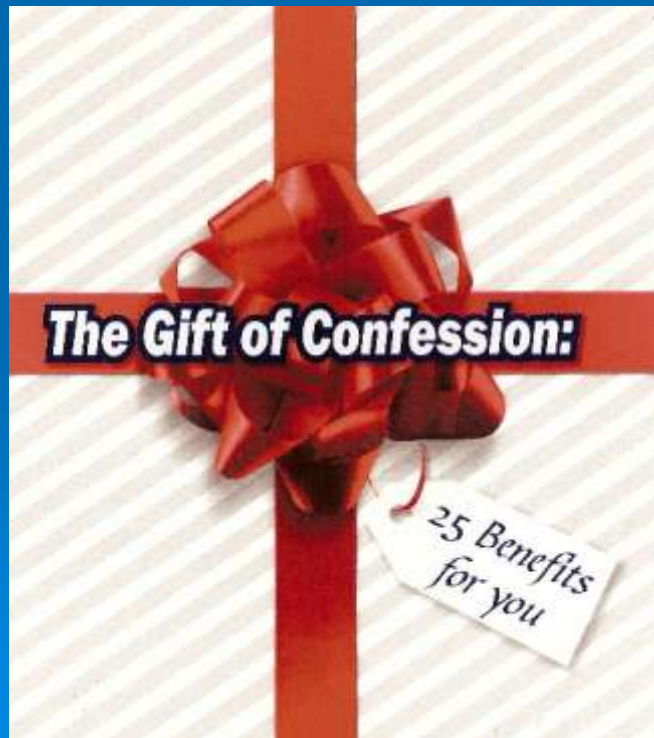


# FAR § 52.203-13

## *Contractor Code of Business Ethics and Conduct*



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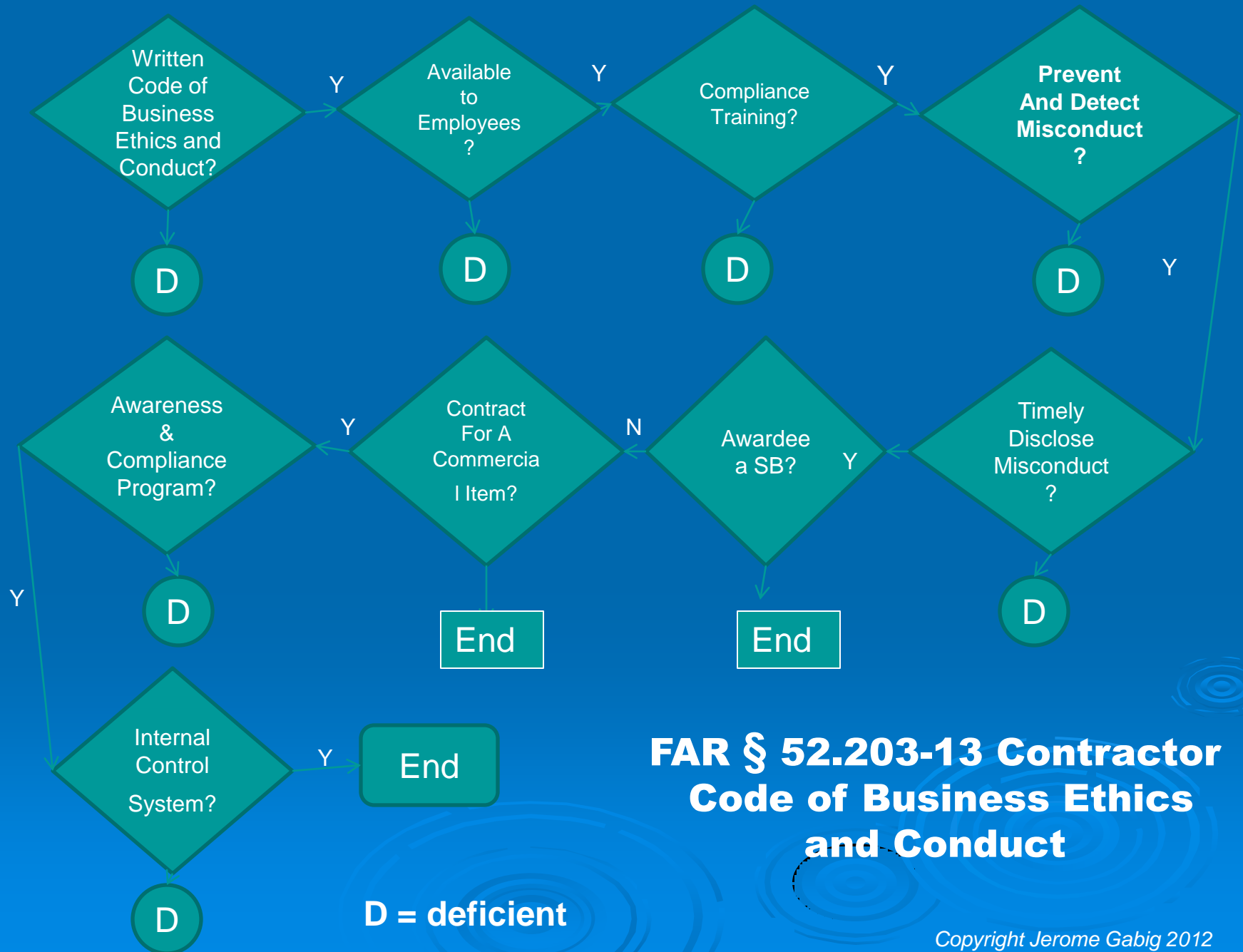
# FAR § 52.203-13

