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How to Protect Nonprofits' Federally Funded Programs with Global Anti-Corruption Controls

Tuesday, September 20, 2016, 12:30 – 2:00 pm ET

Venable LLP, Washington, DC

Moderator

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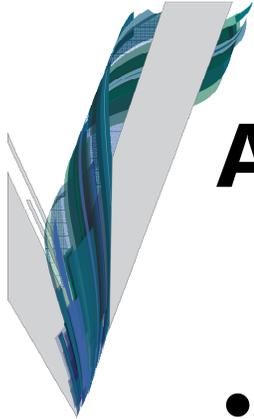
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Upcoming Venable Nonprofit Events

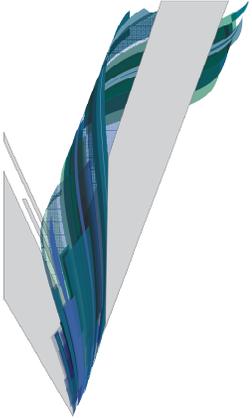
Register Now

- **October 13, 2016:** [How Your Nonprofit Can Operate a Legally Sound Certification or Accreditation Program](#)
- **November 10, 2016:** [Federal and State Regulators and Watchdog Groups Are Bearing Down on Charities and Their Professional Fundraisers: How to Prepare for the Regulatory Storm](#)
- **December 12, 2016:** [Top Ten Risks Facing Nonprofits Operating Internationally, Co-Sponsored by Venable LLP and BDO](#)

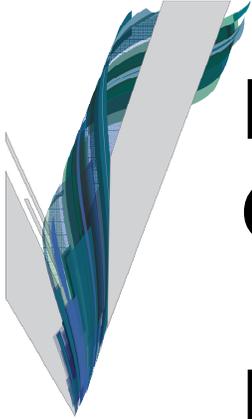


Agenda

- USAID OIG: A Case Study
- OMB's Rules for Pre- and Post-Award Controls
 - Risk Assessments
 - Monitoring
- Anti-Bribery Laws and Due Diligence
 - Global anti-bribery laws
 - U.S. Foreign Corrupt Practices Act
 - Due Diligence and Know Your Customer Guidance



USAID OIG: A Case Study



Reports of Corrupt Practices in Cross-Border Aid to Syria

May 6, 2016 – USAID/OIG Press Release:

- Network of commercial vendors, NGO employees, and others colluded to engage in bid-rigging and multiple bribery and kickback schemes related to contracts to deliver humanitarian aid in Syria
- Lack of fully competitive procurements, insufficient oversight, and the absence of adequate internal controls for obtaining, storing, and delivering relief supplies



Statement by USAID Spokesperson Ben Edwards on Syria Humanitarian Operations

May 11, 2016:

"USAID places the highest priority on ensuring that taxpayer funds are used wisely, effectively and for their intended purpose. We have a zero tolerance policy for fraud and abuse of American taxpayer resources and will take every measure at our disposal to recover misspent funds."



Statement of The Honorable Ann Calvaresi Barr Inspector General, U.S. Agency for International Development

July 14, 2016:

- Collusion between vendors and implementers' procurement and logistics staff who accepted bribes or kickbacks in exchange for contract steering
- Schemes involving product substitution of food and non-food items, inflated billing, and false claims
- Resulted in more than \$11.5 million in savings, 6 program suspensions, the removal of 10 employees of USAID implementers, and suspension or debarment actions against 15 individuals or companies involved in collusive bidding schemes



Statement of The Honorable Ann Calvaresi Barr Inspector General, U.S. Agency for International Development (Con't)

- Seven referrals to USAID outlining internal control deficiencies and potentially illegal acts committed by implementer staff and commercial vendors.
- Large-scale effect on the Syria assistance program
 - Programmatic suspensions on activities under six Syrian humanitarian response awards valued at \$305.8 million
 - These program suspensions remain in place for awards valued at \$239 million



Statement of The Honorable Ann Calvaresi Barr Inspector General, U.S. Agency for International Development

