Federal Contract Ethics & Compliance Program Requirements: How to Improve Your Program

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The Coronavirus Aid, Relief, and Economic Security (CARES) Act provided the largest stimulus package in U.S. history. While this unprecedented government spending provides many contractors with much needed funding, it also entails enhanced government scrutiny and an increased risk of liability under the False Claims Act (FCA) for noncompliant contractors.

The March 2020 CARES Act authorized a $2.2 trillion stimulus package to support business and individuals in response to the coronavirus pandemic[1] — nearly triple that of the initial $830 billion provided in response to the Great Recession through the American Recovery and Reinvestment Act (ARRA) of 2009.[2] The CARES Act's Paycheck Protection Program (PPP) has approved over 5 million loans as of August 2020 amounting to more than $500 billion, with construction being the third-largest industry recipient.[3]

Government spending will, and has always, spurred unprecedented scrutiny of how funds are dispersed, spent and accounted. The aftermath of the 2009 ARRA brought about a huge shift in in FCA litigation, as the government became more active in its attempts to claw back funds through FCA litigation. The CARES Act stimulus package is far larger than that of ARRA, meaning contractors should expect even greater scrutiny and investigation of contractor claims. Further, the enactment of the Fraud Enforcement and Recovery Act (FERA) of 2009 amended the FCA to expand its scope and provide the government with enhanced tools to pursue FCA investigations. Contractors must be cautious to adhere to regulations in order to avoid civil liability under the FCA.

I. Introduction

This article assesses the recent trends in FCA enforcement and offers guidance on practices contractors can adopt to avoid organizational pitfalls that may lead to FCA liability. This section provides a background on the law and recent FCA litigation.

Section II outlines some of the common areas of concern for contractors, focusing on the mandatory Contractor Code of Conduct and Ethics and Federal Acquisition Regulations (FAR) flow-down provisions. Finally, Section III addresses how these concerns impact the way contractors do business as well as the steps contractors can take to remain compliant with federal regulations.

A. The FCA and the Fraud Enforcement and Recovery Act (FERA) of 2009

The FCA imposes liability on federal contractors and organizations that present false, fraudulent claims for payment or knowingly present false records or statements that are material to a false or fraudulent claim.[4] There is a civil FCA and a criminal FCA, both covering the same types of conduct. The civil FCA is the government's primary tool; however, criminal FCA investigations may be increasing. The FCA applies when even $1 of federal money is used to fund a project.[5]

Conduct subject to FCA liability includes direct false claims, false statements, reverse false claims and conspiracy to commit any of the former.[6] Direct false claims arise when a contractor knowingly submits, or causes another to submit, false claims for payment to the government.[7] Similarly, false statements involve knowingly making, using or causing another to use a false record or statement material to payment of a claim.[8] A reverse false claim occurs when a contractor knowingly conceals or decreases the amount of a monetary obligation owed by the contractor to the government.[9]

Contractors in violation of the FCA are liable to the government for a penalty of no less than $11,665 and no more than $23,331[10] per false claim plus three times the amount of damages sustained by the government.[11] Contractors may also be subject to litigation costs, forfeiture of legitimate claims for payment and suspension or debarment from federal contracting.[12] Damages may be reduced if the court finds that a contractor "fully cooperated" with

[1]Andrew Taylor et al., Trump Signs $2.2T Stimulus after Swift Congressional Votes, ASSOCIATED PRESS NEWS (Mar. 28, 2020), https://apnews.com/2099a53bb8adf2def7ee7329ea322f9d.
[2]U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-219, RECOVERY ACT: GRANT IMPLEMENTATION EXPERIENCES OFFER LESSONS FOR ACCOUNTABILITY AND TRANSPARENCY 7 (2014).
[3]U.S. SMALL BUSINESS ADMIN., PAYCHECK PROTECTION PROGRAM (PPP) REPORT: APPROVALS THROUGH 08/08/2020 2,8 (2020).
[4]31 U.S.C. § 3729(a)(1).
[5]See U.S. ex rel. DRC, Inc. v. Custer Battles, LLC, 562 F.3d 295, 303 (4th Cir. 2009).
[6]See 31 U.S.C. § 3729.
[7]Id.
[8]Id.
[9]31 U.S.C. § 3729(a)(1)(G)
[10]Civil Monetary Penalties Inflation Adjustment, 85 Fed. Reg. 37,004 (June 19, 2020) (to be codified at 28 C.F.R. pt. 85)
[11]31 U.S.C. § 3729(a)(1)(G)
[12]31 U.S.C. § 3729.

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the government during the investigation of the FCA violation.[13]

Some of the largest FCA recoveries occurred after the ARRA stimulus package following the 2008 financial crisis. To put this in perspective, of the roughly $62 billion in FCA recoveries since 1986, more than half ($37 billion) occurred in the last 10 years.[14] There were more than $3 billion in FCA settlements and judgments in FY 2019 alone.[15] Given the CARES Act's record-breaking funding, these numbers are expected to be significantly higher in FY 2020 and FY 2021.

Government stimulus spending in the wake of the 2008 economic crisis and concerns related to how contractors would qualify for and use these funds motivated Congress to enact the Fraud Enforcement and Recovery Act (FERA) of 2009.[16] FERA fortified the reach of the FCA by "correct[ing] erroneous interpretations of the law" stemming from prior FCA litigation.[17] FERA amended the FCA in three significant ways: (1) it revised FCA language to address intent and materiality of false information underlying a fraudulent claim, (2) revised the false claim "presentment" requirement for liability, and (3) authorized greater use of Civil Investigative Demands (CID) and CID information sharing.

First, FERA expanded FCA liability by removing the following italicized language from 31 U.S.C. § 3729(a): "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim *paid or approved by the Government*."[18] This overturned the Supreme Court's *Allison Engine* precedent, which held that a subcontractor could not be liable under the FCA for submitting a false statement to a federal prime contractor unless the subcontractor intended "for the statement to be used by the prime contractor to get the Government to pay its claim."[19] FERA's amendment of the FCA removed the statutory language leading to this interpretation and added the word "material" to § 3729(a)(2).

The current FCA § 3729(a)(2) imposes liability when one "knowingly makes, uses, or causes to be made or used, a false record or statement *material* to a false or fraudulent claim."[20] Now, a subcontractor may be liable under the FCA for providing false information to a prime contractor whether or not the subcontractor intended that false information be used in order to induce the government to pay on the prime contractor's own claim.

Second, FERA revised FCA language related to the "presentment" of a false claim. FERA removed the following italicized language from § 3729(a)(1): "knowingly presents, or causes to be presented, *to an officer or employee of the United States Government or a member of the Armed Forces of the United States* a false or fraudulent claim for payment or approval."[21] Further, FERA expanded the FCA's definition of a "claim" to cover requests for money "to be spent or used on the Government's behalf or to advance a Government program or interest."[22] These revisions have serious implications for subcontractors because "presentment" no longer requires the participation of a government official. Subcontractors may be liable under the amended FCA for presenting a claim to a federal prime contractor.

Finally, FERA expanded the use and availability of CIDs. Before FERA, only the Attorney General had the authority to issue CIDs requiring production of documentary material, answers to interrogatories or presentation of testimony relevant to a false claims investigation.[23] FERA granted the Attorney General the authority to delegate the CID issuing power to a designee.[24] Additionally, FERA authorized the Attorney General or a designee to share information gathered from CIDs with any *qui tam* plaintiff if "necessary" to an FCA investigation. [25] The expansion of CID authority and availability of CID materials to FCA plaintiffs presents the enormous potential for abuse of this investigative power.

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[13] 31 U.S.C. § 3729(2)(B).

