



Government Contracts

Overcoming Risks and Challenges

Overview

With a 40-year history and lawyers who are profession and industry leaders, the Government Contracts practice of Crowell & Moring LLP is widely recognized as the best in the business. Whatever the issue, we have nearly 50 government contracts lawyers in our Washington, D.C. and Irvine, California offices with the experience and creativity to meet the challenges.

We apply our expertise to solve problems for all of our clients—from Fortune 50 companies to small businesses, from traditional and established government contractors to companies that for the first time are confronted with the challenges that come from contracting with the government, from domestic businesses to international and multinational companies, and from private industry to governmental and quasi-governmental entities.

Our clients show their confidence in us by retaining us on a regular and recurring basis, and for the “big” cases, and we return that confidence by delivering, including “big” wins such as our 2000 victory in a bid protest over legal consulting services for the controversial Yucca Mountain nuclear waste facility and our 2001 successful defense against a \$260 million government cost claim arising out of an aerospace contractor’s strategic alliances with foreign manufacturers.

Bid Protests/Contract Formation

Our attorneys defend and challenge solicitations and contract awards—federal, state, and municipal—before federal agencies, at the General Accounting Office, in the Court of Federal Claims, in state agencies and courts, and before the Federal Circuit. In addition, we regularly counsel clients on business strategies to reduce protest possibilities as they respond to solicitations or make unsolicited proposals.

The bid protests we pursue and defend are as varied as the items and services the government acquires. They involve procurements by defense and civilian agencies, supply and service contracts, and thousand-dollar as well as billion-dollar requisitions. They also include concession contracts, non-appropriated fund contracts, and other contract or quasi-contract mechanisms not subject to traditional procurement regulations. Privatization and A-76 issues have been the subjects of recent representations. In both our California and Washington, DC offices, we have expertise in protests at the regional, state, and local level as well.

C&M has the distinction of handling—and winning—many major cases in all forums and involving the full-spectrum of protest issues. Representative examples include:

- **Improper Sole-Source:** Established that our client had been improperly excluded from competition for a common avionics architecture system for helicopters where the agency undermined competition by inaccurately describing its requirements. *Lockheed Martin Systems Integration*, B-287190.2, B-287190.3, 2001 CPD ¶ 110.
- **A-76 Contracting Out:** Won GAO protest of A-76 procurement due to noncompliance of in-house offer with RFP and numerous deficiencies in government’s cost comparison. *BAE Systems*, B-287189, B-287189.2, 2001 CPD ¶ 86.

- **IDIQ Evaluation:** Successfully defended \$110 million award of satellite services contract against protest allegations of solicitation ambiguity and evaluation misapplication. *Stratos Mobile Networks USA, LLC v. United States*, 213 F.3d 1375 (Fed. Cir. 2000).
- **Legal Services/Organizational Conflict of Interest:** Successfully defended the award of a legal services contract to assist the Department of Energy and its Nuclear Regulatory Commission in the license application for the Yucca Mountain nuclear waste facility in the face of conflict allegations under the organizational conflict of interest regulations and the Rules of Professional Responsibility. *LeBoeuf, Lamb, Greene & MacRae*, B-283825, 2000 CPD ¶ 35.
- **Health Care/Organizational Conflict of Interest:** Disqualified the awardee where agency improperly failed to find an organizational conflict of interest in a \$3 billion health care procurement. *Aetna Government Health Plans, Inc.; Foundation Health Federal Services, Inc.*, B-254397.15, 95-2 CPD ¶ 129.
- **Postal Service:** Obtained permanent injunction against a 10-year, billion dollar Postal Service contract for express mail service, based on conflict of interest of awardee. *Express One International v. U.S. Postal Service*, 814 F. Supp. 93 (D.D.C. 1992).

Contract Performance Disputes and Litigation

Claims

Claims are integral to the government contracts business and an important and longstanding part of our practice. Crowell & Moring's government contracts lawyers are experts in claims analysis, shaping entitlement theories, formulating

methods of computing the amount of recovery, and presenting, defending, and litigating claims.

Understanding that the most persuasive claim is one that both presents good facts in the best light and confronts and controls bad facts and law, we pursue a thorough and disciplined investigation of the facts, with support from company technical, contracts, and accounting personnel. This approach, described in C&M's Change Proposal Preparation Guide, has been adopted by many of our major clients to educate their employees in the claims process.