FAR § 52.203-13 is a required clause if the value of the contract is expected to exceed \$5,000,000 and the performance period is 120 days or more

# Code Of Business Ethics & Conduct

“Management must convey the message that integrity and ethical values cannot be compromised, and employees must receive and understand that message through continuous demonstration of words, actions and commitment to high ethical standards.”

*DCAA Audit Guidance*



## FAR § 52.203-13 Contractor Code of Business Ethics and Conduct

# Code Of Business Ethics & Conduct

Sample  
*Code Of Business  
Ethics & Conduct*

The background of the slide is a solid blue color. In the lower half, there are several faint, concentric circular ripples, similar to those created by a stone dropped in water, scattered across the bottom.

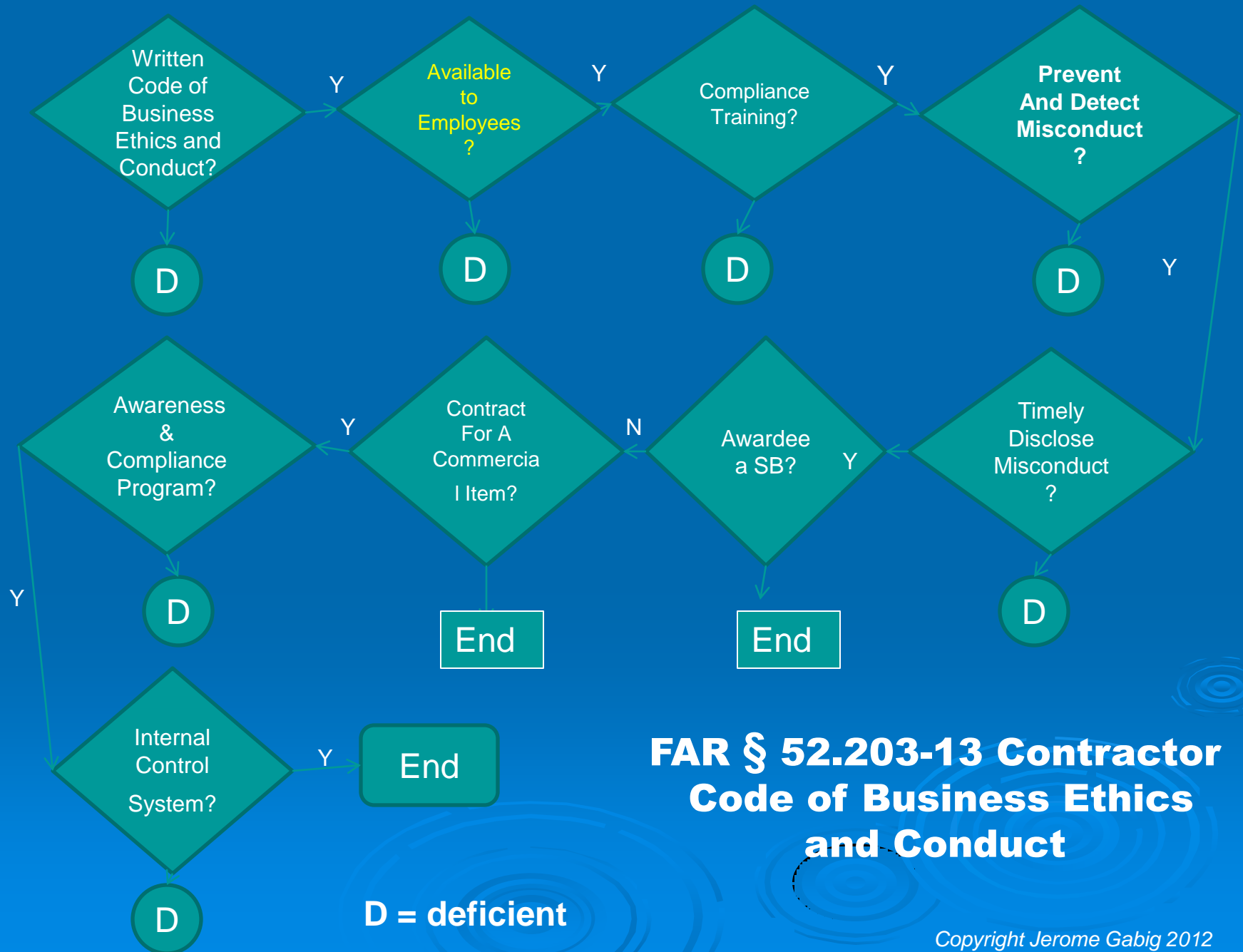
# Gifts To Govt Employees

“An employee may accept unsolicited gifts having an aggregate market value of \$20 or less per source per occasion, provided that the aggregate market value of individual gifts received from any one person under the authority of this paragraph shall not exceed \$50 in a calendar year.”

