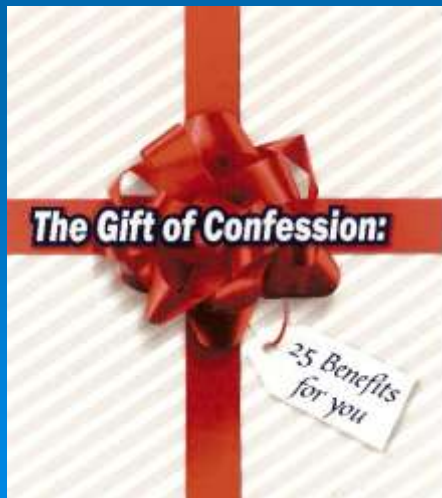


The False Claims Act & Its Antivenom



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Primer On The False Claims Act

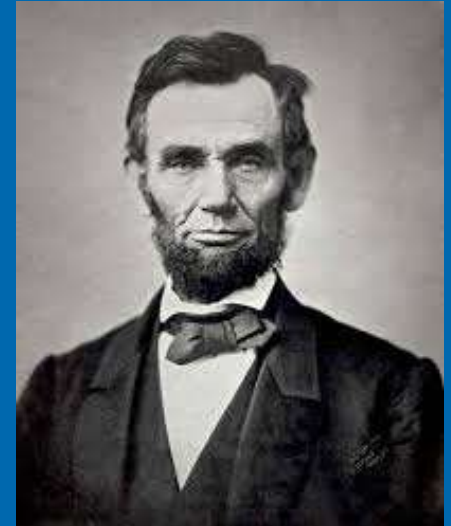
***Qui tam pro domino rege
quam pro se ipso in hac
parte sequitur***

**“he who brings an action for
the king as well as himself”**



Background

- Passed in 1863 during the Civil War to address fraud in military procurement contracts
- Also known as “Lincoln’s Law”
- Has undergone substantial amendments by Congress in 1943, 1986, and 2009
- Allows for triple damages



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

Sampling of *Qui Tam* Actions

1. Misrepresentation in proposal
 2. Misrepresenting social economic status
 3. Buying-in under false pretenses
 4. GSA schedule most favored customer fraud
 5. TINA violation
- 
- A decorative graphic consisting of several sets of concentric circles, resembling ripples in water, is located in the bottom right corner of the slide. The circles are light blue and vary in size and opacity, creating a subtle background element.

Sampling of *Qui Tam* Actions

6. Use of unapproved source
7. Davis Bacon violation
8. Ineffective approved purchasing system
9. Misallocation of indirect costs
10. Falsify QA records

Qui Tam Road Map

- Relator files complaint under seal
- Department of Justice investigates and decide whether to intervene
- DOJ often uses Civil Investigation Demands to investigate
- DOJ goal is to make decision in nine months
- If DOJ declines – files a notice of non-intervention
 - DOJ can intervene at later time
 - DOJ declination rate is approximately 75%
 - Relator free to pursue law suit unless DOJ moves to dismiss
- If DOJ intervenes
 - DOJ runs the litigation
 - DOJ often files new complaint with additional FCA allegation

FCA: A “Profit Center”

The Whistleblower gets:

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

Would The Federal Government Tolerate Incentivizing Federal Employees Being Disloyal?

Why
should
industry?



Dr. LaCorte -- \$38M in Qui Tam Booty

Dynamics Of A Qui Tam Lawsuit



Relator – DOJ - Agency

Strategy Tip For Vendors

If a *qui tam* suit has been filed, do everything possible to dissuade DOJ from intervening

Significance On No Govt Intervention

- If Govt intervenes, most verdicts favor the Govt
- If Govt does not intervene, most verdicts favor Defendant
- Indicative of not being in Govt “cross-hairs”
- Relator likely to have less litigation resources

FCA Is “Big Bucks”

FOR IMMEDIATE RELEASE

Thursday, November 20, 2014

Justice Department Recovers Nearly \$6 Billion from False Claims Act Cases in Fiscal Year 2014

First Annual Recovery to Exceed \$5 Billion; Over 700 Whistleblower Lawsuits for Second Consecutive Year



The U.S. Department of Justice obtained a record \$5.69 billion in settlements and judgments from civil cases involving fraud and false claims against the government in the fiscal year ending September 30, Acting Associate Attorney General Stuart F. Delery and Acting Assistant Attorney General Joyce R. Branda for the Civil Division announced today. This is the first time the department has exceeded \$5 billion in cases under the False Claims Act, and brings total recoveries from January 2009 through the end of the fiscal year to \$22.75 billion – more than half the recoveries since Congress amended the False Claims Act 28 years ago to strengthen the statute and increase the incentives for whistleblowers to file suit.

