


# Checklist to Compliance

**Internal reviews of systems and procedures can help commercial companies doing business with the U.S. government avoid costly mistakes and overwhelming problems.**

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**U**.S. STATUTORY AND REGULATORY CHANGES over the past five years have made it considerably easier and less risky for private-sector companies to sell their products and services to the federal government. In turn, those changes have reduced the accompanying contract requirements.

To take advantage of the potential profits and other benefits associated with selling to the government, companies should have an internal review system to ensure compliance with the various socioeconomic requirements — from equal employment opportunity to small business preferences — that still distinguish a government contract from one used in the private sector.

With access to the Federal Acquisition Regulation (FAR), published at title 48 of the Code of Federal Regulations (CFR) on the Web ([www.arnet.gov/far](http://www.arnet.gov/far)) and a relatively small amount of time

spent learning about the unique government requirements contained in the FAR, an internal auditor for the occasional government prime contractor or subcontractor can easily identify potential trouble spots before they become significant issues. Early identification will help eliminate actions that lead to allegations of fraud and misconduct. Of course, the opposite is just as true. The failure to be aware of the differences when contracting with the government can place a commercial company, its officers, and its employees at both civil and criminal risk as well as create a public relations night-

*Note: This article should not be considered specific legal advice.*

# Checklist to Government Contract Compliance

Many of the requirements listed in this chart need a fundamental understanding of the implementing regulations, so auditors should pay particular attention to the text that accompanies those entries followed by an asterisk. The Web-sites listed will provide additional information, copies of regulations, and access to needed forms.

REQUIREMENT	APPLICABILITY	REQUIRED ACTION	REGULATION
✓ <b>Equal Employment Opportunity</b>	Subcontractors and prime contractors with contracts over \$50,000 per year and 50 or more employees	<i>Written affirmative action plan; annual filing of government Standard Form 100 –EEO1</i>	48 CFR 52.222-26
✓ <b>Nondiscrimination of Disabled Veterans and Vietnam Era Veterans*</b>	Subcontractors and prime contractors with contracts over \$10,000 per year	<i>Written policy of nondiscrimination and affirmative action; annual filing of government form VETS-100 for companies with sales of \$25,000 or more</i>	48 CFR 52.222-35; 52.222-37
✓ <b>Affirmative Action for Workers with Disabilities</b>	Subcontractors and prime contractors with contracts over \$10,000 per year	<i>Written policy of nondiscrimination and affirmative action</i>	48 CFR 52.222-36
✓ <b>Service Contract Act*</b>	Service subcontracts and prime contracts over \$2,500	<i>Payment of prevailing federal wages to service employees</i>	48 CFR 52.222-41
✓ <b>Small Business Subcontracting Plan*</b>	Subcontracts and prime contracts with subcontracting opportunities of over \$500,000	<i>Written small business subcontracting plan with specific dollar goals for subcontract awards; annual filing of government Standard Form 294 or 295</i>	48 CFR 52.219-9
✓ <b>Country-preference Laws*</b>	Product subcontracts and prime contracts over \$2,500	<i>Identification of country-of-origin status for products being sold</i>	48 CFR 52.225-1 through 52.225-16
✓ <b>Prompt Payment Act and Invoicing*</b>	Prime contracts	<i>Submission of proper invoice</i>	48 CFR 52.232-25
✓ <b>Subcontracting With Debarred Companies*</b>	Prime contracts	<i>Prohibition against subcontracting with companies that are debarred</i>	48 CFR 52.209-6
✓ <b>Record-keeping Requirements*</b>	Prime contracts	<i>Maintenance of contract records for 3 years after final payment</i>	48 CFR 4.7

mare. In addition, a non-compliant company can be debarred from doing business with the government for up to three years by any agency that has discovered an error or improper action.

Full-time government contractors selling noncommercial products and services generally have a specially trained workforce knowledgeable about government-contract requirements. There are, however, far more companies that sell commercial products and services, now broadly defined as *commercial items*, that only occasionally sell to the government, either directly as prime contractors or indirectly as subcontractors. For these companies, a compliance review is essential.

