

The Federal Acquisition Regulation Mandatory Disclosure Rule Program at the U.S. General Services Administration Office of Inspector General

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Introduction

Since 2008, it has been mandatory for all federal government contractors to report fraud and significant overpayments in connection with their government contracts to the federal government. Certain contractors are also required to have a code of business ethics.

Federal offices of inspector general are responsible for processing contractor disclosures. The U.S. General Services Administration (“GSA”) Office of Inspector General (“OIG”) developed a program and has received 59 disclosures from program inception in December 2008 through May 31, 2012. Through processing these disclosures, the OIG has identified several issues warranting discussion. Addressed below are (1) the history of the rule, (2) what the rule requires, (3) the GSA OIG program’s experience, (4) reasons for making a disclosure, (5) when to make a disclosure, and (6) to whom disclosures should be made.

Background - A History of Contractor Reporting

The Department of Defense Contractor Reporting Program

A February 28, 1986, report of the President’s Blue Ribbon Commission on Defense Management concluded that “[c]ontractors have a legal and moral obligation to disclose to government authorities misconduct discovered as a result of self-review,” and recommended that “defense contractors . . . promulgate and vigilantly enforce codes of ethics that address the unique problems and procedures incident to defense procurement.”² In response, the Department of Defense (“DOD”) instituted the “Voluntary Disclosure Program” in July of 1986.³

Under that program, defense contractors could make disclosures of “potential fraud” to the DOD OIG. Disclosures were accepted into the program if they contained sufficient information to be useful and if they were “not triggered by the contractor’s recognition that the potential criminal or civil fraud matter . . . [was] about to be discovered by the Government.”⁴

¹ The statements in this paper are those of the author alone and do not represent the views of the Office of Inspector General or anyone else. They are not intended to and do not create any substantive rights in any third party.

² President’s Blue Ribbon Commission on Defense Management, An Interim Report to the President 20-21 (Feb. 28, 1986), *available at* <http://www.ndu.edu/library/pbrc/36In8.pdf>.

³ U.S. General Accounting Office, DOD Procurement: Use and Administration of DOD’s Voluntary Disclosure Program 2 (Feb. 6, 1996), *available at* <http://www.gao.gov/archive/1996/ns96021.pdf> [hereinafter GAO, Voluntary Disclosure Program]; *see also* President’s Blue Ribbon Commission on Defense Management, Conduct and Accountability 4 (June 1986), *available at* <http://www.ndu.edu/library/pbrc/36c75c1.pdf> (recognizing that “leaders in the defense industry recently have committed themselves to an initiative” in response to the Interim Report which includes “adopt[ing] procedures for voluntary disclosure of violations”).

⁴ DOD Inspector General, The Department of Defense Voluntary Disclosure Program 5-6 (Apr. 23, 1990), *available at* <http://www.dodig.osd.mil/IGInformation/archives/vdguidelines.pdf> [hereinafter DODIG, Voluntary Disclosure

After acceptance into the voluntary disclosure program, the contractor had an opportunity to conduct an internal investigation, and the contractor could choose to provide the investigation's results to DOD.⁵

In addition to the opportunity to conduct an internal investigation before intervention by federal investigators,⁶ the U.S. Sentencing Guidelines have required that courts take into account whether a company "reported the offense to appropriate governmental authorities" promptly and "prior to an imminent threat of disclosure or government investigation," and whether the company "fully cooperated in the investigation," when setting fines as part of criminal sentencing.⁷ Companies that made voluntary disclosures under the DOD program received consideration as to "[t]he degree and timeliness of corporate cooperation" to whether they made a "candid and complete disclosure" when the Department of Justice ("DOJ") decided whether to prosecute in the first instance.⁸

