Federal Contracting

Four Federal Contract Rulings Likely to Key New Disputes in 2023

By Daniel Seiden

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- Growing split over personnel unavailability protests
- Other transaction authority jurisdiction expands

As 2022 comes to a close, here's a look at four federal contracts rulings issued this year that could lay the groundwork for further litigation in 2023 and beyond.

The decisions illustrate how contractors could forum shop when launching bid protests based on unavailability of the prevailing party's key personnel; how they could challenge procurement cancellations by agencies; and how the US Court of Federal Claims indicated a growing willingness to hear "Other Transaction authority"-based disputes.

Still another decision, involving the False Claims Act, shows the emergence of a circuit split that may affect how health-care providers and contractors defend against kickback claims.

Key People

An unsuccessful bidder for a US Census Bureau information technology contract failed to show that the winner committed an impermissible key personnel "bait-and-switch," the Federal Claims court said in *Golden IT LLC v. United States*, an opinion released Feb. 4

Protester Golden IT didn't show that Spatial Front Inc.'s $78 million contract should be thrown out for failing to disclose that its proposed information specialist left the company after submitting its bid, the court said.

There was no material misrepresentation because Spatial Front didn't know about the departure, the court said.

The court's conclusion created a split with the Government Accountability Office, which has held that a bidder must tell the agency when a key employee becomes unavailable, Amy C. Hoang of Seyfarth Shaw LLP told Bloomberg Law.

A contractor, that is unsuccessful at the GAO, can then bring its protest to the court. But filing with the GAO is not a required prerequisite for going to the Federal Claims court.

The GAO has said that an agency, after being notified, "must either disqualify the offeror as technically unacceptable or open discussions to allow the offeror to remedy the issue—sometimes a difficult decision for agencies if the unavailability comes at the eleventh hour," she said.

The GAO has issued several decisions upholding its own precedent since *Golden IT*, showing a "growing divergence" between the court and GAO, Hoang said.

Because of this split, contractors "could see an increase in forum shopping between the Court and GAO when key personnel unavailability is at issue. Moreover, in practice, we're already seeing agencies start to use workarounds to key personnel requirements in solicitations to avoid the results under GAO's standard," Hoang said.

Cancellations

A training services contractor in May won its challenge to the US Army's Special Operations Command's decision to cancel and resolicit a $200 million maximum value procurement for situational training exercises in *Seventh Dimension LLC v. United States*.

The Army—which scrapped the solicitation after Seventh Dimension emerged as the final eligible bidder—contended that the cancellation was reasonable because a revised procurement could attract more bidders.

But the claims court said the cancellation couldn't stand on mere conjecture that a resolicitation would increase competition. The cancellation wasn't based on market research or similar evidence, the court found.

"Ordinarily, we think of a solicitation cancellation as an agency decision that is afforded quite a bit of discretion. But in *Seventh Dimension*, Judge Matthew H. Solomson reminded us that there are clear limits to that discretion," said Dan Forman of Crowell & Moring LLP.

The court decided that the cancellation didn't satisfy the Federal Acquisition Regulation because the "administrative record lacked any market research or similar evidence to support cancellation, and instead, merely contained conclusory assertions from the contracting officer regarding need to cancel the solicitation," he said.

Contractors considering a challenge to a cancellation may decide a protest at the GAO isn't worth it, and go straight to the Federal Claims court hoping to draw Judge Solomson, or at least another Federal Claims court judge who is aligned, Forman said.

'Other Transaction Authority'

A defense equipment supplier convinced the Court of Federal Claims that it could hear the company's "other transaction authority"-based protest of an Army solicitation for helicopter ground power prototypes in *Hydraulics Int'l Inc. v. United States*, an opinion released Aug. 8.

OTAs are legally binding but non-contractual instruments that allow contractors to provide prototypes and research services to agencies without having to comply with certain regulations.

Hydraulics International Inc. argued that the Army improperly waived a solicitation requirement before selecting two other companies for prototype projects.

The government said the claims court couldn't hear the protest because it wasn't connected to a procurement or a proposed procurement. OTAs aren't connected to procurements because prototype production is conditional and may not occur, the government argued.

But the court said it had jurisdiction because the Army initiated the process for determining its need for an acquisition.

For jurisdiction purposes, it doesn't matter whether a potential procurement for helicopter power units ever occurs so long as the government initiated the process for determining an acquisition need, and that the acquisition may occur via procurement, the court stated.

The decision indicates an increasing willingness of the court to take on OTA protests, Alex Gorelik of Smith Currie & Hancock LLP said. It is important because of the difficulty that unsuccessful offerors have had in challenging such agreements in the past both at the claims court and US district courts, he said.

"While the OTA process certainly exists to allow agencies some flexibility with the regulations to move quicker when carrying out Research & Development efforts and attaining prototypes, that does not mean that OTAs should protest-proof an effort in perpetuity either," Gorelik said.

Hydraulics International's waiver claim was ultimately rejected. But the government has appealed the jurisdiction ruling.

Whistleblowers and Kickbacks

Finally, a July 26 decision by the US Court of Appeals for the Eighth Circuit to throw out a trebled $5.5 million damages award may herald greater scrutiny of False Claims Act cases brought by kickback claiming whistleblowers as well as the federal government.

The court's ruling, in *United States ex rel. Cairns v. D.S. Med. LLC*, "represents a significant step" in that direction, said Bob Rhoad of Nichols Liu LLP. It was the first case to establish a but-for causation standard and created a split with the Third Circuit, he added.

A new trial is required to determine whether a Missouri neurosurgeon and his fiancee—the owner of a spinal implant distributor—violated the False Claims Act by engaging in a scheme to bill the government for spinal implants tainted by kickbacks, the Eighth Circuit said then.

The three-judge panel said it was throwing out the damages because a Missouri district court improperly failed to instruct the jury that there must be a but-for causal connection between an Anti-Kickback Statute violation, and the items or services included in a claim submitted to the government for payment.

The instruction the jury received "brushed aside causation," which was required by a 2010 amendment to the statute, it said.

The Eighth Circuit's opinion "imposes a more rigorous standard; provides an important new defense to FCA cases premised on AKS violations; and rejects the government's broad interpretation of those statutes," Rhoad said.

The cases are Golden IT LLC v. United States, Fed. Cl., No. 21-1966, 2/4/22; Seventh Dimension LLC v. United States, Fed. Cl., No. 21-2275, 5/11/22; Hydraulics Int'l Inc. v. United States, Fed. Cl., No. 22-364, 8/8/22; and United States ex rel. Cairns v. D.S. Med. LLC, 8th Cir., No. 20-445, 7/26/22.

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