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Top Gov't Contracts Cases From The 2nd Half Of 2018

By **Daniel Wilson**

Law360 (December 20, 2018, 9:56 PM EST) -- Courts have handed down a number of important decisions for federal contractors in the second half of 2018, with the Federal Circuit having been particularly busy, addressing issues ranging from an important federal preference law to how specific agency corrective action must be.

In the first half of the year, important government contracts cases spread across many different courts touched on issues such as the statute of limitations under the False Claims Act and the jurisdictional limits of the Court of Federal Claims and U.S. Government Accountability Office.

In the second half of the year, however, many of the most important contracting-related decisions stemmed from the Federal Circuit, with the circuit court addressing issues implicating several different industries and involving a number of different aspects of federal contracting.

Here are some of the most prominent cases — and their key underlying points — that have made an impact on government contracting law in the latter half of 2018.

Agencies Have Broad Discretion When Taking Corrective Action

In October, the Federal Circuit backed the U.S. Army's broad corrective action for its $5 billion Army Desktop Mobile and Computing procurement, a program to buy commercial off-the-shelf computer hardware.

The Army had faced a raft of protests from unsuccessful bidders, with only nine of 58 bidders considered to have made technically acceptable bids. The excluded bidders argued that they had misunderstood the requirements for filling out Army-provided spreadsheets, and that the Army should have conducted pre-award discussions to offer additional guidance.

In response, the Army effectively issued a resolicitation allowing for new proposals with new pricing, which then prompted new protests from the originally successful bidders, including a unit of computer hardware giant Dell. Those bidders argued that because their pricing had already been publicly revealed, they would be put at a competitive disadvantage in the new round of bidding. The corrective action should have been much narrower, the bidders said.

A Court of Federal Claims judge agreed. The Army could have made minor tweaks and then reevaluated

all the original bids, the judge said, describing its "manifestly overbroad" corrective action as "akin to killing an ant with a sledgehammer when a rolled-up newspaper would have sufficed."

But the "narrowly targeted" standard used by the claims court was too strict, the Federal Circuit ruled, saying the Army's corrective action only had to be "rationally related" to fixing its mistakes.

In doing so, the circuit court effectively pulled its standard — and by extension, the Court of Federal Claims' standard — for permissible corrective action in line with the standard used by the Government Accountability Office, according to Bradley Arant Boult Cummings LLP partner Aron Beezley, who said the ruling was "very possibly the most important bid protest decision of 2018."

"In short, the Federal Circuit's decision makes it more difficult for Court of Federal Claims protesters to challenge agency corrective action," he said. "Previously, certain [claims court] cases applied a more stringent standard, requiring corrective action to be narrowly targeted to a particular defect."

Franklin Turner, co-leader of McCarter & English LLP's government contracts practice group, said that although the shift may be notable, the practical difference may be small.

Whatever the articulated standard, agencies have always had broad discretion to fashion corrective action, as long as they can show a reasonable nexus between a procurement defect and the intended correction, he claimed.

"This just rubber stamps what most bid protest lawyers will tell you — protests about corrective action are always a long walk uphill, in the snow, without any shoes," Turner said.

The case is Dell Federal Systems LP v. U.S., case number 17-2554, in the U.S. Court of Appeals for the Federal Circuit.

VA's Required Preference for Veteran-Owned Small Biz Is (Really) Absolute

In 2016, after years of the U.S. Department of Veterans Affairs effectively ignoring a line of related, nonbinding GAO decisions, the U.S. Supreme Court ruled in its Kingdomware decision that following the "rule of two" was mandatory for all VA procurements, outside of narrow statutory exceptions.

The rule of two, introduced in the 2006 Veterans Benefits, Health Care, and Information Technology Act, or VBA, requires the VA to give preference to veteran-owned small businesses, or VOSBs, for contracts whenever it expects at least two such businesses will bid on a deal and can carry out the work at a fair market price.

Prior to Kingdomware, the agency had taken the stance that the rule was effectively discretionary in some circumstances, like when it had already met its small business participation contracting goals.

While Kingdomware was unequivocal that the use of VOSBs was mandatory whenever possible, what it didn't address was what happens when the rule of two clashes with another mandatory contracting preference.

That issue came to a head when the U.S. AbilityOne Commission proposed to add certain eyewear and eyewear prescription services to its AbilityOne list in one of the VA's Veterans Integrated Service Networks, leading to a court challenge from an aggrieved VOSB, PDS Consultants.

AbilityOne covers certain items made by the blind and significantly disabled, and in most circumstances, federal agencies are required to purchase those items over alternatives.

But the Federal Circuit in October, affirming a Court of Federal Claims decision, found that the more specific nature of the rule of two overrides the more general AbilityOne preference, despite the otherwise-mandatory nature of both.

