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COMPULSORY CONFESSION WITHOUT ABSOLUTION:
COMPLYING WITH THE FAR MANDATORY DISCLOSURE RULE

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*1 The U.S. Government is the largest purchaser of goods and services in the world. It is also armed with the broadest array of mechanisms imaginable to enforce its contract rights and to punish contractors for actual or perceived noncompliance with the terms and conditions of its contracts. These mechanisms include criminal prosecution, civil claims, treble damages, fines and penalties, suspension and debarment, terminations, contract claims, disallowances, and contract withholdings. In late 2008, the Government decided that these weapons were insufficient and that the time had come to force contractors--contractually--to “come to the confessional” and disclose their “procurement sins.”

Although the Government had long had various “voluntary disclosure” programs, confession had never been compulsory. However, with the promulgation of the Federal Acquisition Regulation (FAR) so-called “mandatory disclosure rule” (MDR),¹ the procurement community saw the dawning of a new era. For the first time, disclosures regarding possible violations of Title 18 of the U.S. Code and the civil False Claims Act (FCA)² and of overpayments made to the contractor by the Government became part and parcel of most *2 contractors' obligations under their contracts.³ A failure to disclose when required would now constitute an independent breach of contract and would provide an independent basis for suspension and debarment, even if there were, in actuality, no violation of law. Yes, you read that correctly-- technically, you can breach the contract and be suspended and debarred for having failed to make a disclosure of conduct that was *not* otherwise actionable. This is because the MDR requires disclosures, not of “violations” of law, but rather, of “credible evidence” of such violations.⁴ In other words, even if you objectively believe, based on your review of all the facts, that you did not violate the law, you can be alleged to have breached your contract if the Government asserts that--violation or no--there was “credible evidence” of a violation that you failed to disclose.

More than six years into this new era of compulsory confession, it is time to take stock of the MDR and not only review its requirements, but explore its impact on the marketplace, how contractors have responded, how they should respond, and best practices to ensure compliance.

What Do New Contractors Need To Know About Compliance Before Bidding On A Government Contract?

In a very real sense, what new entrants into this marketplace need to know is what Dorothy told her dog in *The Wizard of Oz*--“Toto, I've a feeling we're not in Kansas anymore.” That may sound glib, but it is precisely on point. Companies accustomed to dealing in commercial items on commercial terms and conditions have little sense of just how different their world is about to become. They are selling the same products, so they often think “How much different can it be?” The answer, of course, is “You have no idea.”

Entering the Government contracting marketplace requires developing an understanding of the key differences between Government and commercial contracting, including the risks--and potential liabilities--posed by Government contracting and the plans, policies, procedures, and checks and balances needed to avoid those liabilities. As well, a company needs to determine whether it is institutionally and systemically “ready” to be a Government contractor.

The differences between commercial and Government contracting are many, varied, and pervasive. However, the MDR may well constitute the most dramatic illustration of the massive divide between these two marketplaces. The concept of committing yourself in advance to telling your customer that you “may” have done something wrong when the consequences for you far transcend normal contractual remedies is, in a word, unprecedented.

What Do Contractors, “Old” and “New,” Need to Know About The Mandatory Disclosure Rule?

There is plenty about the MDR that contractors need to know, digest, understand, and implement. The rule requires not only disclosure of certain events, but also the development of an infrastructure that will facilitate the prevention of such events, the identification of such events as and when they occur, and the timely reporting ³ of such events. It forces contractors to address the issues not only in the present, but to engage in a retrospective assessment of their conduct and to disclose past potential violations that have occurred within a defined window, even if (a) the events predate the promulgation of the rule ⁵ and the incorporation of the implementing clause ⁶ in the affected contract(s), ⁷ and even if (b) the clause has not been incorporated in the affected contract(s). ⁸ It requires contractors to flow these obligations down to their subcontractors ⁹ and, as interpreted by the Government, requires contractors to disclose potential violations by their subcontractors. ¹⁰

Let us look at some of these features in a bit more detail.

How Is The MDR Implemented? What Makes It Applicable To A Contract Or To A Contractor?

