



“Top Challenges Facing Federal Agencies COVID-19 Emergency Relief and Response Efforts” and
How Contractors Can Prepare for Inspector General Audits and Investigations

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Agenda

- Pandemic Response Accountability Committee (PRAC)
- Report - Top Management Challenges facing federal agencies that receive funding
 - Key Themes
 - Agency Findings
- High Level Compliance – Government Contracts & Grants
- Enforcement
- Practical Pointers



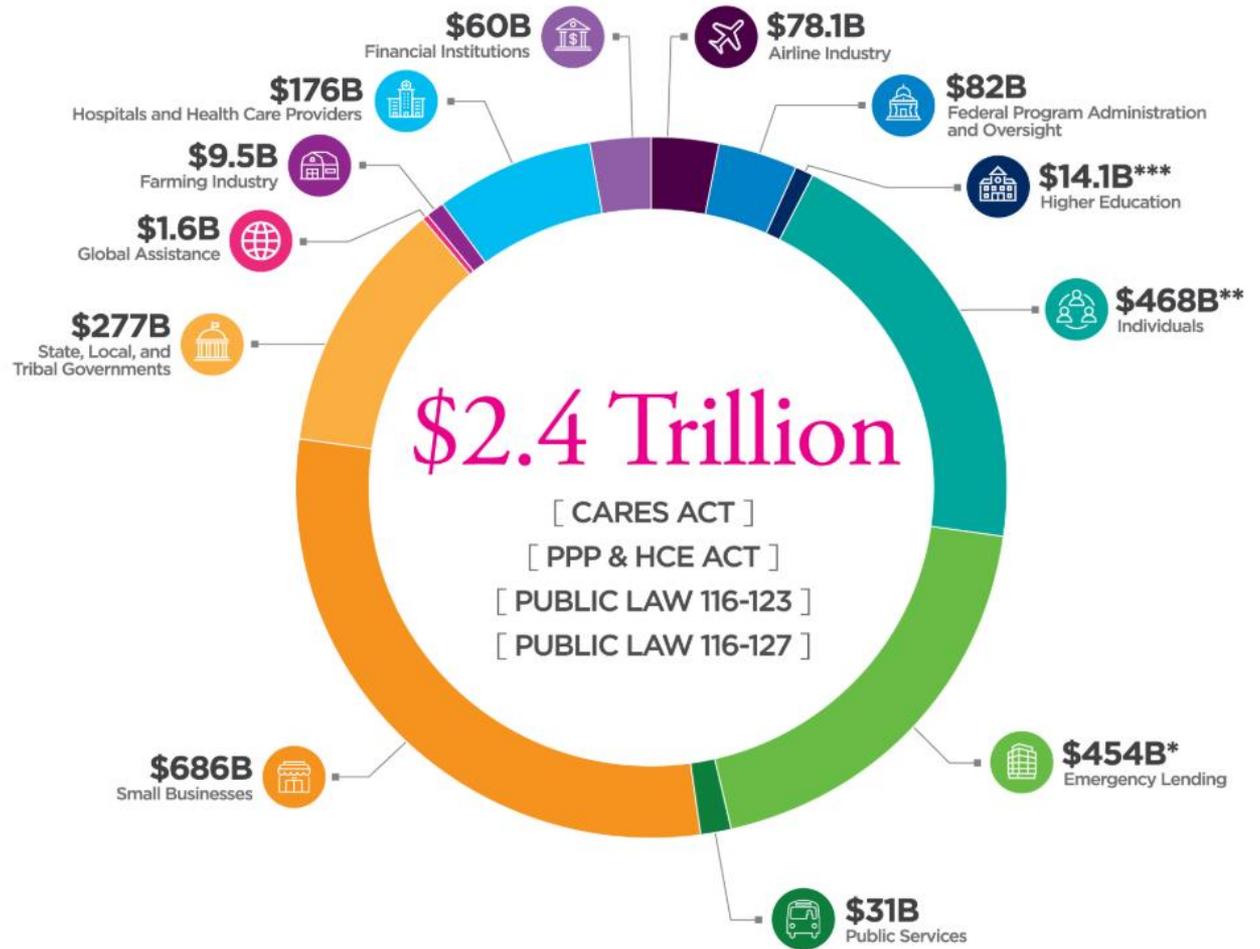
Pandemic Response
Accountability
Committee

