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# Navigating the Labyrinth of Complex Ethics & Compliance Risks Facing Federal Government Contractors

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- Partner, DC & LA
- Chambers USA, National rated for government contracts
- Recognized debarment “expert” by Legal500
- 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

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- I. Ethics & Compliance Requirements for Government Contractors
- II. Overview of Government's Remedies & Consequences of Non-Compliance
- III. Present Responsibility Explored
- IV. Overview of Ethics & Compliance Risk Areas

# I. Ethics & Compliance Requirements for Government Contractors

# Awards May Only Be Made to Responsible Contractors

- The USG only wants to work with responsible contractors!
- To be eligible for contracts, you must be “*responsible*”
  - “*Purchases shall be made from, and contracts shall be awarded to, **responsible prospective contractors only.**” “No purchase or award shall be made unless the contracting officer makes an **affirmative determination of responsibility.**” (FAR 9.103)*

# Awards May Only Be Made to Responsible Contractors *(Cont.)*



- FAR 9.104-1 provides that to be responsible, a prospective contractor must:
  - a) Have adequate financial resources to perform the contract, or the ability to obtain them;
  - b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
  - c) Have a satisfactory performance record. A prospective contractor shall not be determined responsible or non-responsible solely on the basis of a lack of relevant performance history;

# Awards May Only Be Made to Responsible Contractors *(Cont.)*

- FAR 9.104-1 (cont.)
  - d) Have a satisfactory record of integrity and business ethics;
  - e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors);
  - f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and
  - g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

# Awards May Only Be Made to Responsible Contractors (Cont.)



- This presentation focuses on *establishing a record of integrity and business ethics*
- What does it mean to have a “satisfactory record of integrity and business ethics”?
  - *“Responsible”* means can be **“trusted to do what is right or to do the things that are expected or required.”** (Merriam-Webster dictionary\_
  - *“SDO Hat”* - *“Responsible”* means that the contractor is **capable of performing in accordance w/ the contract requirements and can be trusted to do so ethically**



# Awards May Only Be Made to Responsible Contractors (Cont.)

- What does it mean to have a “satisfactory record of integrity and business ethics”? *(cont.)*
- COs are looking at your past performance record and overall character to see if
  - (a) you consistently perform satisfactorily (no T4Ds, no performance blemishes), and
  - (b) you do not have a checkered past (criminal, civil FCA, and debarment) and,
  - (c) If you do, remediation is key!

# COs Rely, In Part, On Contractor Certifications Re Responsibility

- Contractors **must certify** as to their responsibility further elevating the importance.
- FAR 52.209–5 Certification Re Responsibility Matters
  - a) (1) The Offeror certifies, to the best of its knowledge and belief, that the Offeror and/or any of its Principals—
    - A. Are ( ) are not ( ) **presently debarred, suspended, proposed for debarment**, or declared ineligible ...;

# COs Rely, In Part, On Contractor Certifications Re Responsibility *(Cont.)*



- FAR 52.209–5 Certification Regarding Responsibility Matters *(cont.)*
  - b) Have ( ) have not ( ), within a three-year period preceding this offer, **been convicted of or had a civil judgment** rendered against them for:
    - commission of fraud/criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) contract or subcontract;
    - violation of antitrust statutes relating to the submission of offers; or
    - commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property

# Contractors Must Certify as to Their Responsibility *(Cont.)*

- FAR 52.209–5 Certification Regarding Responsibility Matters *(cont.)*
  - C. Are ( ) are not ( ) presently indicted for, or otherwise criminally or civilly charged by a governmental entity with, commission of any of the offenses enumerated in subdivision (a)(1)(i)(B) of this provision; and
  - D. Have ( ), have not ( ), within a three-year period preceding this offer, been notified of any delinquent Federal taxes in an amount that exceeds \$3,000 for which the liability remains unsatisfied.