While not all claims are equally meritorious, we have helped our clients achieve innumerable favorable settlements and thereby avoid unnecessary litigation. A few of these are:

- Several changes claims that were included in a settlement of approximately \$1.4 billion;
- Conversion of a termination for default into a termination for convenience, with claims for defective specifications, defective government-furnished property, breach of duty to cooperate, excess inspection, and impossibility—\$77 million recovered;
- Subcontractor claim against a prime for defects in aircraft design and specifications—\$72 million recovered;
- Claim for anticipatory profit from the Postal Service for wrongfully terminating a contract—\$50 million recovered;
- Prime contractor claim against a military department for changes, delay and disruption to a flight test program—\$27 million recovered; and
- Claims for defective specifications and inadequate government-furnished equipment—\$26 million recovered.

Disputes Litigation

After a complete and cooperative assessment of the litigation risk and strategy, we do not hesitate to take claims to trial if we are unable to obtain what our clients believe are good settlements. We have litigated all varieties of claims both in pursuit of equitable adjustments and defending against government demands.

Disputes under government contracts must be heard in specialty forums—the Court of Federal Claims, the Boards of Contract Appeals, and the Federal Circuit. Crowell & Moring regularly appears in these forums and, we believe, has the earned respect of both judges and government attorneys.

C&M's record of favorable results for our clients in this specialty litigation is unsurpassed. While we take pride in the many favorable settlements we have helped clients obtain, our accomplishments for our clients are also demonstrated by decisions that are a matter of public record. A sample of our successes includes:

- **Strategic Alliance/Overhead Allocation:** Defeated \$250 million government claim based upon alleged misallocation of overhead expenses to government contracts rather than to material supplied under international strategic alliances for the manufacture of commercial jet engines. *United Technologies Corp., Pratt & Whitney*, ASBCA Nos. 47416, 50453, and 50888, 01-2 BCA ¶ 31,592 (2001).
- **FMS Co-Production Rules:** Recovered a \$15 million claim for F-16 co-production support costs arising from an agreement between Turkey and Egypt sponsored by the United States during the Gulf War. *Lockheed Martin Tactical Aircraft Systems*, ASBCA Nos. 49530 and 50057, 00-1 BCA ¶ 30,852.

- **Government Breach:** Established that the Navy breached a “dual source” commitment that our client would share in Navy jet engine awards, by soliciting and accepting a competitor’s 100% “buy-out” offer, leading to recovery of \$150 million in common law damages, including lost profits. *United Technologies Corp.*, ASBCA Nos. 46880, 46881, 97-1 BCA ¶ 28,818.
- **Subcontractor Claim:** Sustained a subcontractor’s “changes” claim for the cost of testing a steam turbine generator, testing not contemplated by the prime contract but required by the Corps of Engineers. *CBI NA-CON, Inc.*, ASBCA No. 42268, 93-3 BCA ¶ 26,187.
- **Latent Defects:** Defeated a \$45 million Army latent defect claim that helicopters did not meet fatigue life requirements by establishing that no contract requirements supported the claim. *United Technologies Corp., Sikorsky Aircraft Div. v. United States*, 27 Fed. Cl. 393 (1992).

Other successful trial results are described throughout this brochure, particularly under “Cost Allowability and the Cost Accounting Standards” and “Defense of Fraud Allegations.”

Construction Litigation

Experienced lawyers in the firm’s Washington, D.C., and California offices staff our nationwide construction practice. Our clients include owners, contractors, sureties, design professionals, and subcontractors who are involved in a wide variety of public and private construction, including subways, waterways, wastewater treatment plants, airport extensions, military installations, public

buildings, shopping malls, hospitals and community developments. We appear regularly before the federal district and appellate courts, state trial and appellate courts, federal agency Boards of Contract Appeals, and the American Arbitration Association.

The issues we typically press for clients in construction cases include:

- differing site conditions;
- defective specifications;
- constructive changes;
- acceleration;
- delay;
- suspension;
- inspection and acceptance;
- terminations; and
- government claims under the federal False Claims Act and state equivalents.

Illustrative engagements include:

- **Default Termination:** Represented public owner in action by contractors challenging default termination of two subway contracts and asserting over \$40 million in claims, resulting in award to client of \$16.5 million, pending further proceedings. *Mergentime Corp. v. Washington Metropolitan Area Transit Authority*, 166 F.3d 1257 (D.C. Cir. 1999).
- **Federal Project:** Represented prime contractor in a unique Alternative Dispute Resolution proceeding that resolved over \$100 million in claims submitted to the U.S. Army Corps of Engineers under a \$600 million contract to construct headquarters, barracks, and related installations for a U.S. Army Division at Fort

Drum, New York.

- **State Project:** Lead counsel for the general contractor in a mini-trial that resulted in the settlement of claims against the Pennsylvania Department of Transportation arising out of a major highway project in Philadelphia.
- **Local Projects:** Successfully mediated multi-million dollar claims involving construction of the Cerritos Performing Arts Center, the Escondito Center for the Performing Arts, and the City of Carson's Sports Complex.

