Government Contract Investigations

Navigate high-stakes inquiries while protecting valued customer relationships

Companies that do business with the US government face unique challenges in investigations related to their government contract compliance. The complex regulatory regimes imposed on federal contractors present contractual and regulatory risks with potentially high stakes: non-compliance can impact not only the contract at issue, but also the company's reputation with valued customers and its eligibility for future work. Whether prompted by government inquiries, claims by third parties, whistleblower reports, or routine internal compliance monitoring, companies involved in government contract inquiries need counsel who can assess the full range of legal risks and guide them in dealing with a variety of government stakeholders.

What Makes Government Contract Investigations Different from Other Types of Investigations?

Investigations involving government contracts can be particularly complex because of the highly technical regulatory and contractual requirements at issue, the risks associated with non-compliance, the unique disclosure obligations, and the number of government actors who can be involved. Compliance considerations include, for example, defective pricing, procurement integrity, foreign sourcing/country of origin, technical conformity of products and services, discounting practices, subcontracting and supply chain risk management, cybersecurity/privacy, socioeconomic program compliance, and conflicts of interest.

When a concern related to a government contract arises, it is important to assess a range of risks to determine whether an internal investigation is warranted, assess whether disclosure is mandatory or whether voluntary disclosure is appropriate, respond to any government inquiries, and identify and address the root cause of any problems.

A. Legal Risk Before a Contract Is Signed

Under federal procurement regulations, legal and business risk can arise before a contract is signed. For example, organizational conflicts of interest can be disqualifying.[1] Obtaining source selection information or competitor bid or proposal information and certain offers of post-government employment can implicate the Procurement Integrity Act, and could result in serious consequences, ranging from disqualification in a particular competition to debarment and criminal and civil penalties.[2] Inaccurate, incomplete, or noncurrent disclosures during contract price negotiations with the government can implicate the Truthful Cost or Pricing Data Act (formerly the Truth in Negotiations Act or TINA) for certain contracts, potentially resulting in contract price adjustments for defective pricing.[3] It is also important to be mindful of the risk of False Claims Act (FCA) liability for fraudulently inducing the award of a contract.[4]

Whereas TINA, when applicable, provides a contractual remedy of price adjustment for failure to submit current, accurate, and complete cost or pricing data, the *knowing* submission of materially false cost or pricing data or other than cost or pricing data can lead to much higher damages under an FCA theory of fraudulent inducement.

B. Layered Risks of Non-Compliance

The sheer volume and complexity of contract requirements arising from the Federal Acquisition Regulation (FAR) and agency supplements such as the Defense Federal Acquisition Regulation Supplement (DFARS) can make compliance more difficult in the government contracting context than in the commercial context. For example, government contracts can require US-made or designated country end products, or that contractors meet complex cybersecurity requirements.[5]

Moreover, non-compliance with potentially burdensome federal contract requirements may carry a higher legal risk than non-compliance with contracts between commercial entities, because of the prospect of FCA liability arising from express or implied certifications of compliance made to the government. Thus, it is important to consider how FCA risk can potentially be minimized or exacerbated by communications between the company and government officials, such as the contracting officer. For example, communications from a variety of company employees without review by a company's contracts or legal department could present more opportunities for false statements or certifications. On the other hand, contractor-government communications during the performance of a contract can be exculpatory, particularly where they contemporaneously disclose the potential non-compliance to the government.[6] Additional risk may arise from whistleblowing by former or current employees—and even by business competitors—under the FCA's "qui tam" provision.[7]

The prospect of treble damages makes the FCA an attractive enforcement tool for the Department of Justice (DOJ) in pursuing conduct by federal contractors and raises the stakes on compliance concerns.[8] FCA statutory penalties alone can be significant for lengthy contracts with numerous claims. Notwithstanding the Supreme Court's admonition that the FCA is not a "vehicle for punishing garden-variety breaches of contract or regulatory violations,"[9] companies may find themselves involved in protracted FCA investigations stemming from non-compliance with complex federal contracting requirements. In these situations, it can be cost-effective to work with experienced counsel who can help navigate and, where appropriate, expedite DOJ investigations.

