

The Compliance Mentoring Program: Improving Ethics and Compliance in Small Government Contractors

By Jessica Tillipman & Vijaya Surampudi¹

I. Introduction

Over the past decade, the anti-corruption, ethics and compliance landscape has changed dramatically. This is a direct consequence of a robust anti-corruption enforcement effort by the United States and other countries. The increase in enforcement has also been spurred by the passage of several multilateral anti-corruption agreements, such as the Organization for Economic Co-operation and Development Anti-Bribery Convention (“OECD Anti-Bribery Convention”) and the United Nations Convention Against Corruption (“UNCAC”), which prohibit, among other things, the bribery of foreign government officials. They also require companies to dedicate resources to maintaining robust internal controls.

The increase in anti-corruption enforcement has had a profound impact on large, multinational corporations. Many of these companies have responded to this increase in

¹ Jessica Tillipman is the Assistant Dean for Field Placement and a Professorial Lecturer in Law at The George Washington University Law School where she co-teaches an Anti-Corruption & Compliance seminar. She is also a Senior Editor of the FCPA Blog. Vijaya Surampudi is a third-year law student at The George Washington University Law School. She will graduate in May, 2015.

enforcement by investing heavily in sophisticated compliance programs designed to prevent or mitigate liability for anti-corruption violations. This development has been most pronounced in the defense industry where large, U.S. defense contractors have developed rigorous compliance programs.

Unlike their large counterparts, many small government contractors are largely unable to keep up with the rapidly evolving trends and best practices in ethics and compliance. Their inattention to this critical area leaves them at risk for compliance failures, fraud and corruption. As a result, small contractors are more likely to be debarred from the U.S. procurement system than their large counterparts. Despite the harsh consequences that stem from these compliance deficiencies, few small contractors dedicate resources to the development of vital compliance policies and internal controls. This has resulted in a critical gap in the defense industry supply chain, as many large contractors regularly partner with small companies that lack the sophistication and resources necessary to ensure compliance with the many government contracts compliance requirements.

One possible solution to this growing problem is to incentivize large government contractors to work with their small partners to help develop their compliance programs. To be effective, the incentives must be substantial so that large contractors are willing to share their confidential and proprietary programs with other companies. Fortunately, a model for this type of arrangement exists in the U.S. procurement system. The U.S. “mentor-protégé” program is designed to assist small businesses with the navigation of the immense government contracts regulatory system. Under this program, the larger, more experienced contractor serves as a “mentor” to the smaller contractor (the “protégé”). Among other things, the mentor guides the protégé through the complex procurement regime by sharing expertise and resources. In return,

the mentor is provided with contractual opportunities and incentives. This model could be beneficial in the area of compliance by providing a mechanism where information could be exchanged between two contracting parties to ensure transparency throughout all levels of the procurement regime.

II. Global Shift in Anti-Corruption Enforcement & Compliance

Over the past decade, there has been a global shift in perceptions and approaches towards public corruption. Enforcement has increased dramatically, the sharing of information and resources among governments has improved, and global best practices in corporate anti-corruption compliance have emerged.² Dozens of countries have made multilateral commitments to combat corruption and have enacted anti-corruption legislation to fight bribery and foster a new era of corporate anti-corruption compliance.³

Anti-bribery enforcement agencies, non-governmental organizations and civil society organizations have developed compliance guidance to assist companies with the prevention and deterrence of corruption. In addition, large, multinational companies have been incentivized to invest in ethics and compliance programs in an effort to avoid expensive anti-corruption enforcement actions and the long-term reputational harm that may result from public knowledge of their misconduct.

a. Relevant Corruption Laws, Treaties and Conventions

Enacted in 1977, the FCPA has provided the foundation for today's global anti-corruption enforcement activities. The U.S. statute criminalizes the bribery of foreign government officials and requires persons and entities to maintain accurate books and records

² *2014 Year-End FCPA Update*, Gibson Dunn Publications (January 5, 2015) available at <http://www.gibsondunn.com/publications/pages/2014-Year-End-FCPA-Update.aspx>

³ *Infra* text accompanying notes 13-16

and robust internal controls.⁴ Working in tandem, the two pillars of the FCPA not only combat bribery, but also ensure that companies and individuals do not hide bribes and improper transactions in off-book accounts and slush funds.⁵ FCPA enforcement has increased dramatically over the past decade, resulting in hundreds of enforcement actions—a significant increase from the previous two decades of enforcement.⁶

While the FCPA is famous for its broad jurisdiction, often ensnaring both U.S. and foreign companies that run afoul of its prohibitions—it is equally feared because of its broad knowledge standard, which has resulted in significant fines and penalties for companies that rely on third parties and suppliers to help them develop business opportunities abroad.⁷ The statute’s knowledge standard “is designed to ensure that companies do not hide behind their agents or other third parties to avoid liability for the bribery of foreign government officials.”⁸ Indeed, the vast majority of FCPA cases were triggered by third parties that have bribed government officials on behalf of a particular company.⁹ To reduce the risk of liability that may result from the actions of third parties and suppliers, companies have developed robust due diligence and oversight procedures for the selection and monitoring of their business partners.¹⁰ Companies that ignore bribery “red flags” in the vetting or monitoring of third parties proceed at their own

⁴ 15 U.S.C. §§ 78dd-1, et. seq. (2010).

⁵ 15 U.S.C. §§ 78dd-1, et. seq. (2010).

⁶ *2014 Year-End FCPA Update*, Gibson Dunn Publications (January 5, 2015) available at <http://www.gibsondunn.com/publications/pages/2014-Year-End-FCPA-Update.aspx>

⁷ 15 U.S.C. §§ 78dd-1, et. seq. (2010); *see also 2014 Year-End FCPA Update*, Gibson Dunn Publications (January 5, 2015) available at <http://www.gibsondunn.com/publications/pages/2014-Year-End-FCPA-Update.aspx>

⁸ Tillipman, Jessica, *Gifts, Hospitality & the Government Contractor* (June 1, 2014). Briefing Papers No. 14-7, June 2014 at 15.

⁹ *Id.*

¹⁰ *Id.*

peril.¹¹

While the United States remained alone for 25 years in its fight against the bribery of government officials in international business transactions, the anti-corruption landscape began to change in the late 1990s.¹² “In less than a decade, dozens of countries [had] signed on to treaties requiring them to criminalize transnational bribery of foreign officials in similar terms to the antibribery prohibition of the FCPA, requiring criminalization of money laundering where the predicate offense is a corrupt practice, and requiring cooperation with other countries in investigations and enforcement.”¹³ Moreover, multilateral agreements, such as the OECD Anti-Bribery Convention and UNCAC, have spawned implementing legislation across the globe designed to, among other things, combat bribery in international business.¹⁴

Signed in 1997, the OECD Anti-Bribery Convention is aimed at reducing corruption in developing countries by encouraging sanctions against bribery in international business transactions.¹⁵ The convention largely mirrors the provisions of the FCPA, prohibiting the bribery of foreign government officials and requiring companies to maintain stringent internal

¹¹ See, e.g., TRACE International, *Trace Due Diligence Guidebook: Doing Business With Intermediaries Internationally*, 19 (2010), <http://www.traceinternational.org/data/public/The2010TRACEDueDiligenceGuidebook-65418-1.pdf>. This guidebook contains a helpful list of common bribery red flags that should signal the need for caution and additional investigation.

