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# Top Gov't Contracts Cases Of 2016

By **Daniel Wilson**

Law360, Nashville (December 12, 2016, 4:21 PM EST) -- A blockbuster U.S. Supreme Court ruling that clarified an important point of False Claims Act law — while simultaneously opening up a new point of debate — headlines the list of the most important government contracts cases for 2016.

In what has been deemed the biggest government contracts-related court decision in many years, the Supreme Court upheld in the so-called Escobar case the "implied certification" theory of FCA liability, while simultaneously outlining its "materiality" standard for false claims, a requirement that has **resulted in** further fierce debate in lower courts.

But Escobar was the not the only Supreme Court case to impact federal contractors — nor even the only FCA case decided by the justices — this year, and lower courts have also produced a number of important decisions.

With apologies to other rulings that also may have broader implications for contractors, such as a U.S. Government Accountability Office decision **weighing in on** when changes in corporate ownership put pending government contract awards at risk, and a Third Circuit decision **finding that** dodging customs duties opens up "reverse false claims" liability, here are five important court rulings for federal contractors that were decided in 2016:

**Universal Health Services v. U.S. ex rel. Escobar**

Far and away the biggest court decision of the year for federal contractors was the Supreme Court's much-anticipated **June ruling** in Escobar, upholding the use of implied certification as a basis for FCA liability.

"Escobar is the case of the decade. ... [Its] effects will continue to ripple," Covington & Burling LLP partner Peter Hutt said.

Implied certification occurs when contractors imply when submitting a claim for payment from the government that they are in compliance with all related laws, regulations and contractual terms, but are not, even if those requirements aren't an explicit condition of payment.

Although the justices upheld the theory, which had split the circuit courts, they also ruled that such violations must be "material" — that is, "capable of influencing" a government payment decision and not merely "minor or insubstantial," a clarification that has been welcomed by many in industry.

"While the implications are being fought out in lower courts as to exactly what the boundaries of the case are, our view is that on balance, it's a positive case for contractors because it establishes a rigorous test for materiality and puts some boundaries on the implied certification doctrine, which left unchecked could have had wide-ranging implications," said Blank Rome LLP government contracts practice group chair David Nadler.

But some continued uncertainty left open by the high court's decision may yet see the issue of materiality back before the high court in the future, attorneys noted.

"I don't think it will get sorted out," said Mintz Levin Cohn Ferris Glovsky and Popeo PC partner Larry Freedman. "I think we'll wind up with a wide range of approaches, and once the circuit courts get involved, probably a wide range of rules on materiality."

The whistleblowers were represented by David C. Frederick, Derek T. Ho and Katherine C. Cooper of Kellogg Huber Hansen Todd Evans & Figel PLLC, and Thomas M. Greene, Michael Tabb and Elizabeth Cho of Greene LLP. The federal government was represented by Donald B. Verrilli Jr., Benjamin C. Mizer, Malcolm L. Stewart, Allon Kedem, Douglas N. Letter, Michael S. Raab and Charles W. Scarborough of the U.S. Department of Justice.

UHS was represented by Roy T. Englert Jr., Gary A. Orseck, Mark T. Stancil, Michael L. Waldman and Donald Burke of Robbins Russell Englert Orseck Untereiner & Sauber LLP, and Mark W. Pearlstein, Laura McLane, Evan D. Panich and M. Miller Baker of McDermott Will & Emery LLP.

The case is Universal Health Services Inc. v. U.S. and Massachusetts ex rel. Escobar et al., case number 15-7, in the Supreme Court of the United States.

**State Farm Fire and Casualty v. U.S. ex rel. Rigsby**

In the second of two FCA cases decided by the high court this year — spread across two separate court terms — the justices **ruled unanimously** on Dec. 6 that violating the FCA's automatic seal doesn't the require the automatic dismissal of a suit, saying penalties should be left up to the discretion of district courts.

Unlike the broad applicability of the Escobar decision, Rigsby's applicability is much narrower, but it is important simply for being heard by the high court at all, attorneys noted.

"It's unusual for government contracts cases to find their way to the Supreme Court — to have three in the space of a year is noteworthy," Nadler said.

