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## Additional Changes to Proposed FAR Amendment Requiring Contractor Code of Ethics and Mandatory Reporting of Overpayments and Violations

**Background:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulation Council ("the Councils") had previously proposed to amend the Federal Acquisition Regulation ("FAR") to require a Contractor Code of Ethics and Business Conduct (FAR Case 2006-007, 72 Fed. Reg. 7588 (February 16, 2007) and FAR Case 2007-006, 72 Fed. Reg. 64019 (Nov. 14, 2007)).<sup>[1]</sup> The Councils received a number of comments on FAR Case 2006-007 and, after analysis of those comments, issued a final rule effective on December 24, 2007 (72 Fed. Reg. 65873 (November 23, 2007)).

The final rule under FAR Case 2006-07 omitted mandatory disclosures to the government or mandatory cooperation with government investigations that had been included in the proposed rule. The Councils then opened FAR Case 2007-006 to address these issues as well as corrective actions sought by the Department of Justice ("DOJ"). The proposed rule under FAR Case 2007-006 required contractors to have a code of ethics and business conduct, establish and maintain specific internal controls to deter and prevent improper conduct related to government contracts or subcontracts, and notify contracting officers when the contractor becomes aware of violations of Federal criminal law with regard to government contracts or subcontracts.

**Changes to Proposed Rule under FAR 2007-006:** Comments on FAR Case 2007-006 raised concerns with the proposed exceptions to the rule for contracts to be performed entirely outside the United States and for contracts for commercial items. Additionally, DOJ proposed to add a requirement for contracts to report violations of the Civil False Claims Act and make the knowing failure to timely report such violations a cause for debarment or suspension.

The Councils are now seeking comments and recommendations regarding the following changes only:

- Elimination of the exception for contracts and subcontracts that will be performed outside the United States by requiring inclusion of FAR 52.23-13 such contracts and subcontracts. In essence, this change would make the requirements for a contractor code of business ethics and conduct, business ethics awareness and compliance program, and an internal control system applicable to contracts performed outside the United States. Under the prior proposed rule, contracts to be performed outside the United States were already subject to the policy demanding integrity and honesty, a clause requiring an internal control system with an internal reporting system for employees to report suspected instances of improper conduct, and suspension/debarment for the knowing failure to timely disclose an overpayment or violations of Federal criminal law in connection with a government contract.
- Similarly, elimination of the exception for commercial items by requiring inclusion of FAR 52.23-13 in contracts and subcontracts for the acquisition of commercial items. Commercial item contracts and subcontracts, however, remain exempt from requirements for a formal business ethics awareness and compliance program and internal control system.
- An addition to the causes for debarment listed at FAR 9.406-2 and the causes for suspension listed at FAR 9.407-2. Specifically, a knowing failure to timely disclose a violation of the Civil False Claims Act in connection with the aware or performance of any government contract or any subcontract thereunder, in addition to the grounds for debarment which appeared in the original proposed rule.

**Practitioner's Tips:**

- Government contractors and those seeking to do business with the government should review their current ethics policies and internal controls to determine whether they comport with the additional

proposed requirements.

- Any comments concerning these new changes to FAR Case 2007-006 must be submitted on or before July 15, 2008 by mail to General Services Administration, Regulatory Secretariat (VPR), 1800 F Street NW, Room 4041, Washington, DC 20405; by fax to 202-501-4067; or by the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov).

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[1] Each of these FAR cases was the subject of a Venable Special Government Contracts Update, 2007-3, in February 2007 and 2007-13 in November 2007, and can be viewed at [www.venable.com/publications.cfm?action=search&section=newsletters&newsletter\\_id=23](http://www.venable.com/publications.cfm?action=search&section=newsletters&newsletter_id=23)

For further information please contact Terry Elling, Sharon Jenks or any other attorneys of the Venable's Government Contracts Practice Group.

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## EPA's Suspension of IBM

**Introduction:** Recently the United States Environmental Protection Agency (EPA) suspended International Business Machines Corporation (IBM) from receiving federal contracts, approved subcontracts, assistance, loans and other benefits under Subpart 9.4 of the Federal Acquisition Regulation. This decision was surprising not only because of the size of the contractor involved and the fact that it applied to all IBM business segments, but also because of the unusual manner in which it was carried out. It may signal a more aggressive attitude towards the use of suspension, even against the largest of contractors.

**Summary:** According to the terms of an April 3, 2008 Interim Agreement signed by the EPA and IBM, the EPA suspended IBM on March 27, 2008 based on information gathered during a federal investigation of IBM's actions in responding to an EPA solicitation. The EPA Debarring Official concluded that adequate evidence was presented "to support allegations that IBM employees obtained protected source selection information from an EPA employee, which IBM officials knew was improperly acquired, and used the information during its negotiations" for the contract in violation of the Federal Procurement Policy Integrity Act.

- The suspension was undertaken prior to an indictment, at least in part because the selection of the successful offeror for the contract was imminent.
- IBM in its entirety, as opposed to some smaller component of the corporation, was suspended because it was the entity that had made the offer in the procurement in question and was thus the only legal entity that could have received and performed the contract.
- In response to receiving the Notice of Suspension, IBM began an internal investigation, promised cooperation with the government's investigation, promised to take any necessary remedial actions, withdrew its offer for the contract, and agreed to waive any awards ordered as a result of a related GAO protest. In addition, the Interim Agreement required that IBM disclose the results of its internal investigation.
- During the period of suspension there was great uncertainty among IBM's subcontractors and user agencies about the practical short-term effect of the suspension on ongoing procurements.

**Analysis and Practitioner's Tips:** While the IBM case presents some very unusual facts, several interesting points emerge:

- Despite frequent complaints that large contractors rarely are the subject of the suspension and debarment process, this EPA case demonstrates that not only are divisions of large corporations vulnerable, but entire corporate entities can be suspended and debarred.
- It is rare for the government to suspend contractors prior to the filing of an indictment where charges are being contemplated, and fact-based debarments can be difficult to prove. Nevertheless, under the circumstances present in the IBM situation, the government felt it had no choice but to act before final award was made to a contractor accused of violating the Procurement Integrity Act on the pending solicitation.
- While some commentators criticized EPA for not raising this matter with IBM prior to the suspension, the IBM suspension underscores that the regulations do not require notice prior to suspension and that the government may not do so where there is an active criminal investigation.

- The effect on subcontractors and user government agencies during the period of suspension demonstrates the powerful and disruptive effects of a suspension, especially with the common use of task order contracts where each task or delivery order is affected by a suspension.
- Governmental requests that contractors turn over the results of internal investigations are no longer a rare event. Contractors and their counsel need to be cognizant of this when planning and conducting any internal investigation.

For further information please contact John J. Pavlick, W. Patrick Doherty or any of the other attorneys in Venable's Government Contracts Practice Group.

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