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Top Government Contract Cases Of 2023: Year In Review

By **Daniel Wilson**

Law360 (December 20, 2023, 6:19 PM EST) -- Courts have decided a number of consequential cases impacting government contractors this year, including the Federal Circuit overhauling its jurisdictional jurisprudence and a Texas federal judge once again questioning the scope of the president's procurement authority.

Here, Law360 explores several of the top government contracts-related court rulings in 2023.

Affirmative Action Ruling Shakes Up Small Disadvantaged Business Program

Drawing from a high-profile June U.S. Supreme Court ruling striking down colleges' use of race-based affirmative action as an equal protection violation, a Tennessee federal judge in July shook up a key underpinning of the Small Business Administration's 8(a) program for companies owned and controlled by the "socially and economically disadvantaged."

U.S. District Judge Clifton L. Corker ruled that the "rebuttable presumption" standard used in the 8(a) program was a similarly discriminatory violation of the equal protection rights of plaintiff Ultima Services Corp.

Before the court's ruling, the rebuttable presumption had been the most common way to qualify for the 8(a) program, which opens up access not only to SBA assistance but also to set-aside and sole-source contracts intended specifically for those companies, worth about $30 billion each year, according to the SBA.

Under the presumption, East Asian, Pacific Islander, Black, Hispanic, subcontinent Asian or Native American small business owners were automatically presumed to be socially disadvantaged and therefore eligible.

Now, those companies must use the process previously reserved for other potential 8(a) program participants, requiring the submission and approval of a narrative statement outlining the disadvantages they have experienced in their life — a tougher standard that some previously qualified participants may not be able to meet.

Ultima is continuing to pursue its case, seeking even more stringent restrictions on the 8(a) program, and the effects of the case could extend even further.

"This could have ripple effects into some of the state-specific [disadvantaged, women-owned and minority-owned] business programs ... [and] I believe that the Department of Transportation's grant regulations flow into a lot of these programs, which have similar presumptions in there," said Seyfarth Shaw LLP partner Adam Lasky.

The case is Ultima Services Corp. v. U.S. Department of Agriculture et al., case number 2:20-cv-00041, in the U.S. District Court for the Eastern District of Tennessee.

Federal Circuit Continues to Knock Down Jurisdictional Limits

Three times this year, the Federal Circuit found that an issue frequently raised in federal contracting disputes is not jurisdictional and must be decided on its merits, most recently in August, in a case over the requirement to state a "sum certain," or request for a specific amount of money, in claims to the government.

Years into a long-running dispute over delays on a U.S. Army Corps of Engineers contract to build a special operations facility in Afghanistan, the government successfully argued to the Armed Services Board of Contract Appeals that the dispute should be dismissed for lack of subject-matter jurisdiction for contractor ECC International Constructors LLC's failure to state a sum certain, or the specific value of its claim.

But the Federal Circuit revived the case in August, finding the sum certain requirement was not jurisdictional, and that the government would effectively forfeit any related defense by raising that issue "too late."

The decision followed on from two other protester-friendly decisions in May in which the court had similarly knocked down jurisdictional barriers, first finding that issues of statutory standing to protest, and whether a contractor has been prejudiced by an agency's contracting decision, are not jurisdictional bars to protesting.

The circuit court then ruled that the so-called Blue & Gold waiver rule, requiring protesters to dispute obvious issues with a contract solicitation before bids are due, was effectively a "claims-processing" rule and not a jurisdictional one.

"The Federal Circuit over the past year has evinced a willingness to reconsider some long-standing principles ... and potentially that trend could continue into 2024," said Crowell & Moring LLP partner Rob Sneckenberg.

The cases are ECC International Constructors LLC v. Secretary of the Army, case number 21-2323, CACI Inc.-Federal v. U.S. et al., case number 22-1488, and M.R. Pittman Group LLC v. U.S., case number 21-2325, in the U.S. Court of Appeals for the Federal Circuit.

