Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Gov't Contracts Cases To Watch In 2018

By **Daniel Wilson**

Law360, Nashville (January 1, 2018, 3:04 PM EST) -- The continued effects of the landmark Escobar decision, alongside other unsettled False Claims Act issues, will join a prominent challenge to a national security-related contracting ban and potential litigation over massive recently awarded and imminent federal deals as cases for government contractors to watch in 2018.

While 2017 lacked a blockbuster decision like Escobar, a number of important rulings were made in the government contracts arena, and attorneys told Law360 they expect several more throughout 2018. Here are some of the more prominent cases, lines of cases, and potential disputes they will be keeping an eye on in 2018.

Post-Escobar Cases Rolling On

The U.S. Supreme Court's landmark 2016 Escobar decision, on its surface, backed the use of implied false certification as a basis for False Claims Act liability, allowing for claims against companies that mistakenly imply they are meeting required contractual, regulatory and statutory requirements by submitting claims for payment.

But it also left lower courts with two new issues to grapple with: whether a "two-part test" for falsity of claims outlined in the opinion is mandatory, and how to determine whether an allegedly false claim is "material" to government payment.

Both district and circuit courts have had cause to weigh in on a number of occasions since Escobar was decided, and no consensus has formed on either of these issues, attorneys said.

"There have been dozens upon dozens of post-Escobar decisions, and they're all over the map," Crowell & Moring LLP partner David Robbins said. "This was supposed to be a decision ... that united the circuits on the materiality standard and the implied certification standard, but all that means is that we have a bunch of judicial circuits trying to interpret what is material. And that's going to be going on for a long time."

FCA relators and defendants alike will be hoping for more clarity in 2018 as more post-Escobar cases are decided; the most closely watched is probably a decision due to come out of the Ninth Circuit this year.

In that recently argued case, accusing the California-based Academy of Art University of paying banned

bonuses to student recruiters, the circuit court will both address the materiality standard and grapple with whether the two-part test is mandatory, something it has already mentioned in two decisions but which the plaintiffs argue the circuit court has yet to tackle head-on.

The case is U.S. ex rel. Rose et al. v. Stephens Institute, case number 17-15111, in the U.S. Court of Appeals for the Ninth Circuit.

Medical Necessity and Possibly a First Cybersecurity FCA Case

The health care industry remains a leading source of FCA recoveries for the government in 2017, making any decision that expands the potential liability of health care providers a big deal.

In line with that, the issue of medical necessity is one of the biggest outstanding FCA-related issues, and after hearing oral arguments in March 2017 the Eleventh Circuit is poised to make a prominent ruling on the issue.

The suit in that case alleges hospice chain AseraCare Inc. wrongly billed the government for serving patients who weren't terminally ill, an issue the district court had found was based on a difference of opinion about eligibility for hospice care.

In addition, the AseraCare case could also touch on the issue of statistical sampling — allowing damages, or liability, to be extrapolated from a sample of claims — another area of uncertainty for FCA litigants.

2018 may also be the year of the first cybersecurity-based FCA case, attorneys said. The federal government has put an increasing emphasis on cybersecurity issues in recent years, and the U.S. Department of Defense's rule amending the Defense Federal Acquisition Regulation Supplement that went into effect at the end of 2017, requiring contractors to protect controlled information and promptly report breaches, is a particularly likely source of potential liability, attorneys said.

Many federal contractors were struggling to have their compliance plans in place by the DOD's Dec. 31 deadline, and there are multiple fronts for potential liability — and potential whistleblowers to emerge — they noted.

"When you look at the number of folks within an organization that will be responsible for compliance with the DFARS rule, there's a lot of people that could raise potential claims as relators under the False Claims Act," Dentons partner Jeniffer De Jesus Roberts said.

The medical necessity case is U.S. v. GGNSC Administrative Services et al., case number 16-13004, in the U.S. Court of Appeals for the Eleventh Circuit.

Federal Circuit Deciding on Competing Preference Programs

The Supreme Court in its 2016 Kingdomware decision ruled that under a 2006 statute, whenever the "Rule of Two" applies — where at least two small business are expected to bid on a contract and can do the work at a reasonable price — the U.S. Department of Veterans Affairs must give preference to veteran-owned small businesses for all of its contracts.

The ruling served as a significant victory for VOSBs but left uncertain the fate of businesses that are part of the AbilityOne program, nonprofits that employ people who are blind or have significant disabilities,

which federal agencies are required to give a mandatory preference to for certain products and services.

