

Government Contracts Group Of The Year: Crowell

By **Martin Bricketto**

Law360, New York (January 31, 2011) -- Crowell & Moring LLP last year helped Lockheed Martin Corp. fend off a government demand for \$14.7 million in alleged increased costs and saw the fruits of a bid protest by Health Net Federal Services over a \$16 billion contract for a military health care program, earning the firm a place among Law360's Government Contracts Groups of 2010.

The firm's victories in 2010 also included helping Cigna Government Services LLC preserve a Medicare claims contract worth \$248 million.

With its 40-year history and a roster of more than 50 highly specialized attorneys, the government contracts group at Crowell provides clients with "one-stop shopping," according to Dan Forman, a partner with the group in the firm's Washington, D.C., office.

"We can really say we cover every aspect of government contracts law, soup to nuts, and we have the deepest expertise in each area," Forman said.

Lockheed is among the Fortune 500 companies that have turned to Crowell to represent it in government contracts disputes.

In June, the U.S. Court of Appeals for the Federal Circuit rejected the federal government's allegations that Lockheed owed it \$14.7 million because the aviation giant increased the price of a \$9.5 billion contract for the next-generation F-22 jet fighter when the company changed its accounting practices.

In the case involving Cost Accounting Standards provisions, the Federal Circuit affirmed the ruling of the Armed Services Board of Contract Appeals and rejected the government's arguments that Lockheed didn't notify it of the accounting change when the contract was renegotiated.

With Crowell serving as lead counsel, Lockheed said the Air Force signed off on the price increases, and the Federal Circuit agreed.

“The board found, with considerable evidentiary support, that Lockheed made the cost effects of its accounting changes clear to the Air Force negotiators, and that they understood the effects of those changes,” the appeals court said.

In 2002, the government claimed it was entitled to \$32 million from Lockheed for increased costs that resulted from changes to the company's accounting practices at a Georgia-based plant, according to the firm.

Lockheed agreed to \$17.3 million, but fought the government on the remaining \$14.7 million, which stemmed from the development of the F-22, a project that wasn't affected by the changes, according to the firm.

The company argued that the F-22 contract was repriced at the government's request in the wake of the accounting changes and their impact was fully disclosed to the government, which accepted the new price, according to the firm.

The case recognized that not all contracts in effect when a change is made are affected by the change, the firm said.

“It represents a lot of money for contractors,” said Angela Styles, a partner with the firm and head of its government contracts group. “Until now, the issue of 'increased costs' was not well-defined. With this case, contractors can make more rational business decisions because they will be able to know in advance what the CAS effect will be in monetary terms.”

Last year also saw victory in a major battle that Crowell has fought on behalf of Health Net for a U.S. Department of Defense TRICARE Managed Care Services contract worth more than \$16 billion.

The program at the center of the dispute provides managed health care to active-duty and retired members of the military and their families.

Aetna Government Health Plans had won the contract for the program's North Region — which covers about 2.9 million beneficiaries — but the U.S. Government Accountability Office in November 2009 ordered the government to reconsider that award based on the protest of Health Net, the incumbent provider.

The GAO agreed with Health Net that the government's evaluation of Aetna's past performance and price realism was flawed, among other sustained challenges.

The GAO also backed Health Net's contention that Aetna secured an unfair competitive advantage because a former chief of staff with TRICARE Management Activity, which administers the health plan, helped prepare its proposal.

According to the GAO, the record showed that the former chief of staff had access to nonpublic, proprietary information regarding Health Net's performance under the old contract, which appeared relevant to the procurement at issue.

"With the lawyering at the firm, they got (the GAO) to delve into areas that ultimately proved to be successful in winning the protest," Forman said.

In May, following its reevaluation, TRICARE announced that it was terminating its contract with Aetna and instead entering into a contract with Health Net for the work.

In another win for Crowell before the GAO, the watchdog agency denied a bid protest from three companies challenging Cigna's \$248 million Medicare claims contract for a U.S. Department of Health and Human Services office.

HHS' Center for Medicare and Medicaid Services did not unfairly engage in discussions only with Cigna leading up to its July 8 award, the GAO said in a decision released in October but made public in December.

The companies Cigna beat out for the contract — Protesters Highmark Medicare Services Inc., Cahaba Government Benefit Administrators LLC and National Government Services Inc. — said the CMS violated the Federal Acquisition Regulation by asking Cigna months after its initial bid whether certain information remained accurate.

The protesters argued that the request constituted something close to an invitation for a proposal revision, and that CMS should have given all bidders the same treatment.

But the request merely asked Cigna to provide a yes or no answer and specifically prohibited additional information, the GAO said.

The decision came about 1 1/2 years after Cigna filed a successful protest with the GAO after initially losing the same contract to Highmark.

Cigna convinced the GAO that government officials had not had meaningful discussions with it leading up to its initial award in 2009, forcing HHS to reopen bidding.

"Agencies don't usually change their mind about who the winner is going to be," government contracts partner Thomas Humphrey said.

Styles said senior practitioners and a younger generation of lawyers with a passion for government contracts help the firm efficiently handle client inquiries without reinventing the wheel each time.

As Forman put it, "you don't have to do eight-hour research projects when you have guys and gals who wrote the books down the halls."

While Crowell represents defense and aerospace companies traditionally associated with government contracts law, Styles said the firm has worked to broaden its client base to include commercial companies that also do business with the government.

Forman said the firm has increased its small and mid-size government contracts clients during the past five to six years.

“It has yielded a great diversity in the type of work and the type of industries we're dealing with,” Forman said. “We're far more diverse today than we've ever been.”

Forman said the group has branched out into state and local government contracts work.

Litigation-related victories may draw attention, but Humphrey stressed that counseling is a key component of the group's success.

Giants such as Lockheed have strong inside counsel that are experts themselves in government contracts, but many of the firm's other clients don't have that capability, Humphrey said.

“A way to develop the practice is to have the counseling skills to help them grow their business in government contracting, and you grow as your clients grow,” Humphrey said.

Organizational conflicts of interest has been one emerging legal issue on which the firm has been ahead of the curve, to the benefit of clients, according to Humphrey.

The firm has worked to counsel clients on OCI risks and identify and mitigate potential pitfalls so “they don't bid on a procurement, then get thrown out because of some OCI that they hadn't thought about,” Humphrey said.

Looking ahead, Humphrey said the firm is well-positioned for what has been an explosion in bid protest activity that he expects to continue.

“The declining defense budget is going to lead people to fight more often about the contract awards that are made, because people won't be as sure there's another one around the corner they can take a shot at,” Humphrey said.

In mid-November, Law360 solicited submissions from more than 300 law firms for its practice group of the year series. The more than 400 submissions received were reviewed by a committee of four editors. Winners were selected based on the number of significant wins the group had in litigation or the size, number and complexity of deals the group worked on in 2010.

--Additional reporting by Nick Brown and Mike Cherney