Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Government Contracts Cases To Watch In 2015

By **Erica Teichert**

Law360, Washington (January 02, 2015, 5:41 PM ET) -- While the government continues to increase its scrutiny of contractor costs, contractors are set to fight back over major and evolving issues including statutes of limitations for litigation and contract audits as well as other interpretation questions involving the False Claims Act.

Here are the top cases to watch in 2015:

KBR v. US ex rel. Carter, US Supreme Court

False Claims Act cases have continued to be an active area of government contracts litigation, and the statute faces a number of challenges to its scope and breadth in 2015. The U.S. Supreme Court will lead the charge in early January as it hears oral arguments over the Wartime Suspension of Limitations Act's ability to suspend the FCA's statute of limitations.

In March 2013, the Fourth Circuit became the first court to rule that the little-used World War II-era law suspends the FCA's six-year statute of limitations until five years after the formal end of any conflict. But the U.S. has rarely experienced a full five years of peace at one time, and that interpretation could effectively eliminate any statute of limitations for civil fraud cases against government contractors.

“The Fourth Circuit decision would permit indefinite tolling of the FCA statute of limitations in the civil context, which will have a dramatic impact on FCA defendants in all industries,” said David M. Nadler, leader of Dickstein Shapiro LLP's government contracts practice group.

Historically, the WSLA has had a criminal focus, but the Fourth Circuit deemed that the extension also applied to civil FCA cases even if the government declines to intervene in a relator suit. In the case at hand, the trial court dismissed a suit against Halliburton Co. and KBR that accuses them of billing the government for water purification work they never did at U.S. bases in Al Asad and Ar Ramadi, Iraq. But the Fourth Circuit reversed that dismissal under the WSLA.

In addition to the statute of limitations issues, the Supreme Court will consider how to apply the FCA's first-to-file bar, as KBR and Halliburton claim that relator Benjamin Carter's 2011 suit was also preempted by a 2006 complaint over the same issues.

The Supreme Court has received a number of amicus briefs in the case, with the solicitor

general supporting the whistleblower and several defense and health care groups backing KBR and Halliburton's quest to nix the controversial Fourth Circuit ruling. In an October brief, Solicitor General Donald Verrilli maintained KBR and Halliburton would have to rely on res judicata principles rather than the first-to-file bar to protect them from future FCA suits on their alleged misconduct.

According to Jeff Bozman of Covington & Burling LLP, the Supreme Court may take a middle-of-the-road approach to resolving the statute of limitations issues in the case.

“The court may rule that only when the government is a plaintiff or intervenor should the suspension of limitations apply in a civil case,” he said.

Carter is represented by David S. Stone, Robert A. Magnanini, Amy Walker Wagner and Jason C. Spiro of Stone & Magnanini LLP.

KBR is represented by John P. Elwood, Craig D. Margolis, Jeremy C. Marwell, Tirzah S. Lollar and Kathleen C. Neace of Vinson & Elkins LLP and John M. Faust of the Law Office of John M. Faust PLLC.

The case is Kellogg Brown & Root Services Inc. et al. v. U.S. ex rel. Carter, case number 12-1497, in the Supreme Court of the United States.

US ex rel. Barko v. KBR, US Supreme Court

The Supreme Court also has a chance to weigh in on the scope of attorney-client privilege during internal investigations in 2015, thanks to a December petition for certiorari in another KBR-related FCA case.

Relator Harry Barko initially sued KBR and Halliburton for allegedly defrauding the government through their Iraq War subcontracts with another company, Daoud & Partners, that performed substandard work and inflated its bills to the prime contractor. To prove his claim, Barko sought discovery of certain internal investigatory reports prepared by KBR’s nonlawyer compliance staff under the direction of the legal department. KBR refused, citing attorney-client privilege.

Although the lower court ruled the companies would have to hand over internal investigatory reports prepared by KBR's nonlawyer compliance staff, the D.C. Circuit ruled in June that the documents fall under attorney-client privilege.

But Barko alleges company investigators failed to tell employees they were conducting the audit for legal purposes and that should negate any attorney-client privilege.

Although the Supreme Court hasn't decided whether to take up Barko's petition yet and briefing is ongoing, Nadler says government contractors are still keeping a watchful eye on the space and how it will affect their protection claims.

“There are a lot of people looking at how they position themselves going forward if the privilege detaches,” he said.

