Recent Amendments to the Federal Acquisition Rule: The Final Changes

By Rick Kulevich

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If your company does business with the federal government and you have not yet had a chance to review the recent amendments to the Federal Acquisition Rule (FAR) and to consider the impact on your compliance program, now is the time. The rules went into effect on December 12, 2008 and present some major changes for government contractors. This article highlights some of the more significant elements of the new rule, as well as the final modifications from the proposed rule.

For certain contracts valued at more than $5 million and with a performance period greater than 120 days, the rule requires the contractor and/or subcontractor to implement an ongoing ethics awareness and compliance program and other internal controls. The ethics awareness and compliance program must include elements such as a written code of conduct, distribution of the code to all employees working on the contract, efforts to raise awareness of and promote compliance with the code, and an internal controls system designed to detect and respond to any improper conduct in connection with federal government contracts. The internal controls required do not appear to be a significant departure from the elements of an effective ethics and compliance program set forth in the U.S. Federal Sentencing Guidelines. However, this new rule now adds the risk of suspension and debarment to the list of repercussions associated with failing to have an effective ethics and compliance program.

In what may likely be the most significant of the final changes, the rule now includes as grounds for suspension and debarment the knowing failure by a principal to timely disclose to the government in connection with the award, performance or closeout of a contract or subcontract hereunder, credible evidence of:

- A violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations;
- A violation of civil False Claims Act (31 U.S.C. 3729-3733); or,
- Significant overpayments on the contract.

So, if a "principal" has "credible evidence" of any of these covered offenses, a government contractor/subcontractor has an obligation to make a "timely" report to the government, or face possible suspension or debarment.

The rule defines "principals" as "an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager, plant manager, head of a subsidiary, division or business segment, and similar positions)." The commentary accompanying the new rule indicates that this definition should be construed broadly and may include compliance officers or directors of internal audit. (73 Fed. Reg. at 67079)

The use of the term "credible evidence" is a change from the originally proposed "reasonable grounds to believe," and the commentary discloses that this change "indicates a higher standard, implying that the contractor will have the opportunity to take some time for preliminary examination of the evidence to determine its credibility before deciding to disclose to the government." Adding that "[u]ntil the contractor has determined the evidence to be credible, there can be no 'knowing failure to disclose' and that [t]his does not impose upon the contractor an obligation to carry out a complex investigation, but only to take reasonable steps that the contractor considers sufficient to determine that the evidence is credible."

Obviously, there will be a large number of questions to be fleshed-out over the months to come. However, one of the first questions every affected compliance officer should be wrestling with right now is: Do I currently have any reportable matters?

The retroactive nature of the reporting obligation makes this a more complicated question than it may at first appear. The reporting obligation applies to active contracts and to any other contract the final payment on which was received in the last three years. So, as an example, if a contractor is presently aware of an unreported False Claim Act violation from 2001 reported and resolved (without reporting) that same year as part of an Ethics Helpline report, but final payment on the contract was not received until 2007, the clock is now ticking on your mandatory reporting obligation. The broad definition of "principal" adds to the complexity, because a supervisory-level employee's knowledge will be imputed to the organization, whether or not it was reported through the proper internal channels.

At the very least, companies should consider conducting a review of internal complaint records to determine if there are any matters that may need to be reported now. Additionally, it is advisable that companies take steps to raise awareness in the organization of this new requirement and develop a process for receiving, evaluating and, if appropriate, reporting covered offenses. The "head-in-the-sand" strategy will not help with this one.