Nevertheless, "the number of disclosures under the program [was] relatively small."⁹ A graph in the GAO report illustrating voluntary disclosure rates between the program's institution in 1986 and 1994 indicates that there was a peak in reporting (fifty-eight reports in a one-year period) shortly after the institution of the program, and that there was a downward trend in reporting thereafter.¹⁰ Nor did reporting become frequent after 1994.¹¹ When the Voluntary Disclosure Program was superseded by the DOD OIG's Contractor Reporting Program in December 2008 after the mandatory rule became effective, it was receiving less than 10 disclosures per year.¹²

The National Reconnaissance Office Program

In 2004, after discovering that its Inspector General's voluntary "program of contractor self-referral of suspected fraud" resulted only "rarely" in reports to the government, the National

Program]. Meeting these requirements allows for preliminary acceptance into the program. *Id.* at 5. Full admission to the program additionally requires a pan-governmental "inquiry for prior government knowledge" and the signing of an "XYZ agreement" requiring the contractor to cooperate in the government's investigation, among other things. *Id.* at 7-10, app. C at 9-12.

⁵ *Id.* at 10.

⁶ "If the Company notifies the IG-DoD that it will provide a written report, the IG-DoD will allow the Company a reasonable period of time to conduct an internal investigation and to provide the written report before the Government commences its investigation." DODIG, Voluntary Disclosure Program, *supra* note 4, app. C at 4-5.

⁷ 2011 Federal Sentencing Guidelines Manual. § 8C2.5(g)(1) (2011), *available at* http://www.ussc.gov/guidelines/2011_Guidelines/Manual_PDF/index.cfm.

⁸ Memorandum from William C. Hendricks III, Fraud Section Chief, Department of Justice to All United States Attorneys 6, 9 (July 17, 1987), *available at* <http://www.dodig.osd.mil/IGInformation/archives/vdguidelines.pdf>.

⁹ GAO, Voluntary Disclosure Program, *supra* note 3, at 3.

¹⁰ GAO, Voluntary Disclosure Program, *supra* note 3, at 4 fig.1.

¹¹ Contractor Business Ethics Program and Disclosure Requirements, 73 Fed. Reg. 67,064, 67,070 (Nov. 12, 2008) .

¹² Jim Graham, Russ Geoffrey, & Frank Albright, Conference Presentation, Fraud Prevention and Detection 2009 Conference – Improving Accountability for Government Professionals (June 17, 2009), <http://www.dodig.mil/inspections/apo/conference/speakerPresentations/Session15Part2.pdf>.

Reconnaissance Office (“NRO”) drafted a new provision for the NRO Acquisition Manual.¹³ The new clause, to be inserted in contracts with NRO vendors, required NRO contractors to self-report “possible violations of federal law or illegal intelligence activities related to [the] contract.”¹⁴ In 2006, the NRO reported that “our proactive procurement fraud prevention and detection efforts have, on the whole, provided us a window into fraudulent activity that would never have opened with more traditional, ‘wait for a complaint to come in’ approach to fraud investigations.”¹⁵

The NRO stated that “this requirement[] improved its relationships with its contractors and enhanced its ability to prevent and detect procurement fraud.”¹⁶ Observers also noted that “it is more effective for a contractor to mandatorily disclose information pursuant to a requirement, than it is for a contractor to be in a position of offering up information that it could be criticized, or even sued, for providing.”¹⁷

Proposal of the New Mandatory Disclosure Rule

The Department of Justice and the OIG community created a new initiative to fight fraud with the knowledge of the limited benefits provided by voluntary disclosure and the success of the NRO program. On October 10, 2006, the Deputy Attorney General established the National Procurement Fraud Task Force (“NPFTF”),¹⁸ naming the Assistant Attorney General for the Criminal Division as the Chair and the GSA Inspector General as the Vice Chair. The Federal Bureau of Investigation, federal inspectors general, defense investigative agencies, federal prosecutors from United States Attorneys’ offices across the country, as well as the Criminal, Civil, Antitrust and Tax Divisions of the Department of Justice participated in the NPFTF. The NPFTF’s goal was to promote the prevention, early detection and prosecution of procurement fraud.