Alternative Dispute Resolution

C&M has been a leader in devising and using alternative procedures for resolving government contract disputes. The legislative history of the Administrative Disputes Resolution Act, Pub. L. No. 101-552, 105 Stat. 2736 (1990), references C&M's role.

The government contract cases often cited as ADR successes are disputes in which C&M lawyers represented the contractor. Representative cases, in addition to those described under "Construction Litigation" include:

- **False Claims Act:** Devised and successfully engaged in a two-step mediation with an Armed Services Board of Contract Appeals judge to resolve civil false claims allegations and disputed contract claims against the Air Force;
- **Trade Secrets and RICO:** Represented a client in a court-supported mediation that successfully resolved trade secret misappropriations and RICO allegations;

- **Breach of Contract Claim:** Obtained a substantial recovery after a two-day ASBCA mini-trial over claims for statutory violations, Memorandum of Understanding breach, and quality specification deficiencies relating to a Navy torpedo program;
- **Breach of Contract Defense:** Obtained a complete defense verdict after a seven-day mini-trial involving multiple claims for constructive changes and breach of contract for a fixed-price, modified commercial-off-the-shelf display system;
- **Program Cancellation:** Represented a defense contractor in an ASBCA-sponsored ADR proceeding that resulted in settlement of claims arising out of premature cancellation of a torpedo program by the U.S. Navy; and
- **Subcontract Termination:** Used ADR to bring about a resolution of a subcontract termination dispute arising out of the highly classified Navy stealth aircraft program.

Also, our lawyers frequently are selected as mediators, arbitrators, and neutrals in many ADR forums.

Costs/Pricing/Payment

Cost Allowability and the Cost Accounting Standards

Crowell & Moring is widely recognized as the expert law firm in issues involving the Cost Accounting Standards and the FAR cost allowability rules. While we have litigated many significant cases, we are most proud of our success in achieving favorable settlements in the vast majority of cost and accounting disputes in which we have been involved. We have unparalleled experience in counseling clients on how to deal with the results of troublesome

internal findings and how to respond to Defense Contract Audit Agency audit reports. Our clients also regularly call upon us to conduct compliance reviews, provide training, and structure accounting policies so as to minimize risk.

Our record of success in litigation is a matter of record:

- **Change in Accounting Practice:** Successfully argued that the Government was not entitled to a price adjustment for CAS-covered firm-fixed-price contracts due to a change in accounting practice because the change did not cause the government to incur increased costs. *E-Systems, Inc.*, ASBCA Nos. 45771, 46409, 00-2 BCA 30,982.
- **Corporate Reorganization:** Successfully argued that an internal corporate reorganization was not a “change in cost accounting practice” requiring a contract price adjustment under the CAS clause. *Perry v. Martin Marietta Corp.*, 47 F.3d 1134 (Fed. Cir. 1995).
- **Lump Sum Wage Payments:** Achieved a favorable decision on the allowability of lump sum wage payments in lieu of salary increases. *Boeing Aerospace Operations, Inc.*, ASBCA Nos. 46274, 46275, 94-2 BCA ¶ 26,802, *aff’d on reconsideration*, 94-3 ¶ BCA 27,281.
- **Contracting Officer Authority:** Successfully argued that the Administrative Contracting Officer is the only Government official with authority to decide CAS issues. *Bell-Boeing Joint Venture*, ASBCA No. 39681, 93-2 BCA ¶ 25,791.
- **NATO Procurement:** Obtained an ASBCA ruling that IR&D/B&P ceilings agreed to with DOD did not limit recovery of such costs under contracts with NATO, even though administered by DOD. *The Boeing Co.*, ASBCA Nos. 28510, 28820, 90-2 BCA ¶ 22,771.

- **Corporate Aircraft Costs:** Successfully argued that the costs of operating most of our client’s corporate aircraft were outweighed by the benefits gained and therefore were allowable on government contracts. *United Technologies Corp.*, ASBCA No. 25501, 87-3 BCA ¶ 20,193.

Defective Pricing/Truth in Negotiations

Our defective pricing practice covers all aspects of contract pricing requirements. We counsel clients—civilian and military, GSA supply schedule and FMS, prime and subcontractors—on traditional cost or pricing data disclosure issues and on the specialized disclosure requirements of General Services Administration and Department of Veterans’ Affairs supply schedules.

