



Tuesday, October 2, 2012

2:30 PM - 4:00 PM

206 – Best Practices for Managing Federal Funding and Government Contracting

Dismas Locaria

Associate

Venable LLP

Lisa Morris

Compliance Officer

LA Conservation Corps

Colleen Struss

Director of Finance / CLO

AAAS

Stephanie Tsacoumis

General Counsel

Georgetown University

Faculty Biographies

Dismas Locaria

Dismas Locaria is an associate in Venable LLP's government contracts group. Mr. Locaria's practice focuses on assisting government contractors in all aspects of working with the federal government, as well as representing and counseling clients in the homeland security field.

Mr. Locaria has represented clients before various federal agencies, including the various components and sub-agencies within the Department of Defense, GSA, SBA, HSS, EPA, Army Corps. of Engineers, Maritime Administration, as well as others. The subject of these representations has ranged from suspension and debarment and regulatory matters, to contract procurement, and administration. Mr. Locaria also has extensive experience in client counseling, including assisting clients with the nuances of becoming government contractors and implementing appropriate systems and methods to achieve and maintain regulatory and contractual compliance.

Mr. Locaria provides pro bono contract formation and negotiation advice to worthy non-profit organizations, as well as representing various indigent persons in Social Security insurance claims as well as indigent persons embroiled in landlord/tenant disputes.

Mr. Locaria received BA's in political science and economics from San Francisco State University and is a graduate of the University of Maryland School of Law.

Lisa Morris

Lisa D. Morris serves as the compliance officer of the Los Angeles Conservation Corps (LA Conservation Corps), which provides at risk youth with job training, education, and work experience with an emphasis on conservation projects. She is primarily responsible for ensuring legal and contractual compliance for about 150 federal, state, local, and private grants. Ms. Morris oversees the agency's contract management, internal audit, and records management systems. She is member of the agency's executive management team and serves as the liaison for the board of directors on audit-related matters.

Prior to joining the LA Conservation Corps, Ms. Morris served as in-house counsel at Crystal Stairs, a childcare development agency in Los Angeles. While at Crystal Stairs, Ms. Morris provided legal counsel to the organization in a variety of substantive areas, including employment law, contract law, and corporate governance.

She is currently on the board of directors of the Neighborhood Legal Services of Los Angeles County and is a member of the Association of Corporate Counsel.

Ms. Morris holds a BA in sociology from UC Santa Barbara and is a graduate of Pepperdine University School of Law. She is certified as a senior professional in human resources.

Colleen Struss

Colleen K. Struss is the director of finance and chief legal officer for the American Association for the Advancement of Science (AAAS), publisher of the peer-reviewed scientific *Journal Science*, in Washington, D.C. In her role as director of finance, she oversees and directs the financial operations of the association and its subsidiary, including audit, financial reporting, tax, budget preparation and analysis, and grants management. Ms. Struss directs and implements domestic and international tax strategies for the association, and devises policies and implements procedures to ensure sound financial operations for the association as well as compliance with relevant legal and regulatory authorities. As chief legal officer, Ms. Struss develops and implements corporate structure recommendations, oversees legal, tax and intercompany transfer pricing arrangements for branch and international subsidiary operations, reviews contractual agreements for the association, assists offices as lead negotiator for major contracts, including leases and multi-million dollar service contracts, oversees bond compliance matters, and serves in a general advisory capacity to senior management.


She is a member of the Virginia Bar Association and the ABA, as well as the AICPA, GWCPA and other professional accountancy organizations, and volunteers in a number of local community non-profit organizations in the Northern Virginia area.

Ms. Struss holds a degree in accounting from Iowa State University and received her JD, cum laude, from George Mason University School of Law.

Stephanie Tsacoumis

Director - Global Compliance, Legal Power Solutions
Johnson Controls, Inc.

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Overview

- Audit/Compliance Review
- Joint Arrangements
- Compliance Best Practices
- When Something Goes Wrong

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Section 1: Audit / Compliance Review

Colleen Struss
Director of Finance / CLO
AAAS

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Section 1: Overview

- Changes in regulatory landscape
 - Focus is on Accountability and Transparency
- What applies to your organization (generally)?
 - OMB Circulars, FARs
 - Audit requirements
- What regs come with the award?
 - Grant, Cooperative Agreement, Contract

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Changes in Regulatory Landscape

- Transparency and Accountability
 - Congress is watching / very interested
 - Executive Orders
- Some new regs already in place
 - Financial Conflicts of Interest
 - Already in place at HHS; expected elsewhere

