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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750-AG98

Defense Federal Acquisition Regulation Supplement; Display of
DoD Inspector General Fraud Hotline Posters (DFARS Case 2010-
D026)

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense
Federal Acquisition Regulation Supplement (DFARS) to require
contractors to display the DoD fraud hotline poster in common
work areas.

DATES: Effective Date: [Insert date of publication in the
FEDERAL REGISTER]

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, 703-602-
1302.

SUPPLEMENTARY INFORMATION:

I. Background

This final rule implements the recommendations of the DoD

Inspector General (IG) by providing a DFARS clause to use in lieu of the FAR clause at 52.203-14, Display of Hotline Poster(s).

Government Accountability Office (GAO) Report GAO-09-591, entitled "Defense Contracting Integrity: Opportunities Exist to Improve DoD's Oversight of Contractor Ethics Programs," recommended that the DoD IG determine the need for defense contractors to display the DoD IG's fraud hotline poster.

The DoD IG determined that DoD contractors, including contractors that have an ethics and compliance program that includes a reporting mechanism such as a hotline poster, need to display DoD fraud hotline posters in a common work area within business segments performing work under the contract and at contract work sites.

FAR 52.203-14(c) states that "(i)f the Contractor has implemented a business ethics and conduct awareness program, including a reporting mechanism, such as a hotline poster, then the Contractor need not display any agency fraud hotline posters, other than any required DHS posters." The DoD IG determined that this exemption has the potential to make the DoD hotline program less effective by ultimately reducing contractor exposure to DoD IG fraud hotline posters and diminishing the means by which fraud, waste, and abuse can be reported under the protection of Federal whistleblower protection laws. According

to the DoD IG, some contractors' posters may not be as effective as the DoD poster in advertising the hotline number, which is integral to the fraud program. The DoD IG is also revising the DoD IG fraud hotline poster to inform contractor employees of their Federal whistleblower protections.

Therefore, the prescription for use of the new DFARS clause provides no exception to the use of the DoD hotline poster for contractors that have implemented a business ethics and conduct awareness program, even those that include a reporting mechanism such as a hotline poster.

II. Discussion and Analysis

DoD published a proposed rule at 76 FR 13327 on March 11, 2011, to implement the DoD IG's policy. Nine respondents submitted 25 public comments on the proposed rule. The comments are summarized and discussed in the following paragraphs.

A. Supportive comments

Comments: Four respondents supported the DFARS rule, stating that it would assist employees in reporting fraud, waste, and abuse and might promote *qui tam* suits. Two respondents recommended expanding the rule's applicability by (1) lowering the threshold or (2) making it applicable to U.S.-owned and -operated firms that perform overseas.

Response: DoD acknowledges the respondents' support. DoD declines to expand the rule's applicability because the

prescription and conditions for the use of the hotline poster in DoD contracts are exactly those prescribed at FAR 3.1004(b) for the inclusion of the FAR clause at 52.203-14, Display of Hotline Poster(s). The respondents did not provide rationale supporting the proposed further expansion of requirements to use the DoD IG hotline poster clause.

B. Requirement to post the DHS hotline poster

Comments: One respondent asked that the DFARS Procedures, Guidance and Information (PGI), include guidance on obtaining relevant information to be inserted in the clause regarding the title of the applicable Department of Homeland Security (DHS) fraud hotline poster and website(s) or other contact information. Another respondent, however, stated that the requirement, at 252.203-700X(b)(ii) of the proposed rule, to display the DHS fraud hotline posters, is unnecessary for several reasons. It is unlikely, according to the respondent, that DoD would be awarding DHS contracts for disaster recovery, and the coverage at FAR 52.203-14 relating to the display of DHS fraud hotline posters does not need to be duplicated in the DFARS.

