HUSCH BLACKWELL

Government Contracts: 2016 Year in Review

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Laguna Construction v. Carter (Fed. Cir. July 15, 2016)

- Laguna's prior material breach (not the acceptance of kickbacks in and of themselves) excused the government's refusal to pay Laguna's $2.8M claim.
- Under this reasoning,*any* action by the contractor deemed to be a material breach could excuse the government's refusal pay any amount for work.
- Government's ability to avoid payment of a multi-million dollar claim expands potential liability for accepting kickbacks far beyond that contemplated by the AKA or even Forfeiture for Fraudulent Claims statute.

Kingdomware Technologies v. U.S. (June 16, 2016)

- The VA must give preference to VOSBs for all contracts where the "rule of two" is satisfied
- Supreme Court decision noted that task orders should also be considered contracts for purposes of the rule
- COFC has subsequently clarified that "Kingdomware does not stand for the general proposition that all task orders are considered contracts as a matter of law." (*Great Southern Eng'g, Inc. v. United States,* 128 Fed. Cl. 739 (Oct. 27, 2016).
- The VA Office of Small and Disadvantaged Business Utilization (ODSBU) is presenting a series of webinars to help VOSBs understand the potential impact of the decision: http://www.va.gov/osdbu/verification/veterans_first_contracting_program_adjustments_to_reflect_the_supreme_court_kingdomware_decision.asp

Universal Health Services v. U.S. ex rel Escobar (June 16, 2016)

- A contractor can be held liable under the False Claims Act even for "implied" claims
- Under some circumstances a claim can be deemed "impliedly false"—even if nothing in expressly stated in the claim is false.
- To satisfy the "implied false certification" theory of FCA liability, (1) the claim must make specific representations about the goods or services provided; and (2) the defendants' failure to disclose noncompliance with material legal requirements "makes those misrepresentations mispleading half-truths."

AllWorld Language Consultants, B-411481.3 (Jan. 6, 2016)

- GAO concluded that the Agency could not exercise options in an FSS order following expiration of the underlying FSS contract—even if the FSS order with the option was issued during the FSS contract's ordering period.
- Did GAO get it wrong?

National Air Cargo Group v. United States (April 28, 2016)

- Solicitation for IDIQ contracts to provide shipping services to the U.S. Transportation Command; solicitation contemplated an award of "approximately" 4 contracts and task orders up to a total maximum of nearly $300M.
- The Agency initially announced the award of five IDIQ contracts to 5 offerors, including the protestor
- Approximately a month later, the Agency announced that it was making an additional award.
- GAO dismissed the protest for lack of standing, but COFC rejected the GAO's finding that the protestor's status as a contract awardee deprived the court of jurisdiction over the bid protest.

Rotech Healthcare, Inc., B-413024 (August 17, 2016)

- Protest to US Dept. of Veterans Affairs' $68.7M contract award for home oxygen and medical equipment to Lincare, Inc.
- Protest alleged that the agency allowed the awardee an unfair advantage through additional discussions and challenged the awardee's "good" past performance rating.
- Decision noted that the "acid test of whether or not discussion have occurred is whether the offeror has been afforded an opportunity to revise or modify its proposal."
- GAO sustained the protest, noting that "the issue is whether Rotech had the same opportunity to submit a revised price proposal—i.e., benefit from discussions, as Lincare. Here, the record is plain that it did not."