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Common Mistakes of Government Contractors

**Presentation by John
Klein, SBA, and
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Your Presenter: John Klein

- Associate General Counsel for Procurement Law United States SBA.
- Principal legal advisor to senior SBA Agency officials and their staff with respect to the 8(a) Business Development program; the Agency's Government Contracting programs, including the small business set-aside, subcontracting and Certificate of Competency programs; the HUBZone program; the Small Business Innovation Research program; the Size Standards program; the Service Disabled Veteran-Owned Small Business program; and SBA's internal contracting procedures.
- Suspension and Debarment Official for Procurement and Grant Programs United States SBA.
- Mr. Klein has been a lawyer in SBA's Office of General Counsel since 1983.

Your Presenter: Christine V. Williams

- Managing Partner and Founder Outlook Law, LLC.
- Fellow of the American Bar Association.
- Former Partner at Two International Law Firms.
- Adjunct Law Professor.
- SBA Board for the 10th Region.
- SBA Award for Excellence in Advocacy.
- Nationally Recognized as a Best Lawyer for 2018, 2019, 2020, and 2021.

Mistakes Happen

- Experience is the name everyone gives to their mistakes. - Oscar Wilde
- Anyone who has never made a mistake has never tried anything new. - Albert Einstein
- All men make mistakes, but only wise men learn from their mistakes. - Winston Churchill
- The only man who never makes a mistake is the man who never does anything. - Theodore Roosevelt

What you Do to Prevent Mistakes Is Important



Compliance Programs



Culture of Honesty



Doing What is Right



Programs Do Not Have to Be Expensive but Not Having One May be Just That

Guidelines for a Good Program

Ethisphere

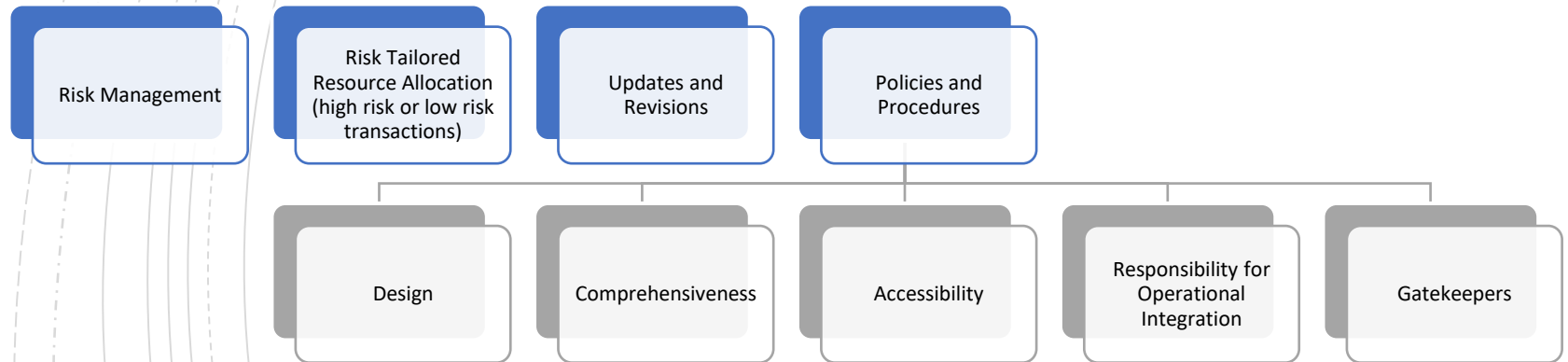
Department of Justice-
Updated June 2020-Corporate
Compliance Programs

Evaluation of Design of
Program

Being Applied Earnestly and In
Good Faith

Does it work in Practice

Department of Justice



Department of Justice-Training and Communication



Risk Based Training



Form/Content/Effectiveness of Training



Communications about Misconduct

Tone from the Top
Message from the Middle
Reinforcement to Front Line Workers



Availability of Guidance



Confidentiality of Reporting Structure

Properly Scoped Investigation by Qualified Personnel
Investigation Response
Resources and Tracking Results

Department of Justice-Mergers and Acquisitions

Speaks to Due
Diligence

Integration into
Compliance Program

Process Connecting
Due Diligence to
Implementation

Department of Justice-Rubber Hits the Road

- Compliance Program that is Adequately Resourced and Empowered to Function Correctly
- Autonomy and Resources
- Incentives and Disciplinary Measures
- Commitment by Senior and Middle Management
 - Shared Commitment Communicated throughout Company
 - Oversight



Department of Justice

<https://www.justice.gov/criminal-fraud/page/file/937501/download>

Calls We Make

- Not Understanding Limitation on Subcontracting
 - Performance
 - Mixed Contracts
 - Who Does What When
 - When do the Rules Apply
 - Similarly Situated Entity
 - Compliance of Subcontractors



Mandatory Disclosures of Overpayment(s)

- How did it happen
- How did the company react
- How is it not going to occur in the future
- Money repayment
- Guarantees to the Government
- Was there training involved
- Is this going to be a false claim

False Claims Actions

- Something has happened
- Warning signs-do NOT ignore them
- Can do concurrent investigation-
Watch for HP trap
- Was there training
- Who needs to know
- Is there a response team in place (be ready a head of time)
- Is this a criminal action or one primarily civil
- Experience matters-Not a Task to Learn on the Job



So You are a Target

Watch for Suspension and Debarment

Move NOW

Get ready with documents

Communication is key

Records and tracking

Honestly dealing with DOJ/FBI while protecting rights

May never pick up the case but be prepared

Grounds

Entity owned unique situations

Affiliation exceptions recognized by SBA

Suspension
and
Debarment
Officials

False Claims Act

Do not forget about trying to get insurance coverage

Gets expensive really fast

Toll it takes internally-physically, mentally, and doubting

If even if you are good company, this may happen

Do no harm

Foresee precautions and take them

Response plan

SBA
Presumption
of Loss Rule
Plays with
False Claims
Act

Misrepresentation

Not scrivener's error

Entire amount of contract

Burden of Proof

People go to jail for
misrepresentation

Mergers and Acquisitions

8(a) M&A

Shall terminate

Other eligibility

Size Constraints

Orders, MACS, New Work, and Tails

Recertifications of Size and Eligibility

Graduated 8(a)s

Mergers and Acquisitions



Process and Procedures

Due Diligence on Acquisition

Working with Multiple Agencies Simultaneously

Representations are True and Correct

Pre-Analysis and Final Analysis

Keep a due diligence list handy

Are your facts changing (normal that is why there is due diligence)

Know your facts

Security clearances-yes, sponsored, or not

Bait and Switch



Presented subcontracting plan



Small business prepares a bid, past performance is used-eligibility



Switched out



DoD has recognized this as a major problem



Can SBA act?

Questions on Regulations

Legal text meant to be read by non-lawyers

Once you get the rhythm and the theory it gets easier

New regulations released

Get to know them

Ask questions

Be ready for adjustments-flex as they are applied

Interaction with Procuring Agencies



Questions