

Ethics Rule Proposed For Federal Contractors

Summary

The Defense Department, General Services Administration and NASA are calling for public comment on proposed rule **FAR Case 2006-007, Contractor Code of Ethics and Business Conduct**. This proposed rule posted in the Federal Register February 16, 2007, is to establish a code of ethics for contractors similar to the Federal Acquisition Regulation (FAR) guidance on improper business practices and personal conflicts of interest by federal procurement officials. The proposed rule adds a Contractor Code of Ethics and Business Conduct to FAR. Code of Federal Regulations (CFR) 48 parts 2,3,52.

Definition

This rule requires contractors receiving awards in excess of \$5,000,000 and entail a performance period of 120 days or more to have a written code of ethics and business conduct in place and fraud hotline posters posted within 30 days after the contract is awarded. It would require such contractors to promote compliance by establishing, within 90 days after contract award, an employee ethics and compliance training program and an internal control system proportionate to the size of the company and the extent of its business with the Federal Government.

Comments

Written comments should be submitted to the Federal Acquisition Regulation (FAR) on or before April 17, 2007 to be considered in the formulation of the final rule. Federal eRulemaking Portal: <http://www.regulations.gov> Federal Acquisition Regulation, Fax: 202-501-4067, Mail: General Services, Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405

ETHICS AND COMPLIANCE ALERT

On February 16, 2007, the Federal Government issued a proposed rule that would establish mandatory requirements relating to contractor codes of ethics and business conduct. In particular, the rule requires contractors receiving awards in excess of \$5,000,000 that entail a performance period of 120 days or more to have a written code of ethics and business conduct in place and fraud hotline posters posted within 30 days after contract award. It would also require such contractors to promote compliance by establishing, within 90 days after contract award, an employee ethics and compliance training program and an internal control system proportionate to the size of the company and the extent of its business with the Federal Government.

While not applicable to certain commercial item contract or contracts to be performed outside the United State, the proposed rule contains a flowdown provision that applies to subcontracts in excess of the \$5 million threshold.

The new rule also includes a statement of Government policy on these matters:

Government contractors must conduct themselves with the highest degree of integrity and honesty. Contractors should have a written code of ethics and business conduct. To promote compliance with such code of ethics and business conduct, contractors should have an employee ethics and compliance training program and an internal control system that - (a) are suitable to the size of the company and extent of its involvement in Government contracting; (b) facilitate timely discovery and disclosure of improper conduct in connection with Government contracts; and (c) ensure corrective measures are promptly instituted and carried out.

As savvy contractors know, it has always been important to ensure ethical business conduct in dealings with the Federal Government. The new rule would go beyond the general guidance contained in the current FAR, to establish specific requirements for and a clear policy regarding contractor ethics and compliance programs. Several agencies already have their own policies. The new rule moves toward a more consistent Government-wide policy.

Regardless of whether they meet the specific thresholds ultimately established for these new requirements, it would be a mistake for any government contractor to ignore the need for an effective ethics and compliance program.

Jackson Kelly regularly assists companies in establishing, updating and implementing compliance programs. Please feel free to contact Gail Zirkelbach or Chris Myers in our Denver, Colorado office at (303) 390-0003 or Lindsay Simmons, Eric Whytsell, Pete Hoffman or Stan Soya in our Washington, DC office at (202) 973-0200 to discuss how we might help you ensure that your business has an appropriate program in place.

Government Contracts Practice Group

If you would like any further information or assistance regarding this feel free to contact:

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Government Contractors Must Take Early Compliance Steps

The U.S. government has vowed to crack down on procurement fraud and other fraud in government programs. Last year's \$3.1 billion in settlements and judgments in cases involving fraud against the government was the largest amount ever recovered in a single year. It included \$615 million paid by the Boeing Co. to resolve claims relating to its use of confidential competitor information and the hiring of a former Air Force acquisition chief who had responsibility for its contract; it also included numerous other cases involving defense procurement fraud, health-care fraud and other fraud against the government.

Last fall, the Justice Department launched a National Procurement Fraud Task Force to focus "resources at all levels of government to increase criminal enforcement" in areas of procurement fraud. More than 50 inspectors general from across all government departments and agencies also are actively pursuing thousands of investigations.

In addition, powerful newly installed Democratic committee and subcommittee chairs in Congress are launching dozens of oversight investigations of alleged government and contractor abuses, numerous areas of military and homeland-security procurement, the pricing of pharmaceuticals and other significant areas of federal contracting.

With all this attention, contractors cannot afford to wait for a call from the Justice Department task force, an inspector general or Congress to take action. Companies must take steps now to prevent and detect improper procurement activity and potential fraud in government programs.