[14] U.S. DEP'T OF JUSTICE, FRAUD STATISTICS OVERVIEW: OCTOBER 1, 1896 – SEPTEMBER 30, 2019 (2019), available at: https://www.justice.gov/opa/press-release/file/1233201/download.

[15] Id.

[16] S. Rep. No. 111-10 at 10 (2009) ("[Stimulus] funds "are often dispensed through contracts . . . going to general contractors and subcontractors working for the Government. Protecting these funds from fraud and abuse must be among our highest priorities as we move forward with these necessary actions.").

[17] S. Rep. No. 111-10 at 10 (2009).

[18] 31 U.S.C. § 3729(a) (2007) (emphasis added); S. Rep. No. 111-10 at 12, 22 (2009).

[19] Allison Engine Co. v. U.S. ex rel. Sanders, 553 U.S. 662, 672 (2008).

[20] 31 U.S.C. § 3729(a)(2) (2009).

[21] 31 U.S.C. § 3729(a)(1) (2007) (emphasis added); S. Rep. No. 111-10 at 12, 22 (2009).

[22] FERA, Pub. L. No. 111-21, §4, 123 Stat 1617, 1622-23 (2009).

[23] See 31 U.S.C. § 3733 (2007).

[24] FERA, Pub. L. No. 111-21, §4, 123 Stat 1617, 1623-24 (2009).

[25] FERA, Pub. L. No. 111-21, §4, 123 Stat 1617, 1624 (2009).

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B. Modern Trends and Case Law

The government is committed to holding bad actors responsible for their actions. Recent public statements released by the Department of Justice (DOJ) reveal that funds distributed under the CARES Act will be subject to strict oversight. On March 16, 2020, U.S. Attorney General William Barr issued a memorandum directing all U.S. attorneys to "prioritize the detection, investigation, and prosecution of all criminal conduct related to the current pandemic."[26] Attorney General Barr also urged the public "to report suspected fraud schemes related to COVID-19."[27] Deputy Attorney General Jeffrey Rosen further directed U.S. Attorneys "to appoint a Coronavirus Fraud Coordinator to serve as the legal counsel for the federal judicial district on matters relating to the Coronavirus, direct the prosecution of Coronavirus-related crimes, and to conduct outreach and awareness."[28]

Under the guidance of the September 2015 memorandum issued by Deputy Attorney General Sally Quillian Yates, the DOJ focuses on identifiable culpable individuals in cases of corporate fraud under the FCA.[29] In her memorandum, Deputy Attorney General Yates stated that "[i]n order for a company to receive any consideration for cooperation" a company must "completely disclose … all relevant facts about individual misconduct."[30] The memo noted that "full cooperation" for civil actions, specifically FCA investigations, requires that, "at a minimum, all relevant facts about responsible individuals must be provided."[31] FAR 52.203-13, Contractor Code of Business Ethics and Conduct, incorporates these measures, defining "full cooperation" as "disclosure to the Government of information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct."[32] The mandatory Contractor Code of Business Ethics and Conduct is discussed in greater detail within Section II.

In August 2019, Luke Hillier, the majority owner and former Chief Executive Officer of the Virginia-based defense contractor ADS Inc., paid $20 million to settle allegations that he fraudulently obtained small business set-aside contracts in violation of the FCA.[33] The government alleged Hillier caused ADS to falsely represent itself as a qualified small business, resulting in the award of "numerous small business set-aside contracts for which it was ineligible."[34] The government previously resolved related claims against both ADS for $16 million and Charles Salle, the former general counsel of ADS, for $225,000. [35] The settlement with Hillier resolved a lawsuit initially filed by a whistleblower, Ameliorate Partners LLP, which is slated to receive $3.6 million as the *qui tam* plaintiff.[36]

Similarly, in April 2018, a construction company and its small business partner agreed to pay the U.S. government $1,062,900 and $150,000 respectively to settle FCA claims against them.[37] Big-D Construction Corp., a large construction company, entered into a leasing agreement with small business Small Business Association (SBA) participant, Creative Times Day School, in a number of government contracts between 2009 and 2013.[38] Under their lease agreement, Big-D Construction provided personnel to assist Creative Times Day School in performance of government contracts.[39] The U.S. alleged this lease agreement caused Creative Times to fail to meet SBA requirements that a small business perform a certain percentage of contract work, causing the small business to submit false claims for payments under the SBA set-aside program. [40]

In March 2020, contractor Daren Arakelian agreed to pay

[26]Memorandum from the Office of the Attorney General, to All United States Attorneys (Mar. 16, 2020) (available at: https://www.justice.gov/ag/page/file/1258676/download).
[27]Press Release, Department of Justice Office of Public Affairs, Attorney General William P. Barr Urges American Public to Report COVID-19 Fraud (Mar. 20, 2020) (available at: https://www.justice.gov/opa/pr/attorney-general-william-p-barr-urges-american-public-report-covid-19-fraud).
[28]Press Release, Department of Justice Office of Public Affairs, Attorney General William P. Barr Urges American Public to Report COVID-19 Fraud (Mar. 20, 2020) (available at: https://www.justice.gov/opa/pr/attorney-general-william-p-barr-urges-american-public-report-covid-19-fraud).
[29]Memorandum from Sally Quillian Yates, Deputy Attorney General (Sept. 9, 2015) (available at https://www.justice.gov/archives/dag/file/769036/download).
[30]Id. (emphasis in original).
[31]Id. at 4.
[32]FAR 52.203-13.
[33]Press Release, Department of Justice Office of Public Affairs, Former CEO of Virginia-Based Defense Contractor Agrees to Pay $20 Million to Settle False Claims Act Allegations Related to Fraudulent Procurement of Small Business Contracts (Aug. 20, 2019) (available at https://www.justice.gov/opa/pr/former-ceo-virginia-based-defense-contractor-agrees-pay-20-million-settle-false-claims-act#:~:text=Luke%20Hillier%2C%20the%20majority%20owner,for%20small%20businesses%20that%20his).
[34]Id.
[35]Id.
[36]Id.
[37]Press Release, Department of Justice Office of Public Affairs, Utah Construction Contractors Reach Civil Settlement in False Claims Act Case (Apr. 2, 2018) (available at: https://www.justice.gov/usao-ut/pr/utah-construction-contractors-reach-civil-settlement-false-claims-act-case).
[38]Id.
[39]Id.
[40]Id.

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$702,000 to resolve civil FCA liability after pleading guilty to wire fraud for his scheme to import Chinese-made goods and sell them as American-made.[41] Arakelian caused his company, Great 4 Image, Inc., to deceptively market Chinese goods as U.S.-made and sell them to federal agencies in violation of the Buy American Act.[42] Great 4 Image had several contracts with federal agencies to supply backpacks, duffle bags, t-shirts, hydration packs and suspension trainers.[43] Each of the company's government contracts required it to comply with the Buy American Act.[44] Arakelian admitted to making verbal and written false statements to federal officials, claiming that his company domestically manufactured goods that he knowingly imported from China.[45] Arakelian faces up to 20 years in prison for his criminal conviction of wire fraud related to the false marketing and selling his goods to the U.S. government as American-made.[46]

These cases serve as a warning to contractors that the government will not tolerate false reporting and fraudulent business tactics. Contractors should expect to see more cases such as these and greater investigation of potential FCA violations in the wake of the CARES Act's unprecedented spending on government projects.

II. The Big Issues Contractors Should Be Concerned About

Compliance with FAR regulations is crucial to avoiding staggering monetary penalties and liability that may disqualify a contractor from receiving any government contracts in the future. This section breaks down some of the major FAR provisions contractors are likely to come across and explains what contractors and subcontractors must do in order to comply.