Barko is represented by Stephen M. Kohn, Michael D. Kohn and David K. Colapinto of Kohn Kohn & Colapinto LLP.

KBR is represented by Craig Margolis and Tirzah Lollar of Vinson & Elkins LLP and John Martin Faust of Law Offices of John M. Faust PLLC.

The case is U.S. ex rel. Harry Barko v. Kellogg Brown & Root Inc. et al., case number 14-637, in the U.S. Supreme Court.

DCAA Audit Challenges

In addition to FCA litigation, federal contractors also face headaches from the Defense Contract Audit Agency because of its never-ending backlog of incurred cost audits. Although the agency has six years to complete audits of contractors' incurred costs and close out cost-reimbursement contracts and has shaved its nearly 25,000 case backlog in half according to a March report, that still leaves thousands of contracts and billions of dollars in the balance.

The DCAA told congressional defense committees in March that it examined over $160 billion in defense contracts in fiscal year 2013 in the midst of a tough budgetary environment and achieved its fourth consecutive year of increased savings.

But in 2015, contracting officers will have to make final decisions on contractors' incurred costs from 2008 on many contracts with little or no information from the DCAA, and that could cause an uptick in protests and litigation with the Board of Contract Appeals over disallowed costs.

“The number of statute of limitations cases is on the rise generally,” Crowell & Moring LLP's Stephen J. McBrady said. “I think government claims arising out of old costs in particular are on the rise.”

However, McBrady noted that a recent Federal Circuit decision upholding the dismissal of an $80 million overbilling suit against Sikorsky Aircraft Corp. may spark a shift in strategy for contractors and the government, as they can now potentially agree to toll the Contract Disputes Act statute of limitations.

In the case, the U.S. alleged it overpaid Sikorsky from 1999 to 2005 on a number of contracts for aircraft and spare parts because of the contractor's noncompliant accounting systems and its accounting method used to allocate indirect costs of buying and handling aircraft parts beginning in 1999.

Although the three-judge panel upheld Sikorsky's win in the case, it dismissed the company's cross-appeal challenging U.S. Court of Federal Claims Judge Charles F. Lettow's ruling that the government's claims were timely.

According to McBrady, the decision opens the door for parties to toll the CDA's statute of limitations via mutual agreements, which could prevent some disputes from going to the Board of Contract Appeals.

“I think those claims are still going to be out there, but this potentially changes the whole approach on how they're handled,” he said. “I think one major takeaway is the Sikorsky decision upends the case law on statute of limitations to say that the Contract Disputes Act statute of limitations is not jurisdictional. Previously, the decisions of the Federal Circuit, the boards of contract appeals, and the Court of Federal Claims had consistently held that the CDA statute of limitations was 'jurisdictional,' meaning that the boards and courts did not have jurisdiction to hear cases involving claims that were not asserted in a timely way. Because the statute of limitations was jurisdictional, it could not be waived, or tolled by mutual agreement. In that respect, Sikorsky is a game-changer.”

Sikorsky is represented by Bartlit Beck Herman Palenchar & Scott LLP.

The U.S. is represented by government attorney James W. Poirier.

The case is Sikorsky Aircraft Corp. v. U.S., case number 13-5096, in the U.S. Court of Appeals for the Federal Circuit.

US ex rel. Conyers v. KBR, Illinois Federal Court

In yet another KBR-related case, an Illinois federal court will have an opportunity this year to determine whether foreign subcontractors can be subject to FCA litigation for allegedly causing a prime contractor to submit false claims to the government.

The U.S. Department of Justice has accused KBR of reaching agreements with two LOGCAP III subcontractors that provided the companies with kickbacks and charged the government inflated prices for the deals. But one of the accused subcontractors, First Kuwaiti Trading Co., is fighting back and alleges the federal government failed to establish a prima facie showing of jurisdiction.

According to First Kuwaiti's motion to dismiss, which was filed in Illinois federal court in May and supplemented in September but is still awaiting a ruling, the FCA case doesn't include a cause and effect relationship between the foreign company and KBR's allegedly inflated claims.

The DOJ has maintained that there were lower, nonkickback-paying bids submitted for the various subcontracts, and KBR knowingly conspired with the Kuwaiti companies on these false claims from 2003 to 2005 and possibly later.

The Conyers case also presents the court with a chance to weigh in on whether government contractors can enforce arbitration provisions when they're faced with whistleblower FCA suits.