The Antivenom:

An Effective Corporate Compliance Program

Bad Things Happen To Good Companies

Huntsville defense contractor raided by federal agents

 Recommend  104 people recommend this. Sign Up to see what your friends recommend.

Posted: Sep 06, 2012 5:11 PM CDT

Updated: Oct 04, 2012 5:19 PM CDT

By WAFF.com Staff - email

HUNTSVILLE, AL (WAFF) - Federal agents raided Huntsville defense contracting business, System Studies and Simulation, Inc. (S3) Thursday. At least one agent remained at the location Friday.

Witnesses said agents stopped by the building Thursday morning and had everyone leave.



A lot of information is being withheld, but several men removed files and boxes from the building and loaded them into a large, white truck.

S3's website remains down, and their Facebook page is inactive.



S3 is a defense contracting company located in Research Park in Huntsville.

Feds knock; a business is lost

Posted 7/10/2008 8:11 PM | Comment  | Recommend 



E-mail | Print

By David J. Lynch, USA TODAY

"I paid with four or five years of my life. I lost my company. This is like the Gestapo. This is not the United States."


— Alex Latifi, whom prosecutors said divulged military secrets. A judge threw out the charges out and fined the government \$364,000



HUNTSVILLE, Ala. — As Alex Latifi walks through his empty factory, the only sounds are his footsteps and the dull hum of the wavering fluorescent light overhead. The lathes and drill presses that once churned out a steady stream of critical parts for the U.S. military are still.

The ghostly silence at Axion is the result of a four-year government probe that targeted Latifi for allegedly violating U.S. export law by sending to China classified drawings of an Army Black Hawk helicopter part and falsifying related tests.

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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

Subcontractor Compliance Program

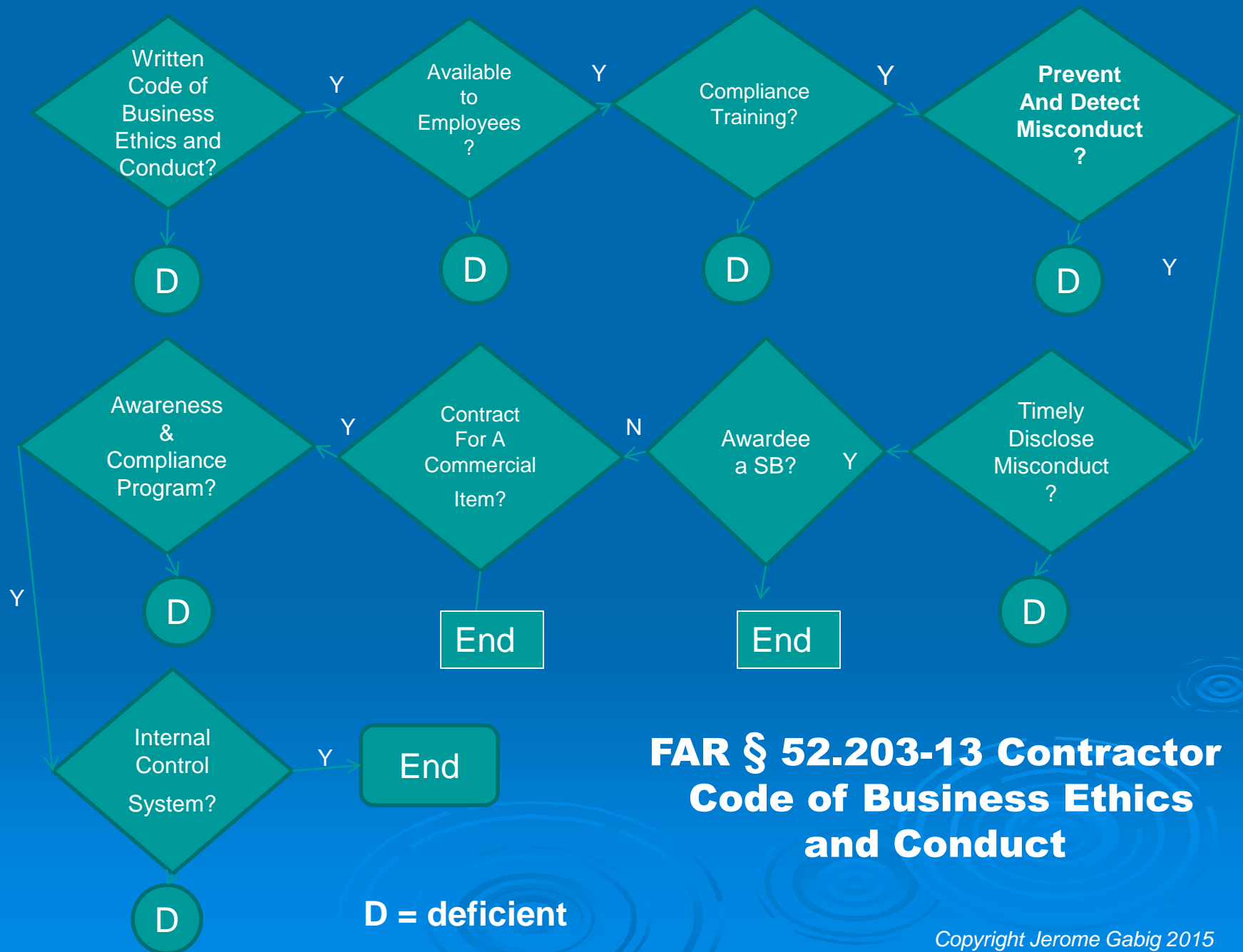
**Must flow-down the
FAR § 52.203-13
clause to subcontracts
that have a value in
excess of \$5M.**