*5 C.F.R. § 2635.204(a)*

# DCAA Audit Guidance

“Verify the existence of a written code of conduct and review the contents to ensure it addresses ethical business practices, conflict of interest, and expected standards of ethical and moral behavior. The code should cover dealings with customers, suppliers, employees, and other parties”

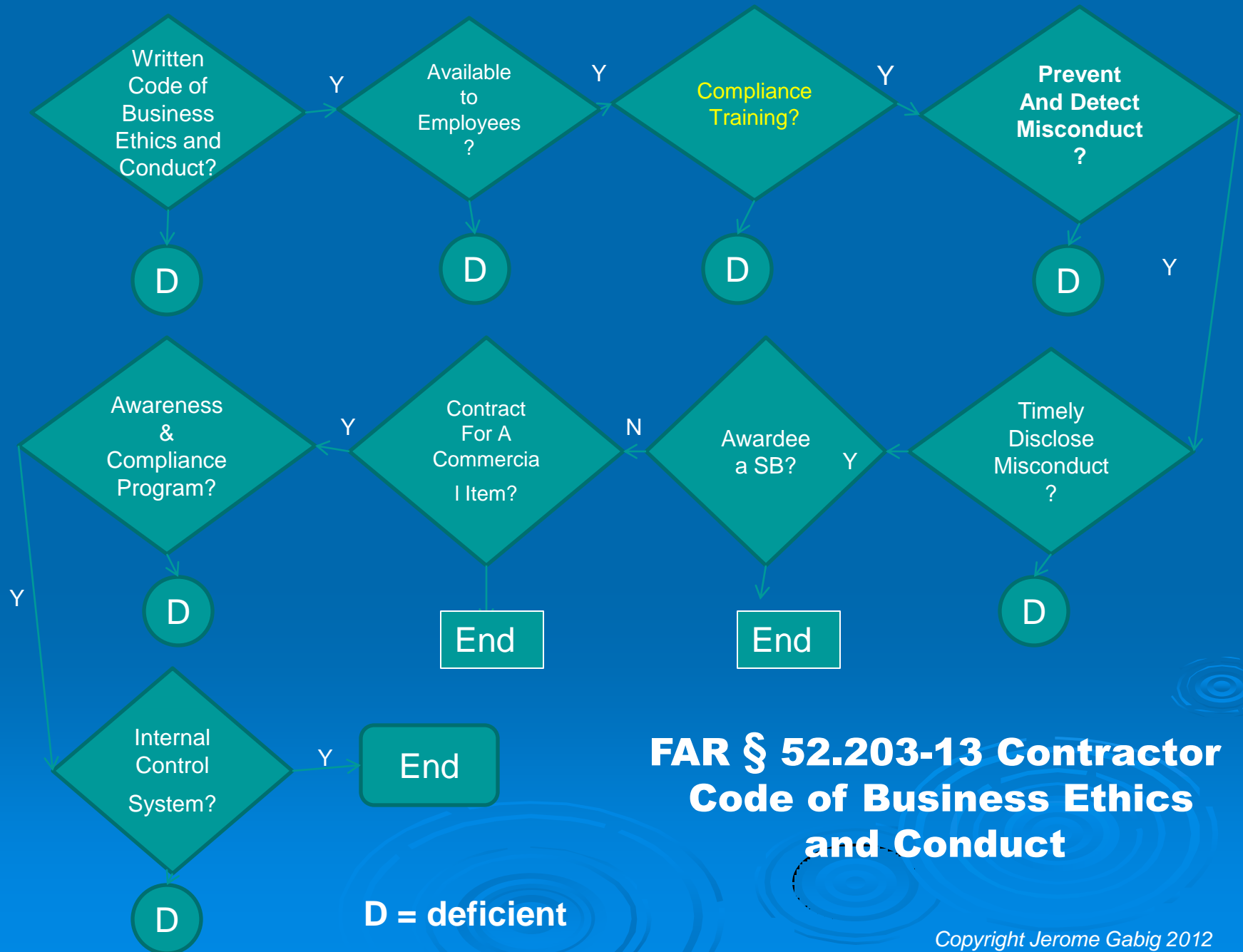


## FAR § 52.203-13 Contractor Code of Business Ethics and Conduct



# Available To Employees

- Provide copy to existing and new employees
- Document receipt of copy in employee HR file
- Post on company web site

