

## Workshop T4

*Tuesday, October 30, 1:30–3:00 p.m. and 3:30–5:00 p.m.*

### **NAVIGATING THE FALSE CLAIMS ACT MINEFIELD**

Presented by



**Steven M. Charney**  
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Most contractors don't realize that certain construction pricing and billing practices may violate the False Claims Act, which imposes civil and criminal penalties for fraudulently charging the government for goods or services. Even more alarming is that the Act's reach extends beyond federal contracts to projects that include federal funds. Penalties range from fines to imprisonment to "debarment," which is a death blow for many contractors. Learn how to protect yourself and your company from this hidden minefield.

- Reviews the requirements of the Act, the projects to which it applies, and penalties for violations.
- Examines the application of the Act to charges for loss sensitive insurance programs, including retros and subguard.
- Provides strategies for managing this risk, including design and implementation of a compliance program.



# WE LIVE SERVICE!®

**service:** (sər-vəs)

- n.** 1. dedication to a task, timely; see **READY / WILLING / HELPFUL.**
- 2. the act of being devoted to helping others.
- v.** 1. to meet the needs of.



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**Steven M. Charney**  
**Managing Partner, New York Office**  
**Peckar & Abramson, P.C.**

Mr. Charney is one of the presenters for Workshop T4, "Navigating the False Claims Act Minefield," on Tuesday afternoon. He is the managing partner of Peckar & Abramson's New York office. He has taken an active role in addressing emerging issues affecting the construction and development industries, both in providing guidance to the industry at large and in counseling clients of the firm. Mr. Charney led the Associated General Contractors of America to establish a task force to study mold-related issues, and then vice-chaired that task force as it drafted the industry's first guide to understanding the problem. Mr. Charney has also taken a lead role in guiding contractors in understanding and addressing other emerging issues affecting the industry. He lectures frequently on such issues, including subcontractor default insurance and evolving legislation.

Mr. Charney's industry experience includes positions with both local and national construction contractors. Before joining Peckar & Abramson, Mr. Charney served as Eastern Division Counsel for Turner Construction Company. Mr. Charney was employed by Turner Construction Company for nearly a decade, prior to entering private legal practice, and served in a number of operations-related roles, including field superintendent, cost and scheduling engineer, and manager of litigation and claims, before serving as counsel.

Mr. Charney lectures nationally regarding matters related to construction contracting and frequently presents private lectures and training to the nation's leading contractors. He presented a three-part seminar before the prestigious Association of the Bar of the City of New York titled "Truly Understanding Construction Contracts" and is a frequent lecturer before the General Building Contractors of the State of New York, The Construction Financial Managers Association, the New Jersey Building Contractors Association, and other construction-related organizations. Mr. Charney has also lectured before the American Concrete Institute, the South Florida Chapter of the Associated General Contractors, Associated Minority Enterprises of New York.

Mr. Charney is a graduate of Seton Hall University School of Law, where he attended as an evening student while working full time in the construction industry. In 1983, Mr. Charney received a master of science degree in construction management from the School of Civil Engineering at New Jersey Institute of Technology (where he also studied as an evening student while working full time in the construction industry). Mr. Charney also holds a bachelor's degree in accounting from Syracuse University, with a minor in construction technologies.

**Patrick J. Greene Jr., Esq.**  
**Partner**  
**Peckar & Abramson, P.C.**

Mr. Greene is one of the presenters for Workshop T4, "Navigating the False Claims Act Minefield," on Tuesday afternoon. Mr. Greene is a partner at Peckar & Abramson, P.C., one of the premier firms representing the construction industry, and heads the Government Practice Group in New York and New Jersey.

In more than 25 years of practice, Mr. Greene has litigated, tried, and arbitrated major complex construction claims and advised some of the nation's largest construction contractors on owner relations, performance, claims, and legal matters involved in contracting in the public and private sectors, including, especially, the application of federal procurement law and regulations on major domestic and international construction projects.