We have defended against defective pricing audits of every shape and size, including those that result in Inspector General, Comptroller General, Civil Investigative Demand, and grand jury investigations. And, when the problem cannot be solved short of litigation, we have tried many of the most important cases, including the two largest defective pricing cases in the history of TINA. For example, we have:

- **Adequate Price Competition:** Established adequate price competition as a valid basis to defeat a defective pricing claim. *United Technologies Corp., Pratt & Whitney*, ASBCA No. 51410, 99-2 BCA ¶ 30,444.
- **“Cost or Pricing Data”:** Defeated a \$90 million government claim testing whether management deliberations having possible cost reduction impacts are “cost or pricing data.” *Lockheed Corp.*, ASBCA Nos. 36420, 37495, and 39195, 95-2 BCA ¶ 27,722.
- **Government Knowledge:** Obtained summary judgment on the basis of government

knowledge of impact of allegedly undisclosed data. *The Boeing Company*, ASBCA No. 32753, 90-1 BCA ¶ 22,270, *motion for reconsideration* denied, 90-1 BCA ¶ 22,426.

Funding and Payment

A contractor’s ability to receive payment in a prompt manner is critical to contract performance and economic health. As a result, our government contracts lawyers have developed expertise in contract payment and funding issues.

Contractors are typically paid based upon completion or partial completion of their work, and financing may be provided in the form of progress payments or advance payments. The Federal Acquisition Streamlining Act added provisions for performance based payments for certain contracts.

In this setting, we frequently counsel or litigate matters involving:

- Anti-Deficiency Act requirements;
- Limitation of Costs and Limitation of Funds restrictions;
- Prompt payment;
- Suspension or reduction of progress payments;
- Setoffs;
- Electronic funds transfers; and
- Judgment fund payments.

Corporate Compliance/Debarment, Suspension and “Listing”

Compliance Programs

Well before the Federal Sentencing Guidelines for Organizations were adopted in 1991, Crowell & Moring’s Government Contracts lawyers pioneered the concept of corporate compliance

programs and compliance reviews. Since performing our first corporate compliance review in 1978, we have conducted compliance reviews, established compliance programs, drafted Codes of Conduct and Compliance Policies, and provided compliance training for well over 200 corporate clients, and in every conceivable industry. Our clients call on us when they are:

- in the midst of responding to a grand jury or an agency Inspector General subpoena or a Department of Justice Civil Investigative Demand;
- considering internal investigations and “voluntary disclosures;”
- taking steps to avoid suspension/debarment and exclusion;
- negotiating a civil or criminal settlement agreement or a corporate integrity agreement;
- considering measures to prevent and detect noncompliance and misconduct and to mitigate the chances of “whistleblower” (*qui tam*) suits under the False Claims Act; and
- seeking to fortify existing corporate internal controls.

Procurement Integrity

We also regularly counsel clients on and litigate matters involving “procurement integrity and standards of conduct,” including:

- gifts and gratuities provided to Government personnel by contractors under criminal statutes and agency rules;
- “kickbacks” offered by vendors and suppliers to higher tier prime contractors and subcontractors under the Anti-Kickback Act;
- access to “off-limits” competitor sensitive and government source selection information under the Procurement Integrity Act and similar state “trade secrets” laws; and
- criminal and civil “revolving door” restrictions on holding employment discussions with and hiring former Government personnel.

Suspension and Debarment

Debarment and suspension can be the equivalent of a “death sentence” for contractors with significant government business. Crowell & Moring has represented scores of individual and corporate clients of all sizes confronted with the possibility of being barred from government business. Our team is led by the former Army Debarring Official and current National Coordinator of the Defense Industry Initiative on Business Ethics and Conduct (“DII”). He is recognized nationwide as an authority on both the legal and practical issues that arise at all phases of the debarment and suspension process.

We believe our success rate is second to none in helping our clients avoid suspension, debarment, or “listing” by negotiating agreements with the government typically based on appropriate remedial actions and comprehensive business ethics and compliance programs. When necessary, we litigate these critical cases. For example:

- **Debarment of Executive:** We freed a corporate executive from debarment by establishing that the DLA had used an improper standard in imputing to him the conduct of others. *Novicki v. Cook*, 946 F.2d 938 (D.C. Cir. 1991).
- **De Facto Debarment:** We obtained a permanent injunction against the de facto debarment of a construction contractor, leading to award of a multi-million dollar dredging contract. *Peter*

Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs, 534 F. Supp. 1139 (D.D.C. 1982).