¹² Lucinda Low, *The United Nations Convention Against Corruption: The Globalization of Anticorruption Standards* (2006), available at <http://www.steptoe.com/assets/attachments/2599.pdf>.

¹³ *Id.* (detailing the numerous regional anti-corruption treaties that were also passed during this time period).

¹⁴ United Nations Convention Against Corruption, (Sept. 2004), V.04-56160, available at https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf; Organization for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, (2011), available at http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

¹⁵ <http://issuu.com/oecd.publishing/docs/reporttoministers>

controls. As of March 2015, thirty-four OECD member countries and seven non-member countries have adopted the convention.¹⁶ The OECD Working Group on Bribery monitors the implementation of anti-corruption legislation and assesses anti-corruption law enforcement efforts.¹⁷ Over the past decade, active implementation of the OECD has led to the criminal sanctioning of 333 individuals and 111 entities for foreign bribery.¹⁸

The UNCAC requires states to implement a variety of anti-corruption measures, which affect their laws, institutions and practices. The UNCAC provides a holistic approach to combatting corruption, focusing not only on traditional law enforcement techniques, but also on methods of enhancing international co-operation and preventative measures directed at both the public and private sectors.¹⁹ Similar to the OECD Anti-Bribery Convention, the UNCAC requires states to impose “civil, administrative or criminal penalties” on individuals or companies that engage in acts of corruption to dissuade other entities from propelling or encouraging similar patterns of corruption.²⁰ Its provisions also address the “promotion of corporate codes of conduct, best practices, and compliance programs for business and the professions, [and] measures to promote corporate transparency.”²¹

¹⁶ *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*
<http://www.oecd.org/corruption/oecdantibriberyconvention.htm> (last visited April 2, 2015).

¹⁷ *Id.*

¹⁸ *Annual Report of the OECD Working Group on Bribery 2014*, Organization for Economic Cooperation and Development (2014) at 15, available at <http://www.oecd.org/daf/anti-bribery/AntiBriberyAnnRep2012.pdf>.

¹⁹ <http://www.unodc.org/unodc/en/treaties/CAC/> (requiring each state to “develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.”) at 9

²⁰ *Id.* at 14.

²¹ Lucinda Low, *The United Nations Convention Against Corruption: The Globalization of Anticorruption Standards* (2006), available at <http://www.stepto.com/assets/attachments/2599.pdf>.

b. Robust Anti-Corruption Enforcement Ushers in a New Era of Compliance

The dramatic increase in anti-corruption enforcement by the United States and (increasingly) other countries, demonstrates a growing global commitment to combatting corruption. Many household company names have run afoul of the FCPA, resulting in time-consuming, expensive and embarrassing enforcement actions.²² Not surprisingly, the negative consequences stemming from these enforcement actions have incentivized large, multinational companies to invest in compliance programs that will detect, prevent and deter illicit activities.²³ Moreover, governments, international organizations and civil society have also championed the role of ethics and compliance in helping to prevent and mitigate corporate corruption.

In fact, the U.S. Department of Justice (“DOJ”) has publicly recognized and rewarded companies that implement robust compliance programs even when allegations of corruption arise. For example, in 2011, Johnson & Johnson entered into a Deferred Prosecution Agreement with the DOJ to resolve corruption allegations. The government made clear that it had reduced the company’s criminal penalty to \$21.4 million “due to J&J’s pre-existing compliance and ethics programs, extensive remediation and improvement of its compliance systems and internal controls.”²⁴ In 2012, the DOJ took an unprecedented step of publicly announcing that it had

²² See Richard L. Cassin, *With Alstom, three French Companies are now in the FCPA top ten*, The FCPA Blog (December 23, 2014 at 9:45AM) available at <http://www.fcpablog.com/blog/2014/12/23/with-alstom-three-french-companies-are-now-in-the-fcpa-top-t.html> (establishing many household companies settled FCPA violations with DOJ including Siemens (\$800 million in 2008), Alstom (\$772 million in 2014), KBR/Halliburton (\$579 million in 2009) BAE (\$400 million in 2010)).

²³ Claudia J. Dumas, Fritz Heimann, Shruti Shah, *Verification of Anti-Corruption Compliance Programs*, Transparency International-USA Report, at p. 9 (2014)

²⁴ *Johnson & Johnson Agrees to Pay 21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations*, Department of Justice Office of Public Affairs Press Release (April 8, 2011) available at <http://www.justice.gov/opa/pr/johnson-johnson-agrees-pay-214-million-criminal-penalty-resolve-foreign-corrupt-practices-act>

declined to prosecute Morgan Stanley for the bribery of a Chinese government official because of the company's strong, pre-existing compliance program.²⁵ Instead, DOJ limited its prosecution to the "rogue" employee that committed the wrongdoing.²⁶

Over the past decade, an international consensus has developed regarding best practices in corporate ethics and compliance programs.²⁷ Several government enforcement agencies, non-governmental anti-corruption organizations, industry groups, and civil society organizations have released compliance "best practices" guides that provide guidance to companies designing risk-based, anti-corruption compliance programs.²⁸ For example, in 2010, the OECD published anti-corruption compliance guidance, titled *Good Practice Guidance on Internal Controls, Ethics and Compliance*, providing a framework for companies to assist them with the design of their compliance programs.²⁹ In 2012, the U.S. Department of Justice published *A Resource Guide to*

²⁵ See *Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA*, Department of Justice Office of Public Affairs Press Release (April 25, 2012) ("After considering all the available facts and circumstances, including that Morgan Stanley constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials, the Department of Justice declined to bring any enforcement action.").

²⁶ *Id.* The DOJ's publicly pronouncements regarding the importance of compliance are not limited to FCPA enforcement. See generally Brent Snyder, *Compliance is a Culture, Not Just a Policy*, Remarks as Prepared for the International Chamber of Commerce/ United States Council of International Business Joint Antitrust Compliance Workshop (September 9, 2014), available at <http://www.justice.gov/atr/public/speeches/308494.pdf>.

²⁷ *Infra* text accompanying notes 24-28.