The MDR has two components: ¹¹

- (1) A new “Contractor Code of Business Ethics and Conduct” clause at [FAR 52.203-13](#), which is applicable to covered contracts and includes a requirement to disclose potential wrongful conduct. Covered contracts are contracts or contract modifications with a value in excess of \$5 million (\$5.5 million effective October 1, 2015) and a period of performance in excess of 120 days. ¹²
- (2) A new definition of “present responsibility” providing that “federal contractors and subcontractors, regardless of whether they are subject to the new business ethics and conduct clause, can be suspended or debarred for failure to timely disclose *potential* wrongful conduct or significant overpayments.” ¹³

What Does The Implementing Clause Require?

Among the requirements of the implementing clause, [FAR 52.203-13](#), are the following:

- (1) *To have a written code of business ethics and conduct and to make a copy of the code available to each employee engaged in the performance of the contract.* ¹⁴ The objective here is to ensure that the company as a whole and its individual employees understand the rules, the theory being that an informed workforce will be more likely to bring irregularities forward within the reporting hierarchy.
- (2) *To exercise due diligence to prevent and detect criminal conduct.* ¹⁵ In actuality, the objective of the clause is much broader than as stated here; the Government is seeking to incentivize due diligence regarding and detection of, not only criminal conduct, but also conduct that is actionable in a civil proceeding (e.g., FCA violations) and contractually (e.g., the requirement to disclose significant overpayments, even if those overpayments are a function of Government negligence as opposed to any contractor wrongdoing).
- (3) *To promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.* ¹⁶ It is difficult to take issue with this as a general objective, although one can easily understand why this should not be a

“one-size-fits-all” requirement; differences in the size of contractors, in the nature of their products and services (e.g., “commercial items” vs. items made and services performed to Government specifications and standards), and in the nature of their contracts (e.g., firm-fixed-price vs. flexibly priced contracts) all can and should have an impact on the level of detail in the processes and procedures that might be regarded as adequate to promote the requisite “organizational culture.”

(4) *To timely disclose in writing, to the agency Office of Inspector General (OIG), with a copy to the Contracting Officer whenever the contractor has “credible evidence” that a principal employee, agent, or subcontractor has committed a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in 18 U.S.C.A. or a violation of the civil FCA in connection with the award, performance, *4 or closeout of the contract in which the clause appears or any subcontract thereunder.*¹⁷

Just What Am I Obligated To Disclose Under The FAR Contract Clause?

The above-stated disclosure obligation is--as the name of the rule suggests-- the core of the MDR. While portions of this disclosure obligation are defined, others are not. Let us examine the parameters of the basic obligation to disclose.

The easy part can be dealt with first. What kinds of violations do you need to disclose? The clause actually gives us the answer:

- (1) Criminal violations relating to fraud, conflicts of interest, bribery, and gratuities, found in 18 U.S.C.A. and
- (2) Violations of the civil FCA,
- (3) Any of which were committed in connection with award, performance, or close-out of a contract in which the clause is incorporated.¹⁸

So, to invoke this disclosure obligation, you need [FAR 52.203-13](#) to be in your contract, the potential violations must have been committed in connection with that contract, and those violations need to have been either one of four types of criminal violations or a civil FCA violation.

But that is about as far as the certainty goes with respect to this obligation. It is important for contractors to understand that the obligation does not require an underlying determination that a violation has *actually* occurred. You cannot diligently investigate an alleged violation, conclude dispassionately and objectively that no violation occurred, elect not to disclose, and assume that you have complied with your obligation under the MDR. You have not. This is because you are obligated to disclose “credible evidence” of a violation.¹⁹ To maximize its leverage on contractors, the Government has chosen not to define the phrase “credible evidence,” even though the entire disclosure regime promulgated under the MDR turns on its meaning.

Contractors sought to have this term defined when the rule was promulgated, but the Government steadfastly refused. Evidently, the Government sees advantages in this uncertainty, perhaps a belief that such uncertainty will prompt contractors, fearful of suspension and debarment for having failed to disclose evidence of violations that is far from compelling, nonetheless to come forward in the hope that disclosure of weak or borderline evidence of a violation will weigh against retributive action by the Government. Whatever the rationale, the Government does not want contractors to operate under the MDR on the assumption that they are an appropriate judge of their own possible misconduct.