FAR § 52.203-13(d)

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

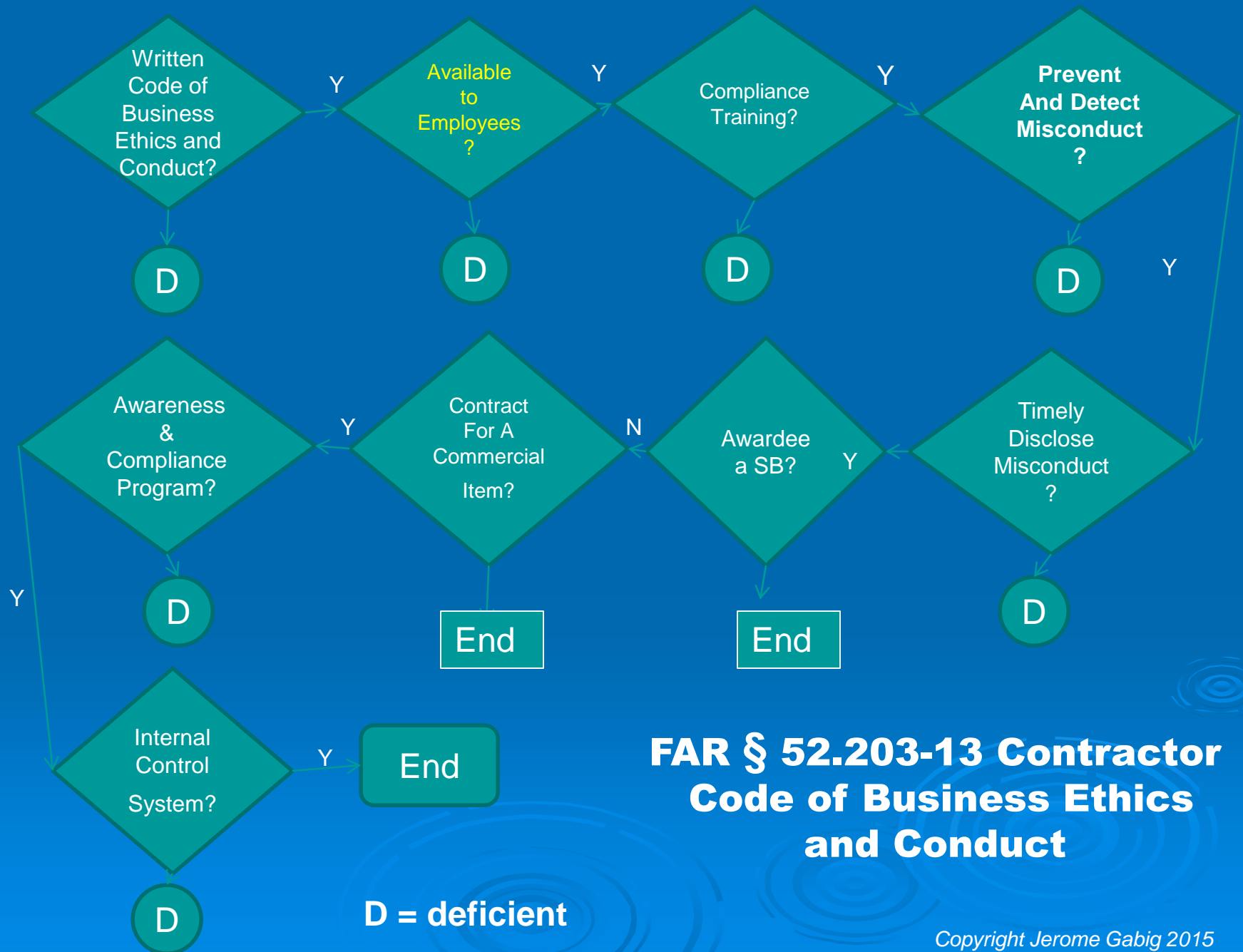
Gifts To Govt Employees

“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)