# Contractors Must Certify as to Their Responsibility *(Cont.)*

- FAR 52.209–5 Certification Regarding Responsibility Matters *(cont.)*
  - b. The Offeror shall provide immediate written notice to the Contracting Officer if, at any time prior to contract award, the Offeror learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
  - c. A certification that any of the items in paragraph (a) of this provision exists will not necessarily result in withholding of an award under this solicitation.
    - ***“However, the certification will be considered in connection with a determination of the Offeror's responsibility.”***

# Contractors Must Maintain A Code of Conduct



- FAR 52.203-13 generally requires contractors to maintain a “Code of Business Ethics and Conduct” (clause inserted where CO believes contract value may > \$6mm)
- For contractors other than small businesses, the clause also requires an ethics and compliance program including:
  - Written compliance policies (i.e., Code but also supplemental government contracts compliance policy);
  - Distribution of policies to employees
  - Training programs;
  - Internal controls to identify and detect improper conduct;
  - Programs to ensure appropriate corrective actions/remedial measures are taken;
  - Monitoring and auditing of program to ensure it remains effective and followed;

# Contractors Must Maintain A Code of Conduct *(Cont.)*

- For contractors other than small businesses, the clause also requires an ethics and compliance program including: *(cont.)*
  - Oversight and management of program by a high level official (i.e., ethics & compliance officer);
  - Maintenance of an employee hotline or helpline that allows for anonymous reporting of concerns
  - Investigative policy and procedure to ensure reports are promptly evaluated;
  - Compliance with the mandatory disclosure obligations where “credible evidence” of certain events is discovered;
  - Screening of employees, including background checks, employment questionnaires, SAM screening, and reference checks;
    - For principals, more rigorous screening is expected; and
  - Maintenance of a disciplinary program to ensure consistency in treatment and enforcement of policies and procedures.

## II. Overview of Government's Remedies & Consequences of Non-Compliance



# Overview of Government Remedies



- **Criminal Enforcement** – Federal prosecutors and investigators
  - Wire Fraud, False Statements, Conspiracy, Major Procurement Fraud, Bribery, Kickbacks, Procurement Integrity, Antitrust, etc.
- **Civil FCA enforcement** – 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** – Suspension Debarment Officials, 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** – Contracting Officers
  - Where misconduct or noncompliance occurs, Government may pursue T4D

# Standards in Criminal, Civil, and Debarment Proceedings

- **Suspension/Debarment:**
    - Adequate evidence = suspension
    - Preponderance of evidence = proposed debarment, debarment
  - **Civil Liability**
    - Preponderance of Evidence
  - **Criminal Liability**
    - Beyond a Reasonable Doubt
- 
- 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

# Consequences for Non-Compliance

- Penalties for non-compliance with laws, regulations, contract terms or acting unethically:
  - Being found non-responsible and losing out on contract awards;
  - Having existing contracts terminated for default;
  - 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. Present Responsibility Explored

# Overview of S&D Under FAR

## Subpart 9.4



- The S&D system is a useful reference for contractors **wishing to establish a best practices compliance program** and to better understand how an SDO would evaluate it following a compliance event
- The Gov't uses debarment to exclude “non-responsible” contractors from receiving new government contracts
- The system is designed to protect USG from “non-responsible” contractors who are not “presently responsible”
- Once suspended, proposed for debarment or debarred, immediately ineligible. Effects:
  - Name listed on public website, [www.sam.gov](http://www.sam.gov) ;
  - Ineligible for any new federal contracts from any agency;
  - Can only receive subcontracts valued at \$35k or less;
  - Individuals cannot serve as an agent or representative of contractors;
    - As a practical matter, it likely means you will not be able to work for a government contractor in most cases
- Suspension Debarment Officials (SDO) are charged with assessing a contractor's responsibility, including its ethics, integrity, and overall ethics and compliance program in determining whether protection is needed

# Suspension vs. Debarment



- Suspension
  - Facts still being developed through an investigation or legal proceedings
  - No conviction or civil judgment exists
  - Adequate evidence = probable cause
    - *Very low standard; gives SDOs much discretion*

# Suspension



- Used where “immediate action” is necessary to protect Government’s interests
- Generally, may last 12 months before legal proceedings must be instituted
- Where the Department of Justice requests, suspensions may continue for 18 months
- Once legal proceedings are initiated, suspension may stay in place until the proceedings conclude

# Proposed Debarment



- Investigation or legal proceeding has concluded resulting in conviction or civil judgment
- In the absence of a conviction or civil judgment, a preponderance of evidence of improper conduct is required
  - Evidence that leads to conclusion that the fact is more probably true than not
- Generally 3 year debarment term imposed