Other federal laws also raise the stakes of government contract investigations, including the Anti-Kickback Act of 1986;[14] the Foreign Corrupt Practices Act;[15] criminal conflict of interest, bribery, and gratuity laws;[16] and Title 18 fraud and false statements statutes.[17] Government enforcement actions under these laws could expose a contractor and/or its employees to significant criminal and/or civil liability. Moreover, suspension and debarment under FAR Subpart 9.4 present a major collateral risk for companies facing government investigations. Companies can engage with counsel early to develop a strategy to avoid suspension or debarment as a consequence of a government contract investigation.

DOJ's Civil Cyber-Fraud Initiative, for example, raises the specter of FCA liability for non-compliance with complex cybersecurity requirements. In October 2021, DOJ announced its intent to use the FCA to pursue entities for "knowingly providing deficient cybersecurity products or services, knowingly misrepresenting their cybersecurity practices or protocols, or knowingly violating obligations to monitor and report cybersecurity incidents and breaches."[10] In March 2022, DOJ announced its first settlement of a case under the Civil Cyber-Fraud Initiative.[11] The case involved allegations that a contractor providing medical support services at US government–run facilities in Iraq and Afghanistan failed to disclose to the government that it had not consistently stored patient records exclusively on a secure electronic record system, the costs for which the contractor billed the government.[12] The settlement resolved qui tam actions brought years ago, in 2017 and 2019, illustrating the potential for costly, protracted investigations arising from non-compliance with contract requirements.[13]

C. Unique Disclosure Obligations

Mandatory disclosure considerations also distinguish government contract investigations from investigations in the commercial context. Federal contractors must timely disclose, in writing, credible evidence of violations of certain federal criminal laws or the civil FCA in connection with the award, performance, or closeout of a government contract or subcontracts, or risk suspension or debarment.[18] Experienced counsel can help companies understand when this requirement applies and how best to prepare for and accomplish the required disclosure. Counsel can also advise on the potential benefits of voluntary disclosure where the mandatory disclosure rule does not apply.

D. Numerous Government Actors

Adding to the complexity of government contract investigations is the large number of government actors who could become involved, including: contracting officers (who could, for example, issue cure notices, demand repayments from the contractor, or seek to terminate the contract); the Defense Contract Audit Agency; federal agency Inspectors General; the Government Accountability Office; numerous investigative

agencies, including investigative agencies of the Military Services; the Civil and Criminal Divisions of DOJ; and suspension and debarment officials.

Tips to Prevent and Mitigate Risk in Government Contract Investigations

Experienced government contract investigation counsel can help companies take steps now to prevent and mitigate legal risk in connection with government contract compliance.

A. Compliance Program Health Check

Counsel can examine the following compliance program components and implement enhancements as appropriate.

- **Corporate Culture:** Ensure that compliance is a priority at every level of the company.
- **Qualified Personnel with Clear Roles:** Train and retain qualified personnel to manage compliance efforts and assign clear roles and responsibilities to them.
- **Policies and Procedures:** Once the company has implemented a comprehensive suite of policies and procedures for government contracting matters, set a schedule to update policies as requirements evolve.
- **Training:** Develop and administer training on key topics, such as procurement integrity, contract pricing and TINA compliance, the mandatory disclosure rule, and mandatory reporting channels. Keep trainings up to date and push them out to the appropriate employees.
- **Internal Reporting Channels:** Set up clear, well-advertised, and well-monitored avenues for internal reporting of concerns. Offer an anonymous reporting hotline and emphasize the company's policy of non-retaliation.
- **Internal Investigations:** Timely investigate and respond to complaints or concerns reported internally.
- **Recordkeeping:** Keep centralized, organized records of the company's compliance program and contract negotiation, administration, and audits. Retain historical versions of policies and trainings. Store internal reports and records of investigations, subject to appropriate privilege protections. Retain records of internal and external audit findings to document the company's history and culture of compliance.
- **Internal Audit:** Monitor and test compliance with myriad government contract and related regulatory requirements.