Mr. Greene acted as lead counsel to the construction contractor on the more than \$300 million subcontract for installation of security devices in airports throughout the United States mandated by Congress to be installed on an expedited basis following 9/11. Mr. Greene advised on, assisted in the preparation of, and helped implement the procurement procedures, compliance programs, and accounting practices on that unique emergency procurement.

Most recently, Mr. Greene completed the trial phase of one of the largest and most complex claims in the history of the United States General Services Administration, representing the general contractor in presenting claims in excess of \$78 million on its behalf and on behalf of its subcontractors arising out of construction of the United States Courthouse in Central Islip, NY. Mr. Greene also represented a general contractor in litigation in the United States Court of Claims over construction of United States Federal Building in Jamaica, Queens, that resulted in a settlement and payment in excess of \$25 million. In connection with the same project, Mr. Greene defended and settled Miller Act claims aggregating in excess of \$15 million. Mr. Greene represented the developer and design-builder of the U.S. Courthouse in Minneapolis, Minn., preparing claims and negotiating a settlement in excess of \$10 million. Mr. Greene has overseen preparation of multimillion-dollar claims with respect to the United States Courthouses in Sacramento, CA, and St. Louis, MO, participating in the litigation of those claims and related subcontractor lawsuits.

Mr. Greene has defended major civil false claims and procurement fraud cases and consulted with respect to major criminal false claims actions. Mr. Greene also has an active practice in non-federal construction projects, both on a national and international basis. Mr. Greene has participated in the presentation and resolution of claims in excess of \$100 million before international arbitration tribunals with respect to projects outside the United States. Notably, Mr. Greene successfully presented the seminal case concerning the New Jersey construction lien law before the New Jersey Supreme Court.

Mr. Greene has lectured on construction, public contract law, and alternative dispute resolution. His seminars have included: "Easements and Ancillary Agreements Related to Construction," presented at the ABA Forum on the Construction Industry, October 2004; "New Jersey's Lien Laws: A Second Look," January 1997; "Using Technology in Trial Preparation and Presentation," May 1997; "Hot Topics in New Jersey Construction Law," May 1998; "Ethical

Questions in Construction and Public Contract Law," May 1999; "Bid Protests & Appeals Under Federal, State & Local Public Contract Laws," November 2000; "New Jersey's Lien Laws: Update 2001 through 2006," all of which were produced by the New Jersey Institute for Continuing Legal Education. Mr. Greene has just completed a chapter on "Defending False Claims Act" cases to be published in an upcoming book from the ABA Forum on the Construction Industry and has published numerous articles on construction and public contract law issues, including, most recently: "The New Stakes in Doing Business with the Federal Government," published in *Construct!*, Summer 2007, Vol. 16 No. 3; "A Pocket Guide to Contractor's Notice Provisions," published in *Construct!*, Spring 2006 Vol. 15 No. 3; "Managing Subcontractor Claims In Construction Litigation With the Owner," published in *Construct!*, Winter 2005, Vol. 14 No.2; "False Claims Liability For Construction Contractors," published in *New Jersey Lawyer*, October 2002; and "Recovering Damages For Lost Overhead: Reassessing *Eichleay*," published in the *Journal Of Construction Accounting & Taxation*, Vol. 10, No. 1, January/February 2000.

Mr. Greene has been recognized as a leading construction lawyer by Who's Who of International Construction Lawyers, New Jersey Super Lawyers, Best Lawyers in America, Best Lawyers in NJ by *New Jersey Magazine*, Best Lawyers in the New York Area by *New York Magazine*.

He is the current co-chairman of the Construction Litigation Committee of the Litigation Section of the American Bar Association and past co-chairman of the New Jersey State Bar Association Construction and Public Contract Law Section. Additionally, Mr. Greene is an active member of the ABA Forum on the Construction Industry and a member of the Bar Association of the United States Court of Federal Claims.

Mr. Greene is a graduate of St. Peter's College and the Georgetown University Law Center.

**William W. Thompson**  
**Partner**  
**Peckar & Abramson**

Mr. Thompson is one of the presenters for Workshop T4, "Navigating the False Claims Act Minefield," on Tuesday afternoon. He has specialized in government contract law and construction litigation for more than 30 years. Mr. Thompson has represented a broad range of government contractors, from major defense contractors to information technology and systems integration contractors, to construction contractors.