Coronavirus Relief & Stimulus (Background)

Congressional action to-date

- February 24, 2020 – 35 confirmed U.S. Cases, no deaths; Trump asks Congress for \$1.25 billion for preparedness
- March 6, 2020 – Phase 1 of Congress' Coronavirus Response signed into law
 - \$8.3 billion for test and vaccine development, support for frontline healthcare
- March 18, 2020 – Phase 2 signed into law
 - \$100 billion for expanded unemployment, paid sick leave, food assistance
- March 27, 2020 – Phase 3 signed into law (CARES Act)
 - \$2 trillion comprehensive package
 - Small business assistance
 - Direct payments to individuals
 - Relief for distressed industries
 - Healthcare support, including supplies, PPE, and direct payments to hospitals

CARES Act Funding



What is the PRAC

- Inspectors General from 9 agencies specifically identified in the CARES Act, as well as 12 additional Inspectors General from agencies that receive funds or otherwise involved in the pandemic response
- Purpose to “promote transparency and conduct and support oversight” and “mitigate major risks that cut across agency boundaries”
- Oversight of \$2.4 trillion appropriated to address the pandemic
- Provide periodic reports
 - Management report
 - Biannual report to President and Congress
 - Other reports as appropriate

Top Challenges Facing Federal Agencies

June 2020 Report

- Submission by 37 OIGs
 - Financial management of CARES Act and other funds
 - Improving Financial Reporting Systems
 - Reducing Improper Payments
 - Grant management
 - Oversee Grant Management
 - Monitoring Grant Performance
 - Information technology security and management
 - Information Technology Management
 - Safeguarding Sensitive Data and Information Systems
 - Protecting health and safety while maintaining effective operations

Specific Agency Concerns

- Department of Defense
- Department of Homeland Security
- Health and Human Services
- Department of Treasury
- Department of Veterans Affairs



Government Contracts and Grants

Procurement Contracts vs. Grants

- Procurement contracts
 - Principal purpose “is to acquire (by purchase, lease, or barter) property or services for the direct benefit of the United States Government”.
- Grant agreements
 - Shall be used when:
 - Principal purpose “is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government” and
 - substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.

Procurement Contracts vs. Grants

- Grant Agreement:
 - “a legal instrument of financial assistance between a Federal awarding agency or pass-through entity and a non-Federal entity that is consistent with 31 U.S.C. 6302, 6304” (2 C.F.R. 200.51).
- Does not include an agreement that provides only:
 - Direct U.S. Government cash assistance to an individual;
 - A subsidy;
 - A loan;
 - A loan guarantee; or
 - Insurance.

(31 U.S.C. 6302; 2 C.F.R. 200.51)

Integrity and Receiving Federal Funding

- Dealing with taxpayer dollars leads to heightened scrutiny of contractors and grant recipients
- Money must be spent or used effectively, efficiently, and fairly
- Level playing field and lack of favoritism
- Perceptions are important



The Mandatory Disclosure Rule

What is the Mandatory Disclosure Rule

- Requires the Mandatory Disclosure of
 - Criminal violations involving fraud, conflicts of interest, bribery, or gratuities under Title 18 U.S.C.
 - Civil False Claims Act violations and
 - Significant overpayments
- Other requirements:
 - Contractor Code of Business Ethics and Conduct requirement (FAR 52.203-13(b)) requiring contractors to have a written Code of Ethics and develop internal procedures to detect, process, investigate, and assess potential violations to determine whether there is credible evidence triggering a reporting obligation
 - Established requirement for a Business Ethics Awareness and Compliance Program and Internal Control System (FAR 52.203-13(c)) to be in place within 90 days of contract award.

