

FAR Subpart 3.10 Code of Business Ethics & Conduct



Setting the Stage

1

Setting the Stage

- Moderator – Mr. Jerry Gabig
- DODIG – Mr. Anthony Black
- DCMA – Ms. Karin Yorke
- DCAA – Mr. Ken Heinzman
- DCAA – Krista Larson

2

2

FAR Subpart 3.10 Code of Business Ethics & Conduct

“[A] contractor may be suspended and/or debarred for knowing failure by a principal to timely disclose to the Government, in connection with the award, performance, or closeout of a Government contract performed by the contractor or a subcontract awarded thereunder, credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code or a violation of the civil False Claims Act. ”

FAR § 3.1003(a)(3)

3

Dissecting Key Words

“[A] contractor may be suspended and/or debarred for knowing failure by a principal to timely disclose to the Government, in connection with the award, performance, or closeout of a Government contract performed by the contractor or a subcontract awarded thereunder, credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code or a violation of the civil False Claims Act. ”

FAR § 3.1003(a)(3)

4

Principal

“Means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a division or business segment; and similar positions).”

FAR § 52.203-13(a)

5

Timely Disclose

“Much angst was expended worrying about this issue when the regulation was issued. Neither the regulation nor IG offices defined the term timely.”

***“Mandatory Disclosures for
Government Contractors”
2014 GCIIR 26***

6

Timely Disclose

When Does The Duty End?

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

FAR § 52.203-13(c)(3)(F)

7

Credible Evidence

“In general, the bar seems to have fixed on a ‘possible’ violation standard (e.g., 33% to 50%) - if the assessment falls somewhere within this range, the contractor is best advised to disclose.”

*“Mandatory Disclosures for
Government Contractors”
2014 GCIIR 26*

8

Subcontractor

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

FAR § 52.203-13(a)

9

“a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18”

Note: these are bound by Title 18 and the rule that criminal statutes are narrowly construed.

10

10

“or a violation of the civil
False Claims Act.”

This obligation
to disclose is
unbounded!



11

11

False Claims Act

“any person who—

- (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
- (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;”

31 U.S.C § 3729

12

FCA Is Expansive

- SAIC entered into a contract with NRC to help develop a national standard for disposal of nuclear waste
- SAIC certified no OCIs and would alert NRC if an OCI arose

U.S. v. SAIC, DC Cir, 2010

13

FCA Is Expansive

- In 2008 a jury held SAIC failed to disclose OCIs that had potential bias to SAIC's work for NRC
- Jury awarded Govt the full amount paid to SAIC (\$1.97M)
- Triple damages for fraud increased award to \$5.91M

U.S. v. SAIC, DC Cir, 2010

14

FCA Is Expansive

The FCA invites
expansiveness because
the whistleblower gets:

- 25% if the government intervenes
- 30% if the government does not intervene

15

Panel discussion begins
by sequentially
addressing eleven
prepared questions.

16

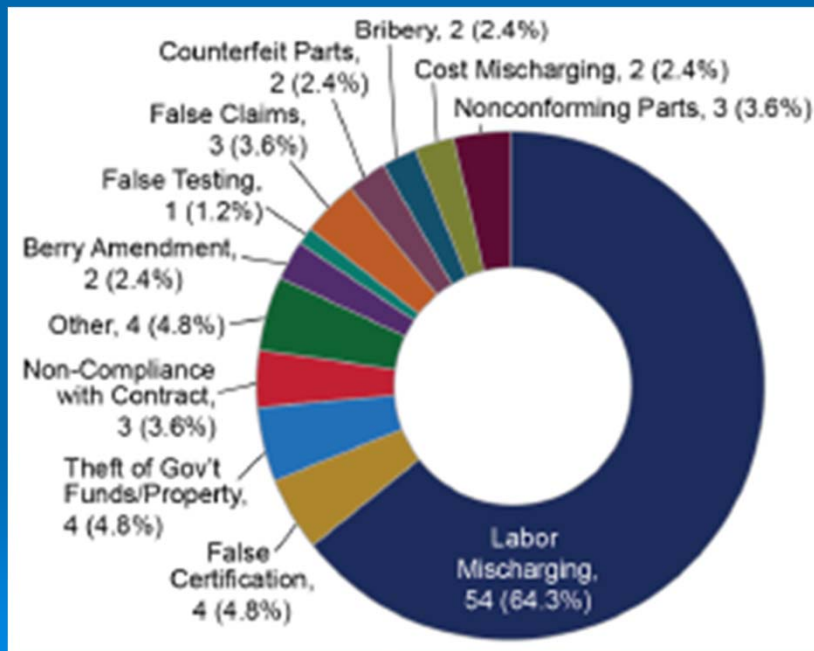
16

First Question

Mr. Black: Please comment on the graphic on the next slide that is taken from the DODIG's October 2018 to April 2019 Semiannual Report to Congress.

17

17



18

18

Second Question

Mr. Heinzman: Would you please amplify on the extracts in the next two slide taken from the DCAA Audit Guidance.

19

19

Code Of Business Ethics & Conduct

“Management must convey the message that integrity and ethical values cannot be compromised, and employees must receive and understand that message through continuous demonstration of words, actions and commitment to high ethical standards.”

