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PENNSYLVANIA PUBLIC CONTRACT COMPLIANCE AND
WHAT YOU MUST DO TO REPORT BAD CONTRACT PRACTICES
TO THE GOVERNMENT

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BAD BEHAVIOR WHICH CALLS FOR LEGAL ANALYSIS
AND/OR DISCLOSURE

- Misrepresentation of facts to the government
 - Reports
 - Job logs or records under agency's review and reliance
 - Oral misrepresentations to inspectors
 - Theft resulting in loss to the government
 - Misrepresentation of credentials
- Improperly seeking payment on applications for payment
- Inducing subcontractors/ suppliers to commit bad behavior

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SORTING THROUGH SEVERAL LAYERS OF GOVERNMENTAL
JURISDICTION

- Federal Jurisdiction
 - When federal funding is involved in a state contract, consider whether there is a disclosure obligation to the federal government independent of the disclosure obligation to the state
 - E.g. the U.S. Department of Transportation Office of Inspector General is responsible for conducting investigations of fraud, waste and abuse involving Federal Highway Administration funds.
- State Jurisdiction
 - Pennsylvania Office of Administration Management Directives
 - Governor's Code of Conduct
 - Pennsylvania Crimes Code
 - Contractor Debarment/Suspension Regulations
 - Common Law Fraud

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PENNSYLVANIA CONTRACTOR INTEGRITY PROVISIONS

Management Directive 215.8 – Contractor Integrity Provisions required to be inserted in every state contract and are non-negotiable. Relevant disclosure provisions:

1. Contractor shall maintain the highest standard of honesty and integrity during the performance of this contract and shall take no action in violation of state or federal laws, or other requirements applicable to Contractor or that govern contracting with the Commonwealth.
3. Contractor shall not influence, or attempt to influence, any Commonwealth employee to breach the standards of ethical conduct for Commonwealth employees.
4. Contractor shall not offer, give, or agree or promise to give any gratuity to a Commonwealth official or employee or to any other person at the direction or request of any Commonwealth official or employee.

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PENNSYLVANIA CONTRACTOR INTEGRITY PROVISIONS (CONT'D)

5. Contractor shall not offer, give, or agree or promise to give any gratuity to a Commonwealth official or employee or to any other person, the acceptance of which would violate the Governor's Code of Conduct or any other published standard of the Commonwealth.
6. Contractor shall not offer or agree to confer any pecuniary benefit on anyone as consideration for the decision, opinion, recommendation, vote, other exercise of discretion.
7. Contractor or anyone in privity with her shall not accept or agree to accept from any person, any gratuity in connection with the performance of work under the contract, except as provided in the contract.
12. Contractor shall comply with requirements of the Lobbying Disclosure Act, and the regulations promulgated pursuant to that law.

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DISCLOSURE UNDER CONTRACTOR INTEGRITY PROVISIONS

- Under Management Directive 215.8, Paragraph 13 requires disclosure if there is a:
 - "reason to believe that any breach of ethical standards as set forth in law, the Governor's Code of Conduct, or in these provisions has occurred or may occur. . . Contractor shall immediately notify the Commonwealth contracting officer or Commonwealth Inspector General in writing."

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MANDATORY DISCLOSURE -- "REASON TO BELIEVE"

QUERY: Is there evidence to support a "reason to believe" that there has been a breach of ethical standards:

1. as set forth in law?
2. the Governor's Code of Conduct?
3. or in these provisions?

QUERY: What does it mean to:

1. immediately notify,
2. the Commonwealth contracting officer or Commonwealth Inspector General
3. in writing?

Some of these questions are easier to answer than others?

YOU CANNOT KID YOURSELF!

