

THE 'CRIMINALIZATION' OF GOVERNMENT PROCUREMENT

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Laws and regulations governing contract work for the federal government are proliferating at an astonishing rate. Violations can result in criminal prosecution and possible debarment. Firms doing business with the federal government can set up compliance programs to prevent problems and reduce possible fines.

Every company that contracts or subcontracts for the federal government should have a program to prevent violation of laws and regulations. The recent "criminalization" of the federal procurement process means that any company, whether it has five employees or 1,000 employees, should scrutinize the way it bids and performs on government contracts. Instituting an effective contract compliance program can help avoid problems and is relatively inexpensive to do. Simply having an organized plan can reduce fines for violations fourfold.

During the past 10 years, the entire government procurement process has been "criminalized." From bidding and award through claims and terminations, what once was treated as only a contractual dispute is now likely to be investigated and prosecuted as a violation of one of the many criminal laws that apply to all government contracts.

In 1981, there were 15 statutory inspectors general in the federal government, charged with detecting and preventing fraud, waste and abuse in the government. Together, all those inspector generals had only about 5,131 personnel, annually accounted for only 1,059 criminal convictions, and caused fewer than 500 individuals and contractors to be suspended or debarred from government contracting.

During the past decade, the Congress

extended the concept of inspector general to 60 government departments and agencies. There are now more than 34,000 auditors, investigators and inspectors enforcing regulations and laws regarding contracting. In addition, procurement laws and regulations have proliferated. In 1988 alone, Congress passed eight statutes including some 60 separate provision affecting the procurement process. Between 1984 and 1990, the government's procurement regulatory system, the Federal Acquisition Regulation, grew by 43% in actual page count, increasing from 3,416 pages to 4,900 pages in the *Federal Register*. All these new regulations and changes make compliance more difficult for those who contract with the federal government.

An even more important development is the new Sentencing Guidelines for Organizations, affecting all crimes that occur after Nov. 1, 1991. These provide a powerful incentive for companies to maintain compliance programs. Firms sentenced for crimes under the new guidelines will face criminal fines likely to be four times higher than the pre-guideline fines. However, a company can reduce its fine by up to 25%, if it has an effective compliance program.

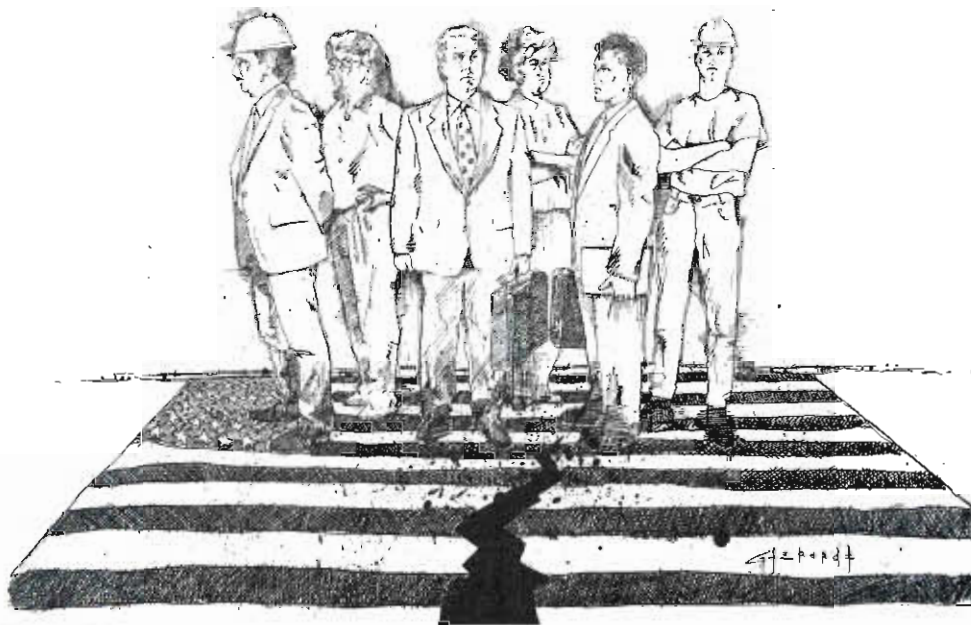
In 1990, the most recent year for which figures are available, inspectors general were responsible for 5,465 convictions, and 3,228 suspensions and debarments, a nearly