The NPFTF’s Legislation Committee, led by the GSA and Department of Homeland Security Inspectors General, undertook to propose several regulatory and legislative changes that would improve fraud detection and contractor accountability, including “a proposed amendment to the FAR requiring contractors to report crimes and overpayments.”¹⁹ Thus, on May 23, 2007,

¹³ Alan S. Larsen & Eric R. Feldman, *Convincing Contractors to Report Their Own Procurement Fraud to the Inspector General*, J. PUB. INQUIRY, Spring/Summer 2006, at 18-20, available at <http://www.ignet.gov/randp/sp06jpi.pdf> [hereinafter Larsen, *Convincing Contractors*].

¹⁴ NRO Acquisition Manual § 52.203-001.

¹⁵ Larsen, *Convincing Contractors*, *supra* note 13, at 21.

¹⁶ Letter from Alice S. Fisher, Assistant Attorney General, Criminal Division, Department of Justice, to the Honorable Paul A. Denett, Administrator, Office of Federal Procurement Policy (May 23, 2007) [hereinafter Fisher Letter].

¹⁷ Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. at 67,071 (Nov. 12, 2008).

¹⁸ See Press Release, Deputy Attorney General Paul McNulty, Deputy Attorney General Paul J. McNulty Announces Formation of National Procurement Fraud Task Force (Oct. 10, 2006), http://www.justice.gov/opa/pr/2006/October/06_odag_688.html.

¹⁹ Brian D. Miller, Inspector General, General Services Administration, Statement Before the Subcommittee on Government Management, Organization, and Procurement, Committee on Oversight and Government Reform, U.S. House of Representatives 2 (Apr. 15, 2008), available at <http://www.gsaig.gov/?LinkServID=E26B3B9C-08D7->

Assistant Attorney General Alice Fisher, then the NPFTF chair, sent a letter to the Office of Federal Procurement Policy proposing expansions of sections 9.406-2, 9.407-2, and 52.203 of the FAR²⁰ to provide, among other things, that companies may be suspended or debarred from entering into contracts with the federal government if they “fail[] to timely disclose an overpayment or violation of federal criminal law.”²¹

In response to the letter from the Assistant Attorney General, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council²² “issue[d] a new proposed rule under . . . FAR Case 2007-006.”²³ The first draft of the proposed rule was published on November 14, 2007, and requested the submission of “comments . . . to be considered in the formulation of a final rule.”²⁴

DOJ, as well as a few OIGs, submitted comments on the first draft of the proposed rule, noting that it exempted both commercial item contracts and contracts performed overseas from the mandatory disclosure requirement and that it did not require contractors to disclose violations of the civil False Claims Act (“FCA”). The comments suggested that the proposed rule should remove these exemptions and include a requirement to report FCA violations.²⁵ The FAR Councils proposed a second mandatory disclosure rule in the Federal Register on May 16, 2008, that accepted most of these comments.²⁶

Just before the second proposed rule was published, the proposed exemptions for commercial item contracts and contracts performed overseas started receiving congressional attention. Congress introduced a bill, the “Close the Contractor Fraud Loophole Act,” which required Federal contractors to disclose crimes and significant overpayments related to their federal contracts.²⁷ The House Oversight and Government Reform Committee’s Subcommittee on Government Management, Organization and Procurement Committee on Oversight and Government Reform also held a hearing that brought these issues of commercial item and

2B85-1CAECF90161F5852&showMeta=0. The Legislation Committee was co-chaired by Department of Homeland Security Inspector General Richard Skinner and this author. The Legislation Committee’s proposals were embodied in a white paper published June 8, 2008.. *Id.*; see also National Procurement Fraud Task Force, Procurement Fraud: Legislative and Regulatory Reform Proposals (July 9, 2007), available at <http://www.gsaig.gov/?LinkServID=A8DD55A6-A6BB-D9F8-0788C31C39FC3CD0&showMeta=0>.

