

Contracting In A Perfect Storm Of Enforcement Risk: Part 2

Law360, New York (June 13, 2013, 4:53 PM ET) -- Our previous article in this series traced the expanding compliance risks faced by government contractors. Not only has False Claims Act and Foreign Corrupt Practices Act enforcement skyrocketed in recent years, but the increased use of suspension and debarment means that the consequences of compliance slips have never been so severe. For the contracting community, this trend presents an obvious question: What steps can contractors take to effectively navigate the minefield of legal risks in today's business environment?

One essential, but often overlooked, strategy for managing these complex and increasing risks is the development of an integrated, holistic approach to addressing the many facets of contractor responsibility. Traditionally, contractors have viewed various aspects of responsibility — responding to investigations, developing ethics programs, interfacing with the customer, etc. — as entirely separate silo practices. In recent years, however, such a piecemeal approach to legal risk management has been shown to be startlingly ineffective, a fact to which a growing list of contractors can attest.

Yet while many contractors have been slow to account for this new dynamic, government enforcement agencies have demonstrated a sophisticated understanding of the need to coordinate the handling of contractor fraud cases, as discussed more fully below. This article argues that contractors would be well advised to take a cue from the government and implement a similarly integrated approach to contractor responsibility and legal risk management. The failure to do so may have devastating consequences, as contractors will find themselves behind the curve and forever playing catch-up with the government.

Coordination Among Government Stakeholders

In recent years, the government has placed tremendous emphasis on coordination and cooperation among the U.S. Department of Justice, the U.S. Securities and Exchange Commission, and relevant agency attorneys. Perhaps the clearest example of this effort is the January 2012 memorandum issued by Attorney General Eric Holder directing DOJ attorneys to “coordinate together and with agency attorneys in a manner that adequately takes into account the government’s criminal, civil, regulatory and administrative remedies.” The Holder memo emphasized that “[e]ffective and timely communication with ... suspension and debarment authorities” should occur “[a]t every point between case intake and final resolution.”

It further made clear that the government viewed such collaboration as a critical tool for “secur[ing] the full range of the government’s remedies.” Since the memo’s release, the DOJ has stepped up its efforts to synchronize debarment and criminal proceedings, issuing quarterly reports to agency suspension and debarment officials (SDOs) listing all convictions, indictments and deferred prosecution agreements.

Additionally, many agencies, including those within the U.S. Department of Defense, now include staff dedicated to insuring that all fraud remedies are aggressively pursued and coordinated.

Although perhaps the most notable example, the Holder memo is hardly the only evidence of this emphasis on increased collaboration and coordination among the various government stakeholders. Just prior to the release of the Holder memo, a report issued by the Council of the Inspectors General on Integrity and Efficiency found that “[e]ffective suspension and debarment practices require regular communication and collaboration among all parties involved,” including Office of Inspector General investigators, agency SDOs, and DOJ attorneys. The report recommended that “the OIG, based upon its relationship with DOJ and with the agency SDO, can serve as an important liaison to help promote communication and coordination between these parties.”

And more recently, the DOJ OIG released a report summarizing its audit of suspension and debarment activities within the department. The report emphasized the need for DOJ attorneys to coordinate with agency SDOs, and it recommended that DOJ attorneys “[d]evelop and implement a system to ensure qualifying [fraud and felony] cases are submitted timely” to agency officials responsible for exclusion actions.[1]

Lessons for Government Contractors

The government’s emphasis on coordination among DOJ, SEC and relevant agencies underscores the fact that it is no longer possible to completely separate the various aspects of risk management in today’s business world. As discussed above, the agencies responsible for pursuing fraud and ensuring contractor responsibility have already recognized this new reality and have taken significant steps to capitalize on the value of coordinated efforts in this area.

Contractors would be well advised to take a cue from the government and develop their own integrated approach to managing the many facets of contractor responsibility. Such a program should cover all aspects of contractor responsibility, including developing internal controls and ethics programs acceptable to the government, investigating potential compliance violations, and navigating the process of disclosure to and negotiating with enforcement agencies and SDOs.

The benefits of a coordinated risk management strategy are undeniable. Not only does it ensure that contractors implement compliance and ethics policies tailored to their specific risk profile, but it also leaves contractors better positioned to engage with government officials to cooperatively resolve any compliance issues that may arise.

For example, the firm retained to investigate alleged misconduct and lead efforts to mitigate the contractor’s liability and debarment risk will be in the best position to assist a contractor in developing an ethics program and associated remedial measures. This approach, which enables a contractor to adopt remedial measures tailored to the unique facts surrounding its underlying misconduct, will demonstrate to government officials that appropriate steps have been taken to mitigate the risk of future violations.

Although critically important, developing an integrated approach to addressing contractor responsibility issues is not the only strategy that contractors should consider in order to reduce exposure to legal risk. In our next article, we discuss the vital role that a robust values-based ethics program can and should play in a contractor’s enterprise risk management framework.

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[1] These examples of interagency coordination are in addition to the increased collaboration between the SEC and DOJ. In particular, the surge in securities and FCPA actions over the past five years has required a greater degree of coordination between the SEC and DOJ, which share enforcement authority in these areas.

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