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Contractor Accountability

Attorneys Predict More Risk, Less Reward For Government Contractors in 2012

The budget cutting fervor in Congress will make 2012 a difficult year for government contractors, attorneys from Crowell Moring said at a Jan. 19 webinar on the outlook for federal procurement.

The business environment will be shaped by moves to cut or end government programs, discourage award of cost-reimbursement contracts, and increase use of suspension and debarment procedures, they told an audience of approximately 375 during a webinar.

Contractors also are going to have to deal with continued scrutiny from agency inspectors general, as well as new processes for auditing business systems and evaluating the potential for organizational conflicts of interest.

The procurement climate in 2012 will be marked by less business as program cuts and terminations grow, said Crowell Moring Partner Stan Johnson.

"The contracts you get will be riskier," he predicted. Firm-fixed price contracts will increase, while cost reimbursement contracts will decline, he said.

The federal government will be looking for "any possible basis" to terminate contracts for default instead of convenience, in order to save costs, Crowell Partner J. Chris Haile warned. This continues the trend of the past few years, he said.

Scrutiny of Contracts to Grow. At the same time, there will be heightened congressional and agency scrutiny of government contracts.

Crowell Partner Robert Wagman predicted a rise in suspensions and debarments in 2012.

He pointed to the Office of Management and Budget's recent directive telling agencies to implement more effective suspension and debarment programs (96 FCR 536, 11/22/11). Also a factor is the recent report by the Government Accountability Office finding that few agency programs in this area are effective (96 FCR 353, 10/11/11).

There is "significant congressional interest" in suspension and debarment, Angela Styles, a partner with the firm and chair of its Government Contracts Group, said. She cited a provision in the fiscal year 2012 consolidated appropriations law (Pub. L. No. 112-94) requiring the Defense Department to take into account whether contractors have a record of felony convictions.

Section 8125 bars use of appropriated funds for contracts to "any corporation that was convicted of a felony

criminal violation under any federal law within the preceding 24 months, where the awarding agency is aware of the conviction." The ban does not apply if the agency has considered suspension or debarment of the corporation and determined such an action not necessary to protect the interests of the government.

"A lot of members of Congress think companies should have mandatory debarments if they make one false step," Styles said. "There's no recognition on the congressional side that bad things happen at good companies with good compliance programs."

Look Out for Business Systems Reviews. "Everyone should keep an eye on how the business system review process unfolds as the year goes on," Crowell Partner Cathy Kunz advised webinar viewers.

DOD issued an interim rule in May 2011 bolstering a contracting officer's oversight of a firm's business systems (95 FCR 537, 5/24/11). The Defense Contract Audit Agency and the Defense Contract Management Agency have since developed processes for auditing business systems, she noted.

Lobbying costs and associated costs are getting "a ton" of attention and are likely audit focuses, Kunz said.

Organizational conflicts of interest (OCIs) also pose risks for contractors in 2012, Crowell Associate James Peyster said. The Federal Acquisition Regulation Council is expected to issue a final rule in 2012 to follow up its April 2011 interim rule (95 FCR 457, 5/3/11).

Most of the key elements of the proposed rule will be carried over, Peyster predicted.

In addition to providing standard conflict of interest contract clauses to address OCIs, the rule suggests that, with limited exceptions, contractors should be contractually obligated to protect all nonpublic information they have access to through contract performance, regardless of whether it is information from the government or a third party.

Prospects for Acquisition Workforce Dim. Meanwhile, the likelihood of improvements with respect to the acquisition workforce is "dubious due to budget constraints," Johnson said. "Expect acquisition to be understaffed and inexperienced," he said.

Other areas to watch in 2012, the Crowell attorneys advised, include:

- final rules implementing the Small Business Jobs Act of 2010;
- application of new Defense Federal Acquisition Regulation Supplement rules on data rights, issued in September 2011; and

■ a continued hike in False Claims Act recoveries, possibly up to \$9 billion from \$3 billion last year.

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