Response: There is a reason to include in the DFARS clause a requirement to use the DHS fraud hotline poster when DHS disaster relief funding is added to a DoD contract. The DoD clause prescription has been expanded (at 203.1004(b)(2)(ii)) to

explain that information regarding the DHS hotline poster is needed only when DHS disaster relief funding is added to the DoD contract. In most cases, there is no need to display the DHS hotline poster and, therefore, no need to include in the clause information about where to obtain the DHS poster. Adding this clarification to the DFARS clause prescription removes any need to add PGI guidance on relevant information regarding the applicable DHS fraud hotline poster and websites or other contact information.

C. Rule does not pass a cost/benefit analysis

Comments: Five comments were received on this issue. One respondent remarked that the new requirement will be unnecessarily burdensome with little, if any, commensurate benefit. The respondent called the rule "an example of the stacking of regulations within and across agencies that increases the burden without any apparent benefit to achieving the mission." Three other respondents made essentially the same point, one suggesting that the rule could be viewed as an unintentional but unfortunate effort by DoD to discourage contractors from implementing rigorous internal mechanisms for dealing with compliance concerns. A respondent suggested that the proposed rule ignored the significant change already made to the FAR that requires mandatory reporting to the agency IG if the contractor has credible evidence of a violation of Federal

criminal law involving fraud, conflict of interest, bribery, or gratuity, or a violation of the civil False Claims Act in connection with Government contracts (see FAR 3.1003(b)).

According to one respondent, many company employee hotline reports simply disclose a concern about an activity or behavior without the employee knowing whether it violates only company policy or some Government contract provision or law. Posting the DoD IG hotline poster will confuse employees, asserted the respondent, and will result in company employees not reporting potentially valuable information to anyone.

Response: A requirement to hang a free poster in work areas does not appear to be measurably burdensome. Further, the DoD poster contains a prominent location for inclusion of the contractor's own fraud hotline number and does not preclude or preempt posting of a contractor's separate fraud hotline poster. As to any additional burden on the DoD IG, that office has weighed the potential cost and elected this approach.

D. Replaces the contractor as the first line of defense against waste and fraud

Comments: One respondent stated that this change would seriously undermine the role company hotline posters have in internal contractor compliance and ethics programs. The respondent noted that these company programs have a proven track record of inhibiting improper and/or illegal behavior. This

respondent and one other respondent expressed concern that, from a purely practical perspective, removing the exemption and requiring the use of the DoD hotline posters will usurp the company's position as the first line of defense against waste and fraud and, instead, place the DoD/IG in that role.

Response: There is no intent to replace the company hotline poster. This rule supplements the Government defense against fraud, waste, and abuse.

E. Will result in inefficiencies for both contractors and the DoD IG

Comments: Five comments were received from two respondents. A respondent concluded that posting the DoD IG fraud hotline poster will result in the DoD IG becoming involved in matters of an urgent nature, as well as a significant number of day-to-day issues. Both respondents pointed out that the majority of the matters reported to company hotlines are human resource-related issues that have little or nothing to do with the direct performance and final deliverables under DoD-funded contracts and subcontracts. The respondents were concerned that, if such matters are reported through the DoD IG fraud hotline rather than directly to the contractor, the latter will be left to learn about them from the DoD IG and will be unable to respond quickly, which ultimately will have a negative impact on employee morale. Further, display of the DoD IG fraud

hotline posters, according to a respondent, will assuredly result in the DoD IG being quickly drawn into a myriad of personnel and related issues, thus bogging down the system. The respondents considered that result to be against the best interests of both DoD and its contractors.

The respondents also noted that, if employees choose to contact the DoD IG hotline regarding more serious potential workplace-safety or product-quality matters, the contractor may not learn about these matters in a timely manner, thereby increasing the possibility of injury or deficient product quality. The respondents suggested that directly inserting the DoD IG into these matters could potentially result in DoD "taking on some measure of responsibility for failing to respond in a timely manner." One of the respondents quoted the GAO report as recognizing these potential issues:

"...there might be practical reasons for continuing to exempt some defense contractors with their own hotlines from displaying DOD's hotline poster, such as avoiding the confusion or duplication that could occur with too many hotline posters on display in one place..."

