

Small Business Prime Contractors And Subcontractors May Need To Institute A Code of Business Ethics And Conduct In Order To Do Business With The Government

Effective December 24, 2007, contracting officers are now required to include FAR Clause 52.203-13, Contractor Code of Business Ethics and Conduct, in all solicitations if the value of the contract is expected to exceed \$5,000,000 and the performance period is at least 120 days, except for the following two situations:

- i. The contract is for the acquisition of a commercial item under part 12, or
- ii. The contract will be performed entirely outside the United States.

The clause requires that within 30 days of contract award (unless a longer period is established by the Contracting Officer), the awardee must have a written code of business ethics and conduct, and must provide a copy of the code to each employee engaged in the performance of the contract. The requirement for implementing a code of business ethics and conduct is mandatory for small businesses having such contracts. In addition, any contractor subject to this clause shall flow down the substance of this clause in subcontracts, including subcontracts with small businesses, which have a value in excess of \$5,000,000 and a performance period of more than 120 days (except if the above listed two conditions apply to the subcontract). According to the government commentary accompanying this rule, the flow down applies to all subcontracts, including purchase orders. Prime contractors are expected to distinguish subcontracts for commercial items from subcontracts for other goods and services in determining the necessity for flowing down the substance of the clause in their subcontracts. In addition, according to the government commentary accompanying this rule, the prime contractor is not required to judge or monitor the ethics awareness program and internal control systems of their subcontractor's systems; however, it is required to "check for existence" of these programs and systems.

The new clause also contains a more comprehensive requirement for the implementation of "an ongoing business ethics and business conduct awareness program" and "an internal control system". However, this additional requirement is not applicable to small businesses. Pursuant to this requirement, the contractor shall establish this program within 90 days after contract award, unless the contracting officer establishes a longer time period. The internal control system shall facilitate timely discovery of improper conduct in connection with government contracts; and ensure that corrective measure are promptly instituted and carried out. The internal control system should provide for: (a) periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the contractor's code of business ethics and conduct; (b) an internal reporting mechanism such as a hotline; (c) internal and/or external audits as appropriate; and (d) disciplinary action for improper conduct.

In an effort to reduce the financial burden on small business associated with having to implement formal training and internal control systems, the government has excepted small businesses and commercial item acquisitions from this requirement. However, the government has decided that the implementation of a formal written code of ethics and the distribution of the code to company employees does not impose a significant financial burden on small businesses. If you need any additional information concerning these new requirements, you can contact Ken Brody of David, Brody & Dondershine, LLP at 703-264-2220 or KBrody@dbd-law.com.

David, Brody & Dondershine, LLP (www.dbd-law.com) is a law firm that provides services to businesses, including representing businesses that do work for federal, state and local governments. This client alert is intended to provide general information about significant legal developments and should not be construed as legal advice on any specific facts and circumstances.

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachment) is not intended or written to be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter that is contained in this communication and attachment.

If you would like to unsubscribe, send an e-mail with unsubscribe in subject line to abrim@dbd-law.com.