His clients have ranged from multibillion-dollar contractors to start-up companies. This representation has included business-related advice on bidding strategies, federal cost principles, and cost accounting requirements, and compliance with federal and state fraud, waste, and abuse laws and regulations. He also has extensive experience with competitions under OMB Circular A-76.

Mr. Thompson has extensive experience in preparing, negotiating, mediating, and, if necessary, litigating contract disputes in arbitrations, state and federal courts, and administrative boards, including the U.S. Court of Federal Claims, GAO, Boards of Contract Appeals of the various agencies, and the U.S. Court of Appeals for the Federal Circuit. He has experience with the prosecution and defense of claims arising from contracts with the entire range of federal agencies, as well as with state and local governmental agencies.

Among the more significant cases that Mr. Thompson has handled are: a \$100+ million claim by a major defense contractor that was settled for \$80 million after a 2-week mediation—the largest successful mediation of a Department of Defense dispute at the time; the contest of a \$2 billion award of an OMB Circular A-76 competition by the Federal Aviation Administration—the largest A-76 contest to date; summary judgment in favor of a contractor in a multimillion-dollar case decided by the Armed Services Board of Contract Appeals; summary judgment in favor of two defendants in the same case brought in federal district court under the False Claims Act; and favorable settlement of \$100 million breach of contract action on a hydroelectric project. Since 2005, Mr. Thompson has handled bid protests totaling \$13.5 billion.

As government oversight of government contractors has intensified in the search for fraud, waste, and abuse, Mr. Thompson's compliance practice has grown. This has included prophylactic advice on internal corporate controls, internal investigations of potential mischarging, and representation of clients in investigations, audits, and litigations. Besides investigating and advising clients on compliance with federal statutes such as the False Claims Act and Truth in Negotiations Act, he has investigated potential violations of the Sarbanes-Oxley statute.

Mr. Thompson received a Bachelor of Arts degree from Yale University in 1972, and a Juris Doctor degree, with Honors, from George Washington University in 1975. He is a member of the bars of Virginia and the District of Columbia and is admitted to practice before the U.S. Supreme Court, U.S. Court of Federal Claims, U.S. Courts of Appeals for the Federal Circuit, the Fourth Circuit and the Second Circuit, U.S. District Court for the District of Columbia, and U.S. District Court for the Eastern District of Virginia.

# ***IRMI***

## ***Navigating the False Claims Act Minefield***

Stephen Charney  
Patrick Greene  
William (Tom) Thompson

Peckar & Abramson, P.C.  
October 30, 2007

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### ***Compliance Overview***

- ◆ Reasons for instituting a compliance program
- ◆ The federal False Claims Act ("FCA")
- ◆ Recent court decisions in FCA cases
- ◆ Elements of a successful compliance program
- ◆ Potential compliance problems in contractor/surety business relationships, and in accounting for and getting paid for bonds and insurance
- ◆ Proper insurance structures for government contracts

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# ***I. Compliance Programs: Why Devote the Resources?***

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## ***Compliance Programs Are REQUIRED***

- ◆ *All contractors with the Department of Defense, Veterans Affairs and EPA must have a comprehensive compliance program*
- ◆ *Recently proposed additions to the Federal Acquisition Regulations ("FAR") would require the same program for contracts with all federal agencies*
- ◆ *All contractors are also required to have an Anti-Kickback Act program to prevent and detect possible violations*
- ◆ *Department of Labor audits EO/AA compliance and training programs*
- ◆ *Required by Sarbanes Oxley for publicly traded companies*

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## *Increased Federal Scrutiny*

- ◆ Federal fraud collections have increased exponentially: \$87 million in 1987; \$3.1 billion in FY 2006
- ◆ New federal fraud task force at DOJ will increase cooperation among prosecutors, auditors and contract administrators
- ◆ Top Department of Justice ("DOJ") official in Nov. 2005 stated: "the construction industry generates the most business and corruption cases in the U.S."

