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What Are We Certifying to Exactly?

*By Jarrod D. Blue and Zohra Tejani**

In this article, the authors help organizations that seek or have funding agreements or procurement contracts with government entities in the United States, whether they are traditional government contractors or first-time awardees, to better understand the representations and certifications that go along with those contracts and to learn strategies for managing them.

In January 2023, the U.S. Army announced that it was seeking to diversify its commercial partners—especially small businesses—in emerging technologies aligned to artificial intelligence. With the passage of the Creating Helpful Incentives to Produce Semiconductors (CHIPS) Act and the Infrastructure Investment and Jobs Act last year, the trend of the government seeking to fund and work with organizations not traditionally government contractors will only continue to grow.

This article is geared toward helping all organizations that seek or have funding agreements or procurement contracts with government entities in the United States, whether they are traditional government contractors or first-time awardees, to better understand the representations and certifications that go along with those contracts and to learn strategies for managing them.

An ongoing concern of federal and state governments is to ensure that contractors conducting business with a governmental department or agency are aligned with the public policy principles and business best practices desired by the government. Compliance offices and other governmental offices (e.g., finance, tax, technology, etc.) have been able to address this concern by using certification and representation documents for organizations that conduct business with the government. In some instances, the representations and certifications are the result of proactive measures of legislative bodies, and sometimes it is the result of an issue or event that has impacted the government department or agency.

For example, on September 22, 2004, then-Governor James E. McGreevey of New Jersey issued Executive Order 134, the purpose of which was to insulate the negotiation and award of state contracts from political contributions that posed a risk of improper influence, purchase of access or the appearance. Executive Order 134 prohibited state departments, agencies, and authorities from entering contracts that exceed \$17,500 with individuals or entities that

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made certain political contributions. Executive Order 134 was superseded by Public Law 2005, Chapter 51, signed into law on March 22, 2005 (Chapter 51). The state of New Jersey had a well-known posture in the contracting world as being a “pay-to-play” state when it came to construction contracts. Thus, all contractors, irrespective of whether they are construction contractors, must attest that political contributions have not been made to the political party or individual with the expectation of receiving a contract award. The goal of Chapter 51 and the countless representations and certifications required of contractors by federal and state government bodies, is to ensure that there is an even playing field for all contractors, that the taxpaying public has confidence in the procurement system and to maintain business best practices that are consistent across all contractors.

Contractors have the incentive to represent accurately and remain compliant. The risks for failing to do so could include criminal prosecution, material breach of active contracts, the basis of a bid protest by a competitor, exposure to severe penalties under the False Claims Act and similar state procurement fraud statutes, and suspension or debarment from doing business with the government. The consequences for failure to make accurate representations can become consequential for both organizations that rely on government contracts for their business earnings and for those new to government funding and contracts.

WHAT IS HAPPENING AT THE FEDERAL LEVEL?

Organizations doing business with or receiving grants from the U.S. federal government record their annual representations and certifications on the System for Award Management known as SAM, which is available at sam.gov. According to the Federal Acquisition Regulation (FAR), all SAM “registrants are required to review and update the representations and certifications submitted to SAM as necessary, but at least annually, to ensure they are kept current, accurate and complete.”

Some topics addressed in the representations and certifications are common and seem naturally aligned to public policy and the use of taxpayer funds. As an example, certifying that the organization is current with federal taxes makes immediate sense. The U.S. government should avoid awarding grants or contracts to an organization that is delinquent with its federal tax obligation.

Others, however, are less obvious. One example is the representation that the offeror will not require its employees or subcontractors to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting waste, fraud, or abuse related to the performance of a government contract to an authorized investigative or law enforcement representative of a federal depart-

ment or agency. While it makes sense that the government would want to avoid non-disclosure agreements from hindering whistleblowers, non-traditional government contractors who may readily use nondisclosure agreements to protect pioneering innovation might be surprised by this representation.

