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Top 7 Gov't Contracting Cases Of 2021: Midyear Report

By **Daniel Wilson**

Law360 (July 19, 2021, 10:18 PM EDT) -- Appeals boards and courts issued several important rulings that impacted federal contractors this year, covering issues such as when companies should protest to pause a contract and what agencies must do for contractors amid a pandemic.

Here, Law360 recaps seven of the biggest decisions in government contracting law during the first half of 2021.

Contractors Need to Ask Questions to Extend the Automatic Stay Deadline

The Federal Circuit in February backed a strict view of the five-day deadline for unsuccessful contract bidders to protest following a debriefing and receive an automatic stay on performance of that contract, overturning a Court of Federal Claims decision.

Under the Competition in Contracting Act, contractors have a statutory five days following a post-award debriefing to protest to the U.S. Government Accountability Office and remain eligible to have the contract automatically halted while the protest is resolved. NIKA Technologies Inc. had waited six days following a debriefing to protest its exclusion from a U.S. Army Corps of Engineers facility maintenance contract and the Corps found no stay applied.

The claims court initially found that NIKA had two business days to ask questions following the debriefing during the "debriefing process," which meant the company in effect had seven days to protest and the automatic stay should have applied.

But the law refers to a specific "debriefing date" not a "debriefing process," and when — as in NIKA's case — there are no additional questions regarding a debriefing, the limit is five days, U.S. Circuit Judge Todd M. Hughes wrote for the Federal Circuit in a precedential decision.

The circuit court decided the case despite it effectively being moot, saying it would have been effectively impossible to decide an appeal within the GAO's strict 100-day deadline for deciding protests, and that the issue was one that was likely to come up again if not addressed.

The issue arose from the U.S. Department of Defense's March 2018 introduction of enhanced debriefing requirements for unsuccessful bidders and how those requirements interacted with protest deadlines, and its resolution had lingered much longer than other related gray areas, which had been resolved within that year, K&L Gates LLP partner Amy Hoang said.

Although contractors would have welcomed an extra two days to protest in all circumstances, "It's still a relief to have clarity in the filing deadline, because frankly, I don't care when the filing deadline is as long as I can give my clients a firm answer," she said.

Also, many attorneys had already been advising their clients to make sure to always ask questions following a debriefing, but "hopefully this will encourage more contractors to take advantage of that Q&A opportunity offered by the enhanced debriefings now that they know it's mandatory in order to get that extra time," Hoang said.

The case is NIKA Technologies Inc. v. U.S., case number 20-1924, in the U.S. Court of Appeals for the Federal Circuit.

Claims Court Can Hear Implied Contract Disputes

In a 2-1 opinion, the Federal Circuit ruled in March that the Court of Federal Claims has jurisdiction over implied-in-fact contract claims involving procurements, extending its 2010 finding that the claims court had jurisdiction over non-procurement, implied-in-fact contract claims, such as sales of government property.

The dispute involved Safeguard Base Operations LLC's allegation that the U.S. Department of Homeland Security breached an implied-in-fact contract to fairly and honestly consider its proposal to manage dormitories at the Federal Law Enforcement Training Center, an issue that had resulted in conflicting opinions at the claims court.

U.S. Circuit Judge Kathleen M. O'Malley wrote for the Federal Circuit that the legislative history of tweaks made to that court's authority under the 1996 Administrative Dispute Resolution Act showed Congress hadn't intended to limit the court's authority over any type of procurement bid protest.

U.S. Circuit Judge Pauline Newman dissented, arguing on the jurisdictional issue that the circuit court hadn't needed to explicitly find the claims court had jurisdiction over implied-in-fact procurement contract claims, as the government's obligation to deal fairly with bidders "is a covenant that underlies all government procurement," rather than a matter of an implied contract.

Although not completely clear why the issue hadn't been clarified by the circuit court before, Bradley Arant Boult Cummings LLP government contracts practice co-leader Aron Beezley noted that breach-of-implied-duty claims usually come as "sort of a catch-all count at the end of the protest, as opposed to the singular or lead protest count," meaning they are not often the claim that a case hinges upon.

As well as clearing up that jurisdictional issue, the case is also important, "because it allows protesters to claim monetary relief in the form of bid preparation and proposal costs, in addition to asking for declaratory and/or injunctive relief," Beezley said.

The case is Safeguard Base Operations LLC v. U.S. et al., case number 19-2261, in the U.S. Court of Appeals for the Federal Circuit.

Equitable Adjustment Requests Aren't Necessarily CDA Claims

The Armed Services Board of Contract Appeals in a March decision found that not all requests for

equitable adjustment, or REAs, are necessarily Contract Disputes Act claims, rejecting the U.S. Army's argument that a BAE Systems unit's cost adjustment claims were untimely.

