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10 Government Contracting Trends To Watch This Year

By **Joseph Berger** (February 20, 2018, 4:18 PM EST)

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The close of 2017 and start of 2018 have marked a number of developments that reflect constant changes in the government contracting legal arena. This article identifies macro trends and touches on several developments relating to the U.S. Department of Defense, given that the DOD is responsible for the greatest share of U.S. government procurement spending, receives the greatest share of protests, and often takes the lead on many aspects of statutory and regulatory reform and enforcement. Here are 10 current trends and recent developments in the government contracts field to keep watch on this year.

1. Increasing Total Spending on Government Contracts

On Feb. 7 congressional leaders reached a budget deal that would raise the federal spending caps under the Budget Control Act of 2011, authorizing an increase in federal spending by at least $300 billion over the next two years, including defense spending by $165 billion. The deal also included more than $80 billion in disaster relief for areas affected by hurricanes and wildfires, $20 billion for infrastructure and $4 billion for Veterans Administration hospitals. Two days later the president signed the resulting legislation, which funded the government until March 23 while further spending legislation is negotiated.

The budget deal would improve national defense and domestic priorities, and likely will lead to increased spending on government contracts. With as much as half of the DOD's total spending potentially going to contracts, the congressional plan could increase spending on defense contracting by tens of billions in each of the next two years, which could return total spending on government contracts to near the historically high levels reached from 2008 to 2011.

Shortly after the budget deal, on Feb. 12 the White House announced its infrastructure plan via a set of guidelines intended for Congress to employ while considering infrastructure legislation. The White House proposes $200 billion in federal funding to help generate $1.5 trillion in spending on American infrastructure. It remains to be seen if the infrastructure plan will be adopted by Congress and, if so, in what form. Any congressional action on infrastructure can be expected to increase spending on government contracts, as occurred under the American Recovery and Reinvestment Act of 2009.

Total spending on government contracts has already increased under the Trump administration. According to current data from USAspending.gov, following a surge related in part to the American

Recovery and Reinvestment Act, spending on contracts reached a high of about $558.9 billion in fiscal year 2010, fell to a low of $438.2 billion in FY 2015, then rose to $473.9 billion in FY 2016, and according to the current data, $509.8 billion in FY 2017.

As I previously wrote in Law360, new defense increases combined with new infrastructure spending could keep total contract spending at or above the current levels. Under the recent budget deal, spending on government contracts will continue to increase and could return to near the historic highs. As discussed further below, this has related implications for procurement reform, bid protests and False Claims Act enforcement. Government contractors must remain vigilant in order to respond to new acquisition programs, government requirements and regulatory changes.

2. Commercial Item Reforms Under Way

Recent NDAA Reforms

The FY 2018 National Defense Authorization Ac, signed by the president in December 2017, includes a subtitle of provisions relating to commercial items, which include significant reforms. The NDAA provisions signal congressional intent to support the DOD's use of commercial item procurements and to reduce the regulatory burdens on industry. This congressional priority is consistent with the priorities expressed by the Trump administration through executive orders, and the 2018 NDAA signals a shift in favor of commercial items that is likely to continue through future congressional, administration and agency actions.

Section 849, "Review of Regulations on Commercial Items," began a year-long process that will simplify DOD regulatory requirements that apply to commercial items. Section 850 requires the president of the Defense Acquisition University to establish a comprehensive training program on commercial items. Section 848 requires that a contract using commercial item procedures serves as a prior commercial item determination with respect to future procurements. Section 820 also changes the definition of "subcontract" in a manner that should reduce regulatory requirements that would otherwise apply to commercial supply agreements.

At the end of January 2018, the DOD issued new regulations on commercial items (resulting primarily from prior NDAAs), and released an updated "Guidebook for Acquiring Commercial Items." In addition, the Section 809 panel created by the 2016 NDAA released its first major report on the streamlining of acquisition regulations, including recommendations for the simplification of commercial item regulations, which may serve the basis for future reforms.

