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Top 5 Gov't Contracts Cases Of 2020: Year In Review

By **Daniel Wilson**

Law360 (December 18, 2020, 12:11 PM EST) -- Courts and the U.S. Government Accountability Office handed down a number of important rulings for federal contractors in 2020, addressing issues such as the impacts of COVID-19 and how personal relationships between contractors and federal employees can sink a deal.

Here are five of the biggest decisions in government contracting law this year.

Agencies Need To Address COVID-19 Impacts

The GAO in September issued its first decision sustaining a protest based on the impacts of COVID-19, finding the U.S. Department of Housing and Urban Development should have taken the pandemic into account before pushing ahead with a solicitation to manage and sell foreclosed properties.

In the Coronavirus Aid, Relief and Economic Security Act in March, Congress forbid foreclosures and related evictions on properties with federally insured mortgages for 60 days and mandated up to 360 days of mortgage forbearance for those facing financial hardship.

But in an April amendment to a 2019 solicitation for foreclosure-related services, which set the deal aside for small businesses but made few other changes, according to the GAO, HUD did not mention COVID-19 or the CARES Act at all, despite what protesters argued would be a significant effect on the deal due to the pandemic.

There would be a reduction in properties managed or sold during the forbearance period, then a significant increase once that expired, as happens during every economic downturn, the protesters said. That meant small businesses likely wouldn't be able to handle the necessary volume.

HUD argued that impacts of the virus were speculative and that indefinite-delivery, indefinite-quantity contracts are able to account for fluctuations in work, but the GAO said such deals still have to have minimum and maximum quantities that are "realistic and based on the most current information available."

"In our view, the changing circumstances resulting from the COVID-19 pandemic, as evidenced in part by the enactment of the CARES Act and HUD's own policies on the single-family mortgage insurance program, represent a material departure from the assumptions set forth in the solicitation," the watchdog said.

While protests related to COVID-19's impacts on federal contracting had been expected, the exact context that the case came in wasn't, said Covington & Burling LLP partner Kayleigh Scalzo.

"We probably all thought it would be something involving a more obvious good or service — [personal protective equipment], medical supplies, something like that," she said. "So the fact that it's about asset management services for HUD is inherently connected to COVID[-19], but not necessarily something that would be an obvious first guess."

Outside the novelty of the COVID-19 context, the case reiterates a number of long-standing principles: for example, that solicitations actually have to reflect agencies' needs and that they need to take material changes into account.

"The case is a good one for contractors, because it reaffirms what the [Federal Acquisition Regulation] says in terms of requirements, and what a lot of GAO case law says, which is that an agency cannot ignore the reality of the world when it issues a solicitation," said Franklin Turner, co-chair of the government contracts practice group at McCarter & English LLP.

The case is Matter of: Chronos Solutions et al., file numbers B-417870.2 through B-417870.4, before the U.S. Government Accountability Office.

Agency Staffer And Contractor Link Can Sink A Deal

In another September ruling, the GAO found that a NASA contracting employee's personal relationship with employees of a contractor and subcontractor had created the appearance of a conflict of interest, which was enough to sink a $651.6 million deal to provide operational services at the Marshall Space Flight Center in Huntsville, Alabama.

A NASA contracting employee involved heavily in the contracting process, "Mr. X," had held weekly informal social gatherings with a group of "longtime friends" to engage in what he said was "camaraderie, friendship, dinner, and ... competitive foosball."

That group included a high-level employee of COLSA Corp., the contractor on one of the two predecessor deals for the disputed contract and a major subcontractor to awardee SGT LLC, as well as a person employed by SGT itself.

NASA said Mr. X had made it aware of those relationships and that it had made efforts to mitigate the perceived conflict of interest.

But those efforts weren't sufficient. NASA let Mr. X stay on the source evaluation board for the disputed contract, deeming him vital to the deal, even though he refused to stop holding the gatherings and even after an agency ethics attorney recommended removing him from the board.

