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Top Government Contracts Cases Of 2022

By **Daniel Wilson**

Law360 (December 21, 2022, 5:33 PM EST) -- This year saw a circuit court decision calling into question a long-held principle of procurement law and another establishing jurisdiction for challenges of prototype deals.

Here, Law360 reviews several of the highest-profile government contracts-related cases from 2022.

D.C. Circuit Backed 'Pro Tanto' Approach to FCA Damages

The D.C. Circuit ruled in an August decision that False Claims Act defendants could claim a "pro tanto," or dollar-for-dollar, reduction in their damages for settlements already paid by other defendants, significantly shaking up how both defendants and the government may approach similar future FCA cases.

Honeywell International Inc. was one of several defendants in FCA cases related to body armor used by law enforcement, made out of Zylon fiber that degraded in heat and humidity.

With the FCA's trebled damages, the federal government had sought $35 million from the company as a "proportionate share" of overall liability. But Honeywell argued it was entitled to a pro tanto reduction based on previous settlements with other Zylon suppliers and body armor manufacturers, effectively leaving only civil penalties.

U.S. District Judge Paul L. Friedman had sided with the government's proportionate share approach, saying it would be "wholly inequitable" for Honeywell not to face any damages liability. But he also certified the issue to the circuit court, saying there were "not insubstantial" arguments in favor of the pro tanto approach, such as not "overcompensating" the government.

And the D.C. Circuit agreed with Honeywell. U.S. Circuit Judge Neomi Rao's opinion said that "the pro tanto rule best fits with the FCA and the joint and several liability applied to FCA claims" when multiple parties cause the "same indivisible harm" to the government, as well as with general principles of common law when one parties settles a case where there is joint liability.

Honeywell, the final remaining defendant, ultimately settled its portion of the dispute for $3.35 million in October.

Given that the purpose of the FCA is "make the government whole" for the actual damages it suffered,

the D.C. Circuit's decision was ultimately the fairest result, said Sheppard Mullin Richter & Hampton LLP partner Scott Roybal, who represents FCA defendants. The government can still use its prosecutorial discretion to prioritize who it goes after in FCA cases if it believes a particular party is more liable, he said.

"I don't believe that the False Claims Act, either in the statute, or in the legislative history, or in the case law, justifies the government or a qui tam relator on behalf of the government to receive actual common damages that become more than the damage suffered by the government — in other words, a windfall," Roybal said.

And although the relators' counsel told Law360 at the time that the ruling would likely prompt some defendants to delay resolving their cases, hoping they can wait out other defendants, it's just one of many factors that go into deciding whether and when to settle a case, like the certainty that comes with reaching an early settlement, said Greenberg Traurig LLP shareholder Matt Cannon, who also represents FCA defendants.

"There's a lot of reasons a defendant may decide to settle the case; this is one more to take into consideration," he said. "I don't know that this necessarily is a driving factor. Depending on the case, if you're a defendant that's got huge potential exposure, I'm not sure choosing when to get in line is as much of a priority as other things that you might have to deal with."

The case is U.S. v. Honeywell International Inc., case number 21-5179, in the U.S. Court of Appeals for the District of Columbia Circuit.

Circuit Courts Said Contractor Vaccine Mandate Overstepped Statutory Authority

In the highest-profile ruling so far from recent challenges to the limits of the Procurement Act — a statute that underpins significant portions of federal contracting policy — the Eleventh Circuit ruled in August that the COVID-19 vaccine mandate for federal contractors overstepped the authority granted under that law.

The 1949 Procurement Act grants the president the authority to administer an "economical and efficient system" for federal procurement.

Much of the bedrock policy for federal contractors, such as nondiscrimination and affirmative action requirements, relies on rules promulgated using that authority, and the government has been given significant leeway for decades under the "nexus test" established by the D.C. Circuit in 1979. Under that test, the president can effectively issue any procurement policy considered to have a close enough nexus to that "economy and efficiency" goal.

But several contracting policies of the Biden administration, particularly its requirement for effectively all employees of federal contractors to be vaccinated against COVID-19, have been hit with challenges arguing they exceed the limits of the Procurement Act, and a number of district courts have agreed, issuing injunctions.

The most sweeping of those injunctions — a nationwide bar on the vaccine mandate issued by a Georgia federal court — went to the Eleventh Circuit, and although the court pulled back the scope of the injunction to only cover the specific parties in the case, a majority of the three-judge panel backed the injunction itself.