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## *Compliance Programs Make Good Business Sense*

- ◆ Fraud, waste and abuse are costly and corrosive to the company's business culture
- ◆ Implementation of compliance program is a plus if the government investigates:
  - May result in decision not to prosecute, or
  - May mitigate penalties
- ◆ Failure to have a program may be regarded as evidence of intent to defraud under the federal False Claims Act
- ◆ "Best practices" add value to privately held companies; less risk

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***II. Principal Federal Compliance  
Laws that Impact Construction  
Contractors: False Claims Act,  
False Statements Act, Anti-Kickback  
Act, Forfeiture Statute, Sherman Act,  
Bribery and Gratuities Statutes.  
Government Often Employs Federal  
Ethics Laws in Combination.***

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***The Federal False Claims Act***

- ◆ Basic Elements:
- (1) submission of a claim for payment to an agent of the federal government;
  - (2) the claim is false or fraudulent;
  - (3) the contractor knows that the claim is false or fraudulent; and
  - (4) the falsity is material to the Government's decision to pay the claim

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## ***FCA Penalties***

- ◆ ***Civil*** penalties of
  - (1) 3 times actual damages;
  - (2) fines of \$5,500 to \$11,000 per false claim; and/or
  - (3) suspension or debarment.
- ◆ ***Criminal*** penalties of up to 5 years imprisonment for intentional violations

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## ***False or Fraudulent Claim***

- ◆ Claim must be a “lie;” an “objective falsehood”
- ◆ Unintentional errors in judgment, bad math, or good faith misinterpretations of plans and specs are not false or fraudulent for purposes of FCA
- ◆ Contractor’s interpretation of contractual or legal requirement should be objectively reasonable. Frivolous claims should never be submitted as negotiation position
- ◆ Ambiguous federal regulations or contract provisions?
- ◆ The “Government knowledge” defense

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## ***Knowledge of Falsity***

Knowledge, for purposes of the FCA, includes:

- ◆ Actual knowledge that information is false
- ◆ “Deliberate ignorance” of truth or falsity (no “head in the sand” defense)
- ◆ “Reckless disregard” for truth or falsity

**Note:** Specific intent to defraud is *not* required for civil liability

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## ***Materiality***

- ◆ Most courts, but not all, have held that materiality is an “implicit” requirement of the FCA
- ◆ To be material, the falsity must have a “natural tendency to influence” payment of the claim
- ◆ In other words, the Government must have relied on the false information in deciding to pay the claim

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## *The FCA's "Presentment" Requirement*

- ◆ FCA covers 2 basic types of claims by a person who
  - "(1) knowingly **presents**, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States **a false or fraudulent claim for payment or approval;**" and
  - "(2) knowingly makes, uses, or causes to be made or used, a **false record or statement to get a false or fraudulent claim paid or approved by the Government;**"

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## *Definition of a "Claim" under the FCA*

- ◆ The FCA defines a "claim" as including:
  - "**any request or demand, whether under a contract or otherwise**, for money or property which is made to a contractor, grantee, or other recipient
  - if the United States Government **provides any portion of the money** or property which is requested or demanded, **or**
  - if the Government will **reimburse such contractor, grantee, or other recipient for any portion of the money** or property which is requested or demanded."

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## *Presentment Requirement and Federally Funded Projects*

- ◆ Federal courts are split on whether a false payment request must be submitted to or approved by the federal government for liability under the FCA
- ◆ *Totten case vs. Sanders case*
- ◆ Second thoughts by Chief Justice Roberts

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## *Who Can Bring an FCA Claim?*

- ◆ *Qui tam* relators, *i.e.*, whistle-blowers
  - FCA places 15%-30% bounty on heads of government contractors
  - Disgruntled employees, competitors, even certain government employees
- ◆ Intervention by the Department of Justice

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## *Progress Payments: Potential Minefield*

- ◆ A progress payment request is a "claim"
- ◆ Every payment request is a *separate* claim
- ◆ Broad certification that invoiced work has been completed in accordance with the contract and that subcontractors have been timely paid
- ◆ Billing for costs that are unallowable under federal regulations may violate the FCA
- ◆ Under the standard FAR Payments clause for fixed price construction contracts, a contractor must certify on payment requests that surety bond premiums have been "*paid*"
- ◆ Progress payments are the most common source of false claims