²⁸ See Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, 14 November 2012, available at <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>; see also OECD Council, "Good Practice Guidance on Internal Controls, Ethics and Compliance," Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transaction, 18 February 2010, available at <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44884389.pdf>; see also The World Bank Group, *Summary of World Bank Group Integrity Compliance Guidelines*, available at http://siteresources.worldbank.org/INTDOII/Resources/IntegrityComplianceGuidelines_2_1_11web.pdf.

²⁹ OECD, *Good Practice Guidance on Internal Controls, Ethics, and Compliance* (Feb. 18, 2010),

the U.S. Foreign Corrupt Practices Act, designed to outline both the government’s policies regarding FCPA enforcement³⁰ and “the hallmarks of an effective corporate compliance program.”³¹ Similarly, the United Nations Office on Drugs and Crime (“UNDOC”), published *An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide*, that outlines policy guidelines for developing company preventative measures to detect and deter foreign bribery during international business transactions.³²

In each guide, companies are encouraged to employ measures designed to prevent and detect misconduct.³³ Although the recommendations are designed to be flexible and tailored to each company’s particular risks and resources, they provide similar recommendations, applicable to all companies, regardless of size, industry or risk.³⁴ For example, most guides consider the following to be necessary components of an effective ethics and compliance program: visible commitments from senior management, a clear corporate policy prohibiting bribery and

available at <http://www.oecd.org/investment/anti-bribery/233/anti-briberyconvention/44884389.pdf>

³⁰ *Foreign Corrupt Practices Act (FCPA) Guidance*, United States Department of Justice Fraud Section Website, <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf> (last visited January 6th, 2015).

³¹ *Id.*

³² See The World Bank Group, Summary of World Bank Group Integrity Compliance Guidelines, available at http://siteresources.worldbank.org/INTDOII/Resources/IntegrityComplianceGuidelines_2_1_11web.pdf.

³³ See Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, A Resource Guide to the U.S. Foreign Corrupt Practices Act, 14 November 2012, available at <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>; see also OECD Council, “Good Practice Guidance on Internal Controls, Ethics and Compliance,” Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transaction, 18 February 2010, available at <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44884389.pdf>; see also The World Bank Group, Summary of World Bank Group Integrity Compliance Guidelines, available at http://siteresources.worldbank.org/INTDOII/Resources/IntegrityComplianceGuidelines_2_1_11web.pdf.

³⁴ Claudia J. Dumas, Fritz Heimann, Shruti Shah, *Verification of Anti-Corruption Compliance Programs*, Transparency International-USA Report, at p. 16-17 (2014)

misconduct, a code of conduct, risk-tailored compliance policies and procedures, risk assessments, robust due diligence and oversight of third parties, confidential reporting and internal investigation procedures, dedication of sufficient resources to the implementation and oversight of the compliance program, ongoing training for employees and relevant third parties, transparent financial and accounting procedures, effective communication and documentation, periodic review and testing of internal controls, and incentives and disciplinary measures for violations of company policies and the law.³⁵

In light of the numerous compliance resources available to companies, government regulators and enforcement agencies have little sympathy for companies that claim ignorance about the necessity of an effective compliance program.³⁶ “They are equally harsh with companies that do compliance “on the cheap” –downloading and adopting the policies and codes of conduct found on the internet, dedicating little to no resources to compliance activities, failing to provide ethics and compliance training to employees, or ignoring red flags of corruption or unethical behavior.”³⁷ Companies that fail to invest in compliance or merely maintain a “paper” compliance program will eventually violate a law—resulting in huge fines, penalties, investigative costs, reputational damage and other related consequences.³⁸

c. Compliance Developments in the U.S. Government Procurement System

³⁵ *Foreign Corrupt Practices Act (FCPA) Guidance*, United States Department of Justice Fraud Section Website, <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf> (last visited January 6th, 2015) at 9-12; *Anti Corruption Ethics and Compliance Handbook for Business*, OECD, UNODC, The World Bank (2013); *An Anti-Corruption Ethics and Compliance for Business- A Practical Guide*, United Nations Office on Drugs and Crime (2013).

³⁶ Tillipman, Jessica, *Gifts, Hospitality & the Government Contractor* (June 1, 2014). Briefing Papers No. 14-7, June 2014 at 20.

³⁷ *Id.*

³⁸ *Id.*

The development and implementation of ethics and compliance best practices requires significant resources and political will.³⁹ While state-of-the-art compliance programs are increasingly prevalent in the commercial sector, robust compliance policies and procedures have always been critical for U.S. government contractors given the myriad laws applicable to their government procurement activities.⁴⁰ A contractor's failure to comply with these requirements and obligations can have a devastating impact on the company's reputation and government revenue streams.⁴¹ Not only does a contractor risk the termination of its current contracts, it also faces a multitude of administrative remedies and civil or criminal penalties.⁴² Given the staggering consequences of non-compliance, it is no surprise that the United States' largest contractors have invested heavily in developing robust and effective ethics and compliance programs.⁴³ Indeed, some of the country's largest contractors have been leaders in the development of robust and innovative anti-corruption policies and procedures.⁴⁴

In light of their significant compliance obligations, the comprehensive compliance guides are a significant resource for contractors designing, implementing and refining their internal

³⁹ Stacey English, Susannah Hammond, *Cost of Compliance 2014*, Thomson Reuters Accelus' Annual Cost of Compliance Survey (2014) at 6.

⁴⁰ John D. Altenburg, *Winding Down War Zone Contracts*, National Defense & Technology Magazine (Nov. 2013), available at <http://www.nationaldefensemagazine.org/archive/2013/November/Pages/WindingDownWarZoneContracts.aspx>.

⁴¹ Stacey English, Susannah Hammond, *Cost of Compliance 2014*, Thomson Reuters Accelus' Annual Cost of Compliance Survey (2014) at 6.

⁴² See 48 C.F.R. §§ 9.406-9.407; see also The Foreign Corrupt Practices Act and Global Anti-Corruption Law, Association of Corporate Counsel and Morrison and Foerster FCPA & Anti Corruption Task Force Report (Dec. 2010) at p. 61-67.

