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INTRODUCTIONS

- Moderator:
  - Christine Williamson, CohnReznick LLP

- Panelist
  - Rick Westerman, CohnReznick LLP
  - Joe Smith, Smith Pachter
  - John Pachter, Smith Pachter
AGENDA

- Background of Key Contractor Ethics Regulations
- Flowchart Requirements & Compliance
- Code of Conduct, Awareness Program & Internal Controls (Gotcha items)
- Hotlines & Whistleblowers
- Federal Laws, Fines, Penalties – example of cases
- What is a Monitor?
- Ten Commandments for Gov Contractor
- Questions
A BRIEF HISTORY OF KEY REGULATIONS

- 1986 - Packard Commission by President Reagan recommended that defense contractors promulgate and vigilantly enforce codes of ethics and internal controls to monitor compliance
  - 32 major contractors formed the “Defense Industry Initiative on Business Ethics and Conduct”
• FAR 3.1002(a):

“Government contractors must conduct themselves with the “highest degree of integrity and honesty.”

But, it wasn’t enough.
CASES LEADING UP TO FAR CHANGE

• 2004 – HealthSouth Corp agreed to pay $325 million for false claims.
• 2005 – Tenet Healthcare and St. Barnabas Corp. accused of fraudulently inflating patient care cost – combined fine of $1.18 billion
• 2006 – Boeing Co. agreed to pay $615 million to resolve allegations of procurement fraud
• 2007 – Sioux Manufacturing and Hexcel Corp agreed to pay a combined $17 million for sale of faulty body armor
• 2008 – Merck & Co agreed to pay $362 million in a qui tam claim that it failed to provide the government its best price and paid kickbacks to prescribing physicians
MORE EVENTS & FACTS CAUSING REFORM

• Significant ground swell in Ethics & Governance starting with public companies (SOX)

• Department of Justice focus on Fraud via National Procurement Fraud Taskforce

• No real Government-wide regulatory requirement for a code of ethics

• Defense Federal Acquisition Regulation Supplement (DFARS) recommended but didn’t make a code mandatory
KEY REVISIONS EFFECTIVE DEC, 2008

- Subpart FAR 3.1003, 4
- FAR 52.203-13 & 14
  - Code of Business Ethics and Conduct (13)
  - Employee Awareness Program (13)
  - Internal Control System (13)
  - Disclosure to the Government of certain violations (13)
  - Reporting Mechanism – Hotline (14)
GREATER CONTRACT RESPONSIBILITY

• Burden has shifted to the contractor to institute anti corruption practices

• Government no longer wants to catch the mistakes……now expects you to catch them on your own

• Timely Reporting is a must
WHO MUST COMPLY?

• Contracts over $5,000,000 and a performance period of more than 120 days
• Includes Subcontracts
• Could Apply to
  • Recipient of Federal Funds…many States adopt FAR
• Public Companies have ethics programs due to SEC requirements
WHAT ARE THE MINIMUM REQUIREMENTS

- Unless extended by CO, within 30 days of the contract award, the contractor must have a code of business ethics and conduct written and provided each employee working on the project.
- Have procedures to prevent or detect criminal conduct and promote an ethical culture
- Timely disclose to OIG and CO violations of Federal criminal law
- Note: regardless of required adherence to this section, subpart 3.1003 requires timely disclosure for 3 years after payment
WHAT IS A CODE OF CONDUCT?

Lockheed-Martin program "Setting the Standard"

- Code of Ethics
  - Citizenship: to obey all the laws of the United States and the other countries in which we do business and to do our part to make the country in which we live better.

