

HAYNES BOONE

Procurement Ethics and Contract Performance

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EDUCATION

J.D., George Mason University
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Edmund M. Amorosi represents clients in the government contracts and construction industries. He has appeared on behalf of clients in federal and state courts, before administrative agencies and boards, and in alternative dispute resolution settings including mediation and arbitration, both domestic and international. Edmund's government contracts practice includes procurement, regulatory, and litigation matters for government contractors in a variety of industries. Edmund has served as an interim in-house counsel for a leading private security firm working for the United States Government in a contingency contracting environment. Edmund has experience in bid protests, audits, investigations into whistleblower allegations, overseas construction contracting, preparation of requests for equitable adjustments and contract claims and disputes, small business issues (including size protests and appeals), resolution of prime-subcontract disputes, contract appeals before Boards of Contract Appeals, alternative dispute resolution, review of prime contracts and subcontracts, False Claims Act matters, contractor responsibility and integrity issues, terminations for default and terminations for convenience, debarment and suspension, task order contracting, commercial products, and schedule contracts. Edmund has represented contractors in bid protests and contract disputes before the Government Accountability Office, the U.S. Court of Federal Claims, and various federal and state courts. Edmund has also served as an expert witness in government contract law. Edmund's construction practice includes the representation of owners, general contractors, subcontractors, and suppliers in litigation matters on public and private projects, including acceleration, delay and disruption claims; payment and performance bond disputes including Miller Act claims; and contract formation, negotiation and administration. Edmund has prepared requests for equitable adjustments and claims, reviewed prime contracts and subcontracts, and litigated prime-subcontract disputes in court and through alternative dispute resolution. His practice also includes commercial litigation and counseling relating to the government contracts and construction industries, including disputes between prime contractors and subcontractors, teaming and confidentiality agreements, joint ventures, and non-compete and non-disclosure agreements.

Agenda

- False Claims Act
- Compliance – Procedure & Substance
- Compliance Program
- Disclosure Requirements
- Employment Restrictions
- Truthful Cost or Pricing Data Act & Fraud Statutes
- Influencing Government Actions – Gratuities
- Lobbying
- Collusive Bidding
- Kickbacks
- Conflicts of Interest – PCI & OCI
- Procurement Integrity Act
- Domestic Preference
- CMMC Updates
- International Sales

Government Contracts and Federal Procurement Laws

- Government contracts are highly regulated
- Laws applicable to government contracts are heavily enforced
- Government enforces laws against companies and individuals, and government employees

Government Contracts and Federal Procurement Laws

- Violations could result in:
 - Criminal proceedings resulting in substantial fines, restitution and incarceration (individuals only)
 - Civil fraud proceedings under the False Claims Act
 - Debarment or suspension of the company as a whole, individual business units and/or individuals
 - Termination of contracts for default
 - Contractual remedies
- Prison terms, restitution, damages and fines are all available to the Government

False Statements (Criminal Liability)

- Knowingly and willfully falsifying or concealing a material fact or making false statements to the Government. 18 U.S.C. § 1001
- Potential false statement:
 - A false representation with respect to a company's ability to comply with Government contract requirements
 - Oral or Written statements or certifications

False Claims Act, 31 U.S.C. § 3729, *et. seq.*

- Civil and/or criminal liability
- Criminal: 18 U.S.C. § 287
 - Requires specific intent to defraud
- Civil:
 - Knowingly submitting false or fraudulent claims for payment in connection with a Government contract
 - Elements:
 - false statement or fraudulent course of conduct
 - made or carried out ***with knowledge of the falsity (scienter)***
 - that involved a claim for payment submitted to the government and
 - that was material to the government's payment decision.
 - *Universal Health Services v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016)

False Claims Act, 31 U.S.C. § 3729, *et. seq.*

- "Knowingly" includes actual knowledge, deliberate ignorance, or reckless disregard for the truth – no proof of specific intent to defraud is required
- Misrepresentation of the company's ability or agreement to comply with Government contract requirements could subject the company and individuals to liability
- All employees are required to comply with contract terms and conditions, and to record information accurately and truthfully, including avoiding any misrepresentations
- Contract compliance issues? CMMC?

False Claims Act, 31 U.S.C. § 3729, *et. seq.*

United States ex rel. Schutte v. Supervalu Inc., 583 U.S. 739, 143 S.Ct. 1391 (2023)

- Alleged Medicare/Medicaid fraud; company sought reimbursement of retail, not discounted, drug prices as “usual and customary”
- Company argued no “knowing” submission of false claim because “usual and customary” ambiguous
- “The FCA’s scienter element refers to respondents’ knowledge and subjective beliefs – not to what an objectively reasonable person may have known or believed. And, even though the phrase ‘usual and customary’ may be ambiguous on its face, such facial ambiguity alone is not sufficient to preclude a finding that respondents knew their claims were false.”

False Claims Act, 31 U.S.C. § 3729, *et. seq.*

United States ex rel. Schutte v. Supervalu Inc., 583 U.S. 739, 143 S.Ct. 1391 (2023) (con't)

- “Although the terms, in isolation, may have been somewhat ambiguous, that ambiguity does not preclude respondents from having learned their correct meaning – or, at least, becoming aware of a substantial likelihood of the terms’ correct meaning.”
- Hypothetical: “Drive Only Reasonable Speeds” as interpreted by police
- Charge only “allowable” costs as interpreted by DCAA?
- Internal debate, communications as evidence company knew substantial risk of “knowingly” submitting false claim?

False Claims Act, 31 U.S.C. § 3729, *et. seq.*

Prysmian Cables Settlement, Office of Public Affairs Press Release (July 23, 2024)

Prysmian Cables and Systems USA LLC (Prysmian), located in Abbeville, South Carolina, agreed to pay \$920,000 to settle allegations that it violated the False Claims Act by knowingly falsifying test results and failing to conduct required testing on military cable, known as M13486 cable, that was used in vehicles manufactured for use by the military.

The settlement resolves allegations disclosed by Prysmian under the Federal Acquisition Regulation (FAR)'s mandatory disclosure rule that Prysmian and prior owners of the Paragould facility had failed to conduct several required tests and, instead, had prepared and submitted to the United States falsified test results and false certifications of compliance.

False Claims Act, 31 U.S.C. § 3729, *et. seq.*

Prysmian Cables Settlement, Office of Public Affairs Press Release (July 23, 2024) (con't)

“Companies who do business with the United States must comply with their contractual commitments,” said Principal Deputy Assistant Attorney General Brian M. Boynton, head of the Justice Department’s Civil Division. “We will hold accountable government contractors who knowingly fail to perform required services or misrepresent their performance of such services, including mandatory testing requirements.”

“The manufacturing of defective products, including ones intended for use in military vehicles, creates a significant risk to America’s warfighters,” said Acting Special Agent in Charge Ryan Settle.

Six Elements of a Compliance Program

- Determine Company's core values
- Establish a Compliance Committee
- Prepare the Company's Code of Conduct
- Institute a reporting and tracking system
- Provide for periodic ethics and compliance training
- Provide for periodic audits and assessments

Company Values

- Determining "Values"
 - Talk with company's leadership
 - Focus groups and interviews with employees
- Typical questions
 - What do we stand for?
 - What is our vision?
 - How do we want to be perceived?
 - What was the philosophy of the founders?
 - What do we say about the company in marketing and advertising?
 - What is important to stakeholders?

Examples of Values

- Honesty
- Integrity
- Respect
- Good Citizenship
- Responsibility
- Customer Satisfaction
- Quality
- People
- Fairness
- Commitment
- Leadership
- Openness
- Courage
- Safety
- Cooperation
- Teaming
- Excellence
- Creativity
- Dignity
- Conscientiousness
- Loyalty

Establish Compliance Committee

- Independent
 - Reports directly to senior management
 - Not involved in company operations
- Adequate resources
- Publicly endorsed by senior management

Code of Conduct

- Purpose: to set forth company values and business conduct information to employees in brief and understandable way
- Typically, a handbook giving description of general policies, with cross-references to specific work situations covered by Standard Operating Procedures

Typical Items In Code of Conduct

- Letter from Chairman/CEO
- Statement of company values and expected and prohibited conduct
- Instructions to ask questions or report concerns and number of "hotline"
- Policies re: confidentiality & non-retaliation
- Resources to deal with other issues, e.g., benefits, safety concerns
- Answers to FAQs

Examples of High-Risk Areas

- Mischarging & time charging
- Confidential information
- Competitor information
- Discrimination & harassment
- Electronic communications
- Environmental issues
- Cyber
- Supply Chain
- Export issue
- FCPA
- Hiring former US employees
- Gifts and gratuities
- Inside information
- Privacy
- Political activities
- Use of company assets
- Product quality

Inquiry & Reporting Mechanisms

- Toll-free hotline or person to contact
- Answered by live person during business hours
- Provision for anonymous emails
- Publicize existence of hotline
- When possible, provide for feedback