⁴³ Claudia J. Dumas, Fritz Heimann, Shruti Shah, *Verification of Anti-Corruption Compliance Programs*, Transparency International-USA Report, at p. 11-12 (2014)

⁴⁴ U.S. Government Accountability Office Report to Congressional Committees, *Defense Contracting Integrity: Opportunities Exist to Improve DOD Oversight of Contractor's Ethics Programs*, GAO-09-591 (2009)(finding that 55 out of 57 defense contracts had ethics programs that are currently standard for compliance prior to the promulgation of the FAR rules) at 3.

compliance programs.⁴⁵ They are of particular importance because most government contractors are legally obligated to implement a “Contractor Code of Business Ethics and Conduct.”⁴⁶ This requirement is designed to ensure that contractors “conduct themselves with the highest degree of integrity and honesty” and maintain a written code of business ethics and conduct.⁴⁷ To promote compliance with these policies, the Federal Acquisition Regulations (“FAR”) requires contractors to employ an “ethics and compliance training program and an internal control system” that is “(1) suitable to the size of the company and extent of its involvement in Government contracting; (2) Facilitate[s] timely discovery and disclosure of improper conduct in connection with Government contracts; and (3) Ensure[s] corrective measures are promptly instituted and carried out.”⁴⁸

The implementation of these “best practices” guidelines and ensuring a comprehensive compliance and ethics program requires substantial integration throughout all levels of the company. Large contractors often have a dedicated ethics and compliance staff that can oversee internal investigations and ensure that internal controls are functioning properly.⁴⁹ Firms are under significant pressure to ensure that they have dedicated ample resources and staffing to their compliance department or face “tough questions” from regulators.⁵⁰ Further, companies must

⁴⁵ See Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, A Resource Guide to the U.S. Foreign Corrupt Practices Act, 14 November 2012; see also OECD Council, “Good Practice Guidance on Internal Controls, Ethics and Compliance,” Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transaction, 18 February 2010; see also The World Bank Group, Summary of World Bank Group Integrity Compliance Guidelines.

⁴⁶ See generally FAR 3.10; 52.2013-13.

⁴⁷ See FAR 3.1002.

⁴⁸ FAR 3.1002.

⁴⁹ Greg Bingham, John T. Jones, *Costs of Mandatory Ethics and Compliance Programs*, General Dynamics and The Kendrick Group LLC Joint Report (January 2009) p.6; .

⁵⁰ Stacey English, Susannah Hammond, *Cost of Compliance 2014*, Thomson Reuters Accelus’ Annual Cost of Compliance Survey (2014) at 6.

invest a significant number of hours providing ethics training to employees to ensure that all employees understand the company's legal obligations, as well as its commitment to ethics and compliance. For example, "a typical aerospace and defense employee receives several hours of training each year on ethics and compliance with government contract requirements"—often more than what is typically required of the employees of commercial companies.⁵¹ Training alone can easily cost a defense contractor tens of millions of dollars annually to ensure that all employees have a sufficient understanding of the interplay between government regulations and the daily operations of the business.⁵²

While many of the U.S. government's largest contractors have invested heavily in developing robust and sophisticated compliance programs, the government's smallest contractors have lagged far behind.⁵³ Small businesses may be contractually required by FAR 52.203-13 to maintain a "code of business ethics and conduct" but are exempt from establishing a "a compliance program and an internal controls system."⁵⁴ While it is "recommended" that small businesses invest in these important compliance and internal control systems, the small business exemption is in recognition of the burden this requirement places on small businesses.⁵⁵ Specifically, unlike larger companies, small businesses "lack the financial resources or even the

⁵¹ Greg Bingham, John T. Jones, *Costs of Mandatory Ethics and Compliance Programs*, General Dynamics and The Kendrich Group LLC Joint Report (January 2009) p.6.

⁵² Greg Bingham, John T. Jones, *Costs of Mandatory Ethics and Compliance Programs*, General Dynamics and The Kendrich Group LLC Joint Report (January 2009) p.6.

⁵³ 2014 Anti-Bribery and Corruption Benchmarking Report: Untangling the Web of Risk and Compliance (2014) at 9 available at http://www.kroll.com/media/pdf/reports/2014_kroll_abc_report.pdf

⁵⁴ FAR 52.203-13(c). *See also* See Joseph D. West, et al., "Contractor Business Ethics Compliance Program & Disclosure Requirements, 09-5 Briefing. Papers 1 (Apr. 2009).

⁵⁵ See Joseph D. West, et al., "Contractor Business Ethics Compliance Program & Disclosure Requirements, 09-5 Briefing. Papers 1 (Apr. 2009).

market power to enforce the kind of zero tolerance policies” towards corruption.⁵⁶ Compared to larger companies, small businesses have far less capital and smaller profit margins to implement compliance programs. As a consequence, some small businesses may feel more pressure to take shortcuts or engage in corrupt practices to obtain greater profit margins.⁵⁷ While exempting small businesses from these compliance obligations is understandable given the resources these systems require, the exclusion continues to perpetuate weaknesses in the procurement system.

A 2007 report by UNDOC found that the failure of small and medium-sized (“SMEs”) businesses to invest in ethics and compliance signals a significant failure in the system.⁵⁸ In contrast to their larger counterparts, SMEs have been much slower to implement or even acknowledge developing best practices in anti-corruption ethics and compliance programs.⁵⁹ The most common (and obvious) reason for the lack of SME commitment to compliance is cost.⁶⁰ Most small businesses spend their resources just trying to survive. Many view compliance as a luxury—not as an essential aspect of doing business.⁶¹ In 2010, the Small Business Administration reported that small firms with less than 20 employees paid \$10,585 per employee to comply with all federal regulations and firms with 20-499 employees paid \$7,454 per

⁵⁶ Corruption Prevention to Foster Small and Medium Sized Enterprise Development Vol. II, United Nations Industrial Development Organization & United Nations Office on Drugs and Crime Joint Report (2012) at 13.

⁵⁷ Corruption Prevention to Foster Small and Medium Sized Enterprise Development Vol. II, United Nations Industrial Development Organization & United Nations Office on Drugs and Crime Joint Report (2012) at 14.

⁵⁸ Corruption Prevention to Foster Small and Medium Sized Enterprise Development, United Nations Industrial Development Organization and United Nations Office on Drugs and Crime, Vienna, 2007.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Nicole V. Crain and W. Mark Crain, The Impact of Regulatory Costs on Small Firms, Small Business Administration Office of Advocacy, available at <https://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20-%28Full%29.pdf>.

employee.⁶² Given the high cost of compliance, many small businesses have found that working outside regulatory requirements to be more profitable.⁶³ Indeed, “corruption in business is an economic issue and it will continue as long as the gains from corrupt behavior exceed the expected losses that are in turn closely connected to the probability of being caught.”⁶⁴

The failure of small companies to design and implement successful compliance programs may also be attributed to the complexity of the current compliance guidelines.⁶⁵ The “hallmarks” of effective compliance programs are often designed with large, multinational companies in mind.⁶⁶ While all of the guides make clear that policies and procedures should be tailored to the risks and resources of each particular company, the guidance can be overwhelming to resource-strapped SMEs.⁶⁷ The guidance is also decidedly less helpful to small businesses that lack the resources and sophistication necessary to meet these aspirational standards.⁶⁸ Many best practices are simply not feasible because the costs required to implement them are too high for resource-constrained entities.⁶⁹ Yet, regardless of the financial burden and

⁶² *Id.*

⁶³ Tonoyon, Strohmeyer, Habib, Perlitz, *How Formal and Informal Institutions Shape Small Firm Behavior in Mature and Emerging Market Economies*, (2006).

