

Oversight in Government Procurement: The New Congress & The Justice Department's Enforcement Agenda

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Overview

- Sources of Increased Oversight & Enforcement
- Oversight & Enforcement Priorities
- Growing Reach of the False Claims Act
- Legislative Developments
- Responding to Oversight & Enforcement Actions
- What can contractors do to prepare?

Sources of Increased Oversight & Enforcement

- Key Congressional Committees
- Government Accountability Office
- Inspectors General
- Department of Justice

Key Congressional Committees

- House Committee on Oversight and Government Reform
 - Chair: Henry Waxman (CA)
 - Ranking Member: Tom Davis (VA)
- House Armed Services Committee
 - Chair: Ike Skelton (MO)
 - Ranking Member: Duncan Hunter (CA)
- Senate Armed Services Committee
 - Chair: Carl Levin (MI)
 - Ranking Member: John McCain (AZ)
- Senate Committee on Homeland Security & Government Affairs
 - Chair: Joe Lieberman (CT)
 - Ranking Member: Susan Collins (MA)
- Senate Permanent Subcommittee on Investigations
 - Chair: Carl Levin (MI)
 - Ranking Member: Norm Coleman (MN)

Key Congressional Committees, Cont'd

- House Energy and Commerce Committee
 - Chair: John Dingell (MI)
 - Ranking member: Joe Barton (TX)
- Senate Finance Committee
 - Chair: Max Baucus (MT)
 - Ranking Member: Charles Grassley (IA)
- Senate Judiciary Committee
 - Chair: Pat Leahy (VT)
 - Ranking Member: Arlen Specter (PA)
- House Judiciary Committee:
 - Chair: John Conyers (MI)
 - Ranking Member: Lamar Smith (TX)
- House Financial Services Committee
 - Chair: Barney Frank (MA)
 - Ranking Member: Spencer Bachus (AL)
- WE WILL FOCUS ON FOUR OF THESE

Government Accountability Office

- Congressional mandates
 - Directed by statute, resolution or legislative report
- Congressional requests
 - Requested by Committee Chair or Ranking Minority Member
- Comptroller General's authority
 - Budget and Accounting Act of 1921, 31 U.S.C. § 712(1)
 - Legislative Reorganization Act of 1970, 31 U.S.C. § 717(b)

Inspectors General

- Permanent Executive Agency Inspectors General
 - Governed by Inspector General Act of 1978
 - Department of Defense – IG handles investigations only
 - Civilian Agencies – IG handles both investigations and contract audits
- Temporary Special Inspectors General
 - Special Inspector General for Iraq Reconstruction
 - PCIE ECIE Oversight of Gulf Coast Hurricane Recovery

Department of Justice

- Criminal Division
- Civil Division
- National Procurement Fraud Task Force
- Hurricane Katrina Fraud Task Force

House Oversight and Government Reform Committee

- Note the name change of the Committee
- Recurrent Topics:
 - Iraq and Iraq Contracting
 - Health Care
 - Homeland Security
 - Abuses in Subcontracting
- These subjects were initially explored during hearings the week of February 5, and will be recurrent themes of the Committee.

House Oversight and Government Reform Committee, Cont'd

- In addition, the Committee intends to look into the following areas:
 - Making Government Work Again (looking at agencies such as FEMA)
 - How much of traditional US Government Functions have Been subcontracted to the private sector?
 - Fraud, Waste and Abuse in a range of sectors, including Health care (including Prescription Drugs) and Homeland Security
 - Private Sector Profiteering, both in terms of contracts with the government and also in private sector performance
 - Health and the Environment
 - Energy and Telecom (through Domestic Policy Subcommittee)
 - Legislation in Clean Contracting Act, FOIA and Ethics in Government

Senate Armed Services Committee

- One special project: Detainee abuse and detainee affairs.
- More traditional oversight arenas, though probably more aggressively, including: Contracting and other Acquisition Issues, including Iraq Contracting. (Some hearings in this area already held.)
- Traditional areas of readiness and weapons systems, but expectation of greater committee aggressiveness than in past six years.

