

# **The Year in Federal Contracting: Zealous Expectations & Enforcement**

W. Stanfield Johnson

Angela B. Styles

# Trends

- Intensified War On Procurement Fraud
- Wartime Contracting Commission
- Suspension/Debarment
- DCAA Powerbase
- DoD “Better Buying Power” Directive

# Intensified War On Procurement Fraud

- National Procurement Fraud Task Force (formed Oct. 2006)
- Mandatory Disclosure Rule (Dec. 2008)
- False Claims Act Amendments
- Increasing AUSA Activity
- FAPIIS (statutory creation to maintain data on “integrity and performance”)

# Intensified War On Procurement Fraud

- *United States v. Science Applications Int'l Corp.*, No. 09-5385 (D.C. Cir. Dec. 3, 2010)
- Increased IG activity
  - Substantial Hiring
  - Subpoenas
  - Mandatory Disclosure Response

# Wartime Contracting Commission

- Bipartisan Legislative Commission (est. 2008)
  - “At What Cost? Contingency Contracting in Iraq and Afghanistan” – June 10, 2009
    - [http://www.wartimecontracting.gov/docs/CWC Interim Report At What Cost 06-10-09.pdf](http://www.wartimecontracting.gov/docs/CWC_Interim_Report_At_What_Cost_06-10-09.pdf)
  - “At What Risk” - February 24, 2011
    - [http://www.wartimecontracting.gov/docs/CWC InterimReport2-highres.pdf](http://www.wartimecontracting.gov/docs/CWC_InterimReport2-highres.pdf)

# Wartime Contracting Commission

Agencies' failure to effectively use contract suspension and debarment tools, and the U.S. government's limited jurisdiction over criminal behavior and limited access to records, have contributed to an environment where contractors misbehave with limited accountability.

## **Section V: Enforcement policies and controls fail to ensure contractor accountability**

- 23.** Require a written rationale for not pursuing a proposed suspension or debarment
- 24.** Increase use of suspensions and debarments
- 25.** Revise regulations to lower procedural barriers to contingency suspensions and debarments
- 26.** Make consent to U.S. civil jurisdiction a condition of contract award
- 27.** Clarify U.S. criminal jurisdiction over civilian-agency contractors operating overseas
- 28.** Establish a permanent organization to investigate international-contract corruption
- 29.** Expand the power of inspectors general
- 30.** Raise the ceiling for access to the Program Fraud Civil Remedies Act
- 31.** Strengthen authority to withhold contract payments for inadequate business systems
- 32.** Amend access-to-records authority to permit broader government access to contractor records

# Wartime Contracting Commission

## ► **RECOMMENDATION 24**

### **Increase use of suspensions and debarments**

Mandate automatic suspensions of indicted contractors and prevent contractors from avoiding suspension and debarment:

- Make suspension actions based on contract-related indictments mandatory for a predetermined time, not subject to discretion of the suspension-and-debarment official.
- Prevent deferred-prosecution and non-prosecution agreements between the Department of Justice and a contractor from being linked to administrative agreements between an agency and a contractor in connection with a suspension or debarment action.

## ► **RECOMMENDATION 25**

### **Revise regulations to lower procedural barriers to contingency suspensions and debarments**

Require regulations and policies be revised to:

- Exempt agencies from the requirement to provide contractors with the opportunity for a hearing prior to a suspension or debarment action not based upon a conviction, civil judgment, or indictment, and when there is a dispute over material facts. Agencies should instead be able to make decisions based on the documentary record alone. This provision should apply only to contracts performed predominantly overseas in support of overseas contingency operations.

# Suspension/Debarment

- New Players
  - U.S. Small Business Administration
  - U.S. Agency for International Development
- New Issues
  - Small Business Contracting
    - Size Certifications
    - Limitation on Subcontracting, FAR 52.219-4
  - Grants



# DCAA Powerbase

- 2008/09 GAO Assault on DCAA
  - “A management environment and agency culture that focused on facilitating the award of contracts and an ineffective audit quality assurance structure are at the root of the agencywide audit failures we identified.”
  - “[P]ressure from the contracting community and buying commands for favorable opinions to support contract negotiations impaired the independence of three audits involving two of the five largest government contractors.”

# Contracting Workforce vs. DCAA

- Audit Management Guidance – Reporting Suspected Contractor Fraud and Other Contractor Irregularities (March 2009)
- Audit guidance on Reporting Significant/Sensitive Unsatisfactory Conditions Related to Actions of Government Officials (March 2009)
- Audit Guidance on FAR Revisions Related to Contractor Code of Business Ethics and Conduct (July 2009)

# DoD “Better Buying Power”

- “Better Buying Power: Guidance for Obtaining Greater Efficiency and Productivity in Defense Spending (Ash Carter Sept. 2010)
  - Affordability and Cost Control
  - Incentivize Productivity and Innovation
  - Improve Competition
  - Improve Tradecraft in Services Acquisition
  - Reduce Non-Productive Process and Bureaucracy

# Questions?

Stan Johnson

[wjohnson@crowell.com](mailto:wjohnson@crowell.com)

202-624-2520

Angela Styles

[astyles@crowell.com](mailto:astyles@crowell.com)

202-624-2901