Another less obvious representation relates to “Covered Telecommunications Equipment or Services” arising from the 2019 National Defense Authorization Act (NDAA) Section 889(a)(1)(A) and Section 889(a)(1)(B). The representation relates to contractors providing covered telecommunications equipment or services as a part of an organization’s offered products or services to the government and the use of covered telecommunications equipment or services, or any equipment, system or service that uses covered telecommunications equipment or services. The representation is rooted in national security concerns with the telecommunications and surveillance equipment created by certain organizations, such as Huawei Technologies Company and ZTE Corporation. The representation requires checking the sam.gov site for excluded parties associated with this covered telecommunications representation. While the nuances of this representation and compliance with the related FAR clauses are out of scope for this article, it serves as a good reminder that, as with all representations and certifications, especially unusual ones, understanding the representation is fundamental to conducting reasonable inquiries, accurately representing and on-going compliance.

WHAT IS HAPPENING AT THE STATE LEVEL?

Each state has its own concerns it would like to address in the procurement process to adhere to compliance requirements to state offices or to taxpayers. States have attempted to account for these concerns through their state specific requirements for representations and certifications. In some instances, all states have a consistent concern regarding conflict of interest or desire to be provided with a list of officers or directors and assurances that officers and directors have not been arrested, charged, indicted or convicted in a criminal or disorderly matter within the respective state. States also frequently require a representation on whether executive leadership or the contractor as a business has been suspended, debarred or otherwise declared ineligible by any government agency. These types of representations and certifications are commonly expected of contractors with the government. Organizations, especially those that are multinational or in the technology sector, may have to engage in significant internal conversations to verify those representations and certifications.

Under the Texas Government Code, a contractor with the state must attest that it does not engage in business with Iran, Sudan or a foreign terrorist organization. At first read, most contractors would be able to attest that they do not engage in business with terrorist organizations, but the question can be

more nuanced if the global organization provides resources through third parties or when subcontractors provide services to prohibited countries.

In California, the Drug-Free Workplace Act of 1990 provides that the contractor of any services from any state agency certifies to the contracting agency that it will provide a drug-free workplace by publishing a statement notifying employees of the unlawful manufacture, distribution, possession or use of controlled substances is prohibited in the workplace and there will be consequences for violations. A drug-free workplace may be a benign representation requirement, but if the contractor is a global organization located in a country that has a different perspective to enforcing a drug-free workplace the response may not be straightforward. These state certifications are not unusual. However, if a contractor does not comply, the incentive of obtaining a lucrative state contract may serve as a compelling reason to do so.

Organizations are placed in a unique position when states seek representations and certifications that may run against business practices. For example, in the state of Oklahoma, under 70 O.S. Section 11-201, there is a requirement that all vendors, persons and/or entities that provide digital and/or online library database resources to students in kindergarten through twelfth grade verify compliance that they will prohibit and prevent the use of resources from sending, receiving, viewing or downloading child pornography or obscene materials. Conceptually, the required representation is straightforward but may pose a challenge for information technology contractors. For example, a contractor that distributes digital medical journals to libraries may provide journals that contain “obscene” materials in the eyes of the state as the content may include images from medical procedures and the contractor would be considered non-compliant. Contractors may be placed in a position to allocate resources to determine whether they can be or are already compliant with a state statute that may seem benign, but, in reality, may be more nuanced due to the overall services rendered by the contractor.

Organizations may be further challenged by recently enacted executive orders. For example, Florida Executive Order 22-216 prohibits state and local government entities from procuring technology products and services from organizations owned, controlled or domiciled in foreign countries of concern (i.e., People’s Republic of China, the Russian Federation, the Islamic Republic of Iran, the Democratic People’s Republic of Korea, the Republic of Cuba, the Venezuelan regime of Nicolas Maduro and the Syrian Arab Republic). Thus, technology contractors will be tasked with working through their supply chain of components and service providers to determine whether they can be compliant with a state or local agency within the state of Florida. Organizations may not be able to easily ascertain the full extent of exposure to these countries

if subcontractors are utilized and, in some instances, global organizations may not be able to decouple themselves from businesses that operate in these countries for logistics and overall business objective. It is these nuanced representations and certifications that can present significant challenges to organizations to ensure compliance.