Senate Permanent Subcommittee on Investigations

- Follow up on prior hearing on industry practices regarding credit cards fees and interest rates.
- Review of offshore tax havens as a means of tax avoidance
- Role of the “the enablers” of complex financial transactions that seek tax avoidance
 - Roles of law firms, accounting firms and financial institutions
- Energy Pricing
- Money Laundering
- Foreign Corrupt Practices Act compliance

Senate Homeland Security & Government Affairs Committee

- Held a hearing (1/9/07) on and draft and mark-up (mid-February) legislation to implement the un-implemented recommendations from the 9/11 Commission
- Conduct vigorous oversight of the FEMA reinvention passed by Congress and signed into law last year
- Conduct vigorous oversight into Katrina Recovery issues (held a field hearing in New Orleans 1/29/07)
- Conduct vigorous oversight of implementation of Safe Port Act, passed and signed into law last year.
- Conduct vigorous oversight of the DHS (including anticipated hearing today with Secretary Chertoff as main witness)
- Continue to advocate for additional funds for first responders
- Continue to advocate for better security for rail and transit systems
- Investigate biological and radiation/nuclear preparedness
- Conduct vigorous oversight of DHS management integration issues

GAO's Suggested Areas for Congressional Oversight

- Address governmentwide acquisition and contracting issues
 - Contractor roles in a blended workforce
 - Contractor cost, quality and performance
 - Inter-agency contracting
- Ensure fair value collection of oil royalties produced from federal lands
- Monitor and assess corporate financial reporting and related standards for public companies accountability
- Iraq Reconstruction

POGO's Suggested Congressional Oversight Priorities

- Addressing federal contractor misconduct
- Hidden costs of privatizing government
- Executive branch revolving door and conflicts-of-interest
- Whistleblower retaliation
- The black hole that is Pentagon spending
- Excessive secrecy
- Defense spending priorities: supporting the troops or the defense contractors

POGO Cont'd

- Government watchdog and accountability organizations
- Dragging the government out of the Cold War
- Oil and gas drilling on federal and Native American lands
- Who is securing the homeland? Because DHS is not
- Conflicts of interest in scientific research
- And of course: fixing the broken federal contracting system

IG Investigations

- Enhanced cooperation and coordination among IG's and with enforcement agencies
 - Increased focus on Training
 - FBI's coordinated involvement
- Gulf Coast Recovery Oversight
 - Coordinated effort by entire Federal
 - IG community
 - 480 IG personnel
 - Working closely with DOJ Hurricane Katrina Fraud Task Force
- SIGIR conducts both audits and investigations
 - Has 92 open criminal investigations
 - Working closely with DOJ National Procurement Fraud Task Force, USAID IG, US Army CID, DCIS, State IG, and FBI
- DoDIG Criminal Investigations Cover 5 Areas:
 - Terrorism, Product Substitution, Computer Crimes, Illegal Technology Transfers, and Public Corruption
- DoD IG Global War on Terrorism Investigations:
 - 100+ auditors working on Iraq projects
 - 41 active fraud investigations
- Regulatory Involvement
 - Self reporting
 - Conflict of interest
 - Sarbanes-Oxley similarities

DOJ Enforcement Priorities

- Procurement Fraud
 - Iraq
 - International
- Public Corruption
 - Funding
 - Coordination
 - Search for cases

National Procurement Fraud Task Force Priorities

- Defective pricing or other irregularities in the pricing and formation of contracts
- Product substitution
- Misuse of classified and procurement sensitive information
- False claims
- Grant fraud
- Labor mischarging
- Accounting fraud
- Fraud involving foreign military sales
- Ethics and conflict of interest violations
- Public corruption associated with procurement fraud.

Cases Indicted under the National Procurement Fraud Initiative

- Last week, five named in alleged Iraq contracting scam on charges that they steered more than \$8.6m in Iraqi reconstruction funds to a contractor in exchange for kickbacks.
- Potoski: Former US Army Contracting Director accepted bribes from contractors and subcontractors in exchange for contract awards related to work at military location in Europe. Contractors and subcontractors inflated contract prices. Investigated by US Army CID and IRS-CID; prosecuted by Main Justice, Fraud Section.
- Harvey: Kickback in exchange for lucrative contracts awarded. Conflict of interest as Harvey as Chief of Acquisitions Section for the US Army, was offered employment while he was overseeing a contract given to the employer. Investigated by DoD IG, DCIS; prosecuted by Public Integrity Section
- A Saudi Arabian company's employee was charged with having paid kickbacks to a defense contractor employee to secure two military dining subcontracts valued at \$21.8 million. Investigated by IRS, DCIS; prosecuted by Main Justice, Fraud Section.

