

New Mandatory Disclosure Rules for Government Contractors

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Garvey Schubert Barer Legal Update, November 17, 2008.

New rules announced on November 12, 2008 require Government contractors to disclose criminal violations in connection with a Government contract. These new rules go into effect on December 12, 2008.

The rules have two enforcement mechanisms. The first is through a contract clause (FAR 52.203-13) (the Clause) that will be inserted in all new contracts in excess of \$5 million and make it a contractual requirement to report criminal violations. The Clause requires the contractor to report to the Agency Inspector General all criminal violations in connection with a Government contract when credible evidence indicates that such a violation occurred. This applies to any violation within the last three years. In this sense, the Clause applies retroactively because a contractor that is awarded a contract containing the Clause must then report any criminal violations that occurred within the last three years.

The second enforcement method is through the Suspension and Debarment program, which permits the Government to suspend or debar contractors that are not "responsible." Under the Suspension and Debarment program the Government may prohibit a contractor from receiving any Government contract, typically for a period up to three years. The new rules added as a debarment basis the failure to disclose a criminal violation in connection with a Government contract within the last three years. (FAR 9.406-2; 9.407-2). Just as with the Clause, this "debarment basis" applies retroactively. However, the debarment basis has a broader reach than the Clause because every contractor, regardless of whether they have a contract that includes the new Clause, must still report any criminal violations within the last three years.

Under both enforcement mechanisms, knowledge of a violation by a principal (defined as an officer, director, partner or person having primary management or supervisory responsibility within a business entity) triggers the reporting requirement. However, the FAR Council did not harmonize the language in the debarment basis and the Clause. Most notably, the Clause requires the contractor to make a report to the Agency Inspector General based on “credible evidence” while the debarment basis requires the contractor to simply report the violation to the Government based on a “preponderance of the evidence.” Reporting to the appropriate contracting officer constitutes reporting to the Government under the debarment provision, but nothing short of reporting to the Agency level Inspector General will satisfy the Clause requirement. Also, though the terminology used for two evidentiary standards differ – “credible evidence” and “preponderance of the evidence” – this may be a distinction without a meaningful difference.

“Credible evidence” may well exist absent any formal legal action, guilty plea or conviction. Therefore, contractors must remain vigilant in identifying criminal violations and reporting them to the appropriate entity, especially when such violations are identified in an internal investigation.