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Gov't Contracts Cases To Watch In 2020: Midyear Report

By **Daniel Wilson**

Law360 (July 6, 2020, 5:54 PM EDT) -- There are several important government contracts cases to watch in the second half of 2020, from high-profile disputes over the Pentagon's $10 billion JEDI cloud deal to a case that could provide clarity on challenges to prototyping deals.

Here are five cases — and one likely area for disputes — that government contractors should pay attention to during the remainder of the year.

Oracle and Amazon's Disputes Over the JEDI Deal

In the highest-profile current government contracts dispute, both Oracle Corp. and Amazon Web Services Inc. have protested the U.S. Department of Defense's Joint Enterprise Defense Infrastructure deal, the centerpiece of the DOD's ongoing push to put many of its legacy information technology systems into the cloud.

The $10 billion deal has been contentious from the start, with potential bidders concerned about the single award model — it's typical for large federal IT deals to be multi-award — and a perceived tilt toward Amazon, the largest commercial cloud provider, in the structure of the JEDI solicitation.

Amazon, which has protested at both the Court of Federal Claims and before the DOD itself, has argued that it only lost out on the deal, awarded to Microsoft Corp. in October, because the DOD downplayed the superiority of its cloud offering, acting under the influence of President Donald Trump. Trump has made no secret of his animus toward the company and its founder, Jeff Bezos.

The claims court judge overseeing the case awarded Amazon a preliminary injunction in February based on its arguments over an "application and data hosting" price scenario in the JEDI solicitation and the DOD agreed to take corrective action, which — after further sparring with Amazon over its scope — is expected to be completed by August.

"There inevitably will be more protests no matter which way the reevaluation comes out," Bradley Arant Boult Cummings LLP government contracts practice co-leader Aron Beezley said. "I think it will be very interesting to see how, when the protest process and procurement inevitably drags on past the November election, how that, if at all, changes things, particularly if there's a new president in the White House."

Oracle, whose case is on appeal before the Federal Circuit, has argued that it was unfairly excluded from JEDI based on selection criteria tipped toward Amazon, and that the deal was "corrupted" from the start based on the input of DOD employees with ties to Amazon.

At oral arguments in June, Oracle pressed its case that a conflict of interest involving one of those employees, a key part of the early JEDI process, should require the DOD to start over on the deal, and at least one of the judges on the panel seemed open to that argument.

The cases are Amazon Web Services Inc. v. U.S., case number 1:19-cv-01796, in the U.S. Court of Federal Claims, and Oracle America Inc. v. U.S. et al., case number 19-2326, in the U.S. Court of Appeals for the Federal Circuit.

SpaceX Challenges 'Other Transaction Authority' Agreement

SpaceX, entrepreneur Elon Musk's space launch company, has challenged its exclusion from $2.2 billion in Air Force space launch development deals awarded to rivals Blue Origin LLC — another company founded by Bezos — Northrop Grumman Innovation Systems and United Launch Alliance.

It argues its proposal was "inexplicably" considered to pose the highest risk when it was based on rockets that are already proven working, unlike the "untested" proposals of its rivals.

The dispute is being closely watched not only because of the size of the deal and the prominent companies involved, but more broadly because it may help to provide some clarity regarding court jurisdiction over Other Transaction Authority agreements, or OTAs.

OTAs are intended to be used for prototyping and development deals, ditching many of the regulatory requirements that apply to traditional federal acquisitions, and their use is on the rise within the government, especially within the DOD. They are not considered procurement contracts, and that has left companies trying to challenge OTAs in a difficult jurisdictional spot.

The Court of Federal Claims, for example, ruled in August 2019 that it lacked jurisdiction over SpaceX's case, sending it to California district court.

But an Arizona district court ruled in January that it lacked jurisdiction over an OTA dispute, and the U.S. Government Accountability Office has also said it lacks jurisdiction over OTA protests, with very limited exceptions**.**

"Who has jurisdiction, that's a really interesting issue," Mayer Brown LLP government contracts practice chair Marcia Madsen said. "There has to be [Administrative Procedure Act] jurisdiction over a government decision … I think somebody's going to have to tackle it, because the dollars are going to go up, the number of [OTA] transactions are going to go up. We see DOD just taking procurements — today it's a procurement, tomorrow it's an OTA."

The California court held a hearing for judgment on the administrative record on June 19, and asked SpaceX and the Air Force to answer some additional questions July 1, although those questions are sealed.

The case is Space Exploration Technologies Corp. v. U.S., case number 2:19-cv-07927, in the U.S. District Court for the Central District of California.

7th Circ. to Address if Courts Can Reject DOJ FCA Dismissal Requests

The vast majority of False Claims Act litigation is brought by whistleblowers, and although in many cases the government chooses not to intervene, FCA cases are filed on behalf of the government and it still retains the ability to weigh in.

That includes the authority for the U.S. Department of Justice to ask courts to dismiss the cases, a power once rarely used but much more prevalent since the release of the "Granston Memo" in early 2018, which reminded DOJ attorneys of that authority and explained the circumstances in which it can be used.