Growing Reach of the False Claims Act

- Significant growth in the number of actions targeting multiple defendants in a particular industry
- Theories of fraud encompass common industry practices
 - Travel rebates
 - Information technology alliance agreements
- DOJ is pursuing more aggressive theories
 - *E.g., U.S. ex rel Hendow v. Univ. of Phoenix*, 461 F.3d 1166 (9th Cir. 2006) (FCA liability may be based on “fraudulent course of conduct”)

Legislative Developments

- S. 1, Legislative Transparency and Accountability Act of 2007
- S. 119, War Profiteering Prevention Act of 2007
- H.R. 2, § 249 – would impose 10-year debarment on contractors that employ illegal immigrants
- Anticipated Re-Introduction of Rep. Waxman's Clean Contracting Act

Broad Principles of Congressional Investigations

- Congress has inherent power to conduct investigations.
- Congressional oversight powers are derived from Congress' Constitutional power to legislate.
- Congress has extremely broad and far-reaching oversight powers, covering any subject over which Congress may legislate.

Process of Congressional Oversight Hearings

- Traditional rules of evidence do not apply in Congressional Oversight Hearings.
- Respect for traditional privileges is discretionary.
- Members of Congress can inquire extremely broadly; relevancy is in discretion of Committee Chair.
- Members of Congress will be in control; work to establish good faith and cooperation.
- Remember court of public opinion.

General Procedures Related to Congressional Investigations

- Need to work collaboratively with Committee Staff
- Need to anticipate interests of Chairman, Majority and Minority Party Committee members
- Need to prepare as thoroughly as for a trial
- Need to remember other likely venues, such as potential civil or criminal exposure and potential use of Congressional testimony in such forums; work with Committee Staff to limit exposure
- Importance of monitoring legislative actions

IG Investigations

- Search Warrant
- Subpoena
- Informal “requests”
- Self-initiation (*e.g.*, after “hot line” call or potential voluntary disclosure)

First Steps in Response

- Key principles:
 - *Triage* – identify the most acute issues & risks
 - *Damage Limitation* – don't make worse
 - *Business Stability* – restore operations
 - *Time* – needed to understand the issues
 - *Strategy* – evolves as issues/risk are known
- Retention of Counsel
 - Know who to call
 - Seek expertise in process and substance

Dealing with the Government

- Document Production
 - Negotiate to narrow (“selective production”)
 - Produce all as demanded
 - Implications
 - Costs and disruption
 - Workload – government and company
 - Isolating non-responsive & privileged documents
 - Potential to focus investigation
 - Process: necessary to document
 - Electronic records: essential to produce, evaluate

Conducting an Internal Investigation

- Identify the focus of the Government investigation
- Assess risks, set strategy
- Build evidence to explain
- Understand monetary exposure
- To decide: “fight,” “wait” or “cooperate”
- Take corrective measures
- Identify and discipline wrongdoers (if any)
- Sarbanes-Oxley duty to investigate and report material violations

Avoiding Obstruction of Justice

- Gathering and reviewing responsive documents
- Communicating with employees and other potential witnesses
- Interviewing, preparing and debriefing witnesses
- Reporting to the government

Anticipate Parallel Proceedings

- Civil False Claims Act
- Criminal prosecution
- Contractual action
- Suspension or debarment proceedings

Properly Account for Costs

- Federal Acquisition Regulation 31.205-47
- Costs incurred in connection with any “proceeding” by a federal, state, local or foreign government, or *qui tam* relator, for violation of, or a failure to comply with, a law or regulation by the contractor (including its agents or employees) may be unallowable, depending on the outcome
 - Proceeding includes government investigation
 - Costs include both in-house and outside counsel
- Requires segregation pending outcome

What Can Contractors Do to Prepare?

- Enhance corporate compliance programs
- Comprehensive risk assessment and tailored compliance strategy
- Additional training in areas of anticipated oversight and enforcement
- Monitor legislative developments
- Be prepared for congressional testimony

Oversight in Government Procurement

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