Response: This rule provides contractor employees with more than one option for reporting matters of concern. Further, the Office of the DoD IG advises that its fraud hotline is

adequately staffed with personnel trained to recognize and react appropriately to reports with the potential to affect safety or quality. They further advise that the staff is trained to distinguish between routine personnel issues and those that impact Government contracts.

F. Unnecessary because of contractors' existing duty

Comments: Four respondents raised issues on this subject. One respondent pointed out that contractors already have existing contractual and regulatory duties to notify the Government of certain significant events that occur in connection with contract performance. Another respondent stated that the requirement is likely to lead to confusion as to appropriate reporting channels and mechanisms. The respondents asserted that defense industry and research institutions, as well as other segments of DoD's contracting community, take most seriously the responsibility to self-report or voluntarily disclose violations to the Government. Contractors also take very seriously the need to have open and accessible reporting mechanisms and respond expeditiously and thoroughly to matters raised through those reporting mechanisms. Creating an alternate reporting mechanism without the same level of accountability as the contractor's in-house or external reporting mechanism, according to respondents, adds no value to the process and undermines existing systems, processes, and

programs already in place. A respondent took issue with the DoD IG implication, made in the background section of the proposed rule (76 FR 13328, March 11, 2011), that reports made to a contractor hotline diminished the protections available under Federal whistleblower-protection laws. This respondent expressed the strong belief that adequate provisions ensure that employees who in good faith report information to a company hotline, but who are not themselves culpable, have full whistleblower protection for their disclosures.

Response: For those contractors that have existing internal compliance programs with a fraud hotline number, the posting of the DoD IG fraud hotline poster supplements the existing reporting mechanisms. A contractor's existing duty to self-report or voluntarily disclose violations to the Government is not preempted by posting the DoD IG fraud hotline poster.

G. Exclusions and flowdown requirement

Comments: One respondent expressed strong support for the \$5 million threshold and the exclusions provided for prime contracts that are for commercial items or that will be performed entirely outside the U.S. This respondent also strongly supported the \$5 million threshold for flowdown of the requirement to subcontracts, as well as the exclusion from the flowdown requirement for subcontracts that are for commercial items or that will be performed entirely outside the U.S.

However, the respondent recommended that the flowdown requirement be further limited to first-tier subcontracts.

Response: DoD has adopted the same criteria for flowdown of the new clause at DFARS 252.203-7004, Display of Fraud Hotline Posters, as is used for the comparable clause at FAR 52.203-14, Display of Hotline Posters. Because DoD is using DFARS 252.203-7004 in lieu of the clause at FAR 52.203-14, DoD has retained the same criteria for flowdown to subcontractors.

H. Allow electronic, as an alternate to physical, display of poster

Comment: A respondent noted that the nature of the workplace has changed significantly, making the requirement to display the DoD IG hotline poster in traditional office locations less effective than it might have been in the past. The respondent, noting that the clause at FAR 52.203-14 already requires each company to display the hotline poster on the company's website, if a website is maintained, recommended that the DFARS final rule allow electronic posting to satisfy the regulatory requirement to "display the hotline poster in common work areas."

Response: The DFARS coverage specifically requires electronic display, if the contractor maintains a website, in addition to physical display. These are the same posting rules

as are used in the comparable FAR clause, 52.203-14, Display of Fraud Hotline Posters.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this final rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the requirement to display posters has minimal economic impact and the rule only applies to contracts and subcontracts that exceed \$5 million in value, so few small business concerns are impacted. However, a final regulatory

flexibility analysis has been performed and is summarized as follows:

This rule was initiated in response to a Government Accountability Office (GAO-09-591) recommendation that the DoD IG should determine the need for defense contractors to display the DoD IG's fraud hotline poster. The DoD IG subsequently determined that DoD contractors, including contractors with an ethics and compliance program that includes a reporting mechanism such as a hotline poster (currently exempt), need to display DoD fraud hotline posters in a common work area within business segments performing work under the contract and at contract work sites.

