How to Negotiate Compliance Contract Provisions:
Law Insider & Laura Frederick series

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Common Ethics and Compliance clauses in commercial agreements
Asha J Palmer & Amee Sandhu

Agenda:
1. Context
2. Business Considerations
3. Anti-bribery
4. Audit & Termination
5. Conflicts of Interest
6. Codes of Ethics
7. Other Clauses
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Context
1. A requirement of top ethics and compliance programs (eg. see WB ICGs, #6.2)
2. All kinds of agreements and often RFPs
3. Expect to see these clauses integrate with other ethics and compliance or regulatory topics (eg. clauses re modern slavery, etc.)
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Context:
Why & How?
Contractual obligations are best practice

Summary of
World Bank Group Integrity Compliance Guidelines

As part of the World Bank Group’s (WBG) continuing effort to improve its sanctions regime, the existing sanction of debarment with conditional release has become the default or “baseline” WBG sanction for cases initiated under the WBG’s revised Sanctions Procedures effective September 2010. Going forward the establishment (or improvement) and implementation of an integrity compliance program satisfactory to the WBG will be a principal condition to ending a debarment (or conditional non-debarment); or in the case of some existing debarments, early termination of the debarment.

In September 2010, the World Bank Integrity Vice Presidency appointed an Integrity Compliance Officer (ICO). In addition to monitoring integrity compliance by sanctioned companies (or codes of conduct for individuals), the ICO also will decide whether the compliance condition, and/or others established by the Sanctions Board or a WBG Evaluation and Suspension Officer as part of a debarment, have been satisfied.

For more on Sanctions Procedures, visit www.worldbank.org/sanctions and for more on World Bank Group anti-corruption efforts, visit www.worldbank.org/integrity.

1. PROHIBITION OF MISCONDUCT: A clearly articulated and visible prohibition of Misconduct (fraud, corruption, collusion and coercive practices), to be articulated in a code of conduct or similar document or communication.

2. RESPONSIBILITY: Create and maintain a trust-based, inclusive organizational culture that encourages ethical conduct, a commitment to compliance with the law and a culture in which Misconduct is not tolerated.

2.1. Leadership: Strong, explicit, visible, and active support and commitment from senior management, and the party’s Board of Directors or similar bodies, for the party’s Integrity Compliance Program (Program) and its implementation, in letter and spirit.

2.2. Individual Responsibility: Compliance with the Program is mandatory and is the duty of all individuals at all levels of the party.

2.3. Compliance Function: Oversight and management of the Program is the duty of one or more senior corporate officers, with an adequate level of autonomy and with sufficient resources and the authority to effectively implement.

3. PROGRAM INITIATION, RISK ASSESSMENT AND REVIEWS: When establishing a suitable Program, carry out an initial (or updated) comprehensive risk assessment relating to the potential for the occurrence of fraud, corruption or other Misconduct in the party’s business and operations, taking into account its size, business sector, location(s) of operations and other circumstances particular to the party, and review and update this risk assessment periodically and whenever necessary to meet changed circumstances. Senior management should implement a systemic approach to monitoring the Program, periodically reviewing the Program’s suitability, adequacy and effectiveness in preventing, detecting, investigating and responding to all types of Misconduct. It also should take into account relevant developments in the field of compliance and evolving international and industry standards. When shortcomings are identified, the party should take reasonable steps to prevent further similar shortcomings, including making any necessary modifications to the Program.

4. INTERNAL POLICIES: Develop a practical and effective Program that clearly articulates values, policies and procedures to be used to prevent, detect, investigate and remediate all forms of Misconduct in all activities under a party’s/person’s effective control.

4.1. Due Diligence of Employees: Vet current and future employees with any decision-making authority or in a position to influence business results, including management and Board members, to determine if they have engaged in Misconduct or other conduct inconsistent with an effective Integrity Compliance Program.

4.2. Restricting Arrangements with former Public Officials: Impose restrictions on the employment of, or other remunerative arrangements with, public officials, and with entities and persons associated or related to them, after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure or those functions over which they were or continue to be able to exercise material influence.