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# ***V. Insurance for Government Contracts***

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## **Insurance for Government Contracts**

- ◆ **Issues to Consider Re: Insurance & Reinsurance**
  - Proper price to be charged
  - Disclosures to be made during negotiation of price
  - Additional disclosures under FAR provisions regulating insurance
  - Disclosures that may be required by specific contract provisions

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# Insurance for Government Contracts

## Proper price to be charged

Issue arises on almost all contracts:

- Cost Reimbursement Contracts
- Negotiated Lump Sum Agreements
- Lump Sum Bid Contracts:
  - Cost Reimbursement Changes
  - Negotiated Changes

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# Insurance for Government Contracts

## Proper price to be charged

Part 31 of the FAR (the "Cost Principles") governs the nature and amount of costs that the government will recognize when paying a contractor under reimbursable contracts (including change orders) or negotiating a price with a contractor when the contractor's costs are a consideration in that negotiation.

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# Insurance for Government Contracts

## Proper price to be charged

FAR 31-205-19 entitled "Insurance and Indemnification" governs the cost that can be charged for insurance.

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# Insurance for Government Contracts

## Proper price to be charged – Purchased Insurance

Under FAR 31-205-19(d) the cost for purchased insurance is generally allowable at the price paid.

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# Insurance for Government Contracts

Proper price to be charged –  
Purchased Insurance

Care must be taken as to retroactive rating insurance:

FAR 31-201-5 provides: "The applicable portion of any income, rebate, allowance, or other credit relating to any allowable cost and received by the contractor shall be credited to the Government either as a cost reduction or by cash refund."

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# Insurance for Government Contracts

Proper Price to be charged –  
Purchased Insurance

Therefore, when a credit or rebate is received for insurance costs allocated to a government job, that credit or rebate has to be traced back to the job, and, in some cases, a credit must be paid to the government.

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# Insurance for Government Contracts

Proper price to be charged –  
Purchased Insurance

It may be possible to reduce onerous accounting requirements by reaching an advance agreement with the government as to a probable final rate for the retroactively rated insurance and having the contractor stand “at-risk”, i.e., allowing subsequent rate adjustments (good or bad) to be absorbed by the contractor.

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# Insurance for Government Contracts

Proper price to be charged –  
Related party insurers

FAR 31-205-26(e) provides: “Allowance for all materials, supplies and services that are sold or transferred between any divisions, subdivisions, subsidiaries, or affiliates of the contractor under a common control shall be on the basis of cost incurred in accordance with this subpart.”

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# Insurance for Government Contracts

Proper price to be charged –  
Related party insurers

FAR 31-205-26(e) further provides: "However, allowance may be at price when it is the established practice of the transferring organization to price interorganizational transfers at other than cost for commercial work of the contractor ..." and "the item ... qualifies for an exception under 15.403-1(b) and the contracting officer has not determined the price to be unreasonable."

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# Insurance for Government Contracts

Proper price to be charged –  
Related party insurers

FAR 15.403-1(b) provides exceptions:

- When the CO decides the price is based on adequate price competition;
- When a "commercial item" is being purchased (e.g., there is a catalog price);
- When prices are established by regulation; and
- Waiver by the agency head.

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# Insurance for Government Contracts

Proper price to be charged –  
“Captive” insurers

FAR 31-205-19 (b) provides: “the Government considers insurance provided by captive insurers (insurers owned by or under control of the contractor) as self-insurance, and charges for it shall comply with the provisions applicable to self-insurance costs in this subsection.”

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# Insurance for Government Contracts

Proper price to be charged –  
“Captive” insurers

FAR 31-205-19 (b) provides one exception: “if the captive insurer also sells insurance to the general public and it can be demonstrated that the charge to the contractor is based on competitive market forces, the Government will consider the insurance as purchased insurance.”

