Fluet

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Keep Calm and Investigate On:
Your Guide to Government Probes

ACC Association of Corporate Counsel

NATIONAL CAPITAL REGION

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Overview

- Compliance - Avoiding a Government Investigation
  - Building a Compliance Program
  - Legal Requirements
  - Government Expectations
  - Cases: Cybersecurity and FCA

- Investigations - Responding to a Government Investigation
  - Internal Investigations and Government Probes
  - Voluntary Disclosures and Mandatory Disclosures
  - Recent Cases

- Remediation - Applying Lessons Learned Post-Government Investigation
  - Evaluation Post-Probe
  - Suspension and Debarment
  - Takeaways

Compliance: Building a Compliance Program

- Conduct a Risk Profile
  - What is the company selling?
  - Where is the company selling/conducting business?
  - Who is selling (employees, consultants, subcontractors)?
  - Who are the company's customers?
  - What are the company's contractual and legal obligations?
  - What are company's strengths/weaknesses?
  - Other factors?
- Mitigation and Implementation
  - Once you've identified the company's risks, how can they best be mitigated?
  - Policies/Procedures
    - Training - who should be trained, and by whom on what, and when/how often?
    - Reporting - what are the mechanisms to report, how do employees know the procedure, what happens when a report comes in?
    - Audits - how often are audits conducted, by whom, what happens if an issue is found during an audit?
    - Revaluation - how often is the compliance program updated, is the program working for the company or are there improvements that can be made?

Compliance: Building a Compliance Program, *cont.*

- What does the Government think a good compliance program looks like?
  - Contractual Requirements
  - DOJ Guidance
  - Settlements/Cases

Compliance: Legal Requirements

- **FAR 52.203-13 Contractor Code of Business Ethics and Conduct**
  - Threshold - Included in government contracts (prime and sub) if the value of the contract is expected to exceed $6 million and the performance period is 120 days or more
  - Written Policy - Generally, within 30 days of contract award the contractor must have a written code of business ethics and conduct which is made available to all employees performing under the contract
  - Culture of Compliance - Exercise due diligence to prevent and detect criminal conduct and promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law
  - Disclosure - Timely disclose, in writing, to the agency OIG, with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed:
    - A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or
    - A violation of the civil False Claims Act (31 U.S.C. 3729-3733)

Compliance: Legal Requirements

–FAR 52.203-13(c)

- Threshold - This section does not apply if the Contractor has represented itself as a small business concern pursuant to the award of the contract or if the contract is for the acquisition of a commercial product or commercial service
- The Contractor shall establish the following within 90 days after contract award (unless the Contracting Officer establishes a longer time period):
  - An ongoing business ethics awareness and compliance program
  - An internal control system
- There are detailed requirements of what consists of an “ongoing business ethics awareness and compliance program” and an “internal control system”

Compliance: Legal Requirements

- **FAR 52.203-13(c)(1) – What does *"[a]n ongoing business ethics awareness and compliance program"* mean?**
  - Must include reasonable steps to communicate periodically and in a practical manner the Contractor's standards and procedures and other aspects of the Contractor's business ethics awareness and compliance program and internal control system, by conducting effective training programs and otherwise disseminating information appropriate to an individual's respective roles and responsibilities
  - The training conducted under this program shall be provided to the Contractor's principals and employees and, as appropriate, the Contractor's agents and subcontractors

Compliance: Legal Requirements, *cont.*

- **FAR 52.203-13(c)(2) – What does *"[a]n internal control system"* mean?**
  - Must establish standards and procedures to facilitate timely discovery of improper conduct in connection with Government Contracts, and ensure corrective measures are promptly instituted and carried out
- **Minimum requirements for the internal control system:**
  - Responsibility and Resources **-** Assign responsibility at a sufficiently high level and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system
  - Role-Model **-** Reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business ethics and conduct

Compliance: Legal Requirements, *cont.*

- **Minimum requirements for the internal control system (continued):**
  - Periodic Reviews - Periodic reviews of company 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
  - Reporting - An internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports
  - Disciplinary Action - Disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct
  - Disclosure - Timely disclosure, in writing, to the agency OIG, with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of any Government contract performed by the Contractor or a subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C. or a violation of the civil False Claims Act (31 U.S.C. 3729-3733)

