

New Regulatory and Statutory Compliance Requirements

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Overview

- New Regulatory Requirements
 - Final Rules
 - New Clauses
 - Proposed Rules
 - Concerns about Proposed Rules
- New Statutory Requirements
 - Proposed Legislation



Regulatory Requirements Final Rules

- **Requirement for Contractor Code of Business Ethics and Conduct, FAR Subpart 3.10**
 - Effective December 24, 2007
 - All contractors should have a code of conduct, a training program, and an internal control system
 - Contractors with contracts over \$5M and with a performance period of 120 days or more, must have a code of conduct, a training program, an internal control system, and display fraud hotline posters
 - Currently, commercial item contracts and contracts performed outside the U.S. are exempt from this requirement
- **Removal of DFARS Subpart 203.70, Contractor Standards of Conduct and Addition of DFARS Subpart 203.10, “Contractor Code of Business Ethics and Conduct”**
 - Effective August 12, 2008
 - Changes consistent with the addition of FAR Subpart 3.10



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Regulatory Requirements Final Rules (cont...)

- **Regulations Implementing Statute (18 U.S.C. 207) on Post-Employment Conflicts of Interest Restrictions, 5 CFR Parts 2637 and 2641**
 - Effective July 25, 2008
 - Applies to former employees in the executive branch or an independent agency
- **Combating Trafficking in Persons, FAR Subpart 22.17 and FAR 52.222-50**
 - US has a “zero tolerance policy” regarding trafficking in persons
 - Company may be held responsible if an employee violates the law
 - Termination of the contract for default
 - Suspension or debarment
 - Commercial sex act defined as “any sex act on account of which anything of value is given to or received by any person”
 - Applies to all acquisitions, including commercial item acquisitions



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Regulatory Requirements New Clauses

- **FAR 52.203-13, “Contractor Code of Business Ethics and Conduct”**
 - The Code must be established and circulated to all employees performing work on the contract within 30 days after contract award
 - A training program and internal control system must be established within 90 days after contract award
 - This requirement does not apply to small businesses
 - Subcontract flow-down requirement
- **FAR 52.203-14, “Display of Hotline Posters”**
 - Contractors must display agency fraud Hotline Posters in common work areas within business segments performing work under the contract and at contract work sites
 - If the company has a website, an electronic version must be on the website
 - If the company has a reporting mechanism, such as a hotline poster, then the contractor does not need to display any agency fraud hotline posters
 - Subcontract flow-down requirement
- **Deletion of DFARS 252.203-7002, “Display of DoD Hotline Poster”**



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Regulatory Requirements - Proposed Rules

- **Employment Eligibility Verification (E-Verify) (73 Fed. Reg. 33374, 6/12/08)**
 - Requires certain federal contractors and subcontractors to use the U.S. Citizenship and Immigration Services' (USCIS) E-Verify system, an internet-based employment verification program, to verify that certain of their employees are eligible for work in the United States.
 - Requires a contractor or subcontractor to, within 30 days of contract award, enroll in the E-Verify Program, and then within 30 days of enrollment, begin verifying the employment eligibility of all employees hired after enrollment in E-Verify.
 - Requires the verification of all existing employees that are directly engaged in the performance of work under the covered contract.
 - Once enrolled in E-verify (after the initial start-up), the contractor is required to verify newly-hired and newly-assigned employees within 3 days.
 - The proposed rule excludes:
 - contracts that do not involve work performed in the United States
 - prime contracts for commercially available off-the-shelf items (COTS) or items that would be COTS, but for minor modifications
 - contracts that do not exceed the micro-purchase threshold (generally \$3,000).



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Regulatory Requirements - Proposed Rules

- **GSAR Revision to Subpart 503.10, “Contractor Code of Business Ethics and Conduct” (73 Fed. Reg. 45194, 8/4/08)**
 - FAR 52.203-14, “Display of Hotline Poster(s)” must be included in contracts or orders funded with disaster assistance funds over \$1,000,000



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Regulatory Requirements - Proposed Rules (cont...)