In addition to offering an important legal point — applicable beyond the context of VA procurement — that more specific legislation essentially trumps more general legislation, the ruling is also notable both for backing the VA's "essential purpose" of assisting veterans and for providing a roadmap for how to do so even when a veterans' preference program may clash with another federal preference program, Venable LLP partner Douglas Proxmire claimed.

"There's always been some feeling that the VA should, whenever it can, give preference to veteran-owned businesses, and this certainly does that," he said. "The case makes sense, and I hope results in more opportunities for [those] businesses."

The case is PDS Consultants Inc. v. U.S. et al., case numbers 17-2379 and 17-2512, in the U.S. Court of Appeals for the Federal Circuit.

Construction Bonding Requirements Fall Under the Christian Doctrine

The Christian doctrine, stemming from a 1963 Court of Claims decision, has become an important part of the federal contracting landscape, effectively establishing that standard or expected contracting clauses are implicitly considered to be part of a federal contract, even if not explicitly included in that contract.

In November, the Federal Circuit ruled that this includes bonding requirements on federal construction contracts, after an Army contractor, K-Con, had attempted to claim for additional costs it said were due to delays caused by the Army imposing performance and payment bond requirements that were not part of the original solicitation.

Bonding requirements, meant to ensure a project is completed and that subcontractors and suppliers are paid, are a standard part of federal construction contracts under the 1935 Miller Act, and thus are both mandatory and a "deeply ingrained strand of public procurement policy," satisfying the Christian doctrine, the circuit court found. It further noted that the doctrine is not limited to "administration-type provisions," despite what the contractor had argued.

The decision was a further demonstration to contractors of the broad applicability of the Christian doctrine, which does not articulate any specific contractual laws or clauses and therefore gives federal agencies significant protection from their own contract drafting mistakes, attorneys told Law360.

The case is K-Con Inc. v. Secretary of the Army, case number 17-2254, in the U.S. Court of Appeals for the Federal Circuit.

The Federal Acquisition Streamlining Act Means What It Says

The Federal Acquisition Streamlining Act, or FASA, was passed in 1994 in the wake of several scandals

involving wasteful defense spending. It requires that federal agencies conduct market research ahead of a contract solicitation to see whether a commercial platform could potentially meet their needs, and to give preference to commercial items whenever practicable.

Despite its broad applicability, however — and despite grumbles from industry and attorneys that many agencies have paid lip service over the years to federal commercial contracting preferences — FASA had never been the subject of a substantive court ruling until late 2016, when the Court of Federal Claims ruled that Palantir Technologies had wrongly been shut out of an Army intelligence software procurement, in violation of FASA.

Then in September this year, the Federal Circuit put a bow on that decision, rejecting the Army's arguments that the claims court should have deferred to its original choice to go with a custom solution for the disputed intelligence platform.

The circuit court noted that the Army was clearly aware ahead of time that commercial solutions, like Palantir's Gotham Platform, could provide a potential solution to many of the Army's base requirements while being supplemented by more customized tools, but had effectively ignored that information.

Among other effects, the Palantir decision should cause federal agencies to take their market research obligations under FASA more seriously, Beezley said. Proxmire agreed, noting that the Army had seemingly gone out of its way to not purchase from a commercial source despite well-documented cost and efficiency benefits.

It could also have impacts for procurement beyond the commercial item context, as the decision "makes clear that agency analyses at all stages should be meaningful and adequately documented, as opposed to perfunctory," Beezley said.

The case is Palantir USG Inc. v. U.S., case number 17-1465, in the U.S. Court of Appeals for the Federal Circuit.

Courts Continue to Develop Post-Escobar FCA Law

The Supreme Court in its landmark 2016 Escobar decision settled one prominent issue of False Claims Act law by backing the implied certification doctrine, whereby parties can be held liable for falsely implying they have complied with all relevant laws, regulations and contractual requirements when submitting claims for government reimbursement, even if those requirements aren't directly tied to payment.

At the same time, however, the justices also opened up some new questions regarding FCA law, including whether the "two-part test" set out in the decision — that an implied false certification requires "specific representations" about goods or services provided and that undisclosed noncompliance that makes those representations "misleading half-truths" — is mandatory or merely advisory.

Perhaps most prominently, the high court also noted that any alleged false claim must be "material" to the government's decision to pay, and the materiality requirement has been interpreted differently across a broad range of courts.

There have been a number of cases to touch on one of those two key questions this year, and some

rulings have even touched on both, such as an August decision in the Ninth Circuit involving a California university's alleged fraud related to paying banned bonuses to student recruiters.

In that case the circuit court panel, based on asides from previous Ninth Circuit cases that hadn't addressed the issue head-on, grudgingly found that the two-part test was mandatory, and then — over a dissent — also found that the banned bonuses could be material to payment, adding to a growing body of decisions on Escobar-related issues.

