

Government Contracts Group Of The Year: Wiley Rein

By **Jacob Fischler**

Law360, Washington (January 8, 2016, 9:18 PM ET) -- High-profile wins representing diverse clients in a variety of forums — including what partners said was a precedential Federal Circuit decision — set Wiley Rein LLP apart from other firms' government contracts groups in 2015 and earned the group a spot among Law360's Government Contracts Groups of the Year.



The firm started off 2015 with a blockbuster win at the U.S. Court of Federal Claims, prevailing in January in defending Boeing Co. from a bid protest for a \$4.76 billion NASA contract to provide commercial spacecrafts that will send astronauts to the International Space Station. And in March, Wiley attorneys won a Federal Circuit case for Centers for Medicaid and Medicare Services contractor CGI Federal Inc., forcing the government to adhere to commercial contracting rules when dealing with procurements under the federal supply schedule.

In the widely watched CGI case, Wiley Rein partner Scott McCaleb persuaded the three-judge panel to overturn the Government Accountability Office and find that Federal Acquisition Regulation Part 12 — which governs commercial item contracting that was revised to implement the Federal Acquisition Streamlining Act of 1996 — required the government to abide by customary commercial contracting practices, McCaleb said in a Friday interview at the firm's K Street office.

The key to winning reversal in that case was to remind the court of the statutory context, McCaleb said, adding that the 1996 law was specifically enacted to bring commercial enterprises into the government contracting sphere. Further, the federal supply schedule is supposed to be the government's vehicle for procuring commercial items, partner Paul F. Khoury said Friday.

"To go back to the 1996 act and say, 'What was Congress trying to accomplish?,' well, they were trying to attract to the government marketplace commercial companies that had been resistant to entering the government marketplace because of the unique rules and regulations with which they have to comply," he said. "Once we were able to really go all the way back to the statute and what Congress was trying to accomplish in 1996, I think the answer became to the court."

Much of the decision also turned on a timeliness issue, as the contract bidding period closed between CGI filing the GAO protest and the Court of Federal Claims submission. Bid protests must be brought before

bidding ends, but the circuit panel unanimously ruled that because CGI had brought the case before the close of bidding and continued to challenge the terms of the procurement, it was still a prospective bidder with standing at the Court of Federal Claims.

That holding reverberated beyond the CGI case, as the firm has been able to apply it to subsequent cases, Khoury said.

“It actually set a really good precedent for us,” he said. “Since that case, we now know [a challenge can be brought to both the GAO and the Court of Federal Claims]. And it’s just one more counter-argument that we can take off the list.”

McCaleb downplayed the precedential importance of the timeliness issue.

“My position was that the law was clear on this all along,” he said. “So this really wasn’t much of an issue.”

In the nearly \$5 billion Boeing case, McCaleb, Khoury and partner Jon Burd persuaded the GAO that NASA had not misrepresented its selection criteria in its solicitation for the private companies to compete and found no flaws in NASA’s evaluation process, as suggested by rival Sierra Nevada Corp.’s Sept. 26 protest.

Regardless of the CGI, Boeing and other headline-grabbing wins — including a successful GAO protest on behalf of Citrix Systems Inc. that forced the U.S. Defense Information Services Agency to withdraw a request for proposals for up to \$1.6 billion in software licensing that would have favored a rival provider — McCaleb, Khoury and partners Rand Allen and William Roberts III said they viewed the group’s well-rounded success as the biggest highlight of the year.

The group of between 40 and 45 partners and associates represented 400 contractors last year, including about one-third of the 100 largest government contractors based on 2014 revenue, according to the firm’s Practice Group of the Year submission.

“It strikes me that we’ve had a lot of success in multiple areas of the law and at multiple levels of judicial review,” McCaleb said.

The diverse client base has been a goal for the practice group for years, said Allen, who came to the firm 30 years ago as its first government contracts attorney. And the group is also strategic about who it does not represent — defense giants Lockheed Martin Corp., Raytheon Co. and Northrop Grumman Corp., for example — so that it can remain eligible to litigate against those companies, Allen said.

“We don’t represent Lockheed,” he said. “We do that consciously because we can be adverse to them. We’re probably one of the few top firms that can be adverse to Lockheed. That’s been a good thing to us over the years.”

In 2016, the firm may look for more work related to federal government grants, instead of traditional contracts, McCaleb and Khoury said. In early 2015, the group identified government grants as a potential growth area, McCaleb said.

“One of the things we’re finding is that the grant recipients are not sophisticated contracts companies,” Khoury said. “And therefore, [they] need a lot of counseling.”

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