

Revised Ethics and Compliance Rule for Government Contractors Significantly Expands Reporting Requirements and Eliminates Exemptions

by J. Alex Ward and Robert R. Stauffer

Due in large part to congressional pressure, the FAR Councils have proposed revisions that will substantially expand the scope and effect of the compliance and reporting rules for government contractors that were published for notice and comment in November 2007 (the "Proposed Rule"). See Federal Acquisition Regulation; FAR Case 2007-006, Contractor Compliance and Integrity Reporting (2nd Proposed Rule), 73 Fed. Reg. 28407 (May 16, 2008). As described below, the revisions eliminate two major exemptions to the Proposed Rule and dramatically expand the Proposed Rule's mandatory disclosure requirements.

As we previously reported, the original version of the Proposed Rule imposed detailed requirements on government contractors' ethics training programs and internal controls, but it exempted commercial item contracts and overseas contracts from most of those requirements. See Federal Acquisition Regulation; FAR Case 2007-006, Contractor Compliance Program and Integrity Reporting, 72 Fed. Reg. 64019 (Nov. 14, 2007); *see also Client Advisory: New Compliance and Reporting Requirements for Government Contractors*. Those exemptions received intense scrutiny in Congress, in the form of both hearings and proposed legislation. See *Congressional Scrutiny Likely to Result in Toughening of Proposed Rule on Government Contractor Ethics*. As a result, the revised version of the Proposed Rule completely eliminates the

exemption for overseas contracts, which the FAR Councils described as essentially a drafting error. For commercial item contracts, the Proposed Rule eliminates the exemption from the mandatory disclosure requirements but continues the exemption from most of the requirements for formal ethics training and internal controls programs.

The original version of the Proposed Rule also required a contractor to timely report to the agency Inspector General and the relevant contracting officer when it has reasonable grounds to believe that a violation of federal criminal law has occurred in connection with the award or performance of a government contract or subcontract. To enforce the reporting requirement, the Proposed Rule authorized suspension and debarment for a failure to report criminal violations or contract overpayments. The revised version of the Proposed Rule significantly expands the mandatory disclosure requirement, as well as the suspension and debarment provisions, by requiring reporting of violations of the civil False Claims Act. Other than stating that the Department of Justice proposed this revision, the FAR Councils did not explain the rationale for extending the disclosure requirement to civil False Claims Act violations.

The deadline for submitting comments on the revised version of the Proposed Rule is July 15, 2008. While the FAR Councils may be open to making minor refinements, the active involvement of Congress and the Department of Justice suggests that the recent

revisions are likely to be retained in the final rule in more or less their current form. As a result, contractors should be prepared to operate in an environment in which all of their major contracts, whether domestic or overseas, other than commercial item contracts, are covered by the new, more rigorous ethics and compliance requirements. And they should anticipate that they will be required to report federal criminal law

and civil false claims violations, as well as contract overpayments, that occur in connection with any major contract, including commercial item contracts. However, contractors who are prepared to comply with the new requirements may enjoy competitive benefits if their competitors perceive that the added compliance burdens outweigh the advantages of seeking the U.S. government's business.

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