The webinar will begin shortly. The slides will be available after the webinar.
What Will the New Year Bring: Top Headlines, Headaches, and Developments for Government Contractors to Watch In 2017

January 25, 2017
Overview and Climate

• New Administration’s Priorities
• Fewer Regulatory Burdens
• More Competition
• Better Program Management
• Increased Focus on Reducing Fraud, Waste, and Abuse
Update on Executive Orders and Other Labor/Employment Matters

• Fair Pay and Safe Workplaces EO/Regulations
• Other Obama Labor-Related EOs
• FLSA Regulations
• DOL Persuader Rule
• Enforcement Posture – DOL, EEOC, and NLRB
Int’l Issues: Looking Overseas

• Export Controls and Sanctions
  – US Sanctions – Reversing course or more of same?
  – ECR – Getting to 1 or petering out?
• FMS/FMF
  – America First – Encouraging sales or backlash?
  – New FMF Guidelines
• Anti-corruption
  – Impact of McDonnell and relaxed view of conflicts of interest

Alan Gourley
202-624-2561
agourley@crowell.com

Addie Cliffe
202-624-2816
acliffe@crowell.com

Jana del-Cerro
202-624-2843
adel-cerro@crowell.com
Int’l Issues: Coming to America

• Domestic Preferences
  – Hire American/Buy American – Translating campaign slogan into effective policy?

• CFIUS
  – Reconciling importing jobs with national security concerns?
  – China policy
Costs and DCAA

- **LMIS decision about subcontractor management**
  - Recent Government attempts to charge contractors with unreasonable responsibilities to “manage” their subcontractors may be relaxed after ASBCA dismissal of Government’s $100M breach of contract claim, finding it was “based on nothing more than a plainly invalid legal theory”

- **Final Rule on Allowability of IR&D Costs**
  - Requires contractors to engage in technical interchanges with DoD
  - Likely administrative burden and chilling effect on IR&D investment

- **FY 2017 NDAA**
  - Revisions to CAS statute
  - Creation of Defense CAS Board

- **DCAA Audit Progress**
  - DCAA’s ability to provide audit support for non-Defense agencies revived in late September 2016 when DCAA issued a memo indicating that it had "met the requirement of less than 18 months of incurred cost inventory"
Claims and Disputes

- Dynamics with the Change in Administration
- Navigating Commercial Item Contract Changes
  - Are unilateral government changes breaches?
  - What is an “Equitable Adjustment” in this context?
- Fraud at the Boards
  - New ASBCA jurisdiction over Gov’t CDA claims demanding 100% forfeiture on contracts tainted by performance fraud (FCA, kickbacks)
- Defective Pricing
  - More DP audits and litigation on the horizon
  - Aggressive new DP audit theories – what to watch for
- Labor Mapping
  - Uptick in hyper-zealous audits of employee résumés and floor duties
  - Rubber-stamped final decisions demand forfeiture of all hours billed

Chris Haile
202-624-2898
chaile@crowell.com

Skye Mathieson
202-624-2606
smathieson@crowell.com
Commercial Item Contracting, GSA and VA Schedules

- **Emphasis on Commercial Item Contracting**
  - Rejection of Obama Administration Procurement Policies...
  - Potentially increased outsourcing
  - FY 2017 NDAA

- **GSA Transactional Data Reporting Final Rule, 81 Fed. Reg. 41104 (June 23, 2016) (Pilot Program)**
  - Purpose: "Embrace modern technology while moving away from outmoded practices. . ."
  - Scope: The new rule covers certain GSA Multiple Award Schedules as well as GSA’s GWAC and IDIQ contracts.
  - Impact: Final Rule represents the most significant change to the GSA MAS program since 1994

- **Department of Veterans Affairs Schedule Program**
  - Acquisition of non-TAA Compliant Pharmaceuticals

There are a lot of unknowns with the new administration but we expect a renewed emphasis on Commercial Item Contracting.