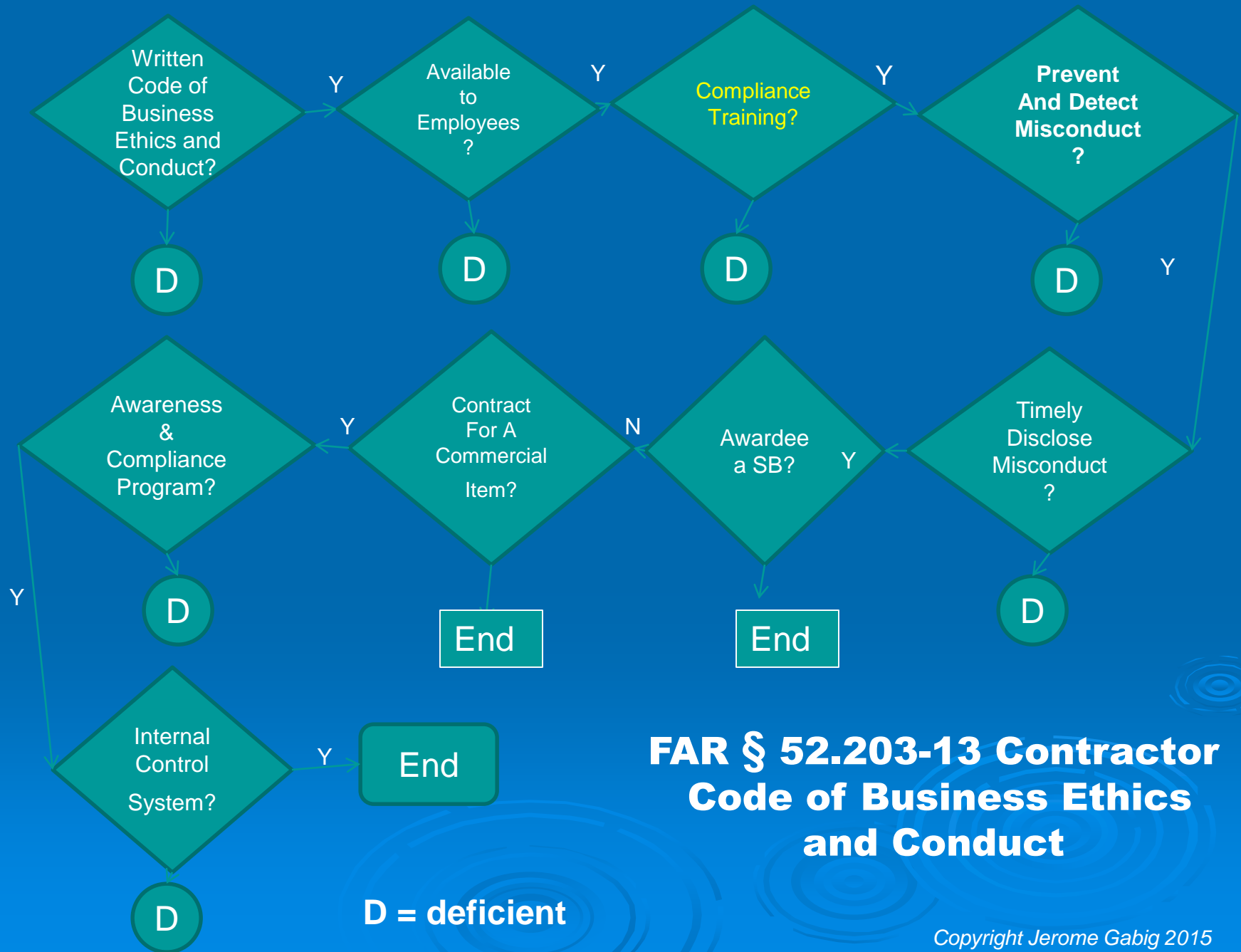
DCAA Audit Guidance

“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”