State Farm, accused by relators Cori and Kerri Rigsby of misclassifying wind damage claims as flood damage claims in the wake of Hurricane Katrina to put liability onto the government, had argued that the Rigsbys' case should have been automatically dismissed because their former counsel had intentionally leaked information to the press about the suit, out from under seal. The FCA's seal requirement automatically places qui tam whistleblower cases under seal for at least 60 days when filed.

Among other purposes, the seal is intended intended to protect defendants, State Farm said, pointing to issues such as reputational harm. But the justices ruled that the seal is effectively intended to intended to protect the government's investigations, and that automatically tossing a case for any seal violation would not serve that purpose. The discretionary sanctions already available to courts are adequate to both dissuade and punish any seal breach, the high court found.

While the justices noted that dismissal remains an option for egregious seal violations, contractors and many defense-side attorneys had **hoped for** a more rigid standard, saying that — although FCA seal violations are a rare occurence — a permissive standard could encourage unscrupulous relators to strategically leak information.

"I think the problem is that the incentive and deterrence must all line up to encourage strict adherence to the seal, and there's some concern that the court didn't do much except to say it's up to the discretion of the trial court," Freedman said.

The Rigsbys are represented by William E. Copley, August J. Matteis Jr., Derek Y. Sugimura, Pamira S. Matteis, Matthew S. Krauss and Timothy M. Belknap of Weisbrod Matteis & Copley PLLC, Tejinder Singh of Goldstein & Russell PC, and C. Maison Heidelberg of Watson Heidelberg Jones PLLC. The government is represented by Ian H. Gershengorn, Benjamin C. Mizer, Malcolm L. Stewart, John F. Bash, Douglas N. Letter, Michael S. Raab, Thomas G. Pulham and Sarah W. Carroll of the U.S. Department of Justice.

State Farm is represented by Sheila L. Birnbaum, Kathleen M. Sullivan, Douglas W. Dunham, Ellen

P. Quackenbos and Bert L. Wolff of Quinn Emanuel Urquhart & Sullivan LLP, and Jeffrey B. Wall of Sullivan & Cromwell LLP.

The case is State Farm Fire and Casualty Co. v. U.S. ex rel. Rigsby et al., case number 15-513, in the Supreme Court of the United States.

**Kingdomware Technologies v. U.S.**

In a major rebuke to the U.S. Department of Veterans Affairs, the Supreme Court **ruled in June** that the VA must give preference to veteran-owned small businesses for all contracts where at least two VOSBs can be expected to bid on the deal and carry out the needed work at a "fair and reasonable" price — adhering to the so-called rule of two.

The VA had effectively taken the line that the requirement, mandated in the 2006 Veterans Benefits, Health Care and Information Technology Act and intended both to increase the number of contracts the VA awards to small businesses and to further its mission of helping veterans, was voluntary once it had met its departmentwide minimum goal for contracting with small business.

It had also argued that the requirement should, at the least, not be applicable to task orders made under overarching Federal Supply Schedule, or FSS, indefinite-delivery contracts, intended to be used for the simplified ordering of certain items and services.

But the justices found that the underlying law was unambiguous — the rule of two applies to all competitive VA contract awards, no matter what type of contract vehicle is used, with only limited exceptions for certain noncompetitive, low-value deals.

Given the thousands of contracts and task orders entered into annually by the VA, attorneys said the decision could be a major win for veteran-owned small business, **opening the door** for potentially billions more dollars to go into the pockets of VOSBs each year.

And in an important aside, the high court also noted that task orders should be considered contracts for legal purposes, a clarification that attorneys said could have implications beyond the immediate context of the dispute.

"There are plenty of places in the Federal Acquisition Regulation that give contractors rights when something happens under a contract," Jeffrey Belkin, co-leader of Alston & Bird LLP's construction and government contracts group, told Law360 shortly after the decision in June. "If there's ever a debate over whether an FSS order is a contract in context, I think the decision moves the ball in the right direction."