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# Insurance for Government Contracts

Proper price to be charged –  
“Captive” insurers

FAR 31-205-19 (d)(2):“Premiums for insurance from fronting insurance companies (insurance companies not related to the contractor but who reinsure with a captive insurer of the contractor) are unallowable to the extent they exceed (i) the amount that would have been allowed had the contractor insured directly with the captive insurer; and (ii) reasonable fronting company charges for services rendered.”

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# Insurance for Government Contracts

Proper price to be charged –  
“Captive” insurers

The operative issue is whether the contractor “controls” the related insurance/reinsurance company.

- Fact issue, subject to government audit, investigation and argument
- Tax regulations and determinations do not control

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# Insurance for Government Contracts

## Control or not control?

If the contractor "controls" the insurer/reinsurer, it is treated as "self-insurance" and FAR 31.205-19 (c) requires:

- Application of special accounting rules contained in 48 CFR 9904.416.

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# Insurance for Government Contracts

## Control or not control?

If the contractor "controls" the insurer/reinsurer, it is treated as "self-insurance":

FAR 31.205-19(c)(2) requires:

- Compliance with FAR Part 28 governing approval of self-insurance programs (which requires a disclosure of specific information in certain circumstances)

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# Insurance for Government Contracts

## Control or not control?

Resolution of whether or not the contractor "controls" the insurer/reinsurer affects the nature and level of information that must be given to the government.

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# Insurance for Government Contracts

Disclosures that must be made in recovering cost or negotiating price for insurance.

Information must be provided to the government when seeking to recover the cost of or negotiating a price for insurance whether or not it is considered "purchased" or provided by a "captive."

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# Insurance for Government Contracts

Disclosures that must be made in recovering cost or negotiating price for insurance.

For cost-reimbursement contracts or change orders the contractor must supply complete and accurate actual cost information which is subject to Government audit. FAR 52.215-2(b).

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# Insurance for Government Contracts

Disclosures that must be made in recovering cost or negotiating price for insurance.

Generally, for negotiated contracts or forward-priced change orders in excess of the "simplified acquisition threshold" in effect at the time of contracting (currently \$650,000) the Contracting Officer must obtain accurate, complete and current "cost or pricing data" from the Contractor. FAR 15.403-4 (a)(1)

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# Insurance for Government Contracts

Disclosures that must be made in recovering cost or negotiating price for insurance.

The requirement for the contractor to submit cost or pricing data "is met when all accurate cost or pricing data reasonably available to the contractor have been submitted, either actually or by specific identification..." FAR 15.408 , Table 15-2, Note 1.

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# Insurance for Government Contracts

Disclosures that must be made in recovering cost or negotiating price for insurance.

"To evaluate the accuracy, completeness, and currency of the cost or pricing data" the Government has the right to "examine and audit all of the contractor's records..." FAR 52.215-2(c)

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# Insurance for Government Contracts

Disclosures that must be made in  
recovering cost or negotiating  
price for insurance.

Even below the \$650,000 threshold, or when an exception to the requirement for cost or pricing data applies, the Government must obtain information "that is adequate for evaluating reasonableness of the price or determining price realism..." FAR 15.403-3(a)(1).

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# Insurance for Government Contracts

Disclosures that must be made in  
recovering cost or negotiating  
price for insurance.

When cost or pricing data is required, one would expect the Government to argue that a full disclosure of the existence and nature of any relationship between the contractor and any insurer/reinsurer is necessary to make the disclosure "accurate, complete and current."

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# Insurance for Government Contracts

Disclosures that must be made in recovering cost or negotiating price for insurance.

Even when formal cost or pricing data is not required, the Government would argue that a disclosure of the affiliation relationship between the contractor and supplier would be required anytime the Contractor is asked to supply information "that is adequate for evaluating reasonableness of the price or determining price realism..." FAR 15.403-3(a)(1).

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# Insurance for Government Contracts

## Control or not control?

As we said earlier, if the contractor "controls" the insurer/reinsurer, it is treated as "self-insurance":

FAR 31.205-19(c)(2) requires:

- Compliance with FAR Part 28 governing approval of self-insurance programs (which requires a disclosure of specific information in certain circumstances).