PENNSYLVANIA CRIMES CODE PROVISIONS ON DECEPTIVE PRACTICES

- **18 Pa.C.S. § 4904. Unsworn falsification to authorities** – "A person commits a misdemeanor of the second degree if, with intent to mislead a public servant in performing his official function, he: (1) makes any written false statement which he does not believe to be true; (2) submits or invites reliance on any writing which he knows to be forged, altered or otherwise lacking in authenticity; or (3) submits or invites reliance on any sample, specimen, map, boundary mark, or other object which he knows to be false."
 - "Under penalty" – an offense under this section when a person makes a written false statement he does not believe to be true on, or pursuant to, a form bearing notice to the effect that false statement made therein are punishable under the Unsworn Falsification to Authorities Act.
- **18 Pa.C.S. § 4107. Deceptive or fraudulent business practices** – "A person commits an offense if, in the course of business, the person: . . . (2) sells, offers or exposes for sale, or delivers less than the represented quantity of any commodity or service; . . . (6) makes or induces others to rely on a false or misleading written statement for the purpose of obtaining property or credit."

PENNSYLVANIA COMMON LAW FRAUD

- Elements of Fraud:
 - (1) a misrepresentation,
 - (2) a fraudulent utterance thereof,
 - (3) an intention by the maker that the recipient will thereby be induced to act,
 - (4) justifiable reliance by the recipient upon the misrepresentation, and
 - (5) damages to the recipient as the proximate result.

OTHER IMPORTANT STATUTES TO BE AWARE

Pennsylvania Corrupt Organizations Act

It is unlawful for any person or entity employed by an enterprise to conduct or participate in the conduct of such enterprises' affairs through a "pattern of racketeering activity."

- "Racketeering activity" includes an act that is indictable under Chapter 39 (relating to theft) and Chapter 49 (relating to falsification), and a "pattern" is a course of conduct requiring two or more acts of the racketeering activity. 18 Pa.C.S. § 911.

Theft by Deception

Under Ch. 39, it is unlawful for a person to intentionally obtain or withhold property of another by deception. 18 Pa.C.S. § 3922.

- To "deceive" a person must intentionally create or reinforce a false impression, including a false impression as to law, value, intention or other state of mind, or to prevent another from acquiring information which could affect his judgment of a transaction, or fails to correct a false impression which the deceiver previously created or reinforced. 18 Pa.C.S. § 3922.

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OTHER IMPORTANT STATUTES TO BE AWARE (CONT'D)

Federal False Claims Act, 31 U.S.C. Secs. 3729(a)(1)(A) and 3729(a)(1)(B)

It is unlawful for any person to knowingly present, or cause to be presented, a false or fraudulent claim for payment or approval, or to knowingly make, use, or cause to be made or used, a false record or statement material to a false or fraudulent claim.

To establish a False Claims Act claim, a plaintiff must prove that:

1. the defendant presented or caused to be presented to a United States agent a claim for payment;
2. the claim was false or fraudulent; and
3. the defendant knew the claim was false or fraudulent.

"Knowing" is met where the defendant acted with actual knowledge, deliberate ignorance, or reckless disregard of the information's truth or falsity.

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CONDUCTING AN INTERNAL INVESTIGATION

- PA Office of Inspector General
- PA Office of General Counsel
- PA Office of Attorney General
- U.S. Office of Inspector General (DOJ)
- Other agencies with specific interest

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THE BASICS

- Understand the law, your client, and the facts
- Strategize continuously as facts develop
- Use all *deliberate* speed
 - Act fast
 - Don't rush to judgment
- Make *independent* conclusions
- Advise and zealously represent your client
 - Disclose misconduct *if necessary*
 - Internal/external damage control
 - Eliminate or minimize penalties/bad press
 - Recommend remedial measures/compliance programs

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UNDERSTANDING THE LAW

- Based on limited, initial facts (e.g., a tip)
- Research for discussion with the client
 - Obligations for disclosure (e.g., "reason to believe")
 - Timing for disclosure (e.g., "immediately")
- Potential for serious state and federal consequences
 - Monetary penalties/restitution
 - Suspension/debarment (potential reciprocity)
 - Criminal punishment
 - Professional licensing suspensions
 - Harm to reputation
 - Business disruptions/firings