Amazon Amendment

After the 2018 NDAA was signed in December, the U.S. General Services Administration commenced the implementation process for Section 846, "Procurement Through Commercial e-Commerce Portals." An implementation plan is due to Congress by mid-March. Section 846 has been dubbed the "Amazon amendment" because it will permit the DOD and other agencies to procure commercial products through commercial online portals. According to the GSA notice, the government market for commercial products is estimated to be greater than $50 billion annually. With the expected increases in defense spending, the e-commerce portals should provide an additional avenue for the DOD and other agencies to simplify and streamline their commercial item purchasing.

3. DOD Cybersecurity NIST Deadline Passes

Under Defense Federal Acquisition Regulation Supplement 252.204-7012, "Safeguarding Covered Defense Information and Cyber Incident Reporting," a contractor that processes, stores or transmits covered defense information must comply with requirements set out by the National Institute of Standards and Technology. The clause requires “adequate security” for covered information systems, contains a cyber incident reporting requirement with related data preservation obligations, and has additional requirements for cloud computing services.

The deadline for compliance with the NIST standards was Dec. 31, 2017, with related guidance on compliance released by the DOD in advance. While the clause was first adopted in 2015 and has been amended several times, this year marks a new phase in its implementation and enforcement. As government contractors continue their efforts to comply with this complex regulation, other agencies are adopting regulations to improve their own cybersecurity requirements, which will only increase over time. For contractors and agencies both, cybersecurity will remain a top priority for compliance efforts in 2018 and beyond. As spending increases, cybersecurity will also be an increasingly frequent subject of audits, bid protests and FCA enforcement.

4. GAO Bid Protests Down, Effectiveness Rate Up

According to the U.S. Government Accountability Office’s "Bid Protest Annual Report to Congress for Fiscal Year 2017," last year there was a slight decrease in the total number of cases filed and a slight increase in the “effectiveness rate,” which reached 47 percent, up from 46 percent the year before and a new record high. The recent effectiveness rates indicate that, including agency corrective actions, a GAO bid protest may have close to a 50/50 chance of resulting in some kind of relief for the protester.

The GAO reported that it sustained 17 percent of the bid protests resolved on the merits. The “sustain rate” of 17 percent was close to the average over the past five years. The report also showed that cases filed were down 7 percent from FY 2016, but remained higher than the number of cases filed in FY 2014. The GAO reported that during FY 2017, it received 2,596 new cases and closed 2,672 cases. With new spending increases, both the total number of bid protests and their effectiveness rate can be expected to remain high.

The effectiveness rate has slowly increased from 33 percent in FY 2001, the first year for which the GAO reported the statistic, to the record highs of last year and this year, reflecting a combination of corrective action and sustained decisions, and highlighting the significance of corrective action. The high effectiveness rate is good for protesters and for agency discretion and accountability, but corrective action often causes delays to procurements, which has been a source of concern for the DOD.

5. Debriefing and Protest Reforms Under Way

The FY 2018 NDAA contains significant reforms relating to DOD debriefings and protests. The NDAA contains a provision for “Enhanced Post-Award Debriefing Rights,” which mandates regulations to require, for an award greater than $100 million, disclosure of a redacted source selection award determination, and for awards greater than $10 million, an option to request this disclosure for small businesses or nontraditional contractors. The NDAA also provides enhanced opportunities for follow-up questions after a debriefing. These provisions, with some to be implemented via regulations, may or may not reduce protests, but should increase the transparency of the DOD procurement system, and are good for both contractors and the DOD.

The NDAA also requires a DOD pilot program on payment of costs for denied GAO bid protests (the "loser pays" provision), to begin in two years and last for three years. The intent of this provision was to limit and reduce bid protests and shift their costs to the private sector, and it remains to be seen what the ultimate result will be. As defense spending increases, the DOD will be implementing this pilot program and must balance its desire to reduce protests with necessary fairness to protesting contractors, and consideration to the accountability and transparency that the bid protest system is designed and needed to ensure.

