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Top Gov't Contracts Cases Of 2017

By **Daniel Wilson**

Law360, Nashville (December 21, 2017, 10:17 PM EST) -- The past year has offered a range of important litigation decisions for federal contractors, from False Claims Act rulings clarifying key points of the anti-fraud law to decisions on responsibility and liability as part of contract performance.

While there was no blockbuster ruling on the scale of 2016's landmark U.S. Supreme Court Escobar False Claims Act decision, there have been a number of important decisions — and in some cases, a series of similar decisions — that were important for federal contractors in 2017.

Here are several cases, and lines of cases, that have made an impact on federal contracting law in 2017:

Post-Escobar FCA Rulings Offer No Clear Pattern

The Escobar decision left two big questions open for lower courts to address, in addition to backing the use of falsely implied certification as a basis for False Claims Act liability. Implied certification allows for claims against companies that mistakenly imply they are meeting legal requirements when submitting claims for payment.

The first is whether the "two-part test" for falsity of claims outlined in the Supreme Court decision is mandatory, while the second has to do with how courts should determine whether an alleged false claim is actually "material" to government payment, as the high court said it must be to support an FCA allegation.

There has been no consensus among courts on either issue, attorneys said, although the requirement to meet the materiality standard has seen some big judgments overturned, most prominently a $663 million judgment against Trinity Industries Inc. in an FCA suit over allegedly defective highway guardrails, which was tossed by the Fifth Circuit in September.

And some common themes are starting to take shape, especially on the materiality issue, with language first used by the Ninth Circuit in a January decision involving a contractor accused of incorrectly billing the U.S. Navy for a "virtual border" project, for example, starting to pop up again and again.

"The Ninth Circuit upheld the lower court's dismissal of the complaint ... and the language [we're] seeing False Claims Act defendants cite up and down is the Ninth Circuit referring to Escobar's materiality standard as being 'a demanding standard'," Bradley Arant Boult Cummings LLP partner Aron Beezley

said.

In addition, the blockbuster ruling also served as a self-described "catalyst" for the Seventh Circuit **to** overturn, in October, its longstanding "but for" FCA causation standard in favor of the stricter "proximate causation" standard used by other circuits. Under the but-for standard, a loss to the government does not have to be directly tied to a false statement, while proximate causation requires a direct causal connection.

The cases are U.S. ex rel. Harman v. Trinity Industries Inc. et al., case number 15-41172, in the U.S. Court of Appeals for the Fifth Circuit; U.S. ex rel. Kelly v. Serco Inc., case number 14-56769, in the U.S. Court of Appeals for the Ninth Circuit; and U.S. v. Luce, case number 16-4093, in the U.S. Court of Appeals for the Seventh Circuit.

But Other FCA Cases Address Key Issues

Beyond cases specifically addressing aspects of Escobar, there were a number of important FCA rulings throughout 2017 either touching upon other key questions regarding the law, or in some instances combining those questions with the issues raised by the landmark high court decision.

In May, for example, the Eleventh Circuit — while still ruling for the defendant, medical products seller Lincare — rejected a district court's finding that the company had relied on reasonable interpretations of ambiguous regulations, meaning it couldn't have known its billing was improper, an issue the U.S. Supreme Court had refused to take up in a January decision.

In July, the D.C. Circuit and Fourth Circuit, both found less than a week apart that the FCA's first-to-file bar requires the dismissal of qui tam suits filed while a similar suit is pending, even if that earlier suit has ended by the time dismissal is decided upon, and that relators can't amend their complaints to escape the issue.

And the Fourth Circuit in October combined the issue of materiality with the hot-button topic of certification of medical necessity as a basis for FCA liability, finding that insurers would not have knowingly paid for medically unnecessary urine drug tests even under the materiality requirement demanded by Escobar.

Just in the past few weeks, a Washington, D.C., district court walked back a previous decision finding that laboratories can be subject to FCA liability for failing to independently verify a doctor's determination that the tests for which they submit claims are medically necessary.

The cases are U.S. ex rel. Phalp et al. v. Lincare Holdings Inc. et al., case number 16-10532, in the U.S. Court of Appeals for the Eleventh Circuit; U.S. ex rel. Shea v. Cellco Partnership DBA Verizon Wireless et al., case numbers 15-7135 and 15-7136, in the U.S. Court of Appeals for the District of Columbia Circuit; U.S. ex. rel. Carter v. Halliburton & Co. et al., case number 16-1262, U.S. v. Palin, case number 16-4522, and U.S. v. Webb, case number 16-4540, all in the U.S. Court of Appeals for the Fourth Circuit; and U.S. et al. ex rel. Tina D. Groat, case number 1:15-cv-00487, in the U.S. District Court for the District of Columbia.