Awareness Training

- Formal and informal program
 - Formal programs once-a-year
 - Informal discussions at staff meetings, etc.
- Cascading approach
 - CEO trains senior management, who then trains lower levels of management, etc.
 - Employee hears message from immediate supervisor
- Training materials include live training, videos, CDs, scenario-based training
- Keep record of attendees

Awareness Training, Cont'd

- Develop a communications plan so employees are aware of importance of Ethics & Business Conduct plan
- Methods of communication
 - Emails
 - Company posters
 - Newsletters
 - Intranet

Program Evaluation

- Periodically, evaluate effectiveness of the program
 - Is Code of Conduct up to date?
 - Are inquiry and reporting mechanisms working?
 - Is training schedule being maintained?
 - Is communication program getting the word out?
 - Place an 'effective through' date on the policy and schedule its periodic revisions.
- Tools for making evaluation
 - History of Internal Reports
 - Internal audits

Leadership Commitment

- Must avoid Potemkin Village
- Committed leadership is essential
 - Lead by example
 - Ensure employees understand ethical standards
 - Create a culture to encourage compliance
 - Respond immediately when concerns are raised
 - Ensure employees have access to Code of Conduct
 - Ensure employees complete training and certifications as required

Enforcement of FAR 52.203-13

- DCAA assumes principal responsibility
 - DCAA Audit Guidance 09-PAS-014(R), July 23, 2009
 - DCAM 4-700
 - DCAA Formal Request For Information
- Spring 2025 Updates to Contract Audit Manual (CAM)
 - Auditing Standards
 - Audit Planning
 - General Auditing Requirements
 - Contractor compliance with DFARS
 - Incurred Costs
 - Audit of Cost Estimates and Price Proposals
 - Other Contract Audit Assignments
 - Auditing Contract Termination and Delay/Disruption, Other Claims

Guidance Navigation

[Directory of Audit Programs](#)

[CAM - Contract Audit Manual](#)

[Selected Area of Cost Guidebook:
FAR 31.205 Cost Principles](#)

[MRDS - Audit Guidance Memos](#)

[CAS - Cost Accounting Standards](#)

[FAR - Federal Acquisition
Regulations](#)

[DFARS - Defense Federal
Acquisition Regulation Supplement](#)

[GAGAS/Yellow Book](#)

[Section 809 Professional Practice
Guide Chapters 1, 2 & Appendix A](#)

Misrepresenting Status of Compliance Program

- *U.S. v. Dynamics Research Corp.*, 2008 WL 886035 (D. Mass. 2008)
 - Employees required to sign annual conflict of interest disclosures
 - DRC took no action to remedy refusal and certified full compliance with conflict of interest requirements
 - DRC failure to self-police basis for FCA liability due to vicarious liability and apparent authority

- United States Attorneys' Offices Voluntary Self-Disclosure Policy (February 22, 2023, revised March 7, 2024)
 - Enhanced benefits for voluntary disclosure and corporate cooperation
 - Companies that voluntarily self-disclose potential misconduct, fully cooperate and remediate problems get a presumption of declination, absent aggravating factors

**FAR 52.203-13:
Detailed Review of Contractor Code of
Ethics and Conduct, Training, and
Disclosure Requirements**

Compliance Program Requirements

- FAR 52.203-13 "Contractor Code of Business Ethics & Conduct" (Nov 2021)
 - Applies to contracts > \$6M and > 120 days
 - Flows down to subcontracts
 - Main requirements:
 - ¶ (b): Written code of business ethics within 30 days and contractor must timely disclose, in writing, to the agency OIG and CO if Contractor has credible evidence of violations of Title 18 violations or a violation of the civil FCA.
 - ¶ (c): Establish ethics awareness program & internal control system suitable to size of company and extent of involvement in Government contracts within 90 days

Compliance Program Requirements

- Major exceptions
 - Contracts for commercial items & services
 - Small businesses exempt from ¶ (c) requirements
 - Contractor is given latitude in designing system of internal controls
 - **No exemption** for foreign contracts

FAR 52.203-13 History

- Before 12/07, there was no mandatory requirement
- 12/07 -- FAR 52.203-13 "Contractor Code of Business Ethics & Conduct"
 - Applied to contracts > \$5M and > 120 days
 - Flowed down to subcontracts
 - Two main requirements:
 - ¶ (b): Written code of business ethics within 30 days
 - ¶ (c): Establish ethics awareness program & internal control system suitable to size of company and extent of involvement in Government contracts within 90 days

FAR 52.203-13 History

■ 12/07 Exceptions

- Contracts for commercial items & services and contracts performed outside U.S exempt from all requirements
- Small businesses exempt from ¶ (c) requirements
- Contractor was given latitude in designing system of internal controls
- No requirement for disclosure of potential violation of statutes or regulations

FAR 52.203-13 History

- DOJ requested revision to
 - Expand internal control requirements
 - Require disclosure of potential violations
 - Eliminate exemptions for commercial items/services and contracts performed outside U.S.
- 11/07 - "First" proposed revision
 - Expanded internal controls requirements patterned on U.S.S.G.
 - Required disclosure where "reasonable grounds" to believe there was violation of criminal laws
 - But, still maintained exemptions
 - Added "failure to disclose" as cause for suspension & debarment

FAR 52.203-13 History

- DOJ pushes for
 - Eliminating foreign contract exemption
 - Adding duty to disclose FCA violations
- Congress passes "Close the Contractor Fraud Loophole Act" Pub. L. No. 110-252 § 6101, 122 Stat. 2386 (2008)
 - Disclose violation of criminal law or receipt of overpayments
 - Impose disclosure requirements on commercial items/services and foreign contracts
- Second proposed rule on 5/16/08
- Final rule, with some changes, effective 12/12/08

Current Version of FAR 52.203-13

- General applicability
 - Mandatory for contracts expected to exceed \$6m and 120 days. FAR 52.203-13 (Nov 2021)
 - Flowed down to subcontractors
 - No exemption for foreign contracts
 - Small business and commercial item contracts exempt from ¶ (c) compliance training and internal control system requirements

¶ (b) Code Of Ethics Requirements

- Written code of ethics within 30 days of award contract and make it available to employees
- Exercise "due diligence" to detect and prevent fraud
- Disclosure requirement for possible violations when there is "credible evidence"

¶ (b) Disclosure Requirement

- In connection with award, performance or close out of this contract or are subcontract thereunder
- "Credible evidence" standard
- Principal, employee, agent, or subcontractor
- Has violated 18 U.S.C. re: fraud, COI, bribery, or gratuity or civil False Claims Act

¶ (b) Disclosure Requirement

- Make timely disclosure in writing
- To OIG and CO
- Multiple agency users - IG of ordering agency and IG of contracting agency
- US will protect if marked “confidential” or “proprietary” and will notify contractor if material is requested under FOIA before releasing information, if required.
- Subcontractor discloses directly to U.S.

¶ (c) Business Ethics Training

- Program must take reasonable steps to communicate periodically the contractor's practices and procedures for compliance
- Training must be provided to principals and employees, and as appropriate, the contractor's agents and subcontractors

¶ (c) Internal Controls

- Establish procedures to facilitate timely discovery of improper conduct in connection with Government contracts
- Ensure corrective measures are carried out
- At a minimum, provide for the following:
 - Assign responsibility for program to senior person and provide adequate resources
 - Reasonable efforts not to employ persons as principal's person whom due diligence would have exposed as having engaged in conduct that conflicts with contractor's code of ethics

¶ (c) Internal Controls

- Periodic review of practices & procedures for compliance with ethics and Government contract requirements, including:
 - Monitoring & auditing to detect criminal activity
 - Periodic review of effectiveness of compliance program & internal controls
 - Periodic assessment of risk of criminal conduct
- Internal reporting mechanism such as "hotline"
- Disciplinary action for violations or failure to take reasonable steps to detect improper conduct

¶ (c) Disclosure Requirement

- Requirement is the same as in ¶ (b), except:
 - It applies to conduct under any Government contract or subcontract
 - Requirement continues for 3 years after closeout of contract
 - Requirement for "full cooperation" in investigating possible violation

Suspension / Debarment Disclosure Requirements

- "Knowing" failure by "principal" to disclose in connection with award, performance, or close out of any Government contract/subcontract credible evidence of:
 - Violation of fraud, COI, bribery or gratuity law
 - Violation of civil False Claims Act
 - Significant overpayments other than those relating to contract financing payments
- Obligation continues for 3 years after final payment
- FAR 9.406-2(b)(1)

IS *ANY* CONTRACTOR *REALLY* EXEMPT?

Questions About Coverage

- When do disclosure obligations "begin" and "end"
 - Obligations under FAR 52.203-13 exist only when contract exists -- if you learn of violation after close out, no duty to disclose; *but see* FAR 52.203-13(c)(2)(ii)(F)(3).
 - Debarment/Suspension disclosure not tied to contract -- obligation arises on effective date of regulation and continues indefinitely.