# Who Can Be Suspended or Debarred?

- FAR 9.403 - “Contractor” means any individual or other legal entity that—
  - (1) Directly or indirectly (e.g., through an affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract ... or a subcontract under a Government contract; or
  - (2) Conducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative of another contractor

# Who Can Be Suspended or Debarred? *(Cont.)*

- Individuals that can be excluded include, but are not limited to:
  - Contractor employees, officers, directors, owners, consultants, and representatives of a contractor
- Most suspension and debarment actions include individuals in addition to companies
- We estimate over 50% of cases involve individuals
- Government views individuals as expendable more so than critical suppliers

# Sources of Suspension & Debarment Cases

- Investigators
- Auditors
- Customers, prime contractors, subcontractors, and contracting personnel
- Department of Justice prosecutors
- Competitors

# Sources of Suspension & Debarment Cases (Cont.)

- Employees (Whistleblowers)
- Public records: civil judgments, indictments, plea agreements, deferred prosecution agreements, settlement agreements, and convictions
- News stories (proactively address issues w/ SDO)
- Contractor disclosures (voluntary and mandatory)

# Causes for Suspension & Debarment

- Improper conduct reflecting negatively on a contractor's responsibility
  - Fraud or criminal offense in connection with obtaining, attempting to obtain, or performing a contract
  - Antitrust violations relating to submission of offers
  - Embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property

# Causes for Suspension & Debarment *(Cont.)*

- ***Unethical conduct indicating a lack of business integrity or business honesty***
- Willful violations of contract terms
- History of a failure to perform or of unsatisfactory performance
- Failure by a principal to disclose credible evidence of fraud, conflicts of interest, bribery, gratuity, violations of civil False Claims Act, or significant overpayments

# Causes for Suspension & Debarment *(Cont.)*

- Catch-all ***“Any other cause of so serious or compelling a nature....”***
  - **SDOs have much discretion in deciding what conduct gives rise to a cause for suspension or debarment**
  - Conduct need not be illegal
  - Conduct need not be related to government contracting (i.e., mortgage fraud, passing bad checks, tax fraud ....)
- \*\*\*Judgments / Convictions are unnecessary**

# Mitigating Factors & Remedial Measures Considered by SDOs

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Standards of Conduct / Internal  
Control Systems

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Disciplined Employee

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Voluntary Disclosure

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Implemented Remedial Measures

---

Internal Investigation  
Conducted & Shared

---

Ethics Policy and Training

---

Full Cooperation

---

Adequate Amount of Time Has  
Passed Since Event

---

Paid Costs/Restitution

---

Management Recognition  
of Problem

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*\*Not all of these will apply in every case*



# Expect Parallel Proceedings



- 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 actions, contractual remedies, and debarment.
- Creates challenges for responding – e.g., transparency & candor v. defensive response; government stakeholders will share information

# Collateral Consequences of Suspension & Debarment

- Potential termination of ongoing contracts
- Reputational damage and loss of goodwill
- Loss of revenue
- Potential loss of security clearances
- Contraction of credit and/or denial of loans
- For individuals, loss of employment
- Reduction in size of the business and/or delay/cancellation of future expansion plans
- Reduction in employees and/or compensation
- Loss of employees to competitors
- Denial of commercial contracts, state/local contracts and
- Bankruptcy



## IV. Overview of Ethics & Compliance Risk Areas

# Common Compliance Risk Areas



- False statements/certifications
- Time mischarging
- Use of unqualified labor
- Falsifying documents
- Personal Conflicts of Interest
- Organizational Conflicts of Interest
- Defective pricing & TINA
- Kickbacks, Bribery, Improper Gifts
- Post-government employment restrictions
- Supplying non-conforming parts
- Repeated on-time delivery issues
- Product substitution
- Billing for out-of-scope work
- Antitrust Violations
- Procurement Integrity (SSI/BPI)
- Improperly obtaining non-public government or competitor's data
- Environmental Violations
- Export Control Violations
- Illegal Immigration/Employment of Undocumented Aliens
- Buy American Act / Trade Agreements Act / Specialty Metals
- Corruption and FCPA violations
- Misrepresenting small business status or socioeconomic status
- Subcontracting with claimed small businesses who don't meet reqs

# 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.
- For contractor employees:
  - Be familiar with the laws and regulations applicable to your job responsibilities;
  - Be familiar with applicable contract clauses that are incorporated into your contracts and subcontracts by reference; and
  - Seek guidance and instruction whenever questions arise.