The GAO noted that it could not determine whether there was any improper influence and that NASA also couldn't determine if the deal was tainted by those social relationships.

But under the Federal Acquisition Regulation, it didn't matter whether there was an actual conflict of interest; the appearance of one is enough to show a protester was prejudiced unless there is clear evidence to the contrary.

"Mr. X's actions have created a concern that the integrity of the acquisition process as a whole has, or may have been, compromised," the GAO said, recommending that NASA start the extensive acquisition process over again.

The decision may foreshadow unsuccessful bidders placing more scrutiny on personal relationships between contracting agency staff and contractor staff, for example by trawling through LinkedIn, Facebook and other social media channels trying to find connections, in order to bring similar cases in the future.

Personal relationships between contractors and agency staff are not uncommon, especially in big federal contracting hubs such as Northern Virginia, close to Washington, D.C., said Aron Beezley, co-leader of the government contracts practice group at Bradley Arant Boult Cummings LLP.

"It's not a coincidence that the underlying facts of this case arose and happened in Huntsville, Alabama, because there's so much government contract activity in Huntsville, and issues like this are just much more likely to arise," he said.

The case is Matter of: Teledyne Brown Engineering Inc., file numbers B-418835 and B-418835.2, before the U.S. Government Accountability Office.

Cybersecurity Requirements Aren't Always Material Under FCA

Adding to the limited jurisprudence in the nascent area of cybersecurity-related False Claims Act cases, a D.C. federal judge ruled in October that Dell's sales of computer systems to the government that contained an alleged cybersecurity vulnerability **weren't material to payment**.

Under the U.S. Supreme Court's landmark Escobar decision in 2016, an entity can only be held liable for an alleged false claim if it's "material" to the government's decision to pay, and courts have since had to weigh a wide variety of different factual circumstances to determine the materiality of certain claims.

While it was "certainly possible" that the federal agencies who had bought Dell computers wouldn't have done so if they were aware of the alleged issue, that wasn't by itself dispositive of materiality, according to U.S. District Judge Thomas F. Hogan, who noted the justices had said that proving materiality is a "demanding" standard.

Judge Adams also noted that it wasn't clear that Dell was required to comply with federal technology policies, and that even if it was, the relevant policy doesn't require a defect-free product, only that agencies limit vulnerabilities and attempt to remedy them as they appear.

Government contracts attorneys have long predicted that claims related to cybersecurity could be a significant new front for FCA cases, given the increased emphasis federal agencies have put on cybersecurity in recent years, but those cases have been slow to emerge, making the decision noteworthy.

It is the second cybersecurity-related FCA materiality ruling in as many years, following a 2019 decision allowing a whistleblower to move forward with his claims that Aerojet Rocketdyne misled the U.S. Department of Defense about its failure to safeguard "unclassified controlled technical information" from cybersecurity threats.

"I think we'll get more cases that arise out of the intersection of cybersecurity and the False Claims Act, so

definitely something to keep an eye on," Beezley said.

The case is U.S. ex rel. Adams v. Dell Computer Corp., case number 1:15-cv-00608, in the U.S. District Court for the District of Columbia.

Fed. Circ. Continues To Pin Down Limits Of Waiver Rule

The Federal Circuit in August revived The Boeing Co.'s challenge to a federal cost accounting regulation, finding that the Court of Federal Claims had misapplied the circuit court's so-called Blue & Gold waiver doctrine, adding to the growing body of case law on the frequently invoked doctrine.

The 2007 Blue & Gold Fleet LP v. U.S. decision is a much-cited ruling that contract bidders must flag patent, or clear, errors in contract solicitations early on or waive the chance to challenge those issues.

The claims court had found that under that doctrine, Boeing should have brought up an alleged clash between a clause under the Federal Acquisition Regulation and cost accounting laws before signing a fighter jet program contract with the DOD, and therefore had effectively waived related breach of contract claims.

The circuit court found that a pre-award objection "would have been futile," as there was no avenue for Boeing to raise its dispute directly with the agency, and the government hadn't identified an alternative judicial venue where Boeing would have been clearly entitled to a pre-award ruling.