What is “credible evidence?” In all candor, nobody knows. It plainly is not evidence of a violation “beyond a reasonable doubt”; nor is it “clear and conclusive” evidence. While one might be tempted to opt for a “preponderance of the evidence” or “more likely than not” standard, the Government does not endorse that standard.²⁰ Perhaps the most pragmatic approach to the definition is one that focuses on potential outcomes in the event of a dispute--i.e., if you believe that the evidence is sufficiently strong to support a judicial determination of liability if the Government were to become aware of its existence, if you would be fearful of submitting the issue to a jury, then one might infer that there is a reasonable basis for regarding that evidence as “credible.” It is an amorphous standard, but the Government likes it that way.

Does The Clause Require Anything More Than Disclosure?

What does the clause require beyond disclosure? Plenty. FAR 52.203-13 also requires covered contractors, other than small business concerns or commercial item contractors, to have both--

- (1) An "ongoing business ethics awareness and compliance program,"²¹ and
- (2) An "internal control system."²²

The clause imposes the following minimum requirements for an acceptable business ethics awareness and compliance program:

*5 (i) This program shall include reasonable steps to communicate periodically and in a practical manner the Contractor's standards and procedures and other aspects of the Contractor's business ethics awareness and compliance program and internal control system, by conducting effective training programs and otherwise disseminating information appropriate to an individual's respective roles and responsibilities.

(ii) The training conducted under this program shall be provided to the Contractor's principals and employees, and as appropriate, the Contractor's agents and subcontractors.²³

The clause also establishes minimum requirements for internal control systems. Such systems must:

(A) Establish standards and procedures to facilitate timely discovery of improper conduct in connection with Government contracts; and

(B) Ensure corrective measures are promptly instituted and carried out.²⁴

In addition, the contractor's internal control system must include the following minimum features:

(A) Assignment of responsibility at a sufficiently high level and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control systems.²⁵

The Government wants to be sure that ethics and compliance are not bromides to be buried in the bowels of the institution.

(B) Reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business ethics and conduct.²⁶

In other words, do not put in positions of authority individuals who have displayed inadequate regard for compliance and ethics.

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

(1) Monitoring and auditing to detect criminal conduct;

(2) Periodic evaluation of the effectiveness of the business ethics awareness and compliance program and internal control system, especially if criminal conduct has been detected; and

(3) Periodic assessment of the risk of criminal conduct, with appropriate steps to design, implement, or modify the business ethics awareness and compliance program and the internal control system as necessary to reduce the risk of criminal conduct identified through this process.²⁷

Simply stated, merely adopting a set of policies and procedures should be the *initial* step, not the *end* of the process; the control system needs to be periodically tested and, if found wanting, improved. A set of controls that allows frequent ethical “escapes” that go uncorrected will be regarded by the Government as inadequate and--perhaps--“reckless,” a term that surfaces with regularity in civil FCA complaints.

(D) An internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.²⁸

Because the MDR relies so heavily on self-identification of irregularities, and because employees who bring such irregularities forward have been known to have suffered for their efforts, a system that protects the employees' identities is of obvious importance.

(E) Disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct.²⁹

If inappropriate conduct goes unpunished, or is given “lip service” discipline, your controls will likely be regarded as inadequate.

(F) Timely disclosure, in writing, to the agency OIG with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of any Government contract performed by the Contractor or a subcontractor thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C. or a violation of the civil False Claims Act (31 U.S.C. [§§] 3729-3733).³⁰

Note that you cannot just tell your friendly Contracting Officer. That does not satisfy the rule. You must “confess”--that is disclose--to the not so friendly Inspector General (IG). As we all know, IGs tend to be less forgiving.

Note also that mandatory disclosure obligations for contractors subject to the internal *6 control systems requirements are broader than the mandatory disclosure obligation applicable to all covered contractors, discussed above. If a contractor is subject to the internal controls provisions, it has a duty to make the requisite disclosures regarding any of its Government contracts. Where there are no internal controls obligations, the disclosure obligations are limited to irregularities in connection with a contract that includes the clause.