GAO Shows the Importance of Key Personnel to Contract Performance

In a series of decisions throughout the year, the U.S. Government Accountability Office put federal

contractors on notice that failure to comply with key personnel plans submitted as part of contract bids is a material change that can result in contractors having their bids rejected, or their contract awards reviewed and potentially overturned.

"[There's been] a bucket of bid protest cases out of GAO, talking about what happens with key personnel if they leave ... and whether that's OK, whether that's to be expected," Crowell & Moring LLP partner David Robbins said. "There are a whole bunch of protests sustained for unavailability of key personnel, and just really foot-stomping that the government truly means that key personnel are key."

For example, the GAO in a March decision issued as part of a massive consolidated protest over a $2.8 billion U.S. Department of Education contract for debt collection services — a complicated dispute that has touched off other cases in the Court of Federal Claims and the Federal Circuit — found that, among other issues with related contract awards, several awardees had failed to tell the Education Department about the withdrawal of key personnel. The GAO recommended the agency take action on the issue.

In May, the GAO recommended that the Office of Personnel Management reevaluate bids after it had initially awarded a $117.4 million investigative support services deal to Primus Solutions LLC, and PS' intended program manager then took another job. "Such a substitution necessarily will amount to a revision to the PS proposal that constitutes discussions," the GAO said.

And in July, the watchdog backed the U.S. Navy's refusal to reopen discussions with a bidder on an operation and training support services deal after that bidder, A-T Solutions Inc., advised it of the unavailability of one of its proposed key personnel.

Later that same month, the GAO sustained a protest by the YWCA of Greater Los Angeles over a close to $100 million Job Corps center operations contract awarded to Management and Training Corp. by the U.S. Department of Labor, finding that the terms of the request for proposals did not permit MTC to just substitute key personnel at any point, and that the DOL allowing MTC to — twice — substitute its proposed center director had resulted in YWCA being treated unequally.

The cases are Matter of: General Revenue Corp et. al, various file numbers from B-414220.2 through B-414220.47; Matter of: Next Tier Concepts Inc.; MAXIMUS Federal Services Inc., file numbers B-414337 and B-414337.2; Matter of: A-T Solutions Inc., file numbers B-413652.2 through B-413652.4; and Matter of: YWCA of Greater Los Angeles, file numbers B-414596 through B-414596.3, all before the U.S. Government Accountability Office.

Fifth Circuit Limits Company Kickback Liability

Defense contracting giant KBR Inc. has been involved in many noteworthy contracting cases over the past several years, including an FCA dispute implicating a wartime liability statute that ended up before the Supreme Court in 2015.

And it was again involved in some prominent rulings in 2017, in July escaping a long-running multidistrict litigation alleging it exposed military personnel to toxic "burn pit" fumes after the court ruled the use of the pits was a military decision.

That came after the Fifth Circuit had in February halved a judgment against KBR in relation to kickbacks two of its employees had allegedly taken from an Army subcontractor, after ruling only one of those two employees had enough seniority to actually influence subcontracting — an important decision regarding

the limits to how employee behavior may be imputed to contractors, attorneys told Law360.

The case is U.S. ex rel. Vavra v. Kellogg Brown & Root Inc., case number 15-41623, in the U.S. Court of Appeals for the Fifth Circuit.

Contractors Opened to Potential Liability From Third-Party Beneficiaries

While the case itself ended in a settlement in September, a June opinion issued in a proposed class action alleging employees of CGI Federal Inc. stole personal information during their work on a contract to process passport applications for the U.S. Department of State — if taken on board in similar future cases — has federal contractors worried that a whole new front of liability may have been opened up.

U.S. District Judge Gladys Kessler ruled that plaintiff Lori McDowell had no direct contractual relationship with CGI, but allowed a breach of contract claim to move forward anyway, ruling McDowell "plausibly [stated] a claim that she is an intended beneficiary of the contract between CGI and the Department of State," with a right to have her information protected by CGI.

The ruling upended the traditional notion of a federal contract — and related disputes — being solely between the government and a contractor, setting alarm bells ringing for the contracting community.

"We do a lot of work in the cybersecurity space and that is a big, big development to the extent that folks are going to be able to sue a company on a third-party beneficiary status — that certainly could cause companies to carefully check and carefully ensure that they are meeting the various data security requirements that are in their contracts, because if not, you see what [could] happen," McCarter & English LLP government contracts practice co-lead Franklin Turner said.

The case is McDowell v. CGI Group Inc., case number 1:15-cv-01157, in the U.S. District Court for the District of Columbia.

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