

Going FAR Enough? What Every Government Contractor Needs to Know

George W. Ash
Scott L. Fredericksen

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Agenda

- Overview of Final Rule
- New Contract Clause Mandatory Disclosure Requirements
- New Cause for Suspension/Debarment
- What This Means For You
- What Should You Do
- Preparing for Possible Prosecution
- Questions



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Overview of New FAR Requirements

- Effective December 12, 2008
- New causes for suspension/debarment for **all** contracts and subcontracts (regardless of value or duration)
- Requires FAR 52.203-13, “Contractor Code of Business Ethics and Conduct” to be included in contracts if the value is expected to **exceed \$5M** and the performance period is **120 days or more**
 - **Includes** commercial item contracts and subcontracts and contracts performed outside of the United States



Overview of New FAR Requirements

- Certain requirements will apply retroactively and others only prospectively
 - Knowing failure to timely disclose for suspension/debarment applies retroactively to **all** contracts and subcontracts that are still open or for which final payment was made within the last 3 years
 - Timely disclosure measured from the later of the date the contractor has credible evidence of violation or December 12, 2008
 - Requirements of FAR 52.203-13 will only apply prospectively to contracts and subcontracts that contain the clause (i.e., contracts and subcontracts resulting from solicitations issued after December 12, 2008)



Overview of New FAR Requirements

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- Requirements that Only Apply if Contract or Subcontract Includes FAR 52.203-13
 - Requirements Applicable to **All** Contracts Containing the Clause
 - Mandatory timely disclosure obligations
 - Have a written code of business ethics and conduct
 - Make a copy of the code available to each employee engaged in the performance of the contract (distributing paper copies not required)
 - Exercise due diligence to prevent and detect criminal conduct
 - Promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law
 - Required Flowdown to subcontractors with a subcontract greater than \$5M and a period of performance of 120 days or more

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Overview of New FAR Requirements

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- Requirements that Only Apply if Contract or Subcontract Includes FAR 52.203-13 (cont...)
 - Requirements Applicable to Contracts Other Than Commercial Item or Small Business Contracts
 - Commercial item contractors and small businesses are encouraged, **but not required**, to have a business ethics awareness and compliance program and internal control system
 - Business ethics awareness program includes:
 - Training programs
 - Other means of disseminating information to principals and employees and, if appropriate, agents and subcontractors

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Overview of New FAR Requirements

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- Requirements that Only Apply if Contract or Subcontract Includes FAR 52.203-13 (cont...)
 - Requirements Applicable to Contracts Other Than Commercial Item or Small Business Contracts (cont...)
 - Internal control system includes:
 - Assignment of responsibility at a high level and adequate resources to ensure effectiveness of programs
 - Reasonable efforts not to include an individual as a principal if they have engaged in conduct contrary to the code
 - Periodic reviews of practices, policies, procedures and internal controls for compliance with the code and government contract requirements
 - Internal reporting mechanism that allows for anonymity or confidentiality (e.g., a hotline)
 - Disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct
 - Timely disclosure procedures for mandatory disclosure requirements
 - Full cooperation with any Government agencies responsible for audits, investigations, or corrective action

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New Contract Clause Mandatory Disclosure Requirements

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- Timely Disclosure
- Credible Evidence
- In connection with the award, performance, or closeout of the contract or any subcontract under the contract
- Principal, employee, agent, or subcontractor has committed
 - A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations; or
 - A violation of the civil False Claims Act
- Disclosure must be marked “confidential” or “proprietary” in order to be kept confidential by the Government and not released in response to a FOIA request
- Disclosure requirement continues until 3 years after final payment on the contract

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New Contract Clause Mandatory Disclosure Requirements