- Political Contributions
- Gifts and Favors
- Conflicts of Interest
- Research Integrity
- Proprietary Information
- Anti-trust
- Cost Accounting Standards
- Work Safety
- Accurate/Complete Records
- Classified Information
- Hazardous Waste

Honesty
Integrity
Citizenship
Respect
Trust
Responsibility
1. Our Commitments
2. Obey the Law
3. Promote a Positive Work Environment
4. Work Safely: Protect Yourself, Your Fellow Employees and the World We Live in
5. Keep Accurate and Complete Records
6. Make Accurate Public Disclosures
7. Record Costs Properly
8. Strictly Adhere to All Antitrust Laws
9. Know and Follow the Law When Involved in International Business
10. Know and Follow the Law and Use Common Sense in Political Contributions and Activities
11. Know and Follow the Rules in Using or Working With Former Government Officials
12. Maintain the Integrity of Consultants, Agents and Representatives
13. Protect Proprietary Information
14. Obtain and Use Company and Customer Assets Wisely
15. Do Not Engage in Speculative or Insider Trading
16. Business Conduct Compliance Training Modules
17. Warning Signs
18. Quick Quiz
19. Our Goal: An Ethical Work Environment
20. Accountability
21. How to Contact the Audit Committee
22. Contact the Ethics Office
## Model Contractors Based on The Ethisphere Institute Ranking (08)

### Best Ethics Programs Overall

<table>
<thead>
<tr>
<th>U.S. Gov Business Rank</th>
<th>Organization</th>
<th>Ethisphere Ethics Program Total Score</th>
<th>Classification</th>
<th>Ethisphere Best Ethics Program Rank</th>
</tr>
</thead>
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<td>1</td>
<td>Lockheed Martin Corp</td>
<td>89.71</td>
<td>above standard</td>
<td>11</td>
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<tr>
<td>8</td>
<td>Science Applications International Corp (SAIC)</td>
<td>90.00</td>
<td>excellent</td>
<td>10</td>
</tr>
<tr>
<td>129</td>
<td>Procter and Gamble</td>
<td>90.51</td>
<td>excellent</td>
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<tr>
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<td>EDS</td>
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<td>379</td>
<td>Avaya Inc</td>
<td>92.09</td>
<td>excellent</td>
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<td>92.43</td>
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<td>CACI International Inc</td>
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<td>5</td>
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<td>Rockwell Collins</td>
<td>94.32</td>
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<tr>
<td>104</td>
<td>Verizon Wireless</td>
<td>97.38</td>
<td>excellent</td>
<td>1</td>
</tr>
</tbody>
</table>
HOW SHOULD YOU DOCUMENT?

Documentation of compliance is **critical** in case of audit:

- Require **employee signatures** attesting to attendance at annual ethics sessions
- Require new hires to **acknowledge receipt** and understanding of code of compliance
- Obtain **written statements from departing employees** whether improper actions or deviations from company policies were observed
WHAT’S REQUIRED IF I AM A SMALL BUSINESS?

If contractor is a Small Business, defined by the SBA or contract is for commercial item:

- **do not** have to implement an ethics awareness training program or internal control systems.
NOT REQUIRED ALTHOUGH GOOD PRACTICE

- It has been **highly recommended** that contractors implement compliance programs even if not required by the FAR.
- A **good defensive position** against improper practices
- Agencies can set **lower compliance thresholds** and it is the **contractor’s responsibility** to find out if its customer has set a lower level for compliance.
Within 90 days after the contract award, the contractor must establish:

- An ethics and business conduct awareness program; and
- An internal control system
BUSINESS ETHICS AWARENESS AND COMPLIANCE PROGRAM

- Implement Fraud Prevention Program
- Promote an ethical culture including compliance with the law
- Conduct Effective Training of Principals, Employees and as appropriate Agents and Subcontractors
- Use Sentencing Guidelines
WHAT ARE THE REQUIREMENTS FOR THE INTERNAL CONTROL SYSTEM?

