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Contractor Accountability

To Disclose or Not to Disclose

By Ken Weckstein

Federal government contractors must make certain mandatory disclosures to agency inspectors general, with a copy to the contracting officer, when the contractor has ''credible evidence'' that ''a principal, employee, agent, or subcontractor'' has violated certain criminal laws. Contractors are obligated to report violations of laws involving fraud, conflicts of interest, bribery, gratuity or false claims.[1] Violations of criminal laws for murder, bank robbery and impersonating Keith Richards need not necessarily be disclosed. After the ''mandatory disclosure'' rule was open for public comment and finalized, lawyers spent some time parsing language and analyzing case law to figure out what ''credible evidence'' meant and the exact reach of the mandatory disclosure rule. A recent administrative agreement between Booz Allen Hamilton, Inc. (''Booz Allen'') and the United States Department of the Air Force,[2] recalls the class we missed in law school about ''Disclosures Bewaris.'' If you think ''credible evidence'' means clear and convincing evidence instead of some possibility of a violation, think again. And disclosing to just the contracting officer and not to the IG? Fuhgetaboutit.

On February 6, 2012, Booz Allen's San Antonio location was proposed for debarment by the Air Force. The Memorandum in Support of Debarment said that Booz Allen hired a former Fed who brought with him to Booz Allen non-public pricing information about an upcoming procurement. (Bad.) On his first day of work at Booz Allen San Antonio, the former Fed gave the pricing information to Booz Allen principals that were working on the company's bid for the procurement. (Very bad.) The former Fed also was appointed one of the Booz Allen Capture Leads for the procurement effort. Uh, hello? Six weeks after the non-public pricing information was first provided to Booz Allen supervisors, a Booz Allen pricing analyst recognized the sensitive nature of the information and reported it to the Booz Allen Law Department. That started in motion the disclosure and subsequent corrective action that led to the Booz Allen/Air Force Administrative Agreement.

The administrative agreement preamble says:

> The Law Department finally learned of the matter approximately six weeks later when a pricing analyst recognized the sensitive nature of the information. However, upon learning of the matter, the Law Department narrowly focused its internal investigation on [the former Fed's] disclosure and, consequentially, overlooked other culpable parties, including principals, and evidence of additional misconduct within the San Antonio office. As a result, at that time, Booz Allen did not uncover indications and signals of broader systemic ethical issues within the firm.[3]

The preamble further explains:

> Booz Allen recognized the seriousness of the matter by ordering through the Law Department a document hold, voluntarily deciding that it would be inappropriate to participate in the follow-on competition, and, ultimately, terminating the [former government employee]. However, Booz

[1] *See* Federal Acquisition Regulation 52.203-13(b)(3)(i).

[2] *See* administrative agreement between Booz Allen and the United States Department of Air Force, dated April 13, 2012 (''Booz Allen administrative agreement''), *available at*: <<http://www.dodig.mil/Inspections/IPO/ContractorDisclosure/Contractor%20Disclosure%20Program%20Guide%20030509.pdf.

[3] *Id.* at 1.

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> Allen determined that it was unnecessary to disclose the matter to the Department of Defense Inspector General, or to the Department of the Air Force, Office of the General Counsel, Contractor Responsibility (SAF/GCR), the Air Force debarring authority. Instead, Booz Allen disclosed the matter informally and without adequate Booz Allen Law Department oversight or engagement through a Booz Allen contracts director through a series of voice mails and e-mails to Air Force contracting personnel involved in the follow-on procurement.[4]

According to the administrative agreement, the original incident, followed by the narrow investigation and Booz Allen's informal disclosure, contributed to the Air Force's ''serious concerns regarding the responsibility of Booz Allen['s] . . . San Antonio office.''[5]

In exchange for the Air Force's agreement not to suspend or debar Booz Allen ''based upon the facts and circumstances in the preamble,'' Booz Allen agreed to review and enhance various components of its self-governance programs.[6] Booz Allen also agreed to what appears to be a much broader ''reporting misconduct'' disclosure requirement. Paragraph 11 of the administrative agreement states:

> Booz Allen will copy the Air Force on all mandatory disclosures . . . required by FAR 52.203-13, voluntary disclosures to an agency Office of Inspector General or Contracting Officer, and any other disclosures to a government official concerning procurement-related matters or business ethics or integrity-related misconduct. . . . Additionally, Booz Allen will report to the Air Force within 15 days of a determination by management that there are reasonable grounds to believe that the suspected misconduct of an employee may constitute a violation of U.S. criminal or civil law or a material violation of Booz Allen's ethics and compliance program concerning procurement-related matters or business ethics or integrity-related misconduct.[7]

You might think this is damned if you do (broad disclosure) and damned if you don't (narrow disclosure), but if you disclose enough so the government will want to pull the string a little more, you probably should pull it yourself before you go to the government. And about those end runs around the IG, if you are in for a penny you might as well be in for a pound.

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[4] *Id.*
[5] Booz Allen Administrative Agreement at 1.
[6] *Id.* at ¶ 24 and ¶ 10.
[7] *Id.* at ¶ 11.

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