Available To Employees

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

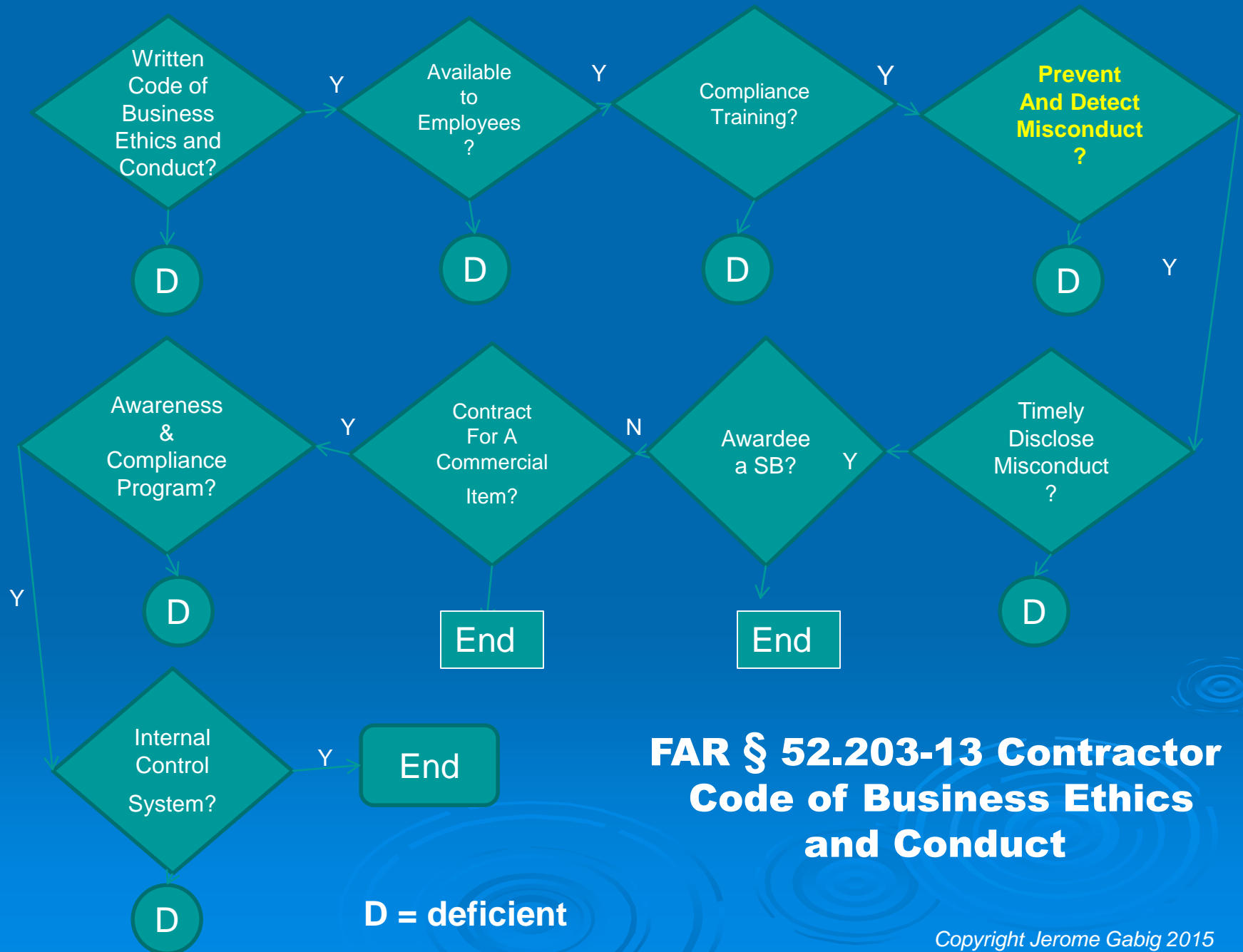


FAR § 52.203-13 Contractor Code of Business Ethics and Conduct

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)

