence and appropriate delegation of authority
  - Conducts periodic internal reviews of business practices, policies and internal controls to assess effectiveness of internal control system
  - Includes an internal reporting mechanism, such as a hotline
  - Provides for corrective actions and disciplinary action for improper conduct (or “failing to take steps to prevent or detect improper conduct”)

# But Wait, There's More!

- Contractor must make timely written disclosure whenever contractor has “credible evidence” that a principal, employee, agent or subcontractor has committed violation of criminal law involving fraud, conflict of interest, bribery or gratuity, or violation of Civil False Claims Act.
- “Full cooperation” must be given to all Government agencies involved with audits, investigations or corrective actions.

# Conclusion (we're almost there)



# Possible Penalties for Violations



**Negative news coverage**

**Federal Awardee Performance and Integrity (FAPIS) Information System**

- **Effective April 15, 2011**
- **Five years of data**
- **Contractor must certify current, accurate, complete**



**Fines**

**Suspension or Debarment**

**Termination of employment**

**Criminal prosecution**

# Is it safe to run near the sideline, or should we stay in the middle of the field?

It depends on the Risk/Reward ratio.

- What do you have to gain?
- What happens if you are wrong?



When little will be gained and much could be risked – stay in the middle of the field!

Bribery and Gratuities

Kickbacks

Contingent Fees

False Claims and False Statements



WHEN much might (and should) be gained – you can run near the sideline – BUT DO NOT STEP OUT OF BOUNDS!

Procurement Integrity

Organizational Conflicts of Interest

Hiring from the Government



# The Bottom Line

In the federal government marketplace, we must

- **Conduct business in accordance with both the *letter* and the *spirit* of the law**
- **Avoid actions which, while technically legal, give the appearance of improper behavior**

Ask yourself:

- How will this look to the investigator?
- How will this look on the front page of my local newspaper?
- How does this feel in my gut?
- ***“Could we do business in complete trust with someone who acts this way?”***

# What Should You Do?

You go to dinner at a restaurant and are seated at a table next to two people who are talking about a proposal they are submitting in response to an important solicitation. You realize that they are working for a competitor and that you are also responding to the same solicitation. **What should you do?**

- A) Put in your hearing aids so you can hear every word that is spoken.
- B) Send them a bottle of wine to loosen their tongues.
- C) Engage them in conversation and try to draw out their plans for the competition.
- D) Introduce yourself and tell them who you work for.

# Mark Twain's Perspective on Ethics

Always do right. This will  
gratify some people,  
& astonish the rest.

Very  
Yours  
Mark Twain

New York, Feb. 16, 1901.





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