# Adherence to the Following Principles will Ensure Your Customer Relationships Remain Strong

- When you enter into a contract, do so fully intending to comply with each and every term;
- Do not enter into contracts that contain ambiguous terms or requirements, terms you do not understand, or terms you cannot fulfill;
- Where the contract is ambiguous on a particular requirement, and you identify this ambiguity post-award, notify the customer promptly, propose a solution, and seek input from the customer. You should ensure that any resolution is memorialized clearly and unmistakably;

# Adherence to the Following Principles will Ensure Your Customer Relationships Remain Strong (Cont.)

- Consider all terms: technical requirements, testing and inspection requirements, first article testing, delivery schedules, quality standards, packaging, and billing requirements, etc.
- Maintain open lines of communication with your customers and keep them apprised of developments where appropriate;
- In the event unexpected delays are encountered, notify your customer promptly and work diligently to minimize, if not eliminate, the impact of the delay; and
- Where you are asked to do something outside the terms of the contract, insist on a formal contract modification. It is critical to maintain a written agreement that mirrors the parties' agreement

# Accurate Representations & Certifications

- All individuals are required to make accurate representations and certifications, including in oral and written communications.
- This requirement extends to both affirmative representations and certifications as well as to implicit representations and certifications.
- Every time you stamp, initial, or sign a document, you are approving of the representations contained within the document and independently representing that the statements are accurate.



# Accurate Representations & Certifications *(Cont.)*



- Do not make any misrepresentations or false statements to any customer, subcontractor, individual or entity you encounter in your government contract dealings.
- Such misrepresentation or false statement may constitute a violation of federal law if the ultimate customer is the U.S. Government.
- Don't rush and don't make assumptions: conduct appropriate due diligence before making representations and certifications.
- If you are not 100% confident in your representation, do not make it and seek guidance and direction.

# Complete and Accurate Records



- All records must be complete, accurate, and reliable in all material respects.
- Undisclosed or unrecorded funds, payments, or receipts are prohibited.
- Misrepresenting facts or falsifying records of any type or even attempt to do so is illegal.
- Your contracts will specify the scope of records to be retained and term.

# Time Recording and Cost Charging



- Every employee must record their time accurately, completely, and in a timely manner.
- Time mischarging is serious and could expose the individual and company to contractual, civil, criminal, and administrative liability, including suspension and debarment.
- Indeed, many debarment cases are taken against individual contractor employees based on allegations that they billed their employer (and in turn the government) for time they did not work.

# Time Recording and Cost Charging (Cont.)

- Ensure employees understand their time charging responsibilities including:
  - what time is billable vs. unbillable,
  - how to account for breaks during the day,
  - how ingress and egress records will be viewed in the event of time charging concerns,
  - whether work done remotely is billable and what work they can take off-site,
  - whether they may periodically check personal e-mail/websites during day and, if so, how to account for such,
  - what records to maintain to support the hours recorded.
- Just a small investment in training can save many jobs and avoid disclosable events

# Billing and Invoicing



- Prior to issuing an invoice to a customer, including a government customer or a prime contractor under a government contract, it is advisable that the responsible employees review and evaluate each entry on the invoice to ensure the billing is consistent and compliant with the Company's contractual, legal, and regulatory obligations under the contract.
- All entries appearing on an invoice should clearly and precisely identify the nature of the supplies provided, the work performed, and the costs associated with the supplies and work. Referencing CLINS is advisable.

# Billing and Invoicing *(Cont.)*



- The customer should never have to guess as to what services or supplies are included in a particular entry.
- Such transparent and explicit billing ensures that the government is fully aware of the work and costs underlying the invoice and, in the instance that a mistake is made, such a practice affords the customer the opportunity to raise questions or concerns in a timely fashion before the mistake has reoccurred multiple times.

# Contract Negotiations and Disclosures



- When you are negotiating with the government or a prime contractor, including but not limited to, contracts, subcontracts, termination settlement proposals, modifications, or other agreements, all your representations must at all times be accurate, honest, and complete.
- The submission of false, incomplete, or misleading information can result in contractual, administrative, civil, and/or criminal liability.
- The government tends to view errors that benefit the contractor as false statements and fraud.