FAR 9.406-1, FAR 9.407-2.

Questions About Coverage

- Whose "knowledge" determines whether there is credible evidence of a violation
 - Clause does not focus on knowledge of individual, but rather on quality of compliance program - a well run program will bring "credible evidence" to attention of senior management which, in turn, triggers disclosure requirement
 - With regard to FAR 52.203-13, concern over whether "knowledge" of low-level employee would trigger disclosure
 - For suspension/debarment, disclosure required only when company's "principals" - officer, director, owner, partner or a primary manager within a segment – is/are aware of "credible evidence"

Questions About Coverage

- How certain must a contractor be that a violation has occurred to trigger the disclosure requirement
 - Original "reasonable grounds" criticized as "vague" and leading to "premature disclosures"
 - FAR Council rejected setting arbitrary time period; only requires "timely" disclosure.
 - "Credible evidence" considered to be "higher" standard that will allow more time to fully investigate
 - But, you will not be able to avoid disclosure by saying investigation was "ongoing"
 - *Anderson v. Fluor Intercontinental, Inc.*, 2021 WL 837335 (ED Va. 2021) (discussing obligatory "preliminary examination" of evidence of employee conflict of interest, obligatory disclosure to DOD IG under FAR 52.203-13)

Questions About Coverage

- What constitutes "full cooperation"
 - Can't block Government auditor's access to documents or employees
 - Reasonable to expect contractor will provide documents and encourage employees to cooperate
 - Concern over improper pressure by DOJ under McNulty Memorandum
 - Waiver of Attorney Client privilege
 - Reimbursement of legal fees for employees
 - Privacy violations
 - Internal DOJ and Judicial concerns
 - 30 former US Attorneys express concern
 - Dismissal of charges against KPMG employees
 - August 2008 Fillip Memorandum
 - Credit to be given for disclosure of relevant information rather than waiver of privilege
 - Encourages corporate counsel to raise concerns with US Attorney or Assistant Attorney General
 - September 2022 Memorandum (Monaco Memorandum)
 - Absent aggravating factors, DOJ will not seek a guilty plea if corporation has voluntarily self-disclosed, cooperated, and remediated criminal conduct
 - DOJ will not require imposition of a compliance monitor for a cooperating corporation that voluntarily self-discloses

Employment Restrictions

Employment Restrictions

- Agency officials participating personally and substantially in a procurement must:
 - Report employment-related contacts with any offeror, and
 - Cease contacts and/or recuse themselves from the procurement

FAR 3.104-2

Employment Restrictions

- Following former federal officials may not accept compensation from an awardee for one year who:
 - served as the: (i) PCO, (ii) source selection authority, (iii) member of the SSEB, or (iv) chief of a financial or technical evaluation team on a procurement exceeding \$10 million
- Following former federal officials may not accept compensation from a contractor for one year who:
 - personally made the decision to: (i) award a contract or modification exceeding \$10 million to the contractor, (ii) establish or approve overhead rates in excess of \$10 million, (iii) approve contract payments exceeding \$10 million, or (iv) pay or settle a claim exceeding \$10 million.
- The one year *may* begin on:
 - (1) date of the contract award; (2) date of contractor selection if the official was not in one of the prohibited positions on the date of award; (3) date official last served in a prohibited position; or (4) the date the official made one of the enumerated decisions.

FAR 3.104-3(c), (d)

Employment Restrictions

- Standards of Ethical Conduct for Employees of the Executive Branch
 - 5 C.F.R. Part 2635
 - Subpart A – General Provisions
 - Subpart B – Gifts from Outside Sources
 - Subpart C – Gifts Between Employees
 - Subpart D – Conflicting Financial Interests
 - Subpart E – Impartiality in Performing Official Duties
 - Subpart F – Seeking Other Employment
 - Subpart G – Misuse of Position
 - Subpart H – Outside Activities
 - Subpart I – Related Statutory Authorities
 - Subpart J – Legal Expense Funds

Compliance Initiatives

- Educate workforce
- Recruitment restrictions
- HR/Legal Hiring procedures
- Website disclaimer
- Certification requirements for job applicants and new hires; ethics opinions

Truthful Cost or Pricing Data

- FAR 15.4 - requires prime contractors and subcontractors in certain circumstances to submit "cost or pricing data" to the government and to certify that the data submitted are current, accurate, and complete
- Federal government has the ability to require contractors to provide data to prove that the contractor's pricing is reasonable
- TINA provides for adjustments to eliminate any price increases resulting from inaccurate, incomplete, or noncurrent data

Truthful Cost or Pricing Data

- FAR 15.408, Table 15-2
- Commercial Product/Service
 - Data Other Than Certified COPD
 - Table 15-2
 - DOD IG
- > \$2M Sole Source
 - Certified COPD
 - Table 15-2
- Civil, criminal False Claims Act 31 U.S.C. § 3729, 18 U.S.C. § 287
- False Statements Act, 18 U.S.C. § 1001
- Obstruction of Federal Audit, 18 U.S.C. § 1516

Influencing Government Actions

Influencing Government Actions

- Items of value
 - Cash
 - Tickets
 - Goods
 - Meals
 - Employment opportunities
- Examples
 - Business development
 - Engineering
 - Contracts
 - Program management
 - Quality control

Bribery & Illegal Gratuities

- Bribery: (1) offer something of value (2) to a public official (3) to induce official to violate an official duty
- Illegal gratuity: (1) offer anything of value (2) to current/former/future public official (3) to perform an official act
- Punishes both offering and accepting bribe or illegal gratuity
- 18 U.S.C. § 201, FAR 3.2, FAR 52.203-3

Differences Between Them

- Bribery: requires an intent to get the official to violate a duty or to improperly exercise discretion -- an intent to "get something"
- Illegal gratuity: A reward for taking an official action, regardless of whether the action was proper
- Both are criminal statutes

Office of Gov't Ethics Rules

- Limits:
 - \$20 or less per source, per occasion
 - \$50 per source per year
 - Must aggregate value from multiple employees
 - Can't pay \$11 on a \$30 bill
- But: Can accept gift from a "personal friend?"

Gratuities Hypothetical

- Trying to get product out
- Back-up in government quality inspection
- Beg government inspector to get to certain items
- He agrees to work through his lunch and gets it done
- Product is appropriately accepted and ships
- Minor league baseball fan
- Give him an \$18 box seat ticket as a thank you
- Could this be considered an improper gratuity?

Gratuities Hypothetical

- Yes
 - Although within OGE's \$20 rule, intent was a thank you for performing an official act
 - AUSA could argue falls within illegal gratuities statute
- How about if you run out and got him a steak and cheese, fries and dessert?
- Contingency operations

Gratuities Example

- Example of a gratuities case
 - In 2005, Thomas Perry pled guilty to illegal gratuities charges.
 - Perry had been the President of Air Cargo Expeditors, Inc.
 - Perry provided numerous items of value to federal and contractor employees in exchange for the award of contracts and circumvention of government requisitions.
 - Items of value included lunches and dinners at various restaurants in the Hampton Roads area, an open tab at a deli in Portsmouth, Virginia, airline tickets, concert tickets, NASCAR race tickets, hotel room charges, sports memorabilia, a jacuzzi, spa days, alcoholic beverages, clothing.

Gratuities Example

- He was sentenced to 8 months in prison, 6 months home detention, and ordered to pay more than \$543,000 in restitution. He could have been sentenced to as long as 5 years but received a lesser punishment for cooperating in the government's ongoing corruption investigation into military freight shipment contracts.
- Government employees also pled guilty to receipt of these items.

Illegal Gratuity

- *United States v. Hoffman*, 556 F.3d 871 (8th Cir. 2009) involved an individual who fought an illegal gratuity conviction through the 8th Circuit
- Hoffman was VP of a company that supplied aerial photography services for the government
- He was convicted by a jury of providing an illegal gratuity to a government contracting official as a result of providing the official with a couple of golf clubs
- The jury found that Hoffman had provided the government official with the golf clubs with the intent to influence the official to provide a favorable past performance rating for Hoffman's company

Illegal Gratuity

- Hoffman argued that the government failed to prove that he acted with the requisite intent to influence an official act because (1) the government official who received the clubs never issued a past performance rating for the company and (2) emails relied upon by the prosecution to link the gifts of the clubs to the desired official act were sent 13 months after the golf clubs were provided to the official
- The 8th Circuit, on appeal, found that a reasonable juror could conclude that the defendant had acted with the intent to influence the government official to issue a favorable past performance rating, despite the fact that 13 months elapsed between the receipt of the clubs and emails seeking the requested official action

Gratuities

- Expense reports
- Can you avoid the gratuities law by personally paying for items of value given to government employees, and not seeking reimbursement from the company?