The Court of Federal Claims subsequently found in May 2017 that VOSBs must be given preference over AbilityOne contractors for VA contracts, throwing the long-standing mandatory preference system into disarray and resulting in an appeal to the Federal Circuit.

More than $3.3 billion in purchases were made through the AbilityOne program in fiscal 2016, according to the AbilityOne Commission, and the way the circuit court rules will have a significant, and possibility even existential, impact on the program, said Jessica Abrahams, chair of Dentons' U.S. government contracts practice and longtime counsel for some of those companies employing blind workers.

"[The case] is important because it goes to the interpretation of an entire statutory framework and a number of various preference programs, and how all of these fit together in the context of [Federal Acquisition Regulation] Part 8," she said.

While the dispute could be resolved by Congress, a fight that pits blind and disabled workers on one side against veterans on the other is a fight that few politicians are likely to want to take on, effectively leaving the issue in the hands of the judiciary, attorneys said.

"We think it's a really fascinating issue and may go back to the Supreme Court because of Kingdomware," Abrahams said.

The case is PDS Consultants Inc. v. U.S., case number 17-2379, in the U.S. Court of Appeals for the Federal Circuit.

Kaspersky's Challenge to Its Federal Contracting Ban

Capping off 2017, embattled Russian antivirus software maker AO Kaspersky Lab hit back at a high-profile September U.S. Department of Homeland Security operational missive directing federal civilian agencies to stop using its software amid security concerns about the company's possible ties to the Russian government, suing the DHS on Dec. 18.

The company — which has also seen its products barred from use by U.S. defense agencies — has claimed for months that it does not collaborate with the Russian government or any other governments, and in its complaint argued that it was not given a fair chance to respond before the ban was issued.

While Kaspersky's direct government sales are minimal, its software is embedded in several other manufacturers' hardware solutions that are used by the government, and it is also likely trying to protect its lucrative retail sales business in the U.S.

Beyond the immediate effect on its business, the case is also likely to let both the government and federal contractors that are based or have operations overseas better know where they stand in regard to similar potential bans from contracting outside of the formal debarment system.

The case is Kaspersky Lab Inc. et al. v. Department of Homeland Security et al., case number 1:17-cv-02697, in the U.S. District Court for the District of Columbia.

Potential Bid Protests and Possible Post-Disaster Contracting Enforcement

As demonstrated by a series of bid protest challenges to the U.S. General Services Administration's recent $50 billion multiaward Alliant 2 information technology contract — still ongoing, and also worth watching in 2018 — any time an agency announces a large contract award, legal challenges from unsuccessful bidders are almost inevitable.

And there is no bigger single contract award expected in 2018 than the DOD's fifth iteration of its multiaward Logistics Civil Augmentation Program contract, or LOGCAP V, which is expected to be finalized in August.

LOGCAP IV, awarded in 2007, has a cap of $150 billion, and while the fifth iteration won't be as lucrative, it will still be worth up to $82 billion over a decade, with both the time and money factors making the deal ripe for challenges.

Litigation in some form or another, whether under the FCA or as a criminal action, is also highly likely in regard to some of the emergency contracting that followed a series of hurricanes and wildfires in 2017, attorneys said, with exigency sometimes meaning not everything is done to the letter.

And longer-term disaster recovery and reconstruction contracts, with Congress poised to provide more than $130 billion in overall federal disaster relief funds, are also likely to draw their own challenges, attorneys said.

"I'm fascinated with what happens [post-disasters] with hurricane recovery, both the contract administration challenges in Puerto Rico ... and whether any policy changes result, or whether it's just the normal wave of enforcement actions following the flow of money to reconstruct," Robbins said.

The aggressive stance recently taken by some federal agencies regarding access to contractors' technical data may also open up a new front of bid protest litigation in 2018, Jenner & Block LLP partner Gregory Petkoff said.

"What we've seen in some [requests for proposal] is agencies getting very aggressive about the technical data rights that they want to acquire," he said. "And it certainly wouldn't surprise me — and there's laws that protects contractors rights in technical data, at least for DOD — if we see start seeing some pre-proposal protests challenging some of these more aggressive data rights provisions."

--Additional reporting by Ben Kochman and Jeff Overley. Editing by Brian Baresch and Mark Lebetkin.