Compliance: Legal Requirements, *cont.*

- **FAR 52.203-14 Display of Hotline Poster(s)**
  - Threshold - Included in (prime and sub) contracts where the contract exceeds $6 million (or a lesser amount established by the agency), and the agency has a fraud hotline poster, or the contract is funded with disaster assistance funds
    - It does not apply to commercial product or commercial service acquisition contracts or to contracts performed entirely outside the United States
  - Display of Hotline Posters - During contract performance, the Contractor must prominently display in common work areas within business segments performing work under this contract and at contract work sites agency fraud hotline poster or Department of Homeland Security (DHS)
    - The poster(s) must also be displayed on the company's website
      - However, if the Contractor has implemented a business ethics and conduct awareness program, including a reporting mechanism, such as a hotline poster, then the Contractor does not have to display any agency fraud hotline posters as required by this clause, other than any required DHS posters

Compliance: Legal Requirements, *cont.*

- Other Legal/Contractual Requirements
  - False Claims Act
    - "New" Kid on the Block: Cybersecurity Requirements (more on this later)
  - Anti-Kickback Act
  - Foreign Corrupt Practices Act

Compliance: Government Expectations

- U.S. Department of Justice Criminal Division Evaluation of Corporate Compliance Programs (ECCP)
  - Last updated September 2024
  - Meant to assist prosecutors in making informed decisions as to whether, and to what extent, the corporation's compliance program was effective at the time of the offense and is effective at the time of a charging decision or resolution, for purposes of determining the appropriate:
    - Form of any resolution or prosecution;
    - Monetary penalty, if any; and
    - Compliance obligations contained in any corporate criminal resolution (e.g., monitorship or reporting obligations)
  - Should be used to assist your company in developing its compliance program!

Compliance: Government Expectations

- **ECCP Fundamental Questions:** The Justice Manual notes three *"fundamental questions"* a prosecutor should ask:

1. Is the corporation's compliance program well designed?
2. Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively?
3. Does the corporation's compliance program work in practice?

- The company should be asking these questions and assessing the answers *before* a prosecutor does!

Compliance: Government Expectations, *cont.*

- Is the Corporation's Compliance Program Well Designed?
  - Risk Assessment
  - Policies and Procedures
  - Training and Communication
  - Confidential Reporting Structure and Investigation Process
  - Third Party Management
  - Mergers & Acquisitions

Compliance: Government Expectations, *cont.*

- Is the Corporation's Compliance Program Adequately Resourced and Empowered to Function Effectively?
  - Commitment by Senior and Middle Management
  - Autonomy and Resources
  - Compensation Structures and Consequence Management

Compliance: Government Expectations, *cont.*

- Does the Corporation's Compliance Program Work in Practice?
  - Continuous Improvement, Periodic Testing, and Review
  - Investigation of Misconduct
  - Analysis and Remediation of Any Underlying Misconduct

Compliance: Cases Cybersecurity and FCA

- CMMC and Cybersecurity - Hot Topic
  - Final Rule recently published effective December 16, 2024
    - DoD's Cybersecurity Maturity Model Certification (CMMC) Program will verify contractors have implemented required security measures necessary to safeguard Federal Contract Information (FCI) and Controlled Unclassified Information (CUI)
- DOJ launched its Civil Cyber-Fraud Initiative in 2021
  - Uses the FCA to prosecute cybersecurity-related fraud
  - June 16, 2022: DoD notes that failure to comply may be a material breach of contract
- Oct. 2024, $1.25M settlement by Penn State to resolve alleged violations of the FCA due to non-compliance with cybersecurity requirements in 15 DoD and NASA contracts and subcontracts
- May 2024, $2.7M settlement by Insight Global LLC to resolve alleged violations of the FCA due to failing to implement adequate cybersecurity measures to protect health information obtained in performing a COVID-related government contract
- Ongoing, Georgia Tech
  - DOJ intervenes in whistleblower case, alleges it knowingly failed to meet cybersecurity requirements under DoD contracts

Investigations: Internal Investigations

- Who conducts the investigation?
  - HR?
  - In-House Legal?
  - Outside Counsel?
- Scope of Document Preservation?
- Scope of Investigation?
- Parallel with Government Investigations?