A. Contractor Code of Business Ethics and Conduct

FAR 52.203-13, Contractor Code of Business Ethics and Conduct, is a contractual provision included in government contracts of $5.5 million or more with a performance period of 120 days or more. [47] Within 30 days of contract award, contractors must establish a written code of business ethics and conduct (Code) and make it available to each employee engaged in performance of the contract.[48] FAR 52.203-13 also requires contractors to "exercise due diligence to prevent and detect criminal conduct," and promote "an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[49] Importantly, contractors must timely disclose in writing any "credible evidence" of a violation of criminal law involving fraud, conflict of interest, bribery, gratuity violations and violations of the civil FCA.[50]

Additionally, contractors must establish a business ethics awareness and compliance program and an internal control system within 90 days after contract award, unless they are a small business concern or the contract is one for commercial items.[51] The ethics awareness and compliance program must provide reasonable steps to periodically communicate standards and procedures as well as training for contractor employees and even subcontractors, when appropriate.[52]

A contractor's internal control system must establish standards and procedures to facilitate timely discovery of improper conduct and ensure corrective measures are promptly instituted in the event of misconduct.[53] At minimum, a contractor's internal control system must: (1) assign responsibility for ethics compliance to a sufficiently high level individual who has not engaged in conduct that is in conflict with business ethics, (2) conduct periodic reviews of business practices, policies and internal controls, including monitoring and auditing to detect criminal conduct, (3) provide an internal reporting mechanism that allows for anonymity through which employees may report improper conduct as well as instructions that encourage such reporting, (4) provide disciplinary action for improper conduct or for the failure to take reasonable steps to prevent or detect such conduct, (5) offer timely disclosure of "credible evidence" of fraud or FCA violations, and (6) provide "full cooperation" with government agencies in the event of audits, investigations or corrective action. [54]

The U.S. Department of Justice, Criminal Division has identified

[41]Press Release, Department of Justice Office of Public Affairs, Upstate New York Businessman Pleads Guilty to Wire Fraud, Pays More Than $700,000 to Resolve False Claims Act Liability (Mar. 10, 2020) (available at: https://www.justice.gov/usao-ndny/pr/upstate-new-york-businessman-pleads-guilty-wire-fraud-pays-more-700000-resolve-false).
[42]Id.
[43]Id.
[44]Id.
[45]Id.
[46]Id.
[47]FAR 3.1004.
[48]FAR 52.203-13(b)(1).
[49]FAR 52.203-13(b)(2).
[50]FAR 52.203-13(b)(3).
[51]FAR 52.203-13(c).
[52]Id.
[53]Id.
[54]FAR 52.203-13(c)(2).

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three fundamental questions prosecutors should consider when determining whether a company's compliance program is effective: (1) "Is the corporation's compliance program well designed?" (2) "Is the program adequately resourced and empowered to function effectively?" (3) "Does the corporation's compliance program work in practice?" [55]

When answering the first question, prosecutors investigating potential fraud should conduct a risk assessment and consider whether a contractor's program and internal control system is "designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business." [56] Prosecutors will also consider the comprehensiveness and accessibility of the compliance program, and whether the program's policies have been "integrated into the organization" through training and certification.[57] One "hallmark of a well-designed compliance program" is an "efficient and trusted" confidential reporting mechanism, which the DOJ considers to be "highly probative" of whether a company has effective governance measures.[58]

As for the second question, prosecutors are instructed to "probe specifically whether a compliance program is a 'paper program'" that is lax and ineffective.[59] Prosecutors are directed to examine the commitment of senior and middle management to implementing a "culture of compliance."[60] Incentives for compliance as well as the disciplinary measures for non-compliance are other "hallmarks" of an effective program and may include internal publication of disciplinary actions, employee promotions or awards for assisting in development of a compliance program, and making compliance a significant metric for managing employee bonuses. [61]

Finally, when considering whether a compliance program works in practice, prosecutors investigating fraud consider whether a company's compliance system was effective at the time of the alleged misconduct.[62] When a contractor is charged with a crime, prosecutors are instructed to determine whether the company's compliance program "evolved over time to address existing and changing compliance risks."[63] The DOJ notes that prosecutors "may reward efforts to promote improvement and sustainability" of a compliance program through a remediation credit or lower fine range under its Sentencing Guidelines.[64]

A recent FCA settlement highlights the importance of adhering to the mandatory disclosure requirements in the FAR's Contractor Code of Business Ethics and Conduct. In June 2020, Bradken Inc. paid $10.8 million to settle FCA allegations with respect to the company's falsification of lab test results measuring the quality of steel used in the installation of Naval submarine components.[65] The government alleged that, for 30 years, the company's Tacoma, Washington foundry produced casting that failed quality testing and falsified the test results to hide the fact its steel failed to meet the Navy's standards.[66]

The related court filings state that there was "no evidence" Bradken's management knew of the fraud until 2017, when it made initial disclosures of the lab test discrepancies to the Navy.[67] However, Bradken then made misleading statements to the Navy that the test result discrepancies were not the result of fraud, which "hindered the Navy's investigation and its efforts to remediate the risks presented by Bradken's fraud."[68] U.S. Attorney Brian T. Moran commented on the case, stating, "[g]overnment contractors must not tolerate fraud within their organizations, and they must be fully forthcoming with the government when they discover it."[69]

B. Additional Obligations Triggered by Federal Funds: FAR Flow-Down Provisions

Federal contracts contain numerous clauses found in the FAR that implement federal legislation and govern contract performance. Contractors must abide by FAR contractual provisions not only to avoid breach, but also to prevent potential FCA liability. Many of the FAR provisions that may give rise to potential FCA liability for prime contractors are also applicable to subcontractors that

[55]U.S. DEP'T OF JUSTICE CRIMINAL DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS 1-2 (2020).
[56]Id. at 3.
[57]Id. at 4-5.
[58]Id. at 6.
[59]Id. at 9.
[60]Id. at 10.
[61]Id. at 13.
[62]Id. at 14.
[63]Id.
[64]Id. at 15.
[65]Press Release, Department of Justice Office of Public Affairs, Bradken Inc. Pays $10.8 Million to Settle False Claims Act Allegations and Enters into Deferred Prosecution Agreement (June 15, 2020) (available at: https://www.justice.gov/usao-wdwa/pr/bradken-inc-pays-108-million-settle-false-claims-act-allegations-and-enters-deferred).
[66]Id.
[67]Id.
[68]Id.
[69]Id.

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are not in direct contract with the government. Prime contractors awarded federal contracts are required to "flow-down" some of these mandatory clauses to their subcontractors by incorporating such provisions in their subcontracts. This section provides an overview of some of the most common flow-down provisions required for federal subcontractors.

1. *Small Business Utilization*

Contractors with federal awards in excess of the $250,000 simplified acquisition threshold are required to abide by and flow-down FAR 52.219-8, Utilization of Small Business Concerns.[70] This FAR clause furthers federal policy of encouraging greater participation of small business concerns in government contracting.[71] It requires contractors to carry out this policy in the award of subcontracts, consistent with contract performance, to small businesses, veteran-owned small businesses, service-disabled veteran-owned small businesses, certified HUBZone small businesses, small disadvantaged businesses and women-owned small businesses.[72] These socioeconomic businesses are outlined below:

- A small disadvantaged business is one that is at least 51% unconditionally and directly owned by one or more socially disadvantaged U.S. citizens. Those who claim an economic disadvantage must each have a net worth not exceeding $750,000 after taking into account exclusions set out in 31 C.F.R. 124.104(c)(2).[73]
- A women-owned small business is one that is at least 51% owned by one or more women and whose management and daily business operations are controlled by one or more women.[74]
- Service-disabled veteran-owned businesses are defined as businesses with not less than 51% ownership by one or more service-disabled veterans and which have management and daily business operations controlled by a service-disabled veteran.[75]
- Veteran-owned small businesses are defined in the same way. In order to qualify, the small business must be at least 51% owned by one or more veterans with management and daily operations controlled by one or more veterans.[76]

