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Supreme Court, U.S.

High Court Answers Sought On Human Trafficking, Agency Power

By DANIEL SEIDEN

Big businesses, small businesses, government agencies, and their attorneys are closely following several government contracts petitions seeking review from the U.S. Supreme Court, which meets Sept. 25 for its first conference of the new court term.

Petitioners want guidance and favorable rulings in disputes concerning:

- claims of alleged human trafficking in Iraq involving a defense contractor;
- the constitutionality of a small-business contract set-aside program; and
- how much deference an agency should receive when interpreting its own rules in a contract breach appeal.

Although the chances are slim that the Supreme Court would agree to review any one case, the major impact any ruling could have requires contractors to pay attention to the progress of these petitions.

Human Trafficking in Iraq Defense contractor Kellogg Brown & Root Inc. should face claims it committed human trafficking violations while it provided logistics support for the U.S. military, families of Nepalese men killed in Iraq told the court in *Adhikari v. Kellogg Brown & Root Inc.*

The Fifth Circuit incorrectly ruled that the Alien Tort Statute didn't allow them to pursue their lawsuit because the alleged violations didn't adequately touch and concern U.S. territory, the petition said. The lawsuit would have satisfied standards used by other circuits, the petition said.

Any contractor that does business in or employs subcontractors in foreign jurisdictions should carefully watch this case, Barbara Taylor, special counsel with Sheppard Mullin Richter & Hampton LLP, Los Angeles, told Bloomberg BNA.

"In my opinion, the principles of extraterritorial jurisdiction are being abused by plaintiffs' counsel trying to expand the Alien Tort Statute to reach conduct that occurs entirely in foreign jurisdictions by claiming that there is 'benefit' and/or economic harm in the U.S.," she said.

The Supreme Court has been refining the test for extraterritorial jurisdiction in recent years, but the circuits

don't always seem to strictly apply this guidance, Taylor said.

KBR disputes the existence of a circuit split that needs addressing, and said Congress chose for plaintiffs an express remedy — the Trafficking Victims Protection Reauthorization Act — not the Alien Tort Statute.

Racial Preference in Set-Asides Computer services contractor Rothe Development Inc.'s petition seeks review of the constitutionality of the Small Business Administration's 8(a) program, which is geared toward expanding contracting opportunities for "socially and economically" disadvantaged business owners, in *Rothe Dev. Inc. v. Dep't of Def.*

Challenging a D.C. Circuit ruling upholding the program, Rothe said the program has racial preferences that prevent it from competing for federal contracts on an equal footing with minority-owned businesses.

The Supreme Court should pass on this case because the specific statutory provision Rothe challenges is race-neutral and doesn't limit program participation to members of certain racial groups, the government said in its response brief.

Rothe's petition seems to be crafted to appeal to a justice with a textualist philosophy — "that is, someone who believes that courts should not be in the business of applying outside sources in interpreting statutory text," Steven J. Koprince, managing partner of Koprince Law LLC in Lawrence, Kan., told Bloomberg BNA.

A textualist like Supreme Court Justice Neil Gorsuch may be uncomfortable with the notion that the statute is facially race-neutral, and could be swayed by points raised in the dissenting opinion D.C. Circuit Judge Karen L. Henderson wrote, Koprince said.

The program "contains a paradigmatic racial classification" and designates members of certain racial minorities as socially disadvantaged, Henderson said.

Regardless, challenges to the 8(a) program may not end if the court passes on this case, said Justin Ganderison, special counsel with Covington & Burling LLP, Washington.

Rothe or another plaintiff could challenge the constitutionality of the 8(a) program's implementing regulations, an issue Rothe didn't raise with the D.C. Circuit, he told Bloomberg BNA.

Deference to Agencies Housing contractor Garco Construction wants the court to overturn a Federal Circuit ruling that the Air Force reasonably enforced a regulation that prevented Garco employees with criminal records from entering Malmstrom Air Force Base, Mont., in *Garco Construction Inc. v. Speer*.

Specifically, Garco wants the court to overturn precedent it said gives federal agencies too much deference in how they interpret rules that affect them.

A neutral arbiter should decide which party has the better reading of a regulation instead of siding with an agency, as long as the agency's interpretation isn't implausible, Garco said in its petition.

Government contractors "face the threat that the government will attempt to change its contractual rights and obligations by changing its interpretation of applicable regulations," The U.S. Chamber of Commerce told the court in its support brief.

Agencies shouldn't be able "to adopt vague regulations that they can later interpret however they see fit," the Chamber said.

Such a change to agency deference would alter the nature of some work performed by government con-

tracts lawyers, said Dennis Callahan, shareholder with Rogers Joseph O'Donnell, San Francisco.

"Often we try to attach regulatory meaning to agency 'field memoranda,' 'operational handbooks,' 'interpretative letters,' and argue that the agency should have to abide by them," Callahan told Bloomberg BNA. "A switch to *de novo* review would greatly devalue these sub-regulatory materials, and make our arguments more facial and textual.

"Given that the Code of Federal Regulations is now near 200,000 pages, however, there'd still be a lot to fight about," he said.

The government's response is due Oct. 11.

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