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# Insurance for Government Contracts

Additional disclosure required if  
the Contractor controls the  
insurer/reinsurer

FAR 28.308(a) requires a written submission of information concerning the Contractor's *proposed* self-insurance program:

- 1) "When it is *anticipated* that 50 percent or more of the self-insurance costs of a segment of a contractor's business will be allocated to negotiated Government contracts, and
- 2) The self-insurance costs at the segment for the contractor's fiscal year are *expected* to be \$200,000 or more..."

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# Insurance for Government Contracts

Additional disclosure required if  
the contractor controls the  
insurer/reinsurer

Under FAR 28.308(a), the written submission must be made to the "administrative contracting officer" and the contractor must "obtain that official's approval of the program."

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# Insurance for Government Contracts

Additional disclosure required if the contractor controls the insurer/reinsurer

Under FAR 28.308(a)(1-10), the written submission must contain ten categories of detailed information related to the risk and cost structure of the self-insurance program.

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# Insurance for Government Contracts

Additional disclosure required if the contractor controls the insurer/reinsurer

Under FAR 28.308(b), the contracting officer will approve the self-insurance program “when examination of a program indicates that its application is in the Government’s interest.”

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# Insurance for Government Contracts

## Proper Price for Bonds

Allowance of cost for bonds is governed by FAR 31.205-4(b) which provides "Costs of bonding required pursuant to the terms of the contract are allowable."

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# Insurance for Government Contracts

## Proper Price for Bonds

No special rules are provided for pricing bonds. However:

- Because insurance companies issue bonds, the government may claim they are subject to the special rules governing insurance; and
- When the bonds are provided by an affiliated company the cost would be subject to the related party rules of FAR 31.205-26(e).

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# Insurance for Government Contracts

Additional disclosure required if  
the contractor controls the  
insurer/reinsurer

Specific contract clauses may also require disclosing the details of a self-insurance agreement or other details of the relationship between the contractor and any insurer, reinsurer, surety or resurety. See, FAR 52-228-7(a)(2) and FAR 52-228-15(c).

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# ***III. Elements of a Successful Compliance Program***

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## ***Educate Employees***

- ◆ Written code of business ethics and conduct
- ◆ Compliance and ethics education program

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## *Reporting Mechanism*

- ◆ "Hot line" or similar mechanism for anonymously reporting suspected violations

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## *Employee Responsibilities*

- ◆ Report suspected violations
- ◆ Fully cooperate with government investigations and audits
- ◆ Employees subject to disciplinary action for ethics violations

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## *Monitoring Compliance*

- ◆ Designate a senior official to exercise day-to-day operational responsibility for program
- ◆ Regular internal and/or external audits of company policies, procedures and internal compliance controls. Are the controls fully operational?

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## *Scope of Compliance Program*

- ◆ All of the foregoing elements of compliance program must be implemented
- ◆ However, extent and formality of compliance program depends upon (1) size of company; (2) volume of Government work; (3) standard industry practice; and (4) previous misconduct

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## *Additional Compliance Requirements under Proposed FAR Regulation*

- ◆ In addition to the foregoing requirements, federal contractors must institute internal controls that:
  - “Facilitate timely discovery and **disclosure** of improper conduct” in connection with government contracts
  - Require timely **reporting** to the government “of any suspected violations of law” or “**any other irregularities**”
  - Require “**full cooperation**” with government investigators

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## ***IV. Structuring a Compliance Program***

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### ***Targeting Potential Risks***

- ◆ As the DOJ has stated, "Compliance programs should be designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business"
- ◆ A construction contractor with GSA contracts faces somewhat different risks than a GSA schedule contractor
- ◆ Primary risks for construction contractors are those discussed above

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## *Existing Financial and Management Controls*

- ◆ The process of constructing a compliance program begins with a complete review of the contractor's *existing* financial and management controls (automated and/or manual processing of subcontractor invoices and progress payment requests, management of purchasing, existing employee training programs, etc.)
- ◆ The "art" of constructing a cost-effective compliance program lies in utilizing existing controls to the extent possible by matching these controls with the relevant potential risks

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## **QUESTIONS & ANSWERS**

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