Additionally, in negotiated and sealed bidding acquisitions of $700,000 or more, or $1.5 million or more for construction contracts, offerors must submit a satisfactory subcontracting plan that provides for the participation of small business concerns in order to be eligible for contract award.[77] The subcontracting plan is not required in offers from small business concerns or for personal service contracts, contracts to be performed outside of the U.S., or for modifications within the scope of a contract that is not required to contain FAR 52.219-8.[778]

Falsely claiming to be a small business or to have a subcontract with a qualified small business can result in FCA violations. Further, providing false reporting or information on the size of one's business or a subcontractor's business can result in FCA liability. It was this kind of false reporting that was alleged in the case of Luke Hillier and his ADS company discussed in section I. The combined settlements of Hillier, ADS company, and its general counsel totaled $36 million and "rank as the largest False Claims Act recovery based on allegations of small business contracting fraud."[79]

2. *Executive Compensation/FFATA*

FAR 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards, requires large federal contractors to annually report on SAM.gov the names and total compensation of each of its five most highly compensated executives.[80] A "large" federal contractor is defined as a contractor who received 80% or more of its revenue from federal contracts (including grants, cooperative

[70]FAR 19.708. The simplified acquisition threshold was increased to $250,000 through the National Defense Authorization Act of 2018. See National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 805, 131 Stat. 1283, 1456 (2017).
[71]See FAR 52.219-8(b).
[72]FAR 52.219-8(b).
[73]FAR 52.219-8(a). "Socially disadvantaged" is defined as individuals "who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities . . . stem[ming] from circumstances beyond their control." 13 C.F.R. 124.103
[74]FAR 52.219-8(a).
[75]FAR 52.219-8(a). In the case of a service-disabled veteran with a permanent and severe disability, the spouse or permanent caregiver may serve in business management and daily operations. Id.
[76]Id. "Veteran" is defined as an individual who "served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." 38 U.S.C. 101(2).
[77]FAR 19.702.
[78]FAR 19.702(b).
[79]Press Release, Department of Justice Office of Public Affairs, Former CEO of Virginia-Based Defense Contractor Agrees to Pay $20 Million to Settle False Claims Act Allegations Related to Fraudulent Procurement of Small Business Contracts (Aug. 20, 2019).
[80]FAR 52.204-10.

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agreements and other federal financial assistance), and whose annual gross revenue from those federal contracts is $25 million or more.[81]

Disclosure of "total compensation" earned by contractor executives includes both cash and noncash values, including: salary and bonus; stock awards, options and rights; earnings for services under non-equity incentive plans; changes in pension value; above-market earnings on deferred compensation that is not tax-qualified; life insurance payments; and any other forms of compensation.[82]

Additionally, contractors subject to FAR 52.204-10 must report similar subcontractor information for all first-tier subcontracts with a value of $30,000 or more.[83] Contractors must also provide this executive compensation information if the subcontractor qualifies as a "large" contractor, meaning it has received over 80% of its annual gross revenue from federal contracts in the preceding fiscal year and its annual gross revenues amount to $25 million or more.[84] These reporting requirements kick in when a subcontract is awarded but are not continuing requirements unless any of the reported data elements changes during the performance of the subcontract.

These reporting requirements were implemented by the Federal Funding Accountability and Transparency Act of 2006, Pub. L. 109-282, as amended by the Government Funding Transparency Act of 2008, Pub. L. 110-252. The reporting requirements apply to all contracts and solicitations of $30,000 or more, [85] which covers the vast majority of federal contracts. These provisions must be flowed down by prime contractors to subcontractors as their information will be made public.

As contractors and subcontractors are reporting these data points to federal databases such as SAM.gov and the Federal Funding Accountability and Transparency Act Subaward Reporting System (FSRS.gov), contractors must be sure that the information reported is accurate. Any false statement or certification can be the basis for a qui tam FCA suit. Failure to comply with reporting will also result in a notation on a contractor's performance information.[86]

3. *Affirmative Action/Diversity/EEO*

Federal contractors must comply with broad Equal Opportunity and Affirmative Action requirements and flow-down such obligations to their subcontractors. These requirements are found in the FAR, Department of Labor regulations, agency directives and federal contracting provisions of the U.S. Code. Record keeping related to women, minority, disabled and protected veteran employees and job applicants are required by these regulations in many contracts.

FAR 52.222-26, Equal Opportunity, is included in all government contracts greater than $10,000 and will even be included in contracts worth less than $10,000 if the aggregate value of all contracts awarded to a contractor in any 12-month period can reasonably be expected to exceed $10,000.[87] Contractors must also flow-down these provisions to subcontractors performing work of $10,000 or more.[88]

FAR 52.222-26 prohibits discrimination against potential or current employees on the grounds of race, color, religion, sex, national origin, sexual orientation or gender identity. [89] The federal antidiscrimination policy applies to the following employment decisions: (1) recruitment or recruitment advertising; (2) hiring; (3) determining rates of pay or other compensation; (4) promoting; (5) demoting; (6) layoffs or termination; (7) transferring; and (8) selection for training and other advancement programs.[90]

Contractors must also disseminate the equal opportunity, antidiscrimination policy, using language prescribed by the Office of Federal Contract Compliance Programs (OFCCP), to

[81]FAR 52.204-10(d).
[82]FAR 52.204-10(a).
[83]FAR 4.1401; FAR 52.204-10(d)(3).
[84]FAR 52.204-10(f).
[85]FAR 4.1401.
[86]FAR 4.1402(c).
[87]FAR 22.807(b)(1).
[88]FAR 52.222-26(c)(10).
[89]FAR 52.222-26(c)(1).
[90]FAR 52.222-26(c)(2).

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employees and job applicants by incorporating this policy in manuals and posting the information in conspicuous places available to employees and applicants.[91] Equal Opportunity notices must be included in all contractor employment advertisements and contractors must notify each labor union with which it has a collective bargaining agreement of its Equal Opportunity commitments. [92]

FAR 52.222-26(c)(8) requires contractors to provide the contracting officer with notice of compliance with federal Equal Opportunity obligations and file Standard Form 100 (EEO-1), tracking employment data, with the Department of Labor on an annual basis.[93] As part of the federal Equal Opportunity policy, contractors are also required to keep records of minority and women applicants, including their names, addresses and phone numbers as well as the employment action taken with respect to each applicant. [94] Regulations also require contractors to keep records of solicitations for subcontracts from minority and female construction contractors and suppliers.[95] Contractors must provide the procuring agency and the Department of Labor access to premises and employment records for on-site compliance evaluations and investigations. [96]

Contracts of $150,000 or more require contractors to annually report the number of workers who qualify as protected veterans and create an Affirmative Action Plan (AAP) within 120 days of contract commencement setting out policies and procedures that encourage the hiring and promotion of qualified protected veterans. [97] Likewise, contractors must also create an AAP and maintain employment records with respect to individuals with disabilities when the contractor has more than 50 employees and a government contract valued at $50,000 or greater.[98] Finally, non-construction contractors with 50 or more employees and a federal contract valued at $50,000 or more must create and AAP and maintain records of employment decisions connected to women and minority employees and applicants.[99] Falsification of any of the previously mentioned records may serve as the basis for an FCA violation, so contractors must be forthright in mandatory Equal Opportunity reporting and AAP recordation.

