U.S. Department of Justice

Criminal Division

2007-006-31

Assistant Attorney General

Washington, D.C. 20530

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

January 14, 2008

Re: Comments on FAR Case 2007-006

Dear Ms. Duarte:

On May 23, 2007, in a letter to the Office of Federal Procurement Policy, the Justice Department (on behalf of the National Procurement Fraud Task Force), proposed some modifications to the Federal Acquisition Regulation (FAR), which would require, among other things, that contractors notify the government whenever they become aware of a material overpayment or fraud relating to the award or performance of a contract or subcontract, rather than wait for the contract overpayment or fraud to be discovered by the government. Shortly thereafter, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council began their review process and on November 14, 2007, published a proposed rule substantially incorporating the Department of Justice's requested changes to the FAR. We appreciate the fine work performed by the defense and civilian agencies in expeditiously evaluating and publishing our proposed FAR changes.

During the past several months, we have continued to consider ways to improve the proposed rule. The Justice Department continues to believe that mandatory disclosure of material overpayments and fraud is necessary and appropriate, and that government contractors should be held to the same disclosure standards as those in the healthcare and banking industries. We recognize that many government contractors have taken steps and are now required to establish corporate compliance programs, but our experience suggests that few have actually responded to the invitation of the Department of Defense (DOD) that they report or voluntarily disclose suspected instances of fraud.

I have attached some proposed modifications to FAR case 2007-006 addressing how some concerns might be meaningfully addressed in any Final Rule. (Attachment A). Among other things, these proposed modifications address the standard for disclosure of overpayments and criminal violations, cooperation and attorney-client privilege, the obligation to disclose potential violations of the False Claims Act, the grounds for suspension and debarment, the time limit for disclosures, and internal investigations by contractors.

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Thank you for the opportunity to comment. If you have any questions, please feel free to call me directly or Steve Linick, the Director of the National Procurement Fraud Task Force, at 202-353-1630.

Sincerely,

Alice S. Fisher
Assistant Attorney General
Criminal Division, Department of Justice

Cc: Robert Burton, Deputy Administrator, OFPP
National Procurement Fraud Task Force Members

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ATTACHMENT A

DOJ's Proposed Modifications to FAR Case 2007-006

Based upon our discussions with the acquisition community, as well as contractors and their counsel, we recommend the following modifications to the proposed rule:

- Contracts Performed Overseas. Proposed FAR 3.1004: while the Justice Department agrees with the proposed exclusion of the contract clause for Part 12 commercial items, we do not agree with also excluding contracts "performed entirely outside the United States." Although these contracts may be performed outside of the United States, the United States still is a party to these contracts and potentially a victim when overpayments are made or when fraud occurs in connection with the contracts. Under these circumstances, the government still maintains jurisdiction to prosecute the perpetrators of the fraud. Moreover, these types of contracts, which in many cases support our efforts to fight the global war on terror, need greater contractor vigilance because they are performed overseas where U.S. government resources and remedies are more limited.

- Overpayments.

  - Proposed FAR 3.1002(c): it appears that the drafters neglected to incorporate "knowing failure to timely disclose an overpayment" reflected in proposed FAR 9.406-2(v)(A). In our view, the duty to disclose overpayments is just as important as the disclosure of a criminal violation and also relieves the contractor from having to decide whether there is an actual criminal violation before deciding to disclose. In addition, to limit the scope of the requirement to disclose overpayments, a materiality requirement is appropriate.

  - For some reason, the proposed rule does not also require disclosure of material overpayments in each of the instances in which it calls for disclosure of violations of federal criminal law. While the duty is captured in proposed FAR 9.406-2 and 9.407-2, it is not found at proposed FAR 3.1002 Policy section or the contractor Code found at proposed FAR 52.203-XX (c)(2)(ii)(F). The concept of a duty to disclose material overpayments is critical here, since it both requires and allows a contractor to make a disclosure without having to find evidence of fraud. The proposed rule should also explain that disclosures of overpayments need be made only to the contracting officer, and not the Inspector General.

  - The FAR Councils may want to consider defining "overpayments." What we originally intended to address were situations where the contractor, as a result of compliance efforts or just by accident, realized it had been overpaid under the

contract without regard to fault. As an example only, a situation in which the contractor is overpaid as a result of a contractor computer error would be a circumstance where the Government would reasonably expect to be alerted to that fact when it is discovered. On the actual language, we would defer to the Councils.