# Truth In Negotiations Act (“TINA”)

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- Where applicable, TINA requires disclosure of “cost or pricing data” to the contracting officer (or designated representative) or prime contractor and certification that, as of a mutually agreed-to-date, such data is current, accurate, and complete.
- TINA is designed to give the government an effective means of negotiating a fair and reasonable price with contractors by requiring the contractor to essentially reveal its costs, and, in turn, its profit margins.



# Truth In Negotiations Act (“TINA”)

(Cont.)

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- The rationale is that contractors have a superior bargaining position in negotiated procurements and, thus, TINA, was designed to level the bargaining positions of the parties and requires contractors to disclose all the cost or pricing information **a reasonable person would deem relevant to the expected costs of contract performance.**
- Because the government uses and relies on the cost or pricing data submitted in evaluating a contractor’s proposal, any defect or omission may lead to a price reduction under the Price Reductions clause of the contract, administrative liability, civil liability, or criminal liability.

# Exceptions to TINA



- First, TINA only applies where the value of the contract action is \$2MM or greater.
- Second, where the dollar threshold is met, there are several exceptions, including:
  - Where the prices are set by a governmental body through law or regulation (i.e., utility rates);
  - Where **commercial items are being procured** (includes modifications to commercial item contracts);
  - Where **adequate price competition exists**; or
  - Where TINA is waived.

# Avoiding the Appearance of a Conflict In Contractor-Government Relationships



- 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. Avoid them.

# 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.
- Ask 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.)*



- 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; or
  - Ownership of, or substantial interest in, a company that is a competitor, customer, or a supplier;
- Apparent conflicts of interest can arise easily.
- The issue is whether your personal interests are involved and interfere with your role for company.

# Organizational Conflicts of Interest

- There are three types of OCIs that generally arise in government contracting:
  - **Unequal access to information** – Through its performance of one government contract, a company has or will have access to ***non-public government information (“NPI”) that could provide it an unfair advantage*** in competing for another government contract.
    - NPI could mean (i.e., source selection info, bid or proposal info, another contractor’s proprietary info, non-public documents provided by gov’t, info obtained through access to gov’t restricted systems, or info governed by an NDA);

# Organizational Conflicts of Interest *(Cont.)*



- **Biased ground rules** – Through its performance of one government contract, a company is or will be in a position to set the grounds rules (such as through **drafting specifications or the statement of work**) for a different acquisition and thereby influence that future competition, whether intentionally or not, in its own favor;
- **Impaired objectivity** – This type of OCI generally arises when a contractor or subcontractor is ***in a position to evaluate the performance of another business unit of the same company or advise the Government regarding selection of contractors***, which could include a business unit within the same company.

# Organizational Conflicts of Interest *(Cont.)*



- OCI Mitigation / Avoidance
  - Unequal Access to Information –
    - May create a firewall.
      - Remove subject employees from covered scope;
      - Ensure document access is properly limited; and
      - Provide training on respecting the firewall.
    - Government could decide to release non-public information to all bidders.



# Organizational Conflicts of Interest *(Cont.)*



- Biased Ground Rules / Impaired Objectivity –
  - Avoidance is key.
    - Bring in a third-party/subcontractor to perform some portions of scope.
  - Can obtain waiver from Government under FAR 9.503.
    - OCI may be waived if enforcement “would not be in the Government’s interest;”
    - Must request waiver in writing, setting forth the extent of the conflict; and
    - Must be approved by the head of the procuring agency.

# Restrictions on Obtaining Non-Public Sensitive Information

- Major Concerns:
  - Procurement Integrity Act;
  - Use of Non-Public Government Information;
  - Restrictions placed on government officials regarding their communications w/ 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 determinations, 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.

# Contractor's Duty to Safeguard Nonpublic Government Information

- Exercise due care and take appropriate measures to safeguard nonpublic government information as required by their assigned contracts/subcontracts, and applicable federal laws/regulations.
- “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) has not been made available to the general public, regardless of whether or not the information is marked with a restrictive legend.

# Contractor's Duty to Safeguard Nonpublic Government Information (Cont.)

- 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”; or
  - Has not actually been disseminated to the general public and is not authorized to be made available to the public upon request.

# How to Use Nonpublic Government Information Properly

- 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.***

# How to Use Nonpublic Government Information Properly

## (Cont.)

- 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.



