

The Complete Compliance and Ethics Manual 2023

Government Contractor Integrity and Responsibility: Risks and Opportunities in the Federal Marketplace

By Eric R. Feldman, CFE, CIG,^[1] and Rodney A. Grandon^[2]

Government contracting is a complex, ever-changing undertaking that offers financial opportunities, a certain degree of economic stability, and a virtual minefield of risks to the contractors who participate in the federal marketplace. One of the greatest of those risks is remaining in compliance with the thousands of regulations that comprise the Federal Acquisition Regulation (FAR)^[3] and its supplements, the regulatory foundation of federal contracting. Contractors need to learn, and fully understand, the nuances associated with federal contracting, such as the special integrity rules that impose restrictions very different than those governing commercial transactions; unique government requirements, such as the Buy American Act,^[4] the Truth in Negotiations Act,^[5] the Procurement Integrity Act;^[6] and myriad cost accounting principles, billing requirements, conflict of interest rules, and other provisions that, if violated, can cost the contractor millions in fines, result in suspension or debarment from future government business, and even end in criminal prosecution for both the company and its officers and directors.

Contractors can survive and, indeed, flourish in the world of government contracting, provided they understand the risks associated with federal contracting; focus on achieving compliance with the many “rules of the road” required to participate in the government sector; and embrace the role of ethics and compliance programs in promoting integrity in their business operations and demonstrating due diligence to government customers and regulators, including the enforcement community (e.g., the Department of Justice and agency Suspending and Debarment Officials) should problems arise.

Integrity First

It all starts with integrity. Government procurement professionals are directed to “conduct themselves in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct” among all involved.^[7] “The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.”^[8]

These principles of public trust expressly extend to contractors participating in the federal marketplace. The FAR mandates that “Government contractors must conduct themselves with the highest degree of integrity and honesty.”^[9] To achieve these worthy objectives, the FAR recommends that *all* contractors should have a written code of business ethics and conduct—only those contractors above a specified threshold *shall* have a code of business ethics and conduct.^[10] To be effective, the code must be customized to the specific risks associated with the contractor’s business operations. This requires contractors to assess their operations from time to time to ensure their codes and related policies and procedures are aligned with their operational risks. There are a common set of risks associated with most businesses. For example, purchasing systems must be controlled to prevent fraud, waste and abuse. Accounting systems must be structured and controlled to ensure books and

records are accurate, current, and complete. Diligence should be exercised in hiring and in employee promotions to ensure a quality workforce. In addition to these standard business risks, government contracting introduces many requirements that have no counterpart in commercial transactions. For example, many government procurements are subject to Buy American requirements; limitations on paying fees to agents to line up business opportunities; mandatory flow-down requirements in subcontracts; and a host of special requirements relating to promoting the United States Government's socio-economic policies (e.g., use of small business concerns, special labor requirements, recycled content requirements, etc.). It is critical for contractors to be tuned to the shifting risk landscape, and their codes and related policies and procedures must be tailored to promote an ethical workforce capable of achieving compliance.

In addition to having a code of business ethics and conduct all contractors should have and contractors above the specified threshold shall have, an employee business ethics and compliance training program and an internal control system that “(1) [a]re suitable to the size of the company and extent of its involvement in government contracting; (2) [f]acilitate timely discovery and disclosure of improper conduct in connection with government contracts; and (3) [e]nsure corrective measures are promptly instituted and carried out.”^[11] In other words, government contractors must have in place written codes, policies, and procedures necessary to prevent misconduct to the extent reasonably possible, to identify misconduct when it occurs, and to take appropriate corrective and remedial steps following the discovery of misconduct. The heart of the business ethics and compliance program distills to three basic elements: PREVENT. DETECT. CORRECT.

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