Also in December 2017, the RAND Corporation submitted to Congress a detailed report on the federal bid protest system and its impacts on DOD contracting. Among its findings, RAND stated that the bid protest effectiveness rate "suggests that firms are not likely to protest without merit." Nevertheless, congressional efforts to reform the bid protest system can be expected to continue.

The transparency of the bid protest system should not be taken for granted. Going forward, as defense spending increases, a greater amount of task order awards will escape the scrutiny of GAO bid protests. The NDAA for FY 2017 increased the jurisdictional threshold from $10 million to $25 million for protests of task order awards issued by the DOD. The change to the GAO's jurisdiction was clearly intended to reduce protests against DOD task order awards, and the numbers in the last two GAO annual reports indicate this amendment may have had a measurable effect.

6. DOJ Continues Streak of High FCA Recoveries

The U.S. Department of Justice recovered more than $3.7 billion in FCA civil case settlements and judgments in FY 2017, according to the press release accompanied by annual statistics issued by DOJ in December 2017. The total recoveries in FY 2017 of just over $3.7 billion reflect a remarkable string of eight straight years of recoveries exceeding $3 billion each year since FY 2010. Prior to that, an annual recovery greater than $3 billion had occurred only once, in 2006.

The DOJ notes that recoveries now total more than $56 billion since 1986, and its press release and statistics demonstrate that FCA enforcement remains a high priority under the new administration. The DOJ's annual statistics summarize settlements and judgments for the 31 years since FY 1987. The statistics indicate that the $3.7 billion figure was the fourth highest total, with higher numbers in 2012, 2014 and 2016, years that also saw unusually high numbers of recoveries in non-qui tam cases and in cases related to housing, mortgages and the financial crisis. The high numbers, while encompassing health care, financial services and other regulated fields, will keep enforcement pressure on government contractors as spending increases.

7. Qui Tam Recoveries Remain High

FY 2017 represented a significant year and continuing trend for qui tam cases (initiated by whistleblowers) in particular. The DOJ statistics show that of the $3.7 billion recovered in FY 2017, just over $3.4 billion resulted from lawsuits filed under the FCA qui tam provisions, and during the same period, the government paid out $392 million to qui tam relators. According to the statistics, there were 674 new qui tam matters (which include referrals, investigations and qui tam actions) and an additional 125 non-qui tam matters initiated in FY 2017. The statistics also show that these numbers are fairly close to the averages over the past 10 years and that recent trends in recoveries driven by whistleblower lawsuits over the past decade can be expected to continue.

The DOJ statistics indicate that the $3.4 billion total recovery in qui tam cases in FY 2017 was the second

highest ever (after FY 2014) and that FY 2017 reflected continued success for DOJ in FCA cases initiated by whistleblowers. Total recoveries in qui tam cases exceeded $2 billion for the first time in 2010 and have remained significantly higher than that level since then. Thus, FY 2017 also marked eight straight years of total recoveries above $2 billion in qui tam cases. Combined with the annual new matters from whistleblowers each year, the qui tam recoveries add to enforcement pressure under the FCA.

8. DOD Enforcement Up, But DOD Whistleblower Filings Down

Although there are no separate DOJ statistics summarizing all procurement cases, the DOJ maintains statistics for the DOD, which are of particular importance for the procurement field because the DOD is responsible for the greatest share of government procurement spending. In FY 2017, recoveries in DOD cases totaled about $220 million. The total in qui tam cases (just over $209 million) was the highest for the DOD since 2010.

The number of new matters in non-qui tam DOD cases, 19, was the highest since 2011, indicating that DOD enforcement is up. But the number of new matters in DOD qui tam cases, 28, was the lowest in the 30 years since 1988. Given the recent high recoveries in qui tam lawsuits, why was the number of new qui tam cases down for the DOD?

