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## Contractors Face Tougher Ethical Standards

■ When private actors seek public funds, the need to protect government accounts from fraud, waste and abuse compels them to act with scrupulous regard to the requirements of the law.

As Justice Oliver Wendell Holmes Jr. put it, “Men must turn square corners when they deal with the government.”

But protection of the public treasury is not just the citizenry’s responsibility. The government also is expected to act with high ethical standards in its use of public funds. As Justice Robert H. Jackson retorted years later, “There is no reason why the square corners should constitute a one-way street.”

Yet, while private actors who misuse public funds are severely punished, when government agencies similarly abuse the public treasury, they escape relatively unscathed. Perhaps nowhere is this dichotomy more felt than in the field of government contracts. Government contractors incur hefty monetary liabilities and suffer other severe forms of punishment if they err in accounting for what they charge the government. In contrast, government agencies may be careless with appropriations, or even intentionally misapply funds to suit their programmatic needs, with relative impunity.

Consider the myriad laws imposing harsh penalties on contractors for erroneous billings submitted to the government. As contractors well know, submitting defective certified cost or pricing data can lead to treble damages under the False Claims Act if the government establishes not intentional or willful misconduct, but “reckless disregard” or “deliberate ignorance” on the part of the contractor.

Then there are the Cost Principles and Cost Accounting Standards, mandating contractors to charge only “allowable” and “allocable” costs — terms the government possesses sole authority to define and seemingly to redefine on a case-by-case basis.

Again, the monetary risk to contractors for failing to abide by these requirements is severe.

But monetary damages and penalties are just the tip of the iceberg of consequences for contractors. The government may cancel a contract, and need not pay for any work done, if it finds the contract was tainted by a conflict of interest. Likewise, inaccurate payment requests may be grounds for default termination or claim forfeiture. There is also the omnipresent threat of suspension and debarment — death knells in the government contracting world. Last, but certainly not least, contractors may be charged with a crime under the False Claims Act.

Now consider the laws designed to keep the government honest in its monetary dealings. It is obligated to conduct its business “above reproach,” to quote Federal Acquisition Regulation 3.101-1. What happens, however, when the government’s conduct falls short of this standard? There are criminal statutes sanctioning misuse of public funds by individual government personnel, and procedures for removing bad eggs. But these measures punish individuals, not institutions. They do not serve as a deterrent against the misuse of public funds at the agency level.

What about the government’s watchdog, the Government Accountability Office? The comptroller general is authorized to investigate all matters related to the receipt, disbursement and use of public money. But in terms of enforcement, GAO is limited in its power to making recommendations to Congress, meaning it can do no more than tattle on agencies for misappropriating funds.

An example of how toothless this approach is can be seen in a recent GAO decision (B-329446) involving the Office of Navajo and Hopi Indian Relocation. Instead of depositing money obtained from the sale of government-owned cattle into the Treasury, the relocation office used the money to offset the costs of a ranch it operated. GAO determined this use of money due the government for its own programmatic purposes violated the Miscellaneous Receipts Act — in other words, the office misappropriated public funds. Yet, GAO could do no more than report the violation to Congress, and recommend that it pay back the money or, if it cannot, report a violation of the Antideficiency Act.

This was not an isolated incident. A few months before, GAO issued another decision (B-331888) finding Customs and Border Protection to have misappropriated public funds when it obligated line item appropriations for goods and services for which the line items were not available.

“It is clear the government treats itself differently than its contractors when caught misusing public funds.”

When contractors shift costs inappropriately between line items, there is hell to pay. But when CBP did it, it received the same GAO recommendation, which was a slap on the wrist.

It is clear the government treats itself differently than its contractors when caught misusing public funds. One option to level the playing field would be to defund noncompliant agencies. However, that would needlessly punish public programs and the contractors that help run them.

Perhaps this is a problem without a solution then. But maybe — just maybe — Congress should reexamine its harsh treatment of contractors and refrain from imposing punishments it does not impose upon government agencies.

Maybe — just maybe — the solution to the double standard is in adjusting the standard applied to contractors by requiring willful misconduct as a condition of the treble damages that hang like the Sword of Damocles over the head of every False Claims Act defendant. **ND**

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