To begin, every contractor must have in place an effective compliance program that includes standards of conduct, as well as mechanisms for investigating potential violations and for taking prompt and appropriate remedial steps if violations are found.

Source: Legal Times (February 28th)

RedHawk Communications

www.ethicscoach.com

applicable law in accordance with 601.1.7. Adult chickens, turkeys, guinea fowl, doves, pigeons, pheasants, partridges, and quail as well as ducks, geese, and swans are mailable as follows:

a. The mailer must send adult fowl by Express Mail in secure containers approved by the manager of Mailing Standards (see 608.8.0 for address).

b. The number of birds per parcel must follow the container manufacturer limits and each bird must weigh more than 6 ounces.

c. Indemnity may be paid only for loss, damage, or rifling, and not for death of the birds in transit if there is no visible damage to the mailing container.

[Delete 9.3.5, Adult Chickens, and renumber 9.3.6 through 9.3.13 as new 9.3.5 through 9.3.12.]

* * * * *

We will publish an appropriate amendment to 39 CFR Part 111 to reflect these changes if our proposal is adopted.

Neva R. Watson,

Attorney, Legislative.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 3, and 52

[FAR Case 2006-007; Docket 2007-0001; Sequence 1]

RIN 9000-AK67

Federal Acquisition Regulation; FAR Case 2006-007, Contractor Code of Ethics and Business Conduct

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to address Contractor Code of Ethics and Business Conduct and the display of Federal agency Office of the Inspector General (OIG) Fraud Hotline Poster.

DATES: Interested parties should submit written comments to the FAR

Secretariat on or before April 17, 2007 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR case 2006-007 by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Search for any document by first selecting the proper document types and selecting "Federal Acquisition Regulation" as the agency of choice. At the "Keyword" prompt, type in the FAR case number (for example, FAR Case 2006-007) and click on the "Submit" button. Please include any personal and/or business information inside the document. You may also search for any document by clicking on the "Advanced search/document search" tab at the top of the screen, selecting from the agency field "Federal Acquisition Regulation", and typing the FAR case number in the keyword field. Select the "Submit" button.

- Fax: 202-501-4067.

- Mail: General Services

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

Instructions: Please submit comments only and cite FAR case 2006-007 in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501-3775 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAR case 2006-007.

SUPPLEMENTARY INFORMATION:

A. Background

FAR Part 3 provides guidance on improper business practices and personal conflicts of interest, but it does not discuss the contractor's responsibilities with regard to code of ethics and business conduct and the avoidance of improper business practices. Currently, three agencies (the Departments of Defense, Veterans Affairs, and the Environmental Protection Agency) maintain policy for contractor code of ethics and business conduct and the contractor's responsibility to avoid improper business practices. With few exceptions, the agencies' clauses and prescriptions are very similar to one another, in that they— establish agency policy and recommend contents of a contractor's

system of management and internal controls in connection with Government contracts; establish contract dollar thresholds for display of the agency Inspector General poster; provide instructions for obtaining the hotline posters; and provide exemptions to displaying posters. However, the agencies' policies differ on the contract dollar thresholds and the address and phone number of the Office of the Inspector General (OIG) to obtain a fraud hotline poster.

In view of the significant sums of Federal dollars spent by agencies to acquire goods and services, this rule establishes a clear and consistent policy regarding contractor code of ethics and business conduct, responsibility to avoid improper business practices, and procedures for displaying an agency OIG Fraud Hotline poster to facilitate the reporting of wrongdoing in Federal contracting. This rule also recognizes the need for agencies to cooperate with the Department of Homeland Security to ensure that contracts funded with disaster assistance funds require display of any event-specific fraud hotline posters announcing ad hoc or other special hotline reporting information applicable to the specific contract. This rule proposes amending the FAR to add FAR Subpart 3.10, Contractor Code of Ethics and Business Conduct, that will—

1. Define the "United States" to mean the 50 States, the District of Columbia and outlying areas as used in FAR 25.003, and exclude contracts performed outside the United States from the requirements of the rule.

2. Include policy stating that contractors "should" have a code of ethics and business conduct.

3. Exclude commercial item contracts awarded pursuant to FAR Part 12 from the requirements of the rule, because the rule will not implement statute or executive order, and because ethics programs and hotline posters are not standard commercial practices as stipulated by the Federal Acquisition Streamlining Act.

