

2007-006-41



U.S. GENERAL SERVICES ADMINISTRATION
Office of Inspector General

January 14, 2008

General Services Administration
Regulatory Secretariat (VIR)
1800 F Street, NW
Room 4035
Washington, D.C. 20405
Attn: Laurieann Duarte

Re: FAR Case 2007-006, Contractor Compliance Program and Integrity Reporting

Dear Ms. Duarte:

This letter transmits the comments of the General Services Administration, Office of Inspector General (OIG) on Case 2007-006, Contractor Compliance Program and Integrity Reporting. We support the FAR proposed rule. The rule generally would require certain government contractors to report to the federal government suspected violations of federal criminal law in connection with their contracts. The rule would also provide that knowing failure to timely disclose these events is a cause for debarment or suspension. As you may know, GSA does an enormous amount of contracting both for itself and other agencies; GSA's MAS program alone generated over \$35 billion in sales in Fiscal Year 2007. Our Office investigates procurement fraud matters, including criminal matters, arising from such contracts.

We fully support the rule's provisions mandating integrity reporting. Since the events of September 11, there has been significant growth in federal procurement expenditures. In addition, it has been our experience that government contractors are coming forward significantly less frequently with voluntary disclosures regarding misconduct on their contracts. We believe mandatory integrity reporting in this context is appropriate, and may be the most effective way for the federal government to monitor its vendors. We note that similar contractually-imposed reporting requirements have been implemented successfully in government contracts at the National Reconnaissance Office.

As an initial matter, we would defer to the comments of the Department of Justice on certain legal issues we understand have been raised by the contractor community, including the definition of cooperation, and attendant concerns regarding waiver of privileges and Fifth Amendment rights; the look back period for reporting violations; and the appropriate disclosure standards. In our view, DOJ is the appropriate entity to provide government-wide guidance on these issues, and we believe a reasonable accommodation of these concerns can be made while preserving the core integrity reporting requirement.

We do have a number of comments regarding specific provisions of the proposed rule.

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Applicability

The proposed rule provides that it would be inapplicable to commercial items contracts and to contracts performed overseas. We believe it likely that fraud is equally prevalent in commercial contracts as in noncommercial contracts, and that a wholesale exclusion for commercial items contracts from the self-reporting requirements is not warranted. First, we note that GSA, and the federal government generally, does a very significant amount of contracting on a commercial items basis under FAR Part 12. The definition of commercial item in the FAR is very broad and can encompass items – including developmental or modified items – that have not been actually sold in the commercial marketplace. FAR § 2.101. We would ask the FAR Council to amend the proposed rule's language to make it applicable to at least some reasonable subset of commercial items contracts, such as contracts for the sale of information technology products or contracts larger than a certain dollar volume.

We have similar concerns regarding the rule's exclusion for contracts performed overseas. Federal taxpayer funds are used for such contracts; further, government contractors may be fully or largely United States companies. We would ask that the final FAR rule eliminate this exclusion.

Overpayments Reporting Requirements

The proposed rule, as written, provides that failure to report overpayments is a basis for debarment or suspension but fails to include the requirement to report such overpayments in the key FAR clause 52.203-XX and the related policy section 3.1001 (c). The proposed rule, as submitted, was intended to include reporting of material overpayments, and we believe such a requirement would be appropriate and useful. We would recommend, however, that any report is required only as to *material* overpayments and is required to be made to the contracting officer rather than the OIG. We would ask that the rule's final language be amended accordingly.

We appreciate your consideration of our comments. Please feel free to call Antigone Potamianos, Assistant Counsel, on 501-1932 with any questions or concerns you might have regarding these comments.

Sincerely yours,



Brian D. Miller
Inspector General