What is Mandatory Disclosure?

- Requires contractors to timely disclose credible evidence of violations of certain criminal laws (fraud, conflict of interest, bribery, or gratuity violations found in Title 18), violations of the False Claims Act and significant overpayments (not defined)
- Applies to subcontractors, ***including for commercial items***
- Failure to issue a refund or credit to the government can be an “overpayment” and basis for False Claims Act action
- Amendments to FAR added the following:
 - Basis for suspension and debarment
 - FAR clause for use in government contracts and subcontracts

What is the Risk of not Disclosing?

- Knowing failure by a **principal**, until 3 years after final payment on any Government contract, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or subcontract, credible evidence of
 - Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;
 - Violation of the civil False Claims Act – including retaliation provisions (31 U.S.C. § § 3729-3733); or
 - Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in FAR 32.001.

Principal means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity. This definition should be interpreted broadly, and could include compliance officers or directors of internal audit, as well as other positions of responsibility. (FAR 2.101)

When must disclosure be made?

- Timely disclosure:
 - The Mandatory Disclosure Rule allows contractors the opportunity to do some preliminary examination of the evidence to determine its credibility before deciding whether to disclose to the government.
 - No set time frame defines “timely.”
 - The “timely” requirement should be read in the context of the “credible evidence” standard, which provides for a period of internal investigation to determine whether evidence is credible before it is disclosed.
 - Contractors should take reasonable steps to determine evidence is credible, not launch a complex investigation.
 - No time frame for what constitutes a “reasonable investigation.”
 - Measured from contract award or discovery of credible evidence, whichever is later.
 - Disclosure requirements under the clause apply prospectively from December 12, 2008; however, examination of past conduct on contracts open to exposure is still required.

Other Contractual Obligations

Code of Conduct, Compliance Program and Internal Controls

- Code of Business Ethics and Conduct (FAR 52.203-13 (b))
 - Written Code
 - Make available to each employee engaged in performance of the contract (electronic access included)
 - Exercise due diligence to prevent and detect criminal conduct
 - Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

Other Contractual Obligations

Code of Conduct, Compliance Program and Internal Controls

- Compliance Program & Internal Control System (FAR 52.203-13(c))
 - 90 days after being awarded a covered contract, ongoing business ethics awareness and compliance program must be in place
 - Communicate periodically and in a practical manner the aspects of the compliance program and internal control system, by conducting effective training programs and otherwise disseminating information
 - Establish standards/procedures to facilitate the timely discovery of improper conduct in connection with government contracts (e.g., hotline)
 - Ensure corrective measures are promptly instituted and carried out

Other Contractual Obligations

Code of Conduct, Compliance Program and Internal Controls

Compliance Program & Internal Control System (FAR 52.203-13(c)) (con't)

- Assigns high level of responsibility to individual for compliance with adequate resources
- Includes periodic audits and reviews of business practices and internal controls (both operational functions and the Code of Ethics and Conduct program)
- Disciplinary action for improper conduct for failing to take reasonable steps to prevent or detect improper conduct
- Include reasonable efforts not to employ individuals as principals who have engaged in conduct that conflicts with the Code of Ethics and Conduct (vetting of promotions with Compliance & Ethics/General Counsel's office and background checks on new candidates)
- Timely disclosure, in writing, to agency OIG (copy CO) re credible evidence of wrongdoing under Mandatory Disclosure Rule
- Does not apply if the Contractor is a small business concern, or if contract is for the acquisition of a commercial item



Fraud, the False Claims Act, and OIG Enforcement

COVID-19: FCA & Fraud Enforcement

Enforcement Sources: Today's Heroes Will Be Tomorrow's "Fraudsters"