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- Disclosure in writing to the agency Office of the Inspector General with a copy to the Contracting Officer
 - Disclosures do not need to be made through the prime contractor
 - If a violation spans several contracts, disclosure should be made to the Agency OIG for the largest dollar value contract impacted
 - For a Government-wide acquisition, multi-agency, or multiple award schedule contract, disclosure should be made to all of the following:
 - The OIG of the ordering agency
 - The OIG responsible for the basic contract
 - Respective agencies' contracting officers
 - General Services Administration's Office of Inspector General created a website with a standardized online disclosure form (<http://oig.gsa.gov/integrityreport.htm>)
 - Defense Department's Office of Inspector General created a website with a sample disclosure form and contact information for submitting reports by mail or e-mail (<http://www.dodig.osd.mil/Inspections/IPO/voldis.htm>)
- Applies to violations by a "principal, employee, agent, or subcontractor"
 - "Agent" includes independent contractors and others authorized to act on behalf of the organization – it is not clear if "agent" includes team members and/or joint venture partners
- Timeliness measured from the later of:
 - The date the contractor has credible evidence of a violation;
 - The date the contract clause is incorporated; or
 - The date the contractor's internal control system was established

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New Cause for Suspension/Debarment

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- Applicable to **all** contractors and **all** contracts, regardless of size or duration
- FAR Revisions
 - FAR 3.1001 and 3.1003
 - FAR 9.406-2 and 9.407-2
 - Definition of "Principal" added in FAR 2.101(b)(2)

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New Cause for Suspension/Debarment

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- Knowing failure
- By a principal
- To timely disclose
- In connection with the award, performance, or closeout of the contract or a subcontract thereunder
- Credible evidence of:
 - Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;
 - Violation of the Civil False Claims Act; or
 - Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments
- Until 3 years after final payment on any Government Contract awarded to the contractor
- Evidentiary Standards
 - Suspension: Adequate Evidence
 - Debarment: Preponderance of the Evidence

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New Cause for Suspension/ Debarment

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- “Knowing failure”
 - Implies actual knowledge
 - The Councils rejected a “should have known” standard

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New Cause for Suspension/ Debarment

- “By a principal”
 - Principal is defined as “an officer, director, owner, partner, or person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division or business segment)”
 - The Councils will broadly interpret this definition – it can include compliance officers, directors of internal audits, or other positions of compliance responsibility
 - Failure to disclose will not be a cause for suspension/debarment if lower-level employees commit a crime and conceal it from all “principals”



New Cause for Suspension/ Debarment

- “Timely disclose”
 - Councils considered and rejected a set period of time (i.e., 30 days)
 - “Credible evidence” implies the contractor will have time to perform a preliminary examination of the evidence before obligation to disclose arises
 - Obligation to timely disclose, in effect, arises as of the effective date, December 12
 - Issue of timely disclosure will likely arise if the Government independently discovers a violation and likely only if a violation actually occurred
 - Although the contract clause specifies who should receive mandatory disclosures, no proper individual/authority is specified for the purpose of suspension/debarment



New Cause for Suspension/ Debarment

- “Credible evidence”
 - Not defined
 - The Councils replaced “reasonable grounds to believe” with “credible evidence”
 - Suggests a higher standard
 - Contractor will have time to make some examination of the evidence to determine its credibility before making the decision to disclose to the Government
 - Compare to “adequate evidence” standard for suspension



New Cause for Suspension/ Debarment

- “Violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code”
 - Title 18 includes over 100 references to fraud
 - Rule does not define these offenses and Title 18 contains several applicable provisions
 - Conflict of Interest
 - Bribery
 - Gratuity Violations



New Cause for Suspension/ Debarment

- “Violation of the Civil False Claims Act” (31 U.S.C. §§ 3729-33)
 - Can be initiated by the government or by a *qui tam* relator (i.e., a disgruntled employee or a whistleblower)
 - “Claim” includes any attempt to get money from the government that is misleading or incorrect (e.g., inaccurate invoices, certifications, claims, statements, falsified test results, product substitutions, etc.)
 - Penalties include treble damages (three times the amount of the false claim) and \$11,000 per false claim (i.e., per invoice or voucher)

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New Cause for Suspension/ Debarment