(G) Full cooperation with any Government agencies responsible for audits, investigations, or corrective actions.³¹

What is “full cooperation?” The clause defines it to mean “disclosure to the Government of the information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct,” including “providing timely and complete response to Government auditors' and investigators' request for documents and access to employees with information.”³² The clause states that “full cooperation” does “not foreclose any Contractor rights arising in law, the FAR, or the terms of the contract.”³³ Specifically, it does not require--

(i) A Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or

(ii) Any officer, director, owner, or employee of the Contractor, including a sole proprietor, to waive his or her attorney client privilege or Fifth Amendment rights[.³⁴

In addition, “full cooperation” does not restrict a contractor from--

(i) Conducting an internal investigation; or

(ii) Defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.³⁵

While the clause discusses full cooperation only in the context of internal control systems, these same standards likely will be applied to all contractors and subcontractors making disclosures.

When Does The Duty To Disclose Expire?

The MDR clause at [FAR 52.203-13](#) provides that “the disclosure requirement for an individual contract continues until at least 3 years after final payment on the contract.”³⁶ Thus, the contractor must disclose any credible evidence of a covered violation on a contract subject to the clause even if the violation occurred prior to the date the clause became applicable to the contractor. Further, contractors subject to the internal controls requirements must have a system in place to report covered violations on “any” of their federal contracts or subcontracts.³⁷ This requirement is part of the so-called “look-back” requirement imposed by the rule on all contractors.³⁸

Will My Mandatory Disclosure Become Publicly Available?

[FAR 52.203-13](#) gives contractors some comfort with respect to confidentiality, stating that “to the extent permitted by law and regulation, [the Government] will safeguard and treat information obtained pursuant to the Contractor's disclosure as confidential where the information has been marked ‘confidential’ or ‘proprietary’ by the company.”³⁹ Furthermore, “to the extent permitted by law and regulation, such information will not be released by the Government to the public pursuant to a Freedom of Information Act request, [5 U.S.C.A. § 552], without proper notification to the Contractor.”⁴⁰

This comfort is limited. The clause also provides: “The Government may transfer documents provided by the Contractor to any department or agency within the Executive Branch if the information relates to matters within the organization's jurisdiction.”⁴¹ In other words, the Department of Justice may well come knocking on your door. The critical point? Disclosure does not guarantee you anything--no immunity from prosecution, no relief from FCA liability, no reduction in the statutory multiplier of FCA damages, and no elimination of FCA penalties.

Does The Rule Apply To Subcontractors?

The clause states that the contractor “shall include the substance of this clause, including this paragraph (d), in subcontracts that have a value *7 in excess of \$5,000,000 [\$5.5 million effective October 1, 2015] and performance period of more than 120 days.”⁴² This provision will subject all subcontractors (and their subcontractors) whose subcontracts meet the \$5 (\$5.5) million/120-day threshold to all of the basic requirements discussed above, as well as the requirements for an internal control system and business ethics awareness and compliance program if they are not small businesses or commercial item contractors.

Does The Rule Apply If [FAR 52.203-13](#) Is Not Incorporated In My Contracts?

Yes, to an extent. The MDR imposes obligations that are not dependent on the incorporation of [FAR 52.203-13](#) in your contracts. Specifically, the MDR essentially establishes a failure to disclose certain events as an independent basis for suspension and debarment. Note--this applies whether or not you have any contracts that incorporate [FAR 52.203-13](#). The MDR provides for suspension and debarment for any of the following:

(vi) Knowing failure by a *principal*, until three years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contractor or a subcontract thereunder, credible evidence of--

(A) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

(B) Violation of the civil False Claims Act (31 U.S.C. [§§] 3729-3733); or

(C) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in [FAR] 32.001.⁴³

The suspension and debarment element of the MDR is significant for a number of reasons. First, it is self-executing and requires no contract clause as a predicate for Government action. Second, as a result, it extends to all contractors essentially the same disclosure obligations as would apply if FAR 52.203-13 were incorporated in their contracts. Third, it adds a new component of the required disclosures--i.e., "significant overpayments."