BAE Systems Ordnance Systems Inc. had filed REAs seeking costs related to addressing environmental conditions at an Army ammunition plant and state-issued fines it received as a result of those conditions. When an Army contracting officer rejected its REAs, it then made a formal claim under the CDA appealing when the Army failed to address the claim by the specified deadline.

But the Army argued that the REAs were themselves CDA claims, meaning BAE Systems should have appealed the rejection of those requests at the time and that the appeal was untimely.

Administrative Judge J. Reid Prouty rejected the Army's argument, saying that although the CDA does not define "claim" and that the distinction between a CDA claim and an REA is "somewhat blurry," the key distinction is often whether there is a call for a final decision by a contracting officer.

BAE's efforts at "scrupulously refraining" from requesting a final decision meant that its REAs didn't count as claims, Judge Prouty found, contrasting the case with the Federal Circuit's 2019 Hejran Hejrat Co. Ltd v. U.S. Army Corps of Engineers decision. That ruling found that, despite being styled as REAs, a contractor's requests — which the contractor itself had argued were claims — implicitly served as a claim.

The Hejran Hejrat decision showed that a contractor's CDA claim "does not need all these magic words as long as it satisfies all the claim requirements, and they're sufficient," while the BAE ruling conversely showed that contractors can avoid making a CDA claim by being careful to show "that what they submitted is clearly an REA with the [Defense Federal Acquisition Regulation Supplement] certification, and not a claim," Crowell & Moring LLP counsel Charles Baek said.

"This is a good reminder for contractors to be diligent in making sure that they're not impliedly requesting one or the other," he said.

The case is Appeal of BAE Systems Ordnance Systems Inc. Under Contract Numbers W52P1J-11-C-0012 and W52P1J-11-D-0013, ASBCA number 62416, before the Armed Services Board of Contract Appeals.

Subcontractor Rule Compliance Misrepresentations Aren't FCA False Claims

A contractor's allegedly false status reports certifying compliance with federal subcontracting requirements didn't count as false claims under the False Claims Act, as they didn't relate to payment, a North Carolina federal judge ruled in March.

A whistleblower had accused a joint venture of Caddell Construction Co. Inc. and W.G. Yates & Sons Construction Co. of working with an outside firm, Pompano Masonry Corp., to set up a shell company to falsely satisfy a requirement on a U.S. Marine Corps construction deal to award a certain amount of subcontract work to women-owned small businesses.

But in a multipronged decision, U.S. District Judge Louise Wood Flanagan found that periodic individual subcontracting reports, even if they included a false statement, weren't a false claim under the FCA, because they weren't part of a claim for payment. And monthly progress payment requests, although counting as claims, didn't certify compliance with the terms and conditions of the subcontracting plan or the Federal Acquisition Regulation, and therefore the judge found they weren't false either, said Crowell

& Moring LLP partner Olivia Lynch.

Additionally, the court said there wasn't the necessary materiality, as required for FCA claims under the U.S. Supreme Court's landmark 2016 Escobar decision, because the subcontracting plan wasn't an express condition of payment, according to Lynch.

"The consequences for not being able to verify the accuracy of the numbers reported on the individual subcontracting reports would have been merely that the report got rejected, and not that the agency would have stopped work or stopped payments," she said.

The judge also noted the government continued to pay the joint venture despite being aware of the FCA allegations and of a related criminal case against Pompano's owner, saying that also cut against materiality.

And Judge Flanagan ruled there was no scienter, or knowledge, on the part of the joint venture regarding its subcontractor, saying it had acted reasonably by relying on the subcontractor's self-certification of its small business status.

"Companies a lot of times are risk-averse in wanting to accept certifications from their subcontractors, and are concerned that if they don't do additional due diligence with respect to their compliance, that that could potentially subject the contractor itself to liability," Hogan Lovells senior associate Stacy Hadeka said. "So it's good to get another opinion weighing in on the fact that there was no scienter there, given that the contractor was able to rely on those certifications from that subcontractor."

The case is Howard v. Caddell Construction Co. Inc. et al., case number 7:11-cv-00270, in the U.S. District Court for the Eastern District of North Carolina.

Proteges in Joint Ventures Can't Be Held to The Same Experience Standard as Other Bidders

Small business proteges participating in protege-mentor joint ventures with larger federal contractors can't be held to the same standard of required experience as other contractors more broadly, the Government Accountability Office found in an April decision.

Mentor-protege joint ventures allow larger businesses to lend expertise and resources to smaller businesses, while the joint venture keeps the smaller company's eligibility for federal small-business set-aside contracts.

Innovate Now LLC, one of those joint ventures, argued that the terms of an Air Force solicitation for various support services had wrongly required joint venture members, including its protege member Macalogic, to hold the same level of experience as individual bidders.

The Air Force argued that it acted reasonably by allowing members of joint ventures to submit individual work samples, instead of restricting its experience requirement to only that of work done by the venture itself, and that its experience requirement had reasonably reflected its minimum needs.