Procurement Act Limits Further Defined in Minimum Wage Challenge

In the latest of a series of cases challenging a U.S. Department of Labor rule setting a $15-per-hour minimum wage — set to rise to $17.20 for 2024 — for employees of federal contractors, a Texas federal judge ruled in September that the rule exceeded President Joe Biden's authority.

U.S. District Judge Drew B. Tipton granted an injunction preventing the rule from being enforced against

federal contractors in Texas, Louisiana and Mississippi, went against previous decisions in Colorado and Arizona that had found an underlying executive order to be lawful. Judge Tipton said Biden went outside the scope of the Federal Property and Administrative Services Act, aka the Procurement Act.

That statute allows the president to implement policies that promote "economy and efficiency" in federal procurement, and neither its text nor its "history and purpose" indicated that authority included the ability to set specific minimum wage requirements, Judge Tipton said.

The decision came in the wake of several circuit court rulings that had found the now-rescinded COVID-19 vaccine mandate for federal contractors was also an overreach, creating further murkiness around the limits of the Procurement Act.

That law had for decades been widely viewed as giving the president broad authority to impose rules, and those rulings could portend future challenges to other contentious procurement rules.

"If you're a [contractor] whose interests are to question some of these actions that have been taken by the administration — by any administration — I think you'll find more opportunities to do so, as at least the current disposition in the courts is that they're willing to entertain these sorts of cases," said Jeffery Chiow, co-chair of Greenberg Traurig LLP's government contracts practice.

The Texas decision is on appeal to the Fifth Circuit, one of several similar cases before circuit courts.

The case is Texas et al. v. Biden et al., case number 6:22-cv-00004, in the U.S. District Court for the Southern District of Texas. The appeal is Texas v. Biden, case number 23-40671, in the U.S. Court of Appeals for the Fifth Circuit.

Courts Confirm Constitutionality of FCA Whistleblower Provisions

Justice Clarence Thomas in a June dissent revived a long-dormant argument about the constitutionality of the False Claims Act's qui tam provisions allowing whistleblowers to bring FCA suits on behalf of the government, prompting related arguments in district courts in the months since.

In a case over the scope of the U.S. Department of Justice's authority to dismiss qui tam cases, Justice Thomas said that there are "substantial arguments" that relators — who have accounted for the majority of FCA cases filed for nearly three decades — filing cases on behalf of the government conflicts with the executive branch authorities set out in Article II of the Constitution.

Justices Brett Kavanaugh and Amy Coney Barrett also said they wanted to see the issue addressed, and several FCA defendants have since made constitutionality arguments when seeking dismissal of their cases.

A Texas federal judge in October appeared to reject constitutionality arguments made by Planned Parenthood in a case accusing the group of wrongly billing Texas' Medicaid program, letting the case move forward, although the related decision remains under seal.

And an Alabama federal judge in November rejected constitutionality arguments from medical device maker Exatech Inc., accused of knowingly charging the U.S. Department of Veterans Affairs for defective devices, saying that "every circuit to consider the issue has concluded that the FCA does not violate Article II."

There is also at least one more similar pending argument in South Carolina federal court, and defendants are likely to keep pushing the constitutionality argument in future cases until it is definitively resolved by the high court.

"Obviously, we have a well-defined view, but the counterarguments, at least to us, they're just not particularly strong," said Craig Margolis of Arnold & Porter, whose firm is representing defendants in the Texas and South Carolina cases. "[Qui tam relators] are essentially acting as a de facto officer of the United States, and they're not appointed. And that's an accountability issue."

The cases are U.S. ex rel. Wallace et al. v. Exactech Inc., case number 7:18-cv-01010, in the U.S. District Court for the Northern District of Alabama; U.S. ex rel. Doe v. Planned Parenthood Federation of America Inc., case number 2:21-cv-00022, in the U.S. District Court for the Northern District of Texas; and U.S. ex rel. Shepherd et al. v. Fluor Corp. et al., case number 6:13-cv-02428, in the U.S. District Court for the District of South Carolina. The Planned Parenthood appeal is Doe v. Planned Parenthood, case number 23-11184, in the U.S. Court of Appeals for the Fifth Circuit.

--Editing by Brian Baresch and Kelly Duncan.
