



# Contractor ~~Voluntary~~ Disclosures and the DoD IG Contractor Disclosure Program

*Jim Graham*, Trial Attorney, DoJ Criminal Division

*Russ Geoffrey*, Director, DCMA Contract Integrity Center

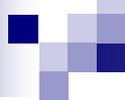
*Frank Albright*, Director, DoD IG Investigative Policy and Programs

# ***Why did DoJ propose a FAR change?***

- DoJ's goals for the new Rule were:
  - ...for the Government to explicitly express its expectation that contractors are required to alert the Government when they discover employees are involved in fraud or corruption; i.e., disclosures no longer voluntary, and
  - DoJ expects IGs and Cos to work closely together when fraud or corruption is involved.

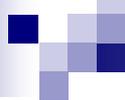
# ***What was changed?***

- Requires contractors to have compliance programs
- As part of those programs, contractors are expected to cooperate with the Government in fraud and corruption investigations arising in their contracts
- All contractors are expected to disclose to the CO and the IG if they become aware of fraud or corruption in their contracts with the Federal Government
- Provides extra incentive for contractors to report significant overpayments to the CO



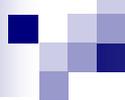
## ***What is needed from IGs and Agencies in implementation?***

- Train CO personnel on the Rule (most not well informed)
- Counsel COs when they are the recipient of a disclosure or identify a matter they think should have been disclosed
- Make reports to the IG when they identify something that should have been disclosed
- Train and help COs who receive disclosures of overpayments that really suggest an underlying fraud
- Help CO personnel in communicating effectively with IGs



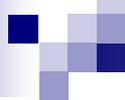
## ***What is needed from IGs and Agencies in implementation? (continued)***

- Once a disclosure is made, identify ways the Government's contractual and investigative interests can be best protected
- Serve as a bridge to facilitate effective coordination between the IG/Justice and CO/Gov't agency
- Process the disclosures promptly and fairly
- DoJ and IGs have to be prepared to resolve matters promptly and fairly including rewarding rather than punishing disclosing contractors



## ***How will the effectiveness of the Rule be measured?***

- The Rule is already a success in terms of the Government clearly stating its expectations for contractors on disclosure and cooperation
- Effectiveness will **not** be how many disclosures contractors decide to make
- Effectiveness will be how the Government responds to disclosures made and not made



# DoD IG Experience

- “Voluntary” Program began circa 1986
- 476 disclosures; \$497 million recovered
- First three years: 30-40 disclosures annually; today, less than 10
- Although not an amnesty program, only 2-3 prosecuted, very early in the program
- None suspended or debarred
- Cases have taken up to 5 years to close

# FAR Rule

- Requires all contractors to:

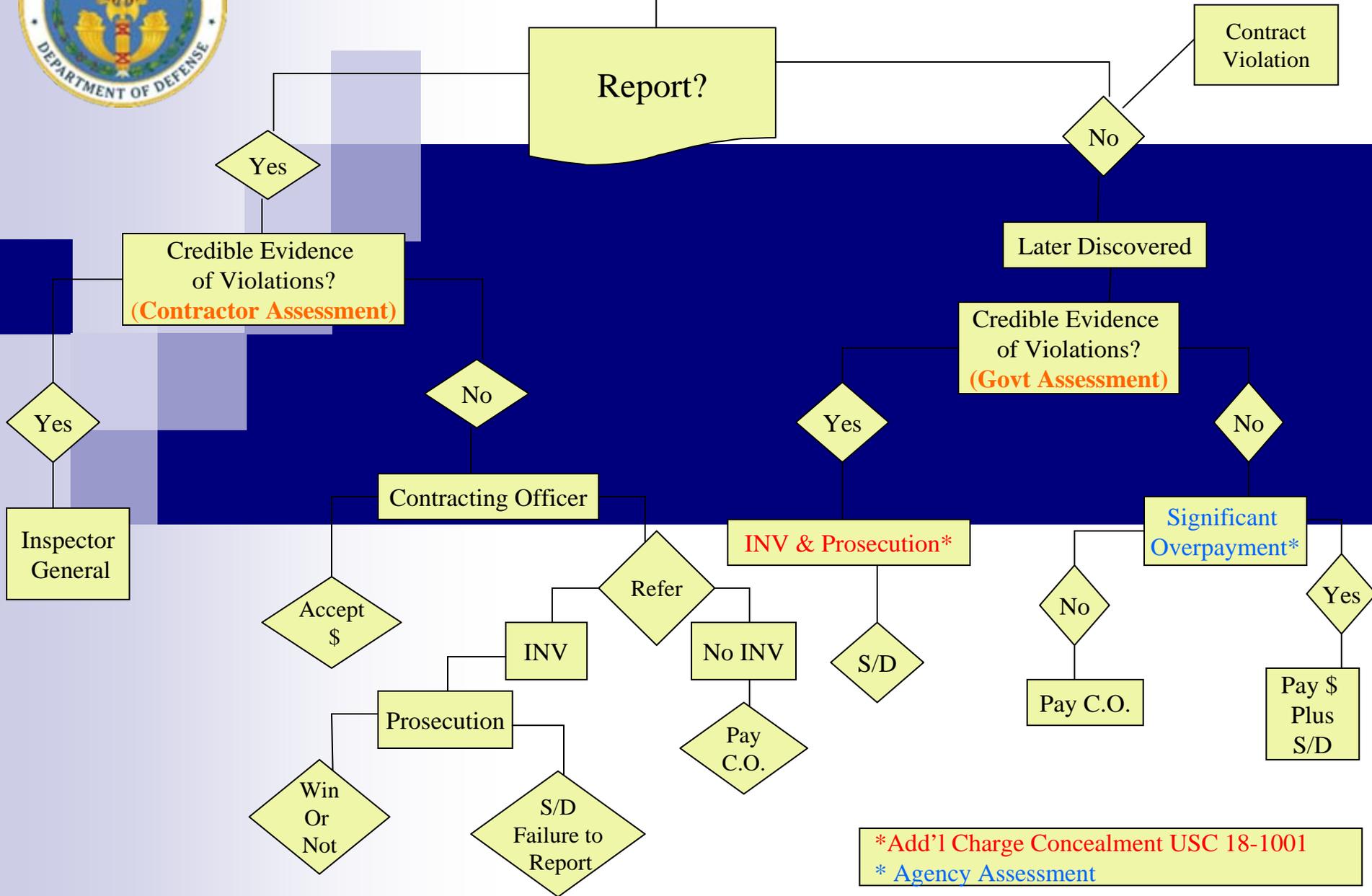
“**timely** disclose to the Govt., in connection with the award, performance, or closeout of a govt. contract or a subcontract awarded there under, **credible evidence** of a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in 18 USC or a violation of the civil False Claims Act . . . [and] remit [any] **significant** overpayment amount.”

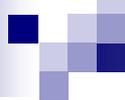
# FAR Rule Implemented

- Voluntary Disclosure Program became Contractor Disclosure Program
- Effective December 12, 2008
- AT&L 29 December 2008 Letter designating DoD Office of Inspector General as agency IG for DoD contracts
- Disclosures must be in writing – to IG – Copy to Contracting Officer



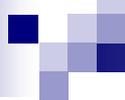
# Contractor Double Bills Subcontractor Costs (overpayment)





# FAR Part 3: Improper Business Practices

- Whether or Not the Clause is in the Contract, a Kor may be Debarred for a Knowing Failure by a Principal to Timely Disclose
- Payment Clauses Require a Kor to Remit an Overpayment. Can be Debarred if There is a Failure to Report a Significant Overpayment other than one Resulting from Contract Financing Payments



# FAR Part 9: Contractor Qualifications

- 9.406-2 Causes for Debarment
  - (vi) knowing failure by a principal until 3 years after final payment to timely disclose:
    - Criminal Violations
    - Civil False Claims Act Violations
    - Significant Overpayments

# FAR 52.203-13

- In Contracts if the Value of is Expected to Exceed \$5,000,000 and the Performance Period is 120 days or More.
- Kor Code of Business Ethics and Conduct
  - Does Not Waive Atty-Client or 5<sup>th</sup> Amendment
  - Kor to use due diligence to prevent and detect criminal conduct
  - Timely Disclosure
  - Ethics Compliance Program Required Within 90 Days of Award Unless
    - Small Business
    - Commercial Item
      - Still Requires Hotline Poster