Lobbying Restrictions

- FAR 3.8
- Byrd Amendment - two separate parts:
 - Prohibits using appropriated funds to influence Congress or federal employees in connection with contract award
 - "Appropriated funds" does not include profit/fee
 - Regardless of whether appropriated funds are used, requires identifying registrants under Lobbying Disclosure Act you hired to lobby relating to procurement
- You must certify compliance with each proposal

Scope of Byrd Amendment

- Doesn't apply to normal liaison "not directly related" to award of contract
- Doesn't apply to professional or technical services relating to bid preparation and contract negotiation
- Remember:
 - Byrd just prohibits use of appropriated funds
 - But it applies to anyone in government

Scope of Lobbying Disclosure Act

- 2 U.S.C. § 1601, *et. seq.*
- "Lobbyist": One "lobbying contact" in 6 months involving 20% of their time
- "Lobbying": Contacts with senior congressional, executive, and military and their staffs regarding a government program, including contracts
- Must register if >\$2,500 for a client during a quarter or >\$10,000 if lobbying during a quarter for your company

Scope of Lobbying Disclosure Act

- Changes since enactment:
 - File quarterly reports within 20 days of end of period
 - Semi-annual disclosure of contributions >\$200 to candidates, PACs, etc.
 - Prohibits gifts and travel in violation of House and Senate rules
 - Random audits by GAO
 - Civil penalties ↑ to \$200K and new criminal penalties

Collusive Bidding

- FAR 3.3
- Four basic situations:
 - Bid suppression - agreement not to bid
 - Complementary bidding - agreeing who will win
 - Bid rotation - taking turns as low bidder
 - Market division - territorial or other restrictions
- Exemption:
 - Affiliated companies - bid with or against each other
 - Joint ventures and teaming agreements
- Issues include teaming, "no poach" agreements, industry meetings

Kickbacks

- FAR 3.502
- Any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind
- Provided directly or indirectly to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee
- For the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or subcontract relating to a prime contract

Kickbacks

- The Anti-Kickback Act of 1986 prohibits
 - Providing or attempting to provide or offering to provide any kickback;
 - Soliciting, accepting, or attempting to accept any kickback; or
 - Including directly or indirectly, the amount of any kickback in the contract price or subcontract price

Kickbacks

- FAR 52.203-7
- Must be included in all contracts and subcontracts (regardless of tier) which exceed \$150,000
- Exception: Does not apply to contracts for Commercial Items. (FAR 3.502-3).
- Requires that contractor have in place and follow reasonable procedures designed to prevent and detect violations of the Anti-Kickback Act

Kickbacks

- Reporting requirement
 - Reasonable grounds to believe
 - IG's Office or DOJ

Kickbacks Cases

- Kevin Smoot, is a former executive at Eagle Global Logistics, Inc.
- Over a three-year period, Smoot provided or authorized entertainment and other items of value to five KBR transportation dep't employees in connection with LOGCAP III transportation subcontracts.
- On approximately 90 occasions, Smoot provided or authorized another employee to provide items of value totaling approximately \$33,000 to KBR employees.

U.S. ex rel. Varva, et al. v. Kellogg Brown & Root, Inc., et al., 903 F.Supp.2d 473 (E.D. Tex. 2011).

Kickbacks Cases

- These items of value included meals, drinks, golf outings, tickets to rodeo events, baseball and football games and other entertainment events
- Smoot falsely listed recipients' names or simply did not list the recipient names on expense reports
- In 2007, Smoot pled guilty of providing "perks" to gain or reward favorable treatment to military subcontractors
- Sentenced to 14 months in prison, 2 years supervised release, and ordered to pay a \$6,000 fine and restitution of \$17,964

Kickbacks

- November 2008 – ELG, Inc. paid the U.S. \$750,000 to settle allegations that in violation of the FCA and Anti-Kickback Act, it had paid gratuities to employees of KBR
 - EJGL had a subcontract with KBR to facilitate shipments of military cargo to Iraq and Kuwait under the LOGCAP III contract
 - Between March 2003 and March 2005, EJGL provided various meals, sporting event tickets and other gifts to KBR employees responsible for administering the subcontract

Kickbacks

- June 2008 – Anthony Martin was a subcontracts administrator working for KBR in Kuwait. He accepted an initial kickback of \$10,000 for awarding a \$4.6 million subcontract to a Kuwaiti company to provide 50 semi-tractors and 50 refrigeration trailers to the U.S. military for a six-month period. He also accepted payment of \$170 per semi-tractor, per month, under any subcontract Martin awarded the company under the LOGCAPIII prime contract, for total kickbacks of \$50,240. The amount of the kickback was incorporated into the price of the subcontract
 - Sentenced to a year and a day in prison, and ordered to pay \$200,000 in restitution
 - One thing that you see from these cases is that particularly in Afghanistan and the Middle East, the dollar amount of bribes and kickbacks being offered is in many cases substantial and could subject employees in those areas to a higher degree of temptation

<https://www.justice.gov/archive/usao/ilc/press/2008/06June/0606.html>

Kickbacks

- Alliance partnerships
 - "Influencer Fees" paid to systems integrators in return for recommendations that federal agencies purchase the vendor's products
 - Settlements to date with HP, IBM, CSC, and PWC among others

Procedures Critical

- Most violations involve personal contact – not always a paper trail (but beware of expense reports)
- A good compliance program is particularly important:
 - Periodic review of written practices and standard procedures
 - Hotline
 - Internal audits
- Remember: you are required to have a detection program in place and to report suspected violations
 - See FAR 52.203-13

Conflicts of Interest: Personal and Organizational

Conflicts of Interest

- Overview
 - Personal
 - Organizational
- Personal Conflicts of Interest
 - Criminal "Revolving Door" Statutes
18 U.S.C. § 208
 - No Government employee may participate in a matter where they have a financial interest

Personal Conflicts of Interest

- Ethics Reform Act, 18 U.S.C. § 207-One-year and two-year bans apply to former government employees' representation back to their former agency.
 - Lifetime ban – may never represent a third party back to the government on a contract for which the employee was significantly involved for the life of the "particular matter."
 - Behind the Scenes participation allowed, but no communication to agency
 - Appearance of Impropriety

Personal Conflicts of Interest

- Procurement Integrity; FAR 3.104-1 through 3.104-9
- One Year Compensation Ban - "Designated former officials involved in procurement over \$10 million are prohibited from accepting compensation from the contractor as an employee, officer, director or consultant for one year"
 - Exception for employment with contractor divisions or affiliates in certain circumstances

Personal Conflicts of Interest

- Restrictions on employment discussions for agency officials "seeking employment"
- Promptly report the contact in writing to:
 - Supervisor and
 - Ethics Counselor

~And~
- Reject the offer, or
- Disqualify yourself from further involvement in the procurement

Senior DoD Officials Seeking Employment With DOD Contractors

- November 2009 – DoD issued final rule
- Certain military flag-rank officers and senior DoD civilian officers must obtain guidance from Ethics Office before accepting from a DoD contractor
 - an offer of employment or consulting position
 - any compensation
- Imposes requirements on contractors
- Full range of punishments exist for non-compliant contractors
- DFARS 203.171

Personal Conflict of Interest Example

- An Air Force general served as the Source Selection Authority (SSA) on a communications procurement awarded to XYZ Corporation
- The Air Force general retires and accepts employment with XYZ Corp.
- The Air Force general represents XYZ Corp. in negotiating several mods under the contract
- Does this scenario present problems for the company and the general?

Personal Conflict of Interest Example (Con't)

- Yes

- The Air Force general violated the statute by representing XYZ Corp. on a government matter in which he was personally and substantially involved
 - The company violated the statute by paying the Air Force general compensation for representing the company in negotiating the mods
 - Complicated rules exist as to when government employees can be hired and what they can do
 - Critical that HR vet these individuals before XYZ Corp. pursues them
- The situation may be entirely different if the general was the base commander where XYZ Corp. was performing, but not SSA

CACI, Inc.- Federal v. US, GDIT, GDMS, No. 23-324C, 2023 WL 4624485 (Fed. Cl. 2023) (CACI protest of exclusion denied)

“The CO excluded CACI from the CHS-6 competition because it hired Mr. Tarr, a former Army employee who managed the CHS-5 procurement, as an independent contractor to help prepare its bid. AR 4169. The CO found that Mr. Tarr's knowledge and previous access to proprietary GDMS documents gave CACI “at a minimum, an appearance of an unfair competitive advantage.” Id. Before working for CACI, Mr. Tarr held leadership positions within the Army's CHS program office from December 2014 through April 2019. AR 633. From January 2016 through April 2019, Mr. Tarr was the product lead running the CHS program office. Id. He then spent seven months with the Program Executive Office Command, Control, Communications Tactical, which oversees the CHS program office. AR 635. While there, he performed a cost analysis of the CHS-5 contract, which included analyzing proprietary GDMS cost information. AR 495–96. He retired from the Army in November 2019. AR 635. Mr. Tarr says that he tried to schedule “an out-processing ethics debriefing” before his retirement from the government. AR 632. However, there is no documentation of that alleged effort, and no such meeting occurred.”

