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Top Gov't Contract Cases In 2022: Midyear Report

By **Daniel Wilson**

Law360 (July 8, 2022, 12:15 PM EDT) -- Courts and administrative bodies have issued several important decisions affecting government contractors this year, for example touching on the government's authority to respond to the COVID-19 pandemic and creating splits between the U.S. Government Accountability Office and Court of Federal Claims.

Here, Law360 explores the takeaways from a number of the most important and high-profile government contract-related rulings in the first half of 2022.

Claims Court Splits From GAO On Key Personnel Unavailability

The Court of Federal Claims in a February decision found that a bidder on a contract does not have an obligation to inform an agency when a proposed key personnel member becomes unavailable between the bidding deadline and contract award, splitting with the U.S. Government Accountability Office.

Golden IT LLC had filed a protest over a $77.7 million U.S. Census Bureau information technology support blanket purchase agreement. Among several allegations, Golden argued that awardee Spatial Front Inc. had misrepresented its key personnel for the deal, knowing a key employee planned to depart the company and wouldn't be available during performance of the BPA but failing to inform the bureau.

But that person was still an employee when Spatial Front submitted its bid and there was no evidence to suggest the company knew he planned to leave prior to submitting its proposal to the Census Bureau, Judge Matthew H. Solomson ruled, refusing to adopt a long-standing GAO rule that bidders are obligated to tell agencies about "material changes in proposed staffing" even after the final deadline for proposal revisions.

There was no obligation in the solicitation, or statute, regulation or Federal Circuit case law for Spatial Front to inform the agency of a staffing change after bids had been submitted, and the GAO rule was not based on any formal rulemaking process and "strikes the court, candidly, as without legal basis and 'unfair,'" Judge Solomson said.

The issue of employees leaving while a contract bid is pending is "one of the true landmines of federal procurement," something often out of a company's control, said Dan Graham, leader of McDermott Will & Emery LLP's government contracts group. And the GAO's standard on disclosure, among other consequences, incentivizes companies who have bid on the same contract to try to lure away key personnel from their rivals, he said.

"Oftentimes, it's very easy to identify who would be named as key personnel, because presumably the incumbent is going to propose the same key personnel that it's already got," Graham said.

Both the GAO and claims court can hear bid protests and can heed each other's decisions, although neither is bound by the other, and it remains to be seen whether the GAO will change course in light of Judge Solomson's ruling.

The GAO noted in a May decision sustaining a key personnel protest brought by Sehlke Consulting LLC that it was aware of the Golden IT ruling, but did not address it head-on, saying that the two cases were "materially distinguishable."

In the Sehlke case, the National Reconnaissance Office knew prior to awarding a finance support services contract to KPMG that a key proposed personnel member would not be able to work on the contract, but disregarded that information, the GAO said.

The cases are Golden IT LLC v. U.S., case number 1:21-cv-01966, in the U.S. Court of Federal Claims and Matter of: Sehlke Consulting LLC, file number B-420538, before the U.S. Government Accountability Office.

And Also Splits From GAO On DOD Discussion Obligation

In March, Judge Solomson once again broke with the GAO by declining to adopt its test used for determining whether U.S. Department of Defense agencies are required to conduct discussions with bidders for high-value contracts.

IAP Worldwide Services Inc. had disputed a more-than $1 billion Army operations and maintenance services contract awarded to Vectrus Systems Corp. While Judge Solomson rejected most of IAP's arguments, he sided with IAP on an allegation that the Army should have made a competitive range determination and conducted discussions to give bidders a chance to straighten out issues within their bids.

A clause in the Defense Federal Acquisition Regulation Supplement, DFARS 215.306, states that "[f]or acquisitions with an estimated value of $100 million or more, contracting officers should conduct discussions."

In that context, "should" means the expected course of action unless otherwise inappropriate, and there was no reason in the administrative record for the Army not to conduct discussions, Judge Solomson said.

He rejected the "3-part-test" used by the GAO to determine compliance with that DFARS clause, after Vectrus had argued the Army's decision not to conduct discussions satisfied that test, saying the test did not follow the text of the clause. The test looks at whether the protester's proposal had deficiencies, if the awardee's proposal was technically superior to all other proposals, and if the awardee's price was reasonable.

That test stems from cases that predate the introduction of that DFARS clause, and the claims court adopting it "would all but swallow the DFARS provision, effectively reading the operative term 'should' out of the regulation, replacing it with 'may,' despite those terms' having different definitions," Judge

Solomson said.

Taken together, the Golden IT and IAP cases reinforce a growing divergence between the GAO and claims court on a number of substantive issues such as when a contract bid is considered late or when corrective action can be challenged, beyond procedural variances like the GAO's strict 100-day deadline for deciding protests and its ability to grant an automatic stay on contract performance, according to Dan Forman, co-chair of Crowell & Moring LLP's government contracts group.

