

## Gov't Contracts Policy And Cases To Watch In 2017

By **Daniel Wilson**

*Law360, Nashville (January 2, 2017, 1:03 PM EST)* -- The direction federal contracting policy will take under the new administration remains somewhat vague, but there are hints available about what may be coming, and a number of pending court cases could also help shape the government contracts landscape in 2017.

### Possible Policy Changes

The unprecedented, and somewhat unexpected, victory of President-elect Donald Trump has left attorneys and other pundits scrambling to work out exactly what the new administration will do, with the new president's positions not fitting into any traditional political framework.

For government contractors and their counsel, the specifics of what will happen are largely still up in the air, but Trump's pre- and post-election promises do offer some broad hints about what the new administration will bring — and the legislation Congress may try to pass to help.

For instance, he has promised to repeal a large number of the Obama administration's executive orders, which could reduce compliance burdens on contractors, especially in areas such as labor and environmental regulations, according to attorneys.

And plans for increased defense and infrastructure spending, including his promise to "build the wall" along the southern border, should benefit some defense and construction contractors. With lawmakers' likely reluctance to ramp up federal spending, the infrastructure plan could also lead to a large increase in public-private partnership deals, attorneys said.

"That could bring a new class of companies into the government contracts space," Crowell & Moring LLP government contracts group co-chair Dan Forman said.

The federal hiring freeze promised by Trump could also have an impact on federal contracting, exacerbating existing issues with the federal contracting workforce, such as an ongoing staff shortage, attorneys claimed, which could drag out the contracting process.

"Many view [contracting officer positions] as understaffed already," Dentons partner Jack Horan said. "For example, the [General Services Administration] already talks about how it's unable to fill positions."

Another potential impact comes from keeping aging contracting workers in the job, without adding new, younger recruits, attorneys said. While older staffers carry useful experience, they also often find the procurement of new information technology like cloud computing, as well as other cutting-edge equipment and services, difficult, using inappropriate contracting models, attorneys said.

“We need more contracting officers who are technically knowledgeable to get better procurements and attract the best and brightest [technology] sellers,” McCarter & English LLP government contracts and export controls group co-leader Alex Major said.

And Trump's recent Twitter broadsides against the Boeing Co. about an allegedly overpriced contract given to the company for the planned replacement for Air Force One — a deal that is not yet actually finalized — and the “out of control” F-35 jet fighter program, alongside Trump's intervention to negotiate with Carrier Corp. amid the planned closure of a manufacturing plant in Indiana, trading off tax breaks for keeping some jobs in the U.S., suggest a president that is willing to directly intervene in high-profile disputes and negotiations, something federal contractors will also have to take into account.

The Carrier deal, along with statements Trump made on the campaign trail about keeping jobs in — or bring jobs back to — the U.S., also suggest that “Buy American” requirements for contractors may see more stringent enforcement under the Trump administration, according to attorneys.

“[Overall], with the new administration coming to town, government contracts could be affected in any number of ways, in terms of what the new administration does to either further or repeal what the previous administration did,” Bradley Arant Boult Cummings LLP associate Aron Beezley said.

On the congressional side, it will be worth watching what lawmakers direct any additional defense funding toward, which may also be strongly influenced by Trump's pick for secretary of defense, the former Marine Corps Gen. James Mattis, and what he sees as the most useful ways to spend that money — which, judging by his past efforts, will likely focus on the most effective solutions to help support warfighters on the ground — attorneys claimed.

The 2018 National Defense Authorization Act is also likely to continue to push the barrow for a number of ongoing acquisition reform efforts by lawmakers, such as the increased use of commercial item contracts. Efforts to further clarify intellectual property rights for contractors — something that has only been barely touched on by lawmakers — would also be welcomed, attorneys said.

### **Cases And Legal Issues To Watch**

While the policies that will be pursued under the new administration and the new Congress are not yet fully clear, the prominent government contracting issues that may be resolved in court are a little more obvious. Here's three legal issues currently being fought out in courts that could affect the government contracts landscape that attorneys say they will be watching in 2017:

#### *Under What Circumstances Does The FCA's Public Disclosure Bar Apply?*

Given its broad applicability to all types of federal contracts, the False Claims Act gets a lot of attention from contractors and their attorneys. And in the past few years, it has also received significant attention from the U.S. Supreme Court, including in two 2016 decisions, one on the “implied certification” doctrine of FCA liability and the other on the appropriate sanctions standard for violations of the seal automatically placed on whistleblower FCA cases.

In 2017, the high court could also look to take on another issue that has been prominent in recent FCA disputes: the circumstances under which the statute's public disclosure bar applies.

The bar prevents qui tam relators from filing suits based on information that has previously been made public, unless they substantially add to that public material, but issues around specifically when and how the bar applies have been decided differently by different courts.

There were several circuit court decisions on the issue in 2016, and although the justices in October turned down a petition asking them to weigh in on whether the bar applies to claims that were not revealed to the general public but had previously been made known to a federal agency, they are currently pondering whether to take another public disclosure case.

That case, filed by Advocates for Basic Legal Equality Inc., alleges foreclosure fraud at U.S. Bank NA. It hinges on whether general, rather than specific, public disclosure of alleged unlawful behavior is enough to trigger a block on a suit.

The high court in October asked the U.S. Solicitor General to weigh in on the case, which — although not a guarantee — gives the petition a much higher chance of being taken up by the justices than usual.