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

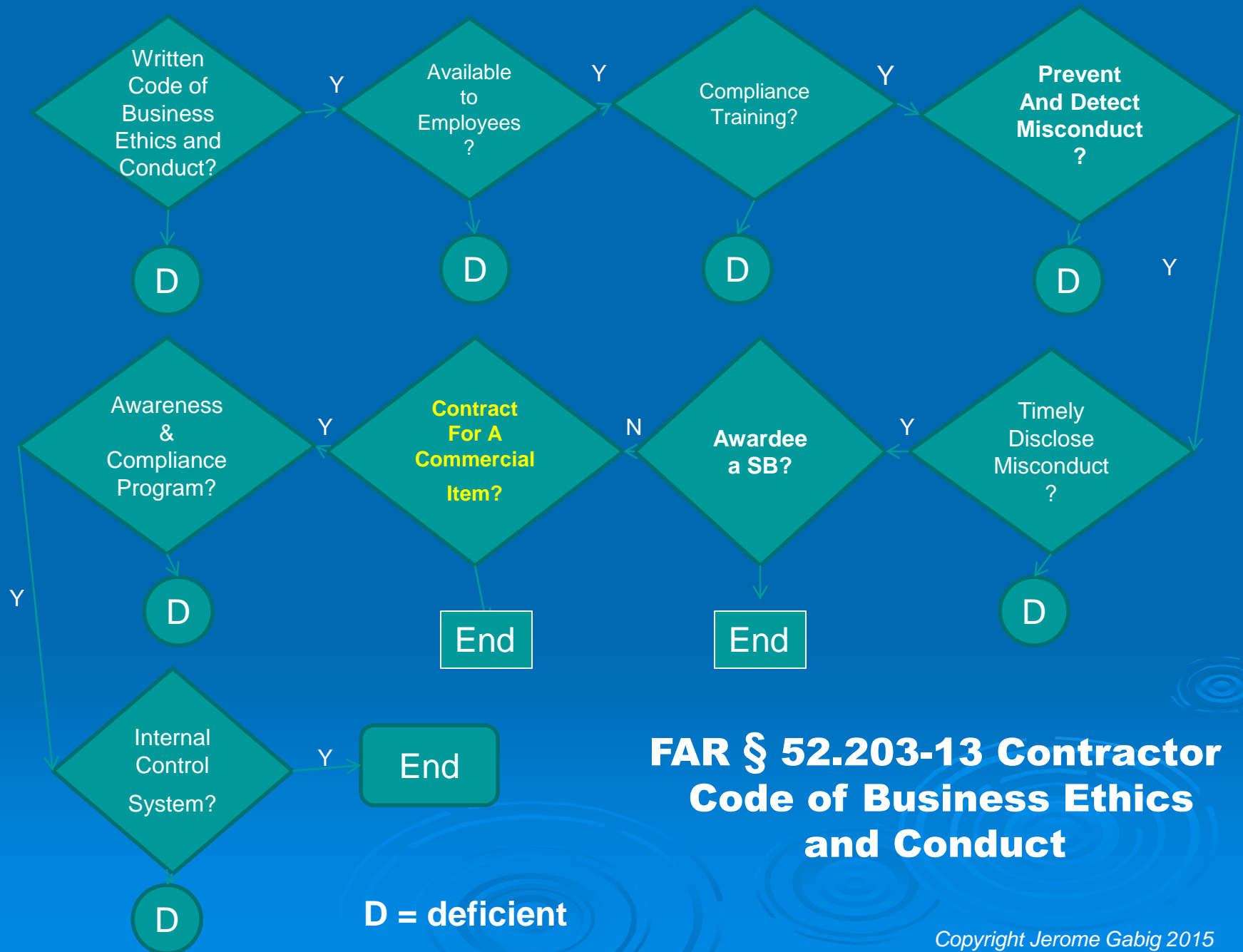
Overpayments

“[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

