

Fed. Circ. Opens Door To More Merits-Based Contract Args

By **Daniel Wilson**

Law360 (May 24, 2023, 10:53 PM EDT) -- Recent Federal Circuit decisions that key standing and waiver issues implicated in many federal contract disputes are not jurisdictional barriers are likely to give bid protesters a significant boost to their chances of arguing the merits of their cases.

On May 10, a Federal Circuit panel ruled in a dispute over a \$774.3 million U.S. Army deal that the Court of Federal Claims had incorrectly treated the issue of whether a CACI International unit had statutory standing under the Tucker Act, which outlines the claims court's authority to hear cases, as a jurisdictional issue instead of a merits issue.

Then on Monday, another Federal Circuit panel found in M.R. Pittman Group LLC's protest over an Army Corps of Engineers pump repair contract that the oft-used Blue & Gold waiver rule, requiring bidders to dispute clear errors in contract solicitations before the bidding deadline or waive any related argument, was also not jurisdictional, but instead "more akin to a nonjurisdictional claims-processing rule."

The jurisdiction of the Court of Federal Claims is of great importance to contractors because it is the only court that can hear monetary claims against the government.

While the circuit court ultimately ruled against both protesters, both of those decisions — and a similar ruling expected to follow from a pending case argued earlier this month — should give companies disputing contract-related decisions a better chance of avoiding, or at least pushing back on, the government's arguments for dismissal, bolstering their chances of having their cases decided on their merits rather than on procedural grounds.

"Let's be clear: It will never be as level of a playing field as we might see in traditional civil litigation between private parties," said Wiley Rein LLP partner Gary Ward. "[But] these cases are an important step in leveling the playing field with the government."

The Pittman decision, in which the circuit court found that the claims court correctly ruled that Pittman had waived its arguments by bringing them too late under the Blue & Gold waiver rule, may ultimately be the least practically impactful of the three recent cases.

The distinction made by the Federal Circuit was that the claims court should have decided the waiver issue based on an underlying court rule related to a failure to state a claim, instead of based on its subject-matter jurisdiction, but "the analysis that it went through was really no different than it would if [the issue] was jurisdictional," said Crowell & Moring LLP partner Anuj Vohra.

But it is still an important ruling for contractors, adding to the growing body of law defining the limits of a rule first established in the Federal Circuit's 2007 *Blue & Gold Fleet LP v. U.S.* decision and cited in dozens of bid protests each year. The Pittman ruling is particularly significant amid "frustration that the private practice bar has had with *Blue & Gold* — it almost feels like a judicially constructed limitation," said Shaun Kennedy, chair of Holland & Hart LLP's government contracts practice group, who also represented an appellee in the CACI case.

Although the Pittman decision doesn't explicitly suggest that protesters facing a *Blue & Gold* defense from the government can argue that violating the waiver rule should be considered at the remedies stage, rather than as a time bar, it at least opens the door to that argument, according to Kennedy.

"I think that's going to be a logical consequence of the distinction that this is not jurisdictional," he said. "I think it's going to invite a lot more arguments. And out of the however many judges there are at the Court of Federal Claims, that argument may resonate with one of them at some point."

Perhaps more likely to have a broader practical impact is the CACI decision, in which the Federal Circuit, citing U.S. Supreme Court decisions distinguishing statutory jurisdiction from "Article III" constitutional jurisdiction, found that whether an "interested party" has the statutory standing to protest a contract award and whether the protester has been prejudiced by a contracting officer's decision are both merits issues.

Prejudice and standing issues are at least tacitly implicated in effectively every bid protest, and the circuit court, unusually, stated that its prior decisions finding those issues to be jurisdictional, in some cases decades old, were "no longer good law."

"CACI is beneficial to protesters ... because it does potentially allow for less jurisdictional motions to dismiss, which a court can't ignore; a court must consider its jurisdiction, and it can do so at any time. So a motion to dismiss based on jurisdiction is a real arrow in the government's quiver," said Vohra of Crowell & Moring, a former trial attorney with the U.S. Department of Justice.

The Federal Circuit's upcoming ruling in another dispute, *ECC International Constructors LLC v. Secretary of the Army*, could have the most practical impact of all three cases. In that matter, the appellate court is considering whether a contractor's failure to specify a "sum certain," or a specific amount of money, for a claim made under the Contract Disputes Act, or CDA, is jurisdictional.

Bid protests involving pending or recently awarded contracts are usually decided relatively quickly, with merits and jurisdictional issues often briefed at the same time and then decided simultaneously, rather than the court deciding jurisdictional issues first. So protesters may not always see a practical difference even if dismissal arguments are merits-based rather than jurisdictional.

But CDA cases, which involve claims against an existing contract, often take much longer to resolve. Making certain CDA requirements nonjurisdictional could significantly shake up how those cases are litigated and how much time they take to pursue, said Crowell & Moring partner Rob Sneckenberg.

"It could be quite impactful if the sum certain or other requirements are not jurisdictional," he said. "It would force motions to dismiss much earlier in the process, and would not allow them after discovery, or even after hearings ... I'm eagerly awaiting the ECC decision, as many are."

Based on the questions raised by the judges at oral argument on May 5, citing the Supreme Court's March Wilkins v. U.S. decision, the Federal Circuit seems poised to rule that sum certain requirements are not jurisdictional. The justices, addressing similar issues, had examined the Quiet Title Act's statute of limitations and found that statutory bar was not jurisdictional.

"These procedural aspects of the CDA, like the sum certain requirement, have always stood out as particularly unnecessary and useful primarily as a defense that the government might assert in litigation," Wiley's Ward said. "So seeing that shift is a very helpful thing for contractors."

--Editing by Jill Coffey and Emily Kokoll.