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# Strategies For Better Positioning Your Company To Do Business With The Federal Government

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## William M. Pannier



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### Practice

- Government Contracts
- Litigation and Dispute Resolution
- Compliance Services
- Corporate Transactions

### Education

- Washington and Lee University (J.D.), 1998
- Texas Christian University (B.B.A.), 1995

### Bar Admission

- California

# Goals for this session / Take-aways

- ▶ The United States Government only does business with presently responsible contractors.
- ▶ It is critical that a contractor conduct itself with the highest degree of integrity and honesty.
- ▶ This presentation will focus on what small business contractors can do to be the type of contractor that the Government can and wants to do business with.

# Our Framework

- ▶ The Law
  - ▶ Statutes
  - ▶ Regulations
    - ▶ Federal Acquisition Regulation (i.e., the FAR)
- ▶ The Application: Doing The Right Things The Right Way
  - ▶ Your Principles
  - ▶ Practical Considerations & Approaches
  - ▶ Policies
  - ▶ Procedures

# Government Business is Only for “Responsible” Parties

- ▶ Being “presently responsible” is required for those doing business with the Government
- ▶ The Government only awards grants and contracts (and permits subcontracts) to “Responsible” parties (FAR 9.103(a))

# What is “Responsible”?

- ▶ To be deemed Responsible, one must be able to perform the work (financial, technical, administrative) and:
  - ▶ Have a satisfactory record of:
    - ▶ business ethics and integrity,
    - ▶ performance, and
    - ▶ “Be otherwise qualified and eligible to receive an award....”

# Get Honest About Integrity and Honesty

- ▶ I would never cheat the Government!
- ▶ I'm a \_\_\_\_\_ person
  - ▶ Good
  - ▶ Ethical
  - ▶ Patriotic
  - ▶ Well meaning / Well intentioned
- ▶ None of this cuts it

# Becoming the Company You Want to Be

- ▶ [FAR 3.10](#), Contractor Code of Business Ethics and Conduct.

- ▶ 3.1002 Policy

(a): “Government contractors must conduct themselves with the highest degree of integrity and honesty”

(b): “Contractors should have a written code of business ethics and conduct.”



# Becoming the Company You Want to Be

## ▶ 3.1002(b) Cont.

To promote compliance with such code of business ethics and conduct, contractors should have [a] an **employee business ethics and compliance training program** and [b] an **internal control system** that—

- (1) Are **suitable** to the size of the company and extent of its involvement in Government contracting;
- (2) **Facilitate timely discovery and disclosure of improper conduct in connection with Government contracts;** and
- (3) **Ensure corrective measures are promptly instituted and carried out.**

# Becoming the Company You Want to Be

## ▶ 3.1003 Requirements.

- ▶ The policy at [3.1002](#) applies as guidance to all Government contractors
- ▶ Mandatory clauses if conditions specified [3.1004](#) are met:
  - ▶ [52.203-13](#), Contractor Code of Business Ethics and Conduct
  - ▶ [52.203-14](#), Display of Hotline Poster(s)

# Compliance and Ethics Program

- ▶ Ethical behavior
  - ▶ Everyone makes it his/her objective to act ethically and responsibly in his/her work-related activities
- ▶ Accountability
  - ▶ All employees, agents, and those doing business with the company are held accountable for compliance and ethical behavior
- ▶ Bottom Line
  - ▶ Being committed to achieving the highest standards of conduct - and to honesty and integrity - in business practices

# Compliance and Ethics Program

- ▶ Reflects the company's commitment to comply with:
  - ▶ All applicable laws, regulations and guidelines
  - ▶ Ethical principles
  - ▶ Company values
- ▶ Program designed to:
  - ▶ Prevent, detect, and correct improper conduct
  - ▶ Improve performance - do things the right way
- ▶ Promote a culture of compliance with law and ethical behavior
- ▶ Commitment to do the right thing
- ▶ Zero tolerance toward fraud and other wrongdoing

# Compliance and Ethics Program

- ▶ Standards to Prevent and Detect Misconduct
  - ▶ Written Code of Business Ethics and Conduct
- ▶ High-level Person to Oversee the Program
  - ▶ Knowledgeable people exercising reasonable oversight
  - ▶ Chief of Ethics and Compliance (reasonably senior person)
  - ▶ Compliance Committee
- ▶ Procedures to Exclude Prohibited Persons from Positions of Authority
  - ▶ HR-type screening procedures

# Compliance and Ethics Program

- ▶ Communications and Training
  - ▶ Ethics Training
  - ▶ Targeted Compliance Training
  - ▶ Senior Management Communications
- ▶ Monitoring and Evaluating Program Effectiveness
  - ▶ Internal Audits
- ▶ System for Reporting Misconduct
  - ▶ No fear of retaliation
  - ▶ Reporting channels (e.g., anonymous hotlines)
  - ▶ Specified case resolution procedures