The use of internal controls and the regular monitoring of implementation efforts helps ensure that a company successfully sells its products and services without running afoul of government regulators. Although no compliance checklist is comprehensive, as numerous exceptions can apply, knowing the issues surrounding government-contract

endeavors — outlined in the above chart — will help the occasional commercial-item contractor or subcontractor be aware of the possible problem areas. In addition, the following information highlights a selection of the issues, giving supplemental resources for definitions, descriptions, and further considerations.

## **NONDISCRIMINATION REQUIREMENTS**

Most companies already have equal employment policies that are consistent with the requirements of the three nondiscrimination clauses, although they may not be as comprehensive as necessary. With a modest increase in detail, existing company plans can be modified to meet federal requirements. Companies need to pay particular attention to the reporting requirements so that the required forms are completed and submitted each year. The Office of Federal Contract Compliance within the U.S. Department of Labor enforces compli-

ance, and its efforts include desk audits, on-site compliance reviews — if records are not in order — and the investigation of employee complaints.

## **SERVICE CONTRACT ACT**

Key to understanding compliance with the Service Contract Act is understanding which employees are covered and which employees are exempt. Although currently in regulatory limbo for commercial companies performing as subcontractors, the Service Contract Act covers “service employees,” meaning any person engaged in fulfilling a service contract — with a few exceptions, including information technology contracts — other than executives or administrative or professional personnel. Service employee definitions and descriptions, which range from “able seaman” to “wrangler,” can be found at 29 CFR 541.

With regard to wage determinations, the Department of Labor generally updates wages annually and at the onset of a new contract. The wage determi-

POSSIBLE INTERNAL CONTROLS	RED FLAG INDICATORS	WEB ADDRESS
<i>Collection of employee data and proper dissemination of job opportunities by HR department</i>	Failure to file annual report	<a href="http://www.dol.gov/dol/esa/public/ofcp_org.htm">www.dol.gov/dol/esa/public/ofcp_org.htm</a>
<i>Collection of employee data and proper dissemination of job opportunities by HR department</i>	Failure to file annual report	<a href="http://www.dol.gov/dol/vets/welcome.html">www.dol.gov/dol/vets/welcome.html</a>
<i>Collection of employee data and proper dissemination of job opportunities by HR department</i>	No written policy	<a href="http://www.dol.gov/dol/topic/discrimination/disabilitydisc.htm#doltopics">www.dol.gov/dol/topic/discrimination/disabilitydisc.htm#doltopics</a>
<i>Monitoring and receipt of Department of Labor wage determinations</i>	Lack of current Department of Labor wage determinations in contract file	<a href="http://www.dol.gov/dol/esa/public/regs/compliance/whd/wage/main.htm">www.dol.gov/dol/esa/public/regs/compliance/whd/wage/main.htm</a>
<i>Collection of subcontractor data by purchasing department</i>	Failure to file annual report	<a href="http://www.dscr.dla.mil/sbo1/sample_subcontracting_plan.htm">www.dscr.dla.mil/sbo1/sample_subcontracting_plan.htm</a>
<i>Identification of place of manufacture of product components and place of product substantial transformation</i>	Blanket certifications of products as domestic end products	<a href="http://www.arnet.gov/far/loadmainre.html">www.arnet.gov/far/loadmainre.html</a> (see Part 52)
<i>Use of invoice with eight required items</i>	Receipt of payments later than 30 days after submission of invoice; failure to receive late payment interest	<a href="http://www.fms.treas.gov/prompt">www.fms.treas.gov/prompt</a>
<i>Use of subcontract clause requiring confirmation of non-debarred status; review of government debarred list</i>	Failure to identify subcontractor status	<a href="http://epls.arnet.gov">epls.arnet.gov</a>
<i>Written policy on record maintenance</i>	Incomplete government contract files	<a href="http://www.arnet.gov/far/loadmainre.html">www.arnet.gov/far/loadmainre.html</a> (see Part 4)

nation includes a minimum hourly rate and a fringe benefit rate that must be paid to the service employee.

### SMALL BUSINESS SUBCONTRACTING PLAN

A large company's small business subcontracting plan must include annual dollar goals — either on a contract-by-contract or company-wide basis — for subcontracting with small-business concerns, small disadvantaged business concerns, women-owned small-business concerns, and HUBZone (Historically Underutilized Business Zone) small-business concerns — all defined with specificity in 13 CFR.

