What Will the New Year Bring?

Top Headlines, Headaches, and Legal Developments for Government Contractors to Watch in 2012

Crowell & Moring
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Policy and Procurement Climate

» **Tightening the Purse Strings**
  - Less business; program cuts and terminations; price competitions; lower valuations; plant closings; and lay-offs

» **Tightening the Screws**
  - Fixed-price; onerous terms and risk allocation; audit scrutiny and payment withholds; cost challenges and government claims

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Policy and Procurement Climate

» Intensifying Investigative Risk
  – IG influence; aggressive suspension & debarment and more “fact-based” referrals; disclosures and certifications – express and implied; false claims without fraud

» More Regulation
  – Especially labor and employment

» Dysfunctional Acquisition System
  – Especially wartime demobilization chaos

» In Sum
  – More risk, less reward, and massive challenges for contractors
Terminations

» Terminations and Descopes
  – Greater risk
  – Underperforming programs at greatest risk

» Terminations for Default
  – Government looking for any possible basis to terminate for default, rather than terminate for convenience, in order to save costs

» Increased Risk of Terminations in Contingency Environment
  – Foreign government’s input
  – Shifting political environment creates more unpredictability
Disclosures, Suspension, and Debarment

» Recent Administrative Developments
  – GAO Report finding that many agencies did not have robust suspension and debarment programs
  – OMB directive to agencies to implement effective suspension and debarment programs

» Enforcement Efforts
  – Recent suspension and debarment statistics show an uptick in enforcement activity

» Legislative Initiatives
  – FY2012 Consolidated Appropriations Act
  – Pending legislation
Costs and DCAA

» Pension Harmonization Act
  - Near-term implementation challenges will include revisions to disclosure statements and adjustments to forward pricing rate agreements, while long-term tasks will include equitable adjustment requests

» Business System Reviews
  - DCAA and DCMA will continue reviewing and auditing contractors’ business systems

» Hot Audit Topics
  - Likely audit focus will include lobbying and associated costs and the commerciality of contracts and subcontracts
OCIs and Unfair Competitive Advantage

» COFC/Federal Circuit Protests
  – Deference to contracting officer determinations

» GAO Standard of Review

» Proposed OCI Rule Likely to be Finalized
  – Possible substantive changes include revised definition of OCI, greater acceptance of mitigation measures in impaired objectivity and biased ground rules settings
  – Possible procedural changes include tightened standard on agency OCI waivers and new obligations for pre-award and post-award OCI disclosures
Personal Conflicts of Interest

» New FAR Provision
  - Preventing personal conflicts of interest for contractor employees performing acquisition functions
  - Expansion of coverage is widely anticipated

» New DFARS Provision
  - Representation relating to post-employment restrictions for former DoD officials
Grants

» Annual Grants Expenditures Exceed Procurement Funding
  – Agency Inspector General interest high (see work plans, recent enforcement actions)
  – Congressional interest high (some even directing agencies to suspend/debar)
  – DOJ interest high (FCA theories abound)

» Action Items
  – Identify where the grants work sits in the organization
  – Add “grants risk areas” to the corporate compliance program
  – Ensure legal department attention
Small Business

» Continued Focus on Enforcement
  – Increased scrutiny of applications for program admissions – delays; denials; protests; investigations; and sanctions

» Large Businesses Implementing own Audit Mechanisms
  – Consequences too great to rely on small business representations and knowledge of the requirements

» Regulatory Developments on the Horizon
  – Final Rule re Subcontracting Plan Requirements
  – Final Rule re Small Business Jobs Act of 2010
OFCCP

» Revised Scheduling Letter
  – Submission of individualized compensation data and personnel activity data by job title for each ethnicity; increased expense and exposure

» Revised Section 503 and VEVRAA Regulations
  – Data collection and utilization goals similar to AAP for women and minorities; highly prescriptive

» Proposed Compensation Tool
  – EO Survey redux, with enhanced consequences
Data Rights

» Changes to the Treatment of Commercial Items
  – Reversal of presumption of development at private expense for non-COTS commercial items relating to major systems

» Recent Statutory Changes
  – Adds new exception to rule of non-disclosure for limited rights technical data
  – Authorizes regulations allowing USG to require delivery of tech data “that has been generated or utilized in the performance of a contract,” provided that certain pre-requisites are met
  – Extends USG’s challenge period to 6 years
  – Rolls back changes from FY 2011 NDAA which revised treatment of IR&D and B&P funds
  – Gives USG government purpose rights in mixed funding tech data, except where SECDEF decides that negotiation of different rights is in USG’s best interest

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Bid Protests

» **GAO Trends**
  - Growth trend ends in 2011
  - Sustain rate is down
  - Impact of budget cuts on protests in 2012

» **New Legislation on Task Order/Delivery Order Jurisdiction**
  - Congressional extension of GAO’s jurisdiction over Task and Delivery Orders over $10 million
  - Restores jurisdictional parity over civilian and DoD task order protests; COFC jurisdiction ends

» **Substantive Developments**
  - Insourcing protests
  - Potential new protest issues
Cyber Security

» **Exploding Cyber Threats**
  - $1 trillion economic losses, escalating breaches, & “digital Pearl Harbor” (Defense Sec. Panetta)

» **Expanding Corporate Disclosure Duties**
  - SEC rules on disclosing cyber risks, breaches, and compliance programs (Oct. 2011)

» **Tightening Regulatory Regimes**
  - GSA, DoD, VA, and other agencies imposing tougher cyber duties with greater risks for noncompliance (debarment, default, & more)
International

» **Domestic Preference Restrictions**
  - New WTO GPA
  - New thresholds
  - Continued threat of new restrictions
  - More enforcement

» **Sanctions**
  - Expansion: Iran & Syria
  - Retrenching: Libya, Myanmar?

» **Export Control Reform**
  - Proceeding apace on redefining line between USML and CCL
  - Brokers & Defense Services

» **Anti-Corruption**
  - Dodd-Frank effect
  - UK Bribery Act effect
Procurement Fraud

» FCA Settlements and Judgments
  – Trends in DOJ’s multi-billion dollar machine

» OIG Priorities in 2012
  – What to watch out for

» Implied Certification Theory under the FCA
  – Will the Supreme Court resolve the circuit split?

» Beyond the FCA
  – Criminal exposure extended to foreign lands by way of government contracting

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