# The Impacts of Misusing Nonpublic Government Information



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

# The Impacts of Misusing Nonpublic Government Information (Cont.)



- The Government potentially could determine that misuse of nonpublic government information:
  - Constitutes a breach of contract/subcontract and subjects a company to a claim, cure notice, or termination for default;
  - Creates an improper OCI and excludes a company from future competitive proposals for related work; or
  - Gives rise to ethical concerns so serious that the Agency reports the issue to an Inspector General and/or its cognizant Suspension/Debarment Official and proposes a company for suspension or debarment.

# Non-Disclosure Agreements



## ■ *Non-Disclosure Agreements*

- Sometimes, the Government places additional restrictions on the use of nonpublic government information by requiring individual employees to review and execute personal NDAs.
- An NDA is a contract between at least two parties that outlines confidential material, knowledge, or information that the parties wish to share with one another for certain purposes, but wish to restrict access to.
- An NDA creates a confidential relationship between the parties to protect any type of nonpublic confidential, proprietary, or trade secret information, which can include nonpublic government information.



- Employees must review carefully such NDAs to understand their personal compliance obligations. Typically, NDAs:
  - Prohibit employees from sharing nonpublic government information, directly or indirectly, with any individuals except for authorized government, contractor, and subcontractor personnel;
  - Restrict employees from using nonpublic government information for any purpose other than activities directly specified in their assigned contracts/subcontracts; and/or
  - Require employees to comply with the NDA restrictions for the duration of their contracts/subcontracts or, sometimes, indefinitely.

# 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
  - Nonpublic information is defined broadly to include “information that the employee gains by reason of Federal employment and that he knows or reasonably should know has not been made available to the general public.”

# Government Officials May Not Share “Nonpublic information” (Cont.)

- Ex. 1 - High-ranking procurement official shares information w/ contractor concerning internal agency discussions following a moratorium/stop work order on contractor’s services. Contractor and official strategize as to how to get services restored under the existing contract.
- Suspension Debarment Official pursued this even absent evidence of the “private interest” and where the contractor believed the government official merely wanted contract services restored.

# 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 any proprietary information about your competitors for competitive purposes that is not in the public domain or otherwise available publicly through FOIA.

# Other Contractors' Confidential Business Information and Trade Secrets (Cont.)

- 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-gov't employment.
- These rules are designed to prevent conflicts of interest from arising where the government or former gov't employee has a conflict between his duties to the government and future contractor employer.

# Employment Discussions & Post-Government Employment Restrictions (Cont.)

- These “seeking employment” restrictions include provisions governing contact or negotiations with current government employees to discuss:
  - Their potential employment with your company; and
  - 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.

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



- Where 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 U.S.C. 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 gov't, employees need post-government employment advice and after leaving the Federal government, former gov't employees can and should continue to contact the agency's ethics office about post-gov't 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 the last year of government service.

# One-year Cooling Off Period on Hiring Certain Former Agency Officials

- A former official may not accept compensation from a contractor that has been awarded a contract, as an employee, officer, director, or consultant of the contractor within a period of 1 year after such former official:
  - Served, at the time of selection of the contractor or the award of a contract to that contractor, ***as the procuring contracting officer, the source selection authority, a member of a source selection evaluation board, or the chief of a financial or technical evaluation team*** in a procurement in which that contractor was selected for award of a contract in excess of \$10,000,000;
  - Served as the ***program manager, deputy program manager, or administrative contracting officer*** for a contract in excess of \$10,000,000 awarded to that contractor; or

# One-year Cooling Off Period on Hiring Certain Former Agency Officials (Cont.)

- Personally made for the federal agency a decision to –
  - (A) award a contract, subcontract, modification of a contract or subcontract, or a task order or delivery order in excess of \$10,000,000 to that contractor;
  - (B) establish overhead or other rates applicable to a contract or contracts for that contractor that are valued in excess of \$10,000,000;
  - (C) approve issuance of a contract payment or payments in excess of \$10,000,000 to that contractor; or
  - (D) pay or settle a claim in excess of \$10,000,000 with that contractor.



# Restrictions on a Former Government Official after Leaving Federal Service



- The restrictions bar a former government employee from representing another person or entity by making a communication to or appearance before a federal department, agency, or court concerning the same ***“particular matter involving specific parties”*** (e.g., the same contract or grant) ***with which the former employee was involved while serving the Government.***

# 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.)

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- 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 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;

# Compliance with Antitrust Laws

(Cont.)