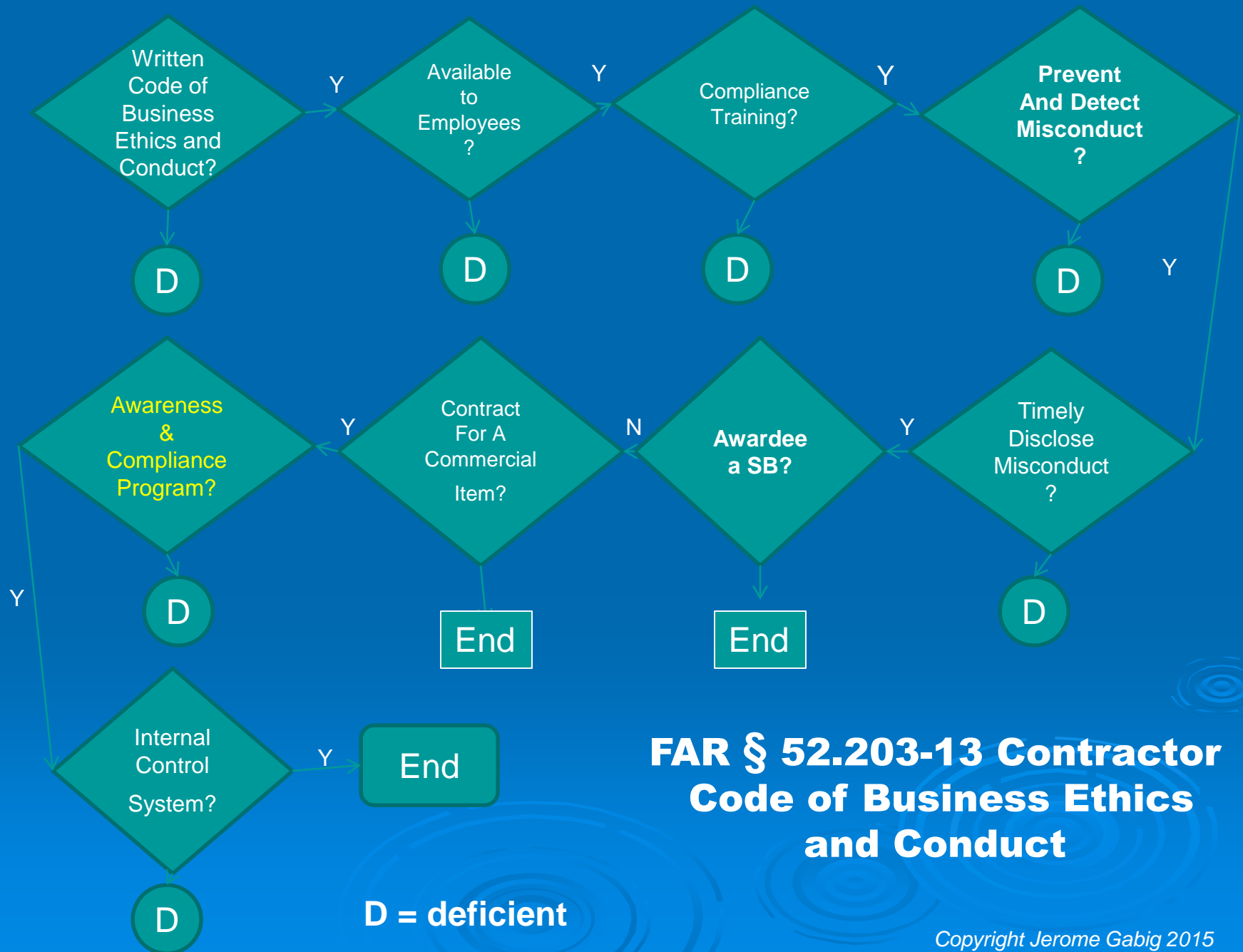


FAR § 52.203-13 Contractor Code of Business Ethics and Conduct

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)

