

Ethics

ABA Group, POGO Weigh in on Proposal To Mandate Contractor Disclosure of Crimes

The American Bar Association Section of Public Contract Law and the Project on Government Oversight have submitted comments on the recent proposal to require federal contractors to disclose violations of criminal law in connection with contracts or subcontracts valued at \$5 million or more, with the bar group arguing that the rule lacks a statutory basis and the oversight group contending that the proposal does not go far enough.

According to the ABA section, there is “no statutory authority” for issuance of a Federal Acquisition Regulation rule providing for mandatory disclosure of criminal acts. “The FAR Council therefore lacks the authority to issue the regulation,” the section said in its Jan. 18 comments, citing *Am. Fed. of Labor & Congress of Indus. Orgs. v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979).

The mandatory disclosure requirements that would be applicable to contractors under the proposed rule, which was issued Nov. 14, 2007 (88 FCR 457, 11/20/07), “are neither the product of specific congressional findings or legislation nor any perceived critical national need,” the ABA section wrote.

It contrasted the proposed FAR disclosure mandate with other mandatory disclosure programs, such as those put in place as a result of the Sarbanes-Oxley Act, the Anti-Kickback Act, and the Foreign Corrupt Practices Act. Those programs “are targeted towards a particular public need and in most cases are the product of legislation that was enacted in response to a specific scandal or important national need,” the group said.

“Similar justifications have not been proffered for the proposed rule,” the section said in its critique. There is “little factual analysis of the need for the proposed rule,” it said--a position also taken in comments on the proposal submitted by representatives of the contractor community (89 FCR 55, 1/22/08).

The proposed rule, initiated at the request of the Justice Department, would require timely reporting to the agency inspector general and contracting officer whenever the contractor has “reasonable grounds to believe that a principal, employee, agent, or subcontractor of the contractor has committed a violation of federal criminal law in connection with the award or performance of any government contract performed by the contractor or subcontractor thereunder.”

It also would establish as grounds for suspension and debarment the “knowing failure to timely disclose” an overpayment on a government contract or a violation of federal criminal law in connection with the award or performance of any government contract or subcontract.

ABA Section Questions DOJ Position.

In asking the Office of Federal Procurement Policy to propose a new FAR rule on disclosure, DOJ argued that a more stringent approach is necessary due to decreased participation by defense contractors in the Defense Department Voluntary Disclosure Program, a joint DOD-DOJ initiative established in 1986 to promote voluntary disclosure of violations of criminal law.

However, the ABA section asserted that DOJ's statement concerning the level of activity in the disclosure program “does not establish that there is a need for a mandatory disclosure program.” Like several contractor groups that submitted comments in opposition to the proposed rule (89 FCR 55, 1/22/08), the bar group suggested that declining use of the DOD-DOJ voluntary program could be the result of increased disclosures via other avenues, insufficient incentives in the DOD-DOJ program, improved administrative resolution of potential issues, and the impact of contractor training and compliance programs.

DOJ should offer factual support for its assumption that criminal activity is being discovered by contractors but not reported, and should explain why less burdensome alternatives--such as improving existing voluntary disclosure programs--will not achieve the desired results, the ABA group urged.

Need for Additional Disclosure Also Questioned.

The ABA section also questioned the need for the proposed disclosure requirements, in light of the new FAR rule that requires federal contractors receiving awards of more than \$5 million and involving work in excess of 120 days to put in place a written “code of business ethics and conduct” (88 FCR 485, 12/4/07). Under the new rule, which went into effect Dec. 24, 2007, contractors also must display fraud hotline posters provided by the office of inspector general of the contracting agency unless they have an internal reporting mechanism in place.

Further, the ABA section pointed to the “existence of other voluntary disclosure programs and incentives,” such as those in the Federal Sentencing Guidelines, the False Claims Act, and the existing suspension/debarment regime, in suggesting that the additional mandatory disclosure requirements in the proposed rule are unnecessary. Because the proposed rule “may eliminate any mitigation that contractors might obtain in suspension/debarment, criminal, or FCA proceedings by virtue of voluntarily disclosing wrongdoing,” the group said, it “might actually create a perverse incentive for contractors to refrain from disclosing wrongdoing, notwithstanding the mandatory reporting mechanism.”