4. *Wage and Labor Requirements*

Federal contractors must comply with federal minimum wage and labor regulations. There are two groups of labor and wage statutes. The Davis-Bacon Act sets forth prevailing wage and labor requirements covering laborers and mechanics working on construction projects in the United States receiving federal money, whether through direct procurement, grants, loans, loan guarantees or insurance. Prevailing wage provisions are also present in approximately 60 other statutes, which together, are referred to as "related Acts" to the Davis-Bacon Act.[100] The Davis-Bacon and Related Acts only prescribe prevailing wage requirements for laborers, which are persons whose duties are primarily physical or manual, and mechanics. In contrast, the Service Contract Act (also referred to as the McNamara-O'Hara Service Contract Act or the Service Contract Labor Standards statute) sets forth prevailing wage and labor requirements covering professionals providing services on federal contracts in the United States.[101] Persons whose duties are primarily mental or administrative are considered service workers. Examples include professional engineers, accountants and software developers.

a. Davis-Bacon and Related Acts.

FAR 22.407(a) inserts the FAR contract clauses implementing the Davis-Bacon and Related Act prevailing provisions into all solicitations and contracts for construction within the United States in excess of $2,000. These FAR clauses include:

1) FAR 52.222-6, Construction Wage Rate Requirements,

[91]FAR 52.222-26(c)(5).
[92]FAR 52.222-26(c)(4)-(5).
[93]FAR 52.222-26(c)(8).
[94]41 C.F.R. § 60-4.3(a)(7)(c).
[95]41 C.F.R. § 60-4.3(a)(7)(o).
[96]FAR 52.222-26(c)(9).
[97]41 C.F.R. § 60-300.40. The AAP requirement applies in contracts of $150,000 or more and where the contractor has more than 50 employees. Id.
[98]41 C.F.R. § 60-741.40.
[99]41 C.F.R. § 60-1.12.
[100]What Are the Davis-Bacon and Related Acts?, U.S. DEP'T OF LABOR, https://www.dol.gov/whd/programs/dbra/whatdbra.htm. (last visited Sept. 14, 2020).
[101]See generally 41 U.S.C. §§ 6701-6707.

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2) FAR 52.222-7, Withholding of Funds,
3) FAR 52.222-8, Payrolls and Basic Records,
4) FAR 52.222-9, Apprentices and Trainees,
5) FAR 52.222-10, Compliance with Copeland Act Requirements,
6) FAR 52.222-11, Subcontracts (Labor Standards),
7) FAR 52.222-12, Contract Termination-Debarment,
8) FAR 52.222-13, Compliance with Construction Wage Rate Requirements and Related Regulations,
9) FAR 52.222-14, Disputes Concerning Labor Standards, and,
10) FAR 52.222-15, Certification of Eligibility.

Contractors are also required to flow down these provisions to any subcontractor performing construction work greater than $2,000.[102] Although these clauses overlap in their application and reach, the FAR provisions discussed below present the most comprehensive and important requirements.

FAR 52.222-13, Compliance with Wage Rate Requirements and Related Regulations, broadly includes by reference all of the Construction Wage Rate Requirements rules, interpretations and procedures implemented by the Department of Labor and set forth at 29 CFR parts 1, 3, and 5.

FAR 52.222-6, Construction Wage Rate Requirements, requires contractors to pay all laborers and mechanics at least weekly and in full, with the exception of permitted payroll deductions under the Copeland Act.[103] It also requires wages and fringe benefits to be calculated based on rates set forth by the Secretary of Labor's wage determinations for each laborer or mechanic's specific labor classification.[104] Contractors are also required to post in "a prominent and accessible place" the operative wage determinations and Construction Wage Rate Requirements poster provided by the Department of Labor.[105] This regulation also establishes a dispute resolution procedure if a contractor and a laborer or mechanic, or their representatives, disagree on the proposed classification and wage rate.[106]

FAR 52.222-8, Payrolls and Basic Records, requires contractors to maintain and submit weekly payrolls and related records for three years for all laborers and mechanics working on a federal construction project.[107] The records must contain each person's identifying information, their labor classification, the hourly wage rate, the number of hours worked, deductions made and actual amounts paid.[108] If any deductions were made for a benefits plan, contractors must also maintain related records showing that the plan is financially responsible, that it has been communicated in writing to covered laborers or mechanics and that the records reflect the costs incurred in providing such benefits.[109] Contractors are responsible for obtaining and submitting payrolls from their subcontractors.[110] The contractor and/or subcontractor must certify that all required information is included in the submitted payroll and that such information is true, correct and complete.[111] A contractor or subcontractor that makes a false certification is subject to civil and/or criminal penalties under the FCA. Failure to submit required records or to make them available when requested may result in suspension or debarment.[112]

In fact, a breach of any of the FAR 22.407(a) clauses listed above or breach of FAR 52.222-4, Contract Work Hours and Safety Standards-Overtime Compensation, may be punishable by contract termination.[113] Breach of these clauses is also grounds for prime contractor or subcontractor debarment.[114] Contractors are required to certify that neither they nor any of their affiliates

[102]FAR 52.222-11.
[103]FAR 52.222-6(b)(1).
[104]FAR 52.222-6(b)(3).
[105]FAR 52.222-6(b)(4).
[106]FAR 52.222-7(c)(3).
[107]FAR 52.222-8(a).
[108]Id.
[109]Id.
[110]FAR 52.222-8(b)(1).
[111]FAR 52.222-8(b)(2).
[112]FAR 52.222-8(c).
[113]FAR 52.222-12.

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are suspended or debarred from federal contracting.[115] Contractors must also certify that they have no subcontractors who are suspended or debarred, or otherwise ineligible to receive a federal subcontract.[116] Again, falsification of any of these certifications is punishable under the Criminal FCA.[117]

A recent 2019 FCA settlement involved a contractor, NAGAN Construction, Inc., submitting monthly reports requesting payment for work that misclassified the wage rate applicable to the laborers on the project.[118] NAGAN "regularly submitted false certified payroll reports that misclassified thousands of hours of skilled work as 'laborer' work" leading to 20 employees being underpaid. [119] As part of the settlement agreement in the civil fraud case, NAGAN agreed to pay $435,000, with $242,375 going to the current and former workers who were underpaid.[120] NAGAN admitted responsibility and "agreed to implement specific measures designed to ensure future compliance with applicable federal prevailing wage laws, including conducting periodic internal compliance audits and ensuring that supervisors are fully trained on federal labor standards."[121] This case demonstrates not only the significance of compliance with federal wage laws, but also the importance of having internal controls that would detect and prevent this kind of fraud in the first place.

b. Service Contract Labor Standards

FAR 52.222-41, Service Contract Labor Standards, is inserted into contracts over $2,500 that are subject to the Service Contract Labor Standards statute.[122] Generally, the statute covers "all Government contracts, the principal purpose of which is to furnish services in the United States through the use of service employees, except as exempted in 22.1003-3 and 22.1003-4."[123] FAR 22.1003-3 and FAR 22.1003-4 set forth, respectively, statutory exemptions for certain types of contracts such as construction or utility services, and limitations and exemptions to the statute such as commercial services contracts.[124] Multiyear fixed price, time and materials, or labor-hour service contracts are supplemented with FAR 52.222-43, Fair Labor Standards Act and Service Contract Labor Standards-Price Adjustment (Multi Year and Option Contracts).[125] The non-multiyear clause, FAR 52.222-44, Fair Labor standards Act and Service Contract Labor Standards-Price Adjustment, is inserted for contracts that are not multiple year contracts or do not have options to renew.[126]

The Service Contract Labor Standards clause imposes substantially the same requirements as set forth in FAR clauses implementing the Davis-Bacon and Related Acts, including, but not limited to: obligations for regular payments, prohibitions against improper withholding, requirements to notify employees of the applicability of the Service Contract Act, certifications of eligibility for federal contracting and dispute resolution procedures for disputes concerning labor standards.[127] More specifically, FAR 52.222-41 requires contractors to pay service employees at least the minimum wage established by the Secretary of Labor's prevailing wage determinations for each labor classification, in the same way the Davis-Bacon Act imposes minimum wages for laborers and mechanics.[128] Contractors are

