



GOVERNMENT CONTRACTS

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Sweeping Fraud Investigations Highlight Need for Prevention and Response Plans

Investigation of 18,000 Government Contracts in Kuwait Underscores Continuing Enforcement Trend

As recently announced by the Defense and Justice Departments, the Army's investigation of nearly 18,000 government contracts emanating from the Kuwaiti contracting office is but the latest spike in a burgeoning government criminal and civil fraud enforcement trend that involves domestic and international military and civilian agency contracts. This heightened government scrutiny on federal contracts ultimately affects virtually all current or prospective government contractors and subcontractors -- and those associated with them.

Background

As a result of the reported improprieties, the Kuwait investigations will encompass some \$3 to \$5 billion of contracts for food, supplies, shelter, weaponry and other goods and services provided by hundreds of companies and civilian contractors. Problems with contracts include, among other things, alleged bid rigging, kickbacks, product substitution, defective products, double billing and other schemes. These investigations are expected to target corporate and individual contractors, military personnel, other government employees and local nationals. In addition to some 73 criminal investigations relating to contract fraud and some 20 civilian and military personnel who have been charged with taking over \$15 million in bribes in Iraq, Kuwait and Afghanistan, the government also has been vigorously using its civil fraud and suspension/debarment authorities to proceed against companies and individuals in conjunction with or addition to the criminal efforts. In addition, qui tam cases -- where a private party brings a False Claims Act case on behalf of the government -- have followed the growth trend.

Many of the criminal and civil proceedings involve traditional allegations of graft or defective products. The government and *qui tam* relators,

however, are advancing ever broader theories in fraud matters. For example, recent cases are testing the issue of false implied certifications and another case is based, in part, upon the violation of an expired Organizational Conflict of Interest clause that the contractor failed to challenge in the solicitation.

Mitigation, Defense and Avoidance Plans: Developing the Appropriate Strategy

Under these circumstances, the old Boy Scout motto "Be Prepared" is an understatement. The cost and disruption to a targeted contractor, as well as the potential adverse consequences if such matters are mishandled, are substantial. Taking proper measures in advance and having a game plan for when the "government comes calling" often can help companies and individuals avoid such matters or work toward a favorable resolution. Since every contracting situation is different, it is appropriate for contractors to keep in mind basic guidelines for dealing with possible government investigations. These include:

1. **Look in the Mirror.** If the government appears ready to launch an investigation, it is prudent for contractors to kick-start their own internal investigation into possible fraud or other malfeasance. Typically, the government looks favorably upon companies that do their utmost to uncover weak compliance and possible wrong-doing.

2. **Structure Your Internal Response.** Companies under investigation should develop a best practices strategy for responding to the inquiries and cases that may follow. Three core components of such a strategy involve the company's response team, company personnel, and company documents.

3. **Be Ready for Your External Response.** Contractors should also ensure a best practices response to investigations by being prepared for any eventuality -- be it criminal, civil fraud, or administrative penalty proceedings. An understanding of the legal playing field and appropriate defensive and offensive strategies is vital.

4. **Don't Forget Suspension and Debarment.** Government investigations can take many forms and have multiple facets. A mistake some companies make is to focus solely on one aspect of an investigation while ignoring the possibility of other eventualities such as a follow-on suspension and debarment proceeding brought by the government.

5. Long-Term Planning Investment Can Pay Dividends. Developing a response plan under fire of an investigation is far more challenging and prone to error than one thought out in advance. Similarly, having a compliance plan in place may avoid or limit having to address the harsh realities and potential consequences of a government investigation.

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