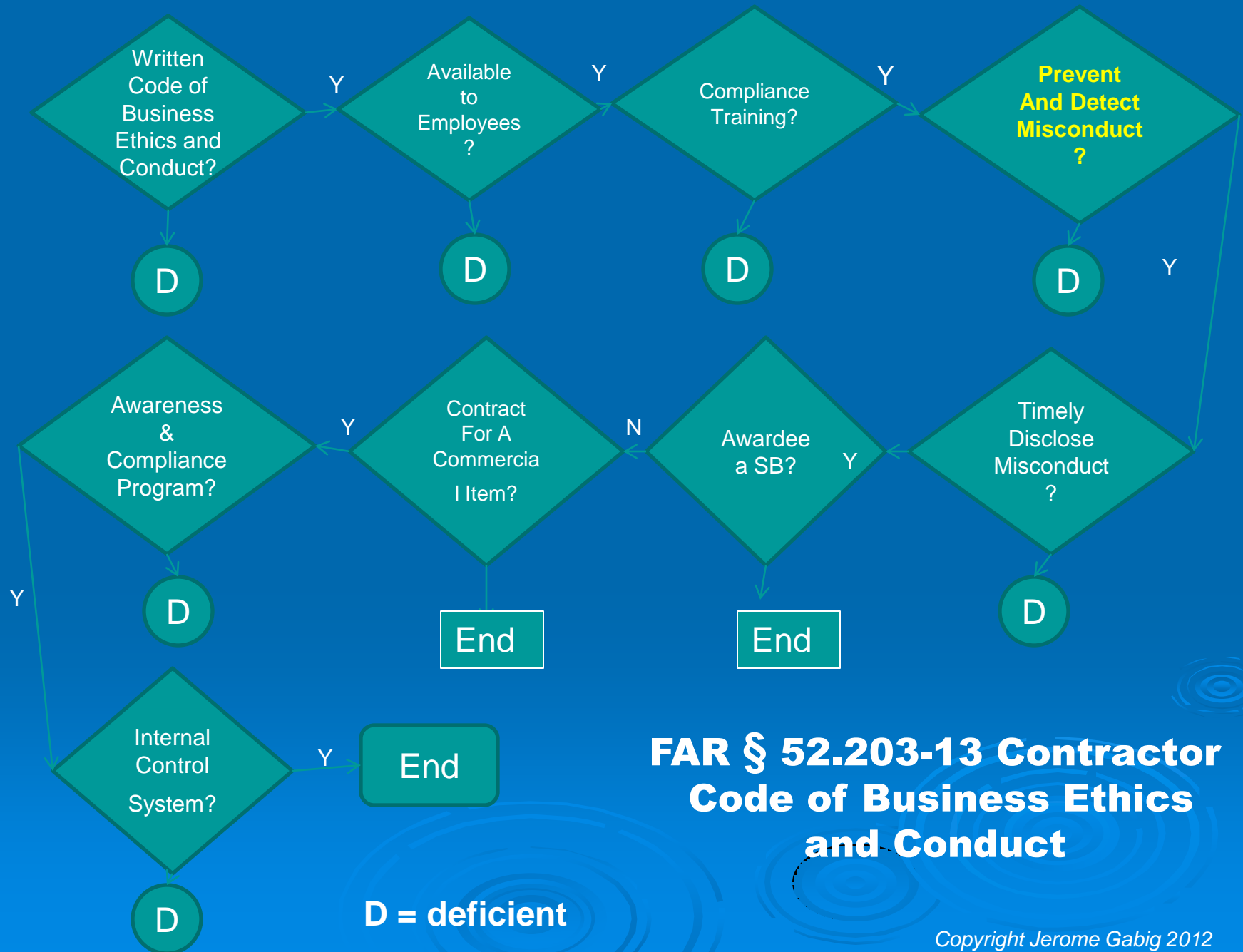


# FAR § 52.203-13 Contractor Code of Business Ethics and Conduct

# Code Of Business Ethics Training

- Must be “suitable to the size of the company and extent of its involvement in Government contracting.”
- Document attendance

*FAR § 3.1002*



## FAR § 52.203-13 Contractor Code of Business Ethics and Conduct

# Timely Disclose

“The Contractor shall timely disclose to the agency Office of the Inspector General, with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that ...”

# Timely Disclose

“that a principal, employee, agent, or subcontractor of the Contractor has committed—

- (A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or
- (B) A violation of the civil **False Claims Act** (31 U.S.C. 3729-3733)

# Timely Disclose

## *When Does The Duty End?*

“The disclosure requirement for an individual contract continues until at least 3 years after final payment on the contract.”

*FAR § 52.203-13(c)(3)(F)*



# False Claims Act

“any person who—

- (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
- (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;”

*31 U.S.C § 3729*



# FCA Is Expansive

- SAIC entered into a contract with NRC to help develop a national standard for disposal of nuclear waste
- SAIC certified no OCIs and would alert NRC if an OCI arose

U.S. v. SAIC, DC Cir, 2010

# FCA Is Expansive

- In 2008 a jury held SAIC failed to disclose OCIs that had potential bias to SAIC's work for NRC
- Jury awarded Govt the full amount paid to SAIC (\$1.97M)
- Triple damages for fraud increased award to \$5.91M

U.S. v. SAIC, DC Cir, 2010

# FCA Is Expansive

## The D.C. Circuit:

- Continued the trend of recognizing a FCA violation where the contractual breach is not conditioned to payment of the contractor
- The D.C. Circuit requires the breach to be “material” to the Govt decision to pay

# FCA Is “Big Bucks”

“The Justice Department secured \$4.9 billion in settlements and judgments in civil cases involving fraud against the government in the fiscal year ending Sept. 30, 2012”

<http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html>

# FCA Is Expansive

The Whistleblower gets:

- 25% if the government intervenes
- 30% if the government does not intervene

# Timely Disclosure

The term “timely” recognizes that a contractor may conduct an internal investigation for purposes of determining if there is “credible evidence” of enumerated misconduct

# Full Cooperation Requirement

“Means disclosure to the Government of the information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct.”