Fortunately, companies can rely on their subcontractors' own classification. However, a company must collect that information regularly, which is often accomplished by annually mailing a postcard questionnaire to suppliers. Although a company need not achieve its specific subcontracting goals, the failure to engage in a good-faith effort

to achieve the goals can lead to monetary damages being imposed.

### COUNTRY-PREFERENCE LAWS

The various statutes that comprise the labyrinth of country-preference laws — Buy American Act, Trade Agreements Act, Caribbean Basin Economic Recovery Act, U.S.-Israel Free Trade Area Implementation Act, North American Free Trade Agreement, Balance of Payments Program, and Agreement on Civil Aircraft — overlap and interrelate in ways that can make them extremely difficult to understand and apply in practice, particularly in light of numerous exceptions and waivers. Those exclusions cover dollar thresholds, product types, and national interests as well as specialty legislation affecting a host of items from anchor chain to night vision image intensifier tubes.

By focusing on basic definitions associated with U.S. government statutory requirements, government contractors or subcontractors can properly certify the

status of a particular commercial product and meet the stated minimum federal contract requirements. Proper enforcement of the requirements, such as in a bid protest against a competitor or a dispute with a government contracting officer, requires a more thorough understanding of the various statutory and regulatory applications and exceptions.

To qualify under a country-preference statute, the end product must be defined as a(n):

**DOMESTIC END PRODUCT** — mined, manufactured, or produced in the United States. If manufactured, the cost of the components manufactured in the United States exceeds 50 percent of the cost of all components.

**DESIGNATED-COUNTRY END PRODUCT** — wholly the growth, product, or manufacture of a designated country, or the product has been substantially transformed in a designated country. There are currently 60 designated countries, a list of which can be found at FAR 25.003. **QUALIFYING COUNTRY END PRODUCT** — an unmanufactured end product or an end

## Checklist to Government Contract Compliance (Cont.)

REQUIREMENT	APPLICABILITY	REQUIRED ACTION	REGULATION
✓ <b>Time Cards*</b>	Labor hour service contracts	<i>Proper recording of labor hours charged</i>	Defense Contract Audit Agency Contract Audit Manual § 5-900
✓ <b>Contract Work Hours</b>	Contracts employing laborers or mechanics	<i>Payment of overtime on 40-hour work week</i>	48 CFR 52.222-4
✓ <b>Convict Labor</b>	Contracts	<i>Prohibition of using current convicts</i>	48 CFR 52.222-3
✓ <b>Section 508 – Rehabilitation Act*</b>	Electronic and information technology contracts	<i>Agencies required to purchase electronic and information technology products and services that are accessible to people with disabilities</i>	48 CFR 39.2
✓ <b>Facility and Personnel Security Clearances*</b>	Contracts and subcontracts requiring access to classified information	<i>Obtain and maintain facility and personnel clearances from Department of Defense</i>	National Industrial Security Program Operating Manual
✓ <b>Gifts and Gratuities*</b>	Government employees	<i>Prohibition for government employees soliciting or accepting gifts</i>	5 CFR 2635
✓ <b>Hiring Practices*</b>	Contractors	<i>Limitation on hiring former government officials</i>	5CFR 2641
✓ <b>Whistleblower Protections</b>	Contractors	<i>Prohibits taking employment action against employee who has disclosed possible violation of contract law</i>	48 CFR 3.9
✓ <b>Price Negotiations*</b>	Contracts	<i>Negotiation of fair and reasonable price without certified cost or pricing data</i>	48 CFR 15.504
✓ <b>Travel Expenses*</b>	Contractors and subcontractors	<i>Compliance with federal travel regulations and reimbursement limits</i>	41 CFR 301

product from a qualifying country, i.e., a country with a memorandum of understanding or international agreement with the U.S. Those countries are listed at 48 CFR 225.872-1.

**CARIBBEAN BASIN-COUNTRY END PRODUCT** — receives duty-free treatment and is wholly the growth, product, or manufacture of a Caribbean Basin country or has been substantially transformed in a Caribbean Basin country.

**U.S.-MADE END PRODUCT** — mined, produced, or manufactured in the United States, or has been substantially transformed in the United States.