The final rule does not include an exemption for DoD contractors to post their own company posters instead of the DoD IG hotline poster and requires all DoD contractors with contracts that exceed \$5 million to post the DoD IG fraud hotline poster. The DoD IG determined that this FAR exemption to the posting of an agency's fraud hotline poster had the potential to make the DoD IG hotline program less effective by ultimately reducing contractor exposure to DoD IG fraud hotline posters and diminishing the means by which fraud, waste, and abuse can be reported under the protection of Federal whistleblower protection laws. The DOD IG further determined that some contractors' posters may not be as effective as the

DoD poster in advertising the hotline number, which is integral to the DoD fraud program. The legal basis for the rule is 41 U.S.C. 1303 and 48 CFR chapter 1.

The rule applies to all contractors with DoD contracts with a value that exceeds \$5 million. Many small businesses, therefore, are not impacted.

Paragraph (c) of the clause at FAR 52.203-14 provides that a contractor need not display any agency fraud hotline posters (other than required DHS posters) if the contractor has implemented a business ethics and conduct awareness program that includes a reporting mechanism such as a hotline poster. The DFARS rule differs only in that it removes this FAR exemption.

There is no reporting or recordkeeping requirement established by this rule. The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no alternatives that would achieve the objectives of the final rule. No comments were received on the small business impact in response to the initial regulatory flexibility analysis.

Interested parties may obtain a copy of the final regulatory flexibility analysis (FRFA) from the point of contact named herein. A copy of the FRFA has been submitted to the Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 203 and 252

Government procurement.

Ynette R. Shelkin

Editor, Defense Acquisition Regulations System

Therefore, 48 CFR parts 203 and 252 are amended as follows:

1. The authority citation for 48 CFR parts 203 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 203— IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

2. Amend section 203.1004 by revising paragraph (b)(2)(ii) to read as follows:

203.1004 Contract clauses.

(a) * * *

(b)(2)(ii) Unless the contract is for the acquisition of a commercial item or will be performed entirely outside the United States, if the contract exceeds \$5 million, use the clause at 252.203-7004, Display of Fraud Hotline Poster(s), in lieu of the clause at FAR 52.203-14, Display of Hotline Poster(s). If the

Department of Homeland Security (DHS) provides disaster relief funds for the contract, DHS will provide information on how to obtain and display the DHS fraud hotline poster.

PART 252--SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Add section 252.203-7004 to read as follows:

252.203-7004 Display of fraud hotline poster(s).

As prescribed in 203.1004(b)(2)(ii), use the following clause:

DISPLAY OF FRAUD HOTLINE POSTER(S) (SEP 2011)

(a) Definition. United States, as used in this clause, means the 50 States, the District of Columbia, and outlying areas.

(b) Display of fraud hotline poster(s).

(1) The Contractor shall display prominently in common work areas within business segments performing work in the United States under Department of Defense (DoD) contracts DoD fraud hotline posters prepared by the DoD Office of the Inspector General. DoD fraud hotline posters may be obtained from the DoD Inspector General, ATTN: Defense Hotline, 400 Army Navy Drive, Washington, DC 22202-2884.

(2) If the contract is funded, in whole or in part, by Department of Homeland Security (DHS) disaster relief funds, the DHS fraud hotline poster shall be displayed in addition to the DoD fraud hotline poster. If a display of a DHS fraud hotline poster is required, the Contractor may obtain such poster from:

[Contracting Officer shall insert the appropriate DHS contact information or website.]

(3) Additionally, if the Contractor maintains a company website as a method of providing information to employees, the Contractor shall display an electronic version of the poster(s) at the website.

(c) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (c), in all subcontracts that exceed \$5 million except when the subcontract—

- (1) Is for the acquisition of a commercial item; or
- (2) Is performed entirely outside the United States.

(End of clause)

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