- Congressional oversight
- OIG auditing and reporting
- Pandemic Response Accountability Committee
- Department of Justice
- Whistleblower Actions
 - Hotline and Fraud Reporting Portals
 - Whistleblowers
 - Relator's / Plaintiff's Bar
- Suspension and Debarment

COVID-19: FCA & Fraud Enforcement

Enforcement Sources: Today's Heroes Will Be Tomorrow's "Fraudsters"

- Pandemic Response Accountability Committee
 - Comprised of IGs from multiple federal agencies
 - Charged with detecting and preventing the misuse of CARES Act funds, and will likely make referrals to DOJ
- Department of Justice
 - Has already stated that it will “prioritize the investigation and prosecution of Coronavirus related fraud schemes,” including through False Claims Act actions
 - Has created a hotline for whistleblowers to report fraud
 - Attorney General has directed all U.S. Attorney’s Offices to appoint a Coronavirus Fraud Coordinator

COVID-19: FCA & Fraud Enforcement

Hasty Legislation and Funding Creates Significant Risks for Recipients

- Funding has appeared almost overnight, but with many strings attached
- Those strings include certifications, attestations, and reporting requirements, all of which subject the recipient / beneficiaries to risk
- These risks include the interpretation of ambiguous/vague language and novel requirements

The Past is Precedent

COVID-19 versus Hurricane Katrina

- Largest bailout / stimulus in history
- Lack of economic root causes – biological cause
- Natural disaster recovery audit and investigation history are helpful guides
 - Immediate aftermath of Hurricane Katrina:
 - DHS began auditing recovery contracts
 - 1 year later:
 - 261 defendants charged in 218 cases across 24 judicial districts
 - 44 convictions
 - 465 government auditors had reviewed 6,665 government contracts covering \$10 billion in value
 - 219 open investigations
 - Overall Katrina recovery spend was less than \$100 billion. CARES is 20x more.

False Claims Act – 31 U.S.C. § 3729

Overview

- Creates liability for any person who, *inter alia*, presents or causes to be presented a false or fraudulent claim for payment to the government, or knowingly avoids an obligation to pay money to the government.
 - Including subcontractor/vendor claims
- Specific intent not required
 - Liability for reckless disregard, deliberate ignorance, or actual knowledge
- Damages and Penalties are severe
 - Treble damages
 - Actual damages can be valued at the *full* amount paid by the government under certain circumstances, including when a recipient of government funds misrepresents its eligibility for those funds
 - Statutory penalty b/w \$11,181 - \$22,363 *per* false claim/statement
- Collateral consequences of an FCA settlement / judgment

False Claims Act

False Claims and False Certifications

- Liability for any person who
 - “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval”; or
 - “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim. 31 U.S.C. § 3729(a)(1)(A), (B).
- Includes express and *impliedly* false certifications material to payment
- The various attestation, certification, and reporting requirements tied to CARES Act funds make them ripe for FCA investigations / actions

False Claims Act

Reverse False Claims

- Liability for any person who
 - “knowingly makes, uses, or causes to be made or used, a false record or statement **material** to an obligation to pay or transmit money or property to the Government, or
 - knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the government.” 31 U.S.C. § 3729(a)(1)(G).
- Providers may be subject to FCA liability for failing to return funding provided by the government that it was not entitled to or did not need to address covered COVID-19 issues

Overarching Risk Mitigation Principles

Risk Mitigation Principles

Overarching Best Practices

- Establish a policy and procedures specific to the entity, funding received, and regulatory flexibilities the entity avails itself of
- Assign an internal resource to administer the policy
 - Monitor compliance and Recordkeeping
 - Reporting
 - Training/Education
- Document contemporaneously and in an easily retrievable format
- Identify areas of specific uncertainty to determine best next steps
 - e.g., seek guidance from counsel, position letter, and communication with government

Record Retention/Audit Access

- We are required by our contracts and grants to maintain records for many years (typically 3 years after final payment)
- Centralized files
 - Significant correspondence
 - Include e-mails
 - Memorialize verbal discussions

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