



INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202-4704

2007-006-40

JAN 14 2008

General Services Administration
Regulatory Secretariat (VIR)
1800 F Street, NW, Room 4035
ATTN: Ms. Laurieann Duarte
Washington, DC 20405

Dear Ms. Duarte:

We reviewed the Federal Acquisition Regulation (FAR) Case 2007-006, "Contractor Compliance Program and Integrity Reporting," that would require contractors to have a code of ethics and business conduct and to establish and maintain specific internal controls to detect and prevent improper conduct in connection with the award or performance of Government contracts or subcontracts. The proposed rule also would require contractors to notify the agency Office of the Inspector General and contracting officer without delay whenever they become aware of violations of Federal criminal law with regards to such contracts or subcontracts.

The Office of the Inspector General for the Department of Defense supports the proposed rule; however, the FAR Council should consider revisions to strengthen it and better represent not only the Federal Government's but also the Public's higher expectations resulting from continuing reports of business conduct failures across various industries. All Government contractors should have an affirmative duty to report potential violations of Federal criminal laws related to Government work, especially safety issues. The suggested revisions included in the Enclosure would clarify to whom mandatory reports should be made and the required time frame.

Thank you for the opportunity to comment on the proposed rule. If you have any questions, please contact Ms. Lois J. Wozniak, Technical Specialist, at lois.wozniak@dodig.mil or (703) 604-8762.

Sincerely,

A handwritten signature in cursive script that reads "Patricia A. Brannin".

Patricia A. Brannin
Acting Deputy Inspector General
Policy and Oversight

Enclosure:As Stated
cc: DAR Council

Office of the Inspector General for the Department of Defense
Comments on Federal Acquisition Case No. 2007-006
"Contractor Compliance Program and Integrity Reporting"

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Our recommended changes are lined-through for deletions and underlined for additional language as follows:

FAR Part 3.1002 (c) A contractor may be suspended and/or debarred for knowing failure to timely disclose—

(i) a potential violation of Federal criminal law,

(ii) a potential safety issue, or

(iii) an overpayment

in connection with the award or performance of any Government contract performed by the contractor or a subcontract awarded thereunder (see 9.406-2(b)(1)(v) and 9.407-2(a)(7)).

Justification. The revised policy section should include all additional situations for which a debarring or suspending official may debar or suspend a contractor for as provided in this revision. Safety issues should be included in the mandatory reporting requirement. Timely disclosure should be defined in other sections.

FAR Part 3.1004 Insert the clause at FAR 52.203-XX, Contractor Code of Business Ethics and Conduct, in all solicitations and contracts. ~~if the value of the contract is expected to exceed \$5,000,000 and the performance period is 120 days or more, except when the contract~~ (a) Will be for the acquisition of a commercial item awarded under FAR Part 12; or (b) Will be performed entirely outside the United States.

Justification. Clause 52.203-XX should apply to all companies doing business with the Federal Government. The responsibility to report potential violations of criminal law or potential safety issues related to Government contracts or subcontracts should not be determined on a contract basis. Contracting officers have, at times, awarded smaller value contracts or modifications instead of one large dollar contract to circumvent various thresholds that trigger additional requirements. Neither commercial contracts nor contracts performed outside the United States should exclude a contractor from this responsibility. The Federal Government and the Public expect contractors and subcontractors performing on Federal Government contracts to act with unquestionable integrity and honesty, no matter whether the company is foreign-owned or the place of performance is overseas. However, the Federal Government would expect contractors with commercial contracts to report potential violations such as bribery of a Government official. Additionally, the Public and members of Congress have similar expectations of all contractors no matter the contract value or type.

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FAR Part 9.406-2(b)(1) A contractor, based upon a preponderance of the evidence, for any of the following—* * * * *

(v) Knowing failure to timely disclose within 30 calendar days after the contractor knew, should have known, or had reasonable grounds to believe that —

(A) A significant overpayment on a Government contract or a pattern of overpayments on one or more Government contracts and subcontracts; or

(B) A potential violation of Federal criminal law in connection with the award or performance of any Government contract or subcontract.

(vi) Knowing failure to disclose immediately after the contractor knew, should have known, or had reasonable grounds to believe that a potential safety issue existed in connection with the award or performance of any Government contract or subcontract.