4.3. Gifts, Hospitality, Entertainment, Travel and Expenses: Establish controls and procedures covering gifts, hospitality, entertainment, travel or other expenses to ensure that they are reasonable, do not improperly affect the outcome of a business transaction, or otherwise result in an improper advantage.

4.4. Political Contributions: Only make contributions to political parties, party officials and candidates in accordance with applicable laws, and take appropriate steps to publicly disclose all political contributions (unless secrecy or confidentiality is legally required).

4.5. Charitable Donations & Sponsorships: Take measures within the party’s power to ensure that their charitable contributions are not used as a subterfuge for Misconduct. Unless secrecy or confidentiality is legally required, all charitable contributions and sponsorships should be publicly disclosed.
6.2 Contractual obligations: Employment and business partner contracts should include express contractual obligations, remedies and/or penalties in relation to Misconduct (including in the case of business partners, a plan to exit from the arrangements, such as a contractor rights of termination, in the event that the business partner engages in Misconduct.)”
Business CONSIDERATIONS

• Are you the buyer or the seller?
• Is it a partner, agent or a vendor agreement?
• Does the contract involve government interaction?
• Where is the contract being performed?
• Will there be sub-delegates under the contract?
• Is the contract for goods or services?
• What kind of goods or services?
• What is the total value of the contract?
• What kind of due diligence has been done?
• Maturity of the parties’ compliance programs?
• Do past relationships matter?
The clause every contract should have:

“…[Party] acknowledges that international Anticorruption laws, including the US Foreign Corrupt Practices Act, the UK Bribery Act and the Canada Corruption of Foreign Public Officials Act, prohibit any direct or indirect payment of money or anything of value to any government official, international organization, political party, party official or candidate for political office, or private individual for the purpose of obtaining, retaining, or directing business or securing any improper advantage…

“…[therefore, we expect you to have certain controls in place to prevent this [insert controls]]

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Audit:
Sample clause

Sample clause:

“All services performed by [Party] under this Agreement, all invoices and requests for expense reimbursement submitted to COMPANY by [Party], and all payments made to or benefits conferred by [Party] on third parties in the course of [Party’s] performance of services under this Agreement, are subject to audit by COMPANY, at its sole discretion, or by a third party retained by COMPANY. [Party] must fully cooperate in any audit that may be conducted…”
Sample clause:

“Seller’s violation of any of the foregoing shall be considered as Seller’s failure to perform its obligations under the terms and conditions of this Purchase Order.

“Such failure shall be considered adequate and justifiable grounds for Buyer to effectuate its rights and remedies under the termination provisions of this Purchase Order.”
Conflicts of Interest: Sample clause

Sample Clause:

“Seller certifies that,

“there is no conflict of interest for the Seller to enter into this Agreement or to perform the Services and that it will promptly notify the Buyer if any circumstances arise in which the Seller will or may be conflicted;

• “the Seller and all Seller’s Personnel owe a duty of loyalty to the Buyer and may not use their positions to profit personally at the expense of the Buyer (financially or otherwise). The Seller will promptly notify the Buyer of any such actual or potential conflict of interest.”
Code of ethics: Sample clause

Sample clause #1:

“[PARTY] agrees to provide in connection with the Work the appropriate standard of care, skill, and diligence normally provided by competent professionals in the performance of services similar to those contemplated by this Agreement.

“[PARTY] will conform to BUYER standard policy and procedure related to safety, and code of conduct.”
Sample clause #2:

“On behalf of my Company and its Subsidiaries, I acknowledge receipt of a Copy of BUYER’s Supplier Code of Ethics.

“We have noted the 10 Key principles BUYER’s Supplier Code of Ethics concerning the sections on Obeying the Law, Employees, Consumers, the Environment and Business Integrity and we are prepared to apply business principles, which are consistent with this.”
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Other clauses:

Training
• Anti-bribery training plan

Investigations & Process
• Hotlines? Investigators? Who gets the reports?

Joint ventures/ Consortiums
• Stand-alone COE or ethics program?

RFPs Questions
• Ethics KPIs, debarments, investigations, conflicts of interest during RFP process, etc
WHAT NEXT?

PASS THE TORCH

- Communicate to the project execution team
- Communicate to supply chain
- Communicate to senior management and any functions applicable
THANK YOU

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