⁶⁴ Corruption Prevention to Foster Small and Medium Sized Enterprise Development, United Nations Industrial Development Organization and United Nations Office on Drugs and Crime, Vienna, 2007.

⁶⁵ Jane Moscovitz, *Compliance Programs for Small Businesses*, 48 No. 5 Prac. Law. 25 (2002).

⁶⁶ *Foreign Corrupt Practices Act (FCPA) Guidance*, United States Department of Justice Fraud Section Website, <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf> (last visited January 6th, 2015) at 9-12; *Anti Corruption Ethics and Compliance Handbook for Business*, OECD, UNODC, The World Bank (2013); *An Anti-Corruption Ethics and Compliance for Business- A Practical Guide*, United Nations Office on Drugs and Crime (2013).

⁶⁷ *Id.*

⁶⁸ 014 Anti-Bribery and Corruption Benchmarking Report: Untangling the Web of Risk and Compliance (2014) at 9 available at

http://www.kroll.com/media/pdf/reports/2014_kroll_abc_report.pdf

⁶⁹ Greg Bingham, John T. Jones, *Costs of Mandatory Ethics and Compliance Programs*, General Dynamics and The Kendrick Group LLC Joint Report (January 2009) at 9 (finding that a robust

infeasibility of implementing a robust compliance program, the legal risks remain the same. Thus, many small businesses face the same corruption and compliance risks as their large counterparts, but do so without the same level of protection.

While the compliance deficiencies of small businesses are bound to create problems for the small business industry, their failure to invest in ethics and compliance creates significant risks for large companies as well.⁷⁰ This is particularly true in the defense industry, where large, multinational contractors depend on small businesses to perform contracts overseas. Although large companies may value and invest in expensive compliance programs, these efforts may be moot when a small company in their supply chain does not have the resources, knowledge or even willingness to invest in compliance.⁷¹

II. The Risks of Contracting with Small Businesses

While commercial companies may be inclined to avoid risky small businesses that do not invest in ethics and compliance, large government contractors do not have the same luxury.⁷² The U.S. government has injected socio-economic policies into its procurement system in an effort to aid in the development of small businesses.⁷³ Indeed, Congress has made it clear it is the responsibility of the procurement system⁷⁴ to protect and promote the interests of small

compliance program even for a small business could amount to \$2,000,000 per year to ensure satisfactory ethics, training and internal controls).

⁷⁰ Corruption Prevention to Foster Small and Medium Sized Enterprise Development, United Nations Industrial Development Organization and United Nations Office on Drugs and Crime, Vienna, 2007.

⁷¹ *Id.*

⁷² *Infra* text accompanying notes 72-83.

⁷³ See Major Patrick E. Tolan Jr., *Government Contracting with Small Business in the Wake of the Federal Acquisition Reform Act, And Adarand: Small Business As Usual*, 44 A.F.L. Rev. 75 (1998); see also Andrew George Sakallaris, *Questioning the Sacred Cow: Reexamining the Justifications for Small Business Set Asides*, 36 Pub. Cont. L.J. 685, 687 (Summer 2007).

⁷⁴ Small Business Act of 1953, Pub. L. No. 83-163, 67 Stat. 232.

businesses.⁷⁵ Through the Small Business Act of 1953, Congress dedicated an entire agency—the Small Business Administration (“SBA”)—to the implementation and encouragement of policies that “aid, counsel, assist and protect... the interest of small business concerns in order to preserve free competitive enterprises, to ensure a fair proportion of the total purchases or contracts and subcontracts for property and services for the Government.”⁷⁶ More importantly, Congress memorialized their support for small businesses by requiring agencies to meet small business contracting goals—targets designed to ensure that a fair proportion of federal contracts are issued to small businesses.⁷⁷ Specifically, Congress requires that all agencies must ensure that 25 % of all contracts and that 35.9% of all contract dollars are issued to small business.⁷⁸ To meet these goals, contracting officers are required to reserve a certain percentage of total contracts so only small businesses may bid on the opportunities.⁷⁹ Typically, a contracting officer must determine whether two or more small business exists offering proposals that do not exceed the market price, quality and delivery.⁸⁰ If the CO determines that this is the case, they must “set-aside” the contract for small businesses.⁸¹

In addition to prime contract set-asides, under certain circumstances, large prime contractors must also preference small businesses as their subcontractors.⁸² Specifically, under

⁷⁵ Mirit Eyal-Cohen, *Why Is Small Business The Chief Business of Congress*, 43 Rutgers L.J. 1, 3 (Fall 2011/Winter 2012).

⁷⁶ 15 U.S.C. § 631(a) (2006).

⁷⁷ See Arthur Miller & W. Theodore Pierson Jr., *Observations on the Consistency of Federal Procurement Policies with Other Government Policies*, 29 Law & Contemp. Probs. 277, 296 (1964).

⁷⁸ Government Efficiency through Small Business Contracting Act of 2012, H.R. 3850, §2.

⁷⁹ An Act to Amend the Small Business Act and the Small Business Investment Act of 1958, P.L. 95-507, §221, 92 Stat. 1771 (October 24, 1978) (codified at 15 U.S.C. §644(g)(2)).

⁸⁰ FAR 19.502-2(b).

⁸¹ FAR 19.501(a).

⁸² FAR 19.702.

certain circumstances, prime contractors must “agree in the contract that small business, veteran-owned small business (VOSB), service-disabled veteran-owned small business (SVOSB), Historically Utilized Business (HUBZone) small business, small disadvantaged business (SDB) and women-owned small business (WOSB) concerns will have the maximum practicable opportunity to participate in contract performance consistent with its efficient performance.”⁸³

Defense contractors have enhanced small business obligations under the Defense Federal Acquisition Regulation Supplement (“DFARS”).⁸⁴ Further, the Department of Defense (“DoD”) is required to ensure that certain techniques such as “bundling,”⁸⁵ which may preclude small businesses from bidding on a particular contract, are minimized.⁸⁶ While there is a perception that the defense industry excludes small business contractors from the market, in reality, the industry has an affirmative obligation to work with small firms.

a. Impact of Small Business Compliance Failures on the Supply Chain

Despite the important role that small businesses play in the procurement system, their compliance failures can undermine the integrity of the entire system, create liability for their

⁸³ Office of Navy Research, Science and Technology, “Small Business Subcontracting Plans,” available at <http://www.onr.navy.mil/en/contracts-grants/small-business/subcontracting-plans.aspx> (last visited April 3, 2015).

⁸⁴ See, e.g., DFARS 219.502-2.