²⁰ 48 C.F.R. §§ 9.406-2, 9.407-2, 52.203.

²¹ Fisher Letter, *supra* note 16, at 1 & app.

²² “[R]evisions to the FAR,” located at Title 48 of the Code of Federal Regulations, are to be “prepared and issued through the coordinated action of [the] two councils” 48 C.F.R. § 1.201-1(a). The Councils are comprised of acquisition professionals from various federal agencies. *Id.* § 1.201-1(a), (b). The Councils work in conjunction with the Office of Federal Procurement Policy in making revisions to the FAR. Acquisition Central, CAAC Regulatory Authorization, <http://www.acquisition.gov/comp/caac/index.htm> (last visited Jan. 25, 2012).

²³ Contractor Compliance Program and Integrity Reporting, 72 Fed. Reg. 64,019, 64,019 (Nov. 14, 2007).

²⁴ *Id.* at 64,019.

²⁵ Transmittal Comments 1-42, FAR Case 2007-006, Contractor Compliance Program and Integrity Reporting (Feb. 22, 2008), available at: <http://www.regulations.gov#!documentDetail;D=FAR-FAR-2007-0001-0255>

²⁶ Contractor Compliance Program and Integrity Reporting, 73 Fed. Reg. 28,407 (May 16, 2008).

²⁷ Close the Contractor Fraud Loophole Act, Pub. L. No. 110-252, § 6101, 122 Stat. 2323 (2008).

overseas contract exemptions to light.²⁸ Then on June 30, 2008, the “Close the Contractor Fraud Loophole Act” was enacted as part of Public Law No. 110-252. This law directed that the FAR be revised within 180 days to require timely notifications by contractors of violations of criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts, including those for commercial items and those performed outside the United States.²⁹

The final rule was published November 12, 2008, with an effective date of December 12, 2008.³⁰ This rule reflected the requirements of the Close the Contractor Fraud Loophole Act.

FAR Mandatory Disclosure Rule

The FAR rule has made three basic changes to the obligations of federal contractors.

First, it creates a cause for suspension or debarment³¹ of contractors:

A contractor [may be suspended or debarred], based upon a preponderance of the evidence, for . . . [k]nowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of

(A) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

(B) Violation of the civil False Claims Act . . . ; or

(C) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001.³²

Second, it requires that future government contracts the “value [of which] . . . is expected to exceed \$5,000,000 and the performance period [of which] is 120 days or more”³³ contain a clause requiring disclosures:

²⁸ H.R. 5712, Close the Contractor Fraud Loophole Act, and H.R. 5787, Federal Real Property Disposal Enhancement Act, 110th Cong. (2008), available at <http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg45945/pdf/CHRG-110hhrg45945.pdf>

²⁹ Supplemental Appropriations Act for 2008, Pub. L. No. 110-252, § 6101, 122 Stat. 2323.

³⁰ Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. at 67,064, 67,066 (Nov. 12, 2008).

³¹ “Contractors debarred, suspended, or proposed for debarment are excluded from receiving [government] contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head determines that there is a compelling reason for such action” 48 C.F.R. § 9.405(a). Suspension and debarment differ in that debarment is “for a period commensurate with the seriousness of the cause(s),” generally not more than three years, while suspension is “for a temporary period pending the completion of investigation and any ensuing legal proceedings.” *Id.* §§ 9.406-4(a)(1), 9.407-4(a).

³² 48 C.F.R. §§ 9.406-2(b)(1)(vi), 9.407-2(a)(8).

³³ *Id.* § 3.1004(a).

