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New Federal Contractor Code of Business Ethics and Conduct

Both the Civilian Agency Acquisition Council and Defense Acquisition Regulations Council have agreed on a final rule amending the Federal Acquisition Regulation to require a contractor code of business ethics and conduct and to require the display of federal agency office of inspector general fraud hotline posters. See 72 F.R. 65873 (2007). This new rule takes effect on December 24, 2007.

The rule applies to all new federal government contracts and subcontracts that are awarded and are in excess of a \$5 million dollar threshold and 120-day period performance requirement. Contracts and subcontracts that are less than \$5 million dollars or that can be performed in less than 120 days are exempt from the rule. Also exempt from the rule are contracts and subcontracts, or the portions thereof, that are performed outside of the United States and commercial item contracts, e.g., items that can be bought by the government agencies or government contractors from "off the shelf" are also exempt from the new regulation.

The new FAR rule requires a contractor code of business ethics and conduct to be promulgated within thirty days after contract award, unless the contracting officer establishes a longer time period. This requirement includes a written code, providing a copy of the code to each employee engaged in performance of the contract, and the contractor promoting compliance with its code.

Additionally, FAR requires that the contractor establish an ongoing business ethics and business conduct awareness program and an internal control program within 90 days of the contract award (unless the contracting officer establishes a longer time period). The internal control program must provide for timely discovery of improper conduct as well as corrective measures for such misconduct, including a hotline for internal reporting, appropriate internal and external audits, and disciplinary action for improper conduct. These particular awareness and internal control program requirements do not apply to small businesses.

The same requirements apply to subcontracts under federal contracts if they are of a value of \$5 million dollars or more and are performed for more than 120 days, except when a commercial item is involved or the subcontract is performed entirely outside the United States.

Additionally, fraud hotline posters must be displayed by the contractor and subcontractor during contract performance. This includes displaying an agency fraud hotline poster or a Department of Homeland Security fraud hotline poster on site as well as on websites.

This new FAR rule does not mandate the application of any particular code of busi-



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ness ethics and conduct but leaves flexibility to the contractor and subcontractor in adoption of an appropriate code. Also, this particular FAR regulation does not mandate reporting to agency inspectors general, as opposed to internal reporting; however, compliance and effectiveness of the contractor's or subcontractor's program will be a matter of contract compliance for the contracting officer if a problem develops involving the contractor's unethical conduct or fraud.

This new final rule expands ethical requirements on more and smaller government contractors, although it does not dictate the terms of the ethical code a company is supposed to promulgate. The new rule would also be in addition to any ethics and training required of publicly traded companies under the Sarbanes-Oxley Act of 2002 (Public Law 107-204).

Although the details of an ethical code are not contained in the new regulation, there are many models for contractors to choose from larger government contractors. For instance, though not mandated, issues addressed in many government contractor ethical conduct codes include the following:

- Conduct of company employees in dealing with other contractors, consultants, and vendors in a fair, consistent, and professional manner
- Limits on gifts to company employees, such as a gift of over \$75 if it could be reasonably inferred that the gift was intended to influence the employee's conduct, interfere with performance of duties, or as a reward for official actions
- Avoiding scenarios with other contractors, consultants, and vendors where a conflict of interest may arise, e.g., by hiring relatives of a company employee
- Prohibiting contractors, consultants, and vendors with whom the company deals from hiring former company employees if they will appear before the company or work on a matter with the vendor on which they personally participated while a company employee
- Ethical business practices for contractors, consultants, and vendors, including not seeking, soliciting, demanding, or accepting information that provides an unfair advantage over a competitor or engaging in any activity or course of conduct that restricts open and fair competition

Mandatory agency reporting is still being separately considered in another FAR rule-making (FAR case 2007-006). See 72 Fed. Reg. 64019 (Nov. 14, 2007).

The latest proposed rule by the FAR councils (Case 2007-006) specifically addresses mandatory and timely reporting in writing to the agencies' inspectors general and contracting officer, whenever a covered contract or subcontractor has reasonable grounds to believe that a principal, employee, agent, or lower-tier subcontractor has committed a violation of federal criminal law in connection with the award or performance of any government contract or subcontract and mandates full cooperation with the government agencies responsible for audits, investigations, or corrective



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actions. If FAR Case No. 2007-006 is finalized, of course, the trigger, “reasonable grounds to believe that [a violation has been committed],” is vague and will raise government allegations of untimely or incomplete reporting if delays occur.

Additionally, government contractors under the proposal can be subject to suspension and debarment for knowingly failing to timely disclose an overpayment on a government contract or a violation of federal criminal law in connection with award or performance of any government contract or subcontract.

For further information, contact [Marc Hebert](#), [Stan Millan](#), or [Mike Drew](#) at Jones Walker.