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Top Gov't Contracts Cases To Watch In 2021

By **Daniel Wilson**

Law360 (January 3, 2021, 12:02 PM EST) -- This year will see the litigation of significant new issues for government contractors, such as when the right to protest may be waived and whether an alleged false claim has to be based on objectively verifiable facts. A wave of litigation related to COVID-19 relief funding is also expected.

Here are the cases that government contractors should watch closely in 2021.

Fed. Circ. To Review Protest Waiver Doctrine

Information technology firm Harmonia Holdings Group LLC has appealed the Court of Federal Claims' ruling that it was too late to challenge a $325 million U.S. Customs and Border Protection contract, the latest in a series of recent high-profile Federal Circuit cases to implicate the circuit court's so-called Blue & Gold waiver doctrine.

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

The claims court found that Harmonia had filed a timely protest with the CBP over amendments made to the contract solicitation, which would typically allow those allegations to be raised again before the court. But Harmonia waited five months to protest again, without explanation, effectively waiving its chance, the court found.

Harmonia has argued the decision "improperly grafted a 'diligent pursuit' requirement onto Blue & Gold's waiver rule" derived from a different type of protest.

One important wrinkle is that the presiding judge in the case is U.S. Circuit Judge Jimmie V. Reyna, which may give him an opportunity to add to his pointed dissent from another prominent recent case involving application of the waiver rule.

"Judge Reyna wrote a very thought provoking dissent, where he really called into question everything about the modern application of the Blue & Gold rule and even questioned whether or not it could withstand recent Supreme Court precedent, whether it should be a timing rule at all, or whether it should be tucked away in injunctive relief," said Arnold & Porter associate Nathan Castellano.

Castellano also noted that at oral arguments in November, U.S. Circuit Judge Alvin A. Schall had questioned the parties about whether the case was more appropriately decided on laches, or an unreasonable delay in bringing a claim.

"The fact that you've got two judges out of three openly questioning whether Blue & Gold should apply in this circumstance makes Harmonia seem like a case that could say something big about what Blue & Gold means and how it should be applied in the future," Castellano said.

What the court may ultimately have to balance is the inefficiency of a bidder sitting on a potential protest argument until after a contract is awarded, against the inefficiency of contractors essentially being obligated to file pre-award protests, said K&L Gates LLP associate Amy Hoang.

"I particularly appreciate that in my role as outside counsel, when you can't tell a client that you are 100% sure that you will be timely if you wait to bring a protest, the chances are the client is going to want you to file a pre-award protest, if only to preserve their rights," she said.

The case is Harmonia Holdings Group LLC v. U.S., case number 20-1538, in the U.S. Court of Appeals for the Federal Circuit.

FCA Liability Requirement Heads To Supreme Court

Hospice operator Care Alternatives has asked the U.S. Supreme Court to weigh in on an increasingly prominent False Claims Act issue: whether an alleged false claim is required to be based on objectively verifiable facts to establish FCA liability.

Objective falsity is an issue that has split circuit courts, with the Third Circuit in Care Alternatives' case rejecting the theory, having found that a doctor's clinical judgment, if later called into question by another medical expert, can be considered a legal falsity.

The Eleventh Circuit, in contrast, found in a similar 2019 case that a "difference of reasonable opinion" between doctors can't alone constitute falsity under the FCA.

Care Alternatives petitioned the high court in September, and several major business and medical groups have weighed in as amici backing the company's position.

While it's difficult to predict which cases the high court will take, there are a number of factors that might convince the justices to take up the dispute, said Christian Sheehan, senior associate at Arnold & Porter.

These include the "very clear" circuit split and the prominence of objective falsity as a hot-button FCA issue, as well as the court's recent track record of taking an FCA case every few years to address what are often significant ambiguities in the law, Sheehan noted.

And although the case comes under the context of claims for hospice care, objective falsity is a much broader issue, according to Sheehan.

"There's a lot of interest in these cases, because an objective falsity requirement is important to businesses to ensure that the types of professional judgments that those companies make every day

aren't open to FCA liability," he said.

The case is Care Alternatives v. U.S., case number 20-371, in the U.S. Supreme Court.

