



JONES DAY COMMENTARY

FEDERAL GOVERNMENT PROPOSES RULE REQUIRING MANDATORY DISCLOSURE OF PROCUREMENT CRIMES

The Federal Government, at the request of the Department of Justice, has proposed changes to the Federal Acquisition Regulation ("FAR") that, among other things, would mandate disclosure of federal crimes by contractors and subcontractors relating to the award or performance of a federal procurement contract. The proposed regulations were published in the Federal Register on November 14, 2007 (72 Fed. Reg. 64019). They include provisions requiring implementation of business ethics compliance programs, reporting of criminal violations relating to contract award and performance, and consequences associated with noncompliance. Implementation of the proposed rule would impose significant additional burdens, responsibilities, and risks on companies doing business with the federal government.

Under the proposed rule, a government contractor will be required to notify the relevant agency's Office of Inspector General and the relevant Contracting Officer, in writing, if the contractor has "reasonable

grounds to believe" that its principal, agent, employee, or subcontractor has violated any federal criminal law in connection with the award or performance of a federal procurement contract or subcontract. Failure to timely report criminal violations may result in suspension or debarment. The regulations provide no guidance on what constitutes "reasonable grounds to believe" a crime may have occurred. This language, however, closely tracks similar mandatory disclosure language in the federal Anti-Kickback Act. See 41 U.S.C. § 57.

The proposed rule also would mandate that contractors implement effective compliance programs patterned along the requirements spelled out in the U.S. Sentencing Guidelines Manual § 8B2.1 (2007) (*available at <http://www.ussc.gov/2007guid/CHAP8.pdf>*). As part of that program, contractors must establish a written code of ethics and business conduct within 30 days of contract award. Copies of the contractor's code must be provided to each employee involved in

contract performance. Compliance programs should include procedures for ongoing risk assessment and compliance training and internal control systems to ensure the program is effective, to deter and detect improprieties, and to ensure timely corrective actions are taken when violations occur. They also should provide for “full cooperation” with federal agencies responsible for audit, investigation, or corrective actions. Again, no guidance is provided on what is meant by “full cooperation.”

The proposed rule states that although the general policies laid out therein will apply to all government contractors, the specific requirements described above will be “mandatory” only when inclusion of the proposed “Contractor Code of Business Ethics and Conduct” clause is required. The proposed clause will be included in contracts and subcontracts with an expected value exceeding \$5 million and a period of performance more than 120 days unless the contract or subcontract is for commercial items or will be performed entirely outside the United States.

Comments regarding the proposed change must be submitted to the FAR Secretariat on or before January 14, 2008. The proposed rule comes in response to a request by the Department of Justice to strengthen the regulatory requirements associated with ensuring integrity in government contracting. As the requirements for government contractors with regard to business ethics compliance and reporting evolve and expand, Jones Day continues to help businesses identify requirements, implement compliance programs, and resolve problems that arise in this and all other aspects of the government contracting process.

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