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UNDERSTANDING YOUR CLIENT

- Identify and meet with your client
 - Which entity?
 - Engagement letter for the entity, not individuals
- Identify key individuals
 - Decisionmaker(s) for the investigation
 - Point person for gathering information
 - Potential "bad actors"
 - Persons in investigation circle versus out of the circle
 - The relevant agencies/personnel
- Learn the business, employees, relationships, and the issue

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UNDERSTANDING THE FACTS

- Communicate strategy with the client
 - Litigation hold (emails, electronic information)
 - Define scope of investigation
 - Decide who should inform employees of the investigation, and how
 - Consider whether a "smokescreen" is needed
 - Correct any bad practices/implement programs
 - Identify witnesses to interview, order and location of interviews
- Your own team
 - Who will research? Interview? Review documents?
 - Keep the client informed?
 - Is an expert needed?

PREPARING FOR THE INTERVIEWS

- Gather and review documents
- Consider persons involved, their positions, and their relationships/sensitivities
- Choose a logical order (e.g., lowest-ranking first, or someone to explain background/business)
- Utilize documents to draft rough interview outline/checklist
 - Basics (e.g., job title, responsibilities, history with company)
 - Key topics and specific lines of inquiry
- Consider number of interviewers (one to take notes)

CONDUCTING THE INTERVIEWS

- Introduction/purpose of investigation
- *Upjohn* "warning," privilege, and confidentiality
 - Counsel to entity, not any individuals
 - Not acting as your counsel
 - Discussions are privileged and confidential, but privileges belong to and are controlled by entity
 - Entity's decision alone whether to protect communications as privileged or share them with a third-party
 - Keep confidential and contact us if anyone approaches you
 - Any questions before we get started?

CONDUCTING THE INTERVIEWS

- Not unlike a deposition, but should be less adversarial
- Learn about your witness as a person/employee
- Hit key checklist points, but let witness talk freely
- Note demeanor, credibility, additional issues, and “bad actors”
- Use documents to obtain more-specific answers
- Conclude with reminders
 - *Upjohn*-ish reminder (keep confidential)
 - Give person a business card
 - Contact us if approached by agency or have questions, documents, or information

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INTERVIEW MEMOS

- Draft when fresh and use logical organization
- Protect privilege with standard introduction
 - Contains counsel's impressions, etc. and is subject to attorney-client privilege/work-product doctrine
 - Information reorganized and summarized
 - Not intended to be verbatim transcript
 - Explain that *Upjohn* warning was given
- Weave in and conclude with thoughtful remarks
 - Demeanor
 - Credibility

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DAILY CONSIDERATIONS

- Draft and update action items
- Stay focused on scope/goals
- Keep client informed
- Consider client's business decisions/disruptions
 - Your presence and employee concerns
 - Whether to continue business as usual (e.g., submit invoices, proposals)
 - Strain on relationships internally and externally (e.g., corporate v. noncorporate, subcontractors)
- Consider whether disclosure standard is met
- Pros and cons of disclosure/non-disclosure

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DISCLOSURE

- Consider timing, level of detail, and waiving privilege/confidentiality (e.g., RTKL)
- Preliminary disclosure
 - Target limited group to satisfy disclosure obligation
 - Conduct in-person meeting with agency officials
- Is an expert needed (e.g., if potential damages)?
- Frame final disclosure in favorable light, but stay true to the facts
 - Isolated events?
 - A few “bad actors?”
 - Agency misconduct?
- Client's compliance program/history?

REMEMBER:

- Continue to adapt as investigation unfolds
- Act with all *deliberate* speed
- Disclose *if necessary* to targeted group
- No guarantees for leniency/confidentiality
- Be thorough and maintain objectivity to remain credible with the agency
- But advocate for your client's interests

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