Authority over procurement should be based on a "specific reference" within the act, and there was no statutory provision that "contemplates the power to implement an across-the-board vaccination mandate," U.S. Circuit Judge Britt C. Grant wrote for the majority. She rejected using the nexus test, saying that approach was "detached from" the act's "text and structure."

That decision was reinforced by the Fifth Circuit in a Monday ruling, which again upheld an injunction against the mandate as exceeding the Procurement Act's authority.

Collectively, these decisions and the district court rulings underlying them may prompt similar challenges that could significantly shake up the foundation of much of the procurement policy that federal contractors are subject to, said Covington & Burling LLP senior of counsel Sandy Hoe, who has practiced government contracts law for decades.

"For five decades, I would never have thought that this would be a hot-button issue," he said. "It was just assumed that if you wanted to be a government contractor, this is what came with it. But in today's world with the increased distrust, if you will, of governmental institutions, I think people are willing to challenge even things we thought were acceptable — if the government said this is a policy that we should follow, most people fell in line. That's less so today."

Contractors or trade associations who are used to complying with long-standing policy may not wish to expend resources trying to overturn existing rules, but new procurement policies issued under the Procurement Act are likely to be "real targets for challenges," Hoe said.

The cases are Georgia et al. v. President of the U.S. et al., case number 21-14269, in the U.S. Court of Appeals for the Eleventh Circuit, and Louisiana et al. v. Biden et al., case number 22-30019, in the U.S. Court of Appeals for the Fifth Circuit.

D.C. District Said Construction Sureties Aren't Liable for Bonded Cos.' Alleged Fraud

An ongoing trend in FCA litigation is for relators to target unusual defendants beyond those they consider directly responsible, such as private equity owners whose portfolio companies are accused of fraud. But a D.C. federal judge ruled in a first-of-its-kind case that liability should not extend to sureties who provide bonding for federal construction projects.

Under the Miller Act, nearly all federal construction contractors must obtain bonding to help protect the government in case of a default, usually provided by a surety company. In line with that, relator Andrew Scollick — for the first time in an FCA case — sued sureties Hudson Insurance Co. and Hanover Insurance Co. and bond broker Centennial Surety Associates.

Scollick claimed their underwriting process should have clued them in to an allegedly fraudulent scheme involving federal contracts set aside for service-disabled veteran-owned small businesses, and that they aided the scheme by providing bonding to the suspects.

The claims against those companies were initially dismissed in 2016 but revived in 2017, before U.S. District Judge Royce C. Lamberth finally ruled in July that there was no evidence the sureties knew the bids by those companies were fraudulent.

Judge Lamberth also found that they hadn't acted recklessly by not taking the knowledge they had and

applying it to related U.S. Department of Veterans Affairs ownership and control regulations, saying he would not "impose an affirmative duty on insurance and bonding companies to double-check the government's verification," especially one that "plaintiff-relator has tried to construct ... out of thin air."

While the ruling doesn't mean sureties can just "stick their head in the sand" regarding who they provide bonding to, it avoids changes to the federal construction market that likely would have resulted in a much more onerous underwriting process for bonded companies, and "significantly increased" bonding prices, Venable LLP partner Diz Locaria said.

"Small businesses [in particular] already have challenges in getting bonding capacity, and so had this case turned out differently, I think you would have seen a major shake up in the construction industry, particularly as it relates to small business construction contractors," he said.

While the sureties ultimately escaped the case, it should nonetheless put other nontraditional potential defendants on notice that they may face FCA-related scrutiny from relators, or the government itself, such as the banks and fintech companies that helped facilitate Paycheck Protection Program loans as part of the government's COVID-19 relief programs, said Crowell & Moring LLP False Claims Act practice co-chair Brian Tully McLaughlin.

"They were entitled to rely on attestations by the borrowers," he said. "[But] there are some significant questions, now, about could they just rely blindly, or did they have to dig into it? Or if there was some kind of evidence that was available to them that they ignored or did not review, could that subject them to liability under the False Claims Act?"

The case is U.S. ex rel. Scollick v. Narula et al., case number 1:14-cv-01339, in the U.S. District Court for the District of Columbia.

Claims Court Clarified Jurisdiction Over OTA Deals

In a July decision, a claims court judge found he had jurisdiction over a dispute involving an other transaction authority agreement, a type of streamlined deal growing in popularity among federal agencies, where limits around their ability to be protested have yet to be fully defined.

