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4 Tips For Curbing Parallel Enforcement Risks

By **Daniel Wilson**

Law360, Nashville (June 13, 2016, 7:16 PM ET) -- The specter of parallel enforcement is something that all attorneys should keep in mind when advising federal contractors on investigations or other legal entanglements, as the successful resolution of one action doesn't necessarily mean the end of potential proceedings — or consequences, experts said.

The range of potential issues that a government contractor can face from alleged violations of law or regulation are broad and include whistleblower False Claims Act suits, inspector general investigations, criminal and civil cases brought by the government, and suspension and debarment proceedings.

But when attorneys advise government contractors, whether as outside counsel or corporate counsel, they often mistakenly limit their assessment to their area of expertise, resolving only the immediate matter at hand without fully taking into account collateral effects from potential parallel proceedings, to the unintentional detriment of their clients, experts claimed.

To help manage this risk and achieve the best possible outcome, there are a number of steps attorneys can, and should, take, according to experts. Here are tips for how to keep on top of potential parallel enforcement consequences for contractors.

Consider Consequences in Advance

Being fully aware of what potentially lies in wait for contractors before guiding them toward a particular course of action is key for minimizing the impact to their business, experts claimed.

"Anyone representing a [contractor] has to be aware of all the remedies available to the government — it may not just be a civil False Claims Act, but there may be a potential criminal case as well and there will likely be suspension or debarment proceedings in the future," Rogers Joseph O'Donnell PC shareholder Brian Miller said. "An effective attorney has to be aware of all these realms and has to protect his or her client from all of these, simultaneously."

Gibson Dunn partner Joseph West said he employs a "worst to first" strategy, starting with the worst possible consequence that could occur for the alleged issue at hand and working back through all potential issues and related solutions.

A particularly commonly overlooked consequence stemming from the failure to fully understand the panoply of remedies open to the government is the potential for suspension or debarment from federal

contracts, a potentially damaging — and in some cases, business-threatening — consequence, several experts said.

Miller, who has extensive experience as both a former federal prosecutor and as the former General Services Administration inspector general, said that in his time as IG, "nearly all" successful investigations by the IG's office were referred to a suspension and debarment official for further consideration.

Robert Meunier, CEO of Debarment Solutions Institute LLC and former chair of the White House Office of Management and Budget's Interagency Suspension and Debarment Committee, noted that for some crimes, such as certain Clean Water Act and Clean Air Act violations, a guilty plea can statutorily require a suspension or debarment.

Sometimes even prosecutors or the courts themselves are not fully aware of the potential consequences of a plea or settlement, so it pays to look deeply into — and beyond — the law or regulation at issue, Meunier claimed.

"If not well-thought-out at the time of a plea agreement, and they're not coordinated with someone who understands the collateral consequences, [a contractor] may very well find that the collateral consequences are more serious than the fines and penalties," he said.

Even when working with a business that doesn't necessarily consider itself to be a government contractor, it is still worth working through potential collateral consequences that may have an impact on access to federal money, several experts noted.

The huge breadth of federal government programs means that a business may secure a significant part of its revenue indirectly from the government without even realizing it, they said — for example, a private contractor to another business that is working under a government grant.

Try to Get Ahead of the Issue ...

The Federal Acquisition Regulation's Mandatory Disclosure Rule requires contractors to timely disclose to the government when they discover "credible evidence" of a potential violation of fraud or bribery law, of the civil False Claims Act, or of a "significant" overpayment stemming from a government contract.

This requirement does not strictly define all of its terms and some contractors may seek to delay disclosure, or at least explore if there is any wiggle room that may allow them to limit the information they provide the government. But the best approach is for a contractor to put their cards on the table as early as possible, several attorneys said.

That doesn't necessarily mean turning over information on things they only suspect but don't yet fully know, Miller said. But revealing the facts that are available to them and telling the relevant agency that they're continuing to investigate the matter more broadly — and, of course, actually following through with that claim — can definitely win brownie points among investigators, prosecutors and contracting officials, experts claimed.

Also, by disclosing as early and broadly as possible in the process, a contractor has the chance to explain their side of the story and help shape the narrative of an investigation, experts claimed.

