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## New Federal Contractor and Subcontractor Disclosure Requirements

By: [Stanley A. Millan](#), [Marc C. Hebert](#), and [Michael C. Drew](#)

Effective December 12, 2008, the Federal Acquisition Regulatory (“FAR”) Council issued a contractor/subcontractor disclosure program at 73 Federal Register 67064 (November 12, 2008). These rules modify various provisions of FAR, including FAR 52.203-13, to supplement the previously promulgated contractor code of business ethics and conduct relating to ethics and internal compliance. Click [here](#) to see a previous E\*Zine on this subject from 2008.

The new rules mandate the inclusion of certain clauses in these areas for federal contract and subcontracts that are over five million dollars and over 120 days performance duration. This new rule affects both large and small business contractors and subcontractors.

Together, the 2007 and 2008 amendments of the regulations require three components of compliance by large contractors: (1) an ethics code, (2) an internal compliance program (including training, hotlines, internal investigation, corrective action, etc.), and (3) a disclosure to an agency inspector general of knowledge of credible evidence of fraud within three years of final pay of any federal contract or subcontract. In other words, this **requirement is retroactive** to an extent to cover not only new contracts covered by the new clauses, but also past contracts and subcontracts within the purview of the new mandatory compliance programs.

However, as small businesses do not have to comply with the internal compliance program aspect, the new regulation would not require mandatory disclosure of fraud on prior contracts, but only of knowledge of credible evidence of fraud on the contracts or subcontracts which are subject to the new clauses. Again, these have threshold requirements of dollar amount and duration, and the disclosures are not triggered until there is knowledge of credible evidence of fraud on a contract or subcontract.

The disclosures relate not only to violations of federal criminal law, including fraud, but also violations of the civil False Claims Act, which includes overpayments or improper billing.

Failure by a contractor or subcontractor to disclose the fraud to the inspector general can warrant a new ground of suspension or debarment of federal contractors or subcontractors if the failure was knowing.

The Department of Justice may be more lenient on violations voluntarily disclosed, and, as such, a suspension is not automatic for voluntary disclosures. Nevertheless, False Claims Act disclosures (improper invoices, overbilling, etc.) can still result in significant government damage claims (including a multiple of the entire contract price), plus penalties for the improper billing or overbilling involved.

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In regard to small business concern contractors and subcontractors, because certain small business programs have come under scrutiny by the U.S. Government Accountability Office (“GAO”), Small Business Administration (“SBA”), Congress, and the Department of Justice, extra care must be taken to assure that a small business’ size status and other eligibility requirements for various small business set-asides are fully justified. Contractors’ affiliations and revenues change the business size dynamics, and disclosures, whistle-blowing, size status protests, SBA examinations, and inspector general investigations may pick up any weakness in a company’s small business program.

*Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:*

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