Perhaps the only ameliorating feature of the suspension and debarment element of the MDR is that Government action must be based on the acts or omissions of individuals with some level of responsibility within the organization--i.e., a "principal." But the Government has been careful to give that term a fairly wide reach within the contracting organization:

"Principal" means 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 division or business segment; and similar positions).⁴⁴

What Are The Best Practices For Contractors Regarding Potentially Reportable Events Under The MDR?

While the MDR requires a code of ethics, due diligence to prevent and detect wrongful conduct, and for most contractors, internal controls to ensure timely identification and investigation of potentially reportable events, the MDR does not explicitly advise Government contractors *how* to accomplish this. Best practices in this area are those designed to ensure that counsel and, as appropriate, compliance personnel are informed of potentially reportable events in a manner that facilitates their proper and prompt resolution. The following recommendations are from the Guide to the Mandatory Disclosure Rule: Issues, Guidelines, and Best Practices prepared by the American Bar Association Section of Public Contract Law task force on the MDR's implementation:

In order to ensure compliance with the Mandatory Disclosure Rule, the contractor must be aware of all potentially reportable events ("PREs") that occur. Regardless of size, type, or industry, Government contractors must have internal controls in place to allow a competent and dedicated individual or group to capture all PREs and ensure that all such events are properly logged, investigated, evaluated, and disclosed to the Government as appropriate. Of course, the result of such reporting and investigations may prompt the organization to take other actions, including but not limited to remedial corrective action, disciplinary action, and changes in process.⁴⁵

*8 But Step 1 is awareness. The ABA task force advises:

In considering whether existing controls are adequate to meet this objective or whether additional controls may be needed, a contractor must first candidly evaluate the capabilities and effectiveness of any existing controls or compliance program. The following questions should be considered when evaluating the adequacy of an internal control system:

Does the entity have a code of conduct in place?

Does the entity have a hotline?

What other reporting mechanisms are in place?

Does the entity have a compliance officer?

What training is conducted regarding business ethics and internal reporting?

What happens to reports of PREs?

Is there a consistent response for investigating PREs?

Are the investigation results, corrective actions, and recommendations documented?

How does the entity ensure that PREs are elevated to an appropriate person?

Would existing controls be sufficient to support a determination of lack of credible evidence and nondisclosure to the government?⁴⁶

This last question is perhaps the most important consideration in determining whether existing controls are adequate.

The CEB Compliance and Ethics Leadership Council conducted research showing that approximately 50% of observed misconduct is never reported by employees and that 60% of the information that is reported to managers by their employees is not elevated for further investigation.⁴⁷ Moreover, the ABA task force noted: “Equally alarming is the fact that the primary reason for failure to elevate compliance concerns is that managers do not know what to do with a noncompliance matter that is reported.”⁴⁸ These statistics reflect the fact that most corporations do not have an effective compliance program or an effective reporting mechanism within the program.⁴⁹ A “best practices” approach to ethics awareness and compliance, thus, would be one that--

significantly increases the likelihood of issues being detected, appropriately reported, and resolved;

operates in a timely and resource efficient manner; and

enables an entity to defend itself against allegations of failing to address a reported noncompliance.⁵⁰

A review of best practices by the ABA task force indicated that the following processes should be considered for compliance with the MDR:

1. All employees are provided a clear definition, in terms that non-lawyers can understand, of what constitutes noncompliant conduct.
2. All employees are informed of their personal obligation to identify and report instances of potentially noncompliant conduct.

3. The personal obligation is disseminated through written/electronic communication, explained and reinforced through training, and refreshed through periodic communication from an appropriate source within the company (*e.g.*, Compliance Officer, staff meetings, bulletins, newsletters, company, or division management).

4. Multiple avenues for reporting noncompliance are made available to employees. These include a hotline, an individual's manager, the legal department, a compliance officer or organization, and/or internal audit. Employees are more likely to report matters of noncompliance when they have multiple avenues.