According to Nadler, enforcement of arbitration agreements has been very fact specific in the courts so far. Several other courts have considered this issue over the past couple years, with the Fourth and Sixth circuits coming out in favor of relators' ability to come to court while the Southern District of Ohio upheld an arbitration agreement's validity in January 2013.

“Given the lack of consistency among the courts as to the enforceability of arbitration clauses in the FCA context, this case could have an impact on future cases, particularly if the court finds that the arbitration clause can be enforced,” Nadler said. “Here, such a finding would be significant, given that arbitration of the relator’s claim would clearly result in the piecemeal litigation of this effort (while the separate claims of the government are resolved).”

First Kuwaiti is represented by Peter F. Garvin III, Grant H. Willis and Meghan E. Greenfield of Jones Day.

The U.S. is represented by John A. Kolar.

KBR is represented by David E. Hawkins, Craig D. Margolis, David E. Hawkins, Laura Lucas Palekar and Christine N. Roushdy of Vinson & Elkins LLP.

The case is U.S. ex rel. Conyers v. KBR Inc. et al., case number 4:12-cv-04095, in the U.S. District Court for the Central District of Illinois.

CGI Federal Inc. v. US, Federal Circuit

Contractors are also looking out for how the Federal Acquisition Streamlining Act of 1994 and the Federal Acquisition Regulation apply to the General Services Administration's federal supply schedule, as the Federal Circuit gears up to hear arguments in CGI Federal Inc.'s challenge to the Centers for Medicare & Medicaid Services' change to payment terms for recovery audit contracts.

Although it was initially intended that the Federal Acquisition Streamlining Act would eliminate burdensome restrictions and requirements in government contracts, nonstandard and noncommercial terms have popped back up across the contracting space, including at CMS.

In the case at hand, CGI alleged CMS violated FAR and FASA by deciding to withhold payments to contractors for identified Medicare overpayments until challenges finished their second round of appeals. But the Court of Federal Claims upheld CMS' decision, saying that the nonstandard rules don't apply to GSA's federal supply schedule.

A contractor trade group blasted the decision as "absurd" in an amicus brief to the Federal Circuit in November, warning that the ruling could negatively impact companies that work with the government as they endure more problematic contract requirements.

Briefing in the case wrapped up in early December, but the Federal Circuit has yet to schedule oral arguments.

"It will be interesting to see how it comes out on that," said Tom McGovern of Hogan Lovells. "I think there's a pretty good chance the decision will be reversed, but it will be interesting to see what language is used."

The Professional Services Council is represented by Michael J. Schaengold, Aaron S. Ralph and Melissa P. Prusock of Greenberg Traurig LLP.

Appellant CGI Federal Inc. is being represented by Scott M. McCaleb, Daniel P. Graham, Christine A. Reynolds and Gary S. Ward of Wiley Rein LLP.

The federal government is being represented by William Porter Rayel of the U.S. Department of Justice's Civil Division.

The suit is CGI Federal Inc. v. U.S., case number 14-5143, in the U.S. Court of Appeals for the Federal Circuit.

CMS Contract Management Services v. US, US Supreme Court

The Supreme Court may also weigh in this year on whether federal agencies can use cooperative agreements and grants rather than formal contract competitions for large projects, as the U.S. Department of Housing and Urban Development appeals a Federal Circuit decision rejecting its method for funding public housing projects.

HUD's cooperative agreement and grant program was initially challenged by local public housing authorities and their nonprofit subsidiaries in February 2011 when HUD chose to re-compete its

Performance-Based Annual Contribution Contracts, saying that new competition would help the agency save money. HUD's new contract decisions were hotly contested, and 66 protests were filed at the GAO.

Although the Court of Federal Claims backed HUD's position, the Federal Circuit and Government Accountability Office have both sided with the local public housing authorities.

In an unusual move, the U.S. Court of Federal Claims granted HUD's request for a stay while the agency takes the case to the Supreme Court.

HUD has until Jan. 5 to file its petition with the high court.

"The Supreme Court hasn't dealt with anything in the bid protest area in forever," Wiley Rein LLP's Scott McCaleb said. "It would be very interesting if they actually took it. When the government is pushing for the Supreme Court to take a case, they listen intensely."

The case is CMS Contract Management Services et al. v. U.S., case number 13-5093, in the U.S. Court of Appeals for the Federal Circuit.

--Additional reporting by Khadijah M. Britton and Aebra Coe. Editing by Jeremy Barker and Emily Kokoll.