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Regulations that Apply

- Grants, Cooperative Agreements, Contracts, POs
 - Grants, Cooperative Agreements = OMB Circulars
 - Contracts = FARs
- Implications:
 - Management Issues
 - Flow-down / flow-up requirements
 - Audit requirements

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OMB Circulars

- Revisions coming – COFAR ideas for reform
 - COFAR (Council on Financial Assistance Reform)
 - Recommendations – Cost Principles
 - Consolidate A-21, A-87, A-122 into one circular
 - Substantive changes to indirect cost rates (e.g., flat rate)
 - Some simplifications to current reasonableness studies
 - Recommendations – Administrative Circulars
 - Consolidate A-102, A110, A-89 into one circular
 - Require agency to perform pre-award merit and financial risk reviews
 - Require agencies to provide standard-format, timely notice of funding opportunity

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A133 Audits

- Changing regulatory landscape
 - The “accountability” lens
 - Executive Orders
 - Improve regulation and regulatory review
 - Eliminate overly burdensome regulations, but keep a strong focus on accountability
 - Improve effectiveness of audits

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A-133 Audits, *cont'd*

- Changes proposed:
 - Six month due date, higher audit threshold - - no big changes
- Some agencies beefing up their own regs
- Continued focus on subs
 - In-house counsel can be critical to ensuring compliance and strong oversight
 - Build compliance enforcement mechanisms into subrecipient agreements
 - Work with program offices on management and enforcement

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A-133 Audit, *cont'd*

- Why is this audit important to counsel?
 - Compliance audit
 - Ensure agreements have appropriate clauses
 - Good communication essential
 - Document, document, document. Then add a flowchart.
 - Expect more audit scrutiny of your contracting processes
 - Selection, agreement, review, monitoring, reporting - - all subject to scrutiny

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A-133 Audit, *cont'd*

- Tips for the audit
 - Anticipate what will be reviewed
 - Work closely with Finance team
 - Do not accept findings until you fully understand cause and impact
 - Expect more focus on documentation of reviews and evidence of compliance
 - Do a post-mortem on your audit and incorporate lessons learned into compliance program

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What Comes with Your Award?

- Grants / Cooperative Agreements
 - OMB Circulars, A-133
- Contract
 - FARs
 - Understand applicability for different funding levels
 - Flow-down rules (both to you and from you)
- Evidence of Compliance
 - Flowcharting for procedures
 - Documentation, documentation, documentation
 - Be able to prove a positive, not just avoid a negative


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Resources

- OMB Circulars
 - http://www.whitehouse.gov/omb/circulars_default
 - Proposed A133 revisions:
http://www.whitehouse.gov/omb/fedreg_rev_a133
- HHS FCOI
 - <http://grants.nih.gov/grants/policy/coi/>
- FARs
- AICPA


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Section 2: Joint Arrangements, Mandatory Disclosures and False Claims

Stephanie Tsacoumis
Distinguished Visitor from Practice
Georgetown University Law Center

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Section 2: Overview

- Subcontracting and JVs
- Teaming Arrangements
- Prime/Sub Structure vs. JV
- Key Terms
- Mandatory Disclosures

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Subcontracts and JVs

- Procurement requirements and complexity may necessitate resources and skills of multiple parties
- Contract “bundling” continues to be common (notwithstanding legislative action to impose new requirements on “bundling”)(e.g., 2010 amendments to Small Business Act)
- Result is variety of arrangements among contracting participants:
 - Traditional prime/subcontractor arrangement (often preceded by a teaming agreement or letter of intent)
 - Joint venture (separate legal entity, such as LLC)

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Teaming Arrangements

- “Contractor team arrangement” is an arrangement where:
 - Two or more companies form a partnership or JV to act as a potential prime contractor
 - A potential prime contractor agrees with one or more other companies to have them act as subcontractors (FAR 9.601)
- May be entered into at any point in acquisition process; most frequently pre-offer
- Recognized by government if fully disclosed:
 - In offer, or
 - Before arrangement becomes effective (for arrangements after submission of offer) (FAR 9.603)

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Prime/Sub Structure vs. JV

- JV:
 - formation more time consuming, complex and expensive
 - JV is offeror/bidder and will be contracting party; must be established before offer/bid
 - governance, management and financial issues usually addressed up front
 - JV generally must be capitalized or secure funding commitments
 - consider affiliation rules for SBA purposes
 - can be used for multiple RFP's/contracts
 - often results in more control over cost structure
 - can have significant tax and accounting implications
- Prime/Sub with Teaming Agreement
 - terms of teaming agreement critical
 - generally specific to one offer/bid
 - prime may be less economically or otherwise committed to subcontractor
 - concern with bid shopping by prime
 - teaming agreement may be viewed as “de facto” JV under SBA affiliation rules
 - antitrust considerations