Outside counsel with government contract investigations experience can assist with health checks of this kind, for example, by reviewing current contract requirements and compliance policies and procedures and advising on best practices. Involving outside counsel at this stage can pay dividends by mitigating the risk of a future violation or investigation and by ensuring that outside counsel is familiar with the company's contractual and regulatory obligations and compliance posture so they can be ready to respond if an investigation arises.

B. Review of Representations and Certifications Made to Government Stakeholders

Counsel can also take steps to review representations and certifications made to the government and ensure that subsequent communications conform to company standards and practices.

First, counsel can review representations and certifications on current contracts or on standard forms to assess the risk of express false certifications. For example, counsel can check certifications in proposals and contracts related to procurement integrity and conflicts of interest. Counsel can also review standard certifications on invoices and other documentation presented to government customers to support claims for payment.

Second, counsel can implement policies and practices to mitigate risk from communications with contracting officers. For example, counsel can advise the company to adopt the practice of handling all contracting officer communications in writing unless certain exceptions are met, or of requiring that communications on particular topics be pre-cleared by legal or compliance before transmission.

A proactive approach to compliance and internal investigations can serve the company well and mitigate many of the unique risks posed by government contract investigations.

For more information, please visit:
https://www.wilmerhale.com/en/solutions/government-contracts/government-contract-investigations

Internal Investigations

In the case of government contract investigations, initial smoke may indicate a fire. Allegations serious enough to prompt an internal or government investigation rarely appear out of nowhere. Diligently investigate concerns raised internally and document the thoroughness of the investigation and the company's findings. Outside counsel can bring strategic value, expertise, resources, and speed to bear in internal investigations that would otherwise overburden internal resources. Outside counsel can also advise on the requirements and benefits of mandatory or voluntary disclosure of the matters under investigation, and can assist in making those disclosures most effectively to various audiences.

[1] Andrew E. Shipley and Daniel E. Chudd, Bid Protests: A Guide to Challenging Federal Procurements (American Bar Association 2021).

[2] Procurement Integrity Act (PIA), 41 U.S.C. §§ 2101-07; FAR 9.406-2.

[3] 41 U.S.C. §§ 3501-3509. Congress amended TINA in 2013, changing the name to the Truthful Cost or Pricing Data Act, though it is still commonly referred to as TINA.

[4] False Claims Act, 31 U.S.C. §§ 3729 et seq.

[5] *See, e.g.*, FAR 52.225-5, Trade Agreements Act; DFARS 252.225-7021,Trade Agreements; FAR 52.204-21, Basic Safeguarding of Covered Contractor Information Systems; DFARS 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting.

[6] *See, e.g.*, *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 178 (2016) (observing that "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material.")

[7] 31 U.S.C. § 3730.

[8] The Department of Justice obtained more than $5.6 billion in settlements and judgments from civil cases involving fraud and false claims against the government in the fiscal year ending Sept. 30, 2021 – the second largest annual total, and the largest since 2014. Of this total, over $5 billion related to matters involving the health care industry. *See* Press Release, U.S. Dep't of Justice, *Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021* (Feb. 1, 2022), https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year.

[9] *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 178 (2016).

[10] Press Release, U.S. Dep't of Justice, *Deputy Attorney General Lisa O. Monaco Announces New Civil Cyber-Fraud Initiative*, (Oct. 6, 2021), https://www.justice.gov/opa/pr/deputy-attorney-general-lisa-o-monaco-announces-new-civil-cyber-fraud-initiative.

[11] Press Release, U.S. Dep't of Justice, *Medical Services Contractor Pays $930,000 to Settle False Claims Act Allegations Relating to Medical Services Contracts at State Department and Air Force Facilities in Iraq and Afghanistan* (Mar. 8, 2022), https://www.justice.gov/opa/pr/medical-services-contractor-pays-930000-settle-false-claims-act-allegations-relating-medical.

[12] *Id.*

[13] *Id.*

[14] 41 U.S.C. §§ 8701 et seq.

[15] 15 U.S.C. §§ 78dd-1 et seq.

[16] *See, e.g.*, 18 U.S.C. §§ 201 and 208.

[17] *See, e.g.*, 18 U.S.C. §§ 287, 1001, and 1031.

[18] FAR 3.1003(a)(1)(2); 52.203-13(b)(3).