Derivative Sovereign Immunity May See Movement At High Court

Defense contractor CACI Premier Technology Inc. wants the high court to weigh in on whether it was wrongly denied the chance to immediately appeal a district court's ruling that the company was not eligible for derivative sovereign immunity from claims it aided and abetted torture at Iraq's notorious Abu Ghraib prison.

Former Abu Ghraib prisoners have argued CACI should be liable for its employees' alleged assistance of torture by the U.S. military at the prison. CACI has argued that it should be eligible for derivative immunity based on the government's sovereign immunity to most lawsuits, as it was acting under government instructions.

The Fourth Circuit declined to weigh in after a district court denied that immunity bid, saying it lacked the authority to hear interlocutory appeals over the immunity issue.

What's at stake is whether federal contractors facing similar claims have a quick route for potentially cutting off a suit, or face years of often-complex litigation, said Dan Russell, of counsel at Covington & Burling LLP.

"The reason why immediate appealability is important to contractors who get sued in these cases is that the immediate appellate right can mean the difference between years of expensive burdensome litigation, including discovery, versus a short and inexpensive route to the end of the litigation matter," he said.

Russell said the case holds a particular interest for contractors providing war-related services, but will also be of broader applicability.

"The government relies on contractors to perform a whole host of activities these days, and works very closely with contractors, and contractors are doing a lot of the work that historically would have been done by government entities," he said.

CACI's petition has been pending for over a year, but there is a strong chance the justices will eventually take the case, according to Russell, who noted the government had recommended they hear the dispute.

The government's position is that claims of derivative sovereign immunity are not true immunity from suit but a defense to liability on the merits — and a defense that requires compliance "with all relevant federal requirements" — and shouldn't be immediately appealable.

It had asked the court to hold the petition pending the outcome of cases brought by food giants Nestlé USA Inc. and Cargill Inc. over allegations of supporting child slavery on cocoa plantations, which involve the underlying issue of whether domestic companies are subject to claims under the Alien Tort Statute.

But recent oral arguments indicated the justices may be unlikely to support a broad exclusion to the ATS.

The case is CACI Premier Technology Inc. v. Al Shimari, case number 19-648, in the U.S. Supreme Court.

COVID-19 FCA Cases Likely To Emerge

A wave of FCA cases is almost inevitable following the federal government's hefty spending directed at addressing the impact of COVID-19, and there is a strong chance that wave will begin in 2021, attorneys said.

Whenever the government spends a lot of money, particularly when it does so in a hurry — like in disaster response or the rollout of the Iraq and Afghanistan wars — FCA cases follow, usually beginning to publicly emerge between a year and 18 months later.

No federal spending package has ever been bigger than the multitrillion-dollar coronavirus response, and in June, then-Principal Deputy Assistant U.S. Attorney General Ethan Davis — now back in private practice — said the U.S. Department of Justice would "energetically use every enforcement tool available to prevent wrongdoers from exploiting the COVID-19 crisis," including the FCA.

As well as the obvious avenue of suits stemming from contracts for items like medical supplies or personal protective equipment, another potential source of FCA cases is the Paycheck Protection Program, where the government provided hundreds of billions of dollars in forgivable loans to help small businesses make payroll.

By taking that money, companies subjected themselves — perhaps unwittingly — to the FCA. And much of the data regarding who received that money is public, enabling potential whistleblowers to investigate issues such as whether a company should have been ineligible to receive a loan or whether they inappropriately spent the money on nonpayroll costs.

"One of the things that I don't think companies are taking into consideration is that by accepting that money, they've effectively opened the door to the vampire and the government is going to, and is rightfully able to, check under the rugs and look in the cabinets," said Alex Major, co-chair of the government contracts practice group at McCarter & English LLP.

That could include scrutiny from the sophisticated "professional relators," organizations created specifically for filing FCA lawsuits, who have used statistical and data analysis to back some of their previous suits, Sheehan said.

Major said it is likely to be a bumper year for FCA cases in 2021, not only with COVID-19-related cases, but in emerging areas such as cybersecurity.

"I believe 2021 will be the year of the False Claims Act," he said. "There is a lot that could happen and will happen in 2021."

The U.S. Department of Justice has already kicked off the fiscal year with a massive $3 billion FCA settlement with Purdue Pharma and its primary owner in October, part of a broader $8 billion deal to settle claims related to the opioid crisis.

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