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Teaming Agreements: Key Terms

- Scope and duration
- Binding agreement (vs. unenforceable intentions)
- Designation of prime and sub
- Responsibilities of prime and sub
- Exclusivity/noncompetition (and remedies if prime secures another "partner" or performs in-house)
- Confidentiality/non-disclosure
- Protection of intellectual property rights
- Participation of subcontractor in negotiations with government regarding subcontract plan
- Terms of ultimate subcontract
- Termination rights
- Compensation rights


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Subcontractor Issues

- Records:
 - Prime contractor access to subcontractor records
 - Compliance with record retention requirements
- Conducting cost or price analyses of subcontractor proposals
- Scope of prime and subcontractor data disclosure and reporting obligations
- Establishing procedures for internal reviews and investigations, and for external disclosures and corrective actions
- Selecting and managing foreign subcontractors
- Incorporation of teaming agreement terms vs. explicit inclusion in subcontract

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FAR Mandatory Disclosure

- Government contractor reporting of fraud, false claims and receipt of significant overpayments to OIGs mandatory since 2008
- Regulatory requirement echoed in contractual requirement that also applies to subcontracts over \$5 million
- GSA OIG has received 59 disclosures through May 31, 2012, with the majority involving:
 - defective pricing
 - overbilling
 - time mis-characterization

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Mandatory Disclosure Issues In Practice

- Disclosure requirement hinges on “credible evidence” of actual criminal violations, False Claims Act violations or “significant” overpayments
 - “credible evidence” not defined, but higher standard than “reasonable grounds to believe”
- Disclosures must be “timely”
- Disclosures must be made by “principals”
- Disclosures must be made to the appropriate officials (OIGs with copies to COs)


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False Claims

- Two type of false claims
 - Criminal
 - Civil
- Criminal False Claims
 - Intentional fraud
 - Personal criminal sanctions


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False Claims, *cont'd*

- Civil False Claims
 - Claim – Broad definition
 - Falsity
 - Knowing submission
 - Deliberate ignorance of the falsity
 - Negligent or reckless disregard
 - Penalties
 - Fines of \$5,500 to \$11,000 per violation
 - Treble damages
 - Suspension/debarment

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False Claims, *cont'd*

- Other False Claims Issues
 - Implied certification
 - *Qui tam* actions
 - The Fraud Enforcement and Recovery Act (FERA)
 - Seeks to overturn *Allison Engine Co.*
 - Extends FCA claims to progress payments
 - Does not require direct presentment to the government
 - Alters intent requirement from “intended to defraud” to “false claim was ‘material’ to the decision to pay the claim”
 - Liability for the failure to return overpayments

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False Claims Act Hot Issues

- Effort reporting
- Cost transfers
- Charging of administrative and internal services costs
- Cost sharing
- Cost allowability

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Section 3: Compliance Management Best Practices

Lisa Morris
Compliance Officer
LA Conservation Corps

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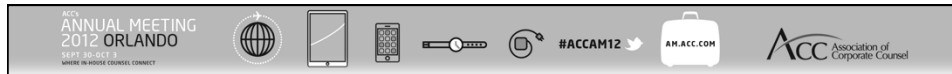


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Section 3: Overview

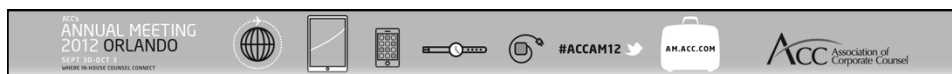
- Key Components
 - Policies and Procedures
 - Training
 - Internal Audit Systems
 - Coordination with Internal and External Stakeholders



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Compliance Policies and Procedures, cont'd

- Key Policies and Procedures
 - Contracts
 - Finance/Accounting
 - Signing Authority
 - Record Retention
 - Code of Ethics, Conflict of Interest, & Confidentiality
 - Disaster Recovery Plan




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Compliance Policies and Procedures, cont'd

- Contracting Policies and Procedures
 - Document Review Process
 - Proposal or Application
 - Grant, Cooperative Agreement, Contract or Subcontract
 - Bid documentation
 - Progress or Final Reports (e.g. ARRA Funding Reports)
 - Corrective Action Plan
 - File Maintenance
 - Proposal File
 - Contract File
 - Fiscal File

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Compliance Policies and Procedures, cont'd

