

# FEDERAL ACQUISITION REGULATIONS & MANDATORY DISCLOSURE

*Mitigating Risk:  
Recent Developments  
&  
Best Practices*

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## February 2010 Headlines...

**\$96.8 Million Increase Sought in DOJ Budget**

*“This increase will continue the department’s efforts to aggressively pursue traditional law enforcement and litigation activities ranging from mortgage fraud, corporate fraud and other economic crimes...”*

-- AG Eric Holder, Feb. 1, 2010



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## FAR COMPLIANCE & 2010 HEADLINES

### DOJ Budget Includes:

- \$75 million to combat all fraud including corporate fraud
- \$17 million for 109 white collar crime prosecutors
- \$ Half million for more prosecutors of FCPA violations, financial and procurement fraud



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## FAR COMPLIANCE & 2010 HEADLINES

March 09: President demands enhanced procurement oversight



- July & October 2009: OMB Listens  
CAO's must track contractor performance in database  
(Revised FAR 42.15)



- February 2010: OFPP Enforcement  
OFPP starts enforcing CAO compliance with FAR 42.15



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**“Success of the self-disclosure provision will be determined in part by how the IG and the DOJ respond, not only to the contractors who self-disclose, but also to the contractors who do not comply with the Rule.”**

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**“If contractors face consequences for failing to self-report, compliance with the FAR will likely increase... vigorous enforcement of this new provision can be a very effective weapon in our efforts to stop and deter fraud.”**

## FAR MANDATORY DISCLOSURE

### Code of Business Ethics and Conduct (FAR 52.203.13)

- If you have a government contract greater than \$5 million and 120 days duration you must have:
  - Internal controls to detect and prevent misconduct;
  - Timely disclose to the agency OIG and contracting officer, credible evidence of a violation of federal criminal law or a violation of the False Claims Act.



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## FAR MANDATORY DISCLOSURE

### FAR Debarment / Suspension Provision:

- Applies to *any* government procurement contract;
- Knowing failure by a principal until three years after final contract payment, to timely disclose to the government, credible evidence of a violation of:
  - (1) Federal Criminal law;
  - (2) The False Claims Act; or
  - (3) Significant Overpayment (other than financing).







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<b>FAR &amp; BEST PRACTICES</b>	
<b>Update E&amp;C Program to reflect changes in FAR, FCA, USSG, DCAA (ERM)</b>	
<b>Audit Your Contract practices (timekeeping, billing, cost principles)</b>	
<b>Diligent payment collection practices (three-year rule)</b>	
<b>Enhance government contract database (December 05)</b>	
<b>Update Subcontractor Agreements (flow-down)</b>	
 	
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<b>FAR &amp; BEST PRACTICES</b>	
<b>Integrate Record Retention into Compliance Policy</b>	
<b>Establish internal process for disclosure via Business Unit, E&amp;C, Audit and Legal</b>	
<b>Ensure “Full Cooperation” via E&amp;C, Audit and Legal Reporting and Decision Chain</b>	
<b>Safeguard “Proprietary and Confidential” disclosures</b>	
 	
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## FAR COMPLIANCE & BEST PRACTICES

- The Government is increasing oversight of:
  - Your contract performance AND
  - Your ethics programs
- ↓
- Your E&C program needs to evolve;
  - New risk justifies new effort (ROI)



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## FAR COMPLIANCE & BEST PRACTICES

“Performance” & “Ethics” pack 1-2  
punch under revised FAR

- **FAR 9.103:** USG buys from and award contracts to, “responsible” contractors only...



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# **FAR COMPLIANCE & BEST PRACTICES**

**“Responsible” Contractor Includes: (See FAR 9.104-1)**

- **Satisfactory performance record (FAR 42.15);**
- **Satisfactory record of integrity and ethics.**



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# **FAR COMPLIANCE & BEST PRACTICES**

- **2009 & 2010 REGULATORY CHANGE:**
  - **EXPANDED FALSE CLAIMS ACT**
  - **NEW DCCA AUDIT “GUIDANCE”**
  - **USSG PROPOSED CHANGES**



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## FALSE CLAIMS & BEST PRACTICES