But the Small Business Administration rule covering mentor-protege arrangements is clear that protege companies can't be required by agencies to meet the same evaluation criteria as their general evaluation criteria, the GAO said, also citing SBA comments reinforcing that view that had accompanied publication of the rule, as well as the agency's response when asked to weigh in on the protest.

"I think the argument that they would have been required to have the same level of experience is odd," Venable LLP partner Dismas Locaria said. "The whole point of the program is to take a mentor who has a vast amount of experience, and a protege, who has relatively little compared to the mentor, and allow them to work together and for the mentor to coach that protege, and bring that protege up."

The case is Matter of: Innovate Now LLC, file number B-419546, before the U.S. Government Accountability Office.

Gov't Can't Impose Penalties for Exceeding Cost Reimbursement Cap it Hasn't Set

The Armed Services Board of Contract Appeals found in May that a contractor's claim for reimbursement of certain executive compensation costs from the Department of Defense **couldn't be considered** expressly unallowable, because the government dragged its feet on setting the cap on reimbursement.

Contractors can claim reimbursement for certain indirect costs on cost reimbursement-type contracts. If the claimed costs are considered unallowable, they are denied, while claims for expressly unallowable costs — specifically identified as unallowable under law, regulation or contract — are not only denied, but the contractor is hit with a penalty.

Ology Bioservices Inc. made a cost reimbursement claim with the Defense Contract Management Agency for executive compensation costs from fiscal year 2013, and the agency found that the amount of those claims above a related cost cap was expressly unallowable.

But despite a statutory requirement to update that cap every year, the Office of Federal Procurement Policy didn't issue the rule specifying its FY2013 cost cap until March 2016, well after Ology's cost reimbursement submission, and the company couldn't be penalized for the government's tardiness, which had left contractors with no guidance, Judge Michael N. O'Connell ruled.

The DCMA argued that Ology should have used the fiscal year 2012 cap that was still in place, but applying that cap — which was lower than the eventual 2013 cap — would have had the "odd effect" of benefiting late filers over those who made timely proposals, the judge said.

The decision followed other high-profile rulings involving expressly unallowable cost claims in recent years, and should be welcomed by contractors given that those definitions have gotten "muddied" over time, Crowell & Moring's Baek said.

"I think this is a sort of a breath of fresh air, so to speak; it's a helpful decision [for contractors]," he said. "Anything that leaves uncertainty as to what is the applicable statutory requirement here certainly should not damage the contractor for following the deadline, and the requirement."

The case is Appeal of Ology Bioservices Inc. Under Contract No. W911QY-13-C-0010 et al., ASBCA number 62633, before the Armed Services Board of Contract Appeals.

Agencies Aren't Obligated to Make Adjustments for Pandemics

The Federal Circuit in June affirmed a Civilian Board of Contract Appeals decision finding that a U.S. Department of State contractor couldn't claim reimbursement for additional costs related to an Ebola

outbreak, a ruling particularly relevant to COVID-19-related contractual adjustment claims.

Pernix Serka Joint Venture had sought an equitable adjustment after temporarily demobilizing its employees and later providing additional medical services, following an outbreak of the deadly Ebola virus while it was doing construction work for the State Department in Sierra Leone.

The State Department had denied the request after noting that the deal was a fixed-price contract, putting the risk of cost overruns on the joint venture, with no contractual provision for equitable adjustment, while the company argued it was left hanging by the department's refusal to provide guidance on how it should respond to the outbreak.

Although the judges on the Federal Circuit panel questioned at oral argument why the agency hadn't provided guidance, they ultimately backed the CBCA's finding, in a so-called Rule 36 judgment issued without a written opinion, that the agency had no obligation to provide any direction on responding to the outbreak and that the only applicable contractual clause covered excusable delays, providing extra time but not additional money for such unforeseeable costs.

The Civilian Board of Contract Appeals decision itself was not complicated, said Jenner & Block LLP partner Jeri Somers, the recently retired chief judge of the CBCA and the author of the ruling.

"It's really a very simple issue, which is basically, 'Did the government answer any of the requests by the contractor to do certain things?'" she said, "And the government didn't. So it has a bad consequence for contractors, clearly, but that's how we saw it."

But the timing of the case made it significant, with the CBCA releasing its original decision in April 2020, shortly after an emergency had been declared and contractors were very uncertain about the options available to them to mitigate the business effects of COVID-19.

"Because the facts are so relevant now, it's become a much more important case than it might have [otherwise] been; it might have just slipped through the cracks," Somers said.

The case is Pernix Serka Joint Venture v. Secretary of State, case number 20-2153, in the U.S. Court of Appeals for the Federal Circuit.

--Editing by Kelly Duncan and Nicole Bleier.