*FAR § 52.203-13(a)*

# Full Cooperation Requirement

“It includes providing timely and complete response to Government auditors’ and investigators’ request for documents and access to employees with information.”

*FAR § 52.203-13(a)*



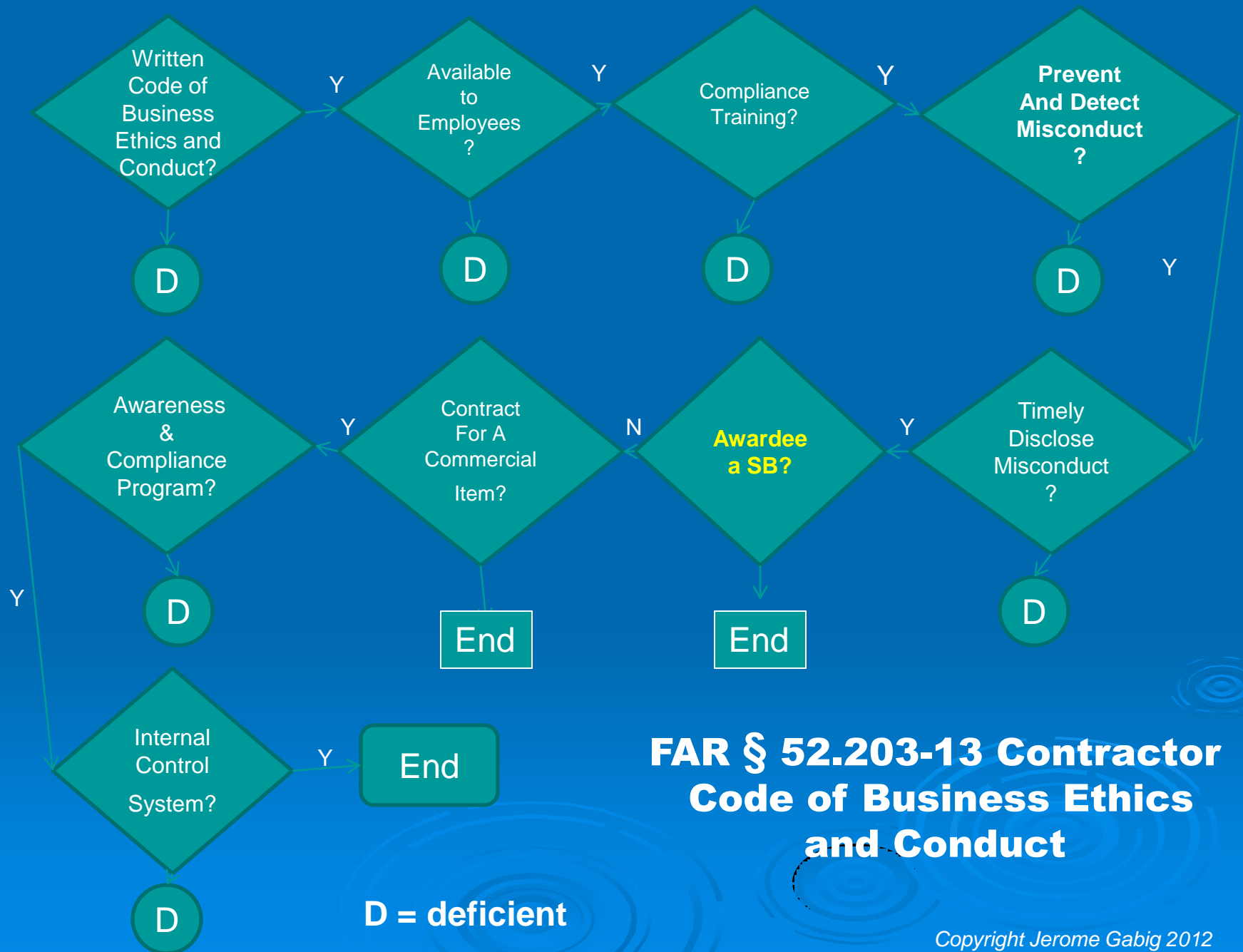
# DCAA Audit Guidance

- “Request a copy of any disclosures”
- “Verify that the contractor complied with their policy and procedures”
- If deficiencies are identified, notify the DCAA Justice Liaison Auditor