5. Managers are informed of their responsibility to act upon all instances of reported potential noncompliance in a timely manner. Managers should be trained on what this means, *i.e.*, reporting the PRE to designated contacts as soon as possible to assure that the PRE is acted upon appropriately. Internal reporting must be done in a timely manner to assure the investigation is not compromised.

6. Meaningful, periodic subject matter-appropriate training on regulatory, legal, and ethical requirements is essential to the functioning of the reporting process. Without such training (and associated procedures), individuals are unlikely to recognize noncompliant practices. Furthermore, the training is often a source of questions about noncompliant activities. Trainers should be alert for this possibility and ensure that questions regarding potential noncompliant activity are referred to the appropriate individual or group for follow-up.

7. A hotline is essential, as there will be some individuals who will not be comfortable reporting potential noncompliance directly to their management or the legal department. Some *9 individuals will only report if they are assured of anonymity.

8. The company should have a clear policy that prohibits retaliation against any employee who reports a PRE or participates in an internal investigation. An explanation of the policy should be included in training.

9. All allegations of noncompliance should be reported into a single location, if possible, but no more than two locations. This could be a designated point of contact in the legal department, *i.e.*, the investigation section, or internal audit or compliance functions. If an entity is small, outside counsel could serve as the point person for evaluating these reports. [Note: Placing the initial intake in the legal department will help to maximize the likelihood that any internal review of the allegations will be conducted under the auspices of the attorney-client privilege.]

10. All reported PREs should be captured in some form of registry or log. The log should be controlled by the single point of contact and [to avoid compromising the privilege] contain only the essential information necessary to track the status of a PRE investigation. A designated individual or group of individuals should be responsible for the review, triage, and resolution of all reported PREs.

11. Information on potential noncompliance from all reporting avenues should be added to the registry or log as appropriate. Potential sources include internal audits, results of testing and monitoring, periodic surveys or self-assessments, and internal certifications. This assures that all items, regardless of source, are tracked, evaluated, and resolved. It also facilitates the identification of trends and root causes. Not all audit findings or testing and monitoring results will be appropriate to include in the registry or log, but all such results or reports should be reviewed to determine whether any findings rise to the level that they should be reported as potential noncompliance. Experience has shown that many companies do not follow up and resolve audit findings in the same manner as they do other allegations of noncompliance or unethical conduct.

12. The review or triage process should be undertaken with frequency to ensure that PREs receive a preliminary review in a timely manner. This review should be led by counsel. The review or triage process may result in some PREs being handled under the attorney-client privilege, whereas others may be returned to the business units or [human resources] departments for

further factfinding. The escalation and reporting process is designed to capture all instances of potential noncompliance and assure their appropriate resolution. Other processes for handling certain types of complaints may operate in parallel.

13. The status of all PREs should be reviewed on a periodic basis to assure that all are moving forward in a timely manner. Resolution of all matters should be appropriately documented.⁵¹

The above best practices must, of course, be tailored to the size, nature, and existing compliance programs in place at an entity. But irrespective of company size, it is critical that management “own” the ethics and compliance process. It must promulgate a corporate code that clearly communicates the company's core values, endorsed at the highest levels, and leaders throughout the structure should:

- (1) Strive to instill the importance of ethics and compliance in all employees under their supervision;⁵² and
- (2) Make themselves available to all company personnel to answer questions, provide guidance, or direct personnel to where they may be able to find appropriate guidance.⁵³

The Defense Industry Initiative (DII) on Business Ethics and Conduct has promulgated useful guidance regarding best practices.⁵⁴

Conclusion

Statistics suggest that the MDR is not having the impact one might have thought. The percentage of violations that are identified at all, and the percentage carried upward in the organization, suggest either a lack of understanding of the obligations imposed by the rule, a failure to appreciate the risks imposed by noncompliance, a lack of institutional commitment industry-wide to the concept, an unwillingness to invest in the infrastructure needed to implement the rule comprehensively, or distrust of the Government in treating the disclosing entities fairly, if and when they do comply. Or maybe it is all of these factors in various combinations for individual contractors. It may be cliché, but “choices have consequences.” And the consequences of a disregard for, or for lip service compliance with, the MDR can be quite severe.