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- (5) Division of the market, so that certain competitors bid low only for contracts awarded by certain agencies, or for contracts in certain geographical areas, or on certain products, and bid high on all other jobs;
- (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 (or near identical) calculation or spelling errors in two or more competitive offers or the submission by one firm of offers for other firms (any signs that the parties were working in concert); and
- (9) Assertions by the employees, former employees, or competitors of offerors, that an agreement to restrain trade exists.

# Giving or Accepting Items of Value 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.

# Giving or Accepting Items of Value in Connection with a Public Procurement (Cont.)

- 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.)

- **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; and
- Food, refreshments, and entertainment at certain meetings or events while on duty in a foreign country.

# 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.





- 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.**

# 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.)



- 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.)



- 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.



- Federal immigration law requires all employers to verify both the identity and employment eligibility of all persons hired to work in the United States.
- FAR 52.222-54 requires contractors to enroll in a federal program known as E-Verify and to: (a) verify the employment eligibility of **all new hires** working in the U.S. w/in three business days after the date of hire; (b) to verify the employment eligibility of **all employees assigned to the contract or subcontract**.
- There are exceptions to this rule for: (a) contracts to perform work outside U.S.; (b) contracts w/ a period of performance of less than 120 days; (c) COTS items and certain commercial services

# Buy American Act



- The Buy American Act (“BAA”) establishes a domestic preference for the use of articles, materials, and supplies manufactured in the U.S. when the government purchases such for use within the United States. Referred to as a “*domestic end product.*”
- Applies to contracts above micro-purchase threshold.
- This is a preference and does not prohibit the use of foreign materials where the cost of the domestic end item is found to be unreasonable, an issue discussed in further detail below.
- The BAA applies to supply and construction contracts and “*contracts for services that involve the furnishing of supplies,*” but does not apply to pure service contracts. Separate rules govern construction.

# Buy American Act (Cont.)



- A two-part test exists to qualify as a “*domestic end product.*”
  - (1) Product must have been manufactured in U.S.
    - The assembly of an end product’s components in the U.S. may constitute domestic manufacture so long as it is more than simple assembly.
  - (2) the cost of domestic components comprising the product must exceed 60-percent of the cost of all the components (It is currently 55% under the DFARS presently).
    - Components are defined as “*an article, material, and supply incorporated directly into an end product or construction material.*”
    - \*\*\* *The government has increased the domestic content requirement and these changes are going into effect over time, so consult governing FAR/DFARS clauses before proceeding.*
    - *Under FAR: Changes to 65% (2024) with a schedule to reach 75% by 2029.*

# Buy American Act (Cont.)



- For DoD acquisitions, the component test is expanded to include U.S. and “*qualifying country* components” as opposed to just “domestic” components.
- This component test has been waived for the acquisition of commercial items meaning that you need only satisfy the first part of the test.



# Exceptions to the BAA



- The BAA contains several exceptions, which were designed to give procuring agencies flexibility.
  - Use outside the U.S.: BAA does not apply to contracts where the solicitation calls for end products that will be used outside the U.S.
  - Information technology commercial items: BAA does not apply to acquisitions of information technology commercial items where the procurement is at a certain threshold.
  - Unreasonable cost: Where the price of the domestic end product is “*unreasonable*,” award may be made to the lowest priced foreign offer. The cost of a domestic end product is “unreasonable” if it is not the low offer when the evaluation factors is applied to the foreign offer.
    - Civilian agencies add a 6 % or 12 % evaluation factor to the price of the foreign offer depending upon whether the “*lowest domestic offer*” is a small or large business.
    - For DoD, a 50 percent evaluation factor is added to the price of the foreign offer.
      - Recent EO considers increasing the evaluation factor added to foreign offers

# Trade Agreements Act



- The Trade Agreements Act (“TAA”), where applicable, waives the BAA requirement for supplies from certain designated countries under certain circumstances.
- As a general rule, the TAA is only a relevant consideration where the supply contract exceeds a certain dollar threshold and the threshold depends upon the origin country.