# Compliance and Ethics Program

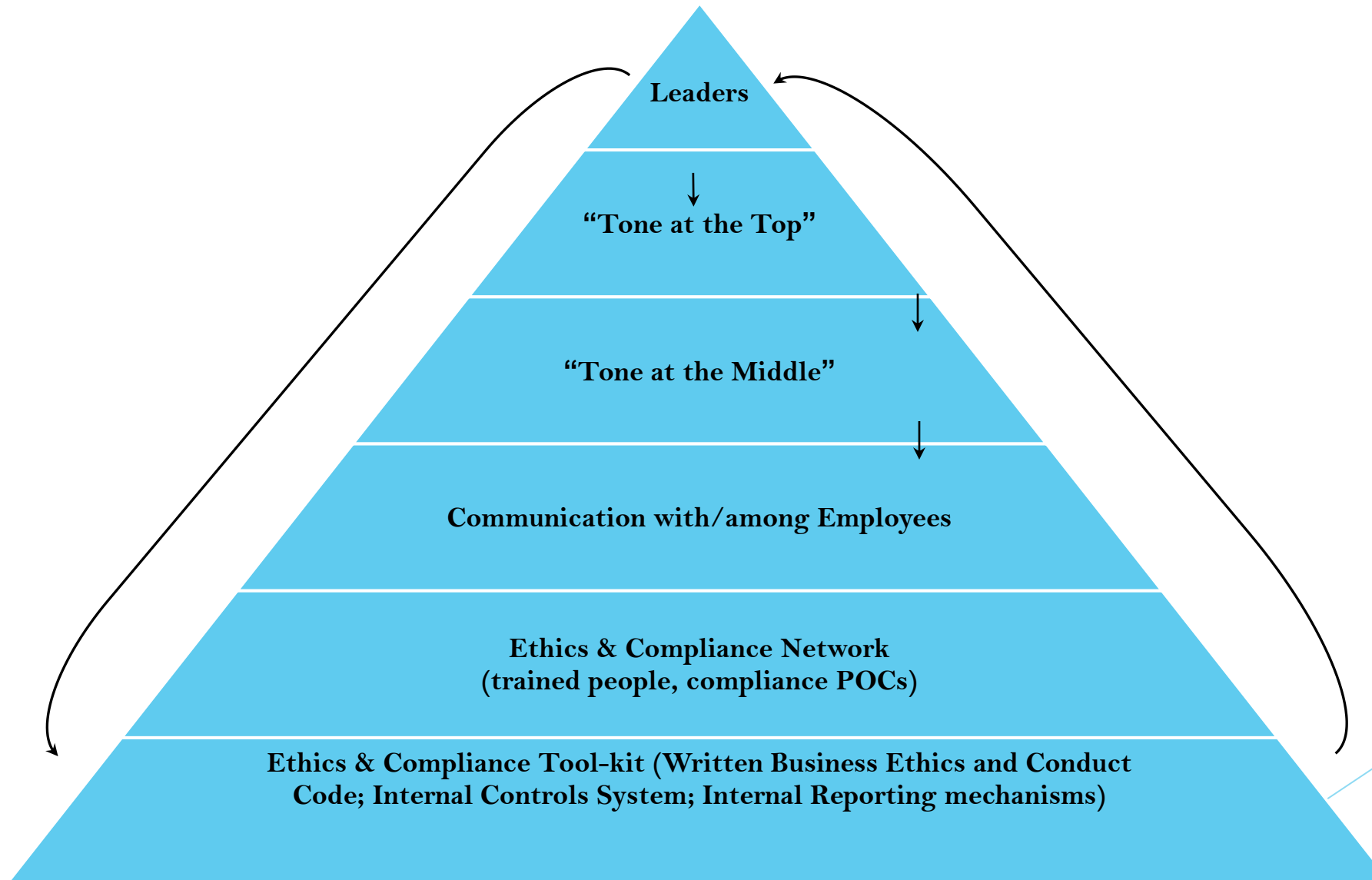
- ▶ Consistent Application and Enforcement
  - ▶ Uniform Policies and Procedures
  - ▶ Disciplinary Action
- ▶ Risk Assessment
  - ▶ Opposite of “Set it and Forget it”
  - ▶ Keep current

# Compliance and Ethics Program

- ▶ Remedial Action
  - ▶ After something goes wrong (e.g., violation or misconduct detected)
  - ▶ Root cause analysis
  - ▶ Trend analysis
  - ▶ Identify key risk areas and improve controls



# Compliance and Ethics Program



# Code of Business Conduct & Ethics

- ▶ Key elements:
  - ▶ Policies and procedures to comply with applicable laws and regulations
  - ▶ Avoid conflicts of interest
  - ▶ Protect confidential or proprietary data
  - ▶ Honest competition (no anti-competitive conduct)
  - ▶ No discrimination or harassment in the workplace
  - ▶ Honor commitments
  - ▶ Be truthful in all things

