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COFC Ruling May Hasten Commercial Contracting's Decline

By **Dietrich Knauth**

Law360, New York (September 02, 2014, 5:52 PM ET) -- A recent Court of Federal Claims decision exempts Federal Supply Schedule contracts from some streamlined commercial acquisition rules, furthering a trend that has some attorneys increasingly concerned about the long-term relevance of commercial contracting rules.

Judge Mary Ellen Coster Williams denied a CGI Federal Inc. protest over the Centers for Medicare and Medicaid Services' purchase of recovery audit contract services through the General Services Administration's schedule contracts, saying on Aug. 22 that the agency was within its rights to include new contract clauses that deviate from commercial practices.

Attorneys who represent contractors say that the decision threatens to further damage the commercial contracting regime that was enacted by the Federal Acquisition Streamlining Act in 1994.

"The court's decision here appears to turn FASA on its head," said Michael Schaengold, co-chair of Greenberg Traurig's government contracts practice. "[It] appears to create a substantial incentive for some commercial contractors not to participate in sales to the federal government, because all of a sudden, you could see the potential influx of various noncommercial terms, and that's not what the statute intended. There are many companies that are hesitant to contract with the U.S. government, and this will give them another reason not to."

The promise of streamlined acquisition for commonly available goods and services has been steadily eroded by new laws and regulations that make no exceptions for commercial items — such as recent rules requiring contractors to scour their supply chains for potential counterfeit parts — and by agency policies, like the DOD's policy of second-guessing commercial prices listed on the supply schedules and agencies increasing demands for commercial contractors' cost and pricing data, attorneys said.

In the frequent conversations on Capitol Hill about acquisition reform, industry groups regularly plead for the government to make it easier for commercial companies to compete for contracts, and the DOD, the government's largest purchaser, has itself acknowledged that its acquisition policies leave it at risk of falling behind the commercial sector in access to cutting-edge technology.

Now that the court and the Government Accountability Office have upheld the CMS plan to deviate from commercial practices by paying its recovery audit contractors more slowly than they'd be paid in the private sector, companies have less assurance than ever that they can expect a reasonable facsimile of commercial contracting when dealing with the government, Schaengold said.

Before FASA was enacted, the government frequently wound up overpaying for standard commercial items, including infamous examples like $700 hardware store hammers purchased by the DOD, Schaengold said. FASA was supposed to allow the government to buy “commercial items from commercial companies on commercial terms," lowering the risk of such overpayments and increasing the government’s access to commercial goods and services, he said.

The Federal Supply Schedules are the government’s most important tool for commercial item purchases, accounting for about $50 billion a year and 10 percent of the government’s total procurement spending, which makes allowing the schedules to deviate from commercial practices hard for businesses to understand, attorneys said.

"Unfortunately, I think it is part of a greater trend of eroding a commercial regime that has a lot of well-thought-out policy reasons behind it," said Sam Knowles, an attorney in DLA Piper’s government contracts practice.

But not everyone thinks the decision will disrupt commercial contracting.

Daniel Gordon, associate dean for government procurement law at George Washington University, said that the GSA schedules have always operated under a unique set of rules and that commercial contracting is often less “commercial” than businesses hope it will be. The effects of the 1990s commercial contracting reforms have always been limited by the fact that the government cannot always act like a business, Gordon said.

“For at least 25 years, there has been tension between people saying the government should buy just like a business and people worried that going down that path puts public funds at unnecessary risk of fraud, waste and abuse,” Gordon said. “This decision strikes me as a sensible approach that recognizes the government’s need to protect public funds and recognizes that the government is not a business and does not function like a business.”

Judge Williams’ opinion is based in part on her analysis of references between Part 12 of the Federal Acquisition Regulation, which governs commercial item contracting, and FAR Part 8.4, which specifically covers the GSA schedules. Because the schedule contracts are expressly designed for the purchase of commercial goods and services, CGI had argued that all of FAR Part 12 applied to purchases under the schedule contracts.

But Judge Williams rejected that argument, instead looking at FAR Part 8.4’s references to Part 12 to determine when the general commercial contracting rules applied.

Because FAR Part 8.4 only provides that FAR Part 12 applies in three instances — termination for cause, termination for convenience and adding open market items to Federal Supply Schedule orders — it doesn’t cover situations like the current case, in which CMS deviated from commercial practices when making an order under the schedules, according to the opinion.

That finding, which opens the door for agencies to add other noncommercial clauses in orders under the Federal Supply Schedules, is likely to catch contractors by surprise, according to Chris Haile of Crowell & Moring LLP.

“The general presumption has been that the schedules are commercial item contracts, so that while

they're subject to FAR Part 8, they're also subject to FAR Part 12," Haile said. "I think that the decision certainly could have come out differently."

CGI has already filed an appeal and sought an emergency injunction from the court, saying in an Aug. 27 motion that the government can afford to wait on the new contracts since its current recovery audit contracts don't expire until 2016.

"In enacting FASA, Congress sought to comprehensively reform government procurement practices by mandating
that the government focus its buying efforts on commercial items acquired only under customary commercial terms," CGI told the court.

The heavy reliance on cross references in the Federal Acquisition Regulation might make the case a good candidate for a stay during CGI's appeal, because it sets up a fairly straightforward and narrow issue for the Federal Circuit to decide, Schaengold said.

The Federal Acquisition Regulatory Council could also step in to clarify its intent through a regulatory revision, according to Knowles.

But while contractors might hope for a more business-friendly resolution in CGI's appeal, they will have to contend with Judge Williams' reputation as one of the foremost experts in government contracting law.

"Judge Williams is as knowledgeable as anyone out there, so it is concerning that someone with that level of knowledge and understanding of the nuances of government contracting would come out that way," Knowles said.

Judge Williams noted that CMS' planned deviation from customary payment terms "will increase cost, reduce competition and appears to be a bit excessive," but she said that the "court would be overstepping its bounds to substitute its judgment for that of the agency in determining its needs, particularly in the financial realm."

If the decision stands and other noncommercial terms are allowed to creep into the Federal Supply Schedules purchases, the government could be on the road back to the "bad old days" before FASA was enacted, contractor attorneys say.

"We're getting to a point where the benefits [of commercial contracting] are less and less clear," Knowles said. "When you have a marketplace where there are high barriers to entry and a few large players, it creates an environment where there's not only the potential for inefficiency and higher prices, but also the more nefarious possibilities, like collusion."

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

The federal government is represented by Stuart F. Delery, Robert F. Kirschman Jr., Kirk Manhardt and William P. Rayel of the U.S. Department of Justice; Jeffri Pierre of the Department of Health and Human Services' Office of General Counsel; and Jennifer L. Howard of the General Services Administration's Office of General Counsel.

The case is CGI Federal Inc. v. U.S., case number 1:14-cv-00355, in the U.S. Court of Federal Claims.

--Editing by Jeremy Barker and Philip Shea.