- Standard for Disclosure of Overpayments and Criminal Violations. Proposed FAR 3.1002, 9.406-2 and 9.407-2: in order to avoid contractor concern that the proposal would require disclosure of every allegation of a criminal violation or overpayment without regard to merit, we suggest inserting either "reasonable grounds to believe," found elsewhere in the proposed rule or "credible information of. . . ." found at DFARS 252.246-7003 governing reports of Potential Safety Issues.

- Scope of Criminal Violations. Contractors may reasonably complain that requiring disclosure of any "violation of Federal criminal law" is too broad, even when limited by the phrase "in connection with the award or performance of any Government contract or subcontract." We would not object to including the following additional limiting language: "involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18, United States Code."

- Obligation to Disclose Potential Violations of the Civil False Claims Act. We recommend that the grounds for suspension and debarment also include the knowing failure to disclose potential violations of the False Claims Act which would be added as a new section 9.406-2(b)(v)(C) and 9.407-2(a)(7) (iii). Since the proposed regulation already includes the knowing failure to disclose an overpayment as well as violations of federal criminal law as a basis for suspension and debarment, it would be an obvious omission to not include the FCA. Given the importance of the civil False Claims Act to the federal contract fraud enforcement effort, contractors should also be required to include in their "business ethics awareness" obligation reflected in the proposed Rule at 52.203 -XX(c)(2)(ii)(F), "training on the False Claims Act" as is currently required of healthcare providers in § 6033 of the Deficit Reduction Act. A similar reference to the False Claims Act should be included in FAR 3.1002(c).

- Cooperation and Attorney-Client Privilege. In our earlier comments on proposed FAR 52.203 Code of Business Ethics and Conduct, we suggested these codes and compliance programs incorporate by reference Chapter 8 of the United States Sentencing Guidelines (USSG) for Organizations which is regularly reviewed and improved. In the absence of that, we recommend that proposed FAR 52.203 F and G incorporate USSG §8C2.5, Application Note 12, which explains what "cooperation" means, and include a statement that "nothing in the Rule is intended to require that a contractor waive its attorney-client privilege, or that any officer, director, owner, or employee of the contractor, including a sole proprietor, waive his or her attorney-client privilege or Fifth Amendment rights." That distinction is necessary because it has long been held that corporations are not

covered by the Fifth Amendment to the United States Constitution. To add as a point of reference, it has been clearly stated in DOD's Voluntary Disclosure Program that contractors were not required to waive their attorney-client privilege, and there is no good reason to think that reservation will not work equally well in the mandated disclosures in the proposed rule.

- Time Limit for Disclosures. To avoid imposing a duty to disclose matters occurring many years ago, we suggest limiting the mandatory disclosure of overpayments or criminal violations to matters discovered by the contractor within three years of the contract completion.

- Grounds for Suspension and Debarment. In response to the concern that suspension or debarment is too severe a remedy for merely failing to disclose an overpayment or federal criminal violation, we would add to the proposed rule on grounds for suspension or debarment "for the purpose of defrauding the United States." See 42 U.S.C. §1320a-7b(a)(3). In the preamble, the Councils may want to be clear that the intent standard found described here, namely, "for the purpose of defrauding the United States," has no application to the False Claims Act.

- FOIA Exemption. For a variety of reasons, not the least of which is to encourage contractors to submit information pertaining to overpayments or violations of federal law even if such occurrences have not yet been confirmed, the Councils may wish to recommend to agencies that the submitted information be maintained confidentially to the extent permitted by law. The Councils may further wish to remind agencies that any decision by agencies to make a discretionary disclosure of information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by such a disclosure. In particular, agencies should be mindful that the Trade Secrets Act operates as a prohibition on the discretionary disclosure of any information covered by Exemption 4 of the FOIA, unless such disclosure is otherwise authorized by law.

- Subcontractors. While we believe it is important to flow the disclosure obligation down to subcontractors, some subcontractors may not be comfortable making the disclosure to the government through the prime contractor. Accordingly, the mechanism through which a subcontractor makes a disclosure to the government may need to be addressed in any final rule.

- Contractor Internal Investigation. The final rule preamble should make clear that nothing in the rule is intended to preclude a contractor from continuing to investigate after making its initial disclosure to the government. In fact, much like the DOD Voluntary Disclosure Program, in most cases, we would expect that the Inspector General or the Contracting Officer will encourage the contractor to complete its internal investigation and make a full report of its findings.