"GAO has historically been the place that protesters look to go first, with an opportunity to go to court if they lose; what you're seeing is that more parties are starting to go straight to court," he said. "And in part it's because, I think, GAO's rulings on document production have become quite stingy in many instances … I also think you're getting somewhat erratic decision-making, frankly, out of some of the GAO attorneys."

The case is IAP Worldwide Services v. U.S., case number 1:21-cv-01570, in the U.S. Court of Federal Claims.

7th Circ. Reiterates View 'Objectively Reasonable' Actions Aren't FCA Violations

Reinforcing a similar 2021 decision, the Seventh Circuit in a split ruling in April found that Safeway Inc.'s drug pricing practices for federal health care programs were "objectively reasonable" under the U.S. Supreme Court's so-called Safeco standard, even if not offering the company's lowest possible price, and therefore not a violation of the False Claims Act.

Relator Thomas Proctor accused the supermarket chain's pharmacies of overcharging Medicare and Medicaid by reporting its retail drug pricing as its "usual and customary," or U&C, pricing, which the court said was typically considered "the cash price charged to the general public."

The majority of Safeway's cash-sale customers for generic drugs over the relevant period had actually paid less than retail, given discounts under a program matching prices with competitors such as Wal-Mart, and Safeway reaped tens of millions of dollars more in reimbursements than if it had passed along its discount pricing to the government, Proctor argued.

The case came after the Seventh Circuit had ruled in its similar Schutte v. SuperValu Inc. decision that the high court's Safeco standard, cribbed from a 2007 Fair Credit Reporting Act case, applied to the scienter, or knowledge, requirement of the False Claims Act.

In that case, Safeco Insurance Co. of America v. Burr, the high court found that a party cannot be considered to have knowledge of alleged wrongdoing or to have acted with "reckless disregard" if they had made an objectively reasonable interpretation of an unclear law or regulation and did not have "authoritative guidance" available to warn it against that interpretation.

Safeway had made an objectively reasonable interpretation of U&C regulations that during the relevant period had multiple reasonable interpretations, even if it had "effectively used its [discount program] enrollment forms as a fig leaf to disguise a Wal-Mart-style generics [discount] program without reporting those prices as U&C," U.S. Circuit Judge Amy J. St. Eve wrote for the panel majority.

And a single footnote in a "lengthy" Centers for Medicare and Medicaid manual stating that routinely discounted prices should be considered U&C pricing, which could be — and was — revised at any time,

could not be considered authoritative guidance, the court majority found.

U.S. Circuit Judge David F. Hamilton dissented after also dissenting in the Schutte case, saying the majority had misinterpreted the FCA's definition of "knowledge" to in effect create "a safe harbor for deliberate or reckless fraudsters whose lawyers can concoct a post-hoc legal rationale that can pass a laugh test."

The issue of objectively reasonableness continues to percolate, with relator Tracy Schutte and co-relator Michael Yarberry from the earlier Seventh Circuit decision having petitioned the Supreme Court to take their case, drawing the support of Sen. Chuck Grassley, R-Iowa, a key driver behind a major 1986 overhaul of the FCA and its most vocal proponent in Congress. He weighed in in May, saying the circuit court had left "a gaping hole in the government's primary fraud-fighting tool."

The Fourth Circuit also agreed in May to rehear en banc a split decision in a similar case alleging an Allergan unit fraudulently failed to fully report its discount rates in its "best price" reported to Medicaid.

The issue is a hotly contested one, where the government and FCA defendants seem to have "a starkly different view of what the right answer should be," said Jonathan Tycko, a partner at Tycko & Zavareei LLP whose practice focuses on representing FCA whistleblowers.

"I think the Department of Justice really sees this issue as very fundamental to their view of the False Claims Act, and as probably the biggest threat to their power under the False Claims Act in recent times," he said.

If the Seventh Circuit and initial Fourth Circuit panel's views stick, then "corporate defendants maybe can't be liable for defrauding the government if a clever lawyer, even years later, can come up with any plausible interpretation of the law," said Roger Lewis, a principal in Goldberg Kohn Ltd.'s litigation group whose practice includes representing whistleblowers in FCA cases.

"It takes subjective intent, arguably, out of the picture in certain cases," he said.

The cases are U.S. ex rel. Proctor v. Safeway, case number 20-3425, in the U.S. Court of Appeals for the Seventh Circuit; U.S. ex rel. Sheldon v. Allergan Sales LLC, case number 20-2330, in the U.S. Court of Appeals for the Fourth Circuit; and U.S. ex rel. Schutte et al. v. SuperValu Inc. et al., case number 21-1326, in the Supreme Court of the United States.

Fed. Circ. Says Mandatory Source Doesn't Have To Bid To Protest

The Federal Circuit, addressing a novel issue, found in May that a mandatory source for a particular contract can still be a "prospective bidder" for a protest, even if it didn't actually bid.

SEKRI Inc., a participant in the AbilityOne program, had protested after the Defense Logistics Agency amended a solicitation to include advanced tactical assault panels, a component that it manufactured that are used in ballistic vests.

