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Government Contractors Must Now Self-Report Violations

Effective December 12, 2008, the government-wide acquisition regulation (FAR) will mandate all government contractors to disclose certain violations of federal criminal law and the civil False Claims Act "in connection with the award, performance, or closeout of a Government contract or a subcontract..." as well as significant overpayments on a contract, either as a contractual matter or based on new grounds for suspension and debarment. (FAR 3.1003(a)(1) and (2)).

The FAR Council's final rules, issued on November 12, 2008, follow previously proposed rules from November 14, 2007, and May 16, 2008, as well as Public Law No. 110-252, §6102, regarding mandatory reporting.

First, the FAR Council issued a final rule that will require new standard contract clause language for contracts projected to exceed \$5 million and 120 days or more of performance (FAC 2005-28, 73 Fed. Reg. 67064, November 12, 2008). The new contractual obligation, FAR 52.203-13(b)(3), will require timely disclosure to the respective agency inspector general and contracting officer whenever the contractor "has credible evidence that a principal, employee, agent, or subcontractor of the Contractor" committed a violation of federal criminal law or a violation of the civil False Claims Act. The Council replaced its previously proposed standard of "reasonable grounds to believe" with the higher standard of "credible evidence" in the final rule, following criticism during the comment period. Subcontractors will also be subject to this contractual disclosure requirement (FAR 52.203-15(d)).

While the contract clause requirement will not be retroactive to contracts and subcontracts awarded prior to December 12, 2008, the Council also issued a new rule establishing additional grounds for suspension and debarment of contractors for knowing failure to timely disclose such violations or knowing failure to timely disclose significant overpayments (FAR 9.406-2 and 9.407-2). This provision is retroactive and applies to all government contractors, regardless of the dollar value and period of performance of the contract (FAR 3.1003(a)(2)). However, the obligation to disclose under the suspension and debarment provisions for violations and significant overpayments under a particular contract or subcontract is limited to three years after final payment.

The Council also provided additional guidance regarding mandatory codes of business ethics and conduct (FAR 52.203-13(b)) and business ethics awareness and compliance programs and internal control systems (FAR 52.203-13(c)). Last December 2007, the Council mandated codes of business ethics and conduct for all contracts other than contracts for commercial items and contracts performed

outside of the United States. The new final rule removes these exceptions. FAR 3.1004(a) now requires all contractors to have a code of business ethics and conduct and requires all contractors (other than small businesses) to establish an awareness program and internal control systems for contracts expected to exceed \$5 million and 120 days.

In addition, FAR 52.203-13(c) now specifically requires that ethics awareness and compliance programs include effective training for principals and employees. It also requires contractors to designate responsibility of the internal control system "at a sufficiently high level" in the company and to provide "adequate resources" to ensure that the compliance program and internal control system are successful.

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