OTA agreements, used mostly by the U.S. Department of Defense and usually for prototyping deals, are not considered procurement contracts, and the U.S. Army argued they were specifically intended by Congress to be outside the claims court's review.

But Judge Ryan T. Holte found that, because the Army OTA deal protested by Hydraulics International Inc. could lead to a follow-on procurement contract, it was sufficiently "in connection with" a procurement to give the claims court jurisdiction.

He drew on the Federal Circuit's 2008 Distributed Solutions v. U.S. decision, which found that a connection with a procurement "by definition involves a connection with any stage of the federal contracting acquisition process" and that it was immaterial that, in that case, no actual procurement occurred.

The decision also built on a prominent 2019 Claims Court decision in which U.S. District Judge Lydia Kay Griggsby rejected Space Exploration Technologies Corp.'s protest over U.S. Air Force launch service agreements, a type of OTA agreement, where there was a later "separate and distinct" procurement,

and Claims Court Judge Charles F. Lettow's 2021 ruling, which found that the court could hear a dispute over a commercial solutions opening, a type of OTA agreement, directly linked to a standard procurement contract.

"The court's decision is an important flag in the sand to let the Department of Justice know that just because something pertains to an OTA does not mean that the court is going to grant your jurisdictional argument every time — the court is actually going to scrutinize the particular OTA arrangement at issue," said Aron Beezley, co-leader of Bradley Arant Boult Cummings LLP's government contracts practice group.

The case is Hydraulics International Inc. v. U.S., case number 1:22-cv-00364, in the U.S. Court of Federal Claims.

Claims Court Continued Highlighting Differences From GAO

Building on cases from earlier in the year highlighting areas of divergence between the U.S. Court of Federal Claims and the U.S. Government Accountability Office on issues such as key personnel availability, claims court judges in the second half of 2022 continued to drive home differences between the venues that may weigh into protesters' decisions on where to file cases.

In one prominent decision made public in July, Judge Zachary N. Somers ordered the Defense Information Systems Agency to look again to ensure it had provided all relevant documents for a protest filed by Trace Systems Inc. over the cancelation of a solicitation, saying it didn't appear from the available documents that all relevant documents had been made available, despite DISA having claimed the administrative record was complete.

In his decision, Judge Somers reinforced the need for agencies at the court to cough up all potentially relevant information, saying they could not seek to "skew the record" by withholding relevant documents, and chastised DISA for claiming certain documents were privileged without formally asserting privilege with the court. In contract, the GAO requires only a limited record from agencies.

While the "administrative record" is in effect a fiction assembled after the fact to represent an agency's contemporaneous decision-making process, and is often fairly standardized, "where it becomes interesting is in cases like Trace where what's being challenged is a more unusual decision, and there's not a typical, standard record that gets created," said Covington partner Jay Carey.

"And then the question becomes much more acute — what is the record?" he said. "That's why, I think, you get the Trace court exploring whether the documents were documents that were considered by the government in the course of making its decision. That's going to be a key question any time this kind of fight arises."

Then in another decision from October, the claims court split from the GAO again by finding that a "government control" exception to the Federal Acquisition Regulation's strict "late is late" rule for untimely proposals — where a late proposal is generally automatically rejected — also applies to electronically submitted proposals.

There are four exceptions to that rule, including one where a bidder has evidence there was "government control" of their proposal by the bidding deadline, and another where if a proposal was electronically submitted before 5 p.m. on the last working day before the bidding deadline but received

late. The GAO strictly adheres to that electronic submission deadline, even if there is evidence that there was government control of an electronic submission before the deadline.

But in eSimplicity Inc.'s case, where the company's bid for a U.S. Navy contract was submitted electronically and rejected by a Navy email server due to exceeding an unstated email size limit, Judge Stephen S. Schwartz ruled that eSimplicity's submission counted as being in "government control," ruling that exception could apply to electronically submitted proposals in the right circumstances.

"The court's view of the FAR's 'late is late' rule is a much more modern understanding of how proposals are submitted — proposals are now submitted electronically, full stop," said Bradley Arant's Beezley. "So I think the court has a much more modern, less draconian view of this rule."

The cases are Trace Systems Inc. v. U.S. et al., case number 1:22-cv-00404, and eSimplicity Inc. v. U.S., case number 1:22-cv-00543, in the U.S. Court of Federal Claims.

--Editing by Brian Baresch and Nicole Bleier.