Elimination of Expanded Penalties Urged.

The ABA section also called for withdrawal of the proposed rule provision incorporating a new basis for suspension and debarment for failure to timely disclose an overpayment on a contract. It argued that:

- there is no demonstration that present FAR provisions requiring disclosure of overpayments are ineffective or that the additional threat of suspension and debarment penalties is expected to “materially improve” reporting of overpayments;
- there is no explanation as to why overpayments need to be treated as anything other than matters of contract administration, as they traditionally have been; and
- the rule “inappropriately seeks to elevate suspension and debarment from its protective role to that of a penalty,” which “in the absence of an authorizing statute...well may be invalid.”

The group also objected to the provision in the proposed rule requiring contractors to implement ethics programs that mandate “full cooperation” with government audits and investigations. The ABA section advised that the rule needs to make clear that:

- “no waiver of the attorney-client privilege is either required or imputed from the making of a disclosure under the proposed rule, and that assertion of the privilege in subsequent proceedings is not a failure to cooperate in an investigation”; and
- “cooperation” does not bar companies from conducting their own investigations, defending themselves and their employees, or indemnifying their employees' defense.

In addition, like several of the contractor groups that commented on the proposed rule, the bar group complained of the “vagueness” of the language, saying that the rule fails to define clearly “what is reportable and when the obligation to report is triggered.” As written, the rule “will create substantial implementation concerns” and “may deprive contractors and their employees of their due process rights,” the group said.

Among the numerous other issues identified by the ABA section in its 27-page comment letter were the failure of the rule to:

- “adequately reflect the stated intent to exempt commercial item contracts” from coverage under the rule; and
- address the potential liability of and costs to contractors that make disclosures concerning their subcontractors that turn out to be erroneous.

POGO Advocates Broader Rule.

On the opposite side of the spectrum, the Project on Government Oversight faulted the rule writers for limiting application of the mandatory disclosure requirements to violations of criminal law rather than applying them to “a broader array of unethical activity.”

While commending the proposal as “certainly an improvement” over the contract compliance system set out in the December 2007 rule, the government accountability advocacy group said in its Jan. 14 comments that the proposed mandatory disclosure requirement is “far too narrow and in need of clarification.”

The proposed rule's “narrow focus excludes a vast universe of misconduct that has bearing on contractors' 'satisfactory record of integrity and business ethics'; and their degree of 'integrity and honesty,’” POGO said. “Contractors do more than conduct business with the federal government and they can misbehave in ways that do not involve violations of federal criminal statutes,” the group pointed out.

Under the proposed rule, for example, contractors would not have to report whether they had their contractors terminated for default or whether they have violated the laws of a city, county, state, or foreign country. Nor would contractors have to report civil or administrative judgments or penalties assessed against them in matters involving the environment, public health, antitrust and securities law, workplace discrimination, and human rights, POGO said.

“As a result of its narrow focus, the proposed rule would limit the information provided to contracting officers, depriving them of information essential to ensuring and reducing unethical conduct,” POGO said. It urged the councils to “expand the scope of reporting to include all criminal, civil, and administrative violations so that contracting officers and the public have access to contractors' complete performance and responsibility track record.”

With respect to disclosure of violations of federal criminal law, POGO said the requirement is “ambiguous because it fails to adequately establish what a 'violation' is and when 'timely' disclosure must occur--after a violation occurs, after an internal review is performed, after a criminal case is filed, after a verdict by a court or jury, or after an appeal.”

The timing of a violation is “troublesome,” the group said, because “contractors often settle cases without any admission of fault or liability,” leaving open the question whether “a 'violation' occurred and whether it must be reported to the government.”

By Deborah Billings

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