The Contractor shall timely disclose, in writing, to the agency Office of Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder [sic], the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed—

(A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations . . . ; or

(B) A violation of the civil False Claims Act³⁴

Third, the rule requires contractors other than “small business concern[s]” and those with “contract[s] . . . for the acquisition of a commercial item” to “establish . . . [a]n ongoing business ethics awareness and compliance program.”³⁵ The program must “provide for,” among other things, the disclosures required by the above-quoted contract clause, “[f]ull cooperation with any Government agencies responsible for audits, investigations, or corrective actions,” and the inclusion of all the required contract clauses, “including this paragraph [requiring that the clause be passed down to the next level of subcontractors] . . . in subcontracts that have a value in excess of \$5,000,000 and a performance period of more than 120 days.”³⁶

The rule also requires that contractors make disclosures to multiple agency IGs when a “violation relates to an order against a government-wide acquisition contract, a multi-agency contract, a multiple-award schedule contract such as the Federal Supply Schedule, or any other procurement instrument intended for use by multiple agencies.”³⁷ The FAR states that “the [c]ontractor shall notify the OIG of the ordering agency and the IG of the agency responsible for the basic contract.”³⁸

The rule does provide protection for the information that a contractor making a disclosure provides:

The Government, to the extent permitted by law and regulation, will safeguard and treat information obtained pursuant to the Contractor’s disclosure as confidential where the information has been marked “confidential” or “proprietary” by the company. To the extent permitted by law and regulation, such information will not be released by the Government to the public pursuant to a Freedom of Information Act request, 5 U.S.C. Section 552, without prior notification to the Contractor. The Government may transfer documents provided by the Contractor to any department or agency within the Executive Branch if the information relates to matters within the organization’s jurisdiction.³⁹

³⁴ *Id.* § 52.203-13(b)(3)(i).

³⁵ *Id.* § 52.203-13(c).

³⁶ *Id.*

³⁷ *Id.* § 52.203-13(b)(3)(iii).

³⁸ *Id.*

³⁹ *Id.*

GSA OIG's Mandatory Disclosure Program

About the Program

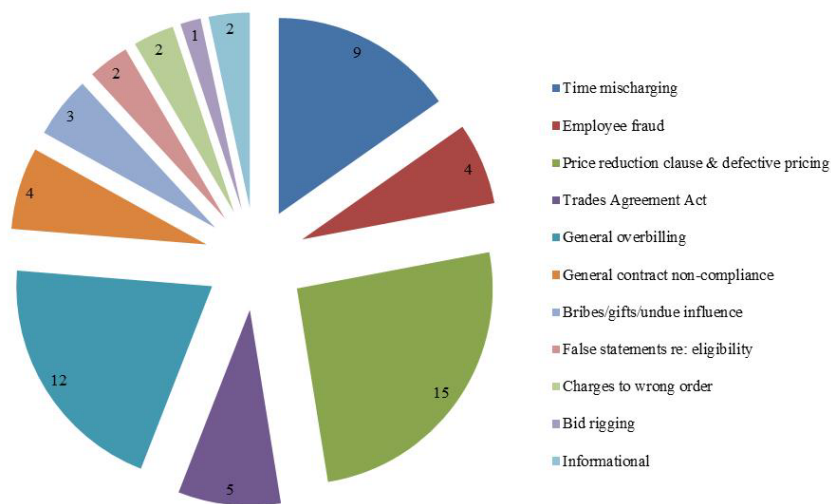
In response to the mandatory disclosure rule, the GSA OIG established a program to accept and triage contractor disclosures beginning with the effective date of the rule in December 2008. The program is essentially a standing task force comprised of OIG audits, investigations, and counsel staff, who also work with GSA contracting officers. We regularly coordinate with DOD OIG since many cases involve both GSA and DOD. We also coordinate with DOJ because of its interest in the disclosure program and the possibility of criminal or civil implications.

When a disclosure is received, the OIG sends the contractor or counsel an acknowledgement letter with a tracking number. Unless the reported violation or significant overpayment is still being investigated by the contractor, the OIG will ask for facts that were not provided in the disclosure, if needed. The OIG will then have an initial meeting with the contractor or counsel and will review the contractor's analysis of the reported conduct. If necessary, the OIG will interview contractor personnel to gain a better understanding of the issues. Once the disclosure findings are verified, typically, referrals for administrative action are made (i.e. demand for payment), or a referral is made to DOJ if there are FCA or criminal implications.