Since 2006, The Procurement Fraud Task Force has pursued 400 procurement fraud cases resulting in 300 criminal convictions;

- DOJ collected about \$362 million in procurement settlements
- OIGs now have statutory law enforcement authority to carry out investigations like the FBI or other LEAs
- Task Force proposed the FAR's mandatory reporting requirements, *with a focus on "material contract overpayment"*

(See Task Force Progress Report, December 15, 2008)



## FALSE CLAIMS & BEST PRACTICES

- **May 20, 2009 President Signs Federal Enforcement and Recovery Act (FERA)**
  - Nullifies FCA intent requirement (*Allison Engine*);
  - Expands FCA "claim" and "Presentment"
  - Broadens FCA *qui tam* exposure
  - Expands DOJ Use of Investigative Demands (CIDs)



## FALSE CLAIMS & BEST PRACTICES

The “3F’s” together mean:

Greater exposure to FCA liability & damages



Greater exposure to FCA violations



Increases need for robust E&C program to prevent, identify and report violations under FAR



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## DCAA & BEST PRACTICES

### July 23, 2009 DCAA Audit Guidance

- Roadmap for audits of contractor compliance with FAR
  - Heightened oversight of your E&C programs;
  - Access to internal records for your E&C programs;
  - Report “reasonable suspicion of fraud” to agencies if corporation did not already disclose (*DCAM 4-702.2 et. seq.*)



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## DCAA & BEST PRACTICES

- **DCAM advises government auditors** (*Sect. 5-306.3(a)*)
  - Obtain list of corporation's COC violations;
  - Assess whether documented disciplinary action occurred;
  - Ensure COC defines "Credible evidence" and a reasonable timeframe for disclosure per FAR 52.203-13;
  - Assess cooperation, potential of citation for control deficiencies

## DCAA & BEST PRACTICES

### Bottom line on "Guidance" ...

- Expect more records requests
- Access delays, lack of cooperation, may mean:
  - finding of control deficiencies ("inadequate")
  - OIG subpoena
  - Suspension of progress payments or reimbursements

## 2010 USSG & BEST PRACTICES

### USSG Amendments Released January 21, 2010:

- Changes factors for penalties against organizations (i.e. government contractors)
- Focus: Do you have effective E&C Program



## 2010 USSG & BEST PRACTICES

### Evidence of Effective E&C Program includes:

- Reasonable steps taken after detecting criminal conduct
  - remedying harm & restitution
- High-level engagement in E&C program



## 2010 USSG & BEST PRACTICES

- “High-Level” engagement means:
  - Board knowledge and oversight of program
  - E&C leaders have direct access to upper management (“governing authority”)
  - Managers with “substantial authority” aware of document retention policies with flow-down to all employees to avoid liability (See USSG Sec. 8B2.1)



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## Records Retention & Policy Integration (example)

- Policy 112 governs the retention and disposal of records in any form:  
<http://compliance/Policies/112.pdf>
  - Defines Business Records vs. Administrative Materials
  - Gives guidance on Legal Hold processes
- The Retention Schedule reflects
  - Business Record Descriptions
  - 3-Step Record Assessment Process
    1. Determine record type (Business vs. Administrative)
    2. What retention period applies
    3. Legal or Tax Hold takes supersedes retention period
- Refer Policy 112 questions to the Records web site at <http://records> or send an e-mail to [records@qwest.com](mailto:records@qwest.com)



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## 2010 USSG & BEST PRACTICES

- Comment on “mitigation” due March 12:
  - Did person with “operational responsibility” for E&C program report directly to Board?
  - Was E&C Program successful at detecting the offense before external discovery

AND

- Did the company promptly report the violation to the appropriate authority?



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## 2010 USSG v. FAR Mitigation

Debaring official should consider: (FAR 9.406.1)

- Were effective standards of conduct and internal controls in place;
- Did the contractor fully investigate and disclose results;
- Did timely disclosure and full cooperation occur;
- Did the contractor pay all liability, government costs, and restitution;
- Did contractor take appropriate disciplinary action;
- Did contractor revised control procedures and ethics training;
- Was contractor afforded adequate time to eliminate the cause;
- Did management recognize seriousness of misconduct and implement remedial and preventive measures.







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