There may be many possible explanations for this trend of the past few years, and they may include a measure of success for anti-fraud programs, including both the mandatory disclosure program (added to the Federal Acquisition Regulation in 2008) and FAR and DFARS regulations requiring whistleblower protections for contractor employees. DOD and contractor efforts to combat fraud can ultimately reduce relator FCA actions, and the mandatory disclosure rule requires contractor ethics programs to remain strong and robust.

9. DOJ Argues Implied Certification; Ninth Circuit May Expand Application

In its June 2016 decision in Universal Health Services v. United States ex rel. Escobar, the U.S. Supreme Court unanimously held that "the implied certification theory can be a basis for liability, at least where two conditions are satisfied." First, the claim must make "specific representations about the goods or services provided," and second, "the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths."

In December 2017, arguments were held in U.S. ex rel. Rose et al. v. Stephens Institute before the U.S. Court of Appeals for the Ninth Circuit, where the DOJ argued that the Escobar two-part test is not mandatory to establish liability. In its amicus brief, the DOJ asserted that Escobar did not overrule other circuits that previously adopted a "broader form" of the implied certification theory. The arguments and exchange with the appellate court in December indicate a strong possibility that the Ninth Circuit could rule that the test is not mandatory.

If the Ninth Circuit agrees with the DOJ, then the scope of the implied certification theory would widen beyond the circumstances addressed in Escobar, not only in the Ninth Circuit but in DOJ and relator arguments in other circuits. The legal theories and cases pressed by the DOJ and relators will expand if the Ninth Circuit rules in their favor. Such a ruling could add further momentum to the current trend of high recoveries in qui tam cases. As spending on government contracts increases, so does the likelihood of new qui tam cases and legal theories. However, this trend may be counterbalanced by the recently issued DOJ policy memos discussed below.

10. DOJ Memos Signal Greater Checks and Balances for FCA Enforcement

Two official DOJ internal memoranda issued in January 2018, one by Civil Fraud Section Director Michael Granston and another by Associate Attorney General Rachel Brand, together signal more checks on whistleblowers and a greater balance in favor of defendants in the DOJ's enforcement of the FCA. The memos support a more limited approach to the scope and pursuit of government FCA actions and legal theories, combined with a more proactive approach to the dismissal of relator complaints.

The memo issued by Granston sets forth factors that the DOJ should consider when deciding whether to request dismissal of a relator's qui tam complaint and will impose greater constraints on whistleblower lawsuits. Brand's memo limits the type and scope of enforcement actions that may be initiated or pursued by the DOJ based on agency guidance documents, with significant relevance to FCA lawsuits in particular. Under the Brand memo, DOJ litigators "may not use noncompliance with guidance documents as a basis for proving violations of applicable law" in affirmative civil enforcement cases, which include FCA cases.

Brand's memo reflects the extensive reliance by federal agencies on guidance documents, which also calls attention to their common application to contractors through government contracts. But neither memo changes contractor compliance obligations, and government contractors must remain vigilant and proactive in their compliance efforts, under not only statutes and regulations, but contractual requirements and applicable agency guidance.

Conclusion

The macro trends discussed above point to continued high total spending on government contracts, which will improve national defense, disaster relief and domestic infrastructure, presenting opportunities and challenges for both agencies and contractors. Commercial item reforms are intended to reduce and simplify regulatory burdens, increase corporate participation, improve procedures for agencies and increase value to the government. Other procurement reforms are under way, including cybersecurity regulations that will only increase requirements over time. Protest numbers and their effectiveness rates can be expected to remain high, while reforms to the debriefing process and protest system are also under way. FCA enforcement and qui tam filings and recoveries will remain high, keeping enforcement pressure on government contractors as they are confronted by regulatory change. The most recent trends and developments present significant challenges for both federal agencies and government contractors, as together they push forward the work of the nation in 2018.

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