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**Inside the Minds:
Government Contracts &
Litigation**



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Published by Aspatore, Inc.

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First Printing, 2005

10 9 8 7 6 5 4 3 2 1

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ISBN 1-59622-037-6 Library of Congress Control Number: 2005902272

Inside the Minds Managing Editor, Laura Kearns, Edited by Marissa Berenson

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Government Contracts & Litigation

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The United States government is probably the largest single purchaser of goods and services in the world. The government marketplace combines aspects of the commercial market with aspects of regulated industry and thus is its own unique realm with its own unique rules and regulations.

A government contracts lawyer assists clients in all of their activities in the government marketplace, from contract counseling to mergers and acquisitions with other government contractors to various kinds of litigation. Many clients are commercial companies that also do business with the government. An important element in representing these companies is ensuring that they understand the critical differences between the commercial market and the government market. It is essential that these clients understand the significance of the representations they make and commitments they undertake when they enter into a contract with the government. As I've advised many clients, what would be a run-of-the-mill business dispute in a commercial setting can turn into a civil, or even criminal, fraud case in the government marketplace. Similarly, what would be acceptable marketing activities with regard to commercial customers may be strictly prohibited when dealing with the government.

Among the ways that I help my clients avoid such problems by helping them develop effective compliance and training programs that ensure that they understand the intricacies of doing business with the government and can spot issues as they arise. These programs cover such topics as gifts and gratuities, cost or pricing requirements, procurement integrity, and revolving door issues.

Working with Clients

The clients of a government contracts practice group fall into two broad groups: companies that are "dedicated" government contractors, in that almost all of their business is with the federal government (e.g.,

aerospace companies); and commercial companies that also do business with the government (e.g., information technology or biotech companies). The former group of clients generally has a better understanding of the unique regulatory aspects of the government market, but often they are too set in their ways to attempt new and creative approaches to succeeding in the government marketplace or resolving disputes with the government. A challenge with companies that are more familiar with the commercial marketplace is to ensure that they have in place the processes necessary to ensure compliance with the significant regulatory burdens that are involved with being a government contractor.

Commercial companies that are new to the government contracting often fails to understand the important differences between selling goods and services to commercial customers and to the government. The biggest mistake a company in the government marketplace can make is presuming that doing business with the government is the same as doing business with a commercial company. Activities that are a normal part of the commercial marketplace can lead to dire consequences for a government contractor. The government can bring to bear a range of significant sanctions--allegations of civil and criminal fraud; suspension and debarment--that do not exist in the commercial marketplace.

For example, many commercial companies seek to sell their products to the government through the General Services Administration's Federal Supply Schedule program, which involves government-wide contracting mechanisms. These contracts essentially require the contractor to provide the government with its best commercial prices and terms. The GSA Office of Inspector General often will audit a contractor's compliance with this requirement, so the contractor must have systems in place to demonstrate compliance after-the-fact. In the commercial context, failure to comply with a "most favored customer" contract clause can lead to breach of contract litigation. However, the

government possesses a much greater arsenal of weapons. In many instances, the government will assert that pricing problems rise to the level of civil or even criminal fraud. Penalty provisions under the civil False Claims Act include treble damages and other provisions that can lead to a damages claims that is vastly greater than the amount of any alleged overpricing. And the government can seek to have the contractor suspended from receiving new government contracts while the pricing dispute is pending.

An attorney will assist clients in the following areas of government contracts and litigation:

Contract counseling involves day-to-day advice to clients on various aspects of government contracts law. Areas of counseling include assisting clients in understanding the intricacies of government contract clauses and advising clients on the legal and regulatory requirements that apply to their work. For example, in a GSA Federal Supply Schedule contract, it would be important to ensure that the client understood the pricing requirements of the contract.

Contract disputes involve representing clients in such areas as bid protests (either as the awardee seeking to sustain the award or the protestor seeking to overturn it) or claims litigation (either by or against the government or by or against another company as to which the client is a prime contractor or subcontractor). Major issues in protests generally involve the adequacy of the government's technical or price evaluations of the various proposals. Claims litigation generally involves the adequacy of the contractor's performance and whether the government forced the contractor to provide performance beyond the requirements of the contract.

Compliance involves assisting clients to develop policies and processes that seek to ensure compliance with the numerous statutory and

regulatory requirements that apply to a government contractor. Work in this area includes creating a compliance systems for clients; conducting compliance training for the client's employees; conducting regular compliance reviews; investigating allegations of wrongdoing that arise in conjunction with compliance reviews; advising clients whether to voluntarily disclose potential wrongdoing to the government; and representing clients in government enforcement proceedings that may arise.

