

Q&A With Akin Gump's Scott Heimberg

Law360, New York (February 22, 2013, 2:44 PM ET) -- Scott M. Heimberg is a partner in Akin Gump Strauss Hauer & Feld LLP's Washington, D.C., office., representing companies in government procurement, transportation issues and domestic and international contracts. His experience includes federal contract formation and administration, as well as contract disputes litigation. Heimberg frequently represents technology and startup companies seeking to identify potential government markets and evaluate the benefits and liabilities associated with selling to the government. He counsels clients on issues of fraud, waste and abuse, including suspension and debarment matters. In addition, he regularly represents government contractors involved in mergers and acquisitions with foreign entities, advising on the Committee on Foreign Investment in the United States process, and obtaining and maintaining security clearances.

Q: What is the most challenging case you have worked on and what made it challenging?

A: I was the lead counsel representing a construction contractor that was terminated for default on a contract to build a runway and associated facilities at Clark Airbase in the Philippines. (The new runway and all of Clark Airbase was ultimately destroyed by the eruption of Mt. Pinatubo). The client was a joint venture of U.S. and Filipino companies and the contract was with the U.S. Navy. The Navy demanded more than \$20 million in default damages. We brought the case to the Armed Services Board of Contract Appeals seeking to (1) overturn the termination and thereby defeat the Navy's damages claim, and (2) recover damages through 10 affirmative claims against the government. We eventually prevailed after a six-week trial in Hawaii (tough duty). The termination was reversed, and the government was ordered to pay more than \$7 million in damages.

The case presented challenges that come with having witnesses in distant places, cultural differences and business differences between the joint venture partners, having to set up trial base camp far from home and with large time differences, and having regulations, and not a small number of facts, that favored the government.

Q: What aspects of your practice area are in need of reform and why?

A: Over the last several years, government agencies are treating issues that in the past were considered contractual disputes or disagreements as fraud or at least threatening the possibility of such treatment. This has had a chilling effect on contractors that have, at least in their view, legitimate claims against the government for damages caused by issues such as defective specifications and government-caused delay.

In the past, if a contractor could not prove with certainty entitlement or the total damages sought, it would not be compensated. Now, that contractor may face a double whammy of not receiving compensation and also facing a False Claims Act or other fraud action brought by the U.S. Department of Justice. This adversarial approach to the contracting process is harming relationships between contracting parties and may ultimately cost the government money as contractors build such risk into their prices. Contractors, especially small businesses, are also receiving the same treatment when it comes to errors in accounting, charging and other areas of compliance. The government now often jumps to the conclusion that such mistakes are intentional rather than errors made due to the extraordinary complexity of operating in a highly regulated environment.

Q: What is an important issue or case relevant to your practice area and why?

A: One of the biggest issues currently is the upcoming sequestration and the impact budget cuts will have on government contracting. Budget cuts will have multiple impacts on clients and the issues that we will see as lawyers. Clients are now seeing new opportunities being delayed and increased competition for those projects that are being solicited. This will result in reduced margins. The government's pool of procurement professionals is also likely to be reduced, resulting in fewer trained contracting officers and more mistakes in analyzing proposals. The increase in competition for a smaller pie combined with a smaller less trained government procurement force will lead to more bid-protest litigation. It may also lead to companies shedding less profitable divisions and lead to more M&A activity.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Mike Charness at Vinson & Elkins. Mike has a reasonable and low-key manner of making a point that I find is an effective approach to working with clients and opposing counsel.

Q: What is a mistake you made early in your career and what did you learn from it?

A: One mistake I made in the early days of handling litigation matters was to take a very aggressive approach with opposing counsel, including often raising my voice in discussions. I believed that was the best way to show you mean business and to persuade the other side to do what you want. I found after a while that you catch more flies with honey than vinegar and that a lower-key, more moderate approach leads to a better net result for the client.

This is particularly true when handling claims against the federal government where the other side of a dispute is often a long-term customer of your client and making enemies does not help you to win the immediate litigation or aid the client in its long-term business relationships. Finding the right balance of fighting for your client's position and not going over the top is not always easy but it has become easier with more experience.

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