THE CHALLENGES

Often the representation and certification document is an online form for which one person, possibly a sales professional, in the organization is responsible for owning the account access. For a small business, this may be a straightforward scenario. But for a larger organization, the individual who is actually responsible for the accuracy of the representations and certifications could be a different individual than the person who opened the account.

The sales professional may receive the request to log in and complete the representations and certifications. If the form or online portal appears to be more of a questionnaire, the sales professional might not recognize the importance of the diligence of providing accurate information and obtaining proper sign off. This situation may be compounded if the representations and certifications are part of a request for proposal (RFP) process. It is not uncommon for these to be overlooked as a merely administrative exercise until the last minute.

The types of issues raised in representations and certifications vary widely. They can cover tax filings, labor law compliance such as affirmative action, political contributions, financial wherewithal, the names and personal information of the officers and directors, foreign ownership, supply chain or cybersecurity requirements. Assuming the individual signing off on the representations and certifications attempts due diligence, they will likely need to engage with an array of business stakeholders possibly including outside professionals (e.g., accountants). This diligence effort can take days or weeks depending upon the scope of information requested.

Beyond being time consuming, the issue with so many stakeholders raises another challenge: ownership. It is common for the representations and certification exercise to become a “hot-potato,” passed around from individual to individual with no one wanting to take ownership of the task or, if they understand it, the risk.

For some organizations the representations and certifications are straightforward. Challenges arise, of course, if one of the answers could be unfavorable and would mean that the organization is not able to agree to the representations and certifications. If that is a clear-cut answer, then at least the organization can avoid risk and consider other government customers for which it could certify.

A more difficult challenge is if there are gray areas and further analysis is needed to be able to represent and certify or not.

Other challenges arise with organizations that have a high volume of commercial contracts with state and local governments. Without proper tracking, the volume of questionnaires over a period of a year could mean duplicative efforts and unnecessary reverification of information. For example, if a questionnaire with representations and certifications were verified for a state agency three months ago, consider whether it is necessary to redo the stakeholder inquiries for a different agency for the same state.

Another common scenario that causes uncertainty is the flowing down of representations and certifications by resellers and other prime contractors to subcontractors. It may not be clear whether certain representations and certifications are intended to also apply to the subcontractor. For example, a large prime contractor or systems integrator could require downstream subcontractors to mirror its own representations and certifications to the government without confirming this is a regulatory or contractual requirement and, even if required, often without discerning which of the representations and certifications are actually intended to apply to subcontractors.

HOW TO MANAGE RESPONSES TO REPRESENTATION AND CERTIFICATION REQUIREMENTS

There are limited options available to government contractors to avoid requirements from federal and state agencies to respond to a certification or representation request; however, there are many options available to how a contractor elects to respond.

Depending on the number of government awards and contracts that make up the business portfolio of an organization, the requirement for representations and certifications may become extensive and require the allocation of significant resources to respond to requests. Thus, it is important for small and large businesses to implement procedures and strategies that will allow organizations to be nimble and accurate as they fulfill requests for certifications and representations. For example, organizations may want to determine if the information that is publicly available, which may be effective for publicly traded companies. In some instances, employees of contractors may be able to answer certifications through filings and reports with the Securities and Exchange Commission or annual reports available on organization websites. If a contractor receives similar requests for representations and certifications from different government agencies, then it may be efficient to develop a database of forms that have been submitted to determine if information can be reused or repurposed for a response. The creation of a database of forms and responses will assist attorneys and support staff to be able to respond quickly to requests

for representations and certifications. Furthermore, as organizations grow and experience staff turnover, a centralized location of responses will become of great value to ensure consistency for an organization and avoiding additional scrutiny by a requesting government agency or department.