# Code of Business Conduct & Ethics

- ▶ Make the Code of Business Conduct and Ethics useful:
  - ▶ People need to have a copy of it
  - ▶ Review it
  - ▶ Understand it
  - ▶ Be trained on it
  - ▶ It can't just be wrapped in cellophane on the shelf (Enron)
- ▶ Everyone must know how to appropriately report any actual or suspected compliance violations

# Company Culture: Tone at the Top

- ▶ Buy-in and support is crucial
- ▶ Promote an organizational culture that encourages ethical conduct and a commitment to compliance with laws and company policies
  - ▶ Culture intolerant of fraud and shoddy practices
  - ▶ Use good accounting systems and sound processes
  - ▶ Competent contract management personnel
  - ▶ Clear guidance on laws and company policies and systems for time-coding, accounting, pricing, billing, etc.
  - ▶ Access to competent legal guidance

# Make the Compliance Program Your Own

- ▶ Tailor it to your company
- ▶ What are your company's values?
  - ▶ Excellence
    - ▶ Deliver first-class products and services
    - ▶ Financial success
  - ▶ Integrity
    - ▶ Be honest and credible at all levels
      - ▶ Internally and externally
    - ▶ Competent and ethical leadership
- ▶ What are your company's risks?

# Keep It Your Own

## ▶ Risk Assessment

- ▶ Identify risks facing the
  - ▶ Company
  - ▶ Industry
  - ▶ Include regulatory/enforcement environment
- ▶ Assess the nature, probability, and severity of the risks
- ▶ Analyze risk avoidance and mitigation
- ▶ Prioritize Compliance Program responses

# Keep It Your Own

- ▶ **Maintain your Compliance Program**
  - ▶ Your company is dynamic - update the program regularly
  - ▶ How? Regularly perform a “**Gap Analysis**”
    - ▶ Identify shortcomings in the Compliance Program
      - ▶ Policies
      - ▶ Personnel
      - ▶ Training
- ▶ Integrate program into business practices
- ▶ Not just once a year training and “get back to business”

# Who's Responsible for the Compliance Program?

- ▶ Someone must exercise “reasonable oversight” over its implementation and effectiveness
  - ▶ Need “high level” personnel “to ensure” program effectiveness
  - ▶ Executive management must have a role in program
- ▶ Who?
  - ▶ Chief of Ethics & Compliance (a sufficiently senior person);
  - ▶ Someone who is knowledgeable about the program’s content and operation
  - ▶ Compliance committee



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# Auditing and Monitoring

- ▶ Target audits to identified/prioritized risks
- ▶ Periodically evaluate effectiveness of program
- ▶ Documented follow-up on hotline calls/reports
- ▶ Use hot/help line as pro-active resource for advice and counseling to employees

# Accountability: Leveraging Human Resources

- ▶ Promote and Enforce Standards Consistently
  - ▶ Need clear disciplinary protocols
  - ▶ Must actually follow them
  - ▶ Make compliance/ethical part of performance evaluations
  - ▶ Managers and Supervisors are responsible for those under them
- ▶ Take reasonable steps to respond to violations
  - ▶ Fix the problem
    - ▶ Not just a repayment
  - ▶ Address root causes and document it
  - ▶ Incorporate industry standards

# Implementation

- ▶ Integrate compliance activities into one program
  - ▶ Structured Compliance Program
  - ▶ Organized - clear lines of responsibility
  - ▶ Comprehensive - Risk based
  - ▶ Oversight - Board and Senior management involved
  - ▶ Objectivity: Minimize conflicts of interest
    - ▶ Too often, those with incentives to take shortcuts oversee their own compliance

# Realizing the Benefits

- ▶ Improve Performance
  - ▶ Management Tool
  - ▶ Increase Efficiency
  - ▶ Foster Better Business Judgment
  - ▶ Increase Profits
- ▶ Strengthen Relationships
  - ▶ Employees
  - ▶ Vendors
  - ▶ Directors
- ▶ Help Avoid Costly Compliance Failures

# Contractor Integrity

## 1. Compliance Programs and Business Ethics

- ▶ Policies and Procedures
- ▶ Internal Controls
- ▶ Standards of Conduct
- ▶ Procurement Integrity
- ▶ Post-government employment restrictions
- ▶ Training

## 2. Conflicts of Interest

- ▶ Organizational Conflict of Interest (OCI)
- ▶ Personal Conflict of Interest (PCI)
- ▶ Procurement Integrity

## 3. Joint Ethics Regulation (JER) Compliance

## 4. Non-Disclosure Agreements

## 5. Confidentiality Agreements

## 6. Personal Security Clearances

## 7. Disclosures

- ▶ Mandatory
- ▶ Voluntary

## 9. Suspension and Debarment

## 10. False Claims Act Defense

# Questions?

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