- Facilitate timely discovery of improper conduct
- Ensure corrective measures are promptly instituted
- Assign responsibility for awareness, compliance and internal controls at a sufficiently high level
- Reasonable efforts to exclude as a principal individuals who have violated the organizations code of ethics and conduct
- Perform periodic reviews
F. Periodic reviews of 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*:

- Monitoring and auditing to detect criminal conduct
- Periodic effectiveness evaluation of ethics, compliance and internal control system, especially if criminal conduct is detected
- Periodic assessment of risk of criminal conduct with steps to reduce risk of criminal conduct
- Disciplinary action for improper conduct
- Timely disclosure to OIG, CO for up to 3 years beyond final payment on contract.
- Full cooperation with agencies responsible for audit, investigations or corrective action.
KEY GOV CONTRACTOR ACCOUNTING INTERNAL CONTROLS

- Accurate & effective accounting systems for cost estimations, accumulation and submissions
  - Federal Acquisitions Regulations/Cost Accounting Standards
  - Billing
  - Time collection
  - Indirect rate calculation
  - Government owned property........
Under the Standards of Ethical Conduct for Employees of the Executive Branch, a “Gift” is defined to include a meal over $20.

5 C.F.R.§ 2635.203 (b)

A person prohibited from giving gifts includes a government contractor.
§ 2635.203 (d)
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5 C.F.R.§ 2635.203 (b)

A person prohibited from giving gifts includes a government contractor.
§ 2635.203 (d)
CAMPAIGN CONTRIBUTIONS

- **11 CFR 115.2 General Limitation**: Federal Contractor cannot make either directly or indirectly any contribution of money or other thing of value to any political party, committee, or candidate for Federal Office. However, the employee of a Federal Contractor can make contributions from their personal funds.

- **11 CFR 115.3 Corporations, labor organizations, membership organizations, cooperative and corporations without capital stock**: Federal Contractors that are set up as corporations can use treasury funds to establish, administer, and solicit contributions to a separate segregated fund, more commonly known as a political action committee (PAC).

- **11 CFR 115.4 Partnerships**: A Federal Contractor that is a Partnership cannot use the assets of the Partnership to make contributions or expenditures in connection with a Federal election. However, individual partners can make contributions in their own names from their personal assets.

- **11 CFR 115.5 Individuals and Sole Proprietors**: A Federal Contractor who are individuals or sole proprietors are prohibited from making contributions or expenditures from their business, personal or other funds under their dominion or control in connection with a Federal election. Their spouse, however, is not prohibited from making a donation in their name.
WHERE/WHEN DO I DISPLAY POSTERS?

• During contract performance
• Display in common areas and at site
• Electronic if website available
  • Any agency or DHS poster identified by contracting officer

unless
• Contractor has implemented an awareness program (DHS may still be required)
WHAT ARE THE LAWS THEY CAN USE?

- Forfeiture Statute - 28 U.S.C. § 2514
- Truth in Negotiations Act – 10 U.S.C. §2306
- Mail and Wire Fraud Statutes – 18 U.S.C. §1341 and 1343
- Procurement Integrity Act – 41 U.S.C. §423
- Bid Rigging and Collusive Bidding – 15 U.S.C. §1
WHAT AND WHO IS AT RISK?

• Potential suspension or debarment if an ethical violation is found.
• Potential criminal prosecution of corporate officers and employees who
  • Sign contracts
  • Sign payment applications
  • Sign change orders
  • Certify to percentage of completion
  • Certify claims
  • Oversee compliance programs
HOW DO PENALTIES GET ASSESSED?

• In the event of a violation of law, a contractor’s failure to have a program in place will be evidence used to determine punishment—the same standard currently in place for judges to use in sentencing companies found guilty of violating federal law.

• Sentencing Guidelines come into play and culpability score

• The less evidence you have a program the more the courts are instructed to be tough on sentencing
ENFORCEMENT ACTION TRENDS

- Boeing - $615
- Schering-Plough - $435
- Merck - $138
CASES LAST YEAR (2010)

- BAE Systems – FCPA violation, design flaws
- Novartis AG – False Claims on unapproved drug
- CH2M, Fluor – Purchasing Card Fraud
- Chugach Management – Over billing of steel
- Northrop Grumman – False Claim of hotel bills
- Culbertson/Raytheon – False Claim, employee expense fraud
WHAT HAPPENS IF I REPORT SOMETHING?

