

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



Stan Johnson
202-624-2520
wjohnson@crowell.com

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



Stan Johnson

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



Robert Nichols
202-624-2541
rnichols@crowell.com



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

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



Angela Styles
202-624-2901
astyles@crowell.com

» Enforcement Efforts

- Recent suspension and debarment statistics show an uptick in enforcement activity



Bob Wagman
202-624-2507
rwagman@crowell.com

» 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



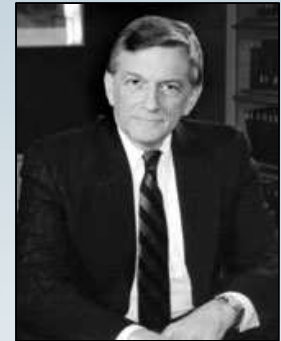
Terry Albertson
202-624-2635
talbertson@crowell.com



Cathy Kunz
202-624-2957
ckunz@crowell.com

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



Tom Humphrey
202-624-2633
thumphrey@crowell.com



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

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



Peter Eyre
202-624-2807
peyre@crowell.com

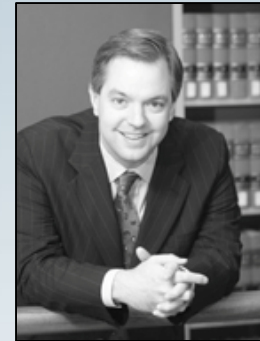
Grants

» 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

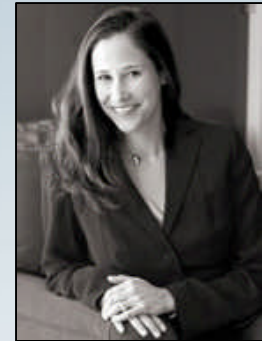
- Identify where the grants work sits in the organization
- Add “grants risk areas” to the corporate compliance program
- Ensure legal department attention



Richard Arnholt
202-624-2792
rarnholt@crowell.com

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



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

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



Rebecca Springer
202-624-2569
rspringer@crowell.com

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



John McCarthy
202-624-2579
jmccarthy@crowell.com



Jonathan Baker
202-624-2641
jbaker@crowell.com

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

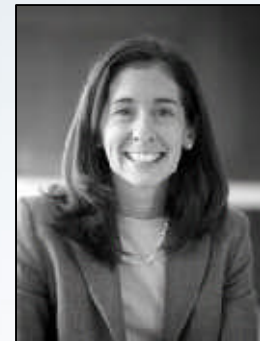
- Congressional extension of GAO's jurisdiction over Task and Delivery Orders over \$10 million
- Restores jurisdictional parity over civilian and DoD task order protests; COFC jurisdiction ends

» Substantive Developments

- Insourcing protests
- Potential new protest issues



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



Sarah Gleich
202-624-2943
sgleich@crowell.com

Cyber Security

» Exploding Cyber Threats

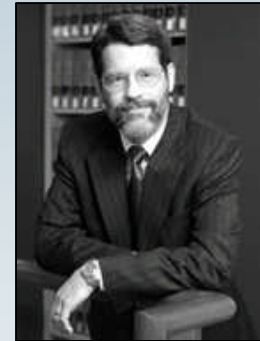
- \$1 trillion economic losses, escalating breaches, & “digital Pearl Harbor” (Defense Sec. Panetta)

» 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)



David Bodenheimer
202-624-2713
dbodenheimer@crowell.com

International

» Domestic Preference Restrictions

- New WTO GPA
- New thresholds
- Continued threat of new restrictions
- More enforcement

» Sanctions

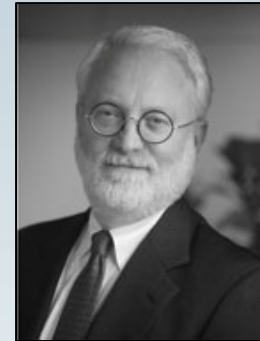
- Expansion: Iran & Syria
- Retrenching: Libya, Myanmar?

» Export Control Reform

- Proceeding apace on redefining line between USML and CCL
- Brokers & Defense Services

» Anti-Corruption

- Dodd-Frank effect
- UK Bribery Act effect



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



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

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



Andy Liu
202-624-2907
aliu@crowell.com



**Brian Tully
McLaughlin**
202-624-2628
bmclaughlin@crowell.com

Contacts		
Terry Albertson 202-624-2635 talbertson@crowell.com	Richard Arnholt 202-624-2792 rarnholt@crowell.com	Jonathan Baker 202-624-2641 jbaker@crowell.com
David Bodenheimer 202-624-2713 dbodenheimer@crowell.com	Addie Cliffe 202-624-2816 acliffe@crowell.com	Peter Eyre 202-624-2807 peyre@crowell.com
Daniel Forman 202-624-2504 dforman@crowell.com	Sarah Gleich 202-624-2943 sgleich@crowell.com	Alan Gourley 202-624-2561 agourley@crowell.com
Chris Haile 202-624-2898 jhaile@crowell.com	Thomas Humphrey 202-624-2633 thumphrey@crowell.com	Stan Johnson 202-624-2520 wjohnson@crowell.com
Cathy Kunz 202-624-2957 ckunz@crowell.com	Andy Liu 202-624-2907 aliu@crowell.com	John McCarthy 202-624-2579 jmccarthy@crowell.com
Brian McLaughlin 202-624-2628 bmclaughlin@crowell.com	Robert Nichols 202-624-2541 rnichols@crowell.com	Amy O'Sullivan 202-624-2563 aosullivan@crowell.com
James Peyster 202-624-2603 jpeyster@crowell.com	Rebecca Springer 202-624-2569 rspringer@crowell.com	Angela Styles 202-624-2901 astyles@crowell.com
Robert Wagman 202-624-2507 rwagman@crowell.com		