

## What Does 2013 Have In Store for Government Contractors and Their Lawyers?

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It has been noted, the more things change, the more they stay the same. In the world of Government Contracts Law, however, the more things change, the more the phone rings. And while we're only a few weeks into 2013, the phone has been ringing off the hook. Here are a few of the reasons why.

**The Government's anti-contractor bias continues unabated.** From the moment President Obama stepped into office, his executive team made clear their distrust of defense contractors. Indeed, one of OMB's first public pronouncements focused on curbing perceived rampant contractor fraud. Shortly thereafter, Congress passed the *Close The Contractor Fraud Loophole Act*, certainly not the title one gives to an Act intended to extoll the virtues of the long and critical partnership between Government and industry. In late 2008, the Government continued down the anti-contractor path when it created what is known as the *Mandatory Disclosure Rule*, a regulation that requires contractors to self-report "credible evidence" of an extremely broad list of potential wrongdoing. The purported rationale for the rule? The Government's belief that contractors were affirmatively hiding their fraudulent activities from the Government. Putting aside for a moment the many flaws in the Government's apparent view that contractors generally are not to be trusted, the fact is the anti-contractor bias remains strong in 2013 and shows no signs of abating.

**Increased enforcement activities.** Tied closely to the Government's view that contractors are not to be trusted, is the Government's ever-increasing efforts to police those contractors more aggressively. Like 2012 before it, 2013 is poised to see increases in federal audits, investigations, and False Claims Act lawsuits. DCAA, the Defense Department's primary audit watchdog, for example, continues to reach new levels of aggressiveness. As one commentator put it not long ago, the DCAA "is out of control." Suspensions and debarments also are likely to increase in 2013. The President has directed federal agencies to make better use of the suspension/debarment process, and the OMB is making sure the President's direction is implemented. It would be naïve, of course, to think this increase in enforcement activity is due solely to a mistrust of contractors. The Government's collection of \$4.9 Billion (yes, that's Billion with a B) in False Claims Act settlements and recoveries in 2012 no doubt feeds the Government's view that contractors need more policing, and fuels the arguments of the enforcement community that they need to be more, not less, aggressive.

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**Shrinking pots of money mean more bid protests.** The number of bid protests (that is, disputes between a contractor and an agency over the non-award of a federal contract) has increased every year since 2008. In 2008, 1,652 actions were filed with the General Accountability Office (GAO), the primary arbiter of procurement award disputes. That number steadily increased to 2,475 in 2012. Whether or not that number will rise again in 2013 remains to be seen, but the likelihood that larger award decisions will be protested by a disappointed bidder will increase. As federal opportunities become fewer, the competition for those that remain almost certainly will heat up. In short, some companies simply cannot afford not to protest.

**The Government will take more work in-house.** With shrinking budgets and the elimination of programs, the Government will bring more work in-house in 2013 to maintain their internal funding levels and workforce headcounts. The move to in-sourcing will be advocated by Government labor “unions” and supported by the Democratic administration. See, e.g., Subtitle C of Title III of the National Defense Authorization Act for Fiscal Year 2012. This won’t just be in-sourcing of traditional Systems Engineering and Technical Assistance (SETA) work and weapons depot work, but will extend to major weapon systems repairs and overhaul, as well as design, development, and implementation of major Government software system upgrades. We also likely will see that Government engineering centers and laboratories will move to keep in-house significant research and development funding and activities. These efforts will have an obvious significant impact on contracting opportunities available to private companies, large and small.

**The Government will become more aggressive with respect to securing intellectual property.** As a consequence of bringing more work in-house, the Government will need the intellectual property necessary to perform that newly in-sourced work. As a result, 2013 likely will manifest an acceleration of recent trends to a more confiscatory Government policy regarding rights in data, including patents and copyright. Regardless of the standard rights in data delineated in applicable regulations and contract clauses, in connection with the solicitation of contracts for major programs, the Government will seek to obtain, at a minimum, a Government Purpose Rights License not only to data first produced or developed under the contract but also to a significant portion of all data used in the performance of the contract. Definitions of “Commercial Items” will be narrowed, expanding the Government’s rights in data, including software. Formal challenges to current contractor claims of data rights will increase. And, unfortunately, in some instances, contractor intellectual property simply will be used by the Government, with the propriety of the use left to be determined by years of litigation.

**Greater competition for fewer dollars will prompt industry consolidation.** The reduced number of contracting opportunities will have many collateral impacts on the Government contracting community and their legal advisors. As occurred with the end of the “cold war,” there likely will be an upswing in industry consolidation. With a reduction in funding and new programs available to contractors, the industry base will need to shrink. Some commercial and “dual use” companies simply will abandon the market. Others, with shrinking backlogs, will seek strength and economies through corporate combinations or “spin-offs.” Some companies, particularly smaller companies, will be targets of acquisition because of their success in winning large or significant program contracts. A business that wishes to be the leader in a particular technology may well need to acquire the winning competitor of the next and only large, long term contract involving that technology.

**The increased pressure that comes with increased competition will cause some to stray.** While the federal contracting community is, far and away, one of the most self-policed industries in the country, every industry has its exceptions. While most contractors will assess the new environment and adapt their business strategy accordingly, some will bend to the new fiscal pressures and adapt

their strategies in more reckless ways. When contractor managers and employees see their livelihoods hitched to the success of the next proposal submission, some will do foolish things – some will seek inside information regarding the procurement, seek proprietary information about their competitors, provide false information to support their offer such as “inflated” resumes or product performance claims, and any number of other prohibited activities. In short, some people do pretty stupid things when they are under pressure. Fortunately, these events are the exception rather than the rule, but companies cannot afford to take any chances. If contractor leadership is not extremely vigilant and committed to internal integrity and compliance, the increased audits and investigations described above may well negate all efforts to be successful in the new smaller, Government contracting market.

**Contractors continue to embrace ethics and compliance as a core element of success.** Years ago, the implementation of an in-house ethics and compliance program was viewed by many contractors as a necessary evil; something needed to keep the lawyers happy, but rarely embraced by the “revenue generators.” Over the last 5-10 years, however, there has been a cultural shift among contractors. Contractors now embrace the benefits of an effective ethics and compliance program. Codes of Conduct are the rule rather than the exception. Training programs are standard fare for Government contractors. While the Government can take some credit for this evolution – there is nothing like a few multi-million dollar False Claims Act settlements in your industry to highlight the importance of compliance – contractors also deserve much of the credit for embracing the benefits of such programs. As the Government’s enforcement activities become more and more aggressive, one can expect to see a continued increase in the roster of Company’s embracing the benefits of an effective internal control system and ethics/compliance program.

In short, we are reminded of an observation provided by an astute securities law school professor who noted: When the stock price of a company goes up, stock sellers will sue the buyers. When the stock price goes down, the buyers will sue the sellers. When the stock price remains the same, each will sue the other. Government contracting is a challenging market. Challenges exist in up-times and they exist in down-times. They likely will be different challenges from year to year, but challenges always are present. The astute contractor understands this and guides the organization accordingly.

The 2013 market clearly counsels in favor of enhanced care in the pursuit of new business. With respect to new solicitations, assure that the proposed terms and conditions and the statement of work/specifications are reviewed carefully and risks identified. Assure decisions to accept risk are fully informed and made at an appropriate level within the company. Finally, refresh your internal personnel training regarding Government and company rules delineating what are prohibited activities in connection with the submittal of a proposal. And, if all else fails, pick up the phone and give your Government Contracts lawyer a call. You won’t be alone.

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