**NAFTA-COUNTRY END PRODUCT** — wholly the growth, product, or manufacture of Canada or Mexico or has been substantially transformed in Canada or Mexico.

**ISRAELI END PRODUCT** — wholly the growth, product, or manufacture of Israel or has been substantially transformed in Israel.

**CANADIAN END PRODUCT** — wholly the growth, product, or manufacture of Canada, or has been substantially transformed in Canada.

Products that do not meet one of the above definitions must be classified as a foreign end product.

“Substantially transformed” is defined as when — as a result of manufacturing processes — a new and different article emerges with a distinctive name, character, or use that’s different from the one originally possessed by the article or material. The mere finishing or modification of a partially or nearly complete foreign product in the United States does not result in a substantial transformation, and it remains the product of a foreign country.

If there is any doubt as to the proper classification of a particular product, the vendor must conduct a more thorough analysis of the facts associated with the product’s origin and manufacture as well as applicable statutory requirements and exceptions. Any doubt should prompt vendors to categorize the product conservatively as one that is foreign-made, the least desirable of all product categories.

### PROMPT PAYMENT ACT

Although government checks never bounce, the government can be a slow pay, notwithstanding the statutory obligations of the Prompt Payment Act, which states that payments be made within 30 days after receipt of a “proper” invoice. To limit payment problems and delays, companies must have a system for submitting “proper” invoices that include required information to the correct government office as identified in the contract.

### SUBCONTRACTING WITH DEBARRED COMPANIES

Because prime contractors are prohibited from using companies and individuals on the government’s current debarred list, a prime contractor that relies on subcontractors should either regularly check the online list of debarred contractors (see chart above for Web-site address) or require all subcontractors to certify that they are not debarred.

POSSIBLE INTERNAL CONTROLS	RED FLAG INDICATORS	WEB ADDRESS
<i>Annual review of time-card procedures; time-card instruction for all employees</i>	Time cards not completed on daily basis; corrections made on time cards without proper review; time cards inconsistent with invoices	<a href="http://www.dcaa.mil/cam.htm">www.dcaa.mil/cam.htm</a>
<i>Written overtime policy in employee manual</i>	No payment of overtime	<a href="http://aspe.os.dhhs.gov/cfda/p17303.htm">aspe.os.dhhs.gov/cfda/p17303.htm</a>
<i>Strict employment policy</i>	Use of prisoners	<a href="http://www.arnet.gov/far/loadmainre.html">www.arnet.gov/far/loadmainre.html</a> (see Part 52)
<i>Internal review of compliance standards</i>	Blanket certifications	<a href="http://www.section508.gov">www.section508.gov</a>
<i>Trained facility security officer who manages clearances</i>	Employees that use security clearances from previous employers	<a href="http://www.dss.mil/index.htm">www.dss.mil/index.htm</a>
<i>Written policy prohibiting the offering of gifts to federal employees</i>	Government sales force seeking reimbursement for gifts to federal employees	<a href="http://www.usoge.gov/home.html">www.usoge.gov/home.html</a>
<i>Management review of all hiring decisions involving government officials; receipt of government ethics opinion as to scope of work of each government official hired</i>	Reliance of former government officials for sales force	<a href="http://www.usoge.gov/home.html">www.usoge.gov/home.html</a>
<i>Written policy protecting whistleblower employees; written policy encouraging employees to communicate with company ombudsman or hotline</i>	Personnel actions against vocal employees	<a href="http://www.whistleblowers.org/protect.htm">www.whistleblowers.org/protect.htm</a>
<i>Limited submission of pricing data; pricing data clearly marked as "information other than cost or pricing data"</i>	Submission of cost data	<a href="http://www.arnet.gov/far/loadmainre.html">www.arnet.gov/far/loadmainre.html</a> (see Part 15)
<i>Written travel policies that are consistent with federal regulations</i>	Charging of travel expenses at actual costs in excess of federal limits	<a href="http://policyworks.gov/org/main/mt/homepage/mtt/fttr/fttrhp.shtml">policyworks.gov/org/main/mt/homepage/mtt/fttr/fttrhp.shtml</a>

## RECORD-KEEPING REQUIREMENTS

Government contractors are generally required to maintain records pertaining to contract performance for three years following the contract's completion. With the exception of companies dealing with General Services Administration contracts, federal agencies no longer have the contractual right to audit commercial-item vendors. However, the comptroller general of the General Accounting Office retains that entitlement. In addition, based on allegations of waste, fraud, or abuse, an agency inspector general can — without difficulty — subpoena contract records, thus making a contract-record retention and destruction system important.