Under the AbilityOne program and its underlying statute, the Javits-Wagner-O'Day Act, federal agencies have a mandatory requirement, with very limited exceptions, to source certain items from nonprofits that employ the blind and severely disabled, and SEKRI was the designated AbilityOne supplier for those

panels.

After the DLA, following an inquiry from SEKRI, said it intended to conduct a competitive procurement instead of using mandatory sourcing, the nonprofit protested, but the Court of Federal Claims dismissed the case, finding SEKRI lacked legal standing.

SEKRI did not bid on the disputed deal despite an invitation from the DLA, so it wasn't an "actual bidder," and did not count as a "prospective bidder" because it did not protest in a timely fashion before bidding ended, the claims court found.

The Federal Circuit found that mandatory sources like SEKRI have already established their "economic interest bona fides" in relevant procurements, and therefore are considered prospective bidders for protest purposes, even if they don't actually bid on that deal.

"It wasn't surprising that the court, although it was a case of first impression, declared that somebody who was guaranteed the business should be deemed a prospective bidder with the right to complain if he didn't get the business," said BakerHostetler partner Stephen Ruscus. "Whatever 'prospective' means [and] the word bidder doesn't even much apply to these JWOD procurements — you're selected as the source and then the agency has the requirement; it comes to you."

The circuit court panel also rejected the claims court's alternative finding that even if SEKRI had standing, it still would have triggered the circuit court's so-called Blue & Gold waiver rule, requiring protesters to dispute clear errors in a solicitation before bidding ends or effectively waive any related arguments.

SEKRI had made the necessary "timely, formal challenge" because it had informed the DLA ahead of the bid deadline that it was a mandatory source and had protested prior to the contract being awarded, the circuit court found.

The case is SEKRI Inc. v. U.S. case number 21-1936, in the U.S. Court of Appeals for the Federal Circuit

Appellate Boards Clarify Limits On Gov't, Contractor Actions During COVID-19

The Civilian Board of Contract Appeals and Armed Services Board of Contract Appeals issued a number of decisions in the first half of the year addressing the effects of COVID-19 on contract performance and eligibility, a hot-button issue for many contractors whose work was disrupted by the pandemic.

One set of decisions saw the boards place heavy scrutiny on claims that COVID-19 was the reason why companies could not timely perform on a contract. For example, in ORSA Technologies LLC's appeals over contracts to supply nitrile gloves to the U.S. Department of Veterans Affairs, the Civilian Board in January rejected the company's argument that its inability to deliver those gloves by the contractual deadline could be excused by "marketplace forces" caused by COVID-19.

ORSA was supposed to have those gloves on hand already, and with the contract being part of the VA's response to COVID-19, the company was "well aware" of the pandemic when it entered into the contract, the board said.

"That was just a very prime example of 'what does your contract require?' and the contract required [ORSA] to have gloves on hand," said Chip Purcell, leader of Thompson Hine LLP's government contracts

practice group. "This notion that, 'well, I'm going to win a contract, and then I'll get the gloves,' not only from the contracting officer's perspective but from the board's perspective, that frustrates the entire purpose of the contract."

The Armed Services Board also denied a similar appeal by Central Co. in February over a contract terminated by the Air Force for default, finding the company was already well behind on its work when COVID-19 hit, meaning the pandemic wasn't an excuse.

And in a pair of April rulings in appeals filed by APTIM Federal Services LLC and JE Dunn Construction Co., the Armed Services Board **rejected** the companies' bids for cost reimbursements related to delays for construction projects on two military bases, which stemmed from a pandemic-linked temporary base shutdown in one case and a quarantine requirement in the other.

Both cases involved a broad, general "sovereign act" by the government with an incidental effect on the contractor, not a specific action aimed at the contractor itself, which means the government had no liability for monetary damages, the board said.

For contractors who believe they faced a genuine COVID-related impact on their work from an issue that affected them narrowly and not the broader public at large, the appeals board cases show how important it is to "establish that robust evidentiary record in order to demonstrate the impacts of COVID," said Hogan Lovells counsel Stacy Hadeka.

The success of the sovereign act defense in these appeals, otherwise rarely used, also means the defense is likely to "be in the government's back pocket going forward" for at least some future cases related to COVID-19 and in other similar circumstances, Hadeka said.

"Knock on wood that we don't have another COVID-19 scenario, but even still, we see that it is possible with weather issues and all of the kinds of standard force majeure issues that are bound to happen again," she said.

The cases are Appeal of Central Co. Under Contract No. FA4654-19-C-A00, ASBCA No. 62624, Appeal of JE Dunn Construction Co. Under Contract No. W9127S-17-D-6003, ASBCA No. 62936, and Appeal of APTIM Federal Services LLC Under Contract No. FA9101-16-D-0006, ASBCA No. 62982, all before the Armed Services Board of Contract Appeals; and Orsa Technologies LLC v. Department of Veterans Affairs, CBCA numbers 7141 and 7142, before the Civilian Board of Contract Appeals.

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