fivefold increase in convictions and sixfold increase in debarments and suspensions during the decade. The convictions included false statements on claims, invoices, test results and certifications provided to the government, bid rigging and collusion, conspiracy to defraud the government, mail and wire fraud, theft and conversion of government property, bribery, and conspiracy. The improper conduct included the padding of invoices and requests for payments, the falsification of a test result (inflating a test score or not testing at all), the mis-marking of employee time cards, and "kicking back" money to a buyer in order to get a subcontract.

These investigations frequently led to criminal prosecutions, convictions, fines, jail sentences, and eventual debarment. Even when an employee perpetrated the crime without the knowledge of management, the company was generally held responsible and the penalties were routinely applied to the company. Many problems can be avoided or ameliorated through company management's commitment to a compliance program.

EFFECTIVE COMPLIANCE PROGRAMS

Compliance programs begin with a "baseline" review of the firm, in which operations are evaluated and potentially vulnerable areas identified. Typically, an experienced at-



torney is part of the process. A program should include these elements:

1. An ethics code that sets forth the company's commitment to honesty and integrity, and advises employees of the various areas in which they may encounter problems.

2. A training program that communicates the code to employees.

3. A compliance official personally responsible for operating the compliance program, even if he or she has other duties. Successful management of the program should be an element in the employee's annual job performance appraisal and bonus evaluation.

4. Careful discretion in the delegation of authority to ensure that only reliable employees are given significant responsibilities for programs and contracts. The company's personnel department should scrutinize the background of all potential employees, and if a new hire has had problems in the past, that individual should not be assigned duties that could be abused.

5. A company hot line or similar mechanism that enables employees to anonymously report suspected wrongdoing without fear of reprisal. A hot line can serve as pressure valve for employees, alerting management to "gripes" as well as allegations of fraud.

6. Internal reviews of how well the program is operating (sometimes performed by auditors or other consultants). These reviews should cover other company operations, such as purchasing, quality control, estimating and bidding procedures. These

reviews could be conducted every two years.

7. A statement indicating the firm's willingness to report wrongdoing to the government, willingness to cooperate with the government, and acceptance of the company's responsibility for its actions. The Department of Defense, for example, has a voluntary disclosure program to which over 100 companies have disclosed serious wrongdoing. Such voluntary disclosure decreases the likelihood that a contractor will be prosecuted. Although the government has recovered more than \$135 million in damages through this program, only three contractors were prosecuted and convicted and only one debarred from contracting. Disclosure and cooperation with the government are considered by prosecutors when assessing whether to bring charges against a firm.

8. Effective discipline when employees violate the ethics code.

9. Corrective actions when problems are discovered. These should include changes in company policies, procedures and internal controls, as well as disciplinary actions to employees.

A company's code of ethics should be brief and should stress the need for integrity in key company business areas. Many companies are able to use similar codes, differing only as required for the special nature of the company's business.

Employee training is essential to communicate the ethics code. Every employee involved in the government contracting process should be trained when the code is

put in place, and every new employee should be trained shortly after being hired. In addition, at least one session of refresher ethics training should be given to each employee annually.

The hot-line mechanism can be a "mail drop" for problems, or a telephone line, e.g., one that simply receives recorded messages. However, all credible reports of possible wrongdoing should be investigated by the ethics official, reported to management, if appropriate, and corrected if warranted. Any internal company investigation must be thorough, and should be conducted by an attorney or with the help of an attorney (either in-house or outside the company), if there appears to be any criminal violation.

Finally, every contractor should have an appropriate records management program, under which records are retained for the length of time specified by law or regulation. Records needed for any internal or government investigation should not be destroyed until the matter is concluded.

What formerly was a mere contractual dispute is likely to result in a criminal investigation by one of the inspectors general. A compliance program is an excellent preventive measure, and relatively easy to implement. ▽

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