### TIME CARDS

For commercial service providers that charge the government for each hour worked by a company employee, the contractor should maintain a time-card system to ensure that time charged to a

particular contract is done on a daily basis with all changes to recorded times noted by the employee and supervisor.

## SECTION 508 – REHABILITATION ACT

As of June 25, all electronic and information technology (EIT) products and services purchased by the government must meet the standards required by Section 508 of the Rehabilitation Act of 1973, as amended. Items affected by the new compliance standards include telecommunications products, Web sites, computers and ancillary equipment, software, services and office equipment such as copiers and fax machines (EIT products and services).

Section 508 mandates that EIT products and services developed, procured, maintained, or used by the government must be accessible to people with disabilities. To ensure accessibility, the Architectural and Transportation Barriers Compliance Board, an independent federal agency, has issued compliance standards. These technical standards

delineate compliance requirements for software applications and operating systems, Web-based intranet and Internet information and applications, telecommunications products, video and multimedia products, self-contained closed products, and desktop portable computers.

## FACILITY AND PERSONNEL SECURITY CLEARANCES

For contractors wishing to work on government classified programs, a facility clearance must be obtained for the company as well as individual security clearances for each employee with access to classified information. Although the Department of Defense has made it easier in recent years to complete the paperwork associated with a facility clearance, the National Industrial Security Program Operating Manual requirements can still be daunting for large companies engaged in international business. A company's appointed facility-clearance officer is responsible for making sure that clear-

ances are activated and deactivated properly as well as ensuring that any classified documents are stored correctly. Auditors should be aware of any employee who claims to have a security clearance “held” by another company. Security clearances are associated with the company that actually employs and pays an individual.

### **GIFTS AND GRATUITIES**

Subject to limited exceptions, any government employee is prohibited from soliciting or accepting gifts or anything of monetary value from any person or company seeking to do business with the employee’s agency. This includes offerings from any person regulated by, or with a substantial interest before, the employee’s agency. As a general rule, companies are

limited to gifts of \$20 or less per federal employee per occasion, with an aggregate \$50 annual limitation. Exemptions are provided for modest items of food and refreshment and items of nominal intrinsic value.

As a reciprocal restraint, contractors are prohibited from giving anything of value to a government employee with the intent to influence an official act, such as bribery, or in response to an official act, such as illegal gratuities. In many instances, the mere public allegation of bribery can cause significant damage to a company. The safest policy is to limit all gifts to under \$20.

### **HIRING PRACTICES**

Former federal officials are subject to ethical standards restricting post-gov-

ernment service. Due to the complexity of the regulations, contractors should insist that officials under consideration for prospective employment secure a written ethics opinion from the Office of Government Ethics. Such an opinion can detail the scope of permissible employment discussions and the specific scope and timing of permissible post-employment activities with the particular contractor.

### **PRICE NEGOTIATIONS**

Companies that sell commercial items to the government are no longer required to provide current, accurate, and complete cost or pricing data. Rather, the government must generally rely upon competition or catalog or market prices to establish a fair price. Companies can be asked to submit information other than cost or pricing data with the only requirement being that the data, generally consisting of previous sales data, is accurate.

### **TRAVEL EXPENSES**

Although compliance is not technically required, most federal agencies require contractors, when seeking direct reimbursement for travel costs, to comply with federal travel regulations as if they were federal employees. Those regulations limit the per diem rates as well as the amount reimbursable for hotels and travel costs.

### **ENSURING COMPLIANCE**

The dramatic changes in government-contract regulations have decreased the risk and the expense for businesses around the world, opening up a host of opportunity. However, fundamental differences remain between commercial transactions and government contracts that require careful attention to detail. The government is still prone to making quick allegations of fraud and false claims when problems arise. As a result, internal review systems that assess compliance with government-unique requirements can ensure that government sales result in company profits, not problems.

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