- Questions Raised:
 - Appropriateness of implementers' procurement policies and practices given the high-risk environment
 - Extended use of emergency waivers to bypass established procurement policies and procedures—including full and open competition—in an effort to expedite procurements
 - A failure on the part of one implementer to conduct historical market analyses to detect inflated billing
 - Logistics, quality control, and monitoring procedures
 - Allowing vendors to ship items directly across the border without inspecting them in advance
 - Implementer staff accepted inappropriate clothing, substandard products, and other humanitarian items that did not meet invoiced technical specifications



Statement of The Honorable Ann Calvaresi Barr Inspector General, U.S. Agency for International Development

- Questions Raised (Con't):
 - Implementer tracking of information and response to allegations of fraud
 - Implementers did not pursue allegations or did not notify USAID or OIG of internal investigations into allegations of bid rigging, inflated billing, conflicts of interest, and other fraud. They also had evidence that corroborated the fraud allegations—including subject matter expert statements, emails, and company profile information—but concluded there was no evidence of fraud



Statement of The Honorable Ann Calvaresi Barr Inspector General, U.S. Agency for International Development

“Providing aid in war-ravaged regions frequently calls for flexible contracting, award, and hiring practices to expedite the delivery of goods and services to the most vulnerable populations. However, as our investigations demonstrate, flexibility cannot eclipse rigor. Lax internal controls, monitoring, and oversight put taxpayer dollars at risk and, in the case of Syria, have delayed the delivery of millions of dollars of assistance to those in need.”



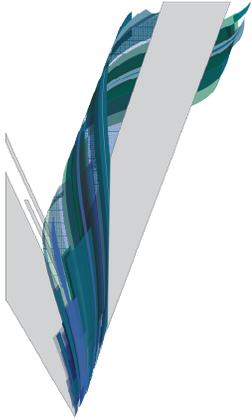
Considerations

- Risk Management
 - Have you asked yourselves if you can or want to implement this program at all?
- Growing group of individuals taking control and advantage of humanitarian aid programs
- USAID/OIG is sharing information with bilateral donors

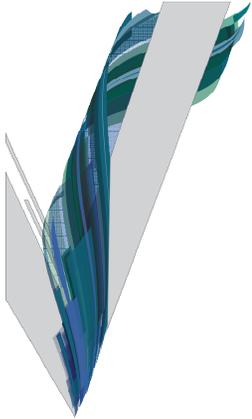


Links

- [Reports of Corrupt Practices in Cross-Border Aid to Syria](#)
- [Statement by USAID Spokesperson Ben Edwards on Syria Humanitarian Operations](#)
- [Fraud Investigations Expose Weaknesses in Syria Humanitarian Aid Programs](#)



Rules of the Road: What You Need to Know



OMB's Rules for Pre- and Post-Award Controls



OMB's Rules for Pre- and Post-Award Controls

- One of the most significant changes is the more stringent requirements for subrecipient monitoring
- Examples of expanded pass-through entity responsibilities include:
 - Requirement for consistent practice to distinguish subrecipient from contractor
 - Identifying or negotiating an appropriate subrecipient indirect cost rate at the time of award
 - Ensuring “flow-down” of new requirements are included within sub agreements, as applicable
 - Evaluating subrecipient risk of noncompliance and determining necessary monitoring activities – including on-site reviews
 - Imposing remedies for subrecipient noncompliance, when necessary



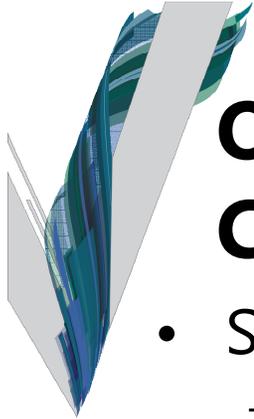
OMB's Rules for Pre- and Post-Award Controls – Risk Assessments

- Subrecipient monitoring plan must ensure that the subaward:
 - Is used only for authorized purposes
 - Is in compliance with Federal statutes/regulations and subaward Ts&Cs
 - Achieves its performance goals
 - Considers risk of subrecipient noncompliance
- Risk assessment is based on:
 - Prior/past experience with similar subawards
 - Previous audit results
 - Significant changes in personnel or systems
 - Extent and results of Federal awarding agency monitoring



