

# Uncle Sam's Buying, but Can You Afford to Sell?

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Would you like to get some of the \$81.9 billion the federal government intends to spend on information technology during its 2010-2011 fiscal year? Federal government contracting can be steady and lucrative work – especially when the private sector is in a recession. But in order to receive federal contract dollars, you must prepare to comply with a wide range of government contract requirements that have little to do with the actual goods or services you will provide. These additional terms and conditions, known as "social issue requirements," promote or discourage certain business behaviors. Every government contractor must have a contract compliance program that covers these social issue requirements. This article explores some of the more recent social issue requirements imposed by the federal government in response to the bad behavior of some contractors.

New federal government contracting compliance rules cover more social issues and require companies who do business with the government to be more careful with contract compliance than ever before. Sure, the federal government has always used its contract dollars to impact social issues. For example, for decades the Federal Acquisition Regulation ("FAR") has encouraged affirmative action and prohibited racial segregation.

Both political parties use these sorts of social contract regulations. Regulation of social issues through contract is one of the few things that is truly bipartisan in Washington, DC. But as government contracts have grown in size and number – the federal government is the nation's single largest consumer of goods and services – the Obama Administration and Congress have increased their use of contracts as a way to deal with social issues. In addition, President Obama has responded to the recession by increasing the regulation of how companies treat their employees, customers, and the general public. Indeed, there are several new regulations and FAR provisions that any company engaged in government contracting must add to its contract compliance plans.

Because FAR deals mostly with contract terms – buying and selling – many companies overlook or ignore the social issue regulations. Experienced government contractors tend to assume that they know the system and don't need to worry about the "boilerplate" terms. Novice government contractors often do not realize that there are significant compliance requirements buried in the "boilerplate" that have very little relationship to their provision of goods or services.

This growth of compliance requirements is a problem government contractors must confront because these requirements can trigger contract default problems. Perhaps more importantly, intentional (and sometimes unintentional) false certifications about compliance can lead to debarment, civil fines, and criminal prosecution.

Today, a federal government contractor's compliance program should include consideration of the following:

**The American Recovery and Reinvestment Act of 2009 ("Stimulus Act") created its own subset of**

## **compliance regulations:**

- A new federal agency, the Recovery Accountability and Transparency Board ("Board"), monitors all Stimulus Act funding. The Board is charged with preventing fraud and waste, and government contractors who receive Stimulus Act funds must ensure that they comply with the Board's directives which include disclosure of potential personal and organizational conflicts of interest.
- The Stimulus Act provides additional protections to whistleblowers. To assist in reducing fraud and waste, the Stimulus Act imposes extensive and complicated procedures designed to encourage federal, state, and private employees to report possible wrongdoing. Wrongdoing includes not only illegal acts, but also mere wasteful spending and danger to the public associated with the use of such funds. Because private government contractors who work on Stimulus Act projects will be subject to this new provision, all such contractors should review the whistleblower provisions in their government-funded contracts carefully and ensure that their practices comply with the law.
- New "Buy American" requirements are imposed. These rules require recipients of Stimulus Act funding to keep track of the origin of raw materials and components. Each funding agency has its own variation of the "Buy American" rule, so government contractors working for any agency must assess their particular situation carefully to see that their policies are in line with the rules of the funding agency.

## **The Federal Funding Accountability and Transparency Act of 2006 ("FFATA") ushered in expanded contractor compliance requirements:**

- In 2006, then-Senator Obama and Republican Senator Tom Coburn led the charge to enact FFATA in order to impose an expanded set of compliance rules on government contractors. FFATA requires government contractors to disclose what previously was private business information. The disclosures are placed on public web databases (<http://www.usaspending.gov> for non-technology contracts and <http://www.itdashboard.gov> for technology contracts). The theory behind FFATA is that if the public knows more about who owns a government contractor and how that contractor operates, then the government contractor will be discouraged from engaging in fraud, waste, and abuse of the contracting system.
- FFATA requires prime contractors on government projects to disclose most first-tier subcontractor payments. Currently, only large subcontracts in excess of \$20,000,000 must be reported. But as of October 1, 2010, subcontracts of over \$550,000 must be reported and, after March 1, 2011, subcontracts of \$25,000 or more must be reported. Government contractors will need to register with the new federal government websites and make the new certifications. A government contractor's compliance program must monitor these rules and ensure all requirements are met.
- Second guessing executive compensation has become a popular pastime for pundits and politicians. Thus, it should not come as a surprise that the Obama Administration has used FFATA to require many government contractors to disclose the total compensation of their top five executives. Government contractors also are responsible for collecting the same information from their first-tier subcontractors and reporting that information to the federal government. The new executive compensation disclosure rule, which went into effect during July 2010, is phased in on the same schedule as the subcontracting reporting rule.

## **You should expect more regulations intended to control government contractors' business decisions:**

In July 2010, the General Services Administration issued a report entitled "Recommendations for Vendor and

Contractor Emissions" that lays out the Obama Administration's plans for making government contractors more environmentally friendly. This report explores four possibilities that likely will make their way into legislation or administrative rules in the next few years. The government is considering:

- Requiring government contractors to participate in a governmental or non-profit private program that educates companies about how to reduce the emission of greenhouse gases;
- Requiring government contractors to develop and make available to the government and the public an inventory of the contractor's greenhouse emission sources. In addition, government contractors would be required to develop and implement a mitigation plan for those emissions. The government then could evaluate the contractors on their ability to reduce the use of polluting practices and use the information to reward or punish the contractors; and,
- Using the procurement process to give environmentally-friendly government contractors an advantage in bid evaluations. Products that are manufactured using more environmentally-friendly methods could be preferred over other products regardless of cost.

If your company has or wants to win federal government contracts, you should take these environmental regulations seriously as you update your company's government contract compliance plans and make long-range plans.

## **Conclusion**

The federal government isn't bashful about using its power as a purchaser of goods and services to promote political policies. Whether you agree or disagree with the policies, if you want to do business with the federal government, your company must have a workable compliance plan that covers not only contract performance, but also the many terms and regulations that control business behavior.

Your company's compliance plan must be tailored to the particular contract and agency with which your company will be working. Not every regulation applies to contracts, agencies, industries, and companies the same way. There are differences depending on the company's size, its dependence on government contracts, and its industry sector. Government and would-be government contractors should seek experienced legal counsel to deal with the emerging, and ever more technical, rules, regulations, and requirements.

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*For further information regarding the issues described above, please contact James W. Norment.*

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