Investigations: Voluntary Disclosure

- DOJ's January 2023 Voluntary Self-Disclosure Policy
  - The Carrot - Presumption of Declination for self-disclosure, full cooperation, and timely/appropriate remediation
  - The Stick - Limited Credit without Voluntary Disclosure, even with cooperation and remediation
  - What is full cooperation?
    - Proactively sharing non-privileged facts, identifying the individuals responsible
    - Timely preservation, collection and disclosure of documents
  - What is Timely and Appropriate Remediation?
    - Root cause analysis, implementation of effective ethics/compliance program, discipline, document retention, and acceptance of responsibility
    - This should avoid a monitor
      - *See* 9/15/22 DAG Memo
  - What's the Catch?
    - Claw-Backs? *See* 9/15/22 DAG Memo at 10
    - Collecting Personal Devices?
      - *See* 9/15/22 DAG Memo at 11

Remedies: What is the Worst that Could Happen?

- Remedies
  - Administrative
  - Civil
  - Criminal
- Coordination of Remedies

Remediation: Applying Lessons Learned Post-Government Investigation

- Evaluation Post-Probe
- Suspension and Debarment
- Takeaways

Lesson #1

Testing, Schmesting

- A prime contract involving a state's emergency assistance program required cybersecurity testing before going live
- The subcontractor agreed to do the testing, but could not complete it
- The prime took over and also could not complete it, *so…*
- They went live anyway, resulting in a cyber incident where PII appeared on the internet within 12 hours of going live, and some was accessed by commercial search engines (although none of viewed or used by unauthorized parties)
- No problem, right?

Lesson #1

“No Harm, no Foul” is not a Defense…

– Office of Public Affairs | Consulting Companies to Pay $11.3M for Failing to Comply with Cybersecurity Requirements in Federally Funded Contract | United States Department of Justice

Lesson #2

Subcontractor Costs are What They are, Right?

- A parent company owns the prime contractor and its subcontractor on a Navy contract to repair and maintain aircraft to train naval aviators
- The prime and sub enter into a cost-plus-percentage-of-cost subcontract, giving the sub a fixed 32% mark-up on its own costs
- Qui tam relators trigger an investigation by DoD IG and NCIS Economic Crimes Field Office

Lesson #2

Audit Your Subcontractors, Even/Especially if Related!

- Office of Public Affairs | Sikorsky Support Services Inc. and Derco Aerospace Inc. Agree to Pay $70M to Settle False Claims Act Allegations of Improper Markups on Spare Parts for Navy Trainer Aircraft | United States Department of Justice
  - Restitution was roughly 50% of the settlement

Lesson #3

When in You're in a Hole, Stop Digging!

- A contractor supporting DLA sold roughly $500k in cables used for military vehicles
- The cables did not meet required tests, so the contractor falsified the tests and then failed to keep records, but
- The company initiated an internal investigation, made a Mandatory Disclosure, bought back the remaining cables, and terminated the four employees involved

Lesson #3

Even Doing the Right Thing Can End in Double Damages…

- Office of Public Affairs | Prysmian Cables Settles Allegations of Falsified Test Results and Failure to Test Cable Used in Military Vehicles | United States Department of Justice
  - Restitution was roughly 50% of the settlement

Lesson #4

No One Checks a Self-Assessment, Right?

- Compliance with Cybersecurity can be hard and who wants to do all that work?
- A major research university failed to develop and implement a system security plan because a big-deal professor didn't want his lab to have antivirus software installed
- What to do when academic freedom runs into government regulation (that was a condition of a contract award), just make up the results of your self-assessment … and draw the attention of a whistleblower

Lesson #4

"Grade Inflation" Does Not Make the Grade with DOJ!

- Office of Public Affairs | United States Files Suit Against the Georgia Institute of Technology and Georgia Tech Research Corporation Alleging Cybersecurity Violations | United States Department of Justice
  - Investigation conducted by DoD OIG, DCIS, USAF OSI and USAF Material Command

Lesson #5

Substitute Parts are Just as Good, Right?