# FAR 52.203-13 (continued)

- Ongoing Business Ethics Awareness & Compliance Program – Training, etc.
- Internal Control System
  - Procedures to Detect Improper Conduct
  - Corrective Measures
    - Periodic Audits
    - Risk Assessments
  - Hotline Posters
  - Discipline for Offenders
  - Flowdown to Subcontracts over \$5M and More than 120 days



# Contractor Disclosure Program

- Process essentially the same as Voluntary Disclosure Program
- Centralized management; decentralized execution
- Affords contractors a means to report violations
- Facilitates coordinated evaluation of criminal, civil, and administrative actions with stakeholders
- Provides a framework for Government verification, when appropriate
- Ensures prompt resolution

# Stakeholders:

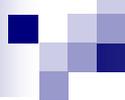
- DoD OIG
- DCMA
- Services General Counsel
- Services Suspension & Debarment Authority
- Contracting Officer
- Affected Military Department
- DCAA
- Defense Agencies
- Defense Criminal Investigative Organizations
  - AFOSI
  - CID
  - DCIS
  - NCIS
- DOJ Criminal Division (Fraud Section)
- DOJ Civil Division (Commercial Litigation)
- US Attorney Offices

## Voluntary Disclosures

- Disclosure and initial inquiry
- Acceptance or rejection
- Execute XYZ Agreement
- Company internal investigation
- Government verification investigation
- Coordination of Remedies
  - Civil, criminal, administrative
- Close with notice to company

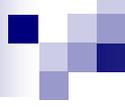
## Contractor Disclosures

- Disclosure
- Stakeholders triage
- Decision on how to proceed
- Company internal investigation, if appropriate
- Government verification investigation, if appropriate
- Coordination of Remedies
- Close with notice to company



# What the Government Must Do

- Encourage contractors to self report
- Respond to contractor reports quickly
- Establish coordination between IG and contracting officers
- Speed up DOJ decision
- Focus and complete the investigation



# Issues for the Government

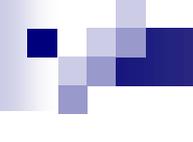
- How much to rely on a contractor's internal investigation in deciding whether to initiate an investigation?
- How to distinguish between an actionable fraud and a matter for the CO without conducting an investigation?
- How can the investigative and decision process be expedited to encourage contractor disclosure?
- How can the government reward contractors who disclose to encourage contractor disclosure?

# What the Contractor Must Do

- Disclose early
- Disclose online when practical
- If not, Disclose using sample format
  - Format for minimum information needed
- Disclose in an abundance of caution
- Fully cooperate ensuring timely resolution

# Issues for Contractors

- **When I become aware of an allegation, do I conduct an internal investigation before deciding whether to disclose?**
- **How conservative do I want to be on disclosures—only clear instances of a violation?**
- **Do I help myself by hiring outside counsel to conduct an internal investigation? To render an opinion on whether there is credible evidence?**
- **What do I tell my employees in the process of conducting an internal investigation?**
- **Can the matter be disclosed to the CO as an overpayment only and meet the disclosure to the IG requirements? Any risks?**



# What if the Contractor Doesn't Comply?

- Specific Basis for Debarment
- Senior management involvement increases risk of prosecution
- Can lead to 18 USC 1001 violation under concealment theory

# CD Program Initiatives

- Toll Free Number 866 429-8011
- Web-based Disclosures
  - <http://www.dodig.mil>
  - [Click Contractor Disclosure](#)
  - [Click Submit a Contractor Disclosure](#)
- DoD Guide to submitting a Disclosure
- DoD Instruction
- Coordination and Outreach



# DoD Contractor Disclosure Program

SA Lynn McCormick, Program Manager

DoD Office of the Inspector General  
Investigative Policy and Oversight  
400 Army Navy Drive, Suite 1037  
Arlington, VA  
Telephone 703 604-8711

E-mail: [frances.mccormick@dodig.mil](mailto:frances.mccormick@dodig.mil)

Toll Free Number: (866) 429-8011

Fax: 703 604-8720

CDP Org Email: [disclosures@dodig.mil](mailto:disclosures@dodig.mil)

Website: [www.dodig.mil](http://www.dodig.mil)