Justification. The time between the contractor's knowledge of a potential violation of criminal law or a potential safety issue and reporting it should be defined in concrete terms, to ensure that authorities can take the appropriate action when a contractor fails to make a good faith effort to comply with the mandatory reporting requirements. In the case of overpayments, mandatory reporting and, therefore, potential suspension or debarment, should not apply to all overpayments, but to a large dollar overpayment or a pattern of receiving overpayments without notifying the contracting officer.

FAR Part 9.407-2(a) * * *

(7) Knowing failure to timely disclose within 30 calendar days after the contractor knew, should have known, or had reasonable grounds to believe that —

(i) A significant overpayment on a Government contract or a pattern of overpayments on one or more Government contracts and subcontracts; or

(ii) A potential violation of a Federal criminal law in connection with the award or performance of any Government contract or subcontract; or

(8) Knowing failure to report immediately after the contractor knew, should have known, or had reasonable grounds to believe that a potential safety issue existed in connection with the award or performance of any Government contract or subcontract; or

(79) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

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Justification. See the justification for the revision to FAR Part 9.406-2(b)(1) above. This revision then requires that the current paragraph (7) be renumbered as (9).

FAR Part 52.203-XX (b) (3) The Contractor shall notify, in writing, ~~the agency Office of the Inspector General, a~~ President-selected and Senate-approved Inspector General or designated Federal entity Inspector General, with a copy to the Contracting Officer, whenever the Contractor has reasonable grounds to believe that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of Federal criminal law in connection with the award or performance of this contract or any subcontract thereunder regardless of its value. Such notification will occur within 30 calendar days of when the Contractor knew, should have known, or had reasonable grounds to believe that a violation occurred. For violations involving potential safety issues, notification must occur immediately after the Contractor has reasonable grounds to believe that a potential safety issue exists and shall include a quantification, to the extent known, of its impact.

Justification. The term "President-selected and Senate-approved Inspector General or designated Federal entity Inspector General" better describes the correct agency to whom the contractor should report potential violations. For DoD contracts or subcontracts, a contractor could misinterpret the language used in the FAR case, "agency Office of the Inspector General," as permitting them to report potential violations to the other various Inspector General organizations within DoD such as the Army, Navy, or Air Force Inspector General. Additional language should clarify the required reporting time frames. This wording makes the clause consistent with our recommended FAR Part 9.406-2(b)(1) and FAR Part 9.407-2(a) language. Finally, the reporting requirements should be mandatory regardless of the contract or subcontract value.

FAR Part 52.203-XX (c) (2) (ii) (F) ~~Timely reporting Report, in writing, to the agency Office of the Inspector General, with a copy to the Contracting Officer a~~ President-selected and Senate-approved Inspector General or designated Federal entity Inspector General, within 30 calendar days of when the Contractor has reasonable grounds to believe that when the Contractor knew, should have known, or had reasonable grounds to believe that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of Federal criminal law in connection with the award or performance of any Government contract performed by the Contractor or a subcontract thereunder regardless of its value. For violations involving potential safety issues, notification must occur immediately after the Contractor has reasonable grounds to believe that a potential safety issue exists and shall include a quantification, to the extent known, of its impact.

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Justification. See explanation for recommended wording under FAR Part 52.203-XX(b)(3) above.

FAR Part 52.203-XX (d) (1) The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts when the subcontractor has or will have, including the subcontract, with that have a value in excess of over \$5,000,000 in Federal Government contracts or subcontracts in the current fiscal year and a performance period of more than 120 days, except when the subcontract is for the acquisition of a commercial item.

~~(i) Is for the acquisition of a commercial item; or~~

~~(ii) Is performed outside the United States.~~

However, all subcontracts regardless of type or dollar amount shall include the mandatory reporting requirements as specified in paragraph (b)(3) of this clause. In altering this clause to identify the appropriate parties, all reports of violation of Federal criminal law shall be directed to a President-selected and Senate-approved Inspector General or designated Federal entity Inspector General, who will notify the contracting officer. ~~(2) In altering this clause to identify the appropriate parties, all reports of violation of Federal criminal law shall be directed to the agency Office of the Inspector General, with a copy to the Contracting Officer.~~

Justification. All subcontracts, regardless of dollar value, should contain the mandatory reporting requirements, especially those relating to safety issues. The total value of a subcontractor's business with the Government is a better criteria than the value of one subcontract for determining the applicability of the clause. Contractors can divide up subcontracts for awards to circumvent thresholds. Additionally, subcontracts that are to be performed outside the United States may be a higher risk for violating certain criminal laws such as bribery, and, therefore, should not be automatically exempt from the requirements of the clause.