Kingdomware is represented by Thomas G. Saunders, Seth P. Waxman, Amy K. Wigmore, Gregory H. Petkoff, Amanda L. Major, Joseph Gay, Matthew Guarnieri, Lauren B. Fletcher and Jason D. Hirsch of WilmerHale.

The VA is represented by Zachary D. Tripp, Donald B. Verrilli Jr., Benjamin C. Mizer, Malcolm L. Stewart, Robert E. Kirschman Jr., Kirk T. Manhardt and Robert C. Bigler of the U.S. Department of Justice and in-house counsel Leigh A. Bradley.

The case is Kingdomware Technologies Inc. v. U.S., case number 14-916, in the Supreme Court of the United States.

**Palantir Technologies v. U.S.**

In another ruling finding that a federal agency was not following the rules set out for it, the Court of Federal Claims ordered the U.S. Army in October to reopen bidding on a $206 million intelligence software management procurement, **saying it had** failed to adequately consider commercial companies for the deal.

A Palantir Technologies Inc. unit had challenged the Army's contract award for its Distributed Common Ground System, or DCGS-A, Increment 2, a system designed to combine all Army intelligence software and hardware capabilities.

The 1994 Federal Acquisition Streamlining Act, passed in the wake of scandals over wasteful spending at the Pentagon, requires that federal agencies conduct market research ahead of a contract award to see which commercial platforms could potentially meet their needs and then give preference to commercial platforms whenever practicable.

But in the more than two decades since FASA's passage, and despite a broader push in the Pentagon to use more commercial suppliers, it has often been ignored by federal agencies, a trend the Court of Federal Claims decision — effectively the first definitive court decision made under FASA, according to several attorneys — could reverse, not only at the Army but well beyond.

"It will avoid this practice of ineffective and ... wasteful spending on development projects by ensuring that, whenever possible, all government agencies will purchase commercial items that already exist rather than trying to reinvent technology that already exists in the private sector," Hamish Hume of Boies Schiller & Flexner LLP, counsel for Palantir, said shortly after the court's initial bench ruling.

Palantir is represented by Hamish P.M. Hume, Stacey Grigsby, Jon R. Knight and Joshua Riley of Boies Schiller & Flexner LLP.

The Army is represented by Benjamin C. Mizer, Robert E. Kirschman Jr., Douglas K. Mickle, Scott A. Macgriff and Domenique Kirchner at the U.S. Department of Justice and by in-house counsel Scott N. Flesch, Lawrence P. Gilbert, Frank A. March and Debra J. Talley.

The case is Palantir Technologies Inc. et al. v. U.S., case number 1:16-cv-00784, in the U.S. Court of Federal Claims.

**Laguna Construction v. Carter**

In a lower-profile ruling, but one that nonetheless serves as an important warning to federal contractors, the Court of Federal Claims ruled in July that the government **was not obligated** to pay the outstanding claims of Laguna Construction Co. after the company committed the""first material breach" of the relevant contract by violating the Anti-Kickback Act.

Laguna, awarded an environmental remediation and construction contract for work in Iraq and tapped for 16 task orders under that deal, had argued over nearly $2.9 million in cost claims it alleged were wrongly denied following an audit.

After some of Laguna's employees and executives were caught up in a kickback scheme involving its subcontractors, the government had amended its defenses, arguing the fraud precluded it from paying any of the company's outstanding claims, while the company had argued that only a few of task orders issued under the contract had been connected to the kickbacks.

The Armed Services Board of Contract Appeals agreed with the government, saying the kickback scheme had been a "material breach" of the contract, therefore allowing the government to legally avoid paying Laguna's claims, despite Laguna's arguments about severability. The Federal Circuit backed the board, finding that the kickbacks had effectively tainted the entire contract.

Laguna is represented by Carolyn Callaway of Carolyn Callaway PC.

The government is represented by Domenique G. Kirchner, Benjamin C. Mizer, Robert E. Kirschman Jr. and Bryant G. Snee of the U.S. Department of Justice.

The case is Laguna Construction Co. v. Carter, case number 15-1291, in the U.S. Court of Appeals for the Federal Circuit.

--Additional reporting by Bryan Koenig. Editing by Rebecca Flanagan and Catherine Sum.