

**STATEMENT OF
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BEFORE THE
COMMITTEE ON OVERSIGHT AND
GOVERNMENT REFORM
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,
ORGANIZATION AND PROCUREMENT
U.S. HOUSE OF REPRESENTATIVES
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Chairman Towns, Ranking Member Bilbray, members of the subcommittee. Thank you for the invitation to come and talk with you today about the FAR rulemaking process and specifically Federal Acquisition Regulation (FAR) Case 2007-006, Contractor Compliance Program and Integrity Reporting.

Changes to the FAR undergo a long established process following the direction of the Congress, the President, or suggestions from agencies or the public. The proposed changes are assigned a case number and then referred to one of the standing teams. On occasion, an ad hoc team may be formed to address either an unusually complicated matter or a matter that requires special attention. Ad Hoc teams are composed of career civil servants and uniformed members of the armed forces and are drawn from either existing team members or experts sought from the various agencies.

Once a case is assigned to a team, the team develops the language they believe implements the suggested/directed changes based upon their specific expertise and knowledge of the procurement process. If they are making the changes based on statutory or executive direction, their discretion in formulating regulatory guidance is limited by the direction received. If they are making changes based upon suggestions from the agencies or public, their discretion is much broader in terms of evaluating the overall consistency of the proposed/suggested changes with existing policies and practices. The FAR Team Guide may be found at:

<http://www.acq.osd.mil/dpap/dars/far/attachments/FAR%20Operating%20Guide%20Version%203.pdf>

Once the team completes its assigned work, the case is then sent to the DARC and CAAC for review. Once both Councils have completed their reviews and made any changes they deem appropriate, the case is submitted to OMB's Office of Federal Procurement Policy (OFPP) for review and approval, then to OMB's Office of Information and Regulatory Affairs (OIRA) for its review (including interagency coordination at OIRA's discretion) and approval, then the final rule is sent to the FAR signatories for their review and approval, and then the case is published in the Federal Register.

Currently over 50 cases are being processed, from both statutory and non-statutory origins. Detailed status on all the cases may be found at <http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf>.

FAR case (2006-007) originated from a letter from the Department of Homeland Security as a Katrina hotline poster case. DHS had been asked by senators Lieberman and Collins to require and ensure wide distribution of a fraud hotline poster in hurricane relief and reconstruction contracts. The senators requested that the regulatory action mirror the Department of Defense contract clause contained in the Defense Federal Acquisition Supplement (DFARS) that requires the prominent display of contact information to report fraud, waste, and abuse.

DoD, GSA and NASA took the initiative to make the ethics coverage in the FAR stronger than DHS or the senators had requested. The original request by DHS was to take the existing DoD hotline poster regulation and make it government-wide. The DoD hotline poster clause (252.203-7002) was required "in solicitations and contracts expected to exceed \$5 million, except when performance will take place in a foreign country." It was also not required in commercial item contracts (see 252.212-7001). The DoD ethics internal control regulation, in the DFARS at 48 CFR 203.7001, recommended that a "contractor's system of management controls should provide for...timely reporting." This was not mandatory on contractors, as there was no clause binding the contractor.

The FAR case (2006-007) originating from DHS issued a clause for hotline posters, keeping the overseas and commercial items exemption. The FAR case went further by making the ethics aspect mandatory and adding it onto the hotline poster clause.

The final rule had two clauses: one for the Contractor Code of Business Ethics and Conduct and another for the Display of Hotline Poster(s). The introductory paragraph, which provides an exception if the contract is for the acquisition of commercial items under Part 12 or will be performed entirely outside the United States, applies to both clauses. The policy states that all Government contractors must conduct themselves with the highest degree of integrity and honesty, and should have a written code of business ethics and conduct. All contractors should also have an employee business ethics and compliance training program and an internal control system that are suitable

to the size of the company, facilitate timely discovery and disclosure of improper conduct in connection with Government contracts, and ensure corrective measures are promptly instituted and carried out.

As this FAR case was progressing, the Department of Justice (DOJ) submitted a public comment asking that FAR case 2006-007 provide more detail on the U.S. Sentencing Guidelines. DOJ did not comment on the exception for contracts for commercial items or contracts performed entirely outside the United States.

At the same time, DOJ submitted a letter to OFPP setting out DOJ's request to open a new FAR case. DOJ requested changes to the FAR to require contractors to establish and maintain internal controls to detect and prevent fraud in their contracts, and to notify contracting officers without delay whenever they become aware of a contract overpayment or fraud rather than wait for its discovery by the Government. The emphasis of the DOJ letter, and the focus of DoD, GSA and NASA, was on mandatory disclosure, rather than on exemptions. The DOJ request provided that commercial contracts may be excluded from the compliance program requirements. DOJ asked for and received a commitment from OFPP to publish a new proposed rule on an expedited basis. The FAR Council complied with this request by expediting the drafting, finishing, and approving a proposed rule.

The new 2007-006 proposed rule did not totally exempt overseas contracts. The proposed rule applied the new debarment and suspension clauses to overseas contracts. A contractor may be debarred/suspended for knowing failure to timely disclose an overpayment on a Government contract, or violations of Federal criminal law in connection with the award or performance of any Government contract or subcontract. This includes violations on any contract, whether domestic or overseas.

The Law Team modified the proposed rule and will republish for public comment and review. Comments received will be considered in the drafting of the final rule

Mr. Chairman, Ranking Member Bilbray, the FAR rulemaking process is one of the unheralded great success stories in the Federal government's procurement process. It has kept partisan politics out of the business function of government for decades. I hope that you will join me in congratulating the hundreds of career civil servants and the uniformed military members who, over the years, have honed this process and made it work for the American taxpayers and the Federal government. These individuals are truly the unsung heroes of Government. Our colleagues in governments all over the world study our system with envy and try to emulate it where their own customs and cultures allow. I would be happy to answer any questions you may have.