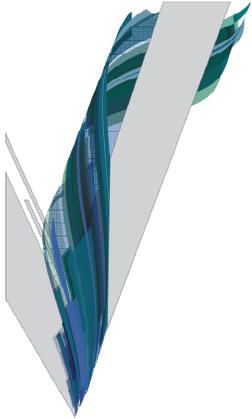
OMB's Rules for Pre- and Post-Award Controls – Monitoring

- Minimum monitoring activities must include:
 - Reviewing financial and programmatic reports
 - Conducting on-site reviews/audits based on risk assessment
 - Conducting follow-up reviews to ensure timely completion of corrective actions required to address deficiencies – as identified through on-site reviews, audits or other means
 - Issuing a management decision for audit findings pertaining to the Federal award
 - Verifying that each subrecipient receive completed audits, as required
- Design of monitoring plan will vary based on subrecipient risk assessment:
 - e.g., more stringent monitoring plan is required for high risk subrecipients

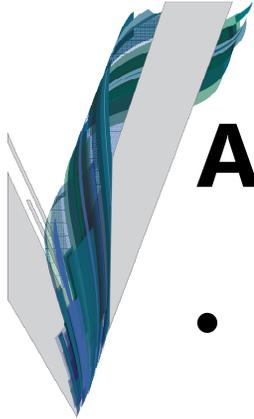


OMB's Rules for Pre- and Post-Award Controls – Monitoring (cont'd)

- Subrecipient monitoring procedures should include:
 - Informing your subrecipient of pertinent information
 - Ensuring your subrecipients are receiving audits when necessary
 - Reviewing financial and programmatic reports:
 - Reconcile the subrecipient's budgeted expenditures to actual expenditures
 - Perform an on-site visit to the subrecipient to review financial and programmatic records and observe operations
 - Desk review - review financial and program reports submitted by subrecipients for allowable use of the grant funds
 - Establishing a tracking system to ensure timely submission of required reporting
 - Having a second party within your organization periodically review the adequacy of subrecipient monitoring for all programs
 - Document! Document! Document!



Anti-Bribery Laws and Due Diligence



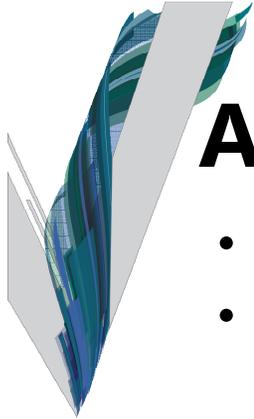
Anti-Bribery Laws Apply

- US and Foreign anti-corruption/anti-bribery laws apply to nonprofits, NGOs, and aid-related work subject to awards and grants – **No exceptions.**
- Enforcement has become a global effort:
 - 40 countries adopted the **OECD Anti-Bribery Convention**, requiring national legislation criminalizing the bribery of foreign officials
 - Commercial bribery – national laws of many foreign countries prohibit official and/or commercial bribery (e.g., UK Bribery Act)
 - International anti-corruption enforcement continues to grow, and several foreign law enforcement agencies assisted in U.S. investigations in 2013-2015



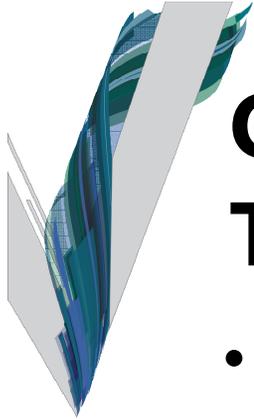
U.S. Foreign Corrupt Practices Act (FCPA)

- FCPA was enacted by Congress in the wake of the “Watergate” scandal to halt the rampant bribery of foreign government officials
- Anti-bribery Provisions (**15 U.S.C. § 78dd-1**):
 - Prohibits the paying, offering, promising to pay (or authorizing to pay or offer) of money or “anything of value,”
 - With corrupt intent,
 - Directly or indirectly,
 - To a “foreign government official” or political party official
 - For the purpose of influencing an official act or decision, or
 - Causing the official to fail to perform his lawful duty, or
 - To secure any improper business advantage, or
 - To assist in obtaining or retaining business for or with any person.
- Certain **limited** exceptions and affirmative defenses