Guidelines

***10** These *Guidelines* are intended to assist you in understanding a Government contractor's compliance obligations under the MDR. They are not, however, a substitute for professional representation in any specific situation.

1. Do not make the mistake of thinking that because you are selling the same products to commercial clients and the Government that terms and conditions are the same. Entering the Government contracting marketplace demands understanding the differences between Government and commercial contracting--the risks and potential liabilities and the plans, policies, procedures, and checks and balances necessary to avoid those liabilities--and most important of all, the institutional and systemic readiness to be a Government contractor. In particular, contractors must understand perhaps the largest difference between the commercial and Government marketplaces: the MDR and the requirement to tell the enforcement arm of the customer (the agency IG) that you “may” have done something wrong when the consequences far transcend normal contractual remedies.

2. Develop an infrastructure to help prevent reportable events under the MDR, to identify the events when they occur, and to report such events in a timely fashion. Contractors must address these issues not only in the present and going forward, but by looking backward to assess their conduct and disclose past potential violations within a defined window. This includes events that occurred before the MDR was created or the implementing clause was added to contracts. Such requirements and practices must be applied to subcontractors as well.

3. Educate employees and subcontractors in all aspects of the MDR and basic disclosure obligations under FAR. Make sure they understand that while some portions of the obligation are defined, others are not, meaning you must read between the lines and infer guidance from Government application and enforcement of the FAR and the MDR. Events requiring disclosure include “credible evidence” of criminal violations relating to fraud, conflicts of interest, bribery and gratuities, and violations of the civil FCA committed in connection with award, performance, or close-out of a contract.

4. Be aware that the obligation to report does not require an underlying determination that a violation has actually occurred. Investigations of alleged violations that end with a determination that no violation has occurred do not equal compliance with the MDR. The obligation is to disclose “credible evidence” of a violation, but the Government has not defined what “credible evidence” means. The conservative approach, of course, is to disclose whenever there is any reasonable likelihood that the evidence could persuade a jury to find you liable. The hope would be that your willingness to come forward, and the relative insubstantiality of the evidence, would persuade the IG to stand down. But there is no guarantee of that outcome and the evidence suggests that most contractors are not adopting that approach.

5. Remember that the obligation to disclose does not require a confession of culpability. A mandatory disclosure should avoid damning admissions and will almost always disclaim wrongful conduct and assert that the submission is being made to assure contract compliance and out of an abundance of caution.

6. Create or strengthen your existing business ethics awareness and compliance programs and internal control systems to deal with and prevent violations. Employees and subcontractors must be educated and trained in these programs and practices so their roles and responsibilities are made clear to them.