4. Provide that contractors receiving awards in excess of \$5,000,000 that have performance periods of 120 days or more, shall have a written code of ethics and business conduct within 30 days after contract award. Furthermore, the contractor shall promote compliance by establishing, within 90 days after contract award, an employee ethics and compliance training program and an internal control system proportionate to the size of the company and extent of its business with the Federal Government.

5. Provide that contractors receiving awards in excess of \$5,000,000 shall

display the agency OIG fraud hotline poster and, when appropriate, any special disaster relief poster from Department of Homeland Security, at work locations in the United States and at the company website if the contractor has established a company website for the purposes of providing information to employees.

6. Provide alternates to the basic clause to accommodate those agencies that do not have posters and to accommodate agencies that choose to require the display of a fraud hotline poster at contract award thresholds at or below \$5,000,000.

7. Include a flowdown provision that applies to subcontracts at the same dollar level as the prime contract.

8. Provide for remedies if the contractor fails to comply with the clause.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not require contractors to have a written code of ethics and business conduct, employee ethics and compliance training program, or internal control system for contracts valued at \$5 million or less; and provides that when such programs are required, they shall be suitable to the size of the company and the extent of the company's business with the Federal Government. Under the rule, contractors have the ability to determine the simplicity or complexity and cost of their programs.

An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Parts 2, 3, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2006-007), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose information collection requirements that require the

approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 2, 3, and 52

Government procurement.

Dated: February 7, 2007.

Ralph De Stefano,

Director, Contract Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 2, 3, and 52 as set forth below:

1. The authority citation for 48 CFR parts 2, 3, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2 — DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101 in paragraph (b), in the definition "United States," by redesignating paragraphs (1) through (6) as paragraphs (2) through (7), respectively, and adding a new paragraph (1) to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

"United States," when used in a geographic sense, means the 50 States and the District of Columbia, except as follows:

(1) For use in Subpart 3.10, see the definition at 3.1001.

* * * * *

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3. Add Subpart 3.10 to read as follows:

Sec.

3.1000 Scope of subpart.

3.1001 Definitions.

3.1002 Policy.

3.1003 Procedures.

3.1004 Contract clause.

Subpart 3.10—Contractor Code of Ethics and Business Conduct

3.1000 Scope of subpart.

This subpart prescribes policies and procedures for the establishment of contractor code of ethics and business conduct, and display of agency Office of Inspector General (OIG) fraud hotline posters.

3.1001 Definitions.

"United States," as used in this subpart, means the 50 States, the District of Columbia, and outlying areas.

3.1002 Policy.

Government contractors must conduct themselves with the highest degree of integrity and honesty. Contractors should have a written code of ethics and business conduct. To promote compliance with such code of ethics and business conduct, contractors should have an employee ethics and compliance training program and an internal control system that—

(a) Are suitable to the size of the company and extent of its involvement in Government contracting;

(b) Facilitate timely discovery and disclosure of improper conduct in connection with Government contracts; and

(c) Ensure corrective measures are promptly instituted and carried out.

3.1003 Procedures.

Contracting officers shall ensure that the requirements of this subpart are implemented using the following procedures:

(a) *Exceptions.* Commercial item contracts performed under Part 12 or performed outside the United States do not apply to this subpart and are not required to—

(1) Have an employee ethics and compliance training program and internal control systems; or

(2) Have the contractor display the fraud poster.

(b) *Contracts exceeding \$5,000,000.*

(1) Contracts exceeding \$5,000,000 shall require the contractor to—

(i) Display the agency OIG fraud hotline poster, unless the agency does not have a fraud hotline poster; and

(ii) Display the Department of Homeland Security (DHS) disaster assistance poster in accordance with paragraph (d)(2) of this section.

(2) In addition to the requirements of paragraph (b)(1) of this section, contracts exceeding \$5,000,000 with performance periods of 120 days or more shall require the contractor to—

(i) Have a written code of ethics and business conduct; and

(ii) Establish an employee ethics and compliance training program and internal control systems commensurate with the size of the company and its involvement in Government contracting.

(c) *Contracts valued at \$5,000,000 or less.* Agencies may establish policy and procedures for display of the agency OIG fraud hotline poster, without imposing the requirements of paragraph (b)(2) of this section, in contracts valued at \$5,000,000 or less.

(d) *Fraud Hotline Poster.* (1) Agencies are responsible for determining the need for, and content of, their respective agency OIG fraud hotline poster(s).

(2) When requested by the Department of Homeland Security (DHS), agencies shall ensure that contracts funded with disaster assistance funds require display of any event-specific fraud hotline poster applicable to the specific contract. As established by the agency, such posters may be displayed in lieu of, or in addition to, the agency's standard poster.