In the 30 years prior to the memo, the DOJ invoked its dismissal authority roughly 45 times. It has used it about 50 times since to eliminate "frivolous or unmeritorious qui tams … to preserve our resources for cases of real fraud, and decrease the likelihood of bad case law," Principal Deputy Assistant U.S. Attorney General Ethan Davis said in a June 26 speech.

Since the authority has been invoked much more regularly, many courts have weighed in on the issue and have split over whether they are compelled to grant a DOJ dismissal request. Some have taken the view that the department has "unfettered discretion" for dismissal, while others said it needs to justify its request with a legitimate reason, with varying standards for how thorough that justification should be.

"For the most part, DOJ has prevailed, but what's happening is, even where it's prevailing, there seems to be developing — maybe a split is too strong — but it looks to be a split between courts that are believing that DOJ should have total discretion to dismiss these cases, and courts that are applying a rational basis test," Robbins Russell Englert Orseck Untereiner & Sauber LLP associate Ralph Mayrell said.

The U.S. Supreme Court in April turned down a petition related to the dismissal of a case accusing JPMorgan Chase Bank NA of abdicating responsible mortgage lending obligations under a post-financial crisis settlement, which the relator argued was "completely unjustified," and not driven by the merits of the case.

But there are several similar cases pending in circuit courts that may help clarify the issue. The Seventh Circuit is expected to weigh in later this year on a dismissal request ruling that came out against the DOJ, in which an Illinois district court refused to dismiss a suit alleging UCB Inc. paid kickbacks to boost prescriptions for its Crohn's disease treatment Cimzia, finding that the DOJ hadn't shown it had adequately investigated the case.

The district court specifically rejected the "unfettered discretion" view, saying it would make "superfluous" the role of the courts in hearing dismissal requests provided for in the FCA. Oral arguments at the circuit court were heard in January and its opinion is pending.

The case is USA v. UCB Inc. et al., case number 19-2273, in the U.S. Court of Appeals for the Seventh Circuit.

CACI Wants High Court to Address Derivative Sovereign Immunity Denial

CACI Premier Technology Inc. has asked the Supreme Court to weigh in on whether it was wrongly denied the chance to immediately appeal the denial of derivative sovereign immunity, stemming from its work for the U.S. military during the Iraq War.

The federal government has sovereign immunity to most lawsuits, and contractors acting under the direction of the government can seek to claim immunity derived from the government's immunity.

Former prisoners at Iraq's notorious Abu Ghraib prison seek to hold CACI liable for its employees' alleged assistance of military torture at the prison. U.S. District Judge Leonie M. Brinkema denied the company's bid for derivative immunity and the Fourth Circuit in August 2019 ruled it lacked the authority to hear interlocutory appeals over the denial of sovereign immunity.

CACI argued in its November petition to the high court that orders on immunity should be immediately appealable to protect government contractors from the burden of unnecessary litigation. The justices asked the federal government in January to weigh in on whether they should take the case, a request that is still pending.

Beyond the immediate question in the petition, the case presents broader questions about immunity, with Judge Brinkema having found — in an issue of first impression for any U.S. court — that claims involving violations of significant norms of international law, such as torture, aren't covered by sovereign immunity.

And although the CACI case stems from a military contract, any ruling related to derivative immunity has relevance to contractors' risk assessments for other federal deals, including COVID-19-related deals, Arnold & Porter partner Michael McGill said.

"That's going to have serious implications for the fallout from the COVID-19 response and liability of federal contractors there, which is going to be a huge issue," he said.

The case is CACI Premier Technology Inc. v. Al Shimari, case number 19-648, in the Supreme Court of the United States.

Expected Spate of COVID-19 FCA Cases

Although yet to emerge, a wave of FCA cases is inevitable in the wake of the federal government's extensive spending to help address COVID-19, attorneys said.

Any time the government spends a lot of money in a hurry, FCA suits follow, as shown by post-disaster contracts that followed Hurricane Katrina, spending under the global financial crisis stimulus package, and Iraq and Afghanistan war contracts. And no federal stimulus has ever been bigger than the multitrillion-dollar legislative package passed in response to the coronavirus.

There was a broad range of assistance programs and procurements introduced by lawmakers and agencies as the threat posed by the virus became clear, such as forgivable loans for businesses under the Paycheck Protection Program — with nearly $521.5 billion in loans issued as of the end of June, according to the U.S. Department of the Treasury — emergency contracts, and assistance for contractors to keep their workforce in a "ready state" under Section 3610 of the CARES Act.

"I think everyone is expecting a wave of False Claims Act litigation after [COVID-19], not only because of

the sheer number of dollars involved in this program and the sheer number of individuals and entities who have touched those dollars, but because the nature of the Paycheck Protection Program certification just leaves ample room for the government and for qui tam relators to bring False Claims Act actions," K&L Gates LLP associate Amy Conant Hoang said.

Hoang also pointed to Davis' June 26 speech, in which he said that stimulus programs had provided "a lot of money [which] creates a number of opportunities for fraud" and that the department will "energetically use every enforcement tool available to prevent wrongdoers from exploiting the COVID-19 crisis." Davis specifically called out the FCA as one of those tools.

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