"If a contractor brings something forward to their contracting officer or enforcement office, they get the

benefit of the doubt [and] to shape the story and talk a bit before the hammer falls," said Crowell & Moring LLP partner David Robbins, a former U.S. Air Force director of procurement fraud remedies.

Any information shared with one investigator or contracting official will be put into a governmentwide database and may also help a contractor to passively make their case with other agencies or officials, even if those officials have yet to reveal their involvement in an issue, according to Robbins.

... But if You Can't, Try to Mitigate It

Sometimes, however, a contractor doesn't get a chance to provide information to the government — whether purposefully or inadvertently — and misses the opportunity to get out ahead of an investigation or enforcement proceeding beginning.

But it's not too late to make a disclosure, even at this point. While generally not as beneficial to do so as early on, voluntarily disclosure and cooperation can be a potentially mitigating factor, helping a contractor to stay within the good graces of a prosecutor, inspector general or suspension and debarment official, experts claimed.

Among other benefits, a frank mea culpa can make it easier to, for instance, negotiate a potential administrative agreement that satisfies a debarment official, warding off a potential suspension, according to experts.

A number of agencies, perhaps in recognition that it is usually mutually beneficial for contractors and agencies to work together, have shown an increasing willingness in recent years to make deals with contractors who have made a mistake but have shown contrition, Meunier claimed.

It's also valuable to be aware of the factors that can help push these deals along, such as agreeing to improve internal controls and take on the related costs of monitoring compliance with the deal, according to Meunier.

West echoed this call, citing an example involving a contractor client whose subsidiary faced allegations of kickbacks to secure local government deals. While its previous counsel had been working in earnest to resolve a potential criminal case, there was little consideration given to the potential for collateral consequences, including the effects on federal contracting, he said.

"If integrity is involved, or the 'F word' — fraud — is involved, or bribery, or kickbacks, it has to involve the federal government, because they're looking at companies' responsibility and integrity," West said.

Once the client brought the issue to West and his team, they were swiftly advised to make a preliminary disclosure to a federal debarring official, a move which ultimately kept the company on the official's nice list, he claimed.

"[Disclosure] prevented the company from getting so far down the road with the criminal case that then the debarring official learns about it [late] and goes bananas," he said.

Conversely, attempts to clam up can irreparably damage the relationship with an agency or official, dissipating good will and potentially affecting chances at future federal work by casting doubt on a contractor's integrity, experts claimed.

Stay on Top of New Legal Developments

Whether through new laws and regulations or even less prescriptive changes like new guidance or emphasis at an agency, new directions in government requirements also require changes in how to approach matters for contractors, according to experts.

The so-called Yates Memo, issued by Deputy Attorney General Sally Q. Yates in September, is a prominent recent example of this. In the memo, Yates flagged that individuals would face more culpability when the U.S. Department of Justice investigates alleged corporate crimes and civil violations, sending a shock wave through the business community.

Yates signaled that to win credit for cooperation with the government, businesses must put forward information on individuals, with DOJ attorneys advised not to resolve any case involving a business unless there is also a plan to resolve potential related cases involving individuals — a particularly important consideration for contractors under mandatory disclosure requirements.

Not a change in law as much as a change in its application, the memo's full extent is yet to be seen. But it definitely changes the calculus for what government contractors need to disclose when highlighting any potential violations to the government, experts said.

For instance, in any proactive disclosure to the government, information will need to be provided not only about individuals who were involved in any potential violation, but also about what the company is doing in regards to those people, experts said. This in turn affects the scope and type of internal investigations that contractors must carry out when deciding how to address external investigations and cases.

"Contractors are still wrestling with 'do we disclose or do we not disclose,' " Robbins said. "However, the discussion once the decision has been made to disclose has become a bit more robust — we need to tell the story, we need to tell who was involved and we need to tell what the company is doing about it. It's focusing industry on perhaps a bit more complete analysis at the earliest disclosure stages."

While many changes to relevant laws or regulations will not be nearly as consequential to federal contractors as the Yates Memo has the potential to be, overlooking any such changes can still have an impact that ripples across multiple proceedings, experts said.

--Editing by Katherine Rautenberg and Patricia K. Cole.