- Finance/Accounting
 - Invoicing, Payments, Receipts, Budgeting, Reporting, Internal controls
- Signing Authority
 - What? Who? How much?
- Record Retention
 - Document Destruction Schedule
- Code of Ethics, Conflict of Interest, & Confidentiality
 - Training, Acknowledgement Form, Disclosure Form
- Disaster Recovery
 - People, Communication, Facility, Technology

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Compliance Training

- Selecting training topics
 - Policies and Procedures
 - Laws and Regulations
 - Code of Ethics
- Identifying your audience
- Maximizing training attendance


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Internal Audit System

- Elements
 - Periodic reviews (site or desk reviews)
 - Business Support
 - Programs or Operations
 - Subcontractors
 - Reports
 - Track progress with meeting deadlines and deliverables
 - Internal Reporting Mechanism
 - Code of Ethics hotline
 - Corrective Action Monitoring
- In-house Internal Audit Function v. Outsourcing


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Coordination with Internal Stakeholder(s)

- Finance Staff
 - Coordinate on reporting, monitoring/audit reviews, and training
- Program and Operations Staff
 - Periodic site visits, compliance training, resource tools performance issues
- Legal Staff
 - Preparation or review of subcontracts, policy review, legal analysis
- Board and Audit Committee
 - Periodic reporting

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Coordination with External Stakeholder(s)

- Program Analyst or Monitor
 - Ensure timely communication and reporting
 - Establish a schedule for monitoring visits
 - Identify in advance documents for on-site monitoring reviews.
 - Clarify or challenge any findings of non-compliance in writing.

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Summary

- Best Practices Summary
 - Establish agency-wide compliance policy and procedures.
 - Maintain thorough records.
 - Provide compliance training to all levels of staff.
 - Establish internal monitoring and reporting system.
 - Establish corrective action plan and monitor implementation of corrective action measures.
 - Work with your stakeholders (i.e. funder, Board, and Finance, Legal, Program or Operations staff).
 - Regularly review and modify, if necessary policies and procedures and internal controls.

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Section 4: When Something Goes Wrong

Dismas Locaria
Associate
Venable, LLC

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Section 4: Overview

- Audit Function
- Internal Investigations
- Disclosure
- When the Government Comes Knocking
- Subpoena

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Audit Function

- Audit and compliance role players
 - Board Audit committee
 - Finance
 - Legal
 - Internal audit
- Separation of powers?
- Audit plan
 - Scope
 - Compliance
 - Ethics
 - Policies and Procedures
 - Confidentiality
- Reporting

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Internal Investigations

- Internal reporting channels
 - Obligations to establish reporting channels
 - Sarbanes-Oxley (SOX)
 - Federal Acquisition Regulation (FAR)
 - Others
 - Handling internal reports
 - Investigate?
 - Required – SOX, FAR
 - Incentivized – SEC, FINRA, DOJ guidelines
 - Anti-retaliation
 - Confidentiality

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Internal Investigations, *cont'd*

- Considerations
 - Stop suspected conduct
 - Avoid conflicts of interest
 - Who will “control” the investigation
 - Use of outside counsel
 - Maintain “privilege” and confidentiality
 - Scope of investigation
 - Goal of investigation
 - Topic(s)
 - Documents
 - Interviews
 - Written findings
 - What will be done with the results
 - Disputes/appeals

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Internal Investigations, *cont'd*

- Best Practices
 - Clear and objective owner of investigation
 - Investigator must also be objective
 - Clearly define scope of investigation
 - Develop an investigation plan
 - Be willing to revisit plan and change course
 - Stop continuing misconduct
 - Preserve all potentially relevant documents (including emails)
 - Be prepared before interviewing employees
 - *Upjohn* warnings
 - Anti-retaliation policy
 - Confidentiality
 - Examine corrective measures

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Disclosures

- Mandatory disclosures
 - FAR
 - Credible evidence of a significant overpayment, civil false claim, federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations
 - Cognizant IG's office and contracting officer
 - SOX
 - Material changes in the financial condition or operation of the company
 - SEC filings
 - Federal agencies – grant authority
 - SOX-like reporting requirements
- Voluntary disclosures
 - DOJ
 - SEC's 21(a) Report for Voluntary Cooperation (Seaboard)
 - Financial Industry Regulatory Authority (FINRA)






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When the government comes knocking

- The “show-up”:
 - IG, DOJ, state regulators
 - Gather information
 - Decline statements – “need to speak with counsel”
 - Do not turn over documents
 - If you do turn over documents – turn over copies


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Subpoena

- Refer to subpoena to counsel
- Document preservation notice
- Document collection
 - Hard copies
 - Electronic records, including emails
- Document production
- Interview
 - Consult with counsel
 - Have counsel present