[114]Id.
[115]FAR 52.222-15(a).
[116]FAR 52.222-15(b).
[117]FAR 52.222-15(c).
[118]Press Release, Department of Justice Office of Public Affairs, Manhattan U.S. Attorney Announces Settlement With Construction Company For Underpaying Workers And Submitting False Payroll Reports On Two Federally Funded Projects (Aug. 5, 2019) https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-settlement-construction-company-underpaying-workers-and.
[119]Id.
[120]Id.
[121]Id.
[122]FAR 22.1006(a)(1).
[123]FAR 22.1003-1.
[124]FAR 22.1003-3; FAR 22.1003-4. The Service Contract Labor Standards clause also does not apply in the following circumstances: if the solicitation contains FAR 52.222-48 "Exemption . . . to Contracts for Maintenance, Calibration, or Repair of Certain Equipment-Certification," if the solicitation contains FAR 52.222-52, "Exemption . . . to Contracts for Certain Services-Certification," or where the contracting officer has determined the Service Contract Labor Standards statute does not apply. FAR 22.1006(a)(2).
[125]FAR 22.1006(c)(1).
[126]FAR 22.1006(c)(2).
[127]See generally FAR 52.222-41.
[128]FAR 52.222-41(c).

also required to annually adjust the compensation and fringe benefits of service employees, and to provide notice of the applicable minimum wage, wage determination and required fringe benefits to be paid under their contract.[129]

As under the Davis-Bacon Act, contractors are required to keep and maintain payroll records for three years from the completion of a contract, and to make such records available upon request.[130] Contractors must pay service employees in full, less any legally allowable deductions, at least on a semimonthly basis.[131] Contractors must ensure their employees work in safe and sanitary working conditions and that all Occupational Safety and Health Act standards are met.[132] The provisions of FAR 52.222-41 must be flowed down to all eligible subcontracts subject to the Service Contract Labor standards statute.[133] As under the Davis-Bacon Act, service contractors must certify that they, their affiliates, and their subcontractors are all eligible to receive federal contracts or subcontracts. [134] Failure to meet any of these requirements or making false certifications regarding these requirements is punishable by suspension of payments, termination of the contract, or more harshly, suspension or debarment from federal contracting or subcontracting.[135]

5. *Buy American/Buy America*

In general, construction and manufacturing contractors are constrained by the following schemes: (1) the Buy American Act of 1933 (BAA),[136] as modified by the Trade Agreements Act (TAA);[137] and (2) the Buy America provision of the Surface Transportation Assistance Act of 1982 (Buy America).[138]

As implemented by the FAR, the BAA expresses "a preference for domestic end products for supplies acquired for use in the United States" and "a preference for domestic construction material" for construction projects to be performed in the United States. [139] Broadly, FAR 52.225-1, Buy American-Supplies, applies to all supply contracts exceeding $25,000 to be performed in the United States.[140] FAR 25.201, Policy, requires contractors to use only domestic construction material and applies the BAA to all construction contracts performed in the United States.[141] A domestic end product or construction material is (1) an unmanufactured product mined or produced in the United States, (2) a manufactured product that is a Commercial Off the Shelf (COTS) product or (3) a manufactured item with greater than 50% of its components, by cost, mined, produced or manufactured in the United States.[142] Construction materials means any product, material, or supply brought to the construction site to be incorporated into the building or work.[143]

The Buy America Act imposes requirements for procurements funded in whole or in part by the Department of Transportation including highway, bridge, rail and transit construction.[144] These provisions are scattered in the U.S. Code and Code of Federal Regulations, but generally require contractors of the Department of Transportation, and its subagencies, to use American steel and/or iron materials and U.S. manufactured goods.[145] Contractors can seek waivers for a variety of reasons, depending on the contracting agency. Generally, contractors can seek waivers if the required steel, iron or goods are not produced in sufficient amount or satisfactory quantity, or if using domestic material will increase the cost of the overall product more than 25%.[146] Additionally, as under the BAA, goods manufactured in countries with trade agreements with the United States may be considered domestic end products

[129]FAR 52.222-14(c)(3); FAR 52.222-41(g).
[130]FAR 52.222-41(i).
[131]FAR 52.222-41(j).
[132]FAR 52.222-41(h).
[133]FAR 52.222-41(l).
[134]FAR 52.222-41(p).
[135]FAR 52.222-41.
[136]41 U.S.C. 8301 et seq.
[137]FAR 52.225-5.
[138]49 C.F.R. § 661.
[139]FAR 52.225-1; FAR 52.225-9(b).
[140]FAR 25.1101(a).
[141]FAR 25.201.
[142]FAR 52.225-1(a); FAR 225-9(a).
[143]FAR 52.225-9(a).
[144]49 CFR Part 661 (FTA Buy America Requirements); 23 CFR 635.410 (FHWA Buy America Requirements); 23 U.S.C. § 313 (FHWA Buy America Requirements); 49 USC 22905(a) (FRA Grant Conditions – Buy America).
[145]Id.
[146]23 U.S.C. 3131(b).

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or domestic construction material for purposes of this Act.[147]

FAR 52.225-5, Trade Agreements, provides statutory waivers from the BAA's domestic product requirements for products made in designated countries that are subject to various trade agreements. In other words, the TAA recognizes certain foreign-made products as if they were domestic products for the purpose of the BAA.[148] FAR 52.225-5 is only entered in contracts for $182,000 or more.[149]

Offerors subject to the BAA must certify that all products to be provided as end products or used as construction material are domestic products, except as otherwise stated or exempted.[150] These required certificates of compliance provide ample opportunity for noncompliant contractors to incur FCA liability related to false reporting. Contractors have reason to be especially wary of BAA compliance, given the government's enhanced emphasis on BAA compliance in recent years. The April 2017 Executive Order 13788, "Buy American and Hire American" directed every agency to "scrupulously monitor, enforce, and comply with Buy American Laws . . . and minimize the use of waivers."[151] The January 2019 Executive Order, "Strengthening Buy-American Preferences for Infrastructure Projects," seeks to enhance Buy-American principles by directing all agency heads to report "any tools, techniques, terms, or conditions" that could "maximize the use of" iron, aluminum, steel, cement and other U.S.-manufactured products in "contracts, sub-contracts, purchase orders, or sub-awards."[152] This direction to maximize BAA principles and to more heavily scrutinize contractor BAA compliance, coupled with the CARES Act's unprecedented spending, makes it likely that agencies will be especially vigilant of contractor certificates of BAA compliance. Contractors must be sure that they and their subcontractors accurately source and report goods used on federal projects subject to the BAA or risk FCA liability.

6. Hotline Posters

The DOJ relies in large part on whistleblowers to expose FCA violations. Since 1997, new fraud matters investigated by the Department's Civil Division have been brought by qui tam relators in far greater numbers than through independent agency investigation.[153] For example, in the last five years, qui tam whistleblowers referred 3,311 new FCA matters — nearly five times the 678 new matters initiated by the government independently.[154] The government's reliance on relators has prompted regulations requiring contractors to inform their personnel of how to report fraud or abuse.