"The government continues to push these novel waiver arguments," Arnold & Porter associate Nathan Castellano said. "And the Federal Circuit is, in some cases, starting to identify the boundaries of how far that can go, saying in Boeing — 'Hey, if you're going to argue waiver based on failure to bring a prior lawsuit, you've got to be able to commit to the idea that there actually is some justiciable lawsuit that the plaintiff could have brought.'"

"I think it's a case of arguing too extreme of a position and then ending up with a lot more than they bargained for," he added.

The case is one of a number of high-profile recent and ongoing Federal Circuit cases involving the Blue & Gold doctrine, following a June decision in Inserso Corp.'s protest over a Defense Information Systems Agency contract.

In that case, the circuit court majority found that Inserso knew or should have known about disputed bidding and debrief processes ahead of time and waited too long to protest, while U.S. Circuit Judge Jimmie V. Reyna issued a strong dissenting opinion calling the whole waiver rule into question as a "judicially created time bar" that he said should be obviated by a 2017 U.S. Supreme Court ruling regarding statutes of limitations.

Judge Reyna will also be the presiding judge in a pending Blue & Gold case filed by Harmonia Holdings, which will offer him a further opportunity to stump for his position on the waiver rule.

The Boeing case is The Boeing Co. v. U.S, case number 19-2148, in the U.S. Court of Appeals for the Federal Circuit.

Split Widens Over DOJ's FCA Dismissal Authority

The Seventh Circuit in August set a new standard for deciding whether to allow the U.S. Department of Justice to dismiss a whistleblower False Claims Act case, widening a previous circuit split.

Since the so-called Granston memo was issued in early 2018, the DOJ has sought to end roughly 50 qui tam FCA cases filed by whistleblowers, more than it had done in the previous three decades combined.

The memo, from the director of the DOJ's civil fraud division at the time, reminded DOJ attorneys that they have the authority to seek dismissal of whistleblower cases and laid out potential situations where they might do so, such as if they believe a case lacks merit or would create bad precedent.

With that uptick in DOJ dismissal filings, many courts have had to determine what standard they should apply. Nearly all of them have aligned under one of two standards set roughly two decades ago: the Ninth Circuit's Sequoia Orange standard, which requires the DOJ to show dismissal serves "a valid government purpose," and the D.C. Circuit's Swift standard, under which the DOJ has an "unfettered right" to dismissal.

But the Seventh Circuit departed from that trend when it addressed one of a number of FCA suits filed by whistleblower company the National Healthcare Analysis Group alleging drugmakers have effectively provided kickbacks to prescribers in the form of free nursing services and reimbursement assistance. The court said the choice between the two standards was "a false one, based on a misunderstanding of the government's rights and obligations under the False Claims Act."

It created its own standard, where a government dismissal motion must also be treated as a motion to intervene in the case, which then can be addressed under the Federal Rules of Civil Procedure.

In practice, the new standard may not be all that different from the Swift standard, especially at the early stages of litigation before too many motions have been filed, said Stacy Hadeka, senior associate at Hogan Lovells.

But given the DOJ's growing use of its dismissal authority, there are a number of other circuit courts that have similar cases pending, and the newly widened circuit split may prompt the U.S. Supreme Court to weigh in after declining a similar petition in April, Hadeka said.

"I think a lot of people are expecting now that there's another standard and another circuit that's opined on it that hopefully the Supreme Court will hear this," she said. "I think with this additional opinion and another standard, it'll be likely that they'll try to take this up."

Alternatively, the issue may be addressed in Congress. Sen. Chuck Grassley, R-Iowa, a longtime champion for FCA whistleblowers, introduced legislation earlier this year that would require the DOJ to explain its reasons for seeking dismissal of a qui tam case — and allow whistleblowers to respond.

The case is U.S. ex rel. CIMZNHCA LLC v. UCB Inc. et al., case number 19-2273, in the U.S. Court of Appeals for the Seventh Circuit.

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