Commercial Items/Multiple Award Schedule Contracts

Recent legislation has revolutionized the way the federal government acquires commercial items and services. We help our clients—principally companies venturing into the government marketplace for the first time, but also experienced government contractors—deal with the resulting thicket of new and ever-changing statutes, regulations, procedures, and case law by:

- Providing guidance on the threshold question of what are commercial items and services;
- Advising on the unique terms and conditions in commercial item contracts, such as the clauses on warranty and termination;
- Counseling and, when necessary, litigation regarding the GSA multiple award schedule contracts and NASA SEWP III contracts, including the Commercial Sales Practices Format, the “price adjustment” clause, and the “price reduction clause;”
- Advising and litigating with respect to award and administration issues concerning government-wide acquisition contracts (GWACS), GSA Areawide contracts, and other multiple award ID/IQ contracts;
- Assisting subcontractors selling commercial items to government primes and government primes acquiring commercial items from subcontractors; and
- Establishing internal systems to comply with requirements of commercial item government contracts and conducting internal investigation of compliance issues.

Defense of Fraud Allegations Criminal Investigations

Crowell & Moring lawyers literally wrote the book on defending criminal investigations of government contractors. Elmer, Swennen, and Beizer, *Government Contract Fraud* (Federal Publications 1985). Over the past 20 years, we have handled investigations for scores of government contractors in many industries on every conceivable issue. Our experience involves working with federal prosecutors and grand juries, almost every traditional federal law enforcement agency, and the Inspectors General of a least a dozen governmental departments.

Because concluding investigations often involves consideration of suspension and debarment, our clients benefit from the advice of the Government Contracts attorneys who are acknowledged experts in this high stakes area. Also, we work closely with company counsel and internal auditors to avoid future problems by improving compliance and establishing proper and practical internal procedures and controls.

False Claims/Qui Tam Actions

Crowell & Moring Government Contracts lawyers have been defending False Claims Act and *qui tam* cases for decades. Our lawyers have defended scores of these high-risk cases, including many that have resulted in benchmark decisions. *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir.), *cert. denied*, 508 U.S. 973 (1993) (limiting “original sources” under the False Claims Act); *United States ex rel. Harrison v. Westinghouse Savannah River Company*, 176 F.3d 776 (4th Cir. 1999) (defining “claims” under the False Claims Act); and *United States v. Krizek*, 111 F.3d 934 (D.C. Cir. 1997), *on remand* 7 F.

Supp. 2d 56 (D.D.C. 1998) (defining “claims” subject to penalties under the False Claims Act).

Many of the cases that we defend never make it to trial or formal decision. Most results remain unpublished due to our lawyers’ ability to convince the government not to intervene, while other cases are dismissed due to unpublished pre-trial motions or negotiations, often resulting in settlements for less than the alleged single damages. When necessary, however, we do try False Claims Act and *qui tam* cases.

Some successful representations include:

- **No Defective Pricing:** In *United States v. United Technologies Corporation, Sikorsky Aircraft Division*, 51 F. Supp. 2d 167 (D. Conn. 1999), after a four-week bench trial, the court ruled in favor of our client on virtually every issue in a case based on defective pricing and awarded a judgment less than half that originally offered by the company in settlement of related non-fraud claims.
- **No Pre-Complaint Disclosure:** Obtained dismissal of False Claims Act allegations for lack of jurisdiction due to relator’s failure to prove the required pre-complaint disclosure. *United States ex rel. Ackley v. International Business Machines Corp.*, 76 F. Supp. 2d 654 (D. Md. 1999).
- **Immunity of Medicare Intermediary:** Obtained dismissal of *qui tam* suit because Medicare intermediary found to be immune from liability for payments to healthcare providers. *United States ex rel. Body v. Blue Cross and Blue Shield of Alabama*, 156 F.3d 1098 (11th Cir. 1998).
- **Inappropriate Relator:** Achieved dismissal of *qui tam* case brought by DCAA auditors based on information they obtained in the course of their own audit. *Wercinski v. IBM Corp.*, 982 F. Supp. 449 (S.D. Texas 1997).
- **Summary Judgment and Sanctions:** In a *qui tam* case involving allegations of accounting fraud, we obtained summary judgment for our client and an award of monetary sanctions against relator. *United States ex rel. Simpson v. Lear Astronics Corp.*, 77 F.3d 1170 (9th Cir. 1996).
- **Corporate Veil:** Obtained dismissal of a *qui tam* case alleging failure to disclose most favorable commercial pricing practice, based on an argument that our client was protected from the actions of its wholly owned subsidiary by the “corporate veil.”
- **Post-Trial Settlement:** After a two-week jury trial, we settled a *qui tam* case alleging billing for work not performed for *de minimus* payment.
- **Retention of Medicare Contract:** Settled a *qui tam* case brought against a Medicare contractor in a manner that permitted the contractor to retain its contract.
- **Permanent Seal:** We successfully kept a *qui tam* case under “permanent seal” despite Department of Justice’s vigorous argument that all False Claims Act cases must see the light of day.