- A contractor manufacturing combat ships for the Navy delivered hulls with parts that did not meet specifications, had not been tested, and which had been substituted for proper parts

Lesson #5

Supplying Nonconforming Parts … Endangers the Lives of U.S. Servicemembers!

- Office of Public Affairs | Austal USA LLC Agrees to Settle False Claims Act Allegations Involving Navy Ships | United States Department of Justice
  - Restitution was a little less than half of the settlement

Lesson #6

Compliance is Expensive, but Not as Expensive as Non-Compliance…

- A major defense contractor submitted a voluntary disclosure that it violated the Arms Export Control Act and the International Traffic in Arms Regulations **750** times, including unauthorized exports of defense articles, including classified defense articles

Lesson #6

Debarment Can Be Avoided, Even for 750 Violations!

- U.S. Department of State Concludes $200 Million Settlement Resolving Export Violations by RTX Corporation - United States Department of State
  - Half of the settlement to be used for remediation;
  - A Designated Official will focus on policies and procedures; oversee compliance, remediation and incorporate that into senior management business plans; and report to the CEO of the company and the Director of DDTC
  - The Company's Legal Department must support the Company's compliance with the Consent Order

Lesson #7

Internal Controls Matter…

- The subsidiary of a publicly traded defense manufacturer bribed foreign officials to win business or to exclude competitors **over three years**, using third-party agents and distributors to mask the bribes as legitimate business expenses, enriching the company by $500k
- The parent company disclosed to DOJ and updated the SEC on the internal investigation
- The company terminated employees, and third parties involved, enhanced internal controls and enhance global compliance, including training

Lesson #7

Proper Controls Prevent Problems From Continuing Undetected!

- SEC.gov | SEC Charges U.S.-Based Moog Inc. with FCPA Violations for Subsidiary's Role in Indian Bribery Scheme
  - The fine was 2x the disgorgement (for a total of 3x the amount at issue)

Lesson #8

Winners Never Cheat…

- A U.S. subsidiary of a foreign energy company was one of three bidders on a $500M infrastructure project, each of whom signed an NDA
- An insider shared confidential information of the other bidders with the subsidiary, who used the information to revise the subsidiary's bid (after sharing it with executives of the subsidiary and the parent company), ultimately winning the bid
- Four employees involved pleaded guilty to criminal charges
- The company pleaded guilty, too

Lesson #8

…And Cheaters Never Win!

- Eastern District of Virginia | Siemens Energy, Inc. pleads guilty to stealing confidential competitor information in $104M resolution after former corporate executive and others were sentenced | United States Department of Justice

Lesson #9

Payments to Suppliers are ok, Right?

- A major defense contractor paid an agent (who was related to members of a foreign government customer) $30M over two decades in connection with obtaining contracts, ignoring red flags
- The agent's work was ghost-written by a company employee to cover up the sham supplier nature of the bribes
- The company did not cease efforts despite questions by the SEC, until new management took over post-acquisition

Lesson #9

A Company is Responsible for its Agents and Cannot Turn a Blind Eye…

- SEC.gov | SEC Charges Virginia-Based RTX Corp. with Violating Foreign Corrupt Practices Act in Connection with Efforts to Obtain Contracts with the Qatari Military
  - $124M settlement, including $49M disgorgement

Lesson #10

Return of the $600 Hammer?

- On a multi-billion contract from the purchase of spare aviation parts, a call to the DoD Hotline asked if one of these should cost ***80x*** the other?

Lesson #10

What Should a Contractor do When the Recommendations Are About You?

- Audit of C-17 Spare Parts Pricing (Report No. DODIG-2025-009) > Department of Defense Office of Inspector General > DoD OIG Reports

Final Thought:

Does Bad News Come In Threes?

– Office of Public Affairs | Raytheon Company to Pay Over $950M in Connection with Defective Pricing, Foreign Bribery, and Export Control Schemes | United States Department of Justice

Questions?

*Let's "Keep Calm and Investigate On," **Together!***

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