Confidentiality Agreements of Federal Contractor Employees – Changes To The Federal Acquisition Regulations Are Coming Soon

Confidentiality agreements for employees of federal contractors are increasingly coming under scrutiny by federal agencies. In late 2014, as part of the Consolidated and Further Continuing Appropriations Act (the “Act”), Congress prohibited the appropriation of federal funds to government contractors whose confidentiality policies restrict employees from reporting fraud, waste, or abuse to investigative agencies.

The FAR Council has been developing a new rule to implement the restrictions imposed by the Act. The rule will modify the following FAR provisions: (1) Part 3.9; (2) Part 4.1202; (3) Part 52.203; (4) Part 52.212-3; and (5) Part 52.212-5. The rule is expected to apply only to new contracts. The rule is expected to prohibit contractors from requiring employees or subcontractors to sign a confidentiality agreement that prohibits or restricts them from reporting suspected violations to the appropriate investigative or law enforcement agency or to the appropriate federal agency. Moreover, the rule is expected to require contractors whose current policies are non-compliant, to modify their policies and notify employees that the restrictions in them are no longer in effect.

Pending adoption of the new FAR provision, the U.S. Department of Defense (“DOD”) and the U.S. Department of the Treasury have issued their own provisions consistent with the Act. DOD has issued Defense Federal Acquisition Rules (“DFAR”) 252.203-7998 and 252.203-7999 (available here). Moreover, the Treasury Department has issued Acquisition Bulletin No. 15-03 (available here).

Among other things, both of the rules—which are identical in text—prohibit the appropriation of federal funds to a contractor that “requires employees or subcontractors of such entity seeking to report fraud, waste, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or contactors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.”

Contractors should carefully review their current confidentiality agreements and policies to ensure they are compliant with current regulations and the anticipated revised FARs.