About the Disclosures

Since we started this program, we have received 59 disclosures from contractors, in addition to 10 shared with us by DOD OIG and three reports of overpayments. Of the 59 disclosures, 35 remain open and 24 have been closed. The subject matter of the disclosures has varied, which can be seen in the chart below. We have recovered over \$3.4 million so far.⁴⁰

Subject Matter of Reported Violations



⁴⁰ As of May 31, 2012.

We created a form on the GSA OIG website for contractors to make disclosures electronically, shown below. Although most of our disclosures have been sent in hard copy, the number of electronic submissions has recently increased.

GSA OIG Contractor Reporting Form
Instructions:

If you are unsure if this form applies or you have any questions, please contact Counsel to the Inspector General at OIGCounsel@gsaig.gov or (202) 501-0155.

GSA Office of Inspector General
Attn: FAR Contractor Reporting
Office of Audits (JA)
1800 F Street NW, Room 5318
Washington, DC 20405

Your Company Information

Your First Name:

Your Last Name:

Your Title:

Your Business Email:

Confirm Your Business Email:

Company Name:

Business Address1:

Business Address2:

Business City:

Business State / Province:

Business Zip or Postal Code:

Business Country:

Business Phone Number:

Business Fax Number:

Relationship

My company is the:

I am reporting on:

Contract Information

Contract No:

DUNS or TINS:

GSA Contracting Officer Name:

GSA Component / Region: /

If other, please specify:

Description of Services/Supplies/System:

Incident

Estimated Amount of Loss:

Loss Description:

Initial Incident Date: / /

Is the incident ongoing? Yes No

Date contractor learned of potential violation: / /

Comments

Please provide a complete description of the facts and circumstances surrounding the reported activities, including the evidence forming the basis of this report, the names of the individuals involved, dates, location, how the matter was discovered, potential witnesses and their involvement and any corrective action taken by the company.
NOTE: Please provide only the names, business email contact, and business phone for any individuals involved and/or potential witnesses.

Does this report contain confidential or proprietary information? Yes No

Please list any other government entities you are notifying about this incident:

Your Full Name:

GSA OIG's Contractor Reporting Form components for mandatory disclosures. Available at: <http://www.gsaig.gov/index.cfm/gsa-oig-contractor-reporting/gsa-oig-contractor-reporting-form/>

Making Disclosures

Reasons for Making a Disclosure

Obviously, making disclosures is legally required, and a failure to disclose can result in suspension or debarment.⁴¹ We believe, however, that it is in the contractor's own interest to disclose. While failure to disclose may be sufficient grounds for suspension and debarment, the fact of disclosure by itself is not. To date, none of the disclosures made to my office has resulted in a referral for suspension or debarment.⁴² Similarly, only one of the disclosures made to my office has been referred to DOJ for civil or criminal litigation.

Other considerations in making a disclosure include the possible impact on litigation, including *qui tams*, and on investigations and audits. Under the FCA, a disclosure by itself has no legal effect on a pending or future *qui tam* action. On the positive side, a good-faith disclosure and full cooperation may demonstrate a contractor's integrity and present responsibility.

With respect to criminal prosecution, as I previously noted, the Sentencing Guidelines take into account whether a company "reported the offense to appropriate governmental authorities" promptly and "prior to an imminent threat of disclosure or government investigation," and whether the company "fully cooperated in the investigation." Companies who made voluntary disclosures under the DOD program received consideration as to whether they had made a "candid and complete disclosure" and "[t]he degree and timeliness of corporate cooperation" when the DOJ decided whether to prosecute in the first instance. I believe these same principles apply in the case of mandatory disclosures.