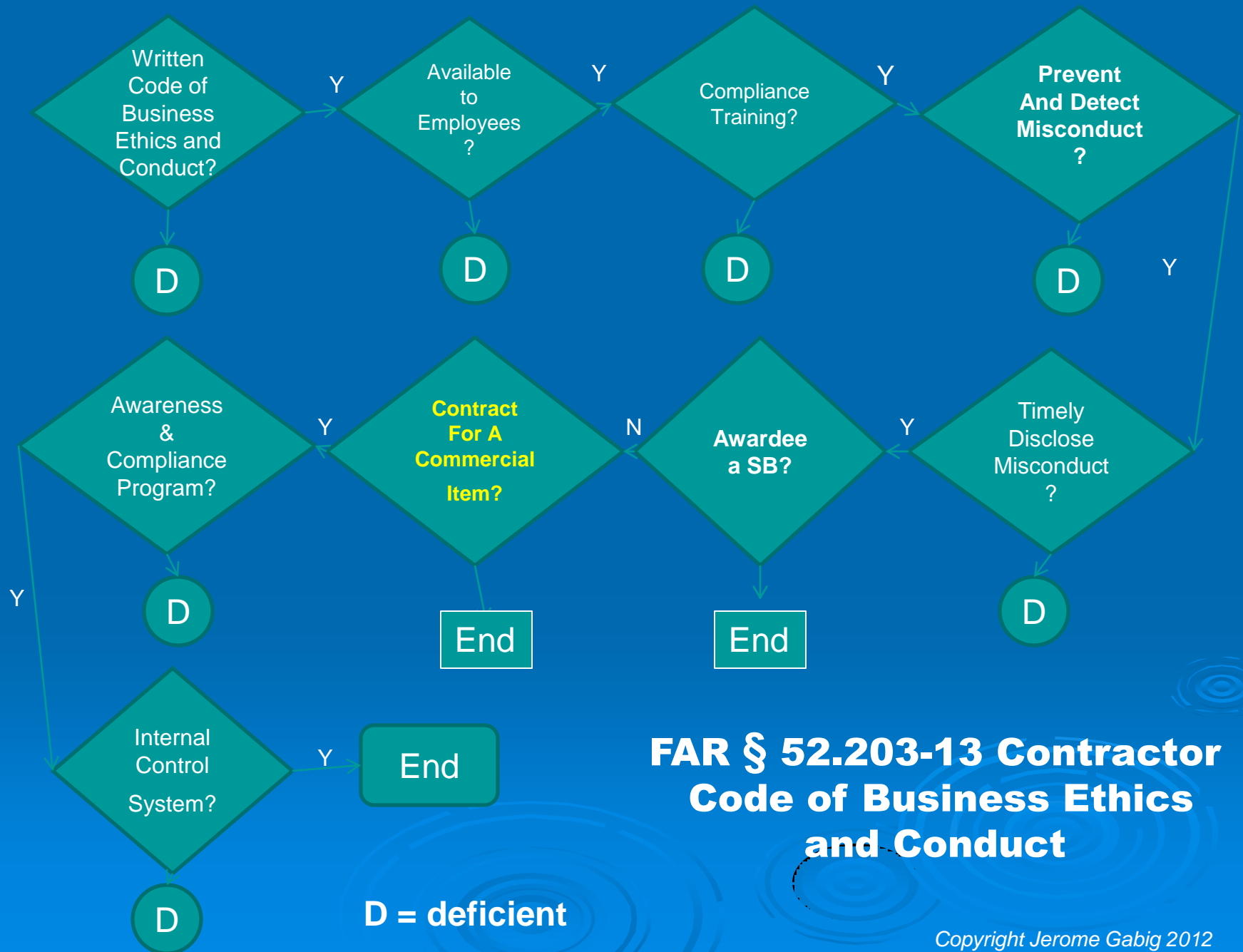
# Overpayments

“[I]f the contractor becomes aware that the Government has overpaid on a contract financing or invoice payment, the contractor shall remit the overpayment amount to the Government.”