Lorraine Campos
202-624-2786
lcampos@crowell.com
Transactions and Strategic Alliances

• Expected themes for 2017
  – Increased deal flow
  – Hot areas
  – Larger combinations

• Our “top ten” diligence list for 2017

• Minimizing protest risk associated with corporate transactions
Investigations

• **Yates Memo**
  – More focus on individual accountability

• **Criminal Division Review of Qui Tam Complaints**
  – Heightened risk of parallel criminal investigations

• **Impact on FCA and Internal Investigations**
  – Individuals as defendants: separate counsel, taking the fifth, joint defense agreements
  – Potential *de facto* waivers of privilege and work product
  – Self-disclosure of criminal conduct
False Claims Act

• FY 2016 Statistics
  – $4.7 billion recovered
  – 845 new suits filed

• Supreme Court Issues Landmark Decision in *Escobar*
  – Upheld implied certification theory and articulated amorphous materiality standard that leaves significant room for interpretation
  – Early application of materiality standard in lower courts

• Higher Penalties Increase Leverage for Government and Relators Alike
Convergence of ethics and compliance & other fields

- **Labor & Employment:** *Whistleblower reprisal* matters may require teamed labor/employment and government contracting expertise and overhang from failed Fair Pay causes more *intra-government communication re labor issues* and requires further proactive communication from contractors; increased *DoL debarment* efforts.

- **White Collar & Investigations:** *Parallel proceeding risk* increasing with continued emphasis on companies and individuals facing multiple enforcement inquiries.

- **False Claims Act and Disclosures Collateral Consequences:** SDOs involved rapidly in FCA cases, and continuing involvement after disclosures – consider parallel proceeding and debarment risk early.

Disclosure regime expands – MDR, counterfeit parts, TIP, data breach, etc., with broad benefits/reduced regulatory interest when “fronting” matters to the government rather than reacting.
Cybersecurity and Privacy

• Continuing impacts from 2016
  – Finalization of DFARS 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting (OCT 2016)
  – Implementation of DSS insider threat program

• What to watch for in 2017
  – Pending FAR case regarding controlled unclassified information (CUI) and agency-specific implementation
  – Recent focus on personally identifiable information (PII)
    • OMB M-17-12, Preparing for and Responding to a Breach of Personally Identifiable Information
    • FAR 52.224-3, Privacy Training (JAN 2017)
Small Business

- Rollout of New All Small Mentor-Protégé Program
  - Vastly expanded eligibility with same benefits as original 8(a) MPP
  - Competition and race for the best teammates
  - Streamlined electronic application process – current approvals issued on average in 8 days!
  - Challenges/Questions on new MP joint ventures

- Challenges During of Period of Uncertainty with New Limitations on Subcontracting and Credit for Lower-Tier Subcontractors
  - Effective June 30, 2016, SBA overhauled the method of calculating compliance with LOS but FAR 52.219-14 still unchanged
  - Effective January 23, 2017, SBA’s regulations allow credit for lower-tier subcontractors on individual subcontracting plans but FAR 52.219-9 still unchanged
  - Requesting pre-proposal guidance and clarification is essential

- Stricter Enforcement of Subcontracting Plans
  - Impact of new notice requirements to subcontractors and “whistleblower” provisions
  - Potential for rise in imposition of liquidated damages?
  - Implications for past performance evaluations
  - Evolving case law and potential for FCA actions

Amy O’Sullivan
202-624-2563
aosullivan@crowell.com

Olivia Lynch
202-624-2654
olynch@crowell.com
Data Rights

• NDAA for FY 2017
  – Walks back some of changes from NDAA for FY 2012
  – Promotes use of modular open system architecture
  – Deferred ordering
• Proposed amendments to Bayh-Dole regulations
• Impact of new IR&D procedures
Bid Protests

• **2016 GAO Statistics & Implications for Protesters**
  – More sustained protests (22.56%), similar overall effectiveness (46%)
  – Less ADR, less corrective action?

• **Key Issues Worth Monitoring**
  – Mid-procurement corporate changes
  – Keeping track of key personnel
  – Awardee standing to file protests

• **Legislative Developments**
  – Task Order jurisdiction
    • Civilian task order jurisdiction made permanent
    • DoD threshold increased ($25 million)
  – Other changes on the horizon?

Dan Forman
202-624-2504
dforman@crowell.com

James Peyster
202-624-2603
jpeyster@crowell.com

Rob Sneckenberg
202-624-2874
rsneckenberg@crowell.com
What Will the New Year Bring: Top Headlines, Headaches, and Developments for Government Contractors to Watch In 2017

January 25, 2017

Thank you for joining us!