⁸⁵ “Bundling” means—(1) Consolidating two or more requirements for supplies or services, previously provided or performed under separate smaller contracts, into a solicitation for a single contract that is likely to be unsuitable for award to a small business concern....” FAR 2.101.

⁸⁶ DFARS 205.205-70; see also Acquisition Process: Task and Delivery Order Contracts, Bundling, 78 Fed. Reg. 191 (October 2, 2013) (finding new regulations are needed to ensure that small business as both prime and subcontractors can be considered in rather than excluded from multiple award contracts and acquisitions that are consolidated through bundling); see also U.S. Government Accountability Office Report on Small Business Contracting, Updated Guidance and Reporting Needed for Consolidated Contracts, GAO-14-36 (November 2013) available at <http://www.gao.gov/assets/660/659254.pdf>; see also <http://washingtontechnology.com/articles/2010/07/13/bundled-contract-sole-source-reporting.aspx>

large-contractor partners, and result in their exclusion from the procurement system. Although the U.S. government does not collect data on the number of small businesses excluded each year due to compliance failures, it is well-known in the industry that small business are more susceptible to debarment because of their limited knowledge of regulatory requirements and “less developed compliance and ethics programs.”⁸⁷ Moreover, when misconduct is discovered, small businesses “often lack the resources to respond to and remediate harm.”⁸⁸ When the U.S. government has attempted to reverse this trend by proposing enhancements to small business compliance programs and internal controls, the government contracts industry has pushed back vehemently arguing that the costs would be too burdensome for the small companies.⁸⁹

While small businesses bear the brunt of negative consequences that stem from their compliance deficiencies, they do not operate in a vacuum. Compliance deficiencies can impact the entire supply chain and create significant risks for the large, prime contractors that partner with small firms.⁹⁰ Thus, in an effort to minimize risks stemming from compliance deficiencies in their supply chains, many sophisticated contractors dedicate significant resources to the monitoring and oversight of their subcontractors.⁹¹ Large contractors may also invest in ethics and compliance training for some of their small subcontractors to ensure that their business

⁸⁷ Dietrich Knauth, *5 Areas of Growing Debarment Risk for Contractors*, Law360, New York (January 13, 2014, 10:49 PM ET) available at <http://www.crowell.com/files/5-Areas-Of-Growing-Debarment-Risk-For-Contractors.pdf>

⁸⁸ Tillipman, Jessica, *A House of Cards Falls: Why 'Too Big to Debar' is All Slogan and Little Substance* (January 13, 2012). *Fordham Law Review Res Gestae*, Vol. 80, No. 49, 2012.

⁸⁹ FAR Case 2007-006: Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67064, 67087 (Nov. 12, 2008).

⁹⁰ PriceWaterhouseCoopers, *How to Fortify Your Supply Chain Through Collaborative Risk Management* (January 2009), at <http://www.pwc.com/us/en/aerospace-defense/assets/pwc-aerospace-scrm-012008.pdf> (“A compliance failure at a supplier based anywhere in the world could become a major problem for a contractor”).

⁹¹ FAR Case 2007-006: Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67064, 67087 (Nov. 12, 2008).

partners are aware of the extensive compliance obligations required under their subcontracts.⁹² Unfortunately, oversight and training is not enough to prevent compliance failures—especially where subcontractors have failed to invest time or resources in developing their own compliance programs. This is source of great concern for prime contractors, which may be held liable for the actions of their subcontractors.⁹³

Although large contractors continue to work with small businesses in order to meet statutory goals, it is rare that a large company's commitment to small businesses extends beyond their minimum requirements.⁹⁴ Indeed, many large corporations have typically “shied away from small suppliers because of the sense that they are untested, less reliable and more likely to go out of business.”⁹⁵ This not only undermines the government's long-term strategic goals of enhancing opportunities for small businesses, it handicaps opportunities for large businesses to partner with new and potentially more innovative firms.

b. Sharing Compliance Best Practices

The defense industry has made very visible commitments to elevating ethics and compliance in the industry. Many of the world's largest defense contractors are making great strides in establishing global ethics and compliance standards through their participation in organizations and forums dedicated to these issues.⁹⁶ For the past five years, the aerospace and

⁹² Aaron Grieser, *The Outer Limit of Global Compliance Programs: Emerging Legal & Reputational Liability in Corporate Supply Chains*, 10 Or. Rev. Int'l L. 285, 312 (2008).

⁹³ *Id.*

⁹⁴ Lockheed Martin is the only large defense contractor to provide direct assistance and use of internal corporate ethics resources to their suppliers.

<http://www.lockheedmartin.com/us/suppliers/ethics.html>

⁹⁵ Mark Foggin, *Breaking into the Corporate Supply Chain* at 16, available at [https://nycfuture.org/pdf/Breaking into the Corporate Supply Chain.pdf](https://nycfuture.org/pdf/Breaking%20into%20the%20Corporate%20Supply%20Chain.pdf).

⁹⁶ See, e.g., Defense Industry Initiative, www.DII.org, United Nations Global Compact and International Forum on Business Ethical Conduct for the Aerospace and Defence Industry, <http://ifbec.info>.

defense industries have held an annual conference attended by industry members, government representatives, and non-governmental organizations in an effort to share compliance “best practices” and to “promote trust and integrity.”⁹⁷ Further, the Defense Industry Initiative (“DII”) Working Group⁹⁸ has hosted an annual forum of over “300 industry professionals and U.S. Government officials to share best practices and discuss current issues related to ethics and compliance.”⁹⁹ The DII Working Group has also developed a “model supplier code of conduct” designed to articulate the “expectations” DII holds for suppliers throughout the industry.¹⁰⁰ It also serves as a resource for small and medium-sized contractors “seeking to streamline the processes by which they agreed to individual contractors’ codes of conduct when doing business with other DII members.”¹⁰¹ DII has also developed a “supplier toolkit” that has been “designed to give SMEs the necessary guidance on creating effective ethics and compliance programs.”¹⁰² These examples make clear that defense industry members are actively collaborating with each other to share anti-corruption, ethics and compliance best practices.

While these forums and public initiatives certainly convey a willingness to share information about ethics and compliance practices, the specific details of company compliance programs are not always publicly available. A 2012 Transparency International U.K. Defence

⁹⁷ International Forum on Business Ethical Conduct for the Aerospace and Defence Industry 5th Annual Conference Report [hereinafter “IFBEC Report”] at 1.

⁹⁸ The Defense Industry initiative is a non-profit organization with “seventy-seven signatory companies comprising the top U.S. defense and security companies. . . [the organization seeks]the continued promotion and advancement of a culture of ethical conduct in every company that provides products and services to the United States Armed Forces.” See <http://www.dii.org/about-us>.

⁹⁹ *Id.* at 3.

¹⁰⁰ DII Model Supplier Code of Conduct, available at <http://www.dii.org/resources/dii-model-supplier-code-conduct>.