- “Significant Overpayment”
 - Implies more than just a dollar value
 - Depends on the circumstances of overpayment
 - Not meant to address rate adjustment or interim payments
 - Rate adjustments are not considered overpayments until the rates are determined
 - Councils excluded overpayments that result from contract financing payments (i.e., advance payments, performance-based payments, progress payments, etc.)
 - Aims to address undisclosed “unjust enrichment” overpayments

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What This Means For You

- Even though not all contractors are required to have business ethics awareness and internal control programs, they still must have some mechanism for detecting significant overpayments, violations of Federal criminal law and the civil False Claims Act (FCA) and a process for making timely mandatory disclosures to avoid suspension/debarment and to get the benefit of the U.S. Sentencing Guidelines
 - Note if the contract clause applies and you are providing a non-commercial item and you are not a small business, these programs are required under the contract terms



What This Means For You

- The new causes for suspension/ debarment have a retroactive effect
 - Applies up to three years after final payment
 - Councils rejected contract closeout as the end point because fraud often occurs at that time
 - Contractors have an obligation to make mandatory disclosures regarding contracts in place and for conduct that occurred prior to the effective date of the rule, and prior to the contractor having an internal control system in place
 - Good reason to be diligent in closing out contracts



What This Means For You

- New Contract Clause Mandatory Disclosure Requirements
 - Requires contractors to disclose known violations by its subcontractors and agents
 - Does not seem to require contractors to disclose information about other contractors (including the prime or a higher tiered subcontractor) or violations by government employees
 - Mandatory disclosure of FCA violations presents a risk of prompting a *qui tam* lawsuit
 - Contractors must be diligent about flowing down this clause to its subcontractors
 - The clause does not **require** contractors to review/approve of its subcontractors' codes or systems, but it may be a good practice to confirm that the subcontractors have such codes and systems



What This Means For You

- New Causes for Suspension/Debarment
 - All contractors should have internal controls systems for identifying when they receive an overpayment from the Government
 - Since the knowledge of a principal triggers the suspension and debarment clause, all principals must be trained to identify federal criminal law and FCA violations
 - Contractors needs to train employees regarding what constitutes a false claim under the FCA
 - This may not be easy as Courts disagree as to when a violation of the FCA has occurred
 - The Councils noted that genuine disputes over the proper application of the FCA may be considered in evaluating whether the contractor knowingly failed to disclose a violation
 - Requirement to perform a higher level of due diligence on selecting principals and subcontractors



What Should You Do

- Create internal procedures for uncovering possible violations/overpayments
 - Identify all open contracts and contracts closed within the last three years
 - Identify all “principals”
 - Training
 - Periodic interviews for reportable events
 - Review prior disclosures that are still pending and update the disclosure consistent with the new regulation (i.e., in writing, to the OIG, etc.)
- Conduct an internal investigation and/or audit
 - Interview principal employees
 - Collect and review documents
 - Document findings



What Should You Do

- Evaluate existing internal controls
 - Review Current Policies
 - Review and assess quality of current written policies and procedures and whether these policies are followed
 - Are they current and up to date?
 - Are there any gaps?
 - Is someone accountable for adherence to policy?
 - Review and/or implement Code of Business Conduct
 - Tone from the Top
 - Statement of company’s core values
 - Commitment to stakeholders



What Should You Do

- Refine Reporting Mechanisms
 - Publicize existence of system
 - Make system easily accessible to all employees
 - Emphasize importance of reporting potential violations
 - Anonymous and Confidential
 - Memorialize reports received and document response
 - Utilize existing infrastructure: HR, Internal Audit, and Compliance Officer



What Should You Do

- Create a written protocol for reporting, reviewing and vetting potential disclosures
 - What events trigger the requirement for a report?
 - Who should “principals” and other employees go to with reports?
 - What documentation should the company prepare?
 - What did the company know and when did it know it?
 - What documents were reviewed and who was interviewed?
 - What factors/criteria were used to assess credible evidence?
 - Who was involved in the evaluation of the potential disclosure?
 - Who made the final decision (Lawyer? Business unit? Compliance Officer? Board? Audit Committee of Board?)