# Trade Agreements Act (Cont.)



- “Designated country end products” are treated the same as “*domestic end products*” and no evaluation factor is applied.
- A product is considered to be a “*designated country end product*” if it is “*wholly the growth, product, or manufacture of the designated country.*”
  - “*Designated country end product*” includes World Trade Organization Government Procurement Agreement country end products, Free Trade Agreement country end products, least developed country end products, and Caribbean Basin country end products.
- The TAA, however, creates a prohibition on the procurement of foreign end products that are not from a designated country. Where the TAA is applicable to the procurement, a contractor is prohibited from supplying end products from certain countries (i.e., China).

# Trade Agreements Act (Cont.)



- Where the article, in question, consists in whole or in part of materials from a non-designated country, it may, nonetheless, qualify as a designated country end product where it “**has been substantially transformed** *[in a designated country] into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.*”
- The concept of substantial transformation is fact intensive and focuses on whether the product was subject to a manufacturing process in that country which resulted in a “*new and different*” article of commerce bearing a new name, character or use.



- Rulings from the U.S. Customs Service have developed five general characteristics of manufacturing operations in deciding whether a manufacturing process caused a substantial transformation.
- Unlike the FAR implementing provisions, which base waivers to the BAA solely upon whether a designated country is involved, the DFARS provisions restrict the TAA waiver to the BAA to designated products from designated countries (i.e., products that fall within one of the specified *“Federal supply groups”* (*“FSG”*), and further states that *“[i]f an end product is not in one of the listed groups, the trade agreements do not apply”* meaning that the TAA does not apply to the procurement and the BAA applies.)

# Exceptions to the TAA



- The TAA does not apply to:
  - Acquisitions set aside for small businesses;
  - The purchase of arms, ammunition or war materials or purchases indispensable for national security or for national defense purposes;
  - Acquisition of end products for resale;
  - Acquisitions not using full and open competition if authorized by certain sections of the FAR;
  - Where offers of domestic or eligible products are either not received or are insufficient to fulfill the government's requirements; and
  - Where DoD has waived the TAA and entered into a reciprocal procurement agreement or memorandum of understanding with a country.

# Export Control Compliance



- The United States has export control laws governing strategically necessary technologies and products.
- These laws are extremely important, and they are extremely complex.
- Moreover, they change and take unpredictable turns as governments adjust to new geopolitics and security pressures.
- Violations of export controls can harm U.S. national security and foreign policy.
- Penalties for violations are severe and can include monetary penalties, imprisonment, debarment, and suspension of export and Government contracting privileges.



- The major U.S. export laws include:
  - **International Traffic in Arms Regulations (“ITAR”)**. The ITAR, administered by the U.S. Department of State in furtherance of the Arms Export Control Act, controls exports and temporary imports of a military nature, including defense articles, services, and technical data. Such products and services are identified on the U.S. Munitions List contained in the ITAR. The ITAR contains the requirements for export licenses and other approvals for permanent export, temporary export, or temporary import transactions.





- The major U.S. export laws include: *(cont'd)*
  - **Export Administration Regulations (“EAR”)**. The EAR, administered by the U.S. Department of Commerce, controls exports of commercial and “*dual-use*” commodities and technology. Dual-use items are products, software, and technical data developed for civil applications, but which can be used militarily without further modification. Items requiring export licenses appear on the Commerce Control List (“*CCL*”) contained in the EAR. Items on the CCL are subject to U.S. export control whether they are exported from the United States or are re-exported from one non-U.S. country to another.



- Other restrictions:
  - **Sanctions & Foreign Assets Controls**: To comply with the Trading with the Enemy Act or the International Emergency Powers Act, and in some cases to comply with sanctions imposed by the United Nations, the United States imposes sanctions and embargoes on certain countries. The Department of Treasury Office of Foreign Assets Control (“OFAC”) administers regulations that can involve blocking property, prohibiting exports and re-exports, and other activities with respect to those countries. OFAC maintains a list of “Specifically Designated” nationals or persons, who are also subject to restrictions under the regulations.



- Other restrictions: *(cont'd)*
  - **Anti-boycott Regulations**: In addition to export and import controls, the EAR contains anti-boycott provisions, which prohibit companies from complying with foreign-nation imposed boycotts of countries friendly to the United States. The Internal Revenue Code also imposes tax penalties for agreements to comply with such boycott actions.

# 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.)



- 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.)



- Consistent with 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; or
  - 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.

# Questions?



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