Awareness 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”

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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)

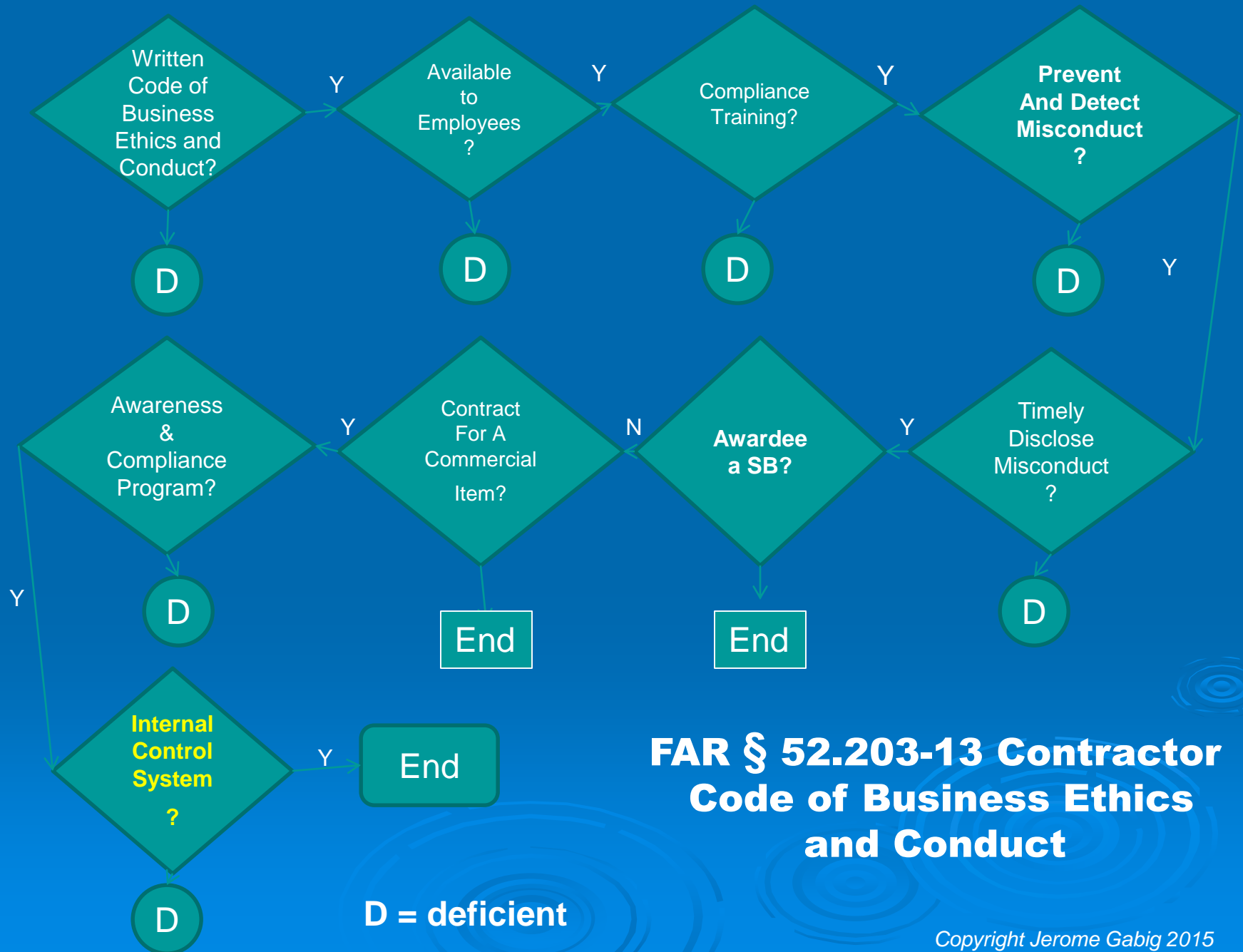
Compliance Program

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)

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 should 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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"I'm not going to lie to you. We've been having our share of legal problems."