Representation in enforcement proceedings involves a broad range of multifaceted activities. For example, an agency's Office of Inspector General (IG) may undertake an investigation of a client's contracting activities in response to a "whistleblower" complaint or as part of an agency initiative focused on a particular contracting practice (e.g., whether the contractor has complied with the price reduction clause in its GSA schedule contracts). Government contracts counsel will assist a client in responding to an IG investigation with regard to document production, employee interviews, and other activities. If an IG investigation discovers evidence of wrongdoing, the matter can proceed in a variety of fashions. The agency contracting officer may seek remedies under the contract (e.g., a refund of overcharges or termination for default), or the agency's debarment official may seek to suspend or debar the company from receipt of future government contracts. Government contracts counsel is involved in arguing the client's position, either with the contracting officer, the debarment official, or both. In some instances, counsel will represent the client in a formal debarment hearing. At the same time, the Department of Justice (DOJ) may consider bringing a civil fraud case against the company or, if the conduct rises to that level, a criminal case. Government contracts counsel is involved in attempting to persuade DOJ that the company's conduct does not warrant fraud actions, or in defending such actions if they are brought. In some instances, the matter involves a *qui tam* case brought in the name of the government by a whistleblower. In those

cases, the whistleblower is allowed to proceed with the litigation even if the DOJ chooses not to intervene, and government contracts counsel will defend the case.

One of the challenges for government contracts counsel is that the matter may involve several of these activities at the same time--the contracting officer may be seeking a refund, the debarment official may be considering suspension or debarment, and the DOJ may be conducting a fraud investigation. Part of the job of a government contracts lawyer is to manage, and successfully resolve, the various aspects of the case.

The government's overall enforcement priorities change over time. Recent areas of focus have included pharmaceutical pricing (the U.S. government likely is the largest single purchaser of pharmaceutical products in the world) and defense spending related to the war in Iraq.

Mergers and acquisitions involving government contractors require special care and attention, because the purchaser generally is viewed as "inheriting" the problems that may exist under the seller's government contracts--and such problems may "infect" the purchaser's government contracts business in ways that could jeopardize the purchaser's survival. Therefore, it is important to have government contracts counsel conduct specialized due diligence of a seller's government contracts and prepare representations and warranties that specifically address the risks involved with government contracts. In due diligence, government contracts counsel will focus on the key areas of risk under the seller's contracts -- which generally include pricing and performance issues. In addition, government contracts counsel often will assist a client after a transaction closes in determining whether novations are necessary and, if so, assisting in obtaining the novations.

Defending Government Litigation Cases

Government contracts cases brought by the government fall into two general categories: contract disputes and enforcement proceedings. Contract disputes include government claims for financial recovery (e.g., a claim for liquidated damages because a construction contract was not completed on time) or a termination for default. In such cases, it actually is the contractor that initiates litigation to challenge the government action. The contractor has the choice of litigating the case before a board of contract appeals (BCA) or the U.S. Court of Federal Claims (CFC). Government contracts counsel helps the client make this choice, by investigating and understanding the nature and history of the dispute. Once contract disputes litigation has begun, either before the BCA or the CFC, the case proceeds through traditional discovery, motions practice, and non-jury trial. Developing a strategy in either forum requires a thorough understanding of the nature of the contract, the allegations underlying the government's claims, and the client's responses. Often, government contracts counsel must understand the requirements of the contract almost as well as those who are performing the work, because success often depends upon presenting the intricacies of performance in a clear and coherent fashion.

Government enforcement actions proceed in the manner described above. Because the stakes in an enforcement action usually are high, it is essential that government contracts counsel develop a full understanding of the underlying facts as soon as possible. Equally important, counsel must determine the overall scope of the government actions--is it limited to an agency proceeding? Is the debarment official involved? Is DOJ involved? The earlier that counsel is brought into the matter, the more likely counsel will be able to shape a resolution that involves all of the possible players on the government side.

Most cases involving claims by the government, whether contract disputes or enforcement actions, are settled before trial. Because contract disputes generally involve claims for monetary recovery,

compromise usually is possible, although not usually at as early a stage in the litigation as in a commercial dispute. This is because government counsel, particularly in the CFC, often will want to conduct significant discovery before discussing settlement of a case. The tools of discovery in a government contracts case essentially are the same as in other federal litigation – document requests, interrogatories, depositions, and the like. However, in contrast to many private parties, the government is less likely to agree to an early settlement of a case; settlements must be approved through a formal process, and in most instances government counsel will not proceed with the process until he/she has conducted significant discovery.

