

ADVISORY

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DCAA FORMAL REQUESTS FOR INFORMATION RELATED TO CONTRACTOR CONTROL ENVIRONMENT AND THE NEW COMPLIANCE RULES

The Defense Contract Audit Agency (DCAA) has begun to issue formal letter requests to major contractors seeking detailed information regarding various aspects of a contractor's "Control Environment," asserting that DCAA's "understanding of the management control environment at every major contractor is an essential part of our annual audit plan." DCAA Letter Request at 1.¹ The information requests focus on the contractor's efforts to comply with the new Federal Acquisition Regulations (FAR) compliance rules that were promulgated in late 2007 and 2008 and, in many instances, seek information beyond the mandatory disclosure provisions of the December 2008 rule.²

The typical DCAA request references the DCAA Internal Control Matrix, which sets forth the objectives and audit procedures for DCAA's audit of a contractor's "Control Environment and Overall Accounting System Controls,"³ and seeks information pertaining to a broad range of activities, including:

- The existence of "written codes of conduct/evidence," including compliance training, communication policies, and periodic reviews;
- "Self-governance activities," including systems that identify noncompliance, pursue corrective action, and provide for timely reporting to the government and cooperation in government investigations;

1 A redacted copy of a typical letter can be found at http://www.arnoldporter.com/public_document.cfm?id=14581&key=22B1.

2 On November 12, 2008, the Civilian Agency Acquisition Council and the Defense Acquisition Council published a Final Rule amending the FAR to increase the compliance and reporting obligations of federal government contractors and subcontractors. See 73 Fed. Reg. 67064, FAR Case 2007-006, Contractor Business Ethics Compliance Program and Disclosure Requirements (Nov. 12, 2008) (effective Dec. 12, 2008). For a discussion of the new FAR compliance requirements, see Arnold & Porter advisories, "Final Compliance Rule Requires Broad Mandatory Disclosure Based on 'Credible Evidence' of Wrongdoing," Nov. 2008, available at: http://www.arnoldporter.com/resources/documents/CA_FinalComplianceRuleRequiresMandatoryDisclosure_112108.pdf; "New Version of Proposed FAR Rule Would Require Broad Self-Reporting by Government Contractors," May 2008 (summarizing the Second Proposed Rule), available at: http://www.arnoldporter.com/resources/documents/CA_NewVersionOf_052108.pdf; and "New FAR Provisions Mandate Federal Contracts Compliance Plans, Training, and Internal Controls," Nov. 2007 (summarizing the First Proposed Rule), available at: http://www.arnoldporter.com/resources/documents/A&PCA_NewFARProvisionsMandateFederalContracts_112907.pdf.

3 DCAA updated the Internal Control Matrix in July 2009 to incorporate procedures for verifying a contractor's compliance with the requirements in FAR 52.203-13. See "Internal Control Matrix for Control Environment and Overall Accounting Controls," Version No. 5.0, available at <http://www.dcaa.mil/> (Audit Guidance).

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- “Policies and procedures” that address “management intervention,” including the approval of intervention, and that strictly prohibit “any management overrides;” and
- “Internal and external audit functions and efforts” related to the contractor’s accounting system.

The DCAA asks for detailed information in each of these areas. For example, the request asks for the agendas of all ethics training programs during the last 12 months, as well as the names of all employees who attended those programs.

More significant are requests for information that, on their face, go beyond the mandatory reporting requirements of FAR 52.203-13. For example, DCAA intends to verify that the contractor’s standards of conduct “provide[] [for] appropriate disclosure to the government of information needed to fulfill its responsibilities.” DCAA “define[s] adequate disclosure as disclosure to DCAA and the ACO of *all findings that significantly impact government contracts* within 5-10 days of identification,” and seeks “a list of violations to [sic] the code of conduct/ethics which occurred in the past 12 months.” This request appears to demand disclosures beyond those required by FAR 52-203-13(b)(3)(i), which addresses disclosure of *credible evidence* of violations of certain criminal statutes and the civil False Claims Act—a considerably narrower scope of disclosure than “findings that significantly impact government contracts.” In addition, although the FAR requires “timely” disclosure to the Office of Inspector General and the Contracting Officer, it does not specify that such disclosure must be made within 5 to 10 days of “identification,” a term that is ambiguous at best, and FAR 52-203-13 does not require disclosure to DCAA under any circumstances.

Similarly, the DCAA information request seeks “a list of... noncompliances” reported to the contractor’s hotline during the past 12 months, as well as “a company-wide list of any current open investigations.” Again, the request for lists of *all* instances of reported noncompliance and *all* open investigations—regardless of whether the circumstances involved credible evidence of the types of violations encompassed by the new FAR compliance rules—appears to impose significant additional disclosure obligations on government contractors.

Contractors that receive these DCAA information requests face a number of complex issues. For good business reasons, major contractors generally seek to maintain a cooperative relationship with DCAA, and it may make good business sense to provide the detailed information sought regarding policies, procedures, training, and the like. However, in an area as important—and controversial—as mandatory disclosure of wrongdoing, contractors may seek to limit their responses to DCAA’s requests to the information required to be disclosed by FAR 52.203-13(b)(3)(i). In addition, the FAR compliance rules recognize that cooperation with the government under those rules does not require the contractor to waive the attorney-client privilege or work product protection. FAR 52.203-13(a)(2)(i). Thus, in responding to the DCAA, a contractor should be mindful not to make disclosures that could be viewed as waiving the privilege or protection.

We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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