

## **ETHICS AND GOVERNMENT CONTRACTING**

By Andrew Mohr and Kelly Kroll

The Federal Acquisition Regulations ("FAR") were revised during the Fall of 2007 to add a new rule which mandated, among other things, mandatory federal contractor compliance plans and business ethics training. The rule was designed to increase awareness of contractor compliance obligations and thereby decrease violations of federal law during contract performance. The final rule, with certain exceptions, requires contractors to maintain a written code of business ethics and conduct ("Code"), make the Code accessible to all employees working on a federal contract, establish a business ethics and conduct awareness program including an internal control system, display fraud hotline posters, and flow-down these requirements to certain subcontractors. In November 2008, the rule was revised yet again to require ALL contractors to timely report suspected violations of Federal criminal and civil laws involving fraud, and conflict of interest, bribery, or gratuity violations. Failure to timely report suspected violations can result in the withholding of payment, debarment or suspension.

As recently revised, the rule still applies only to contracts and subcontracts valued in excess of \$5 million and with a period of performance in excess of 120 days. The requirements for training and an internal control system do not apply to small businesses. However, blanket exceptions that previously existed for commercial item contracts or contracts performed entirely outside the United States have been eliminated. Furthermore, whether or not other provisions of the rule is applicable, all contractors are now required to timely disclose any suspected ethical violations as set forth in the rule. Thus while the limitations above mean that this new rule will fully apply only to a relatively small number of federal contractors, all contractors will be responsible for the failure to report known or suspected violations of federal ethical policies.

The rule encourages all contractors to voluntarily implement the new ethical policy, even if they are otherwise exempt from its application. Whenever a contractor, especially a small contractor, is asked to do something voluntarily, the first reaction may be to stop reading and move on to more pressing issues. But the government's request here clearly falls within the adage category of "An ounce of prevention is worth a pound of cure." Really, stop and think about it. You know that all government contracts, including those for commercial items, have certain ethical and compliance related obligations. You know that, with some exceptions, these requirements apply to all businesses, large or small, foreign or domestic. You know that violations of these obligations can result in wide ranging consequences, including but not limited to, debarment, suspension, breach of contract claims, penalties, jail time and fines. And now you know that you have an affirmative duty to report suspected violations. But what has your company done to make sure these violations are avoided? How has your company communicated these unique federal government requirements to all its employees? Is waiting to be forced to comply with these regulations really the right approach? How catastrophic would it be to your bottom line (or stock price) if your company were suspending from government contracting because of an ethical lapse? How much would you have to spend on attorneys, accountants and other professionals, and in management time, to repair the damage caused by violations?

Developing a written Code for distribution to all employees is a good first step and can help to mitigate any possible issues down the road. And it isn't that hard. Many businesses have already adopted a Code in one form or another, and revising it to address government procurement specific concerns would take only minimal effort. In addition, a Code need not

cover every possible circumstance and there are, in reality, a finite number of topics to be addressed. Specifically, a Code should address, at a minimum, the following areas:

- Equal Opportunity and Diversity
- Gratuities
- Drug and Alcohol Policy
- Proper Use of Government Assets
- Fair Competition and Anti-Trust Compliance
- Confidential Information
- Procurement Integrity
- Discussions with Current or Former Government Employees Regarding Employment Opportunities
- Gifts and Entertainment
- Conflicts of Interest
- Recordkeeping

These are, of course, the high points, and any company Code should be tailored specifically for that company and with that company's particular government contracts in mind. For example, provisions on insider trading or export licensing and control may be apt in some circumstances.

To ensure that all employees are made aware of the ground rules, copies of the Code should be made accessible to all employees, and each employee asked to sign an acknowledgement that they have read the Code and will abide by its guidelines. Higher ups in the company may be aware that the provision of lavish gifts and entertainment to government officials are prohibited as illegal gratuities under a government contract, but the new sales guy hired last week may not. Most importantly, the Code should contain provisions apprising employees of the procedures for reporting violations or seeking clarifications.

One thing is clear. Government contract ethics compliance is on the upswing. The papers in Washington, DC are full of stories of government scandals involving illegal gratuities, improper hiring of government officials and flat out bribes. The ball is now in the contractor's court and dissemination of the ground rules to all employees will go a long way toward mitigating future problems for organizations large and small.

Andrew Mohr is a partner in the law firm of Cohen Mohr LLP in Washington, D.C. Mohr specializes in government and commercial contracts, including GSA schedules, security clearance, contract administration and compliance, teaming agreements, subcontracts, dealer contracts, regulatory analysis and compliance, bid protests and claims. C. Kelly Kroll is an associate at Cohen Mohr with extensive experience in GSA Schedule contract proposal preparation, negotiation and administration. Mohr's email is [amohr@cohenmohr.com](mailto:amohr@cohenmohr.com); Kroll's email is [kkroll@cohenmohr.com](mailto:kkroll@cohenmohr.com); and either can be reached at (202) 342-2550, fax (202) 342-6147, and on the Internet at [www.cohenmohr.com](http://www.cohenmohr.com).

© Copyright Andrew Mohr & C. Kelly Kroll 2009, All Rights Reserved.