FAR 52.203-14, Display of Hotline Posters, requires contractors and subcontractors to display information on where fraud may be reported safely, examples of which are provided by the Office of Inspector General (OIG).[155] Unless a contractor has implemented a business ethics and conduct awareness program that includes a reporting mechanism, contractors awarded a government contract have an obligation to display certain hotline posters during contract performance, which may include the following: (1) agency fraud hotline posters, (2) Department of Defense (DoD) fraud, waste, and abuse hotline poster, (3) and the Department of Homeland Security posters.[156] This provision is generally incorporated into all contracts that exceed $5.5 million or a lesser amount if established by the agency unless the contract is for the acquisition of a commercial item or will be performed entirely outside of the United States.[157]

a. DoD Consolidates Poster Requirements

The DoD no longer requires three separate posters: DoD fraud hotline poster, a poster about combatting human trafficking and a poster informing employees

[147] 23 U.S.C. 3131(f).
[148] FAR 52.225-5.
[149] FAR 25.1101(c)(1).
[150] FAR 52.225-2(a).
[151] Exec. Order No. 13,788, 82 Fed. Reg. 18,837 (Apr. 21, 2017).
[152] Exec. Order No. 13,858, 84 Fed. Reg. 2,039 (Jan. 31, 2019).
[153] See U.S. DEP'T OF JUSTICE, FRAUD STATISTICS OVERVIEW: OCTOBER 1, 1896 – SEPTEMBER 30, 2019 (2019), available at: https://www.justice.gov/opa/press-release/file/1233201/download.
[154] Id.
[155] OIG Hotline Operations: Posters and Flyers, OFF. OF INSPECTOR GEN, https://forms.oig.hhs.gov/hotlineoperations/posteren.aspx?AspxAutoDetectCookieSupport=1.
[156] FAR 52.203-14.
[157] 48 CFR § 3.1004. "United States" is defined as "the 50 States, the District of Columbia, and outlying areas." 48 CFR § 3.1001.

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of the FAR's whistleblower protection program.[158] The DoD has consolidated the poster requirements into a single poster, mandating that contractors prominently display "the DoD fraud, waste, and abuse hotline poster prepared by the DoD Office of the Inspector General" in common work areas of those contractors performing work on DoD contracts.[159] For DoD contracts performed outside of the U.S., the contracting officer can provide the option to publicize the program to contractor personnel in a manner other than public display "when security concerns can be properly demonstrated."[160]

b. Mandatory Flow-Down Provision: Must Include in Subcontracts

Contractors are required to flow this provision down to any subcontracts that exceed $5.5 million.[161] "Subcontracts" include "any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract" except those subcontracts that are "for the acquisition of a commercial item or will be performed entirely outside of the United States."[162] Similarly, DoD requires the DFAR 252.203-7004 to be incorporated into subcontracts that exceed $5.5 million so long as the subcontract is not for the acquisition of a commercial item, but it expands FAR 52.203-14(d) to contracts performed outside of the United States.[163]

The DoD also requires contractors, where a significant portion of the contractor's workforce does not speak English, to translate the poster into the appropriate foreign language(s) at their own expense,[164] which is not required for non-DoD contractors under FAR 52.203-14.[165] Contractors must be sure to provide the appropriate hotline posters in their place of business when performing government contracts, to facilitate the government's policy of investigating fraud through the assistance of civilian informants.

III. How FCA Compliance Should Affect the Way Contractors Do Business

In order to be compliant with regulations and avoid potential FCA liability, contractors should develop and maintain a robust compliance program that they share with employees and teaming partners. If compliance is simply deemed an afterthought or merely tolerated by contractor employees as an impediment or nuisance, the contractor's program will suffer, risking potential exposure to FCA violations or investigations. A strong internal compliance program helps mitigate or even eliminate these risks. This section proposes actions contractors can take to develop an effective internal compliance program.

A. Implement a Code of Ethics and Re-evaluate Annually

A system of internal standards and controls and a comprehensive code of business ethics is essential to fostering a culture of compliance and mitigating the risk of FCA violations related to false reporting and fraudulent business practices.

Strict adherence to the requirements laid out in FAR 52.203-13, Contractor Code of Business Ethics and Conduct, is required for all contractors performing work that exceeds $5.5 million and more than 120 days of expected performance time.[166] However, even those federal contractors to which this provision does not apply would be wise to review FAR 52.203-13 and adopt the measures it lays out. This is because the FAR adopts the requirements of 52.203-13 as a matter of policy applicable to all government contractors, not only those with covered contracts.[167] The FAR advises contractors to "have a written code of business ethics and conduct," as they must "conduct themselves with the highest degree of integrity and honesty."[168]

An internal controls system includes rules, procedures and policies

[158]DFAR 252.203-7004.
[159]DFAR 252.203-7004(b)(1)(i). An example of the single poster may be downloaded from the DoD Office of Inspector General's website: https://www.dodig.mil/Resources/Posters-and-Brochures/.
[160]DFAR 252.203-7004(b)(1)(ii). Other means of publication to contractor personnel include "private employee written instructions and briefings." Id.
[161]48 CFR § 52.203-14(d). This provision does not have to be incorporated into subcontracts that are "for the acquisition of a commercial item or will be performed entirely outside of the United States". 48 CFR § 52.203-14(d). "[If] the agency has established policies and procedures for display of the OIG fraud hotline poster at a lesser amount, the contracting officer shall replace "$5.5 million" with the lesser amount that the agency has established." 48 CFR § 3.1004(b)(3).
[162]48 CFR § 3.1001; 48 CFR § 52.203-14(d).
[163]48 CFR § 252.203-7004(d).
[164]48 CFR § 252.203-7004(c)(2).
[165]See FAR 52.203-14.
[166]FAR 52.203-13; FAR 3.1004(a).
[167]See FAR 3.1003(a)(2).
[168]FAR 3.1002.

a company implements to detect, prevent and correct improper conduct.[169] A written code of business ethics should emphasize honest reporting in all required certifications and informational documents provided to the government in the course of contract performance. The ethics code should also refer employees to the specific internal controls available, such as the procedures for making anonymous complaints, the department or supervisor responsible for overseeing compliance and the corrective measures used by the contractor when improper conduct is discovered. These principles should be further emphasized to all personnel through a business ethics awareness program.[170] This program must include "reasonable steps to communicate periodically and in a reasonable manner" the contractor's standards and procedures related to business ethics and disseminate information that is "appropriate to an individual's respective roles and responsibilities."[171]

These policies and internal controls should be re-evaluated annually to ensure they are in line with current federal regulations. Annually reviewing the effectiveness of the business ethics compliance program is a way to ensure policies are up-to-date and provides a means of correcting flaws in a company's internal controls. Contractors can assess the effectiveness of their standards and controls by conducting periodic surveys and employee testing to confirm employee understanding of the ethics policies. Such testing can highlight areas of a contractor's standards and internal control system.

B. Conduct Internal Investigations When Necessary

In the event of potential misconduct that could subject a contractor to FCA liability, a contractor has the option to conduct an internal investigation. An internal investigation of a potential FCA violation can assist a contractor facing an investigation of wrongdoing or an internal report of alleged wrongdoing. While conducting an internal investigation may not eliminate the potential consequences of an FCA violation charge, it can help contractors identify key witnesses and evidence, highlight flaws in the contractor's internal controls and protect documents created during the course of the internal investigation from discovery in the event of litigation.

In the 2014 case, In re Kellogg Brown & Root, the D.C. Circuit Court of Appeals held that, "if one of the significant purposes of [an] internal investigation [is] to obtain or provide legal advice, the [attorney-client] privilege will apply," protecting related documents from discovery.[172] In that case, an employee of the defense contractor, Kellogg Brown & Root (KBR), filed an FCA complaint against the company, alleging KBR inflated costs and accepted kickbacks in performance of its contract with the U.S. government.[173] During litigation, the employee requested discovery of KBR's documents related to the internal investigation, and KBR argued they should be protected by the attorney-client privilege, as they were developed for the purpose of obtaining legal advice.[174]

The court held that documents produced through an organization's internal investigation are privileged, even when "conducted pursuant to company compliance program required by statute or regulation," so long as a significant purpose of the investigation was to obtain or provide legal advice.[175] For contractors, this means an internal legal department or outside legal counsel can assist in conducting an internal investigation, and if done properly, related documents will be privileged so long as the investigation was meant to provide the company with legal advice or to help the company seek legal advice on a matter.

