

Ethics Is Good Business

By John Horan and John G. DeGooyer

We are lawyers and we are going to tell you about ethics. Yes, we know it sounds funny; but seriously, hear us out. You need a code of business ethics and conduct. Your lawyer can help you create and implement one. Having a well-drafted and properly implemented ethics code is good business. It can help you stay out of trouble; protect you if you get into trouble; and in the end, maybe even save your company.

FEDERAL GOVERNMENT REQUIREMENTS

If you are engaged in federal procurement contracting, you are required to have a code of business ethics and conduct if (i) the contract value will exceed \$5 million and (ii) the contract performance period is 120 days or more. Federal Acquisition Regulations (“FAR”) 3.1003(a)(1) and 3.1004(a), as amended effective Dec. 12, 2008. 73 Fed. Reg. 67064 (Nov. 12, 2008). FAR 3.1004(a) provides that the contract clause at FAR 52.203-13 must be included in solicitations and contracts that meet those two criteria.

The contract clause imposes many requirements on you, including the following:

- Within 30 days of contract award, you must have a written code of business ethics and conduct and give a copy to each employee engaged in contract performance.
- Unless you are a small business or the contract is for a commercial item, you must also establish (i) an ongoing business awareness and compliance program, and (ii) an internal control system.

- You must timely notify the government of certain unlawful conduct by a principal, employee, agent or subcontractor of your company. Your failure to do so could result in your company being suspended or debarred.
- You must exercise due diligence to prevent and detect criminal conduct and promote an enterprise culture that encourages ethical conduct and compliance with the law.
- Finally, you must flow the contract clause down to subcontracts that meet the \$5 million and 120-day threshold criteria.

YOUR ETHICS CODE

The primary objectives of your ethics code should be to (i) prevent unethical and illegal activity in your business, (ii) affirm your company’s commitment to business integrity and lawful behavior, and (iii) mitigate adverse consequences to your company if unethical or unlawful activities occur. Your ethics code should be suited to the size of your company; facilitate the timely discovery and disclosure of improper conduct; and ensure that corrective measures are promptly instituted and consistently carried out. At a minimum, your ethics code should contain:

- A message from your company’s leadership emphasizing the importance of ethical and legal behavior.
- A statement of the company’s vision, mission and core values.

- A statement of the company's commitment to shareholders, customers, suppliers, lenders, investors, employees, and the community.
- A clear description of what business conduct is required or permitted, and what conduct is prohibited.
- Topics addressing discrimination, harassment, safety, alcohol, drugs, etc.
- Topics addressing use of company assets, intellectual property, maintaining accurate books and records, etc.
- Topics specific to government and international business – bribery, kickbacks, Truth in Negotiations Act, political contributions, lobbying costs, hiring government employees, export and import compliance, etc.
- A certificate to be signed by each employee that he or she has received the ethics code and agrees to comply with its requirements.

BENEFITS OF AN ETHICS CODE

The benefits of having a code of business ethics and conduct are many, and this is true whether you are required to have one or not.

Reputation. Having a sound ethics program will enhance your company's reputation among investors, lenders, customers, suppliers, and vendors, because those groups have confidence in companies that practice good corporate governance and business ethics. In short, your ethics code can lead to more and better business for your company and more referrals from customers and suppliers that have similar values and are committed to their own ethics programs.

Education. Your code will facilitate educating and training your employees on how to identify legal and ethical pitfalls; do the "right thing" from the company's perspective; make "right" decisions; and address legal or ethical issues in a consistent fashion.

Recruitment. Your ethics program can be a valuable recruitment tool, as employees are usually happier, more productive, and possess greater self-esteem and morale in an environment in which responsibility, accountability, honesty, teamwork and ethics are expected and rewarded.

Mitigation of Adverse Consequences. Having a well-drafted and properly implemented code of business ethics and conduct cannot guarantee that your business will not get into trouble some day. If that should occur, however, the fact that you have a rigorous ethics program – strong ethics code, education and training programs, and internal controls – will be considered in mitigation of any criminal liability your business may face. See United States Sentencing Commission, Guidelines Manual, § 8B2.1 (Nov. 2008).

Another consequence of getting into trouble is the possibility of being suspended, debarred, or proposed for debarment, which can devastate your business. The causes for debarment and suspension are listed in FAR 9.406-2 and 9.407-2. As mentioned above, the causes now include a knowing failure to disclose certain unlawful activity. If you are debarred, suspended or proposed for debarment, you will be excluded from receiving new contracts, as well as subcontracts larger than \$30,000. Also, your business will be entered into the Excluded Parties List System ("EPLS"). See FAR 9.404 and 9.405. The effect of this listing is to place all federal agencies, as well as the general public, on notice that you are excluded from participating in any procurement or nonprocurement transaction during the period of the

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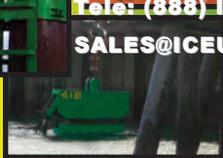



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listing. This restriction is government-wide for all departments, agencies, etc., and covers essentially all government programs, which means that, if you are debarred as a contractor, you are also debarred from participating in nonprocurement programs.

Federal government debarment has other far-reaching consequences. Virtually every state government routinely reviews the EPLS and, upon learning that you have been suspended, debarred, or proposed for debarment by the federal government, the state will exclude you from bidding on state work. The same is true of many counties and municipalities throughout the country as well. But that is not the end of the story. Many commercial companies will refuse to do business with you if you are suspended, debarred, or proposed for debarment by the federal or state government. In short, federal debarment could mean the death of your company, even if most of your business has nothing to do with federal contracting.

However, the bright side of this otherwise bleak prospect (if you have an ethics code) is that debarment officials, like the judges, are directed to recognize the existence of a strong ethical compliance program – ethics code, education and training, internal controls, etc. – as a mitigating factor that must be considered in connection with any proposed debarment. FAR 9.406-1(a)(1).

CONCLUSION

As you can see, having an effective code of business ethics and conduct is far more than just a legal requirement. It is a valuable asset that can enhance your reputation and stature in your business dealings, help you avoid ethical and legal pitfalls that could damage your business, and protect you from disaster if an employee's transgression causes your company to face criminal charges, false claims act liability, or suspension and debarment. Your ethics code is, in fact, an insurance policy against these possibilities. In short, having an ethic code is just good business.

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