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EXPERT ANALYSIS

Confidentiality Agreements Continue to Pose Potential Compliance Trap for Contractors

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Federal contractors who require employees to sign confidentiality agreements — including those selling only commercial products or in small quantities — need to examine their agreements closely. For the last two years, the government has sought to prohibit confidentiality agreements that restrict employees' ability to report fraud, waste, or abuse to "designated investigative or law enforcement representative[s]" for federal agencies authorized to receive that information."[1]

Most recently, the Department of Defense issued a new class deviation on November 14, 2016, prohibiting DoD from using funds from recent appropriations to contract with companies using overbroad confidentiality agreements.[2] While these restrictions may not be new, the deviation's broad application and significant consequences mean that contractors should give close scrutiny to ensure any agreements with employees comply with the prohibition.

SPECIFICS OF THE LATEST CLASS DEVIATION

DoD's recent class deviation prohibits DoD agencies from using any money appropriated by the Continuing Appropriations Act of 2017 (or other FY 2017 dollars authorized by future continuing resolutions) to contract with an entity whose confidentiality agreement prevents employees from reporting fraud, waste, or abuse. The deviation does not provide a clear explanation of what constitutes an offending agreement, instead it makes the broad statement that DoD cannot contract with:

> an entity that requires employees or contractors of such entity seeking to report fraud, waste, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or contractors from lawfully reporting such waste, fraud, or abuse to a designated investigated or law enforcement representative of a Federal department or agency authorized to receive such information.

Given the potential for a government agency enforcing this restriction to lend an expansive interpretation to what types of provisions "otherwise restrict" lawful reports of fraud, waste, or abuse and may therefore have the potential effect of stifling whistleblower reporting, the safest course of action for contractors may be to include a safe harbor provision in any confidentiality agreement that explicitly mirrors the prohibition discussed in the deviation.

The class deviation further requires contracting officers to include DFARS 252.203-7994 (Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements – Representation) (DEVIATION 2017-O0001) (NOV. 2016) and DFARS 252.203-7995 (Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements) (DEVIATION 2017-O0001) (NOV. 2016) in any contract or solicitation using these appropriated funds. And it requires contracting officers to modify existing contracts to include these provisions. Significantly, this includes all

contracts regardless of the contractor's size, the commercial status of the products or services, or the dollar value of procurement.

These clauses contain a number of significant provisions:

- The mere submission of an offer would constitute a representation that the contractor does not require its employees to sign agreements preventing the employee to report waste, fraud, or abuse. DFARS 252.203-7994 (DEVIATION 2017-O0001) (c).
- The Contractor must notify its employees that any prohibitions and restrictions covered by this clause are no longer in effect. DFARS 252.203-7995 (DEVIATION 2017-O0001) (b).
- Agreements required to protect classified information are not covered by these requirements. DFARS 252.203-7994 (DEVIATION 2017-O0001) (b).

The Department of Defense issued a new class deviation prohibiting it from using funds from recent appropriations to contract with companies using overbroad confidentiality agreements.

SIGNIFICANCE

The consequences of noncompliance with the new class deviation are significant: a contractor in violation of the rule's requirements would be, in effect, immediately debarred and disqualified from receiving a federal contract award — no matter how well-positioned it might be to perform the contract.

Further, the deviation raises the risk of False Claims Act liability because the mere submission of an offer constitutes a representation that the contractor does not prevent or otherwise restrict whistleblowing to the Government. If that representation is subsequently determined to be untrue, some government regulators could assert that the contractor secured the contract by "fraudulent inducement." This risk is exasperated by the immediate effective date of this class deviation. Thus, it is important that contractors carefully assess their compliance with the class deviation and appropriately caveat any proposals that are submitted before full compliance is achieved.

In addition, the class deviation's broad application compounds these issues. The class deviation is not limited to large, sophisticated contractors. It applies to any contractor doing business with the Department of Defense — commercial contractors, small businesses, and small-dollar value contractors alike.

CONCLUSION

All defense contractors should be prepared to confirm that their employment, intellectual property, non-disclosure, and similar agreements with employees and subcontractors clearly state an exception to the standard requirements to keep sensitive commercial information confidential for reports of fraud, waste, or abuse to relevant agencies. In this respect, the safest course may be to mirror the prohibition contained in the deviation in a safe harbor provision, although contractors also should continue monitoring developments to ensure that any revisions to their confidentiality policies and procedures reflect the final language of the rule that is ultimately promulgated or future class deviations issued by relevant agencies.

NOTES

[1] While these requirements may come as a surprise, as we mentioned above, they are not new. DoD previously issued a class deviation in February 2015 and the Department of Veterans Affairs followed suit in April 2015. And as previously reported on Covington's InsideGovernmentContracts blog, the FAR Council released a proposed rule on January 22, 2016, that, if adopted, would impose a government-wide prohibition on contracting with companies that limit the ability of employees or subcontractors to lawfully report fraud, waste, and abuse to the government. In addition, the deviation follows efforts by other federal agencies, such as SEC and Department of Labor, to crack down on agreements that stifle whistleblower activity outside the contractor context.

[2] The class deviation implements Section 743 of the Consolidated Appropriations Act, 2016 (Pub. L. 114-113) and successor provisions in subsequent appropriations acts and continuing resolutions.

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