

5 Issues Gov't Contractors Need To Know About In 2015

By **Daniel Wilson**

Law360, Washington (January 07, 2015, 9:41 PM ET) -- The federal government will continue its rigorous enforcement efforts and its push for more access to private contractor data in 2015, creating a diverse range of challenges that government contractors should be aware of, attorneys say.

Here are some of the issues federal contractors should pay attention to in 2015, Crowell & Moring LLP attorneys said in their preview of the year ahead.

Congress Clashing With the White House

With the Republican Party now in control of both the House and the Senate, government contractors should be on guard for a potential series of “epic battles” between lawmakers and the White House that are unlikely to leave them unscathed, according to Crowell & Moring government contracts group co-chair Angela Styles.

Federal contractors should start preparing now, Styles said — especially those in industries related to areas where lawmakers and the administration are likely to clash, such as the Affordable Care Act, defense contracting and cybersecurity.

Although the White House has limited tools to effectuate changes without the support of Congress, one area where it has broad authority is in federal procurement, Styles noted. As such, contractors should expect significant movement on rules stemming from recent executive orders, including the “Fair Pay and Safe Workplaces” order.

The order would require contractors to disclose certain labor law violations going back three years, and a notice of proposed rule-making is expected sometime this year.

This potential rule should be of particular concern, as it is likely to be a “reporting nightmare” that imposes a host of requirements on contractors, despite recent administration efforts to improve efficiency and cut back on red tape, according to Styles. As such, contractors should be prepared to engage strongly in the rule-making process to try to shape any eventual rule, she noted.

“If issued as listed, it’s likely to bring the procurement system to a halt,” Styles said.

More executive and agency action affecting government contractors is also likely to emerge as the

Obama administration winds down, according to labor and employment group chair Kris Meade. For instance, an expected notice of proposed rule-making could more than double the current white collar overtime exemption threshold from around \$23,000 to about \$50,000.

Contractors should also take note of a recent compliance review scheduling letter issued by the Office of Federal Contract Compliance Programs that has largely flown under the radar, counsel Rebecca Springer said.

Under the letter, which relates to affirmative action obligations for veterans and the disabled, contractors and other employers will be open to much more audit risk. They will need to break down adverse impact data more granularly, by racial subgroup and by individual levels of compensation, further split into base pay, bonuses and other pay components.

Backlogs at the DCAA

While the Defense Contract Audit Agency pointed out last year that it had significantly cut into its incurred cost audit backlog — which had been building since changes made in 2009 — the DCAA still has thousands of cases to get through, and the pressure on the agency to resolve outstanding cases won't go away, according to associate Skye Mathieson.

The agency has proposed a range of strategies to make inroads, such as offloading some audit functions to the Defense Contract Management Agency or trying to cover multiple audit years through a single audit, using methods such as extrapolation. This could be good news for contractors, but it will depend on the implementation, Mathieson noted.

The DCAA may also see the pressure on it eased by a recent Federal Circuit decision involving a contract dispute between the federal government and Sikorsky Aircraft Corp. that found that contractors and the government can mutually agree to toll, or even waive, the six-year statute of limitations under the Contract Disputes Act, potentially preventing some DCAA appeals cases and other litigation from needing to go ahead at all, attorneys say.

“[This is] good news for contractors,” Mathieson said.

Defective Pricing Claims, Procurement Fraud Claims and Bid Protests

But even as the DCAA attempts to lighten its load, defense contractors should steel themselves for the aggressive pursuit of defective pricing claims through litigation and audits, with the government likely to assert a range of “radical” theories and to test the limits of the statute of limitations by pursuing a range of stale claims, partner David Bodenheimer said.

“Expect bigger, badder and uglier defective pricing auditing and claims,” he said.

The average value of claims asserted in recent years had taken a sharp upswing, and commercial pricing determinations are increasingly under attack, according to Bodenheimer, who said the government is likely to continue with its “hyperaggressive” stance.

With many defective pricing cases stemming back to 2008 and 2009, contractors should be vigilant on statute of limitations issues, as the DCAA and contracting officers are likely to test the limits, Bodenheimer said.

Procurement fraud claims have also ticked up, with a record \$5.69 billion False Claims Act haul in fiscal year 2014, much of this on the back of a series of huge housing and mortgage fraud claims, partner Bob Rhoad noted.

This heightened fraud scrutiny should continue in 2015, as the government and qui tam relators have shown they are prepared to pursue so-called indirect false claims where no actual loss occurred, according to counsel Tully McLaughlin.

“The government and relators continue to push the bounds,” he said.

On the upside, while the number of qui tam actions have risen over the last five years, their rate of success where the government decides not to intervene — about 2 percent — has not, Rhoad said.

Also, while the government has strongly pursued defective pricing and fraud claims, it has eased back on fighting strong bid protests over the past several years, which contractors should take into account when preparing their own protests, according to partner Tom Humphrey and counsel James Peyster.

Where contractors have made well-written, meritorious protests, the government has been far more willing to take early corrective action and not defend such claims deep into the process, meaning contractors don’t necessarily have to assume a six-figure bill as par for the course, Peyster claimed.

“The financial calculus has changed,” he said. “Early adjustment is far less expensive.”

Compliance, Security and Ethics Programs

Senior U.S. Department of Justice officials have made clear recently that the agency looks favorably upon strong compliance programs as a mitigating factor when it pursues action against companies, and contractors would be wise to give careful attention to this advice, partner Peter Eyre said.

The DOJ looks for factors such as periodic risk-based reviews that reflect changes to the company or the environment in which it operates, Eyre noted. It also considers whether compliance and ethics groups are independent from other business functions and whether the company has an “unmistakable” focus on ensuring culpable individuals are held responsible.

This vigilance should extend to international operations, given a recent spate of Foreign Corrupt Practices Act actions by the DOJ, and should encompass the contractor’s supply chain, according to partner Alan Gourley and counsel Addie Cliffe.

Further, contractors should pay close attention to the hot-button topic of cybersecurity and cyber-risk, according to privacy and cybersecurity practice leader Evan Wolff. A number of regulatory and legislative changes took place in 2014, including a “flurry” of related federal laws passed toward the end of the year, and Wolff predicts an increased focus on the issue from the government in 2015.

A key question will likely be how contractors and other companies can voluntarily share risk information without opening themselves to liability, as well how they can mitigate cyber-risk throughout their supply chains, Wolff said.

Data and Intellectual Property Rights Protection

More movement is also expected on regulations stemming from the 2012 National Defense Authorization Act regarding the intellectual property protections of contractors, which should be vigilant in trying to minimize the erosion of their IP and data rights, associate Joelle Sires said.

The NDAA provision, designed to protect the Pentagon from the risk of “vendor lock” and to increase competition, would require contractors to give up certain technical data and rights, but the government has yet to make clear how broad its implementation will be. Would-be contractors may be forced to effectively cough up confidential business data to competitors if they want to bid on government contracts, attorneys said.

“The devil is in the details — I think [the government] will overreach,” partner John McCarthy said.

McCarthy noted, however, that contractors that have chosen to pursue claims against the U.S. to protect their IP rights have had some recent success. Conglomerate Honeywell International Inc. won a \$75 million settlement last year, after alleging the government infringed a night-vision goggle patent.

--Editing by Kat Laskowski and Edrienne Su.