¹⁰¹ IFBEC Report at 3.

¹⁰² *Id.*

and Security Programme report noted that over half of companies involved in the organization's study had not shared information publicly about their anti-corruption policies or even whether their ethics programs meet the industry best practices.¹⁰³ Additionally, although the defense industry regularly hosts ethics and compliance conferences and forums, the events are generally closed to the public.

The hesitancy to share this information publicly is understandable given the significant investment large contractors make in designing and implementing their ethics and compliance programs. Some of the largest contractors are unwilling to share detailed information about their sophisticated programs because they view their programs as proprietary and confidential. Many contractors (understandably) fear that competitors will exploit this information if they share it publicly. Yet, by depriving small businesses of access to this information, the large contractors may ultimately be harmed if their suppliers suffer from compliance deficiencies or failures.

II. Incentivizing the Sharing of Resources and Guidance

The entire supply chain benefits when contractors at all tiers view ethics and compliance as a critical component of their business. While enhanced supply chain integrity may incentivize some large businesses to share compliance best practices with their suppliers, many large contractors continue to keep this information confidential. Although the defense industry is increasingly committed to sharing guidance and resources with small businesses and suppliers, the amount and type of information shared varies greatly among industry members.

Some of the largest government contractors have decided to invest significant time and resources into helping elevate the ethics and compliance programs of their suppliers. For

¹⁰³ Mark Pyman, Tiffany Clark, Saad Mustafa and Gareth Somerset, Defence Companies Anti-Corruption Index 2012, Transparency International UK Defence and Security Programme, London, U.K. (October 2012)

example, Lockheed Martin has created an “Ethics Supplier Mentoring Program” as a means to ensure that the company’s suppliers maintain similarly robust ethics and compliance programs.¹⁰⁴ Per Lockheed’s website, the goal of the program is to share “best practices, resources, and experiences, all with the aim of creating a more robust ethics program throughout the supply chain.”¹⁰⁵ The program “includes an objective review of the supplier’s existing Ethics & Business Conduct program, and recommendations for improvement. Each company is partnered with one or more Ethics Officers, who is available as a resource throughout the program.”¹⁰⁶

Lockheed’s attempt to enhance the ethics and compliance programs of its suppliers not only reduces the risk of a compliance failure in the supply chain; it also enhances the overall integrity of the procurement system. If other large and sophisticated contractors were to implement a similar program, it could have a dramatic impact on the integrity of the U.S. government contracts regime. Unfortunately, not all contractors are willing to spend the time and resources necessary to mentor their suppliers on ethics and compliance best practices. It is clear that additional incentives are necessary to foster increased information sharing among the companies. Fortunately, a template for incentivized information sharing already exists in the U.S. procurement system: the “mentor-protégé program.” If implemented in the ethics and compliance context, this model could provide lasting benefits to the entire procurement system.

a. The Model: Federal Mentor Protégé Programs

¹⁰⁴ See <http://www.lockheedmartin.com/us/suppliers/ethics.html>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

In 1991, the FAR Council created mentor-protégé assistance programs to provide small businesses with resources and support in the federal procurement sector.¹⁰⁷

A mentor-protégé program is an arrangement in which mentors—businesses, typically experienced prime contractors—provide technical, managerial, and other business development assistance to eligible small businesses, or protégés. In return, the programs provide incentives for mentor participation, such as credit toward subcontracting goals, additional evaluation points toward the awarding of contracts, an annual award to the mentor providing the most effective developmental support to a protégé, and in some cases, cost reimbursement.¹⁰⁸

Ideally, mentors and protégées work in conjunction “to create a developmental assistance agreement.”¹⁰⁹ The purpose of the agreement is to ensure that the large business trains the smaller business on industry specific subjects,¹¹⁰ provides assistance in obtaining required federal contract certifications, advises on issues related to contract administration and guides the smaller company on general business and organizational management skills.¹¹¹ Through these initiatives, the U.S. government hopes to develop and produce businesses that are able to function independently in the federal contracting system.¹¹²

The mentor-protégé program depends on the willingness of experienced and sophisticated contractors to serve as mentors to smaller companies. Thus, the U.S. government provides

¹⁰⁷ U.S. Government Accountability Office, Implementation of the Pilot Mentor-Protégée Program, GAO/NSLAD-94-101 (February 1994).

¹⁰⁸ Letter to the Honorable Mary L. Landrieu, Committee on Small Business and Entrepreneurship, *Mentor-Protégé Programs Have Policies That Aim to Benefit Participants but Do Not Require Post agreement Tracking*, U.S. Government Accountability Office, GAO-11-548R (July 15, 2011)

¹⁰⁹ *Id.*

¹¹⁰ U.S. Government Accountability Office, Implementation of the Pilot Mentor-Protégée Program, GAO/NSLAD-94-101 (February 1994) (including production, quality control, manufacturing, engineering, and computer hardware and software).

¹¹¹ U.S. Government Accountability Office, Implementation of the Pilot Mentor-Protégée Program, GAO/NSLAD-94-101 (February 1994).

¹¹² Keir X. Bancroft, *Regulating Information Security in the Government Contracting Industry*, 62 Am. U. L. Rev. 1145, 1192 (2013).

various incentives to encourage large businesses to participate in the program.¹¹³ The incentives are typically financial and contractual advantages that may be used to obtain or enhance procurement opportunities.¹¹⁴ This may include credit towards a prime contractor's mandatory subcontracting goals,¹¹⁵ additional evaluation points that increase a prime's likelihood of winning a contract, or an annual monetary award to mentors who prove that their development support has been beneficial to the protégé.¹¹⁶

Other agencies may provide additional incentives. For example, DoD allows prime contractor mentors to collect reimbursements for certain costs that are incurred while providing mentorship to their protégés.¹¹⁷ The Departments of Energy, Homeland Security and NASA provide prime contractors with award fees¹¹⁸ in recognition of successful mentor protégé developments.¹¹⁹ Additionally, the Small Business Administration's program permits large companies to work on contracts that are specifically set-aside for small businesses if they serve

¹¹³ Letter to the Honorable Mary L. Landrieu, Committee on Small Business and Entrepreneurship, *Mentor-Protégé Programs Have Policies That Aim to Benefit Participants but Do Not Require Post agreement Tracking*, U.S. Government Accountability Office, GAO-11-548R (July 15, 2011)

¹¹⁴ *Id.*

¹¹⁵ A credit allows prime contractors to count costs incurred during mentorship as if they were incurred in a subcontract awarded to their protégé. *See Evaluating Federal Mentor-Protégé Programs: Assessment, Case Studies and Recommendations*, National Women's Business Council Advisors to the President, Congress and the SBA, p. 7 (April 2011). This allows large businesses to better meet their subcontracting goals. *Id.*

¹¹⁶ *Id.*

¹¹⁷ DFARS I-109(d) (permitting mentors to seek reimbursement of costs up to \$1,000,000 for costs of assistance furnished to a protégé firm each fiscal year).