Enforcement actions also generally are settled before trial, because of the enormous risks a contractor faces in prolonged enforcement litigation. Damages in a False Claims Act (FCA) case can be very large, and the threat of suspension or debarment during the pendency of an FCA case can threaten to put a contractor out of business.

In both contract disputes and enforcement litigation, the contractor generally is the party that initiates settlement discussions with the government. Settlements with the government are subject to various levels of approval within the Justice Department, which generally requires a detailed justification for the settlement terms. Counsel for the contractor can help facilitate the approval process by preparing a written summary of its position in the case, which government counsel can use in preparing her/his memorandum seeking approval of the settlement.

Damages

Damages in a contract dispute involving a government claim are measured by the terms of the contract and general principles of contract law. Unless the government is seeking to recover liquidated damages, it must prove the amount of damages it suffered due to the contractor's

conduct. Similar principles apply to contract disputes involving contractor claims for additional compensation. The contractor must demonstrate that the government took action that was not permitted by the contract and that it suffered additional costs or delays because of the government's actions.

Damages in enforcement actions can be vastly more than the government's actual losses incurred because of a contractor's alleged fraud. The civil False Claims Act provides for treble damages (three times the actual losses), plus a penalty for each alleged false claim (and the government will assert, for example, that each invoice submitted under an overpriced contract is a separate false claim).

Another significant potential element of "damages" for a government contractor is suspension or debarment from receipt of future government contracts. The government's ability to suspend a contractor faced with allegations of wrongdoing is an extremely powerful weapon, because the contractor is faced with the loss of revenue from new contracts while defending itself against the government's charges. The threat of suspension or debarment often leads a contractor to seek to settle a case, despite the existence of potentially meritorious defenses to the government's allegations.

Keeping an Edge

Sophisticated government contractors expect their outside counsel to stay abreast of changes both in the government's priorities (either in terms of the goods and services it requires or its areas of enforcement) and in the legal framework through which the government seeks to implement these priorities. For example, the government has increasingly attempted to purchase goods and services, particularly in the information technology area, in ways that take advantage of its sizable buying power. The proliferation of Federal Supply Schedule (FSS) contracts, agency blanket

purchase agreements under FSS contracts, and government-wide acquisition contracts presents contractors with enormous opportunities to expand their government sales, as well as significant risks. Although these seemingly streamlined means of procurement can make it easier for a contractor to sell to the government, these contracting vehicles generally involve various forms of “most favored customer” pricing requirements. As government contracts counsel, one should attempt to understand the government’s changing procurement strategies by studying any available information on the government’s approach--reading available material, speaking to knowledgeable individuals both inside and outside the government, etc. One must also attempt to understand clients’ business interests--what opportunities are they interested in pursuing? Finally, stay on top of changes in the law by reading everything available in the field. Keep clients up to date by any means possible--through telephone calls, letters, training sessions, formal client advisories, and the like.

Ronald Schechter specializes in government contracts, health care, and commercial litigation. He has served as lead attorney on government contract and commercial disputes before the U.S. Court of Federal Claims, federal district courts, various U.S. Courts of Appeal, the General Accounting Office, agency boards of contract appeals, and various alternative dispute resolution forums. Mr. Schechter has extensive experience in bid protests, claims litigation, false claims act cases, and suspension and debarment matters. Prior to joining Arnold & Porter, Mr. Schechter served as a trial attorney for the U.S. Department of Justice, commercial litigation branch. He also clerked for Chief Judge Harold Greene of the Superior Court of the District of Columbia. Mr. Schechter has published the following: "Recovery of Home Office Overhead -- Resurrection of the Eichleay Formula" (co-author), Government Contract Costs, Pricing & Accounting Report, March 1994; "Protecting Confidential Commercial Information from Disclosure

Under FOIA after Critical Mass" (co-author), The Government Contractor, November 17, 1993; and "Retroactive Cost Disallowances: Looking Backward & Ahead" (co-author), Government Contract Costs, Pricing and Accounting Report, July 1993. He is a frequent lecturer and author on various subjects associated with legal ethics and government contracts, and served on the advisory board of the Costs, Pricing and Accounting Report.



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