*FAR § 3.1003(a)(3)*



## FAR § 52.203-13 Contractor Code of Business Ethics and Conduct

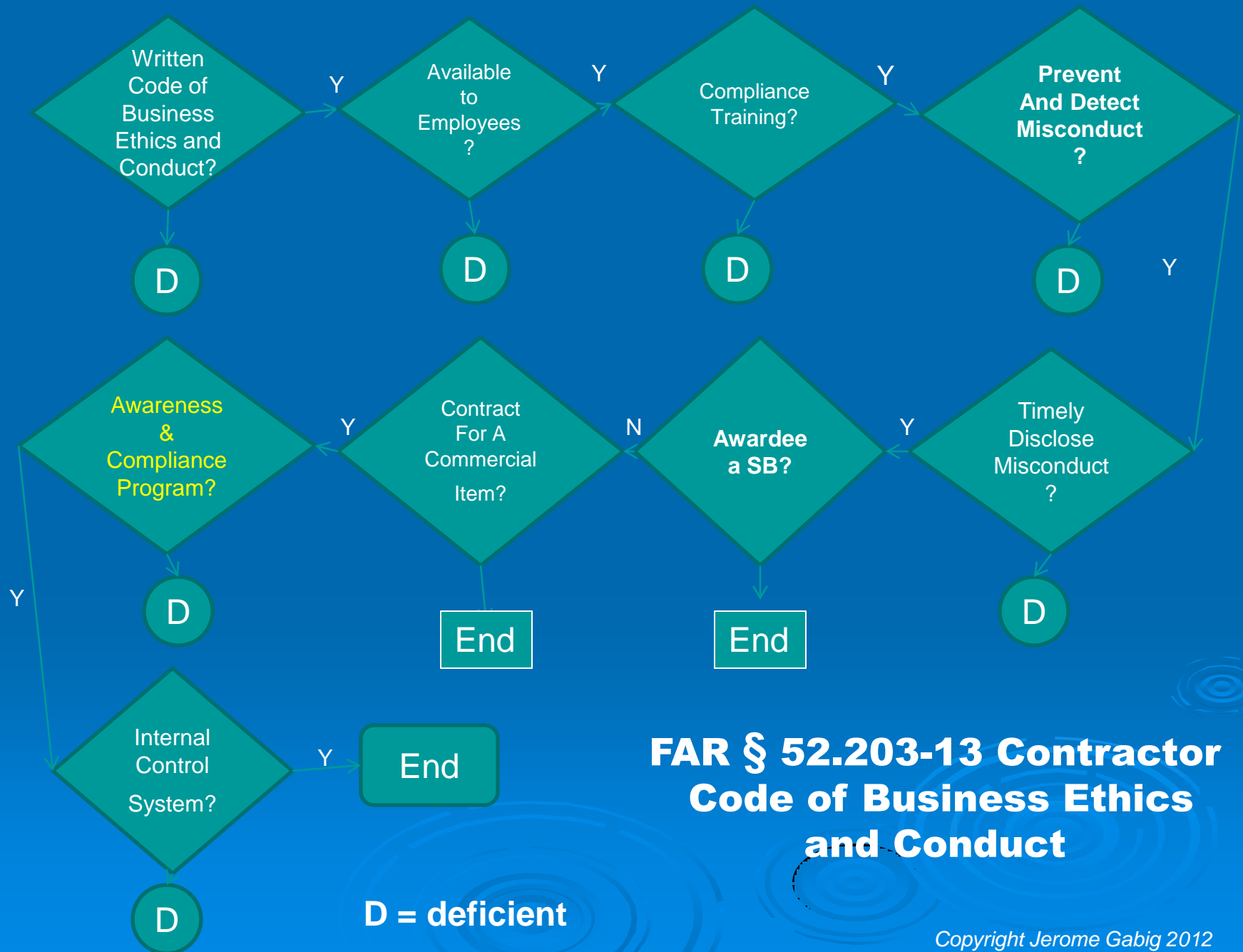


## FAR § 52.203-13 Contractor Code of Business Ethics and Conduct

# Commercial Item

- Has been sold, leased, or licensed to the general public
- Has been offered to the general public
- Evolved from an item sold to the general public
- Is a modification of an item sold to the general public

*FAR § 2.101*



## FAR § 52.203-13 Contractor Code of Business Ethics and Conduct

# Awareness

Requires periodic training “and otherwise disseminating information” on “Contractor’s standards and procedures and other aspects of Contractor’s business ethics awareness and compliance program and internal control system”

*FAR § 52.203-13(c)*

# Awareness

“The training conducted under this program shall be provided to the Contractor’s principals and employees, and as appropriate, the Contractor’s agents and subcontractors.”

*FAR § 52.203-13(c)(1)(ii)*



# Compliance Program

- “Standards and procedures to facilitate timely discovery of improper conduct”
- “Ensure corrective measures are promptly instituted and carried out”

*FAR § 52.203-13(c)(2)(i)*

# Compliance Program

“Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.”

*Federal Sentencing Guideline §8B2.1.*

# Compliance Program

- One-size-fits-all type programs generally are ineffective
- Risk assessment is essential
  - Emphasis on gifts to govt official inappropriate when industry has history of other problems

*OECD Guidance On Internal Controls*

# Compliance Officer

“Assignment of responsibility at a sufficiently high level and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system.”

*FAR § 52.203-13(c)(2)((ii)(A)*

# Compliance Officer

Contractor is required to perform a due diligence to avoid selecting a compliance officer who has “engaged in conduct that is in conflict with the Contractor’s code of business ethics and conduct.”

*FAR § 52.203-13(c)(2)((ii)(C)*

# Compliance Program

Must have “an internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.”

*FAR § 52.203-13(c)(2)*

# Compliance Training

- “Verify that the business ethics awareness and compliance program includes an ethics training program for all principals and employees, and as appropriate, the contractor’s agents and subcontractors”
- “Selectively test this control by evaluating training program materials and training records of completion”

# Compliance Program

Requires “disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct.”