Data Rights, Software and Patents

To maintain a competitive advantage, companies must rigorously protect rights in their advanced technology and computer software. This is particularly true for any company that does business at the prime contract, subcontract, or grant level with the federal government, because the government obtains broad rights when intellectual property is developed,

conceived, or reduced to practice with government money.

Often teaming with our Intellectual Property Group, we advise companies on how they can maximize their commercial rights in software, technical data, and patentable inventions. We do this in three ways:

- First, we train contract and finance personnel on how to identify and preserve intellectual rights.
- Second, we design procedures to track development and reduction to practice so that companies can restrict the government's rights in data and software, and retain title to inventions.
- Third, we prepare and review intellectual property and software license agreements; proprietary information, non-disclosure, and confidentiality agreements; teaming and joint venture agreements; Cooperative Research and Development Agreements ("CRADAs"); grant agreements; and "Other Transactions" to assure that intellectual property rights are perfected and protected.

We also represent companies when they enforce or protect their intellectual property rights. This involves litigating challenges by the government to restrictions on software and technical data; litigating patent infringement by the government or its contractors under 28 USC § 1498; and pursuing injunctive relief against companies that misappropriate trade secrets.

International

Crowell & Moring's international practice has grown with its clients' efforts to penetrate global markets and form multinational ventures. Our experience covers the waterfront, from the regulatory issues presented by the marketing and performance of commercial and government contracts abroad to the resolution of disputes. Specific areas of expertise are identified below:

Export Controls

The United States maintains a complex system of controls over the export of U.S. goods and technology, including the State Department's International Traffic in Arms Regulations, the Department of Treasury's Office of Foreign Asset Control, and the Department of Commerce's Export Administration Regulations.

Our expertise and experience extends across these various regulatory schemes and, just as importantly, we have experience with many of the industries most affected by these regulations:

- Aerospace & Defense;
- Satellite & Launch Services;
- Information Technology;
- Telecommunications;
- Research Labs; and
- Manufacturing/Capital Equipment.

We counsel clients in these and other industries from literally on-the-spot questions to full scale compliance reviews to litigation of administrative penalty cases. Some recent representations include:

- Defended a major U.S. aerospace company against State Department administrative charges of alleged unauthorized transfer of technical

- data and performance of defense services in connection with satellite launch in China;
- Counseled foreign manufacturer on the reach of OFAC regulations in controlling a domestic subsidiary's technology needed if foreign affiliate were to obtain contract with Iran;
 - Counseled a telecommunications company on deemed export that would occur in using foreign national employees in work involving controlled technologies; and
 - Investigated potential violations, identified corrective actions and prepared comprehensive voluntary disclosure to Commerce for manufacturer of dual use aerospace product.

Foreign Corrupt Practices Act

Our practice includes devising compliance programs for clients, counseling clients as compliance issues arise in the establishment or performance of an international ventures, training marketing and other employees (including web-based training), conducting internal investigations and defending clients in the course of SEC and grand jury investigations.

The following issues are representative of the breadth of our practice:

- What do you do when a reseller in Latin America resists payment of overdue amounts in part on the grounds that he has made improper payments to foreign government officials?
- How do you respond to allegations that a foreign affiliate's employee has made an improper offer of payment to a foreign government official in connection with a pending tender for a World Bank financed project in a former Soviet republic?
- Are there pro-active steps that you can take to

avoid criminal liability when you discover that your manufacturing subsidiary has paid a bribe in connection with a pending sale to a foreign government?

Finally, where indictment cannot be avoided or settlement is prudent, our experience in debarment and suspension matters makes us uniquely well situated to address the issues with the necessary global perspective. Indictment (or conviction) under the FCPA has collateral consequences for a company's export and government business that require attention in devising an appropriate resolution.

Foreign Military Financing & Foreign Military Sales

The Arms Export Control Act provides the President with authority to transfer US defense articles and services (including construction services) to friendly countries and allies. Under the Foreign Military Sales ("FMS") program, DoD procures goods and services from the U.S. contractor on behalf of the foreign government recipient. Under the Foreign Military Financing ("FMF") program, DoD provides grants—principally to Israel and Egypt—for the purchase of U.S. goods and services.