- **Contractor Compliance Program and Integrity Reporting**
 - First Proposed Rule (72 Fed. Reg. 64019, 11/14/07)
 - Include contractor’s record of integrity and business ethics in past performance information
 - Use U.S. Sentencing Guidelines to establish expectations for an effective compliance and ethics program
 - Make stated elements of the compliance program mandatory rather than guidance
 - Take disciplinary action for failing to take steps to prevent or detect improper conduct by others
 - Add as a ground for suspension/debarment a “knowing failure to timely disclose an overpayment on a Government contract or a violation of Federal criminal law in connection with the award or performance of any Government contract performed by the contractor or a subcontract awarded thereunder”
 - Add a mandatory disclosure requirement – “reasonable grounds” to believe a violation of criminal law has been committed
 - Internal control system requires “full cooperation” with Government agencies



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Regulatory Requirements - Proposed Rules

- **Contractor Compliance Program and Integrity Reporting (cont...)**
 - Second Proposed Rule (73 Fed. Reg. 28407, 5/16/08)
 - Require inclusion of FAR 52.203-13 in contracts and subcontracts to be performed outside the United States
 - Initial exclusion of these contracts was based on the DFARS exclusion of these contracts from the requirement to post DoD Hotline Posters
 - Require inclusion of FAR 52.203-13 in contracts and subcontracts for the acquisition of commercial items
 - This would require commercial item contractors with a contract over \$5M and with a performance period of more than 120 days to:
 - » Have a written code of business ethics;
 - » Prevent and detect criminal conduct; and
 - » Notify the government, in writing, when the contractor has reasonable grounds to believe that violations of the Civil False Claims Act or Federal criminal law have occurred in connection with the award or performance of a contract or subcontract
 - Add a new cause for suspension or debarment to the current lists at FAR 9.407-2 and 9.406-2, respectively
 - Suspension – “adequate evidence”
 - Debarment – “preponderance of the evidence”



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Concerns About Proposed Rule

- **Contractor Compliance Program and Integrity Reporting**
 - Mandatory disclosures remove the voluntary nature of self-governance
 - “Full cooperation” standard may compel waiver of the attorney-client privilege
 - Vague “reasonable grounds to believe” standard
 - ABA recommends revision to “actual knowledge” standard
 - Scope of “federal criminal law” is too broad
 - Required disclosures regarding overpayments should include a materiality requirement
 - Several questions remain outstanding
 - What is a “timely” disclosure?
 - What is a prime contractor/higher tiered subcontractor’s duty to police its subcontractors?
 - What type of information is required to be included in a mandatory disclosure?



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Proposed Legislation

- **H.R. 3405:** To require persons to certify that they have not violated foreign corrupt practices statutes before being awarded Government contracts, and for other purposes
- **H.R. 3383: Defense Contracting Ethics Oversight Act of 2007**
 - To require internal ethics compliance programs by Department of Defense contractors, and for other purposes



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Proposed Legislation (cont...)

- **H.R. 5658: Duncan Hunter National Defense Authorization Act for Fiscal Year 2009**
 - Section 831: To establish a DoD database for use by contracting officers regarding the integrity and performance of federal contractors awarded DoD contracts in excess of \$500,000. The database would include:
 - A brief description of each civil, criminal, or administrative proceeding in connection with the award or performance of a federal contract that resulted in a criminal conviction, civil or administrative penalty of \$5,000 or more, or damages in excess of \$100,000 as a result of an administrative proceeding.
 - A brief description of any civil or administrative proceeding that was resolved through a settlement agreement, if the proceedings could have led to any of the above penalties.
 - Information for the previous 5 years regarding each federal contract or grant terminated for default, each federal suspension and debarment, each federal administrative agreement to resolve a suspension or debarment proceeding, and each final finding by a federal official that the contractor has been determined not to be a responsible source.



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Proposed Legislation (cont...)

■ **H.R. 5658: Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (cont...)**

- Section 4402: To require the FAR to be amended to include provisions that require timely notification by Federal contractors of violations in Federal criminal law or overpayments in connection with the award or performance of covered contract or subcontracts, including those performed outside the US and those for commercial items
- Section 832: To include a mandatory clause addressing personal conflicts of interest in contracts or task orders for the performance of acquisition functions closely associated with inherently governmental functions.
- Section 833: To require DoD to prescribe in regulations a policy to inform contractor employees of their whistleblower rights under U.S.C. Title 10 and the FAR.



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New Reliance on Existing Regulation

■ FAR 9.406-2, "Causes for Debarment"

- (b)(2) provides that several violations of the Immigration and Nationality Act (INA) employment provisions may be grounds for debarment.
 - Knowingly hiring unauthorized workers
 - Continuing to employ an alien who is or becomes unauthorized
 - Engaging in patterns or practices of knowingly hiring or continuing to knowingly employ unauthorized workers
- In September 2008, the Department of Homeland Security's Immigration and Customs Enforcement (ICE) notified 7 companies previously found to have knowingly hired illegal aliens that they are being considered for debarment.
- ICE officials are using the debarment option for the first time.



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