Key Items to Consider:

- Know your business and analyze which representations and certifications apply. This analysis relates to the products and services delivered and other thresholds (total value of the contract, annual income, etc.).
- Some representations may require personal information about the organization's executive leadership and board. Consider whether other legal requirements are implicated such as confidentiality and privacy laws.
- Use knowledge qualifiers such as "to the organization's knowledge," "to the best of my knowledge after reasonable inquiry."
- Use time-based qualifiers such as "as of today's date" "based on a reasonable inquiry conducted last month" and "for the one-year period ending [today's date]."
- Use materiality qualifiers such as "in all material respects."
- Help clients parse the language in the representation, give guidance during the internal diligence and help analyze gray areas.
- Consider developing a template representation and certifications document that you can submit on short notice with a request for quotation (RFQ) and RFP response.
- Document the inquiry and diligence taken in support of representations and certifications. That documentation can help show good faith in the event of an allegation of a false representation or certification.
- Establish a compliance cadence such as an annual review of the due diligence.
- Manage changes: plan on how to address changes in the organization due to new acquisitions of people or businesses; change in financial system, etc.
- Use the need to manage representations and certifications to move your organization ahead on its overall compliance journey; consider what other processes, policies or training to implement.
- In advance of certifying online, organizations should download and preview the text of the representations and certifications.

What Technical Tools Exist to Assist in Efficiently and Quickly Responding to Representations and Certifications?

There are technical and non-technical tools that organizations can use to track regulatory changes, which could require new and updated representations and certifications. While there are paid subscriptions to regulatory databases that monitor changes to federal policies, there are options that do not require subscriptions and rely upon independent research. Changes in regulatory policies can be addressed by monitoring regulatory websites; following regulatory agencies on websites and social media; subscribing to blogs and newsletters; attending conferences to connect with peers to learn from practice experience. The learned information from connections and newsletters can be stored in a compliance database and allow individuals within an organization to know ways that an organization is compliant or deadlines to show compliance. The rise in RegTech organizations may lead to technology-based solutions to managing representations and certifications with government funding agreements and contracts.

CONCLUSION

Certain representations and certifications requests by a federal or state agency may be benign and simple to answer while others may require significant internal discussion, review, investigation, and analysis to respond correctly. While organizations that do business with or receive funding from a government agency do not have control over the requests that are made, an organization does control how it prepares and effectively responds. There is no one size fits all solution to address the challenges that an organization may face when presented with a certification and representation request by a state or federal government.

As organizations consider how to better manage the representations and certifications that governments require, government entities have an opportunity to consider how to reduce the burden that the representations and certifications can place on organizations. For example, state offices should consider developing their own databases of provided representations and certifications provided by contractors so that agencies are not asking contractors to provide information that has recently been provided to another state agency.

Governments could also develop a common certification and representation document that every contractor completes, similar to the Common Application for college admissions. The goal would be that contractors would complete all representations and certifications at one-time and possibly renew on an annual basis; limiting the need to complete different documents for different agencies within the same state or federal department. In addition, federal and state government offices should consider opportunities for contractors to raise

concerns regarding requested representations and certifications and evaluate whether they are overly burdensome or provide the information that is truly needed by the funding governmental entity to award contracts. Reducing the burden and the risk associated with multiple representations and certifications documents could open the door to more non-traditional contractors, which in turn could give government agencies more access to companies that are innovating and developing cutting edge technologies.

The path forward will depend on the size and structure of the organization, the nature of the products and services it provides, and the extent to which government contracts compose the business portfolio. Keep in mind that representations and certifications often have an individual liability component. At the organizational level, larger companies with increased exposure to government contracts will have a greater incentive to have a clear and efficient plan to respond to a representation and certification request. Even small organizations or new entrants to government grants and contracts can take basic steps to ensure that they manage the inherent risk as they reap the reward of those agreements and contracts with the government.¹

¹ Sources for this article:

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