

Policy & Regs: Unusual Intelligence Community Partnership Raises Self-Reporting Issues

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In 2004 Congress created the Director of National Intelligence (DNI) and gave him budgetary and other controls over spending by the 16 agencies of the intelligence community (IC). Even though the specifics are not public, we know that IC budgets have surged since September 11. As a result, more contractors, of all types and sizes, are playing significant roles in the execution of critical IC missions.

But with the increased number of contractors also comes increases in the number of individuals with access to sensitive information. This increases the risk that a violation of law or security regulations will have heightened national security consequences. For this reason, if you do business with the IC, or want to, you need to consider the potential benefits and drawbacks of a new kind of "partnership" that some intelligence agencies are promoting.

The Inspector General of the National Reconnaissance Office (NRO) has launched an ambitious and comprehensive new program, the Procurement Fraud Initiative (PFI), designed to deter and detect contract fraud or violations of intelligence information controls due to actions by either government or contractor personnel. According to the NRO IG, typically both the government and the company are victims—not perpetrators—of procurement fraud.

This PFI program is already mandatory for all NRO contractors, and a special contract clause implementing the PFI is already in effect. It has four main thrusts: education, information exchange, risk analysis and data mining, and audit and inspection. This initiative is being expanded to cover all contractors for all IC agencies and is emerging as the template for other federal agencies. The PFI is also being integrated into the nationwide procurement fraud efforts recently launched by Deputy Attorney General Paul McNulty.

PFI's Teeth. The most innovative but most risky feature of the PFI is the provision for contractor self-referral. The mandatory special contract clause imposes two primary performance obligations on all NRO contractors: (1) reporting "any and all suspected vio-

lations or illegal intelligence activities" to the NRO IG, and (2) cooperating with the NRO IG by providing access to any individual and any contractor books and records.

Industry Concerns. PSC and several NRO contractors raised concerns about this new requirement as it was being developed. These included permitting reporting outside the company without first making internal reporting mandatory; the responsibility to report information without having a credible basis to believe that a violation has occurred; the impact on privacy rights of individuals who are asked to be interviewed with their risk of losing security clearances; and the impact on a company's continued performance of NRO contracts without any basis to know about concerns raised directly to the government. To its credit, in the final version of the contract clause and the PFI program, NRO addressed several of these concerns with a measure of success.

Because of the mandatory nature of the contract requirements and the significant leverage the NRO has, several NRO contractors have invested in this unusual arrangement with the NRO IG. Contractors already working in the IC, and those competing to do so, need to pay special attention to this unique PFI "partnership." All contractors should be aware of this emerging initiative.

What's a contractor to do?

First, understand the additional compliance and reporting obligations of the NRO contract clause and the special needs when working with an IC agency. Then validate your internal compliance program and mechanisms for detecting and investigating contract or program irregularities, particularly for classified work. This internal assessment is critical for any type of federal contracting and is all the more important in the IC arena. But this assessment needs to also address the business risk and intelligence implications of full compliance, such as adverse past performance, loss of security clearances and future government business, and liability from improper or erroneous disclosures.

Second, regularly inform your cleared

employees of your internal compliance program and your company's contractual obligation and commitment to cooperation with the IC IGs and others. Explain how you will implement the disclosure and access provisions of the NRO clause and other similar requirements, including the extent to which cleared employees may (or may not) be able to be told of the actions.

Finally, discuss in advance with the NRO IG the circumstances in which they expect a contractor to come forward with information, what information can be provided, and who

should be talking with whom. In the world of highly classified information, and the special security clearances that govern these programs, knowing whom to talk to may be the most valuable element of any disclosure.

This PFI program is built on the ongoing relationship between the NRO and adds elements of mutual trust and communication to obtain early voluntary disclosure of potential illegal activity. It also requires the full understanding and cooperation of all employees and organizations. Doing business in the classified IC world demands it. ■