In the event of potential misconduct, contractors should not refrain from conducting an internal investigation solely in order to avoid creating a paper trail. Contractors utilizing internal investigations must be sure to keep any related documents privileged by ensuring an attorney regularly oversees substantive portions of the investigation, including employee interviews.[176] Internal investigations can be a very useful tool for contractors not only when anticipating litigation for alleged FCA violations, but also when remediating flawed internal controls.

[169]See FAR 52.203-13(d)(2).
[170]See FAR 52.203-13.
[171]FAR 52.203-13(d)(1)(i).
[172]In re Kellogg Brown & Root, Inc., 756 F.3d 754, 760 (D.C. Cir. 2014).
[173]Id.at 756.
[174]Id.
[175]Id. at 756.
[176]See generally Upjohn Co. v. United States, 449 U.S. 383 (1981).

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C. Voluntary vs. Mandatory Disclosures

Federal regulations require contractors to make timely disclosures related to known "credible evidence" of a violation of certain civil and criminal fraud statutes. Additionally, the DOJ has recently released new directives that reward voluntary disclosures of misconduct. Knowing when to disclose information can be the difference between reporting fraud and participating in it.

The Contractor Code of Business Ethics and Conduct requires contractors to disclose "credible evidence" that a principal, agent, employee or subcontractor has committed any of the following: (1) a violation of federal criminal law involving fraud, bribery or gratuity violations of Title 18 of the U.S. Code, or (2) a violation of the civil False Claims Act.[177] Such mandatory disclosures must be delivered in writing to the agency Office of Inspector General and shared with the contracting officer.[178] The government will treat such disclosures as confidential, to the extent permitted by law, if the contractor labels the information as "proprietary" or "confidential."[179] Further, if the contractor becomes aware of such credible evidence and the violation relates to a multi-agency contract or multiple-award schedule contract, the contractor must notify the proper authorities within the ordering agency and the agency responsible for the contract.[180]

The mandatory disclosures of credible evidence are part of the regulation's mandate that contractors "fully cooperate" with all government agencies conducting audits, investigations or corrective actions.[181] Although these mandatory disclosures must be made in a timely manner, "full cooperation" does not require that a contractor waive any attorney-client privileges or Fifth Amendment rights, nor does it restrict a contractor from conducting an internal investigation.[182] This means that contractors are free to conduct an internal investigation upon learning of "credible evidence," but nonetheless must not wait too long to make such mandatory disclosure to the appropriate authority.

Voluntary disclosures, on the other hand, are encouraged and even rewarded, but not required. In 2019, the DOJ added guidance to its manual for implementation of a new policy aimed at crediting contractors for certain voluntary disclosures. The manual states that the DOJ "has a strong interest in incentivizing companies and individuals that discover false claims to voluntarily disclose them to the government."[183] Contractors under investigation who make "proactive, timely, and voluntary self-disclosure" about misconduct "will receive credit during the resolution of a FCA case."[184] Such voluntary cooperation includes: identifying individuals involved in misconduct, disclosing relevant facts and identifying opportunities for the government to obtain relevant evidence, preserving and disclosing relevant documents, disclosing information collected during an independent internal investigation (that is not privileged), disclosing potential misconduct of third-party entities, admitting liability or accepting some responsibility for wrongdoing, and assisting in the determination and recovery of losses suffered by the government as a result of contractor misconduct.[185]

When determining the value of voluntary disclosures, agency attorneys consider the following factors: (1) the timeliness and voluntariness of assistance, (2) the completeness, truthfulness, and reliability of disclosed information, (3) the nature and extent of contractor assistance, and (4) the significance of the contractor's cooperation to the government.[186] The government will also consider whether a contractor has taken remedial measures in response to an FCA violation.[187] Examples of remedial measures the government may consider in giving credit are: a thorough analysis of the cause of the underlying conduct, implementing an effective compliance program to prevent recurrence, appropriate discipline or replacement of those responsible for misconduct, and "any additional steps demonstrating recognition of the seriousness of the entity's misconduct, acceptance of responsibility for it, and the implementation of measures to reduce risk."[188]

Entities making voluntary disclosures have the opportunity to earn partial or maximum credit, which is usually reflected by a reduction in penalties or the damages multiple sought by

[177]FAR 52.203-13(b)(3)(i). A "principal" is 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)." FAR 2.101.
[178]Id.
[179]FAR 52.203-13(b)(3)(ii).
[180]FAR 52.203-13(b)(3)(iii).
[181]FAR 52.203-13(a).
[182]Id.
[183]DEP'T OF JUSTICE, JUSTICE MANUAL § 4-4.112 (2019).
[184]Id.
[185]Id.
[186]Id.
[187]Id.
[188]Id.

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the government.[189] Maximum credit for voluntary disclosures cannot exceed an amount that would result in the government getting less than full compensation for damages suffered as a result of the contractor's misconduct, however.[190] The DOJ will not award any credit to an individual or company that conceals senior management's or the board of directors' involvement in the misconduct, "or otherwise demonstrates a lack of good faith during the course of the investigation."[191]

D. Train Personnel Annually

The development of a firm, clear system of compliance standards and controls is essential to educating employee understanding of federal regulatory requirements and preventing inadvertent noncompliance by contractor personnel. According to a study performed in 2019 by Gartner, Inc., "Nearly 60% of all misconduct that is observed in the workplace is never reported."[192] FAR regulations recommend that all federal contractors have an employee business ethics and compliance training program that is suitable to the size of the contractor's company and the extent of involvement the contractor has in federal contracting.[193]

Companies have heavily invested in creating internal control systems, including the use of services provided by third-party vendors that provide confidential and anonymous reporting mechanisms for employee use. However, these efforts are derailed if employees provide their supervisors with these protected disclosures and then their supervisor fails to raise these concerns to the appropriate person within the company with the capability to investigate the potential violation. This happens generally for one of two reasons: (1) the supervisor didn't realize that what they were told was a protected disclosure, and they had an obligation to report it, or (2) they did realize it was a disclosure, but felt it was meritless, and believed they had no obligation to do anything further. For these reasons, contractors should provide additional training to those employees with management responsibilities, including training to help supervisors properly identify protected disclosures.

The FAR mandates that a contractor's internal control system assign responsibility of the entity's business ethics awareness and compliance program to a "sufficiently high level."[194] A contractor's standards and controls should explicitly require supervisors to report the protected disclosure to the proper person, regardless of their personal feelings about the statement so that the disclosure may be appropriately investigated.

Contractors are required to provide training to their principals, employees, and as appropriate, to agents and subcontractors.[195] All employees should have an understanding of the organization's internal controls and standards of business ethics. As mentioned, greater training may be required for higher levels of management to adequately prepare them for responding to allegations and discoveries of misconduct. In order to ensure all departments and employee levels have a sufficient understanding of the company policies on business ethics and conduct, annual training is recommended. Annual training ensures the ethics policies and relevant regulations stay fresh in the minds of employees, helping to create a culture of compliance. Fostering a culture of compliance impacts an employee's perception of his or her organization, and creating an environment where employees feel safe to report misconduct means that wrongdoing can be discovered and remedied before it develops into a DOJ investigation. ■

[189] Id.
[190] Id.
[191] Id.
[192] Gartner Says Just 41% of Workplace Misconduct Is Reported, GARTNER: NEWSROOM (Mar. 12, 2019) https://www.gartner.com/en/newsroom/press-releases/2019-03-12-gartner-says-just-41- %-of-workplace-misconduct-is-reported#:~:text=Nearly%2060%20 %%20of%20all,for%20employers%20of%20all%20types.
[193] FAR 3.1002(b).
[194] FAR 52.203-13(c)(2)(ii).
[195] FAR 52.203-13(c)(1).