¹¹⁸ An award fee functions as a monetary bonus for any costs that are saved or for performance that is beyond satisfactory and is used to motivate the contractor to provide optimum performance in critical areas. *See U.S. Department of Air Force Award Fee Guide (2008)* available at

<http://www.acq.osd.mil/dpap/ccap/cc/jcchb/Files/Topical/1Restricted/award.fee.oct08.pdf>

¹¹⁹ 48 C.F.R. 919.7006(a) (March 26, 2015)); see also 48 C.F.R. 1819.7201(b) (March 26, 2015)); see also 48 C.F.R. 819.7105(d) (March 26, 2015).

as a mentor to the small business in the contract.¹²⁰ These incentives are designed to provide prime contractors with opportunities that are normally barred by other federal contracting policies to sweeten the deal for providing assistance to these small businesses. The ultimate advantage of these special arrangements is that “mentors benefit from a strengthened cadre of subcontractors and [the agency] benefits from a resultant robust and competitive supplier base.”¹²¹

b. The Compliance Mentor-Mentee Program

The existing mentor-protégé program provides a template that could help narrow the compliance gap that currently plagues the procurement system. This model of information sharing in exchange for financial and contractual incentives is a proven concept that could be implemented in the compliance context with modest effort and resources. The application of this program in the ethics and compliance setting could encourage the sharing of expertise and resources by large contractors with their small, less sophisticated counterparts.

This template could benefit both small and large companies for several reasons. First, the mentee will benefit from the compliance guidance and resources shared by the mentor. By sharing resources and offering guidance, the mentor can help elevate the mentee’s ethics and compliance program to better reflect industry best practices. It will also help the mentee identify potential areas of corruption risk—a task that will likely benefit the entire supply chain. While specific ethics and compliance goals would be established at the outset of the program, mentors would be expected to help the protégé (1) design a compliance program tailored to the protégé’s

¹²⁰ 13 C.F.R. § 124.50 (2010) (granting a SBA mentor and protégé relationship authority to enter a joint venture as a small business for any government prime contract or subcontract including those set aside for companies who meet certain small business size standards).

¹²¹ GAO Report 01-767

specific size, industry and risk profile, (2) develop a comprehensive and effective training program, and (3) draft tailored policies and procedures. Mentors would also be expected to share resources and guidance on an ongoing basis, thus eventually enabling the mentee to maintain an effective, internal compliance program.

In addition to the benefits afforded to the mentee firms, mentors would also be rewarded for the time and energy spent guiding the mentee. In addition to the incentives inherent in reducing risks in the supply chain, the program will provide mentors with significant financial and contractual incentives, such as award fees and access to certain set-aside contracts. This will allow large companies to benefit from additional contracting opportunities while simultaneously promoting a more ethical and compliant procurement process. This could be particularly profitable for large companies given the significant resources they allocate to their compliance functions. While the costs of sharing best practices would be minimal, the financial incentives and enhanced market access could be quite lucrative.

Developments in the defense industry suggest that this approach could be embraced as a positive movement towards a more collaborative and transparent system. As previously noted, Lockheed Martin has developed a similar model in order to ensure ethics and compliance best practices are implemented throughout the company's supply chains.¹²² Lockheed's "Ethics Supplier Mentoring Program" demonstrates the significant strides that could be made if large contractors regularly partnered with small contractors to help them enhance their ethics and compliance programs. According to Lockheed's website, their program provides, among other things, (1) an objective review of the supplier's existing ethics program, (2) recommendations

¹²² 2014 Supplier Ethics Letter, Ethics Supplier Mentoring Program available at <http://www.lockheedmartin.com/us/suppliers/ethics.html>

for improvements (3) a direct mentor from their Office of Ethics and Business Conduct to train the supplier for six months, (4) access to internal Lockheed Martin ethics resources, and (5) the opportunity to benchmark the company's compliance program against Lockheed's program.¹²³ This comprehensive system demonstrates that tangible benefits that a small business may derive from its "ethics and compliance" partnership with a large and sophisticated contractor.

To maximize the proposed program's effectiveness, it will be necessary for the government to dedicate resources to ensuring that the mentor-firm is providing sufficient guidance and assistance to the mentee. It is also critical that mentors are properly screened to ensure that they are joining the program to further the program's policy goals—not to exploit the incentives at the expense of the mentee firms. While no government program is immune from abuse, safeguards will be necessary to prevent and deter the potential manipulation of the program.

Fortunately, lessons may be drawn from audits of the existing mentor-protégé program. For example, a 2007 audit of the DoD Mentor-Protégé Program indicates that in some instances, mentors have benefited from the program's procurement and financial incentives, but have failed to provide adequate procurement guidance to their protégé.¹²⁴ Dissatisfied protégé firms have pointed to a "lack of mentor commitment to the program, [the] mentor's failure to meet the objectives of mentor-protégé agreements and costs that exceeded the return for participation."¹²⁵ While some concerns with the existing mentor-protégé program exist, the audit also found that

¹²³ 2014 Supplier Ethics Letter, Ethics Supplier Mentoring Program available at <http://www.lockheedmartin.com/us/suppliers/ethics.html>

¹²⁴ United States Gov't Accountability Office Report: Contract Management Protégés Value DOD's Mentor Protégé Program, but Annual Reporting to Congress Needs Improvement, GAO-07-151 (Jan. 31, 2007).

¹²⁵ *Id.*

DoD's mentor-protégé program enhanced the overall capabilities of 93% of the 48 protégés involved in the program.¹²⁶

The lessons learned from past experiences in the mentor-protégé program, coupled with developments in industry “ethics and compliance mentoring programs,” demonstrate that this model could be extremely beneficial in the ethics and compliance setting, so long as sufficient safeguards are put in place.¹²⁷ Not only would front-end screening of prospective participants be an essential component of the program, the government would need to install a back-end verification process to ensure all parties have maintained their commitments. With screening and oversight mechanisms in place, the impact of this program on small business ethics and compliance programs could be significant.

III. Conclusion

A “compliance mentor-mentee program” could successfully foster the development of small business ethics and compliance programs. With appropriate safeguards in place, the potential improvements to the overall integrity of the procurement system could be significant. The program could greatly reduce supply chain risks and enhance the overall ethics and compliance practices of a chronically weak segment of the procurement system. By incentivizing ethics and compliance at all levels of the supply chain, a “compliance mentor-mentee program” could substantially enhance the U.S. procurement system by ensuring that the government's business partners, large and small, are responsible, ethical and compliant.

¹²⁶ *Id.*

¹²⁷ *Id.*