*FAR § 52.203-13(c)(2)(ii)(F)*



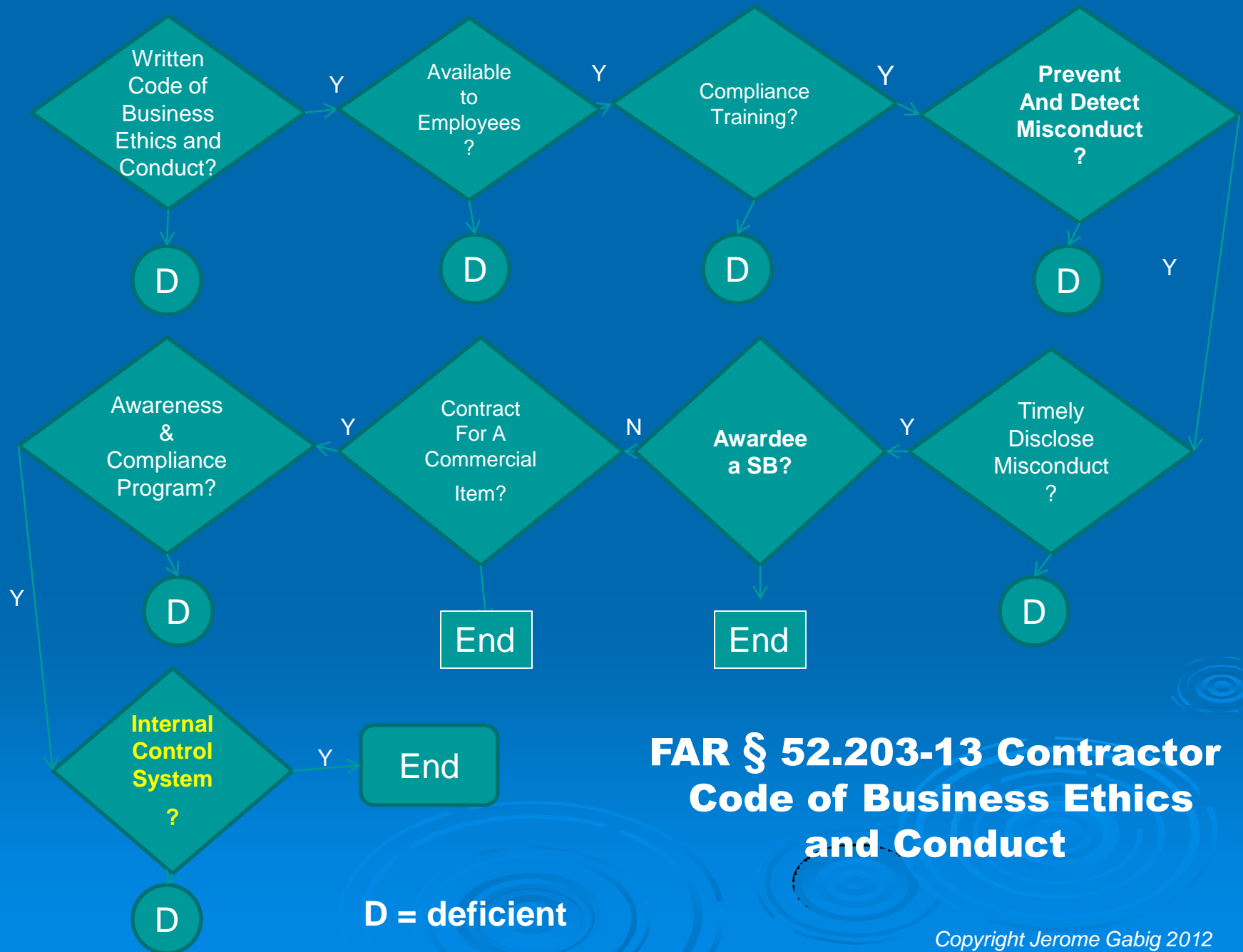
# Subcontractor Compliance Program

Must flow-down the FAR  
§ 52.203-13 clause to  
subcontracts that have a  
value in excess of \$5M.

*FAR § 52.203-13(d)*

# DCAA Audit Guidance

“Verify that the contractor includes the substance of FAR § 52.203-13 when appropriate, in its subcontracts”



# FAR § 52.203-13 Contractor Code of Business Ethics and Conduct

# Internal Control System

Must periodically review the effectiveness of the company's business practices, procedures, policies, and internal controls for compliance with the code of business ethics and conduct including "especially if criminal conduct has been detected"

*FAR § 52.203-13(c)(2)*

# Internal Control System

“Ascertain if the contractor has taken the necessary corrective actions to protect the Government’s interests. If the contractor has not taken the appropriate corrective action, the auditor should report this as an internal control deficiency.”

*DCAA Audit Guidance*

# Internal Control System

“Verify that the contractor’s policies and procedures provide for cooperation with any Government agencies responsible for audits, investigations, or corrective actions.”

*DCAA Audit Guidance*

# Principal

“Means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a division or business segment; and similar positions).”

# Possible Consequence

“A contractor may be suspended and/or debarred for knowing failure by a principal to timely disclose credible evidence of a significant overpayment.”

*FAR § 3.1003(a)(3)*



# Possible Consequences

A factor that a debarring official must consider is “whether the contractor had an effective standards of conduct and internal control system in place at the time....”

*FAR § 9.406-1(a)(1)*

# Final Thought

“An ethics and compliance program, and internal controls, that are only on paper -- i.e., that sit on a shelf without being implemented and becoming a part of the contractor’s culture -- are not only a waste of an important opportunity but also are dangerous. *(continued)*”

# Final Thought (*cont.*)

In the event of future wrongdoing, the contractor will be judged against the standards set forth in the ethics and compliance program, and internal controls.”

*ABA Guide on Suspension & Debarment (2002) at 142*

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