

ASSOCIATED BUILDERS AND CONTRACTORS, INC.

A GUIDE FOR COMPLYING
WITH THE
FEDERAL ACQUISITION REGULATION (FAR):
CODE OF BUSINESS ETHICS AND CONDUCT FOR
GOVERNMENT CONTRACTORS AND SUBCONTRACTORS

Background:

On November 23, 2007, the federal government published a final rule amending the federal acquisition regulations governing all future contracts for services and goods involving the General Services Administration (GSA), Department of Defense (DOD), or National Aeronautics and Space Administration (NASA). The amended regulations became effective on December 24, 2007. As a result, all government contractors and subcontractors are required to have and comply with an ethics program in order to qualify to be awarded government contracts. The following questions and answers are intended to explain the new requirements and provide guidance on what contractors can do to comply.¹

Q #1: What obligations do these new regulations impose on federal contractors and subcontractors in general?

ANSWER: Under the new regulations, federal contractors and subcontractors, in general, are required to do the following:

- a. Adopt a formal written code of ethics and business conduct within 30 days of a contract award, or have an existing code of ethics and business conduct;
- b. Distribute a copy of the written code to each employee;
- c. Implement a compliance awareness program and internal control system for compliance within 90 days of the contract award or already have an existing awareness program and internal control system;
- d. Display the appropriate agency Inspector General (IG) fraud hotline poster designated by the applicable contracting officer; *and*
- e. Comply with the above requirements on an ongoing basis.

¹ For the protection of members, ABC has solicited feedback from the GSA concerning the guidance provided herein. ABC is still waiting for GSA's response. While we do not anticipate the need to revise the guidance provided, should that be necessary based on the GSA's feedback, a revised guidance document will be published by ABC. Because the regulations require ongoing compliance, ABC recommended that contractors consult with their legal counsel before finalizing their code.

Q #2: Are there any circumstances when contractors will be exempted from the new requirements?

ANSWER: Yes, there are two exemptions as follows:

Exemption from implementing a compliance awareness program and internal control system: While all federal contractors and subcontractors will still be required to have and comply with a formal written code of business ethics and conduct, contractors will not have to have an awareness program and internal control system, if the contract meets *any* of the following conditions:

- a. Is valued at \$5 million or less;
- b. Has a performance period less than 120 days;
- c. Will be performed entirely outside the United States; *or*
- d. Is for the acquisition of a “commercial item,” as defined in the applicable acquisition regulations.

Exemption from having to display the applicable fraud hotline poster: While contractors will still be required to have and comply with a formal written code of business ethics and business conduct, contractors will not have to have to display the applicable agency fraud hotline poster, if the contract meets *any* of the following conditions:

- a. Is valued at \$5 million or less;
- b. Will be performed entirely outside the United States; *or*
- c. Is for the acquisition of a “commercial item,” as defined in the applicable acquisition regulations.

Q #3: Do the regulations state what specifically should be included in a contractor’s code of business ethics and conduct?

ANSWER: No. The regulations do not indicate what specifically should be included in a company’s ethics code. As a result, companies have a lot of latitude in the content of code they adopt. However, there are some caveats that companies should consider:

- a. Because the regulations require ongoing compliance, it is recommended that contractors consult with their legal counsel before finalizing their code. This will ensure that the terms of your company’s code are terms that the company can not only comply with, but also successfully defend if a challenge for non-compliance should later arise.
- b. Each contractor should adopt a code that it tailored to its specific operations. Contractors should steer away from merely adopting another company’s code of ethics “as is.” However, the use of another company’s code can nonetheless be useful in drafting a company’s code.

Q #4: Can you recommend any examples of codes of conduct that contractors can use when drafting their code of business ethics and conduct?

ANSWER: Yes. ABC recommends the following two online resources for contractors wishing to see examples of existing ethics codes:

Findlaw:
<http://smallbusiness.findlaw.com/business-forms-contracts/business-forms-contracts-a-to-z/form2-1.html>

Illinois Institute of Technology Center for the Study of Ethics in the Professions:
<http://ethics.iit.edu/codes/coe.html>

Q #5: What are the mandatory objectives of the compliance awareness program and internal control system?

ANSWER: The compliance awareness programs and internal control systems ***must:***

- a. Be suitable to the size of the company and extent of its involvement in Government contracting;
- b. Facilitate timely discovery and disclosure of improper conduct in connection with Government contracts; ***and***
- c. Ensure corrective measures are promptly instituted and carried out.

In addition to the three parameters listed above, the rule lays out the following **non-mandatory** recommendations for compliance awareness programs and internal control systems:

- a. Provide periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the contractor's code of business ethics and conduct;
- b. Utilize an internal reporting mechanism, such as a hotline, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports;
- c. Carry out internal and/or external audits, as appropriate;
- d. Administer disciplinary action for improper conduct.

Q #6: Can contractors obtain an extension of time to comply if they currently do not have the requisite programs in place?

ANSWER: Yes, but the contractor must request an extension from the contracting officer. Contracting officers have been given the authority to increase the 30 day time period for preparation of a code of business ethics and conduct and the 90 day time period for establishment of an ethics awareness and compliance program and internal control system, upon the request of the contractor.

Q #7: The new regulations require the display of the appropriate agency's Office of Inspector General (OIG) fraud hotline poster. What does this mean and where can contractors obtain the poster(s)?

ANSWER: The appropriate poster will depend upon each contracting agency's Inspector General (IG). For each contract, the contracting officer who is working with the contractor should, during the acquisition process, direct the contractor in writing to the appropriate posters to use, as well as how and where to obtain them. Contractors will need to review their contract documents carefully to ensure this information has been provided in the contract documents and, if not, ask for the contract office to provide the information.

NOTE: It is important to understand that the IG in each agency may have different requirements and information that the posters must contain. There is no central telephone number or website that serves as the hotline for all agency IGs. The specific information you will need post must be obtained from the contracting office for each specific contract.

Q #8: If a contractor already has a fraud reporting system in place, is the display of Government fraud hotline posters required?

ANSWER: No. A contractor does not need to display Government fraud hotline posters "if it has established a mechanism by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports."

Q #9: How will compliance to these new regulations be verified?

ANSWER: The contracting officer is not required to verify compliance, but may inquire at his or her discretion as part of contract administrative duties. Review of contractors' compliance would be incorporated into normal contract administration. The Government will not be routinely reviewing plans unless a problem arises. The Government does not need the code of ethics as a deliverable. What is important is that the contractor develops the code and promotes compliance of its employees. Additionally, it is stated that "the contracting officer does not judge the internal control system, but only verifies its existence."

The regulations also advise that a contractor's initial code and program may warrant changes based on the contractor's experience.

Q #10: Where can I get more information?

ANSWER: For more information, contact Bob Hirsch, ABC Director of Legal and Regulatory Affairs at hirsch@abc.org.