3.1004 Contract clause.

(a)(1) Insert the clause at FAR 52.203-XX, Contractor Code of Ethics and Business Conduct, in solicitations and contracts expected to exceed \$5,000,000 and the performance period is 120 days or more, except when the contract –

(i) Will be awarded pursuant to the procedures in FAR Part 12; or to address Contractor Code of Ethics and Business Conduct and the display of Federal agency Office of the Inspector General (OIG) Fraud Hotline Poster.

(ii) Will be performed outside the United States. (2) The contracting officer shall insert the website link(s) or other contact information for obtaining the agency and/or DHS poster.

(b) Insert the clause with its Alternate I–

(1) When the agency does not have a fraud hotline poster; and

(2) When the requirements of 3.1003(d)(2) do not apply.

(c) Insert the clause with its Alternate II–

(1) When the contract performance period is less than 120 days; or
(2) If the agency has established policies and procedures for display of the OIG fraud hotline poster at a lesser amount. The contracting officer shall insert the agency authorized lesser amount in paragraph (d) of this section.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Add section 52.203-XX to read as follows:

52.203-XX Contractor Code of Ethics and Business Conduct.

As prescribed in 3.1004(a), insert the following clause:

CONTRACTOR CODE OF ETHICS AND BUSINESS CONDUCT (DATE)

(a) Definition.

“United States,” as used in this clause, means the 50 States, the District of Columbia, and outlying areas.

(b) *Code of ethics and business conduct.* (1) Within 30 days after contract award, the Contractor shall have a written code of ethics and business conduct.

(2) (i) The Contractor shall promote compliance with its code of ethics and business conduct. Within 90 days after contract award, the Contractor shall establish—

(A) An employee ethics and compliance training program; and

(B) An internal control system.

(ii) Such program and system shall be suitable to the size of the company and its involvement in Government contracting.

(c) *Internal control system.* (1) The Contractor's internal control system shall—

(i) Facilitate timely discovery and disclosure of improper conduct in connection with Government contracts; and
(ii) Ensure corrective measures are promptly instituted and carried out.

(2) For example, the Contractor's internal control system should provide for—

(i) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Contractor's code of ethics and business conduct and the special requirements of Government contracting;

(ii) An internal reporting mechanism, such as a hotline, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports;

(iii) Internal and/or external audits, as appropriate;

(iv) Disciplinary action for improper conduct;

(v) Timely reporting to appropriate Government officials of any suspected violations of law in connection with Government contracts or any other irregularities in connection with such contracts; and

(vi) Full cooperation with any Government agencies responsible for either investigation or corrective actions.

(d) Display of fraud hotline poster(s). (1) During contract performance, the Contractor shall prominently display the _____ (Contracting Officer shall insert (i) appropriate agency name(s) and/or (ii) title of applicable DHS event-specific fraud hotline poster) fraud hotline poster(s) in common work areas within business segments performing work under this contract and at contract work sites. The Contractor is not required to display the

poster(s) in common work areas and contract sites outside the United States.

(2) Additionally, if the Contractor maintains a company website as a method of providing information to employees, the Contractor shall display an electronic version of the poster(s) at the website.

(3) The _____ poster(s) may be obtained from _____. (Contracting Officer shall insert the website(s) or other contact information for obtaining the poster(s).)

(e) *Remedies.* In addition to the other remedies available to the Government, the Contractor's failure to comply with the requirements of this clause may render the Contractor subject to—

(1) Withholding of contract payments; or

(2) Loss of award fee, consistent with the award fee plan, for the performance period in which the Government determined Contractor non-compliance.

(f) *Subcontracts.* (1) The Contractor shall include the substance of this clause, including this paragraph (f), in all subcontracts that exceed \$5,000,000, except when the subcontract—

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

(ii) Is performed outside the United States.

(2) The Contractor is not required to include the requirements of paragraphs (b) and (c) of this clause in subcontracts that have performance periods of less than 120 days.

(End of clause)

Alternate I (DATE). As prescribed in 3.1004(b), delete paragraph (d), and redesignate paragraphs (e) and (f) as paragraphs (d) and (e).

Alternate II (DATE). As prescribed in 3.1004(c), delete paragraphs (b), (c) and (f) from the basic clause, redesignate paragraphs (d) and (e) as paragraphs (b) and (c) and insert the following paragraph (d):

(d) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (d), in all subcontracts that exceed

\$ _____ (Contracting Officer shall insert \$5,000,000 or the amount authorized by agency procedures), except when the subcontract—

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

(2) Is performed outside the United States.

[FR Doc. 07-698 Filed 2-15-07; 8:45 am]

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