I suggest that a contractor will be better off if it makes a disclosure than if it does not. I recognize that a few contractors may hope that their conduct is never discovered and they are never held accountable for their actions. In today's world, that belief may be unrealistic. Contractors may balance the risk of getting caught against the potential penalties. In my view, that balance is clear: reporting, in addition to being required and the right thing to do, produces benefits that outweigh any risks or expectations of not being caught.

When to Make a Disclosure

The rule states that contractors must make a disclosure when they have "credible evidence." Although the preamble to the rule discusses the term, neither the preamble nor the rule defines credible evidence. Contractors must determine based upon the circumstances of individual disclosures whether credible evidence exists.

The rule contemplates giving contractors some time period to investigate potential issues and determine whether they have credible evidence of a violation. Some contractors notify us as

⁴¹ 48 C.F.R. § 9.406-2(b)(1)(vi).

⁴² One contractor who made a disclosure, however, was suspended in connection with an indictment on related facts.

soon as they learn of a potential issue and begin their internal investigation. Others notify us only after they have completed their internal investigation. We prefer early notification, and so long as the contractor keeps us informed of its progress, we do not intervene until the contractor has completed its internal review.

If we agree with a contractor's methodology for assessing the scope of the reported misconduct, we are able to review and resolve the disclosure far more quickly. Where review procedures will be particularly involved (for example, when systemic errors are involved), early disclosures may be particularly useful because we can work with the contractor to develop a review methodology, and the contractor can avoid a substantial investment of resources in a methodology that is insufficient for the OIG to verify the disclosure. Naturally, the more thorough the information a contractor presents, the more easily we are able to verify the disclosed information and the more readily we will accept the contractor's explanation of the circumstances. We expect contractors to exhibit the "full cooperation" required by the rule, namely "providing timely and complete response to government auditors' and investigators' request[s] for documents and access to employees with information."⁴³

Another question that has come up is whether disclosure is required when the government already has knowledge of the act, such as when an audit, investigation, or pending litigation has already identified the issue. Reporting under these circumstances may be redundant; however, the rule does not contain an express exception for matters the government already knows about.

To Whom Disclosures Should be Made

The rule requires that reports of fraud or potential FCA violations be made to OIGs with copies to contracting officers.⁴⁴ In disclosures involving multi-agency contract vehicles, disclosure is to be made to both the ordering agency and the agency involved in the base contract.⁴⁵ The rule does not specify the government personnel to whom significant overpayments should be disclosed. However, other contract provisions state all overpayments should be reported to the contracting officer.

In most disclosures we have received, the contractor has characterized the conduct as an overbilling; some contractors fail to state even whether the information is disclosed pursuant to the disclosure rule. We recognize that contractors are concerned that if they acknowledge they are making a required disclosure of credible evidence of fraud or a civil FCA violation, that statement could be used against them in litigation. Accordingly, we review disclosures based on the facts they contain, not the label the company gives those facts. Whether they are characterized as disclosures under the rule, as disclosures of overpayments only, or otherwise, we have accepted disclosures into the program if they are addressed to the OIG and provide information regarding misconduct in connection with agency contracts, unless the contractor explains that the disclosure was intended for another purpose.

⁴³ 48 C.F.R. § 52.203-13(a).

⁴⁴ *Id.* § 52.203-13(c)(2)(ii)(F).

⁴⁵ *Id.* § 52.203-13(b)(3)(iii).

In some cases, contractors have reported only to the contracting officer, who in turn has forwarded the disclosure to the OIG. In our view, this practice does not comport with the rule. If a contractor settles a matter with a contracting officer as an overpayment, but in fact there was credible evidence of fraud or a false claim that later comes to the attention of the OIG, we will not consider that an adequate disclosure made under the mandatory disclosure rule.

To avoid problems and questions about rule compliance, we suggest that contractors disclose to both the contracting officer and the OIG in cases in which conduct *may* qualify as a violation of the FCA or the criminal laws specified in the rule.