We have nearly 25 years of experience with both these programs. Indeed, we litigated and won the case that established the U.S. government's liability for U.S. contractor claims under FMS contracts. *Federal Electric Corp.*, ASBCA No. 24002, 82-2 BCA ¶ 15,862, *aff'd* 2 FPD ¶ 9 (Fed. Cir. 1983)

We counsel clients regularly concerning agent fees, offset arrangements and costs, and other unique circumstances presented by FMS arrangements. For example, we overcame the Air Force's determination that co-production costs

were “offset” arrangements, which the United States could not reimburse. *Lockheed Martin Tactical Aircraft Systems*, ASBCA Nos. 49530, 50057, 00-1 BCA ¶ 30,852.

Although limited to a handful of countries, the FMF program presents significant challenges to U.S. companies whose commercial contracts are financed under it. Instead of regulations, this program operates under a set of *Guidelines* that are enforced through a Certification & Agreement each contractor must execute for the Defense Security Cooperation Agency (“DSCA”).

These policies are fraught with ambiguities, and we have extensive experience with each version of these *Guidelines* since they were originally established in 1984 and with the DSCA officials who formulated them. We have counseled and litigated dozens of matters involving some of the most troublesome areas:

- undisclosed non-U.S. content;
- payment of contingent fees (even to employees);
- improper use of advance payments; and
- in-country support costs.

Transactions

Due Diligence/Mergers & Acquisitions

Either in conjunction with our own Corporate Group or with other law firm M & A counsel, Crowell & Moring has extensive experience assisting companies that seek to acquire or sell business units that are government contractors. Because of our expertise across the whole range of government contract issues, we are well suited to evaluate the target company’s government business in the due diligence process and identify non-obvious (but very real) areas of risk. For example:

- When a target company boasted that it had never overrun a contract in 25 years, our due diligence review found problems with the integrity of the time-charging system and pricing practices; and
- We identified a \$1 million solution that saved the divesting company from a \$60 million government claim for surplus pension assets.

When the acquiring company is owned or controlled by foreign interests, we assist clients in the myriad of reporting and approval requirements—such as approval by the Committee on Foreign Investment in the United States (“CFIUS”) under the Exon-Florio Act—that affect foreign investment in the United States. For example:

- We assisted a Dutch company in obtaining U.S. government approvals to acquire the last domestic producer of a key satellite component, including obtaining CFIUS clearance and negotiating a Special Security Agreement that allowed continuance of necessary facility security clearances; and
- We assisted a domestic investment partnership with majority participation by a French insurance company to structure its purchase of a sensitive U.S. defense contractor to permit continuation of a facility security clearance.

The size of our Government Contracts practice permits rapid deployment of experienced lawyers across the country to meet almost any closing schedule. For example:

- On behalf of a major British aerospace client, we fielded a team, working coast-to-coast at three separate locations, to review documents, interview key personnel and prepare written due diligence reports, all in less than two weeks.

Joint Ventures, Teaming Agreements, and Strategic Alliances

We take an interdisciplinary approach to teaming agreements, joint ventures and strategic alliances, involving lawyers from our antitrust, corporate, and tax practices. We have represented a wide variety of clients, dating back to our representation of Northrop Corporation in the leading published decision on teaming agreement and joint venture disputes, *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir. 1983). We also provide counseling on the formation of teaming agreements and strategic alliances, and we assist in analyzing and drafting such agreements.

Among the cutting edge issues on which we have experience in the context of teaming agreements, joint ventures, and strategic alliances are:

- CAS disclosure and compliance;
- Federal, state and foreign taxation;
- Intellectual property;
- Export control;
- Defective pricing;
- Foreign Corrupt Practices Act compliance; and
- Antitrust, including Hart-Scott-Rodino requirements and exclusive dealing issues.

Because of our recognized expertise in matters involving teaming agreements, we recently were selected by the National Defense Industrial Association to write a brief amicus curiae on an important Ninth Circuit appeal testing the scope of damages available for breach of agreements to team.

Security Clearances

We represent corporations and individuals in matters relating to U.S. government security clearances, particularly in the context of changes in corporate ownership or leadership. For example:

- We counsel companies threatened with the loss of corporate facilities security clearances upon acquisition by a foreign entity of a significant interest in the U.S. company or upon the appointment of a non-U.S. citizen to the Board of Directors or a key management position; and
- We negotiate with the Defense Security Service to implement acceptable mechanisms for clients to obtain or retain a facility security clearance and to mitigate the effect of the Foreign Ownership, Control, or Influence (“FOCI”) requirements. These mechanisms include Special Security Agreements, Security Control Agreements, Voting Trust Agreements, Proxy Agreements, and Board Resolutions.

In addition, we assist companies and individuals with significant security issues. For example:

- We assist companies in threatened or actual breaches of security requirements and in security clearance investigations; and
- We counsel and litigate appeals when the government determines that an individual ceases to be qualified for a personal security clearance or fails to qualify for a higher level of clearance.