CACI, Inc.- Federal v. US, GDIT, GDMS, No. 23-324C, 2023 WL 4624485 (Fed. Cl. 2023)(con't)

“While serving as product lead of CHS, Mr. Tarr oversaw the cost, schedule, and performance of CHS-5. AR 1555. He led the planning team for the transition from CHS-4 to CHS-5, during which time he met on a weekly basis with representatives from Army Contracting Command and GDMS. AR 492-93. Current and former GDMS employees described their communications with Mr. Tarr as “oftentimes daily” or “almost daily.” AR 494. He reviewed and approved task order requests from GDMS, which included proprietary cost, rate, and technical information. Id. He also had access to “competition sensitive” information about GDMS hardware designs for CHS-5. Id. In his product lead role, Mr. Tarr chaired the Source Selection Advisory Council (“SSAC”) for CHS-5. AR 736. He appointed members to the Source Selection Evaluation Board, which was responsible for evaluating GDMS's proposal for the program. AR 736-37. Mr. Tarr signed an SSAC memo about GDMS's CHS-5 bid that included proprietary cost information. AR 768-73. He was included on email negotiations between GDMS and Army Contracting Command employees about the CHS-5 contract.”

PCI History: Sec. 841 of the FY 2009 NDAA

- Requires that Office of Federal Procurement Policy (OFPP) establish standard PCI policies that define personal conflict of interest
- Requires contractors performing work that is closely associated with inherently governmental functions to:
 - Identify and prevent PCIs
 - Prohibit contractor employees from improperly using non-public Government information
 - Report PCI violations to the contracting officer or the CO's representative as soon as such violations are identified
 - Oversee and verify compliance with PCI safeguards
 - Adopt procedures to screen employees performing such functions for potential PCIs
 - Discipline employees who do not comply

PCI History: Sec. 841 FY 2009 NDAA

- The regulations that are mandated by the statute are not intended to apply to all contractor employees
- Covers only employees who perform functions closely associated with inherently governmental functions
- Mandated clause to apply to an entire contract if such inherently governmental functions are pervasive, or only to "portion" of a contract if only certain employees perform functions that implicate PCI concerns

History of FAR PCI Provision

- December 2, 2011 Rule Implementing Sec. 841 of 2009 NDAA
- FAR Case 2008-025, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions
- Now FAR 3.11, Preventing Personal Conflict of Interest for Contractor Employees Acquisition Functions
- FAR clause 52.203-16, Preventing Personal Conflicts of Interest
- The 2011 Rule required contractors to screen for and prevent personal conflicts of interest when supporting Government acquisition functions.

FAR 3.1101 Definition of Personal Conflict of Interest

- A situation in which a covered employee has a financial interest, personal activity, or relationship that could impair the employee's ability to act impartially and in the best interest of the Government when performing under the contract.
- A *de minimis* interest that would not "impair the employee's ability to act impartially and in the best interest of the Government" is not covered under this definition.

Personal Conflicts of Interest Background

- The FAR also requires contractors to prohibit covered employees from utilizing non-public information for personal gain and to obtain from covered employees executed non-disclosure agreements prohibiting the dissemination of such information
- The FAR requires each contractor that has employees performing acquisition functions closely associated with inherently governmental functions to identify and prevent PCIs for such employees
- "covered employees" include the contractor's employees and self-employed individuals who perform an "acquisition function closely associated with inherently governmental functions"

Personal Conflicts of Interest Background

- Contractors are responsible for:
 - Having procedures to screen for potential conflicts of interest
 - Informing covered employees of their obligations with regard to those policies
 - Maintaining effective oversight to verify compliance
 - Reporting any personal conflict of interest violations to the CO
 - Taking appropriate disciplinary action
- Contractors are required to flow down these obligations in subcontracts exceeding the Simplified Acquisition Threshold (currently \$250,000 and a FARC proposed rule to increase that amount to \$350,000) where the subcontractors' employees qualify as "covered employees"

FAR 52.203-16

Personal Conflicts of Interest Background

- Sec. 829 of the FY13 NDAA required the Secretary of Defense to determine whether it would be appropriate to extend PCI rules to contractor personnel performing any of the following:
 - Functions other than acquisition functions that are closely associated with inherently governmental functions;
 - Personal service contracts; and/or
 - Contracts for staff augmentation

Personal Conflicts of Interest Background

- On April 2, 2014, DoD and NASA provided a change to the FAR to extend the limitations on contractor employee personal conflict of interest to apply to the performance of all functions that are closely associated with inherently governmental functions (not just acquisition functions and contracts for personal services). 79 FR 18503, 2014 WL 1289401.
- Still does not apply to:
 - Contracts below simplified acquisition threshold, and
 - Commercial contracts

Personal Conflicts of Interest

Compliance Initiatives

- Personal Conflict Prevention
 - Require HR to become familiar with laws and regulations;
 - Implement employee training;
 - Establish written procedures;
 - Obtain ethics opinion letter from government for prospective employee;
 - Be sensitive to the appearance of impropriety;
 - Conflict avoidance plan review periodically;
 - Include procedures to remind former federal employees of their obligations.

Personal Conflicts of Interest: Compliance Impact

- To comply with the rule, contractors should, among other things:
 - Review their code of business ethics and conduct to ensure adequate coverage of PCIs
 - Draft and implement specific policies and procedures relating to the identification, prevention, and reporting of PCIs
 - Develop training materials to educate employees regarding their obligations relating to PCIs
 - Create a standard form financial disclosure statement that addresses all potential sources of PCIs
 - Review the adequacy of existing standard form NDAs vis-à-vis the requirements of the rule

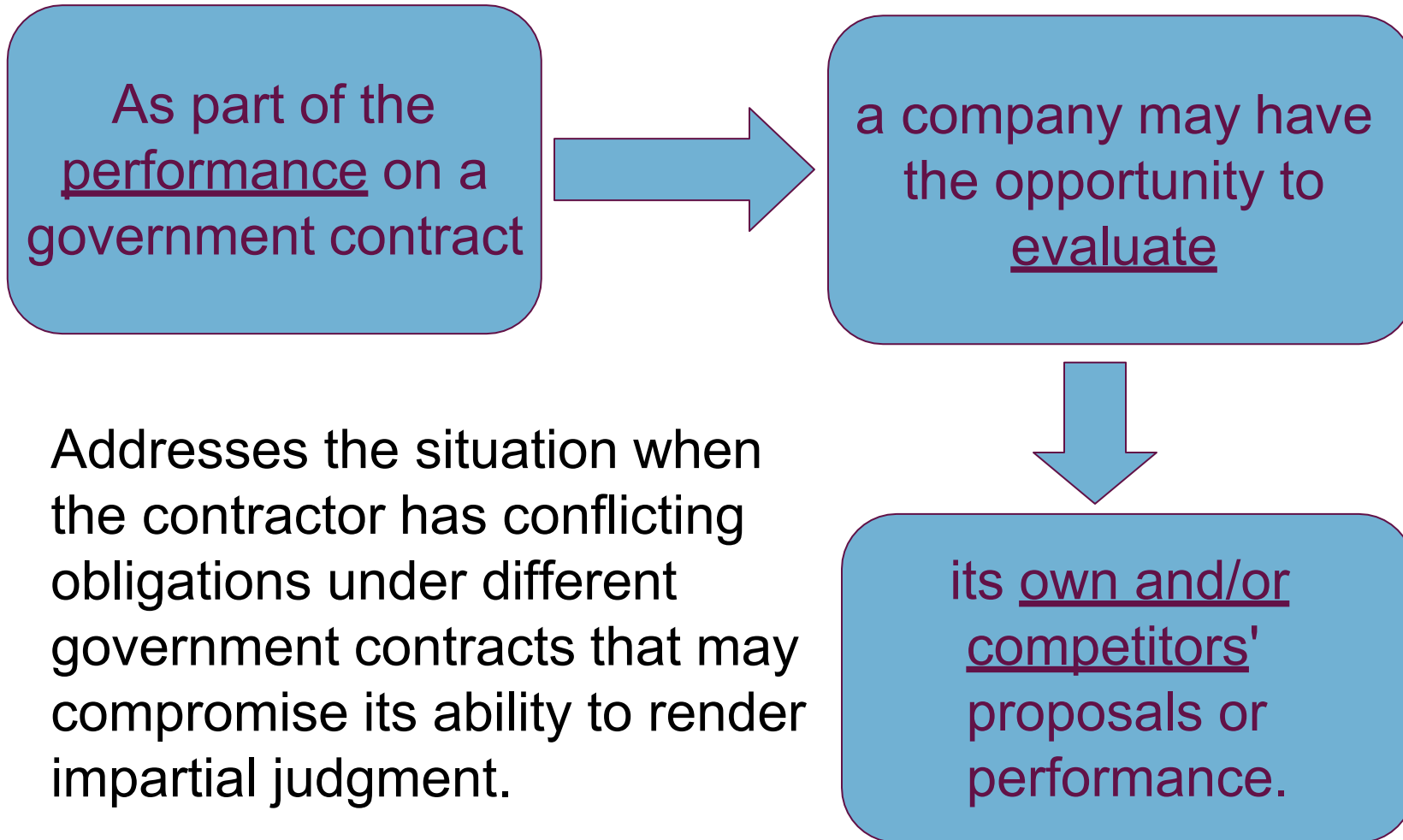
Organizational Conflicts of Interest (OCIs)

- Defined in FAR 2.101:
 - “[A] situation in which because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.
- Proposed Rule (Jan. 15, 2025) (90 FR 4376):
 - The new rule aims to provide clarity to agencies with “tailorable” provisions to use for solicitations and contractors. The new rule contains guidance and examples of relationships that’s may create OCI under FAR 3.1204.
 - The new rule provides specific methods to address conflicts—such as mitigation strategies and avoidance measures. It also provides direction for instances in which government should accept a certain amount of risk under FAR 3.1205.
 - The new rule adds FAR section 3.1206 for guidance re: waivers (similar to FAR 9.503).