ABLE is represented by Scott L. Nelson and Allison M. Zieve of Public Citizen Litigation Group, John P. Relman, Sasha Samberg-Champion, Stephen M. Dane and Michael G. Allen of Relman Dane & Colfax PLLC, Pamela S. Karlan, and in-house counsel Aneel L. Chablani and George A. Thomas.

U.S. Bank is represented by Andrew W. Schilling, John B. Williams III and Matthew E. Newman of BuckleySandler LLP.

The case is U.S. ex rel. Advocates for Basic Legal Equality Inc. v. U.S. Bank NA, case number 16-130, in the Supreme Court of the United States.

#### *How Does Statutory Ambiguity Apply In FCA Litigation?*

Robert Purcell, a former employee of water pump company MWI Corp., has asked the high court to decide whether companies can avoid FCA penalties through a claim of reasonable interpretation of a vague law, after MWI won a landmark decision in its favor in 2015.

The D.C. Circuit in November 2015 had overturned a \$22.5 million FCA judgment against MWI over an allegedly excessive commission paid to a Nigerian sales agent under a deal funded through a U.S. Export-Import Bank loan.

The judgment was reduced to close to zero post-trial, with the district court judge noting Nigeria had not only repaid the loan, but had also paid the Ex-Im Bank millions of dollars in fees and interest, prompting the government to appeal, asking for reinstatement of penalties.

But the circuit court ultimately found the company hadn't knowingly violated the FCA when it certified it had paid only "regular commissions," because the term had been left vague by the government and the company's interpretation of the term, given it had long paid its sales agent the same rate, had been reasonable.

The decision sent ripples through the government contracting community, both because the government's interpretation of a vague law or regulation is usually given significant deference by courts, and because the issue of interpretation of ambiguous terms comes up regularly in FCA litigation.

"It's a case that's ... been widely cited to say that for the government, if you're going to promulgate regulations, or if you're going to use material terms in certifications, you can't have the benefit of imposing draconian sanctions under the False Claims Act against the regulated companies if you don't define the terms and you don't warn them away from what would otherwise be an objectively reasonable interpretation," Robert Rhoad of Sheppard Mullin Richter & Hampton LLP, counsel for MWI, told Law360.

Therefore, no matter whether the high court decides to reject Purcell's petition — finally ending a case that has played out for nearly two decades — or to consider the case, that ruling will be important for contractors, attorneys claimed. The justices are set to consider the petition at their Jan. 6 conference.

Purcell is represented by Joseph J. Aronica and Kristina C. Kelly of Duane Morris LLP.

MWI is represented by Robert T. Rhoad of Sheppard Mullin Richter & Hampton LLP and Brian Tully McLaughlin of Crowell & Moring LLP.

The case is U.S. ex rel. Purcell v. MWI Corp., case number 16-361, in the Supreme Court of the United States.

#### *Can Extrapolation Of Claims Be Used In FCA Cases?*

Another hot FCA issue is statistical sampling, or extrapolation, expanding upon an allegedly representative set of claims to determine broader FCA liability. Given the hefty potential damages stemming from extrapolated claims, many government contractors and their counsel have been watching the issue closely.

"Extrapolation is a huge issue," Crowell & Moring government contracts group co-chair Peter Eyre said.

The issue has been raised in a number of recent FCA cases, including a high profile dispute involving hospice chain AseraCare Inc., currently before the Eleventh Circuit, also notable for the district court's ruling that differences in opinion on medical necessity aren't grounds for a false claim.

The Fourth Circuit in October also heard oral arguments in a relevant dispute accusing Agape Senior Community Inc. of overbilling Medicare for nursing home services, although the judges appeared to suggest they may have been hasty in granting the interlocutory appeal, saying the case may actually come down to a factual dispute about whether sampling evidence is reliable and not a controlling question of law that needs interlocutory appeal.

Either way, circuit court guidance on statistical sampling has been limited, and contractors and their counsel are awaiting the circuit courts' decisions to see if they will get any further clarity on the issue.

The Agape whistleblowers are represented by T. Christopher Tuck, Catherine H. McElveen, Daniel Haltiwanger and Terry E. Richardson Jr. of Richardson Patrick Westbrook & Brickman LLC, Jessica H. Lerer and Mario A. Pacella of Strom Law Firm LLC, and Christy DeLuca LLC.

Agape is represented by William W. Wilkins, Kirsten E. Small and Mark C. Moore of Nexsen Pruet LLC, and Deborah B. Barbier LLC.

The government in the AseraCare case is represented by Benjamin C. Mizer, Joyce White Vance, Jenny L. Smith, Abby C. Wright and Michael S. Raab of the U.S. Department of Justice.

AseraCare is represented by Jack W. Selden, James S. Christie Jr., Matthew H. Lembke, Nicholas A. Danella and Kimberly Bessiere Martin of Bradley Arant Boult Cummings LLP.

The cases are U.S. ex rel. Michaels et al. v. Agape Senior Community Inc. et al., case numbers 15-2145 and 15-2147, in the U.S. Court of Appeals for the Fourth Circuit; and U.S. v. GGNSC Administrative Services et al., case number 16-13004, in the U.S. Court of Appeals for the Eleventh Circuit.

--Additional reporting by Jeff Overley. Editing by Emily Kokoll.