Affirmative Defenses and Exceptions

- **Extremely limited and difficult to rely on!**
- Two affirmative defenses:
 1. When the payment was lawful under the written laws of foreign country:
 - ... But, we have yet to find such a written law.
 2. When payment is a reasonable and *bona fide* expenditure:
 - Made in connection with either efforts to sell a product (directly relating to promoting, demonstrating or explaining the product), or
 - Performing a lawful contract with foreign government.
- Facilitation Payment Exception – Narrow for nominal payments:
 - Action sought to be facilitated must be ministerial
 - Must not involve any discretion by the foreign government official
 - Amount paid must be modest
 - Contrary to OECD recommendations
 - Violates the U.K. Bribery Act
 - Violates the national law of most nations, including China



Operational Risks: What Should I Think About?

- **Geographic:** FCPA risk is especially high in less developed regions and areas of “conflict” with reputations for corruption: including Central and West Africa; former Soviet Union; S. America; Middle East
- **Industry:** Medical, agricultural and food industries have seen increased levels of FCPA enforcement over the past several years. No industry is exempt!
- **Activities:** Certain activities—such as interacting with foreign government officials in seeking permits, importing product, or in hosting or sponsoring officials—can lead to anti-corruption risks
- **Agents:** Use of third parties such as subcontractors, consultants, agents, and other partners means increased risk



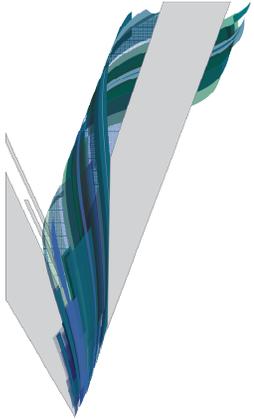
Know Your Customer/Partner

- **Know Your Customer “Red Flags” to Consider:**
 - Did you “screen” potential partner, agent, customer against the US Government’s “Lists to Check”? See [Consolidated Screening List](#).
 - Did customer/third party provide a contact name, mailing address (not PO Box), and contact information (phone, e-mail, fax)?
 - Is customer/third party requesting unusual payment terms? Are payment methods questionable? – e.g., payment in cash, to “offshore” accounts, or through third parties.
 - Is customer/third party proposing to take on a role that fits in with its line of business?
 - **Due Diligence:**
 - Is the country in question prone to corruption?
 - Does the customer/third party have a corrupt or questionable reputation?
 - Does the customer/third party refuse to provide anti-corruption representations or certifications?
 - Is the customer/third party a government agent?
 - Does the customer/third party have familial or other personal relationships with government officials and/or representatives?
 - Will the customer/third party be dealing with government officials, e.g. employees of government-owned or -controlled hospitals, businesses, schools?
 - Was the customer/third party recommended by a government official?

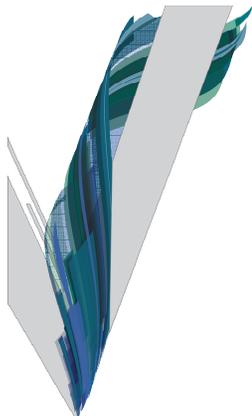


FCPA: Due Diligence

- **Due Diligence Check List:**
 - Assess risk of doing business in each country
 - Check applicable anti-bribery conventions and local national law
 - Consult with U.S. Embassy
 - Due diligence regarding third parties prior to engagement (Use of 3rd party risk consultants)
 - Match degree of due diligence to risk
- Periodic audits must be conducted
- A senior manager with independent decision making authority should have direct responsibility over overseas programs
- Organization should track and monitor (Document! Document!):
 - Management and oversight of award funds
 - Management and reporting in accordance with OMB rules
 - Internal accounts
 - Charitable giving
 - Entertainment expenses (if any)
 - Payments to middlemen, agents or distributors



Discussion



Questions?

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