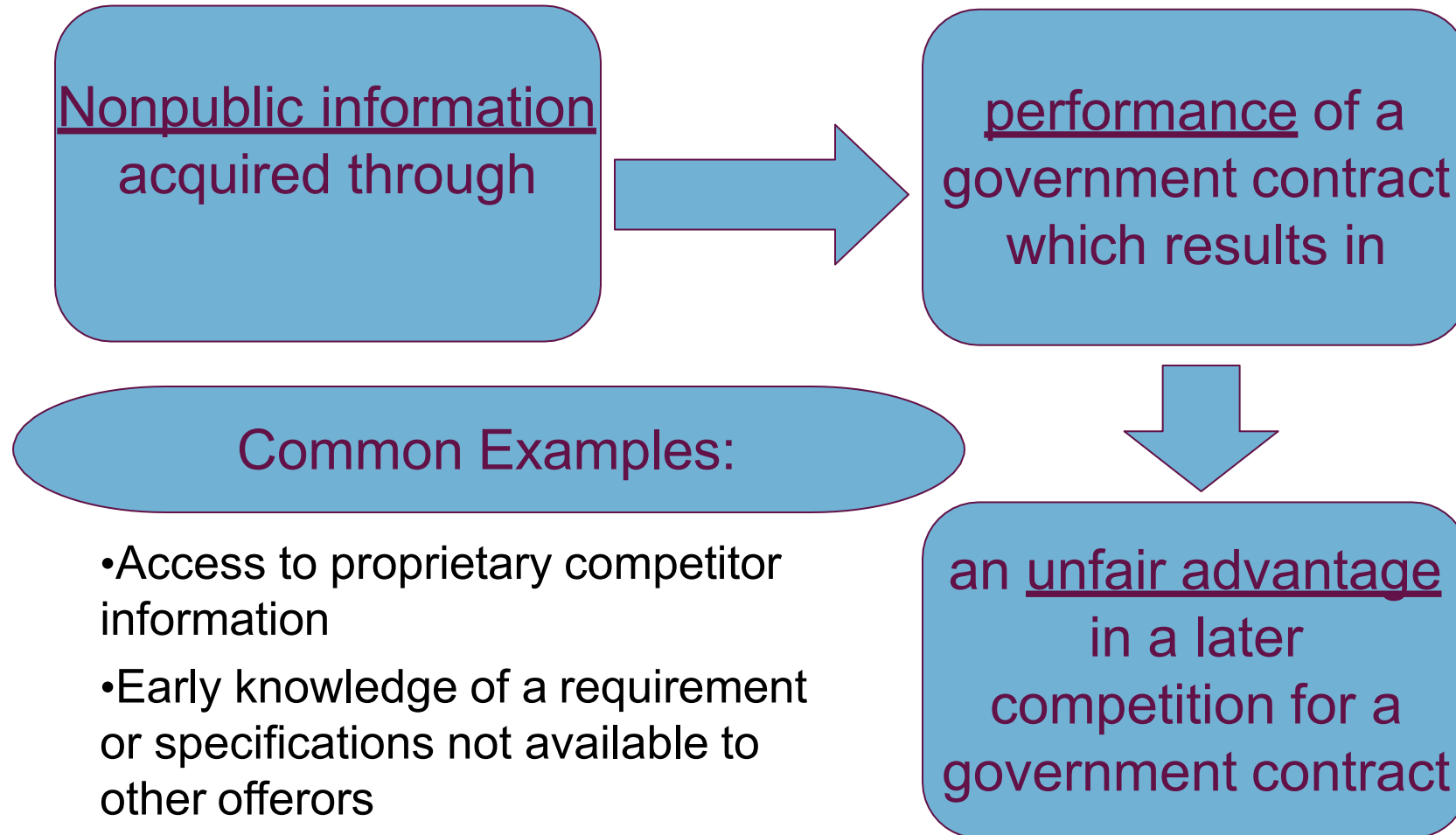
Organizational Conflicts of Interest (OCIs)

- Three Categories Organizational Conflicts of Interest
 - Impaired objectivity
 - Unfair access to non-public information
 - Biased ground rules
 - FAR 9.5
- Mergers and Acquisitions
- DOD Report on Competition (Feb. 2022)
- Intellectual Property

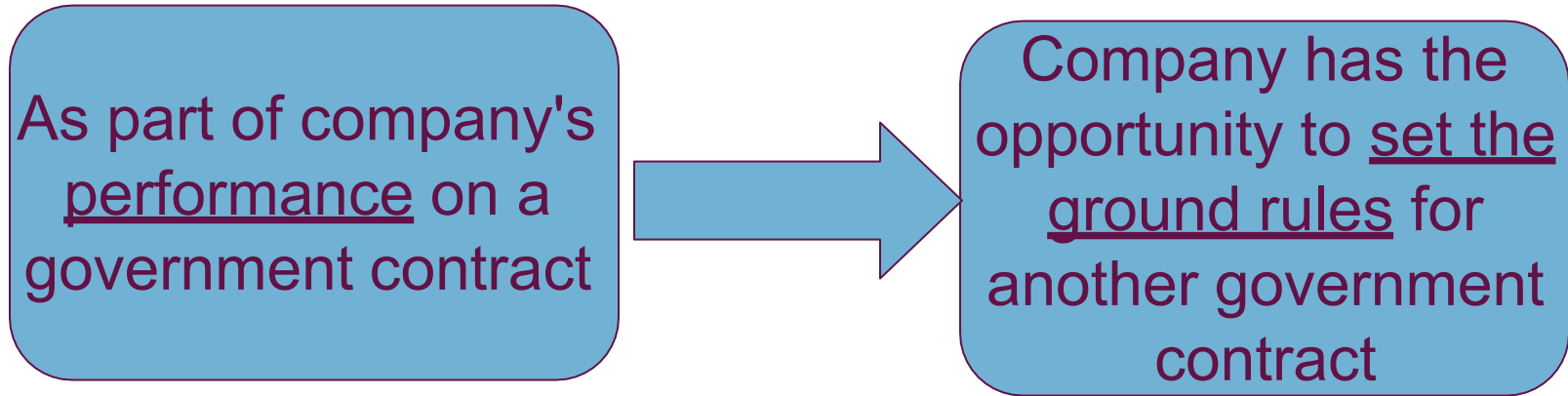
Impaired Objectivity



Unequal Access To Information



Biased Ground Rules



Common Examples:

- Writing the statement of work
- Drafting the specifications

that Company or an affiliate wishes to compete on.

Organizational Conflicts of Interest

- Activities that most often result in an OCI:
 - Systems engineering and technical direction
 - Development of specifications and work statements
 - Evaluation services
 - Access to proprietary information

MPZA, LLC, B-421568.2 (July 3, 2023)

“The FAR requires contracting officials to avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor’s objectivity. FAR 9.504(a), 9.505.

The situations in which OCIs arise, as described in FAR subpart 9.5 and the decisions of our Office, can be categorized broadly into three groups: biased ground rules, unequal access to nonpublic information, and impaired objectivity.

As relevant here, an unequal access to information OCI exists where a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition. FAR 9.505(b), 9.505-4; *Raytheon Tech. Servs. Co. LLC, B-404655.4 et al.*, Oct. 11, 2011, 2011 CPD ¶236 at 4.” (emphasis added).

MPZA, LLC, B-421568.2 (July 3, 2023)(con't)

“In challenging an agency's OCI determination, a protester must identify hard facts that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. ViON Corp.; EMC Corp., B-409985.4 et al., Apr. 3, 2015, 2015 CPD ¶141 at 10; Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011).

The identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion. Guident Techs., Inc., B-405112.3, June 4, 2012, 2012 CPD ¶166 at 7.

We will review the reasonableness of a contracting officer's OCI investigation and determination; where an agency has given meaningful consideration to whether an OCI exists, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. Raytheon Tech. Servs. Co. LLC, supra at 5; Zolon Tech, Inc., B-419280.4, Mar. 18, 2021, 2021 CPD ¶154 at 6.”

FAR OCI Provisions Update

- In 2011, FAR § 3.1202 was proposed but not adopted
- On Dec. 27, 2022, President Biden signed into law the Preventing Organizational Conflicts of Interest in Federal Acquisition Act, Pub. L. No.117-324
 - Aimed at overhauling the OCI regulatory scheme, criticized as insufficient to cover many OCI scenarios
 - Update FAR 9.5 to address definitions to permit agencies to tailor solicitations

FAR OCI Provisions Update

- The new law directs the FAR Council to:
 - Revise the FAR to provide and update:
 - Definitions related to specific types of OCI's
 - Definitions, guidance, and illustrative examples related to relationships of contractors with public, private, domestic and foreign entities that may cause contract to be subject to potential OCIs
 - Illustrative examples of potential OCIs identified
 - Draft solicitation provisions and contract clauses requiring contractors to disclose information that could be relevant to potential OCIs
 - Update FAR procedures to permit Contracting Officers to take into account "professional standards and procedures"
- H.R. 2670, §808; S.2226, §819; National Defense Authorization Act FY24 (DoD contracts with consultants who performed work for Chinese, Russian, or terrorist organizations)

Organizational Conflicts of Interest

■ Risk Mitigation Strategies

- When you agree to assist the government in preparing specifications or providing technical advice, scrupulously evaluate the risks
- Track restrictive contract clauses that prohibit involvement in follow-on work
- Protect competitors' proprietary data
- Use of task order contract
- Training program
- H clauses
- Subcontract clauses

Procurement Integrity Act

- Operation Ill Wind
- The Procurement Integrity Act (PIA) intended to protect procurement process, fairness for all contractors. **FAR 3.104.**
- Restricts:
 - Handling of bid and proposal information and source selection information
 - Discussing employment or making offers of employment to certain government officials
 - FAR 3.104-3

Procurement Integrity Act

- A company competing for a contract or subcontract must not knowingly disclose or obtain contractor "bid or proposal information" or "source selection information" regarding the procurement before the award.

Procurement Integrity Act

- What is bid or proposal information?
 - Not defined in FAR 3.104's definitions.
 - Includes information submitted by the competing bidders or offerors
 - For example:
 - Cost or pricing data
 - Indirect costs and labor rates
 - Proprietary information
 - Information marked as "contractor bid or proposal information"

Procurement Integrity Act

- What is source selection information?
 - Not defined in FAR 3.104's definitions.
 - Internal agency documents or information about the procurement process or decision
 - For example:
 - Technical evaluation plans
 - Results of technical evaluations
 - Results of cost or price evaluations
 - Rankings of bids or proposals
 - Reports of source selection panels or boards

Procurement Integrity Act

- If suspected PIA information is received, do not read or review, copy, further distribute, or use.
- Immediately contact your supervisor or the Ethics Officer.

Procurement Integrity Act

Hypothetical:

You receive an email from the contracting officer requesting a clarification on a recently submitted proposal. The email contains an attachment with an excerpt of the relevant proposal section. Upon opening the attachment, you see the heading clearly identifies the document as an excerpt from your competitor's proposal.

What do you do?

PIA – Post Government Employment Restrictions

- FAR 3.104-3, 18 U.S.C. § § 207-08
- The PIA includes complex rules and restrictions on the hiring of government employees (includes military personnel)
 - Bidders on Government contracts cannot discuss employment opportunities or offer post-government employment to federal agency officials
 - Lifetime Bar – Agency official may not communicate with agency on particular matter in which he or she personally and substantially participated
 - One-Year Bar – Agency officials involved in procurement worth over \$10 million cannot accept compensation from certain contractors for one year after the award decision
 - FAR 3.104-6, Ethics Advisory Opinion

Procurement Integrity Act

- Civil

- Companies

- Up to \$500,000 for each violation plus twice the amount of compensation

- Individuals

- Penalty for not more than \$50,000 per each violation plus twice the amount of compensation received or offered for the conduct

- Criminal

- Imprisonment for up to 5 years

- Suspension and Debarment

- FAR 9.406

Procurement Integrity Act

- Administrative Remedies (FAR 3.104-7)
 - If the contract has not been awarded
 - Cancel the procurement
 - Disqualify the Offeror
 - If the contract has already been awarded
 - Contractual remedies (i.e., profit recapture, price or fee adjustment for improper activity)
 - Rescission of a contract
 - Referral of Suspension or debarment
- Special Rules for Bid Protests (FAR 33.102(f))

Domestic Sourcing Restrictions

- Buy American Act (“**BAA**”), 41 U.S.C. §§ 8301- 8305
- Trade Agreements Act (“**TAA**”), 19 U.S.C. §§ 2501-2581
- FAR Part 25: imposes the rules for sourcing of domestic or trading partner “end products”

END PRODUCTS

Those articles, materials, and supplies to be acquired under the contract for public use

FAR 25.003

NOT END PRODUCTS

Component & subcomponents: article, material, or supply incorporated directly into an end product or construction material

Buy American Act (BAA)

- Price Preference for Domestic End Products: In the procurement of supplies and construction materials for use in the United States:
 - Civilian agencies must add 20% to the price of foreign end items for large businesses and 30% for small businesses for purposes of evaluation. **FAR 25.106(b)**
 - Defense agencies add 50% regardless of business size. **DFARS 225.105(b)**
 - Special rules apply higher preferences for “critical items”
- Domestic generally means:
 - (1) end product was manufactured in the U.S., and
 - (2) cost of components mined, produced, or manufactured in the U.S. exceeds 65%* of all components [the “**components test**”]. **FAR 52.225-1(a)**
- *Unmanufactured* end products need only be mined/produced in the U.S.
- Special rules apply to *iron* or *steel* end products

Exceptions and Waivers

- BAA is waived/ does not apply where TAA applies
- Commercial IT products are not subject to BAA
- *Waivers* may be obtained for unreasonable cost, non-availability, and public interest
 - Waivers can receive heightened scrutiny

Buy American Act (BAA)

- **Products Consisting Wholly or Predominantly of Iron or Steel.** The cost of foreign iron and steel must constitute less than 5 percent of the cost of all the components used in the end product to qualify as “domestic”
- **Commercially-Available Off-the-Shelf (COTS).** BAA applies even to COTS end products, but commercial end products are not subject to the “components” test, they need only be manufactured in the U.S. to be considered “domestic”
- **DoD Balance of Payments (BOP) Program.**
 - Extends BAA requirements to DoD contracts, including those overseas
 - Allow offerors to propose products of “qualifying countries” [countries with reciprocal defense procurement agreements with the U.S.].
 - Components test thresholds are different



Trade Agreements Act (TAA)

- TAA requires purchase of domestic or trading partner end products
 - Wholly the growth, product, or manufacture of the U.S. or a free trade agreement country; or
 - “Substantially transformed . . . into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed” in the U.S. or FTA country
 - “Substantial transformation” test applies, not components test
- Prohibits end products of countries with which the U.S. does not have a trade agreement, e.g., Russia, China, India
- TAA applies above the Free Trade Agreements thresholds:
 - World Trade Organization (“WTO”) Government Procurement Agreement (“GPA”) is **\$183,000** for supply and service contracts and **\$7,032,000** for construction contracts

Exceptions

- TAA and BAA are mutually exclusive
- Certain categories of products are exempt from TAA:
 - Small Business set asides
 - Acquisition of arms, ammunition, or war materials, or purchases indispensable for national security

Specialty Metals

- DoD-specific prohibition on acquiring the following items, or components of these items, unless any specialty metals contained in the items or components are melted or produced in the U.S. or a “qualifying country”:
 1. Aircraft.
 2. Missile or space systems.
 3. Ships.
 4. Tank or automotive items.
 5. Weapon systems.
 6. Ammunition.
- Prohibition extends to any specialty metal acquired as an end item.

What are “specialty metals”?