Despite more and more courts grappling with the materiality standard, however, no clear consensus has emerged. Instead, perhaps the clearest thread to emerge from those materiality-related rulings is that the Supreme Court needs to revisit the issue, Crowell & Moring LLP partner David Robbins said.

"For so many years there was a fight over whether implied certification exists, and it took the Supreme Court's involvement to settle [the issue]," he said. "There's so much at stake [with materiality] — it needs that level of certainty."

The materiality of an alleged false claim is usually decided relatively early in an FCA case, and there can be huge amounts of money at stake for either side depending on how that determination comes out, given issues such as the size of federal contracts and treble damages under the FCA, Robbins noted.

The case is U.S. ex rel. Rose et al. v. Stephens Institute, case number 17-15111, in the U.S. Court of Appeals for the Ninth Circuit.

The Granston Memo Begins to Bite

After the government was asked in April for its views on a prominent FCA case accusing biopharmaceutical company Gilead Sciences of concealing information about sourcing and contamination of HIV drugs, many thought that case could be the vehicle used by the high court to clarify the materiality standard, the key issue at stake in the dispute.

The Supreme Court has yet to make up its mind on whether or not to hear the case, but it does take a relatively high percentage of cases where it asks the government to formally weigh in.

When the government finally weighed in on the petition in November, however, its brief was not notable for its position on materiality, but instead as perhaps the most high-profile application of the "Granston Memo" so far.

The memo, a guidance document penned by U.S. Department of Justice civil fraud chief Michael Granston for DOJ lawyers and issued in January, describes situations in which government attorneys should invoke the government's previously rarely used authority to dismiss FCA cases, for example when it deems a whistleblower case to be frivolous. Although not specified in the memo, the implicit message seems to be that the dismissal authority should be used more often.

In its brief regarding the Gilead suit, the government said that it would move to dismiss the case if it was not picked up by the high court. That determination was based in part on its investigation into related allegations, and in part on concerns about the parties in the case making "burdensome" requests on the U.S. Food and Drug Administration, the government claimed.

"The government has concluded that allowing this suit to proceed to discovery, and potentially a trial,

would impinge on agency decision making and discretion and would disserve the interests of the United States," it said.

Then, earlier this week, the DOJ made yet another high-profile move related to the Granston Memo, asking several courts to dismiss 11 similar cases revolving around a relative new theory of FCA liability, involving allegations that patient assistance services supplied by drugmakers are unlawful kickbacks.

In its dismissal requests, the government said that it believed the "common industry practice" — involving assistance with prior authorizations and arrangements for nurses to educate patients about how to use drugs properly — was "appropriate and beneficial to federal health care programs and their beneficiaries."

Any move by the government to take a more aggressive stance on dismissing FCA cases it deems unworthy is welcome news to contractors, according to Turner, who noted that more than 600 new FCA cases are filed every year. For larger contractors, frivolous FCA cases are an expensive nuisance, and for smaller contractors, they can be "a company-ending ordeal," he claimed.

"And it's good for taxpayers, not spending endless resources monitoring cases with no merit or that impose all sorts of problems on various agencies," Turner said.

The high court case is Gilead Sciences Inc. v. U.S. ex rel. Jeffrey Campie et al., case number 17-936, in the Supreme Court of the United States.

The kickback cases are U.S. ex rel. Health Choice Group LLC v. Bayer Corp. et al., case number 5:17-cv-00126; U.S. ex rel. Health Choice Alliance LLC v. Eli Lilly & Co., case number 5:17-cv-00123; and U.S. ex rel. Health Choice Advocates LLC v. Gilead Sciences Inc. et al., case number 5:17-cv-00121, in the U.S. District Court for the Eastern District of Texas; U.S. ex rel. Miller v. AbbVie Inc., case number 3:16-cv-02111, in the U.S. District Court for the Northern District of Texas; U.S. ex rel. CIMZNHCA v. UCB Inc., case number 3:17-cv-00765, in the U.S. District Court for the Southern District of Illinois; U.S. ex rel. Carle v. Otsuka Holdings Co., case number 1:17-cv-00966, in the U.S. District Court for the Northern District of Illinois; U.S. ex rel. SCEF LLC v. AstraZeneca PLC, case number 2:17-cv-01328, in the U.S. District Court for the Western District of Washington; U.S. ex rel. SMSF LLC v. Biogen Inc., case number 1:16-cv-11379, in the U.S. District Court for the District of Massachusetts; and U.S. ex rel. SAPF LLC, v. Amgen Inc., case number 2:16-cv-05203; U.S. ex rel. SMSPF LLC v. EMD Serono Inc., case number 2:16-cv-05594; and U.S. ex rel. NHCA-TEV LLC v. Teva Pharmaceutical Products Ltd., case number 2:17-cv-02040, in the U.S. District Court for the Eastern District of Pennsylvania.

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