References

Footnotes

- 1 [73 Fed. Reg. 67064 \(Nov. 12, 2008\)](#). For an in-depth discussion of the development of the MDR, see West, Richard, Brennan, Barsalona, Koos & Meene, “Contractor Business Ethics Compliance Program & Disclosure Requirements,” Briefing Papers No. 09-5 (Apr. 2009).
- 2 [31 U.S.C.A. §§ 3729-3733](#).
- 3 [FAR 3.1003\(a\), 9.406-2\(b\)\(1\)\(vi\), 9.407- 2\(a\)\(8\), 52.203-13\(b\)\(3\)\(i\), \(c\)\(2\)\(ii\)\(F\)](#).
- 4 [FAR 3.1003\(a\), 9.406-2\(b\)\(1\)\(vi\), 9.407- 2\(a\)\(8\), 52.203-13\(b\)\(3\)\(i\), \(c\)\(2\)\(ii\)\(F\)](#).
- 5 [73 Fed. Reg. 67064 \(Nov. 12, 2008\)](#) (effective Dec. 12, 2008).
- 6 [FAR 52.203-13](#).
- 7 [FAR 3.1003\(a\), 9.406-2\(b\)\(1\)\(vi\), 9.407- 2\(a\)\(8\), 52.203-13\(c\)\(2\)\(ii\)\(F\)](#); see [73 Fed. Reg. 67064, 67073-74 \(Nov. 12, 2008\)](#). see also American Bar Ass'n Section of Public Contract Law, *Guide to the Mandatory Disclosure Rule: Issues, Guidelines and Best Practices*, Report of the Task Force on Implementation of the Contractor Code of Business Ethics and Conduct and Mandatory Disclosure Rule 125-28 (2010) (hereinafter ABA Guide).
- 8 [FAR 3.1003\(a\), 9.406-2\(b\)\(1\)\(vi\), 9.407- 2\(a\)\(8\)](#).
- 9 [FAR 52.203-13\(d\)](#).
- 10 [FAR 3.1003\(a\), 9.406-2\(b\)\(1\)\(vi\), 9.407- 2\(a\)\(8\), 52.203-13\(b\)\(3\)\(i\), \(c\)\(2\)\(ii\)\(F\)](#); see ABA Guide 83-95.
- 11 ABA Guide 10.
- 12 [FAR 3.1004\(a\)](#); see [80 Fed. Reg. 38293, 38296 \(July 2, 2015\)](#) (adjusting acquisition-related thresholds for inflation).
- 13 ABA Guide 10 (emphasis added).
- 14 [FAR 52.203-13\(b\)\(1\)](#).
- 15 [FAR 52.203-13\(b\)\(2\)\(i\)](#).
- 16 [FAR 52.203-13\(b\)\(2\)\(ii\)](#).
- 17 [FAR 52.203-13\(b\)\(3\)\(i\)](#).
- 18 [FAR 52.203-13\(b\)\(3\)\(i\)](#).
- 19 [FAR 52.203-13\(b\)\(3\)\(i\)](#).

- 20 See ABA Guide 64-73 (discussing guidance regarding “credible evidence” standard found in the MDR Preamble).
- 21 (c)(1).
- 22 FAR 52.203-13(c)(2).
- 23 FAR 52.203-13(c)(1)(i)-(ii).
- 24 FAR 52.203-13(c)(2)(i)(A)-(B).
- 25 FAR 52.203-13(c)(2)(ii)(A).
- 26 FAR 52.203-13(c)(2)(ii)(B).
- 27 FAR 52.203-13(c)(2)(ii)(C).
- 28 FAR 52.203-13(c)(2)(ii)(D).
- 29 FAR 52.203-13(c)(2)(ii)(E).
- 30 FAR 52.203-13(c)(2)(ii)(F).
- 31 FAR 52.203-13(c)(2)(ii)(G).
- 32 FAR 52.203-13(a).
- 33 FAR 52.203-13(a).
- 34 FAR 52.203-13(a).
- 35 FAR 52.203-13(a).
- 36 FAR 52.203-13(c)(2)(ii)(F)(3).
- 37 FAR 52.203-13(c)(2)(ii)(F).
- 38 FAR 9.406-2(b)(1)(vi), 9.407-2(a)(8); see ABA Guide 125-28.
- 39 FAR 52.203-13(b)(3)(ii); see also FAR 52.203-13(c)(2)(ii)(F)(4).
- 40 FAR 52.203-13(b)(3)(ii).
- 41 FAR 52.203-13(b)(3)(ii).
- 42 FAR 52.203-13(d); see 80 Fed. Reg. 38293, 38299 (July 2, 2015) (adjusting acquisition-related thresholds for inflation).
- 43 FAR 9.406-2(b)(1)(vi) (debarment), 9.407-2(a)(8) (suspension) (emphasis added).
- 44 FAR 2.101, 52.203-13(a); see 75 Fed. Reg. 14059, 14065, 14066 (Mar. 23, 2010) (amending definition of “principal”).
- 45 ABA Guide 97.
- 46 ABA Guide 97-98.
- 47 ABA Guide 98.
- 48 ABA Guide 98.
- 49 ABA Guide 99.
- 50 ABA Guide 99.
- 51 ABA Guide 99-101.
- 52 ABA Guide 206.
- 53 ABA Guide 206.
- 54 Defense Industry Initiative on Business Ethics and Conduct, Creating and Maintaining an Effective Ethics and Business Conduct Program, available at <http://www.dii.org/resources/defense-industry-initiative-toolkit>.
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