Steel -

- With a maximum alloy content exceeding one or more of the following limits:
 - 1.65% manganese; .60% silicon; .60% copper; or
 - containing more than 0.25% of any of the following elements:
 - Aluminum, chromium, cobalt, molybdenum, nickel, niobium (columbium), Titanium, Tungsten, vanadium

Metal alloys consisting of -

- Nickel or iron-nickel alloys that contain a total of alloying metals other than nickel and iron in excess of 10%
- Cobalt alloys that contain a total of alloying metals other than cobalt and iron in excess of 10%

Titanium and titanium alloys

Zirconium and zirconium alloys

Cybersecurity Maturity Manual Certification (CMMC)

Background

- In the wake of the rapidly developing threat of cybersecurity attacks, the DoD* is prioritizing the protection of information that the Defense Industrial Base (DIB) use in their performance of government contracts.
- The CMMC program is aligned with existing security requirements for DIB contractors.
 - The recycled requirements are formatted in a three-tier (phases) format
- The CMMC program is a contractual requirement for DIB contractors that they must certify to and become responsible for any non-compliance.
- **CMMC Phase 1 Implementation for Self-Assessments begin November 10th**

Cybersecurity Maturity Manual Certification (CMMC)

DoD Final Rule and History

- On October 15, 2024, the DoD issued the Final Rule implementing the CMMC Program
- 89 Fed. Reg. 83092 (Oct. 15, 2024)
- The CMMC Program . . .
 - Is purposed to verify contractors have implemented required security measures necessary to safeguard: (1) Federal Contract Information (FCI); and (2) Controlled Classified Information.
 - Became effective December 16, 2024.
 - Is a move away from the self-attestation model of security

Cybersecurity Maturity Manual Certification (CMMC)

Three Key Features

- **Tiered Model:** CMMC requires companies entrusted with FCI and CUI to implement cybersecurity standards at progressively advanced levels, depending on the type and sensitivity of the information. The program also describes the process for requiring protection of information flowed down to subcontractors.
- **Assessment Requirement:** CMMC assessments allow the Department to verify the implementation of clear cybersecurity standards.*
- **Phased Implementation:** Once CMMC rules become effective, certain DoD contractors handling FCI and CUI will be required to achieve a particular CMMC level as a condition of contract award. CMMC requirements will be implemented using a 4-phase implementation plan over a three-year period.

Cybersecurity Maturity Manual Certification (CMMC)

Level 1: Basic Safeguarding of FCI

- Annual Self-Assessment
- Annual Affirmation of Compliance with FAR 52.204-21
 - **All** 15 security requirements located that provision
- Results are entered into SPRS
- Plan of Action and Milestones (POA&M) Requirements*
 - Not permitted.

Cybersecurity Maturity Manual Certification (CMMC)

Level 2: Broad Protection of CUI

- Either Self-Assessment or C3PAO Assessment
every 3 years
- Assessment determined by the type of information the contractor processes, transmits, or stores on their information systems
- Annual Affirmation (made in SPRS)
 - Verify compliance with 110 Security Requirements of NIST SP 80-171 Rev. 2
- Limited POA&M Allowances
 - Permitted in accordance with 32 CFR 170.21(a)(2)
 - Must be closed out in 180 days

Level 2 Self Assessment	Level 2 C3PAO Assessment
110 NIST SP 800-171 R2 required by DFARS clause 252.204-7012	110 NIST SP 800-171 R2 required by DFARS clause 252.204-7012
Conducted by OSA; Results entered into SPRS	Conducted by C3PAO; Results entered into CMMC eMASS
Required after each assessment and annually	Required after each assessment and annually
Status valid for 3 years (32 CFR 170.4)	Status valid for 3 years (32 CFR 170.4)

Cybersecurity Maturity Manual Certification (CMMC)

Level 3: Higher-Level Protection of CUI Against Advanced Persistent Threats

- Achieve CMMC Status of Level 2
 - See previous slide
- Undergo DCMAA's Defense Industrial Base Cybersecurity Assessment Center (DIBCAC)
 - **Every three years**
 - Results entered into CMMC eMASS
- Annual Affirmation
 - Verifying compliance with 110 identified requirements in NIST SP 800-171 Rev. 2
 - Part of CMMC Status of Level 2
 - Verifying compliance with 24 identified requirements in NIST SP 800-172*
- Limited POA&M Allowances (32 CFR 170.21(a)(3))
 - Must be closed out in 180 days

Cybersecurity Maturity Manual Certification (CMMC)

Phased Implementation Timeline



In some procurements, DoD may implement CMMC requirements in advance of the planned phase

International Sales

Export Restrictions

- International Traffic In Arms Regulations (ITAR)
- Export Administration Regulations (EAR)
- Others

Export Restrictions

- International Traffic In Arms Regulations
 - 22 C.F.R. § 120
 - Administered by the Directorate of Defense Trade Controls of the Department of State
 - Approval of the Directorate is required before exporting, or re-exporting, any defense related:
 - article
 - technical data
 - defense service
 - "Deemed export" – disclosing technical data to a person not a citizen or permanent resident of the United States, regardless of where the disclosure takes place

Export Restrictions

- International Traffic In Arms Regulations
 - Approval of the Directorate is required before engaging in certain brokering activities with respect to the transfer of defense items
 - Registration with the Directorate is required for manufacturers, exporters and/or brokers of defense items
 - Exceptions:
 - certain exports to Canada
 - re-exports to the governments of NATO countries, Australia and/or Japan
 - information in the public domain

Export Restrictions

- Export Administration Regulations
 - 15 C.F.R. § 730
 - Administered by the Bureau of Industry and Security of the Dep't of Commerce
 - Approval of the Bureau may, or may not, be required before exporting, or re-exporting, any non-defense related:
 - article
 - technology
 - "Deemed Export" – disclosing technology to a person not a citizen or permanent resident of the United States, regardless of where the disclosure takes place

Export Restrictions

- Export Administration Regulations

- Generally, the more sophisticated the item, the less friendly the country of destination is to U.S. interests, the more likely it is that approval is required
- Whether approval is required is determined by reference to the Export Commodity Classification Number ("ECCN") and the Country Chart
- Exceptions
 - *de minimis* rule
 - information in the public domain

Export Restrictions

- Other
 - Office of Foreign Assets Control Regulations, 31 C.F.R. § 500-599
 - Department of Energy Regulations, 10 C.F.R. § 810

Foreign Corrupt Practices Act

- 15 U.S.C. § 78dd-1
- Anti-Bribery Provisions, 15 U.S.C. § 78dd-3
- Accounting Provisions, 15 U.S.C. § 78m(b)(2)(A)

Foreign Corrupt Practices Act

■ Anti-Bribery Provisions

- Prohibits offering or "giving anything of value to . . . any foreign official for the purposes of . . .
 - influencing any act or decision of such foreign official in his official capacity,
 - inducing such foreign official to do or omit to do any act in violation of a lawful duty of such official, or
 - securing any improper advantage
 - in order to . . . obtain[] or retain[] business. . . ."
- Prohibition applies to direct payments and indirect payments (e.g., agent makes an improper payment)

Foreign Corrupt Practices Act

- Anti-Bribery Provisions

- Exceptions:

- "Grease payments"
 - Bribe is authorized by the law of the country in which the bribe is paid (caution – Department of Justice asserts that no country's law authorizes such payments)

Foreign Corrupt Practices Act

■ Accounting Provisions

- Applies to companies registered with the Securities and Exchange Commission
- Requires company to "make and keep books . . . which, in reasonable detail, accurately reflect the transactions and [dispositions] of the company's assets"
- Requires companies to "proceed in good faith to use [their influence] to ensure that companies in which they hold stock likewise make and keep accurate books"

Anti-Boycott Provisions

- 15 C.F.R. § 760
- Promulgated in response to the Arab League's Boycott of Israel
 - Primary boycott – boycotting country won't purchase from Israel
 - Secondary boycott – boycotting country won't purchase from companies contracting with Israel
 - Tertiary boycott – boycotting country won't purchase from contracting companies contracting with Israel

Anti-Boycott Provisions

- Prohibits U.S. persons from complying with any unauthorized secondary or tertiary boycott
- Permits U.S. persons to comply with unauthorized primary boycotts, however, representations must be affirmative, not negative
 - E.g., statement that "goods are of Japanese origin" is permitted
 - Statement that "goods are not of Israeli origin" is prohibited
- Prohibits U.S. persons from discriminating based on race, religion, etc.
- Prohibits U.S. persons from providing any information regarding the person's compliance with unauthorized boycotts to a boycott requester
- Requires U.S. persons to report requests to support an unauthorized boycott

Foreign Military Sales

- Foreign Military Sales
- Direct Sales Financed with Foreign Military Funding

Foreign Military Sales

- Process
 - Letter of offer and acceptance between foreign purchaser and the U.S. Department of Defense
 - U.S. Department of Defense contracts with U.S. industry using standard FAR rules
- Compliance issues are the same as with any procurement by the Department of Defense
- Additional compliance issues:
 - Contingent agent fees are limited to \$50,000 (if allowed at all)

Foreign Military Sales

- Direct Sales Financed with Foreign Military Funding
 - Process
 - Foreign purchaser contracts directly with U.S. company
 - Foreign purchaser signs Certification and Agreement with Defense Security Corporation Agency
 - Compliance issues are the same as with any international direct sale
 - Additional compliance issues:
 - FMF may not typically be used to fund contingent agent fees
 - FMF can be used only to fund the value of the U.S. origin content
 - FMF may not typically be used to fund offset requirements



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