DCAA Audit Guidance

20

DCAA Audit Guidance

“Verify the existence of a written code of conduct and review the contents to ensure it addresses ethical business practices, conflict of interest, and expected standards of ethical and moral behavior. The code should cover dealings with customers, suppliers, employees, and other parties”

21

Third Question

Ms. Yorke and Larson: From DCMA’s perspective would you please explain what an ACO is likely to regard as a “timely” (as contrasted to an “untimely”) disclosure.

22

22

Fourth Question

All Panel Members: Would you please provide the Government's perspective of the FAR definition of "full cooperation requirement" set forth in the following slides:

23

23

Full Cooperation Requirement

"Means disclosure to the Government of the information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct."

FAR § 52.203-13(a)

24

Full Cooperation Requirement

“It includes providing timely and complete response to Government auditors’ and investigators’ request for documents and access to employees with information.”

FAR § 52.203-13(a)

25

Fifth Question

Ms. Yorke: As an attorney, would you please explain possible consequences if a contractor does not meet the Government’s expectations of full cooperation.

26

26

Sixth Question

Mr. Heinzman: Would you please amplify on the following two slides concerning training.

27

27

Code Of Business Ethics Training

- Must be “suitable to the size of the company and extent of its involvement in Government contracting.”
- Document attendance

FAR § 3.1002

28

Compliance Training

- “Verify that the business ethics awareness and compliance program includes an ethics training program for all principals and employees, and as appropriate, the contractor’s agents and subcontractors”
- “Selectively test this control by evaluating training program materials and training records of completion”

DCAA Audit Guidance

29

Seventh Question

Ms. Yorke and Larson:
Concerning the DCAA Audit Guidance as to “verify that the contractor complied with their policy and procedures” can you tell us what the ACO does with the information.

30

30

Eighth Question

The next slide is on overpayments. If any panel member has experience with overpayments, would you please share them with the audience.

31

31

Overpayments

“[I]f the contractor becomes aware that the Government has overpaid on a contract financing or invoice payment, the contractor shall remit the overpayment amount to the Government.”

FAR § 3.1003(a)(3)

32

Ninth Question

All Panel Members: although Question # 9 might be more in the domain of an SDO, do you have any comments on the next three slides which are extracts from the FAR on the qualifications of a compliance officer and the need for disciplinary action?

33

33

Compliance Officer

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

FAR § 52.203-13(c)(2)(ii)(A)

34

Compliance Officer

Contractor is required to perform a due diligence to avoid selecting a compliance officer who has “engaged in conduct that is in conflict with the Contractor’s code of business ethics and conduct.”

FAR § 52.203-13(c)(2)((ii)(C)

35

Compliance Program

Requires “disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct.”

FAR § 52.203-13(c)(2)(ii)(E)

36

Tenth Question

It is the contractor's obligation to have a reliable internal control system. Would the Panel Members please comment on why the Government expects a contractor to have a reliable internal control system.

37

37

Internal Control System

Must periodically review the effectiveness of the company's business practices, procedures, policies, and internal controls for compliance with the code of business ethics and conduct including "especially if criminal conduct has been detected"

FAR § 52.203-13(c)(2)

38

Internal Control System

“Ascertain if the contractor has taken the necessary corrective actions to protect the Government’s interests. If the contractor has not taken the appropriate corrective action, the auditor should report this as an internal control deficiency.”

DCAA Audit Guidance

39

Internal Control System

“Verify that the contractor’s policies and procedures provide for cooperation with any Government agencies responsible for audits, investigations, or corrective actions.”

DCAA Audit Guidance

40

Eleventh Question

All Panel Members: The FAR 52.203-13 clause does not require small businesses to have a “business ethics awareness and compliance program and internal control system.” When a disclosure is filed, is there a different standard of accountability for small businesses?

41

41

Poll audience for
additional
questions.

42

42

Final Question

Would the four panelists please close by sharing their thoughts on the following commentary:

43

43

Commentary

“An ethics and compliance program, and internal controls, that are only on paper -- i.e., that sit on a shelf without being implemented and becoming a part of the contractor’s culture -- are not only a waste of an important opportunity but also are dangerous. *(continued)*”

44

44

Commentary (cont.)

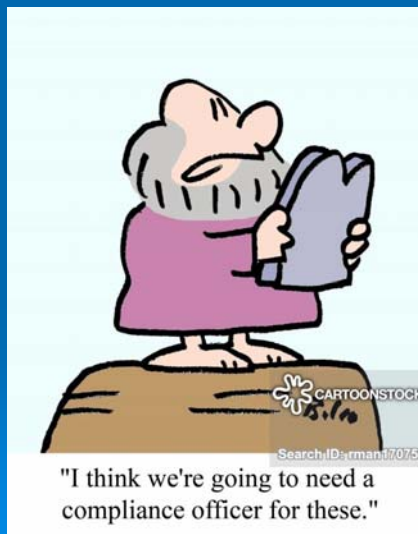
In the event of future wrongdoing, the contractor will be judged against the standards set forth in the ethics and compliance program, and internal controls.”

ABA Guide on Suspension & Debarment (2002) at 142

45

45

Thank You



46

46