**Whistle-blowers must be protected (52.203-15)**

Under the Fraud Enforcement and Recovery Act of 2009 (FERA), whistleblowers who are retaliated against now are entitled to (1) reinstatement with same seniority status; (2) double back-pay; (3) any “special damages”; and (4) attorney’s fees.

Relief from Retaliatory Actions, 31 U.S.C. 3730(h)
WHAT HAPPENS IF YOU DON’T COMPLY

• Fines, Suspension, Debarment, etc
• Excluded Parties List
• A “Monitor” could be required by the Government to “look after” your company
  • Selected and paid by the Company
  • Approved by the Agency
  • Operates independently from both the contractor and the government
  • Reports back to the government on compliance
  • Period of 1-3 years
RESPONSIBILITIES OF THE MONITOR

• Examine Code of Conduct and Code of Ethics

• Examine whether company has a culture of ethics and compliance; whether management and employees live the values espoused by management

• Review and critique training materials and training sessions

• Review internal procedures with emphasis on risk assessment

• Review business procedures to determine whether Ethics and Compliance is inserted into business routine
RESPONSIBILITIES OF THE MONITOR

• Review procedures for reporting misconduct, establishing discipline and corrective measures

• Examine results of complaint investigations to assess whether company response is appropriate

• Review procedures for escalation of potential disclosure issues to appropriate management officials

• Interview management and compliance officials and meet with Board of Directors to assess “tone from the top”
RESPONSIBILITIES OF THE MONITOR

• Review results of surveys and focus groups regarding ethics and compliance
• Interview employees on random basis
• Report to agency Debarment and Suspension Official and Department of Justice

Ultimate Question:
Does the contractor exhibit “present responsibility”? 
TEN COMMANDMENTS OF GOV CONTRACTOR

I. Deal honestly with each other, your customers and suppliers.

II. Keep accurate and complete financial records.

III. Avoid conflicts of interest, bribes, gratuities and kickbacks.

IV. Maintain a safe, healthy workplace.

V. Engage in fair competition.
TEN COMMANDMENTS OF GOV CONTRACTOR

I. Preserve the environment.

II. Safeguard classified information, IP and proprietary information.

III. Avoid unauthorized exports.

IV. Be fair and non-discriminatory in employment and promotion.

V. Encourage reporting and embrace non-retaliation.
RECAP

1) an **in-person** training of **all employees who might possibly work on federal projects**, so that there can be Q&As, followed up by;

2) a **web-based** (or in-person) training for those who couldn't be there in person and for new hires, with verification that they attended;

3) a **booklet** summarizing the requirements that is given to all trainees and signed for;

4) a corporate **code of business ethics** that is posted to employees;
RECAP

1) preparation and posting of **posters** advising employees about the program and how to make complaints;

2) a **toll-free number** for "hot-line" calls;

3) a system for **monitoring that hot-line number**, a protocol for **saving/transcribing** messages, a **review and analysis** of the messages;

4) a system for **investigation of complaints** of suspected violations;
RECAP

1) a system for **monitoring ethics compliance**;

2) a system for **auditing contracts** for ethics compliance;

3) a system for **training the Ethics Compliance officer**;

4) A system for **protecting whistle-blowers**; and

5) **annual refresher** and update training for all.
HOW TO GET STARTED

Assess your code of conduct

Work with legal counsel as needed

Communicate ethics and code

Establish effective reporting mechanism (hotline)

Begin reviewing internal controls using a risk based approach

- Programs have to be woven into fabric of organization
- Must walk the talk/Tone at the Top
QUESTIONS/COMMENTS
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