



Contractor Integrity Solutions

**CONTRACTORS MAY NOT ALWAYS HAVE THE REQUIRED EFFECTIVE ETHICS
AND COMPLIANCE PROGRAMS THEY THINK THEY HAVE**

—AND THERE ARE CONSEQUENCES

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Having performed multiple independent reviews of company ethics and compliance programs over the years, utilizing the standards developed by both DOJ and DOD, it is always remarkable to find that, even with relatively well-developed programs, there are invariably notable shortcomings. These can lead to a Federal government determination that a company's program is actually non-compliant with the U.S. Sentencing Guidelines, the 2020 DOJ guidance, and/or the FAR, thereby exposing companies to significant criminal and debarment risk. Here are a few examples from recent reviews conducted by Contractor Integrity Solutions (CIS) of federal contractors that otherwise had long established programs, including a senior Compliance Officer:

- There was no meaningful management and Board of Directors oversight of the company's ethics and compliance program and no regular evaluation of the effectiveness of the program.
- The company had no process to evaluate and mitigate risks.
- The company had only identified as a "risk" the sole problem that led them to a multi-million dollar fraud settlement with DOJ, but failed to identify other existing risks.
- At one of the largest Defense contractors, the company had no integrated process of monitoring and overseeing internal investigations which, despite the existence of a Compliance Officer function, were being conducted by different functions within the company. This compounded the difficulty in ensuring effective Board of Directors' oversight.
- The company's risk identification process was so broad that it was meaningless in terms of prioritizing key risks and instituting mitigation plans.
- The company's communications to employees on ethics issues were essentially non-existent and there was no mechanism or outside annual ethics training to keep employees apprised of ongoing ethics issues and responsibilities.

In each of these examples, CIS not only made recommendations for corrective action but also assisted in developing solutions, including developing new practices, procedures or policies. Without adopting these targeted solutions, CIS believes that a federal agency or DOJ review would have likely found the company non-compliant with the prevailing FAR and DOJ guidance.

Our experience is that even relatively mature ethics and compliance programs can benefit from a periodic independent review of these programs. This is particularly important for

government contractors seeking to proactively protect themselves against civil False Claims Act (FCA) liability, administrative and contractual remedies, and suspension and debarment exposure, where a reviewing federal agency or DoJ would expect the contractor's ethics and compliance programs to be up-to-date and thorough.

Several recent FCA cases demonstrate that an independent review of a company's ethics and compliance program can have a meaningful effect on a court's determination of the contractor's scienter, positively impacting a defendant's ability to obtain dismissal of such a case. In the absence of evidence of clear intent or willfulness, federal courts considering FCA liability will consider the contractor's conduct under the standards of "reckless disregard" or "deliberate ignorance." DOJ attorneys and whistleblowers sometimes allege that the company has ignored employee complaints of noncompliance or that the company's compliance programs have been poorly implemented or communicated.

- In *United States ex rel. Prather v. Brookdale Senior Living Cmty., Inc.*, 892 F.3d 822, 838 (6th Cir. 2018), the Sixth Circuit focused heavily on the fact that the defendant company had "deliberately ignored" various employee concerns regarding compliance with applicable federal regulations.
- In *United States ex rel. Bawduniak v. Biogen Idec, Inc.*, 2018 WL 1996829 (D. Mass. Apr. 27, 2018), the District Court found that the defendant contractor ignored the concerns communicated by its Compliance Department. *Bawduniak* underscores the importance of the Board of Directors and contractor management having a modern company's ethics and compliance program as well as processes for receiving and responding to Compliance Department actions and findings.
- In *United States ex rel. Schmuckley v. Rite Aid Corp.*, 2018 WL 4214887 (E.D. Cal. Sept. 5, 2018), reckless disregard by a defendant company was found by the court when, after delegating certain compliance duties to employees, the company thereafter failed to follow up and ensure compliance.

These judicial findings are consistent with the U.S. Sentencing Guidelines, which recite the requirement that a company will "evaluate periodically the effectiveness of the organization's compliance and ethics program." Likewise, guidance issued by both DOJ and the SEC indicate the expectation that companies test their internal controls, assess weaknesses and risk areas, and periodically conduct targeted audits of controls.

In addition to potential FCA liability, Federal contractors must protect their “present responsibility” status, which can be their most important asset. Suspension or debarment of a contractor can have catastrophic business impacts, precluding that entity from competing for or receiving Federal government contracts for years. Furthermore, the FAR’s internal compliance program and mandatory disclosure mandates require contractors to bear the burden of self-policing and self-reporting their own activities or risk damaging their reputations as responsible contractors. These activities necessitate the contractor having a sound ethics and compliance program with sufficient internal processes to meet its compliance obligations and minimize the risk of suspension or debarment.

A periodic third-party review of an ethics and compliance program is essential, whether characterized as sound company management, or fulfilling the Board’s fiduciary duties, or as a form of potential insurance against FCA and other allegations. Contractor Integrity Solutions regularly provides such services on a fixed fee basis with a well-defined scope.

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