What Should You Do

- Training for all employees on:
 - Policies and Procedures
 - Code of Conduct
 - New Requirements
 - Explain mandatory disclosure requirements
 - Emphasize importance of reporting potential violations
 - Define and give examples of conduct that must be reported internally
 - Periodic refreshers and require certification



What Should You Do

- Assess legal and compliance resources NOW
 - Self-evaluation of potential risks – better to do it now before the government knocks
 - Risk of potential whistleblowers
 - The sooner you uncover potential disclosures, the sooner you can take corrective action and bolster your compliance program and internal controls
 - Begin taking steps to build your case for “present responsibility”



Preparing for Possible Prosecution

- A Word on Cooperation:
 - An open question whether the move from voluntary to mandatory disclosure causes a loss of the benefit of corporate cooperation
 - “Full Cooperation” now a Requirement, not a plus factor
 - Full cooperation must be given to all government agencies involved with audits, investigations or corrective actions



Preparing for Possible Prosecution

- Full cooperation is defined as “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. 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).
- Full Cooperation does not foreclose contractor rights
 - No waiver of attorney client privilege or attorney work product
 - No waiver of 5th amendment rights
 - Not restricted from conducting an internal investigation
 - Not precluded from defending a dispute arising out of a disclosed violation



Preparing for Possible Prosecution

- Responding to Subpoenas and Search Warrants
 - Advise employees not to destroy or alter any documents
 - After the search/receipt of subpoena, promptly issue a document retention memorandum to all employees that may have information that no documents should be destroyed or altered
 - Counsel should debrief all employees that were present at the search; begin interviewing employees
 - Immediately identify employees that may be knowledgeable about the subject of the investigation



Preparing for Possible Prosecution

- Document Preservation, Retention and Collection Strategies
 - Designate a custodian of records
 - This person will be responsible for logging all collected documents, collecting certifications, and will be the liaison with counsel
 - Ideally, custodian not involved in the subject of the investigation (sometimes it is an in-house paralegal)



Preparing for Possible Prosecution

- Document Preservation, Retention and Collection Strategies
 - Issue a Document Preservation and Collection Memorandum. The memo should:
 - Be sent to all employees that may have relevant documents (be over inclusive in your universe of employees)
 - Describe the category of documents at issue (should use identical language to the subpoena so no argument of obstruction)
 - Explain that described documents (including e-mails and electronic files) should not be deleted or destroyed
 - Remind employees to search their electronic files, off-site documents, documents at home, archive email (if subject to the subpoena date), shared drives, etc.
 - Include a certificate of compliance that requires the employee to certify that he read the notice, understood it and made diligent efforts to locate documents within his control



Preparing for Possible Prosecution

- Avoiding Indictment
 - A robust compliance program is critical to avoid indictment
 - A compliance program demonstrates a company's commitment to business ethics and integrity and is a key factor listed in the Filip Memorandum, the DOJ guidance prosecutors must use when deciding whether or not to charge a company



Preparing for Possible Prosecution

- Avoiding Suspension and Debarment
 - Standard: Present Responsibility
 - The contractor has the burden of demonstrating its present responsibility and that suspension/debarment is not necessary
 - The FAR expressly provides that debarment is “not for purposes of punishment” and shall only be imposed if it is in the public interest



Preparing for Possible Prosecution

- Avoiding Suspension and Debarment
- The mitigating factors are listed in FAR 9.406-1(a)(1)-(10) and closely mirror the Filip Memorandum factors considered when deciding whether to criminally charge a cooperation. The factors include:
 - Internal Controls
 - Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any government investigation



Preparing for Possible Prosecution

- Mitigating factors (cont...)
 - Whether the contractor brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner
 - Whether the contractor has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official
 - Whether the contractor cooperated fully with Government agencies during the investigation and any court or administrative action
 - Whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution



Preparing for Possible Prosecution

- Mitigating Factors (cont...)
 - Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment
 - Whether the contractor has implemented or agreed to implement remedial measures, including any identified by the Government.
 - Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs
 - Whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for debarment
 - Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence



Preparing for Possible Prosecution

- Open question how the new rules affect the mitigating factors



Questions