Health Care Contracting

When the Federal Government contracts for the administration of its various health care programs,

it interposes a unique and complex layer of statutory and regulatory requirements on the standard contracting process. Health care contracting transforms routine Government procurements into a highly specialized form of contracting. The sheer magnitude and complexity of these programs - involving Medicare, Medicaid, TRICARE, and Federal Employees Health Benefits - is such that they require specialists who have both Government contract *and* health care experience.

Our firm is fortunate to have a group of attorneys whose day-to-day practice is devoted to the specialized area of health care contracting. We are second to none in having lawyers within our group who counsel and litigate various issues and transactions that are unique to this specialty. For example:

- We have a former leader in HHS' legal office whose expertise was interpreting the ins and outs of the Medicare and Medicaid contracting authorities.
- Several of our attorneys are recognized experts on health care contracting with the Department of Defense and are responsible for successfully litigating numerous TRICARE bid protests involving the award of these contracts.
- A number of our attorneys are recognized experts on the application of the complex cost accounting standards and their impact on health care contractors who may not be aware of the burdens and risks they face when accounting for the expenditures that are incurred under these contracts.
- We successfully established in the *Body* Eleventh Circuit Court of Appeals decision that Medicare contractors are immune from False Claims Act liability that may be caused by the negligent acts of their employees.

Legislation

We are actively engaged in counseling clients on current legislative and regulatory issues that affect government contractors. Because of the wide array of goods and services our clients sell to federal, state, and local governments and governmental agencies, our lawyers keep abreast of policy initiatives, new legislative bills, and regulatory proposals from the time that they first surface. Developments in e-business and new commercial item legislation are recent examples.

Our legislative representations include headline cases, single client matters and, most often, coalitions of companies or trade associations that share a common concern. Our work is focused on the key congressional committees with jurisdiction over the matters at issue, and our activities include:

- Drafting critical legislative language;
- Preparing detailed legal analyses or shorter rationales to support or oppose proposed legislation;
- Preparing talking points for lawyers and lobbyists; and
- Developing strategic lobbying plans and lobbying members of key committees.

We help clients prepare for testifying before federal and state legislative committees. We conduct mock hearings during which the witness practices and refines his or her testimony and firm lawyers pose questions to the witness, assuming the demeanor of members of the particular committee. We also prepare "Dear Colleague" letters, floor statements, and op-ed pieces.



Privatization

From its simple roots as a “contracting out” policy, privatization has not only survived changes and turnover in the executive and legislative branches, but has steadily evolved and grown as a result of new government reform policies and legislation. Privatization now spans the spectrum of activities, from public-private competitions, to public-private partnering, to energy savings performance contracts. The experience of Crowell & Moring Government Contracts lawyers extends over this spectrum of privatization activities.

Our clients include both contractors who are competing directly against the government and companies who are teamed up with public entities or are competing against public-private combinations. These public-private competitions and partnerships present novel issues, such as organizational conflicts of interest, that Crowell & Moring has had a direct hand in shaping.

The issues we typically press for clients in privatization matters include: OMB Circular A-76 counseling and protests, public-private partnering, Energy Savings Performance contracts, utility privatization, depot-level maintenance competitions, organizational conflicts of interest, and legislative developments.

Small/Small Disadvantaged Business

We have a longstanding expertise in helping clients understand, comply with, and utilize programs that encourage small and small disadvantaged businesses to sell services and products to the federal government. Our experience spans the many available vehicles for assisting small and small disadvantaged businesses - the 8(a) Program, the Small Disadvantaged Business Program, Hubzone procurements, small business set-asides and

preferences, small and small disadvantaged business subcontracting requirements, etc.

Some of the things we do regularly for our clients include:

- Counseling on compliance with small business size standards, including defending challenges to a client’s size status and prosecuting challenges to a competitor’s size status at the Small Business Administration and, if necessary, in court;
- Drafting working relationships between small or small disadvantaged businesses, or between these businesses and large/non-disadvantaged businesses, that will enhance the competitiveness of a small or small disadvantaged business without jeopardizing its size or disadvantaged status;
- Tracking legislative, regulatory, and judicial developments that effect small and small disadvantaged business procurements; and
- Providing small and small disadvantaged clients with access to our unparalleled expertise in all government contracting issues, so that they are able to compete for and perform federal contracts with the benefit of the best available legal advice.

References

This brochure is designed to acquaint you with Crowell & Moring LLP’s special expertise and its extraordinary record in the practice of government contract law. We hope it does. But we would also be pleased to refer you to clients, academics, judges, and government officials who have seen us at work. Thus, references are available upon request.